

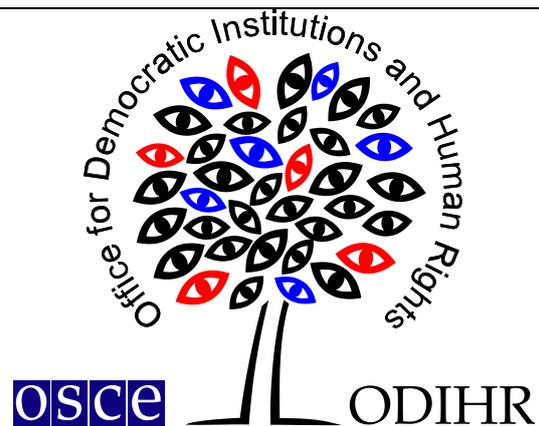
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OSCE/ODIHR COMMENTS

ON THE DRAFT ANTI-DISCRIMINATION LAW

OF THE FORMER YUGOSLAV REPUBLIC OF

MACEDONIA

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

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I. INTRODUCTION

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

II. SCOPE OF REVIEW

3. This does not purport to be a comprehensive review. Rather it highlights the key issues, and seeks to provide useful indicators of areas of concern that future drafts should take into account. One key criterion is the extent to which the legislation is effective in securing the rights desired; the law must be capable of full and meaningful implementation. Achieving this requires legislation which is concrete, with a clear appreciation of the social context, and the financial consequences to the implementing state. The letter of request from the Minister of Labor to the ODIHR noted that the government was particularly interested to *“ensure that the final version [of the draft law]*

would comply with European standards and best practices.” This request is reflected within the opinion.

4. International standards in the anti-discrimination field are extensive; they can be found in the European Convention on Human Rights (ECHR), European Union (EU) law, and various conventions especially the UN Convention on the Elimination of Racial Discrimination (CERD). These standards have been elaborated and given detail by the European Court of Human Rights (ECtHR), the European Court of Justice (ECJ) and in numerous national courts’ decisions across the EU.
5. The Former Yugoslav Republic of Macedonia is a signatory to, and has ratified, UN conventions on discrimination; these international treaties are directly applicable. Therefore CERD has direct effect, and sets standards; its implementation is overseen by a Committee and its most report considers both legislation and implementation.
6. A number of EU Directives (including the ‘Racial Equality Directive’¹, the ‘Employment Equality Directive’², the ‘Burden of Proof Directive, and many directives relating to sex discrimination) and related ECJ judgments are relevant and will be referred to in this review.

III. BACKGROUND

7. In 2004 two draft anti-discriminations laws were produced and proposed to the Government of Former Yugoslav Republic of Macedonia. One was prepared by the Macedonia Helsinki Committee and the other by the NGO Macedonian Centre for International Cooperation (MCIC). These were not adopted. In early 2008, as the possibility of a government-sponsored anti-discrimination law became evident, ODIHR were requested by the OSCE Spillover Monitor Mission to Skopje to provide an opinion on these drafts. The opinion can be found on www.legislationline.org.

¹ 2000/43/EC

² 2000/78/EC

8. A Working Group on the government proposal for a draft law against discrimination was established in early 2008 by the Ministry of Labour and Social Policy (MLSP). The Working Group was composed of all relevant ministries together with Polio Plus, an NGO representing a coalition of NGOs lobbying for such a law, and Ms Mirjana Najcevska an academic and independent expert. The Working Group began drafting a law on protection against discrimination. The government plans to adopt a law in early 2009.
9. ODIHR was made aware during the field visit that the government had produced a further draft of the law which had not been seen by the members of the field visit, as it was still being considered by the government's legislative secretariat. It had not been drafted by, or disseminated to the Working Group. The ODIHR was informed that once formally approved by the secretariat, it would be sent to Working Group and OSCE to translate. The Roundtable in Skopje is delayed pending this draft being released.
10. Since there was no clarity about when the final version of the law would be forwarded, yet a need for immediate comments to assist the drafting process, it was decided that the Venice Commission and ODIHR would both comment on the September draft and the ODIHR would provide further updated comments on the final draft produced by the government in 2009.

IV. EXECUTIVE SUMMARY

11. First, it should be stated that there are ostensibly admirable aspects to this Draft Law. In Article 2, there is a short, focused 'purposes clause' which will provide a valuable guide to the courts and administrative authorities as well as employers, service providers and the citizens of Former Yugoslav Republic of Macedonia. All the grounds of discrimination provided for in EU equality law are present in the Draft Law and indeed are significantly expanded. So also in relation to enforcement, there are valuable provisions on 'temporary measures', on court orders other than compensation and the possibility of associations and organisations participating in court proceedings.

12. However, there are also some serious deficiencies. Generally, the organisation of sections needs to be given more attention. Less significant provisions precede more significant provisions for no obvious reason. Some definitions are set out in a complicated and opaque fashion. Some phrases appear, in English, to be unfamiliar versions of familiar terminology in EU equality law. This may be due to translation into English. However, it is important that the authoritative text in Macedonian uses the exact terminology of the EU equality directives in relation to core concepts and terms in order to avoid future confusion, in the courts and amongst administrative authorities, employers, providers of services and citizens, over whether the concepts and terms are intended to be synonymous.
13. The ‘long list’ of discrimination grounds in Article 3 is potentially self-destructive of the effectiveness of the Act. There is not the creation of a specialised equality body to promote the Act and equality and non-discrimination more generally and there are doubts over the effectiveness of the utilisation of the Ombudsman system as an alternative system to litigation.
14. In short, the effectiveness of what appears at first sight to be an expansive Draft Law, as promised in Article 2, must be questioned. The Draft Law is overburdened with complicated definitions and an over-extensive list of discrimination grounds. It lacks a focus on key elements of discrimination and inequality in the Former Yugoslav Republic of Macedonia and this weakness is compounded by the absence of an independent, specialised body to promote equality and non-discrimination and to provide informed enforcement of the Act.
15. Additionally, the ODIHR shares the concerns expressed by the Venice Commission about the deficiencies both in the draft text and in drafting process.³ The lack of genuine consultation with the Working Group combined with the weaknesses in the text undermines claims that the Draft Law will seriously tackle issues of discrimination.

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

16. Below follows a detailed list of recommendations:

- a) It is recommended that the Draft Law should contain a relatively short list of discrimination grounds and the government should critically examine whether it is advantageous to expand this list on a ground-by-ground basis. *[para. 27]*
- b) The first priority ought to be to define key forms of discrimination, particularly direct and indirect discrimination and harassment. *[para. 28]*
- c) It is recommended that the definition of direct discrimination is modelled on the definition in EU equality directives as a significant body of case law on its meaning has been established by the European Court of Justice (ECJ). *[para. 31]*
- d) It is recommended that terms used in the Draft Law which reflect key EU concepts should coincide with those in EU law. *[para. 32]*
- e) Article 8.1 should be brought in compliance with the respective EU definitions. *[para. 35]*
- f) Article 8.2 requires significant redrafting. *[para. 37]*
- g) It is recommended that key concepts in the Draft Law are expressed in a form consistent with international and EU standards. *[para. 38]*
- h) It is recommended that Article 14 be re-drafted so as to allow only specific exceptions. *[para. 42]*
- i) Care should be taken to ensure that the limits of affirmative action permitted by EU law are not contravened. *[para 50]*
- j) Article 15 must be redrafted to avoid the real danger of considerable divergence from the EU legal requirements. *[para. 43-56]*
- k) It is recommended that the government should consider the establishment of a specialised equality body, which may have an investigatory and adjudicatory role but should also be able at least to intervene in judicial proceedings. It should also have a strong promotional role. *[para. 57-70]*

- l) It is recommended that the body established to promote equal treatment in the Former Yugoslav Republic of Macedonia should have a mandate across all public and private acts within the scope of the EU equality directives and consistent with the Paris Principles. [para. 72]
- m) It is recommended that Article 29.1 is re-drafted to enable NGOs to bring cases on behalf of complainants. [para. 78]

V. ANALYSIS AND RECOMMENDATIONS

- 16. **Article 1** provides that, “This Law regulates and advances the right to equality and provides protection against all forms of discrimination.” This reflects the breadth of Article 3 of the Draft Law which is discussed further below. Article 3 adopts a ‘long list’ approach to non-discrimination grounds. It is suggested below that a greater sense of focus on active conditions of equality and non-discrimination would be preferable. Therefore it would be preferable if Article 1 refers to “all forms of unlawful discrimination”.
- 17. **Article 2** sets out what may be described as a ‘purposes clause’. It refers not just to the “the rights guaranteed by the Constitution, the law, the international treaties” but also to “effective protection from discrimination”. This latter phrase is a valuable indication to the courts and administration that the Draft Law must be applied in an effective fashion. Unfortunately, some of the key provisions of the Draft Law are likely to be counter-productive and prove to be inimical to ‘effective protection’.
- 18. **Article 3** sets out a comprehensive assertion of discrimination principles and a ‘long list’ of non-discrimination grounds.
- 19. First, it would be preferable to divide out these principles. They are separately defined later but the existing text is confusing. The key concepts are *direct* and *indirect discrimination*. Direct discrimination is underpinned by more specific provisions on harassment. Protection from discrimination is underpinned by provisions on victimisation. Further supplementary provisions on “calling upon or instigating discrimination is forbidden, as is helping in discriminatory

action” have their place (which is in Article 10) but they add complexity to this key provision.

20. Secondly, what is an initially attractive list of non-discrimination grounds is likely to be counter-productive. Constitutional documents and international instruments can have quite long lists of grounds. Article 14 ECHR, which must be read in conjunction with other Convention rights, provides that “The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”
21. So also Article 9 of the Constitution which provides that “Citizens of the Republic of Macedonia are equal in their freedoms and rights, regardless of sex, race, colour of skin, national and social origin, political and religious beliefs, property and social status. All citizens are equal before the Constitution and law.”
22. Non-discrimination provisions in constitutional and international instruments are usually interpreted in relation to direct, rather than indirect, discrimination and, even then, can be subject to exceptions. They form a vital floor of fundamental rights to combat, in equality terms, the more blatant examples of discrimination.
23. A non-discrimination statute ought to build upon such fundamental rights by establishing an infrastructure of equality law and policy and by focusing on protection against identifiable incidents of discrimination either recognised in EU law or of particular significance in the state. Thereby the full effect of the statute can be applied to advancing the protection of disadvantaged and vulnerable members of the society.
24. It is preferable, in a context where anti-discrimination provisions are a legal novelty to start with a narrow list of grounds, for example those in EU law, allowing for additions by legislative action, or judicial interpretation through an ‘other status’ ground. So also the Framework Convention on the Rights of National Minorities has particular pertinence in a State such as Former

Yugoslav Republic of Macedonia. Although rights of national minorities can be subsumed with issues of racial and ethnic origins, explicit reference to discrimination against national minorities could be seen as a positive development.

25. The dangers in this ‘long list’ approach are that the judicial and administrative systems, such as the Ombudsman, are inundated with cases and complaints, which many may consider unmeritorious. The law can also be brought into disrepute by unexpected consequences of applying an intrusive concept such as indirect discrimination to grounds such as ‘social status’ or ‘property’. The impact is that what initially appears to be a positive attempt to prohibit ‘all’ discrimination is in grave danger of being diluted by calling into question many aspects of human behaviour which ought not to be subject to a non-discrimination law. In turn, exceptions are extended unnecessarily in Articles 14 and 15 and liable to be widely interpreted by the courts to prevent these unexpected consequences.
26. Hence institutions involved in promoting equality and non-discrimination find their reputations tarnished and the expectations of those who promoted the legislation, and those who expected to be protected by it, are not realised.
27. **It is recommended that the Draft Law should contain a relatively short list of discrimination grounds and the government should critically examine whether it is advantageous to expand this list on a ground-by-ground basis.**
28. The ‘Definitions’ section of the Draft Law starts with **Article 6** in which paragraphs 1 and 2 set out definitions of ‘affirmative action’ and ‘marginalised groups’. It could be said that giving prominence to affirmative action emphasises its significance, but it also reflects a confusing structure in this section. Here affirmative action and marginalised groups appear to be given prominence but are only referred to again in the 12th exception in Article 15, where they could more naturally be defined. **The first priority ought to be to define key forms of discrimination, particularly direct and indirect discrimination and harassment.**

29. **Article 6.3** defines ‘sexual orientation’ which is a valuable provision but **it may be necessary to define other grounds, in particular ‘disability’**. Article 6.4 defines ‘sexual harassment’ which is an important provision derived from the Revised Equal Treatment Directive but its natural home is along with the ‘harassment’ definition in Part II ‘Forms of Discrimination’.
30. **Article 7.1** sets out the definition of the core concept of direct discrimination. This definition is very wide, setting out a wide range of situations in which direct discrimination may occur. This initially appears laudable and it may articulate more specifically, particularly for the benefit of the courts, the types of scenarios when direct discrimination might occur. However, direct discrimination is a powerful concept and it should be difficult to justify. The EU concept refers to ‘less favourable treatment’ ‘on grounds of’ the prohibited factor. A wide definition, as set out in Article 7, may catch unexpected situations in which the concept is brought into question and hence where exceptions can be expected to be widely interpreted.
31. **It is recommended that the definition of direct discrimination is modelled on the definition in EU equality directives as a significant body of case law on its meaning has been established by the European Court of Justice (ECJ).**
32. **Article 7.2** sets out what appears to be a reasonable approximation to the EU definition of indirect discrimination. A few phrases appear in English which do not coincide with those in the EU definition, for example, ‘unfavourable state’ rather than ‘particular disadvantage’. Such terms are likely to receive interpretation by the ECJ and it is important for the consistent interpretation of such terms that the authoritative version of the Draft Law accurately reflects key EU terms, unless a deliberate attempt is made to improve on EU standards. **It is recommended that terms used in the Draft Law which reflect key EU concepts should coincide with those in EU law.**
33. **Article 8.1** sets out a harassment definition. As stated above, it is not necessary for every concept and definition in the Draft Law to repeat precisely every EU concept and definition, as long as a deliberate effort is made to improve on those standards. However, the definition of harassment is a

particular product of EU equality legislation and a complicated issue. Therefore, it is important that the EU definition is carefully compared with the definition in the Draft Law.

34. For example, Article 3.3 of the Framework Directive provides that “3. Harassment shall be deemed to be a form of discrimination within the meaning of paragraph 1, when unwanted conduct related to any of the grounds referred to in Article 1 takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. In this context, the concept of harassment may be defined in accordance with the national laws and practice of the Member States.”

35. Article 8.1 appears to be a genuine attempt to apply this definition in the Draft Law. Three points can be identified.

- First, the definition in Article 8.1 only refers to “the goal to damage the dignity of certain person” while Article 3.3 of the Directive refers to “purpose *or effect* of violating the dignity of a person”. By requiring the harasser to intend a certain outcome, the definition is unduly limited. In this regard, **Article 8.1 is narrower than the EU definition in an important respect.**
- Second, the definition in Article 8.1 is wider than the EU definition in the sense that the ‘damage to dignity’ and the creation of a prohibited ‘atmosphere’ are disjunctive, that is either the former or the latter is sufficient. By contrast, the EU definition is ‘conjunctive’, i.e. both a ‘violation’ of dignity’ and the creation of a prohibited environment are necessary. The government should be aware that the definition of harassment is wider within the Draft Law than may be necessary unless there is already a body of law which uses this wider approach⁴

⁴ For EU States, transposition of EU directives cannot be ‘regressive’, i.e. they cannot reduce the existing level of protection against discrimination. This is the reason that, for instance, in UK law there is a wide, disjunctive approach: the previous case law of harassment gave greater protection than the EU standards.

- The third point, related to the second, is that the English translation uses the term a ‘frightening’ rather than an ‘offensive’, atmosphere/environment. This is important: using the disjunctive approach, difficulties might arise, particularly in relation to provision of services, if an ‘offensive’ atmosphere/environment is sufficient. These can include possible conflicts with freedom of speech, for example, in a theatrical performance or conflicts between freedom of religion and rights of sexual minorities in a range of situations, including in education. For example, controversy has arisen in the UK on the interaction of religious belief and sexual orientation discrimination in non-employment situations.⁵ Hence, it is important that the translation is accurate in this respect: if it could also be rendered as ‘offensive’ there is a real danger of infringing other fundamental rights.

36. It is not suggested that these difficulties are insurmountable but the difference between the EU standards and the Draft Law are problematic and the drafting of the definition of harassment needs to carefully consider these differences.

37. **Article 8.2**, on the other hand, is a very confusing provision. These are not examples of harassment and are in danger of bringing the concept into disrepute. Sexual harassment should also be defined here rather than above. Threats of discrimination may or may not be harassment but should be dealt with along with incitement (see Article 10). A failure to make reasonable accommodation is a separate concept, not an aspect of harassment, and should be dealt with separately (see Article 9). **Article 8.2 requires significant redrafting.**

38. **Article 9** sets out disability provisions. The term utilised in the English translation is “appropriate adaptation” while both the EU definition and the

⁵ These difficulties have arisen in the UK where a harassment provision in the Equality Bill 2006, in relation to religious belief discrimination in the provision of goods and services, was defeated in the legislature. A harassment provision was also excluded from corresponding provisions on sexual orientation discrimination in the provision of goods and services. A harassment provision was included in Northern Ireland legislation on sexual orientation discrimination in the provision of goods and services but was struck out by way of judicial review.

UN Convention on the Rights of Persons with Disabilities⁶ use the term “reasonable accommodation”. **It is recommended that key concepts in the Draft Law are expressed in a form consistent with international and EU standards.**

39. **Article 11** sets out provisions on ‘segregation’. These appear to be innovative and reflect the particular needs of the country. The only reservation about its inclusion is that it appears to involve more serious conduct than is generally covered in non-discrimination statutes. For example, it is not typical to include hate crime in non-discrimination statutes, except to the extent that there is an overlap with harassment provisions. This is not an objection to the inclusion of these important provisions, merely a concern that this is the appropriate place for them.
40. **Article 13** on aggravating forms of discrimination is a valuable and important provision, particularly in relation to sanctions and remedies. However, there appear to be no ‘operative clauses’ relating to this provision, in the sense that there are apparently no differences in penalties or remedial powers where aggravated discrimination occurs.
41. Part III of the Draft Law concerns ‘Exceptions from discrimination’. **Article 14** sets out a broad, general exception, particularly when the “objectively justifiable cause exists according to ... the law”. While international instruments, such as the ECHR, contain a list of specific exceptions, related to a particular right, they do not allow for such a general exception. EU equality law (and the ECJ) take a rigorous approach to exceptions. For example, in relation to sex discrimination, only ‘genuine occupational requirements’ (GOR) and a few other instances are permitted in the employment sphere. The Race Directive does not have an equivalent provision to a GOR in relation to provision of services. The Framework Directive, dealing with religion or belief, disability, sexual orientation and age, has a little recognised provision in Article 2.5 which states that “5. This Directive shall be without prejudice to measures laid down by national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the

⁶ Article 2.

prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others.”

42. This provision can be utilised to justify inclusion of a statutory authority defence in some circumstances, but only within the precise terms of Article 2.5. It is difficult to see how the generality of Article 14 can come within the terms of EU equality law or a range of international human rights instruments.

It is recommended that Article 14 be re-drafted so as to allow only specific exceptions.

43. **Article 15** is a source of greater concern. It contains 12 ‘special exceptions’. Sex and race discrimination in EU law are subject to very limited exceptions which are narrowly interpreted by the ECJ. Even in relation to other EU grounds, provisions such as Article 2.5 of the Framework Directive must be satisfied. In particular, Article 2.5 is subject to the requirement that national exceptions are “measures laid down by national law which, in a democratic society, are necessary for” the significantly more limited range of exceptions. Below these “special exceptions” are considered.

44. **Article 15.1** states that “1) action that aims at protecting the health of the people, the general safety and prevention of executing criminal acts, that needs to be justified with a legitimate goal and reasonable and required means to achieve the aim.” **It would appear that this exception conforms to Article 2.5.**

45. **Article 15.2** reads that “2) Action from the bodies in charge, that aims at improving the position of the members of the communities in a way and through a procedure provided by law”. This is a measure specific to the national conditions. To the extent that ‘the communities’ are minority or ‘marginalised’ groups, this measure is to be welcomed. This measure should be used to conduct ‘equality audits’, using the concept of indirect discrimination as a guide, to identify disadvantages suffered by minority communities. So also the provisions of the Framework Convention on National Minorities are an important source of this analysis. Justified measures can therefore be taken to alleviate or remove these disadvantages. Care should

be taken to ensure that the limits of affirmative action permitted by EU law are not contravened.

46. **Article 15.3** states that “3) Different treatment of foreigners in a way and through a procedure provided by law. It is not permissible to discriminate against EU nationals or nationals of States of the Council of Europe. Except for issues of immigration, it is also impermissible, in EU law, to discriminate, on EU equality law grounds, against non-EU nationals”. Different treatment of the persons regarding certain action when the nature of the [sic] that action and the conditions in which it is accomplished are related to some of the bases of Article 3 of this Law, i.e. that represents crucial and decisive condition for the accomplishment of that action.

47. This appears to be, in English translation, an attempt to reflect the exception of ‘genuine occupational requirements’ (GOR) in EU equality law directives. As set out previously, core EU equality law concepts should be expressed, in the authoritative text, in terms compatible with EU concepts and terminology. It should be noted that GORs do not apply outside of employment and training, where more limited exceptions apply, depending on the EU equality ground.

48. **Article 15.5** states that “5) Different treatment of the persons on the basis of religion, religious belief or sex in connection to the occupation taking place in religious institutions or organizations, when according to the character of the specific occupation or activity, or because of the conditions in which it takes place, the religion, the beliefs or the sex represent a crucial and decisive condition for the accomplishment of the work”. This is a closer approximation, in English translation, to specific EU GORs in relation to religion, sexual orientation and sex.

49. **Article 15.6** reads that “6) The requirement of certain age, professional experience or number of years in the working relations, the training and the education, when they represent crucial and decisive condition in accomplishing the work and career advancement”. This provision must be critically examined in relation to the age discrimination provisions of the Framework Directive, which, at this time, only applies to employment and training.

50. **Article 15.7** states that “7) The special protection provided by the law for pregnant women, mothers, children without parents, children without parental care, minors, single parents, persons with special needs”. **This is generally a positive measure but must also be critically analysed in the context of EU equality law.**
51. **Article 15.8** provides that “8) Measures envisioned by law for the advancement of employment”. **This is only justified in the context of age discrimination law and, more generally, Article 2.5 of the Framework Directive.**
52. **Article 15.9** states that “9) Different treatment of the persons with intellectual and physical disability, according to the law”. **This allows for a ‘reasonable accommodation’ concept but this has already been articulated in Article 9.2.**
53. **Article 15.10** provides that “10) Measures in the area of education and training directed at creating equal opportunities for men and women”. **Care should be taken to ensure that the limits of affirmative action permitted by EU law are not contravened.**
54. **Article 15.11** states that “11) Measures for protection of the difference and the identity of the persons belonging to different communities and their right to care and develop their own identity individually or in a community with other members”. **This measure reflects key principles of the Framework Convention on National Minorities. It might be helpful to refer to the Convention in relation to these terms.**
55. **Article 15.12** provides that “12) The affirmative actions, that aims at protection of marginalized groups, meaning elimination or reduction of the factual inequalities, and if the measure taking with reasonable means is justified and proportional to the aim”. This is a constructive measure, directed at affirmative action towards the most vulnerable members of society. This measure should be exploited to its full extent. Nonetheless, the absence of a specialised equality body weakens the impact of this measure. The Former Yugoslav Republic of Macedonia needs a focal point of expertise, with real

powers to promote and enforce the rights and interests of the vulnerable members of society so that the objectives of measures such as Article 15.12 can be realised.

56. Two more general points may be made. First, direct discrimination must always be subject to limited justifications and exceptions. Secondly, as mentioned above, a ‘long list’ approach to discrimination grounds in Article 3 encourages narrow interpretations of non-discrimination concepts and extensive use of exceptions, which is the opposite of the approach of the ECJ to non-discrimination concepts and exceptions. A provision such as Article 15 would create considerable strains between the national and the EU legal systems. **Article 15 must therefore be redrafted to avoid this. It is recommended that this Article is re-drafted to take into account this rigorous approach to exceptions in EU law and the specific analysis set out here.**

57. Part V of the Draft Law concerns ‘Institutional framework’. **Article 17** contains important provisions on ‘Body in charge for protection against discrimination’, giving jurisdiction to the Ombudsman to investigate ‘submissions’ about breaches of the Draft Law.

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

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

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

— without prejudice to the right of victims and of associations, organisations or other legal entities referred to in Article 7(2),

providing independent assistance to victims of discrimination in pursuing their complaints about discrimination,

— conducting independent surveys concerning discrimination,

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

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

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

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

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

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

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

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

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

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

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

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

64. He also has emergency powers in Article 33, “if he assesses that the execution of the administrative act may cause irreparable damage to the right of the interested person, he shall *request*: - temporarily postponement of the implementation of the administrative act until the decision by the second-instance body is adopted; - temporarily postponement of the execution of the administrative act until passing a decision by the competent court.” (emphasis added)

65. Article 13 of the Race Directive is ambiguous as to the model upon which bodies which promote equal treatment should be based. Article 13.2, 1st indent

starts with the clause, “without prejudice to the right of victims and of associations, organisations or other legal entities referred to in Article 7(2)”, which refers to the powers of such bodies to act of behalf of or support individual in judicial and administrative processes. The actual competence is in “providing independent assistance to victims of discrimination in pursuing their complaints about discrimination”.

66. At first glance, this appears to reflect a model which has been used in states such as the United Kingdom and Ireland for many years, namely a body which gives assistance to individuals in judicial and administrative processes. A model which impartially investigates and adjudicates upon complaints might not appear to satisfy this model. And yet a range of *specialised* equality bodies across the EU largely adopt this model and their compatibility with Article 13 has not been questioned. Nonetheless, the Dutch Equal Treatment Commission does have a power to initiate judicial proceedings, although it has a self-denying ordinance not to do so, to protect the impartiality of its adjudicatory proceedings. In the Nordic model, for example in Sweden, it is typical for an Ombudsman to be able to bring cases to court after s/he has investigated them if s/he is unsatisfied at the outcome and this competence is frequently used. In Ireland, there are two bodies, each devised on what might appear to be alternative models, namely an Equality Tribunal to adjudicate upon discrimination cases and an Equality Authority to promote equality and assist individuals before the Tribunal as well as bringing its own cases in some circumstances.

67. There are important provisions in Articles 26.1 and 29.1 of the Draft Law which allows autonomous organisations to intervene in and initiate legal proceedings in discrimination cases but the Ombudsman does not have this power.

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

major flaws in the Draft Law and undermines any commitment to promoting equality, particularly for ‘marginalised groups’.

69. The Ombudsman does exercise competences in the promotion of human rights and non-discrimination⁷ but these appear to be very much subsidiary to his investigative and adjudicatory powers. It cannot be said that this investigatory and adjudicatory model does not satisfy Article 13, given other precedents within the EU. Nonetheless, such bodies take a more active role in promoting equality and non-discrimination and conducting independent investigations outside their strict adjudicatory functions. In particular they are specialised bodies dedicated specifically to the protection of those who suffer discrimination.

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

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

72. This is interpreted to mean that the NHRI must have a mandate in both public and private sectors, an approach consistent with Article 13 of the Race Directive. There is no objection to such a body having both investigative and adjudicatory powers. In the OSCE region, Ireland appears to reflect one of the most impressive models for specialised bodies whereby there are two bodies, one dedicated to investigation and adjudication, and the other dedicated to the promotion and enforcement of non-discrimination rights for disadvantaged people. In the Nordic model the Ombudsman is given powers to investigate and adjudicate formally but also extensive promotional powers and powers to conduct non-adversarial investigations and to conduct legal proceedings on

⁷ See Annual Report for 2007
(http://www.ombudsman.mk/comp_includes/webdata/documents/Izvestaj-2007-ang.pdf)

behalf of discriminated persons. **It is recommended that the body established to promote equal treatment in the Former Yugoslav Republic of Macedonia should have a mandate across all public and private acts within the scope of the EU equality directives and consistent with the Paris Principles.**

73. A second relevant Paris Principle is B.2, which provides that “The national institution shall have an infrastructure which is suited to the smooth conduct of its activities, in particular adequate funding. The purpose of this funding should be to enable it to have its own staff and premises, in order to be independent of the government and not be subject to financial control which might affect this independence.”
74. Article 3 of the Ombudsman Law states that “The Ombudsman shall be independent and self-governing in the performance of his function.” However, this must be a real independence from Government and this must be judged as much by the practical realities of how the NHRI operates as its formal powers.
75. Part VI of the Draft Law is entitled ‘Court Proceedings for Protection against Discrimination’. This sets out extensive provisions on the judicial process which appear to satisfy fully the requirements of effective judicial process, recognised by the ECJ in EU law. For example, Article 9.1 of the Framework Directive provides that “1. Member States shall ensure that judicial and/or administrative procedures, including where they deem it appropriate conciliation procedures, for the enforcement of obligations under this Directive are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them, even after the relationship in which the discrimination is alleged to have occurred has ended.” The provisions of Part VI appear to satisfy this obligation on EU States.
76. Article 9.2 states that “Member States shall ensure that associations, organisations or other legal entities which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring that the provisions of this Directive are complied with, may engage, either on behalf or in support of the complainant, with his or her approval, in any judicial and/or

administrative procedure provided for the enforcement of obligations under this Directive.”

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

VI. CONCLUSION

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

ambiguity over the standing of NGOs to litigate in their own name and
this should be clarified.

[END]