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Dear Prime Minister

Submission of The Equal Rights Trust on the Draft Law on Equal Opportunities

I write on behalf of The Equal Rights Trust (ERT), an independent international organisation whose purpose is to combat discrimination and promote equality as a fundamental human right and a basic principle of social justice I write to express our grave concerns about the recently published draft *Law on Equal Opportunities* (the Draft Law). In particular, I would like to state ERT's absolute opposition to the decision to remove the grounds of health status, sexual orientation, wealth and social origin from Article 1(1) (Purpose), the related decision to provide a specific, but narrow, protection from discrimination on grounds of sexual orientation in the area of employment alone (Article 7(1)) and the decision to define marriage as a union between a man and a woman under Article 1(2).

While in general, ERT welcomes any and all attempts to improve protection from discrimination, it is our opinion that these amendments undermine both the stated purpose of the law itself and Moldova's adherence to the fundamental principles of equality and non-discrimination. In our strong opinion, laws which purport to "prevent and combat discrimination" and "guarantee equal opportunities or treatment for all persons" should not create a hierarchy with different levels of protection between different grounds of discrimination.

It is our opinion that, as amended, the current Draft Law is inconsistent with international law and best practice on the rights to non-discrimination and equality. We note reports that the present Draft Law has been approved by representatives of the European Union involved in negotiations with your government. However, it is our firm view that the amendments made to the Draft Law are inconsistent with Moldova's obligations under other international instruments which have at least equal weight to those developed under the framework of the European Union. These instruments include notably the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the European Convention on Human Rights (ECHR). As such, our submission focuses on the requirements of these laws, and those of the Declaration of Principles on Equality,¹ a document of international best practice on equality which was adopted and signed by 128 human rights and equality experts, including many prominent experts from the European Union and the Council of Europe. The Declaration has been endorsed by the Parliamentary Assembly of the Council of Europe as a basis for legislating in the area of equality in the member states.²

Introduction

ERT is the only international human rights organisation which is entirely focused on the rights to equality and non-discrimination as such. Established as an advocacy organisation, resource centre and a think tank, ERT focuses on the complex relationship between different types of discrimination, developing strategies for translating the principles of equality into practice. In the exercise of this mission, we make regular submissions to governments concerning the implementation and enforcement of these rights.

As you may be aware, ERT has made submissions to members of your government on previous drafts of this law (in July 2009, September 2010, and March and October 2011), previously entitled the *Law on Preventing and Combating Discrimination*. In those submissions, ERT made recommendations in a number of areas where we believed that the law could be improved, providing greater clarity about the scope of its application, and bringing the protections provided therein into line with international law and best practice. The most recent of these submissions, providing comments on the draft of the *Law on Preventing and Combating Discrimination* which was published in October 2011, is enclosed with this letter.

While we welcome the fact that the present Draft Law has incorporated some of the amendments we proposed in our previous submissions, including notably defining reasonable accommodation as a form of discrimination, it is our opinion that any positive changes to the Draft Law are entirely undermined by the amendments set out above. In this letter therefore, we urge you in the strongest possible terms to:

- (a) Halt the process of adoption of the draft *Law on Equal Opportunities* by your government and its presentation before parliament;
- (b) Make further amendments to the Draft Law in order to bring it into line with Moldova's legal obligations under European and international law.

ERT welcomes and endorses the views expressed by the *Civic Group for Equality* in response to the publication of the Draft Law.³ We therefore urge the government to engage with and consult this

¹ Declaration of Principles on Equality, London, 2008, available at: <http://www.equalrightstrust.org/ertdocumentbank/Pages%20from%20Declaration%20perfect%20principle.pdf>.

² Council of Europe, Parliamentary Assembly, *The Declaration of Principles on Equality and activities of the Council of Europe*, REC 1986 (2011), 25 November 2011, available at: http://assembly.coe.int/ASP/Doc/ATListingDetails_E.asp?ATID=11380.

³ Info-Prim News Agency, "Civil society asks government to return to old version of Antidiscrimination Law", 15 May 2012, available at: <http://www.info-prim.md/?x=24&y=46416>.

Group in developing a new draft of the law which both complies with Moldova's international and European obligations and reflects the concerns of civil society in the country.

Removal of Grounds from Article 1(1)

ERT is alarmed by the decision to remove four grounds – health status, sexual orientation, wealth and social origin – from the list of protected grounds provided in Article 1(1). The signatories of the Declaration of Principles on Equality chose to include each of these grounds (or, in the case of “wealth”, its close parallel “economic status”) in the definition of discrimination, as they saw these characteristics as meriting the same standard of protection as other grounds, such as race, sex and religion or belief, which this Draft Law retains.⁴ In addition, each of these grounds is recognised as a protected ground at international law, and as such, each deserves the same level of protection as that provided for the other grounds listed in Article 1(1).

While health status and sexual orientation are not explicitly recognised in the text of any of the UN human rights treaties, there is a consistent practice of interpretation which leads to the clear conclusion that these characteristics are forms of “other status” as provided in Article 2 of the ICCPR and the ICESCR. The UN Human Rights Committee (HRC), for example, found in *Young v Australia* that sexual orientation is covered by the definition of “other status” under Article 26 ICCPR,⁵ reversing its previous decision that sexual orientation was covered by the ground of sex.⁶ The Committee on Economic, Social and Cultural Rights (CESCR) in its General Comment 20, stated that both sexual orientation and health status fall within the scope of the “other status” provided under Article 2.⁷

In the same General Comment, the CESCR approached the question of whether discrimination should be prohibited on the basis of economic and social situation, a classification which can be read as analogous to the ground of wealth included in previous drafts of the present Draft Law. The Committee stated clearly:

Individuals and groups of individuals must not be arbitrarily treated on account of belonging to a certain economic or social group or strata within society. A person's social and economic situation when living in poverty or being homeless may result in pervasive discrimination, stigmatisation and negative stereotyping which can lead to the refusal of or unequal access to the same quality of education and health care as others, as well as the denial of or unequal access to public places.⁸

Finally, both ICCPR and ICESCR include social origin, the fourth ground removed from Article 1(1), in the list of grounds explicitly protected in Article 2. Again, the CESCR, in General Comment 20, has expanded on how the ground of social origin should be interpreted and the need for its explicit protection, stating that it refers to a person's “inherited social status [...] descent-based discrimination [...] and 'economic and social status'”.⁹

In addition to their inclusion in instruments of international law, a number of those grounds which have been removed from the current version of the Draft Law have been recognised under the European Convention on Human Rights (ECHR). In respect of sexual orientation, while the Convention

⁴ See above, note 1, Principle 5.

⁵ *Young v Australia*, no. 941/2000, ICCPR.

⁶ *Toonen v Australia*, no. 488/1992, ICCPR.

⁷ Committee on Economic, Social and Cultural Rights, *General Comment 20: Non-discrimination in economic, social and cultural rights*, UN Doc. E/C.12/GC/20, 2009, Paras 32 and 33.

⁸ *Ibid.*, Para 35.

⁹ *Ibid.*, Para 24.

itself does not include this ground, the European Court of Human Rights (the Court) has developed a consistent body of jurisprudence which indicates that sexual orientation is treated as a “suspect classification” within the scope of Article 14, the right to non-discrimination. In *Dudgeon v the United Kingdom*, the Court found that laws criminalising sexual relations between consenting adults of the same sex contravened Article 8, the right to respect for private life.¹⁰ In subsequent cases, the Court has found a number of examples of differential treatment on the basis of sexual orientation to constitute violations of Article 14, including in the areas of age of consent laws,¹¹ and child custody,¹² for example. More recently, in a 2011 case, *Kiyutin v Russia*, the Court held that the refusal to grant a residency permit on the basis of a person's HIV status, was discriminatory under Article 14, read in conjunction with Article 8, finding that health status was a form of “other status” within the meaning of Article 14.¹³

In common with the ICCPR and ICESCR, social origin is among the grounds of discrimination which are explicitly protected under ECHR. While the ECHR does not explicitly provide protection from discrimination on grounds of wealth or economic status, it does provide protection on the basis of “property”. The CESCR, in its General Comment 20, has reflected that property may include both land and other forms of property, thus indicating that discrimination on grounds of property should be read in a way which would provide some of the same protections as available under the ground of wealth which has been omitted from the present Draft Law.

Thus, it is clear that Moldova's obligations under the ICCPR, ICESCR and the ECHR require it to provide protection from discrimination on each of the grounds which have been excluded from the present draft. ERT therefore urges the government of Moldova to re-instate the grounds of health status, sexual orientation, wealth and social origin in the list of protected grounds provided in Article 1(1).

Amendment to Article 1(2)

In its previous submissions to the government on drafts of this law, ERT has expressed its serious concerns about the limitations on the protection from discrimination which are created by Article 1(2). The Declaration of Principles on Equality states clearly that the right to equality, and therefore the right to non-discrimination which is subsumed within the right to equality, “applies in all areas of activity regulated by law”.¹⁴ A provision which states, as Article 1(2) does, that the protection from discrimination does not apply in areas of personal law or in respect of the activities of religious institutions, is contrary to this principle of universal application. Moreover, such limitations are inconsistent with Moldova's obligations under international law. In our October letter for example, we drew attention to the fact that exceptions which mean that “non-discrimination does not apply with respect to personal laws, in particular in the areas of marriage, divorce, adoption, burial and succession” have been explicitly criticised by the Committee on the Elimination of Discrimination Against Women.¹⁵

We are therefore disappointed that, far from removing Article 1(2), as urged in our previous correspondence, the decision has been taken to further expand it, by incorporating a provision which discriminates against persons in same-sex relationships. As revised in the Draft Law, Article 1(2) states that marriage is a union between a man and a woman. Thus, the Draft Law clearly disbars gay

¹⁰ *Dudgeon v the United Kingdom*, no. 7525/76, 22 October 1981.

¹¹ *Sutherland v the United Kingdom*, no. 25186/94, 01 July 1997.

¹² *Salgueiro Da SilvaMouta v Portugal*, no. 33290/96, 21 December 1999.

¹³ *Kiyutin v. Russia*, no. 2700/10, 10 March 2011.

¹⁴ See above, note 1, Principle 8.

¹⁵ See for example, UN Committee on the Elimination of Discrimination Against Women, *Concluding Observations on Kenya*, UN Doc. ICEDAW/C/KEN/CO/6, 10 August 2007, Para 11, available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N07/459/89/PDF/N0745989.pdf?OpenElement>.

men and lesbian women from entering into same-sex unions, and in so doing discriminates against these people on the basis of their sexual orientation in an important area of life – marriage. As stated above, the Declaration of Principles on Equality clearly states that the rights to equality and non-discrimination apply in all areas of life regulated by law, clearly covering the area of marriage and the foundation of a family.

While the Human Rights Committee, in examining whether Article 23 of the ICCPR provides a right to same-sex marriage, and whether the refusal to provide for marriage between same-sex couples violated Article 26, found that it did not. However, it is our opinion that Article 1(2) remains inconsistent with the ICCPR. Article 1(2) directly discriminates against lesbian, gay and bi-sexual people, in that it treats them unfavourably on the basis of their sexual orientation. As outlined above, sexual orientation is well established as a protected ground of discrimination within the scope of the “other status” category under ICCPR and ICESCR. Under the ICCPR, Moldova is obliged to refrain from discrimination, an obligation which means both that the state and its agents should not discriminate and that the laws of the country must not discriminate.¹⁶ Thus, Moldova clearly has an obligation to refrain from adopting laws which discriminate, either directly or indirectly, on a range of grounds which includes sexual orientation. While, at present, Moldova is not obliged to legislate to provide same-sex marriage, it remains under an obligation not to discriminate by passing legislation which treats persons sharing a protected ground or characteristic unfavourably.

In terms of Moldova’s obligations under the ECHR, we note that the European Court of Human Rights (the Court), in *Schalck and Kopf v Austria*, found that a ban on same-sex marriage was not a breach of Articles 8, 12 or 14, basing its decision on the margin of appreciation for state parties.¹⁷ Importantly however, the court stated that it did not consider Article 12 to be restricted to marriages between heterosexual couples, thereby leaving open the question of future interpretation. Moreover, in stating that the question should be “regarded as one of evolving rights with no established consensus”, the Court indicated a clear openness to finding an obligation to legislate for same-sex marriage in future. The evolution of rights to which the Court pointed is currently occurring at a rapid pace in a number of Council of Europe member states. ERT therefore believes that Moldova should consider carefully whether Article 1(2) will be consistent with its obligations under the ECHR in the future, and revise the Draft Law to ensure that it is consistent with the direction of travel pointed to by the Court.

For these reasons, and for those made in our previous submissions about the excessive limitations placed on the protection from discrimination by Article 1(2), ERT urges the government of Moldova to delete Article 1(2) in its entirety, or, if this is not possible, remove any reference within Article 1(2) to what constitutes a legitimate form of marital union.

Amendment to Article 7(1)

Consistent with our serious concerns over the changes to Article 1(1), ERT is concerned by the related decision to amend Article 7(1) to incorporate a specific reference to a prohibition of discrimination on grounds of sexual orientation in respect of employment. While this protection is not problematic as such, we believe that it is highly questionable, in the context of the other changes incorporated in the Draft Law. The effect of the change made to Article 7(1), together with the change to Article 1(1), is to downgrade the level of protection provided from discrimination on grounds of sexual orientation, limiting its application to the area of employment only. We believe that this move is contrary to Moldova's international legal obligations, inconsistent with the principles of non-discrimination and equality which the Draft Law purports to adopt and establish, and leaves the Draft Law severely limited in respect of one of the most important patterns of discrimination in Moldova today.

¹⁶ International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 1966, Articles, 2(1) and 26; Human Rights Committee, *General Comment 18: Non-discrimination*, 1989, Para 12.

¹⁷ *Schalck and Kopf v Austria*, no. 30141/04, 24 June 2010.

The Declaration of Principles on Equality explicitly requires that “Legislation must provide for equal protection from discrimination regardless of the ground or combination of grounds concerned”.¹⁸ In this regard, the Declaration reflects current expert opinion that any hierarchy of protection for different grounds of discrimination is inconsistent with the right to equality. It is also reflective of international law: neither the ICCPR nor the ICESCR establishes a system of different levels of protection from discrimination on different grounds, whether explicitly recognised in the text or subsequently read into the “other status” provision. These instruments require instead that states respect and ensure the Covenant rights “without distinction of any kind”. Any hierarchy of protections based on different grounds has no place in a law designed to provide protection from discrimination and promote equality.

Moreover, it is our view that the proposed change to the law will leave the law woefully inadequate in respect of addressing one of the most serious problems of discrimination in Moldova. There is extensive evidence of problems of discrimination and discriminatory violence directed at sexual and gender minorities in Moldova, which points to the need for effective protection from discrimination in all spheres of life. Moldovan NGO Promo-LEX, for example, has documented severe patterns of discriminatory ill-treatment directed at gay men and lesbians, in its recent report, *Discriminatory Ill-treatment in Moldova*, produced in partnership with ERT.¹⁹ The International Lesbian, Gay, Bisexual, Trans and Intersex Association – Europe, published its first *Annual Review of the Human Rights Situation of Lesbian, Gay, Bisexual, Trans and Intersex People in Europe 2011* on 15 May 2012, which examines the level of legal equality for LGBTI persons in all countries in Europe and provides a rating.²⁰ Moldova, together with Russia, held the worst rating in Europe, scoring -4.5 out of 30, a rating which indicates that the country does “not meet the basic requirements of human rights standards” in respect of LGBTI persons. In this context, reducing the level of legal protection for lesbian, gay and bisexual persons to employment alone is a deeply worrying move.

For these reasons, and for those made above in respect of Article 1(1), ERT urges the government of Moldova to re-instate the ground of sexual orientation in the list of protected grounds provided in Article 1(1) and to delete any specific reference to sexual orientation from Article 7(1).

Positive changes to the Law

As stated in the introduction to this letter, ERT believes that the changes made to Articles 1 and 7 of the Draft Law are sufficiently damaging to undermine any positive changes which have been made between the last draft and this one. For this reason, we urge the government to either make the amendments specified in the preceding three parts of this letter, or revert to the draft of the law which was published in late 2011. However, should the government decide to revert to the previous draft, we would urge the retention of three amendments to the Draft Law which represent improvements, in line with our previous submissions:

1. The inclusion, at Article 2(j), of a paragraph making provision for reasonable accommodation;
2. The inclusion, at Article 5(d), of a paragraph providing that measures to eliminate discrimination include reparations for both material and moral damage to the victim;
3. The inclusion, at Article 18(2), of a paragraph providing the right of standing for interested parties in discrimination cases, including associations, trade unions and non-governmental organisations.

¹⁸ See above, note 1, Principle 6.

¹⁹ Promo-LEX, “Promo-LEX Association released the Report „Discriminatory ill-treatment in Moldova””, 19 March 2012, available at: <http://www.promolex.md/index.php?module=news&item=871>.

²⁰ International Lesbian, Gay, Bisexual, Trans and Intersex Association – Europe, “ILGA-Europe launches its very first Annual Review of Human Rights Situation LGBTI in Europe and updated Rainbow Map”, 15 May 2012, available at: http://www.ilga-europe.org/home/news/latest_news/ilga_europe_launches_its_very_first_annual_review_of_human_rights_situation_lgbti_in_europe_and_updated_rainbow_map.

While ERT cannot endorse the current Draft Law for the reasons previously stated, we believe that these positive amendments should be retained in any future draft. Therefore, ERT urges the government of Moldova to retain new paragraphs 2(j), 5(d) and 18(2) in any new draft law on protection from discrimination which is produced.

Further improvements

Aside from the positive changes listed immediately above, we note that a number of recommendations made in our previous correspondence with members of your government have not been adopted. We remain of the belief that all of these past recommendations remain valid, and should be adopted, if the Draft Law is to effectively fulfil its stated purpose of combating discrimination and guaranteeing equality of opportunity and treatment, and be consistent with Moldova's obligations under international law. Therefore, ERT urges the government of Moldova to adopt the further recommendations made in ERT's submission of October 2011, in any new draft law on protection from discrimination which is produced.

Conclusion

By adopting a comprehensive anti-discrimination law, Moldova would take a pivotal step towards ensuring the fundamental human rights of everyone within its territory. As amended however, the current Draft Law cannot be properly called comprehensive. A law which omits protection from discrimination on certain important grounds recognised at international law, which contains discriminatory provisions directed at one group of persons, and which creates a hierarchy of protection for different grounds is not one which meets the ambition set out in the opening paragraphs of this Draft Law. Moreover, such a law is, as evidenced in this submission, inconsistent with Moldova's obligations under international law and the European Convention on Human Rights Law.

The present Draft Law, unlike previous drafts, does not merely provide a lower standard of protection than is desirable or required by international law and best practice. It violates the core principles of equality and non-discrimination, not least by singling out one particularly marginalised group and providing a different level of protection. ERT therefore urges you to adopt the recommendations presented in this submission, by halting the progress of the Draft Law, removing the relevant parts of Articles 1 and 7, and examining our proposals for how to further enhance the law.

Yours sincerely



Dimitrina Petrova
The Equal Rights Trust

Encs:

ERT submission to the Minister of Justice, October 2011.