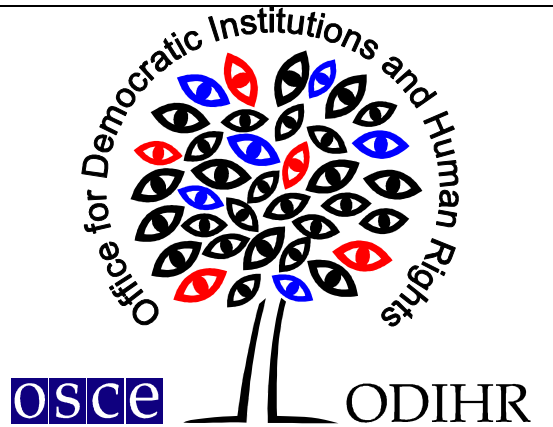


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**OSCE/ODIHR COMMENTS**

**ON DRAFT ANTI-DISCRIMINATION LAW IN**

**MONTENEGRO**

**Based on a translation of the draft Law on the Prohibition of Discrimination  
provided by the OSCE Mission to Montenegro**

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## **I. INTRODUCTION**

1. The Ministry for Minority and Human Rights of Montenegro has prepared a draft law on Prohibition of Discrimination (hereafter referred to as the “draft law”). The draft law is part of on-going process to create a comprehensive and unified legal response to unfair discrimination. This draft law is therefore a welcome and positive step.

2. The OSCE Mission to Montenegro has been in close communication with the government regarding this law, and in May the Mission approached the ODIHR, with a request for an expert commentary on the draft. In preparing this review, the ODIHR has made use of the English translation of the draft law<sup>1</sup> prepared by the Mission, and the information note on the background issues and legal framework relating to anti-discrimination legislation in Montenegro prepared by the Mission (the “information note”).<sup>2</sup> Since legislative interpretation is highly sensitive to specific word choices, the review avoids making highly detailed analyses of the wording of the clauses. Nonetheless, in some instances the review has commented on details (most specifically when discussing definitions) which turn on the accuracy of the translation.

## **II. SCOPE OF REVIEW**

3. This review analyzes the draft law in terms of its compatibility with relevant international and regional standards and the OSCE Commitments. The review also examines the draft law in light of both relevant case law and international good practice relating to the regulation of non-discrimination issues. Examples of good practice are provided where possible.

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<sup>1</sup> Attached at Annex 1.

<sup>2</sup> “Legal Background relating to Anti-Discrimination Legislation”, OSCE Mission in Montenegro, submitted to the OSCE/ODIHR in June 2009.

4. This does not purport to be a comprehensive review. Rather it highlights the strengths and weaknesses of the draft law and provides recommendations that future drafts should take into account. Recommendations are provided in light of a number of key indicators for effective anti-discrimination legislation. One important criterion which has been applied 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.

5. The OSCE/ODIHR notes that this Commentary provided is without prejudice to any other opinions or recommendations that the OSCE/ODIHR may wish to make on the issues under consideration in the future, as many of these are not reflected in the draft law.

### **III. EXECUTIVE SUMMARY:**

6. The key recommendations of this review are summarized below:

**A. It is recommended that definitions and concepts are more clearly defined:**

- The extensive list of protected characteristics should be limited to characteristics which are based on core, immutable characteristics;
- The prohibition against discrimination should include discrimination against individuals on the basis of their assumed membership of and/or association with members of a protected group;
- To focus on specified areas of public rather than private life;
- Exceptions should be identified where it is permissible to differentiate between individuals. This would eliminate the risk that unintended scenarios might be brought within the scope of the law;
- The definition of discrimination should not require impairment or nullification of human rights;

- Clauses relating to positive action should be clarified to comply with EU standards;
- The prohibition on discriminatory speech should be clarified and worded to avoid breaching the right to freedom of expression;
- Definitions consistent with EU standards should be used throughout, especially in relation to measures to enable access by persons with disabilities and indirect discrimination.

**B. It is recommended that remedies and sanctions are expanded to include:**

- The power to compel action and/or impose sanctions for non-compliance;
- The minimum and maximum amount of compensation to which individual complainants are entitled;
- Clearer provisions relating to the enforcement of disciplinary actions against individuals;
- The power to impose fines and remedial orders on organizations which are breaching the law.

**C. It is recommended that procedural issues be expanded and clarified:**

- Conciliation, and other elements of administrative action, in addition to litigation should be available to complainants;
- The jurisdiction of the Ombudsman and the courts should be more clearly defined, including the relationship between the two;
- The investigatory and enforcement powers of the Ombudsman should be strengthened and expanded;
- Procedural provisions in civil law should be conducive to the active pursuance of discrimination claims. This includes allowing for statistical evidence to be adduced in support of claims of discrimination;
- The limitation period of 15 days should be increased so as to allow complainants adequate time to submit a complaint;
- Third party actions should be allowed in a wider range of situations.

**D. It is recommended that the government consider resource issues:**

- An explanatory note sets out the plans for future implementation, including the necessary resources.

**E. Additionally, it is recommended that:**

- The definition of segregation be re-worded to prohibit racial segregation, in all circumstances, in accordance with international standards.

**IV. RELEVANT LAW**

***A. Domestic Legislation***

7. The Constitution of Montenegro contains a number of provisions prohibiting discrimination; additionally there are a number of criminal and civil law provisions regulating discriminatory behaviour. These include the Labour Law, which prohibits discrimination in employment and the Law on Gender Equality, which prohibits discrimination on the grounds of gender.<sup>3</sup> It is unclear how the draft law would interact with existing anti-discrimination legislation: it is assumed that existing legislation which would potentially conflict with the draft law will be repealed although is not made clear in any of the documents received. Additionally, it is assumed that the specific and detailed EU provisions relating to gender equality and pregnancy in employment law are already or will be given effect in those other provisions.<sup>4</sup>

***B. International Law and Standards***

8. 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 such as the United Nations Convention on the Elimination of Racial Discrimination (“CERD”), to which Montenegro is a party. These standards have been elaborated and given detail by the European Court of

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<sup>3</sup> Described in the information note.

<sup>4</sup> Article 21 states that provisions for equality on the basis of sex/gender shall be in a separate law.

Human Rights (“ECtHR”) the European Court of Justice (“ECJ”) as well as numerous national courts’ decisions. Montenegro is a signatory to, and has ratified, UN conventions on discrimination, including CERD and the Convention on the Elimination of All Forms of Discrimination against Women. According to Article 9 of the Constitution of Montenegro international treaties are directly applicable and, in the event of a conflict take precedence over Montenegrin law.<sup>5</sup>

9. As Montenegro is a candidate for EU membership, it aspires to meet the standards set by the EU, inter alia in the field of anti-discrimination. A number of Discrimination Directives (including the ‘Racial Equality Directive’<sup>6</sup>, the ‘Employment Equality Directive’<sup>7</sup>, the ‘Burden of Proof Directive’<sup>8</sup>, and directives relating to sex discrimination) and related ECJ judgments are therefore relevant and will be referred to in this review.

## **V. ANALYSIS AND RECOMMENDATIONS**

10. The analysis that follows is primarily focused on recommendations for improvement. However, it should be emphasized at the outset that there are many positive aspects to the draft law, not least its attempt to forge a comprehensive set of measures to protect many forms of discrimination. The draft law is well-organized, thorough and covers most of the key areas required by international standards in discrimination law. Thus, a wide range of discriminatory actions are prohibited, including direct and indirect discrimination and it also contains a clause relating to positive action - which is a positive step to ensuring full and effective equality. The draft law includes some procedural requirements, including a provision relating to the burden of proof in discrimination claims and a provision relating to possibility of associations and organisations initiating and participating in court proceedings, which are requirements under EU Directives.

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<sup>5</sup> Article 9 of the Constitution. Accessed at <http://www.legislationline.org/documents/section/constitutions/country/57>

<sup>6</sup> 2000/43/EC

<sup>7</sup> 2000/78/EC

<sup>8</sup> 1997/80/EC

11. However, the draft law contains some deficiencies. A number of clauses are not sufficiently detailed to meet the ECHR requirement of legal certainty. The draft law is also in some places overly ambitious, leading to some concerns about implementation and enforcement issues.

12. There are four pre-conditions for effective anti-discrimination measures:
- A. Definitions of unlawful practices which are effective and meaningful;
  - B. Remedies which provide incentives for voluntary compliance and effective means for change;
  - C. Procedural law which facilitates the presentation of serious claims; and
  - D. Resources to implement the law.

13. Since these are fundamental elements of any anti-discrimination law, this review considers first how the draft law addresses these issues, and then proceeds to analyse individual clauses.

## **A. DEFINITIONS**

14. It is important to clearly set out the scope of the law i.e. when, and against whom, it will be enforceable. This means that definitions should be sufficiently detailed to allow for consistent interpretation and application. In addition, the law generally should be sufficiently clear to conform to the requirement of legal certainty. This is a fundamental principle of the European Court of Justice<sup>9</sup> and in relation to criminal law has been expressed in Article 7 of the ECHR.<sup>10</sup> Legal certainty requires that it must be possible to reasonably anticipate what kind of behaviour will be prohibited under criminal and civil law, and the likely consequences for breaching the law. In other words, the effect of the law must be reasonably predictable.

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<sup>9</sup> See also C-323/88 Sermes (1990) ECR I-3027

<sup>10</sup> Full text of the ECHR is available at <http://conventions.coe.int/treaty/EN/Treaties/html/005.htm>. Article 7, reads as follows: “1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed. 2. This article shall not prejudice the trial and punishment of any persons for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilized nations.”



***Protected Characteristics***

15. Article 3 of the draft law sets out the scope of the law. It contains a blanket prohibition against discrimination on the basis of an extensive list of characteristics.<sup>11</sup> There are three issues that arise regarding the scope of this provision.

16. First, the list is too extensive; it is doubtful whether such an extensive list can be given meaningful effect in practice. There is also a risk that such an extensive list may bring within the scope of the law unintended situations which are not perceived as genuinely related to unfair discrimination.

17. Second, the list does not differentiate between different types of characteristics. Whilst it is possible for a person to be discriminated against on the basis of their hair colour, such discrimination is not comparable for example, to racial discrimination. Thus, the EU Discrimination Directives outline a number of characteristics which must be protected under anti-discrimination law, including race and religion, sex, sexual orientation, age and disability. These are all related to innate or immutable characteristics<sup>12</sup> which are at the core of the legal protection against discrimination. Moving too far from such characteristics risks diluting the concept of discrimination, and also could inundate the courts with legal claims. The draft law would be improved by having a clear focus on the forms of discrimination which relate innate or immutable characteristics.

18. Third, the term “personal trait” is undefined and open-ended. This means it could include anything from hair colour, to musical taste etc. The draft law would be improved if this concept was clearly defined.

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<sup>11</sup> “...race, national or ethnic origin, language, religion or confession, political conviction, opinion, birth, sex, sexual orientation, material status, social background, health condition, disability, marital status, parenthood or any other personal trait...”

<sup>12</sup> i.e. deeply personal and/or unchangeable characteristics.

19. Additionally, there are two important forms of discrimination which are not included in the draft law. The first is discrimination on the basis of *assumed membership* of a protected group where an individual has been discriminated against due to a mistaken belief that he or she belongs to a particular group, although in fact he or she does not. The second is discrimination by *association*; this occurs where a person is discriminated against because of a relationship with a person or persons from a protected group. This commonly arises for example when inter-ethnic relationships arise; couples in such situations frequently experience discrimination by others of the same ethnicity because of their association with a person from a different group.

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

- **focus on discrimination based on fundamental and immutable characteristics;**
- **define the meaning of the term ‘personal trait’;**
- **include discrimination based on assumed membership of, or association with members of a protected group.**

***Protected Spheres of Activity***

20. Article 3 of the draft law seeks to prohibit discrimination in any sphere of life by any person or institution. A prohibition this broad may be difficult to enforce; it is likely to result in an inundation of claims and bring into the scope of the law unintended situations. An underpinning concept in discrimination law is that it is permissible to discriminate, or differentiate, between individuals based on relevant characteristics but not on irrelevant characteristics. Such differentiation, however, must be based on rational, objective criteria relevant to a particular situation. For example, using physical strength as a selection criterion may be rational, objective, and relevant to the decision to appoint someone as a baggage handler, but less so for a teacher. It is therefore suggested that the draft law clearly delineate in which situations a distinction can be made.

21. Further, the provision does not distinguish between the public and private sphere. As a result, it is likely to conflict with Article 8 of the ECHR, which protects the right to private and family life.<sup>13</sup> There are also a number of other situations of differential treatment which may conflict with ECHR requirements, including the freedom of religion or freedom of association under Articles 9 and 11 of the ECHR respectively.<sup>14</sup> For example, religious institutions frequently require persons to belong to a certain religious affiliation or gender when appointing to certain posts, which for policy reasons, states usually wish to allow. An example of such a provision is given below:

Bulgaria - The Protection Against Discrimination Act

Article 7

The following shall not constitute discrimination:

...(3). different treatment of persons on grounds of religion, faith or gender with respect to an occupation carried out in religious institutions or organisations where, by reason of the nature of the occupation, or of the conditions it is carried out in, religion, faith or gender constitutes an essential and determining professional requirement in view of the nature of the institution or organisation, where the aim is legitimate and the requirement does not exceed the necessary to accomplish it;

<sup>13</sup> Article 8 of the ECHR states the following:

*(1) Everyone has the right to respect for his private and family life, his home and his correspondence.*  
*(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*  
Full text of the ECHR is available at <http://conventions.coe.int/treaty/EN/Treaties/html/005.htm> (last visited June 24, 2009).

<sup>14</sup> Article 9 of the ECHR:

- 1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.*
- 2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or the protection of the rights and freedoms of others.*

Article 11 of the ECHR:

- 1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.*
- 2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. this article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.*

Full text of the ECHR is available at <http://conventions.coe.int/treaty/EN/Treaties/html/005.htm> (last visited June 24, 2009).

(4.) different treatment of persons on the basis of religion, faith or gender in religious education or training, including training or education for the purposes of carrying out an occupation under subsection 3 above...

22. Article 3 also requires that an individual's "*human rights are impaired or nullified*". This is unduly restrictive; discrimination in a number of spheres should be prohibited, regardless of whether or not an individual's human rights have been engaged. There is no human right, for example, to use a restaurant or to seek employment, however, discrimination in these areas must be prohibited under EU and international law.<sup>15</sup> This provision should therefore be re-worded.

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

- **focus on prohibiting discrimination in specific areas of public, as opposed to, private life;**
- **clearly distinguish between situations where it is permissible and not permissible to differentiate between individuals especially in light of ECHR requirements;**
- **does not require that an individuals' human rights are impaired or nullified for discrimination to have occurred.**

### ***Positive Action***

23. The inclusion of a clause focused on positive action is a constructive step. Many countries with mature anti-discrimination laws have included such provisions in an effort to promote full and effective equality. However, the proposed definition contained in Article 3 is broadly worded and may not be sufficiently tailored to meet

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<sup>15</sup> EU Discrimination Directives, for example, include access to employment, education, goods and services, and social protection (including social security and healthcare). Council Directive 2000/43/EC

the needs of specific groups who are disadvantaged. For example, it is neither clear which groups are in “need of protection”, nor what the goal of “adequate progress” means. Additionally, if the provision is vague, there is a risk that the lack of certainty will lead to breaches of EU law. The ECJ considered an affirmative action program in the case of *Abrahamsson and Andersson v Fogqvist*<sup>16</sup> which allowed less qualified female candidates to be appointed for posts in order to create a better balance of representation. They found the terms of the scheme to be in breach of Article 2(4) of the Equal Treatment Directive. This decision highlights that individual positive action programmes must be carefully structured in order to pass ECJ scrutiny; the anti-discrimination law would be improved by clarifying when and how such positive actions schemes will be lawful under EU law.

**It is recommended that the criteria for positive action measures be clarified in the draft law, so as to comply with EU requirements.**

### ***Incitement to Discriminate***

24. The inclusion of a provision which prohibits the instruction to discriminate is a positive aspect of the draft law. This prohibition is in line with EU Discrimination Directives, which require that giving instructions as well as any recruitment or selection procedures and/or announcements which announce an intention to discriminate be prohibited.<sup>17</sup> The absolute prohibition on promotion or incitement to discrimination contained in Article 7, however, runs the risk of breaching ECHR Article 10, which protects the right to freedom of expression.<sup>18</sup> This is especially the

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<sup>16</sup> Case C-407/98 [2000]

<sup>17</sup> Article 5, 2000/43/EC, Article 4, 2000/78/EC

<sup>18</sup> Article 10 of the ECHR:

(1) *Everyone has the right to freedom of expression. this right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.*

(2) *The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.*

case because it would affect the freedom of the media. While this right can be restricted in appropriate circumstances, it must be necessary and be proportionate to the harm being addressed. It is not clear that this blanket prohibition would fulfil these criteria.

**It is recommended that the draft law is amended so that the prohibition on discriminatory speech is tightened to protect freedom of expression.**

### *Forms of Discrimination*

25. The prohibition on direct and indirect forms of discrimination is in line with Montenegro's legal obligations. However, the definition of indirect discrimination in Article 8 is not aligned with international standards. EU Directives define indirect discrimination as occurring where a seemingly neutral provision, criterion or practice has the result of putting individuals from a protected category in a disadvantageous position.<sup>19</sup> Whilst this may simply be a consequence of the English translation seen by ODIHR, it is recommended that care is taken that definitions in national legislation are consistent with those in the EU directives, so as to avoid any potential conflict or confusion.

26. EU Directives require a prohibition against harassment in anti-discrimination legislation, and the definition provided in the draft law is in line with EU Directives.<sup>20</sup> Similarly the prohibition on victimisation in Article 13 is welcome. However, a number of other provisions in Articles 9, 10 and 11, including the incitement of hatred and intolerance,<sup>21</sup> slavery, human trafficking, and genocide<sup>22</sup> properly belong in the criminal law and should be dealt with in the Penal Code.

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<sup>19</sup> Article 2(b), 2000/43/EC

<sup>20</sup> 2000/43/EC

<sup>21</sup> Article 11

<sup>22</sup> Ibid.

27. Finally, Article 11 of the draft law makes reference to “grave forms of discrimination”. It is unclear whether or not such forms of discrimination would result in heavier sanctions and/or a difference in the availability of remedies. In the absence of any consequences for committing a grave form of discrimination, it appears that the distinction has no legal effect, and the authorities should consider whether it is necessary to retain such a provision, and if so, how to make it effective.

**It is recommended that:**

- **the definition of indirect discrimination is amended to be consistent with EU definitions;**
- **the reference to incitement of hatred and intolerance, slavery, human trafficking, and genocide be removed; these should all be defined as crimes under the Penal Code.**

**B. REMEDIES**

*Sanctions and Remedies*

28. Article 31 of the draft law sets out available remedies, which include an order prohibiting the discriminatory behaviour, and compensation. A significant gap is that there is no power to require other steps which would correct the discriminatory behaviour, or to impose sanctions for non-compliance of such orders; the draft law would be strengthened if courts are explicitly given the power to make such orders.

29. The draft law also refers to financial compensation as a remedy. The current legislation makes no reference to the amount of compensation to which a complainant is entitled and may breach the ECHR requirement of legal certainty. Since EU Directives require the need for “effective, proportionate and dissuasive sanctions”<sup>23</sup> the draft law would be improved if the legislation were to delineate a minimum and maximum amount of compensation to which complainants are entitled, as well as the

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<sup>23</sup> 2000/43/EC

levels of damages flowing from different breaches, to reflect the seriousness. The Anti-Discrimination Law in Serbia provides details in Article 50 – 60 of the quantity of damages that may be granted for different breaches. For space reasons, only Article 50 is reproduced below, but the draft law can be accessed online.<sup>24</sup>

Serbia – The Law on the Prohibition of Discrimination

Article 50

The authorised official or the person in charge within the framework of a public administration organ shall be fined in the amount of 10,000 to 50,000 dinars for committing a discriminatory act...

30. Several provisions make reference to disciplinary breaches and the power to impose a fine on an individual who has breached the legislation.<sup>25</sup> It is unclear how these sanctions will be enforced, by whom, and the consequences of non-payment. If there is legislation governing disciplinary proceedings against public officials and it is the intention of the drafters that such procedures prevail, it should be cross-referenced. The legislation should also state the types of fines which flow from different breaches, and not simply be restricted to direct and deliberate acts of discrimination. This is too limited, as indirect discrimination does not require an intention to discriminate but results from organizational or institutional practices. Hence, there should be a power to impose fines and remedial orders on organizations which undertake discriminatory practices.

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

- **includes a provision which allows a decision maker to compel action and/or impose sanctions for non-compliance;**
- **defines the minimum and maximum amount of compensation to which individuals are entitled;**

<sup>24</sup> Accessed from <http://www.iglhrc.org/cgi-bin/iowa/article/takeaction/resourcecenter/896.html> on 2 July 2009.

<sup>25</sup> Articles 14 and 15 of the draft law can be found at Annex 1.



- **detail how disciplinary sanctions are to be enforced and the effect of non-payment;**
- **introduces a power to impose fines and remedial orders on organizations which undertake discriminatory practices.**

## **C. PROCEDURE**

### *Litigation, Conciliation and Administrative Action*

31. In order to achieve the goal of improving social responses to discrimination, litigation alone is not recommended. Complainants may for many reasons be reluctant to take legal action through litigation: it requires knowledge of their legal rights, and a willingness to be identified as a complainant. Litigation is expensive and generally slow. Further, in the draft law, the remedies available through litigation are limited. In order to effect real social change, it can be valuable to include mechanisms which allow opportunities to negotiate or educate (for instance through conciliation).

32. Conciliation is particularly effective where an individual complainant wants to maintain a continued relationship with the individual (or institution) who has committed the discriminatory act(s). This is often the case in employer-employee relationships. Therefore the Government may wish to consider an approach which incorporates elements of administrative action, and conciliation, with litigation as one available procedure.

**It is recommended that conciliation and elements of administrative action, in addition to litigation, are available to complainants.**

### *Jurisdictional Issues*

33. The draft law gives enforcement powers to the Protector of Human Rights and Freedoms (“Ombudsman”),<sup>26</sup> and the courts.<sup>27</sup> However, the draft law does not sufficiently outline whether the jurisdiction of the Ombudsman and the courts are

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<sup>26</sup> Article 26 of the draft law

<sup>27</sup> Article 29 of the draft law

concurrent or not. It needs to be clear whether a complaint made through the Ombudsman prohibits future legal action and vice-versa.

34. As litigation can be costly, and may limit the types of remedies available to a complainant, it would be advisable to increase the investigatory and enforcement powers of the Ombudsman. The jurisdiction of the Ombudsman requires some further consideration.

35. Under Montenegrin law, the Ombudsman has the power to issue recommendations, but he/she does not have the power to initiate investigations, compel action, award compensation or mediate disputes between private parties.<sup>28</sup> Other issues that require clarification include whether or not the courts are able to review the Ombudsman's decisions; whether a respondent can respond to a complaint of discrimination submitted to the Ombudsman's office and what consequences would result should a respondent fail to implement the Ombudsman's recommendations. An example of wide-ranging powers given to an Ombudsman is reproduced below.

Croatia - Anti-Discrimination Act

Article 12

Central body responsible for the suppression of discrimination

(1) Activities of the central body responsible for the suppression of discrimination shall be carried out by the Ombudsman.

(2) Within the scope of his/her work, the Ombudsman shall:

1. receive reports of all the natural and legal persons referred to in Article 10 of this Act;
2. provide necessary information to natural and legal persons that have filed a complaint on account of discrimination with regard to their rights and obligations and to possibilities of court and other protection;
3. if the court proceedings have not yet been initiated, examine individual reports and take actions falling within his/her competence required for elimination of discrimination and protection of rights of discriminated persons;
4. warn the public about the occurrence of discrimination;
5. with the parties' consent, conduct mediation with a possibility of reaching an out-of-court settlement;
6. file criminal charges related to discrimination cases to the competent state attorney's office;
7. collect and analyse statistical data on discrimination cases,
8. inform the Croatian Parliament on the occurrence of discrimination in his/her annual and, when required, extraordinary reports;
9. conduct surveys concerning discrimination, give opinions and recommendations, and suggest appropriate legal and strategic solutions to the Government of the Republic of Croatia.

Text of anti-discrimination act is available at website of the Ombudsman of Croatia:

<http://www.ombudsman.hr/default.asp?ru=173&sid=&akcija=&jezik=2>

**It is recommended that:**

- **The jurisdiction of, and relationship between the Ombudsman and the courts are clarified, including under what circumstances a complainant may initiate a complaint to each body;**
- **The investigatory and enforcement powers of the Ombudsman are strengthened.**

***Other Procedural Issues***

36. Article 28 of the draft law provides that the rules of civil procedure should regulate discrimination claims, unless the legislation provides otherwise.<sup>29</sup> The drafters should be commended for including a provision shifting the burden of proof; this is in accordance with the Burden of Proof Directive.<sup>30</sup> However, care should be taken to ensure that other procedural provisions in civil law are conducive to the active pursuance of discrimination claims. The 15 day limitation period provided for in Article 28 is a bar to effective protection as complainants will rarely be able to initiate a complaint in time. Drafters may also wish to consider creating other procedural provisions which are tailored to discrimination claims, such as allowing complainants to adduce statistical evidence to support a claim of discrimination.<sup>31</sup> Article 30(3), which allows third parties to initiate proceedings on behalf of victims of discrimination, is in line with EU Discrimination Directives,<sup>32</sup> and is welcome. However, the definition contained in this provision is limited to situations “where the

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<sup>29</sup> Article 28 of the draft law

<sup>30</sup> Article 33 of the draft law; 2000/43/EC

<sup>31</sup> As under the Burden of Proof Directive, 2000/43/EC

<sup>32</sup> Article 19, 2000/43/EC

discriminatory act took place in the media, in the public sphere or by a public authority”. It is unclear why this limitation is imposed, and it would be better to allow this in all cases of discrimination under the draft law, as in Croatia, for example.

Croatia - Anti-Discrimination Act  
Article 21  
Participation by third parties

- (1) In a litigation based on the legal action referred to in Article 17, paragraph 1 of this Act, a plaintiff may be joined by an intervenor, being a body, organisation, institution, association or another person that, within its scope of activities, deals with the protection of the right to equal treatment in relation to groups whose rights are decided upon in the proceedings. The court shall decide on the participation of an intervenor by applying accordingly the provisions of the Civil Procedure Act.
- (2) The court shall allow participation of the intervenor referred to in paragraph 1 of this Article only with the plaintiff’s consent.
- (3) The intervenor referred to in paragraph 1 of this Article may undertake activities in the proceedings and shall have all the rights belonging to an intervenor in the proceedings.

Article 24  
Joint legal action for the protection against discrimination

- (1) Associations, bodies, institutions or other organisations set up in line with law and having a justified interest in protecting collective interests of a certain group, or those which within their scope of activities deal with the protection of the right to equal treatment, may bring a legal action against a person that has violated the right to equal treatment, if they make plausible that the defendant’s conduct has violated the right to equal treatment of a larger number of persons who predominantly belong to the group whose rights the plaintiff defends...

If discriminatory treatment solely affects a particular person, the plaintiffs referred to in paragraph 1 of this Article may initiate a lawsuit only with his/her consent given in writing.

A person who had deliberately exposed him/herself to discriminatory treatment intending to directly verify the application of the regulations pertaining to the prohibition of discrimination in a particular case may initiate a lawsuit referred to in Article 43 items 1, 2, 3 and 5 of this Law.

The person referred to in paragraph 3 of this Article shall be obligated to inform the Commissioner of what he/she intends to do, unless the circumstances do not allow it, and to inform the Commissioner in writing of the action undertaken.

If the person referred to in paragraph 3 of this Article has not initiated a lawsuit, a court may hear him/her as a witness.

The person referred to in paragraph 3 of this Article may not be subjected to the claim of shared responsibility for the damage resulting from a discriminatory act.

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

<sup>33</sup> Accessed from <http://www.iglhrc.org/cgi-bin/iowa/article/takeaction/resourcecenter/896.html> on 2 July 2009.

- **allows for statistical evidence to be adduced in support of claims of discrimination;**
- **allows claims to be brought within a longer time frame;**
- **allows third party actions in a wider range of situations.**

#### **D. RESOURCES**

37. In view of the likely costs imposed on public and private business as a result of these provisions, it is recommended the Government undertake a cost analysis of implementation. In order to ensure that the legislation is implemented, it is essential that adequate resources are allocated to enable the body/bodies charged with implementation, the courts and affected enterprises. Further, prior to implementation it would be important to ensure adequate training in the law to the legal community, including judges, as this appears to be a relatively new area of law. Resources should also be allocated to publicise the new law. If there are to be explanatory notes issued alongside the law it is suggested that these issues be reflected therein.

#### **It is recommended that:**

- **the draft law is supplemented by explanatory notes setting out plans for implementation of the law;**
- **the government undertake an assessment of the financial impacts of the draft law.**

#### **E. INDIVIDUAL CLAUSES**

38. Issues in individual clauses which give rise to comment but have not already been discussed are outlined below.

#### **Articles 1 & 2**

39. These articles introduce the draft law. Article 2 sets out the objectives of the Law. Although not essential, such a clause can provide a valuable guide on

interpretation of the Law to the courts and administrative authorities, as well as others who are regulated by the legislation. These introductory clauses, however, would be improved if they clearly identified against whom the legislation is enforceable.

#### **Article 5**

40. This Article provides that all individuals, irrespective of their citizenship status, shall be protected from discrimination and enjoy protection under the draft law. This is in line with Montenegro's legal obligations under EU and international law.

#### **Article 12**

41. Segregation need not be included in a separate provision, as segregation is a manifestation of discrimination. Unless there are separate sanctions or remedies which correlate with segregation under the draft law, it should be removed and included under the definition of discrimination. The definition of segregation does not comply with international standards as it requires coercive separation. Assuming this is translated accurately, it is important to prohibit segregation even where it is not coercive. According to the Hungarian Equal Treatment Act, "unlawful segregation is a conduct that separates individuals or groups of individuals from others on the basis of their characteristics as defined in Article 8 without a reasonable explanation resulting from objective consideration."<sup>34</sup> The consequences of requiring coercion are that the most frequent forms of segregation are not included within the definition. For example, in considering a schools segregation case, the Debrecen Appeals Court of Hungary ruled that, "the maintenance of a situation that results in disadvantage, which is, however, not a result of an action, may also amount to the violation of the law".<sup>17</sup> In Bulgaria the law includes situations which involve coercive separation, but also distinction or isolation in the absence of coercion (see below) and imposes a duty on the Minister of Education to ensure segregation does not occur in schools. The consequences of this provision are described in the case study below.

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<sup>34</sup> Article 10 (2) of the CXXV Act of 2003 on the Promotion of Equal Treatment and Equal Opportunities.

Bulgaria – Law on the Prohibition of Discrimination

Article 5

Harassment on the grounds under Art. 4 (1), sexual harassment, incitement to discrimination, victimisation and racial segregation, as well the construction and maintenance of an architectural environment hindering the access of persons with disabilities to public places shall be deemed to be discrimination.

Article 29

(1) Racial segregation consists in actions or inaction leading to coercive separation, distinction or isolation of a person on grounds of race, ethnic belonging or colour of skin.

Case Study

On October 25, 2005, the Sofia District court released its decision on Case 11630/ 2004. Sofia School 103, a school with one hundred percent Romani students, situated in the Romani neighbourhood Filipovtsi in Sofia. The civil suit against the Ministry of Education, the Sofia Municipality and School 103 was filed by the European Roma Rights Centre (ERRC). The ERRC challenged the failure of the Bulgarian authorities to terminate the conditions of racially segregated education of the Romani children attending School 103 and ensure that the Romani children have equal access to education and equal treatment in education. The ERRC claimed that the fact that 100 per cent of the student body of School 103 was Romani constituted segregation on racial grounds prohibited by Article 29 of the Bulgarian Protection against Discrimination Act. The Court ruled that the separation of the Romani children in School 103 “was not the result of their free will but of circumstances beyond their control, accompanied by inaction on the part of authorities obliged to take measures to remedy this situation”. The Court accepted that the separation of the Romani children in School 103 was the result of lack of opportunity to attend other schools caused by residential segregation in an all-Romani neighbourhood, obstacles for enrolment in other schools, and fear of racist abuse by non-Romani children. Further, the Court affirmed that the poor material conditions in School 103, the low educational results of the children, and failure of the school authorities to exert control on truancy are manifestations of unequal and degrading treatment of the children in School 103.<sup>35</sup>

42. Additionally, the requirement that for segregation to occur a group must be placed in a disadvantaged position is not in keeping with international standards: racial segregation must *always* be prohibited (although it usually is accompanied by disadvantage, this should not be requirement). By contrast gender segregation in the fields of health, sport, and education are common. This type of segregation is acceptable if it does not involve any element of disadvantage. Further, as some forms

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<sup>35</sup> Taken from “The Prohibition of Discrimination And Segregation In Education Under Domestic Law” by Editorial Team European Roma Rights Center at [www.ceeol.com](http://www.ceeol.com).

of gender segregation may arise due to welfare or religious reasons, an absolute bar would give rise to situations which violate the ECHR right to privacy,<sup>36</sup> or the right to freedom of religion or belief.<sup>37</sup>

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

- **clearly define segregation as a form of discrimination;**
- **prohibit racial segregation in all circumstances;**
- **remove the requirement of coercion from the definition of segregation.**

**Articles 14-25**

43. These provisions cover specific cases of discrimination, including discrimination in procedures before the state<sup>38</sup>, in the field of public service delivery<sup>39</sup>, and in the field of education and vocational health<sup>40</sup>. There is a risk that they overlap and conflict with earlier clauses in the draft law, which contain different prohibitions against discrimination. Article 3 contains a prohibition against discrimination, subject to positive action measures. In contrast, Article 7 contains a blanket prohibition on discrimination. While some of the differences may have resulted through the translation of the draft law, **it is recommended that consistent definitions be used throughout the draft law.**

44. Articles 14-25 would be improved if specific exceptions were delineated where it is permissible to differentiate between individuals. For example, Article 23 would appear to protect the rights of minors to marry.

45. There are also some areas of concern with respect to the following:

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<sup>36</sup> ECHR Article 8. Full text of the ECHR is available at <http://conventions.coe.int/treaty/EN/Treaties/html/005.htm> (last visited June 24, 2009).

<sup>37</sup> ECHR Article 9. Full text of the ECHR is available at <http://conventions.coe.int/treaty/EN/Treaties/html/005.htm> (last visited June 24, 2009).

<sup>38</sup> Article 14 of the draft law

<sup>39</sup> Article 15 of the draft law

<sup>40</sup> Article 18 of the draft law



- Article 16 requires that the construction of facilities for public use be done so as to enable unrestricted access to individuals with reduced mobility or disabled persons. This is a financially ambitious clause and, as a result, there may be barriers to its enforcement.
- Article 16 also covers the liability of an employer and/or service provider to provide unrestricted access to an employee who has limited mobility or manages a disability. This is not in line with EU Discrimination Directives<sup>41</sup> and ECHR jurisprudence, which require that an employer provide accommodation to an individual with a disability “unless such measures would impose a disproportionate burden on the employer”.<sup>42</sup> **It is recommended that this be amended to be consistent with the EU requirements.**
- Article 17 covers discrimination on the grounds of health. As the provision covers the use of forced detention in a health care facility and the use of forced medical procedures, it is likely to breach Articles 3 and 5 of the ECHR, which protect the right to be free from torture and inhuman or degrading treatment or punishment and protect the right to liberty and security of the person. It is also likely to engage Article 7 of the International Covenant on Civil and Political Rights (“ICCPR”), which protects the right not to be subjected to medical or scientific experiments without free consent.<sup>43</sup>
- Article 20 prohibits discrimination against individuals who have a disability. **It is recommended that a definition be included as to the nature and seriousness of the disability in question.**

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<sup>41</sup> Article 5, (2000/78/EC)

<sup>42</sup> Reasonable accommodation has been defined as the necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms. *Glor v. Switzerland*, European Court of Human Rights, Section 1, Application No. 13444/04.

<sup>43</sup> Under both conventions, such a right can only be infringed if the infringement is provided by and carried out in accordance with the law, and the measures

- a. are in the interests of a legitimate objective such as the protection of public health;
- b. are strictly necessary in a democratic society to achieve such an objective and proportional to the goal; and
- c. are not imposed in an arbitrary manner.

**Article 27**

46. The Ministry competent for the protection of human rights and minority rights is granted supervisory duties in relation to the implementation of the draft law. This provision would be improved if it clearly defined what supervisory duties the Ministry should engage in.

**VI. CONCLUSION**

47. The draft law is a comprehensive draft, covering many well-established areas of anti-discrimination law. While the focus of this Comment has been to highlight key areas for improvement, there are some positive aspects to the draft law. Future drafts that incorporate these recommendations would bring it further in line with Montenegro's legal obligation under EU and international law and strengthen the mechanisms available to victims of discrimination within the country.