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National project *“Strengthening the capacities of the justice sector actors to deliver justice in line with European standards, in particular to fight discrimination”*

and

regional project *“Strengthening access to justice through non-judiciary redress mechanisms for victims of discrimination, hate crime and hate speech in Eastern Partnership countries”*

Opinion on Draft Amendments to:

Law on Ensuring Equality (Law No. 121); and

**Law on Activity of the Council for Prevention and Elimination of
Discrimination and Ensuring Equality (Law No. 298)**

Constantin Cojocariu & Niall Crowley

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1. Introduction

This opinion assesses amendments proposed in relation to the Law on Ensuring Equality (Law No. 121) and the Law on Activity of the Equality Council (Law No. 298). The assessment is made against:

- Previous opinions offered by the Council of Europe on the two Laws in February 2016 and July 2016 respectively.
- International standards for such legislation.

The opinion explores and acknowledges the important progress represented by these proposed amendments and makes recommendations for improvements that could be made to the proposed amendments on foot of this assessment.

The opinion is based on an unofficial translation of the Law provided by the Council of Europe Office in Moldova. Errors due to interpretation are therefore possible.

2. International Standards

2.1 Standards applicable to equal treatment legislation

EU equal treatment Directives¹ establish definitions for direct and indirect discrimination, harassment and sexual harassment, reasonable accommodation on the disability ground, victimisation and positive action.

They establish the scope for such legislation, most expansively in Directive 2000/43/EC, as covering: employment, self-employment, and occupation; vocational guidance, training and retraining; employment and working conditions, including dismissal and pay; memberships of worker, employer or professional organisations; social protection, including social security and healthcare; social advantages; education; and access to and supply of goods and services which are available to the public, including housing.

They include provisions on shifting the burden of proof, dialogue with NGOs, social dialogue, and applying effective, proportionate and dissuasive sanctions where discrimination is found. They cover the grounds of sex, racial or ethnic origin, religion and belief, sexual orientation, age, and disability.

General Policy Recommendation no. 7 of ECRI of the Council of Europe² sets out standards that are similar to the EU Directives. It goes further to include a prohibition of: segregation; discrimination by association; announced intention to discriminate; instructing another to discriminate; inciting another to discriminate; and aiding another to discriminate.

It includes standards for positive duties on public authorities to promote equality and to prevent discrimination in carrying out their functions and to ensure that those parties to

¹ Council Directive 2000/43/EC implementing the principle of equal treatment of persons irrespective of racial or ethnic origin; Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation; 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).

² European Commission against Racism and Intolerance General Policy Recommendation no. 7: National Legislation to Combat Racism and Racial Discrimination, adopted 13 December 2002 (amended 7 December 2017), Council of Europe.

whom they award contracts, loans, grants or other benefits respect and promote a policy of non-discrimination.

The *Opinion on National Mechanisms to Promote Equality of the Commissioner for Human Rights of the Council of Europe*³ states that the grounds of socio-economic status and gender identity should be covered by such legislation and that the functions of the state should also be covered. It recommends public duties on both the private and the public sectors with: public sector organisations required to have due regard to equality in carrying out their functions; and private sector organisations required to be planned and systematic in their approach to equality.

2.2 Standards applicable to equality bodies

*EU equal treatment Directives*⁴ require that equality bodies have competences to: assist victims of discrimination; conduct surveys on discrimination and issue reports; and make recommendations on issues relating to discrimination. A competence to exchange information with corresponding European bodies, such as the European Institute for Gender Equality, is required on the gender ground. The Directives emphasise the independent exercise of these competences by equality bodies.

The *European Commission Recommendation on standards for equality bodies*⁵ addresses the mandate, independence and effectiveness, and coordination of equality bodies. It encourages the Member States to extend the equality body's mandate to cover the areas of employment and occupation, access to and supply of goods and services, and the issue of hate speech. Alongside the functions of providing independent assistance, conducting surveys, publishing reports and making recommendations, it further identifies, as functions to be accorded to equality bodies: promotion of equality by providing training, information, guidance and support to duty bearers; and raising awareness within the general public.

In addressing independence and effectiveness, the Recommendation states, among other elements, that Member States should ensure equality bodies are provided with the human, technical and financial resources necessary to perform their tasks and exercise their powers effectively. In addressing cooperation and coordination, it recommends that Member States ensure equality bodies are consulted in good time and transparently on policy and legislative proposals.

*General Policy Recommendation No. 2 (Revised) of ECRI of the Council of Europe*⁶ addresses the establishment of equality bodies, the institutional architecture for equality bodies, their functions and competences, and their independence, effectiveness and accessibility. This standard recommends a mandate for equality bodies to promote and

³ Opinion on National Mechanisms to Promote Equality issued by the Commissioner for Human Rights of the Council of Europe, Council of Europe, 2010.

⁴ 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).

⁵ Commission Recommendation of 22.06.2018 on standards for equality bodies, European Commission, C(2018) 3850 final.

⁶ European Commission against Racism and Intolerance General Policy Recommendation no. 2: Equality bodies to Combat Racism and Intolerance at National Level, adopted 7 December 2017 (Revised), Council of Europe.

achieve equality, prevent and eliminate discrimination and intolerance, including structural discrimination and hate speech, and promote diversity and good relations between persons belonging to all the different groups in society. It recommends that equality bodies should have a promotion and prevention function and a support and litigation function. It indicates a preference for the decision-making function and the support and litigation function to be allocated to different bodies.

In its focus on independence, the recommendation is concerned with ensuring no interference in or instruction to equality bodies, and establishes standards for appointments, safeguards for members of the equality body, accountability, and management of staff and resources. Its focus on effectiveness is concerned with the resources, competences, strategic planning, communication strategy and stakeholder engagement of the equality body. Its focus on accessibility is concerned with its location and premises, outreach work, and the accommodation of diversity in the procedures and services of the equality body.

The *Opinion of the Commissioner for Human Rights on National Structures for Promoting Equality*⁷ identifies the legal structure of the equality body, the processes of accountability of the equality body and the process of appointment of board members and senior staff as key factors for independence. The level of resources of the equality body and the functions accorded to it are identified as key factors for effectiveness. Accessibility of services and stakeholder engagement are identified as key internal factors for effectiveness.

The *UN 'Paris Principles'*⁸ relate specifically to national human rights institutions. They address the competence and responsibilities, composition and guarantees of independence and pluralism and methods of operation of these bodies.

3. Assessment of the proposed Amendments to Law No. 121 as they relate to equal treatment

3.1 Previous Opinion (Law No. 121) of Council of Europe⁹

This previous opinion (Law No. 121) provides an assessment of Law no. 121 along with suggestions for its further development. The analysis in the previous opinion (Law No. 121) covered each of the four chapters of Law No. 121. It made recommendations in each of these areas and concluded with some general recommendations.

The analysis and recommendations from this previous opinion (Law No. 121) that relate to Chapter 3 of Law No. 121 are addressed in the following section 4 of this opinion, as they pertain to the equality body.

It is positive that a number of the proposed amendments reflect some of the recommendations of the 2018 ECRI fifth monitoring cycle report on Moldova¹⁰.

⁷ Opinion on National Mechanisms to Promote Equality issued by the Commissioner for Human Rights of the Council of Europe, Council of Europe, 2010.

⁸ UN Principles relating to the Status of National Institutions (Paris Principles), 1993.

⁹ Assessment of the Law No. 121 on ensuring equality in compliance with the Council of Europe anti-discrimination standards, Ivana Roagna and Nevena Petrusic, Council of Europe consultants, February 2016.

3.2 General Provisions (Chapter 1)

The **Preamble**, as recommended in the previous opinion (Law No. 121), is not amended to clarify that interpretation of the Law does not prejudice rights and freedoms as guaranteed by the ECHR, as provided by the case-law of the ECtHR.

The amended **Article 1** proposed usefully references 'jurisdiction' rather than 'territory' as recommended in the previous opinion (Law No. 121).

The proposed amendments extend the grounds covered with: social, national and social statute; gender identity; marital status; health status and HIV status; political opinions or any other opinions; and wealth, birth or any other criterion. This reflects international standards in including gender identity and grounds related to socio-economic status. It reflects the recommendations of the previous opinion (Law No. 121) in clarifying the open nature of the list of grounds, and including national status. However, there remains a significant failure to name the ground of sexual orientation as required by international standards, other than in relation to the employment setting. It might be useful to reinsert the word 'similar' in terms of 'any other similar criterion' at the end of the amendment for clarity that the criteria relate to grounds of discrimination and pertain to groups experiencing inequality.

The exemptions provided for in Article 1 (2) have not been amended as recommended in the previous opinion (Law No. 121) to state only: 'The provisions of this law shall not extend to and cannot be interpreted as limiting or prejudicing marriage, which is based on the freely consented marriage between man and woman'. The issue of religious cults is more fully addressed in Article 7 (6).

In **Article 2** the proposed amendments introduce an exemption into the definition of discrimination of "unless it is objectively and reasonably justified by a legitimate purpose and if the means of achieving that purpose are proportionate, appropriate and necessary". This importantly is not included in the definition of direct discrimination and this needs to be made clear, as such an exemption would be in breach of requirements under international standards.

The proposed criteria in the definition of discrimination, direct discrimination and harassment are usefully amended to "protected, real or presumed".

The definition of instigation to discriminate should, as recommended in the previous opinion (Law No. 121), include for announced intention to discriminate; instructing another to discriminate; inciting another to discriminate; and aiding another to discriminate as required under international standards.

Harassment is usefully defined in Law No. 121, however, there is no explicit reference to sexual harassment. Harassment is prohibited in the workplace but does not appear to be prohibited in all other fields as required under international standards. Reasonable

¹⁰ European Commission against Racism and Intolerance, Report on the Republic of Moldova (fifth monitoring cycle), adopted on 20 June 2018, published on 1 October 2018, Council of Europe.

accommodation is usefully defined in Law No. 121, however, despite reference in the separate law on persons with disabilities, it would be useful to clarify that in all fields, the failure to provide reasonable accommodation is a form of discrimination, as required in relation to the ground of disability under international standards. Victimisation is defined in Law No. 121 but no provisions appear to be made for its prohibition, as required under international standards.

The draft amendments to the definition of positive measures positively reflect the recommendation in the previous opinion (Law No. 121) to include a focus on equality and the aim of both preventing and compensating for disadvantage. The wording of the aim of 'achievement of full equality in practice' as set out in the EU equal treatment Directive could usefully have been deployed.

The issues of hate speech and of multiple or intersectional discrimination, both a growing focus in international standards, are not addressed. Both would need to be defined and their prohibition made clear in Law No. 121, and the competence of the equality body to address them set out in Law No. 298. This should be based on the Council of Europe standard developed by ECRI on combating hate speech¹¹.

The purpose of **Article 4** remains unclear and no amendment is proposed, as recommended in the previous opinion (Law No. 121), for specific consideration to be given to such severe forms of discrimination and for linking this article with Chapter 4 on liability for discrimination acts.

3.3 Scope (Chapter 2)

In the **field of work**, the provisions, under the draft amendments, have usefully been expanded to encompass 'pursuit of profession' and affiliation to employee organisations, employer organisations, or organisations of professionals. This, however, does not appear to fully address the fields of occupation and self-employment as required under international standards and recommended in the previous opinion (Law No. 121).

It is not clear why the amended Article 7 (1) proposed appears to be restricted to "conclusion, suspension, modification or termination" of employment. This should retain the original wording that identified access to employment and experience in employment, which would be consistent with the subsequent articles.

Provisions on equal pay, Article 7 (2) (d), are improved by the proposed amendment.

The use of the term 'ungrounded' in Article 7 (2) is unclear. The understanding of 'ungrounded' set out in Article 7 (3) is limiting. It would be clearer and reflective of international standards to use the terminology 'based on protected, real or presumed, criteria' and to delete Article 7 (3).

Specific reference to working conditions, promotion and dismissal should be listed in Article 7 (2), despite the open ended list. Vocational guidance, vocational training, and

¹¹ European Commission Against Racism and Intolerance, General Policy Recommendation no. 15: Combating Hate Speech, adopted 8 December 2015, Council of Europe.

advanced vocational training and retraining should be included as the wording of access to 'professional training' courses is limited.

Article 7 (4) appears to include some form of positive duty on employers in the requirement to 'locate' legal provisions in places accessible to employees. This would need to be expanded to meet requirements under international standards for employers to be 'planned and systematic' in their approach to non-discrimination and equality. Requirements on employers to have an equality policy in place and an associated plan for its implementation would be important.

In the field of **goods and services**, the proposed amendment to Article 8 offers clarity. It is not clear why the term 'goods' has been deleted from the element of 'other services available to the public' as this would be required under international standards. It is not clear why housing merits a separate sub-article. It does not reference allocation of housing by the public authorities which might be important.

In the field of **education**, the proposed amendment to Article 9 (1) usefully clarifies the prohibited conduct in this field. However, it would have been useful in the reference to protected criteria in this sub-article to have used the wording 'protected, real or imagined'. The proposed amendment of new Article 9 (2') valuably places positive duties on educational establishments. However, provisions are not made for the equality body to set standards, support, monitor or enforce this duty.

No provision is made to prohibit discrimination in the functions of public bodies, including law enforcement, as required under international standards.

3.4 Liability (Chapter 4)

The provisions for the shifting of the burden of proof are enhanced in the proposed amendments to Article 19. The provisions for time limits in Article 20 have been improved. Both amendments reflect recommendations made in the previous opinion (Law No. 121).

There is no provision to amend Article 17 to cross-reference the relevant provisions of the Criminal Code or of special legislation that can be considered "criminal" for the purpose of the ECHR in order to comply with the requirements of legal certainty of criminal sanctions as recommended in the previous opinion (Law No. 121). No provision is made for the person taking a case to request the court, and for the court to issue, temporary measures to secure a cessation of ongoing discrimination, where there is danger of violence or irreparable damage as recommended in the previous opinion (Law No. 121).

There is limited provision in Law No. 121 addressing remedies for discrimination, when it comes to the application of sanctions that are proportionate, effective, and dissuasive and the making of orders to remedy situations of discrimination and take actions to prevent recurrence of discrimination. Currently, Article 15 (4) empowers the equality body to issue recommendations aimed at restoring the status quo ante and preventing recurrence of discrimination. The Misdemeanour Code provides the equality body with a limited role in applying fines for certain types of discrimination, as well as for the refusal to comply with recommendations.

It would be important to address this issue comprehensively both for clarity and to meet international standards in relation to remedies available for discrimination. The equality body should have the power to issue legally binding decisions that require action to put an end to discrimination, advancing equality, and prevent future discrimination, and apply effective, proportionate and dissuasive sanctions, including compensation for both financial and non-financial damages and fines.

Alternatively, the Misdemeanour Code should be amended to more consistently follow the structure and contents of Law no. 121 in order to ensure that all types of discrimination are adequately covered, as well as to broaden the range of remedies that the equality body may provide to match those set out in the paragraph above.

3.5 Recommendations

The analysis raises a wide range of issues and recommendations are set out below to address these. Within these, it appears particularly important that the draft amendments would be further developed to:

- Make full provision for a ground of sexual orientation (recommendation 1).
- Clarify the full range of discrimination prohibited (recommendation 4).
- Improve the manner in which discrimination in employment and vocational training is defined (recommendation 6, 7, 8 and 9).
- Include a prohibition on sexual harassment and harassment in all fields covered by the Law (recommendation 10).
- Include a prohibition on discrimination in the provision of both goods and services generally available to the public (recommendation 11).
- Include a prohibition of discrimination in relation to the functions of public authorities, including law enforcement (recommendation 12).
- Provide for the Court to introduce temporary measures as appropriate in cases of discrimination (recommendation 16).
- Provide for remedies for discrimination, including sanctions that are proportionate, effective, and dissuasive and allowing for orders to remedy situations of discrimination and take actions to prevent recurrence of discrimination (recommendation 17).

It is recommended, as a priority, that the proposed amendments to Law No. 121 should be further developed to:

1. Name the ground of sexual orientation as a protected criterion in Article 1.
2. Clarify the open list of grounds with the wording 'any other similar criterion' in Article 1.
3. Replace the word 'family' with the word 'marriage' in Article 1 (2) (a) and delete parts (b) and (c).
4. Clarify in Article 2 that discrimination, direct discrimination, indirect discrimination, discrimination by association, intersectional discrimination, racial segregation, harassment, hate speech, instigation to discrimination, victimisation, and the failure to provide reasonable accommodation are all prohibited as forms of discrimination for the

purpose of this Law, and include definitions of intersectional discrimination and of hate speech for this purpose¹².

5. Establish that the severe forms of discrimination set out in Article 4 will attract specific and additional penalties if found to have taken place and make provision for these in Chapter 4.
6. Specify occupation and self-employment after the word “profession” in amended Article 7 (1).
7. Include access to employment and experience in employment before the words “conclusion, suspension, modification or termination” in amended Article 7 (1).
8. Delete the term ‘ungrounded’ in Article 7 (2), replace it with “based on protected, real or presumed, criteria” and delete Article 7 (3).
9. Include unequal working conditions, refusal to promote, dismissal, and refusal of access to vocational guidance and vocational training and retraining based on protected, real or presumed, criteria in the list in Article 7 (2).
10. Introduce a prohibition on sexual harassment and harassment in all areas covered by Law No. 121: in particular employment, accessing goods and services and education.
11. Introduce the words ‘goods and’ in amended Article 8 (g).
12. Include the functions of public authorities, including law enforcement in the list in amended Article 8.
13. Include the words after the word “property” the words and “allocation of housing by the public authorities” in amended Article 8 (2).
14. Replace the reference to protected criteria with the words “protected, real or imagined criteria” in amended Article 9 (1).
15. Provide that employers are required to take steps, including having an equality policy and action plan in place, to be planned and systematic in their approach to non-discrimination, in Article 7 (4) .
16. Provide for the person taking a case to request the court and for the court to issue temporary measures to secure a cessation of ongoing discrimination in Article 14 (1)
17. Provide in Article 17 that the equality body may, on finding discrimination in a case, provide remedies for discrimination that include the application of effective, proportionate, and dissuasive financial and other sanctions, as well as orders for steps to: put an end to discrimination; restore the situation of the complainant; and prevent future acts of discrimination and advance equality, without having to go to court to secure sanctions¹³.

4. Assessment of the proposed Amendments to Law No. 298 and Law No. 121 as they relate to the Council for Equality

¹² Based on: European Commission Against Racism and Intolerance, General Policy Recommendation no. 15: Combating Hate Speech, adopted 8 December 2015, Council of Europe.

¹³ Alternatively, amend the Misdemeanour Code to more consistently follows the structure and contents of Law no. 121 in order to ensure that all types of discrimination are adequately covered and to broaden the range of remedies available to the equality body to match those proposed in this recommendation.

4.1 Previous Opinion (Law No. 298) of Council of Europe¹⁴

This previous opinion (Law No. 298) provides an assessment of Law no. 298 on the activity of the Council for Preventing and combating Discrimination and Ensuring Equality along with suggestions for its further development. The analysis covered the mandate and functions of the equality body, independence of the equality body, effectiveness of the equality body, accessibility of the equality body, and a set of other issues. It made recommendations in each of these areas.

This section has a primary focus on Law No. 298 and takes account of this previous opinion (Law No. 298). Where Law No. 121 is referenced this is identified as such. Chapter 3 of Law No. 121 makes provisions in relation to the equality body. The following analysis addresses the amendments proposed in Chapter 3 of Law No. 121 and takes account of the previous opinion (Law No. 121).

As a general rule, the proposed amendments for this Chapter 3 of Law No. 121 provide for some valuable efficiencies and an important alignment with Law No. 298 and the proposed amendments for Law No. 298.

It is a positive that a number of the proposed amendments reflect some of the recommendations of the 2018 ECRI fifth monitoring report on Moldova¹⁵.

4.2 Mandate and Functions of the equality body

The proposed amendments to both Law No. 121 and Law No. 298 establish the equality body as having the purpose of preventing and combating discrimination and promoting equality. This reflects the recommendation in the previous opinion (Law No. 298) for coherence in establishing the mission of the equality body. This is a broad mandate as required under international standards. However, it does not include a mandate in combating hate speech as required in international standards. This would further require a definition and prohibition of hate speech, in line with international standards, in Law No. 121 as recommended above.

The functions of the equality body are set out in Chapter IV of Law No. 298. It remains unclear, as stated in the previous opinion (Law No. 298), why an incomplete summary of these is provided in Point 19. However, amended Point 19 has been expanded to include 'conciliation agreements and other acts' and the wording has improved clarity. The recommendations of the previous opinion (Law No. 298) that this should be an open list allowing flexibility and discretion to the equality body is not addressed.

In other sections of Law No. 298, the functions are set out in an improved arrangement as a result of proposed amendments, and now cover:

¹⁴ Assessment of Law No. 298 on the activity of the Council for Prevention and Elimination of Discrimination and Ensuring Equality, Niall Crowley and Ivana Roagna, Council of Europe consultants, July 2016.

¹⁵ European Commission against Racism and Intolerance, Report on the Republic of Moldova (fifth monitoring cycle), adopted on 20 June 2018, published on 1 October 2018, Council of Europe.

- Improvement of legislation and practice in order to prevent and combat discrimination and promote equality (Section 1): This has improved wording and covers the advisory function of the equality body.
- Monitoring the way of implementing the legislation from the perspective of non-discrimination standards (new Section 2'): This new section includes monitoring of the equal treatment legislation and the research and knowledge development function of the equality body and, while its title does not offer clarity, it usefully groups the competences provided for this latter function.
- Increasing the level of information of society regarding the discrimination phenomenon (Section 2): This covers the awareness raising function of the equality body.
- Cooperation with civil society, other national and international institutions (Section 3): This addresses some external relations of the equality body.
- Sanctions for discrimination acts (Section 4 – new title): This addresses some enforcement functions of the equality body beyond the hearing of cases.
- Examining complaints and ex-officio acts (Section 5): This addresses the case hearing function of the equality body.

The proposed amendments reflect a clearer arrangement of functions and align with the recommendations of the previous opinion (Law No. 298). They address the key areas required for an equality body under international standards.

4.3 Independence of the equality body

The proposed amendment to identify the equality body as an 'autonomous public authority' should contribute to the independence of the equality body (Point 1 and Article 11 (1) of Law No. 121).

The amendment to Point 7 that references the role of the President of the equality body in approving regulations regarding internal procedures appears to address the recommendation in the previous opinion (Law No. 298) to empower the equality body to draft its detailed rules of procedure for hearing and mediating cases of discrimination within the boundaries established by the Law. However, the requirement for this regulation to be approved by Parliament remains in Article 11 (14) of Law No. 121, contradicting the previous opinion (Law No. 121)

The proposed amendment to Article 11 of Law No. 121 that the equality body works under conditions of 'organisational, functional, operational, and financial independence from any public authority, natural or legal person, regardless of the type of property and the legal form of organisation, and from any person with responsibility at all levels' enhances independence and reflects the previous opinion (Law No. 121). It would be useful to explicitly clarify that, in line with international standards, the equality body is solely responsible for the management, deployment, and organisation of its members and staff.

The members of the equality body, under Article 11 new (8') of Law No. 121, are provided with immunity for statements and actions 'performed in compliance with the law, during the exercise of the mandate'. These provisions strengthen its independence. However, it is not clear that the phrase 'performed in compliance with the law' does not undermine the

immunity provided. It would be important, and in line with international standards, to clearly set out that members of the equality body and staff are provided with immunity such that they are not liable for opinions and actions carried out while performing their functions.

The appointments procedure for members of the equality body, set out in Law No. 121, reflect the international standards for independence. However, they do not, as recommended in the previous opinion (Law No. 121) set any term limits. It would be useful to establish that a member cannot be elected more than twice, and to provide for a form of staggered replacement of members over time, to ensure institutional memory and experience is preserved and the whole membership is not replaced at one point in time.

The proposed amendments usefully establish that the members of the equality body should spend at least 33.3% of their time working in the equality body in Article 11 (11). This responds, though not completely, to the previous opinion (Law No.121) which had suggested a 50% minimum. The most appropriate, from the perspective of international standards, would be for the members of the equality body to be full-time given the responsibilities held and to clarify that operational management and monitoring of this, or whatever time regime applies, rests with the equality body. Law No. 121 remains silent on remuneration levels despite concerns raised in the previous opinion (Law No.121).

4.4 Effectiveness of the equality body

Effectiveness, under international standards, has a particular concern with the **resources** made available to the equality body. This was raised in the previous opinion (Law No. 298) which included a recommendations for a provision to guide Parliament in establishing the budget for the Council, in particular to ensure adequacy of resources, with 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 realisation of its potential”. The draft amendments remain silent on this key issue for effectiveness of equality bodies.

This should be addressed in the terms set out by the Venice Commission in its 2017 Opinion on the Ombudsperson’s Office that: the budgetary allocation should be adequate to the need to ensure full, independent and effective discharge of the tasks of the institution, based on indicators such as the number of complaints lodged with the People’s Advocate in the previous period of reference. The Law should provide for the autonomous management, by the Office, of the budgetary allocation at its disposal. This encompasses human and financial resources.

Effectiveness is enhanced where the equality body applies a full **planning cycle** in conducting its work and this is reflected in international standards. No provision is made for the equality body to engage in strategic and annual work-planning and in evaluation of its work, as recommended in the previous opinion (Law No. 298).

The **competences** of the equality body are set out in relation to each of its functions. These have been usefully ordered and further developed in the draft amendments. International standards are clear that the spread of competences and associated powers afforded to the equality body are a key to its effectiveness.

The analysis below points to the need to further develop and expand the competences of the equality body to be in line with international standards. This will have implications for the resources of the equality body. International standards are clear that the 'resources allocated to equality bodies should take into account the competences and tasks allocated'¹⁶. Thus any expansion of the competences of an equality body should be accompanied by the additional resources required to implement such expanded competences. It would be important for this standard to be respected in the proposed amendments.

The competences provided for and issues in relation to these are addressed in turn below under the relevant sections of the Law:

Improvement of legislation and practice in order to prevent and combat discrimination and promote equality (Chapter 4, Section 1):

The amended title for this section is a positive development in establishing a necessary breadth of focus for this work of preventing and combating discrimination and promoting equality.

The proposed amendments enhance the advisory function of the equality body. This is evident in clarifying its contribution to draft normative acts in amended Point 21, as recommended in the previous opinion (Law No. 298). The proposed amendments provide for initiation of proposals to amend legislation in order to prevent and combat discrimination, as per the previous legislation. However, in Article 12 of Law No 121 this is further strengthened by a power to notify the Constitutional Court. This should be referenced in Law No. 298 for coherence.

The proposed amendments enhance the role of the equality body in relation to good practice. This is evident in the provision for the equality body to elaborate and draft general recommendations (amended Point 21). Further detail would be usefully provided to ensure that general recommendations could have a policy and a practice focus and could also target the private sector. This would reflect the recommendation in the previous opinion (Law No. 298) to include the private sector in the promotion of good practice.

The proposed amendments do not address any obligation on the state to consider and respond in a timely manner to the proposals, opinions, policy documents, and general recommendations of the equality body as is required under international standards. The only provision related to this is Parliamentary consideration of the general report. In this instance the further provision that Parliament would then make a decision is not clear (Point 29). International standards require that such a report is not subject to Parliamentary approval or disapproval.

While thematic reports, under the proposed amendments, are to be submitted to Parliament and the relevant authorities, as recommended in both previous opinions, it is not made clear what is to be done on foot of submission.

The provision of Point 24 that appear to allow for individual opinions from equality body members in this area, a weakening of the potential impact of the collective decision of the equality body, has not been deleted as recommended.

¹⁶ Commission Recommendation of 22.06.2018 on standards for equality bodies, European Commission, C(2018) 3850 final.

The role provided for the equality body in relation to good practice is limited to making general recommendations and does not address roles to promote good practice by providing training, information, guidance and support to public and private sector organisations as recommended in the previous opinion (Law No. 298) and as required under international standards.

Monitoring the way of implementing the legislation from the perspective of non-discrimination standards (new Section 2'):

This new section appears to provide for the functions of the equality body to keep the equal treatment legislation under review, support good practice, and engage in knowledge development. The power of the equality body to request and secure information is usefully included in the amendments (new Point 25'').

The equality body is empowered to provide methodological support, to those in the public and private sectors, in the process of implementing equal treatment legislation (new Point 25'). It is not clear what this refers to. It might refer to support for good practice, which would be positive and address the issue identified in the preceding section of the Law. If such, it might be useful to clarify this and to place it in the preceding section which refers to practice in its title.

It is presumed that the amended Point 26 is part of this new section. It would be important for Points 27, 28, 29, and 30, with their useful proposed amendments, which reflect the previous opinion (Law No. 298), to be part of this new section.

Increasing the level of information of society regarding the discrimination phenomenon:

The provisions in relation to the awareness raising function of the equality body remain largely unaltered. As such they do not address the recommendations in the previous opinion (Law No. 298) that: communication with the general public should encompass the promotion of equality as well as the issue of discrimination; clarify that communication on rights and how to exercise rights under the legislation should specifically target those groups at risk of discrimination; and the equality body should produce a communication strategy. These recommendations reflect requirements under international standards.

More specifically, the recommendation in the previous opinion (Law No. 298) that Point 25 (a), dealing with communication with society, should refer to the impact that this communication work has on social values of equality, diversity and non-discrimination should be introduced, alongside the impact of zero tolerance of discrimination currently stated.

Cooperation with civil society, other national and international institutions:

The amendments introduced into this section in providing for the establishment of a 'consultative council' with representatives of civil society, academics, and independent experts reflect the recommendation made in the previous opinion (Law No. 298). While this lacks detail, it is, usefully, set out that the consultative council would be established by means of a regulation approved by the equality body. This reflects requirements under international standards.

Sanctions for discrimination acts:

The amended title for this section appears inappropriate, though this could be a matter of translation. Otherwise, the draft amendments are minimal in this section.

It is positive that a specific form of amicus role is extended to the equality body in the proposed amendment to Article 18 (new sub-article 2') of Law No. 121. This appears to provide for a role for the equality body in court hearings of complaints of discrimination. However, it does not provide for discretion in respecting the independence of the equality body to determine in which cases it would play such a role.

Examining complaints and ex-officio acts:

The extensive amendments provided for in this section are valuable in that they:

- Improve the powers of the equality body (proposed amended Point 45 which allows the equality body, on an own initiative basis, to continue working on a withdrawn complaint, proposed new Point 53' which appears to be a power of inspection, proposed amended Point 55 which appears to make conciliation agreements binding on both parties, and proposed amended Point 65 which appears to clarify the legally binding nature of the equality body decisions);
- Establish reasonable and more realistic time limits for operations of the equality body including for notification of the parties about an extension (proposed amended Point 57 and proposed amended Point 62) and (proposed amended Article 15 (1) in Law No. 121);
- Allow some flexibility for the parties (proposed new Point 54'); and
- Make some provision for the issue of accessibility (proposed amended Point 59 and proposed amended Point 53 (g)); and
- Clarify the time-limits for cases of continuous or prolonged nature (proposed amended Article 13 (2) of Law No. 121).

These respond to and go beyond the recommendations in both previous opinions.

Provision for the equality body to support those seeking to submit a claim of discrimination does not appear to be made. This falls short of requirements under international standards. The previous opinion (Law No. 298) recommended, at a minimum, provision for a pre-hearing processes to implemented by the equality body 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 and to balance this with provision of information to respondents on the procedure to be following in hearing the case.

Provision, as recommended in the previous opinion (Law No. 298), relating to follow-up procedures once a decision has been made, does usefully appear to be made in proposed new Point 53' with reference to visits by way of executing the prescriptions/recommendations formulated and monitored by the equality body.

These could be strengthened by a reporting obligation on the respondent party within a specified time limit, on steps taken to implement recommendations made. The proposed amended Article 15 (5) of Law No. 121 states that the equality body "has to inform in 30 days about the undertaken measures". This appears problematic where there appears to be no requirement on the respondent to provide such information. It is possible this is an error and this actually refers to the respondent.

Article 15 (6) of Law No. 121 provides for the equality body to approach a superior body for appropriate actions if there is a failure to implement a recommendation or to address public opinion. New text is provided in the proposed amendment for Article 15 (6) in relation to addressing public opinion. It would be important, from the perspective of

international standards, that the original text of this sub-article would also remain or an equivalent and appropriate provision empowering the equality body to pursue effective action through the courts to secure implementation of its recommendations.

Point 55 does not appear to allow any discretion to either or both parties or indeed the equality body to refuse to pursue an amicable settlement. This would be in breach of requirements under international standards. It is positive that the provision in relation to recording such a refusal has been deleted in the proposed amendments, as recommended in the previous opinion (Law No. 298).

Provisions in proposed amended Point 61 usefully clarify the composition of the decision of the equality body as recommended in the previous opinion (Law No. 121).

Provisions, as recommended in the previous opinion (Law No. 298), to empower the equality body to directly apply effective, proportionate and dissuasive financial and other sanctions and make relevant orders, where discrimination has been found, have not been adequately included. This issue is addressed above in recommendations made under Law No. 121.

Provisions in proposed amended Article 13 in Law No. 121 usefully clarify what is required in the composition of a complaint. It is not clear why Article 13 (3) was removed. Provision should be made that submitting a complaint before a court has the effect of terminating proceedings before the equality body. This is aimed at avoiding parallel proceedings before courts and the equality body.

Provisions in Article 14 and new Article 14' in the proposed amendments to Law No. 121 usefully set out the rationale for refusing a complaint, that a refused complaint can be resubmitted, and the rationale for finding a complaint inadmissible.

Provisions in Article 15 in the proposed amendments to Law No. 121 usefully establish reasonable and more realistic time limits for the equality body in examining a complaint, with some potential to extend this in case of complexity or volume of information to be processed in Article 15 (1).

The shifting of the burden of proof is given added detail and clarity in proposed amended Article 19 of Law No. 121. It is also usefully clarified in proposed amended Point 56 of Law No. 298. However, the text in proposed amended Article 15 (1) appears to suggest an incorrect understanding with the use of the sole wording "The responsibility of proving that the act in question does not constitute discrimination shall lie with the person alleged to have committed the act".

Article 10 of Law No. 121 sets out that the equality body, the Courts and the public authorities have a role in dealing with complaints of discrimination. The previous opinion (Law No. 121) had noted a problematic lack of detail on the role and positioning of public authorities in this regard. The proposed new Article 16 (a) in Law No. 121 appears to valuably redefine the role of public authorities in terms of a requirement on them to "implement the principle of equality, non-discrimination and respect for diversity in the activity performed" rather than a role in relation to complaints of discrimination.

This reflects a key development in Law No. 121 in introducing a positive statutory duty on public authorities to be proactive in securing the principles of equality, non-discrimination and respect for diversity. This reflects requirements under international standards. It is

further enhanced by the specific positive duty on educational establishments set out in the proposed amended Article 9 (2').

However, these provisions should be strengthened by providing for the equality body to have a role in setting standards for the implementation of these duties and to monitor, support and enforce their full and effective implementation.

There is no provision made for 'situation testing' by the equality body as recommended in the previous opinion (Law No. 121).

No provision is made to empower the equality body to conduct formal inquiries into all matters under their mandate and to make and publicise recommendations from such inquiries. This would be a requirement under international standards.

4.5 Accessibility of the equality body

Issues of accessibility are valuably introduced in the proposed amendments, in particular the proposed amendments to Point 59 and Point 53 (g).

However, the proposed amendment to Point 59 would have benefited from further clarification as to what is meant by 'accessibility' and should have included some requirement to provide a procedure for and to make a reasonable accommodation for diversity across all grounds covered by the Law. This would have better reflected the requirements of international standards.

Accessibility would have been enhanced by provision for a local presence for the equality body outside Chişinău by way of regular outreach, open meetings or local offices, and for the hearing of cases. This would have better reflected the requirements of international standards.

4.6 Other Issues

The previous opinion (Law No. 298) raised a number of ancillary issues in relation to Law No. 298. These related to equality of arms, definitions, the role of the President of the equality body, and amicable settlements. Many of the recommendations in relation to these issues have been addressed.

In relation to **equality of arms**, provision is made for an adjournment of the hearing on the reasoned request of either party in proposed new Point 54', and clarification of the timeline for the respondent to reply to complaint is made in proposed amended Point 57. However, contrary to the recommendations made in the previous opinion (Law No. 298), no flexibility is allowed in the deadline for the respondent if the case raises complex matters; no detail is provided on the sanctions that would be applied where the deadline is not met; and no clarification is provided that the minutes of hearing nor the decision of the equality could not be used in criminal proceedings.

There is no provision, as recommended in the previous opinion (Law No. 298), to clarify the purpose of the foreseen attendance of Council in the proceedings identified in Point 36; establish an obligation on private persons and organisations to provide necessary evidence

to the equality body; and ensure the equality body can address imbalanced representation of the parties (complainant and respondent) by, for example, playing a proactive role in determining the facts and applying the law.

In relation to **definitions**, the proposed amendments to Point 4 provide greater clarity. However, they do not, as recommended, clarify that a respondent can be an individual or legal entity from the public and private area, that the concept of interested person should not be restricted to specified organisations, distinguish between an interested person and a representative/proxy of the complainant, and clarify that this latter type of interested person could be both legal entities and private persons.

In relation to the role of the **President** of the equality body, a proposed amendment usefully allows for some delegation of functions in Point 7. However, the recommendation to amend Point 6 to ensure that revocation of the President should be made conditional on consensus on the Council is not addressed.

In relation to **amicable settlements**, no provisions are made in relation to confidentiality of settlements if appropriate, as recommended in the previous opinion (Law No. 298).

4.7 Recommendations

The analysis raises a wide range of issues and recommendations are set out below to address these. Within these, it appears particularly important that the draft amendments would be further developed to:

- Enhance the mandate and competences of the equality body (recommendations 1, 12, 18, 19, 21, 22 and 24).
- Ensure adequacy of resources for the equality body (recommendation 8).
- Enhance the advisory function of the equality body (recommendations 10, and 11).
- Address the issue of sanctions in cases of discrimination (recommendation 20).

It is recommended, as a priority, that the proposed amendments to Law No. 298 (and Law No. 121 where specified) should be further developed to:

1. Provide for the equality body to have a mandate in combating hate speech in Point 2 and subsequently.
2. Provide in Point 6 that the revocation of the President should be made conditional on consensus in the Council.
3. Delete the requirement in Article 11 (14) of Law No. 121 requiring the internal regulation of the equality body to be approved by Parliament.
4. Provide limits in Article 11 of Law No. 121 on the number of terms that a member of the equality body can serve at two terms and provide for a staggered replacement of members to ensure institutional memory and experience is retained and the whole membership is not replaced at one time.
5. Amend Article 11 (11) of Law No. 121 for the members of the equality body to be full-time in implementation of their responsibilities and to clarify that operational management and monitoring of this, or whatever time regime applies, rests with the equality body.

6. Article 11 (8') of Law No. 121 should be reworded to specifically set out that members of the equality body and staff are provided with immunity, such that they are not liable for opinions and actions carried out while performing their functions.
7. Introduce a provision in Article 11 of Law No. 121 that the equality body is solely responsible for the management, deployment, and organisation of its members and staff.
8. Provide in Point 3 that parliament have regard to the need to ensure the provision of resources adequate for the equality body to implement its functions to a scale and a standard to ensure impact and the full realisation of its potential when establishing the budget for the equality body, and make separate provisions for the adequacy of the budget in line with the 2017 recommendation made by the Venice Commission in relation to the Law on the People's Advocate finance provisions, in terms of both human and financial resources.
9. Delete wording in proposed amended Article 15 (1): "The responsibility of proving that the act in question does not constitute discrimination shall lie with the person alleged to have committed the act".
10. Provide in Point 21 that the public authorities would consider and respond in a timely manner to the proposals, opinions, policy documents, and general recommendations of the equality body.
11. Provide in Point 21 that general recommendations made by the equality body may have a focus on policy and on practice and may be directed at public and private entities.
12. Provide in Point 21 a role for the equality body to promote good practice through the provision of training, information, guidance, and support to public and private entities, as appropriate.
13. Delete Point 24 allowing individual members to provide opinions.
14. Provide in Point 25 (a) that communication with the general public would also be to advance a valuing of equality, diversity and non-discrimination.
15. Provide in Article 13 Law No. 121 that submitting a complaint before a court has the effect of terminating proceedings before the equality body to avoid parallel proceedings before the courts and the equality body.
16. Rephrase the proposed amendment to Article 18 (2') of Law No. 121 to allow discretion for the equality body to choose in which cases of discrimination it would act as *amicus curiae*.
17. Provide in Article 15 (5) of Law No. 121, an obligation on the respondent, where discrimination is found, to inform the equality body within 30 days of measures undertaken on foot of recommendations.
18. Provide in section 5 for the equality body to provide support to individuals bringing cases of discrimination in the form of a pre-hearing implemented by administration staff not later involved in the hearing of the case; and to provide information to respondents on the case procedures to be followed.
19. Provide in Section 5 for the equality body to address imbalanced representation of the parties (complainant and respondent) by playing a proactive role in determining the facts and applying the law.
20. Provide in section 5 that the equality body may, on finding discrimination in a case, provide remedies for discrimination that include the application of effective, proportionate, and dissuasive financial and other sanctions, as well as orders for steps to: put an end to discrimination; restore the situation of the complainant; and prevent

future acts of discrimination and advance equality, without having to go to court to secure sanctions.

21. Provide in section 5 for the equality body to have competence to conduct formal inquiries into all matters under their mandate and to make and publicise recommendations from such inquiries.
22. Provide competences to the equality body to effectively pursue implementation of its decisions through the courts where there has been a failure to implement by the respondent, in Article 15 (6), of Law No. 121.
23. Provide in proposed Article 55 that the pursuit of an amicable settlement is optional for the equality body and is predicated on agreement of both parties and that amicable settlements may be confidential as agreed with the parties.
24. Provide for the equality body to monitor, support, set standards for, and enforce duties on employers in Article 7 (4) of Law No. 121, on educational establishments in new proposed Article 9 (2') of Law No. 121, and on public authorities in new proposed Article 16 (a) of Law No. 121.
25. Provide in proposed amended Point 57 for flexibility in the deadline for the respondent if the case raises complex matters and make provision for the failure to meet this deadline.
26. Provide in Point 59 in relation to 'accessibility' that the equality body will implement a procedure to make reasonable accommodation for diversity of complainants and respondents.
27. Provide for the equality body to have a local presence through outreach, open meetings or local offices, and for hearing cases, as appropriate.
28. Provide that the equality body engage in strategic and annual work-planning and in evaluation of its work and prepare a communication strategy.
29. Any expansion of the competences of an equality body as part of the proposed amendments should be accompanied by the additional resources required to implement such expanded competences.

5. Gender Analysis of the Proposed Amendments

5.1 Gender perspective

Law No. 121 covers the ground of sex. A separate and previous Law No. 5 specifically addresses equal opportunities between women and men. This predated the establishment of the equality body and sets out no role for the equality body.

Employment is a priority focus in action on gender equality across Europe. Significant inequalities persist for women in the workplace in terms of such as vertical and horizontal segregation, pay gaps, low paid precarious work, inflexible working arrangements and their take-up, sexual harassment, and pregnancy-related discrimination. This priority is evident in the relevant EU policy document, the Strategic Engagement for Gender Equality 2016-2019. Four of the five key thematic areas, economic independence, equal pay, equality in decision-making, gender-based violence, include a significant focus on the workplace. Equal treatment legislation has a key contribution to make in all of these areas.

Equal pay on the ground of sex and the gender pay gap has always been a focus in equal treatment legislation across Europe. The draft amendments for Article 7 (d) of Law No. 121 provide for an improved definition of the prohibition of discrimination in relation to equal pay that better reflects international standards.

However, the persistence of the gender pay gap has raised issues in relation to the effective implementation of the measures in place and in relation to the adequacy of these measures. Access to information for those experiencing pay discrimination is one key barrier to effective implementation. New pay transparency measures are gaining significant traction in response to the inadequacy of current measures.

Pay transparency measures are finding their way into equal treatment legislation and will gradually become the norm and an international standard. The measures take the form of requiring employers to conduct regular pay surveys, use the survey to establish if there are pay differences between women and men, and develop and implement a plan of action to rectify such differences. Such provisions can be monitored, supported and enforced through the equality body.

There are no measures in relation to access to information for those making complaints of pay related discrimination and no duty placed on employers in this regard in Law No. 121. There are no measures in relation to pay transparency.

Sexual harassment at work is emerging as a key gender equality issue across Europe. This is analysed in terms of change in the advancing of gender equality in the public domain leading to a situation where violence against women, previously an issue confined to the private domain, is now prevalent in the public domain. This must be a priority for equal treatment legislation governing the workplace, educational establishments and all other public arenas.

Law No. 5 includes a definition of sexual harassment as “any form of physical, verbal, or nonverbal behaviour, of sexual nature, which abases a person or creates an unpleasant, hostile, degrading, humiliating, or insulting environment”. It does not appear to explicitly prohibit sexual harassment or to establish employer liability in this regard. It does include a duty on employers to “undertake measures to prevent sexual harassment of women and men at their place of work”. There is no requirement on employers to appropriately address incidents of sexual harassment where an allegation is made in their workplace. Law No. 121 defines and specifically prohibits harassment in the workplace. It makes no explicit provision on sexual harassment and does not address harassment in the field of education and other fields. This is a significant omission.

Pregnancy, maternity and paternity related discrimination are included in the definition of direct discrimination in Law No. 5. This formula is not used in Law No. 121. This is a significant omission as it appears to fail to bring this discrimination into the ambit of the developed enforcement provisions set out in Law No. 121.

Law No. 5 usefully allows “measures to ensure certain special conditions for women during the period of pregnancy, recuperation, and/or breast-feeding”. However, international standards are going beyond this. The work life balance Directive of the EU¹⁷ establishes

¹⁷ DIRECTIVE 2019/1158 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU.

that workers with children up to a specified age have the right to request flexible working arrangements for caring purposes and employers must consider and respond to such requests and provide reasons for any refusal. There is no provision made for such a right in Law No. 121.

Education is another key arena in which to advance gender equality. The international focus here has moved to focus on issues of educational content and of educational segregation and the choices made by girls and boys, rather than issues of access and of outcome. Law No. 5 usefully requires educational establishments to include gender education as a component part of the educational system. There are no provisions made for a failure to do so or to set standards in relation to what is required. A named focus on the elimination of gender stereotypes and on addressing issues of segregation from an early stage would be particularly valuable.

Equality bodies have an important contribution to make to gender equality that goes beyond the prohibition on discrimination to focus on advancing more substantive forms of gender equality achieving more equal outcomes for women and men in all arenas. Law No. 5 includes for a wide range of initiatives in support of substantive gender equality with specific Chapters on “Ensuring equal opportunities between women and men in” the public domain, the socio-economic sphere, and education and healthcare. However, the equality body is accorded no role in the full and effective implementation of the positive measures in these Chapters.

It would be important to level up the provisions of Law No. 5 to align with the provisions in Law No. 121 and Law No. 298. This could involve a review of Law No. 5 or, for the current moment, to provide that the updated provisions in these two Laws take precedence in addressing discrimination on the ground of sex.

5.2 Recommendations

The analysis raises a wide range of issues and recommendations are set out below to address these. Within these, it appears particularly important that the draft amendments would:

- Improve provisions to better enable cases in relation to equal pay (recommendation 1).
- Make more adequate provisions to address sexual harassment (recommendation 2).
- Provide for a role for the equality body in securing implementation of the provisions for substantive gender equality in Law No. 5 (recommendation 5).

It is recommended, as a priority, that the proposed amendments to Law No. 121 should be further developed to:

1. Provide in Law No. 121 that persons taking cases of pay discrimination have a right of access to relevant information from their employer in making their case.
2. Include a definition of sexual harassment in Law No. 121, in accordance with international standards, identify it as a prohibited form of discrimination in the workplace, educational establishments and other public domains, and establish that a failure by employers and service providers to undertake measures to prevent sexual

harassment and address it when it occurs renders them liable in a case where sexual harassment has been found to occur.

3. Provide in Law No. 121 that employees with children up to a specified age have the right to request flexible working arrangements for caring purposes and employers must consider and respond to such requests and provide reasons for any refusal.
4. Provide an obligation on educational establishments in Law No. 121 to take action to eliminate and counter gender stereotypes and to ensure that these do not inform choices made by girls and boys.
5. Provide and set out under Law No. 121 a role for the Equality body in monitoring, supporting, and setting standards to advance the provisions for gender equality made under Law No. 5.
6. Provide in Law No. 121 that any provisions in Law No. 5 of a lesser or narrower articulation are replaced by the provisions on these matters in Law No. 121.
7. Consider the piloting in practice and subsequent introduction of obligations in Law No. 121 in relation to pay transparency.

6. Reference Documentation

- Law No. 5 on Ensuring Equal Opportunities for Women and Men dated 9th February 2006.
- Law No. 121 on Ensuring Equality dated 25th May 2012.
- Law No. 298 on the activity of the Council for Preventing and Eliminating Discrimination and Ensuring Equality dated 21st December 2012.
- Law on amending and supplementing some legislative acts.
- Information Note to the draft Law on amending and supplementing some legislative acts.
- Assessment of Law No. 298 on the activity of the Council for Prevention and Elimination of Discrimination and Ensuring Equality, Niall Crowley and Ivana Roagna, Council of Europe consultants, July 2016.
- Assessment of the Law No. 121 on ensuring equality in compliance with the Council of Europe anti-discrimination standards, Ivana Roagna and Nevena Petrusic, Council of Europe consultants, February 2016.
- Opinion on National Mechanisms to Promote Equality from the Commissioner for Human Rights of the Council of Europe, Council of Europe, 2010.
- European Commission against Racism and Intolerance General Policy Recommendation no. 2: Equality bodies to Combat Racism and Intolerance at National Level, adopted 7 December 2017 (Revised), Council of Europe.
- European Commission against Racism and Intolerance General Policy Recommendation no. 7: National Legislation to Combat Racism and Racial Discrimination, adopted 13 December 2002 (amended 7 December 2017), Council of Europe.
- European Commission against Racism and Intolerance, General Policy Recommendation no. 15: Combating Hate Speech, adopted 8 December 2015, Council of Europe.
- European Commission against Racism and Intolerance, Report on the Republic of Moldova (fifth monitoring cycle), adopted on 20 June 2018, published on 1 October 2018, Council of Europe.

- EU equal treatment Directives, in particular: Council Directive 2000/43/EC implementing the principle of equal treatment of persons irrespective of racial or ethnic origin; Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation; 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).
- DIRECTIVE 2019/1158 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU.
- Commission Recommendation of 22.06.2018 on standards for equality bodies, European Commission, C(2018) 3850 final.
- UN Principles relating to the Status of National Institutions (Paris Principles), 1993.
- Opinion on Proposed new Article 37 of the Law on the People’s Advocate Finance Provisions of Republic of Moldova, European Commission for Democracy through Law (Venice Commission), CDL-AD(2017)032, September 2017, Strasbourg.

Table on Amendments Proposed and Required to Law No. 121: Art. VI. – Law no. 121 of 25 May 2012 on the promotion of equality (Official Gazette of the Republic of Moldova, 2012, no. 103, Art. 355)

Proposed Amendment	Comment	Recommendation
2. In Article 1 paragraph (1), the words...	This usefully references 'jurisdiction' rather than 'territory'.	Replace the word 'family' with the word 'marriage' in Article 1 (2) (a) and delete parts (b) and (c).
2. In Article 1 paragraph (1), the words...	This usefully extends the grounds covered to include gender identity and grounds related to socio-economic status and clarifies the open nature of the list.	Name the ground of sexual orientation as a protected criterion in Article 1. Clarify the open list of grounds with the wording 'any other similar criterion' in Article 1.
3. Article 2: in the notion of...	The criteria in the definition of discrimination, direct discrimination and harassment are usefully amended to "protected, real or presumed". The definition of instigation to discriminate should include for	Clarify in Article 2 that discrimination, direct discrimination, indirect discrimination, discrimination by association, intersectional discrimination, racial segregation, harassment, hate speech, instigation to discrimination, victimisation, and the failure to provide reasonable accommodation are all prohibited as forms of

	<p>announced intention to discriminate; instructing another to discriminate; inciting another to discriminate; and aiding another to discriminate.</p> <p>Harassment is usefully defined, however, there is no reference to sexual harassment.</p>	<p>discrimination for the purpose of this Law, and include definitions of intersectional discrimination and of hate speech for this purpose¹⁸.</p> <p>Include a definition of sexual harassment in Law No. 121, in accordance with international standards, identify it as a prohibited form of discrimination in the workplace, educational establishments and other public domains, and establish that a failure by employers and service providers to undertake measures to prevent sexual harassment and address it when it occurs renders them liable in a case where sexual harassment has been found to occur.</p>
4. Article 4: at letter...		<p>Establish that the severe forms of discrimination set out in Article 4 will attract specific and additional penalties if found to have taken place and make provision for these in Chapter 4.</p>
6. Article 7: the title of the Article shall be...	<p>The provision have usefully been expanded to encompass 'pursuit of profession' and affiliation to employee organisations, employer organisations, or organisations of professionals.</p> <p>Provisions on equal pay, Article 7 (2) (d), are improved by the proposed amendment.</p>	<p>Specify occupation and self-employment after the word "profession" in amended Article 7 (1).</p> <p>Include access to employment and experience in employment before the words "conclusion, suspension, modification or termination" in amended Article 7 (1).</p> <p>Provide in 7 (2) that persons taking cases of pay discrimination have a right of access to relevant information from their employer in making their case.</p> <p>Consider the piloting in practice and subsequent introduction of obligations in Law No. 121 in relation to pay transparency.</p> <p>Include unequal working conditions, refusal to promote, dismissal, and refusal of access to vocational guidance and vocational training and retraining based on protected, real or presumed, criteria in the list in Article 7 (2).</p> <p>Delete the term 'ungrounded' is in Article 7 (2), replace it with "based on protected, real or presumed, criteria" and delete Article 7 (3).</p> <p>Provide that employers are required to take steps, including having an equality policy and action plan in place, to be planned and systematic in their approach to non-discrimination, in Article 7 (4) .</p> <p>Provide for the equality body to monitor, support, set standards for, and enforce duties on employers in Article 7 (4) of Law No. 121.</p>
7. Article 8 shall have the following content...	This offers useful clarity.	<p>Introduce the words 'goods and' in amended Article 8 (g).</p> <p>Include the functions of public authorities, including</p>

¹⁸ Based on: European Commission Against Racism and Intolerance, General Policy Recommendation no. 15: Combating Hate Speech, adopted 8 December 2015, Council of Europe.

		<p>law enforcement in the list in amended Article 8.</p> <p>Include the words after the word "property" the words and "allocation of housing by the public authorities" in amended Article 8 (2).</p>
8. Article 9: the title of the Article and...	<p>This offers useful clarity and valuably places positive duties on educational establishments.</p>	<p>Replace the reference to protected criteria with the words "protected, real or imagined criteria" in amended Article 9 (1).</p> <p>Provide for the equality body to monitor, support, set standards for, and enforce duties on educational establishments in new proposed Article 9 (2').</p>
		<p>Introduce a prohibition on sexual harassment and harassment in all areas covered by Law No. 121: in particular employment, accessing goods and services and education.</p>
10. Article 11: in the title of...	<p>Enhances the independence of the equality body as an 'autonomous public authority'...and as working under conditions of 'organisational, functional, operational, and financial independence from any public authority, natural or legal person...and with immunity provisions for members of the equality body.</p> <p>Effectiveness is enhance by provision that members of the equality body should spend at least 33.3% of their time working in the equality body</p>	<p>Provide limits in Article 11 of Law No. 121 on the number of terms that a member of the equality body can serve at two terms and provide for a staggered replacement of members to ensure institutional memory and experience is retained and the whole membership is not replaced at one time.</p> <p>Amend Article 11 (11) of Law No. 121 for the members of the equality body to be full-time in implementation of their responsibilities and to clarify that operational management and monitoring of this, or whatever time regime applies, rests with the equality body.</p> <p>Article 11 (8') of Law No. 121 should be reworded to specifically set out that members of the equality body and staff are provided with immunity, such that they are not liable for opinions and actions carried out while performing their functions.</p> <p>Delete the requirement in Article 11 (14) of Law No. 121 requiring the internal regulation of the equality body to be approved by Parliament.</p> <p>Introduce a provision in Article 11 of Law No. 121 that the equality body is solely responsible for the management, deployment, and organisation of its members and staff.</p>
12. Article 13 shall have the following content...	<p>Useful clarifies what is required in the composition of a complaint and the time-limits for cases of continuous or prolonged nature.</p>	<p>Provide in Article 13 Law No. 121 that submitting a complaint before a court has the effect of terminating proceedings before the equality body to avoid parallel proceedings before the courts and the equality body.</p>
13. Article 14 shall have the following content... & 14. Shall be supplemented by...	<p>Usefully sets out the rationale for refusing a complaint, that a refused complaint can be resubmitted, and the rationale for finding a complaint inadmissible.</p>	<p>Provide for the person taking a case to request the court and for the court to issue temporary measures to secure a cessation of ongoing discrimination in Article 14 (1)</p>

15. Article 15: Paragraph...	Usefully establishes reasonable and more realistic time limits for the equality body.	Provide in Article 15 (5) of Law No. 121, an obligation on the respondent, where discrimination is found, to inform the equality body within 30 days of measures undertaken on foot of recommendations. Provide competences to the equality body to effectively pursue implementation of its decisions through the courts where there has been a failure to implement by the respondent, in Article 15 (6), of Law No. 121.
16. At Article 16: the words...	Valuably redefine the role of public authorities in terms of a requirement on them to "implement the principle of equality, non-discrimination and respect for diversity in the activity performed".	Provide for the equality body to monitor, support, set standards for, and enforce duties on public authorities.
		Provide in Article 17 that the equality body may, on finding discrimination in a case, provide remedies for discrimination that include the application of effective, proportionate, and dissuasive financial and other sanctions, as well as orders for steps to: put an end to discrimination; restore the situation of the complainant; and prevent future acts of discrimination and advance equality, without having to go to court to secure sanctions
17. Article 18: in the title...	It is positive that a specific form of amicus role is extended to the equality body.	Reword the proposed amendment to Article 18 (2') of Law No. 121 to allow discretion for the equality body to choose in which cases of discrimination it would act as amicus curiae.
18. At Article 19 paragraph (1)...	The shifting of the burden of proof is given added detail and clarity... However, the text in proposed amended Article 15 (1) is problematic.	Delete wording in Article 15 (1)... "The responsibility of proving that the act in question does not constitute discrimination shall lie with the person alleged to have committed the act".
		Provide in Law No. 121 that employees with children up to a specified age have the right to request flexible working arrangements for caring purposes and employers must consider and respond to such requests and provide reasons for any refusal. Provide an obligation on educational establishments in Law No. 121 to take action to eliminate and counter gender stereotypes and to ensure that these do not inform choices made by girls and boys. Provide and set out under Law No. 121 a role for the Equality body in monitoring, supporting, and setting standards to advance the provisions for gender equality made under Law No. 5. Provide in Law No. 121 that any provisions in Law

		No. 5 of a lesser or narrower articulation are replaced by the provisions on these matters in Law No. 121.
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Table on Amendments Proposed and Required to Law No. 298: Art. VII. – Law no. 298 of December 21, 2012 regarding the activity of the Council for the prevention and elimination of discrimination and promotion of equality (Official Gazette of the Republic of Moldova, 2012, no. 48, Art. 148)

Proposed Amendment	Comment	Recommendation
2) point 2 shall have the following content:	The proposed amendments to both Law No. 121 and Law No. 298 establish the equality body as having the purpose of preventing and combating discrimination and promoting equality.	Provide for the equality body to have a mandate in combating hate speech in Point 2 and subsequently.
		Provide in Point 3 that parliament have regard to the need to ensure the provision of resources adequate for the equality body to implement its functions to a scale and a standard to ensure impact and the full realisation of its potential when establishing the budget for the equality body, and make separate provisions for the adequacy of the budget in line with the 2017 recommendation made by the Venice Commission in relation to the Law on the People's Advocate finance provisions, in terms of both human and financial resources.
		Provide in Point 6 that the revocation of the President should be made conditional on consensus in the Council.
4) point 7: letter...	Usefully empowers the equality body to draft its detailed rules of procedure for hearing and mediating cases of discrimination.	
14) Point 21 shall have the following content...	enhance the advisory function enhance the role of the equality body in relation to good practice	Provide in Point 21 that the public authorities would consider and respond in a timely manner to the proposals, opinions, policy documents, and general recommendations of the equality body. Provide in Point 21 that general recommendations made by the equality body may have a focus on policy and on practice and may be directed at public and private entities. Provide in Point 21 a role for the equality body to

		promote good practice through the provision of training, information, guidance, and support to public and private entities, as appropriate.
		Delete Point 24 allowing individual members to provide opinions.
15) Point 25: at letter...		Provide in Point 25 (a) that communication with the general public would also be to advance a valuing of equality, diversity and non-discrimination.
20) shall be supplemented by point 31 ¹ having the following content...	Valuably provides for a consultative council to the equality body.	
		<p>Provide in section 5 for the equality body to provide support to individuals bringing cases of discrimination in the form of a pre-hearing implemented by administration staff not later involved in the hearing of the case; and to provide information to respondents on the case procedures to be followed.</p> <p>Provide in Section 5 for the equality body to address imbalanced representation of the parties (complainant and respondent) by playing a proactive role in determining the facts and applying the law.</p> <p>Provide in section 5 that the equality body may, on finding discrimination in a case, provide remedies for discrimination that include the application of effective, proportionate, and dissuasive financial and other sanctions, as well as orders for steps to: put an end to discrimination; restore the situation of the complainant; and prevent future acts of discrimination and advance equality, without having to go to court to secure sanctions.</p> <p>Provide in section 5 for the equality body to have competence to conduct formal inquiries into all matters under their mandate and to make and publicise recommendations from such inquiries.</p>
26) point 45 shall have the following content...	Improves the powers of the equality body as allows the equality body, on an own initiative basis, to continue working on a withdrawn complaint.	
32) shall be supplemented by points 53 ¹ -53 ⁶ having the following content...	Improves the powers of the equality body as providing a power of inspection and, in particular, enhances powers to follow-up decisions.	
35) point 55 shall have the	Valuably makes conciliation	Provide in proposed amended Article 55 that the pursuit of an amicable settlement is optional for the

following content...	agreements binding.	equality body and is predicated on agreement of both parties and that amicable settlements may be confidential as agreed with the parties.
37) points 57, 58 and 59 shall have the following content...	Valuably address issue of time-limits and make some provision for accessibility.	Provide in proposed amended Point 57 for flexibility in the deadline for the respondent if the case raises complex matters and make provision for the failure to meet this deadline. Provide in Point 59 in relation to 'accessibility' that the equality body will implement a procedure to make reasonable accommodation for diversity of complainants and respondents.
39) points 61 and 62 shall have the following content...	Usefully clarify the composition of the decision of the equality body.	
42) point 65 shall have the following content...	Improves the powers of the equality body as clarifies the legally binding nature of the equality body decisions.	
		Provide for the equality body to have a local presence through outreach, open meetings or local offices, and for hearing cases, as appropriate. Provide that the equality body engage in strategic and annual work-planning and in evaluation of its work and prepare a communication strategy.
		Any expansion of the competences of an equality body as part of the proposed amendments should be accompanied by the additional resources required to implement such expanded competences.