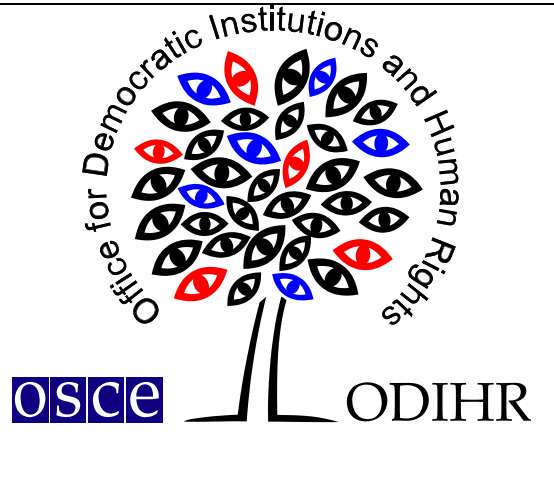


Warsaw, 27 January 2010

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(TND)

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OSCE/ODIHR COMMENTS

ON THE DRAFT LAW ON PROHIBITION OF

DISCRIMINATION IN MONTENEGRO

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

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ANNEX A: DRAFT LAW ON THE PROHIBITION OF DISCRIMINATION

I. INTRODUCTION

1. The Ministry for Minority and Human Rights of Montenegro (hereinafter “the Ministry”) has been preparing a law on prohibition of discrimination in Montenegro. The most recent version of the draft law was issued in November 2009 (hereinafter “the latest draft”), along with the translation prepared by the Government of Montenegro (hereinafter “the Government”). This commentary has been produced at the request of the OSCE Mission to Montenegro, based on the above-mentioned translation. For ease of reference, it is attached at Annex A.

2. The process leading to the issue of the latest draft originally began in spring 2009 with an initial draft prepared by the Ministry (hereinafter “the first draft”), which was opened for consultation. Both the OSCE/ODIHR¹ and the Venice Commission² issued expert comments and opinions respectively regarding that draft. Both reviews welcomed aspects of the first draft, but expressed strong concerns that the provisions were lacking in key areas especially in regard to the inadequacy of the implementation mechanism. It appeared that these would result in a law which fell short of EU and international standards.

3. After this consultation, the draft was extensively amended and made public in November 2009, and the Government is currently undertaking a further round of consultation on the latest draft before it is presented to Parliament. These comments have been produced in order to form part of the consultation being undertaken by the Ministry.

II. SCOPE OF REVIEW

¹ Opinion-Nr: NDISCR– MNG /135/2009 (TND) dated 9 July 2009. Available to download at www.legislationline.org.

²² Opinion No. 541/2009, adopted at the 80th Plenary Session of the Venice Commission, 9-10 October 2009. Available to download at www.venice.coe.int/site/dynamics/N_Opinion_ef.asp?L=E&OID=541

4. This review bears in mind that the objective of the law is to secure the right to be free from discrimination. The law must therefore be capable of full and meaningful implementation. With this consideration in mind, these comments contain recommendations for further amendments.

5. This review does not aim to be comprehensive, but aims to highlight the most important issues to ensure that the law is in compliance with international and EU standards. Further, since many aspects of ODIHR's comments on the first draft remain valid, this review will reiterate some recommendations made previously.

6. The OSCE/ODIHR notes that the commentary provided is without prejudice to any other comments/opinions or recommendations that the OSCE/ODIHR may wish to make on these or related issues in the future.

III. EXECUTIVE SUMMARY:

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

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

- (1) The Genuine Occupational Requirement should be incorporated as an exception to both direct and indirect discrimination; [pars. 16-18]
- (2) the list of personal characteristics in Article 3 should be reduced and focused on discrimination based on personal characteristics which are *fundamental and immutable*; [pars 19-24]
- (3) discrimination based on *assumed* membership of a protected group and discrimination based on *association* with a member of a protected group should both be prohibited; [pars 25-26]
- (4) *instructions* to discriminate should be prohibited, but not *incitement* to discriminate; [par 27]

- (5) it should be made clear that the law regulates discrimination both in the public and private sector, and by natural or legal persons and in which spheres of activity the law applies, using the EU standards as a minimum; [pars 28-29]
- (6) the definition of victimization should be widened to allow any person who provides support or assistance to a person or group to make a claim of discrimination, and that the words ‘acting conscientiously’ be removed from Article 4 of the latest draft; [par 30]
- (7) the definition of harassment should be reviewed and, if necessary, adapted to EU definitions; [par 32]
- (8) racial segregation should be expressly prohibited in all circumstances; [pars 33-34]
- (9) conformity should be ensured between Article 3 and Articles 12/19 of the latest draft; [pars 35-36] and
- (10) provisions regarding reasonable accommodation should be redrafted to conform with EU directives. [par 37]

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

- (1) Courts and other bodies charged with investigating discrimination cases should be given wider powers to impose sanctions for non-co-operation or non-compliance with previous orders and to correct discriminatory behaviour; [par 38] and
- (2) increased sanctions be imposed for grave forms of discrimination. [par 39]

C. It is therefore recommended that; procedures to complain about discrimination are strengthened:

- (1) In accordance with EU standards, an equality body should be established, with investigatory and adjudicatory powers, and a strong awareness-raising role; [pars 40-43]
- (2) third parties with a legitimate interest should be allowed to intervene in proceedings on behalf of complainants; [par 45] and
- (3) statistical evidence should be admissible in court in support of a claim of discrimination. [par 45]

IV. RELEVANT LAW

A. Domestic Legislation

8. The Constitution of Montenegro contains a number of provisions prohibiting discrimination³; additionally there are civil and criminal law provisions regulating discriminatory behaviour. These include the Labour Law⁴ which prohibits discrimination in employment, and the Law on Gender Equality⁵. It is unclear how the latest draft will interact with these laws. There is always potential for conflict and overlap where provisions relating to discrimination can be found in different acts, especially if there are differences in terminology. Before passing this law, potential conflicts should be eliminated or clarified.

B. International Law and Standards

9. International standards in the anti-discrimination field are extensive. The International Convention on the Elimination of All Forms of Racial Discrimination⁶ (hereinafter “CERD”) to which Montenegro is a party⁷, is the most significant, together with a convention addressing discrimination against women⁸ and the UN Declaration on the Elimination of Religious Discrimination⁹. These instruments are complemented by regional ones such as, the European Convention on Human Rights¹⁰

³ E.g. Article 8 (prohibition of discrimination), Article 17 par. 2 (equality before the law) and Article 18 (gender equality), Constitution of Republic of Montenegro, adopted on 19 October 2007

⁴ Official Gazette of the Republic of Montenegro No. 43/03, adopted on 9 July 2003

⁵ Official Journal No. 46/07, adopted on 31 July 2007 and entered into force on 8 August 2007

⁶ Adopted by the 2nd International Convention on the Elimination of All Forms of Racial Discrimination in New York on 7 March 1966

⁷ The Republic of Montenegro succeeded to the CERD on 23 October 2006

⁸ UN Convention on the Elimination of All Forms of Discrimination Against Women, adopted by the General Assembly through resolution 34/180 at its thirty-fourth session on 18 December 1979. The Republic of Montenegro succeeded to the Convention on 23 October 2006

⁹ UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, adopted by the General Assembly through resolution 36/55 at its thirty-sixth session on 25th November 1981

¹⁰ The Republic of Montenegro ratified the ECHR on 6 June 2006

(hereinafter “ECHR”), and EU anti-discrimination directives¹¹. The interpretation of these instruments by the European Court of Human Rights (hereinafter “ECtHR”), the European Court of Justice (hereinafter “ECJ”), and national courts provide detailed guidance on good practice. Taken together these provide the standards against which the latest draft can be measured. Since Montenegro wishes to implement legislation in compliance with EU standards, those standards have been applied as the benchmark in this review.

10. The ECHR requires states to refrain from discrimination in the application of any right conferred under the convention (Article 14); this provision is ‘parasitic’ in that it depends on another right protected by the Convention being invoked. By contrast, Protocol 12 of the ECHR¹² is a stand-alone provision, that extends this protection so that “the enjoyment of any right set forth by law 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.”

11. While the ECHR sets out broad protection from discrimination, it makes no attempt to delineate how governments should, in practice, apply this principle in legislative form. Protocol 12 has, thus far, only been applied in one case¹³. By contrast, the EU provides a detailed framework and extensive case law for states implementing anti-discrimination measures.

12. The EU framework includes a number of directives prohibiting discrimination on grounds of racial or ethnic origin¹⁴ (hereinafter “the Race Equality Directive”);

¹¹ EU Racial Equality Directive (Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, *Official Journal L 180*, 19/07/2000 P. 0022 – 0026) and EU Employment Equality Directive (Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, *Official Journal L 303*, 02/12/2000 P. 0016 - 0022)

¹² Ratified by Montenegro on 3 March 2004

¹³ *Sejdic and Finci v. Bosnia and Herzegovina* (application nos. 27996/06 and 34836/06), GC judgment of 22 December 2009

¹⁴ 2000/43/EC, see footnote 10 supra

discrimination in matters of employment and occupation on grounds of religion or belief; disability; age; and sexual orientation¹⁵ (hereinafter “the Employment Equality Directive”); and requiring equal treatment between men and women in employment and occupation, and access to and supply of goods and services¹⁶ (hereinafter “the Gender Directives”). Collectively, these are referred to here as “the Equality Directives”¹⁷. Although they differ slightly in scope, they form a coherent framework of law for member states to follow, with consistent terminology, concepts and approach.

V. ANALYSIS AND RECOMMENDATIONS

13. The ODIHR welcomes the fact that many of the recommendations in its earlier opinion have been incorporated into the latest draft. However, not all the key points have been accepted. The most obvious of these is the decision not to create any form of equality body, nor to enhance the powers of the Ombudsman, and instead rely solely on the courts to implement the law. This makes it unlikely that the law will effectively challenge discriminatory practices and attitudes, and runs counter to the tenor of the recommendations made by ODIHR¹⁸. Furthermore, there has been no attempt to resolve the difficulties caused by the absence of an effective implementation and sanction regime.

14. Some definitions are set out in a complicated and opaque fashion. In a number of instances key terms differ, in this translation, from the EU terminology. While it is

¹⁵ 2000/78/EC, see footnote 10 supra

¹⁶ EU Council Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services of 13 December 2004 and Directive 2006/54/EC of the European Parliament and Council on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) of 5 July 2006

¹⁷ The former Burden of Proof Directive was repealed in 2009 and incorporated into the body of the Equality Directives.

¹⁸ This lack of an Ombudsman or similar body is also not in line with the recommendations of the Venice Commission in their Opinion No. 541/2009, which state, inter alia that the Republic of Montenegro should “provide for the establishment of a specialised anti-discrimination body or in case of granting enforcement powers to the Ombudsman [...] ensure that: a) the Ombudsman has full powers for the implementation of the law; and b) the Ombudsman institution has the necessary human and financial resources to fulfil its new tasks, and specialised training in discrimination is provided for its staff” (par. 126).

not necessary in every instance that national legislation adopt exactly the EU approach, the divergence must not create a lesser degree of protection, nor create confusion between the same concepts by them being expressed in different ways. It is important that the authoritative text in the Montenegrin language 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.

A. Definitions

15. ODIHR's earlier opinion emphasized the need for clarity as to when, and against whom, the law is applicable and enforceable. Whilst Article 1 of the latest draft notes that protection from discrimination shall be exercised pursuant to this law, as well as other laws, it fails to explain how potentially conflicting or ambiguous provisions in different laws shall be resolved. A clearer exposition of how such conflict or ambiguity shall be resolved would be beneficial.

Forms of discrimination

16. The terms "discrimination", "direct discrimination" and "indirect discrimination" are defined in Article 3. The definitions of direct discrimination and indirect discrimination follow closely the EU terminology, which is a significant improvement over the first draft. It is only in one important respect that they significantly diverge. The EU definition of discrimination excludes cases where, for a particular occupation, there is a Genuine Occupational Requirement ("GOR"), the objective is legitimate and the requirement proportionate. This exception applies to both direct and indirect discrimination. However, in Article 3 of the latest draft the exception appears to apply only to indirect discrimination. The consequence is that direct discrimination cannot be justified by reference to a GOR.

17. Hence, the draft law is more restrictive than EU law. The Government of Montenegro should be aware that this is likely to lead to undesirable outcomes, especially combined with a long list of protected characteristics. This will mean for example, that seeking to employ a person with a particular specific language skill would be direct discrimination even where there is a genuine occupational requirement for that background or skill. The same would apply to selection based on any other personal characteristic.

18. A well-drafted anti-discrimination law should allow legitimate differences in treatment between groups, based on objective and relevant criteria, in strictly limited circumstances. If no such exception is allowed, it can lead to unreasonable applications of the law. Alternatively, and more likely, the law will be ignored or misapplied in order to avoid such outcomes. If this happens, the law will lose credibility. A further problem with this narrow definition of discrimination is that it makes the law more complicated. For example, where women are at greater risk of violence taxi services driven only by women may be a reasonable response. According to the latest draft, hiring women driver for this service could not be legitimized as a GOR. Article 3, as currently drafted, would prohibit this as direct discrimination against men. To avoid liability, it would be necessary for the taxi company to argue that it was a form of positive action under Article 5 – a much more uncertain option than a clear exception. The GOR is therefore an essential exception to direct discrimination to avoid absurd and undesirable outcomes, and should be incorporated into the definition of direct discrimination.

It is therefore recommended that; the Genuine Occupational Requirement be incorporated as an exception to both direct and indirect discrimination.

Protected Characteristics

19. Article 3 sets out the list of protected characteristics which can form grounds for a discrimination claim: “sex, race, colour of skin, national affiliation, social or ethnic origin, affiliation to minority nation or minority national community, language,

confession, political or other opinion, sexual orientation, health conditions, disability, age, material status, membership in a group or assumed membership in a group, as well as other personal characteristics.” In ODIHR’s previous opinion, three points were made about this long list,¹⁹ which are reiterated below.

20. First, this list of grounds is too extensive and it is doubtful whether it will be possible to give it meaningful effect in practice. It may be intended to reflect those characteristics which are often found in international human rights documents, such as the ECHR. However, it is important to distinguish national legislation from international human rights documents; the latter set out broad principles based on which detailed national legislation should be developed. National anti-discrimination laws should be specific, detailed and need to cover many issues not addressed in human rights documents, such as indirect discrimination, harassment and victimization. The Government should note that the long list goes well beyond the requirements of the EU Directives which cover discrimination on the grounds of race or ethnicity, sex, religion or belief, age, disability, and sexual orientation which should form the core of its anti-discrimination measures.

21. Second, the list does not differentiate between types of characteristics which are immutable or fundamental to personal identity (and which usually form the basis of anti-discrimination measures), and others, such as occupation, or social status. While national governments are free to extend the protection from discrimination to grounds beyond those applied by the EU, taking this too far may in fact hamper efforts to counteract real problems of discrimination in society. While inclusion of grounds such as education, personal or social status, property status etc. seems to be a positive measure, it may prevent effective action against the worst forms and manifestations of discrimination by ‘watering-down’ the concept.

22. Finally, by referring to “other personal characteristics” the drafters have ensured that the law is open to application to many other characteristics which may

¹⁹ Paragraphs 15 – 19

not have been envisaged. This can be positive, as it allows the law to be flexible and adaptive to new circumstance. Conversely, it can lead to unmeritorious claims.

23. It is impossible to foresee what situations will be captured by such a long and open-ended list, and the danger is that regulatory bodies will be inundated with claims, especially unmeritorious ones. If discrimination concepts are applied equally to such grounds as ‘personal or social status’ the law is likely to fall into disrepute. For example, if a charity offers free goods or services only to the poor, this would be a *prima facie* case of direct discrimination on the grounds of social or property status, and a claim of discrimination by an ineligible person should be successful. Thus, in order to avoid such unwanted outcomes the exceptions to discrimination will need to be contorted and interpreted widely. This in turn will impact on the ability to use the law in the meritorious claims of discrimination and undermine the effectiveness of the legislation.

24. Given these complications, it is preferable to adopt a more limited approach, perhaps listing only characteristics already protected under EU law, which may be extended later.

25. A further issue arises in relation to *assumed* membership of a group. Article 3 treats “membership or assumed membership of a group” as if it were a personal characteristic similar to ‘sex’ ‘race’, ‘colour of skin’ etc. This gives the impression that any group is protected from discrimination no matter what sort of group it is (for example, police officers would be a group). However, it seems more likely that the intention of the drafters is to incorporate the suggestion in paragraph 19 of ODIHR’s earlier opinion that situations where a discriminator mistakenly assumes that a person is a member of a protected group²⁰ should be prohibited as discrimination. To achieve this, this article needs to be re-drafted.

²⁰ A ‘protected group’ means a group defined by a common characteristic listed in Article 3, such as race, language, religion etc.

26. The law should also protect persons who are discriminated against because of their affiliation or connection to a third person because of that person's membership of a racial, ethnic, religious or sexual group. For example, if an employee is discriminated against not because of her own race, but because of the race of her husband, this should be prohibited. Thus, discrimination by association should be incorporated into the definition of discrimination.

It is therefore recommended that;

- **the law focus on discrimination based on fundamental and immutable characteristics by reducing the list of personal characteristics;**
- **discrimination based on assumed membership of a protected group be prohibited; and**
- **discrimination based on association with a member of a protected group be prohibited.**

Incitement to discriminate

27. The final paragraph of Article 3 prohibits *incitement* to discriminate, rather than *instruction* to discriminate which is prohibited under EU law. This may be a translation error, but the Ministry should be aware of the need to reflect precisely the wording of the Equality Directives in this respect. Prohibiting incitement to discriminate would appear to be a wide-ranging prohibition of speech, which could lead to conflict with the right to freedom of expression. As this was discussed in the previous opinion in paragraph 24²¹, this review will not repeat these arguments.

It is therefore recommended that; instructions to discriminate are prohibited, not incitement to discriminate.

Protected sphere of activity

²¹ In Opinion No. NDISCR– MNG /135/2009 (TND) of 9 July 2009, par. 24 states that Article 10 of the ECHR could be violated because prohibiting the incitement to discriminate would also affect the freedom of the media. As further stated, “[w]hile 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.”

28. This aspect of the law has been substantially changed since the first draft and is much stronger as a consequence. However, it would be further strengthened by the inclusion of a provision which sets out clearly the scope of the law. Article 7 refers to the application of the law for all natural persons to whom the law of Montenegro applies, but it is not clear that the law prohibits discrimination both in the public and private sector, and by natural or legal persons. Such clarification is desirable.

29. Moreover, it is not entirely clear which areas of activity are covered. While Article 3 is not restricted to any specific sphere, the provisions in Articles 13 – 19 refer only to discrimination in certain specific areas. This leaves room for doubt and confusion when interpreting the law. In order to meet EU standards²², the law should unequivocally prohibit discrimination in:

- access to employment, self-employment and occupation, vocational training;
- employment conditions, including dismissals and pay;
- membership / involvement in workers associations or professional bodies;
- social protection, including social security and healthcare;
- education;
- access to and supply of goods and services which are available to the public, including housing.

It is therefore recommended that;

- **the law prohibits discrimination both in the public and private sector, and by natural or legal persons; and**
- **it is made clear which spheres of activity the law applies to, using the EU standards as a minimum.**

Victimization

²² This review applies the broader scope of the Race Equality and Gender Directives; it should be noted, however, that the Employment Equality Directive has a narrower scope, in that only the first three bulleted items apply.

30. Article 4 prohibits victimization. However, victimization claims are allowed only where a person has reported a case of discrimination or given a deposition before a competent authority. This is unduly restrictive: the concept of victimization was designed to protect all persons who complain of discrimination, or provide support or assistance to a person who claims discrimination from suffering repercussions. In addition, the scope of this article has been unduly narrowed by the requirement that a person is “acting conscientiously”. This opens up the possibility that victimization claims will end up examining the motives of a complainant or a person providing assistance to another person considering making a claim of discrimination. This issue should be irrelevant to the issue of victimization.

It is therefore recommended that; the definition of discrimination is widened to include any persons who provide support or assistance to a person or group wishing to make a claim of discrimination, and that the words “acting conscientiously” be removed.

Positive Action

31. Article 5 allows “special measures” for persons in unequal positions, in order to achieve full equality. This is a welcome provision as the realization of full equality may require positive action. EU law explicitly allows this, within certain limits.

Harassment

32. Article 9 defines harassment as a form of discrimination, thereby implementing EU law (namely the Racial Equality Directive) which states under Article 2 par. 3 that in certain circumstances, harassment shall be considered as a form of discrimination²³. The only slight deviation is that it includes actions which have the effect of causing *inter alia* “inconvenience”. It is important to note that this sets a very low threshold for discrimination, while the directives refer to an ‘intimidating, hostile,

²³ See Article 2 par. 3 of the Racial Equality Directive: “Harassment shall be deemed to be discrimination within the meaning of paragraph 1, when an unwanted conduct related to racial or ethnic origin 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.”

degrading, humiliating or offensive environment'. This discrepancy may simply arise from a translation error, but otherwise drafters may wish to consider this wording and ensure the draft law is in conformity with it.

Segregation

33. Article 12 defines and prohibits segregation, provided there is no “objective or reasonable justification”. Segregation is defined as separation based on any of the grounds referred to in Article 3(1). However, this is problematic. First, international standards have long made clear that racial segregation can *never* be justified;²⁴ hence this clause must make clear that racial segregation is not subject to any justification.

34. Conversely, in many instances separation by reference to other characteristics such as gender, or age may not only be justified but desirable. With the exception of racial segregation, separating persons according to personal traits need only be forbidden where one group is put at a disadvantage. Where such disadvantage arises, this will amount to direct or indirect discrimination, which is prohibited already under Article 3. Hence, there is no practical value to legislating against segregation, in this way. As a general rule, legislation should not unnecessarily create multiple and overlapping grounds for legal action unless there is some concrete benefit.

It is therefore recommended that; racial segregation is expressly prohibited in all circumstances.

35. Articles 12 – 19 describe certain forms of discrimination suffered by specific groups, or in some of spheres of life. It is unclear whether this list of situations is simply supplementing the general prohibition contained in Article 3, or whether these articles are intended to be exhaustive. It seems most likely that the former is intended;

²⁴ See Article 3 of the International Convention on the Elimination of All Forms of Racial Discrimination. In this context ‘racial’ is used to include race, colour, descent or national or ethnic origin, adopting the approach taken in UN CERD’s definition of racial discrimination: “...any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin...”.

hence a clarification in the Explanatory Notes to the latest draft would benefit a proper interpretation of the law.

36. A number of these articles overlap with Article 3 creating potential for confusion between different clauses. Thus, Article 14 is entirely unnecessary by reason of being redundant, since the definition of discrimination in Article 3 clearly includes the restriction of access to public buildings. The provision regarding unequal payment for work of equal value in Article 17 is similarly a clear cut case of direct discrimination and also need not be reiterated here. If these are included solely for clarification of the meaning of discrimination, it may be better to remove them from the legislation but include a detailed commentary on these issues in the Explanatory Notes.

Special exceptions for disability

37. The EU Employment Equality Directive requires reasonable accommodation where needed in a particular case, to be made by employers for a person with a disability. This is not a form of positive action, but ensures that appropriate measures are taken to allow equal participation by persons with disabilities in employment. Reasonable accommodation requires employers to make modifications or adjustments to the job application process, the physical environment, and policies and practices at work to facilitate qualified disabled candidates. Reasonable accommodation does not, however, require employers to undertake measures which impose a disproportionate burden. It appears that the last paragraph of Article 18 is intended to implement the requirement for reasonable accommodation, although it is worded so that a failure to take measures to remedy “limitations or unequal position” is a form of discrimination. In order to avoid any confusion as to the meaning of this paragraph, it is advisable to use the terminology and approach adopted in the Employment Equality Directive.

It is therefore recommended that; provisions regarding reasonable accommodation be re-drafted so as to be more conform with EU directives.

B. Remedies

Sanctions and Remedies

38. The EU Equality Directives require “effective, proportionate and dissuasive sanctions”. The sanctions provided for in the latest draft law are limited to court-imposed orders prohibiting repetition of discriminatory activity and compensation. In the case of media, orders to publish the judgment may also be made. However, there is no power to order or require other steps to correct discriminatory behaviour, nor to punish failure to comply with previous orders (although that may be part of the court’s jurisdiction under the civil code). These powers should be given to the court and to the Ombudsman/equality body.

It is therefore recommended that; courts and other bodies charged with investigating discrimination cases are given wider powers to impose sanctions for non-co-operation or non-compliance with previous orders and to correct discriminatory behaviour.

Grave Forms of Discrimination

39. Article 11 lists grave forms of discrimination, and is a valuable and important provision which could enable stronger sanctions for particularly egregious acts of discrimination. However, there appear to be no ‘operative clauses’ in the sense that there are apparently no differences in sanctions or remedial powers where grave discrimination occurs.

It is therefore recommended that; increased sanctions be imposed for grave forms of discrimination.

C. Procedure

40. The first draft gave the Ombudsman a role in investigating claims of discrimination and both the ODIHR’s earlier opinion, and that of the Venice

Commission²⁵, emphasized that the functions of the Ombudsman/equality body should include significant and meaningful powers to support and represent complainants financially. Second, it was recommended that the body be operationally independent of the government. Regretfully, the latest draft appears not to have followed these recommendations. The Ombudsman's powers are restricted to receiving complaints, and reporting/making recommendations to Parliament. As the Ombudsman can only investigate the conduct of public bodies, the enforcement of the law against private persons and organizations is only possible through litigation.

41. In order to achieve the goal of reducing and combating discrimination, litigation must be supplemented by other remedies such as arbitration, conciliation and administrative action. There are many reasons for this. First, litigation is expensive and generally slow. In terms of the remedies available, this will depend on the legal framework in place, but they are likely to be limited to financial penalties in the way of fines or compensation. Second, the execution of such sentences in turn depends on the means of the respondent party. Additionally, complainants may for many reasons feel reluctant to take legal action: It requires knowledge of their legal rights, and a willingness to be identified as a complainant. It also means enforcement can be haphazard.

42. The EU Equality Directives require that Member States 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 a national level with the defence of human rights or the safeguard of individuals' rights. The competences of these bodies should include:

- providing independent assistance to victims of discrimination in pursuing their complaints about discrimination;
- conducting independent surveys concerning discrimination; and

²⁵ See footnote 18 supra

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

43. Therefore, the government should consider an approach which incorporates elements of administrative action, and conciliation, with litigation as only one part of a broader set of remedies. This can be particularly valuable where there is a large gap between the aspirations of the legislation and the readiness of employers and society at large to implement the equality provisions in full. By being given a responsibility to foster equality and to educate as well as to adjudicate situations of discrimination, an independent equality body can be an effective mechanism.

44. The shift in the burden of proof which is required under EU law is articulated in Article 24. Article 23 allows claims to be made within 60 days of the “cognition of discrimination”. This change from the original time limit of 15 days is welcome.

45. An important lacuna is the absence of a provision for intervention by third parties in legal proceedings. The EU Equality Directives require that Member States enable legal entities having a legitimate interest in ensuring that the directives are complied with, to act on behalf of or in support of a complainant. Such provisions are especially necessary in the absence of an equality body with robust powers to act to prevent or sanction cases of discrimination. Additionally, drafters may wish to consider creating other procedural provisions tailored to discrimination claims, such as allowing statistical evidence to be adduced in support of a claim of discrimination.

It is therefore recommended that;

- **In accordance with EU standards, a specialized equality body is created, with investigatory and adjudicatory powers and a strong promotional role;**
- **third parties with a legitimate interest are allowed to intervene in proceedings on behalf of complainants, and;**

- **statistical evidence is made admissible in support of a claim of discrimination.**

D. CONCLUSION

46. The latest draft law is ambitious in attempting to cover all possible grounds of discrimination, and has been significantly improved since the first draft. But there remain problematic aspects which mean that the latest draft still falls short of its objectives and EU standards. The long list of discrimination grounds necessitates broad exceptions which undermine the purpose of the law. The lack of an effective and independent enforcement mechanism threatens to make the law an empty shell. The Government is urged to further amend this draft in consultation with civil society and relevant experts, in order to amend these deficiencies. The ODIHR stands ready to provide assistance as necessary.

[END OF TEXT]

ANNEX A: DRAFT LAW ON PROHIBITION OF DISCRIMINATION



Montenegro
GOVERNMENT OF MONTENEGRO
**Ministry of Human and
Minority Rights Protection**

**DRAFT LAW
ON PROHIBITION OF DISCRIMINATION**

Podgorica, November 2009

Draft

LAW ON PROHIBITION OF DISCRIMINATION

I GENERAL PROVISIONS

Subject of the Law

Article 1

Protection from discrimination shall be exercised pursuant this Law, as well as pursuant other laws regulating protection from discrimination on particular grounds or related to exercise of particular rights.

Protection from discrimination

Article 2

Protection from discrimination implies undertaking of measures and activities for suppression and prevention of discrimination, creation of equal possibilities and achieving the equality of all citizens in exercising rights and freedoms, as well as court protection.

Definition of discrimination

Article 3

Discrimination is any unjustified legal or physical, direct or indirect distinction or unequal treatment, or non-treatment of a person or a group of persons in comparison to other persons, as well as exclusion, restriction or giving preference to a person in comparison to other persons, based on sex, race, colour of skin, national affiliation, social or ethnic origin, affiliation to minority nation or minority national community, language, confession, political or other opinion, sexual orientation, health conditions, disability, age, material status, membership in a group or assumed membership in a group, as well as other personal characteristics.

Direct discrimination exists if a person or a group of persons, in the same or similar situation in respect to other person or group of persons, is brought or have been brought into unfavourable

position by any act, action, failure to act on any of the grounds referred to in paragraph 1 of this Article.

Indirect discrimination exists if an apparently neutral provision, criterion or practice is bringing or can bring a person or a group of persons into unfavourable position in respect to other person or group of persons, on any of the grounds referred to in paragraph 1 of this Article, except in the cases when that provision, criterion or practice is objectively and reasonably justified by a legitimate goal and achievable with the means appropriate and necessary to use for achieving that goal, or when they are acceptable and proportionate in relation to the goal to be achieved.

The incitement to discriminate certain person or a group of persons on any of the grounds referred to in paragraph 1 of this Article shall be deemed to be discrimination.

Protection from victimisation

Article 4

No one who, by acting conscientiously, reports a case of discrimination or in any capacity gives a deposition before a competent authority in the proceeding investigating a case of discrimination, shall suffer damaging consequences.

Causing a damaging consequences referred to in paragraph 1 of this Article shall be deemed to be discrimination.

Special measures for protection from discrimination

Article 5

Special measures, directed on providing conditions for realisation of national, gender and overall equality and protection of persons being in unequal position based on any of the grounds referred to in Article 3 paragraph 1 of this Law, may be imposed by state bodies, bodies of the state administration, bodies of the units of local self-government, public enterprises and other legal persons performing public powers (hereinafter referred to as: bodies), as well as other natural and legal persons.

Consent

Article 6

Consent of a person to be discriminated shall not relieve from liability the person performing discrimination or a person inciting discrimination.

Application of the Law

Article 7

Provisions of this Law are in effect for all natural persons whereon the legislation of Montenegro applies.

Protection from discrimination in accordance with this Law also can be achieved by legal persons being discriminated on any of the grounds referred to in Article 3 of this Law.

Use of gender sensitive language

Article 8

Expressions used in this Law referring to a natural person in masculine, consider the same expressions in feminine.

II SPECIAL FORMS OF DISCRIMINATION

Harassment

Article 9

Harassment, on any of the grounds referred to in Article 3 of this Law, represents unwanted conduct or action with the purpose or effect of violating a personal dignity, and which causes a state of intimidation, inconvenience, animosity, humiliation or offensiveness.

Mobbing

Article 10

Mobbing is a form of conduct at working place representing systematic, prolonged physical abuse or humiliation of one person conducted by other person or persons by the way of insulations, depreciation, harassment and other activities having for a goal a harm of his personal reputation and moral, human dignity and integrity and which can lead to the harmful consequences on his physical or mental health or compromise professional future of the employee the victim of mobbing.

Grave form of discrimination

Article 11

Discrimination causing, or that can cause, grave consequences for the victim of discrimination, represents a grave form of discrimination, what shall be considered by the court in occasion of deciding about the sanction or compensation of damage.

Segregation

Article 12

Segregation represents a separation of persons or a group of persons, on any of the grounds referred to in Article 3 paragraph 1 of this Law, under the condition that there is no objective and reasonable justification for such treatment.

Discrimination in procedures before public state authorities

Article 13

Any unjustified differentiation or unequal treatment before the state bodies, bodies of the local self-government, public services and other holders of public powers of a person or a group of persons, on any of the grounds referred to in Article 3 paragraph 1 of this Law, shall be deemed to be discrimination.

Discrimination in use of facilities/buildings and areas in public use

Article 14

Restricting or disabling the use of facilities/buildings and areas in public use to a person or a group of persons, on any of the grounds referred to in Article 3 paragraph 1 of this Law, shall be deemed to be discrimination.

Discrimination on the grounds of health conditions

Article 15

Disabling, restricting or making difficult for a person to work, to get employment, education or exercise other rights, shall be deemed to be discrimination.

Discrimination in the field of education and vocational training

Article 16

Discrimination in the field of education and vocational training is deemed to be complicating or preventing from enrolment in educational institution and institution for high education and selection of educational

programme on all levels of education, expelling from mentioned institutions, making difficult or deny the possibility of attending classes and participate in other educational activities, classification of children, pupils, participants in education and students, abuse or in other way making unjust differentiation or unequally treating them, on any of the grounds referred to in Article 3 paragraph 1 of this Law.

Discrimination in field of labour

Article 17

In addition to the cases of discrimination prescribed by the law regulating the field of labour and employment, discrimination at work shall be deemed to be also payment of unequal salary or compensation amount for the work of equal value to a person or a group of persons, on any of the grounds referred to in Article 3 paragraph 1 of this Law.

Persons performing temporary or seasonal work or work by special agreement, students and pupils on practice, as well as other persons participating on any ground in the work for an employer, have the right on the protection from discrimination referred to in paragraph 1 of this Article.

Discrimination of persons with disabilities

Article 18

Under discrimination of a person with disability shall be especially deemed: preventing or making difficult the access to health care i.e. denial of the right to health care, regular medical treatment and medicines, rehabilitation means and measures, in accordance with his needs, denial of the right to marry, form a family and other rights from the field of matrimony and family relations, denial of the rights on schooling or education, denial of the right to work and the rights related to employment relations.

Discrimination of the person with disability exists also in the case when measures to remedy limitations or unequal position, this person is facing on the basis of disability, are not taken.

Discrimination on the basis of gender identity and sexual orientation

Article 19

Any differentiation, unequal treatment or bringing in unequal position of a person on the basis of gender identity or sexual orientation , shall be deemed to be discrimination in the spirit of this Law.

Everyone has the right to publicly declare his gender identity and sexual orientation.

Provisions referred to in paragraphs 1 and 2 of this Article relates also to transgender and transsexual persons.

***Application of provisions
regulating protection from discrimination***

Article 20

On discrimination regulated by a separate law, i.e. by law regulating exercise of certain rights, are applied provisions of this law regulating protection from discrimination.

III COURT PROTECTION

Initiation of proceeding

Article 21

Everyone who deems to be damaged by discriminatory treatment has the right to be protected before the court in accordance with the law.

Proceeding shall be initiated by filing an action.

Statement of claim

Article 22

By action referred to in Article 21 of this Law one can claim also:

1. establishment of the fact that the respondent has acted discriminatory towards the plaintiff;
2. prohibition of exercising the activity that bears potential treat of discrimination, i.e. prohibition of repetition of discrimination activity;
3. compensation of damage, in accordance with the law,
4. in case discrimination is performed by the way of media, publication in the media of the judgement establishing discrimination, on the expenses of respondent.

In cases referred to in paragraph 1, items 1 and 2 of this Article, the statement of claim shall be exert together with the requests for protection of the right to be decided in civil proceeding if those clams are correlated.

Action referred to in paragraph 1, items 1 and 2 of this Article, can be filed individually only if act or action of discrimination did not had as a consequence the lost or violation of some right.

On the acts and actions of discrimination committed by official persons during the court proceeding, can be pointed out only in legal remedies.

Deadline for filing the action

Article 23

Action referred to in the article 22 paragraph 3 of this Law can be filed within 60 days from the day of cognition for discrimination performed.

Burden of proof

Article 24

If the plaintiff makes probable the facts that the respondent committed an act of discrimination, the burden of proof, that that act did not violated equality in rights and equality before the law, passes on the respondent.

Paragraph 1 of this Article does not refer to misdemeanour and criminal proceedings.

IV INSTITUTIONAL FRAME

Protector of human rights and freedoms

Article 25

Anyone who considers that he has been discriminated by an act, action or failure to act of an authority can address the Protector of Human Rights and Freedoms by a complaint.

Procedure by the complaints referred to in the paragraph 1 of this article shall be conducted in compliance with the Law on the Protector of Human Rights and Freedoms.

Report of Protector of Human Rights and Liberties

Article 26

Protector of Human Rights and Freedoms, in separate part of the annual report, shall inform the Parliament of Montenegro on noted cases of discrimination and undertaken activities and give recommendations and propose measures for remedy of discrimination.

About noted cases of discrimination the Protector of Human Rights can submit to the Parliament of Montenegro a separate report, if evaluates the need for that according to the exceptionally important reasons.

V INSPECTION CONTROL

The role of inspection

Article 27

Inspection control over the implementation of this law in respect to discrimination in the field of labour and employment, protection at working place, health care, education, building and construction, traffic, tourism and other fields shall be performed by inspections competent for those fields, in accordance with the law.

VI FINAL PROVISION

Entering into force

Article 28

This Law shall enter into force on the eighth day as of the day of publication in the “Official Gazette of Montenegro”