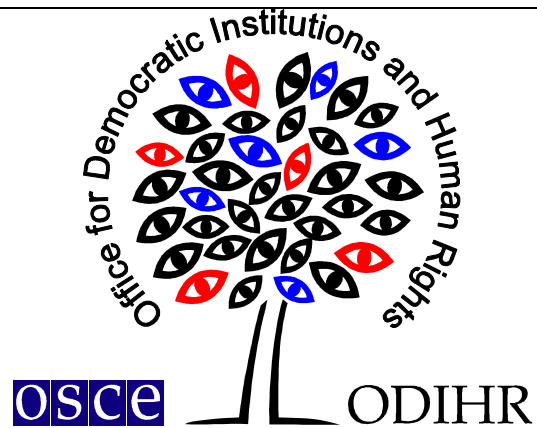


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## **OSCE/ODIHR COMMENTS ON DRAFT ANTI-DISCRIMINATION LAWS IN FORMER YUGOSLAV REPUBLIC OF MACEDONIA**

*Two draft laws concerning discrimination were forwarded to the OSCE - ODIHR for an informal review by the OSCE Spillover Monitor Mission to Skopje. One has been prepared by the Macedonian Helsinki Committee and consists of 44 Articles, together with list of definitions, and reasons for enactment; this will be referred to hereafter as 'the Helsinki draft'. The other, also attaching reasons for enactment, was prepared as part of a project by the Macedonian Center for International Cooperation (MCIC), the 'MCIC draft'.*

### **I - INTRODUCTION**

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 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.

Relevant law:

These drafts are prepared in the context of the constitution of the Former Yugoslav Republic of Macedonia ('FYRoM') which guarantees equality between citizens, and criminal provisions which punish discrimination (Articles 137 and 417). However, to the best information available there has never been any successful litigation asserting a breach of constitutional right to equality nor under the criminal provisions. There is also a Law on Equal Opportunities between Men and Women ('Equal Opportunities Law'), which covers, to some extent, the same issues. There are also Labour laws relating to pregnancy and related rights.

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') as well as numerous national courts' decisions.

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 in FYRoM, and sets standards; its implementation is overseen by a Committee and its most report considers both legislation and implementation.

Since FYRoM is a candidate for EU membership, it aspires to meet the standards set by the EU, *inter alia* in the field of anti-discrimination. A number of Directives (including the 'Racial Equality Directive'<sup>1</sup>, the 'Employment Equality Directive'<sup>2</sup>, the 'Burden of Proof Directive, and many directives relating to sex discrimination) and related ECJ judgments are relevant for the Macedonian anti-discrimination legislation and will be referred to in this review.

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<sup>1</sup> 2000/43/EC

<sup>2</sup> 2000/78/EC

## II KEY ISSUES:

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

- A. Definitions of unlawful practices which are effective and meaningful;
- B. Remedies which provide incentives for voluntary compliance and effective means for change;
- C. Procedural law which facilitates presentation of serious claims; and
- D. Resources to implement the law.

Since these are fundamental elements of any anti-discrimination law, this review considers first how the drafts deal with these issues, and then considers the detail of the individual clauses of each draft in turn.

### Summary:

The two draft laws are in many respects similar, covering well-established areas in anti-discrimination law:

- Both drafts were prepared before the Law on Equal Opportunities was passed and contain some definitions at variance with that Law.  
**It is recommended that the law fully take into account the existing anti-discrimination mechanisms in the Law on Equal Opportunities.**
- Both drafts adopt a comprehensive and ambitious approach to anti-discrimination legislation. While there are some differences, both seek, in essence, to prohibit discrimination in *any* sphere of life by *any* person or institution against groups or individuals based on *any* group characteristic.  
**It is recommended that the scope of the law prohibits discrimination in specific areas of public, as opposed to private, life, and that law focus on specific and limited protected categories.**
- Both drafts prohibit endorsement or support of acts of discrimination, including by third parties, whether done knowingly or unknowingly. Speech is included in these prohibitions.

**It is recommended that the prohibition on speech be narrowed in order to avoid breaching other fundamental freedoms especially that of freedom of expression.**

- Both drafts tend towards conflating the concepts of discrimination, indirect and direct discrimination and justification and victimisation/harassment to some degree. Some key forms of discrimination are excluded.

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

- Both drafts rely almost exclusively on litigation as an enforcement tool.

**It is recommended that litigation be supplemented by other mechanisms in order to achieve the aims of the legislation.**

- The procedural mechanisms are different in each draft but neither makes a comprehensive procedural system that facilitates such claims.

**It is recommended that the Government take into account the existing procedural provisions in civil law (including Equal Opportunities law); and also consider making provision shifting the burden of proof from the claimant; allowing statistical evidence to be adduced; stating the compensation and damages to which successful claimants are entitled; and allowing other measures which might prevent repetition of the discriminatory behaviour.**

## A. DEFINITIONS

### *Scope:*

It is important to be clear in what circumstances the law will be applied. Article 6 of the Helsinki draft sets out the scope of the law. The effect of this article is to impose no restriction at all on the situations in which this non-discrimination law is applicable. It apparently prohibits any form of discrimination in all human relationships based on any grounds. There is no distinction made between discrimination in public and in private contexts. This is not the approach taken by states with mature anti-discrimination provisions, which usually prohibit

discrimination in specific circumstances, such employment, education, and provision of goods and services, and provision of government services such as social security, and pensions.

Example

**Netherlands Equal Treatment Law**

**Section 5 :** It is unlawful to discriminate in or with regard to:

- a. advertisements for job vacancies and procedures leading to the filling of vacancies;
- b. job placement;
- c. the commencement or termination of an employment relationship;
- d. the appointment and dismissal of civil servants;
- e. terms and conditions of employment;
- f. permitting staff to receive education or training during or prior to employment;
- g. promotion;
- h. working conditions.

**Section 6:** It is unlawful to discriminate with regard to the conditions for and access to the professions and opportunities to pursue such professions or for development within them.

**Section 6a:** It is unlawful to discriminate with regard to membership of or involvement in an employers' organisation or trade union, or a professional association, or with regard to the benefits which arise from such membership or involvement.

**Section 7:** 1. It is unlawful to discriminate in offering goods or services, in concluding, implementing or terminating agreements thereon, and in providing educational or careers guidance if such acts of discrimination are committed:

- a. in the course of carrying on a business or practising a profession;
- b. by the public sector;
- c. by institutions which are active in the fields of housing, social services, health care, cultural affairs or education, or
- d. by private persons not engaged in carrying on a business or practising a profession, insofar as the offer is made publicly.<sup>1</sup>

If the scope of this draft is not narrowed to avoid regulating personal relationships it is likely to breach the right to private and family life under Article 8 of the ECHR.

Article 6 should be amended so that the scope of the law is limited to the situations in public life provided for in the Discrimination Directives.

Neither law takes into account the existence of the Law on Equal Opportunities. Any anti-Discrimination law needs to work in conformity with that law. The drafts should carve out the scope of the new law so as not to overlap with the existing provisions.

They should take a consistent approach in terms of definitions, and should make clear how the two laws inter-relate in cases of conflict between the two, or where a person

believes they have been discriminated by virtue both of their sex and other characteristics.

**It is recommended that the scope of the law is reviewed and:**

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

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

*Protected characteristics:*

Article 4(1) of the Helsinki draft prohibits discrimination, called here ‘discriminatory grounds’, based on ‘*color of skin, gender, race, ethnicity, language, citizenship, social background, religion or conviction, education, opinion, political affiliation, personal or societal status, disability, age, sexual orientation, family or marital status, property status, belonging to a vulnerable group, health status or any other grounds*’.

Article 3 of the MCIC draft sets out a similarly lengthy list of characteristics referred to as ‘personal characteristics’.

It is doubtful whether such an extensive list of protected characteristics can be given effect or meaningful protection in reality. An underpinning concept in discrimination law is that it is permissible to discriminate, or differentiate, between individuals based on relevant characteristics. But it is not permissible to do so based on *irrelevant* characteristics. This includes prejudiced or stereotyped views of a person based on their group membership. In other words, selection must be based on rational objective criteria.

In states with a history of anti-discrimination laws, protected characteristics have started from a narrow group, and slowly widened. Protected groups are usually said to have ‘immutable characteristics’ i.e. they share characteristics which are deeply personal and unchangeable. Consequently the main protected characteristics have been: ‘race’, ethnicity, sex/gender, religious affiliation. These characteristics can be expressed in other words; for instance discrimination based on membership of national minority can also be said to be on the grounds of race or ethnicity. Sexual

orientation has in the ECJ been found to come within the prohibition on sex discrimination<sup>3</sup>.

Most EU states with mature discrimination laws prohibit discrimination based on only limited characteristics, and frequently have different legal provisions tailored to the needs of the group being protected, and the sphere of activity being regulated. For instance, steps to prevent discrimination on the grounds of disability are different to those relating to age discrimination. For example, in the UK: age discrimination is forbidden in the work place, but not in night clubs. Race discrimination is forbidden in all spheres except strictly personal relationships. Specific measures against disability discrimination exist which are different to those for other groups. By tailoring the law to take account of different needs of different groups, it is more likely to be useful and effective.

There is a danger that the law of FYRoM, by including so many protected characteristics, will not be effective and achievable. Further there is a danger of a loss of focus on the key immutable characteristics such as 'race', religion and sex. It would be better to have a clear and limited list of groups which are protected than to aim for an unrealistically inclusive group.

**It is recommended that this legislation focus on specific protected categories.**

*Direct discrimination and indirect discrimination :*

In the Helsinki Draft, direct discrimination is defined in Article 4(4). It is significantly different to that in the Equal Opportunities Law. They should be consistent; this could be achieved by amending the Equal Opportunities Law, or by drafting the definition in the anti-Discrimination law to conform to that definition.

Article 4(4) requires that the discrimination '*has or could have as a result withdrawal impediment or limitation of the equal recognition enjoyment exercising of the human rights and basic freedoms...*'. This formulation is too limited since there are many areas of life in which human rights and basic freedoms are not infringed, yet where

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<sup>3</sup> P v S and Cornwall C-13/94

discrimination would still need to be prohibited. There is no human right, for instance, to employment, nor to using a restaurant, yet these are some of the core areas in which the law will operate. This wording also lacks clarity, since there is no definition of ‘human rights and basic freedoms’.

In the MCIC draft the definition of discrimination in art 5(2) includes ‘facilitating in discriminatory activities’ and ‘violation of the principle of equal rights and obligations’. Article 5(3) additionally defines direct discrimination. Both the drafts contain extremely broadly worded definitions which would, to a large extent control verbal and written expressions of opinion. They would engage Article 10 (freedom of expression) and have the potential to also engage Article 9 (freedom of conscience). An interference with the right to freedom of expression can be justified if it is ‘prescribed by law’ and is necessary for one of the limited reasons in Article 10(2). In this case, it can be said that the restriction is necessary to safeguard the rights of others. However, for the necessity test to be satisfied, the measure must be proportionate to the aim sought and be the minimum restriction necessary to achieve this aim. As noted by the European Court in *Handyside v UK*, this includes ideas “*that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society". This means, amongst other things, that every "formality", "condition", "restriction" or "penalty" imposed in this sphere must be proportionate to the legitimate aim pursued.*”

Thus, while words which support discriminatory behaviour may be undesirable, they would come within the scope of legitimate free expression and opinion. Further, because the phrase ‘encouraging, advocating or lending support’ is nebulous it may fail to fulfil the principle of certainty under the European Convention, and would therefore not be ‘prescribed by law’. Similar arguments arise in respect of the right to freedom of belief under Article 9.

It is, however, important that giving instructions to discriminate is still prohibited, and also recruitment or selection procedures and announcements which demonstrate an intention to discriminate. These are required for compliance under the Discrimination Directives.

**EXAMPLE**

**Sweden Prohibition on Discrimination Act Section 14**

A person who has allegedly discriminated against someone under the terms of this Act may not subject an individual to victimisation because he or she has reported or drawn attention to the discrimination or taken part in an investigation into the discrimination.

There are forms of discrimination excluded by these definitions: they would not protect persons who are discriminated by virtue of assumed characteristics (where a person is wrongly believed to belong to a particular group) or by association (because they associate with persons from a different, protected group). These are important grounds of discrimination and it is recommended that the definition include them.

Additionally, it is important that the exceptions also allow appropriate measures to compensate men and women for disadvantages linked to their sex, so that, where women are at greater risk of violence, taxi services may provide differential which takes this into account. It appears that both drafts contain qualifications which would allow this to happen, but it would be beneficial for the sake of clarity to make this more explicit.

**It is recommended that the law defines discrimination and analogous terms**

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

*Harassment*

The definition of harassment which is adopted in Article 5(1) of the Helsinki draft is in line with internationally accepted norms and is welcomed. However, Article 5(2) includes racial segregation as a form of harassment. Rather, segregation is a manifestation of discrimination and the definitions should reflect this.

**It is recommend that racial segregation is defined as a form of discrimination rather than harassment.**

## B. REMEDIES

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

Therefore, the Government may wish to consider an approach which incorporates elements of administrative action, and conciliation, with litigation as one available element. This can be particularly valuable where there is a large gap between the aspirations of the legislation and the readiness of employers and society at large to implement the equality provisions in full. By giving a responsibility to foster equality and to educate as well as to adjudicate situations of discrimination such a body can be more effective. Further, the creation of routes for litigation without ensuring there are adequate procedural mechanisms to enable applications to be made can be a weakness.

### EXAMPLE

#### Finland Non-Discrimination Act 21/2004 Section 13<sup>1</sup>

The role of the Discrimination Board includes power to:

1. confirm a conciliation settlement between the parties; or
2. prohibit the continuation or repeat of conduct contrary to sections 6 or 8 [discrimination or victimisation]

## C. PROCEDURE

The Helsinki draft, while clearly assuming there will be legal action, makes no provision for sanction or punishments, nor for the procedure to be undertaken. Article 9 of the Helsinki draft, while making certain statements as to the way litigation should be conducted, fails to make these statements effective by incorporating them into the

civil procedure code. Nor does it contain a detailed procedure for claims under the law. Consideration should be given to introducing special provisions to allow statistical evidence to be adduced to prove discrimination has occurred.

Nor are any penalties or consequences for discrimination included anywhere in the draft. This is required under the Race Directive, which explicitly refers to the need for ‘effective proportionate and dissuasive sanctions’.

There is also a possibility to make provision to shift the burden of proof once the claimant has brought a certain level of evidence that discrimination has occurred.

Example

**Netherlands Equal Treatment Law Section 10:**

If a person who considers that he is a victim of discrimination within the meaning of this Act adduces before a court facts from which it may be presumed that such discrimination has taken place, the other party is required to prove that the action in question was not in breach of this Act.<sup>1</sup>

**It is recommended that the Government consider making specific provision:**

- **shifting the burden of proof from the claimant;**
- **allowing statistical evidence to be adduced to support a claim of discrimination;**
- **stating the level of compensation and damages to which successful claimants are entitled; and**
- **allowing claimants to be reinstated if they have been dismissed from employment, and other measures which might prevent repetition of the discriminatory behaviour.**

**It is also recommended that the law:**

- **take into account the existing procedural provisions in civil law and ensure that they are conducive to active pursuance of claims under the anti-discrimination law; and**

- **contains procedural provisions which conform to those under the Equal Opportunities law.**

#### D. RESOURCES

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

**It is recommended that the explanatory notes provided with both drafts are supplemented by an assessment of the financial impacts of the draft law.**

### III INDIVIDUAL CLAUSES

#### Helsinki draft

##### **Article 2:**

###### *Paragraph (2)*

- The reference to international documents is clarified by a separate list of definitions. The definitions are not part of the draft law; to have legal effect they must be included within the law.

##### **Article 4:**

###### *Paragraph (1):*

- This Article purports to regulate not only direct and indirect discrimination, but also ‘encouraging, advocating or lending support to discrimination’ and ‘helping in discriminatory behaviour’. The phrases in quotation marks are undefined; the scope of a concept such as ‘lending support to’ (unless defined concretely elsewhere in the FYRoM legal codes and then cross-referred to in this legislation) lacks certainty. Further, as previously noted there is a danger the restrictions on speech could violate Articles 9 and 10 of the ECHR.

- Disability is not further defined. It is recommended that, for clarity, a definition is included as to the nature and seriousness of the disability in question. An example is in the Swedish Prohibition of Discrimination Act (2003:307) '*permanent physical, mental or intellectual limitation of a person's functional capacity that as a consequence of injury or illness was present at birth, has arisen since, or may be expected to arise.*'<sup>4</sup>

*Paragraph (2):*

- It is not necessary to define discrimination independently of the definitions of direct and indirect discrimination. While the difference between direct and indirect discrimination is, on the whole, clear there is no need to further define discrimination. It tends to add confusion since the relationship between these 3 concepts is unclear. For instance 'discrimination' in this paragraph requires the existence of 'motivation', whilst indirect discrimination does not. Yet in future uses of the term discrimination as in Article 6 and 7, it is clear that the intention is not to exclude indirect discrimination.
- The words in brackets should be removed; they lack clarity and appear to prohibit acts of direct discrimination which took place in the past but are no longer occurring; this would be a retrospective application of the law and should be removed.<sup>5</sup> Conversely, the phrase 'or could exist in the future' prohibits acts even where their discriminatory effect has not yet been demonstrated, and may never have such effect. While this wording is inspired by the Race Directive, it is helpful to clarify and interpret them for national purposes.

**It is recommended that this Article be re-drafted to:**

- a. comply with the right to free expression, and EU law;**

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<sup>4</sup> As of July 2005.

<http://www.handikappombudsmannen.se/upload/The%20Prohibition%20of%20Discrimination%20Act,%20nyaste.pdf>

<sup>5</sup> Indirect discrimination, because it involves looking at the effects of a policy or procedure, can have an on-going and continuing effect. Hence, past acts can properly be included in a definition of indirect discrimination, provided they have a current impact.

- b. **clarify the meaning of disability;**
- c. **Clarify the terms ‘discrimination’, ‘direct discrimination’, ‘indirect discrimination’ and ‘discriminatory’ and the relationship between them.**

## **Article 5**

- Whereas the definition of harassment adopts internationally accepted wording, it is unlimited in scope. In most states laws on discrimination-related harassment apply only in the work place. For example in the UK, sexual harassment is prohibited in the Sex Equality Act 1975, as amended by The Employment Equality (Sex Discrimination) Regulations 2005:  
(2A) It is unlawful for an employer, in relation to employment by him at an establishment in Great Britain, to subject to harassment—
  - (a) a woman whom he employs, or
  - (b) a woman who has applied to him for employment
- There may also be additional legislation relating to criminal harassment; if the intention is to create a new offence of harassment it should be inserted into the Penal Code.

**It is recommended that this Article refer to harassment in certain specified circumstances only.**

## **Article 7**

### *Paragraph (2)*

- (a) This is designed to enable differential treatment based on citizenship, but the scope of the exception is unclear. It is not possible from this clause to predict for instance, whether citizenship discrimination will be permissible in employment, or in the provision of goods and services.
- (c) It is unclear what is included within a ‘religious organization or institution’, such as whether it would include schools or hospitals run by religious organisations. Similarly, it is unclear what is meant by ‘occupation’ in this context, and whether it applies to both paid and unpaid work. These terms should therefore be clarified.

**It is recommended that this Article be re-drafted to clarify the scope of the exceptions.**

*Paragraph (3)*

This clause, to enable affirmative action, is widely drafted, and is in danger of being too wide, and failing to comply with EU law. The ECJ considered an affirmative action program in the case of *Abrahamsson and Anderson v Fogelqvist*<sup>6</sup> that allowed less qualified female candidates to be appointed for posts in order to create a better balance of representation. They found the terms of the scheme to be in breach of Article 2(4) of the Equal Treatment Directive.

**It is recommended that criteria for admissible affirmative measures be drawn more precisely to comply with EU requirements.**

**Article 24**

*Paragraph (2):*

There is a danger that personal information such as salaries and medical histories will have to be disclosed under this clause. It is important to make provision for information which is confidential or sensitive and which can be attributed to other individuals in the office. Without proper safeguards there is a danger that this will violate others' rights to privacy both under Article 8 of the ECHR (which provides a right to respect for one's "private and family life...and correspondence" subject to certain restrictions) and EU Directive 95/46/EC on the protection of personal data.

**It is recommended that the right to access information create a balance between the applicants' access to data against the right to privacy and the protection of others' data.**

**Article 31**

Although racial segregation can never be allowed, gender segregation in the fields *inter alia* of health, sport, and education are common. It is acceptable if does not involve any element of disadvantage; providing segregated facilities so long as they

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<sup>6</sup> Case C-407/98 [2000]

are of the same standard is unexceptionable. Further, as some forms of gender segregation may arise from religious or welfare reasons, the absolute bar may give rise to situations which violate the ECHR right to privacy (Article 8) or the right freedom of religion or belief (Article 9).

**It is recommended that this be re-drafted to allow appropriate and limited exceptions; these should conform to the ECHR.**

### **Article 32**

The effect of this clause appears to be to prohibit schools from imposing admission tests, or religious schools requiring their pupils' families to be of the same faith. It would also be impermissible to establish educational institutions (perhaps as a program of affirmative action) that catered to under-represented groups unless it is made clear this falls within the exceptions set out in Chapter I of the Law.

**It is recommended that this be re-drafted to allow appropriate and limited exceptions.**

### **MCIC draft:**

### **Article 4**

This appears to re-state the content of the Constitution. If that is the case it is unnecessary. However, if it is intended as a definition of the phrase 'equality principle' the clause should be retained and amended to clearly define the phrase.

### **Article 5**

#### *Paragraph (2)*

- This defines 'discrimination' to include direct and indirect discrimination' and then goes on to define those terms in paragraphs (3) and (4). This approach is to be commended as it avoids creating confusion by having too many differently defined terms.
- The scope of this provision is wide and lacks certainty; it is unclear what activities this would, in fact, prohibit. It contains the danger of infringing

other fundamental rights of expression and assembly, for reasons set out in relation to Article 4(1) of the Helsinki draft.

*Paragraph (3)*

- The definition of direct discrimination needs to take into account, and conform to that in the Law on Equal Opportunities.

*Paragraph (5)*

- This definition of ‘maltreatment’ seems to be intended to refer to ‘harassment’. It is preferable to use the internationally accepted terminology to avoid confusion.

*Paragraph (6)*

- Although racial segregation can never be allowed, gender segregation can sometimes be acceptable. Although this could fall within the proviso of ‘reasonable argumentation’ it is preferable, in the interests of certainty and clarity to prohibit segregation in specific circumstances.

**It is recommended that this Article be re-drafted to:**

- a. comply with the right to free expression, and EU law;**
- b. refer to ‘harassment’ rather than ‘maltreatment’;**
- c. clarify the extent to which some forms of gender segregation may be acceptable.**

**Article 6:**

This sets out activities which will not be considered discrimination. It is helpful in that it is precise and limited, and makes it easy for affected persons to interpret when an act is discriminatory and when not. It is noted that the affirmative action clause is very broadly worded in that it allows such action in order to accomplish ‘basic human rights or freedoms’. It is unclear what would be encompassed within such a phrase. Further, the ECJ judgment in *Abrahamsson and Anderson v Fogelqvist* must be taken into account in order to ensure that the measures are in compliance with EU law.

**It is recommended this Article be re-drafted to:**

- a. define which basic human rights or freedoms justify affirmative action;**
- and**
- b. lay down conditions which would ensure compliance with EU restrictions on affirmative action**

#### **Article 7**

This moves away from the core, legally certain, concept of direct and indirect discrimination to a notion of ‘the equality principle’. That principle is not elsewhere defined, although, previously as noted, may be intended to be that referred to in Article 4. The relationship between this Article and discrimination is entirely unclear. If it is intended to include additional defences or justifications for discrimination, it should be drafted in a way which makes that clear.

**It is recommended that, in allowing defences, justifications or other exceptions the draft refer to the defined concept of discrimination and not ‘the equality principle’.**

#### **Article 8:**

The offences listed in the first and last paragraphs in this article are already offences under the criminal code, hence these provisions add nothing. If it is intended that the other paragraphs create new offences to supplement or amend the criminal code, the article must specify such an amendment.

#### **Article 9:**

There is a danger this clause would violate Article 10 (freedom of expression) and Article 8 (privacy) of the ECHR. The arguments in relation to freedom of expression have already been set out in the commentary on definitions of discrimination. In relation to Article 8, this provision prohibits discriminatory messages even in letters or emails. It is unlikely that legislating in relation to private messages of this sort could come within one of the exceptions in articles 10(2) or 8(2). Even if this could be established an interference in personal communication of this sort would not be proportionate to the aim.

#### **Article 10**

Rather than imposing a general duty on state, it is better to create an enforcement body with these functions.

**Article 12**

It is unclear whether this is amending the civil procedure law or whether it seeks to create criminal penalties. This clause must be amended for clarity and precision.