Programmatic Cooperation Framework for
Armenia, Azerbaijan, Georgia, Republic of Moldova, Ukraine and Belarus

Funded by the European Union and the Council of Europe

EUROPEAN UNION

COUNCIL OF EUROPE

CONSEIL DE L'EUROPE

Implemented by the Council of Europe

July 2016

Assessment of Law no. 298 on the activity of the Council for Prevention and Elimination of Discrimination and Ensuring Equality in Moldova

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The views expressed in this report are those of the authors and do not necessarily reflect those of the Council of Europe or the European Union. This report has been prepared as a result of an independent assessment by the consultants being contracted under the Project "Supporting national efforts for prevention and combating discrimination in Moldova"

Contents

1. Introduction

This report provides an assessment of Law no. 298 on the activity of the Council for Preventing and combating Discrimination and Ensuring Equality (hereinafter the Council) along with suggestions for its further development. The Law entered into force in January 2013. The Council was established under Law no. 121 on Ensuring Equality, which was also consulted for the purpose of this opinion.

The Opinion is based on an unofficial translation of the Law provided by the Council of Europe Office in Moldova. Errors due to the interpretation are therefore possible. It should further be noted that this work is further limited in that it does not extend to all current pieces of legislation in Moldova pertaining to discrimination or connected with it. It explores issues related to their coordination only to a limited extent.

Law no. 298 and the accompanying regulation address the manner in which the Council should operate. The Opinion addresses those provisions of the Law which are of concern vis-à-vis international standards as set out in the Opinion on National Mechanisms to Promote Equality issued by the Commissioner for Human Rights of the Council of Europe, the European Commission against Racism and Intolerance (hereinafter ECRI) General Policy Recommendations no. 2 and no. 7, and in the EU equal treatment Directives: Council Directive 2000/43/EC implementing the principle of equal treatment of persons irrespective of racial or ethnic origin; Council Directive 2004/113/EC implementing the principle of equal treatment between men and women in access to and supply of goods and services; and Directive 2006/54/EC implementing the principle of equal opportunities and equal treatment between men and women in matters of employment and occupation (Recast). Reference is also made to the European Convention on Human Rights (hereinafter ECHR), the UN Principles relating to the Status of National Institutions (Paris Principles), and the UN Convention on the Rights of Persons with Disabilities.

The present analysis includes recommendations aimed at ensuring full compliance of Law no. 298 with these standards. It also takes into account the findings of the Compatibility Analysis of Moldovan Legislation with European Standards on Equality and Non-discrimination published by the Legal Resources Centre of Moldova and the Euroregional Centre for Public Initiatives in 2015.[1]

[1] Available at: http://crim.org/wp-content/uploads/2015/07/LRCM-Compatib-MD-EU-nondsicrim-legis-2015.pdf. The report focuses on the provisions of Law no. 121 related to the mandate and role of the Council, including the complaint mechanisms it establishes, and contextualises these vis-à-vis domestic practices and the broader legal framework.

2. Overview of standards applicable to equality bodies

2.1 Independence and effectiveness

Council of Europe standards[2] establish independence and effectiveness as the two core indicators against which to assess equality bodies and their operations. Independence is defined in terms of "being able to allocate their resources as they see fit, make decisions in relation to their own staff, determine their own priorities and exercise their powers as and when they deem necessary". Legal structure, forms of accountability, appointment processes and leadership are key factors identified for independence.

Effectiveness is defined in terms of being able "to deploy all of their functions and powers to a scale and a standard that ensures impact and the full realisation of their potential". Resource levels, powers and functions, being strategic, being accessible, stakeholder engagement, and networking are key factors identified for effectiveness.

Accessibility is identified in this standard as an element of effectiveness. However, given its importance it is addressed as a separate indicator for the purpose of this report.

The European Union equal treatment Directives on grounds of gender and of racial or ethnic origin provide that equality bodies must be independent in carrying out their functions. They require Member States to designate or establish an equality body to: provide independent assistance to victims of discrimination in pursuing complaints of discrimination; conduct independent surveys on discrimination; and publish independent reports and make recommendations on any related issue.[3]

The European Commission review of the "Race" Directive and the "Framework Employment" Directive emphasised effectiveness as a criterion for equality bodies and a requirement "to ensure that equality bodies have the powers and the resources that are necessary to effectively carry out their tasks including the crucial element of providing assistance to victims of discrimination".[4] The review of the "gender employment" Directive provides some further detail on independence in emphasising, "equality bodies can only perform their tasks independently if

[2] Opinion on National Mechanisms to Promote Equality, Office of Commissioner for Human Rights, Council of Europe, Strasbourg, 2010 - available at: https://wcd.coe.int/ViewDoc.jsp?p=&id=1761031&direct=true.

[3] Council Directive 2000/43/EC implementing the principle of equal treatment of persons irrespective of racial or ethnic origin; Council Directive 2004/113/EC implementing the principle of equal treatment between men and women in access to and supply of goods and services; and Directive 2006/54/EC Implementing the principle of equal opportunities and equal treatment between men and women in Matters of Employment and Occupation (Recast).

[4] Joint Report on the application of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin ('Racial Equality Directive') and of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation ('Employment Equality Directive'), Report from the Commission to the European Parliament and the Council, COM (2014) 2 final, Brussels, 2014.

they are also independent to some extent in terms of organisation and financial and human resources".[5]

Effectiveness is further influenced by the nature of sanctions that can be and are awarded in cases where discrimination is found to have occurred. The EU equal treatment Directives require that sanctions be "effective, proportionate and dissuasive". This underpins a concern to address damage done to the complainant, improve the situation of the complainant, and prevent recurrence of similar discrimination.

The Council of Europe standards[6] have a particular focus on the operations of equality bodies. In relation to independence, they recommend the need for independent leadership and to develop an internal culture of independence. They emphasise the importance of engagement with public authorities, employer bodies, trade unions and non-governmental organisations to mobilise, develop and support a wider framework of action for equality and non-discrimination.

In relation to effectiveness, they recommend the need for equality bodies to adopt a strategic approach with a strategic plan for their work, to develop and implement a communication strategy, and to devise criteria for the selection of cases to be supported. They emphasise the need to develop systems and fora for stakeholder participation, engage in networking at national level with other statutory bodies with linked mandates in relation to equality and human rights, and engage in European networking of equality and human rights bodies. They point to the need to secure visibility in the work of equality bodies for all grounds of discrimination covered.

2.2 Accessibility

In relation to accessibility, the Council of Europe standard referenced above recommends that equality bodies establish a local presence or outreach activities that cover their full geographical remit. They emphasise the need to devise and implement cost-free and simple procedures in their work to enhance accessibility and the need to support non-governmental organisations and trade unions to provide advocacy supports to people experiencing discrimination.

The European Union Agency for Fundamental Rights has published research that provides further insights into the demands of accessibility.[7] This research on access to justice identifies the importance of:

[5] Report from the Commission to the Council and the European Parliament, Report on the application of Directive 2002/73/EC of the European Parliament and the Council of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, COM (2009) 409 final, Brussels, 2009.

[6] Opinion on National Mechanisms to Promote Equality, Office of Commissioner for Human Rights, Council of Europe, Strasbourg, 2010 - - available at: https://wcd.coe.int/ViewDoc.jsp?p=&id=1761031&direct=true.

[7] Access to Justice in Cases of Discrimination in the EU: Steps to further equality, European Union Agency for Fundamental Rights, Luxembourg, 2012.

- "Structures including the format of equality legislation and complaints mechanisms as well as structures in terms of geographical proximity to complaint mechanisms;
- Procedures from the perspective of usability, fairness and effectiveness of procedures;
- Support including access to legal advice and assistance and provision of other forms of support, such as emotional, personal and moral, as well as rights awareness and accommodation of diversity, enabling access irrespective of needs such as those of persons with disabilities".

According to this research report, the structures established to deal with cases of discrimination need to make it easy for complainants to determine which institution to address. Legal definitions of discrimination need to be clarified and legal provisions standardised. It is important to bridge physical distance to first contact points for complainants when accessing justice.

Procedures in cases of discrimination need to address the currently narrow concept of legal standing to bring a case; a lack of "equality of arms" between those involved in a case; a lack of protection of complainants and witnesses from victimisation; judges' insufficient awareness of equality legislation; and the inadequate application of the shift of burden of proof;

The research points to the need to facilitate faster and simpler procedures; to ensure adequate resources for the equality body to avoid undue delays and backlogs; and to empower quasi-judicial-type equality bodies and other administrative/judicial institutions to take legally binding decisions. In relation to sanctions it emphasises the importance of provisions that could facilitate a return, where possible and requested by the complainant, to the situation before the discrimination took place and to be able to meet complainants" goals in discrimination cases.

Supports available to complainants need to include access to legal aid or to the use of legal insurance to cover costs and need to ensure easy accessibility and availability of legal advice and support during the entire procedure. The report emphasises the need to accommodate the diversity of complainants. Equality body procedures to identify and adequately respond to differences in needs of complainants as well as awareness of and competence in these issues among the equality body staff are viewed as key. Quality communication strategies, including outreach initiatives targeting particular groups at risk of discrimination, and tailoring information to their specific needs, are also important for accessibility.

3. Analysis of selected articles and recommendations

3.1 General Perspective

Article 2 of the regulation in Law no. 298 states the mission of the Council is to protect against discrimination, to ensure equality and to restore the rights of all discriminated persons. This reflects article 11 (1) of Law no. 121 on Ensuring Equality. The mission stated could usefully

reference a role in the prevention of discrimination given that this function is named in the title of the Council.

This is indicative of a general issue for Law no. 298. It is largely predicated on a narrow understanding of the mandate of the Council. It does make mention of the various activities the Council can engage in on foot of its mandate. However, a concern with the legal work and, specifically, the hearing and resolution of cases dominates the provisions.

Article 10 of the regulation, for example, requires that the meetings of the Council are public, while allowing for closed meetings under limited circumstances. It is appropriate, given the quasi-judicial nature of the Council, to ensure that claimants and respondents have the possibility to request that an examination of a case be conducted in private. The limited circumstances set out for this, however, might not be sufficient to cover all the situations where it might be appropriate to grant such a request and the role of the Council might be unduly fettered in this regard. Article 10 also appears to be in contradiction with article 63 which requires the Council to deliberate on cases in closed meetings.

Further, this provision allowing for closed meetings does not allow for the Council to conduct its work involving other types of intervention or planning and evaluation activity which would be better conducted in private. These different types of meetings and their requirements for privacy could usefully be addressed in article 10.

Article 19 of the regulation sets out that the Council can adopt decisions, ex-officio acts, consultative endorsements, finding acts, provide orders and notifications, develop studies and reports, present information and submit requests. It is a list of actions that are relevant to the legal work of the Council, but the article appears to refer to all duties of the Council. Consideration of other areas of its work would have resulted in the inclusion of other forms of activity and this could usefully be amended.

Council of Europe standards[8] identify four categories of work for equality bodies:

- Enforcement: enforce the equal treatment legislation through providing assistance to claimants and investigating and hearing cases of discrimination.
- Communication: create awareness of rights under the legislation and how to exercise these rights, and awareness of equality and the case for an equal society.
- Research: build a knowledge and evidence base through survey work and research projects to support action on discrimination and equality.

[8] Opinion on National Mechanisms to Promote Equality, Office of Commissioner for Human Rights, Council of Europe, Strasbourg, 2010 - available at: https://wcd.coe.int/ViewDoc.jsp?p=&id=1761031&direct=true.

- Promotion: provide guidance on, and support to, good practice by policy makers, employers and service providers in promoting equality, adjusting for diversity, and eliminating discrimination.

Law no. 298 does reference each of these categories of work but does not do so in a clear and unambiguous manner. Most sections of the Law are related to the enforcement category. The other areas of work are addressed in provisions that are scattered through the Law. It would provide greater clarity for Law no. 298 to follow the framework established in international standards and to group and further develop its provision under the headings of enforcement; communication; research and promotion. Better cross-reference and coordination with Law no. 121 on Ensuring Equality should also be guaranteed. This could usefully be done in any revision.

This restructuring of the report would usefully be based on the following analysis of the five different sections of the Law, as outlined below.

There is a section 1 in the Law on "improvement of legislation and change of practice on the discrimination area" that is focused on monitoring and recommending improvements in Law no. 121 on Ensuring Equality. It also includes two elements of the promotion category of work in article 21 (b) focused on influencing other legislation and in article 21 (d) focused on developing policy. Article 21 (d) is referenced in the most general fashion with no mention of the particular focus suggested by specific provisions in Law no. 121 on Ensuring Equality in relation to the three fields of work, of accessing goods and services, and of education. That part of section 1 on "improvement of legislation and change of practice on the discrimination area" relating to the work of the Council in making recommendations to improve the equal treatment legislation should continue as a distinct section on this category of work under the heading "Promotion".

It is not clear if article 24 in this section allows for individual members to make recommendations in relation to amending the legislation or that they would sign any amendments they individually proposed that were agreed by the Council. Either way this section should be deleted as it weakens the potential impact of the collective decision based on a majority of the Council.

There is a section 2 in the Law on "increasing the level of information of the society regarding the discrimination phenomenon". While this section is predominantly focused on the communication category and should be under the heading "Communication", it includes the research category of work with mention of studies and thematic reports and the general report of the Council in articles 26, 27, 28, 29, and 30. These latter activities have a broader function than just informing society, in that they contribute to a knowledge base to inform policy, institutional practice and legal interpretation among other. They should be placed in a separate section under the heading of "Research"

There is a section 3 in the Law on "cooperation with civil society and other national and international organisations". This is a useful section that allows for projects and events that could lie within all four categories of work named above. It should continue as a section in its own right, under the heading "Cooperation". No provision is made in this section for civil society involvement in the work of the Council and, as suggested in the part of this report on effectiveness below, provision could usefully be made to require the Council to establish an Advisory Committee made up of civil society representatives. Further detail on this proposal is provided in section 3.3.1 below.

There is a section 4 in the Law on "collaboration with public authorities and sanctioning discrimination actions". This addresses the enforcement category of work including follow-up to decisions and access to the Courts. There could usefully some further detailed provisions set out in relation to follow-up procedures. Further detail on this proposal is provided in section 3.3.5 below. These provisions are also limited to public authorities. Since Law no. 121 applies to individuals and legal entities from the public and the private sectors, an analogous section dealing with collaboration with private individuals and entities should also be introduced.

This section 4 usefully allows for submitting general proposals to public authorities for broad action on discrimination and equality under article 32 (a) of the regulation on foot of a finding of discrimination. This enables casework to contribute to the promotion category of work as well as enforcement. It too could usefully be extended to the private sector. The terminology in this section 4 appears problematic. Article 32 (b), for example, refers to "measures undertaken by the person who has committed discriminatory action". However, in the case of a public authority, it is the responsibility of the public authority and not only or necessarily the individual that should be referred to.

Provisions listed in paragraphs no. 65 and 66 of section 5 of the Law, devoted to the examination of the complaints and ex-officio acts, also address the enforcement category of work. They should better located in a single section devoted to the enforcement work of the Council, whose content should include that of current section 4, under the heading "Enforcement".

Recommendations:

Article 2 should be reformulated to reflect the mission of the Council as stated in article 11 (1) of Law no. 121 on Ensuring Equality. Reference to the prevention of discrimination should be included to reflect the title of the Council.

Article 10 should be amended to ensure that both claimants and respondents have the possibility to request that the examination of a case be conducted in private.

The limited circumstances set out for a closed meeting in article 10 should be amended to allow the Council general discretion in making such a decision so as to ensure all situations where such

a decision might be appropriate are covered, including matters internal to other areas of work of the Council.

The provisions of Article 10 should be reconciled with those of article 63.

Article 19 should be amended to include other forms of activities functional to the performances of its tasks rather than referring only to the Council's duties in relation to casework. It should include tasks in relation to the work of communication, research and the promotion of good practice. It does not need to be an exhaustive list and should be an open list allowing flexibility and discretion to the Council.

Law no. 298 should follow the framework established in international standards in grouping and further developing all of its provisions under the headings of enforcement; communication; research and promotion.

Provisions of Section 1 on "improvement of legislation and change of practice on the discrimination area" that relate to the work of the Council in making recommendations to improve the equal treatment legislation should continue as a distinct section.

Article 24 should be deleted as it weakens the potential impact of the collective decision of the majority of the Council.

Provisions of Section 2 on "increasing the level of information of the society regarding the discrimination phenomenon" should be amended to only include reference those activities of the Council pertaining to communication.

The provisions of section 3 on "cooperation with civil society and other national and international organisations" should continue as a section in its own right.

The general proposals provided for in Section 4 should be extended to the private sector.

Section 4 should include further provisions related to follow-up procedures, including in relation to the private sector.

Article 32 (b) should be reformulated to refer not only to the individual responsible for the discriminatory act but also to the employer (both private and public).

Provisions in Section 5 addressing the enforcement category should be grouped in the single section dealing with enforcement work of the Council.

3.2 Independence

It is important that, while Law no. 121 establishes the boundaries within which the Council operates, Law no. 298 should not fetter its discretion in operating within these boundaries. As such, open lists could usefully be used with wording such as “including” and “amongst others” to enable this discretion. This applies in particular to articles 7, 14, 15, 19, 21, 25, 31, 32, and 53 of the regulation. For the same reason, it would be better if the lists of tasks for the Council in articles 21, 25, 31, and 32 of the regulation were not be preceded by “the Council shall” but by “the Council can”.

More generally, Law no. 298 addresses independence in a useful manner. Article 20 of the regulation makes a clear statement on the independence of the Council: “the Council shall act impartially and independently from other public authorities, individuals or legal entities”. Article 1 of the regulation affirms that the Council has the status of legal entity of public domain. A stand-alone legal structure is important for independence.

The role established for Parliament in setting the budget for the Council is valuable with regard to independence. Article 3 of the regulation provides that the budget of the Council shall be approved by Parliament and thereafter submitted to Government for inclusion in the state budget for the year. The Council of five members is appointed by Parliament, as per Law no. 121, another important element for independence. It also valuably establishes that the President is elected by vote of the members of the Council.

Article 11 para. 14 of Law 121 foresees an involvement of the Parliament also in relation to the regulation on procedure of the Council, which has to receive the approval of the Parliament. This seems to conflict with the need for the Council to conduct its day-to-day affairs independently. In order to preserve the Council’s operational autonomy, the text of this provision would need to be reformulated so that the Council is given the power to draft its own detailed rules of procedures for hearing cases, that would be done in consultation with relevant stakeholders and that could not be modified by any external authority. Law no. 298 should establish the power of the Council in this regard outside of any matters covered in this Law.

Article 69 of the regulation provides that recruitment of staff is subject to Law no. 158. It is not clear if this leaves full control of the recruitment process in the hands of the Council, as suggested in article 7 (e) of the regulation. It is important that it should.

Recommendations:

Articles 7, 14, 15, 19, 21, 25, 31, 32, and 53 should be reformulated to ensure the Council’s independence when operating with the boundaries set by Law no. 121 is not fettered, using wording such as “including” and “amongst others”.

Articles 21, 25, 31, and 32 should be reformulated, replacing the expression “the Council shall” with “the Council can”.

In order to ensure the independence of the Council the provision of article 11 para. 14 in Law no. 121 should be amended so as to give the Council the power to draft its detailed rules of procedure for hearing and mediating cases of discrimination and provision for this should be made in Law no. 298 and for this to be done in consultation with relevant stakeholders.

Article 69 should clarify that reference to Law no. 158 on recruitment of staff cannot be interpreted as to impinge on Council’s independence and its full control of the recruitment process.

3.3 Effectiveness

3.3.1 General issues

Law no. 298 demonstrates a useful focus on effectiveness in the detail provided on internal procedures and in the range of areas covered. However, before examining the four specific categories of work for an equality body, a few general issues arise.

Article 3 of the regulation usefully deals with the approval of the budget of the Council by Parliament. Article 1 of the Law sets a limit on the number of personnel at 20 units. Law no. 298 makes no reference to adequacy of resources. It provides no guidance to Parliament in establishing the budget for the Council. The Law could usefully make a commitment to “provide resources adequate for the Council to implement its functions to a scale and a standard to ensure impact and the full realization of its potential”.

Stakeholder cooperation and national and international networking are addressed in a valuable manner in article 31 (a), (b), (c), and (d). However, no provision is made for stakeholder participation in the work of the Council. This could usefully be rectified to ensure a dialogue between the Council and organisations in civil society working on issues of equality and non-discrimination about the plans, priorities, work and standards of the Council. The Council could establish an Advisory Committee with the purpose: to hear reports from the Council on its current work and future plans; to provide information to inform the work and plans of the Council; to provide advice to the Council in developing particular activities, on its strategy and planning, and on its approach and practice in implementing its mandate; and to assist in evaluating the work of the Council. The Advisory Committee would include representation from civil society organisations representing groups experiencing inequality under the various grounds covered by Law no. 121 on Ensuring Equality and academics with an expertise in this field.

The Council has a development strategy and action plan. However, Law no. 298 makes no reference to a requirement on the Council to plan strategically and to evaluate its work on a

regular basis. There are no provisions on who is responsible for this and how it is to be executed. This could usefully be rectified.

The Council works to an open list of grounds with a number of grounds named. Effectiveness requires a focus on all of these grounds in the work of the Council. This needs a visibility for all grounds in the enforcement, promotion, communication, and research work of the Council. The Law makes no reference to this. This could usefully be rectified to ensure that all grounds are addressed in the work of the Council.

Recommendations:

Law no. 298 should be amended to provide guidance to Parliament in establishing the budget for the Council, in particular to ensure adequacy of resources.

Article 1 should be reformulated to include reference to a commitment to "provide resources adequate for the Council to implement its functions to a scale and a standard to ensure impact and the full realization of its potential".

A provision should be included to ensure the Council establishes an Advisory Committee, comprising of representatives of civil society organisations representing groups experiencing inequality under the various grounds covered by Law no.121 on Ensuring Equality and relevant academics, to hear reports on the work of the Council, inform and advise on the plans, priorities, and activities of the Council, and to monitor standards in and support evaluation of the work of the Council.

Law no. 298 should be amended to establish responsibilities and indicate modalities for the execution of a development strategy and annual plan of action by the Council and for evaluation of these. The Council should evaluate its own work against the priorities and indicators established in its strategy plan on an annual basis. An independent evaluation should be commissioned in the final year of each strategy plan to test out the relevance of the work of the Council to the context it is operating in and to assess the efficiency, effectiveness, and impact of the work of the Council over the period of the strategy plan.

Provision should be made to ensure that all grounds named by Law no. 121 would receive the visibility to the best extent possible in the enforcement, promotion, communication, and research work of the Council.

3.3.2 Promotion

The promotion category of the work is addressed in different places in the Law. This needs to be clearer with a separate section on promotion work of the Council to include:

- article 21 (b) on checking new legislation for compliance with Law no. 121 on Ensuring Equality. This could usefully be extended to existing legislation;

- article 21 (d) on developing policy documents on issues of discrimination and monitoring the implementation of such documents;
- article 25 (d) on the education of the population on ensuring equality through education in formal and non-formal settings;
- A reference to article 32 (a) on submitting general proposals to public authorities on foot of findings of discrimination and the importance of these in stimulating good practice by public bodies.

There is no reference in the Law to collaboration or cooperation with the private sector, despite the private sector being covered by Law no. 121 on Ensuring Equality. A further provision could usefully be added to point the Council in the direction of:

- Providing guidance and support for good practice for public and private organisations in preventing and combating discrimination and ensuring equality in the field of work, the provision of goods and services and education.

There is no reference in the Law to the provision of advisory opinions by the Council concerning draft legislation as set out in Article 12 of Law no. 121 on Ensuring Equality. A further provision could usefully be added to point the Council in the direction of:

- Providing advisory opinions on draft legislation that ensure legislation is in compliance with Law no. 121 and is adequate in relation to preventing discrimination and ensuring equality across the grounds covered by Law no. 121 and encouraging the Council to provide guidance and set standards for public authorities on how to prepare legislation such that it is free from discrimination, prevents future discrimination and ensures equality.

Recommendations:

The promotion category of the work of the Council should be addressed organically in a separate, dedicated section, grouping provisions (including article 21 (b) and (d), 25 (d) and 32 (d)) which are scattered through the current law.

A better coordination with Law no. 121 should be achieved by introducing a provision dealing with the cooperation with the private sector. This should also be reflected in the wording of article 32, which as it stands now, only refers to public authorities.

A new provision should be introduced to underpin the work of the Council in providing guidance and support for good practice to public and private sector organisations.

A new provision should be introduced to underpin the work of the Council in providing advisory opinions on draft legislation and in supporting and ensuring public authorities draft legislation in a manner that is compliant with Law no. 121.

3.3.3 Research

The research category of the work is addressed in different places in the Law. This needs to be clearer with a separate section on research work of the Council to include:

- article 25 (e) on collecting information on discrimination trends and developing reports;
- article 26 on the carrying out of studies. The word "shall" could be changed to "can" and the wording "amongst other matters" could be added at the end;
- article 27 on the preparation of thematic reports. Further detail could be given on the nature of a thematic report and how it is to be addressed by the authorities. Thematic reports should have more significance than research studies and could usefully be considered by Parliament.
- articles 28 and 29 on the general report of the Council;

Recommendations:

The research category of the work of the Council should be addressed organically in a separate dedicated section, grouping provisions (including articles 25 (e), 26, 27, 28 and 29) which are scattered through the current law.

Article 26 should be amended so that the word "shall" could be changed to "can" and the wording "amongst other matters" could be added at the end.

Article 27 could provide further details on the nature of a thematic report and how it is to be addressed by the authorities. They should be accorded the same status as the general report and deal with in the same manner by Parliament.

3.3.4 Communication

The communication category of work is addressed well in article 25. It is further addressed in article 31 (e). These provisions could usefully be joined in a separate section on communication and divided into two sub- sections:

- Communication with society could usefully:
  - Include article 25 (a) and (b);
  - Include article 31 (e);
  - Emphasise the need for this communication work to impact on how society values equality, diversity and non-discrimination as well as the zero tolerance of discrimination named in Article 25 (a).

- Communication with groups experiencing discrimination could usefully:

  Include article 25 (c).

- Make reference to the imperative of understanding and addressing under-reporting of discrimination across all grounds and of developing collaboration with a range of stakeholders to address this;
- Point the Council in the direction of ensuring a local presence outside of Chisinau by way of regular outreach open meetings in venues around the country and/or by means of local offices;
- Point the Council in the direction of developing communication actions to target specific groups experiencing discrimination.

A further overarching article could usefully be added to encourage the Council to develop and implement a specific communication strategy. Such a strategy could be prepared in coordination with each strategic plan. It would serve to prioritise and focus the work of the Council in what is a crucial but very broad field of activity. It would ensure effective channels of communication with groups experiencing inequality and subject to discrimination and effective messages on equality, diversity and non-discrimination to promote this value base within the general public.

Recommendations:

The communication category of the work of the Council should be addressed organically in a separate dedicated, grouping provisions (including such as articles 25 (a), (b) and (c), and 31 (e)) which are scattered through the current law. This should be divided into two subsections, one dealing with communication with society, and the other dealing with communication with groups experiencing discrimination.

The first subsection dealing with communication with society should refer to the impact that this communication work could have on social values of equality, diversity and non-discrimination as well as the currently referenced zero tolerance approach to discrimination.

The second subsection dealing with communication with groups experiencing discrimination should provide for a local presence of the Council outside Chisinau by way of regular outreach, open meetings or local offices, and for communication actions targeting particular groups experiencing discrimination.

An overarching provision encouraging the Council to develop and implement a specific communication strategy and to do so at the same time as its strategic plan should be introduced.

3.3.5 Amicus Curiae

"Amicus Curiae" is an important legal tool in the fight against discrimination. However, it is not explicitly provided for in Law no. 298. It could be deployed as a tool by the Council in its own hearings by inviting relevant experts on the matters under consideration to provide advice and expertise in the hearing of a case. This would allow the Council access to information, knowledge and analysis both legal and other by inviting in organisations and individuals to act as 'amicus

curiae'. This would acknowledge the breadth and complexity of the remit of the Council and enable to Council to manage this effectively in its work of enforcement. The Council itself could seek to be invited as 'amicus curiae' in cases of relevance to its mandate before the Courts. This would allow the Courts to draw on expertise in equal treatment legislation that might not otherwise be readily available. It enables the Council to pursue its enforcement goals in resource sensitive manner. It supports capacity building among the judiciary in matters of equal treatment.

Recommendations:

An additional provision should be made in Law no. 298 to enable the Council to:

- Invite relevant organisations and individuals to act as 'amicus curiae' in its hearing of a case of discrimination;
- Act as “amicus curiae” in relevant cases before the Courts if so invited.

3.3.6 Enforcement

The Law no. 298 makes extensive reference to the enforcement category of work of the Council. This too could usefully be gathered in more coherent sections.

Article 32 of the regulation makes useful reference to follow-up to cases heard where findings of discrimination have been made, in particular in part (b). Further provision could usefully be made to ensure this happens. There could be a requirement on respondents found to have discriminated to report within a specified time limit that they have implemented the recommendations of the Council or the Council could be pointed in the direction of corresponding with complainants, interested persons and respondents found to have discriminated to seek confirmation that its recommendations have been implemented and of conducting on-site inspections within the organization involved to ensure recommendations have been implemented.

Article 5 of Law no. 121, “Modalities to eliminate discrimination”, references prevention, mediation, punishment and reparation. Article 61 of Law no. 298 dealing with the content of the decision of the Council, only refers to “recommendations formulated to ensure the rights recovery of the discrimination victim and to prevent similar actions in the future”. Law no. 298 could usefully provide clarity as to who is responsible for implementing the different modalities in Article no. 5 of Law no. 121 and the extent to which the Council could be involved in punishment and reparation. The impact of the casework of the Council in preventing discrimination would be enhanced by making its decisions binding and by empowering it to apply punishment and seek reparation in a manner that is effective, proportionate and dissuasive.

Article 32 (a) of the regulation provides for the Council to submit general proposals on foot of a finding of discrimination to public authorities to prevent and combat discrimination and change behaviours towards persons covered by the Law. This provision could usefully be extended to the private sector. The Council could usefully be pointed in the direction of combining such general

provisions with more specific requirements in relation to the person discriminated against in recommendations made on foot of a finding of discrimination. This is suggested in article 61 of the regulation in terms of recommendations to ensure rights recovery and prevent similar acts in the future. This could be considered sufficient but reference in article32 (a) would strengthen this focus.

Article 55 of the regulation makes useful provision in relation to mediating a solution to the issues arising during the hearing. This is a useful provision in that agreed solutions to issues of discrimination can be arrived at without the conflict involved in hearing a case. However, it would be useful to clarify that the Council is responsible for ensuring that any mediated solution meets the requirements of Law no. 121. The provision that a refusal to engage in mediation be noted in the minutes of the meeting is not useful and it would be better if it were deleted. Inferences should not be taken from the refusal to take part in mediation and the minute should merely reflect that mediation was offered, the participants availed of their right to accept or reject this, and whether or not both parties agreed to this procedure.

Article 56 of the regulation makes useful reference to the implementation of the shift in the burden of proof. It could usefully explicitly specify that *prima facie* evidence of discrimination has to be presented first. The burden of proof should only shift to the respondent once the complainant has established less favourable treatment. At that point the respondent must prove that this treatment was on grounds other than the grounds under which discrimination is prohibited in Law no. 121.

Recommendations:

The enforcement category of the work of the Council should address organically in a separate dedicated section, grouping provisions which are scattered through the current law.

Provisions should be made in relation to follow-up of decisions adopted by the Council in a given case, by imposing a reporting obligation on the respondent party within a specified time limit, enabling the Council to follow-up with the complainants or other interested person, or allowing on-site inspections by the Council within the organisation found to have discriminated in the case to ensure the recommendation made has been adequately and appropriately implemented.

Law no. 298 should clarify who is responsible for implementing the different modalities set out in combating discrimination in Article no. 5 of Law no. 121 and the extent to which the Council could be involved in 'punishment' and 'reparation' in making its decisions on cases of discrimination. It should establish that decisions of the Council in cases of discrimination are legally binding and it should establish the power of the Council to impose sanctions, including financial sanctions, that are effective, proportionate and dissuasive where discrimination has been found.

Coordination should be established in relation to the content of the Council's decision under article 32 (a) and article 61 of Law no. 298.

Law no. 298 should better coordinate with Law no. 121 and specify that any mediation solution offered by the Council should meet the requirements set by Law no. 121.

Article 55 should clarify that the minutes of the meeting do not include any reference to a refusal to engage in mediation and that inferences would not be taken from such refusal.

Article 56 should be amended to specify that *prima facie* evidence of discrimination has to be presented first for the burden of proof to shift.

4. Accessibility

Article 53 establishes six key principles that should govern the examination of complaints. This is valuable. However, article 53 could usefully make reference to the principle of accessibility and the need for the process and procedures of the Council to be accessible to respondents, complainants and interested persons and to take account of the diversity of respondents, complainants, and interested persons.

The regulation sets down a number of deadlines and allows little by way of discretion where deadlines cannot be met. In particular, article 14 (c) requires that the secretariat communicates at least 7 days before to the respondent and complainant about the date, time, place and agenda of the meeting to hear their case. This is very short notice for the complainant and respondent and some flexibility could usefully be provided for in setting another date if they are not available. Likewise, the timeframe for a response to complaint by a respondent in article 14 is very tight at ten days and some provision could usefully be made for flexibility in the case of a genuine excuse where such a deadline cannot be met.

Article 37 of the regulation is valuable in supporting accessibility by allowing for submission of complaints by a variety of means including by verbal means at the hearing. A specific article could usefully be included to establish a pre-hearing process to be offered by the Council to support complainants to effectively present their case. This could include informing the complainant of the procedures for hearing a case and about what they need to present for a case to proceed. It could include some support to the complainant in setting down their case in an accurate manner and in a manner that clearly presents their issue under Law no. 121 on Ensuring Equality. This work should be done by administration staff who would not be involved in the hearing of the case. Similarly, adequate information could be provided to the respondents.

Article 39 of the regulation is valuable in allowing for any member of Council can submit an ex-officio act to the Council. This essentially allows for own initiative cases and is important in contexts of high levels of under-reporting of discrimination.

Article 59 of the regulation provides for a valuable accommodation of difference in requiring provision of an interpreter where language diversity needs to be accommodated. However, the accommodation of diversity goes no further in the regulation. There needs to be further provision in this area to ensure the Council:

- makes reasonable accommodation for people with disabilities to ensure they have access to the Council;
- makes reasonable accommodation of differences that present across the other grounds that could present barrier for people to access the Council;
- promotes its commitment in this regard to complainants, interested persons and respondents;
- has a procedure in place to discuss and respond to any such accommodations required.

The regulation makes no provision to point the Council in the direction of holding meetings outside Chisinau to hear and deal with cases of discrimination. This could usefully be rectified.

Recommendations:

Article 53 should be amended and a reference to the principle of accessibility and the need for the process and procedures of the Council to be accessible to respondents, complainants and interested persons, making adjustments for their diversity as necessary, be included.

The provisions setting deadlines should allow for some flexibility where deadlines cannot be met on objective grounds or for force-major.

Provision should be made for a pre-hearing process to be implemented by the Council that would include steps to support complainants in presenting their case, which should be implemented by administration staff not later involved in the hearing of the case.

Provision should be made in relation to the provision of information to respondents about the procedures of the Council.

Article 59 should be amended to encompass an accommodation for diversity that includes for not only for language diversity but also other specific needs, including those of persons with disabilities and to provide for a procedure to be introduced to discuss and respond to any such accommodations required.

Provision should be made to foresee the possibility for the Council to hold meetings and hear cases outside Chisinau.

5. Other Issues

5.1 The adversarial principle and equality of arms

The Council is a quasi-judicial body. Its decisions are binding and enforceable and may be contested in the court for administrative disputes (article 65). The Council is also established to prevent discrimination and ensure equality. However, this does not mean that the Council would be on the side of a claimant in a case and, therefore, partial. The Council is required to monitor compliance with the legal provisions laid down in Law no. 121. Like a court, it performs this function as an objective and independent body which is required to find not only the existence but also the possible non-existence of discrimination in hearing a case.

Accordingly, article 53 lists standards for the Council procedures that include, among others, celerity, the adversarial principle and the right to defence. The principle of celerity is important in avoiding long delays and backlogs of cases. However, article 51 in setting a deadline of 15 days for the member rapporteur to settle the complaint could undermine the quality of the work required, particularly in complex cases. It would be better to allow for this to be done between 15 and 45 days with a prolongation available if required.

The principles of celerity, the adversarial principle and the right to defence do not appear to be properly mirrored throughout Law no. 298. Article 37, for example, allows a new complaint to be introduced verbally during the hearing related to the complaint already introduced. Article 44 allows for the complainant to complete his or her complaint with new data before the hearing. While the possibility to introduce a complaint orally and to complete a complaint in this manner is commendable, for reasons stated earlier, no provision is made to ensure respondents have the possibility to request an adjournment of the hearing in order to better structure their defence or produce different or additional evidence.

The provision of 10 days for the preparation of the “defence” under article 57 is not satisfactory, given that the wording appears to only refer to the time from when complaint was “sent” to the Council rather than from when it was “received”. Reference to the date of notification of the complaint to the respondent, as set by article 14, should be included.

While 10 days appear sufficient for respondents to present their opinion and evidence to prove that the facts presented by the complainant do not amount to discrimination, the deadline seems too rigid, failing to take account complex situations where more time would be needed. This is particularly so given that, under the same article, the unjustified failure to provide the information requested “shall be sanctioned according to the legislation in force and shall be interpreted in the respondent’s disadvantage”.

Article 57 appears problematic in that it foresees the possibility for the Council to sanction respondents for non-compliance with their request to provide information. First of all, the

generic allusion to sanctions without reference to identified legislation and the consequent lack of predictability of any consequences is problematic and needs to be addressed.

Secondly, the issue of the use of sanctions by the Council to strengthen this rights to information does not seem to be adequately addressed, given that the Council is considered as a "fact-establishing agent", required to submit to the court the minutes regarding the contravention and the material of the case for "substance examination" (article 33) and the Council bears a duty to notify the criminal investigation bodies when discriminatory acts meet the elements of an offence are committed (article 32).

While articles 3, 5, and 6 of the European Convention on Human Rights (ECHR) allow for the existence of laws imposing ordinary civil obligations[9], the European Court on Human Rights (ECtHR) has made it clear that attention should be paid where direct compulsion, such as the risk of a fine for a failure to testify, is involved.[10] The Law does not make it clear (nor excludes *a priori*) that the minutes of the meetings (putting to one side the fact that the decision is quasi-judicial) be used as evidence in relation to a criminal offence as referred to in article 32 or another criminal offence not-related to discrimination.[11] The wording should be revised to ensure that minutes of the hearing of the Council cannot be used as evidence outside the procedure before it. This should also be extended to appeal, before the court for administrative disputes, provided that the latter cannot adopt sanctions which could be regarded as substantively "criminal" from the perspective of article 6 ECHR.[12]

The provision that inference can be drawn against the respondent is sufficient on foot of such a failure would appear to be sufficient and more in line with the right of respondents to choose their defence strategy. If the intention was to impose an obligation on private persons and organisations, other than the respondent, to provide necessary evidence to the Council this should be spelled out. This would be in line with ECRI General Policy Recommendation no. 2.

Article 58 allows for representation by a lawyer or a representative which is useful. However, where there is an imbalance in representation the Council must act to ensure that the complainant or interested person and the respondent are equally able to present their case. There is a need to ensure an equality of arms between respondent and the complainant. This could be done by the Council playing a proactive role and freeing the complainant and respondent from having to present legal arguments beyond the facts of the case. This is not to

[9] For example: to inform the police of one's identity (Vasileva v. Denmark), to declare income to the tax authorities (Allen v. United Kingdom), or to give evidence as a witness at a trial (Serves v. France).
[10] O'Halloran and Francis v. United Kingdom.
[11] There could be, for example, charges of fraud or of a fiscal nature where the discrimination evidence gathered by the Council by compulsion might be relevant or used. In Funke v. France the ECtHR clarified that, even if the fine imposed outside the context of underlying criminal proceedings was of insignificant amount, violation of Article 6 might occur.
[12] As per the "Engel" criteria, elaborated in Engel and others v. the Netherlands.

undermine the impartiality of the Council but allows it to hear the facts of the case and to then explore these further as necessary, apply the law as relevant, and come to a finding.
Under article 60, the parties submit evidence to the Council by the end of the hearing. The wording of this article is unclear. There is, further, nothing in section 5, on the examination of the application, to suggest that there is full disclosure to the respondent of the complaint, evidence and other data attached to it.

Finally, article 36 provides, "The trial regarding the respective contravention case shall be attended by the member of the Council who has concluded the minutes regarding the contravention or by another member appointed by the President of the Council". The reference to "trial" and "contravention" appear to suggest that the provision relates to misdemeanour proceedings which might be considered criminal for the purpose of article 6 ECHR. The meaning of this provision is not clear, in that it does not specify the purpose of such attendance and/or the role of the Council member during the proceedings. If the intention is to guarantee follow-up to cases decided by the Council, the article should be worded differently and joined with the provisions whose introduction under Section 4 are recommended above.

Recommendations:

Article 51 should be amended to allow the member rapporteur to settle the complaint within a period of 15 to 45 days from its receipt, and to allow for a further prolongation if requested and suitably justified.

A provision should be introduced to guarantee that respondents can request an adjournment of the hearing in order to better structure their defence or produce different or additional evidence following the introduction of a verbal complaint (under article 37) or the completion of the already submitted complaint with new data (under article 44).

Article 36 should be amended to clarify the purpose of the foreseen attendance and/or the role of the Council during the mentioned proceedings. Should this provision be intended to guarantee follow-up to cases decided by the Council, the article should be worded differently and linked to the provisions whose introduction are recommended under Section 4.

Article 57 should be amended to set the date of the notification of the complaint to the respondent as starting point for the 10 days for the preparation of the defence by the respondent. The 10-day deadline rule should allow for flexibility in the light of the complexity of the situation where more time would be needed.

Article 57 should be amended so as to explicitly identify the sanctions referred to.

Article 57, read in conjunction with articles 32 and 33, should clarify that neither the minutes of the meetings nor the decision of the Council can be used as evidence in relation to criminal proceedings.

An obligation on private persons and organisations to provide necessary evidence to the Council should be introduced in article 57.

Article 58 should be amended to ensure the Council can address imbalanced representation of the parties (complainant and respondent). This could be done by the Council playing proactive role in determining the facts and applying the law.

5.2 Definitions

Article 4 of the Regulation contains definitions of a number of terms. As currently worded, in the English version of the law, definitions of complainant and respondent seem to refer to physical persons only. However, Law no. 121 states that "subjects in the area of discrimination are individuals and legal entities from the public and private sectors". It would be useful that both Law no. 298 and no. 121 use the same terminology adopted by the latter.

Interested person is defined as "the person who considers himself/herself discriminated, trade-union or public association active in the area of promoting and protecting human rights, any other person with legitimate interest in combating discrimination and representing a person, a group of person or a community against whom discriminatory acts have been committed". Reference to the person who considers himself/herself discriminated is redundant as they would be complainants. The recognition for such status only trade unions or public associations active in the area of promoting human rights appears to conflict with the Council of Europe standards. These are based on the Paris Principles which consider interested "third parties, non-governmental organisations, associations of trade unions or any other representative organisations", regardless of their area of operation. The wording of "any other person with legitimate interest in combating discrimination and representing a person, a group of person or a community against whom discriminatory acts have been committed" does not appear to be in line with the Paris Principles. Reference should be made to both legal entities and private persons.

The status of interested person should not be linked to the fact that the person is representing the victim(s) of an alleged violation. A clarification that the complainant can introduce the complaint through a proxy and/or have a representative needs to be introduced. This underpins the accessibility of the Council and assists in reducing the barriers that impede reporting of incidents of discrimination.

Recommendations:

The definitions of complainant and respondent should be better coordinated with the provision of article 3 of Law no. 121 and include reference to individuals and legal entities from the public and private area.

The definition of interested person included in article 4 should be amended in line with the Paris Principles and should include reference to any other representative organisation, with no limitation as to their area of activity.

Article 4 should recognise the status of interested person for both legal and private persons having a legitimate interest.

Article 4 should be coordinated with article 38 and article 13 of Law no. 121. A clear distinction between the representative/proxy of the complainant and interested person should be drawn. Interested persons should not be required to represent the complainant who, on the other hand, should be able to introduce the complaint through a representative according to its choice/proxy.

5.3 Provisions related to the President

Article 7 of the regulation sets out a broad range of functions of the President. This could be too onerous or could distract the President from addressing priorities in implementing the plans of the Council. It could usefully make provision for the President to delegate functions to other Council members or to members of the administrative staff. This is already provided for in article 11 of the regulation but only in relation to the chairing of meetings of the Council.

Article 6 of the regulation provides for revoking the president. This can be done at the request of two members of the Council along with a vote in favour by three members of the Council. This appears to render the position of the President too vulnerable. It would be better if the President could only be revoked where there is consensus on the Council. This would match provisions in article 23 of the regulation for making decisions on recommendations in relation to improving Law no. 298.

Recommendations:

Article 7 should be amended to enable the President to delegate functions to other Council members or administrative staff.

Article 6 should be amended to ensure that the revocation of the President should be made conditional on consensus on the Council.

5.4 Amiable settlements

Article 15 (c) of the regulation refers to the duty of the Council to contribute to the amiable settlement of the conflict. Reference to friendly settlement does not seem adequate. The

provision should mention, in line with the Paris Principles, conciliation or, within the limits prescribed by the law, binding decisions. A provision enabling for confidentiality of such settlement should also be included.

Recommendations:

Article 15 (c) should be amended to include reference to conciliation and, within the limits of the law, binding decisions and should provide for confidentiality of such settlements.