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OPINION OF THE
COMMISSIONER FOR HUMAN RIGHTS ON
NATIONAL STRUCTURES FOR PROMOTING EQUALITY

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SUMMARY

National structures for promoting equality are bodies created by law to combat discrimination and promote equality at member state level. They are usually established under equal treatment legislation which prohibits discrimination, harassment and victimisation. Equal treatment legislation provides actionable rights to people with reference to prohibited grounds of discrimination such as gender or sex, racial or ethnic origin, disability, sexual orientation, age and religion or belief among others.

National structures for promoting equality have the potential to play a number of valuable roles. They examine and make findings on complaints of discrimination and so enable people to exercise their rights under equal treatment legislation. National structures also support employers, service providers and policy makers to develop effective equality policies and practices within their organisations and mobilise a wide range of stakeholder organisations to take action to promote equality and combat discrimination. They contribute to a culture of rights within society which recognises the value of strong equal treatment legislation. In addition, these national structures are essential for developing a knowledge base about issues of discrimination and inequality

There is a broad range of international instruments that establish rights in relation to equality and non-discrimination and that require member states to establish national structures for promoting equality and set standards for these bodies. This Opinion does not seek to replace or alter the valuable provisions of these instruments. Rather it builds on their provisions.

The quality of equal treatment legislation is important for realising the potential of national structures for promoting equality. A new generation of such legislation is beginning to emerge in response to limitations experienced in the implementation of current and previous provisions. In particular, this new generation of legislation seeks to extend and improve protection afforded as regards the range of grounds and material scope covered, definition of discrimination, inclusion of positive duties, scope of reasonable accommodation requirements and dissuasiveness of sanctions that can be ordered.

There is a broad diversity of approach among the national structures established in member states. This diversity is particularly evident in the legal structure of the bodies, the range of grounds they cover, the nature of the functions and powers accorded to the bodies, and their scale of operations. Some elements of the diversity are a reflection of the particular circumstances of smaller member states. Many member states have still to establish a specialised national structure for promoting equality.

Independence and effectiveness are the two core indicators against which to assess national structures for promoting equality. Independence is key to the effectiveness of national structures for promoting equality. The independence of the bodies can be understood in terms of being able to allocate their resources as they see fit, to make decisions in relation to their own staff, to determine their own priorities and exercise their powers as and when they deem necessary. The legal structure of the bodies, the manner in which appointments of board members and senior staff are made, and the processes of accountability of the bodies are key factors in securing their independence.

Effectiveness is key to the impact of national structures for promoting equality. Effectiveness requires that these bodies are able to deploy all of their functions and powers to a scale and a standard that ensures impact on discrimination and inequality. The level of resources made available to the bodies and the nature and range of functions accorded to them are essential factors for effectiveness.

The internal operations of national structures for promoting equality also influence their independence and effectiveness. Leadership within the bodies is crucial for securing independence. Key factors for effectiveness are a strategic approach, ensuring accessibility of their services, and engaging stakeholder organisations in their work.

A number of recommendations are made to the member states in relation to enacting equal treatment legislation and establishing and supporting national structures for promoting equality. Recommendations are also made to the national structures in relation to the conduct of their operations.

1. INTRODUCTION

1.1 National Structures for Promoting Equality

National structures for promoting equality are bodies created by law to promote equality and combat discrimination at member state level. They are independent of all stakeholders, including the state, in carrying out their functions. Their functions relate to the implementation of equal treatment legislation and may include:

- Providing legal advice and assistance to people who experience discrimination.
- Conducting research and surveys on discrimination and equality issues.
- Building awareness of rights under equal treatment legislation and of the mechanisms through which to vindicate these rights.
- Providing guidance and support to employers, service providers and policy makers on good practice in promoting equality, adjusting for diversity and combating discrimination.
- Investigating, hearing and/or mediating, and making findings in cases of discrimination brought forward under equal treatment legislation.

1.2 Equal Treatment Legislation

At its most basic level equal treatment legislation prohibits discrimination, harassment and victimisation. It provides actionable rights in these areas to people covered by certain named grounds such as gender or sex, racial or ethnic origin, disability, sexual orientation, age and religion or belief among others. It also establishes national structures for promoting equality which are necessary to implement the legislation.

1.3 Roles Played by National Structures for Promoting Equality

The publication of this Opinion is a reflection of the importance of, and value in, the roles played by national structures for promoting equality. These bodies play valuable roles in

- Enabling people covered by the equal treatment legislation to exercise the rights afforded to them under this legislation.
- Stimulating a culture of compliance with the legislation among employers, service providers and policy makers and supporting their capacity and commitment to develop effective equality policies, procedures and practices within their organisations.
- Contributing to a culture of rights within society such that there is a popular acceptance of the value in strong equal treatment legislation and a popular recognition for those who take action to vindicate their rights under this legislation.
- Developing a knowledge base about issues of discrimination and inequality.
- Encouraging a wide range of stakeholder organisations to take action to promote equality and combat discrimination.

1.4 Purpose of this Opinion

The purpose of this opinion is fourfold:

1. To assist member states in enacting equal treatment legislation with a capacity to advance equality and eliminate discrimination in the member state and to establish or designate independent and effective national structures for promoting equality.
2. To assist member states in establishing and supporting national structures for promoting equality in a manner that enables them to realise their potential. An understanding of, and recognition for, this potential underpins high standards in the establishment of such structures.
3. To assist national structures for promoting equality in realising their potential. These structures are unique bodies. It is important that they have access to standards that enable them to deploy their functions and resources independently and effectively so as to maximise their impact.

4. To address the vulnerability of national structures for promoting equality. The independence and/or effectiveness of these bodies can be undermined when the nature of their work is not properly understood and they may be viewed with a degree of hostility or deemed in some way politically inconvenient. Standards can protect the structures from the potential for backlash when progress is made on issues of equality and non-discrimination.

2. LEGAL CONTEXT – INTERNATIONAL INSTRUMENTS

There is a broad range of international instruments that establish rights in relation to equality and non-discrimination, require member states to establish national structures for promoting equality and set standards for these bodies. Six of these international instruments have a particular relevance to this opinion:

1. *European Convention on Human Rights*. Article 14 of this Convention establishes that the enjoyment of the rights and freedoms laid out in the Convention are to be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. Furthermore, Protocol No. 12 to the European Convention on Human Rights establishes a broad and free-standing right against discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. All member states should sign and ratify this Protocol.
2. *The Equal Treatment Directives of the European Union*. These Directives prohibit discrimination, harassment and victimisation on the ground of racial or ethnic origin within and outside of working life (Council Directive 2000/43/EC), on the grounds of religion or belief, age, disability and sexual orientation within working life (Council Directive 2000/78/EC), and on the ground of gender or sex within and outside of working life (Council Directive 2004/113/EC and the recast Council Directive 2006/54/EC).

The Equal Treatment Directives on the grounds of racial or ethnic origin and of gender or sex require member states of the European Union to establish or designate a body or bodies for the promotion of equal treatment on the grounds of racial or ethnic origin and gender or sex. These bodies may form part of agencies charged at national level with the defence of human rights or the safeguard of individual rights. The competences of these bodies are required to include:

- The provision of independent assistance to victims of discrimination in pursuing their complaints of discrimination.
- Conducting independent surveys concerning discrimination.
- Publishing independent reports and making recommendations on any issue relating to such discrimination
- Exchanging available information with corresponding European bodies such as the European Institute for Gender Equality (under recast Directive 2006/54/EC only).

3. *The Convention on the Rights of Persons with Disabilities*. This United Nations Convention aims to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities and to promote respect for their inherent dignity (Article 1). Non-discrimination, respect for difference and equality of opportunity are among the principles of the Convention (Article 3). The Convention includes an obligation on States Parties to prohibit all discrimination on the basis of disability and to take all appropriate steps to ensure that reasonable accommodation is provided (Article 5).

The States Parties to the Convention are obliged to maintain, strengthen, designate or establish within the State Party a framework, including one or more independent mechanisms, as appropriate, to promote, protect and monitor implementation of the Convention. In establishing such mechanisms States Parties are required to take into account the Principles Relating to the Status and Functioning of National Institutions for the Protection and Promotion of Human Rights (Article 33).

4. *The Paris Principles – Principles Relating to the Status of National Institutions* (Adopted by the General Assembly of the United Nations under resolution 48/134 of 20th December 1993). These principles provide detailed standards for the establishment and operation of national human rights institutions. They are not legally binding.

The Paris Principles set out the responsibilities that should be afforded to national human rights institutions. They make specific reference to the independence of these institutions with particular requirements in relation to the appointment of the members of these institutions through a procedure that guarantees the pluralist representation of the social forces involved in the promotion and protection of human rights. They require that these members have a stable mandate of specific duration. The provision of adequate funding to these bodies is a further requirement. Finally, they set out requirements in relation to the method of operation of the national human rights institutions.

The International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC) applies the Paris Principles in assessing the accreditation of national human rights institutions.

5. *ECRI General Policy Recommendation No. 2 on Specialised Bodies to Combat Racism, Xenophobia, Anti-Semitism and Intolerance at National Level* (Adopted 13th June 1997). This recommendation is not legally binding on the member states. It recommends that member states consider setting up a specialised body to combat racism, xenophobia, anti-semitism and intolerance and sets out basic principles as guidelines for the establishment and operation of such a body.

These principles cover the functions and responsibilities to be accorded to the specialised body, the administration and functioning of the body and its style and operation. They emphasise the independence (principle 5) of the bodies in terms of:

- being provided with sufficient funds which should be approved by parliament,
- functioning without interference from the state,
- reporting on their actions on the basis of measurable objectives for debate in parliament,
- clear provisions for the appointment of members with appropriate safeguards against arbitrary dismissal.

The accessibility of the specialised bodies to those whose rights they are intended to protect is also emphasised (principle 6). The establishment of local offices is recommended where appropriate.

6. *ECRI General Policy Recommendation No. 7 on National Legislation to Combat Racism and Racial Discrimination* (Adopted 13th December 2002). This recommendation is not legally binding on member states. It recommends that member states would enact legislation against racism and racial discrimination and sets out the key components that could be provided in such legislation.

One of the key components suggested for this legislation is providing for the establishment of an independent specialised body to combat racism and racial discrimination at national level. The Explanatory Memorandum gives some detail on the functions to be attributed to the specialised body. It distinguishes between promotion type bodies and quasi-judicial type bodies in suggesting that another body could be entrusted with the adjudication of complaints through legally binding decisions.

These international instruments reflect an important and valuable body of work to underpin and inform the establishment and operation of national structures for promoting equality. This Opinion does not seek to replace or alter this work in any way. Rather it seeks to build on the provisions of these various instruments.

It is timely and necessary to build on these instruments. The guidance they offer and the standards they set need, in some instances, to be tailored to suit the particular mandate and circumstances of national structures for promoting equality. It is necessary to further develop this guidance and these standards to ensure they fit and respond to the current situation that such structures are required to operate within and within which they seek to realise their potential.

3. LEGAL CONTEXT – NATIONAL EQUALITY LEGISLATION

3.1 Current Equal Treatment Legislation

Equal treatment legislation at member state level establishes the rights and obligations that become the focus for the work of national structures for promoting equality. This legislation also sets out the structure, functions and powers of these bodies. The nature and standard of this legislation is central to the potential and impact of such bodies.

The prohibited grounds of discrimination covered by the equal treatment legislation vary from member state to member state. In some instances the ground of gender or sex or the ground of racial or ethnic origin alone is covered. The ground of racial or ethnic origin varies in its coverage with some member states usefully including nationality within the definition. In other instances the six grounds named in the European Union treaties and equal treatment directives are included – gender or sex, racial or ethnic origin, sexual orientation, age, religion or belief and disability. Some member states cover a broader list of grounds than this and in some instances member states use an open ended listing of grounds.

The scope of equal treatment legislation varies across the member states. Most common is legislation that covers working life with a focus on employment, occupation and vocational training. Many member states also encompass areas outside of working life within the legislation. This can include coverage of a broad range of areas including access to goods and services generally available to the public, accommodation, education, social protection, healthcare and social advantage.

The prohibition of discrimination and harassment lies at the heart of the equal treatment legislation enacted by the member states. Discrimination is commonly defined in comparative terms as involving less favourable treatment than another person in a comparable situation based on membership of one of the grounds covered by the legislation. Direct and indirect discrimination are prohibited. Harassment is usually understood as unwelcome behaviour based on one of the grounds covered that has the effect of violating a person's dignity and creating an offensive, humiliating or intimidating environment for the person.

There is significant under-reporting of discrimination and harassment and a low level of awareness of national structures for promoting equality.¹ This situation has a range of different causes. One cause is the fear of retribution against the person taking a case. Equal treatment legislation usually includes a prohibition of victimisation. This establishes that adverse treatment due to taking or supporting a case is also prohibited.

Equal treatment legislation in member states may include positive duties, or obligations to be proactive, on employers, service providers or policy makers. Most common in current legislation is a duty imposed on employers, and sometimes on service providers, to make adjustments to enable the participation of people with disabilities. This is referred to as making reasonable accommodation. It is not required if it is the source of disproportionate burden on the employer or service provider.

Some exemptions from its provisions are included in the legislation. In some instances the nature and the scale of the exemptions can be such as to significantly weaken the legislation and to seriously limit the field of endeavour of national structures for promoting equality. All exemptions to be included need to be assessed for their necessity, for their proportionality to the policy outcomes sought and for their potential to dilute and diminish the impact of the legislation.

Equal treatment legislation usually designates or establishes a body or bodies to promote equality and combat discrimination in the fields and across the grounds it covers. These provisions establish the structure and composition of the bodies, set out their functions and accord them the powers to fulfil these functions.

3.2 A New Generation of Equal Treatment Legislation

It is evident in a number of member states that a new generation of equal treatment legislation is beginning to emerge. The emergence of this new generation of legislation is due to limitations experienced in the implementation of current provisions in equal treatment legislation.

The range of grounds covered can be too narrow in the current legislation. The exclusion of grounds can create an unhelpful hierarchy between different forms of discrimination.

The material scope of the current legislation can also be too narrow. It can, for example, be confined to employment and occupation. Important areas such as the provision of goods and services, accommodation, education, social protection and social advantage, or the functions of the State can thus be excluded from the prohibition on discrimination.

The current equal treatment legislation is mainly based on an individual enforcement model. Under-reporting undermines the impact of this model. This model depends for impact on the willingness, capacity and courage of individual litigants to come forward and take a case. This individual enforcement model also relies on retrospective fault finding rather than encouraging a more proactive approach to eliminating and preventing discrimination happening in the first place. It has, as a result, a limited potential to address structural or institutionalised discrimination.

The definition of discrimination in terms of less favourable treatment than another person in a comparable situation provides limited remedy for treatment that is consistently poor. This definition means that to prove discrimination the claimant requires a comparator – another person in a comparable situation who is not a member of the group that is discriminated against – who was treated differently than the claimant. The sole reliance on a comparator in equal treatment legislation is problematic where, for example, a service is only provided to members of a particular group and there is no such other person, not a member of the group, to make a comparison against. In some instances this is mitigated by the use of a hypothetical comparator and there are situations, such as requirements to make reasonable accommodation, where a comparator is not required. However, universal bad treatment for all people in a particular situation based on a prohibited ground of discrimination cannot easily be addressed under equal

¹ The EU-MIDIS report of the European Union Agency for Fundamental Rights published in 2009, 'European Union Minorities and Discrimination Survey', found that, across all the minority ethnic and immigrant groups surveyed, 82% of those who were discriminated against in the past 12 months did not report their most recent experience of discrimination. 23% of those who did not report discrimination were concerned about negative consequences that could follow reporting.

treatment legislation because a comparator is not available. Finding an adequate comparator is also difficult in cases of multiple discrimination.

There is a limited approach to diversity in current equal treatment legislation. The main focus on responding to diversity has been provisions in the legislation in many member states that require reasonable accommodation for people with disabilities and that provide specific protection in relation to pregnancy related discrimination. In some instances these requirements are limited by being confined to the areas of employment and occupation. In most instances there is an absence of explicit provisions requiring a reasonable accommodation of the practical implications of, for example, cultural difference, different sexual orientations or gender identities, holding caring responsibilities and workplace flexibilities required by older people.

Sanctions for discrimination, harassment and victimisation need to be proportionate, effective and dissuasive if equal treatment legislation is to have an impact. In a number of instances bodies established in the member states to hear and decide cases of discrimination are not afforded the power to order legally binding sanctions and in some instances the sanctions available to these bodies are too low to be dissuasive.

Some member states have already implemented responses to these limitations and there is evidence that a new generation of legislation is emerging that could usefully be more universally enacted.

There is progress evident in relation to a more comprehensive approach to the grounds covered. Some member states have used an open list of grounds based on the model of Article 14 of the European Convention on Human Rights and its Protocol No. 12.

Specific mention of the ground of socio-economic status in equal treatment legislation in other member states has valuably enabled a more complete approach to all forms of inequality, including both economic inequality and identity based inequality. A range of different terms are used by member states in their approach to the inclusion of this ground including social origin and social class. In some member states specific mention of transgender persons or gender identity as a ground has usefully enabled a clearer recognition that some but not all trans people currently enjoy some protection under the gender or sex ground alongside securing a broader protection for people on this ground.

The scope of equal treatment legislation has also been expanded in some member states to encompass both employment and the provision of goods and services, accommodation, education, social protection, healthcare and social advantage. In some instances the scope of the legislation also explicitly includes the functions of the State. Equal treatment legislation that covers the functions of the state can usefully encompass the role of the State in exercising its powers in areas such as policing, immigration control, social protection, education and housing.

The major development in the new generation of legislation is the inclusion of provisions imposing positive duties on policy makers, employers and service providers. Positive duties have been imposed on designated public sector organisations to have due regard to equality in carrying out their functions. More specific duties have been imposed on employers in the public and private sectors to be proactive in promoting equality through developing equality plans, implementing diversity policies or conducting wage surveys. Positive duties have also been imposed on local authorities to plan for equality.

These positive duties hold a valuable potential to prevent discrimination. They also stimulate change in culture, systems and policies of organisations. They can stimulate necessary structural and institutional changes such that equality is advanced, diversity is taken into account and discrimination is prevented within organisations. Research has shown that the integration of a focus on equality and diversity in organisational systems is good for organisational performance.² This integration can result from the effective application of these positive duties.

² For example 'Business Benefits of Race Equality at Work', Metcalf H. and Forth J., DfEE research report No. 177, Department for Education and Employment, London, 2000; 'The Business of Diversity', Rutherford S. and Ollerearnshaw S., Schneider-Ross/Cabinet Office, London 2002; Human Resource Management, 'Leveraging diversity to improve business performance: research findings and recommendations for organisations', Jayne M. and Dipboye R., Wiley Periodicals, 2003; Group and Organisation Management, 'Defining the domain of workplace diversity scholarship', Sage Journals on line, Konrad A., 2003; 'The

National structures for promoting equality have been accorded roles under this new generation of equal treatment legislation in relation to the positive duties. They play roles in establishing standards for their implementation, in providing guidance and training to support the implementation of the positive duties and in monitoring their implementation and applying sanctions where the positive duty is not being realised.

As part of the further development of this new generation of legislation consideration needs to be given to extending the provisions on reasonable accommodation to the other grounds covered by the legislation and to reviewing the definition of discrimination. Reasonable accommodation could be further developed under the grounds of gender or sex, age, religion or belief, racial or ethnic origin, sexual orientation, gender identity and socio-economic status.³ New ways of defining discrimination could also be examined so as to reduce the need for a comparator and to link the characteristic or ground more directly to the treatment experienced.

4. NATIONAL STRUCTURES FOR PROMOTING EQUALITY

4.1 Purpose and Potential

National structures for promoting equality are unique bodies. They should be statutory bodies established by law and yet be independent of the state. They do not form part of civil society due to their statutory basis and they are also independent of civil society. This holds a potential for an added value from these bodies to the promotion of equality and the combat against discrimination. However it challenges these bodies to thread a fine line of independence from all stakeholders and to innovate in breaking new ground if they are to realise this added value.

The purpose of such structures is first and foremost to implement the functions and powers they are accorded under the equal treatment legislation. They must also advance the broad mandate they are given which is usually posed in terms of promoting equality and combating discrimination. This broad mandate establishes a further purpose for these bodies in enabling social change in terms of contributing to progress towards a more equal society free from discrimination.

National structures for promoting equality hold significant potential.⁴ They can:

- Empower communities experiencing discrimination and inequality by enabling individuals to take cases under the legislation.
- Enhance the overall performance of organisations, in the public and private sectors, by supporting them to be competent in promoting equality, adjusting for diversity and eliminating discrimination.
- Enhance the reach and effectiveness of public policy making by assisting policy makers to include an equality dimension into all policies and programmes and by gathering information to underpin policy making.
- Achieve a multiplier effect from the resources they hold by supporting a range of stakeholder organisations to play roles in promoting equality and combating discrimination.
- Stimulate social change for equality, diversity and non-discrimination by informing public attitudes such that there is:

Costs and Benefits of Diversity: A study on methods and indicators to measure the cost effectiveness of diversity policies in enterprises', Centre for Strategy and Evaluation Services, European Commission, Brussels, 2003; 'Equality at Work? Workplace equality policies, flexible working arrangements and the quality of work', Equality Authority, Dublin, 2004.

³ Equinet, the European network of specialised equality bodies, recommended that the European Union should ensure an adequate and appropriate response to diversity in its proposed new horizontal Directive addressing discrimination outside the workplace by requiring service providers to make adjustments to ensure that members of minority groups experiencing inequality can access their services. This opinion is entitled 'Beyond the Labour Market: New Initiatives to Prevent and Combat Discrimination' (January 2008).

⁴ A study on equality bodies recently published by the European Commission established the impact of equality bodies on individuals who experience discrimination, organisations providing employment and/or goods and services, statutory policy and legislation, stakeholder action and public attitudes. Study on Equality Bodies set up under Directives 2000/43/EC, 2004/113/EC and 2006/54/EC - Synthesis Report by Margit Ammer, Niall Crowley, Barbara Liegl, Elisabeth Holzleithner, Katrin Wladasch, Kutsal Yesilkagit. Human European Consultancy in partnership with Ludwig Boltzmann Institute for Human Rights, October 2010. Published by the European Commission in January 2011.

- a value accorded by society to equality and the promotion of equality,
- an acceptance across society that people have rights and these rights should be exercised,
- a broad commitment to compliance with the equal treatment legislation.

4.2 Diversity

In practice, there is significant diversity of national structures for promoting equality across the member states. This diversity is particularly evident in the legal structure of the bodies, in the grounds that they cover, in the range of functions and powers accorded to the bodies, and in the scale of operations of the bodies. In some instances elements of this diversity are a reflection of the particular circumstances of smaller member states. It must also be noted that there are no specialised national structures with an explicit mandate for promoting equality in a significant number of member states.

An overview of the present situation demonstrates this diversity. There are national structures for promoting equality which are stand alone legal entities. There are bodies that form part of Government departments or ministries. Other bodies are embedded in another public body with a remit in relation to rights such as national human rights institutions or ombudsperson offices. Some national structures function as collective bodies with a board of Commissioners while others may be headed by an individual, e.g. an Ombudsperson or a Director.

It is important that there is sufficient common ground between the bodies before a national structure for promoting equality is embedded within another body. The determining factor for such an approach must be that it makes the combating of discrimination and the promotion of equality more effective. Safeguards are required to ensure that issues of equality and non-discrimination are afforded an adequate priority within the embedded structure.

Some of the national structures have a mandate that covers a single ground – usually the ground of gender or sex or racial or ethnic origin. Some bodies have a mandate that covers a wide range of grounds and the mandate of some bodies covers an open ended list of grounds.

An increasing number of member states have established multi-ground bodies. National structures for promoting equality that hold a multi-ground mandate can ensure that there is no hierarchy between the different grounds of discrimination. They offer an administrative simplicity to employers and service providers who have responsibilities under the equal treatment legislation in that one body is dealing with all grounds covered. They allow for a focus on multiple discrimination where individuals fall within more than one ground and where the experience of discrimination is based on more than one ground. However, national structures holding a single-ground mandate can develop a more detailed and in-depth expertise in relation to that ground in their work. It is important that multi-ground bodies are enabled to recruit or develop in-depth expertise in relation to all the grounds they cover and that they ensure that all the grounds they cover have a visibility in their work. Overlap should be minimised where there are a number of equality bodies in a member state. There is a need to encourage cooperation and coordination between the bodies in such a situation.

The functions accorded to the national structures fall into four broad categories. National structures for promoting equality:

- enforce the equal treatment legislation through providing assistance to claimants and through investigating and hearing cases of discrimination.
- create awareness of rights under this legislation and of how to exercise these rights, and contribute to awareness about equality and the case for a more equal society.
- build a knowledge base and an evidence base through survey work and research projects to support action on discrimination and inequality.
- provide guidance on, and support to, good practice by policy makers, employers and service providers in promoting equality, adjusting for diversity and eliminating discrimination.

If these bodies are to fulfil their potential it is important that they are empowered and enabled to deploy their functions and powers in all of these four broad categories. There can be imbalances and gaps in this regard, in particular the area of providing guidance on and support to good practice is under-developed.

There are two broad types of national structures for promoting equality. There are quasi-judicial type bodies which predominantly operate to investigate, hear or mediate, and make findings in relation to claims of discrimination. There are promotional type bodies that predominantly operate to provide assistance to individuals experiencing discrimination and to implement a broader range of awareness raising initiatives, survey work and activities supporting good practice.

In some instances member states have established a quasi-judicial type body alone under their equal treatment legislation. This can result in a limited range of assistance being provided to people who experience discrimination and a lesser range of activities to promote equality.⁵ A promotional mandate accorded to such a body may also run the risk of undermining its perceived impartiality. In other instances member states have set up both a promotional type body and a quasi-judicial type body.

The scale of national structures for promoting equality, in terms of their human and financial resources, varies widely between different member states. It is not easy to make direct comparisons that are of value between the member states in this regard given the very different circumstances and conditions prevailing in each. However the breadth of difference between the best and least resourced bodies suggest that in part this difference reflects different levels of commitment to the national structures, and different understandings of their potential and the societal, economic and organisational gains that can be realised through such bodies.

4.3 Indicators

Independence and effectiveness are the two core indicators against which to assess national structures for promoting equality.⁶ These indicators are examined below in relation to the conditions created for such structures by external actors. They are examined in the next section (chapter 5) in relation to the operation the structures and the factors which lie within the control of these bodies.

4.4 Independence

Independence is key to the effectiveness of national structures for promoting equality.⁷ The independence of these bodies can be understood in terms of being able to allocate their resources as they see fit, make decisions in relation to their own staff, determine their own priorities and exercise their powers as and when they deem necessary. Independence can be both *de jure* and *de facto*. *De jure* independence is based on the legal provisions that govern the relationship between the body and political institutions. *De facto* independence is based on the reality of independence as exercised by the body.

Issues of lack of independence have been identified, in a 2008 survey of equality bodies in the European Union, in relation to both the management of finances and of personnel by national structures for promoting equality.⁸ Issues of lack of independence were found to be less likely in relation to their policy making and choice of intervention. It is a less complex step to use the external control of resources as a means to limit the independence of a national structure for promoting equality than to curtail the exercise

⁵ *Idem*. The study on equality bodies set up under Directives 2000/43/EC, 2004/113/EC and 2006/54/EC raises this as a compliance issue in stating that it is not clear if assistance to victims can be provided where the only equality body available is a tribunal type body.

⁶ *Idem*. The study on equality bodies set up under Directives 2000/43/EC, 2004/113/EC and 2006/54/EC states that independence is considered a key pre-requisite for effectiveness and impact of equality bodies.

⁷ The 2010 report of the European Union Agency for Fundamental Rights, 'National Human Rights Institutions in the EU Member States: Strengthening the fundamental rights architecture in the EU', concludes that national human rights institutions must be fully independent and guaranteed a sufficient infrastructure with adequate funding so as to ensure the highest attainable level of operations irrespective of changes in the political leanings of successive governments, economic downturns or perceived sensitivity of the matters they address.

⁸ In 2008 Equinet published a survey of equality bodies on the issue of independence conducted by Dr. Kutsal Yesilkagit and Berend Snijders of the University of Utrecht. 'Between Impartiality and Responsiveness: Equality bodies and practices of independence' underscored the importance of a separate legal status and collegiate top management structures for the independence of equality bodies and emphasised the centrality of leadership within equality bodies for the independence of equality bodies, in particular for *de facto* independence.

of its functions. The latter might require legislative initiative whereas the former merely requires an administrative decision. Equality bodies in a number of member states have reported significant and disproportionate cuts in their budgets in recent years. This reflects a disturbing development in relation to the independence and effectiveness of such structures.

The legal structure of the body, the processes of accountability of the body and the process of appointment of board members and of senior staff are key factors in securing independence for the body.

National structures for promoting equality in the member states are diverse in structure being stand alone entities with their own legal standing, or forming part of a Government department or Ministry or being embedded within other statutory bodies such as ombudsperson offices or national human rights institutions. The legal structure for these bodies has implications for their independence. Stand alone bodies with their own legal status have been found to be more independent.⁹ Bodies that form part of a Government department or ministry face significant issues of independence.

The independence of national structures for promoting equality is shaped by the manner in which their accountability is structured. There are a variety of accountability mechanisms across the member states. These tend to involve either formal reporting to Government Ministries or formal reporting to Parliament. Both mechanisms can serve to undermine the independence of the body where the institution being reported to has the power to intervene in the plans or operations of the body or in the appointments to the body. Care is required in structuring this accountability to ensure that independence is preserved.

The manner of appointment of Board members, Commissioners, or Head of the body and of senior staff to the structures is another factor in securing the independence of these bodies. It is important that the appointment of Board members, Commissioners, or Head of the body is through an open and transparent process of recruitment. The criteria for such appointments should seek, to the maximum extent possible, a plurality of membership that encompasses the diversity of society and the different sectors of civil society working on equality issues, as well as the different skills and competencies required by the body. Staff members should be recruited and appointed by the body itself, through an open and transparent process of recruitment that secures the necessary skills and competences required by the body.

4.5 Effectiveness

Effectiveness is key to the impact of the national structures for promoting equality. Effectiveness requires that such structures are able to deploy all of their functions and powers to a scale and a standard that ensures impact and the full realisation of their potential. The level of resources made available to the bodies and the functions accorded to them are key factors for effectiveness.

Inadequate resources are an issue for national structures for promoting equality in most member states. The lack of sufficient resources has meant that some of these bodies are unable to implement some of their functions and powers. It has also meant that some of these bodies are unable to implement their functions and powers to the critical mass required for impact. A sufficient level of resources for these structures will vary from member state to member state. Any assessment of sufficient resources needs to be evidence based and to take account of a range of factors including:

- Population size and economic circumstances.
- The nature and levels of reported and estimated un-reported discrimination.
- The range and roles of other stakeholders involved in promoting equality and combating discrimination.
- The resources required to enable the body to implement all of its functions in a strategic manner and to a scale and standard to make an impact.

⁹ *Idem*.

The extent of the functions and the nature of the powers accorded to national structures for promoting equality are also a determinant of their effectiveness. It is important that these bodies are accorded the full range of functions required to enable them to implement a strategic mix of work in enforcing the legislation, building a knowledge base about discrimination and inequality, raising awareness about rights and the case for a more equal society and providing support for good practice to policy makers, employers and service providers. It is this strategic mix of activity that enables impact to be achieved.

Four limitations in the functions of national structures constitute particular weaknesses in terms of effectiveness. Two of these have a particular relevance to promotion type bodies. In a number of member states the bodies do not have the power to investigate a case or take legal proceedings on their own initiative. In some member states the bodies do not have the power to bring cases to court.

Three further limitations have a particular relevance to quasi-judicial type bodies. The first relates to situations where the body is not empowered to order sanctions that are effective or dissuasive. There can also be instances where the body hearing a case fails to order effective or dissuasive sanctions although it has the power to do so. The second relates to the situation where the body does not have sufficient resources or powers to engage in follow-up to ensure implementation of the decisions and recommendations that they make. The third relates to the situation where the decisions of the body are not legally binding.

5. THE OPERATION OF NATIONAL STRUCTURES FOR PROMOTING EQUALITY

5.1 Introduction

The internal operations of national structures for promoting equality also influence their independence and effectiveness. In this section the indicators of independence and effectiveness are examined in relation to factors that lie within the control of national structures for promoting equality.

5.2 Independence

Leadership within the organisation is a key factor in securing independence, in particular *de facto* independence. The Board, Commissioners or the Head and senior staff must manage the political environment within which the body operates. The leadership is challenged to manage a constantly changing political environment while maintaining a continuous and critical advocacy for equality and non-discrimination. The Board, Commissioners or the Head and senior staff play a key role in managing the relationships of the body with key stakeholders such as:

- non-governmental organisations, trade unions and employers. These stakeholders have an important contribution to make to the effectiveness of the body. However the relationship must be managed in a manner that protects the independence of the body.
- the media. The media play a valuable role in communicating the outcomes of the work of the national structure for promoting equality. However, in engaging with the media, it is necessary for the body to ensure that its independence and the full breadth of its mandate are communicated by the media.
- other statutory bodies with a mandate to promote equality and/or receive complaints about discrimination. Networking among different equality and human rights bodies should ensure that there is a coherence of initiative and a maximisation of impact based on the reciprocal respect for the independence of each body.
- parliament and other political decision-makers. These stakeholders are central in determining the context within which the body seeks to implement its mandate and in shaping the mandate of the body and the resources that might be available to it. This can be a complex relationship which should be characterised by a fearless independence on the part of the body and a respect for independence on the part of the political decision-makers.

De facto independence depends on the manner in which the leadership of the national structure for promoting equality manages these different relationships. It is necessary that these relationships are managed in a strategic manner to enable the body to reach its potential. Equally, it is necessary that they are all managed on the basis of a strict commitment to maintaining the independence of the body.

The leadership must also seek to establish a culture of independence within the body. Independence needs to be a norm that shapes the thinking and decision making within the body. It needs to be established as the norm that is expected of the body from the perspective of all external stakeholders.

5.3 Effectiveness

Four key factors for effectiveness that lie within the control of national structures for promoting equality are being strategic, accessibility of their services, stakeholder engagement in their work and networking.

The national structures need to be strategic in deploying their functions and their resources if they are to be effective. However the bodies in many member states do not work to multi-annual strategic plans and few bodies carry out evaluations of their work based on such plans. This hinders a strategic approach which can only be based on a multi-annual strategic plan of action with indicators and targets against which to measure output and impact of the body. Such a plan enables a national structure for promoting equality to identify the best mix of its functions and powers to deploy in its particular context. It enables the body to find the best fit for its work within any wider set of institutions playing a role in promoting equality and combating discrimination. It ensures the body makes best use of its resources by following a planned approach.

Strategic litigation has an important role to play within such a multi-annual plan. Strategic litigation ensures that the body deals with a sufficient number of cases so that its legal work can make an impact on key issues of discrimination. It also ensures that the body, in choosing the cases to support, takes account of both the individual interests of the person who has experienced discrimination and the wider public interest where the case itself could contribute to institutional or social change that would have benefit beyond the individual claimant. Strategic litigation has a particular meaning for quasi-judicial type bodies which have to take on all complaints addressed to them. In this instance strategic litigation is involved in the allocation of resources to particular cases and in the manner of communicating the outcomes of particular cases.

Communication is a core area of work for national structures for promoting equality. This work can also benefit from a more specific strategic approach. The national structures need to communicate through a range of channels – mainstream media channels, the channels of communication used by civil society organisations and their own means of communication. They need to communicate about their services, about the rights under the equal treatment legislation, about the outcomes from their work and about the broader case for equality in business and in society. They need to manage a sometimes hostile media context. This is a complex communications challenge and the work of the bodies needs to be based on a carefully thought out communication strategy.

In a context of high levels of under-reporting, accessibility is central to the effectiveness of national structures for promoting equality. Effective communication is an important element in achieving the necessary accessibility. Accessibility is also served by procedures that do not involve a cost to the complainants and that are simple and straightforward. Most importantly accessibility requires a local presence for the national structures. Local offices and outreach initiatives increase the visibility of the bodies and enable immediate access to the services of the bodies for those who have experienced discrimination. They are a valuable tool to address under-reporting. However they have only been put in

place by national structures for promoting equality in a small number of member states. It is important that there is central networking and accountability of local offices and outreach services so that standards are maintained.

Stakeholder engagement takes two particular forms that can assist the effectiveness of national structures for promoting equality. The first form is stakeholder participation in the work of the body itself. This can involve stakeholder participation in the governance structures of the body. However it is important that any such participation is not on a representative capacity and does not draw from Government or public authorities. Those participating in the governance structure must be bound to act in the corporate interests of the bodies.

Stakeholder participation is also valuable in strategic planning by national structures for promoting equality and in the development and implementation of their activities. This participation enables the bodies to have access to the knowledge, information and ideas held by non-governmental organisations, trade unions, employers and public authorities. It enhances the potential impact of the work of the bodies through a partnership with relevant stakeholders. It also affords a valuable legitimacy to the work of the bodies.

The second form of stakeholder engagement involves national structures for promoting equality working with and supporting a wider institutional framework for equality. The national structures do not act alone in promoting equality and combating discrimination within the various member states. There are other bodies with the capacity and commitment to engage in this work. In particular non-governmental organisations, trade unions, employer bodies and public authorities can and do play roles in this regard.¹⁰

The national structures for promoting equality need to plan their own activities in the context of this wider endeavour. In this way they avoid duplication and enhance their impact through coordination with other organisations. The national structures are well placed to act as a hub for these different stakeholder organisations and thus to contribute coherence and shared ambition to this endeavour. The bodies can usefully further mobilise and give practical support to these different stakeholder organisations in developing their commitment to, capacity in and work of promoting equality and combating discrimination. This engagement enables an important multiplier effect to the work of these bodies.

Non-governmental organisations and, in some instances, trade unions can play particular roles in ensuring the effective implementation of the equal treatment legislation by providing advice and assistance to individuals who experience discrimination in taking a case under the legislation. It is valuable, particularly in a context of under-reporting, that claimants have this broader range of advocacy support available to them. The national structures for promoting equality can usefully take steps to stimulate, support and provide technical back up to this work of these stakeholders. However, some member states only allow a limited role to non-governmental organisations and trade unions in providing such assistance and few member states provide funding to enable this advocacy work.

Effectiveness requires a networking between the different statutory bodies that hold mandates that relate to the broad field of human rights and equality within any member state. These bodies can include national structures for promoting equality, national human rights institutions and a variety of ombudsperson offices. This networking should ensure there is no duplication of activity. It should allow the bodies to refer complainants to the most appropriate body. While based on the reciprocal respect for the independence of each body, networking should enable joint planning to maximise the impact of all these bodies.

Regional networking can also assist effectiveness.¹¹ National structures for promoting equality can engage in peer learning and can create opportunities to develop and enhance the capacity of their

¹⁰ The European Union Agency for Fundamental Rights 2010 publication 'The Impact of the Racial Equality Directive: Views of trade unions and employers in the European Union' found some strong examples of involvement and productive collaboration between employers and equality bodies. However an absence of contact between equality bodies and employer organisations was common. Trade unions reported varying degrees of collaboration which was partly shaped by the degree of influence the trade union had in each jurisdiction and partly by the degree of political independence and resources of the equality body.

¹¹ The 2010 report of the European Union Agency for Fundamental Rights, 'National Human Rights Institutions in the EU Member States: Strengthening the fundamental rights architecture in the EU', emphasises the importance of strengthening regional cooperation of national human rights institutions through the establishment of a permanent entity for the European Group of national

organisations and staff through such cooperation. Networking can also assist in harmonising data collection across member states. Equinet, the European Union network of specialised equality bodies, offers a valuable and necessary vehicle for regional cooperation. There is also a European Group of national human rights institutions under the auspices of the United Nations that offers the potential for cooperation and coordination. This European Group includes equality bodies that also play the role of national human rights institutions.

6. CONCLUSIONS AND RECOMMENDATIONS

National structures for promoting equality are established to implement functions accorded to them under equal treatment legislation. Such legislation prohibits discrimination, harassment and victimisation. A new generation of equal treatment legislation is now emerging with provisions that also place duties on public and private sector organisations to be proactive in promoting equality. The nature and standard of this legislation is central to realising the potential of national structures for promoting equality.

National structures for promoting equality are usually given a broad mandate to promote equality and combat discrimination. A core purpose of these structures is to enable social change in terms of contributing to progress towards a more equal society free from discrimination. National structures for promoting equality hold potential to:

- assist individuals to respond effectively to experiences of discrimination;
- enable companies and organisations to perform better by investing in equality and diversity systems;
- enhance policy making by contributing an equality perspective to policies and programmes and by gathering information to underpin policy making;
- achieve a multiplier effect by mobilising stakeholder organisations to play roles in advancing equality and eliminating discrimination;
- contribute to a societal value base that prizes equality, recognises the importance of equal treatment legislation, and acknowledges the need for people to challenge the discrimination that they experience.

There is a wide diversity of national structures for promoting equality across the member states. This diversity encompasses their legal structure, the grounds they cover, their functions and powers and their scale. In some instances elements of this diversity can be a reflection of the particular circumstances of smaller member states. Independence and effectiveness are the two key indicators against which to assess the national structures and their potential to make an impact on discrimination and inequality.

Many member states have still to establish a specialised national structure for promoting equality and to enact comprehensive non-discrimination legislation.

In order to assist member states in enacting equal treatment legislation as well as in establishing, supporting and developing national structures for promoting equality in accordance with international instruments, the Commissioner issues the following recommendations.

6.1 Equal treatment legislation

In enacting or reviewing legislation to underpin the work of national structures for promoting equality member states should:

1. Enact comprehensive equal treatment legislation. Such legislation should be comprehensive in covering all grounds of discrimination. In this particular consideration should be given to explicitly identifying the grounds of socio-economic status and gender identity among the applicable grounds. The material scope for such legislation should also be comprehensive in covering employment, the provision of goods and services, accommodation, education, social protection, healthcare and social advantage, and the functions of the state.
2. Implement positive duties under the equal treatment legislation. Public sector organisations should be required to have due regard to equality in carrying out their functions. Private sector organisations should be required to be planned and systematic in their approach to equality. A planned and systematic approach to equality involves organisations putting in place an equality policy, providing equality training to staff and implementing an equality action plan. All organisations should be required to make reasonable accommodation for the practical implications of diversity across all grounds covered by the legislation unless this causes a disproportionate burden on them.
3. Ensure that all exemptions in the equal treatment legislation are proportional to the policy outcomes sought, that they are necessary and that they do not diminish the impact of the legislation.
4. Define discrimination in the equal treatment legislation in a sufficiently broad way so as to reduce the sole dependence on a comparator. Universal bad treatment of all members of a group based on a prohibited ground of discrimination and cases of multiple discrimination should be addressed even in the absence of a comparator.
5. Establish proportionate, effective and dissuasive legally binding sanctions that can be ordered where the equal treatment legislation has been breached.
6. Introduce provisions for the establishment or designation and operation of an independent and effective national structure for promoting equality.

6.2 Establishment of national structures for promoting equality

In establishing and supporting national structures for promoting equality member states should:

1. Implement a public review of national structures for promoting equality that have been established or designated to ensure that they comply with all relevant international instruments and this Opinion with particular reference to their independence and effectiveness.
2. Ensure that the architecture of national structures for promoting equality enables both a distinct quasi-judicial function in hearing or mediating cases under the legislation as well as a distinct promotional function. It is good practice to locate these distinct functions in different bodies. The promotional function of national structures should involve providing legal advice and representation to those who experience discrimination, conducting surveys and research work, raising awareness of rights under the legislation and the means of vindicating those rights, and supporting good practice by policy makers, employers and service providers.
3. Ensure that national structures for promoting equality have the powers necessary to carry out the full range of their functions to enforce the legislation, build a knowledge base about equality and discrimination, raise awareness and support good practice. In particular, ensure that promotional bodies can take cases on their own initiative and bring cases to court. Quasi-judicial bodies should be able to order binding sanctions that are proportionate, effective and dissuasive and follow up on cases decided to secure implementation of any recommendations they have made.

4. Ensure that national structures for promoting equality have sufficient resources to implement all their functions to the scale and standard necessary to make an impact on discrimination and equality. Member states should develop an evidence based approach to the assessment of sufficient resources. In particular, member states should put in place measures to ensure that there can be no arbitrary or disproportionate reduction in the resources of the bodies.
5. Establish accountability from national structures for promoting equality to parliament that is defined in terms of questioning and debate of the strategic plans and annual reports of the bodies, and to the relevant financial authorities to ensure the bodies have spent and managed public money appropriately.
6. Establish open and transparent recruitment procedures for the Boards and Heads of national structures for promoting equality. Specific criteria should be set to ensure that the Boards reflect the diversity of society, the breadth of civil society concerned with promoting equality and the expertise required by the body.
7. Enable national structures for promoting equality to recruit their own staff and to secure the diversity of expertise that they require to realise their potential.
8. Introduce and monitor safeguards to secure an adequate prioritisation of issues of equality and non-discrimination where national structures for promoting equality are embedded in other public bodies such as ombudsperson offices and human rights institutions.

6.3 Operations of national structures for promoting equality

In their operations national structures for promoting equality should:

1. Adopt a strategic approach in developing and evaluating their work on the basis of multi-annual activity plans.
2. Develop and implement a communication strategy.
3. Devise criteria for the selection of cases to be supported to enable strategic litigation alongside the support of a critical mass of cases.
4. Secure visibility in their work for all grounds of discrimination covered by the equal treatment legislation.
5. Provide independent leadership and develop a culture of independence within the organisation.
6. Establish a local presence or outreach activities that encompass their full geographical remit.
7. Devise and implement cost-free and simple procedures for their services to enhance accessibility.
8. Develop systems and fora for stakeholder participation in their planning and in the design and implementation of their activities.
9. Engage with public authorities, employer bodies, trade unions and non-governmental organisations to mobilise, develop and support a wider framework of action for equality and non-discrimination. Effective means of engagement with those communities experiencing inequality and discrimination who are not yet organised in any formal manner should also be developed and implemented.
10. Support non-governmental organisations and trade unions to provide advocacy supports to people experiencing discrimination.

11. Engage in networking at national level with other statutory bodies with linked mandates in relation to equality and human rights in order to avoid unnecessary duplication of activities, allow referral of complainants and to enable joint planning. Such networking should be based on the reciprocal respect for the independence of each body.
12. Engage in European networking of equality and human rights bodies to enhance their own capacity and to provide support to build the capacity of national structures for promoting equality in other countries.

