



Warsaw/Skopje, 13 October 2009

Opinion-Nr.: NDISCR-fYROM/145/2009

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Comments
On the Draft Law
on Prevention and Protection Against Discrimination
of the Former Yugoslav Republic of Macedonia

**based on an English translation of the draft law
provided by the OSCE Spillover Monitor Mission to Skopje.**

These Joint Comments have been drafted by the
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I. INTRODUCTION

1. *On 19 December 2008, following a request of the Minister of Labor and Social Policy of the Former Yugoslav Republic of Macedonia, the ODIHR prepared comments on the then draft Law on Prevention and Protection Against Discrimination in consultation with the Council of Europe's European Commission for Democracy through Law (hereinafter the "Venice Commission")¹. The comments (hereinafter "the 2008 Comments") were submitted to the Minister of Labor and Social Policy on 22 December 2008 and were based on a version of the draft Law prepared by the Ministry in September 2008 (hereinafter "the 2008 draft"). The 2008 Comments have been attached hereto as Annex 1.*
2. *In September 2009, the OSCE Spillover Monitor Mission to Skopje sent a revised version of the draft Law to the ODIHR (hereinafter "the draft law") with a request for cooperation in the preparation of comments. The draft law contains significant changes to the 2008 draft and has been attached hereto as Annex 2.*
3. *While the 2008 Comments were prepared in consultation with the Venice Commission, it was not possible to co-ordinate a joint review with the Commission on this occasion due to lack of time. However, this review will be shared with the Venice Commission, for their information.*
4. *The Comments contained herein have been drafted by the OSCE ODIHR and the OSCE Spillover Monitor Mission to Skopje. They are based on the (latest) text of the draft law.*

II. SCOPE OF REVIEW

5. The scope of the Comments covers only the above-mentioned Draft. Therefore, the Comments do not constitute a full and comprehensive review of all available framework legislation governing the issue in the Former Yugoslav Republic of Macedonia. Instead, they aim to highlight the most important issues to ensure that the draft law is in compliance with international standards. This review aims to provide concrete comments; therefore the provisions are scrutinized from the perspective of implementation and likely effectiveness.
6. The Comments are based on an unofficial translation of the text of the draft law provided by the OSCE Spillover Monitor Mission to Skopje. Errors from translation may result.
7. In view of the above, the OSCE ODIHR and the OSCE Spillover Monitor Mission to Skopje would like to make mention that these Comments are without prejudice to any written or oral recommendations and comments to the Draft that either OSCE office may wish to make in the future.

¹ ODIHR Opinion-Nr: NDISCR – fYROM/124/2008(TND) of 19 December, 2008.

III. EXECUTIVE SUMMARY

8. It should be pointed out that while there have been some significant changes since the 2008 draft, many of the points and concerns described in the 2008 Comments remain valid. Therefore, in some important respects this review will reiterate comments made previously and furthermore provide more concrete comments.
9. In order to ensure the compliance of the Draft with international standards and obligations to which the Former Yugoslav Republic of Macedonia is signatory and has committed, it is recommended as follows:
 - A. to review the compatibility of the draft law with European Union law; [par. 10]
 - B. to ensure that key terms in the draft law are consistent with the terminology used in EU equality directives and in domestic legal texts; [pars. 11 and 57]
 - C. to add reference to promoting and protecting the principle of equality, as defined in the 2000/78 EC Directive, to Article 1 of the draft law; [par. 15]
 - D. to amend Article 2 so that it refers to protection from unlawful discrimination and clarify the scope of the law to include private and public sector bodies; [par. 16]
 - E. to limit the list of discrimination grounds laid down in Article 3 to those protected by EU law and clearly define the terms used therein; [par. 20]
 - F. to extend the list of definitions in Article 5 to contain a systematic and detailed list of all definitions used in the draft law; [par. 21]
 - G. to amend the definition of direct discrimination laid down in Article 6 par. 1 so as to conform with to the definition used in EU equality directives and adapt the definition of indirect discrimination (Article 6 par. 2) to the terminology used in these directives; [par. 24]
 - H. to re-draft Article 7 to ensure greater consistency with definitions used in EU law and international standards and distinguish the concepts of harassment and other forms of discrimination in conformity with international standards; [par. 28]
 - I. to re-draft Article 8 to ensure greater conformity with European Union directives; [par. 29]
 - J. to re-draft Article 9 to avoid current potential infringements of the freedom of expression; [par. 31]
 - K. to add an operative clause to Article 11; [par. 32]

- L. to establish social dialogue and cooperation with associations of citizens with the draft law, pursuant to the 2000/43/EC Directive, Articles 11 and 12, and the 2000/78/EC Directive, Articles 13 and 14; [par. 33]
- M. to clarify and make more specific the exceptions listed in Article 12; [par. 36]
- N. to re-draft Article 13 to limit “specific exceptions” to limited circumstances and ensure consistency with European Union law; [par. 38]
- O. to re-structure Part V of the draft law to comply with EU and international standards and include the establishment of a remedial complaints body, possibly a specialized equality body; [par. 54]
- P. to redraft parts VI, VII and IX in line with a specialized equality body; [pars. 55, 56 and 58]
- Q. to re-draft Article 51 to take into account the Law on Civil Procedure. [par. 57]

IV. ANALYSIS AND RECOMMENDATIONS

10. While the draft law generally has positive aspects, such as the attempt to regulate a wide range of discrimination grounds, there remain major concerns that if adopted, the law would be unworkable and fail to provide effective remedies for acts of discrimination. Furthermore, in consistency with the correspondent table for the approximation of the regulation with the European Union (hereinafter “EU”) *acquis communautaire*, the draft does not correspond with the requests of the EU Directives, which define the basic framework for the drafting of the anti-discriminatory legislation.
11. Some definitions are set out in a complicated and opaque fashion. In a number of instances key terms differ, in this translation, from the EU terminology. While it is not necessary in every instance that national legislation adopt exactly the EU approach, the divergence must not create a lesser degree of protection. It is important that the authoritative text in the original language uses the exact 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. Where these concerns arise, they have been highlighted in this review.
12. The ‘long list’ of discrimination grounds in Article 3 is potentially self-destructive of the effectiveness of the draft law. The applicable European standards do not limit the countries in introducing through their internal legislation new criteria for definition of discrimination in line with the context of the country. However, in such case, the new standards should be well defined in Article 5 of the draft law and compatible with the existing legal framework.

13. There is no independent specialized equality body to promote the draft law and equality and non-discrimination more generally; the bodies which are created appear to have no remedial powers, nor powers to impose sanctions. The bodies charged with responsibilities to prevent and protect from discrimination do not meet the key criteria of the Paris Principles², which are the basic international standards for national human rights institutions.
14. Additionally, the ODIHR and the OSCE Spillover Monitor Mission to Skopje shares the concerns expressed by the Venice Commission in its opinion regarding the 2008 draft about the deficiencies both in the draft text and in drafting process.³ Nothing has occurred since the issue of that opinion almost 12 months ago to remedy those deficiencies. The lack of genuine consultation combined with the weaknesses in the text undermines claims that the draft law will seriously tackle issues of discrimination. The following paragraphs will outline the above general comments in greater detail.
15. Article 1 of the draft law sets out the aim of the law. The developments in EU legislation point out that not only the protection from discrimination should be regulated but furthermore the promotion and protection of the principle of equal treatment as defined in the 2000/78/EC Directive⁴ as well as in the national Law on Equal Opportunities of Women and Men⁵. As drafted, Article 1 is limited, and is not completely structured. It requires more emphasis on the normative principles and objectives.
16. Article 2 sets out the scope of the draft law. Since not all forms of discrimination are prohibited, it would be more accurate to refer to protection from **unlawful** discrimination. It is noted that the law covers natural persons in the phrase ‘private and legal entities’, an apparently standard legal formulation in the country. In this article should be stated clearly that the public as well as the private sector are bound with this law as stated in the 2000/43/EC Directive⁶ (Article 3).
17. Article 3 sets out a list of protected characteristics referred to therein as ‘discriminatory basis’ (sic). This list reflects long lists which are often found in

² Adopted by United Nations Human Rights Commission Resolution 1992/54 of 1992 and General Assembly Resolution 48/134 of 1993

³ The Venice Commission notes in the General Remarks section of its Opinion that the draft “...*would not meet at this stage international standards.*” And “...*the transparency and legitimacy of the legislative process remains dubious...*”

⁴ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, Official Journal L 303 , 02/12/2000 P. 0016 – 0022, see under <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0078:en:HTML>

⁵ Adopted in May 2006, Official Gazette: Nr: 66/06

⁶ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Official Journal L 180 , 19/07/2000 P. 0022 – 0026, see under <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0043:en:HTML>

International Human Rights documents and constitutional documents, such as Article 9 of the Constitution⁷. However, these documents should be distinguished from the anti-discrimination laws especially those which are implementing the EU *acquis*. First, the former are usually interpreted as referring to direct discrimination only, and can be subject to exceptions. By contrast, primary legislation must cover indirect discrimination, harassment, segregation and victimization. The role of law should be to build on the ‘safety net’ of the Constitution to provide a detailed infrastructure of equality law and policy to combat the particularly egregious forms of discrimination.

18. The long list contained in Article 3 goes well beyond the requirements of the EU Directives which cover discrimination on the grounds of race or ethnicity, sex, religion or belief, age, disability, and sexual orientation. These relate to the most fundamental or immutable human characteristics and discrimination on these grounds has been deemed the most socially damaging discrimination. While national governments are free to offer protection based on other grounds, such protection should be well-defined in Article 5 and compatible with the existing legal framework, in particular since this draft law contains many concepts which are new to the local jurisdiction.
19. Moreover, there are practical problems which arise over the inclusion of grounds such as education, personal or social status, property status etc in the above list. Ostensibly a positive measure, it is likely to prevent effective action against the worst forms and manifestations of unfair discrimination. It is impossible to foresee what form of situation will be captured by such wide grounds and the danger is that regulatory bodies will be inundated with claims, especially unmeritorious ones. If discrimination concepts are applied equally to such grounds as ‘personal or social status’ the law may fall into disrepute. For example, if a charity offers free goods or services only to the poor, this would be a *prima facie* case of direct discrimination on the grounds of social or property status, and a claim of discrimination by an ineligible person should be successful. But in order to avoid absurd outcomes the exceptions described in Articles 12 and 13 will need to be contorted and interpreted widely. This in turn will impact on the ability to use the law in the meritorious claims of discrimination and undermine the effectiveness of the legislation.
20. Therefore it is recommended that the law adopts a shorter list of discrimination grounds more closely aligned to the EU Equality Directives and define the discrimination grounds in Article 5 of the draft law.
21. Article 5 contains a list of definitions of terms used in the draft law. There are a number of other terms used in the law that would benefit from inclusion in such a list, such as ‘disability’. It may be necessary to also define sexual orientation here as well as “affirmative action”, “equality”, “objectively justifiable cause”, “xenophobia”, “reasonable accommodation”, “tolerance”, “systematic discrimination”, “stereotypes” and “prejudice”.
22. Article 6 (1) defines direct discrimination. This definition does not conform to the EU Directives, which define discrimination as a person’s being subjected

⁷ Adopted on 17 November 1991

to ‘less favourable treatment’ than another comparable person ‘on grounds of’ a prohibited factor. The draft law refers to ‘differentiation, exclusion or limitation which as a result could have the taking away, abruption or limitation of equal recognition or fulfillment of human rights and basic freedoms’. Article 6 (1) as drafted lacks specificity and may lead to unpredictable effects since it depends on the interpretation of such broad concepts as ‘human rights and basic freedoms’. Moreover, it is substantially lacking in that it does not cover those situations which may not be a breach on human rights and fundamental freedoms but which still require regulation, such as equal access to private property such as bars, or restaurants. Article 6 (2) leaves room for interpretation that this is a legitimate exercise of private property rights, rather than a breach of the prohibition on discrimination. Hence, the law falls short of EU and other international standards, and requires significant re-drafting to be in compliance.

23. Article 6(2) defines indirect discrimination and is reasonably close to the definition in the EU directive. However, the terminology may require some clarification, since it is, in the translation supplied, somewhat different from the EU formulation. Since the European Court of Justice (ECJ) has interpreted the concept through a significant body of law it would be better to draft this so that the same terminology is used for the avoidance of doubt in local courts. Furthermore, pursuant to the EU Directives and the Protocol 12 of the Convention on Human Rights and Fundamental Freedoms of the Council of Europe⁸, the definition should stipulate precise mechanisms, through which the victims could obtain adequate and effective protection, to enable the more precise definition of a State’s affirmative action with the purpose of its adequate usage and preventing misuse.
24. Therefore it is recommended that the definition in Article 6 of direct discrimination be significantly amended so as to conform to the definition in the EU equality directives. The definition of indirect discrimination should use terminology taken from those directives. Furthermore, the definition should stipulate precise mechanisms, through which the victims could obtain adequate and effective protection.
25. Article 7(1) (harassment) and 7(3) (sexual harassment) again diverge from EU law. There are three issues that arise: First, Article 7(1) requires that to amount to harassment the behavior should have the ‘purpose’ of hurting dignity etc, while Article 7(3) uses the word ‘aimed at’. However, harassment can be committed by persons with no intention that their actions should have this negative effect, and the prohibition from harassment or discrimination generally should not depend on the perpetrator’s intention. The EU Directives refer simply to ‘the purpose or effect’ of the perpetrator’s behaviour.
26. Article 7(4) conflates a number of important concepts such as segregation, threats to discriminate and adequate accommodation for disabilities. These are not forms of harassment, and should be treated separately as forms of discrimination. It is unclear whether the term ‘threat to discriminate’ is intended to cover instructions to discriminate. If not, this is an important

⁸ Adopted on 4 November 2000

additional concept from EU law which should be included. The limitation of segregation only within its special dimension and the connection with the geographical definition disregards other forms of segregation (in the education, sports, everyday life). According to the Human Rights Council document A/HRC/AC.1/1/CRP.4⁹, one of the minimum standards that the legislation with aim to protect against discrimination should encompass is the prohibition of segregation.

27. It may be necessary to add definitions to explain what ‘pursuit or segregation’ (sic) and ‘an architectural environment’ mean. Additionally, Articles 8 and 9 overlap with 7(4) in that they also deal with lack of reasonable accommodation and incitement to discriminate as forms of discrimination, which leads to confusion of concepts and consequent problems of interpretation and implementation.
28. Therefore it is recommended that Article 7 is significantly re-drafted to ensure that the terms used therein conform to the definitions in EU law and international standards, and that the concepts of harassment and other forms of discrimination such as segregation and instructions to discriminate are distinguished so as to be in conformity with international standards.
29. In Article 8, an ambitious standard for overcoming disability discrimination is articulated. However, it is unclear what the term ‘adaptation of infrastructure’ means, and who has the duty to ensure such adaptation. It is unclear whether ‘infrastructure’ would include working methods or processes, which are a major barrier to persons with disabilities. It is important for the effectiveness of this provision that it goes beyond simply the built environment. The justification for failing to adapt the infrastructure also does not conform to EU law. Under the EU Equality Directives, ‘reasonable accommodation’ for persons with disabilities must be made, unless it imposes a disproportionate burden. It is thus recommended that Article 8 provisions regarding reasonable accommodation and justification for failure are re-drafted to be more closely in conformity with EU directives.
30. Article 9 describes acts of incitement to discriminate. This is a good example of the difficulty of drafting a proportionate law using a long list of discrimination grounds (as in Article 3). This would be a major restriction on freedom of expression since it would appear to prohibit political and media discourse. For example, calling for increased taxes of the highest earners society would be incitement to discriminate on the grounds of property or social status. This Article therefore would be in breach of the European Convention on Human Rights¹⁰ and other international instruments protecting the freedom of expression.

⁹ UN Human Rights Council, Ad Hoc Committee on the Elaboration of Complementary International Standards, Compilation of Conclusions and Recommendations of the Study by the Five Experts on the Content and Scope of Substantive Gaps in the Existing International Instruments to Combat Racism, Racial Discrimination, Xenophobia and Related Intolerance, document A/HRC/AC.1/1/CRP.4 of 18 February 2008

¹⁰ European Convention on Human Rights and Fundamental Freedoms, adopted on 4 November 1950, ratified by the Former Yugoslav Republic of Macedonia on 10 April 1997

31. It is thus recommended that Article 9 be re-drafted so as not to infringe the right to free expression.
32. Article 11 on aggravated forms of discrimination is a valuable and important provision. However, there appear to be no ‘operative clauses’ in the sense that there are apparently no differences in sanctions or remedial powers where aggravated discrimination occurs. Furthermore, this Article should include a paragraph referring to aggravating sentencing by the competent court in line with international standards.
33. The social dialogue and cooperation with associations of citizens is not established with the draft law, and neither is a dialogue with the whole civil society sector with legitimate interest and practice to contribute to the fight against discrimination, as required by the 2000/43/EC Directive, Articles 11 and 12 and the 2000/78/EC Directive, Article 13 and Article 14. It is recommended to include this into the draft law to ensure its conformity with EU law.
34. Article 12 contains a general exception to the prohibition on discrimination and Article 13 contains a list of specific exceptions.
35. The general exception in Article 12 is broad and applies when ‘objectively justifiable cause exists according to the Constitution, the law and international treaties’. International law does not allow general exceptions. EU law takes a rigorous approach to exceptions to the prohibition of discrimination so that for example, only ‘genuine occupational requirements (GOR) and a few other instances are permitted in the employment sphere. There is no equivalent provision in the EU Race Directive 2000/43/EC in the area of service provision. While it appears that reference to international treaties is an attempt to restrict the scope of this somewhat, it has little effect. First, the Former Yugoslav Republic of Macedonia has not adopted EU law nor signed the treaties on which it is based. Second, it is unsatisfactory for the interpretation of such an important element of the law to be determined by reference to external documents. It appears that as currently drafted, the Article fails to conform to EU law by providing a broad and vague exception to the prohibition on discrimination.
36. It is therefore recommended that Article 12 be re-drafted so as to allow only specific exceptions to the prohibition of discrimination.
37. Further special exceptions are listed in Article 13. Sex and race discrimination are subject to only very limited exceptions which are narrowly interpreted by the ECJ. Even in relation to the other discrimination grounds, the exceptions must satisfy the Framework Directive 2000/78/EC . In particular, Article 2.5 of the Directive is subject to the requirement that national exceptions must be “measures laid down by national law, which in a democratic society are necessary for” a limited range of exceptions. Comparing the specific exceptions in Article 13 against those allowed in the Framework Directive it appears that :

1. 13(1) falls within Article 2.5

2. 13(2) should fall within Article 2.5 but care needs to be taken to ensure that the limits of affirmative action permitted by EU law are not contravened.
 3. 13(3) is not permissible. Except for with regard to issues of immigration, it is impermissible, in EU law, to discriminate, on EU equality law grounds, against non-EU nationals. Between EU member states' nationals no discrimination on nationality is allowed.
 4. 13(4) appears to be, in English translation, an attempt to reflect the exception of 'genuine occupational requirements' (GOR) in EU equality law directives. As set out previously, core EU equality law concepts should be expressed, in the authoritative text, in terms compatible with EU concepts and terminology. It should be noted that GORs do not apply outside of employment and training, where more limited exceptions apply, depending on the EU equality ground.
 5. 13(5) is a closer approximation, in English translation, to specific EU GORs in relation to religion, sexual orientation and sex.
 6. 13(6) must be critically examined in relation to the age discrimination provisions of the Framework Directive 2000/78/EC, which, at this time, only applies to employment and training.
 7. 13(7) is generally a positive measure but must also be critically analyzed in the context of EU equality law.
 8. 13(8) is only justified in the context of age discrimination law and, more generally, Article 2.5 of the Framework Directive.
 9. 13(9) allows for a 'reasonable accommodation' concept but this has already been articulated, so it is repetitive.
 10. 13(10) should be reviewed to ensure that the limits of affirmative action permitted by EU law are not contravened.
 11. 13(11) reflects key principles of the Council of Europe Framework Convention the Protection of National Minorities¹¹. It might be helpful to refer to the Convention in relation to these terms.
 12. 13(12) is a constructive measure, directed at affirmative action towards the most vulnerable members of society. This measure should be exploited to its full extent. Nonetheless, the absence of an independent specialized equality body weakens the impact of this measure. The Former Yugoslav Republic of Macedonia needs a focal point of expertise, with real powers to promote and enforce the rights and interests of the vulnerable members of society so that the objectives of measures such as Article 13(12) can be realized.
38. Three more general points may be made. First, direct discrimination must always be subject to limited justifications and exceptions. Secondly, as mentioned above, a 'long list' approach to discrimination grounds in Article 3 encourages narrow interpretations of non-discrimination concepts and extensive use of exceptions, which is the opposite of the approach of the ECJ to non-discrimination concepts and exceptions. A provision such as Article 13 would create considerable strains between the national and the EU legal systems. Article 13 must therefore be redrafted to avoid this. Thirdly, the paragraph referring to the affirmative action should be expanded and explained in principle, difference between the "legitimate differentiation", protective mechanism for particular groups of people and affirmative actions per se

¹¹ Adopted on 11 February 1995, ratified by the Former Yugoslav Republic of Macedonia on 10 April 1997

should be made clear in conformity with EU law and recommendations of the European Commission Against Racism and Intolerance (ECRI). Article 13 must therefore be redrafted to take into account this rigorous approach to exceptions in EU law and the specific analysis set out here.

39. Part V relates to the bodies charged with responsibilities to prevent and protect from discrimination. Article 15 creates a Council and a Bureau. The Council is to be composed of members of ministries and the Ombudsman's office and is to be 'governed' by the Minister of Labor and Social Policy. Articles 16 and 17 have overlapping provisions relating to the areas of responsibility of the Council – under Article 16 it is responsible for co-operation and co-ordination of bodies of state in the area of discrimination, while Article 17 additionally gives it responsibility for awareness-raising and relations with international bodies.
40. The Bureau is an office within the Ministry of Labor and Social Policy ('MLSP') which is charged with acting upon complaints and providing legal aid. It is also given some responsibilities which are the same or similar to those given to the Council.
41. This is a major shift from the 2008 draft which proposed the Ombudsman's office to be given these roles and powers. While there were flaws with that proposal, regretfully, the new draft law appears to be regressive, in that there is no attempt to address the concerns raised previously by ODIHR and the Venice Commission. In both these commentaries, the point was strongly made that the functions of the implementing body should be strengthened so that it has significant and meaningful powers to support and represent complainants financially. Second, it was recommended that the body be operationally independent of government and that it comply with the Paris Principles.
42. There are two important sources of legal standards in this context: EU provisions on bodies to promote equal treatment and the UN 'Paris Principles' on national human rights institutions (which are elaborated in the UN Handbook on National Human Rights Institutions and suggest necessary elements on nationality, profession and qualifications, which persons are entitled to dismiss members and for what reasons, privileges and immunities). These focus on two elements: the functions given to the equality body, and the composition and status of the equality body.
43. As far as the functions are concerned, Article 13 of the Race Directive provides:
 - “1. Member States shall designate a body or bodies for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin. These bodies may form part of agencies charged at national level with the defence of human rights or the safeguard of individuals' rights.
 2. Member States shall ensure that the competences of these bodies include: without prejudice to the right of victims and of associations, organizations or other legal entities referred to in Article 7(2), providing independent assistance to victims of discrimination in pursuing their complaints about discrimination, conducting independent surveys concerning discrimination, publishing independent reports and making recommendations on any issue relating to such discrimination.

44. The Paris Principles at A.2 provide that “A national institution shall be given as broad a mandate as possible, which shall be clearly set forth in a constitutional or legislative text, specifying its composition and its sphere of competence.” This is interpreted to mean that national human rights institutions must have a mandate in both public and private sectors, an approach consistent with Article 13 of the Race Directive.
45. As far as composition and status are concerned, the Paris Principles set down, in Part B, a number of criteria for human rights bodies to ensure their independence and impartiality:
The procedure for appointment of members and the composition of the body must provide guarantees of pluralist representation (including Civil Society, qualified academic experts etc). There must be adequate funding to enable independence from government.
The mandate of the members shall be for a specific duration.
46. With regard to the first point there is no provision at all in the draft law. Indeed, the draft law is diametrically at odds with the Principles which require that government departments, if part of an equality body, should be represented only in an advisory capacity. The latter two points are irrelevant since the body is not independent.
47. Some of the most significant problems arising from the adoption of the structure in the draft law are: The Paris Principles on National Human Rights Institutions, elaborated in the UN Handbook on National Human Rights Institutions provide a core framework to which such bodies should conform. Unfortunately, as both the Council and Bureau are governed by the Ministry for Labor and Social Protection, the current provisions fail to meet such international standards.
48. Neither body is given any effective powers to impose sanctions. The complaints mechanism appears to do nothing more than to enable the Bureau, through its representative, to receive written complaints and ‘explanations’ and to make a determination based on these petitions. The representative has no powers beyond forwarding his/her conclusion to an ‘authorized inspectoral body, the Ombudsman or other authorized body’ (Article 41). Thus, the existence of the Bureau and Council fails to provide a mechanism which is capable of delivering any effective remedy to a complainant whether in the form of fines, compensation, injunction or other remedial orders. At the same time, before the complaint can be addressed by the authority with such power, this procedure is likely to lead to delay, and increased costs.
49. Where a complaint is forwarded to the Ombudsman, his powers are limited. The Ombudsman Act 2003 Article 32, provides, amongst a range of enforcement powers:
“When the Ombudsman concludes that the state administration bodies set out in Article 2 of this Law infringe the constitutional and legal rights of the person who put forward the submission, or that some other irregularities have occurred, he may:
give recommendations, proposals, opinions and indications on the manner of the removal of the determined infringements;

propose that a certain procedure be implemented pursuant to law;
raise an initiative for commencing disciplinary proceedings against an official,
i.e. the responsible person;
submit a request to the competent Public Prosecutor for initiation of a
procedure in order to determine a criminal responsibility.”

50. None of these would amount to an effective remedy, so there appears to be no added benefit to the complainant in the creation of the Bureau or the Council.
51. It is also not clear, in English translation, what an authorized inspectoral body is, nor when it would have jurisdiction over a complaint rather than the Ombudsman. This may be clear from other legislation in the country but it requires clarification in the text of the draft law, especially as there may be overlapping jurisdictions. For example, a complaint of discrimination relating to police or equitable representation may be covered both by the Ombudsman and an inspectoral body.
52. The Ombudsman’s jurisdiction extends only to public bodies, while a large proportion of discriminatory practices occur in the private sphere. Yet there is no mechanism created that would have the power to investigate, sanction or provide remedies in the case of discrimination by a private entity. This omission further, and severely, undermines the potential effect of this law.
53. The Ombudsman retains responsibility over issues of discrimination under Article 2 of the Ombudsman Act 2003 and also retains a power to receive complaints and to initiate complaints under Article 13 of the Ombudsman Act 2003. The overlapping and split roles of the Council, Bureau and Ombudsman further weaken the ability of each to perform their functions effectively.
54. It is therefore strongly recommended that Part V be re-structured in order to comply with EU and international standards and to provide an institution which is capable of delivering effective remedial action on behalf of complainants. The government should consider the establishment of a specialized equality body, which may have an investigatory and adjudicatory role but should also be able at least to intervene in judicial proceedings. It should also have a strong promotional and educational role.
55. Part VI relates to the procedure for promotion and protection against discrimination. It should be redrafted in line with the established specialized equality body.
56. Part VII relating to the legal protection of discriminated persons should be redrafted in line with the established specialized equality body.
57. Article 51 regulates the participation of third parties in the litigation process. Article 51 (4), stipulates that third parties should cover their own costs. Bearing in mind that this is a civil procedure, this Article should be amended pursuant to the Law on Civil Procedure. Namely, in the Law on Litigation Procedure, it is clearly stated that the party losing the dispute shall compensate all costs, including those of the third party. It is thus recommended that Article 51 is re-drafted to take into account the national Law on Civil Procedure.

58. Part IX relating to sanctions for misdemeanours should be revised after making a final decision on the specialized equality body.

Conclusion:

59. The draft law is ambitious in attempting to cover all possible grounds of discrimination, but there remain seriously problematic aspects which mean that the latest draft falls significantly short of its objectives and international standards. The long list of discrimination grounds necessitates broad exceptions which undermine the purpose of the law. The definitions do not conform to recognized and well-established formulae, and the lack of an effective and independent enforcement mechanism threatens to make the law an empty shell. The Government is urged to further amend this draft in consultation with civil society and relevant experts, in order to amend these deficiencies. The OSCE Spillover Monitor Mission to Skopje and the ODIHR stands ready to provide assistance as necessary.

[END OF TEXT]

ANNEX 1

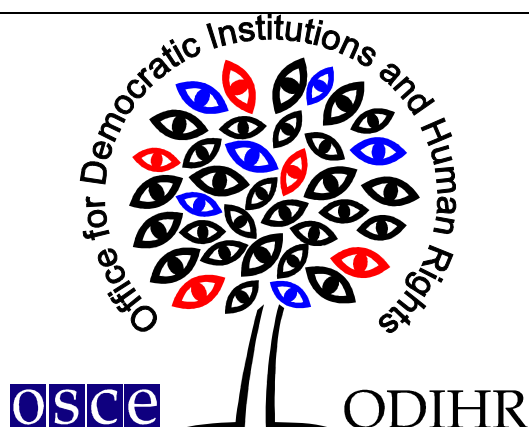
Warsaw, 19 December 2008

Opinion-Nr: NDISCR – FYROM

/124/2008

(TND)

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OSCE/ODIHR COMMENTS

ON THE DRAFT ANTI-DISCRIMINATION LAW

OF THE FORMER YUGOSLAV REPUBLIC OF

MACEDONIA

**Based on a translation of the draft Law on Protection Against Discrimination
provided by the OSCE Spillover Mission in Skopje.**

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I. INTRODUCTION

1. On 26 May 2008 the Minister of Labor and Social Policy of the Former Yugoslav Republic of Macedonia requested the opinion of the ODIHR on a proposed draft anti-discrimination law. A similar request was received by the European Commission for Democracy through Law (Venice Commission). The experts of the Venice Commission and ODIHR have been in close communication during the process of preparing their respective commentaries, and this opinion takes into account the Commission's Opinion (No. 486/2008 adopted December 2008 based on comments prepared by Mr Sejersted and Ms Err). ODIHR supports the comments of the Venice Commission, and urges the government of the Former Yugoslav Republic of Macedonia to revise the draft in a manner consistent with comments by both expert commentaries.
2. ODIHR received a draft of the law in August which was replaced by another in September. It is this later version on which both ODIHR and the Venice Commission based their commentaries and is referred to herein as the Draft Law, attached at Annex A. ODIHR and Venice Commission conducted a joint field visit to Skopje on 24 – 26 November. The agenda of the visit is attached at Annex B.

II. SCOPE OF REVIEW

3. This does not purport to be a comprehensive review. Rather it highlights the key issues, and seeks 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. The letter of request from the Minister of Labor to the ODIHR noted that the government was particularly interested to “*ensure that the final version [of the draft law] would comply with European standards and best practices.*” This request is reflected within the opinion.
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 Former Yugoslav Republic of Macedonia 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'¹², the 'Employment Equality Directive'¹³, 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.

III. BACKGROUND

7. In 2004 two draft anti-discriminations laws were produced and proposed to the Government of Former Yugoslav Republic of Macedonia. One was prepared by the Macedonia Helsinki Committee and the other by the NGO Macedonian Centre for International Cooperation (MCIC). These were not adopted. In early 2008, as the possibility of a government-sponsored anti-discrimination law became evident, ODIHR were requested by the OSCE Spillover Monitor Mission to Skopje to provide an opinion on these drafts. The opinion can be found on www.legislationline.org.
8. A Working Group on the government proposal for a draft law against discrimination was established in early 2008 by the Ministry of Labour and Social Policy (MLSP). The Working Group was composed of all relevant ministries together with Polio Plus, an NGO representing a coalition of NGOs lobbying for such a law, and Ms Mirjana Najcevska an academic and

¹² 2000/43/EC

¹³ 2000/78/EC

independent expert. The Working Group began drafting a law on protection against discrimination. The government plans to adopt a law in early 2009.

9. ODIHR was made aware during the field visit that the government had produced a further draft of the law which had not been seen by the members of the field visit, as it was still being considered by the government's legislative secretariat. It had not been drafted by, or disseminated to the Working Group. The ODIHR was informed that once formally approved by the secretariat, it would be sent to Working Group and OSCE to translate. The Roundtable in Skopje is delayed pending this draft being released.
10. Since there was no clarity about when the final version of the law would be forwarded, yet a need for immediate comments to assist the drafting process, it was decided that the Venice Commission and ODIHR would both comment on the September draft and the ODIHR would provide further updated comments on the final draft produced by the government in 2009.

IV. EXECUTIVE SUMMARY

11. First, it should be stated that there are ostensibly admirable aspects to this Draft Law. In Article 2, there is a short, focused 'purposes clause' which will provide a valuable guide to the courts and administrative authorities as well as employers, service providers and the citizens of Former Yugoslav Republic of Macedonia. All the grounds of discrimination provided for in EU equality law are present in the Draft Law and indeed are significantly expanded. So also in relation to enforcement, there are valuable provisions on 'temporary measures', on court orders other than compensation and the possibility of associations and organisations participating in court proceedings.
12. However, there are also some serious deficiencies. Generally, the organisation of sections needs to be given more attention. Less significant provisions precede more significant provisions for no obvious reason. Some definitions are set out in a complicated and opaque fashion. Some phrases appear, in English, to be 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 Macedonian uses the exact 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.

13. The ‘long list’ of discrimination grounds in Article 3 is potentially self-destructive of the effectiveness of the Act. There is not the creation of a specialised equality body to promote the Act and equality and non-discrimination more generally and there are doubts over the effectiveness of the utilisation of the Ombudsman system as an alternative system to litigation.
14. In short, the effectiveness of what appears at first sight to be an expansive Draft Law, as promised in Article 2, must be questioned. The Draft Law is overburdened with complicated definitions and an over-extensive list of discrimination grounds. It lacks a focus on key elements of discrimination and inequality in the Former Yugoslav Republic of Macedonia and this weakness is compounded by the absence of an independent, specialised body to promote equality and non-discrimination and to provide informed enforcement of the Act.
15. Additionally, the ODIHR shares the concerns expressed by the Venice Commission about the deficiencies both in the draft text and in drafting process.¹⁴ The lack of genuine consultation with the Working Group combined with the weaknesses in the text undermines claims that the Draft Law will seriously tackle issues of discrimination.
16. Below follows a detailed list of recommendations:
 - a) 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. *[para. 27]*
 - b) The first priority ought to be to define key forms of discrimination, particularly direct and indirect discrimination and harassment. *[para. 28]*

¹⁴ The Venice Commission notes in the General Remarks section of its Opinion that the draft “...*would not meet at this stage international standards.*” And “...*the transparency and legitimacy of the legislative process remains dubious...*”

- c) It is recommended that the definition of direct discrimination is modelled on the definition in EU equality directives as a significant body of case law on its meaning has been established by the European Court of Justice (ECJ). *[para. 31]*
- d) It is recommended that terms used in the Draft Law which reflect key EU concepts should coincide with those in EU law. *[para. 32]*
- e) Article 8.1 should be brought in compliance with the respective EU definitions. *[para. 35]*
- f) Article 8.2 requires significant redrafting. *[para. 37]*
- g) It is recommended that key concepts in the Draft Law are expressed in a form consistent with international and EU standards. *[para. 38]*
- h) It is recommended that Article 14 be re-drafted so as to allow only specific exceptions. *[para. 42]*
- i) Care should be taken to ensure that the limits of affirmative action permitted by EU law are not contravened. *[para 50]*
- j) Article 15 must be redrafted to avoid the real danger of considerable divergence from the EU legal requirements. *[para. 43-56]*
- k) It is recommended that the government should consider the establishment of a specialised equality body, which may have an investigatory and adjudicatory role but should also be able at least to intervene in judicial proceedings. It should also have a strong promotional role. *[para. 57-70]*
- l) It is recommended that the body established to promote equal treatment in the Former Yugoslav Republic of Macedonia should have a mandate across all public and private acts within the scope of the EU equality directives and consistent with the Paris Principles. *[para. 72]*
- m) It is recommended that Article 29.1 is re-drafted to enable NGOs to bring cases on behalf of complainants. *[para. 78]*

V. ANALYSIS AND RECOMMENDATIONS

16. **Article 1** provides that, “This Law regulates and advances the right to equality and provides protection against all forms of discrimination.” This reflects the breadth of Article 3 of the Draft Law which is discussed further below. Article 3 adopts a ‘long list’ approach to non-discrimination grounds. It is suggested below that a greater sense of focus on active conditions of equality and non-discrimination would be preferable. Therefore it would be preferable if Article 1 refers to “all forms of unlawful discrimination”.
17. **Article 2** sets out what may be described as a ‘purposes clause’. It refers not just to the “the rights guaranteed by the Constitution, the law, the international treaties” but also to “effective protection from discrimination”. This latter phrase is a valuable indication to the courts and administration that the Draft Law must be applied in an effective fashion. Unfortunately, some of the key provisions of the Draft Law are likely to be counter-productive and prove to be inimical to ‘effective protection’.
18. **Article 3** sets out a comprehensive assertion of discrimination principles and a ‘long list’ of non-discrimination grounds.
19. First, it would be preferable to divide out these principles. They are separately defined later but the existing text is confusing. The key concepts are *direct* and *indirect discrimination*. Direct discrimination is underpinned by more specific provisions on harassment. Protection from discrimination is underpinned by provisions on victimisation. Further supplementary provisions on “calling upon or instigating discrimination is forbidden, as is helping in discriminatory action” have their place (which is in Article 10) but they add complexity to this key provision.
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 ECHR, which must be read in conjunction with other Convention rights, provides that “The 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 9 of the Constitution which provides that “Citizens of the Republic of Macedonia are equal in their freedoms and rights, regardless of sex, race, colour of skin, national and social origin, political and religious beliefs, property and social status. All citizens are equal before the Constitution and law.”
22. Non-discrimination provisions in constitutional and international instruments are usually interpreted in relation to direct, rather than indirect, discrimination 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 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 Former Yugoslav Republic of Macedonia. Although rights of national minorities can be subsumed with issues of racial and ethnic origins, explicit reference to discrimination against national minorities could be seen as a positive development.
25. The dangers in this ‘long list’ approach are that the judicial and administrative systems, such as the Ombudsman, are inundated with cases and complaints, which many may consider unmeritorious. 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’. The impact is that what initially appears to be a positive attempt to prohibit ‘all’ discrimination is in grave danger of being diluted by calling into question many aspects of human behaviour which ought not to be subject to a non-

discrimination law. In turn, exceptions are extended unnecessarily in Articles 14 and 15 and liable to be widely interpreted by the courts to prevent these unexpected consequences.

26. 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.

27. **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.**

28. The 'Definitions' section of the Draft Law starts with **Article 6** in which paragraphs 1 and 2 set out definitions of 'affirmative action' and 'marginalised groups'. It could be said that giving prominence to affirmative action emphasises its significance, but it also reflects a confusing structure in this section. Here affirmative action and marginalised groups appear to be given prominence but are only referred to again in the 12th exception in Article 15, where they could more naturally be defined. **The first priority ought to be to define key forms of discrimination, particularly direct and indirect discrimination and harassment.**

29. **Article 6.3** defines 'sexual orientation' which is a valuable provision but **it may be necessary to define other grounds, in particular 'disability'**. Article 6.4 defines 'sexual harassment' which is an important provision derived from the Revised Equal Treatment Directive but its natural home is along with the 'harassment' definition in Part II 'Forms of Discrimination'.

30. **Article 7.1** sets out the definition of the core concept of direct discrimination. This definition is very wide, setting out a wide range of situations in which direct discrimination may occur. This initially appears laudable and it may articulate more specifically, particularly for the benefit of the courts, the types of scenarios when direct discrimination might occur. However, direct discrimination is a powerful concept and it should be difficult to justify. The EU concept refers to 'less favourable treatment' 'on grounds of' the prohibited factor. A wide definition, as set out in Article 7, may catch unexpected

situations in which the concept is brought into question and hence where exceptions can be expected to be widely interpreted.

31. **It is recommended that the definition of direct discrimination is modelled on the definition in EU equality directives as a significant body of case law on its meaning has been established by the European Court of Justice (ECJ).**
32. **Article 7.2** sets out what appears to be a reasonable approximation to the EU definition of indirect discrimination. A few phrases appear in English which do not coincide with those in the EU definition, for example, ‘unfavourable state’ rather than ‘particular disadvantage’. Such terms are likely to receive interpretation by the ECJ and it is important for the consistent interpretation of such terms that the authoritative version of the Draft Law accurately reflects key EU terms, unless a deliberate attempt is made to improve on EU standards. **It is recommended that terms used in the Draft Law which reflect key EU concepts should coincide with those in EU law.**
33. **Article 8.1** sets out a harassment definition. As stated above, 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.
34. For example, Article 3.3 of the Framework Directive provides that “3. Harassment 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.”
35. Article 8.1 appears to be a genuine attempt to apply this definition in the Draft Law. Three points can be identified.

- First, the definition in Article 8.1 only refers to “the goal to damage the dignity of certain person” while Article 3.3 of the Directive refers to “purpose *or effect* of violating the dignity of a person”. By requiring the harasser to intend a certain outcome, the definition is unduly limited. In this regard, **Article 8.1 is narrower than the EU definition in an important respect.**
- Second, the definition in Article 8.1 is wider than the EU definition in the sense that the ‘damage to dignity’ and the creation of a prohibited ‘atmosphere’ are disjunctive, that is either the former or the latter is sufficient. By contrast, the EU definition is ‘conjunctive’, i.e. both a ‘violation’ of dignity’ and the creation of a prohibited environment are necessary. The government should be aware that the definition of harassment is wider within the Draft Law than may be necessary unless there is already a body of law which uses this wider approach¹⁵
- The third point, related to the second, is that the English translation uses the term a ‘frightening’ rather than an ‘offensive’, atmosphere/environment. This is important: using the disjunctive approach, difficulties might arise, particularly in relation to provision of services, if an ‘offensive’ atmosphere/environment is sufficient. 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.¹⁶ Hence, it is important that the translation is accurate in this respect: if it could also be

¹⁵ For EU States, transposition of EU directives cannot be ‘regressive’, i.e. they cannot reduce the existing level of protection against discrimination. This is the reason that, for instance, in UK law there is a wide, disjunctive approach: the previous case law of harassment gave greater protection than the EU standards.

¹⁶ 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 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.

rendered as ‘offensive’ there is a real danger of infringing other fundamental rights.

36. 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.
37. **Article 8.2**, on the other hand, is a very confusing provision. These are not examples of harassment and are in danger of bringing the concept into disrepute. Sexual harassment should also be defined here rather than above. Threats of discrimination may or may not be harassment but should be dealt with along with incitement (see Article 10). A failure to make reasonable accommodation is a separate concept, not an aspect of harassment, and should be dealt with separately (see Article 9). **Article 8.2 requires significant redrafting.**
38. **Article 9** sets out disability provisions. The term utilised in the English translation is “appropriate adaptation” while both the EU definition and the UN Convention on the Rights of Persons with Disabilities¹⁷ use the term “reasonable accommodation”. **It is recommended that key concepts in the Draft Law are expressed in a form consistent with international and EU standards.**
39. **Article 11** sets out provisions on ‘segregation’. These appear to be innovative and reflect the particular needs of the country. The only reservation about its inclusion is that it appears to involve more serious conduct than is generally covered in non-discrimination statutes. For example, it is not typical to include hate crime in non-discrimination statutes, except to the extent that there is an overlap with harassment provisions. This is not an objection to the inclusion of these important provisions, merely a concern that this is the appropriate place for them.
40. **Article 13** on aggravating forms of discrimination is a valuable and important provision, particularly in relation to sanctions and remedies. However, there appear to be no ‘operative clauses’ relating to this provision, in the sense that

¹⁷ Article 2.

there are apparently no differences in penalties or remedial powers where aggravated discrimination occurs.

41. Part III of the Draft Law concerns 'Exceptions from discrimination'. **Article 14** sets out a broad, general exception, particularly when the "objectively justifiable cause exists according to ... the law". While international instruments, such as the ECHR, contain a list of specific exceptions, related to a particular right, they do not allow for such a general exception. EU equality law (and the ECJ) take a rigorous approach to exceptions. For example, in relation to sex discrimination, only 'genuine occupational requirements' (GOR) and a few other instances are permitted in the employment sphere. The Race Directive does not have an equivalent provision to a GOR in relation to provision of services. The Framework Directive, dealing with religion or belief, disability, sexual orientation and age, has a little recognised provision in Article 2.5 which states that "5. This 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 the protection of health and for the protection of the rights and freedoms of others."
42. This provision can be utilised to justify inclusion of a statutory authority defence in some circumstances, but only within the precise terms of Article 2.5. It is difficult to see how the generality of Article 14 can come within the terms of EU equality law or a range of international human rights instruments. **It is recommended that Article 14 be re-drafted so as to allow only specific exceptions.**
43. **Article 15** is a source of greater concern. It contains 12 'special exceptions'. Sex and race discrimination in EU law are subject to very limited exceptions which are narrowly interpreted by the ECJ. Even in relation to other EU grounds, provisions such as Article 2.5 of the Framework Directive must be satisfied. In particular, Article 2.5 is subject to the requirement that national exceptions are "measures laid down by national law which, in a democratic society, are necessary for" the significantly more limited range of exceptions. Below these "special exceptions" are considered.

44. **Article 15.1** states that “1) action that aims at protecting the health of the people, the general safety and prevention of executing criminal acts, that needs to be justified with a legitimate goal and reasonable and required means to achieve the aim.” **It would appear that this exception conforms to Article 2.5.**
45. **Article 15.2** reads that “2) Action from the bodies in charge, that aims at improving the position of the members of the communities in a way and through a procedure provided by law”. This is a measure specific to the national conditions. To the extent that ‘the communities’ are minority or ‘marginalised’ groups, this measure is to be welcomed. This measure should be used to conduct ‘equality audits’, using the concept of indirect discrimination as a guide, to identify disadvantages suffered by minority communities. So also the provisions of the Framework Convention on National Minorities are an important source of this analysis. Justified measures can therefore be taken to alleviate or remove these disadvantages. Care should be taken to ensure that the limits of affirmative action permitted by EU law are not contravened.
46. **Article 15.3** states that “3) Different treatment of foreigners in a way and through a procedure provided by law. It is not permissible to discriminate against EU nationals or nationals of States of the Council of Europe. Except for issues of immigration, it is also impermissible, in EU law, to discriminate, on EU equality law grounds, against non-EU nationals”. Different treatment of the persons regarding certain action when the nature of the [sic] that action and the conditions in which it is accomplished are related to some of the bases of Article 3 of this Law, i.e. that represents crucial and decisive condition for the accomplishment of that action.
47. This appears to be, in English translation, an attempt to reflect the exception of ‘genuine occupational requirements’ (GOR) in EU equality law directives. As set out previously, core EU equality law concepts should be expressed, in the authoritative text, in terms compatible with EU concepts and terminology. It should be noted that GORs do not apply outside of employment and training, where more limited exceptions apply, depending on the EU equality ground.

48. **Article 15.5** states that “5) Different treatment of the persons on the basis of religion, religious belief or sex in connection to the occupation taking place in religious institutions or organizations, when according to the character of the specific occupation or activity, or because of the conditions in which it takes place, the religion, the beliefs or the sex represent a crucial and decisive condition for the accomplishment of the work”. This is a closer approximation, in English translation, to specific EU GORs in relation to religion, sexual orientation and sex.
49. **Article 15.6** reads that “6) The requirement of certain age, professional experience or number of years in the working relations, the training and the education, when they represent crucial and decisive condition in accomplishing the work and career advancement”. This provision must be critically examined in relation to the age discrimination provisions of the Framework Directive, which, at this time, only applies to employment and training.
50. **Article 15.7** states that “7) The special protection provided by the law for pregnant women, mothers, children without parents, children without parental care, minors, single parents, persons with special needs”. **This is generally a positive measure but must also be critically analysed in the context of EU equality law.**
51. **Article 15.8** provides that “8) Measures envisioned by law for the advancement of employment”. **This is only justified in the context of age discrimination law and, more generally, Article 2.5 of the Framework Directive.**
52. **Article 15.9** states that “9) Different treatment of the persons with intellectual and physical disability, according to the law”. **This allows for a ‘reasonable accommodation’ concept but this has already been articulated in Article 9.2.**
53. **Article 15.10** provides that “10) Measures in the area of education and training directed at creating equal opportunities for men and women”. **Care should be taken to ensure that the limits of affirmative action permitted by EU law are not contravened.**

54. **Article 15.11** states that “11) Measures for protection of the difference and the identity of the persons belonging to different communities and their right to care and develop their own identity individually or in a community with other members”. **This measure reflects key principles of the Framework Convention on National Minorities. It might be helpful to refer to the Convention in relation to these terms.**
55. **Article 15.12** provides that “12) The affirmative actions, that aims at protection of marginalized groups, meaning elimination or reduction of the factual inequalities, and if the measure taking with reasonable means is justified and proportional to the aim”. This is a constructive measure, directed at affirmative action towards the most vulnerable members of society. This measure should be exploited to its full extent. Nonetheless, the absence of a specialised equality body weakens the impact of this measure. The Former Yugoslav Republic of Macedonia needs a focal point of expertise, with real powers to promote and enforce the rights and interests of the vulnerable members of society so that the objectives of measures such as Article 15.12 can be realised.
56. Two more general points may be made. First, direct discrimination must always be subject to limited justifications and exceptions. Secondly, as mentioned above, a ‘long list’ approach to discrimination grounds in Article 3 encourages narrow interpretations of non-discrimination concepts and extensive use of exceptions, which is the opposite of the approach of the ECJ to non-discrimination concepts and exceptions. A provision such as Article 15 would create considerable strains between the national and the EU legal systems. **Article 15 must therefore be redrafted to avoid this. It is recommended that this Article is re-drafted to take into account this rigorous approach to exceptions in EU law and the specific analysis set out here.**
57. Part V of the Draft Law concerns ‘Institutional framework’. **Article 17** contains important provisions on ‘Body in charge for protection against discrimination’, giving jurisdiction to the Ombudsman to investigate ‘submissions’ about breaches of the Draft Law.

58. There are two important sources of legal standards, EU provisions on bodies to promote equal treatment and the UN 'Paris Principles' on national human rights institutions. Article 13 of the Race Directive provides:-

“1. Member States shall designate a body or bodies for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin. These bodies may form part of agencies charged at national level with the defence of human rights or the safeguard of individuals' rights.

2. Member States shall ensure that the competences of these bodies include:

— without prejudice to the right of victims and of associations, organisations or other legal entities referred to in Article 7(2), providing independent assistance to victims of discrimination in pursuing their complaints about discrimination,

— conducting independent surveys concerning discrimination,

— publishing independent reports and making recommendations on any issue relating to such discrimination.”

59. The Ombudsman Act 2003 sets out the Ombudsman's remit and powers.

Article 2 provides that “The Ombudsman shall be a body of the Republic of Macedonia that shall protect the constitutional and legal rights of citizens and all other persons when these are infringed by acts, actions and omissions by the state administration bodies and by other bodies and organizations that have public authority, and who shall undertake actions and measures for protection of the principle of non-discrimination and adequate and equitable representation of community members in the state administration bodies, the local self-government units and the public institutions and agencies.”

60. Article 11 of the same Law states that “The Ombudsman, in performing his function, shall undertake actions for which he is authorized with this Law for the purpose of protection of the constitutional and legal rights of citizens or protection of the principles of non-discrimination and adequate and equitable representation of citizens belonging to all the communities when these are infringed by the bodies set out in Article 2 of this Law.”

61. Therefore, although “principles of non-discrimination” are within his remit, an immediate difficulty is encountered here in that the Ombudsman can only act in the public law sphere. He does not have powers to act in relation to discrimination in the private and voluntary sectors.

62. The Ombudsman is essentially an investigative and adjudicatory body on the model of the Dutch Equal Treatment Commission and the Nordic Ombudsman model. Article 13 provides that

“The procedure for protection of the constitutional and legal rights of citizens before the Ombudsman shall be initiated by putting forward a submission.

Anyone may put forward a submission to the Ombudsman when he assesses that his constitutional and legal freedoms and rights have been infringed or when the principal of non-discrimination and adequate and equitable representation of community members in the bodies set out in Article 2 of this Law has been breached.

The Ombudsman may initiate a procedure on his own initiative if he assesses that the constitutional and legal rights of citizens, stipulated in Article 2 of this Law, have been infringed.”

63. Amongst a range of enforcement powers, Article 32 provides:

“When the Ombudsman concludes that the state administration bodies set out in Article 2 of this Law infringe the constitutional and legal rights of the person who put forward the submission, or that some other irregularities have occurred, he may:

- give recommendations, proposals, opinions and indications on the manner of the removal of the determined infringements;
- propose that a certain procedure be implemented pursuant to law;
- raise an initiative for commencing disciplinary proceedings against an official, i.e. the responsible person;
- submit a request to the competent Public Prosecutor for initiation of a procedure in order to determine a criminal responsibility.”

64. He also has emergency powers in Article 33, “if he assesses that the execution of the administrative act may cause irreparable damage to the right of the interested person, he shall *request*: - temporarily postponement of the implementation of the administrative act until the decision by the second-instance body is adopted; - temporarily postponement of the execution of the administrative act until passing a decision by the competent court.” (emphasis added)
65. Article 13 of the Race Directive is ambiguous as to the model upon which bodies which promote equal treatment should be based. Article 13.2, 1st indent starts with the clause, “without prejudice to the right of victims and of associations, organisations or other legal entities referred to in Article 7(2)”, which refers to the powers of such bodies to act of behalf of or support individual in judicial and administrative processes. The actual competence is in “providing independent assistance to victims of discrimination in pursuing their complaints about discrimination”.
66. At first glance, this appears to reflect a model which has been used in states such as the United Kingdom and Ireland for many years, namely a body which gives assistance to individuals in judicial and administrative processes. A model which impartially investigates and adjudicates upon complaints might not appear to satisfy this model. And yet a range of *specialised* equality bodies across the EU largely adopt this model and their compatibility with Article 13 has not been questioned. Nonetheless, the Dutch Equal Treatment Commission does have a power to initiate judicial proceedings, although it has a self-denying ordinance not to do so, to protect the impartiality of its adjudicatory proceedings. In the Nordic model, for example in Sweden, it is typical for an Ombudsman to be able to bring cases to court after s/he has investigated them if s/he is unsatisfied at the outcome and this competence is frequently used. In Ireland, there are two bodies, each devised on what might appear to be alternative models, namely an Equality Tribunal to adjudicate upon discrimination cases and an Equality Authority to promote equality and assist individuals before the Tribunal as well as bringing its own cases in some circumstances.
67. There are important provisions in Articles 26.1 and 29.1 of the Draft Law which allows autonomous organisations to intervene in and initiate legal

proceedings in discrimination cases but the Ombudsman does not have this power.

68. In analysing the general, adjudicatory powers of the Ombudsman, it is possible to conclude that the Draft Law lacks a specialised equality body which will promote equality and non-discrimination and assist individuals in achieving their rights under the Draft Law. Adding into the analysis the ‘long list’ of non-discrimination grounds in Article 3, the lack of a specialised body is a major flaw in the Draft Law and undermines any commitment to promoting equality, particularly for ‘marginalised groups’.

69. The Ombudsman does exercise competences in the promotion of human rights and non-discrimination¹⁸ but these appear to be very much subsidiary to his investigative and adjudicatory powers. It cannot be said that this investigatory and adjudicatory model does not satisfy Article 13, given other precedents within the EU. Nonetheless, such bodies take a more active role in promoting equality and non-discrimination and conducting independent investigations outside their strict adjudicatory functions. In particular they are specialised bodies dedicated specifically to the protection of those who suffer discrimination.

70. It is recommended that the government should consider the establishment of a specialised equality body, which may have an investigatory and adjudicatory role but should also be able at least to intervene in judicial proceedings. It should also have a strong promotional role.

71. A second source of legal standards is the UN Paris Principles on national human rights institutions (NHRI). Paris Principles A.2 provides that “A national institution shall be given as broad a mandate as possible, which shall be clearly set forth in a constitutional or legislative text, specifying its composition and its sphere of competence.”

72. This is interpreted to mean that the NHRI must have a mandate in both public and private sectors, an approach consistent with Article 13 of the Race Directive. There is no objection to such a body having both investigative and adjudicatory powers. In the OSCE region, Ireland appears to reflect one of the

¹⁸ See Annual Report for 2007

(http://www.ombudsman.mk/comp_includes/webdata/documents/Izvestaj-2007-ang.pdf)

most impressive models for specialised bodies whereby there are two bodies, one dedicated to investigation and adjudication, and the other dedicated to the promotion and enforcement of non-discrimination rights for disadvantaged people. In the Nordic model the Ombudsman is given powers to investigate and adjudicate formally but also extensive promotional powers and powers to conduct non-adversarial investigations and to conduct legal proceedings on behalf of discriminated persons. **It is recommended that the body established to promote equal treatment in the Former Yugoslav Republic of Macedonia should have a mandate across all public and private acts within the scope of the EU equality directives and consistent with the Paris Principles.**

73. A second relevant Paris Principle is B.2, which provides that “The 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.”
74. Article 3 of the Ombudsman Law states that “The Ombudsman shall be independent and self-governing in the performance of his function.” However, this must be a real independence from Government and this must be judged as much by the practical realities of how the NHRI operates as its formal powers.
75. Part VI of the Draft Law is entitled ‘Court Proceedings for Protection against Discrimination’. This sets out extensive provisions on the judicial process which appear to satisfy fully the requirements of effective judicial process, recognised by the ECJ in EU law. For example, Article 9.1 of the Framework Directive provides that “1. Member States shall ensure that judicial and/or administrative procedures, including where they deem it appropriate conciliation procedures, for the enforcement of obligations under this Directive are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them, even after the relationship in which the discrimination is alleged to have occurred has ended.” The provisions of Part VI appear to satisfy this obligation on EU States.

76. Article 9.2 states 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 obligations under this Directive.”
77. **Article 29.1** of the Draft Law seeks to satisfy this requirement. It is not entirely clear that it does so. It provides that appropriate organisations “could bring an action and in the court proceedings they can present them selves as a co-plaintiff against the person that disrespected the right of equal action if they make it probable that with the actions of the sued party the right of acting was disrespected for a larger number of persons, which generally belong to the group whose rights are protected by the party suing.”
78. Given that, as presently drafted, the Draft Law does not allow the Ombudsman, or some other specialised body, to bring court cases in their own name, it is important that Article 29.1 unambiguously allows NGOs to bring cases in their name on behalf of complainants. **It is recommended that Article 29.1 is re-drafted to enable NGOs to bring cases on behalf of complainants.**

VI. CONCLUSION

79. There are positive aspects to this Draft Law but they appear to be included in an expansive attempt to create formal non-discrimination without any concern for real, substantive equality and non-discrimination. There is a lack of focus on the most pressing issues of inequality and non-discrimination for the most vulnerable and marginalised members of society.
80. The most obvious difficulty with the Draft Law is that there are no provisions for a specialised equality body which promotes the rights and interests of people who have suffered discrimination. It is important that such an institution is established, with powers to

intervene in judicial process and initiate legal proceedings on behalf of discriminated people.

81. The administrative and judicial processes appear to be totally in conformity with EU and international standards. There is a certain ambiguity over the standing of NGOs to litigate in their own name and this should be clarified.

[END]

DRAFT LAW ON PREVENTION AND PROTECTION AGAINST DISCRIMINATION

I. GENERAL PROVISIONS

Article 1

This Law secures the prevention and protection against discrimination in the accomplishment of rights guaranteed by the Constitution of the Republic of Macedonia, the law and the ratified international treaties.

Article 2

This Law secures the protection of all private and legal entities in the Republic of Macedonia from discrimination.

Article 3

This Law prohibits all direct or indirect discrimination, calling for and endorsement of discrimination and assisting in discriminatory activities based on: sex, race, skin color, gender, membership in a marginalized group, ethnical affiliation, language, citizenship, social background, religion or religious belief, education, political affiliation, personal or social status, disability, age, sexual orientation, family or marital status, property status, health condition or any other basis prescribed by law or international treaty (hereinafter: discriminatory basis).

Article 4

When performing their authorities, the state bodies, the bodies of the units of local self-government, other bodies and organizations that perform public authorities, public institutions, and legal entities from the public and private sector are obliged to undertake measures and activities aimed at preventing and protecting against discrimination.

Definition of Terms used in this Law

Article 5

Specific expressions used in this law have the following meaning:

1. “Affirmative measures” are activities of authorized bodies directed towards the prevention and protection against discrimination, i.e. the decrease or elimination of factual inequality which has occurred as a result of previous discrimination.

2. A Marginalized group is a group of individuals united by a specific position in society, being an object of prejudices, having special features that make them viable for certain types of violence, have lesser possibility for fulfilling and protecting their rights, or being exposed to a greater opportunity for further victimization.

3. Sexual orientation means the emotional, sexual or romantic attraction towards another person, which is usually connected with the sex of the persons involved.

II. FORMS OF DISCRIMINATION

Direct and indirect discrimination

Article 6

(1) Direct discrimination on discriminatory basis is every unfavorable action, differentiation, exclusion or limitation, which, as a result has or could have the taking away, abruption or limitation of equal recognition or fulfillment of human rights and basic freedoms.

(2) Indirect discrimination on discriminatory basis is every placement of a certain person in an unfavorable state in comparison to other persons, by enactment of provisions or criteria, or by undertaking specific actions or practices which in their content are seemingly neutral, except when such provisions, criteria or practices result from a justified goal, and the content for the achievement of that goal is appropriate and necessary.

Harassment

Article 7

(1) Harassment represents a form of discrimination in conditions of unwanted behavior that results from a discriminatory basis, intent, or action, and has the purpose of hurting the dignity of a specific person, group or community, or the creation of a threatening, hostile, degrading, humiliating or frightening environment, access or practice.

(2) Sexual harassment and the threat of discrimination are also considered as harassment.

(3) Sexual harassment is an unwanted behavior of sexual character, which is expressed physically, verbally or in any other way, and is aimed at causing harm over the dignity of the person and/or at creating a hostile, threatening and humiliating environment, especially when by refusing to accept such a behavior or pressure for acceptance may influence the enactment of decisions that may have an influence over that person.

(4) The threat of discrimination, pursuit or segregation, as well as the construction and maintenance of an architectural environment that limits the access of persons with disability to public places, i.e. the lack of adequate adaptations for persons with disabilities, shall also be considered as harassment.

Discrimination of persons with intellectual or physical disability

Article 8

(1) The lack of appropriate adaptation of infrastructure for persons with intellectual and physical disability shall be considered as discrimination.

(2) As a justified adaptation of infrastructure shall be considered the adaptation that does not cause unproportional burden for the subject that should implement it, or unproportional burden that may or is compensated by other means.

(3) As discrimination in the sense of this Law shall also be considered the omission to allow the persons with intellectual and physical disability, with regard to their specific needs, the use of publicly available resources or participation in public and social life or access to employment and the appropriate working conditions.

Incitement of Discrimination

Article 9

Any activity which directly or indirectly calls for, encourages, provides guidance or persuades somebody to commit discrimination shall also be considered as discrimination.

Victimization

Article 10

The victimization, i.e. the unfavorable treatment towards the person that undertook or is presumed to have undertaken or that shall undertake any activity aimed at protecting from discrimination, shall also be considered as discrimination in the sense of Article 3 of this Law.

Aggravating form of discrimination

Article 11

As an aggravating form of discrimination in the sense of this Law shall be considered the discrimination inflicted over a certain person on multiple grounds (multiplied discrimination), discrimination performed numerous times (repeated discrimination), one performed during an extended period of time (extended discrimination) or the one which has particularly severe consequences for the victim of discrimination.

III.

EXCEPTIONS FROM DISCRIMINATION

General exceptions

Article 12

The prohibition of discrimination contained in this Law shall not apply to cases where objectively justifiable cause exists according to the Constitution, the law and international treaties.

Special exceptions

Article 13

The following shall not be considered as discrimination:

- 1) action that aims at protecting the health of the people, the general safety and prevention of executing criminal acts, that needs to be justified with a legitimate goal and reasonable and necessary means to achieve the aim;
- 2) action by the bodies from Article 4 of this Law, that aims at improving the position of the members of the communities in a way and through a procedure determined by law;
- 3) different treatment of foreigners in a way and through a procedure determined by law;
- 4) different treatment of persons in regards to a specific working position when the nature of that work or the conditions in which it is performed are connected to some of the basis for discrimination, i.e. represents a crucial and decisive condition for the execution of working tasks;
- 5) different treatment of persons on the basis of religion, religious belief or sex, in connection to an occupation taking place in religious institutions or organizations when, according to the character of the specific occupation or activity, or because of the conditions in which it takes place, the religion, the beliefs or the sex represent a crucial and decisive condition for the accomplishment of the work;
- 6) The requirement of certain age, professional experience or number of years in service, the training and education, when they represent crucial and decisive condition in accomplishing the work and career advancement;
- 7) The special protection provided by law for pregnant women, mothers, children without parents, children without parental care, children under guardianship, minors, single parents, persons with special needs and old persons;
- 8) The undertaking of measures envisioned by law for the advancement of employment;
- 9) The different treatment of persons with intellectual and physical disability, according to the law;
- 10) The undertaking of measures in the area of education and training directed at establishing equal opportunities for the employment of men and women;
- 11) The undertaking of measures for protection of the specifics and the identity of the persons belonging to different communities and their right to cherish and develop their own identity individually or in a community with other members;
- 12) The undertaking of affirmative actions aimed at the protection of marginalized groups, i.e. the elimination or reduction of factual inequalities, and if the undertaking of such measures with reasonable means is justified and proportional to the aim.

IV.

IMPLEMENTATION OF THE LAW

Article 14

This Law is applied over the actions of bodies from Article 4 of the Law, in the area of:

- 1) labor and labor relations, the possibility of executing independent activity, including the criteria of selection and conditions for employment and advancement, access to all types of professional improvements, vocational training, betterment or re-qualification;
- 2) Education, science and sports;
- 3) Social security, including the area of social care, pension and disability insurance, health insurance, and medical protection;
- 4) Justice and administration;
- 5) Housing;
- 6) Public information and the Media;
- 7) Access to goods and services;
- 8) Membership and action in unions, political parties or any other association of citizens;
- 9) Culture;
- 10) Other areas determined by law.

V.

BODIES IN CHARGE OF PREVENTION AND PROTECTION FROM DISCRIMINATION

Bodies in charge of prevention and protection from discrimination

Article 15

Bodies in charge of prevention and protection from discrimination are:

- (1) The Council for prevention of discrimination;
- (2) Bureau for prevention and protection from discrimination;
- (3) Other competent bodies in accordance with the law.

The Council for prevention of discrimination

Article 16

- (1) The Government shall establish Council for prevention of discrimination that shall provide cooperation and coordination of the work of the bodies of the state administration and shall specify proposals for undertaking concrete measures in the area of protection from discrimination (hereinafter referred to as the "Council")
- (2) The Council shall be composed of nine members appointed by the Government of the Republic of Macedonia.
- (3) The Council shall be composed by one representative from the Ministry of Justice, Ministry of Labor and Social Policy, Ministry of Education and Science, Ministry of Health, Ministry of Transport and Communications, Ministry of Foreign Affairs, Secretariat for Implementation of the Ohrid Framework Agreement and Secretariat for European Integration.
- (4) Representatives from the Ombudsman office, civil society sector and from the professional and scientific public can participate in the work of the Council.
- (5) The Council shall be governed by the Minister of Labor and Social Policy.

Competencies of the Council for prevention of discrimination

Article 17

The Council shall have the following competencies:

- Shall adopt the Rulebook for its work;
- Shall work on strengthening of a mutual coordination of all bodies in charged in the area of prevention and protection from discrimination and promotion of the right to equality;
- Shall specify proposals for promotion of the legislation and undertaking measures and activities in the area of protection from discrimination in Republic of Macedonia;
- Shall start initiatives to broader familiarize the citizens with the issues in the area of protection from discrimination;
- Shall cooperate with international organizations and bodies engaged in the protection from discrimination;
- Shall prepare annual report for its work and conditions in the area of protection from discrimination to be submitted to the Government of Republic of Macedonia.

Administrative and finance operation of the Council for prevention and protection from discrimination

Article 18

- (1) The administrative work of the Council shall be performed by the Ministry of Labor and Social Policy.
- (2) Funds for operation of the Council shall be provided from the Budget of the Republic of Macedonia, within the frame of the budget of the Ministry of Labor and Social Policy.

Bureau for prevention and protection from discrimination

Article 19

- (1) A Bureau for prevention and protection from discrimination of Republic of Macedonia shall be established for prevention and protection from discrimination (hereinafter referred to as the "Bureau")
- (2) The Bureau shall be the body of the state administration within the Ministry of Labor and Social Policy without capacity of a legal entity.

Competencies of the Bureau

Article 20

The Bureau shall have the following competencies:

- Shall proceed upon complaints for prevention and protection from discrimination;
- Shall provide legal aid for prevention and protection from discrimination;
- Shall organize and coordinate cooperation with the other bodies and institutions in prevention and protection from discrimination;

- Shall provide cooperation and shall inform the bodies in charge for the activities undertaken for prevention and protection from discrimination;
- Shall inform the public for the most often types of discrimination, when necessary;
- Shall follow the implementation of the law and the other legislation, shall initiate adoption or amending of legislation for prevention and protection from discrimination;
- Shall provide opinion for the draft law and other legislation that concern prevention and protection from discrimination;
- Shall perform other duties provided in the law;
- Shall prepare annual report for its work.

Director-Representative for prevention and protection from discrimination

Article 21

- (1) The Bureau shall be governed by Director-Representative for prevention and protection from discrimination (hereinafter referred to as the “Representative”)

Article 22

- (1) On the proposal of the Minister of Labor and Social Policy, the Representative shall be appointed and dismissed by the Government of the Republic of Macedonia.
- (2) The Representative shall be appointed for the period of five years, entitled to for reelection.

Article 23

In addition to the general conditions stipulated in the Law on Civil Servants, the Representative shall comply with the following special conditions: completed higher education in the area of social sciences, minimum five years of professional experience in the area of protection and promotion of human rights and freedoms determined with the Constitution of Republic of Macedonia and the international law.

Article 24

The Representative must not perform other public function, profession, political party membership or membership in executive board, regulatory board or other bodies of other entities.

Termination and dismissal of the Representative

Article 25

The function of the Representative shall be terminated:

- upon expiration of his tenure;
- by decease;
- if he himself requests it;
- if he fulfils the terms of retirement according the law;

- if he permanently loses ability to perform the function;
- if he is appointed to another public function;
- if he is convicted of a criminal act with an unconditional sentence of imprisonment to at least six months;
- if a sentence or misdemeanour sanction prohibiting him of performance of profession, activity or duty is pronounced.

Article 26

Termination of the function of the Representative shall be determined by the Government.

Dismissal of the Representative

Article 27

The Representative can be dismissed due to unprofessional and unscrupulous execution of the function as representative

Article 28

The Representative is dismissed by the government upon proposal by the Minister of Labour and Social Policy

Article 29

An administrative dispute in front of the Administrative court can be initiated within 30 days from the day the decision to terminate the function and the decision for dismissal was delivered.

PROCEDURE TO PREVENT AND PROTECT FROM DISCRIMINATION

Proceeding in front of the bureau

Article 30

- (1) The procedure commences upon submission of the complain to the Representative
- (2) The Representative can initiate the procedure upon its own initiative

Article 31

Eligible to submit complain to the Bureau have all physical entities, associations of citizens, syndicates and other legal entities for individual act or undertaken activity by subject in the public and private sector that is against this law.

Article 32

The procedure is lead without obligation to pay compensation.

Article 33

For the protection of the personal data during the procedure are applied the provisions that regulate this area.

Article 34

- (1) The complaint for prevention and protection against discrimination can be submitted within one year after the harm was committed.
- (2) The Representative can initiate the procedure after the deadline of paragraph (1) of this article, if it is determined that is a matter of delicate case that is essential and expedient to be processed.

Not initiating procedure

Article 35

The Representative will not initiate a procedure upon submitted complaint, whereas it is obvious that no discrimination was done in the sense of this law, and informs the complainant in writing within 30 days after receiving the complaint.

Procedural flow

Article 36

- (1) The procedure is conducted in written form.
- (2) Upon exception, the Representative can invite both parties engaged in the discrimination case, if assessing that it would contribute to solve the case.
- (3) The Representative can request against of the defendant to submit written explanation within 15 days from the day when the request for explanation was addressed
- (4) If the defendant of paragraph (3) of this article does not submit the requested explanation, the Representative will state its opinion on base on the information at its disposal.

Obligation to cooperate with the Representative

Article 37

The entities addressed by the Representative are obliged to comply and submit the requested documents and information as well as to provide the required explanations.

Duration of the procedure

Article 38

- (1) The procedure shall be processed within six months after the submission of the complaint
- (2) The deadline of paragraph (1) of this article can be extended for another 30 days, if the complexity of the case requires that.

Ending the procedure

Article 39

The Representative will end the procedure upon written request from the complainant, whereas the complainant is not interested to continue with the procedure or due to lack of documents i.e. evidence and information the procedure cannot be completed.

Written opinion

Article 40

(1) The procedure is completed by a submission of opinion in writing that contains the factual situation determined by the Representative and its opinion on the circumstances of the case in the sense whether there is discrimination in accordance to this law.

(2) The Representative submits the opinion in writing to the involved parties in the case.

(3) In the opinion of paragraph (1) of this article, the Representative can state the irregularities that were concluded in the concrete case and to provide recommendations how to preclude them and can request of the defendant to undertake certain measures in given time frame and also to report back for the undertaken measures.

VII

LEGAL PROTECTION OF DISCRIMINATED PERSONS

Cases eligible for proceedings

Article 41

(1) The Representative submits the written opinion of article 40 of this law to the authorized inspectoral body, the Ombudsman or other authorized body that oversight the enforcement of the lawful provisions that regulates the equal opportunities in cases when the defendant did not preclude the determined irregularities in accordance to the written opinion of the Representative or if the Representative is not informed by the defendant for the undertaken measures within the given timeframe, when the case according to the Representative contains all the characteristics of discrimination according to this law.

(2) As authorized inspectoral body of paragraph (1) of this article, is considered inspectoral body authorized in accordance to the law that oversees the implementation of the laws and sub laws, collective agreements, as well as common acts in cases when certain acts were applied that represent discrimination, in accordance to this law.

Authorizations of the inspectoral bodies

Article 42

(1) If the authorized inspectoral body determines that in the written opinion of the case submitted by the Representative, this law or other law that regulates equal opportunities, conveys decision in which he/she orders to comply with the recommendations from the Representative within the given timeframe determined by the inspectoral body that cannot be longer then 30 days since the decision is issued.

(2) The decision of paragraph (1) of this article is submitted by the inspectoral body to the defendant that received the written opinion in the concrete case from the

Representative and to the Representative within 15 days after the decision was ordered.

Article 43

(1) Against the decision issued by the inspectoral body, a complaint can be submitted to the Authorized Commission within the Government within eight days after receiving the decision.

(2) The complaint of paragraph (1) of this article does not postpone the execution of the decision.

(3) The decision upon the complaint is conveyed within 15 days upon receiving the complaint.

Article 44

(1) If the inspectoral body determines that with violation of this law or other law that regulates equal opportunities, a misdemeanor or criminal act was committed, is obliged to submit initiation to conduct misdemeanor procedure i.e. criminal charge.

(2) The body to which the request or the criminal charge request of paragraph (1) of this article was submitted is obliged to deliver its decision to authorized inspectoral body.

(3) Civil society organizations, association of employers and trade unions can represented the persons stipulate in art 39 paragraph 1 of this Law upon their request in administrative procedure initiated due to protection of rights that based on gender were subtracted or limited.

VIII

RIGHT TO PROTECTION AND PROCEDURE FOR PROTECTION AGAINST DISCRIMINATION

COURT PROTECTION AGAINST DISCRIMINATION

Right to protection

Article 45

(1) Person considering that due to discrimination certain right of his/hers was violated, may ask for protection of that right in a procedure before a competent court.

(2) The court and other bodies implementing the procedure are required to undertake their actions in the procedure urgently and without delay, so that all of the discrimination claims are investigated.

Motions for protection against discrimination

Article 46

(1) Person claiming to be a victim of discrimination according to the provisions of this Law is authorized to file a motion and to demand:

1) to be established that the defendant has harmed the right of the plaintiff to equal procedure, namely that the acting taken or omission can directly lead to harming the equality rights during the procedure (motion to establish discrimination);

2) to forbid taking actions with which the right of the plaintiff is violated or can be violated, and to implement actions with which the discrimination or its consequences are removed (motion to prohibit or eliminate the discrimination);

3) to claim the pecuniary and non-pecuniary damages made through violation of the rights protected by this Law (motion to claim damages);

4) to publish in the media the verdict with which the disrespect of the rights of equal procedure has been established on the expense of the defendant.

(2) For the requests from paragraph 1 of this Article the court decides by applying the provisions of the Law for Civil Procedure, unless this law does not otherwise regulates.

(3) The requests from paragraph 1 of this Article can be submitted along with the requests for the protection of other rights for which it can be decided in the civil proceedings if all of the requests are in interconnected relationship and if same court has the jurisdiction on them, regardless if for those requests it is regulated that they be solved in general or special civil procedure.

Public announcement of the verdict

Article 47

(1) The request for publishing the verdict from article 46 paragraph (1) point 4) will be accepted by the court if it is established:

1) that the violation of the rights for equal procedure happened by means of the media, or

2) that the information on action which violates the right to equal procedure was published in the media, and the publication of the verdict is required for full compensation of damages or for protection from unequal proceeding in future cases.

(2) If the request for the publication of the verdict is accepted, the court will order for the verdict to be published in full or partially for reasons of protection of personal data.

(3) The verdict with which is ordered a publication in media obliges the publisher of the media which is to publish the verdict, regardless whether he has been a party in the proceedings.

Jurisdiction

Article 48

(1) For the requests from the Article 46 of this Law in first instance, a Basic court has jurisdiction, if it is not otherwise regulated by Law.

(2) For proceedings in disputes as per Article 46 of this Law, apart from the court with general competences, the court in which area the plaintiff lives, or has a residence, also has a jurisdiction, as well as the court on which area the damages occurred or the discriminatory motion has taken place.

Temporary measures

Article 49

(1) Prior to the beginning or during the proceedings regarding the motion from the Article 21 of this Law the court can, on the suggestion of a party, decide upon temporary measures.

- (2) With the submission of the proposal for a temporary measure, it is necessary that:
- the plaintiff has made probable that his right on equal procedure has been violated;
 - the granting of the measure is necessary to remove the danger of inflicting damages that cannot be compensated, and in the cases of especially aggravating violations of the right of equal motion or prevention of violence.
- (3) For the temporary measures from the paragraph (1) of this Article decides the court in charge for the suits in a way and through a procedure regulated by the Law.

Burden of proof

Article 50

- (1) If the party in a court or other procedure claims that the right on equal motion was disrespected according to the regulations of this Law, that party is obligated to present all of the facts that justify such claim. In that case, the burden of proving that there was no discrimination lies with the opposite party.
- (2) The provision in paragraph 1 of this Article is not applicable in misdemeanor and criminal proceedings.

Participation of third parties

Article 51

- (1) In the proceedings regarding the motion from the Article 46 of this Law as an involved party on the side of the person claiming to be a discrimination victim, another body, organization, institution, association or other person can be involved, which in the framework of his activities is working on the issue of the protection of the rights of equal motion in regard of the group whose rights are subject of the proceedings. The court decides on the involvement of the third party by applying the provisions in the Law on Civil Procedure.
- (2) The court will allow for the third party to be involved, as stated in the paragraph 1 of this Article, only by approval of the person on whose side the third party wants to be involved.
- (3) The third party from the paragraph 1 of this Article can take actions in the procedure and, in the procedure, has all of the rights belonging to him.
- (4) Regardless of the result of the case, the third party from the paragraph 1 of this Article alone bears the expenses of its involvement in the case.

Deadline to fulfill the obligation and execution

Article 52

- (1) Regarding the request from the Article 46, paragraph 1, points 1 and 4, the court may decide the appeal not to delay the fulfillment or to determine a shorter term for the fulfillment of obligations of the defendant.

Extraordinary legal remedies

Article 53

In the proceedings from the Article 21 a revision is always allowed.

Joint motion for protection against discrimination

Article 54

(1) Associations, bodies, institutions or other organization established according with the existing regulations and having justified interest for protection of the joint interests of a certain group or in the framework of their activities they deal with the protection of the rights of equal action, could bring an motion and in the court proceedings they can present them selves as a co-plaintiff against the person that disrespected the right of equal proceeding if they make it plausible that with the actions of the defendant the right of equal proceeding of larger number of persons has been violated.

(2) In the motion from the paragraph 1 of this Article a demand can be put forward:

- 1) to determine that the actions of the defendant has violated the right of equal motion in regard to the members of the group;
- 2) to prohibit activities with which the right of equal proceeding is violated or might be violated, meaning to execute activities with which the discrimination or its consequences are removed in regards to the members of the group;
- 3) the judgment with which the disrespect of the rights for equal motion is established, to be published in the media at the expense of the sued party.

(3) For the motion from the paragraph 1 of this Article decision making in first instance is taken by the basic court territorially in charge for the opponent or the basic court in charge at the place where the discriminatory act occurred.

(4) Other regulations from this Law concerning the actions from the Article (46), paragraph 1 of this Law, are applied on the suit from the paragraph 1 of this Article in an appropriate way.

(5) The motion from the paragraph 1 of this Article is allowed if there is an concurrence from the person that claims being a victim of discrimination.

IX

MISDEMEANOR SANCTIONS

Article 55

(1) A fine in the amount of 400 to 600 EUR in MKD counter-value will be ruled for misdemeanor for anybody who will hurt the dignity of another, aiming to cause fear or create hostile, humiliating or insulting environment on discriminatory basis (Article 8).

(2) A fine in the amount of 600 to 800 EUR in MKD counter-value will be ruled for misdemeanor from the paragraph (1) of this Article when done by a competent person in the legal entity, state body, or local self-government body or a person with public authorization or an individual who in a form of a registered profession performs certain work.

(3) A fine in the amount of 800 to 1000 EUR in MKD counter-value will be ruled against a legal entity for the misdemeanor from the paragraph 1 of this article.

Article 56

(1) A fine in the amount of 400 to 600 EUR in MKD counter-value will be ruled against the responsible person in the state administration and the body of the unit of local self government, which will not report to the Ombudsman the existence of probable suspicion of discrimination, for which he/she found out during the course of performing his/hers duties (Article 17).

Article 57

(1) A fine in the amount of 400 to 600 EUR in MKD counter-value will be ruled against the person in charge in the state administration or in the body of the unit of local self government if upon a request from the Ombudsman in a period of 30 days from receiving the request, does not provide data connected to the discrimination or disallows insight in files (Article 17).

Article 58

(1) A fine in the amount of 400 to 600 EUR in MKD counter-value will be ruled against the person which will intentionally bring in an unwillful position the person which in good faith reported the discrimination or in any way took part in the act regarding discrimination in accordance to the provisions of this Law (Article 12).

(2) The fine from the paragraph 1 of this Article will be ruled also against the person that intentionally brings into unfavorable position the person that was witness of discrimination or refused an order to behave in a discriminatory manner.

(3) (1) A fine in the amount of 600 to 800 EUR in MKD counter-value will be ruled for the misdemeanor regarding the paragraphs 1 and 2 of this Article against a competent person in the legal entity, state body, or local self-government body or a person with public authorization or an individual who in a form of a registered profession performs certain work.

X

TRANSITIONAL AND FINAL PROVISIONS

Article 59

This Law shall enter into force on the eighth day from the day of its promulgation in the Official Gazette of the Republic of Macedonia, and it shall be applied after three months have passed from the day when it entered into force.