

The Bill
**“On protection against
racial, national and ethnic
discrimination”**

This document was prepared under a project entitled, “Defending the rights of Roma in Ukraine and Ensuring their Access to Justice,” carried out by the European Roma Rights Center (ERRC) together with the International Centre for Policy Studies (ICPS, Ukraine) and a number of Roma community organizations in Ukraine, with financial support from the European Commission under Grant Contract (DDH/2003/063972).

This document was prepared by the project consultants, Serhiy Seheda (ICPS) and Oleksandr Tatarevskiy (ICPS).

Translation – Oleksandra Boliachevska

Editing – L.A.Wolanskyj

Design and layout – Ostap Stasiuk

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Foreword

This document was prepared under a project entitled, “Defending the rights of Roma in Ukraine and Ensuring their Access to Justice,” carried out by the European Roma Rights Center (ERRC) together with the International Centre for Policy Studies (ICPS, Ukraine) and a number of Roma community organizations in Ukraine, with financial support from the European Commission under Grant Contract (DDH/2003/063972).

The purpose of this project is to expand the options for members of the Roma minority to have access to justice when defending their rights and interests against violation.

The main instrument for reaching this goal is the adoption of a Law of Ukraine “On protection from discrimination on the basis of race, nationality or ethnic origins.”

The draft bill was authored by specialists at ICPS in consultation with ERRC and other participants in the project. This work was supported by a serious study into the issue of legal regulation of the protection of minority rights in Ukraine, including the rights of Ukraine’s Roma, and consultations with both top experts on the issue and representatives of various interest groups.

The research undertaken and the discussions with experts showed that one of the most painful issues that causes considerable suffering among the Roma minority is discrimination. This problem not only prevents them from freely enjoying the rights guaranteed to them by Ukrainian law, but actually interferes in their efforts to defend these rights in the country’s courts and government executive bodies. In addition, the consultations with experts and stakeholders made it possible to draw the conclusion that the main obstacles to effectively protecting people against the violation of minority rights can be eliminated through an anti-discrimination law.

The results of the research and expert discussions have been summarized and are presented in an explanatory brief attached to the draft Law of Ukraine “On protection from discrimination on the basis of race, nationality or ethnic origin,” which is a part of this document.

An intermediary result of this project was the submission of the draft Law of Ukraine “On protection from discrimination on the basis of race, nationality or ethnic origin” to the Verkhovna Rada of Ukraine, where it was registered as Bill №8590 of 15.12.2005. Attached to this bill was the above-mentioned explanatory brief.

The authors of the of the draft Law of Ukraine “On protection from discrimination on the basis of race, nationality or ethnic origin” and the attached Explanatory Brief would like to express their thanks to all those who assisted them during the preparation of these documents and who participated in the expert discussions.

This document was prepared by the project consultants, Serhiy Seheda (ICPS) and Oleksandr Tatarevskiy (ICPS).

THE LAW OF UKRAINE

“On protection against racial, national and ethnic discrimination”

The purpose of this Law shall be to ensure the exercise of human rights and freedoms on an egalitarian basis and to institute effective government policy aimed at preventing and countering racial, national and ethnic discrimination.

Section I.

General Provisions

Article 1. Definition of terms

The following terms shall be used in this Law:

Victimization: Any unlawful action, omission or decision that directly or indirectly violate the rights and lawful interests of an individual, hamper an individual in the free exercise of their rights and lawful interests, or cause harm to an individual, as a result of such individual filing a complaint about discrimination or in the course of carrying out anti-discrimination activities;

Discrimination: Any action or omission that expresses distinctions, restrictions or privileges on a racial, national or ethnic basis, provided such action or omission is intended to restrict or make impossible the recognition, application or expression of human rights and freedoms on an egalitarian basis;

Discriminatory practice: Systematic violations of legal requirements regarding anti-discriminatory action, or the establishing of conditions for such violations through the adoption of resolutions, acts, corporate codes, and so on, that might lead to discrimination;

Affirmative action: Any special, temporary measure that violates the principle of equality, but is applied to ensure the necessary progress of certain racial, national or ethnic groups in need of protection, in order to provide such groups with equal opportunities to exercise their human rights and freedoms and to eliminate *de jure* or *de facto* inequality;

Instigation to discrimination: Orders, instructions or appeals to discrimination on a racial, national or ethnic basis;

Equality: Equal standing before the law for individuals regardless of race, nationality or ethnicity, as well as equal opportunities to exercise such standing and to participate in all areas of social life;

Equal opportunity: The actual provision, to all individuals, without regard to race, nationality or ethnicity, of equal conditions for the exercise of human rights and freedoms in accordance with the Constitution and Laws of Ukraine and the principles and standards of international law.

Article 2. Anti-discrimination legislation

Anti-discrimination legislation and legislation that guarantees equal rights and opportunities for all individuals, regardless of race, nationality or ethnicity, shall consist of the Constitution of Ukraine, this Law and other regulatory and legislative acts.

If an international treaty to which Ukraine is party and which has been adopted as mandatory by the Verkhovna Rada of Ukraine establishes rules different from those entailed in this Law, the rules set by such international treaty shall take precedence.

Article 3. Key directions in anti-discrimination policy

Government anti-discrimination policy against individuals on the basis of race, nationality or ethnicity is directed at:

- reinforcing equality and ensuring equal opportunities for all individuals regardless of race, nationality or ethnicity;
- preventing discrimination;
- establishing conditions for the timely disclosure of discrimination and the provision of effective protection to those who have suffered from discrimination;
- inculcating the principles of equality and promoting them among the population of Ukraine and expanding public awareness activities in this sphere;
- protecting Ukrainian society from information aimed at discriminating on the basis of race, nationality or ethnicity.

Article 4. The principle of equality and the prohibition of discrimination

In accordance with the Constitution of Ukraine, generally accepted principles and standards of international law, and international treaties to which Ukraine is party, all individuals, regardless of race, nationality or ethnicity, shall have equal rights and freedoms, and equal opportunities to exercise these.

Any discrimination against individuals on the basis of race, nationality or ethnicity shall be deemed a violation of the principle of equality and is expressly prohibited.

Article 5. Exceptions to the principle of non-discrimination

For the purpose of this Law, the following activities shall not be deemed discrimination:

- affirmative action;
- different attitudes towards individuals on the basis of race, nationality or ethnicity that arises from Ukrainian law or international treaties that have been ratified by the Verkhovna Rada of Ukraine;
- different attitudes towards individuals when such is required by the nature of a given activity or by the conditions under which such activity is carried out;

- measures intended to protect the specific identity of individuals from a given race, nationality or ethnicity and measures to protect the rights of such individuals in order to preserve and develop their culture and traditions, language, history, religion, and so on;
- measures in the educational system aimed at ensuring that individuals representing specific races, nationalities or ethnicities participate in the educational process, when such measures are unavoidable.

Article 6. Affirmative action

Affirmative action shall not be deemed a violation of the principle of equality, provided that:

- such actions or decisions are based on standards established by law or by resolution of the Cabinet of Ministers of Ukraine and are effective for a limited period of time;
- such actions do not restrict the rights and freedoms of other individuals and do not create obstacles for the exercise of such rights and freedoms, and do not offer unjustified advantages to individuals representing a given race, nationality or ethnicity who are the target of affirmative action.

Affirmative action shall be introduced to institute the provisions of Ukrainian laws and specific decisions of the country's executive bodies. Such decisions with regard to affirmative action shall be subject to approval by a specially-authorized central executive anti-discrimination body.

Article 7. The scope of this Law

This Law shall apply to all individuals on Ukrainian territory. The prohibition of discrimination shall apply to all physical and legal entities, including government bodies and local governments, and their officials.

This Law shall apply in the following areas of social interaction:

- labor relations;
- healthcare;
- education;
- social security;
- social services;
- residential services;
- justice;
- political activity, that is, participation in the activities of political parties, participation in elections;
- civil service;
- access to goods and services.

Article 8. Typical manifestations of discrimination

Typical manifestations of discrimination prohibited by this Law shall include, but are not limited to:

- instigation to discrimination;
- victimization;
- any hostile actions with respect to individuals representing a given race, nationality or ethnicity that are expressed either verbally, such as threats or obscene comments, or physically with the intention of intimidating, humiliating or offending individuals or creating a hostile or aggressive environment around them;
- advertisements for employment that offer preferential treatment to individuals on the basis of race, nationality or ethnicity;
- the refusal to hire individuals on the basis of their race, nationality or ethnicity;
- the establishment of different working conditions for individuals, including different wages for equal work, based on race, nationality or ethnicity;
- the creation of obstacles for educational equality for individuals on the basis of race, nationality or ethnicity;
- the refusal of representatives of executive bodies and local governments to serve or to provide administrative services to individuals on the basis of race, nationality or ethnicity, including because such individuals are using their national language;
- the refusal to provide goods or services or the provision of goods or services of poorer quality or at higher prices for individuals on the basis of race, nationality or ethnicity;
- the prohibition or restriction of access to public places, government institutions, organizations providing goods and service, public eateries to individuals on the basis of race, nationality or ethnicity.

If necessary, a specially-authorized central executive anti-discrimination body shall approve an expanded list of typical manifestations of discrimination.

Section II.

Ensuring the Institution of the Anti-Discrimination Policy

Article 9. Bodies and organizations authorized to protect against discrimination

Bodies and organizations authorized to protect from discrimination shall be:

- the Verkhovna Rada of Ukraine;
- the Cabinet of Ministers of Ukraine;
- a specially-authorized central executive anti-discrimination body;
- local state administrations and local governments;
- prosecutor's offices;
- community organizations.

Article 10. Powers vested in the Verkhovna Rada to protect against discrimination

The Verkhovna Rada of Ukraine shall:

- determine the basic principles underlying anti-discrimination policy;
- exercise legislative oversight of the institution of legislation to ensure equal rights and opportunities for individuals regardless of race, nationality or ethnicity and to protect such individuals from discrimination, within the limits established by the Constitution.

Article 11. Powers vested in the Cabinet of Ministers to protect against discrimination

The Cabinet of Ministers of Ukraine shall:

- ensure the institution of a unified policy aimed at ensuring equal rights and opportunities for individuals in all areas of social life;
- develop and implement targeted state anti-discrimination programs;
- direct and coordinate the actions of ministries and other executive bodies to ensure the carrying out of anti-discrimination policy;
- adopt regulations and legislation based on the principle of the equality of all individuals regardless of race, nationality or ethnicity;
- exercise other powers in this area as envisaged by Ukrainian law.

Article 12. Powers vested in the specially-authorized central executive anti-discrimination body

A specially-authorized central executive anti-discrimination body shall enforce anti-discrimination policy.

The functions of the specially-authorized central executive anti-discrimination body shall be carried out by a current central executive body designated by the Cabinet of Ministers.

The objective of the specially-authorized central executive anti-discrimination body shall be to prevent discrimination, to ensure the protection of individuals from discrimination, and to establish the conditions for the exercise of human rights and freedoms on an egalitarian and non-discriminatory basis.

This specially-authorized central executive anti-discrimination body shall:

- enforce the implementation of anti-discrimination legislation;
- prepare and publish independent research/reports on discrimination in Ukraine;
- monitor evidence of discrimination and generalize and publish the results obtained;
- develop recommendations for improving anti-discrimination legislation;
- enforce adherence to the requirements of this Law and other Ukrainian legislation aimed at guaranteeing equality;
- review claims of discrimination;
- provide legal aid to victims of discrimination, including providing advice on issues within its competence;
- organize, coordinate and hold unbiased inspections in response to claims of discrimination;
- resolve and regulate conflicts resulting from claims of discrimination;
- evaluate evidence of discrimination, discrimination claims and related documents;
- carry out public awareness campaigns through the media and organize anti-discrimination awareness events;
- organize training for government workers on applying anti-discrimination legislation;
- make proposals on introducing and suspending affirmative action and approve relevant decisions by executive bodies;
- cooperate with international organizations and foreign government bodies working to counter discrimination.

In order to carry out its anti-discrimination functions, the specially-authorized central executive anti-discrimination body shall be empowered to:

- receive from physical and legal entities, including government bodies and local governments, documents and information that are needed to examine facts presented in discrimination claims reviewed by this specially-authorized central executive anti-discrimination body;
- obtain oral or written depositions with regard to circumstances under examination from officials, Ukrainian citizens, foreign citizens, and stateless individuals;
- study documents and receive copies of them from government bodies, local governments, public associations, companies, institutions, and organizations of any form of ownership;

- require elected and non-elected officials in government bodies or local governments, and companies, institutions and organizations of any form of ownership to allow inspections, assign specialists to participate in such inspections and expert reviews, and provide appropriate conclusions;
- carry out inspections in response to discrimination claims in without impediment except where otherwise stated in Ukrainian law and visit government bodies, local governments, companies, institutions, and organizations of any form of ownership during such inspections;
- with the approval of relevant higher officials, involve representatives of the police and prosecutor's offices in inspections resulting from discrimination claims;
- prepare statements on the results of such inspections;
- prepare protocols regarding administrative offences;
- based on the results of such inspections, decide on mandatory measures to eliminate uncovered discriminatory practices;
- file court claims on behalf of victims of discrimination or participate in court proceedings involving discrimination suits as an interested party;
- impose such penalties as are established by this Law on legal entities that violated the requirements of this Law and other anti-discrimination legislation in Ukraine;
- turn to the courts to impose administrative penalties;
- bind perpetrators to pay compensation to victims of discrimination;
- offer proposals and recommendations to executive bodies and local governments on eliminating discriminatory practices and ensuring adherence to the principle of equality;
- issue orders on matters within its competence.

Article 13. Anti-discrimination activities by other executive bodies and local governments

Within their competence, executive bodies and local governments shall:

- ensure equal rights and opportunities for all individuals without regard to race, nationality or ethnicity;
- implement targeted government anti-discrimination programs;
- carry out anti-discrimination awareness programs;
- cooperate with community organizations to prevent, detect and counter discrimination;
- submit proposals on improving anti-discrimination legislation and ensuring equal rights and opportunities;
- foster scientific work in countering discrimination;
- carry out affirmative action.

To protect individuals from discrimination, local governments shall have the right to set up departments under their executive to counter discrimination. These shall be empowered to:

- to consider the claims of individuals and advise them on how to protect themselves from discrimination;

- to assess the actions and decisions of local executive bodies, companies, institutions and organizations of any form of ownership to determine discriminatory practices;
- to inform the specially-authorized central executive anti-discrimination body and the prosecutor's office about instances of discrimination or discriminatory practices and to develop recommendations for eliminating violations of anti-discrimination requirements in Ukrainian law.

Article 14. Duties and responsibility of officials of executive bodies carrying out anti-discrimination policy

Officials of executive bodies that implement anti-discrimination policy shall:

- uphold the requirements of Ukrainian law and the rights of individuals turning to them for help;
- provide free explanations and advice on issues within their competence upon the request of individuals seeking help;
- not disclose information about individuals that was obtained in the course of their duties without the prior agreement of such individuals or other information that constitutes state or other secrets that are protected by Ukrainian law.

Officials shall be held responsible according to current legislation for any failure to fulfill or for the improper fulfillment of their duties.

Article 15. Relations between agencies of the prosecutor's office and the police and anti-discrimination executive bodies

Executive anti-discrimination bodies, prosecutor's offices and the police shall cooperate in order to:

- determine instances of discrimination and collect facts and evidence pointing to discrimination against individuals in a timely manner;
- effectively respond and bring to account individuals who violate anti-discrimination legislation.

When receiving complaints about discriminatory actions that show evidence of an offence or when such actions have been detected independently, the specially-authorized central executive anti-discrimination body shall, within 24 hours, submit relevant information to the appropriate prosecutor's office for consideration. The top official of the relevant prosecutor's office shall then inform the specially-authorized central executive anti-discrimination body of the results of a review of the submitted documents and information within established deadlines.

When it becomes necessary to look for evidence or information about a suspected offence, the specially-authorized central executive anti-discrimination body shall turn to the police or prosecutor's office with an appropriate request. The head of the relevant agency shall consider such application and determine the expediency of launching an investigation.

Police officers shall assist executive officials whose duty is to protect individuals from discrimination fulfill such official duties and, if necessary, shall stop the unlawful actions of any individuals who may try to hamper the carrying out of their duties.

Should they fail to find evidence of discrimination that warrants the laying of criminal charges, the prosecutors and police shall, within 10 days, turn over the relevant materials to the specially-authorized central executive anti-discrimination body for consideration.

If necessary, the prosecutor's office shall turn to the specially-authorized central executive anti-discrimination body to review offences, documents and decisions for evidence of discrimination. This application shall be reviewed and an assessment shall be carried out within 20 working days after the request has been received.

Article 16. The rights of community anti-discrimination organizations in countering discrimination

The government shall support the activity of community organizations that is aimed at countering manifestations of discrimination, at educating and preventing violations of the principle of equality, at preventing discrimination, and at protecting and supporting victims of discrimination.

Government support for the protection of human rights by community organizations means involving these organizations in carrying out government policy to counter discrimination and to establish appropriate legal and organizational conditions for providing help and support to victims of discrimination.

When countering discrimination, community organization shall have the right to:

- participate in developing regulatory and legislative documents for adoption by government bodies and local governments in order to institute anti-discrimination policy;
- analyze the provisions of legislation as to their conformity to the principle of equality and submit proposals for improving that legislation to the specially-authorized central executive anti-discrimination body;
- monitor manifestations of discrimination in the community;
- be given the information from executive bodies and local governments necessary to achieve their goals and objectives;
- organize and provide, within the law, legal aid and advice to victims of discrimination;
- submit complaints to the specially-authorized central executive anti-discrimination body, other government bodies, local governments, and prosecutors' offices, and represent and defend the interests of victims of discrimination before such bodies;
- file claims in court on behalf of victims of discrimination and represent such victims in court, regardless whether such victims are members of or participants in that organization;
- carry out other anti-discrimination activities in accordance with their status and Ukrainian law.

Article 17. Delegation of anti-discrimination functions and rights

To increase the effectiveness of government anti-discrimination policy at the local level and to facilitate the access of victims of discrimination to the protection mechanisms written into this Law, the specially-authorized central executive anti-discrimination body shall have the right to delegate a part of its functions to community organizations.

The following anti-discrimination functions may be delegated to community organizations:

- to monitor adherence to anti-discrimination legislation;
- to provide advice to victims of discrimination;
- to accept discrimination-related claims;
- to review actions, omissions and decisions that show evidence of discrimination and to determine their correspondence or the lack of correspondence to anti-discrimination legislation.

Delegating functions to a community organization can involve the provision of financial, logistical or other resources needed to carry out the delegated functions or can take place without any financial or material support.

If the provision of financial, logistical or other support to implement the delegated functions is anticipated, the community organization to whom the functions will be delegated shall be selected through a competitive tender, in accordance with the law.

Anti-discrimination functions may be delegated to a community organization without financial, logistical and other support only upon the consent of that organization.

To insure that the process of delegation is public, the specially-authorized central executive anti-discrimination body shall disseminate information about:

- the extent of the delegated functions;
- the name, location, telephone number, and so on of the organization that shall take on these functions;
- the rights and duties of the organization fulfilling such delegated functions;
- the period for which such functions are being delegated.

To allow oversight of the implementation of delegated functions, designated community organizations shall report to the specially-authorized central executive anti-discrimination body. This body shall set out the requirements for such reports. Reports shall be submitted at least once a year.

After considering these reports, the specially-authorized central executive anti-discrimination body can decide to terminate the delegation of functions to a given community organization prior to the agreed deadline.

Section III.

Prevention of Discrimination

Article 18. Public awareness and information

The specially-authorized central executive anti-discrimination body shall:

- disseminate information about the main anti-discrimination policy directions, mechanisms for protecting individuals from discrimination, and the procedures for applying protection mechanisms;
- promote the need for tolerance and equal treatment for all individuals regardless of race, nationality or ethnicity among the general public;
- take steps to prevent the dissemination of false information about individuals or groups of individuals representing a certain race, nationality or ethnicity, the rise of hostility, the creation of a hostile environment, and the stigmatization of individuals representing a certain race, nationality or ethnicity;
- disseminate educational materials among specialists of the police, prosecution, judiciary and other government bodies on the main provisions of national and international anti-discrimination laws and their application.

Article 19. Monitoring manifestations of discrimination

To ensure alert and effective response to manifestations of discrimination in society and the timely adjustments to anti-discrimination policy, the specially-authorized central executive anti-discrimination body shall monitor manifestations of discrimination. The specially-authorized central executive anti-discrimination body shall determine the procedure for monitoring manifestations of discrimination. Executive bodies and local governments shall, within their competency, facilitate such monitoring and provide the necessary data and information. Based on the results of monitoring, the specially-authorized central executive anti-discrimination body shall prepare a progress report on the implementation of anti-discrimination policy and ensure that this information is publicized.

Article 20. Improving anti-discrimination legislation

The specially-authorized central executive anti-discrimination body shall ensure ongoing improvements to Ukrainian anti-discrimination legislation, bringing it in line with international standards in this area, specifically by:

- analyzing the effectiveness of current Ukrainian anti-discrimination legislation;
- tracking changes to international anti-discrimination legislation;
- preparing propositions to improve Ukrainian anti-discrimination legislation and submitting them to the Cabinet of Ministers for consideration.

The development of feedback and propositions shall be in conjunction with consultations involving community organizations, specialists and other interested parties.

Section IV.

Consideration of Violations of Anti-Discrimination Legislation

Article 21. Grounds for opening a case involving violations of anti-discrimination legislation

The review of cases of violations of anti-discrimination legislation shall begin with an official instruction to open the case and end with a decision on the case.

The specially-authorized central executive anti-discrimination body shall begin reviewing a case of violation of anti-discrimination legislation upon:

- receiving a discrimination claim by an individual;
- its own initiative in the case of independent discovery of evidence of violations of the requirements of the current anti-discrimination Law;
- requests from other government bodies, local governments and community organizations.

Article 22. Requirements of complaints filed with the specially-authorized central executive anti-discrimination body

Complaints shall be submitted to the specially-authorized central executive anti-discrimination body in writing and, as a rule, in the state language. If the applicant is not fluent in the state language, the complaint may be written in the individual's own national language or in another language acceptable for consideration. When a complaint is submitted in the language of a national minority, the translation of such a complaint shall be provided by the specially-authorized central executive anti-discrimination body.

Complaints submitted to the specially-authorized central executive anti-discrimination body shall include:

- the applicant's first and last name;
- the applicant's place of residence;
- the circumstances that constitute evidence of a violation of anti-discrimination legislation;
- documents, facts and other evidence, when available, that confirm the circumstances that have led to the complaint;
- a list of the documents and evidence enclosed to the complaint;
- the date;
- the applicant's signature or that of an authorized representative.

If a complaint is filed by an authorized representative, power of attorney confirming the rights of the filing individual shall be enclosed with the complaint.

Anonymous complaints shall not be considered.

Article 23. Opening a case

Within two working days after grounds for an anti-discrimination case as provided for in Art. 21 of this Law, the specially-authorized central executive anti-discrimination body shall issue an instruction to open or reject the case.

Notice that a case has been opened shall be delivered to the parties in the case within three working days after being signed.

The specially-authorized central executive anti-discrimination body may refuse to consider a case only in the following instances:

- the requirements specified in Art. 22 of this Law have been violated;
- the complaint or application deals with issues that are beyond the power of the specially-authorized central executive anti-discrimination body to consider;
- the complaint or application relates to action that took place more than 12 months earlier.

Where the specially-authorized central executive anti-discrimination body has refused to consider a case, the body's official notice of such refusal shall indicate the grounds for this decision.

An individual who has received notice of a refusal to consider their case shall have the right to eliminate the obstacles to the case that were offered as grounds for this decision and resubmit the complaint.

Notice from the specially-authorized central executive anti-discrimination body of a refusal to consider a case may also be appealed in court.

Article 24. Individuals involved in a case

The individuals involved in a case are defined as the two parties (plaintiff and defendant) and third parties and their representatives.

The plaintiff shall be the individual who filed the complaint or application regarding a violation of anti-discrimination legislation.

The defendant shall be the person whose actions, omissions or decisions are the subject of the complaint or application.

A third party shall be an entity engaged in the case because the final decision could significantly affect their rights and interests under this Law.

Article 25. The rights and duties of individuals involved in a case

Individuals involved in a case shall have the right to:

- study the materials of the case, except for confidential information or information whose disclosure might damage the interests of other individuals who are taking part or have taken part in the case or hamper further consideration of the case;
- be present at the case hearings;
- provide evidence, submit petitions, provide oral and written explanations or objections;
- receive copies of the decision in the case or extracts of these, except for confidential information or information whose disclosure might damage the interests of other individuals who have taken part in the case;

- appeal decisions according to the procedure established in law.

Individuals involved in a case shall apply their relevant rights in good faith.

Article 26. The procedure for reviewing a case

To determine all the circumstances of a case and to study the facts comprehensively, the specially-authorized central executive anti-discrimination body shall gather information, documents and other material evidence.

The specially-authorized central executive anti-discrimination body shall have the right to investigate the activities of companies, institutions and organizations of any form of ownership regarding issues within its mandate. Such investigations shall be carried out by studying documents that might contain information pertinent to the case and by requesting explanations from the officials of companies, institutions and organizations.

Officials from executive bodies, local governments, companies, institutions, and organizations of all types of ownership shall cooperate with the specially-authorized central executive anti-discrimination body in the gathering of information, provision of necessary documents, materials, testimony, or other information upon lawful request of its representatives.

Confidential information shall be provided according to the procedure and under the conditions specified by the Law of Ukraine “On information.” Officials from the specially-authorized central executive anti-discrimination body shall not have the right to disclose any confidential information obtained by them. These officials shall be liable under Ukrainian law for violating this requirement.

When needed and in accordance with the procedure established in this Law, the specially-authorized central executive anti-discrimination body shall engage the prosecutor’s office and the police in gathering information and finding evidence.

After it finishes gathering information, the specially-authorized central executive anti-discrimination body shall summarize and study the information, prepare a statement and set the date for a hearing on the case.

If, after studying the obtained materials, the specially-authorized central executive anti-discrimination body decides that the offence falls within the scope of criminal legislation, it shall transfer all materials to the prosecutor’s office for consideration and inform the parties to the case of this fact.

The specially-authorized central executive anti-discrimination body shall inform the parties to the case about the date of any hearing in writing at least 10 calendar days prior to such hearing.

The hearing of anti-discrimination cases shall be public and shall take place within 30 calendar days of the opening of the case. Under specific circumstances, the head of the specially-authorized central executive anti-discrimination body shall have the right to extend this period to 60 calendar days. A reasoned decision for such an extension shall be delivered to the parties to a case not later than 20 calendar days after the launch of the case.

Either the head or the deputy head of the specially-authorized central executive anti-discrimination body must participate in the hearings of a case.

The results of the hearing of a case shall be officially recorded. These minutes shall be signed by head or deputy head of the specially-authorized central executive anti-discrimination body and by the parties to the case, or their authorized representatives.

Within 5 calendar days of hearing a case, the head or deputy head of the specially-authorized central executive anti-discrimination body shall make the necessary decision on the basis of the official record.

The decision of the head or deputy head of the specially-authorized central executive anti-discrimination body after considering a case shall be delivered to the parties to the case within 1 day after being made.

Article 27. Decisions adopted after considering a case

After considering a case, the specially-authorized central executive anti-discrimination body can make a decision on:

- imposing an obligation on the individual who violated anti-discrimination legislation to cease any discriminatory practice, to restore the violated rights of individuals, or to eliminate obstacles to their full enjoyment;
- assigning compensation to the individual who is a victim of discrimination;
- imposing a penalty on the legal entity that violated anti-discrimination legislation in the amount established by this Law;
- finding an private individual who is in violation of this Law administratively liable;
- closing the case for lack of evidence of violations of anti-discrimination legislation;
- closing the case due to the reconciliation of the parties.

More than one of the above decisions may be made at the same time.

The decision shall be delivered to the parties within 1 working day after being made. The decisions of the specially-authorized central executive anti-discrimination body as indicated by Para. 1, 2, 3, and 4 of Sec. 1 of this Article are subject to mandatory implementation within 10 calendar days after being made. The parties shall have the right to appeal decisions of the specially-authorized central executive anti-discrimination body in court.

Should a decision not be carried out within the established period or if a party has not appealed the decision in court, the specially-authorized central executive anti-discrimination body shall file a claim with a court for mandatory enforcement of its decision within 30 calendar days.

Where a private individual has been deemed administratively liable, the specially-authorized central executive anti-discrimination body shall submit the record of the hearing and available materials to a court not later than the following working day.

Article 28. Reconciliation of the parties

If, during the review of a case, the specially-authorized central executive anti-discrimination body receives information that offers evidence of discrimination in the actions, decisions or omissions under examination, it shall prepare proposals for the reconciliation of the parties.

Proposals for the reconciliation of the parties shall contain conditions under which the party who is a victim of discrimination will agree to close the case, that is:

- conditions for restoring the violated rights or eliminating obstacles to implementing those rights and basic freedoms;
- conditions for compensating the damages inflicted upon the victim of discrimination.

The specially-authorized central executive anti-discrimination body shall send the parties its proposals for reconciliation along with a notification of the date of the case's hearing.

The parties shall have the right to accept the conditions for reconciliation, propose other conditions, or refuse to reconcile.

The final decision regarding reconciliation shall be made during a hearing. If the parties reach agreement on the conditions for reconciliation, the specially-authorized central executive anti-discrimination body shall close the case due to the reconciliation of the parties. Such decision shall specify the conditions for reconciliation and the deadline for fulfilling these conditions.

In the case of reconciliation, penalties and administrative fines shall not be applied and compensation to the victim of discrimination, other than that compensation contained in the conditions for reconciliation, shall not be assigned.

The specially-authorized central executive anti-discrimination body shall oversee how the parties to the case fulfill the conditions for reconciliation. If the parties fail to fulfill the conditions for reconciliation within the established period of time, the case shall be reopened.

Penalties for the failure to carry out a decision of the specially-authorized central executive anti-discrimination body established under this Law shall apply to the guilty party for the failure to fulfill the conditions for reconciliation.

Article 29. Compensation to victims of discrimination

While considering a case involving a legal entity in violation of anti-discrimination legislation, the specially-authorized central executive anti-discrimination body may decide to assign compensation to the victim of discrimination.

The size of compensation shall be determined by the specially-authorized central executive anti-discrimination body, based on the damage sustained by the victim of discrimination, and may constitute payment for losses, moral damages and a fine. The Cabinet of Ministers shall approve a method for calculating such compensations.

The amount of compensation shall be specified within the decision of the specially-authorized central executive anti-discrimination body.

Article 30. Instructions by the specially-authorized central executive anti-discrimination body to eliminate discriminatory practice

When the review of a case points to the existence of discriminatory practice, the specially-authorized central executive anti-discrimination body shall issue an instruction on eliminating such discriminatory practice. Such an instruction on eliminating discriminatory practice shall specify:

- requirements to eliminate the negative consequences of discriminatory practice;
- steps to be undertaken by the guilty party to stop systematic actions of a discriminatory nature, including steps to eliminate the factors underlying the discriminatory practice;
- a deadline for fulfilling the requirements in the instruction on eliminating discriminatory practice;
- the procedure for and periodicity of filing reports or information on the steps undertaken to terminate discriminatory practice.

Penalties for the failure to implement the lawful requirements of the specially-authorized central executive anti-discrimination body established in this Law shall apply to the guilty entities for the failure to fulfill or for the dilatory fulfillment of an instruction to eliminate discriminatory practice.

Article 31. Oversight of how decisions are implemented

The specially-authorized central executive anti-discrimination body shall oversee the implementation of its decisions.

Individuals who have been handed a decision as the result of a case on violating anti-discrimination legislation shall inform the specially-authorized central executive anti-discrimination body about their implementation or appeal in court of such decision.

Should a decision handed down in the review of a case fail to be implemented, the specially-authorized central executive anti-discrimination body shall file a claim in court for the enforcement of such decision.

Section V.

The consideration of Discrimination Claims in Court

Article 32. Court protection of individuals from discrimination

Any individuals who believe they have been subjected to discrimination shall have the right to file a claim in court according to the procedures established by law with regard to:

- establishing the fact of discrimination;
- restoring violated rights or lawful interests of such an individual or eliminating obstacles to their enjoyment;
- assigning compensation or moral damages.

Individuals who file claims related to violations of the requirements of this Law shall be exempt from paying state duty.

Claims listed under Sec. 1 of this Article of Law may be filed by community organizations on behalf of victims of discrimination.

Article 33. Proof in cases related to protection from discrimination

The facts of discrimination may be proved in courts of general jurisdiction in accordance with the Civil Procedural Code of Ukraine and taking into account the specifics established in this Article of Law.

When considering claims envisaged by Art. 31 of this Law, a court may place the burden of proof on the defendant to show that rights of the individual who filed a claim or on whose behalf the claim was filed have not been not violated or that the actions under examination do not violate the principle of equality established by this Law.

When considering claims under Art. 31 of this Law, evidence of discrimination may include:

- statistical data provided by any of the parties that confirm the existence or the lack of discriminatory attitudes towards individuals based on race, nationality or ethnicity;
- data obtained by using special methods for revealing discrimination. The procedure for applying such methods shall be determined by the specially-authorized central executive anti-discrimination body;
- the conclusions of an expert assessment carried out by the specially-authorized central executive anti-discrimination body or organizations authorized by this body.

Section VI.

Liability for Violating Anti-Discrimination Legislation in Ukraine

Article 34. Types of liability

Private individuals and the officials of executive bodies and local governments, companies, institutions, and organizations of any form of ownership shall bear disciplinary, administrative and criminal responsibility under the law for violating the requirements of anti-discrimination legislation.

Financial penalties in the form of fines shall apply to legal entities for violating the requirements of anti-discrimination legislation, in amounts established by this Law

Article 35. The procedure for fixing administrative liability

Where violations of anti-discrimination legislation are revealed that entail liability under the Code of Administrative Violations of Ukraine, the specially-authorized central executive anti-discrimination body shall draw up a statement indicating such administrative violation.

Within two working days after being drawn up, such statement shall be submitted for consideration to a court with jurisdiction over the location where the administrative violation took place.

The decision to make a guilty party administratively liable shall be handed down and implemented according to the procedure established by the Code of Administrative Violations of Ukraine.

Article 36. Financial penalties for violating anti-discrimination legislation

Where anti-discrimination legislation has been violated, legal entities shall bear responsibility for:

- unjustified refusal to provide services or sell goods under generally accepted conditions to an individual or individuals on the basis of race, nationality or ethnicity, or restricting access to services or goods provided by culture-related, educational, healthcare, food services, trade, service, and entertainment facilities to an individual on the basis of race, nationality or ethnicity, except for instances when such a refusal or restriction is provided for by law: in the amount of 25 tax-free minimums;
- refusal to sell or lease land or buildings to an individual or individuals on the basis of race, nationality or ethnicity, except for instances when such refusal is provided for by law: in the amount of 50 tax-free minimums;

- restricted access to transport or telecommunication services, services provided by public institutions and facilities for individuals on the basis of race, nationality or ethnicity, except for instances when such restriction is provided for by law: in the amount of 25 tax-free minimums;
- actions, decisions or requirements that place an individual of a certain race, nationality or ethnicity in unequal or significantly worse conditions in relation to other individuals: in the amount of 25 tax-free minimums;
- instigation to discrimination or victimization: in the amount of 50 tax-free minimums;
- any hostile actions with respect to individuals representing a particular race, nationality or ethnicity, expressed verbally through threats or obscene comments or physically, that are intended to intimidate, humiliate or offend such individuals or to create a hostile or aggressive environment around them: in the amount of 50 tax-free minimums;
- the failure to carry out instructions handed down by the specially-authorized central executive anti-discrimination body: in the amount of 50 tax-free minimums;
- the failure to carry out the lawful requirements of the specially-authorized central executive anti-discrimination body, such as refusing to provide information or documents, or setting up obstacles to access to data needed by this body in order to review a discrimination claim: in the amount of 50 tax-free minimums.

Where there is a repeat violation within one year of the original claim, the financial penalties applied to the guilty party shall be doubled.

Article 37. The procedure for imposing and collecting financial penalties

The decision to impose financial penalties shall be adopted after reviewing a case involving violations of anti-discrimination legislation, based on summaries of inspections and other materials collected by the specially-authorized central executive anti-discrimination body, when there are evident violations as specified in Art. 35 of this Law.

The decision to impose financial penalties shall be handed down according to a format established by the specially-authorized central executive anti-discrimination body and must be carried out.

The amounts of financial penalties specified in Art. 35 of this Law shall be transferred by legal entities to the State Budget of Ukraine within a 10-day period after the decision to impose such financial penalties was handed down by the specially-authorized central executive anti-discrimination body.

Should such decision not be carried out, the financial penalty shall be collected through a court claim filed by the specially-authorized central executive anti-discrimination body.

Financial penalties shall not relieve the legal entity of the obligation to pay compensation to the victim of discrimination or to eliminate discriminatory practice in those instances provided for by this Law.

A legal entity shall have the right to appeal in court a decision to impose a financial penalty for violating anti-discrimination legislation.

Article 38. Compensation of material and moral damages inflicted as a result of discrimination

Victims of discrimination shall have the right to demand, through a court, compensation of material or moral damages resulting from such discrimination.

Where the specially-authorized central executive anti-discrimination body has assigned compensation to a victim of discrimination, such individual shall have the right to demand a revision of the amount of assigned compensation in court.

Material and moral damages resulting from the discriminatory actions of representatives of government bodies shall be compensated according to procedures established by Law.

Section VII.

Final Provisions

1. This Law shall come into force in three months after its publication.
2. Before bringing other laws and regulatory and normative documents in line with this Law, they may be applied in those parts that do not contradict this Law.
3. The Cabinet of Ministers of Ukraine shall:
 - a) within two months after this Law comes into force:
 - i. prepare proposals for bringing legislation of Ukraine in line with this Law and submit them to the Verkhovna Rada for consideration;
 - ii. ensure, within its powers, the adoption of the regulatory and legislative documents needed to implement this Law;
 - b) provide financing for the cost of instituting the requirements of this Law in the Draft State Budget for subsequent years.
4. Art. 161 of the Criminal Code of Ukraine (*Vidomosti Verkhovnoi Rady Ukrainy*, 2001, №25–26, p. 131) shall be reworded as follows:

“Article 161. Violation of equality”

1. Actions aimed at directly or indirectly restricting rights, at creating obstacles to the enjoyment of or making it impossible to enjoy human rights and freedoms, at establishing direct or indirect privileges, provided that such actions are committed with respect to individuals on the basis of race, nationality or ethnicity, skin color, religious beliefs, affiliation to political parties or other community organizations, sex, sexual orientation, age, state of health, language, or other features, as well as establishing or managing organizations whose goals are to commit such actions, shall be punishable by a fine of up to 50 tax-free minimums or correctional work for a term of up to two years, or imprisonment up to five years, with the option of a revocation of the right to hold certain offices or to carry out certain activities for up to three years.
2. The same actions involving violence, deceit or threats, or committed by an official shall be punishable with correctional work for a term of up to two years or imprisonment up to five years.
3. Actions described in Para. 1 and Para. 2 of this Article committed by an organized group of individuals or resulting in the death of an individual or other serious consequences shall be punished by imprisonment from two to five years.
5. The Criminal Code of Ukraine (*Vidomosti Verkhovnoi Rady Ukrainy*, 2001, №25–26, p. 131) shall be expanded to include Art. 161¹ as follows:

“Article 161¹. Propaganda of or incitement to hostility”

1. Dissemination of statements or other information among the general population aimed at inciting hostility and hatred towards individuals or groups of individuals on the basis of race, nationality or ethnicity, skin color, religious beliefs, affiliation to political parties or other community organizations, sex, sexual orientation, age, state of health, language, or other features, violations of the honor and dignity of such indi-

viduals, the dissemination of threats, slander, calls to hostility or hatred towards such individuals shall be punishable with a fine of up to 50 tax-free minimums or correctional work for a term of up to two years, or imprisonment up to five years, with the option of a revocation of the right to hold certain offices or to carry out certain activities for up to three years.

2. The same actions involving violence, deceit or threats, or committed by an official shall be punishable with correctional work for a term of up to two years or imprisonment up to five years.
3. Actions described in Para. 1 and Para. 2 of this Article committed by an organized group of individuals or resulting in the death of an individual or other serious consequences shall be punished by imprisonment from two to five years.
6. In Para. 1 of Art. 112 of the Criminal Procedural Code of Ukraine, the number “161¹” shall be inserted after “161.”
7. The Code of Administrative Violations of Ukraine (*Vidomosti Verkhovnoi Rady of URSR*, 1984, appendix to №51, p. 1122):
 - 1) shall be expanded to include Arts. 186⁷ and 188²² as follows:

“Article 1867. Violation of requirements in law to counter racial, national or ethnic discrimination”

Violations of requirements in law to counter racial, national or ethnic discrimination include:

- (1) unjustified refusal to provide services or sell goods under generally accepted conditions to individuals on the basis of race, nationality or ethnicity, or restricting access to services or goods provided by culture-related, educational, healthcare, food services, trade, service, and entertainment facilities for an individual on the basis of race, nationality or ethnicity, except for instances when such a refusal or restriction is provided for by law;
- (2) refusal to sell or lease land or buildings to individuals on the basis of race, nationality or ethnicity, except for instances when such refusal is provided for by law;
- (3) restricted access to transport or telecommunication services, services provided by public institutions and facilities for individuals on the basis of race, nationality or ethnicity, except for instances when such restriction is provided for by law;
- (4) actions, decisions or requirements that place an individual of a certain race, nationality or ethnicity in unequal or significantly worse conditions in relation to other individuals; and
- (5) instigation to the above actions, the persecution of victims of discrimination, victimization

shall all be punishable by a fine of 10–20 tax-free minimums.

If actions such as those listed in Para. 1 of this Article have been repeatedly committed within a year after the imposition of an administrative penalty or have been committed by an official working in government office, the offender shall be punished by the imposition of a fine from 20–40 tax-free minimums or correctional work for a term of 1–2 months with a 20% reduction of wages.

“Article 188²². Failure to fulfill lawful requirements of the specially-authorized central executive anti-discrimination body

The failure to fulfill the lawful requirements of officials from the specially-authorized central executive anti-discrimination body, such as refusing to provide information or documents or setting up obstacles to access to data needed by the specially-authorized central executive anti-discrimination body to review discrimination claims shall be punishable by a fine of 3–5 tax-free minimums.

The failure to carry out the instructions of the specially-authorized central executive anti-discrimination body shall be punishable by a fine of 10–25 tax-free minimums.

2) In Para. 1 of Art. 221, “188²²” shall be added after “188¹⁹”

3) Item 1 of Para. 1 of Art. 255 shall be expanded to include the following text:

“the specially-authorized central executive anti-discrimination body (Articles 1867, 188²²).”

8. Para. 3 of Sec. 1 of Art. 32 of the Law “On citizens’ associations” (*Vidomosti Verkhovnoi Rady Ukrainy*, 1992, №34, p. 504) shall be worded as follows:

“to represent and protect their lawful interests, the lawful interests of their members or participants, and, where provided for by Ukrainian law, the lawful interests of other individuals, before the courts and other government bodies.”

V. LYTVYN

Speaker

the Verkhovna Rada of Ukraine

EXPLANATORY BRIEF

to the Bill

**“On protection against racial,
national and ethnic
discrimination”**

1. Why This Anti-Discrimination Bill Should Be Adopted

The practice has developed in Ukraine that discussions of discrimination are considered bad form. It is generally believed that Ukrainian law contains provisions that prohibit any form of discrimination—and, indeed, this is true. But these provisions do not mean that a huge number of people do not suffer from discrimination.

The guarantees of equality and freedom from discrimination written into Ukrainian laws are not working. The government still has not taken the trouble to make these laws meaningful. This means that discrimination, that is, unlawful actions that violate these rights or hinder the proper enjoyment of these rights on the basis of nationality or ethnicity, skin color, gender, language, political beliefs, or other characteristics, has become a common practice in the Ukrainian society. So common is it that people simply fail to notice it.

Opinion surveys corroborate the seriousness of this problem, revealing that **about 90% of respondents** have faced manifestations of discrimination in their lives. This means almost **every Ukrainian**.

In short, there is no doubt as to the urgency of this problem and the need to resolve it immediately.

1.1. The symptoms of the problem

1.1.1. Inequality on the labor market

The principles of equality and freedom from discrimination are most frequently violated on the labor market, during job placement, dismissal, payment for labor, and promotion. Among all respondents who mentioned discrimination in opinion surveys, nearly 38% said they had faced discrimination in this area.

The problem of discrimination in the workplace is especially pressing for specific groups of ethnic minorities. According to data from the European Commission against Racism and Intolerance (ECRI):¹

- at least half of those individuals who have been deported to Ukraine remain unemployed;
- most Roma (gypsies) in Ukraine are also unemployed.

The rate of unemployment among the Roma is astonishing—nearly 90%, according to information from the Roma Congress of Ukraine.

Although this situation is partly explained by the generally low level of education among Roma, a biased attitude in the society and discrimination also play an important role.

1.1.2. Discrimination among the police

In its reports, the ECRI specifies that representatives of some minority groups, such as the Roma, people from Caucasus, and refugees from Africa and Central or Eastern Asia, often become objects of discriminatory treatment on the part of the police. They more frequently

¹ See the Second Report on Ukraine of 14 December 2001.

suffer from unjustified or unlawful inspections of documents, searches, confiscations of documents, and so on.

The number of notices of race-related violence against individuals of African or Asian origin has been growing. Representatives of these groups complain that the police continue to ignore violence against them and sometimes even encourage such violence.²

Examples of discriminatory treatment on the part of the police include:

Mandatory fingerprinting

Mandatory fingerprinting of individuals of certain nationalities has become a regular “crime-fighting tool” used by the police. For example, in early June 2004, the police subjected all citizens of Roma origins to be fingerprinted in Korosten, Zhytomyr oblast. In this instance, the discrimination was unquestionable, as the police took fingerprints only of Roma residents. Moreover, this procedure involved rude treatment, insults, intimidation and humiliation towards Ukrainian citizens.³

Similar practices can be found in other Ukrainian oblasts. Over March–April 2005, mass arrests of citizens of Roma nationality took place throughout Chernihiv oblast without regard to gender and social standing. Roma citizens were forcibly taken to police stations, where they were subjected to mandatory fingerprinting.

Mass searches

Mass searches organized by departments of the Ministry of Internal Affairs (MIA) often have elements of discrimination. For example, on 8 March 2004, mass searches were carried out among Roma families in Chernihiv, ostensibly to uncover narcotic substances. These actions by police officers were clearly discriminatory, as they did not specifically search individuals suspected of dealing in narcotic substances, but all Roma in the area.

1.1.3. Discrimination in education and access to residential premises

According to data from the Ukrainian Institute for Social Research (UISR), some 50% of Roma children do not attend school or regularly skip classes. The situation with education is the worst in Zakarpattia and Kharkiv oblasts, regions where dense Roma communities live. According to *Romani Yag*, a Roma newspaper, 83.7% of Roma children living in Zakarpattia oblast failed to finish high school, 14.5% have a basic high-school diploma, 1.4% have graduated from a technical-vocation school, 0.3% have completed a specialized secondary education, and only 0.1% have had a higher education.

Representatives of formerly deported peoples also suffer from discrimination in terms of access to basic living conditions. The majority of Crimean Tartars who came back to Ukraine settled in 300 new settlements. 75% of Crimean Tartar villages have power (power grids) and only 27% have water supplies (through pipes). These villages have nearly no hard-surface roads, no schools and no medical facilities. The lack of basic living conditions in Tartar settlements has led to a steep decline in health and to growing mortality among these repatriated people.

² See www.khpg.org/index.php?id=1040202612 (in Ukrainian).

³ From *Romani Yag*, a Roma newspaper, №9(51).

1.2. Why discrimination cannot be ignored: The consequences of this problem

1.2.1. Ignoring this issue spoils Ukraine's international image

In today's world, all forms of racism and discrimination **belong to the most serious violations of human rights**. This means that fighting racism and discrimination, as well as xenophobia and intolerance are top priority for any country.⁴ These commitments are enshrined in many international documents that Ukraine is a party to. These include the Declaration on the Rights of Persons Belonging to National, Ethnic, Religious, or Linguistic Minorities. Its provisions commit Ukraine to take appropriate legislative steps to prevent discrimination.

In 2003, the Parliamentary Assembly of the Council of Europe (PACE) concluded Ukraine had not fulfilled the majority of its commitments related to preventing discrimination.⁵

This has a negative impact on Ukraine's international image and is an obstacle to the country's becoming an equal partner in the world community.

1.2.2. Adopting anti-discrimination legislation is a condition for integrating into the EU

In recent years, the European Union itself has begun to pay a lot of attention to countering discrimination and ensuring equal opportunities for all individuals. To fulfill these objectives, the EU adopted a number of directives, among which the most well-known document is the Council Directive implementing the principle of equal treatment among persons, regardless of racial or ethnic origin (Directive 2000/43/EC). Today, this Directive is essentially part of EU legislation.

Since 2000, **the EU has required that accession candidates introduce standards proposed by this Directive into their national legislation and put them into practice.**

This means that Ukraine, which would like to integrate into the European community, must introduce the principles of Directive 2000/43/EC into its legislation and into legal practice.

1.2.3. Countering discrimination ensures a country's conflict-free and democratic development

The experience of many countries shows that manifestations of inequality and disregard for rights and lawful interests raise a strong reaction among minority groups. Too often, these can lead to conflicts within a society.

Ukraine is a country where national minorities constitute about 22.2% of the total population. This makes the potential risk of discrimination-related confrontations in Ukrainian society high.

To minimize such risks and to ensure the country's conflict-free, democratic development, the Ukrainian government should create an effective system for countering discrimination.

⁴ See the 20 August 1998 decision of the World Conference against Racism, Racial Discrimination, Xenophobia, and Related Intolerance.

⁵ PACE resolution adopted in Strasbourg on 29 September 2003.

1.3. Why the government is cannot overcome discrimination: The roots of the problem

1.3.1. Poor terminology complicates the detection and classification of offences

Ukrainian legislation lacks clear definitions of basic terms related to discrimination, such as “discrimination”—with the exception of the term “sexual discrimination” in the Law “On ensuring equal rights and opportunities for men and women”—, “incitement to discrimination,” “victimization,” and so on.

Such lack of clarity is one of the main obstacles for victims of discrimination who want legal protection. When there is no clear understanding of what is behind the term “discrimination,” it is impossible to expect that all discriminatory actions will be uncovered, properly investigated and punished.

1.3.2. Impunity encourages discrimination

One of the main causes for the spread of discrimination in Ukrainian society is that **all manifestations of discrimination in Ukraine essentially go unpunished.**

Today, the provisions of laws that guarantee equality and freedom from discrimination are little more than declarations. The government is not able of ensure adherence to the principle of equality declared in Art. 24 of the Constitution of Ukraine, as government bodies do not have any real leverage to influence offenders.

The Criminal Code establishes responsibility for violating the principle of equality on the basis of race, nationality or religious beliefs (Art. 161). However, this article is barely effective for three reasons:

- **Intent has to be proved.** The liability written into Art. 161 of the Criminal Code can be applied only if there is intent in actions that violate the principle of equality. Yet the particular nature of such offences makes it nearly impossible to prove intent.
- **Responsibility can be determined only for unlawful actions against Ukrainian nationals.** Similar actions against individuals who are not Ukrainian nationals or who cannot confirm their citizenship are not seen as an offence.
- **Only a narrow base of offences related to discrimination is covered by this Article.** Many offences against members of minorities that should be treated as crimes according to international conventions are not included in Ukraine’s Criminal Code (see Table).

Offence as understood by international legislation	International legislation
<ul style="list-style-type: none"> • All dissemination of ideas based on racial superiority or hatred; • All incitement to racial discrimination; • All acts of violence or incitement to such acts against any race or group of persons of another skin color or ethnic origin; • The provision of any assistance to racist activities, including financing; • Participation in organizations that promote racial discrimination, incitement to racial discrimination and participation in such activity. 	Art. 4 of the International Convention on the Elimination of All Forms of Racial Discrimination
<ul style="list-style-type: none"> • Establishing organizations and disseminating ideas related to discrimination, especially racial discrimination. 	Art. 20 of the International Covenant on Civil and Political Rights

The current Code of Administrative Offences of Ukraine cannot serve as an anti-discrimination instrument because it contains no provisions that would establish responsibility for discriminatory actions or violations of the principle of equality. That is, today, even where unlawful actions have been proved, the guilty party bears no responsibility.

In addition, individuals from minorities have little protection from discriminatory actions on the part of legal entities. The reason for this is that, with rare exceptions, Ukrainian legislation does not clearly determine what penalties can be applied to legal entities violating anti-discrimination laws and regulations. The majority of legal documents do not consider this kind of offences separately and, at best, are limited to the following formulation: *“Individuals guilty of violating this legislation shall bear civil, legal, administrative, or criminal responsibility according to Ukrainian legislation.”*

Moreover, such legal documents do not establish the size and type of civil and legal liability. As for administrative and criminal responsibility, under Ukrainian law, these are “instruments of influence” over private individuals and cannot be applied to legal entities.

1.3.3. Justice is out of reach

In Ukraine, victims of discrimination face numerous obstacles when they attempt to protect their violated rights in courts. The root of this problem is gaps in legislation that does not allow victims of discrimination to:

- request and use effective, affordable legal aid;
- use special opportunities that ease the burden of proof;
- settle a dispute or case without turning to the courts.

Today, victims of discrimination in Ukraine cannot count on guaranteed legal aid on the part of government or other authorized bodies. The myriad functions of government bodies do not include a single function that includes providing assistance and support to minorities who have suffered from discrimination while their claims are filed and considered.

The conditions are lacking to provide access to low-cost or free legal aid to impoverished representatives of minorities.⁶ On the contrary, the government has set up artificial obstacles for community organizations that are prepared to provide assistance to and support to victims of discrimination. Legally, community organizations can only represent interests of their own members in court and then only if this function is specifically allowed in their statutes.

To build an effective anti-discrimination system, domestic legislation must provide victims of discrimination special options to facilitate the process of establishing or proving the fact of discrimination. The experience of many countries shows that, without this step, victims of discrimination basically have little chance of winning their case in court.

This is confirmed by Ukrainian realities. Here, the burden of proof is an almost insuperable barrier for individuals who have suffered from discrimination.

This is because national legislation does not take account of the fact that, in most instances, the evidence of discrimination is in the hands of those who have committed the violation. The law does not provide any special measures that would help overcome this obstacle.

Ukraine has failed to create and introduce special out-of-court or administrative procedures for handling discrimination-related claims. To protect their rights, victims of discrimination can only file a claim with a court. However, along with unquestionable advantages, judiciary protection also has a number of drawbacks. The main ones are complicated procedures, high costs—the claimant has to pay state duty, court costs and lawyer’s fees—and duration. Disputes can drag out in Ukrainian courts for more than one year.

⁶ Only individuals who are involved in criminal proceedings and do not speak the language of the courts can count on free legal aid.

For many victims of discrimination, such drawbacks become insuperable obstacles to restoring violated rights. As there are no alternative mechanisms for protecting these rights, victims of discrimination frequently have no possibility to protect their rights at all.

1.3.4. Government bodies ignore the issue of discrimination

Countering discrimination and protecting individuals from discrimination has not been declared a priority by any government body. So, by not dealing with the issue of discrimination, the government in some sense encourages its spread and aggravation.

Only the Ombudsman, the MIA and prosecutors' offices have real potential to confront discrimination in Ukraine. However, the Ombudsman deals with human rights as a whole and, because of limited resources, cannot concentrate on discrimination alone. As for the MIA and prosecutors' offices, protecting minorities is not their priority and there are no separate departments that might specialize in such issues. Secondly, the majority of cases involving gross violations of minority rights are related specifically to actions by the police, who thus cannot investigate such cases without bias.

2. The Purpose of this Anti-discrimination Bill

To eliminate the current drawbacks, an anti-discrimination bill must fulfill four objectives:

1. **Identify basic concepts and principles** that will be the basis for effective anti-discrimination mechanisms. Firstly, this means clearly defining terms, a list of characteristics that cannot be used as a basis for discrimination, the scope of the law, typical manifestations of discrimination, and so on.
2. **Facilitate access to justice for victims of discrimination.** This means improving existing court mechanisms for defending the violated rights and lawful interests of individuals and creating new mechanisms as an effective alternative to court mechanisms for protecting rights.
3. **Increase the state's responsibility for countering discrimination.** Government bodies must actively counter discrimination in Ukraine. For this purpose, the necessary functions and powers of relevant bodies need to be written into national legislation.
4. **Introduce effective restraining factors** to prevent manifestations of discrimination. In the first place, this would be suitable penalties for violating anti-discrimination legislation.

3. The General Features and Main Provisions of the Bill

3.1. What kind of discrimination this bill will counter

The key issue is the types of discrimination it will counter.

The proposed bill aims at countering a narrow range of discrimination: **racial, national and ethnic discrimination**.

3.1.1. Why this option is being proposed

At this point, world practice has developed two approaches to legislative regulation of a problem such as discrimination. The first approach involves adopting a number of anti-discrimination laws that combat different types of discrimination or discrimination in different areas of social relations. The second approach involves a single anti-discrimination law that tackles discrimination through a broad or even unlimited list of characteristics.

The proposed bill follows the first approach. This choice was made because **Ukraine has already gone the way of adopting different anti-discrimination laws:**

- the Law “On ensuring equal rights and opportunities for men and women” adopted in September 2005 aims at eliminating gender-based discrimination;
- two Bills “On the rights of patients in Ukraine” focus on discrimination against patients;
- the Law “On the principles of social protection for the disabled in Ukraine” adopted in March 1991 prohibits discrimination against the disabled and guarantees them equal rights and opportunities to participate in economic, political and social life.

Moreover, this approach has a number of advantages, such as:

1. **It corresponds to EU legislation.** The bill fully conforms to the requirements of Directive 2000/43/EC (the European Race Directive) that aims at ensuring equal treatment for all persons without regard to race or ethnicity. Implementing the provisions of this directive into domestic legislation is a requirement for EU membership.
2. **It guarantees the implementation of a number of Ukraine’s international commitments.** Specifically, this means commitments enshrined in the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, which Ukraine has signed.
3. **It offers low implementation costs.** Enacting this bill does not require new bodies or institutions to be established, significant funds to be allocated from the State Budget, or substantial amendments to existing legislation or regulations.
4. **It is universal.** Although the bill aims at countering racial, national and ethnic discrimination, the instruments written into this bill are universal. Later, after the mechanisms written into this law begin to work and the country gains some experience in fighting discrimination, these instruments can be applied to other types of discrimination.

3.1.2. The drawbacks of the proposed bill

The drawbacks of the proposed bill are:

1. **The bill does not consider individuals suffering from other types of discrimination.** Countering racial, national and ethnic discrimination against minorities can create an impression that other types of minorities are of secondary importance.
2. **Some risk that access to justice will be complicated in cases of multiple discrimination.** In some cases, an established limited list of actions deemed discrimination might significantly complicate access to protection procedures even for those who are within the scope of the bill. For example, a practicing Muslim woman who belongs to a national minority has suffered discrimination. In this instance, to resort to the protection instruments provided in the bill, she will have to prove that the discrimination she experienced was specifically because of her nationality or race and not, say, due to her gender or religion.

3.1.3. What alternatives were rejected

Countering discrimination on a broad basis

This option envisages a law that covers racial, national and ethnic discrimination, discrimination according to gender, age, religion, state of health, political beliefs, and sexual orientation. Its advantage over the proposed bill is that it provides protection to a broader base of potential victims of discrimination. However, it has two substantial drawbacks. First, the costs of implementation are high. Clearly, there will be a need for a separate body to deal with discrimination that covers a very broad base of minorities. Second, the political risks are high and may affect the fate of such a law with the inclusion of such characteristics as language of communication or political beliefs. According to the authors, including language and political affiliation in the bill might make it impossible to adopt.

Countering any manifestations of discrimination

With this option, the anti-discrimination mechanisms written into the bill need to apply to all types of discrimination. It means that the list of characteristics must be open or must end with the words “or by any other characteristic.” The unquestionable advantages of this approach are that it maximally applies international legislation and theoretically provides protection to all possible victims of discrimination.

However, this approach also has serious drawbacks. Firstly, implementation will require substantial financial support from public budgets. The more cases of discriminations are raised, the greater number of bureaucrats will be needed to handle claims and the more claims will be filed in court.

If the number of discrimination-related claims is large, government agencies will not be able to rapidly process all the cases and provide assistance to those who really need it. In fact, the government is institutionally not prepared to fight discrimination according to an unlimited list of characteristics.

3.1.4. What requirements European and international legislation set *EU directives*

The key requirements for protection against discrimination are written into three European directives. All of them contain requirements for prohibiting and countering discrimination according to a limited list of characteristics:

- Directive 2000/43/EC requires countering racial and ethnic discrimination;
- Directive 2000/78/EC prohibits discrimination on the basis of religion or religious beliefs, age, disability, and sexual orientation. However, this prohibition extends only to labor relations and residential access;

- Directive 2002/73/EC prohibits gender discrimination. This prohibition extends only to access to employment, vocational training and promotion, and working conditions.

The European Convention for the Protection of Human Rights and Fundamental Freedoms

According to Art. 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, the enjoyment of the rights and freedoms **set forth in this Convention** should be secured without discrimination on the basis of *gender, race, skin color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status*.

This list of characteristics that cannot be used as the basis for discrimination by this document is, in short, not limited. However, the Convention does provide a limited list of rights and freedoms where freedom from discrimination is guaranteed.

Conclusion: The Convention requires protection from discrimination based on an unlimited base of characteristics, but with respect to a limited number of rights.

Unlike this Convention, Protocol №12 of the European Convention for the Protection of Human Rights and Fundamental Freedoms prohibits **discrimination on the basis of an unlimited list of characteristics and with respect to all rights recognized by law**. Ukraine has not ratified this Protocol.

The Declaration on the Rights of Persons Belonging to National, Ethnic, Religious or Linguistic Minorities

According to this document, countries must take appropriate legislative and other measures to overcome discrimination based on nationality, ethnicity, language, or religion.

The International Covenant on Civil and Political Rights

This document prohibits discrimination based on an unlimited list of characteristics. Specifically, Art. 2, 26 and others note the unacceptability of any form of discrimination based on any characteristic: race, skin color, gender, language, religion, political or other opinion, national or social origin, property, birth or other status. Such discrimination must be prohibited and the government must guarantee effective protection from discrimination to all individuals.

3.2. How this bill defines discrimination

According to the proposed bill, racial, national or ethnic discrimination is defined as any action or inaction that expresses any racial, national or ethnic distinction, restriction or preference whose purpose or effect is to restrict or render impossible the recognition, enjoyment or exercise, on an equal footing, of human rights and freedoms. This definition was based on the provisions of the International Convention on the Elimination of All Forms of Racial Discrimination and of the UN Human Rights Committee Report’s definition of discrimination.

3.2.1. Why this particular approach was chosen

The proposed definition is similar to the definition of the term “discrimination” used in the existing Law “On ensuring equal rights and opportunities for men and women.” This Law and the proposed bill must be completely consistent. Different interpretations will confuse both individuals and government agencies that have to review discrimination cases.

In addition, the given definition is easy to understand, compared to alternative definitions.

The main drawback of the proposed approach is that it does not cover all the requirements of EU directives. According to these, a country's legislation must provide a definition for indirect discrimination as well as direct discrimination.⁷

3.2.2. *What alternative definitions are available*

The European approach

To define discrimination, EU legislation, including Directive 2000/43/EC, uses two terms:

- **direct discrimination** shall be understood where an individual is treated less favorably than another is, has been or would be treated in a comparable situation, on the basis of racial or ethnic origin;
- **indirect discrimination** shall be understood where an apparently neutral provision, criterion or practice places persons of a particular racial or ethnic origin at a notable disadvantage compared to other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

This approach was rejected as being very complicated and abstract.

Russian practice

According to the Russian Federal Law "On government guarantees for equal rights and freedoms and equal opportunities for men and women in the Russian Federation", discrimination is defined as the distinction, exclusion or restriction on the basis of a particular characteristic which has the purpose or effect of restricting or rendering impossible the recognition, enjoyment or exercise, on an equal footing, of human rights and freedoms.

Unlike the definition provided in the proposed Ukrainian bill, the Russian bill does not note that discrimination can be expressed through both action and inaction. This makes the term "discrimination" less clear and understandable.

International legislation

International legislation uses several approaches to defining discrimination. Among others, discrimination is identified as any distinction, exclusion or preference made on the basis of race, skin color, gender, religion, political opinion, national extraction or social origin, which has the effect of restricting or rendering impossible equality of opportunity or treatment.⁸ The principal difference between this and the definition proposed in the bill is the existence of negative consequences.

3.3. What the anti-discrimination body will be like

A necessary condition for overcoming discrimination is the active involvement of government bodies in anti-discrimination activity. To ensure this, the proposed bill:

- clearly divides among government bodies the functions related to carrying out anti-discrimination policy;
- establishes a procedure for collaboration among government bodies and between them and community organizations in anti-discrimination work;
- establishes legal grounds for the work of a special anti-discrimination body.

⁷ The definition of indirect discrimination provided in the EU Directives is very difficult to understand. It can be introduced to domestic legislation only after a country has gained some experience in applying anti-discrimination legislation, terms and principles in this complex sector.

⁸ ILO Convention № 111.

Note that this anti-discrimination body is one of the key instruments to ensure effective work against discrimination in Ukraine. This body will be responsible for implementing the provisions of the bill that aim at overcoming discrimination.

3.3.1. The legal status of the anti-discrimination body

The bill does not require a new executive body to be set up. The functions of the specially-authorized central executive anti-discrimination body will be handled by an existing body, to be determined by the Cabinet of Ministers. According to the authors of the bill, this body should be the Ministry of Justice.

This option was chosen among available alternatives, based on several factors:

1. **Easy implementation.** This option requires no significant changes to existing laws. Institutional changes will be minimal.
2. **Low cost.** As no new government body is needed, public costs will be minimal. An existing executive body can fulfill the objectives of the bill using available resources.
3. **Rapid launch.** An existing executive body can begin to actively work to counter discrimination almost immediately. The necessary structural changes and their legal formulation, such as amendments to the regulation of the relevant body, should not take much time.
4. **Professionalism and the lack of negative expectations.** There is no doubt that the possible candidates for the role of the anti-discrimination body, the Ministry of Justice and the State Nationalities and Migration Committee, have qualified specialists who can deal with the issue of discrimination competently. In addition, unlike, say, the police, these bodies have a better image in the eyes of the general public. This means that victims of discrimination will not be afraid to turn to them for help.

The drawbacks and risks of this option are:

1. **The lack of independence and the risk of conflict of interests.** Clearly, no central executive body will be independent enough to carry out an unbiased investigation of claims of discrimination against representatives of executive bodies.
2. **The risk of overextending existing bodies.** The new functions envisaged by the proposed bill may prove too heavy a burden for the central executive body designated by the Cabinet of Ministers. The risk is that they will then be ignored, especially if they are not supported with the necessary financing.

3.3.2. The functions of the anti-discrimination body

The main functions of the anti-discrimination body identified by the proposed bill are to:

- oversee the implementation of anti-discrimination legislation;
- prepare and publish unbiased studies and reports on manifestations of discriminations in Ukraine;
- ensure protection for victims of discrimination that includes: reviewing discrimination claims, providing legal aid to victims of discrimination and, if necessary, filing claims in court;
- organize, coordinate and carry out unbiased inspections related to discrimination claims;
- review manifestations of discrimination, claims and documents on this issue;
- look for paths to reconciliation and the regulation of conflicts related to discrimination claims.

3.3.3. *The powers of the anti-discrimination body*

According to the proposed bill, the main powers of the anti-discrimination body are to:

- impose the penalties provided for in the bill on individuals and legal entities who have violated anti-discrimination legislation;
- require offenders to paying compensation to victims of discrimination;
- adopt and issue binding instructions to restore violated rights and eliminate discriminatory practice;
- file claims with a court on behalf of a victim of discrimination or participate in court proceedings as an interested party in cases involving to violations of the principle of equality;
- review documents and receive copies of originals from government bodies, local governments, citizen associations, companies, institutions, and organizations regardless of form of ownership;
- take oral or written depositions from officials, Ukrainian citizens, foreigners, and stateless individuals regarding the circumstances under examination.

3.3.4. *What alternatives were rejected*

The alternatives to delegating the functions of the anti-discrimination body to an existing central executive body were:

- (1) to set up a new state anti-discrimination body;
- (2) to increase the anti-discrimination functions of the Verkhovna Rada Ombudsman for Human Rights by setting up the post of Special Representatives on Discrimination;
- (3) to delegate anti-discrimination functions to counteraction to the MIA or prosecutors' offices.

These options were rejected because of serious drawbacks.

A new anti-discrimination body

One positive aspect to this option would be its narrow specialization. The new body would deal only with the issue of discrimination and would not spread its efforts across other areas. This would guarantee systematic, consistent, professional and, finally, effective anti-discrimination activity.

Drawbacks and risks, which would emerge during the implementation of this option, are:

- **Significant costs.** To set up a new body and to extend its activity to the regional level, the government would need to invest significant financial resources.
- **Delayed implementation.** Experience shows that it generally takes several years from the adoption of legislative provisions to the time when a new body actually starts working. In essence, the law would not be functional during this time.

Special Representatives for discrimination issues under the VR Ombudsman for Human Rights

This option means establishing Special Representatives on discrimination issues under the Verkhovna Rada Ombudsman for Human Rights.

The advantages of this approach are:

- **Maximum independence.** The institute of Ombudsman is outside the executive branch of power. Thus, there should be no conflict of interests in considering claims against government bodies.

- **Public confidence.** The Ombudsman’s Office enjoys a high level of confidence among the general population. This means that people would not be afraid to turn to its representatives for help in discrimination claims.

The drawbacks of this option are:

- **The unassignability of certain key functions and powers to Special Representatives.** Obviously, the functions and powers of Special Representatives cannot be broader than those of the Verkhovna Rada Ombudsman for Human Rights. This means it would be impossible to delegate a number of key functions to Special Representatives:
 - imposing penalties;
 - drawing up instructions regarding administrative offences;
 - coordinating measures for an appropriate response to violations.
- **The risk of not being financed.** Instituting Special Representatives for discrimination issues would require additional funds from the State Budget. Given that the Government still has not ensured proper financing for the activities of the existing representatives of the Ombudsman for Human Rights, it is unlikely that Special Representatives for discrimination will fare any better.

Anti-discrimination activity by the MIA

This could be implemented by setting up specialized anti-discrimination departments or units within the MIA system. Their functions would include reviewing individual claims about discriminatory actions and investigating offences involving discrimination.⁹

The positive aspects of this option are:

- **Consistency and compatibility with existing legislation.** According to the Law “On the police,” the police are an executive body that protects the rights and freedoms of citizens from unlawful infringements. This would make it quite natural for police agencies to protect citizens from discrimination, as the right to equality and freedom from discrimination are key human rights.
- **An existing broad network of sub-units, enough staff, a variety of specialized services, and research centers.** The MIA is represented at all levels across the country, from the capital to city districts. This would make it possible for victims of discrimination to quickly receive assistance and protection from unlawful actions.
- **A broad range of punitive instruments.** The MIA bodies can apply the full spectrum of means envisaged by the proposed bill to influence offenders.

The negative aspects of this option are:

- **The unassignability of certain key functions to the MIA bodies.** These include the functions of awareness-building and education, representing the interests of victims in court, and so on.
- **The need for an additional mechanism for reviewing discrimination claims by the police.** Practice shows that police officers are the biggest violators of the principle of non-discriminatory practice. Clearly, the police would be unable to consider claims of such violations in an unbiased manner.
- **The lack of trust among the general population.** The police enjoy little trust among the general population, especially among those groups who most frequently suffer from discrimination. Therefore, this option contains a significant risk that victims of discrimination would not turn for help at all for fear of further abuse.

⁹ Ukraine already has experience in setting up specialized units within the Ministry of Internal Affairs to fulfill specific objectives, such as a criminal police for juveniles and departments of veterinary police.

Anti-discrimination activity by prosecutors' offices

The function of protecting individuals against discrimination can also be delegated to the prosecutors' offices. As with the MIA, such activities are completely compatible with its objectives. Many of the pluses that are true for the police and MIA also apply here. Moreover, it has some additional advantages. First of all, according to law, prosecutors' offices guarantee more independence, a broader base of instruments for influencing offenders, and they have the right to hand down binding instructions.

Unlike the Law "On the police," however, the Law "On the prosecutor's office" does not provide for the possibility of setting up specialized sub-units in prosecutors' offices. This option would actually delegate a number of anti-discrimination duties and functions that would be seen as secondary to the prosecutors' main function and, in practice, would be largely neglected.

3.3.5. The anti-discrimination body as defined in European and international legislation

EU directives

EU legislation, including Directive 2000/43/EC, requires Member States to designate a body or bodies for the promotion of equal treatment that can provide independent assistance to victims of discrimination and be responsible for implementing anti-discrimination legislation. These bodies must supplement existing court protection mechanisms.

European anti-discrimination legislation requires that these bodies be provided both the necessary resources and the necessary legal powers to:

- provide independent assistance to victims of discrimination by explaining them their rights and launching legal proceedings in response to their claims;
- carry out independent investigations into cases of discrimination;
- file claims in court;
- prepare and publish independent reports on issues related to anti-discrimination legislation.

According to EU legislation, the anti-discrimination body may be both a part of an existing body charged with the defense of human rights or the safeguard of individuals' rights, or a separate institution.

International legislation

A number of key recommendations were included in the Action Plan to implement the Declaration on the Elimination of All Forms of Racial Discrimination. The most important are:

- establish and strengthen independent, specialized national human rights institutions and provide them with adequate financial resources, authority and capacity for investigating discrimination claims, researching discriminatory practice, carrying out educational and public awareness activities to combat such practices;
- provide access to victims of discrimination to legal protection by appointing independent, specialized national bodies;
- establish competent national institutions that can effectively investigate notices of instances of racial discrimination and protect claimants from intimidation or persecution.

¹⁰ Adopted by the World Conference against Racism, Racial Discrimination, Xenophobia, and Related Intolerance.

Other international legislation, such as the International Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965, the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities of 18 December 1992, and others, contains no additional specific requirements of national anti-discrimination bodies.

3.4. Instruments for preventing discrimination and eliminating its consequences

Ukrainian legislation currently does not contain penalties for violating provisions of existing anti-discrimination laws. Because of the lack of preventive instruments, these anti-discrimination provisions are not working.

To eliminate this problem, the proposed bill contains provisions to:

- increase liability for discriminatory actions;
- eliminate the negative consequences of discrimination.

3.4.1. *The administrative liability of private individuals*

To introduce effective administrative liability, the text of the proposed bill identifies discriminatory actions that are considered administrative violations:

- refusal to provide services or sell goods under generally accepted conditions to individuals on the basis of race, nationality or ethnicity or restricted access to services or goods provided by culture-related, educational, healthcare, food services, trade, service, and entertainment facilities for individuals on the basis of race, nationality or ethnicity, except for instances when such refusal or restriction is allowed by law;
- refusal to sell or lease land or buildings to individuals on the basis of race, nationality or ethnicity, except for instances when such refusal is allowed by law;
- restricted access to transport or telecommunication services, services provided by public institutions and facilities to individuals on the basis of race, nationality or ethnicity, except for instances when such restriction is allowed by law;
- actions, decisions or demands that place an individual of a certain race, nationality or ethnicity in unequal, significantly worse conditions than other individuals;
- incitement to the above-mentioned actions, persecution of victims of discrimination, victimization;
- failure on the part officials of the specially-authorized central executive anti-discrimination body to carry out requirements set by law, such as the refusal to provide information or documents or creating obstacles to access to data needed by this body in order to review a discrimination claim;
- failure to carry out the instructions of the specially-authorized central executive anti-discrimination body.

The size of administrative fines will be set by amending the Code of Administrative Violations and will range between 3 and 25 tax-free minimums.

Administrative fines will apply to offences that are repeated within a year or committed by a government official.

The procedure for imposing administrative fines written into the proposed bill is based on existing practice. It will look as follows:

1. After an inspection or in other identified instances, the specially-authorized central executive anti-discrimination body draws up an instruction as to the presence of an administrative violation;
2. This instruction is then submitted for consideration to a court that, within two months, makes decision to impose or not impose an administrative fine and the size of the fine.

This decision is carried out either voluntarily within the period established by the proposed bill or on a mandatory basis through the state enforcement service.

3.4.2. The financial liability of legal entities

In addition to introducing administrative liability, the proposed bill includes provisions to establish penalties for offences committed by legal entities.

The list of such offences is similar to the list of administrative violations.

The size of fines will be set between 25 and 50 tax-free minimums.

The mechanism for imposing fines on legal entities will look as follows:

1. After an inspection, the specially-authorized central executive anti-discrimination body draws up a resolution regarding any violations;
2. The decision to impose a fine is made on the basis of this determination.
3. The decision is delivered to the legal entity, which can either carry it out voluntarily or appeal it either to the determining body or in court.
4. Should the offender fail to carry out or to appeal a decision, any fines are collected through court.

3.4.3. Increasing of criminal liability

To make criminal liability an effective restraining instrument, the proposed bill amends the list of unlawful actions that are considered an offence:

Promotion of or incitement to hostility: This includes the dissemination of statements or other information among the general public with the intent of rousing hostility and hatred towards individuals or groups of a certain race, nationality or ethnicity, skin color, religious belief, affiliation to a political party or other community organization, gender, sexual orientation, age, state of health, language of communication, or other characteristics, the denigration of the honor and dignity of such individuals, and the dissemination of threats, slander, calls for hostility or hatred towards them.

Violation of the principle of equality: This includes actions aimed at directly or indirectly restricting rights, at impeding or making impossible the exercise of human rights and freedoms, and at establishing direct or indirect privileges, provided such actions are committed with respect to individuals on the basis of race, nationality or ethnicity, skin color, religious beliefs, affiliation to political parties or other community organizations, gender, sexual orientation, age, state of health, language of communication, or other characteristics, and the establishment or management of organizations whose goals are to commit such actions.

These offences are grouped in two articles that will replace Art. 161 of the Criminal Code in its present form.

The new articles to be introduced in the Criminal Code according to the proposed bill have two significant differences from the existing Art. 161. Firstly, they protect all individuals and not just Ukrainian nationals. Secondly, they provide for punishment for any violation, not only for those committed with intent.¹¹

¹¹ According to the current Criminal Code, an offense shall mean **deliberate** illegal actions against Ukrainian **nationals**, as was noted earlier in this text.

3.4.4. Compensation to victims as a means of eliminating the negative impact of discrimination

Compensation is intended to play a dual role. On one hand, it constitutes a specific punishment against individuals guilty of discrimination. On the other, it makes it possible to at least partly indemnify damages inflicted on the injured party and should thus encourage individuals to actively defend their rights.

Compensation will be assigned by the specially-authorized central executive anti-discrimination body when reviewing specific violations of anti-discrimination legislation.

The provisions of the proposed bill specify that the size of compensation will be determined based on:

- damages sustained by the injured party;
- lost profits in terms of future income or benefits;
- moral damage;
- a fine, that constitutes interest on the value of inflicted damage.

The Cabinet of Ministers will develop a method for calculating compensation.

3.4.5. Instructions to eliminate discriminatory practice

According to the proposed bill, one of the instruments for influencing offenders will be instructions to eliminate discriminatory practice issued by the specially authorized central executive body for counteracting discrimination. Such instructions will include:

- requirements to eliminate the negative consequences of discriminatory practice;
- requirements to terminate systematic actions of a discriminatory nature and eliminate the factors underlying discriminatory practice;
- a deadline for carrying out the demands in the instruction;
- the procedure and deadlines for submitting reports and information on the steps undertaken to terminate discriminatory practices.

Financial or administrative penalties will be imposed on the offender for failing to fulfill the requirements of such instructions.

3.4.6. An evaluation of alternatives

An alternative here could be that the bill contains, rather than a specific list of penalties for violating anti-discrimination legislation, a general phrase stating that guilty individuals will be liable according to legislation governing such violations.

In this version, the proposed bill might raise fewer objections. However, the lack of specific penalties would make implementing the bill impossible because existing Ukrainian legislation does not provide penalties for discrimination.

In addition, this approach does not match EU legislation.

3.4.7. Penalties for discrimination in European and international legislation

EU directives

EU directives related to discrimination do not directly state which penalties and for which actions must be included in the national legislation of Member States. Directive 2000/43/EC only establishes that domestic legislation of Member States should provide for

“effective, proportionate and dissuasive sanctions” in breaches of anti-discrimination provisions and that such penalties must include compensation to the victim of discrimination.¹²

International legislation

According to the International Convention on the Elimination of All Forms of Racial Discrimination, an offence is:

- any dissemination of ideas based on racial superiority or hatred;
- any incitement to racial discrimination;
- all acts of violence or incitement to such acts against any race or group of persons of another skin color or ethnic origin;
- the provision of any assistance to racist activities, including financing;
- participation in organizations that promote racial discrimination or incitement to racial discrimination, or participation in such activities.

The International Covenant on Civil and Political Rights requires that both the establishment of organizations and the dissemination of ideas related to discrimination be treated as offences.

According to the recommendations of the European Commission Against Racism and Intolerance’s Document №7 approved on 13 December 2002, criminal legislation must establish penalties for:

- public incitement to violence, hatred or discrimination;
- public threats; or
- public insults and defamation against a person or a group of persons on the basis of race, skin color, language, religion, nationality, or national or ethnic origin.

3.5. How to facilitate access to justice

To facilitate access to justice for victims of discrimination, the proposed bill includes provisions to:

- set up out-of-court or administrative mechanisms to protect against discrimination. Such out-of-court mechanisms do not preclude the right to file a claim in court;
- expand government and non-government assistance to victims of discrimination;
- remove obstacles that complicate the court process of protection from discrimination.

3.5.1. What will be done to develop a non-court protection procedure

The proposed bill includes provisions to provide a specially-authorized central executive anti-discrimination body with the power to consider discrimination claims by both private individuals and legal entities, to carry out inspections related to such claims and make binding decisions, including the imposition of penalties, assignment of compensation, and so on.

The bill also includes a section that clearly sets out the procedure for considering such claims. This procedure should become an alternative to using the courts as a protection mechanism.

The specially-authorized central executive anti-discrimination body will begin reviewing a discrimination case after:

- receiving a claim of discriminatory actions;

¹² The proposed bill does contain provisions that provide for compensations to victims of discrimination.

- independently uncovering discrimination;
- receiving a relevant application from other government bodies.

The administrative process for considering discrimination claims will have four stages:

1. **Opening the case.**
2. **Examining and collecting evidence.** To clarify the circumstances of the case, the specially-authorized body can carry out inspections. If necessary, the police may be involved in collecting evidence.
3. **Taking steps to reconcile the parties.** The specially-authorized body will take steps to reconcile the parties by proposing: the restoration of violated rights, the payment of fair compensation as determined by the parties, and so on.
4. **Making a decision.** Where the parties failed to reconcile, the specially-authorized body will, based on a determination that there was an offence:
 - issue an instruction requiring that any discriminatory practice be eliminated;
 - commit the guilty party to paying compensation to the victim of discrimination;
 - impose a penalty;
 - submit the case to a court for consideration in order to impose an administrative penalty.

The advantages of a non-court procedure for protection against discrimination

Accessibility. Practice shows that non-court procedures for considering claims are far easier, more understandable and, thus, more accessible for the population. These procedures are not as formal as court procedures, so they do not require special knowledge from ordinary citizens.

Affordability. Unlike court procedures, non-court procedures do not require individuals applying for help to pay for anything.

Rapidity. The review of a claim by a special government body will take far less time than taking that same case through court. This approach will make it possible to resolve problems within the shortest period of time.

The drawbacks of a non-court procedure for protection against discrimination

No guarantee of objectivity, that is, there could be a possible conflict of interests. The main advantage of courts should be their independent decision-making—at least in theory. Government bodies by their nature do not have this kind of independence. This means that government representatives may make biased decisions in reviewing claims against other government bodies.

No closure. The decisions of the government body can be appealed in court.

The need for public financing. To effectively implement these provisions of the proposed bill, the Government will have to provide Budget funding.

3.5.2. Incentives for non-government assistance to victims of discrimination

Expanded rights for community organizations involved in anti-discrimination activity

The proposed bill provides for community organizations involved in defending human rights to have the right to file claims with a court and submit claims to government bodies on behalf of victims of discrimination.

Along with this, amendments to the Law “On citizen associations”¹³ are introduced, to make Ukrainian legislation consistent.

A partnership to eliminate discrimination

The proposed bill anticipates the active involvement of community organizations in implementing anti-discrimination policy by, among others, delegating to them some of the functions of the anti-discrimination body. The bill makes it possible to delegate these four functions:

- monitoring the application of anti-discrimination legislation;
- providing consultations to victims of discrimination;
- accepting discrimination claims;
- scrutinizing actions, inaction and decisions that are discriminatory and providing conclusions as to their correspondence or lack of correspondence to anti-discrimination legislation.

Advantages and drawbacks of the proposed steps

The advantages of these provisions include:

- the possibility of lifting part of the burden of providing assistance to victims of discrimination from the government without additional financing or establishing new institutions, and so on;
- expanded opportunities for victims of discrimination to obtain legal aid.

No significant drawbacks are evident.

What alternatives were rejected

One alternative was to increase state financing for anti-discrimination activity among community organizations. This would mean creating financial incentives for such activities through:

- establishing in law a number of benefits for human rights organizations involved in practical activity to protect the rights of minorities and to counter discrimination;
- promoting the attraction of financial and material resources from domestic and foreign donors;
- developing and introducing incentives: reduced duty, partial compensation for costs, tax breaks, and so on.

Advantages:

- financial incentives are most effective;
- increased capacities among human rights organizations, as the additional resources could be used to expand assistance to victims of discrimination.

Drawbacks:

- serious preparatory work to develop and implement effective instruments of legal and financial support;
- additional financing from the State Budget;
- additional state oversight of targeted use of the support or benefits provided.

¹³ According to this law, community organizations only have the right to represent the interests of their own members in court.

3.5.3. Eliminating obstacles that complicate court protection from discrimination

Easing the burden of proof requirement

The proposed bill establishes that, when considering discrimination claims, the court may decide to place the burden of proof upon the defendant. That is, the injured party will not have to prove that discrimination took place, but the defendant will have to prove that the actions under examination did not violate the principle of equality.

What is the purpose of such a provision? European practice in countries that actively combat discrimination shows that it is extremely difficult, sometimes, even impossible to prove the fact of discrimination without easing the burden of proof. As a rule, the party accused of discrimination has all the evidence.

This amendment will be introduced only into the civil process.

In a criminal process, it is impossible and inexpedient to shift the burden of proof to the accused party. The presumption of innocence applies to criminal trials, which means that nobody must prove innocence with respect to an alleged offence. This principle is written into the Constitution of Ukraine.

The Code of Administrative Procedures will not need changes, as it already contains provisions that allow the burden of proof to be placed on the defendant in administrative cases.

As for the Commercial Procedural Code, discrimination cases fall beyond its scope so there, too, no amendments need to be introduced.

Expanding the list of acceptable evidence

According to the current Civil Procedural Code, evidence in a case can include: depositions from the parties, third parties, or their representatives; statements from witnesses; written evidence; material evidence such as audiotapes and videotapes; the opinions of experts. However, discriminatory actions cannot always be proved even with the help of such evidence.

Given this and existing European practice, the proposed bill allows additional evidence in discrimination claims:

- statistical data provided by any party that confirm the existence or the lack of unequal treatment;
- data obtained as a result of using special methods for determining discrimination.¹⁴ The procedure for applying such methods will be determined by auxiliary regulations.

Why propose these changes? Pros and cons

European practice in countries that have experience combating discrimination shows that it is very difficult for victims of discrimination to defend their interest in courts. It is extremely difficult, sometimes even impossible, to prove discrimination because, as a rule, the party accused of discrimination has all the evidence.

Ukrainian judicial practice confirms what European practice has shown: that it is very difficult, if not impossible, to prove discrimination. To date, not a single legal case in Ukraine has been decided in favor of the individual who suffered discrimination or where the court has found discriminatory treatment.

¹⁴ Given the large number of particulars, it is almost impossible to reveal discrimination using ordinary approaches. Specially developed methods, such as sampling and paired observations, test groups, and so on, are used for this purpose.

European legislation introduced provisions requiring Member State to take steps to eliminate this problem.

The provisions in the proposed bill are in effect in many EU Member States and have proved effective.

Their main advantage is that they significantly strengthen the role of the courts as institutions that protect people from discrimination. Moreover, this positive feature does not require the government to provide funding for institutional transformations. Their implementation does not require serious amendments to existing Ukrainian laws.

Yet there is one drawback. Some are of the opinion that placing the burden of proof on the defendant in civil proceedings violates the principle of equality and the competitive relationship of the parties. However, victims of discrimination and those who discriminate against them do not enjoy a level playing field. Since evidence of discrimination rarely has a material form, it is much more difficult to reveal evidence than to conceal it.

3.5.4. Expanding government aid to victims of discrimination

To expand government aid to victims of discrimination, the proposed bill adds to the functions of the anti-discrimination body:

- providing consultations to victims of discrimination and practical assistance related to claims in court;
- protecting victims of discrimination by filing claims in court on their behalf.

Another element of government assistance is the dropping of state duty from discrimination claims.

3.5.5. European and international legislation on access to justice

EU directives

The EU directives contain a number of requirements to facilitate access to justice for victims of discrimination.

According to Art. 7 (1) of Directive 2000/43/EC, Member States must ensure that judicial and administrative procedures for protecting the principle of equality are available to all persons.

As for legal aid, Art. 7 (2) of Directive 2000/43/EC requires that Member States ensure that associations, organizations or other legal entities connected to the protection of human rights have the right to support or represent victims of discrimination with the help of all the instruments allowed by law, including by filing legal or administrative claims to defend the rights of victims of discrimination.

European legislation also contains a number of requirements for improving procedural legislation to:¹⁵

- shift the burden of proof in civil proceedings. According to the EU directives, “it shall be for the respondent to prove that there has been no breach of the principle of equal treatment;”¹⁶
- allow claimants to establish or prove facts of discrimination “by any means, including on the basis of statistical evidence.”¹⁷

¹⁵ These requirements are not related to criminal proceedings.

¹⁶ Art. 8 of the Directive 2000/43/EC and Art. 10 of the Directive 2000/78/EC.

¹⁷ Directive 2000/43/EC, preamble, paragraph 15 and Art. 8 (2).

International legislation

A number of important requirements are reflected in the Action Plan to implement the Declaration on the Elimination of All Forms of Racial Discrimination. Countries that signed this plan must specifically provide:

- assistance to victims of discrimination in the procedures for submitting claims;
- legal aid to victims of discrimination and assistance in filing claims in civil or criminal court;
- access to free legal aid for victims of racial discrimination;
- access to effective protection through both non-court and court means of legal protection at the national level.

In addition, the World Conference Against Racism, Racial Discrimination, Xenophobia, and Related Intolerance calls on countries to:

- recognize that claims of racial discrimination need to be reviewed and decided upon as rapidly as possible;
- guarantee victims of discrimination full access to support. For this purpose, within the limits of the possible, NGOs need to be given the right to provide support during the court process to individuals who have filed claims against manifestations of racism.

4. Legal Analysis of the Bill

4.1. How the bill fits in with existing legislative

The proposed bill fits in well with existing legislation. It implements a number of anti-discrimination declarations written into other legislation, such as:

- Art. 24 of the Constitution, which establishes that citizens have equal constitutional rights and freedoms and are equal before the law. There can be no superiority or restrictions based on race, skin color, political, religious and other beliefs, gender, ethnic and social origins, financial standing, place of residence, language, or other characteristics.
- Art. 18 of the Law “On national minorities in Ukraine,” which states that any direct or indirect restriction of rights and freedoms because of nationality should be prohibited and is punishable by law.

The bill also implements many commitments by Ukraine arising from international agreements that were ratified by the Verkhovna Rada.

All the changes that need to be introduced to existing laws to ensure complete conformity between them and the provisions of the proposed bill are included in the Final Provisions. Specifically, amendments must be made to four pieces of legislation:

- the Criminal Code is changed to increase criminal liability, according to the principles of the bill;
- the Criminal Procedural Code is changed to reflect the changes to the Criminal Code;
- the Code of Administrative Violations is changed to identify penalties for violating the proposed law and to establish procedural issues related to the imposition of such penalties;
- the Law “On citizen associations” is changed to reflect the expansion of rights for community organizations involved in anti-discrimination activity that is written into the bill.

4.2. The transitional period

If adopted, the proposed bill will come into force three months after publication. During this period, the Cabinet of Minister will have to:

- prepare proposals for bringing Ukrainian legislation in line with this bill and submit these to the Verkhovna Rada for approval;
- ensure, within its powers, the adoption of the regulations needed to implement this bill.

Where laws and regulations have not been brought in line with this proposed bill, they will apply in that part that does not contradict this bill.

4.3. What other legislation needs to be developed and adopted

The proposed bill will be a law that applies directly. It will regulate nearly all issues related to the anti-discrimination system and will be able to work without supplementary regulations.

4.4. Correspondence with EU and international legislation

The proposed bill reflects the majority of requirements written into the EU’s anti-discrimination directives.

The main difference is that this bill does not propose establishing a separate, independent anti-discrimination institution.

The bill implements a number of requirements of international agreements, the main one being the Declaration on the Rights of Persons Belonging to National, Ethnic, Religious or Linguistic Minorities.

The proposed wording of the bill does not ensure the full implementation of the Protocol №12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, which requires countering any kind of discrimination.

However, after Ukraine has gained experience in countering discrimination, this drawback can be corrected by expanding the list of types of discrimination prohibited by law.

5. Socio-economic and Other Consequences of Adopting this Bill

5.1. Greater legal protection for Ukrainian citizens

The proposed bill protects the right to equality that is guaranteed by the Constitution. Implementing this bill will help:

- reduce the number of instances of racial, national and ethnic discrimination against Ukrainian citizens;
- defend and restore violated rights and freedoms;
- prevent possible conflicts based on racial, national or ethnic discrimination.

This bill will be another step in Ukraine's progress in democratic and conflict-free development.

5.2. Closer to European standards

The proposed bill will bring Ukraine's anti-discrimination legislation closer to EU legislation. This bill helps Ukraine move towards integration into the European community.

5.3. Better international image for Ukraine

The proposed bill implements a number of Ukraine's commitments in the international arena. Given that the global community is paying considerable attention to the issue of discrimination today, taking these steps will significantly improve Ukraine's international image. The bill will help establish Ukraine as a democratic country that values human rights and freedoms above all and is taking active steps to protect them.