



Opinion on the proposed amendments to the Law on the Prohibition of Discrimination of Serbia

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Strasbourg, May 2021

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<https://www.coe.int/en/web/inclusion-and-antidiscrimination>

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This opinion was produced with the financial support of the European Union and the Council of Europe. The views expressed herein can in no way be taken to reflect the official opinion of either party.

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Introduction

On 24 February 2021, the Council of Europe was addressed by the Minister for Human and Minority Rights and Social Dialogue of Serbia, requesting a legal opinion on the amendments to the Law on the Prohibition of Discrimination of Serbia (*Law on amendments and supplements to the Law on the Prohibition of Discrimination*), following the consultation process with national stakeholders.

To respond to this request, Christian Ahlund and Robert Wintemute were asked to jointly prepare as independent experts an analysis, including comments and recommendations, and any possible proposed amendments to the draft law. This legal opinion takes into consideration the Council of Europe standards and monitoring reports in the field of anti-discrimination and promotion of equality, including the country monitoring reports and General Policy Recommendations of the European Commission against Racism and Intolerance, the case law of the European Court of Human Rights, as well as the latest European Commission Progress Reports on Serbia and the EU acquis.

This document and all comments are based on the English translation, provided by the Council of Europe, of the draft amendments received on 21 April 2021.

Part one - General comments:

1. According to the [2017 Report on Serbia](#) of the European Commission against Racism and Intolerance (ECRI), the Law on the Prohibition of Discrimination (LDP) does not place public authorities under a duty to ensure that those parties to whom they award contracts, loans or other benefits respect and positively promote a policy of non-discrimination, as per article 9 of [ECRI General Policy Recommendation N°7](#) (revised) on national legislation to combat racism and racial discrimination, 2017. The Draft LPD does not seem to contain any such provisions. A provision to that effect should be included in the law.
2. ECRI's 2017 report (paragraph 15 vi) recommends that the law provides *'for an obligation to suppress public financing of all organisations, including political parties, which promote racism'*. A provision to that effect should be included in the law.
3. In the Draft Law, Article 10, a new last sentence should be included: *"An association which has been created for the above purpose shall be dissolved"*, in line with article 17 of ECRI General Policy Recommendation n.7.
4. In the Draft Law, Article 16, paragraph three, after "be considered to constitute discrimination" the words *"provided that the requirement is proportionate"* should be added, in accordance with the article 4 of the [Council Directive 2000/78/EC](#) of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

5. In its 2017 report, ECRI noted that access to justice for victims of discrimination was severely hampered by the absence of a law on free legal aid. It recommended that such legislation, including free representation by a lawyer, be enacted (paragraphs 12 and 15). It is noted with satisfaction that such a law was enacted in 2018.
6. According to paragraph 21 of [ECRI General Policy Recommendation N°2 revised on Equality Bodies to combat racism and intolerance at national level, 2017](#): "Equality bodies should, in particular when conducting inquiries and deciding on complaints, have powers to obtain evidence and information. They should include powers to:
 - a.require the production of files, documents and other material for inspection, examination and making copies thereof;
 - b.conduct on-site inspections;
 - c.question persons;
 - d.apply for an enforceable court order or impose administrative fines if an individual or institution does not comply with the above."

According to the Draft Law, Article 18, paragraph 3, the Commissioner shall have the right to "take statements from the complainant, the person against whom the complaint was lodged, as well as from other persons". This provision appears to satisfy the above required power to "question persons", but the rest of the required powers appear to still be missing from the Draft Law.

Part two - Comments on specific Draft Law provisions

Article 1

In Article 1, paragraph 4) the words: "and other organisation entrusted with" shall be replaced by the words: "other organisation or natural person entrusted with".

The beginning of the above (second) paragraph should read "In Article 2, paragraph 4)" (typo).

Article 2

In Article 5, after the words: „hate speech" a comma shall be added and the words: „and disturbing and humiliating treatment" shall be replaced by the words: "harassment, humiliating treatment and sexual and gender harassment and incitement to discrimination".

New paragraphs 2 and 3 shall be added to read:

"Segregation is any act by which a natural or legal entity separates, without an objective and reasonable justification, other persons or a group of individuals on account of their personal characteristics referred to in Article 2, paragraph 1, point 1 of this Law. Voluntary separation from other persons on account of personal characteristics shall not represent segregation.

A form of discrimination is incitement to discrimination. Discrimination shall occur if an individual or a group of persons shall be incited to discrimination and are given instructions on how to undertake discriminatory actions or if they are incited to discrimination in other similar manner”.

ECRI GPR n.7, Art III:6 recommends that the law includes *inter alia* "segregation" and "announced intention to discriminate" among the forms of discrimination. The new Draft Law, Article 5, paragraph two, contains a definition of segregation, but there is no mention of segregation as a form of discrimination in the first paragraph – as the basis for the definition. Both "segregation" and "announced intention to discriminate" should be added to the enumeration in paragraph 1.

Article 3

“Indirect discrimination shall occur if seemingly a neutral provision, criterion or practice places or might place an individual or a group of persons, on account of their personal characteristics, in an unfavourable position in comparison to other persons in the same or similar situation, unless it is justified by legitimate objective and the means of achieving that objective are proper and necessary”.

In its Report from 2017, ECRI found that the definition of indirect discrimination in Article 7 of the LPD was not fully in line with European standards. With the new wording of Article 7 of the Draft Law, this concern has been dealt with.

Particularly, since in the latest version "a lawful objective" has been replaced by "a legitimate objective". This language is in line with the language used both by the EU Directives and ECRI's GPR n.7 art 1.c) stating "indirect racial discrimination" shall mean cases where an apparently neutral factor such as a provision, criterion or practice cannot be as easily complied with by, or disadvantages, persons belonging to a group designated by a ground such as race, colour, language, religion, nationality or national or ethnic origin, unless this factor has an objective and reasonable justification. This latter would be the case if it pursues a legitimate aim and if there is a reasonable relationship of proportionality between the means employed and the aim sought to be realised”.

Article 4

In Article 8, the words: “if the objective or the consequence of the measures undertaken is unjustified, and if the measures undertaken are not commensurate with the objective achieved through them” shall be replaced by the words: “unless it is justified by a legitimate objective and the means of achieving that objective are proper and necessary”.

As per the above comment on the "legitimate objective". The word "unwarrantedly" duplicates "unless it is justified" and should be removed. Also, the Draft Law should make it clear that direct discrimination based on sex or racial or ethnic origin cannot be justified, in line with the EU acquis. This is

specifically related to the provisions of the [Council Directive 2000/43/EC](#) of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin and [Directive 2006/54/EC of the European Parliament and of the Council](#) of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) The EU law does not permit justification, if an express exception does not apply.

Article 5

Sexual harassment, within the meaning of this Law, shall mean any form of unwanted verbal, non-verbal or physical conduct, with the purpose or effect of violating the dignity of a person, in particular when inducing fear or creating an intimidating, hostile, degrading, humiliating or offensive environment”.

The amendment of Article 12, last paragraph, includes a definition of sexual harassment, which seeks to implement Article 2(1)(d) of the above mentioned Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast).

Likewise, it appears the definition is taken verbatim from the ECRI GPR No 7, Explanatory Memorandum, paragraph 35, related to the general definition of harassment: *“Harassment consists in conduct related to one of the enumerated grounds which has the purpose or the effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. As far as possible, protection against harassment related to one of the enumerated grounds should not only target the conduct of the author of the harassment but also that of other persons.’.*

The Draft Law definition of sexual harassment is insufficient because it does not specify that the described “unwanted conduct” must be *“of a sexual nature”*.

Article 7

Special measures introduced for the purpose of achieving full equality, protection and progress of an individual or a group of persons who may find themselves in unequal positions shall not constitute discrimination.

Article 14 paragraph 1 should read: *“Special measures for the purpose of achieving full equality, protection and progress of an individual or a group of persons who are in an unequal position shall not constitute discrimination. These measures should not be continued once the intended objectives have been achieved”*. This is in line with ECRI GPR n.7 art 5, *“The law should provide that the prohibition of racial discrimination does not prevent the maintenance or adoption of temporary special measures designed either to prevent or compensate for disadvantages suffered by persons designated by the grounds*

enumerated in paragraph 1 b) (henceforth: enumerated grounds), or to facilitate their full participation in all fields of life. These measures should not be continued once the intended objectives have been achieved.” Under [Case C-407/98, Abrahamsson](#) (Court of Justice of the EU, 6 July 2000), special measures should not result in an automatic preference for members of an under-represented group, but should instead amount to “breaking a tie” between persons with equal qualifications.

A new (reinserted) third paragraph of Article 14 should read: “*Within their respective mandates, public administration organs shall undertake appropriate measures aimed at promoting equality and preventing discrimination in carrying out their functions*”. This is in line with ECRI 2017 report, paragraphs 11 and 15. Paragraph 11 recommends this as per ECRI GPR n.7, as a positive duty to be introduced into the LPD or the Constitution. Paragraph 15 further elaborates on the need to bring the anti-discrimination legislation in line with ECRI GPR n.7.

3) *a risk assessment as to the rights, obligations and lawfully grounded interests of individuals and groups of persons referred to in paragraph 3 of this Article*”.

Article 14, (new) paragraph 4, 3) should read:” ..persons referred to in paragraph 2”.

Article 9

“In the course of conducting the divine service, religious services and other religious activities in churches and religious communities whose system of values is based on faith or belief, different treatment by priests or religious officials towards individuals or a group of persons in the course of conducting such activities shall not represent discrimination in case where, due to the nature of the activity or circumstances under which they are being conducted, faith or belief represents an actual, lawful and justified prerequisite for its conducting, in accordance with the system of values of the church and religious community registered in the registry of religious communities, in accordance with the law. Churches or other religious communities, whose system of values is based on faith or belief, in accordance with the Constitution and the law, may request from individuals, who are conducting the divine service, to act in good faith and with loyalty to the system of values of the church or other religious community”.

The new version of Article 18, paragraph 2 is not in accordance with the EU Directive 2000/78, Article 4, as the new 2 refers to the conduct of religious services, whereas the Directive concerns the occupational activities and requirements within churches and other public or private organisations, whose ethos is based on religion or belief.

It is recommended to revise the paragraph as per the following: “*In the course of providing religious services and conducting other religious activities in churches and religious communities whose system of values is based on religion or belief,*

different treatment by priests or religious officials towards individuals or a group of persons in the course of conducting such activities shall not represent discrimination where, due to the nature of the activities or of the context in which they are carried out, religion or belief represents a genuine, legitimate and justified occupational requirement, having regard to the organisation's system of values. This difference of treatment should not justify discrimination on a ground other than religion or belief. Churches or other religious communities, whose system of values is based on religion or belief, in accordance with the Constitution and the law, may request from individuals, who are conducting religious activities, to act in good faith and with loyalty to the system of values of the church or other religious community”.

Article 11

“Different treatment on the grounds of age shall not be considered discrimination provided it is objective, and reasonably justified by a legitimate objective and, in particular, by legitimately defined employment policy, labour market objectives, further education and training or professional training, and provided the ways of achieving such objective are proper and necessary, such as:

1) imposing special conditions for employment, job performance and further education or professional training and development, including also the conditions with regard to earnings and termination of employment, for the youth, the elderly and individuals who are obligated to provide financial support or care, for the purpose of stimulating their inclusion into the labour market or ensuring their protection;

2) defining minimum conditions pertaining to age, working experience, or years of service for access to employment or securing certain priorities for employment;

3) determining the maximum age for employment, which is based on conditions for inclusion into further education or professional training and development for performing certain jobs or based on the necessity of a reasonable duration of the period of employment prior to fulfilling the requirements for acquiring the right to a pension”.

The intention of Article 23 is obviously to follow the standards established by the EU Directive 78/2000, Article 6. The proposed wording largely supports that intention. For even closer adherence to the EU text, it is suggested the new paragraph 3 would read as follows:

“Notwithstanding [one word] Articles 6 and 7, different treatment on the grounds of age shall not constitute discrimination provided it is objective, and reasonably justified by a legitimate aim including a legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.

Such differences of treatment may include, among others:

- 1) imposing special conditions for employment, job performance and further education or professional training and development, including also conditions with regard to earnings and termination of employment, for the youth, the elderly and individuals who are obligated to provide financial support or care, for the purpose of stimulating their inclusion into the labour market or ensuring their protection;
- 2) defining minimum conditions pertaining to age, working experience, or years of service for access to employment or securing certain priorities for employment;
- 3) determining the maximum age for employment, which is based on conditions for inclusion into further education or professional training and development for performing certain jobs or based on the necessity of a reasonable duration of the period of employment prior to fulfilling the requirements for acquiring the right to a pension”.

Article 12

After Article 27, a title above Article 27a shall be added to read: “Discrimination in the area of housing”

In its report from 2017, paragraph 10, ECRI wanted a clarification whether the general prohibition of discrimination applied also to housing and social protection. Against that background, the introduction of Article 27a , which expressly prohibits ”discrimination in the area of housing” is a welcome development of the Draft Law.