

Strategic Enforcement Powers and Competences of Equality Bodies

Report by Equinet Working Group 2 on Strategic Enforcement

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Preface

The Moderators of Equinet's Working Group 2:
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This report is a product of the European Network of Equality Bodies' (Equinet) Working Group 2 on Strategic Enforcement. The objective of Working Group 2 is to contribute to the effective implementation of the Racial Equality Directive (2000/43/EC) and the Employment Equality Directive (2000/78/EC).¹ The Racial Equality Directive establishes the principle of equal treatment for all persons irrespective of racial or ethnic origin and the Employment Equality Directive 2000/78/EC provides a general framework for equal treatment in employment and occupation. The work of Working Group 2 builds on the outcome of the 6th Experts' Meeting held in Dublin in March 2004.²

Working Group 2 focuses on the competences and powers - including those competences listed in Directive 2000/43/EC, such as providing assistance to victims, conducting surveys, and issuing reports and recommendations - that equality bodies can use for the strategic enforcement of these Directives.³

Working Group 2 has inquired into the competences of the bodies, the powers available to them and the powers that are being used, the criteria for selecting and deploying a particular power, the experience of using these powers and any problems or issues arising therein, and the challenge of allocating limited resources in a context of unlimited demand. The aim is to identify strategies for the effective enforcement of equal treatment legislation, for the effective deployment of the powers available to the equality bodies, and for the further development of the powers made available to the bodies.

Working Group 2 has concentrated on powers relating to 5 specific competences in the area of enforcement that can be utilised strategically:

- Legal assistance to individuals
- General inquiries
- Investigations
- Interventions
- Positive duties

Working Group 2 initiated this process by developing a Questionnaire (see Annex) on the equality bodies' competences and powers to promote equal treatment and to combat discrimination on the grounds of race and ethnic origin (as outlined in the Racial Equality Directive), of religion, belief, disability, age and sexual orientation (as outlined in the Employment Equality Directive), and of gender.

The purpose of the Questionnaire was to identify the competences and powers available, the criteria that each body uses to decide on which power to use and when to use it, how the powers work in combination, the body's assessment of the power, and what powers the body in its own opinion needs in order to complete its tasks and fulfil its role efficiently.

The Questionnaire was sent to all members of Equinet on 23 June 2005. Replies were received from sixteen bodies: the Office of the Equal Opportunities Ombudsperson

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

² For further information see *Strategic Enforcement and the EC Equal Treatment Directives*, Migration Policy Group, 2004 <http://www.migpolgroup.com/multiattachments/2482/DocumentName/strat6e.pdf>

³ This focus area was adopted by a decision of Working Group 2 members taken at the Equinet Annual General Meeting in Leuven on 23 and 24 March 2005.

(Lithuania), the National Human Rights Office (Latvia), the National Centre for Human Rights (Slovakia), the Chancellor of Justice (Estonia), the Office for Equal Opportunities (Slovenia), the High Authority against Discrimination and for Equality (France), the Centre for Equal Opportunities and Opposition to Racism (Belgium), the Ombudsman against Ethnic Discrimination (Sweden), the National Equality Body (Austria), the Greek Ombudsman (Greece), the Disability Rights Commission (Great Britain), the Equal Opportunities Commission (Great Britain), the Institute for Equality for Women and Men (Belgium), the Office of the Commissioner for Administration (Cyprus), the Complaints Committee for Ethnic Equal Treatment (Denmark) and the Equal Treatment Commission (Netherlands). Additionally, the Gender Equality Board (Denmark), which is not a member of the network, also replied.

The replies form the backbone of this report, which includes articles on the following topics: legal assistance to individuals, formal investigations and inquiries, interventions and amicus curiae applications, and positive duties to promote equality.⁴

This report is the first of two reports based on the Questionnaire and produced by Equinet's Working Group 2. The second report will focus on more specific issues regarding the effective and strategic enforcement of the equality bodies' powers. The report is due to be published in 2006.

It is the hope of Working Group 2 that this report will provide equality bodies with an insight into the competences and powers of strategic enforcement that are available to the individual bodies, how they work, what can be achieved with these powers and how they can be strategically employed, and in this way facilitate the bodies' work towards uniform implementation of EU anti-discrimination law and levelling-up of legal protection for victims of discrimination.

Under Article 17 of the Racial Equality Directive and Article 19 of the Employment Equality Directive, the Member States are to report to the Commission by 19 July 2005 and 2 December 2005 respectively on the implementation and application of the Directives. The Commission then presents its reports to the European Parliament and the European Council. It is also the hope of Equinet's Working Group 2 that the report will be a useful supplementary component in this exchange of information.

⁴ The Questionnaires were completed by experienced employees at the national equality bodies. Whilst the answers cannot be read as official statements of the bodies, all information used in this report was approved by the bodies before publication.

Legal Assistance to Individuals Powers and Procedures of Effective and Strategic Individual Enforcement

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Eddie Omar Rosenberg Khawaja, Legal Officer, The Danish Institute for Human Rights¹

¹ Section 2, 3, 4 and 5 by Bjørn Dilou Jacobsen, section 1 by Eddie Omar Rosenberg Khawaja, Introduction and Conclusion in unison.

INTRODUCTION

According to Article 13 of the Racial Equality Directive,² the objective of the European equality bodies is to promote equal treatment of all persons without discrimination on grounds of race or ethnic origin. One of the main functions of equality bodies, in executing this objective, is to assist victims of discrimination in pursuing their complaints.

Providing victims with assistance in discrimination cases is an important step towards promoting equality and eliminating discrimination. Experience has shown that few individuals who feel they have been discriminated against take their claims to court themselves - presumably because legal action is too strenuous, expensive and time-consuming a process to embark on. Assistance in discrimination cases is therefore a precondition for effective enforcement of anti-discrimination law and for ensuring that victims of discrimination are provided with an effective remedy against discrimination in practice.

However, it has been the experience of equality bodies that handling individual complaints is a resource-intensive process that is not always in proportion to the results achieved on a larger scale. It has also been the experience that some types of discrimination, e.g. systemic discrimination, cannot be combated effectively solely by individual enforcement.³

In recognition of these experiences and of the fact that equality bodies are mandated to offer legal assistance to individuals, this article examines how this can be achieved effectively.

Using the Questionnaire⁴ carried out by Equinet in the summer of 2005⁵ as its basis, this article will focus on the powers and procedures that equality bodies apply when handling individual complaints, and how these powers and procedures may be used effectively — both in terms of providing the highest possible level of protection to individual victims given limited resources, and in terms of ensuring that the enforcement of an individual claim has general, long-term effects beyond the results of any single case. Some of the Canadian Human Rights Commission's experiences with individual enforcement will be used as inspiration for possible approaches to achieving this result.

Although equality bodies work within the same field and are governed by the same EU legislation, they are all organised differently, have been provided with different competences, and operate in different legal environments. Some equality bodies have many years of experience handling individual complaints whilst others have only recently been established. Some receive thousands of inquiries per year and have large budgets and many employees while others are quite small. The contents of this paper may be common knowledge to some, while to others it may be useful information.

For these reasons, whether the individual enforcement approaches suggested in this article will be useful or even feasible for a particular equality body will depend on the existing structure and powers of that equality body. However, despite the many differences, it is hoped that the following considerations and recommendations may be of use to equality bodies in general.

² Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

³ See Razia Karim, *A legal strategy to combine and coordinate different tools available*, in Strategic Enforcement and the EC Equal Treatment Directives, Migration Policy Group, 2004, p. 28. In Canada, it has been the experience of the Ontario Human Rights Commission that decades of enforcing individual complaints has done little to stop systemic racism. This recognition has led, among other things, to the preparation of the Commission's *Policy and Guidelines on Racism and Racial Discrimination*, approved by the Commission on 9 June, 2005. The Guidelines are available on the Commission's website: www.ohrc.on.ca

⁴ See Annex

⁵ See Preface.

1. GROUNDS OF DISCRIMINATION

1.1 The anti-discrimination grounds of the Equality Directives

At a minimum, implementation of the Racial Equality Directive, the Employment Equality Directive and the Gender Equal Treatment Directive as amended⁶ only provides access to an equality body for victims of discrimination on the grounds of race, ethnic origin, or sex. According to Articles 1 and 2 of the Racial Equality Directive, Member States are obliged to provide protection against discrimination on the grounds of race and ethnic origin. Likewise, concerning gender, according to Article 8(a) of the Gender Equal Treatment Directive as amended, Member States have to designate a body or bodies for the promotion of equal treatment of all persons without discrimination on the grounds of sex. The Employment Equality Directive⁷ includes protection against discrimination on the grounds of religion or belief, disability, age or sexual orientation. However, there is no requirement to designate a body or bodies for the promotion of equal treatment of all persons without discrimination under the Employment Equality Directive.

1.2 Aspects of the horizontal approach

From the perspective of individual complaints, it may be considered preferable to go beyond a minimum implementation of the directives, and establish access to equality bodies on all of the grounds of discrimination included in the Equality Directives. Indeed, the question arises as to what extent equality bodies that cover all grounds of discrimination provide, or have the potential to provide, more effective protection against discrimination than equality bodies that cover only a single ground of discrimination.

The first aspect of deploying a horizontal approach that should be highlighted is the possibility of a more effective utilisation of limited resources. The advantage of shared resources applies not only to the effective utilisation of limited financial resources, but also to the sharing of knowledge. Second, because the different grounds listed in the Racial Equality Directive and the Employment Equality Directive are to some extent inter-linked, the bodies that handle cases of discrimination on a range of grounds may more easily address all aspects of a given case. For instance, cases of religious discrimination regarding employment of women wearing religious headscarves include possible elements of discrimination on the grounds of religion, gender and ethnic origin. Third, equality bodies that cover all grounds of discrimination facilitate access in the sense that a victim of discrimination can have all aspects of his or her complaint heard without having to file several complaints with different organisations. Fourth, the possibility of uncovering structural and institutional discrimination that spans across several grounds, such as ethnic origin and gender, provides a substantial positive aspect of the horizontal approach.⁸ A fifth aspect of having harmonised and unified access to the assistance or decisions of quasi-judicial bodies that could be achieved through the horizontal approach is the 'signal' effect of such an approach. When some groups and individuals do not have the same protection and possibilities as other groups or individuals, a possible unwanted effect could be that a hierarchy - both in the eyes of the victims and in general - is created between the different grounds of discrimination, rendering some groups or individuals less important.

The horizontal approach, however, does also require attention to the specific construction of the equality body. The different grounds of discrimination include different characteristics based on the nature, history and development of the given area. It is important to ensure that

⁶ Council Directive 2000/78/EC, Council Directive 2000/43/EC and Council Directive 76/207/EEC as amended by Council Directive 2002/73/EC.

⁷ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

⁸ Some identical aspects are discussed by Colm O'Cinneide in *The Racial Equality Directive as a basis for Strategic Enforcement*, Strategic Enforcement and the EC Equal Treatment Directives, Migration Policy Group, 2004, pp. 49-50.

the equality body working with the horizontal approach pays attention to and upholds these differences when structuring its work, for instance through the creation of separate directorates or functional divisions within the body.⁹ Moreover, it is preferable that the body is equipped with similar powers when dealing with discrimination on different grounds. This will ensure that the beneficial effects of applying a horizontal approach are upheld because it is easier to make use of expertise and experiences from different areas if the body can conduct the same levels of investigations and apply the same procedural rules on all areas.

If such structures and powers are not in place when applying the horizontal approach in the equality body, there is a risk that the resources and the focus of the body will not be applied in a beneficial way to all areas. The danger exists in particular when several bodies with different life spans, resources and experiences are merged into one.

1.3 The mandate of the equality bodies

The information gathered in the Questionnaire shows that some equality bodies, including the Lithuanian, Latvian, Slovakian, Estonian, Slovenian and French equality bodies,¹⁰ are authorised to handle complaints that include all of the anti-discrimination grounds covered by the Racial Equality Directive and the Employment Equality Directive.¹¹ Other equality bodies have varying powers, depending on what material area of law the complaint pertains to. For instance the Cyprus Commissioner for Administration can handle complaints on the grounds of racial and ethnic origin, religion or other belief, age, sexual orientation and disability in the fields of social welfare, medical treatment, training, and access to goods and services, and can handle complaints on the grounds of racial and ethnic origin, religion or other belief, age, sexual orientation, disability and gender in the field of employment. Finally, a variety of existing bodies' mandates are defined by the ground of discrimination itself. For example, in countries like Denmark and Belgium, bodies with the power to handle complaints in the field of gender discrimination co-exist with racial equality bodies. In Great Britain and Sweden, disability bodies also co-exist with gender and racial equality bodies.

In the Questionnaire, the Belgian Centre for Equal Opportunities and Opposition to Racism that acts as a legal aid institution and deals with complaints on all grounds except gender has listed its experience with the horizontal approach. According to the Centre, the centralisation of complaints allows for easier identification and transfer of expertise between the different grounds as the range of expertise is present in the centre. As a positive aspect of the horizontal approach, the Centre has also highlighted that victims of discrimination only have to turn to one body in order to have all aspects of their complaints heard.

The Danish Institute for Human Rights, where the Complaints Committee for Ethnic Equal Treatment is established, recently published the report *Equal Treatment – Status and Future Perspectives* in which the Institute recommends that equality bodies adopt a horizontal approach to equal treatment. It is the view of the Institute that a horizontal approach resulting in the creation of a single body with the mandate to handle complaints on multiple grounds is

⁹ See also Evelyn Collins, *Challenges and Choices – Establishing a Single Equality Commission in Northern Ireland*, in *Considerations for Establishing Single Equality Bodies and Integrated Equality Legislation*, Migration Policy Group, 2004, pp. 7-8.

¹⁰ The Lithuanian Office of Equal Opportunities Ombudsperson, the Latvian National Human Rights Office, the Slovak National Centre for Human Rights, the Estonian Chancellor of Justice, the Slovenian Office for Equal Opportunities and the French High Authority against Discrimination and for Equality.

¹¹ Other Equality Bodies, such as the Equality Commission for Northern Ireland and the Irish Equality Authority can also handle complaints on multiple grounds. Other international examples of bodies that utilise the horizontal approach when handling complaints include the Australian Human Rights and Equal Opportunity Commission and The Canadian Human Rights Commission. The Australian Human Rights and Equal Opportunity Commission handles complaints on the grounds of race, colour, descent or national or ethnic origin, sex, marital status or pregnancy, disability and age, under the Racial Discrimination Act 1975, Sex Discrimination Act 1984, Disability Discrimination Act 1992, Age Discrimination Act 2004 and the Human Rights and Equal Opportunity Commission Act 1986. The Canadian Human Rights Commission handles complaints on the grounds of race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status and disability, under the Canadian Human Rights Act section 3.

a positive development for the promotion of equality, and provides more effective protection against discrimination.¹² According to the Institute, equality bodies should be able to handle complaints about discrimination on grounds of age, disability, gender, race and ethnic origin, religion or belief, and sexual orientation. The Institute finds that a single body covering all the grounds has a wider impact in society than several bodies working on different grounds. Single bodies are able to create and spread knowledge of discrimination more efficiently. Furthermore, a single body can work as a catalyst for the levelling-up of legal protection for all grounds.¹³

From 1 January 2006, a new complaints handling system adopting the horizontal approach will be established in Norway. Even though Norway is not a member of the European Union, it has fully implemented the Employment Equality Directive through the Working Environment Act,¹⁴ and the Racial Equality Directive through the Act on the Equality and Anti-Discrimination Ombudsman and the Equality and Anti-Discrimination Board.¹⁵ Under this horizontal approach, two new bodies will be established and the existing Centre for Combating Ethnic Discrimination will be closed down from 1 January 2006. The new bodies are the Equality and Anti-Discrimination Ombudsman and the Equality and Anti-Discrimination Board. The Ombudsman and Board will be able to handle complaints concerning discrimination on the grounds of gender, ethnic origin, national origin, descent, colour, language and religion or belief outside the labour market, and on the grounds of political belief, sexual orientation, disability and age inside the labour market.¹⁶

The reasons given for establishing the new bodies in Norway include some of the aspects touched upon above.¹⁷ For example, the horizontal approach is perceived to be the best way to meet the potential future needs of victims of discrimination and to ensure their protection. In addition, the new bodies and the new mandate are expected to create a more stimulating academic environment that will attract qualified staff and ensure a high level of quality in the work on a daily basis.¹⁸ Finally, the horizontal approach is billed as facilitating the transfer of knowledge and experience between different areas, enabling more effective utilisation of resources, and preventing overlap in the handling of complaints by different bodies.¹⁹

1.4 Considerations and recommendations

On the basis of the experience of bodies that apply the horizontal approach, it is recommended that the different areas of discrimination, i.e. age, disability and sexual orientation, be given the same protection as race and gender. As a minimum, this includes establishing uniform rules in the legislation against discrimination outside the labour market, regardless of the grounds of discrimination and regardless of the fact that the Racial Equality Directive only includes protection on the grounds of race and ethnic origin. It is desirable that victims of discrimination on the grounds of disability and age, for instance, are also given

¹² It should be noted that the report mentioned above published by the Danish Institute for Human Rights is the result of the work of the Equality Commission set up in 2003 under the Institute's Council of Human Rights. The objective of the Equality Commission is to create and develop a strategy for equality in Denmark. The Equality Commission includes stakeholders representing all grounds of discrimination, i.e. age, ethnic origin, disability, gender, religion and sexual orientation. The recommendation of a single equality body handling all complaints is, however, solely the recommendation of the Institute, as the Commission has not yet reached agreement on whether this is a desirable approach for all stakeholders.

¹³ The Danish Institute for Human Rights, *Equal Treatment – Status and Future Perspectives*, 2005, pp. 148-149.

¹⁴ Chapter XA and XB in the Working Environment Act.

¹⁵ Regarding gender equality, Norway is bound by EU legislation under the EEA agreement. Norway also participates in the community action programme to combat discrimination (2001 to 2006) under the Council of the European Union (2000/750/EC), and has in this connection fully implemented the Employment Equality Directive. The Racial Equality Directive is being implemented through the Act on the Equality and Anti-Discrimination Ombudsman and the Equality and Anti-Discrimination Board, to ensure, among other things, that Norwegian legislation complies with the Directive, cf. section 19.

¹⁶ Act on the Equality and Anti-Discrimination Ombudsman and the Equality and Anti-Discrimination Board section 3.

¹⁷ See section 1.2

¹⁸ Det Kongelige Barne- og Familiedepartement, Ot.prp. nr. 34 (2004-2005), *Om lov om Likestillings- og diskrimineringsombudet og Likestillings og diskrimineringsnemnda (diskrimineringsombudsloven)*, p. 29.

¹⁹ Ibid.

effective protection outside the labour market. Moreover, equality bodies identical to the ones being established under Article 13 of the Racial Equality Directive should be established within all areas of discrimination covered by the Equality Directives.

When considering whether a single body should be given competence to handle complaints about discrimination on multiple grounds, attention must be paid to several aspects. On the basis of the issues outlined above, creating one body to deal with all areas of discrimination is likely to result in more effective protection. On the other hand, it is difficult to generally recommend this approach for all European countries. The differences between the groups that represent different areas of discrimination, i.e. gender or ethnic origin, have to be identified, discussed and ironed-out on a national level before equality bodies are merged. If the different areas do not share the strategy and goal behind the creation of a single body, merging could result in a *de facto* weakening (possibly only temporarily) of available protection. In conclusion, the implementation of a horizontal approach resulting in the creation of a single equality body should preferably start with a common commitment to target discrimination in this manner, thereby avoiding top-down implementation that does not include, or includes only to a limited extent, the goals and demands of the areas and bodies that are being combined.

2. TRIAGING COMPLAINTS

2.1 Experiences with increasing case loads

Some of the more well-established equality bodies have received so many complaints that it has caused a backlog of cases.²⁰ This prolongs the review time, which often makes the complaints process less effective. Complaints about discrimination are best dealt with quickly: the sooner the conflict is addressed, the easier it tends to be to resolve it and the less resource-intensive it is for the parties and the equality body.

In the Questionnaire,²¹ 13 of the 16 equality bodies that responded said they had experienced an increase in complaints, mainly because of greater public awareness of the existence of the equality bodies. Only three of the responding equality bodies said they received too many individual complaints causing a backlog of cases. A possible explanation is that some of the equality bodies were established in the last two years and are still in the start-up phase. Based on the experiences of the more well-established equality bodies, it must be assumed that as an equality body becomes more established, the size of its caseload will become a challenge. The question is how to address the challenge so it does not prevent the equality bodies from dealing with complaints effectively.

2.2 Options for triaging complaints

As a general rule, equality bodies are obliged under national law to assist all individuals who wish to complain about discrimination, provided that the complaint falls within the mandate of the equality body, that time limits are respected and that the complaint is not found to be manifestly ill-founded or better dealt with by another body. Within the area of racial and gender discrimination, this obligation follows indirectly from Article 13 of the Racial Equality Directive and Article 8(a) of the Amending Gender Equal Treatment Directive, according to which the equality bodies must be given the competence to assist victims of discrimination. Nevertheless, national law often leaves it to the discretion of the equality body to determine

²⁰ E.g. Equality Commission for Northern Ireland and Commission for Racial Equality, see Paul O'Neill, *Positive Duties and Strategic Enforcement*, in Strategic Enforcement and the EC Equal Treatment Directives, Migration Policy Group, 2004, p. 19-21, and Razia Karim, *A Legal Strategy to Combine and Coordinate Different Tools Available*, in Strategic Enforcement and the EC Equal Treatment Directives, Migration Policy Group, 2004, p. 30-32.

²¹ Question 1.11 in the Questionnaire.

the scale of assistance to be given in each single case, which can stretch from providing information about complainants' legal rights by telephone to taking cases to court on behalf of complainants. This section presents three examples of how this discretion can be used to triage complaints according to individual needs and available resources.

2.2.1 Strategic litigation

Some of the more experienced equality bodies have taken the approach of focusing their resources on cases that could lead to sustainable changes and that could have a wider public benefit.²² This can be achieved by setting up criteria for extensive assistance and legal representation, such as that a case has to test a point of law, affect a large number of people, or have a strong likelihood of success.²³

2.2.2 Preliminary assessment

Preliminary assessment is an approach recently deployed by the Canadian Human Rights Commission. In 2001, the Canadian Human Rights Commission concluded, based on a review of 23 years of operation, that the number of cases received exceeded the number of cases the Commission could conclude in any given year.²⁴ In recognition of the fact that changes were needed to reduce the existing backlog of cases and that it was inexpedient to let all cases undergo the same investigation process (the "one size fits all" approach), the Commission decided to transform its procedures through a number of activities including the launch of a pilot preliminary assessment project in early 2005.²⁵

Preliminary assessment is an informal assessment of a complaint conducted by an experienced human rights specialist who has expertise dealing with individual complaints about discrimination and in resolving disputes through alternative dispute resolution processes such as mediation and conciliation. The assessment is conducted and communicated to the complainant and the respondent within 21 days of the parties being notified of the Commission's acceptance of the complaint. By narrowing down and clarifying the issues involved in the complaint, the human rights specialist helps the parties establish realistic expectations of the case so they can engage in an open discussion about their conflict. The parties are not bound by the considerations and suggestions put forth by the human rights specialist. The main aims of preliminary assessment are to expedite the complaints process by providing the parties with an overview of the conflict to facilitate dispute resolution and, if the conflict is not settled, to identify issues that may guide and speed up the case process, e.g. mediation or further investigation.²⁶

The human rights specialist conducting the preliminary assessment has to consider the possible public interest issues of the case, e.g. does the case show signs of possible systemic discrimination or does it involve legal issues that need to be clarified in general. If public interest issues are involved, the human rights expert informs the Commission so they can be addressed early on in the process. This method ensures that the use of complaints to achieve a wider impact is not precluded by possible quick and informal resolutions.

2.2.3 Multi-disciplinary team review

The Canadian Human Rights Commission began to use a multi-disciplinary team approach as part of its case-handling process in 2003 as a means to reduce the existing backlog of cases. The main objective of the approach is to deal with each complaint according to its need and in

²² Cf. footnote 18.

²³ Cf. footnote 18.

²⁴ The Canadian Human Rights Commission's Annual Report 2002, p. 15.

²⁵ *Ibid* p. 5.

²⁶ A description of the preliminary assessment process can be found on the Canadian Human Rights Commission's website: www.chrc-ccdp.ca/publications/pe_ep-en.asp?highlight=1

this way speed up the complaints process.²⁷ The multi-disciplinary teams are made up of staff from the Commission's Investigations, Policy, and Legal Services. The teams review all complaints after initial processing has been completed, i.e. after the Intake Service has received the complaints and the complainants have filled out a form documenting their complaint. Based on the complaint forms, the team considers, among other things, whether the complaint should engage a limited or full investigation, or whether it should be referred straight to the Canadian Human Rights Tribunal. If the complaint is referred to further investigation, the team reviews the investigating officer's investigation plan and investigation report before they are disclosed to the parties and the Commissioners. Throughout the case process, the team also reviews whether the case is linked to other complaints, whether it raises policy issues that should be addressed, and whether any general issues relating to the complaint should be scrutinised further in special studies or reports.

2.3 Considerations and recommendations

In order to meet the challenge of an increasing caseload, it is important to be able to triage complaints so they can be dealt with effectively and strategically. A possible approach to this is the *strategic litigation* approach, the main advantage of which is that it ensures that the resources of the equality body are used mainly on complaints that can lead to a wider impact. This approach is particularly useful for equality bodies that represent the complainant. Equality bodies that issue legally-binding decisions or non-legally binding statements as a neutral party must, as a general rule, handle all complaints that fall within the mandate of the equality bodies, that respect the time limits and that are not found to be manifestly ill founded or better dealt with by another body. These equality bodies must deploy a case handling process that not only detects cases that may have a wider impact, but is also effective for all complaints.

Preliminary assessment may be an effective tool for speeding up the review process, primarily because it can lead to the quick settlement of complaints. However, applying informal procedures such as preliminary assessment is usually at the cost of the parties' right to due process. To ensure that parties do not feel pressured into settling their case without having exercised these rights, it is important that, as with the procedure followed by the Canadian Human Rights Commission, the parties are informed of their rights when the preliminary assessment is communicated, i. e. that they are not bound by the assessment, that the assessment does not exclude a normal investigation, what the rights of the parties are under a normal investigation, and what influence the assessment may have on the final decision. Furthermore, one of the objectives of the individual undertaking the preliminary assessment may be to evaluate whether the situation described in the complaint constitutes discrimination. This assessment is made before any investigation is undertaken, i. e. before the respondent has been heard. If the individual undertaking the assessment is to do any further work on the case, he/she may be influenced by his/her initial view of the case. If the equality body is to act as a neutral party when investigating a complaint and to issue objective decisions or statements, the question arises as to whether it is appropriate for the individual conducting the preliminary assessment to participate in the investigation and decision-making process.

The *multi-disciplinary team review* is recommended for enforcing individual complaints strategically because it focuses on the elements of single cases that can be used to promote equal treatment in general. The downside of the approach is that it costs more at the outset in terms of human resources and that it prolongs the review time. However, it has been the experience of the Canadian Human Rights Commission that the resources and time are well spent because the investigations tend to be shorter as a result.²⁸

²⁷ The Canadian Human Rights Commission's Annual Report 2003, p. 20. There is a more comprehensive description of the approach in the Commission's new case manual, which is expected to be published early in 2006.

²⁸ John J. Chamberlin, *Team X Progress Report*, September 9, 2003.

3. POWERS OF INVESTIGATION

3.1 Investigation and the principle against self-incrimination

Equality bodies that are expected to investigate complaints using the inquisitorial procedure to issue legally binding decisions or non-legally binding opinions are commonly assigned certain powers of investigation. In general, these equality bodies investigate complaints in a similar manner to ordinary administrative bodies that enforce civil legislation.

In some Member States discrimination is not only considered a civil offence, but also a criminal offence. This seems to be particularly true of racial discrimination.²⁹ In Denmark, the prohibition against racial discrimination outside the labour market is, in certain areas, regulated by both the Act on Ethnic Equal Treatment, which is a civil act, and by the Act on Prohibition against Racial Discrimination, according to which the offence is punishable by a fine or detention. This implies that a case handled by the Danish Complaints Committee for Ethnic Equal Treatment may also be raised by the prosecution as a criminal case. Thus, when considering the powers of investigation that should be granted to equality bodies and how they are to be enforced in practice, it is necessary to keep the principle against self-incrimination in mind.

It follows from the principle against self-incrimination that a person who is charged with a criminal offence cannot be compelled to provide self-incriminating evidence. The principle is enshrined in Article 6 of the European Convention on Human Rights on the right to a fair trial. The principle entails that administrative bodies cannot compel individuals who are considered to be “charged” in terms of the Convention to provide self-incriminating evidence.³⁰ The decisive factor is not whether the information given is incriminating in itself, but rather the use to which the evidence is put during the course of a criminal trial.³¹ Whether a person is to be considered “charged” cannot be defined on the basis of the national legal systems of Member States, but has to be decided on the basis of the European Court of Human Rights’ case law.³² It can be difficult to determine whether the respondent is “charged” within the meaning of the Convention. For practical reasons, administrative bodies should therefore not compel individuals to provide information if the administrative body suspects that the individual has committed a crime.³³ The principle against self-incrimination also means that evidence given in the administrative case is not to be used by the courts in a criminal case, even though the evidence was given to the administrative body at a time when the individual involved could not be considered “charged” within the meaning of the Convention.³⁴

3.2 The equality bodies’ powers of investigation

Some of the responding equality bodies have comprehensive powers of investigation, such as being able to compel the parties to the case to produce documents,³⁵ to grant access to premises,³⁶ and/or to give statements under oath.³⁷ In some Member States, non-cooperation

²⁹ E.g., in Norway (the Working Environment Act, section 85), Sweden (the Criminal Code chapter 16, section 9) and Denmark (The Act on Prohibition against Racial Discrimination, section 1).

³⁰ Jacobs and White, *The European Convention on Human Rights*, Oxford University Press, 2002, pp. 174-176.

³¹ *Saunders v. United Kingdom*, app. 19187/91, Judgment of 17 December 1996, para. 71.

³² *Engel and others v. Netherlands*, Judgment of 8 June 1976, para. 81.

³³ Jens Møller, *Forbud mod selvinkriminering i forvaltningsret?*, in *Forhandlingerne ved Det 37. Nordiske Juristmøde i Reykjavik* 18. 20. August 2005, Den Islandske Styrelse, 2005, p. 285.

³⁴ *Saunders v. United Kingdom*, app. 19187/91, Judgment of 17 December 1996, para. 74.

³⁵ The Danish Gender Equality Board, The Estonian Chancellor of Justice, the Swedish Ombudsman against Ethnic Discrimination, the Greek Ombudsman, the French High Authority against Discrimination and for Equality, the Latvian National Human Rights Office, the Lithuanian Office of the Equal Opportunities Ombudsperson, the Cyprus Office of the Commissioner for Administration, and the Slovak National Centre for Human Rights.

³⁶ The Estonian Chancellor of Justice, the Greek Ombudsman, the French High Authority against Discrimination and for Equality, the Austrian National Equality Body, and the Cyprus Office of the Commissioner for Administration,

³⁷ The Greek Ombudsman, the French High Authority against Discrimination and for Equality, and the Cyprus Office of the Commissioner for Administration.

with the equality body's investigation is considered a criminal offence³⁸ and/or can be subject to a fine.³⁹ Other equality bodies have no specific powers of investigation and therefore have to rely on the parties' and especially the respondent's willingness to co-operate in the investigation.⁴⁰ In general, the equality bodies that have been given the most extensive powers of investigation are those that issue legally binding decisions or non-legally binding opinions, while the equality bodies that simply represent complainants are without these powers.

In the Questionnaire, six of the equality bodies pointed out that it is difficult to get information from respondents and/or that investigation of individual complaints would be more effective if they were granted extended powers to compel respondents to provide information.⁴¹ Five of the six issue either legally binding decisions⁴² or non-legally binding opinions.⁴³

3.3 Considerations and recommendations

It can be difficult, often impossible, to determine whether a complainant has been discriminated against, if the respondents do not wish to co-operate with the investigation of a case. To quote the response of the Estonian Chancellor of Justice on this matter: *"... if the complaint concerns the activities of the private individual or body and conciliation proceedings are initiated, the Chancellor has no means to force the party to submit the documents or grant access. This means that if the party does not wish to co-operate any longer, the conciliation proceedings have to be terminated."* This is also the experience of the Danish Complaints Committee for Ethnic Equal Treatment, as described in section 5.3 and section 6.3 below.

Equality bodies that are expected to issue legally-binding and non-legally-binding statements on whether discrimination has taken place are, all things being equal, better equipped to handle this task if they have been assigned powers of investigation. It is recommended that these powers apply to both public and private respondents. However, when equipping equality bodies with these powers, a balance between the efficiency of the equality body and the respondents' right to due process must be struck. How this is to be achieved will depend on the organisation and powers of the single equality body. As a general rule, it can be said that the more extensive the powers of investigation, the greater the emphasis should be on the application of judicial rules of procedure. Furthermore, if an equality body is equipped with powers of investigation, compliance with the principle of self-incrimination must be kept in mind when these powers are used in practice.

³⁸ The Greek Ombudsman and the Cyprus Office of the Commissioner for Administration.

³⁹ The Swedish Ombudsman against ethnic discrimination, the Greek Ombudsman, and the Lithuanian Office of the Equal Opportunities Ombudsperson.

⁴⁰ The Slovenian Office for Equal Opportunities, the Belgian Centre for Equal Opportunities and Opposition to Racism, the Belgian Institute for Equality for Women and Men, the Danish Complaints Committee for Ethnic Equal Treatment, the British Disability Rights Commission and the British Equal Opportunities Commission.

⁴¹ The Danish Complaints Committee for Ethnic Equal Treatment, the Lithuanian Office of the Equal Opportunities Ombudsman, the Swedish Ombudsman against Ethnic Discrimination (concerning private respondents outside the labour market), the Austrian National Equality Body, the Belgian Centre for Equal Opportunities and Opposition to Racism, and the Estonian Chancellor of Justice (concerning private respondents).

⁴² The Lithuanian Office of the Equal Opportunities Ombudsman.

⁴³ The Swedish Ombudsman against ethnic discrimination, the Belgian Centre for Equal Opportunities and Opposition to Racism, the Danish Complaints Committee for Ethnic Equal, and the Estonian Chancellor of Justice (in ombudsman proceedings concerning public authorities).

4. BURDEN OF PROOF

4.1 The Equality Directives' principle of burden of proof

One of the most difficult hurdles to overcome for victims of discrimination is to prove the alleged discriminatory practice. This problem is addressed in the Racial Equality Directive, the Employment Equality Directive and the Burden of Proof Directive⁴⁴ by making it easier for a complainant to shift the burden of proof to the respondent.

According to the Racial Equality Directive, the Employment Equality Directive and the Burden of Proof Directive:

*"Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment".*⁴⁵

The rules on the burden of proof *"must be adapted when there is a prima facie case and, for the principle of equal treatment to be applied effectively, the burden of proof must shift back to the respondent, when evidence of such discrimination is brought"*.⁴⁶ By way of example, we can consider a complaint about discrimination on the grounds of ethnic origin in a job application situation: the complainant fulfils all the requirements mentioned in the job description, but is not called for interview. The complainant can prove that he/she applied for the job, that he/she was qualified, that he/she did not get interviewed, and that he/she has a foreign sounding name indicating his/her ethnic origin. In such a situation the complainant may be said to have established a prima facie case of discrimination on grounds of ethnic origin. The respondent will then have to prove that the reason why the complainant was not called for interview was not because of his/her ethnic origin. One way of doing this would be by providing information showing that the persons interviewed, and the person who eventually got the job, had better qualifications than the complainant. If the respondent fails to discharge his/her burden of proof, the prima facie case of discrimination, in combination with the respondent's failure to prove otherwise, is to be considered sufficient to conclude that the complainant was discriminated against on the grounds of ethnic origin.⁴⁷ Thus, the principle of burden of proof stipulated in the directives makes it easier for the complainant to pass the burden of proof onto the respondent, which, in practice, creates an incentive for the respondent to come forward with information in order to clear her/himself. This is an important factor in discrimination cases since it is often the respondent that is in possession of the essential information of the case.⁴⁸

⁴⁴ Directive 97/80/EC on the burden of proof in cases of discrimination based on sex, which codifies the European Court of Justice's practice on the burden of proof in gender equality cases.

⁴⁵ Article 8 of the Racial Equality Directive, Article 10 of the Employment Equality Directive, and Article 4 of the Burden of Proof Directive.

⁴⁶ Recital (21) in the preamble to the Racial Equality Directive, Recital (31) in the Employment Equality Directive, and Recital (18) in the Burden of Proof Directive. In Denmark, Norway and Sweden the principle is commonly referred to as the principle of "shared burden of proof". It is this term that is used in the Questionnaire. Theoretically, it does not make sense to refer to a shared burden of proof, since the onus of proof will always be on one of the parties, while the burden of proof and/or the evidential burden of proof may switch.

⁴⁷ There is no definitive case law from the European Court of Justice on the use of the rules of burden of proof in the Racial and Employment Equality Directives. However, for an important interpretation of the rules of proof by a national court, see the Court of Appeal of England and Wales judgment in *Igen Ltd. & Others v Wong, Chamberlin & Another - v- Emokpae, Brunel University v Webster*, 18/2/2005 [2005] EWCA Civ 142

⁴⁸ On this problem, see, *inter alia* Jonathon Hunyor, *Skin-deep: Proof and Inferences of Racial Discrimination in Employment* in *The Sydney Law Review*, Volume 25, 2003, pp. 535-554.

It follows from the Racial Equality Directive, the Employment Equality Directive and the Burden of Proof Directive that Member States do not have to apply the principle of burden of proof enshrined therein to proceedings in which it is the court or competent body that investigates the facts of the case.⁴⁹

4.2 The equality bodies use of the Equality Directives' principle of the burden of proof

According to the Questionnaire, most of the responding equality bodies can use the principle of the burden of proof stipulated in the Racial Equality Directive, the Employment Equality Directive and the Burden of Proof Directive when handling individual complaints.⁵⁰ In general, the equality bodies that can use the principle of the burden of proof under these directives are the equality bodies that issue legally binding decisions or non-legally binding opinions. The equality bodies that represent the complainant have answered that they do not use the eased burden of proof since it is not up to the equality body but to the tribunals and/or the courts to decide whether discrimination has taken place or not.⁵¹ The Danish Complaints Committee on Ethnic Equal Treatment represents a third category: the Committee issues non-legally binding opinions on whether discrimination has taken place or not. However, it cannot use the burden of proof of the directives and uses the principle of burden of proof normally applied in Danish administrative procedures instead.⁵² The Estonian Chancellor of Justice also has to apply the burden of proof used in administrative proceedings, except in cases under the Estonian Gender Equality Act and the Employment Contract Act, where the Chancellor has competence to use a rule of burden of proof similar to the principle stipulated in the three directives.

Half of the equality bodies that responded to the Questionnaire have reported that it is often too difficult for the complainant/the equality body to overcome evidential burdens and that cases are often rejected as a result.⁵³ Some of the equality bodies point out that this is especially the case in employment and harassment cases and in cases involving the private sector in general.⁵⁴

4.3 Considerations and recommendations

Equality bodies that issue legally binding decisions or non-legally binding opinions are, primarily, quasi-judicial bodies specialised in reviewing discrimination cases and, as such, are intended to supplement judicial review procedures before the ordinary courts. One of the main purposes of establishing specialised quasi-judicial bodies is to provide complainants in

⁴⁹ The Racial Equality Directive Article 8 (5), the Employment Equality Directive Article 10 (5), and the Burden of Proof Directive Article 4 (3). According to the preambles, the procedures referred to are those "in which the plaintiff is not required to prove the facts, which it is for the court or competent body to investigate", cf. Recital (22) in the Race Directive, Recital (33) in the Employment Equality Directive, and Recital (16) in the Burden of Proof Directive.

⁵⁰ The Slovenian Office for Equal Opportunities, the Danish Gender Equality Board, the Swedish Ombudsman against ethnic discrimination, the Greek Ombudsman, the French High Authority against Discrimination and Equality, the Latvian National Human Rights Office, the Belgian Institute for Equality of Women and Men, the Lithuanian Office of the Equal Opportunities Ombudsperson, the Cyprus Office of the Commissioner for Administration, and the Slovak National Centre for Human Rights.

⁵¹ The Belgian Centre for Equal Opportunities and Opposition to Racism, the British Disability Rights Commission, the British Equal Opportunities Commission, and the Austrian National Equality Body.

⁵² According to the preparatory texts for the Danish Ethnic Equal Treatment Act, the Complaints Committee is to use the inquisitorial procedure normally applied by Danish administrative bodies, cf. FT. 2002-03, Appendix A, Volume VII, p. 3878. According to the Ministry of Integration this implies that the Complaints Committee is not to apply the eased burden of proof stipulated in the Racial Equality Directive, but the general principle of burden of proof applied in administrative procedures, cf. Appendix 12 to Bill 155 on the Act on Ethnic Equal Treatment.

⁵³ Question 1.11 in the Questionnaire.

⁵⁴ The Cyprus Office of the Commissioner for Administration explained that it is particularly problematic in cases where it comes down to the complainant's word against the respondent's, because there is no obligation to keep records in the private sector. The Danish Complaints Committee for Ethnic Equal Treatment pointed out that it is a problem especially in the private sector because, unlike the public sector, it is not obliged to co-operate with the Committee's investigation.

discrimination cases with a better alternative to the ordinary courts. It would not be in compliance with this objective for the complainant's legal position to be less favourable before the specialised quasi-judicial bodies than before the ordinary courts. The complainant's burden of proof before quasi-judicial bodies should therefore be the same as that which applies before the ordinary courts in discrimination cases. Thus, it is advisable for equality bodies issuing legally binding decisions or non-legally binding statements to be able to use the burden of proof stipulated in the Racial Equality Directive, the Employment Equality Directive and the Burden of Proof Directive.

If the equality body has the competence to investigate the facts of the case before issuing a decision or opinion, the need to use the eased burden of proof is less compelling, hence the exception in these directives⁵⁵ providing that the eased burden of proof need not apply in inquisitorial proceedings. However, the assumption only holds for equality bodies that have adequate powers to obtain the necessary information for the case. As an example, the Danish Complaints Committee for Ethnic Equal Treatment does not have powers to compel the respondent to give statements or to produce documents or any other kind of information. Further, the Complaints Committee cannot undertake any hearing of witnesses. Thus, according to preliminary documents for the Danish Act on Ethnic Equal Treatment,⁵⁶ the Complaints Committee has to dismiss cases that pose evidential problems and have to be settled through evidence given by the parties or by witnesses. In practice, this has resulted in the Committee being forced to dismiss cases where respondents do not co-operate with the Committee's investigation of the case and where there are evidential problems. In such situations, the complainants have received neither the benefit of the eased burden of proof nor that of having a body investigate the case. Thus, if an equality body cannot use the burden of proof of the above-mentioned directives because it uses the inquisitorial procedure, it is recommended that it be given powers to be able to complete a thorough investigation in practice.

5. JUDICIAL REVIEW

5.1 The importance of being able to take discrimination cases to court

Trying discrimination cases at a tribunal or the courts can be an effective means of strategic enforcement: it can clarify anti-discrimination laws, it can establish precedents benefiting future complainants, it can lead to legal and/or social changes, and it can raise issues publicly.⁵⁷ Thus, a key element of enforcing individual complaints effectively and strategically is to be able to take cases to a tribunal and/or the courts for judicial review.

The pressure that can be exercised on respondents is another important element of being able to take discrimination cases to court and should not be underestimated. Many of the equality bodies offer free mediation or conciliation⁵⁸ on a voluntary basis and see this as an important tool for handling complaints effectively because it is more cost effective and less time-consuming. However, if there are no potential legal consequences as a result of not resolving the dispute, respondents may lack the incentive to participate in the mediation or conciliation process. Furthermore, some of the equality bodies cannot compel the parties to

⁵⁵ Cf. note 46.

⁵⁶ FT. 2002-03, Appendix A, Volume VII, p. 3878

⁵⁷ Eilís Barry, *Strategic Enforcement – from Concept to Practice*, in *Strategic Enforcement and the EC Equal Treatment Directives*, Migration Policy Group, 2004, p. 7.

⁵⁸ The Greek Ombudsman, the Cyprus Office of the Commissioner for Administration, the French High Authority against Discrimination and for Equality, the Latvian National Human Rights Office, the Belgian Institute for Equality of Women and Men, the Belgian Centre for Equal Opportunities and Opposition to Racism, The Danish Complaints Committee for Ethnic Equal Treatment, the Swedish Ombudsman against Ethnic Equal Discrimination, the Austrian National Equality Body, and the Estonian Chancellor of Justice.

the case to provide information.⁵⁹ Thus, when investigating a complaint, these equality bodies have to rely on the respondents' willingness to co-operate. The possibility of the equality body referring a case to a tribunal or taking it to court on behalf of the complainants may make respondents more willing to take part in the equality body's investigation in order to avoid this.

5.2 The equality bodies' powers to take cases to court

According to the Questionnaire, nine of the responding equality bodies have powers to take cases to court with the consent of the complainant,⁶⁰ while the remaining seven responding equality bodies do not have this option.⁶¹ Among the latter, the Danish Complaints Committee for Ethnic Equal Treatment and the Estonian Chancellor of Justice can recommend⁶² that free legal aid is given to the complainant and thus ease the way to court for some cases. The Austrian National Equality Body cannot take cases to court directly but it can submit an application to the Austrian Equal Treatment Commission. If the decision of the Commission is not consistent with that of the National Equality Body, the body can take the case to court with the consent of the complainant.

5.3 Considerations and recommendations

The ability to take cases to court enhances the equality bodies' possibilities of enforcing individual cases effectively and strategically. The main reasons for this are that a court ruling can have a wider impact and that the risk of ending up in court may give respondents an incentive to participate in mediation or conciliation and co-operate with the investigation of the case. As a general rule, it is therefore recommended that equality bodies be given the power to take cases to court with the consent of the complainant.

If the equality body can issue legally-binding decisions it does not need the ability to take cases to court to the same degree. However, this presupposes that the equality body's decisions have, in practice, the same effect as court rulings, e.g. establish precedents.

An alternative to empowering equality bodies to take cases to court is to give them the power to recommend that complainants be provided with free legal aid at the court. However, if this power is to work as an effective tool for an equality body in practice, it must be left to the discretion of the equality body to decide which complaints justify being given legal aid.

The point is illustrated by the experience of the Danish Complaints Committee for Ethnic Equal Treatment, which can only recommend that free legal aid, in order to take the case to court, be given to the complainant if the Committee has found that the complainant has been discriminated against. In situations where the respondent does not co-operate with the investigation or does not even respond to the Committee's initial inquiry, as is sometimes the case, the Committee will often have to dismiss the case due to lack of evidence. The Committee cannot suggest that the complainant is provided with free legal aid in order to take the case to court since it has not found that the complainant has been discriminated against. As a result, cases like these seldom end up in court even though the Committee may find it important that some of them are tried.

⁵⁹ E.g. the Austrian National Equality Body, the Slovenian Office for Equal Opportunities, the Belgium Centre for Equal Opportunities and Opposition to Racism, The Danish Complaints Committee for Ethnic Equal Treatment, the Belgian Institute for Equality of Women and Men, the British Disability Rights Commission, and the British Equal Opportunities Commission.

⁶⁰ The Latvian National Human Rights Office, the Slovak National Centre for Human Rights, the Danish Gender Equality Board, the Swedish Ombudsman against Ethnic Discrimination, the Belgian Centre for Equal Opportunities and Opposition to Racism, the Cyprus Office of the Commissioner for Administration, the Belgian Institute for Equality of Women and Men, the British Equal Opportunities Commission, and the British Disability Rights Commission.

⁶¹ The Danish Complaints Committee for Ethnic Equal Treatment, the Estonian Chancellor of Justice, the Slovenian Office for Equal Opportunities, the Austrian National Equality Body, the Lithuanian Office of the Equal Opportunities Ombudsman, the Greek Ombudsman, the French High Authority against Discrimination and for Equality.

⁶² The Danish Complaints Committee's recommendations are not binding for the Danish authorities that grant legal aid (regional authorities), but in practice such recommendations are followed.

The Complaints Committee addressed this issue⁶³ in response to the Danish Ministry of Refugee, Immigration and Integration's request for information on the Committee's experiences with the handling of complaints since the Committee was established in 2003. The Ministry's request followed the European Commission's general request of 12 May 2005 to the Danish government to receive information on the implementation of the Racial Equality Directive in Denmark. With reference to Article 13 of the Racial Equality Directive, the Complaints Committee suggested in its response that the Committee be given powers to recommend free legal aid for complainants in cases where the Committee has to reject the case because it requires that the parties or the witnesses of a case are heard, and where it is the assessment of the Committee that the complainant has a reasonable case that should be tried by the courts.

CONCLUSIONS

At first sight, the Questionnaire illustrates great variety in the way the equality bodies are organised, the powers they have been assigned, and the level of protection they can provide. Upon closer examination, the Questionnaire also shows that many of the problems the equality bodies are facing are the same. Sharing information on what these problems are and how they can be resolved may help equality bodies resolve existing problems and anticipate potential future problems. The different experiences of the equality bodies may also be of value to Member States that wish to progressively revise the structures and powers of their current equality bodies to upgrade them.

Whether an equality body can benefit from the considerations and recommendations in this article depends mainly on the functions of the equality body. In this respect, the equality bodies can roughly be divided into two groups: equality bodies that investigate complaints as a neutral party to issue legally binding decisions or non-legally binding opinions and equality bodies that represent the complainants. The considerations on applying a horizontal approach relate to both groups.

Equality bodies that investigate complaints as a neutral party and that issue legally-binding decisions or non-legally binding opinions:

- These equality bodies are, in general, established to serve as quasi-judicial bodies and, as such, to review all complaints that fall within their mandate. At the same time their main objective is to promote equal treatment and to eliminate discrimination in general. To be able to do this with limited resources the equality bodies must apply an individual complaint process that is effective for all incoming complaints and that, at the same time, makes it possible to focus on the public interest issues associated with the single complaints to ensure that individual enforcement has a wider impact. Triaging complaints by means of preliminary assessment and multi-disciplinary review can serve these objectives. Equality bodies that have the power to take cases to court - after having issued a decision or opinion - can also apply the strategic litigation approach.
- One of the main functions of these equality bodies is to investigate complaints as a neutral party in order to issue decisions or opinions. For equality bodies to be capable of handling this task it is recommended that equality bodies be assigned certain powers of investigation. However, when deciding what these powers will be and how they may be used, the respondents' right to due process must be kept in mind.

⁶³ The Danish Complaints Committee for Ethnic Equal Treatment's letter of 5 July 2005 to the Danish Ministry of Refugees, Immigration and Integration.

- Since these equality bodies are to function as an alternative to the ordinary courts, it is recommended that they apply the principle of burden of proof stipulated in the Racial Equality Directive, the Employment Equality Directive and the Burden of Proof Directive to ensure that complainants are given the evidential advantage intended by these directives.
- Court rulings are an important part of effective and strategic individual enforcement. Decisions or opinions issued by these equality bodies seldom have the same impact as ordinary court rulings. Therefore, it is recommended that these equality bodies can, at their own objective discretion, take cases to court or recommend that complainants be given free legal aid to take their case to court.

Equality bodies that represent complainants:

- These equality bodies are set up to work as advocates for the complainants. At the same time, they are charged with promoting equal treatment and eliminating discrimination in general. Given limited resources, applying the strategic litigation approach can serve to highlight complaints that may have a wider impact. The strategic litigation approach can be supplemented with the multi-disciplinary review approach to increase the focus on elements of single cases that can be used to promote public interest issues in general.
- If a complaint cannot be referred to a quasi-judicial equality body, taking cases to court may, in some situations, be the only effective way for these equality bodies to ensure a final decision in a case. Furthermore, court rulings in discrimination cases may have greater impact with regard to the elimination of discrimination in general. The equality bodies' ability to take cases to court may also enhance the respondent's willingness to participate in mediation or conciliation proceedings. It is therefore recommended that these equality bodies be assigned powers to take cases to court.

Formal Investigations and Inquiries

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INTRODUCTION

This paper examines the use of formal investigations and inquiries as a strategic enforcement tool in combating systemic discrimination and promoting wider social change. The use of inquiry and investigative powers to tackle discrimination has long been seen in the UK as complementary to traditional forms of enforcement such as support for individual litigants and conciliation. Whilst individual recourse to the law and assistance has remained an important tool in the suite of powers available for use by British equality bodies,¹ increasingly these bodies have looked to other distinctive ways to bring about this desired social change.² This is reflected in the work of equality and human rights bodies outside Great Britain also, as Des Hogan from the Irish Human Rights Commission notes:

“There appears to be a growing belief within national and specialised human rights institutions that strategic investigations and inquiries can and should form an integral component of an institution’s core work, being inter-related with its other functions, including those relating to promotional and advice activities.”³

However, this has not always been the case. One needs to look no further than Britain in the mid 70’s and 80’s to witness how, through a series of procedural errors and restrictive court decisions, the powers for conducting formal investigations were curtailed to such an extent that these tools were essentially abandoned for fear of procedural impropriety.⁴ It was not until recent years that these powers were re-employed by the existing equality bodies. The re-engagement with the use of inquiries and investigations as effective strategic enforcement tools was further embedded in the formation of the powers given to the new Disability Rights Commission (DRC) in 1999, when a large part of the founding act was devoted to entirely this field of enforcement.⁵ Clearly, a return to individual litigation as the sole tool, as witnessed in the 70’s and 80’s, was not deemed effective in tackling intractable and systemic discrimination.

This paper examines the use of inquiries and investigations as tools for strategic enforcement and systemic change. It will focus in the main on the experience in Great Britain and draw comparatively on examples from across the EU particularly the experiences of equality bodies within the region. The material used is drawn from responses to the Questionnaire⁶ conducted by Equinet’s working group on strategic enforcement. The decision to focus on the British experience is simply a pragmatic decision born from research that suggests that the most expertise and experience to date in this field have been within the UK. Initial evidence demonstrated that many of the equality bodies within Europe were only in the early stages of establishment, and those that were well established did not use their inquiry or investigative powers widely, the reasons for which are touched on below.⁷

¹ British equality bodies refers to the Equal Opportunities Commission (EOC), the Commission for Racial Equality (CRE) and the Disability Rights Commission (DRC). Northern Ireland (UK wide remit) has an independent Equality Commission (ECNI) and a Human Rights Commission (NIHRC).

² This paper draws on an earlier paper by Nick O’Brien, *The GB Disability Rights Commission and Strategic Law Enforcement: Transcending the Common Law Mind*, in *Disability Rights in Europe*, Anna Lawson and Caroline Gooding (eds.), Hart Publishing, 2005.

³ Taken from Des Hogan, *Inquiries within a Wider Functional Strategy*, in *Strategic Enforcement and the EC Equal Treatment Directives*, Migration Policy Group, 2004, p. 38.

⁴ Whilst the CRE have noted that their return to individual litigation was supported by a process of ‘legal follow-up’ whereby organisations who had received adverse decisions were offered support and guidance leading in some circumstances to wider cultural change akin to the outcome of a formal investigation, it is acknowledged that the move away from formal investigations was primarily due to the adverse court findings against them. See Razia Karim, *A legal strategy to combine and co-ordinate different tools available*, *ibid*.

⁵ Section 3 of the DRC Act and Schedule 1 empowers the DRC to undertake formal investigations and gives the DRC a range of enforcement mechanisms for employing these powers.

⁶ See Annex.

⁷ Exceptions to this are the experiences of the Northern Ireland and Irish Equality Authorities. See the detailed report on strategic enforcement produced as a result of the sixth experts’ meeting of specialised equality bodies held in Dublin in 2004, *Strategic Enforcement and the EC Equal Treatment Directives*, Migration Policy Group, 2004. This

1. DEFINITIONS

First, it is necessary to define the remit of an inquiry and an investigation in this context. Throughout the course of the work undertaken by the Equinet working group on strategic enforcement it became quickly apparent that terminology was key in assisting members in coming to a shared understanding of what various powers may mean in differing national and legal contexts. This paper takes as its starting point the broadest suite of investigative powers under scrutiny. A working definition is that unlike an investigation, a general inquiry does not usually require a belief that discrimination has taken place. Furthermore, a general inquiry can cover a whole sector, for example housing, while an investigation is usually more specific and must comply with strict legal procedures to ensure that the party being investigated can respond. In some countries investigations are also known as *own initiative investigations*, *own initiative cases* or *ex officio investigation of cases*.

2. GENERAL INQUIRIES

Inquiries are a useful tool for looking into a sector or theme without being required to have a specific named party (or parties) or to show a finding of reasonable belief that an unlawful act of discrimination has occurred. Inquiries must fall within the remit and scope of activity of the equality body undertaking the enquiry (for instance, the DRC's general duty to work towards the elimination of discrimination). In addition, in the case of the DRC the inquiry must be completed within a specified time (18 months). The basis for conducting inquiries provides greater flexibility in terms of the sector/sectors that equality bodies may examine. However, unlike for a named-party investigation, they may only make recommendations and may not issue a finding of unlawful discrimination. The DRC has completed one full general inquiry into website accessibility and is currently undertaking a second into health inequalities with a particular focus on those with learning difficulties and mental ill health. The Equal Opportunities Commission conducted three general inquiries in 2004-2005 on pregnancy discrimination, occupational segregation and flexible working practices respectively.

Other European examples have demonstrated that inquiries can be used to great effect as a means for promotion and lobbying. There are also some specific benefits of an inquiry-based approach, as noted by the Greek Ombudsman (GO) in the response to the Equinet questionnaire:

“These powers allow the GO to examine in a systematic and general manner a specific service or sector, and to shed light in certain dark corners of public administration which may not be evident in a typical investigation of an individual complain. As a result, these powers provide an important opportunity for the equality body to have a broad and constructive impact on the activities of public administration, particularly in cases where the issues are serious, the problems are widespread and the evidential documents or information insufficient to support an individual complaint.”

However there are some differences in application and scope when looking at examples across the EU. For example, the Estonian Chancellor of Justice and Greek Ombudsman can only undertake inquiries into public authorities or bodies that undertake functions of a public nature.⁸ This differs from the UK where the equality statutes do not restrict the scope of inquiries to either the public or private sectors.⁹

report covers the full range of strategic enforcement options. The report includes references to the Irish experience, amongst others.

⁸ However, in Greece, the Equal Treatment Committee covers the private sectors (fields outside employment and occupation) and another body, the Work Inspectorate is active in the private sector in the field of employment and

3. FORMAL INVESTIGATIONS

In Great Britain the three main equality commissions may on their own initiative or if directed by the Secretary of State undertake a formal investigation into areas connected with their explicit duties. This applies in a similar fashion to the race, gender and disability areas. Currently, due to the lack of infrastructure for other grounds such as religion and belief, sexual orientation and age, there is no mechanism for launching an investigation on this basis. However, once the Commission for Equality and Human Rights (CEHR) comes into being in late 2007, investigations on other grounds will also be possible. An investigation differs from an inquiry, as set out above, in that it requires the accusatory body to demonstrate a reasonable 'belief' that there is unlawful discrimination and that a particular body or bodies are targeted.¹⁰

In addition to establishing 'belief', the accusatory party must also follow a specified process for the investigation, including allowing parties under investigation time to respond. The positive aspect of this type of investigation is that the process is kept in-house and can be controlled by the equality authority itself.

As mentioned previously, the DRC investigation power is subject to a time limit of 18 months. The limit was introduced by regulation to force the DRC to plan and research the investigation thoroughly prior to commencement in order to prevent the delays that were witnessed with some of the earlier Commission for Racial Equality and Equal Opportunities Commission investigations that dragged on for many years, consuming valuable resources and staff time.¹¹

Experience from British equality bodies has shown that formal 'belief' investigations are most effective in situations where the party under investigation is a repeat offender or in situations where prior litigation has been unsuccessful in instigating the desired cultural and organisational change, for example the Commission for Racial Equality's investigation into the Prison Service in 2000. These types of investigations are also useful where there is no victim, but where there is evidence of systemic or institutional discrimination.

In addition, there are specific quasi-investigative powers relating to the positive duties upon public authorities to promote race equality and shortly disability equality, as well as the gender duty, following the passage of the Equality Bill. The CEHR will have the power to carry out an assessment of the extent to which or the manner in which an authority has complied with these duties. The procedure for carrying out an assessment is similar for that relating to investigations and inquiries.

occupation. There is also the Equal Treatment Service, which is entitled to examine complaints of violations of the principle of equal treatment, act as a conciliator and submit reports to the Equal Treatment Committee.

⁹ However, when the new Commission for Equality and Human Rights (CEHR) is established, a similar restriction will apply in regard to human rights inquiries as the Human Rights Act 1998 only applies to public authorities and functions of a public nature.

¹⁰ In the DRC's case, as it has not yet undertaken a named-party investigation, the quota for establishing belief is not tested. However, such an investigation would require a genuine reason for believing that there may be (or have been) a breach of the DDA. This would in most cases need to be supported by evidence demonstrating that a breach had occurred (or was occurring). It would also be necessary to ensure that the terms of reference for a named-party investigation are broad enough to cover all issues that the DRC wishes to investigate. See DRC paper to Legal Committee 18 January 2006, Jonathan Holbrook et al.

¹¹ Disability Rights Commission (Time Limits) Regulations 2000

4. PRO'S AND CON'S OF INQUIRIES AND INVESTIGATIONS: A COMPARATIVE APPROACH

Criticisms of the conduct of formal 'named-party' or 'belief' investigations in the 70's and 80's were that they were overly adversarial and confrontational (in particular, the investigated parties would often challenge the investigation, taking up both time and resources in lengthy legal battles). Similarly, powers available by way of enforcement tools either before or following an investigation did not allow negotiation by way of a settlement, as is now the case under section 5 of the DRC Act which allows for a binding settlement agreement in lieu of other enforcement tools. Whilst this power has not been used in the context of an investigation thus far, the agreements brokered between the DRC and other parties in individual litigation cases have been deemed a useful tool in the range of available enforcement and resolution instruments.¹²

Building on the experience of the DRC and the commitment to non-regression, the Bill currently before the British parliament aimed at establishing the CEHR will include the 'section 5' power within it, along with the broadest powers for conducting inquiries and investigations in Britain so far. This suite of strategic enforcement powers builds on the DRC model whilst aiming to incorporate and address some of the issues that have hindered the other equality bodies in Britain in conducting investigations.

Of course, one of the key criticisms of undertaking an inquisitorial or investigative approach is the resources required. This was a common theme among all the equality bodies that responded to the survey. This was true both of organisations that have an existing inquiry power (Austria, Denmark, Sweden and Latvia, for example) and of those that do not have an inquiry power, as cost was said to be a prohibitive factor in permitting such powers.

Distribution of resources for the new CEHR in Britain will also be a key factor in determining its success. The operational design is yet to be decided and it is not known what proportion of staff and money will be allocated to inquiries and investigations nor how resources will be divided between inquiries and investigations on the one hand, and other forms of strategic enforcement on the other. Nevertheless, due to the powers conferred on the CEHR in this area and the role these powers have occupied in the existing legislation establishing equality bodies in Great Britain (such as the DRC Act 1999, the Race Relations Act 1976 and the Sex Discrimination Act 1975) there is no doubt that the intent is for inquiries and investigations to be fundamental to the work of the CEHR.

Another area of common complaint across equality bodies (with some exceptions e.g. the Estonian Chancellor of Justice and the French High Authority against Discrimination and for Equality) was the inability to compel evidence in an inquiry or investigation (although this is a power which the UK equality commissions have) and/or follow up that investigation with any enforcement options, apart from general 'soft' recommendations, awareness raising or referral to a higher authority. An exception here was the French High Authority, which has powers to turn non-compliance over to the courts as a criminal matter.

The ability to compel evidence is a power possessed by all existing Great Britain equality bodies; it is built into their founding legislation and is a strong power that can be enforced by a court order. To date, the DRC has not had to use this power due to being a relative newcomer to such powers. The Commission for Racial Equality has used this power. Under their amended Race Relations legislation (2000) they are now required to serve a notice that may

¹² The DRC has not undertaken any named-party formal investigations to date, however the section 5 power has been utilised in a number of individual discrimination cases. The DRC entered into 4 agreements in 2004/05 and are currently negotiating a 5th agreement in the employment field. Section 5's can be used before or after litigation (most often beforehand as a way of encouraging an organisation to review policies and practices and avoid adverse publicity). The DRC has also begun to examine ways in which an agreement may be brokered prior to a formal investigation being formally launched on a named party.

require respondents to provide the requested written information, give oral information, and/or produce any documents in their possession.¹³ Whilst it is not always necessary to use such a power, the fact that it exists assists in encouraging compliance.

There were also instances where investigative powers went further than Britain: for example the Commissioner for Administration in Cyprus can conduct investigations into human rights matters as well as equality areas (The new CEHR in Great Britain will be able to undertake human rights inquiries only and not 'named-party' or 'belief' investigations).

CONCLUSION

The results derived from initial evidence gathering demonstrate a diverse approach to inquiries and investigations amongst equality bodies in Europe. This is partly due to the complex nature of the terminology. Indeed, equality bodies in some countries made no distinction between an inquiry and an investigation (Latvia); others only had competence in one or the other. Whilst there were many similarities between bodies, no two countries had exactly matching powers or procedures, demonstrating the richness in approach to this area of strategic enforcement. The different approaches and the powers within the competence of the different specialised bodies is a result of the differing social and political contexts in which the organisations were established. Indeed, even in Britain the three main equality bodies, whilst bearing very similar powers in this field, are not identical.

In closing, Britain is in the unusual position of having relatively well established equality bodies within the EU context. This has meant that the practice of inquiries and investigations has had considerable more time to 'bed-down' than in states such as the Czech Republic or Italy for example. Whilst this hasn't been without its own problems it has allowed the collective knowledge and experience to inform newer bodies such as the DRC and play an influential role in the development of the powers for the new CEHR in Great Britain.

¹³ See <http://www.cre.gov.uk/about/legalpowers/fi.html#disclosure>

Interventions and Amicus Curiae Applications Making Individual Enforcement More Effective

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INTRODUCTION

This article seeks to locate the development and use of amicus curiae applications in the developing concept of European equality law with its emphasis on enforcement and remedies. This article will explore the connections between the individual enforcement model and amicus curiae applications/interventions, the new opportunities offered by the Racial Equality Directive, the Employment Equality Directive and the Gender Equal Treatment in Goods and Services Directive² in relation to amicus curiae/intervention applications, the actual experience of equality bodies in this area and the advantages and disadvantages of such applications. It will be seen that amicus curiae applications and interventions have the potential to greatly enhance the effectiveness of the individual enforcement model and that the required competencies of equality bodies under the directives opens the way for equality bodies to make such applications in appropriate cases.

Enforcement provisions and procedural rules which govern matters like interventions and amicus curiae applications will dictate the manner and extent to which legislative objectives are achieved. They also reflect the various preferred models of equality and the extent to which the preferred model or models are merely aspirational or actively realisable. A number of models of equality have been identified.³

1. INDIVIDUAL ENFORCEMENT MODEL

European measures have until recently tended to favour the individualised justice model. The individual enforcement model of combating discrimination is designed to permit individuals to bring civil actions challenging discrimination. This model does not imply a positive general equality duty, but rather a specific individual right not be discriminated against in relation to a list of prohibited grounds, in certain areas of activity. A single case can have extensive legal and social effects. It may establish a precedent that benefits other claimants. It can contribute to a culture of compliance in that other potential respondents may change how they behave on foot of the case. It tests and clarifies the content of existing laws and may highlight flaws in existing laws (thus furthering government accountability by establishing the parameters within which governments operate). It raises issues publicly. In Ireland individual discrimination cases regularly receive considerable publicity and have prompted extensive national debate on a number of occasions. This has greatly heightened awareness of the legislation.

The individual enforcement model achieves results in specific areas when rigorously enforced. The Independent Review of the Enforcement of UK Anti-Discrimination Law describes its effect in the UK as having “*broken down barriers for individuals in their search for jobs, housing or services*” and “*driven underground [...] overt expressions of discrimination*” as well as “*providing an unequivocal declaration of public policy*” and having an important “*educative or persuasive function*”.⁴

The inadequacies of the individual model are well identified and understood. The inadequacies that are most relevant in amicus curiae applications and interventions can be reiterated as follows: firstly the individual enforcement model relies on the willingness, ability and capacity of the individual to bring an action with consequential financial and other costs.

² Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin; Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation; Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in access to and supply of goods and services.

³ These models include equality as rationality, equality as individualised justice, equality as group justice, equality justice as recognition of cultural diversity, equality as participation, equality as result and equality of opportunity. See C McCrudden, Chapter 1, Equality and Diversity in The New Equality Directives ICEL No. 29; see also the European Anti-Discrimination Law Review, Issue 1, European Commission, 2005.

⁴ B. Hepple, M. Coussey and T. Choudhury, Equality: A New Framework, Report of the Independent Review of the Enforcement of UK Anti-Discrimination Legislation (Hart, 2000), para. 1.33

This may be problematic for disenfranchised groups that face cultural, language, poverty or educational barriers to participation in formal public enforcement mechanisms. A potential claimant faces evidential burdens such as gathering sufficient evidence to raise a *prima facie* case, or identifying the correct pool of comparators (in an indirect discrimination claim). The model also ignores the varying ability of different groups to compete once fair procedural requirements are in place. Fourthly, claimants' cases may be settled denying the benefit of a successful precedent to others. Parties involved in a case may not realise the potential impact of the case. The result of a successful case will usually only be confined to the individuals involved in the case.⁵ Certain arguments may not be addressed or discussed. Legislation may be introduced overturning successful outcomes. There are other well recognised problems with this model.⁶

2. DEVELOPMENT OF THE CONCEPT OF EQUALITY

There has been a conceptual development of European equality law with a move towards more nuanced and varied models of equality and enforcement mechanisms. The case law of the European Court of Justice (ECJ) contains mixed messages as to the model of equality pursued. In *Webb v Emo Air Cargo* the ECJ held that the Gender Equal Treatment Directive⁷ must be construed so as to achieve substantive equality, and not mere formal equality, which would constitute the very denial of the concept of equality.⁸ However, in *Kalanke v Freie Hansestadt Bremen* the ECJ, in examining a positive action measure stated, “such a system substitutes for equality of opportunity as envisaged in [the Gender Equal Treatment Directive] the result of which is only to be arrived at by providing for such equality of opportunity”.⁹

In contrast, the ECJ stated in *Marschall v Land Nordrhein-Westfalen* that “the objective is to arrive at real equality of opportunity”.¹⁰ In *P v S* the ECJ held that “one of the goals of the equality legislation is to respect the dignity and freedom to which [a person] is entitled”.¹¹

The Amsterdam Treaty is remarkable for the extension of the specified grounds and the dramatic development in the expression of the principle of equality. While the Racial Equality Directive and the Employment Equality Directive¹² reflect the traditional expression of the principle of equality (i.e. non-discrimination) in that they focus on combating discrimination and define direct discrimination in terms of the right not to be treated less favourably than an individual comparator, there is also evidence in these directives and in the amended Gender Equal Treatment Directive¹³ and more recently the Gender Equal Treatment in Goods and Services Directive¹⁴ of a shift away from adherence to the individual justice model. Article 3(2) and Article 14(1) of the EC Treaty now explicitly aim at the promotion of equality and at ensuring full equality in practice. The promotion of equality between men and women is now

⁵ Although the Irish Equality Tribunal and the Labour Court have the power to make an order that a person or persons specified in the order take a specified course of action – Section 27 1(b) of the Equal Status Act 1998-2004 and Section 82 1(e) of the Employment Equality Act 1998.

⁶ There is no positive obligation to combat discrimination. Secondly the model provides no remedy for behaviour that is consistently poor. Finally the individual enforcement model relies on an *ex post facto* individual remedy in the context of retrospective fault finding, rather than encouraging proactive identification and elimination of discriminatory practices. It has limited capacity in tackling institutional or structural discrimination. The MacPherson Report defined institutional race discrimination as the “collective failure of an organisation to provide an appropriate and professional service to people because of their colour, culture and ethnic origin [...] it can be seen or detected in processes, attitudes and behaviour which amounts to discrimination through unwitting prejudice, ignorance, thoughtless and racist stereotyping which disadvantages minority ethnic people”. W. Macpherson et al. The Stephen Lawrence Inquiry (Stationary Office, 1999), available at <<http://www.official-documents.co.uk/document/cm42/4262/4262.htm>>

⁷ Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion and working conditions [1976] OJ L39/40

⁸ Case C-32/93 [1993] ECR I-3567

⁹ Case C-450/93 [1995] ECR I-305

¹⁰ Case C-409/95 [1997] ECR I-6363

¹¹ Case c – 13/94 [1996] ECRI-2143

¹² Council Directive 2000/43/EC [2000] OJ L180/22 and Council Directive 2000/78/EC [2000] OJ L303/16

¹³ [2002] OJ L269/5

¹⁴ Council Directive 2004/113/EC

an explicit task of the Community. Article 1(a) of the Amended Gender Equal Treatment Directive¹⁵ explicitly obliges Member States to actively take into account the objective of equality between men and women when formulating and implementing laws, regulations and administrative provisions, policies and activities with regard to employment.¹⁶

The enhancement of and move away from the individual enforcement model is evident particularly in the provisions on remedies and enforcement in all of these directives. Indeed one of the most striking features of the new Directives is the focus on enforcement and remedies. Traditionally neither the EC Treaty nor the Gender Equal Treatment Directive required specific procedures and remedies. While the Gender Equal Treatment Directive required Member States to take necessary measures to protect employees against dismissal¹⁷ and to introduce such measures as are necessary to enable victims “to pursue their claims by judicial process after possible recourse to other competent authorities”,¹⁸ it remained up to each Member State to designate the courts having jurisdiction and to determine the procedural conditions governing enforcement actions. The presence of detailed and enhanced enforcement provisions in the more recent Directives is thus particularly noteworthy and will be relevant in relation to procedural rules governing amicus curiae/interventions.

The Court of Justice in *Rewe-Zentral finanz*:¹⁹

“In the absence of community rules on this subject, it is for the domestic legal systems of each Member State to designate the courts having jurisdiction and to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which citizens have from the direct effect of community law.”

There are some limitations on the procedural autonomy of the Member States with regard to procedural rules: “the national procedural conditions laid down by national law cannot be less favourable than those relating to similar actions of a domestic nature (the requirement of equivalence or non-discrimination). Second, those conditions cannot render virtually impossible or excessively difficult the exercise of rights conferred by Community law (the requirement of minimum effectiveness of enforcement of Community law).”²⁰

In *Levez*²¹ the ECJ thought it appropriate to consider issues such as costs, delay and the simplicity of the actions, in order to determine whether the principle of equivalence had been complied with when comparing an action before a County Court and an Industrial Tribunal.

The requirement of minimum effectiveness requires a variety of factors to be examined. It is not necessarily satisfied by virtue of the enforcement of the right concerned being possible.

“For the purposes of applying those principles, each case which raises the question whether a national procedural provision renders application of Community law impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole before the various national instances. In the light of that analysis the basic principles of the domestic judicial systems, such as the protection of the rights of the defence, the principle of legal

¹⁵ Council Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.

¹⁶ [2002] OJ L 269/5

¹⁷ Article 7

¹⁸ Article 6

¹⁹ Case 33/76 *Rewe-Zentral Finanz eG and Rewe Zentral AG v Landwirtschafts Kamer für das Saarland* [1976] ECR 1989, para.13

²⁰ Enforcement and the New Equality Directives, Imelda Higgins, Chapter 17 Equality in Diversity, ICEL No.29

²¹ Case 326/96 *Belinda Levez v T. H. Jennings (Harlow Pools Ltd)* [1998] ECR I-7835

*certainty and the proper conduct of procedure, must, where appropriate, be taken into consideration.*²²

3. EQUALITY BODIES

There are a number of provisions in the new directives that recognise weaknesses in the adversarial nature of the individual enforcement model. These include provisions on measures to protect complainants against victimisation; burden of proof; positive action measures and dialogue with civil society. The measures that are most relevant to the issue of interventions/amicus curiae applications are those in relation to establishing bodies to promote equal treatment and improved rules on standing.

The Racial Equality Directive, the Amended Gender Equal Treatment Directive and the Gender Equal Treatment in Goods and Services Directive require Member States to designate a body or bodies for the promotion of equal treatment.²³ The bodies must have competence to provide assistance to victims of discrimination in pursuing their complaints about discrimination. They must also be in a position to conduct independent surveys and publish independent reports on any issue relating to such discrimination.

The nature and extent of assistance to be provided to victims is unspecified. The core functions of the equality bodies as specified in the directives would have relevance in equality bodies seeking to make an intervention or application as amicus curiae (see later).

The recommendations of the European Commission against Racism and Intolerance on equality bodies²⁴ while non-binding, reflect a thoughtful attempt to codify best practice in relation to enforcement bodies and as such provide a useful benchmark to inform the interpretation of provisions of these Directives. Chapter C deals with the functions and responsibilities of equality bodies. Principle 3 states that subject to national circumstances, law and practice, equality bodies should possess functions and responsibilities.

These include:

- “a. to work towards the elimination of the various forms of discrimination set out in the preamble and to promote equality of opportunity and good relations between persons belonging to all the different groups in society;*
- b. to monitor the content and effect of legislation and executive acts with respect to their relevance to the aim of combating racism, xenophobia, anti-Semitism and intolerance and to make proposals, if necessary, for possible modifications to such legislation;*
- c. to advise the legislative and executive authorities with a view to improving regulations and practice in the relevant fields;*
- d. to provide aid and assistance to victims, including legal aid, in order to secure their rights before institutions and the courts;*
- e. subject to the legal framework of the country concerned, to have recourse to the courts or other judicial authorities as appropriate if and when necessary.”*

²² Case C – 312/93 Peterbroeck v Belgian State [1995] ECR I-4705

²³ Article 13 of the Racial Equality Directive; Article 1(2) of the Amendment to the Gender Equal Treatment Directive; Article 12 of the Gender Equal Treatment in Goods and Services Directive.

²⁴ ECRI general policy recommendation No.2: Specialised bodies to combat racism, xenophobia, anti-Semitism and intolerance at national level CRI (97)36, 13 June 1997

4. LEGAL STANDING

The Racial Equality Directive, the Employment Equality Directive, the Amended Gender Equal Treatment Directive and the Gender Equal Treatment in Goods and Services Directive all contain provisions requiring Member States to ensure that associations, organisations, or other legal entities which have a legitimate interest in ensuring that the provisions of these directives are complied with, may engage either on behalf of or in support of the complainant with his or her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations.²⁵ While it is up to the Member States to lay down the criteria to determine whether an organisation has a legitimate interest and the procedural rules for interventions, these criteria will have to comply with the principles of equivalence and effectiveness that are mentioned above. This is one of the truly innovative features of the Directives with no parallel in earlier directives.

5. INTERVENTIONS AND AMICUS CURIAE APPLICATIONS IN IRELAND

In Ireland there is a difference between interventions and an amicus curiae. The Rules of the Superior Courts 1986 as amended deal with interveners in a number of rules. In a number of circumstances a person not a party may apply to be joined as an intervener. The practice of the courts is that it has discretion to consider and decide whether to grant or refuse the application. The specific incidents dealing with interventions as set out in the Rules of the Superior Courts relate to matrimonial causes, admiralty actions probate and actions for recovery of land. The intervention of parties under those provisions is in protection of their own interests. In the Irish context, intervener has a particular sense and relates historically to the four areas mentioned above.

The intervention of parties in protection of their own interests can be distinguished from the appearance of an amicus curiae. An amicus curiae was traditionally disinterested in nature and intended exclusively to assist the court in its determination of a particular point of law. In a number of cases the following definition is referred to from Jowitt's Dictionary of English Law:

"A friend of the court, that is to say a person, whether a member of the bar not engaged in the case or any other bystander, who calls the attention of the court to some decision whether reported or unreported, or some point of law which would appear to have been overlooked".

Keane CJ in the Supreme Court in *H.I. v The Minister for Justice, Equality and Law Reform on the Application of the United Nations High Commissioner for Refugees*²⁶ noted that it was not unknown for a member of the bar in this jurisdiction who was not actually engaged in a case but who happened to be in court, to intervene and draw the attention of the court to a decision which might otherwise have been overlooked.

In Ireland, in relation to the Superior Courts, there are no statutory provisions or rules of court providing for the appointment of an amicus curiae, except in relation to the Irish Human Rights Commission.²⁷

The Equality Tribunal is the quasi judicial body established under Irish equality legislation to investigate, hear and decide claims of discrimination under the Equal Status Acts 2000 – 2004 and the Employment Equality Acts 1998 – 2004. An appeal of a recommendation of the

²⁵ Article 7(2) of the Racial Equality Directive; Article 9(2) of the Employment Equality Directive, Article (5) of the Amendment to the Gender Equal Treatment Directive and Article 8(3) of the Gender Equal Treatment in Goods and Services Directive

²⁶ [2003] 3 I.R.

²⁷ IHRC Section 8 of the Human Rights Commission Act, 2000

Equality Tribunal under the Employment Equality Acts 1998 – 2004 will be heard by the Labour Court. Both the Equality Tribunal and the Labour Court are obliged to “investigate the case and hear all persons appearing to the Director (or the Labour Court) to be interested and desiring to be heard.”²⁸

These provisions clearly envisage amicus curiae type applications. However, the extent to which this provision has been relied upon (if at all) is unknown.

The Irish Supreme Court has held that it does have an inherent jurisdiction to appoint an amicus curiae where it appears that this might be of assistance in determining an issue before the court:²⁹

“It is an unavoidable disadvantage of the adversarial system of litigation in common law jurisdictions that the courts are, almost invariably, confined in their consideration of the case to the submissions and other materials, such as relevant authorities, which the parties elect to place before the court. Since the resources of the court itself in this context are necessarily limited, there may be cases in which it would be advantageous to have the written and oral submissions of a party with a bona fide interest in the issue before the court which cannot be characterised as a meddling busy body. As the experience in other common law jurisdictions demonstrates, such intervention is particularly appropriate at the national appellate level in cases with a public law dimension.”

The Chief Justice also noted that the role of the amicus curiae in other jurisdictions has changed considerably over time:

“While it is still the case that an amicus curiae is allowed to appear because the court would be thereby assisted in coming to a correct resolution of an issue in dispute by being informed of all the relevant cases, statutes and other materials relevant to its determination, the amicus is no longer expected to be wholly disinterested in the outcome of the litigation.”

In *O’Brien v Personal Injuries Assessment Board*³⁰ the High Court judge took into account a number of factors in joining the Incorporated Law Society of Ireland (the solicitor’s professional body) as an amicus curiae. The first issue he examined was whether the applicant had a bona fide interest and was not just acting as a “meddling busybody”. In this regard he noted the interest of the Law Society in Law Reform and the operation of the legal system and concluded that it would be quite wrong to regard it as a meddling busybody.

The second issue he examined was whether there was a public law dimension to the case. In this regard he was satisfied that given the history of involvement of the Law Society that the Society had a general interest and not just a sectional interest of its members.

The third matter he had regard to was the fact that the decision would affect the entitlement of a great number of litigants, as well as the solicitor’s profession in terms of the attention of solicitors to the affairs of their clients. The fourth matter he had regard to was the benefit of certainty in relation to the procedures of the respondent and he considered this to be in the public interest. The issue in the case arose for the first time and he considered that it should be examined broadly and not just in the light of the particular circumstances so that the Personal Injuries Assessment Board, the solicitor’s profession and the claimants themselves would have certainty as to the procedures which are appropriate.

²⁸ Section 79(1) of the Employment Equality Act 1998 and section 25 of the Equal Status Act 2000

²⁹ *H.I. v Minister for Justice Equality and Law Reform on the Application of The United Nations High Commissioner for Refugees*

³⁰ [2005] IEHC 101

The experience of the United States in relation to the role of amicus curiae is of relevance. It has permitted the most spectacular expansion of the traditional role. There were a number of factors contributing to this, one of them being the sheer volume of American law, embracing as it does the decisions of a huge number of federal courts and courts of the individual states. It was also confronted with difficult problems arising from the federal structure of government and the differences between the statutes of the various states of the union. This is a situation that is likely to be replicated in the EU in relation to the directives with each member state having its own national legislation and national courts providing their own adjudication on the matter. The US has seen the growth of a vast array of private non-profit organisations intended to promote the interests of particular groups in society such as ethnic groups, consumer bodies, civil liberties organisations and many others. The proliferation of amicus curiae briefs is a conspicuous feature of the US legal scene particularly at the level of the Supreme Court.

6. EQUALITY BODIES AND AMICUS CURIAE APPLICATIONS

Before looking at the recorded experience of other equality bodies in relation to amicus curiae applications three matters merit particular attention. The first concerns the Northern Ireland Human Rights Commission (NIHRC), which has powers and functions that are broadly similar to the powers and functions accorded to the equality bodies under the various directives. The NIHRC has a number of powers and functions. These include the duty to keep under review the adequacy and effectiveness of law and practice relating to the protection of human rights, an obligation to “*promote understanding and awareness of the importance of human rights in Northern Ireland*”. In relation to the courts it is empowered to give assistance to individuals in a number of instances and it can bring proceedings involving law or practice relating to the protection of human rights. In a case which arose out of an inquest held by the Coroner for the district of Fermanagh and Tyrone into the death of victims of the bomb explosion in Omagh in 1998, the Coroner ruled in 2000 that the Commission had no statutory power to intervene in the inquest and that accordingly he could not permit it to intervene. The Lord Chief Justice Sir Robert Carswell upheld the Coroner’s ruling. The Court of Appeal by a majority dismissed the Commission’s appeal. In the House of Lords, Lord Slynn stated that while the duty to keep under review the adequacy and effectiveness of law and practice does not expressly give the Commission a power to address submissions,

“It does however, indicate the importance of the Commission in developing such law and practice. The organ most concerned with the interpretation and enforcement of human rights law and practice once incorporated by statute is the court. Submissions by the Commission as to how the human rights law should be interpreted and applied so as to be adequate and effective show how relevant is the work of the Commission to that of the courts.”

He concluded that the combination of particular subsections of the relevant act indicates the conferring on the Commission of general powers to promote the understanding of human rights law and practice and to review its adequacy and effectiveness.

“The capacity to make (not a power to insist on making) submissions to the court is incidental to this general power [...] I am not troubled by the floodgates argument. The Commission must exercise caution in deciding whether a case is important enough to justify intervention or assistance; and whether there is a risk of particular parties or one party feeling that it is unfair that the Commission should come down on one side rather than the other in the legal argument. It is in the end for the court to decide these matters. The courts will only allow or invite assistance when they feel it necessary or helpful; with increasing knowledge particularly of cases in the European Court of Human Rights they may find it less necessary but this capacity to give assistance to the court is potentially valuable in achieving the purpose of

the legislation. In my view the existence of that capacity is reasonably incidental to its main express power.”

A striking example of a highly effective use of intervention by equality bodies can be seen in the UK Court of Appeal judgement in *IGEN Ltd and Ors v Wong*.³¹ The case involved three appeals from the Employment Appeals Tribunal. The circumstances of each differ widely, but they all raised questions on the interpretation and application of the statutory provisions comparatively recently introduced by the Sex Discrimination Act 1975 and the Race Relations Act 1976 respectively on the shifting of the burden of proof in direct discrimination cases under those Acts. A similar statutory provision has been introduced into the Disability Discrimination Act 1995. Similar provisions are also to be found in Reg. 29 of the Employment Equality (Sexual Orientation) Regulations 2003 and in Reg. 29 of the Employment Equality (Religion or Belief) Regulations 2003. The various Acts had been amended in relation to the burden of proof. Because of the possible impact of the decisions in these appeals on practice in discrimination cases, three equality bodies, the Equal Opportunities Commission, the Commission for Racial Equality and the Disability Rights Commission successfully applied to the Court of Appeal for permission to intervene.³² The Court of Appeal took the opportunity to examine earlier guidance that had been issued on the burden of proof - “The Barton Guidance”³³ - and to set it out again in the form in which they approved it. This guidance is set out in the annex to the judgment with the incorporated amendments and other minor corrections. This judgment will have a widespread impact even beyond the UK. It is now regularly relied upon in Irish case law and it has the potential to be a benchmark across Europe on the interpretation of the Burden of Proof provisions.

More recently, on 11 January 2006, the Equality Authority (the equality body in Ireland) was given liberty to appear as an amicus curiae in High Court proceedings being brought by a Traveller family³⁴ against a number of respondents including the local housing authorities, the Commissioner of An Garda Síochána, the Director of Public Prosecution, the District Justice, Ireland and the Attorney General. The case taken by the Traveller family raises a number of issues. These include the failure of the relevant housing authorities to meet the accommodation needs of the Traveller family. The claimants also contended that the Criminal Justice (Public Order) Act has a disproportionate and discriminatory impact on members of the Travelling community. This Act criminalises entry into and occupation of lands in certain situations. It gives members of An Garda Síochána broad powers including arrest and removal of caravans. The Equality Authority was given leave to appear as amicus curiae in relation to the application and interpretation of the Racial Equality Directive should it arise as part of the case. The Equality Authority sought to rely on the provisions of Article 13 of the Racial Equality Directive rather than Article 7(2), in making the application. This constitutes an important development for the Equality Authority, as it was not given explicit power in its legislation to apply to intervene as an amicus curiae.

7. AMICUS CURIAE / INTERVENTIONS AND EQUALITY BODIES

The use of interventions and/or amicus curiae applications among equality bodies is not a widespread phenomenon. There are a number of possible reasons for this. Some of the legal systems make no provision for it in any shape or form. Some of the equality bodies are very new and the parameters of their powers and the legislative provisions they operate under have been untested. Broadly speaking it seems to be a concept that has more resonance in Member States that have common-law backgrounds. However, it is not confined to Member States with common-law backgrounds. For example in France, in civil law and administrative cases the parties or the court can request the High Authority against Discrimination and for

³¹ [2005] EWCA CIV 1042 (18 February 2005)

³² S66A (inserted by the Sex Discrimination (Indirect Discrimination and Burden of Proof) Regulations 2001); S.544 (inserted by the Race Relations Act 1976 (Amendment) Regulations 2003); S.17A(9c)(inserted by the Disability Discrimination Act 1995 (Amendment) Regulations 2003)

³³ Barton v Investec Securities Ltd [2003] I.C.R. 1205 para 25

³⁴ Travellers are an Irish ethnic minority

Equality (HALDE) to intervene by transmitting its investigation file on the case to the court, together with its opinion on the case, or, where the HALDE has not investigated the case before the court, to intervene by giving its opinion (conclusions in fact or in law) on a case. In criminal cases, in addition to responding to requests for intervention, the HALDE can intervene on its own initiative. The Institute for Equality between Women and Men in Belgium may intervene in the name of the complainant or intervene on its own in the name of the principle of sex equality. The Centre for Equal Opportunities and Opposition to Racism in Belgium normally cannot intervene in the course of a case but in civil law cases, with the permission of the victim, can join as a party in a case. It can initiate a case in criminal law even without the specific permission of the victim.

There would appear to be a considerable degree of overlap and confusion in relation to the concepts of intervention and amicus curiae application. For example, the National Centre for Human Rights in Slovakia may provide a court with a “*professional standpoint*” dealing with the principle of equal treatment. This would appear to be akin to the common law concept of amicus curiae.

8. THE BENEFITS OF AMICUS CURIAE / INTERVENTIONS

What is very striking is the perceived strategic effectiveness of the intervention / amicus curiae as an enforcement tool by equality bodies that do intervene or apply as an amicus curiae. The Equal Opportunities Commission (EOC) in the UK attributes the increase in its interventions to “*an increasing need to use the EOC’s legal budget more effectively and a realisation that an intervention can achieve a court decision without the same degree of financial and resource commitment as full assistance to an individual entails (and a useful means of involving the EOC where a claimant is already fully assisted e.g. by a union, and does not require the EOC’s assistance).*”

The potential impact of the intervention is also striking, for example the issue of the guidance on burden of proof in the *Igen* case. The Disability Rights Commission (DRC) describes how during the course of a hearing in which it had intervened,³⁵ the DRC and the parties were able to agree on the wording of a policy in relation to the manual handling of people with disabilities, which was approved by the court. The potential of an intervention by an equality body can be seen in another case in which the DRC intervened, in *Burke v GMC*.³⁶ The judge made the following comments on the role of the DRC in his judgment: “*The DRC was able to deploy to the great assistance of the court, a particular and highly relevant informed expertise which none of the other parties could bring to the task in hand*”. He also referred to “*the important role that, in appropriate cases, bodies such as the DRC have to play in litigation, affording our courts the kind of valuable and valued assistance that courts in the United States of America have for so long been accustomed to receiving from those filing amicus curiae briefs.*”

9. DISADVANTAGES OF AMICUS CURIAE / INTERVENTIONS

It is clear from case law and practice that there may be some disadvantages to an equality body appearing as an amicus curiae or intervener. An amicus curiae will have very little control over the running of the case. The case may be resolved or settled or go in a direction not envisaged by the equality body. There may be a perception that the intervention of an amicus curiae will add to costs and delay the hearing.

There may be some suspicion of the motives of the equality bodies in intervening. As McCollum LJ noted in the Court of Appeal in the Northern Ireland Human Rights Commission Case:³⁷

³⁵ *ER v Sussex County Council, Ex parte A, B, X and Y High Court*

³⁶ [2004] EWHC 1879 (2004) 79 B.M.L.R. 126

³⁷ [2002] UK HL25 (20 June 2002)

“To allow the Commission to intervene in proceedings in which it had no direct interest as a party had one of two objectives: either it is not calculated to affect the outcome in which case it is irrelevant, or it is calculated to affect the outcome, in which case a number of potentially undesirable results may ensue.”

In referring to McCollum LJ’s concerns, Lord Slynn stated the following:

“The public perception might be that the Court was influenced by a Government agency not a party to the proceedings. Costs could be increased. The party against whose stance the Commission argued would feel aggrieved by the inequality of arms. Moreover, it is undesirable that the Commission should be involved in controversy in the course of a case to which it is not a party. The concept of human rights itself and the interpretation of the Human Rights Act 1998 are not matters which should give a great deal of difficulty to a Court.” (2001 NI 272 at p282)

CONCLUSION

The power to apply as an equality body to intervene as an amicus curiae in relevant cases would appear to be incidental to the required competencies of the equality body to provide independent assistance to victims of discrimination and make recommendations on any issue relating to such discrimination. If equality bodies have the function of promoting equal treatment without discrimination, it would seem to follow that they have competencies or capabilities to do things necessary to that end, including appearing as an amicus curiae in proceedings concerning the true meaning of the relevant directives. The courts of Member States must interpret domestic legislation in the light of the wording and purpose of the directives in order to achieve the result to be envisaged by the directives.³⁸ It would be extraordinary if a body charged with promoting equal treatment did not have the capability of doing so by advocating a particular interpretation of a directive in a Court of Law given that this might be one of the most important and effective ways by which that principal could be promoted.

It is suggested therefore that equality bodies that are charged with the functions and capacities as envisaged by the directives have the capacity to act as an amicus curiae in a case involving the interpretation of the relevant directive and such capacity implicitly arises under the provisions of the directives. Equality bodies should also be able to take part in litigation concerning the directive in support of a party: all of the relevant directives require Member States to ensure that associations, organisations or other legal entities, which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring that the provisions of the directive are complied with, may engage, either on behalf of or in support of the complainant. Relevant procedural rules must comply with the principles of equivalence and effectiveness mentioned earlier.

Given the competencies that equality bodies must have, it is difficult to see how it could be maintained that they do not have a legitimate interest in ensuring that the provisions of the directive are complied with. The *raison d’être* of the equality bodies is the promotion of equal treatment.

Equality bodies under the relevant directives are partisan by the definition of their competencies. It is not suggested that equality bodies become ‘meddlesome busybodies’ and seek to intervene in every case concerning every aspect of the directives. While amicus curiae and intervention applications are clearly a strategic use of an equality body’s resources, the equality body needs to be strategic about making such applications. It would

³⁸ Marleasing SA. Commercial Internaciocional De Alimentacion S.A. 1991 ECR 4135.

be useful and important for equality bodies to develop and have transparent guidelines governing the decisions to make such applications. These guidelines could for example include:

- the importance of the equality issues raised in the proceedings,
- the extent to which there is significant case law on the issue,
- the extent to which the proceedings are likely to have a beneficial impact for others covered under the same discrimination ground or other ground,
- the extent to which equality issues are central or peripheral to the case,
- the Court in which the proceedings are being heard (for e.g. is it an appellate/Superior Court).

It is likely that equality bodies will not have resources to provide assistance to every individual. It is not always possible to predict a 'test case' in advance. In *H.I. v Minister for Justice, Equality and Law Reform*³⁹ it emerged that the UNHCR had identified the particular mechanism of amicus curiae interventions before the highest appellate courts of a country as an appropriate and effective means of ensuring the correct interpretation and application of the convention's provisions. This is an approach that could be adopted by the equality bodies. The amicus curia applications taken to date highlight how effective these types of applications can be. They considerably enhance the individual enforcement model and identify its weaknesses. They also highlight the advantages and potential of equality bodies working together in a co-ordinated fashion.

³⁹ [2003] 3 I.R.

Positive Duties to Promote Equality

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INTRODUCTION

This paper is based on responses to the Questionnaire¹ carried out by Equinet in the summer 2005. It looks at the extent to which positive duties to promote equality have been introduced in a number of European countries, and focuses in particular on the various approaches to positive duties that have been adopted in the UK.

What Are Positive Duties?

A positive duty is a requirement that organisations promote equality and diversity in all aspects of their work, in a manner that involves employees, employers and service-users alike. It is a proactive approach, with an emphasis on achieving results backed by enforcement mechanisms and the measurement of outcomes.

The positive duties that have been, and are due to be, implemented in the public sector in the UK are based upon a legal requirement to eliminate unlawful discrimination and promote equality of treatment. This can be fulfilled by monitoring workforce composition, consulting with relevant groups, carrying out impact assessments to determine the impact of particular policies and practices upon disadvantaged groups, and by taking remedial action where necessary.

Why Positive Duties?

Anti-discrimination law has generated considerable cultural change in UK society, and has been effective in breaking down many visible barriers and prejudices. However, it often proves less than adequate in dealing with more complex and deep-rooted patterns of exclusion and inequality. There is too much reliance upon individual enforcement, legal technicalities of interpretation and complex adversarial litigation. It frequently suffers from lack of participation and input of disadvantaged groups themselves. It also encourages a culture of passive compliance with legislation, rather than the taking of proactive action to encourage diversity.

In the public sector, this means that public authorities often treat eliminating discrimination as a compliance issue, which carries with it a negative connotation. Policy is often constructed on the basis of assumptions about the needs of disadvantaged groups that do not mirror their own perceptions and actual needs. Equality is not given its necessary place within the central aims of public sector organisations. It is also not treated as being of real importance to their core business, such as the delivery of services to the public and strengthening social cohesion.

To remedy these shortcomings, various forms of public sector diversity strategies and equality mainstreaming have been adopted throughout the EU and elsewhere, in order to incorporate equality perspectives in all aspects of policy and practice. However, in the absence of comprehensive enforcement, these types of “soft law” have generally proved piecemeal and ineffective. Unless backed by consistent political will, organisational capacity, sustained leadership and expert advice, they tend to be at best procedure-oriented or even to collapse completely.

There is evidence that a legislative regime based on positive duties can lead to more effective progress in equality and diversity policies than the current anti-discrimination legislation. Compliance with equality law is potentially made simpler, and the promotion of substantive equality of treatment becomes part of policies of social cohesion, good relations and community relations.

¹ See Annex

Are Positive Duties common across Europe?

In the Questionnaire carried out by Equinet in the summer 2005, a number of European equality bodies were asked whether the equality legislation in their countries imposes any legal obligations on public or private bodies to take action with regard to equality. There were a wide variety of responses to this question. Some countries reported that there were provisions in place that enabled positive action in both the public and private sphere.² In the Slovak Republic, the constitutionality of provisions enabling positive action on the grounds of race and ethnic origin are currently being considered by the Constitutional Court. The Slovenian Office for Equal Opportunities reported that the Slovenian legislation sets out that the *"National Parliament, government, ministries and other state bodies and bodies of local communities shall establish conditions for equal treatment of all persons through awareness-raising and monitoring the situation in this field as well as through measures of a normative and political nature."* No details were given, however, of any enforcement mechanism to ensure that such measures are implemented.

The National Equality Body of Austria reported that, although equality legislation provides for the possibility of positive action, it does not require public or private bodies to implement positive action. However, Government contracts are only awarded to companies and individuals who observe the equality legislation.

The Office of the Commissioner for Administration in Cyprus reported that their equality legislation provides that positive duties can be imposed on both public and private sector organisations, but that so far no such duties have been imposed. Denmark has no positive duty for public or private bodies, although the Article 13 body has been given the task of promoting the principle of equality and non-discrimination on the grounds of race and ethnic origin. It does not, however, have the power to oblige private or public entities to eliminate discrimination in general or to promote equality.

In its response to the questionnaire, the Swedish Ombudsman against Ethnic Discrimination stated that there are positive duties in Sweden that cover both the public and private sector. These duties, however, apply only to employment in both the public and private sectors, and are only in force with regards to ethnicity, gender and religion. Only the Ombudsman against Ethnic Discrimination and the Equality Ombudsman have the right to enforce positive duties.

The Estonian Chancellor of Justice set out in detail legislative provisions introduced in the Gender Equality Act placing obligations on state and local government agencies, educational and research institutions and employers to promote gender equality of men and women. These obligations are wide-ranging. They require State and local government agencies to promote gender equality *"systematically and purposefully. Their duty is to change the conditions and circumstances which hinder achievement of gender equality."* The Estonian legislation requires State and local government agencies to *"take into account the different needs and social status of men and women"* in the *"planning, implementation and assessment of national, regional and institutional strategies, policies and action plans"*. The Minister of Social Affairs has responsibility for making recommendations concerning the implementation of these obligations. Educational institutions are required to *"ensure equal treatment for men and women in vocational guidance, acquisition of education, professional and vocational development and re-training."* They are also obliged to ensure that *"the curricula, study material used and research conducted shall facilitate abolition of the unequal treatment of men and women and promote equality."* The Estonian legislation goes further than the proposed positive duty in Great Britain, as it places a legal requirement on private sector employers to promote gender equality, including a requirement that employers *"create working conditions which are suitable for both women and men and support the combination of work and family life, taking into account the needs of employees."* Private sector employers are also required to *"collect statistical data concerning employment which are based on gender and which allow, if necessary, the relevant institutions to monitor and assess whether*

² Response of the Centre for Equal Opportunities and Opposition to Racism, Belgium; Response of the Greek Ombudsman, Greece.

the principle of equal treatment is complied with in employment relationships. The procedure for the collection of data and a list of data shall be established by a regulation of the Government of the Republic." A Gender Equality Commissioner will be appointed who will have responsibility for monitoring compliance with these positive requirements. The Commissioner does not appear to have enforcement powers.

In the UK, there are a number of existing and proposed duties to promote equality. The National Assembly for Wales has a positive duty to promote equality generally, while the Greater London Authority (GLA) has a duty to promote equality across the six grounds of age, disability, gender, race, religion and sexual orientation. In addition to the positive duties imposed on devolved administrations, there are existing and planned positive duties that apply to the public sector generally. The most comprehensive duty exists in Northern Ireland, where public bodies are required to promote equality across nine grounds. The race equality duty applies to all public authorities in Great Britain, as will the disability equality duty from December 2006 and the proposed gender equality duty.

1. THE UK CONTEXT: DEVOLVED AUTHORITIES

Since 1997, the UK Government has engaged in a process of devolving power from Westminster. In 1998, the Good Friday Agreement set out a plan for devolved government in Northern Ireland. The Scotland Act, passed in the same year, led to the establishment of the Scottish Parliament and the Government of Wales Act, also passed in 1998, led to the establishment of the National Assembly for Wales. Following on from these moves towards devolution for the nations, the Greater London Authority Act 1999 led to the election of the Mayor of London and the establishment of the Greater London Authority, a strategic citywide government for London. The legislation that established these devolved authorities contained innovative approaches to the promotion of equality. Section 75 of the Northern Ireland Act requires public authorities to have due regard to the need to promote equality of opportunity, the Government of Wales Act places the National Assembly for Wales under a duty to exercise its functions with due regard to the principle of equality of opportunity, the Greater London Authority Act requires the GLA to have due regard to the principle of equality of opportunity in its work. Although the Scottish Parliament is not under a positive duty to promote equality, it has the power to encourage equal opportunities.

Central government in Westminster retains responsibility for the development of equality legislation (e.g. amendments to the Sex Discrimination Act) for Great Britain (England, Scotland and Wales). In tandem with the developments that have seen the devolved administrations given greater powers to proactively promote equality, central government has also recognised the important role of positive duties to promote equality. In 2000, the government introduced a positive duty on public sector bodies to promote race equality. The Disability Discrimination Act 2005 introduced a duty on public sector bodies to promote equality for disabled people that will come into force on 4 December 2006. The Equality Bill, currently before Parliament in Westminster, will, in addition to establishing a new Commission for Equality and Human Rights, introduce a duty on public sector bodies to promote gender equality.

1.1 Northern Ireland

Section 75 of the Northern Ireland Act 1998 places a statutory obligation on public authorities (Northern Ireland departments, most non-departmental public bodies, District Councils and other bodies including UK departments designated by the Secretary of State) to carry out their functions relating to Northern Ireland with due regard to the need to promote equality of opportunity:

- *“between persons of different religious belief, political opinion, racial group, age, marital status or sexual orientation;*
- *between men and women generally;*
- *between persons with a disability and persons without; and*
- *between persons with dependants and persons without.”*

This statutory duty came into force on 1 January 2000 and impacts on all public bodies in Northern Ireland, cross-border bodies and a number of UK-wide public authorities. Public authorities are also required to have regard to the desirability of promoting good relations between persons of different religious belief, political opinion or racial group.

Most public authorities are required by the legislation to have an equality scheme in place, both as a statement of their commitment to the statutory duties, and a plan for performance of the duties. Public authorities must also assess the equality impact of their policies and publish the outcome of such assessments. If a public authority’s assessment of the impact of a policy shows a possible *“adverse impact”* on any group it must consider how this impact might be reduced, and how an alternative policy might lessen any adverse impact that the policy may have. The public authority must also show that it considered how any alternative policies might better achieve the promotion of equality of opportunity.

The legislation also requires public authorities to consult with affected groups. Before any new legislation can be implemented or major decisions can be made, consultation must take place. Under section 75, *“consultation must be ‘timely, open and inclusive’ and should begin as early as possible, including those directly affected by the policy to be assessed.”* Consultation with those affected by public policy decisions is central to the effectiveness of positive duties. Equality schemes spell out an authority’s arrangements for consultation.

The Equality Commission for Northern Ireland has responsibility for approving the Equality Schemes of all public bodies in Northern Ireland. The Commission also gives advice to public bodies and others on the implementation of the statutory duty, and has powers to investigate complaints that a public authority has failed to comply with an equality scheme.

The recent review of the duty’s initial impact has identified its most immediate effect as the creation of a new openness on the part of policy makers to a greater range of perspectives from diverse groups. This has brought about shifts in consultation, monitoring and policy assessment procedures. The duty has also encouraged more extensive equality training, the overhaul of complaints mechanisms, the collection of hitherto unavailable data, the creation of special units, including Good Relations Units, and greater public access to information and public services, particularly for minority ethnic groups and disabled people.

Some specific outcomes of policy impact assessments have included the identification of disability issues as a priority for the Northern Ireland Housing Executive, amendments to the Criminal Justice Compensation Scheme to mitigate adverse impact on the Roman Catholic community, and the harmonisation of prison service allowances for different age groups of prisoners.

Problems with the Northern Irish duty include the lack of any specific requirements for each of the nine grounds, creating the risk that certain grounds might be neglected. There has been good practice in consultation, but this has sometimes created *“consultation fatigue”* in the

voluntary sector, with a lack of well-organised representative groups for some equality grounds. The duty has also been accused of being overly focused on process at the expense of outcome, but it has succeeded in bringing equality to the forefront of public authority business in Northern Ireland.

1.2 Wales

The Government of Wales Act (1998) gives the National Assembly for Wales a statutory duty to:

“Make appropriate arrangements with a view to securing that its functions are exercised with due regard to the principle that there should be equality of opportunity for all people”

The statutory duty extends only to matters that have been devolved to the National Assembly for Wales, however these include health, economic development, education and local government. Unlike the duties and powers of the other devolved administrations, the duty in the Government of Wales Act does not refer to specific equality grounds.

The Minister for Social Justice and Regeneration has responsibility for equality at the Cabinet level within the Welsh Assembly Government and is the chair of the Equality of Opportunity Committee. The Equality of Opportunity Committee ensures that the Assembly has effective arrangements to promote the principle of equality of opportunity for all people in the exercise of its functions and the conduct of its business. The Committee undertakes ongoing monitoring of equality awareness and procedures in the Assembly.

The Equality of Opportunity Committee has looked at equal pay in the Assembly. The Welsh Assembly Government is also developing the use of contractual terms or “contract compliance” in relation to its annual budget. This has an impact on the goods and services that the Assembly procures, and the employment practices of those that the legislature does business with. The Assembly executive has launched a voluntary code of equality practice for suppliers, supported by a dedicated website. This is comparable to the approach to positive action in Austria, where Government contracts are only awarded to companies and individuals who observe the equality legislation.

The Equality of Opportunity Committee's initial work plan stated the Welsh executive's aim of mainstreaming equality across all of the Assembly's functions. A particular need was identified for measurable targets in policy documents with time frames that would enable the Committee and others to assess the effectiveness of Assembly Government policies by reference to equality outcomes. The Equal Opportunities Commission in Wales published an introduction to mainstreaming to establish a common understanding amongst Assembly Members, senior civil servants and policy-makers. The Minister for Social Justice and Regeneration has also made a commitment to trialling the implementation of gender budgeting processes in the Assembly Government.

The duty requires the Welsh Assembly to ensure that the public authorities that are subject to its remit promote equal opportunities in the performance of their functions. This duty in tandem with a favourable political climate has contributed to the emergence of a proactive equality agenda in Wales and to improving the output of existing initiatives. The Welsh Assembly Government has established a Public Sector Round Table on Equalities and an Equalities Unit within the Welsh Local Government Association, both of which complement the Welsh Equalities Standard that has been developed to assist Welsh public authorities in implementing the duty.

The deficiency in the Welsh duty remains the lack of an enforcement mechanism to secure progress should the current political impetus fade. The Welsh duty is only enforceable via judicial review, which is an expensive and unsatisfactory mechanism for ensuring compliance

with this kind of requirement. Under Schedule 9 of the Government of Wales Act, the Welsh Administration Ombudsman may challenge the Assembly for maladministration, which may also provide an enforcement route for the duty. The audit inspectorates can monitor Welsh public bodies for compliance with the duty. Nevertheless, the lack of a direct enforcement mechanism makes the duty's successful implementation largely dependent on political will. There is no body, for example, with the power to issue compliance notices in respect of public authorities' failure to implement the Welsh duty. Where that will is present, it serves as a very useful tool: however, it may not be suitable for other political contexts where sustainability may be more of a challenge.

1.3 Scotland

Unlike the National Assembly for Wales, the Scottish Parliament has no statutory duty to promote equality. The Scotland Act gives the Scottish Parliament power to encourage equal opportunities, including:

“The prevention, elimination or regulation of discrimination between persons on grounds of sex or marital status, on racial grounds, or on grounds of disability, age, sexual orientation, language or social origin, or of other personal attributes including beliefs or opinions, such as religious beliefs or political opinions.”

This power is to have due regard to existing equal opportunities legislation in their work in devolved areas.

Concrete results of this power have included the insertion of equal opportunities duties in the Scottish Parliament's Housing Act, the Scottish Parliament's Local Government Act and in education policies. There has also been equality mainstreaming in the processes of the Parliament and the Executive. The Minister for Social Justice is responsible for equality in the Scottish Executive and the Executive's Equality Strategy outlines plans to change the way the Executive works to ensure better service provision and greater equality of opportunity. All legislation proposed by the Scottish Executive must be accompanied by a statement of its impact on equal opportunities. The Equal Opportunities Committee of the Scottish Parliament monitors the work of the Scottish Executive and the committees of the Scottish Parliament in developing the equalities agenda and mainstreaming equalities. The Committee has published a report on mainstreaming equality in the work of committees of the Scottish Parliament. The Scottish power is not a duty, and is unenforceable, but does provide a useful enabling tool.

The Scottish Executive can also impose a duty on Scottish public authorities and cross-border public bodies operating in Scotland to ensure that functions are carried out with due regard for equality of opportunity.

1.4 Greater London Authority (GLA)

The Greater London Authority Act 1999 states that:

“The Authority shall make appropriate arrangements with a view to securing that in the exercise of powers, the formulation of policies and proposals and in the implementation of any of those strategies, there is due regard to the principle that there should be equality of opportunity for all people.”

The GLA duty covers six grounds - age, disability, gender, race, religion and sexual orientation. Implementation is based on a comprehensive Equalities Framework, including comprehensive consultation and reporting mechanisms such as the London Older People's Assembly and the annual Mayoral Equalities Report. The GLA also reports on individual

equality grounds, including reviews of the organisation's gender equality and disability equality schemes. Equality has been built into the public procurement process and into the GLA compact with the voluntary sector (the formal agreement on the relationship between the GLA and the voluntary sector). The GLA has also announced its commitment to securing that equality considerations are highlighted in the procurement processes for the building of the Olympic venues and other major public building projects in London.

Equality is also built into the Mayor's overall budget processes. The budget and equalities process considers resource allocation in the context of strategic policy, organisation and service delivery. The process is meant to create an organisational culture where equality is openly and explicitly at the heart of resource prioritisation and allocation. It contributes towards allowing each organisation in the GLA Group³ to demonstrate that they are fulfilling their statutory obligations, as well as keeping equalities at the forefront of the GLA Group's agenda. The process tests the integrity and soundness of the business planning process and the resulting budget and examines the relationship between equalities plans and ambitions with the resources devoted to achieving them.

The GLA duty has raised consciousness of the need for demonstrable outcomes across all equality grounds, however the lack of an enforcement mechanism leaves the duty vulnerable to changes in the political climate.

2. THE EQUALITY DUTIES

2.1 The Race Equality Duty

The Race Relations (Amendment) Act 2000 placed a comprehensive positive duty on public authorities across Great Britain to promote race equality.

The general duty

The Race Relations (Amendment) Act 2000 imposes a general positive duty on an extensive list of specific public authorities listed in Schedule 1A of the Act. Under this Act, public authorities must pay due regard to

- “a) the need to eliminate racial discrimination and*
- b) to promote equality of opportunity and good relations between people of different ethnic groups.”*

The Commission for Racial Equality (CRE) in its code of practice defines “*due regard*” as meaning that “*the weight given to race equality should be proportionate to its relevance to a particular function, incorporating the requirements of relevance and proportionality.*”

The CRE code of practice states that public authorities should “consider” meeting the duty by identifying which of their functions are relevant to the duty, setting priorities for these functions based on their relevance for race relations, assessing how the implementation of these

³ The Mayor sets the annual budget for five organisations. These organisations, which have become known as the 'GLA Group', comprise:

- the Greater London Authority;
- Transport for London, which provides bus, river and some light rail services, maintains London's main roads, regulates London's licensed taxi service and runs the Tube;
- the Metropolitan Police Authority, which is responsible for maintaining an effective and efficient police service for London;
- the London Development Agency, which works with business to sustain and improve London's role as a business centre, while increasing economic opportunity for all Londoners;
- London Fire Brigade, which responds to fires and promotes fire prevention, under the oversight of London Fire and Emergency Planning Authority.

functions and related policies affect race equality, and considering how the policies and practices might be changed, where necessary, to meet the duty. Where a listed authority has made arrangements for a private or voluntary body to carry out some of its functions, then it is required to make the necessary arrangements (by inserting appropriate contractual terms for monitoring and enforcement if necessary) to ensure that its obligations under the duty are fulfilled: authorities cannot evade their obligations under the duty by “contracting-out” or by entering into public-private partnerships.

The specific duties

The general duty is supplemented by specific duties imposed by the Home Secretary on specific public authorities. Listed central government departments, local authorities, police, other criminal justice authorities, health authorities, educational authorities and regulatory bodies are required to prepare and publish a Race Equality Scheme, setting out how they intend to fulfil the requirements of the duty. The scheme should explain how they will meet both their general and specific duties.

Under the Race Equality Scheme, the listed public authorities to which this requirement applies must:

- *“assess whether their functions and policies are relevant to race equality*
- *monitor their policies to see how they affect race equality*
- *assess and consult on policies they are proposing to introduce*
- *publish the results of their consultations, monitoring and assessments*
- *make sure that the public have access to the information and services they provide*
- *train their staff on the new duties.”*

The Race Equality Scheme – itself one of the specific duties – essentially packages the other duties into a coherent strategy and action plan. The Scheme must also set out its arrangements for publishing the results and for making sure the public has access to public services and information, as well as the authority’s training arrangements in respect of race equality.

In addition, listed public authorities are under various specific duties to monitor the ethnic composition of their staff and the ethnic make-up of the pool of applicants for posts, promotion and training. In addition, if these listed authorities have more than 150 full-time staff, they are required to monitor the composition of those involved in grievances, disciplinary procedures and performance appraisals, training and those who are dismissed.

A similar duty is imposed on educational bodies in respect of the ethnic composition and performance of their staff and pupils. Schools must prepare and publish a race equality policy, as well as monitor and assess how their policies affect ethnic minority pupils, staff and parents. Higher and further education institutions must prepare a race equality policy, assess how their policies affect ethnic minority students and staff and arrange to publish their policy and the results of assessments and monitoring.

The race duty does not require race equality schemes to be referred to the CRE for formal approval (unlike in the case of Northern Ireland) on account of the potentially ungovernable workload, but the CRE does have a crucial enforcement responsibility for the duty. It can issue a compliance notice to any public authority that is failing to comply with one of the specific duties, requiring the authority to take steps to meet the duty and to provide evidence of compliance. If after three months the CRE considers the authority is still in violation of the duty in question, an order from a county court or the sheriff’s court (Scotland) ordering compliance can be sought. As the specific duties impose clear and specific procedural requirements, failure to comply or inadequate compliance with these procedural requirements

may be straightforward to challenge. A failure by a public authority to prepare a race equality scheme or to monitor its workforce could therefore be challenged under this procedure.

The specific duties imposed on the listed authorities, in respect of educational authorities and public sector employers, require those authorities to make the necessary arrangements to fulfil these duties, so a failure to implement these specific duties (as distinct from a failure to draw up the required schemes) will be challengeable. However, it may not be possible to challenge failure to implement adequately other commitments made by public authorities in race equality schemes under this procedure, as there is no specific duty to fulfil these commitments.

The approach of the Great Britain race duty, which is reflected in the disability duty and proposed gender duty, can be compared with the positive duty to promote gender equality in Estonia.⁴ The Estonian legislation makes it clear that *"State and local government agencies are required to promote gender equality systematically and purposefully."* However, unlike the regime of specific duties in the Great Britain race, disability and gender duties, the Estonian legislation gives the Minister of Social Affairs the power to *"make recommendations concerning performance of the obligations."* It also appears that the positive duty in Estonia is not enforceable in the same way as the specific duties under the race, disability and gender duties in Great Britain.

Enforcement

A failure to actually implement an equality scheme or, crucially, to comply with the general duty itself can only be challenged by judicial review (by individuals with the necessary legal standing or the CRE) or by the CRE launching a formal investigation under its powers conferred by sections 48–52 and 58–62 of the Race Relations Act. Both are legally high-risk strategies, as demonstrating a failure to give "due regard" to the duty will be difficult, and involve substantial costs. This means that it may be very difficult to enforce the implementation of equality schemes or compliance with the general duty. The CRE also lacks the powers to require authorities to produce evidence of the steps they are taking to comply with the duty. The enforcement mechanisms for the race duty are, therefore, lacking in teeth.

The CRE commissioned an independent review of responses to the duty in the first year. Just over a third of the respondents were responding well to both the spirit and letter of the law, with thirty-nine per cent of the random sample of analysed schemes and policies assessed as "fully" or "mainly" developed. There was a further significant group who had put the building blocks in place, but have some way to go. Lastly, there was a group where the response was weak and, in some cases, did not yet comply with the legislation. Certain areas of necessary improvement were noted, including a clear desire for more guidance and support, lags between sectors (in particular in the education field) and a need for organisations to articulate more clearly what they are aiming to achieve within a concrete timetable, including how better to link impact assessment and monitoring. Authorities were also often giving less attention to the employment duties, and mostly addressed good relations or partnership and procurement strategies in their assessments of functions and policies. However, this independent study also found that public authorities strongly value the ways in which the duty has improved policy-making and service delivery design.

⁴ Response of the Estonian Chancellor of Justice

2.2 The Disability Duty

From December 2006, public authorities in Great Britain will be under a positive duty to promote equality for disabled people.

The general duty

The Disability Discrimination Act 2005 imposes a positive duty on public authorities when carrying out their functions to pay due regard to the need to:

- *“promote equality of opportunity between disabled persons and other persons;*
- *eliminate discrimination that is unlawful under the Act;*
- *eliminate harassment of disabled persons that is related to their disabilities;*
- *promote positive attitudes towards disabled persons;*
- *encourage participation by disabled persons in public life; and*
- *take steps to take account of disabled persons’ disabilities, even where that involves treating disabled persons more favourably than other persons.”*

This general duty applies to every Public Authority. The Disability Discrimination Act does not define a public authority other than to say that it includes *“any person certain of whose functions are functions of a public nature.”* This is the same approach as that contained in the Human Rights Act 1998, and differs from the approach of the Race Relations (Amendment) Act 2000 which imposes a general positive duty on an extensive list of specific public authorities listed in Schedule 1A of the Act.

The statutory Code of Practice produced by the Disability Rights Commission (DRC) states that:

“A person will be exercising a “public function” where it is in effect exercising a function which would otherwise be exercised by the state – and where individuals have to rely upon that person for the exercise of the governmental function.”

This definition would include both private and voluntary sector organisations that are, in the words of the DRC, *“standing in the shoes of government”*, and providing public services that are paid for by public funds. In an age of growing public-private initiatives, the move away from a list based approach to a definition of public authorities is likely to prove vital in ensuring that all bodies that provide public services are required to implement the positive duty.

The specific duties

The disability duty follows the model of the race duty in imposing specific duties on listed public authorities. The disability duty model, having learnt lessons from the design of the race duty, is designed to be more action and outcome focused. Public authorities' compliance with the disability duty will be measured in terms of the action that they take to eliminate unlawful discrimination and promote equality for disabled people.

The Code of Practice produced by the DRC sets out the requirements of the specific duties:

- *“a public authority should publish a Disability Equality Scheme demonstrating how it intends to fulfil its general and specific duties;*
- *a public authority should involve disabled people in the development of the scheme;*

- *the scheme should include a statement of:*
 - *the way in which disabled people have been involved in the development of the scheme;*
 - *the authority's methods for impact assessment;*
 - *steps which the authority will take towards fulfilling its general duty (the "action plan");*
 - *the authority's arrangements for gathering information in relation to employment, and, where appropriate, its delivery of education and its functions;*
 - *the authority's arrangements for putting the information gathered to use, in particular in reviewing the effectiveness of its action plan and in preparing subsequent Disability Equality Schemes.*
- *a public authority must, within 3 years of the scheme being published, take the steps set out in its action plan (unless it is unreasonable or impracticable for it to do so) and put into effect the arrangements for gathering and making use of information;*
- *a public authority must publish a report containing a summary of the steps taken under the action plan, the results of its information gathering and the use to which it has put the information."*

Unlike the race duty, all listed public authorities must comply with the same specific duties. Under the disability duty, there are no separate provisions for the education sector or employment sectors, other than in relation to information gathering.

The disability duty also differs from the race duty in placing a specific duty on specific secretaries of state⁵ and the National Assembly for Wales who are designated as reporting authorities. The DRC Code of Practice states that:

"From December 2008, these reporting authorities will have to publish a report every three years that:

- *Gives an overview of the progress made by public authorities in that policy sector in relation to disability equality.*
- *Sets out proposals for coordination of action by those public authorities in that policy sector to bring about further progress on disability equality."*

The aim of the "Secretary of State" duty, as it is known, is to "*prompt leadership on disability equality across key elements of the public sector.*" It is envisaged that this duty will ensure that strategic action is taken across key elements of the public sector to tackle the main causes of inequality for disabled people.

Enforcement

The DRC has published the statutory Code of Practice for the disability duty, and will also provide guidance to the public sector on how to implement the duty. The DRC also has an enforcement role in relation to the disability duty. The DRC's enforcement powers relate to the implementation of the specific duties, and mirror those of the CRE in relation to the specific

⁵ The Secretaries of State listed for the purposes of the disability equality duty are:

- the First Secretary of State
- the Secretary of State for Constitutional Affairs
- the Secretary of State for Culture, Media and Sport
- the Secretary of State for Education and Skills
- the Secretary of State for Environment, Food and Rural Affairs
- the Secretary of State for Health
- the Secretary of State for the Home Department
- the Secretary of State for Trade and Industry
- the Secretary of State for Transport; and
- the Secretary of State for Work and Pensions.

duties under the Race Relations (Amendment) Act 2000. The DRC will be empowered to issue compliance notices to public authorities, and to seek a court order to require a public authority to comply with a compliance notice.

2.3 The Gender Equality Duty

The Equal Opportunities Commission (EOC) has been campaigning for the introduction of a gender equality duty since 1999. The provisions to introduce the gender equality duty are in the Equality Bill, currently before Parliament in Westminster. The main focus of the provisions of the Equality Bill is the establishment of a single Commission for Equality and Human Rights in Great Britain.

A legal requirement to mainstream?

Almost all of the EU Member States, as well as Canada, Australia and New Zealand, have implemented gender mainstreaming programmes of varying degrees of effectiveness and ambition. In Great Britain, the Women and Equality Unit based in the Department for Trade and Industry (DTI) has developed a guide to gender impact assessments to help policy makers assess whether their policies will deliver equality of opportunity across the board, and also to encourage them to question the assumption that policies and services affect everyone in the same way. In 2003, the government introduced a gender equality Public Service Agreement. The Public Service Agreements (PSAs) were introduced as a performance management measure for central government. Performance under the PSAs is measured against objectives that are set out in those PSAs. The amount of money allocated to central government departments by the Treasury, under the Comprehensive Spending Review (CSR), is linked to their performance under the PSAs.

The gender equality PSA is a cross-government PSA, owned by the DTI. In the document *Delivering on Gender Equality*, published in 2003, the Government set out the specific targets and initiatives across government, which were seen by the Ministers for Women to be key to delivering improvements in gender equality, and which they believed should underpin the gender equality PSA.

Despite these initiatives, the Women's National Commission (WNC), an NGO and independent advisory group to the Government, has stated that "*women's organisations have been disappointed by the lack of real progress in gender mainstreaming between 1999 and 2003.*" There has been no systematic evaluation of gender mainstreaming in the government, but the WNC and their partners are concerned that "*it clearly consists, at best, of pockets of good practice only.*" This comment relates to the period 1999 - 2003, but could equally be applied to the period 2003 - 2005.

The EOC believes that the gender equality duty can act as a legal requirement to mainstream gender. By requiring institutions themselves to deliver equality for their employees and service users, the gender equality duty has the potential to address some of the most intractable forms of inequality between women and men. Public bodies should no longer be designing policies which do not meet the realities of women's and men's lives – such as pension policies which assume a 40 year unbroken working life with no caring responsibilities. Public service providers will have to think again about whose needs they are addressing and how. Furthermore, the workforce that provides public services will benefit from more positive policies to close the pay gap and address their needs in balancing working and family life.

The general duty

As stated above, the Equality Bill contains the legislative provisions to introduce the gender equality duty. The gender duty follows the same model as the race and disability duties, with a general duty – set out in the Equality Bill – and specific duties that will be introduced

through Regulations once the Equality Bill becomes law. The projected date of implementation for the gender duty is April 2007.

The general duty in the Equality Bill requires public authorities to pay due regard to the need to:

- *“eliminate unlawful sex discrimination and harassment, and*
- *promote equality of opportunity for women and men”*

The general duty will apply to all public authorities. Like the disability duty, the gender duty includes a definition of a public authority, and not a list. The definition in the gender duty is *“any person who has functions of a public nature.”* Private and voluntary sector organisations who are providing services on behalf of a public authority, for example running a prison or hospital, will fall within the definition of public authorities and so be subject to the duty – though only for the area of their work directly relating to the service. The EOC is, however, concerned that the definition of a public authority set out in the Equality Bill differs slightly from that in the Disability Discrimination Act 2005 and the Human Rights Act 1998, and that judges are likely to read significance into that difference. The EOC is calling on the government to amend the definition in the Equality Bill to bring it into line with the definition in the Disability Discrimination Act 2005. The EOC believes that public authorities will welcome a single definition for both the disability and gender general duties.

Elimination of discrimination on the grounds of gender reassignment

Unlawful sex discrimination under the Sex Discrimination Act 1975 (as amended) includes the prohibition of discrimination on grounds of gender reassignment in employment and vocational training. The first element of the gender duty, the requirement to eliminate unlawful discrimination, will therefore require public authorities to have due regard to the need to eliminate discrimination on grounds of gender reassignment in employment and vocational training. Currently, however, there is no protection on grounds of gender reassignment in the provision of goods, facilities and services. Public authorities, therefore, in implementing the requirement in the first half of the gender duty to pay due regard to the need to eliminate discrimination, will not be required to eliminate discrimination on grounds of gender reassignment in the provision of goods, facilities and services or the exercise of public functions.

This distinction between discrimination on grounds of gender reassignment in employment and vocational training and discrimination in the provision of goods, facilities and services is likely to be confusing for public authorities. The lack of consistency may lead public authorities to fail to recognise the legal duty that they will have to take proactive measures to eliminate discrimination on grounds of gender reassignment in the areas of employment and vocational training. Extending goods, facilities and services protection on grounds of gender reassignment has not been included in the Equality Bill. This is regrettable, not least because it will remain lawful for public authorities to discriminate against a small, but vulnerable group of people. Further, the EU Gender Equal Treatment in Goods and Services Directive⁶ which implements the principle of equal treatment between men and women in the access to and supply of goods and services and thus provides protection on grounds of gender reassignment in the provision of goods and services, will have to be implemented by government by December 2007 in any event. It would be far more straightforward if public authorities implementing the gender duty were required to eliminate discrimination against transsexual people in the provision of goods, facilities and services from the date of implementation of the gender duty. The staggered implementation is likely to cause confusion for public authorities.

The second limb of the gender equality duty, dealing with the promotion of equality between women and men does not include a specific obligation to promote equality of opportunity

⁶ Council Directive 2004/113/EC of 13 December 2004

between transsexual people and people generally. Whilst it is true that transsexual people, as men or women, will benefit from the general obligation to promote equality of opportunity between the sexes, much of the inequality that transsexual people face, in employment, in the provision of goods, facilities and services and in the exercise of public functions is related to their transsexual status and not their status as women or men. The EOC, therefore, would like to see transsexual and transgender people explicitly covered by the gender duty, in order to ensure that this vulnerable group of people benefit fully from the requirement to promote equality under the gender duty.

The specific duties

The Equality Bill includes a provision giving the Secretary of State power to set by order specific duties that will set out the specific steps that public authorities must take to comply with the general duty.

On 4 October 2005, the Department for Trade and Industry (DTI) launched a consultation paper, *Advancing Equality for Men and Women: Government proposals to introduce a public sector duty to promote gender equality*. The consultation paper sets out the government's proposals for the specific duties. The Government is proposing three specific duties:

“Gender Equality Schemes

A public authority must:

- *draw up a scheme identifying gender equality goals and showing the action it will take to implement them;*
- *consult employees and stakeholders as appropriate in setting gender equality goals and schemes;*
- *publish their gender equality goals and scheme;*
- *monitor progress and publish annual reports on progress; and*
- *review their gender equality goals & scheme every three years.*

Equal pay

A public authority must develop and publish a policy on developing equitable pay arrangements - including measures to ensure fair promotion and development opportunities and tackle occupational segregation - between women and men which must be reviewed at regular intervals (for example, every three years).

Gender impact assessments

Public authorities must:

(I) Conduct and publish gender impact assessments, consulting appropriate stakeholders, covering:

- *all primary legislation and significant secondary legislation; and*
- *all major proposed developments in employment/policy/services.*

(II) Develop and publish arrangements for identifying developments that justify conducting a formal gender impact assessment.”

The EOC is concerned that the specific duties, as currently worded, will not ensure that strategic action is taken to target gender inequality. Strong leadership is vital to the success of the gender duty, and central government needs to show leadership and ensure a strategic approach to the implementation of the duty. Without this, there is a danger that the duty will result in separate and unconnected initiatives in different public authorities, which do not lead to systematic change. The EOC wants to see secretaries of state setting targets and reporting on progress across the public sector in which they lead, rather than just for their Whitehall departments (ministries). The EOC believes that there should be a duty on secretaries of state to set targets in relation to gender that is similar to the specific duty on named secretaries of state under the disability duty.

The EOC also believes that policy levers, such as government's forthcoming Comprehensive Spending Review (CSR) for 2007 and its associated Public Service Agreements (PSAs), need to be used to ensure government action on gender focuses effectively on tackling the biggest problems. Legally, the enforceable specific duties cannot be applied simply to central government as a whole; they have to be applied to each secretary of state. However, what Britain needs is a government-wide gender equality strategy focussing on issues like closing the gender pay gap, tackling occupational segregation and removing the barriers and penalties facing parents and carers. It is vital that ministers take the opportunity of the gender duty (and the CSR) to create a robust cross-government gender equality strategy. This strategy should drive the PSAs that individual departments agree with the Treasury.

The EOC also wants to see responsibility for action on each major issue, for example closing the gender pay gap, belong to one secretary of state who could then lead across the public sector and be held accountable for progress.

The EOC is also concerned that the specific duties, as currently worded, are not sufficiently action focussed. The EOC welcomes and supports the government's view that the gender duty should focus on outcomes and not on process. However, the EOC is concerned that in the drafting of the specific duties, the government has failed to include clear requirements for public authorities to take action to tackle discrimination and to promote equality. The wording of the specific duties must set out clearly for public authorities the action they must take to meet the duties. Currently the specific duty on equal pay only requires a policy, not the legally enforceable taking of action. The EOC is also concerned that, as it is currently worded, the specific duty to produce gender equality goals and schemes stops short of requiring public authorities to take legally enforceable action to implement the gender equality scheme.

The role of the EOC

The EOC has been working closely with the Women and Equality Unit at the Department for Trade and Industry (DTI) on the development of the gender duty. The EOC will have a statutory responsibility to produce the gender duty Code of Practice. Like the race duty Code of Practice produced by the CRE and the disability duty Code of Practice produced by the DRC, the gender duty Code of Practice will be a statutory Code of Practice, and courts will have to take account of the Code in any proceedings to enforce the gender duty.

The EOC will also be providing guidance to public sector organisations on how to implement the gender duty. The EOC plans to produce sectoral guidance, e.g. specific guidance for the health sector, for education, for local authorities, but will also be providing guidance on particular topics, e.g. gender impact assessments and procurement.

The Equality Bill provides enforcement powers for the EOC in relation to the specific duties under the gender duties. These are similar to the enforcement powers that the CRE and DRC have in relation to the race and disability duties.

3. THE FUTURE FOR POSITIVE DUTIES

Enforcement of existing and planned positive duties

The key aim of the Equality Bill is to establish the Commission for Equality and Human Rights (CEHR) to promote equality, enforce anti-discrimination legislation, and to promote understanding, awareness and protection of human rights. The CEHR will build on the work of the CRE, the DRC and the EOC, as well as take responsibility for the new equality areas of religion and belief, sexual orientation and age. The DRC and EOC will be dissolved on the establishment of the CEHR, with the CRE joining the CEHR by 31 March 2009.

The Equality Bill contains provisions giving the CEHR powers to enforce not only the specific duties under the race, disability and gender duties, but also the general duties. It will therefore have far broader enforcement powers in relation to the three duties than the current Commissions. The Equality Bill gives the CEHR power to assess "*the extent to which or the manner in which a person has complied with*" the general duties under the race, disability and gender duties. If the CEHR believes that a public authority has failed to comply with one of the general duties, it will be able to issue a compliance notice. If the CEHR believes that a public authority has failed to comply with a compliance notice, it will be able to apply for a court order requiring the public authority to comply with the compliance notice.

The Discrimination Law Review: a single equality act and a single equality duty?

In March 2005, the government announced plans to undertake a review of discrimination law in the Great Britain context. The terms of reference for the Discrimination Law Review, which is being conducted by the Department for Trade and Industry, is to "*consider the opportunities for creating a clearer and more streamlined equality legislation framework, which produces better outcomes for those who experience disadvantage.*" The Labour Party, in its election manifesto for the 2005 general election, committed itself to introducing a Single Equality Act by the end of the current Parliament. The work of the Discrimination Law Review has been specifically designed to consider "*the opportunities for creating a simpler, fairer and more streamlined legislative framework in a Single Equality Act.*" The Single Equality Act is expected to harmonise equality legislation across the six grounds of age, disability, gender, race, religion or belief and sexual orientation.

It is possible that a Single Equality Act will include a single positive duty applicable across all six equality grounds. A single equality duty could have great potential to mainstream equality into the development and delivery of public services and into public sector employment.

Annex

Equinet Questionnaire on the strategic enforcement of the powers of equality bodies

QUESTIONNAIRE

on

STRATEGIC ENFORCEMENT OF THE POWERS OF SPECIALISED EQUALITY BODIES

Introduction

The following Questionnaire is developed by **European Network of Equality Bodies'** (Equinet) **Working Group 2 on Strategic Enforcement** (WG2).

The object of WG2 is to contribute to the effective implementation by specialised equality bodies (SEB) of their mandate through exchanging expertise, experience and information on the strategic enforcement of their powers. This will be done by focusing on some of the powers available to the SEBs, including some of those listed in Directive 2000/43 (assistance to victims, conducting surveys and issuing reports and recommendations) and will have a particular focus on those powers available to the bodies that go beyond individual enforcement. It will explore which powers are available and which are being used, the criteria for selecting and deploying a particular power, the experience of using these powers and any problems or issues arising, and the challenge of using limited resources in a context of unlimited demand. WG2 will identify strategies for the effective enforcement of equal treatment legislation, for the effective deployment of the powers available to equality bodies and for the further development of the powers made available to the bodies.

WG2 has chosen to focus on five specific powers of enforcement that can be utilised strategically:

- Legal assistance to individuals
- General inquiries
- Investigations
- Interventions
- Positive duties

The object of the Questionnaire is to identify the powers available, the criteria that each body uses to decide which power to apply and when to apply it, how the powers work in combination, the body's assessment of the powers, and what powers the body in its own opinion needs in order to be able to complete its tasks/fulfil its role efficiently.

WG2 will use the information received to explore how the powers of the SEBs\ are used in practice and how the powers are and can be used in combination. The outcome will be expert papers on the pros and cons of the powers with suggestions for effective approaches to strategic enforcement. The expert papers will result in one report pr. year featuring 4-5 expert papers.

Scope

The questions in the Questionnaire are limited to the bodies' powers within the scope of Directive 2000/78/EC (access to employment etc.) and within the field of goods and

services as defined in Directive 2000/43/EC. The investigation will include the SEBs' mandate to enforce these powers to combat discrimination on the grounds mentioned in Directive 2000/78/EC (religion, belief, etc.), as well as racial and ethnic origin, and gender.

Please elaborate when filling out the Questionnaire

By means of the Questionnaire it is the intention of WG2 to explore in more detail in what areas and how the SEBs enforce their powers strategically and what their experiences within this field are. It is therefore important that you elaborate on your answers whenever possible, e.g. when you are asked to provide further comments to a yes/no answer, and to give as detailed a picture as possible of the powers available to you, how they are used, and how they could be used more efficiently.

Questions

If you have any questions on how to complete the Questionnaire, please do not hesitate to contact the moderator of WG2, Eddie Omar Rosenberg Khawaja, on phone +45 32 69 89 44 or email eok@humanrights.dk.

Returning the Questionnaire

The completed Questionnaire is to be emailed to Fiona Palmer at Migration Policy Group's secretariat: fiona.palmer@migpolgroup.com

Deadline

The deadline for returning the Questionnaire is **29 July 2005**.

Name of the SEB:	
Country:	
Contact Person:	Email:

1. LEGAL ASSISTANCE TO INDIVIDUALS

1.1 Can you (your organization) handle individual complaints? If yes, please state on which grounds (race, religion etc.):

(please write answer here)

1.2 If no, please state whether it is the opinion of your organization that it should be able to do so and why/why not?

(please write answer here)

1.3 If yes, which procedure does your organization apply when investigating the case?

(please mark with x where relevant)

<input type="checkbox"/>	The inquisitorial procedure (as a neutral party)
<input type="checkbox"/>	On behalf of the complainant (as representative of the complainant)

Other:

(please write answer here)

1.4 How does the SEB obtain information when investigating the case?

(please mark with x where relevant)

<input type="checkbox"/>	The SEB has powers to compel the parties of the case to produce documents
<input type="checkbox"/>	The SEB has powers to compel third parties to produce documents
<input type="checkbox"/>	The SEB has powers to compel the parties to give statements under oath
<input type="checkbox"/>	The SEB has powers to compel witnesses to give statements under oath
<input type="checkbox"/>	The SEB has powers to compel access to premises
<input type="checkbox"/>	The body can obtain information from other bodies, authorities etc, e.g. statistical information, reports, etc
<input type="checkbox"/>	Non-cooperation with the SEB's investigation is a criminal offence
<input type="checkbox"/>	Non-cooperation with the SEB's investigation is a civil offence
<input type="checkbox"/>	Non-cooperation with the SEB's investigation can be subject to a fine

Other:*(please write answer here)***1.5 What powers of investigation would your organization like to be granted in order to be able to make the investigation of individual complaints more effective?***(please write answer here)***1.6 Can your organization use the principle of shared burden of proof?**

YES	<input type="checkbox"/>	NO	<input type="checkbox"/>
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1.7 If no, what rules of burden of proof does your organization apply?*(please write answer here)***1.8 Your organization's options for deciding/finalizing the case:***(please mark with x where relevant)*

<input type="checkbox"/>	The SEB can issue legally binding decisions
<input type="checkbox"/>	The SEB can issue non-legally binding statements
<input type="checkbox"/>	The SEB can award damages. If yes, please specify which types: <i>(please specify here)</i>
<input type="checkbox"/>	The SEB can recommend that damages are awarded. If yes, please specify which types: <i>(please specify here)</i>
<input type="checkbox"/>	The SEB can recommend that certain measures are taken (e.g. that the respondent changes its policies). If yes, please specify which types: <i>(please specify here)</i>
<input type="checkbox"/>	The SEB can mediate between the parties and thereby reach a settlement
<input type="checkbox"/>	The SEB can recommend changes in the law on grounds of the results of the case
<input type="checkbox"/>	The SEB can recommend that free legal aid at the courts is given to the complainant
<input type="checkbox"/>	The SEB can take the case to court on behalf of the complainant with the consent of the complainant
<input type="checkbox"/>	The SEB can take the case to court on behalf of the complainant without the complainants consent
<input type="checkbox"/>	The SEB can impose fines

Other:*(Notice the questions on Interventions in section 4 below, which are not to be answered here)**(please write answer here)*

1.9 What way of deciding/finalizing the case does your organization find most effective and why?

(please write answer here)

1.10 What powers of investigation would your organization like to be granted in order to be able to determine/finalize a case in a certain way and why?

(please write answer here)

1.11 Positive and negative effects of individual complaints handling seen from a strategic enforcement perspective:

(please mark with x where relevant)

<input type="checkbox"/>	It clarifies the content of existing non-discrimination laws
<input type="checkbox"/>	Handling of individual complaint cases can lead to landmark decisions entailing positive changes in general, e.g. in practises or in the law
<input type="checkbox"/>	The SEB receives too many individual complaints causing backlog of cases
<input type="checkbox"/>	There are areas where handling of individual complaints does not seem to lead to less discrimination in general. If yes, please give examples: <i>(please give examples here)</i>
<input type="checkbox"/>	It is often too difficult for the claimant/SEB to overcome evidential burdens and cases are therefore often rejected. If yes, please identify in which specific areas: <i>(please specify here)</i>

Other positive or negative effects:

(please write answer here)

1.12 How many individual complaints did your organization receive in 2004?

(number)

1.13 What percentage of individual complaints finalized in 2004 resulted in findings of discrimination?

%

1.14 What percentage of individual complaints were settled through mediation in 2004?

%

1.15 Is there an increase in individual complaints over the years of your organization's operation?

YES		NO	
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Please specify why/why not:

(please specify here)

2. GENERAL INQUIRIES

*(Please note when answering the questions in section 2 and section 3 that **general inquiries** differ from **investigations**. Unlike an investigation, a general inquiry does not usually require a belief that discrimination has taken place. Furthermore, a general inquiry can cover a whole sector, for example housing, while an investigation is usually more specific and must comply with strict legal procedures to ensure that the party being investigated can respond etc. In some countries investigations are also known as own initiative investigations/own initiative cases/ex officio investigation of cases)*

2.1 What powers do you have to undertake inquiries into general topics for which you have responsibility (i.e. on which grounds and areas)?

(please write answer here)

2.2 If you do not have the powers to undertake general inquiries, please state whether it is the opinion of your organization that it should be able to do so and why/why not:

(please write answer here)

2.3 Do these powers allow you to look at a theme or sector?

(please write answer here)

2.4 Do they allow you to look at the practice or operations of a specific organisation or company?

(please write answer here)

2.5 What is the process you would undertake to begin an inquiry? Can someone outside your organisation request that you do this (e.g. a minister of government or a judge)?

(please write answer here)

2.6 What process/stages do you go through when undertaking an inquiry (i.e. terms of reference, launch, public hearings, submissions)?

(please write answer here)

2.7 What powers do you have to request or compel (demand) evidence?

(please write answer here)

2.8 What happens after the inquiry is completed? (i.e. do you write a report? If so what do you do with it?)

(please write answer here)

2.9 Do you have any other powers or tools that you can use in the course of undertaking an inquiry?

(please write answer here)

2.10 In what situations would you consider an inquiry to be the best recourse for a problem? (i.e. where there is no individual complainant? you have received information or intelligence from a number of complainants but not enough to file an individual case? The matter is best served by taking a wide look at an issue without implicating a single company or organisation?)

(please write answer here)

2.11 How many inquiries have you launched in 2004?

(number)

2.12 What percentage of your organization's inquiries finalized in 2004 resulted in findings of discrimination?

%

2.13 Has there been an increase in inquiries undertaken by your organization over the years of your operation?

YES

NO

Please specify why/why not:

(please specify here)

2.14 Does your organization consider its inquiries more effective than investigations launched on grounds of individual complaints or investigations launched on your organization's own initiative?

(please write answer here)

2.15 How can your organization increase the effectiveness of its inquiries (e.g. by being granted more resources, if so, for what; by being granted additional powers in relation to undertaking inquiries, if yes, what powers, etc)?

(please write answer here)

3. INVESTIGATIONS

*(Please note when answering the questions in section 2 and section 3 that a **general inquiry** differs from an **investigation**. Unlike an investigation, a general inquiry does not usually require a belief that discrimination has taken place. Further, a general inquiry can cover a whole sector, for example housing, while an investigation is usually more specific and must comply with strict legal procedures to ensure that the party being investigated can respond etc. In some countries investigations are also known as own initiative investigations)*

3.1 What powers do you have to undertake investigations for which you have responsibility (i.e. on which grounds and areas)?

(please write answer here)

3.2 If you do not have the powers to undertake investigations, please state whether it is the opinion of your organization that it should be able to do so and why/why not:

(please write answer here)

3.3 If you do have powers to undertake investigations, please state under which circumstances you can initiate an investigation (e.g. when there is a belief that an individual has been discriminated, when practical, physical or legal impediments makes it impossible for the person(s) involved to complain, when the incident affects a group of people, when the incident has been mentioned in the mass media or in NGO reports, when the incident indicates systematic discrimination)?

(please write answer here)

3.4 Do they allow you to look at the practice or operations of a specific organisation or company?

(please write answer here)

3.5 What is the process you would undertake to begin an investigation? Can someone outside your organisation request that you do this? (e.g. a minister of government or a judge?)

(please write answer here)

3.6 What process/stages do you go through when undertaking an investigation (i.e. terms of reference, launch, public hearings, submissions)?

(please write answer here)

3.7 If there is an alleged victim, is the consent of the alleged victim required? If yes, at what stage?

(please write answer here)

3.8 What powers do you have to request or compel (demand) evidence?

(please write answer here)

3.9 What happens after the investigation is completed? (i.e. do you write a report? If so what do you do with it?)

(please write answer here)

3.10 Do you have any other powers or tools that you can use in the course of undertaking an investigation?

(please write answer here)

3.11 In what situations would you consider an investigation to be the best recourse for a problem? (i.e. where there is no individual complainant? you have received information or intelligence from a number of complainants but not enough to file a individual case? The matter is best served by taking a wide look at an issue without

implicating a single company or organisation?)

(please write answer here)

3.12 Are there any areas for which your organisation has responsibility but in which you are unable to undertake an investigation (for example into human rights issues)?

(please write answer here)

3.13 Before you launch an investigation what information or evidence must you be in possession of in order to go ahead with the investigation? (e.g. do you need to hold a 'reasonable belief' that unlawful discrimination has occurred)?

(please write answer here)

3.14 What (if any) opportunity does the discriminating party have to object to the investigation? What is the procedure for doing this?

(please write answer here)

3.15 Must you abide by time limits when undertaking an investigation or can it be open-ended?

(please write answer here)

3.16 If the report finds that unlawful discrimination has occurred, what powers do you have to enforce this finding?

(please write answer here)

3.17 If the organisation or company is uncooperative (i.e. doesn't agree they have discriminated or refuses to change its policies or practices to remove the risk of this happening again) can you ask the court to prevent this from happening (i.e. an injunction)?

(please write answer here)

3.18 What happens if recommendations are made following an investigation and the party doesn't follow them (i.e. can the courts enforce)?

(please write answer here)

3.19 Are you able to make an agreement to settle the issue without having to pursue other sanctions?

(please write answer here)

3.20 If answer is yes, is this option available to you in settling individual cases of discrimination also?

(please write answer here)

3.21 In what situations do you find it is preferable to settle via agreement rather than by litigation?

(please write answer here)

3.22 What conditions are placed on the accused company or organisation in order to sign-up to an agreement as opposed to litigation?

(please write answer here)

3.23 How many times in the year 2004 has your organization launched an investigation?

(number)

3.24 What percentage of the SEB's investigations finalized in 2004 resulted in findings of discrimination?

%

3.25 Has there been an increase of investigations over the years of your operation?

YES

NO

Please specify why/why not:

(please specify here)

3.26 Does your organization consider its own initiative investigations to be more effective than investigations launched on grounds of individual complaints?

(please write answer here)

3.27 How can your organization increase the effectiveness of its investigations (e.g. by

being granted more resources, if so, for what, by being granted additional powers to initiate and to carry out the investigations, if yes, what powers, etc)?

(please write answer here)

4. INTERVENTIONS

4.1 Is your organization able to ask the court's permission to intervene as a 'third-party' in a case or to be joined as a party in the case? ?

(please write answer here)

4.2 When would you use this power? Can you give examples of successful interventions?

(please write answer here)

4.3 Has your organization ever sought leave to intervene and been refused permission from the court? – what were the reasons given for this?

(please write answer here)

4.4 Are you (your organisation) able to ask the court to act as amicus curie or 'friend of the court' (usually not with status as a party/third party in a case, but e.g. by submitting a brief on the general understanding of a specific anti-discrimination clause, or a brief on how the case may affect other than the parties to the case)?

(please write answer here)

4.5 Is your organization able to act as an 'expert witness' in certain discrimination cases?

(please write answer here)

4.6 How often in 2004 has your organization intervened in a case?

(number)

4.7 What percentage of your organization's interventions finalized in 2004 resulted in findings of discrimination?

%

4.8 Is there an increase of your organization's interventions over the years of your operation?

YES	<input type="checkbox"/>	NO	<input type="checkbox"/>
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Please specify why/why not:

<i>(please specify here)</i>

4.9 How can your organization increase the effectiveness of its power to intervene in cases (e.g. by being granted more resources, if so, for what, by being granted additional powers of intervention, if yes, what powers)?

<i>(please write answer here)</i>

5. POSITIVE DUTIES

5.1 Does the equality legislation in your country impose any legal obligations on public or private bodies to take action with regard to equality (these are sometimes known as 'positive equality duties' and oblige employers and service providers to take action to eliminate discrimination and/or promote equality. They are different from the equality rights of individuals to bring cases against those who discriminate.)?

<i>(please write answer here)</i>

5.2 If no, please state whether it is the opinion of the SEB that it should be able to do so and why /why not:

<i>(please write answer here)</i>

5.3 If yes, please give details. (Does the legislation cover the private and the public sector. If so are there any differences. Does the legislation cover employment and service provision? On which grounds, e.g. race, religion etc?)

<i>(please write answer here)</i>

5.4 Who monitors and enforces this legislation? What powers do they have to do so?

(please write answer here)

5.5 What is your evaluation of the success of the legislation?

(please write answer here)

5.6 How often in 2004 has your organization imposed positive duties?

(number)

5.7 Is there an increase of the use of imposing positive duties over the years of your operation?

YES NO

Please specify why/why not:

(please specify here)

5.8 How can your organization increase the effectiveness of its power to impose positive duties (e.g. by being granted more resources, if so, for what, by being granted additional powers of imposing positive duties, if yes, what powers)?

(please write answer here)