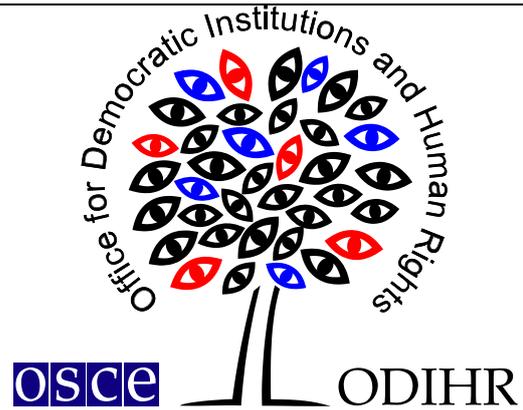


Warsaw, 13 October 2011

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**OPINION**

**ON THE REVISED DRAFT**

**LAW ON PREVENTING AND COMBATING**

**DISCRIMINATION**

**OF THE REPUBLIC OF MOLDOVA**

**Based on an unofficial English translation of the Draft Law**

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## **I. INTRODUCTION**

1. *In October 2007, the Minister of Justice of the Republic of Moldova (hereinafter “the Minister of Justice”) established an Anti-Discrimination Working Group. The Working Group prepared a draft Law on Preventing and Combating Discrimination, in June 2008 (hereinafter “the 2008 draft Law”). In September 2008, the OSCE/ODIHR provided Comments on the 2008 draft Law (hereinafter “the 2008 Comments”) upon request of the OSCE Mission to Moldova. The draft Law on Preventing and Combating Discrimination has undergone numerous revisions since then.*
2. *On 2 April 2010, the Minister of Justice sent an official letter to the OSCE/ODIHR Director, in which he asked for OSCE/ODIHR expertise on draft amendments to hate crime legislation in the Republic of Moldova and indicated that subsequently, he would be interested in an ODIHR evaluation of the most recent version of the draft of the Law on Preventing and Combating Discrimination (hereinafter “the 2010 draft Law”).*
3. *On 8 August 2010, the Deputy Minister of Justice sent a letter to the Head of the OSCE Mission to Moldova requesting the review of the 2010 draft Law. This letter included a link to the draft Law and the related Information Note on the Ministry of Justice’s website. The OSCE Mission to Moldova forwarded this request to OSCE/ODIHR, along with an English translation of the draft Law.*
4. *On 29 October 2010, the OSCE/ODIHR issued an Opinion on the Draft Law on Preventing and Combating Discrimination in the Republic of Moldova<sup>1</sup> (hereinafter “ODIHR’s 2010 Opinion”), which the OSCE Mission to Moldova forwarded to the Ministry of Justice.*
5. *On 19 September 2011, the OSCE Mission to Moldova forwarded a revised version of the draft Law (hereinafter “the draft Law”) to the OSCE/ODIHR indicating that the Ministry of Justice would like to receive further input on the draft Law.*
6. *This Opinion is provided in response to the above request.*

## **II. SCOPE OF REVIEW**

7. The scope of the Opinion covers only the above-mentioned draft Law, submitted for review. Thus limited, the Opinion does not constitute a full and comprehensive review of all available framework legislation governing anti-discrimination in Moldova.
8. The Opinion raises key issues and provides indications of areas of concern. The ensuing recommendations are based on international standards and best practices on anti-discrimination, as found in the international agreements and commitments ratified and entered into by the Republic of Moldova. Additionally, the Opinion refers not only to international standards that are legally binding on the Republic

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<sup>1</sup> OSCE/ODIHR Opinion on the draft Law on Preventing and Combating Discrimination of the Republic of Moldova, Opinion No. NDISCR-MOL/169/2010, issued on 29 October 2010.

of Moldova, but also to those which the State is aspiring to.<sup>2</sup> The Opinion also reflects the contents of previous OSCE/ODIHR Comments on the 2008 draft Law<sup>3</sup> and ODIHR's 2010 Opinion<sup>4</sup>, as applicable.

9. This Opinion is based on an unofficial translation of the draft Law provided by the OSCE Mission to Moldova. Errors from translation may result.
10. In view of the above, the OSCE/ODIHR would like to make mention that this Opinion is without prejudice to any written or oral recommendations and comments to the draft Law or related legislation that the OSCE/ODIHR may make in the future.

### **III. EXECUTIVE SUMMARY**

11. The OSCE/ODIHR welcomes the draft Law, which in many ways incorporates international and EU anti-discrimination standards. Nevertheless, certain parts of the draft Law would still benefit from amendments, in order to ensure full compliance with said international standards.
12. It is thus recommended as follows:

#### ***1. Key Recommendations***

- A. to remove the reference to “rights and freedoms” from the definition of discrimination under Article 2 par a) of the draft Law; [par 25]
- B. to strengthen the powers of the Council to Prevent and Combat Discrimination as follows:
  1. Outline and clarify the circumstances in which a Council member shall be dismissed and replaced by Parliament; [pars 56-58)
  2. Specify in the draft Law that the Council shall receive adequate funding and shall not be under the financial control of other public authorities or institutions; [par 61]
  3. Provide detailed information on the decision-making procedure and quorum of the Council; [par 70]
  4. Expand the scope of measures that may be taken by the Council in cases of non-compliance with Council decisions under Article 15 par 3; [pars 73-74]
- C. to explicitly introduce the possibility of third-party interventions into provisions on procedures before the courts and Council, as foreseen in the EU Equality Directives; [par 67]

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<sup>2</sup> Although Moldova is not a member of the EU, it aspires to meet the standards set by the EU in the field of anti-discrimination. The EU/Moldova Action Plan refers to the need to implement legislation on anti-discrimination and national minorities in line with EU standards. It also requires that Moldova continues efforts to ensure equality of men and women in society and economic life. See EU/Moldova Action Plan, to be found under: <[http://ec.europa.eu/world/enp/pdf/action\\_plans/moldova\\_enp\\_ap\\_final\\_en.pdf](http://ec.europa.eu/world/enp/pdf/action_plans/moldova_enp_ap_final_en.pdf)>.

<sup>3</sup> OSCE/ODIHR Comments on the draft Law of the Republic of Moldova on Preventing and Combating Discrimination, Opinion No. NDISCR-MK/117/2008 (TND), of 11 September 2008.

<sup>4</sup> *Op. cit* note 1.

- D. to outline what behaviour will lead to which type of liability following which procedures and entailing which possible sanctions, and specify which bodies shall preside over such proceedings; [pars 32, 49, and 77-81]

### ***3.2 Additional Recommendations***

- E. to amend Article 1 on the purpose and scope of the draft Law as follows:
1. Clarify the meaning of “nationality”; [par 20]
  2. Ensure that this provision explicitly protects religion and (non-religious) belief; [par 21]
  3. Make more transparent the meaning of par 2, or, should it exclude marriage and adoption procedures from the principle of non-discrimination, delete this part of the provision; [par 22]
  4. Differentiate in par 2 between staff performing religious functions or functions closely linked to a religious organization and administrative and support staff, so that the latter is not excluded from the scope of the draft Law; [par 23]
- F. to amend Article 2 on general notions as follows:
1. Rephrase the part of par a) referring to “discriminatory behaviour support as laid down in this law”; [par 26]
  2. Ensure that the definitions in the draft Law and definitions found in the Equal Opportunities Law are consistent with each other; [par 27]
  3. Specify in par a) that the draft Law prohibits discrimination based on real or presumed characteristics or criteria; [par 28]
  4. Clarify in par i) that affirmative measures shall be taken as necessary to enhance equal treatment of certain groups and that the success of such measures will be continually assessed; [par 31]
- G. to review Article 4 on severe forms of discrimination and its intended effect; [par 33]
- H. to state explicitly in Article 4 that only extremely grave anti-discriminatory acts or declarations by the media will fall under Article 4, as an exception to the right to freedom of expression; [par 34]
- I. to amend Article 7 prohibiting discrimination in employment as follows:
1. Include unlawful or unjustified dismissal in the list of discriminatory actions under par 2; [par 37]
  2. Insert an additional provision on reasonable accommodation for disabled persons; [par 39]
  3. Introduce an obligation for employers to cooperate with employees to establish internal labour rules to prevent and exclude discrimination at work; [par 39]

- J. to differentiate between the protection of direct and indirect discrimination in Articles 7 and 9 par 2; [par 38]
- K. to amend Article 8 as follows:
  - 1. Expand par a) so that is specifically covers public services provided by private companies; [par 41]
  - 2. Explicitly prohibit discrimination in the area of housing under par c); [par 42]
- L. to introduce the obligation to provide disability access in provisions on employment and goods and services; [par 42]
- M. to clarify the term “specific restriction” and the reference to “legislation in force” under Article 9 par 2 and specify that restrictions may not be based on direct or indirect discrimination; [par 43]
- N. to include in the draft Law a provision prohibiting discrimination in the access to and administration of justice; [par 44]
- O. to ensure in the draft Law that institutions tasked to fight discrimination will undertake efforts to collaborate on a regular basis, and that the Council will collaborate with the Committee for Equality between Women and Men established by the Equal Opportunities Law; [par 47]
- P. to specify in the draft Law the relationship between institutions tasked to fight discrimination and the Parliamentary Advocates; [par 48]
- Q. to outline the role of courts under the draft Law in a separate provision; [par 49]
- R. to indicate in Article 16 the nature of complaints proceedings before public authorities and the possible outcomes of such proceedings; [par 50]
- S. to include in the draft Law special and detailed obligations for all relevant public stakeholders; [par 51]
- T. to amend Article 11 on the Council as follows:
  - 1. Ensure that selection proceedings for Council members are conducted based on principles of gender and diversity in general, and that members are elected by a two-thirds parliamentary majority; [par 53]
  - 2. Grant Council members an appropriate level of immunity in carrying out their responsibilities, even after the expiry of their mandates; [par 54]
  - 3. Re-introduce into the draft Law the procedure for removing the Council’s Chairperson from office; [par 59]
  - 4. Clarify the meaning of par 8; [par 60]
- U. to specify the recipient of the Council’s annual reports under Article 12 par 2; [par 63]
- V. to amend Articles 13 and 20 by outlining in detail that the confidentiality of personal information related to victims shall be maintained at all times and that victims’ identity and personal information shall only be

disseminated to specifically named bodies and only upon prior consent of the victims; [pars 65 and 83]

W. to amend Article 14 on the rejection of a complaint as follows:

1. Re-introduce wording according to which complaints shall only be rejected based on unspecified information if the complainant fails to provide additional information upon request; [par 68]
2. Include in Article 14 the obligation for the Council to provide a written and justified reasoning when dismissing complaints; [par 69]

X. to amend Article 15 on the examination of complaints as follows:

1. Clarify whether the 30 days' time limit reflects to the begin or completion of the examination of a complaint and, in case of the latter, provide for the possibility of a time extension; [par 71]
2. Insert a provision entailing consequences for the failure to comply with the Council's requests for information, e.g. the initiation of discrimination procedures; [par 72]

Y. to delete Article 19 or specify that public offices and companies may also be held liable under the draft Law; [par 82]

Z. to amend Article 21 on the burden of proof as follows:

1. Replace the obligation to "prove facts" with the obligation to "establish facts"; [par 84]
2. Specify that the shift in the burden of proof will apply both before courts and the Council; [par 85]
3. Delete par 1 (b) or specify that damages only need to be proved if compensation has been requested; [par 86] and

AA. to continue to involve civil society and all relevant stakeholders in further discussions on the draft Law and conduct regular state and non-state assessments of the impact and implementation of the law once passed. [pars 87 and 88]

#### **IV. ANALYSIS AND RECOMMENDATIONS**

##### **1. International Definitions and Standards Related to Anti-Discrimination Legislation**

13. This Opinion analyzes the current draft Law from the viewpoint of its compatibility with relevant international human rights standards and OSCE commitments. International anti-discrimination standards are extensive; they can be found in generic human rights instruments such as the International Covenant

on Civil and Political Rights<sup>5</sup> (hereinafter “the ICCPR”) (Article 26) and the European Convention on Human Rights and Fundamental Freedoms<sup>6</sup> (hereinafter “the ECHR” or “the Convention”) (Article 14, in combination with other articles of the Convention protecting individual rights and freedoms). Other more specific anti-discrimination conventions are also relevant in this context, such as the UN Convention on the Elimination of All Forms of Racial Discrimination<sup>7</sup> (hereinafter “the CERD”), the UN Convention on the Elimination of All Forms of Discrimination Against Women<sup>8</sup>, and the UN Convention on the Rights of Persons with Disabilities (hereinafter “the CRPD”).<sup>9</sup>

14. Both Article 26 of the ICCPR and Article 14 of the ECHR protect individuals from discrimination based on an extensive and non-exhaustive range of grounds.<sup>10</sup> The UN Human Rights Committee has defined discrimination as implying “any distinction, exclusion, restriction or preference” based on the grounds enumerated in Article 26, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise of all persons, on an equal footing, of all rights and freedoms.<sup>11</sup> The overall concept behind the anti-discrimination provisions in both the ICCPR and the ECHR is to prevent any difference in treatment of persons in a relevantly similar or analogous situation that is not based on “objective and reasonable” grounds.<sup>12</sup>
15. Under European Union law, numerous directives have reflected EU countries’ commitment to protecting equal treatment of all persons, in particular the

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<sup>5</sup> The United Nations International Covenant on Civil and Political Rights, adopted by General Assembly resolution 2200A (XXI) on 16 December 1966 and ratified by the Republic of Moldova on 26 January 1993.

<sup>6</sup> The Council of Europe’s Convention for the Protection of Human Rights and Fundamental Freedoms, signed on 4 November 1950, entered into force on 3 September 1953. The Republic of Moldova ratified the Convention on 12 September 1997.

<sup>7</sup> The International Convention on the Elimination of All Forms of Racial Discrimination, adopted by the General Assembly of the United Nations in resolution 2106 (XX) of 21 December 1965 and signed on 7 March 1966. The Republic of Moldova acceded to this Convention on 26 January 1993.

<sup>8</sup> Convention on the Elimination of All Forms of Discrimination against Women, adopted by resolution 34/180 of the General Assembly at its thirty-fourth session, 18 December 1979. The Republic of Moldova acceded to this Convention on 1 July 1994.

<sup>9</sup> Convention on the Rights of Persons with Disabilities, adopted on 13 December 2006 during the sixty-first session of the General Assembly by resolution A/RES/61/106. The Republic of Moldova ratified this Convention on 21 September 2010.

<sup>10</sup> Article 26 states that “the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political and other opinion, national or social origin, property, birth or other status”. Similarly, Article 14 foresees 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.”

<sup>11</sup> See the UN Human Rights Committee’s General Comment No. 18 on Non-Discrimination, adopted at its thirty-seventh session on 10 November 1989, par 7. See similar definitions of specific forms of discrimination in Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination and Article 1 of the Convention on the Elimination of All Forms of Discrimination against Women.

<sup>12</sup> See the UN Human Rights Committee’s General Comment No. 18, par. 13, and its admissibility decision in the case of *Balani v. Spain*, Communication No. 1021/2001, of 28 March 2003, par 4.3. See also, among others, the recent ECtHR judgment in the case of *Carson and Others v. the United Kingdom*, no. 42184/05, of 16 March 2010, par 61.

“Employment Equality Directive” (Council Directive 2000/78/EC)<sup>13</sup>, as well as directives specifically protecting equal treatment of men and women<sup>14</sup> and equal treatment irrespective of ethnic or racial origin<sup>15</sup> (Council Directive 2000/43/EC, hereinafter also referred to as “the Racial Equality Directive”). The EU directives include clear and specific definitions of direct and indirect discrimination, as well as remedy and enforcement provisions and requirements for anti-discrimination/equality bodies. These bodies focus on the promotion of equal treatment and on the protection from discrimination.

16. Of the various OSCE Commitments focusing on equal treatment, the Vienna Document is one of the most specific in stressing that all OSCE participating States commit to ensure human rights and fundamental freedoms to everyone within their territory and subject to their jurisdiction, without distinction of any kind such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.<sup>16</sup>

## **2. Key Terms and Principles in the Draft Law**

### ***2.1 Purpose and Scope of the Draft Law***

17. It is welcomed that in its Preamble, the present draft Law now explicitly refers to EU Council Directives 2000/43/EC and 2000/78/EC, thereby specifying that it aims to implement both of these Directives into Moldovan domestic legislation.
18. Article 1 provides for equal treatment irrespective of certain protected characteristics, namely “race, colour, nationality, ethnic origin, language, religion or religious belief, sex, age, health, disability, sexual orientation, opinion, political affiliation, property, social origin, and based on any other similar criterion”.
19. It is laudable that sexual orientation remains part of this draft Law. Also, the inclusion of colour as a protected characteristic is a positive improvement, as is the deletion of the vague protected characteristic of “belonging to a group of disadvantaged persons”, both of which had been recommended in ODIHR’s 2010 Opinion.
20. At the same time, as also stated in ODIHR’s 2010 Opinion, a number of other characteristics listed under Article 1 would benefit from clarification, e.g. the meaning of nationality, specifically whether it refers to citizenship, as under

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<sup>13</sup> See the Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, hereinafter “the Employment Equality Directive” or “Council Directive 2000/78/EC”.

<sup>14</sup> Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation; and Council Directive 2004/113/EC of 13 December 2004 on the principle of equal treatment between men and women in the access to and supply of goods and services.

<sup>15</sup> See Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial and ethnic origin.

<sup>16</sup> The OSCE Concluding Document of Vienna – The Third Follow-Up Meeting, Vienna, 15 January 1989, Questions Relating to Security in Europe, Principles, par 13.8. <sup>16</sup> The Ministerial Council Decision 4/03 on Tolerance and Non-Discrimination of 2 December 2003 reaffirmed the Ministerial Council’s concern about discrimination in all participating States and the Permanent Council Decision no. 621 of 29 July 2004 on Tolerance and the Fights against Racism, Xenophobia and Discrimination committed participating States to consider enacting, or strengthening, as appropriate, legislation prohibiting discrimination.

certain international law agreements<sup>17</sup>, or to ethnicity or ethnic origin, as appears to be the practice in Moldova.<sup>18</sup>

21. Furthermore, the distinction between religion and religious belief still remains unclear. It is in keeping with international agreements such as the ICCPR (Article 18) and the ECHR (Article 9) to protect religion and (non-religious) belief, referring to deeply held (yet non-religious) conscientious beliefs that are fundamental about the human condition and the world, such as atheism and agnosticism.<sup>19</sup> Article 1 should thus be amended to explicitly protect religion and (non-religious) belief.
22. Article 1 par 2 stipulates that the draft Law shall not extend to marriage and adoption relationships governed by legislation in force and “religious cults and their components in part related to their religious beliefs”. The meaning of this provision is not clear – in case it should imply that marriage and adoption relationships should not be conducted following the principles of non-discrimination, then Article 1 par 2 should be amended or even deleted.
23. Excluding religious organizations from the scope of the draft Law may be justified insofar as this concerns staff performing religious functions, or functions that are closely linked to the nature or image of a religious organization – in such cases, it is natural that religious belief would be a requirement for a certain position. However, this should not apply to administrative and support staff, whose tasks are not related to religious exercise and teachings. Such administrative and support staff should have the same rights in employment as employees working for other employees. It is thus recommended to differentiate accordingly in Article 1 par 2.

## ***2.2. General Notions under Article 2 of the Draft Law***

24. Article 2 of the draft Law contains a list of “general notions” and their definitions. Compared to the 2010 draft Law, certain new terms have been included under Article 2, namely discrimination by association, and racial segregation. Both are laudable inclusions to the draft Law. At the same time, a number of issues raised in ODIHR’s 2010 Opinion remain unchanged in the present draft Law and are thus reiterated here.
25. For example, discrimination under Article 2 par a) is defined as “any distinction, exclusion, restriction or preference in the rights and freedoms of the person or group of persons, as well as discriminatory behaviour support based on the criteria laid down in this law”. Linking the difference in treatment to “the rights and freedoms of [a] person” may be too limiting, since not all cases of

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<sup>17</sup> See, e.g., Article 2 (a) of the Council of Europe’s Convention on Nationality, adopted on 6 November 1997, stating that ““nationality” means the legal bond between a person and a State and does not indicate the person’s ethnic origin”.

<sup>18</sup> In the Romanian language, the term “*naționalitate*” refers more to ethnicity or ethnic origin than to citizenship.

<sup>19</sup> See the OSCE/ODIHR Guidelines for Review of Legislation Pertaining to Religion and Belief, prepared by the OSCE/ODIHR Advisory Panel of Experts on Freedom of Religion or Belief in consultation with the European Commission for Democracy through Law (Venice Commission), 2004, p. 8.

- discrimination will necessarily infringe a person's rights or freedoms.<sup>20</sup> It is therefore recommended to remove the reference to rights and freedoms contained therein.
26. Also, the part of the above definition referring to “discriminatory behaviour support based on the criteria laid down in this law” (Article 2 par a)) is unclear. Should the definition of discrimination be retained in the draft Law, it is recommended to clarify this point.
  27. It is welcomed that the definitions of direct and indirect discrimination contained in this provision largely correspond to the definitions found, e.g. in the EU Employment Equality Directive and the EU Racial Equality Directive (hereinafter “the EU Equality Directives”). At the same time, as recommended in ODIHR’s 2010 Opinion, the definitions of the draft Law should be made consistent with certain definitions found in the Law of the Republic of Moldova on Ensuring Equal Opportunities for Women and Men (hereinafter “the Equal Opportunities Law”).<sup>21</sup>
  28. The definition of discrimination in Article 2 does not specifically include discrimination by virtue of assumed characteristics (meaning where a person is wrongly believed to belong to a particular group). It may be beneficial to clarify in Article 2 that the draft Law prohibits discrimination based on real *or presumed* characteristics or criteria.
  29. Affirmative action is defined under Article 2 par i) as temporary special measures taken by public authorities in favor of a person, group of persons or community, intended to ensure the development of their natural and actual implementation of equal opportunities and treatment in relation to other individuals, groups of persons or communities. Such measures will apply pending the establishment of equality and social inclusion of persons/groups of persons who are in a disadvantaged position compared to other people (Article 5 par a)).
  30. As indicated in ODIHR’s 2010 Opinion, measures taken “in favour of” a person, group of persons or community could imply some form of preferential treatment of these persons. This would not appear to be in line with the general characteristics of affirmative action, namely the requirement that it be taken only if it has an objective legal aim and if the measures taken are proportionate and necessary to achieve this aim.
  31. Article 2 par i) should thus specify that affirmative measures will be taken as considered necessary to enhance equal treatment of certain groups or communities that are at that moment, and following careful research and review, considered under-privileged in certain sectors. The success of such measures should be the topic of regular and diligent examination, while continually assessing whether equality and social inclusion for certain groups have been enhanced.

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<sup>20</sup> For example, a person may be barred from entering a nightclub due to his/her ethnicity or colour, but this will not constitute a violation of his/her rights or freedoms, since entering a nightclub does not affect his/her human rights.

<sup>21</sup> Law on Ensuring Equal Opportunities for Women and Men, No. 5/XVI of 9 February 2006, Official Monitor of the Republic of Moldova, No. 47-50/200 of 24 March 2006. This Law also defines terms such as affirmative action, discrimination based on sex, sexual harassment, as well as direct and indirect discrimination based on sex in its Article 2, but the wording of these definitions does not correspond to the wording of Article 2 of the draft Law. Both laws should be brought into harmony with one another.

32. It is much welcomed that the terms defined in Article 2, namely direct and indirect discrimination, also harassment, victimization and incitement to discrimination, are explicitly banned under Article 6. Article 6 further states that promoting policies, or carrying out actions or inactions that violate the principle of equality must be removed by competent public authorities and punished under the law. It would be advisable to indicate here under which law these actions will be punished, and whether they will be sanctioned under administrative, disciplinary, criminal or civil procedure (see pars 77-81 *infra* on liability under the draft Law).

### ***2.3 Severe Forms of Discrimination***

33. Article 4 deals with certain types of discrimination deemed to be especially severe, e.g. promotion of practice of discrimination by public authorities, through mass media, by placing discriminatory message and symbols in public places, against persons on the basis of two or more criteria, committed against two or more people or two or more times, against a group of persons, or by way of racial segregation. As indicated in ODIHR's 2010 Opinion, the legal effect and purpose of this provision remain unclear, in particular as "severe forms of discrimination" are not mentioned at any other stage in the draft Law. Chapter IV on liability for acts of discrimination also does not indicate aggravated sanctions for such types of discrimination. It is once more recommended to review Article 4 and its legal effect, including possible aggravated sanctions.
34. At the same time, Articles 4 (b) and (c) on discrimination through mass media and placing discriminatory messages and symbols in public places should be reviewed to ensure these provisions' compliance with each individual's freedom of expression under Article 10 of the ECHR. According to the case law of the ECtHR, the notion of freedom of expression is also applicable to information or ideas that "offend, shock or disturb".<sup>22</sup> The exceptions listed in Article 10, par. 2 of the ECHR must be narrowly interpreted and the necessity for restrictions must be convincingly established.<sup>23</sup> The draft Law should thus explicitly state that only extremely grave anti-discriminatory actions or declarations by the media would justifiably fall under Article 4, in exception to the right to freedom of expression mentioned above.
35. Given the above lack of clarity as to the necessity and practical effect of Article 4, it is recommended to either delete this provision, or make substantial amendments to it, taking into account the concerns raised above. In particular, the practical effect of this provision, including whether it will lead to aggravated sanctions, should be specified.

### **3. Special Provisions**

36. Chapter II on Special Provisions (Articles 7-9) enumerates the prohibition of discrimination in employment, public access to goods and services, and

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<sup>22</sup> See the ECtHR judgment of *Bodrožić v. Serbia* of 23 June 2009, no. 32550/05, pars. 46 and 56. See also, among others, the judgment *Vogt v. Germany* of 26 September 1995, Series A no. 323, pp. 25–26, par. 52.

<sup>23</sup> See the *Vogt v. Germany* judgment, par. 52.

education. Some of these provisions would benefit from certain amendments or additions.

37. It is noted that while listing specific actions which will be considered discriminatory, Article 7 prohibiting discrimination in the field of employment still does not mention the unlawful termination of employment based on discrimination. Considering that such an action could be considered much more invasive than some of the others listed under Article 7 par 2 (e.g. unequal pay, or unjustified and differentiated distribution of tasks), it is recommended to include unlawful or unjustified dismissal in this list.
38. In particular in the field of labour, the draft Law should differentiate between the prohibition of direct discrimination on the one hand and indirect discrimination on the other (as should Article 9 par 2 on discrimination in education (see par 43 *infra*)). Article 7 should thus specify that not only individual actions or behaviour, but also general rules or practices that indirectly discriminate certain groups for no justifiable reason shall be prohibited.
39. At the same time, as already stressed in ODIHR's 2010 Opinion, the draft Law does not refer to the reasonable accommodation for disabled persons provided for in both the Employment Equality Directive and the Convention on the Rights of Disabled Persons (hereinafter "the CRDP").<sup>24</sup> Reasonable accommodation involves taking appropriate measures to provide disabled persons with access to, participation in, or advancement in employment or training, provided such measures do not impose a disproportionate burden on the employer. It is reiterated that the Republic of Moldova, having signed and ratified the CRDP, should specifically mention reasonable accommodation in the draft Law, and also include it in the list of definitions under Article 2.
40. Moreover, it is noted that in the previous 2010 draft Law, Article 9 on cooperation in ensuring the observance of non-discrimination in labour relations foresaw that employers shall cooperate with employees to establish internal labour rules to effectively prevent and exclude cases of discrimination at work. While most aspects of Article 9 have been included in Article 7 of the draft Law, this part was not. It is recommended to re-introduce this obligation to cooperate in the above manner.
41. Article 8 prohibits discrimination in the access to goods and services available to the public and lists examples of such services. Under par a), this involves services provided by public authorities. This part of Article 8 should be expanded to explicitly cover services provided by private companies contracted to perform such services by public administration.
42. Further, as proposed in the 2010 ODIHR Opinion, "social protection services" under par c) should also specify that they include prohibition on discrimination in the area of access to housing.<sup>25</sup> In order to ensure the draft Law's compliance with the CRDP, it is recommended to include, in particular in the provisions on employment and goods and services, the obligation for public offices to provide disability access to disabled persons, as laid out in Article 9 of the CRDP.

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<sup>24</sup> See Article 5 of the Employment Equality Directive and Articles 5 par 3 and 27 par 1 (i) of the CRDP. See also the Memorandum to the Minister of Justice of Moldova by the UN Country Team, Moldova on the draft Law to Prevent and Combat Discrimination of 10 September 2010, Section 2.

<sup>25</sup> See Article 3 (h) of the EU Directive 2000/43/EC, see also Article 5 (e) (iii) of the CERD.

43. Article 9 deals with the prohibition of discrimination in education. Par 2 of this provision states that admission principles may be established based on specific restrictions, except in cases stipulated by the legislation in force. The term “specific restrictions” is very general, as is the reference to “legislation in force”. It is recommended to specify that such “specific restrictions” may not themselves be based on direct or indirect discrimination.
44. The draft Law should also specifically prohibit discrimination in access to and the administration of justice – this sphere of activity is not included in Article 1 on the scope of the draft Law. While it may arguably fall under “goods and services available to the public” under Article 8, it may be helpful to include this principle of non-discrimination in access to and the administration of justice in the draft Law in a separate provision, to specify that next to the administration and the legislative, the judiciary also has clear responsibilities under the draft Law

#### **4. The Institutional Framework for Preventing and Combating Discrimination**

##### ***4.1 Institutions Tasked to Fight Discrimination***

45. Under Chapter III, the draft Law lists institutions that are tasked to fight discrimination, as well as their competences and procedures. Chapter IV of the draft Law specifies the liability for discriminatory acts and certain related procedural matters.
46. Article 10 lists subjects with duties in the field of preventing and combating discrimination, namely courts, the Council to Prevent and Combat Discrimination (hereinafter “the Council”), public authorities, and public associations.
47. As mentioned in ODIHR’s 2010 Opinion, these bodies need to collaborate in order to avoid overlaps and ensure that, e.g., the Council is aware of cases pending before court, to avoid situations where the Council’s decision is followed by a (possibly contradictory) court decision in the same case. The Council should also collaborate with the Governmental Committee for Equality between Women and Men, established by Article 18 of the Equal Opportunities Law, to avoid overlaps in cases dealing with complaints involving discrimination based on several grounds, including gender.
48. Further, it may be worthwhile to specify in the draft Law the relationship between the bodies mentioned under Article 10 and Parliamentary Advocates, who according to Article 1 of the Law on Parliamentary Advocates are mandated to guarantee and ensure human rights<sup>26</sup>, which would appear to cover the right to be free from all forms of discrimination<sup>27</sup>. Ideally, the Law on Parliamentary Advocates should specify that anti-discrimination complaints should be forwarded to the Council as the more specialized body, while stipulating that both bodies should collaborate in this respect.
49. While courts are mentioned as bodies tasked to fight discrimination, it is noted that these are the only bodies listed under Article 10 whose role under the draft

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<sup>26</sup> Law on Parliamentary Advocates, no. 1349, adopted on 17 October 1997, Official Gazette No. 82-82 of 11 December 1997, last amended on 12 June 2008.

<sup>27</sup> This right is laid down in Article 26 of the ICCPR and Article 14 of the ECHR.

Law is not outlined in a separate provision.<sup>28</sup> Article 18 states that acts of discrimination shall entail disciplinary, civil, administrative and criminal liability, but does not elaborate this in detail (see pars 77-81 *infra*). Article 20 on the protection of victims likewise mentions that victims may submit actions in court, but does not specify which actions will be dealt with by which courts. It would be helpful to include in the draft Law an indication of the role of courts, types of proceedings before courts related to discrimination complaints, along with references to the appropriate courts and procedure.

50. As for the competences of public authorities, it is noted that next to the Council, such authorities are also competent to examine complaints of persons considering themselves to be victims of discrimination (Article 16). While it is positive that administrative authorities are thus given the chance to revoke public administration's discriminatory actions and decisions, it would be helpful to indicate in Article 16 which procedures would be followed in this case and what the outcome of such procedures would be (possibly administrative procedures leading to administrative sanctions).
51. At the same time, as already noted in ODIHR's 2010 Opinion, Chapter III does not mention any specific obligations of selected government or other public bodies, as opposed to the Equal Opportunities Law, which contains special obligations for parliament, government, the Ministry of Health and Social Protection and other administrative authorities. Article 16 merely indicates that public authorities shall, *inter alia*, examine complaints, coordinate activities and contribute to awareness-raising. In order to ensure that relevant public stakeholders in Moldova understand their roles and responsibilities under the draft Law, it may be worthwhile to include references to specific public authorities, and their roles under the draft Law.

#### ***4.2 The Council to Prevent and Combat Discrimination***

52. The Council is described in Articles 11-15 of the draft Law. As an independent and impartial collegiate body, it falls under the purview of relevant international standards on national human rights institutions, namely the UN Paris Principles.<sup>29</sup> Article 11 now describes its composition, eligibility criteria for members and open and inclusive recruitment and appointment procedures (pars 2-5), which is a marked and welcome improvement compared to the 2010 draft Law. It is noted that members are required to have no political affiliation, but higher education, an "impeccable reputation" and at least five years' experience in the field of human rights.
53. Members of the Council are recruited via a public contest, which is based on open and transparent competition (Article 11, pars 3 and 4). Additionally, the selection of members based on this contest should be conducted based on the principles of gender and other (e.g. ethnic or religious) diversity – it is recommended to add

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<sup>28</sup> See, in comparison, Articles 11-15 on the Council, Article 16 on public authorities and Article 17 on public associations.

<sup>29</sup> See the United Nations Principles relating to the status of national institutions, as defined at the first International Workshop on National Institutions for the Promotion and Protection of Human Rights in Paris 7-9 October 1991, adopted by Human Rights Commission Resolution 1992/54, 1992 and General Assembly Resolution 48/134, 1993. Such elements include independence of the body, in particular financial independence.

- this principle to Article 11. Further, to ensure proper independence and impartiality, Article 11 par 5 should specify that members of the Council are appointed by a qualified majority of the elected members of parliament.
54. Such independence would be further enhanced if members of the Council were granted an appropriate level of immunity in carrying out their responsibilities following their appointment. Such immunity in relation to the Council's actions and decisions should persist upon expiry of their mandates.
  55. Based on Article 11 par 6, membership of the Council shall terminate upon expiry, on demand (presumably, this implies the resignation of a Council member) or in case of death. Members shall be dismissed by the body which appointed them (in other words, the parliament). This shall occur "in circumstances that preclude the possibility of exercising the mandate", or if a majority of the members of Council requested this, due to a member's "failure or improper performance of duties".
  56. The above provision is quite vague and potentially undermines the independence of members of Council as it does not determine specifically which criteria need to be fulfilled before a member of Council is dismissed. Instead, it is up to the Parliament to assess when circumstances preclude the possibility of Council members exercising their mandates – a formulation which allows various interpretations and could facilitate the arbitrary removal of disagreeable and overly critical members of the Council.
  57. In order to prevent abuse of this provision, it is recommended to enhance it by defining by exhaustive list what amounts to improper conduct leading to dismissal. Usually, this would include cases where he/she performs activities incompatible with membership in the Council and leading to a conflict of interest (but only following a formal rebuke, so that the person in question has the chance to discontinue such activities), or upon conviction of a serious criminal offence which demonstrates his/her ineptitude as member of Council. Another ground could be a permanent illness which renders him/her incapable of performing the above tasks. As in the case of appointment (see par 53 *supra*), Parliament should decide on the removal of a member of Council by qualified majority. The Council members whose dismissal is requested should have the right to be heard before Parliament and respond to any accusations made in this context.
  58. Article 11 par 6 further stipulates that a dismissed member of Council shall be replaced by a "new member of Council" until the expiration of the original member's mandate. Article 11 does not specify, however, how this new member of Council shall be appointed. In the interests of consistency, and to ensure that this new member is seen as a full member of the Council, it is recommended to clarify in Article 11 par 6 that this new member of the Council shall be appointed following the eligibility requirements and procedure set out in Article 11 pars 2-5.
  59. According to Article 11 par 7, the Chairman of the Council is elected by majority vote of the members. It is noted that as opposed to the 2010 draft Law (Article 13 par 4), this draft Law no longer outlines circumstances for the Chairman's removal. It may be worthwhile to re-introduce such procedure for removing the Chairman from office, which according to the 2010 draft Law involved a request of one-third of the members of Council and a secret vote by two-thirds of the members. Such removal should only involve the position as Chairman, but not the

dismissal as member of the Council, which is already regulated under Article 11 par 6. Faced with such a request for removal, the Chairman should also have the right to respond to any accusations (see par 57 *supra*).

60. Under Article 11 par 8, Council members who “do not activate properly” receive an allowance of 10 percent of an average salary for each meeting. It is not clear what kind of Council members this provision is referring to, nor why some should get remuneration and others not. This should be clarified in Article 11 par 8.
61. Generally, it should be reiterated that in order to act impartially and independently, the Council requires adequate funding and shall not be under the financial control of any other public authority or institution.<sup>30</sup> Remuneration of Council members is one aspect of such financial independence, while another is sufficient funding from the state budget to permit the administrative apparatus mentioned in Article 11 par 9 to function properly, with sufficient staff and means.
62. The powers of the Council are laid down in Article 12, which now also includes amicable settlement procedures. It is praiseworthy that such procedures are now listed alongside the Council’s other powers and no longer as a part of complaints procedures, thereby demonstrating the important conciliatory role that the Council should play.<sup>31</sup>
63. It is welcomed that now, under Article 12 par 2, the Council is held to submit a general report on the situation in preventing and combating discrimination at the beginning of each year, which shall also be published. It is recommended to specify to whom this report shall be submitted – presumably, the recipient of such report will be the Parliament. Ideally, the submission of the report should be followed by a discussion on its contents in a special parliamentary session.

#### ***4.3 The Complaints Procedure before the Council***

64. Articles 13 – 15 of the draft Law outline proceedings before the Council, mainly the manner of filing a complaint (Article 13), and the examination and decision-making procedures before the Council (Articles 14-15).
65. Under Article 13, proceedings before the Council shall be initiated *ex officio* or at the request of the person concerned. Presumably, this means that the Council has the right to initiate *ex officio* proceedings upon receiving information that a case of discriminatory treatment may have occurred. While such proceedings should be initiated regardless of potential victims’ consent, the confidentiality of personal information related to the victims will need to be maintained. This could be outlined in greater detail in the draft Law.
66. At the same time, it is noted that Article 13 still does not mention third-party interventions of civil rights groups or representatives of individuals, despite recommendations to this effect in ODIHR’s 2010 Opinion. It is reiterated at this point that third party interventions by associations, organizations and other legal

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<sup>30</sup> See the Paris Principles, Composition and guarantees of independence and pluralism, par. 2.

<sup>31</sup> Conciliation procedures are also mentioned specifically as tasks of national human rights institutions and anti-discrimination bodies under the Paris Principles and the EU Equality Directives respectively. See the Paris Principles, Additional principles concerning the status of commissions with quasi-jurisdictional competence, (a), and Article 7 par 1 of the Racial Equality Directive.

entities having a legitimate interest in implementing the EU Equality Directives, based on said Directives, engage, on behalf or in support of the complainant, and with or without his/her approval, in judicial or administrative proceedings provided for the enforcement of obligations under the EU Equality Directives.<sup>32</sup> The UN Paris Principles take a similar approach.<sup>33</sup>

67. While Article 17 par 2 (a) permits public associations to submit court actions to protect alleged victims of discrimination, this does not necessarily signify a third-party intervention in the above sense, which allows intervention in support of a complainant, and also without his/her approval. This provision should thus include a clear right to third-party intervention by the above groups in court proceedings. It is further recommended to extend the group of persons having the right to bring complaints before the Council under Article 13 accordingly.
68. Article 14 provides a list of reasons based on which a complaint may be rejected. Under Article 14 par b), this is possible if the complaint does not contain the contents laid down in Article 13 par 2. It is noted that in the 2010 draft Law, the previous Article 16 par b) stated that a complaint may be rejected if the necessary information is not specified and “the person who filed it does not provide additional information”. This formulation is preferable, as it allows complainants unfamiliar with proceedings before the Council to supplement incomplete applications. It is proposed to re-introduce such formulation to Article 14.
69. Furthermore, as already advised in ODIHR’s 2010 Opinion, it would be beneficial to include in Article 14 the obligation for the Council to provide a written and reasoned justification when dismissing a complaint (unless the complainant’s identity is not known).
70. It is noted here that, as in the 2010 draft Law, the decision-making procedure and quorum of the Council are not specified. In order to enhance transparency of the procedures before the Council, information on the necessary decision-making quorum should be included in the draft Law, in other words it should be clear how many members of the Council need to be present in order to take a decision on admissibility and merits of complaints. At the same time, the draft Law should specify whether decisions are taken unanimously or by majority decision. Members of the Council should be held to recuse themselves from deciding on a case in case of a vested interest in the case, or other close involvement. More detailed aspects of the procedure and decision-making process should then be included in specific rules of procedure regulating the Council’s working procedures, which according to Article 11 par 10 shall be approved by Parliament.
71. Under Article 15, complaints are examined by the Council within 30 days of submission. This is a welcomed addition to the draft Law and it corresponds with recommendations made in ODIHR’s 2010 Opinion. However, it should be clarified whether this means that examination will begin within 30 days, or whether Article 15 requires the examination of complaints to be completed within

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<sup>32</sup> See Article 9 par 2 of the Employment Equality Directive and Article 7 par 2 of the Racial Equality Directive. See also the Paris Principles (additional principles concerning the status of commissions with quasi-judicial competence), stating that aside from individuals, “their representatives, third parties, non-governmental organizations, associations of trade unions or any other representative organizations” may bring cases before national human rights institutions.

<sup>33</sup> Paris Principles, Additional principles concerning the status of commissions with quasi-judicial competence.

30 days. In case of the latter interpretation, it is noted that 30 days may be too short a time to review more complex cases involving many documents or several complainants. With regard to such cases, it would be recommendable to include in Article 15 a provision permitting the Council to extend this time limit, in which case it should then also inform the complainant. Generally, the complainant should be well-informed of all stages of proceedings before the Council and should receive copies of relevant actions of the Council.

72. Par 1 of Article 15 also specifies that the Council may request relevant information and data from persons presumed to have committed acts of discrimination, and that all related data, information and documents shall be made available to the Council. In order to strengthen the powers of the Council, it is recommended to include in Article 15 or in Article 12 on the powers of the Council a provision entailing consequences of the failure to comply with the Council's requests for information, e.g. the initiation of disciplinary proceedings.
73. Article 15 par 2 stipulates that once the Council has adopted a decision containing measures for the suppression of discriminatory acts (submitted to both the complainant and respondent parties), the respondent party shall inform the Council about the measures taken in response to this decision within 10 days. Article 15 does not list any consequences in case such measures are not undertaken, or in cases where they are undertaken with significant delay. Article 15 par 3 refers to "appropriate measures" undertaken by the hierarchical superior in case of non-compliance, but only in cases where the Council does not agree with the measures taken, not in cases where no measures are taken, or such measures are delayed. It is advised to state in Article 15 that respondent parties shall be obliged to justify a failure to undertake measures at all, or in a timely manner in response to the Council's decision. In case the respondent party undertakes no measures at all and fails to justify this, or if the justification is rejected by the Council, the Council should have the right to initiate disciplinary proceedings. Likewise, the initiation of discriminatory proceedings should also be the consequence of inadequate measures under Article 15 par 3 – this should be clarified in this provision.
74. At the same time, Article 15 par 3 appears to deal only with cases where the respondent party is a public authority, and where such party has a hierarchical superior. In cases where respondent parties are private companies or private persons, discriminatory actions or decisions may have been taken by the leadership of such a company, or by a person who does not have a hierarchical superior – in this case, Article 15 par 3 would not apply. Likewise, Article 15 par 3 does not apply to cases where the respondent party is the highest public authority and has no superior. It is therefore recommended to specify in Article 15 or Article 12 that in such cases, the Council will have the right to initiate administrative proceedings against the respective private company or individual, or superior body. Should this already be possible under Article 12 par 1 (k), then this provision should be revised to specify more explicitly in which cases administrative sanctions will be imposed (possibly also in other cases of non-compliance with Article 15).

## **5. Liability for Acts of Discrimination**

75. Under the draft Law, liability for acts of discrimination is laid down in Chapter IV. Such liability should lead to effective, proportionate and dissuasive sanctions to be exercised by established enforcement bodies, as required by the EU Equality Directives<sup>34</sup> and the Council of Europe's European Commission Against Racism<sup>35</sup>.
76. In this context, it is noted that sanctions will only then be effective and dissuasive if they are outlined clearly in the draft Law. At the moment, however, it is questionable whether this is the case.
77. Article 5 on "ways to eliminate discrimination" mentions sanctions for discriminatory behaviour (Article 5 par c). Such sanctions are not, however, outlined in a foreseeable and clear manner.
78. Under Article 12 par 1 (k), the Council shall examine administrative cases in the area of discrimination and apply sanctions. This provision is not transparent in that it does not outline which discriminatory acts will lead to which kind of sanctions. This is also not clarified in Article 18, which merely states that acts of discrimination shall lead to disciplinary, civil, administrative and criminal liability under the legislation in force. The respective acts should be outlined with greater precision, as should the ensuing proceedings, along with their possible outcomes and the responsible bodies presiding over such procedures. This information could be included directly in the draft Law, or by reference to relevant procedural legislation.
79. In particular with regard to civil and administrative liability, it would be beneficial to include in the draft Law a list of possible claims that could be taken to court aimed at, e.g., the cessation of a discriminatory act, the declaration that such an act has taken place, and compensation/damages for such acts. The draft Law should also specify which court would be competent to hear such cases.
80. In particular, the draft Law should also specify whether grave forms of discrimination shall lead to aggravated sanctions. These should however generally be limited to fines, since procedures on anti-discrimination cases should not develop into quasi-criminal procedures. In this context, it should be reiterated that sanctions and fines should always be considered, by both courts and administrative bodies, as *ultima ratio*, only to be applied if prior conciliation procedures have failed, or if, given the circumstances of the case, they would not be considered effective.
81. As for the criminal liability mentioned in Article 18, it is noted that ODIHR's Opinion on draft Amendments to the Moldovan Criminal Code Related to Hate Crimes of 2010 stated that anti-discrimination provisions are of a civil and not of

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<sup>34</sup> See Article 15 of Council Directive 2000/43/EC and Article 27 of Council Directive 2000/78/EC.

<sup>35</sup> European Commission Against Racism, General Policy Recommendation No. 2 on "Specialised Bodies to combat Racism, Xenophobia, Antisemitism and Intolerance at National Level", adopted 13 June 1997, CRI(97)36,  
<[http://www.coe.int/t/dghl/monitoring/ecri/activities/gpr/en/recommendation\\_n2/Rec02en.pdf](http://www.coe.int/t/dghl/monitoring/ecri/activities/gpr/en/recommendation_n2/Rec02en.pdf)>.

a criminal nature and should thus be removed from the Moldovan Criminal Code.<sup>36</sup>

82. Article 19 speaks of the individualization of discriminatory acts. It should be noted that this individualization of discriminatory behaviour is still too limited, as it does not take into consideration cases where such behaviour emanates from office rules or policies which cannot, or should not always be attributed to an individual person. As indicated in ODIHR's 2010 Opinion, it may be advisable to delete Article 19, or to specify that public offices or companies may also be liable under the draft Law.
83. According to Article 20, victims have the right to protection. Article 20 par 2 stipulates that the dissemination of information of the victim's privacy and identity shall be prohibited at the victim's request. The recipients of this request are not clear – possibly such requests shall be submitted to courts, administrative authorities and the Council. In these cases, however, it would appear more appropriate to ensure a high level of confidentiality throughout, and only permit dissemination of information on individuals and their identity if the victims have explicitly allowed this. Article 20 should list the recipients of the victim's request and ensure that dissemination of private information is the exception, not the rule.
84. Under Article 21, a person submitting an action for discrimination in court should prove facts allegedly having caused discrimination and material or moral damage caused. The defendant then needs to prove that the facts do not constitute discrimination (except in cases of criminal liability). It is welcome that the draft Law contains reference to the shift of the burden of proof before courts and other bodies as specified in the EU Equality Directives. At the same time, it may be more appropriate to speak of the defendant's obligation to "establish facts", rather than the need to "prove" such facts. This would ensure that the formulation of Article 21 is more in line with the standards set by the Equality Directives.
85. Further, it is recommended to specify in Article 21 that this shift of the burden of proof will apply not only to proceedings before courts, but also before the Council. Also, it may be helpful to specify in Article 21 that statistical evidence shall also be accepted before both courts and the Council to prove that discrimination has occurred.<sup>37</sup>
86. Moreover, it is not quite clear why persons submitting an action in court shall always be obliged to prove material and moral damage caused. While this makes sense in cases where complainants request damages and compensation, other lawsuits may be directed solely at proving that discrimination has taken place, or at revoking a discriminatory decision. In such instances, it is not clear why, in addition to submitting *prima facie* evidence that discrimination may have occurred, complainants must also prove material and moral damage. It is recommended to delete Article 21 par 1 (b), or to specify that such damages will only need to be proved if compensation has been requested.

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<sup>36</sup> OSCE/ODIHR Opinion on draft Amendments to the Moldovan Criminal Code Related to Hate Crimes, Opinion No. HCRIM–MOL/156/2010 (AT), of 7 June 2010, par 22.

<sup>37</sup> See the ECHR Grand Chamber judgment in the case of *D.H. and Others v. the Czech Republic*, application no. 57325/00, of 13 November 2007, par. 188; see also OSCE/ODIHR Comments on the draft Law of the Republic of Moldova on Preventing and Combating Discrimination of 11 September 2008, II, C.

**6. The Law-Drafting Process**

87. The involvement so far of OSCE/ODIHR and other international organizations in the development of this draft Law is much welcomed. Next to the above recommendations related to the contents of the draft Law, it is advised to continue involving civil society and all relevant stakeholders on further discussions on the draft Law, to ensure an open and transparent process in completing a new Law on Preventing and Combating Discrimination.
88. Once passed, it is recommended to conduct regular assessments of the impact of the Law and have proper implementation of the Law monitored by both state and non-state actors. The general impact assessment should particularly focus on measuring the Law's possible impact on vulnerable groups of society.

*[END OF TEXT]*

**Annex 1:**

*Draft*

**LAW**  
on preventing and combating discrimination

Parliament adopts the present organic law.

This law creates the framework needed for the application of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, published in the Official Journal of the European Union (OJ) no. 180 of 19 July 2000 and Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation published in the Official Journal of the European Union (OJ ) no. 303 of December 2, 2000.

**Chapter I**  
General provisions

**Article 1. The purpose and scope of the Law**

(1) The purpose of this law is to prevent and combat discrimination and ensure equal opportunities and treatment of all persons in the Republic of Moldova in the political, economic, social, cultural and other spheres of life irrespective of race, color, nationality, ethnic origin, language, religion or religious belief, sex, age, health, disability, sexual orientation, opinion, political affiliation, property, social origin and based on any other similar criterion.

(2) The provisions of this Law shall not extend to marriage and adoption relationships governed by legislation in force and religious cults and their components in part related to their religious beliefs.

**Article 2. General notions**

For the purposes of this law, the terms below have the following meaning:

*a) discrimination* - any distinction, exclusion, restriction or preference in the rights and freedoms of the person or group of persons, as well as discriminatory behaviour support based on the criteria laid down in this law;

*b) direct discrimination* - less favourable treatment of a person than it is, was or would be treated in a comparable situation another person, on the basis of the criteria laid down in this law;

*c) indirect discrimination* - any provision, action, criterion or practice, apparently neutral, which results in disadvantage to a person against another person, on the basis of the criteria laid down in this law, unless that provision, action, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are proportionate, adequate and necessary;

*d) discrimination by association* – any distinction, exclusion, restriction or preference which is based on the association between a person and persons who are protected on the basis of the criteria laid down in this law;

*e) racial segregation* – any action or inaction which leads directly or indirectly to the separation or differentiation between persons on the basis of the criteria of race, ethnicity or colour;

*f) harassment* – any unwanted behavior leading to the creation of an intimidating, hostile, degrading, humiliating or offensive environment, with the aim or effect of the violation of the dignity of a person, on the basis of the criteria laid down in this law;

*g) incitement to discrimination* – any conduct whereby a person applies pressure or has a certain behavior with the goal of discriminating a third person, on the basis of the criteria laid down in this law;

*h) victimization* – any action or inaction of adverse consequences as a result of filing a complaint, filing an action in court in order to ensure the application of the provisions of this law or the provision of information, including testimony, which refers to the complaint or action lodged by another person;

*i) affirmative action* - temporary special measures taken by public authorities in favour of a person, group of persons or a community, intended to ensure the development of their natural and actual implementation of equal opportunities and treatment in relation to other individuals, groups of persons or communities.

### Article 3. Subjects in the area of discrimination

Subjects in the area of discrimination are natural persons and legal entities from public and private area.

### Article 4. Severe forms of discrimination

Severe forms of discrimination are:

- a) promotion or practice of discrimination by public authorities;
- b) support discrimination through mass media;
- c) placing discriminatory messages and symbols in public places;
- d) discrimination against persons on the basis of two or more criteria;
- e) discrimination committed by two or more people;

- f) discrimination committed two or more times;
- g) discrimination committed against a group of persons;
- h) racial segregation.

#### Article 5. Ways to eliminate discrimination

Discrimination can be eliminated through the following ways:

a) preventing any discriminatory acts through the establishment of specific measures, including affirmative measures, in order to protect persons who are disadvantaged in relation to others. Affirmative measures will apply pending the establishment of equality and social inclusion of persons or groups of persons who are in a disadvantageous position compared to other people.

b) mediation by the amicable settlement of disputes arising from discriminatory acts committed;

c) sanctioning discriminatory behaviour.

#### Article 6. Prohibition of discrimination

Direct or indirect discrimination, harassment, victimization and incitement to discrimination are banned. Promotion of a policy or carrying out of actions or inactions that violate the equality of rights of persons must be removed by the competent public authorities, and punished under the law.

## Chapter II Special provisions

#### Article 7. Prohibition of discrimination in employment

(1) Any distinction, exclusion, restriction or preference based on the criteria established by this law that have the effect of limiting or undermining of equality of opportunity or treatment in employment, direct work and training is banned.

(2) The following actions of the employer shall be regarded as discriminatory:

a) placement of employment ads with the indication of the conditions and criteria that exclude or promote certain people;

b) unjustified refusal of employment;

c) unjustified refusal to admit certain persons to vocational training courses;

d) unequal pay for work of equal value;

e) differentiated and unjustified distribution of tasks, resulting in granting a less favourable status;

g) harassment;

f) any other actions which contravene legal provisions,

(3) Refusal of employment, of admission to vocational training courses or promotion of persons is considered unfounded if:

a) submission of additional documents to the legally established ones is required;

b) claiming the incompatibility of the person to conditions that have nothing in common with the professional qualification required for the exercise of the profession or requiring compliance with any other illegal conditions which have similar consequences.

(4) The employer is obliged to display in places accessible to all employees, legal provisions ensuring compliance with equal opportunities and treatment at work.

(5) Any distinction, exclusion, restriction or preference in relation to a specific job shall not constitute discrimination where, by the specific nature of the activities concerned or of the conditions in which these activities are carried out, it requires certain professional requirements, provided that the purpose is legitimate and the requirement is proportionate.

(6) In the case of professional activities of religious denominations and their component parts whose professional ethics is based on religion or belief, differences of treatment based on religion or beliefs of a person shall not constitute discrimination if the nature of these activities or from the context in which they are exercised, religion or beliefs constitutes an essential professional, legitimate and justified requirement.

#### Article 8. Prohibition of discrimination in access to goods and services available to the public

It is prohibited any form of discrimination, except in cases prescribed by law, concerning the access of persons to:

- a) services provided by public authorities;
- b) healthcare and other health services;
- c) social protection services;
- d) banking and financial services;
- e) transport services;
- f) cultural and leisure services;
- g) other services and goods available to the public.

#### Article 9. Prohibition of discrimination in education

(1) Educational institutions shall ensure compliance with the principle of non-discrimination:

- a) by providing access to educational institutions of any form and level;
- b) in the educational process, including the assessment of knowledge acquired;
- c) in scientific-didactic activity;

d) through the development of teaching materials and curricula;  
e) through information and training of teachers for the application of methods and means for the prevention and notification of competent authorities of acts of discrimination;

(2) Educational institutions may establish principles for admission based on specific restrictions, except in cases stipulated by the legislation in force.

(3) Refusal of educational institutions to admit to studies a certain person, whose qualifications do not meet the level necessary for admission, does not constitute a limitation of the right to education.

(4) The provisions of this article shall not constitute a restriction of the right of educational institutions for training staff of a particular cult to refuse the entry to a person whose confessional status does not meet the conditions laid down for access to this institution.

### Chapter III Institutional framework for preventing and combating discrimination

Article 10. Subjects with duties in the field  
of preventing and combating discrimination  
Subjects with duties in the field of preventing and combating  
discrimination are:

- a) courts;
- a) council to prevent and combat discrimination;
- b) public authorities;
- c) public associations.

Article 11. Council to prevent  
and combat discrimination

(1) Council to prevent and combat discrimination (hereinafter Council) is a collegiate body with the status of a legal person under public law, established to ensure protection against discrimination and to ensure equal opportunities and treatment to all persons who consider themselves to be victims of discrimination. Council shall act with impartiality and independence from public authorities.

(2) The Council consists of 5 members, who have no political affiliation, appointed by Parliament for a period of 5 years, of which 2 members are licensed in law. In the composition of the Council may be appointed any citizen of the Republic of Moldova which has higher education, has an impeccable reputation and has a recognized activity in the area of human rights of at least 5 years.

(3) For the appointment of the candidates to the Council by Parliament, the Human Rights Standing Committee organizes a public contest. Information about the organization and conducting the contest, the requirements to the candidates, documents required to be submitted, shall be placed on the website of the Parliament.

(4) The procedure of organization and conducting the contest is based on the following principles:

a) open and transparent competition, ensuring free access of participation of any person who meets the requirements;

b) equal treatment by applying objective and clearly defined criteria for selecting in a non-discriminatory manner, so that everyone has equal opportunities.

(5) Candidates are interviewed by Human Rights Standing Committee, which shall prepare a reasoned opinion on each selected candidate to be submitted to the Parliament Plenary. Candidates are appointed by the majority of the elected deputies.

(6) Membership of the Council shall terminate upon the expiry, on demand or in case of death. The member of the Council may be revoked by the body which appointed him or her, in circumstances that preclude the possibility of exercising the mandate or at the request of the Council adopted by the majority of the members elected, in the event of failure or improper performance of duties. New Member of the Council shall exercise the functions of the revoked member until the expiration of his mandate.

(7) The Chairman of the Council is elected by a majority vote of the total number of its members. The Chairman of the Council activates permanently. Other members of the Council are summoned by the Chairman in the meetings.

(8) Members of the Council who do not activate permanently, receive an allowance in the amount of 10 per cent of the average salary on economy for a meeting.

(9) In its work, the Council shall be assisted by an administrative apparatus.

(10) Regulation of activity of the Council shall be approved by Parliament.

#### Article 12. Powers of the Council

(1) The Council has the following powers:

a) examines the compliance of legislation in force with the non-discriminatory standards;

b) initiates proposals to amend the legislation in force on preventing and combating discrimination;

c) adopts advisory opinions concerning the compliance of draft legislation with the legislation on preventing and combating discrimination;

- d) shall monitor the implementation of legislation in the field;
- e) collects information about sizes, state and trends of discrimination at the national level;
- f) submits general proposals to public authorities on preventing and combating discrimination, and to improve behavior towards people that fall within the scope of this law;
- g) contributes to raising awareness in society towards the elimination of all forms of discrimination, based on democratic values;
- h) cooperates with international bodies with powers in preventing and combating discrimination;
- i) examines complaints of people who consider themselves to be victims of discrimination;
- j) comes by the appropriate authorities with a request for the initiation of a disciplinary process in respect of the person on official position which has committed discriminatory acts in his work;
- k) examines the administrative causes in the area of discrimination and applies sanctions;
- l) notifies the prosecution on the fact of committing discriminatory acts that contain elements of offense;
- m) contributes to the amicable settlement of disputes arising from the commission of discriminatory acts by reconciling the parties and seeking a mutually acceptable solution;
- n) performs other duties stipulated by this law and its regulation of activity.

(2) At the beginning of each year, until March 15, the Council shall submit a general report on the situation in preventing and combating discrimination. The report shall be published on Council website.

#### Article 13. The method of filing the complaint to the Council

(1) The finding of the existence or lack of discrimination by the Council shall be initiated ex officio or at the request of the persons concerned.

(2) The complaint of the person who is deemed to be discriminated is submitted to the Council. The complaint must contain a description of the infringement of the right, the time when the infringement took place, the facts and evidence that support the complaint, the name and address of the person lodging the complaint.

(3) Filing of complaint addressed to the Council is not a mandatory preliminary procedure to address the court.

#### Article 14. Rejection of complaint

Council will reject the complaint if it:

- a) does not contain information identifying the person who has

- submitted it;
- b) does not contain the information referred to in Art. 13. paragraph (2);
- c) is a repeated complaint that does not contain new information and evidence.

#### Article 15. Complaint examination

(1) The complaint is examined within 30 days of submission. When examining the complaint, the Council has the right to request relevant information and data from people who are presumed to have committed acts of discrimination. All data, information and documents related to discriminatory behaviour or actions the complaint referrers to, shall be made available to the Council.

(2) After examining the complaint, the Council adopts a decision containing measures for the suppression of discriminatory acts, which shall be communicated to the person who allegedly committed a discriminatory act and the person who submitted the complaint. The Council will be informed within 10 days on measures taken.

(3) If the Council does not agree with the measures undertaken, it has the right to apply to a hierarchical superior to body for taking the appropriate measures and/or to inform the public opinion.

(4) Decisions of the Council shall be published on its website.

(5) If during the examination of a complaint is being stated the commission of facts constituting an administrative offence, the Council shall examine the contravention case and impose fines in accordance with the provisions of the code of administrative offences.

(6) If the examined facts contain elements of an offence, the Council shall immediately send the materials to the criminal investigation bodies.

#### Article 16. Competence of public authorities

In order to prevent discriminatory acts, public authorities, based on their functional competence, shall exercise the following powers:

- a) examine complaints of people who consider themselves to be victims of discrimination;
- b) coordinates the activity in the area of decentralized and deconcentrated structures;
- c) contribute to public education and awareness on the prohibition of discrimination in the areas of competence;
- d) exercise other powers in accordance with the legislation in the field.

Article 17. The activity of public associations in the field of preventing and combating discrimination

(1) In order to prevent and combat discrimination, public associations working in the field, can cooperate with the competent public authorities.

(2) Public associations have the right:

a) to submit in court actions to protect those who consider themselves to be discriminated;

b) to notify the competent bodies on the prosecution of persons guilty of committing discriminatory acts;

c) to provide advisory assistance to victims of discrimination;

d) to monitor compliance by local and central public administration of the provisions stipulated by the legislation in force;

e) to provide and publish information in respect of non-discrimination;

f) to submit proposals to public authorities for improving the legislation on preventing and combating discrimination.

#### Chapter IV

#### Liability for acts of discrimination

Article 18. Liability for acts of discrimination

Acts of discrimination are liable to disciplinary, civil, administrative and criminal legislation in force.

Article 19. Individualization of acts of discrimination

Individualization of the act of discrimination shall be made taking into account the degree of social danger of the offence committed, the circumstances in which the offence was committed, the manner and means of committing it, its purpose, consequences, the personality of the perpetrator, and the other circumstances of committing the offense.

Article 20. The right to protection of the victim

(1) Any person who considers himself/herself to be the victim of discrimination has the right to submit an action in court, and request:

a) establishing the fact of violating his/her rights;

b) prohibiting further violations of rights;

c) restoration of the situation foregoing the violation of his rights;

d) compensation for material and moral damage caused;

e) declaration of invalidity of the act which led to discrimination.

(2) At the request of the victim, shall be prohibited the dissemination of information about his/her privacy and identity. The recording, retention and

use of personal information relating to the victim of discrimination shall be made subject to special privacy rules laid down in accordance with the law.

Article 21. Burden of proof

(1) The person who submits an action in court must prove:

- a) facts alleged to have caused discrimination;
- b) material and moral damage caused;

(2) The burden of proving that the facts do not constitute discrimination is attributed to the defendant, unless the facts lead to criminal liability.

Article 22. Limitation period

The limitation period for bringing an action under this law is 1 year after the commission of the act or from the date on which the person might become aware of committing it.

Article 23. State tax

The person submitting an action in court on cases of discrimination is exempt from State tax.

Article 24. Funding

(1) Public authorities in charge with implementation of this law are funded from the account and within the limits of funds approved in the annual State budget and the budgets of administrative territorial units.

(2) Activities to prevent and combat discrimination can be funded from other sources not prohibited by law.

## Chapter V Final provisions

Article 25.

(1) This law shall enter into force as of 1 January 2012.

(2) The Government, within six months from the date of entry into force of this law:

- a) shall submit to the Parliament proposals of bringing the legislation in force into conformity with this law;
- b) shall adopt normative acts for the implementation of this law.

Speaker of Parliament