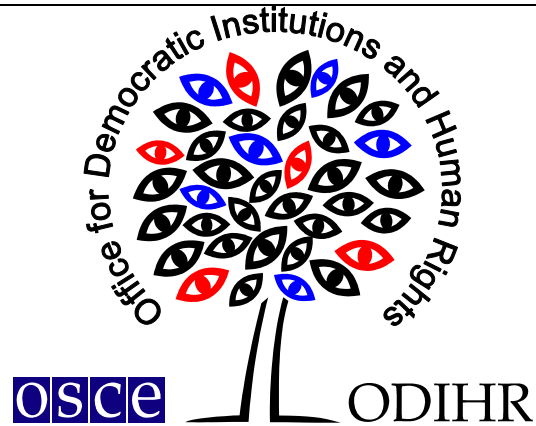


Warsaw, 8 March, 2006

Opinion-Nr: GEND – MK/054/2006
(MASz)

www.legislationline.org



Opinion
on the Revised Version¹ of the
Draft Law on Equal Opportunities
of the
former Yugoslav Republic of Macedonia

**based on an English translation of the draft Law on Equal Opportunities
of the former Yugoslav Republic of Macedonia
provided by the OSCE Spillover Mission to Skopje**

Aleje Ujazdowskie 19 PL-00-557 Warsaw ph. +48 22 520 06 00 fax. +48 22 520 0605

¹ Translated version provided to the OSCE ODIHR in February, 2006.

TABLE OF CONTENTS:

1. INTRODUCTION

2. SCOPE OF REVIEW

3. EXECUTIVE SUMMARY

4. ANALYSIS AND RECOMMENDATIONS

4.1. Basic Provisions- Subject and Purpose of the Law

4.2 Definition of Terms

4.3 Subjects Responsible for the Tasks, their Authority and Obligations

4.4 National Action Plan and Periodic Plans

4.5 Procedure for Determining Unequal Treatment of Women and Men

4.6 Legal Protection of Discriminated Persons

4.7 Penal Provisions

5. ADDITIONAL COMMENTS AND RECOMMENDATIONS

1. INTRODUCTION

1. On 9 May, 2005 the Ministry for Labour and Social (Department for Equal Opportunities) made a request to the OSCE Spillover Mission to Skopje, for comments on the draft Law on Equal Opportunities of the former Yugoslav Republic of Macedonia (hereinafter also referred to as “Draft Law”).
2. Further, the OSCE Spillover Mission to Skopje requested assistance from the OSCE ODIHR in this regard and a preliminary comment was drafted in response thereto and issued on 3 August, 2005² (hereinafter, “Preliminary Comment”).
3. In the time that followed several amendments were made to the Draft Law and a revised version was presented to the OSCE Spillover Mission to Skopje in February 2006, with a request to review the revised version of the Draft Law (hereinafter, “Revised Draft Law”).
4. Thereafter, the OSCE Spillover Mission to Skopje requested assistance from the OSCE ODIHR in this regard and this Opinion has been drafted in response to this request for assistance.

2. SCOPE OF REVIEW

5. This Opinion does not equate to a full and comprehensive review, rather it has been drafted to provide consideration which should be taken into account in light of international standards in the field of gender equality to which the former Yugoslav Republic of Macedonia has committed or may seek to commit.
6. As appropriate, this Opinion will refer to the OSCE ODIHR Preliminary Comments on the Draft Law on Equal Opportunities of the former Yugoslav Republic of Macedonia³.
7. In this regard, the OSCE ODIHR and the OSCE Spillover Mission to Skopje would like to make mention that the Opinion contained herein is without prejudice to any recommendations and comments to the Revised Draft Law that both aforementioned institutions may wish to make in the future.

3. EXECUTIVE SUMMARY

8. The draft Law presents a unique opportunity to not only lay down legal principles and ensure compliance with international standards, but moreover install practical national machinery which would give effect to the principles and thereby ensure not only *de jure* but also *de facto* equality of opportunity between men and women.⁴
9. Further to the above, it is recommended that:
 - A. consideration is given to regulating the offences of “harassment” and “sexual harassment” in criminal provisions [par 16];

² OSCE ODIHR Opinion-Nr: GEND – MK/036/2006 MASz)

³ OSCE ODIHR Opinion-Nr: GEND – MK/036/2006 MASz), Warsaw, 3 August, 2005.

⁴ OSCE participating States affirmed their goal to achieve not only *de jure* but *de facto* equality of opportunities between men and women and the promotion of effective measures to that end, as early as the Moscow Concluding Document, 1991, paragraph 40.4.

- B. consideration is given to placing a positive obligation on employers to ensure that the workplace is an environment free of discrimination [par.17];
- C. the definition of the term “direct discrimination” is made more precise [par 18];
- D. the adoption of programmatic measures expressed in Article 9(2) to include also the input of the private sector and non-governmental organizations [par.18];
- E. the composition of the Sector on Equal Opportunities be clarified [par.21];
- F. the Sector should have a clearly stated capacity to review the law and recommend amendments to it as necessary, on a regular basis [par.22, 23];
- G. the Ministry of Labour and Social Policy receives the responsibility of not only co-ordination with the bodies responsible for implementing the Revised Version of the Draft Law, but also ensures co-ordination amongst them – thus taking the leading role in co-ordination [par 24];
- H. the procedure for determining unequal treatment of women and men be clarified as to its co-existence with other mechanisms of recourse available [par.27];
- I. it is made clear whether the Procedure, in recommending rectification of a situation of unequal treatment can also recommend that compensation to the aggrieved person [par 29];
- J. that the burden of proof remains on the subject accused of discrimination, as amended in this Revised Version of the Draft Law [par.30];
- K. in addition to the Revised Version of the Draft Law, domestic violence be addressed, in order to criminalize the acts which constitute domestic violence and provisions which would provide effective assistance and remedies;
- L. the Revision Version of the Draft Law should clearly stipulate which existing provisions of other laws it will amend;
- M. the Revision Version of the Draft Law is accompanied by a detailed explanatory note, which would provide also, an assessment of the financial impact of the Draft Law;
- N. the Revision Version of the Draft Law is translated into minority languages of the former Yugoslav Republic of Macedonia.

4. ANALYSIS AND RECOMMENDATIONS

4.1 Basic provisions – Subject and Purpose of the Law

10. Article 1 has been revised to state the subject of the law, instead of as previously, the goal of the law. This is considered a positive amendment, in particular as it clearly outlines the establishment of the Representative for equal Opportunities between Women and Men.

11. Unless by reason of translation Article 1 (3)⁵ would benefit from clarification, and is recommended to be revised.

12. The purpose of the Revised Version of the Draft Law as expressed in Article 2 has been taken verbatim from the Draft Law. Article 2(1) is considered as clear, however, as mentioned in the Preliminary Comment⁶, Article 2(2) appears to state rather the means of achieving the purpose, rather than expressing the purpose itself.

⁵ The version received for review marks this paragraph as (4). It is noted however, that the article contains only three paragraphs and therefore, it has been assumed to be paragraph (3).

⁶ Paragraph 8 of the Preliminary Comment: OSCE ODIHR Opinion-Nr: GEND – MK/036/2006 MASz), Warsaw, 3 August, 2005.

13. It is considered a positive amendment to move Article 2 of the Draft Law (now former, Article 2) into the section on Subject Responsible for the Tasks, their Authority and Obligations.

14. Article 3 containing the general prohibition on discrimination is welcomed.

4.2 Definition of Terms

15. It is considered positive that the Revised Draft Law includes definitions of “equal opportunities”, “equal treatment”, “direct discrimination” and “indirect discrimination”, “harassment” and “sexual harassment”.

16. It is noted that the definition of “sexual harassment” in particular, in a broad manner and its operation will depend amongst others, on the interpretation given by the body responsible to review cases of unequal treatment, as stipulated in the new section VI (six) of the Revised Draft Law as well as the courts. Within the OSCE region, States there is a wide array of legislative approaches that have been taken to deal with the issue of sexual harassment. For instance, in France, “sexual harassment” has been incorporated as an offence into the Criminal Code, also into the Employment Code, and the statutes of the three branches of public service. It is recommended to consider whether other laws of the former Yugoslav Republic of Macedonia should also be amended to secure a consistent approach to the offence.

17. Furthermore, legislation of many OSCE States obliges employers to prevent such behaviour and ensure that there is no sexual harassment on their premises⁷ – while those employers who tolerate sexual harassment are considered to be adopting a discriminatory attitude. It is understood that under the Revised Draft Law, Article 25 (3) which permits submission of a written “initiative” (that is, complaint), also includes such complaint against employers and thus they would be held responsible in the instances where they failed to fulfill their positive duty to ensure equal treatment in the workplace, in particular, here, as regards sexual harassment. For the purposes of legislative consistency however, such positive duty may be stated outright in the Draft Revised Law, and amendments to the Criminal Code and/or Labour Code, may also be considered. The procedure stipulated in section VI, shall be discussed further below.

18. Regarding the definitions of “direct discrimination” and “indirect discrimination”, these have not been subject to any amendment in the Revised Version of the Draft Law. Unless by reason of translation the definition of “direct discrimination” would benefit from clarification so as to ensure the understanding that direct discrimination exists where there is a causal connection between the sex of the aggrieved person and any less favourable treatment accorded to them. In fact, it may even be considered for the Revised Version of the Draft Law to stipulate common forms of direct discrimination based on sex, such as, pregnancy discrimination, sexual harassment, marital status discrimination, and discrimination on the grounds of family responsibilities. The definition of “indirect discrimination” is clear in the Revised Draft Law and it is welcomed.

⁷ See for instance, Article 4 of the Law on Equality between Women and Men, of Switzerland, in force 1 July, 1996, and Article L.122-46 of the Employment Code of France, in force 9 May, 2001.

19. It is welcomed that Article 9(1) appears to connect the adoption of programmatic measures with the reporting system established in the Revised Version of the Draft Law. Furthermore, the introduced Article 9(2) appears to adopt a more open manner in which such programmatic measures ought be adopted, by including the recommendations and initiatives which come from bodies of the public sector, public companies, political parties or other bodies. What this paragraph does not include however, is the private sector and non-governmental organization, which may be pivotal in providing information on things such as workplace relations and the realities of the employment sector (in the case of the private sector) and for instance, on the issues of domestic violence or labour unions (in the case on non-governmental organizations). It is contended that programmatic measures could only benefit from consideration of this wider scope of incoming information, and thus, it is recommended to be considered.

20. It is duly noted that Articles 12, 13 and 14 have been moved to Section IV of the Revised Version of the Draft Law on Subjects Responsible for the Tasks, their Authorities and Obligations. This appears to be a more fitting place for the articles, as their purpose would be to ensure the implementation of the principles of the Revised Version of the Draft Law.

4.3 Subjects Responsible for the Tasks, their Authority and Obligations

21. It is welcomed that the Revised Version of the Draft Law establishes the Sector for Equal Opportunities; however, the composition of this Sector remains unclear, as well as the process of nomination of personnel to the Sector and its structure. This is recommended to be clarified either in the Revised Version of the Draft Law or in secondary implementing regulations of the Ministry of Labour and Social Policy.

22. The amendment to Article 18 is welcomed, as it ascribes a positive duty on the Sector for Equal Opportunities within the Ministry of Labour and Social Policy to control the implementation of the provisions of the Revised Draft Law. It is assumed that this capacity to control would also include proposals to amend the Revised Draft Law, once in force, in the case that certain principles are unable to be implemented by the provisions.

23. Alternatively, it may be considered to include the responsibility to review and recommend changes to the Revised Version of the Draft Law of the Sector for Equal Opportunities, in this Article 19. Furthermore, a systematic approach to such review could be adopted by considering including the obligation to establish an appropriate timetable for such review⁸, after the coming into force of the Revised Version of the Draft Law.

24. Furthermore, and as highlighted in the Preliminary Comment, Article 19 on the functions, powers⁹ and obligations of the Ministry of Labour and Social Policy, the Revised Version of the Draft Law should go further in making clear that the Ministry is responsible for ensuring that not only the Ministry itself coordinates with all responsible bodies, but also that these bodies are coordinating amongst themselves to ensure implementation. Thereby, it is recommended that the Ministry be given the responsibility for national machinery, which

⁸ For instance, the first review may take place 2 years after implementation, and subsequently annually, thereafter.

⁹ For instance, on what criteria will “permission” be granted by the Ministry, to implement positive measures, as articulated in Article 19 (1) point 3.

would include in addition to the State bodies responsible, also representatives of associations of employers, trade unions and non-governmental organizations. Such, multi-sector, multi-disciplinary co-ordination is recommended to be clearly demarcated in the Draft Law.

25. The articles on political parties, media and presentation of statistical data remain unchanged and thus the comments and recommendations made thereto in the Preliminary Comment remain applicable.

4.4 National Action Plan and Periodic Plans

26. The Articles on the National Action Plan and Period Plans remain unchanged in the Revised Version of the Draft Law and thus, the recommendations presented in the Preliminary Comment remain applicable.

4.5 Procedure for Determining Unequal Treatment of Women and Men.

27. In general, it may be said that the procedure presents a concrete complaints mechanism, available also to individuals, indeed in a similar manner as complaints made to the Ombudsman. The Preliminary Comment called for the strengthening of the role of the Ombudsperson, or creation of an Equality Ombudsperson or and Equality Board. It is understood that the Representative, together with the established Procedure are the proposed response to this recommendation. Although considered a positive development in general, certain questions remain as to its status, effectiveness and operation in practice, considering the limited powers of enforcement¹⁰ of recommendations and co-existence with other mechanisms for recourse.

28. Importantly, according to Article 30, the procedure is to be completed within a 60 day period, which provides a swift form of resolving cases of unequal treatment. However, although in this respect the procedure may reduce the time in which an aggrieved person may receive a resolution to his or her case, in the event that the subject against whom the complaint is made and proven, does not comply, the case will nevertheless need to be referred to the Ombudsman's office. Having little power of enforcement of recommendations may discourage rectifying the wrong by the subject against whom the complaint is bought, and consequently, lengthen the entire process. Having said that, the positive aspects of the procedure outweigh the negative, as this point of first complaint will provide for a possibility for dealing with cases where good faith and interest in quick resolution is present.

29. Furthermore, it is suggested as important to make clear whether a request or recommendation for rectifying the situation of unequal treatment may include also monetary compensation (for instance, in a situation of unequal pay, or dismissal based on gender).

30. Article 37 is also important in ensuring that those acts which are criminal offences or misdemeanors are referred to the State bodies responsible for pressing charges. If understood correctly, this would mean that cases of harassment, sexual harassment, direct and indirect discrimination, as a violation of the prohibition on discrimination, would in any case be referred further.

¹⁰ As according to Article 34- cases would nevertheless need to be referred to authorized bodies.

4.6 Legal Protection of Discriminated Persons

31. Furthermore, as regards Article 39 and as stated above, it is not clear whether this is the only manner in which compensation may be sought and achieved, and whether the procedure described in Section VII of the Revised Version of the Draft Law would also grant this possibility.

32. Article 40 which establishes the burden of proof on the subject who is accused of the discrimination (to prove that he/she or it, did not violate the principle of equal treatment, that is, did not discriminate) is welcomed.

4.7 Penal Provisions

33. It is commendable that the Draft Law underscores the importance of reporting requirements by the relevant bodies, by imposing sanctions on the failure to fulfill the reporting obligations laid down by the Draft Law.

34. As stated above, and as stated in the Preliminary Comment, it is recommended to consider criminalising the act of harassment and sexual harassment, amongst other forms of discrimination.

5. ADDITIONAL RECOMMENDATIONS

35. As stated in the Preliminary Comments, it is recommended that with the aim of compliance with recommendations of the OSCE,¹¹ United Nations¹² and Council of Europe,¹³ acts of violence, in particular, domestic violence are appropriately legislated for. It is worth re-stating that violence in the home is a serious obstacle to equality between women and men, and indeed perpetuates inequality by relegating women into a position of inferiority. The clear and specific definition of acts which may constitute domestic violence, definition of the relationships within which domestic violence may occur and introduction of procedural provisions which would provide effective assistance and remedies to the victims of violence and to the family affected by the violence, would serve to promote attitudinal change within the family, which indisputably is at the core of equality between men and women.

¹¹ Chapter IV/Point 42, of OSCE Ministerial Council Decision No.14/04, on the 2004 OSCE Action Plan for the Promotion of Gender Equality, which refers to the elimination of all forms of violence against women.

¹² Report of the Special Rapporteur on violence against women, its causes and consequences, Ms Radhika Coomaraswamy, E/CN.4/1996/53.

¹³ Recommendation Rec(2002)5 of the Committee of Ministers to member States on the protection of women against violence adopted on 30 April 2002, which in paragraphs 34 and 35, states that Member states should: Paragraph 34. "ensure that criminal law provides that any act of violence against a person, in particular physical or sexual violence, constitutes a violation of that person's physical, psychological and/or sexual freedom and integrity, and not solely a violation of morality, honour or decency"; Paragraph 35. "provide for appropriate measures and sanctions in national legislation, making it possible to take swift and effective action against perpetrators of violence and redress the wrong done to women who are victims of violence. In particular, national law should: penalise sexual violence and rape between spouses, regular or occasional partners and cohabitants; penalise any sexual act committed against non-consenting persons, even if they do not show signs of resistance; penalise sexual penetration of any nature whatsoever or by any means whatsoever of a non-consenting person; penalise any abuse of the vulnerability of a pregnant, defenceless, ill, physically or mentally handicapped or dependent victim; penalise any abuse of the position of a perpetrator, and in particular of an adult vis-à-vis a child."

Opinion on the Revised Version of the Draft Law on Equal Opportunities of the former Yugoslav Republic of Macedonia

36. Referring to the Final and Transitory Provisions, it is proposed as essential to the proper functioning of the Draft Law to ensure the alignment of all affected laws with the present Draft Law. This recommendation goes to the heart of practical implementation of this Draft Law and in order to ensure such implementation an assessment should be made of laws which will require amendment at the outset, either in the text of the law, or in an accompanying explanatory memorandum.¹⁴ It is clear, that in the formulation of policies which are proscribed by this Draft Law and in the operation of the national institutions established by the law, further amendments and issuance of secondary legislation may become necessary, and are not able to be predicted at this point in time. However, it is nevertheless highly recommended to conduct an assessment at this point of those laws which would be affected by the Draft Law on its adoption and coming into force.

37. Further to the above recommendation and owing to the fact that the Draft Law proposes the establishment or expansion of activities of various authorities, a cost assessment is also recommended to be made.

38. It is also recommended that in accordance with the recommendations made in Beijing Declaration and Platform for Action,¹⁵ this law should be translated into minority languages of the former Yugoslav Republic of Macedonia, in order to ensure full awareness of the provision and redress on their basis, to all persons comprising the State.

[END OF TEXT]

¹⁴ For instance, this *may* include amendments to the Laws on Elections, External Affairs, Citizenship, Labour Relations, Employment Protection, Health Care, Education, Housing, Commercial Activity, etc., as well as a number of various regulations (and other secondary legislation) governing, the same.

¹⁵ Objective 1.3 par. 233(a) Beijing Declaration and Platform for Action, Fourth World Conference on Women, 15 September 1995, A/CONF.177/20 91995) and A/CONF.177/20/Add.1 (1995).