

TAKING STOCK

A perspective from the work
of equality bodies on:

European equality policy strategies,
equal treatment directives,
and standards for equality bodies

by Niall Crowley

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BY NIALL CROWLEY
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*This designation is without prejudice to positions on status, and is in line with UNSCR 1244/1999 and the ICJ Opinion on the Kosovo declaration of independence.

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1. INTRODUCTION

The European Institutions are in a moment of transition. There is new leadership and new personnel in place after the elections to the European Parliament and the appointment of a new European Commission. There are new policies proposed and in preparation as a spectrum of equality and equality-related policy strategies come to the end of their term. Key equal treatment legislation, the 'Race' Directive and the Employment Directive,¹ is under review with the five-yearly report on Directives in preparation by the European Commission. This review will include an examination of the situation of equality bodies in relation to the European Commission Recommendation on standards for equality bodies.²

In all this period of change, there is evident and welcome ambition behind the focus on equality and commitment to give full expression to the value of equality adopted in the European Treaties. Equality bodies, given their mandate, functions and track record, have a unique contribution to realising this new ambition and to giving practical expression to such strengthened commitment.

This unique contribution flows from their mandate to combat discrimination and promote equality. It draws from their work at Member State level in: enforcing equal treatment legislation; promoting good equality practice; providing policy advice; deepening the knowledge base on equality; and engaging in public discourse to stimulate a valuing of equality. It is enriched by their experience of working on multiple grounds, including and stretching beyond those of gender, racial and ethnic origin, religion or belief, age, disability, and sexual orientation.

This contribution is offered at European level, through Equinet, in gathering and analysing the learning from the work of equality bodies at Member State level and communicating its implications and indications for European policy. Equinet seeks to contribute to this current moment of transition in the European Institutions with this 'perspective'.

This 'perspective' seeks to draw out the learning from the work of equality bodies that might inform the:

- Development of new equality policy strategies;
- Review of the equal treatment Directives;

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

2 [Commission Recommendation of 22.6.2018 on standards for equality bodies](#), Brussels, 22.6.2018 C(2018) 3850 final

- Examination of implementation of the standard for equality bodies; and
- Further action on equality data.

This 'perspective' has been developed on the basis of a questionnaire circulated to all Equinet members, attached in Annex One. The results of this questionnaire were discussed and the framework for the 'perspective' developed at a working meeting of Equinet's Policy Formation Working Group. The final draft 'perspective' was subject to discussion and approval by the Board of Equinet. Twenty-seven equality bodies in twenty-four jurisdictions completed the survey.³

3 Commission for Protection from Discrimination in Albania; Ombud for Equal Treatment in Austria; UNIA in Belgium; Ombudsman institution of Bosnia and Herzegovina; Commission for Protection from Discrimination in Bulgaria; Ombudsman and Ombudsperson for Persons with Disabilities in Croatia; Ombudsperson in Cyprus; Public Defender of Rights (Ombudsperson), Czech Republic; Danish Board of Equal Treatment in Denmark; Non-Discrimination Ombudsman and Ombudsman for Equality in Finland; Defender of Rights in France; Public Defender of Georgia; Federal Anti-Discrimination Agency in Germany; Greek Ombudsman in Greece; Irish Human Rights and Equality Commission in Ireland; Office of Equal Opportunities Ombudsperson in Lithuania; Commission for Rights of Persons with Disability and National Commission for Promotion of Equality in Malta; Commissioner for Human Rights in Poland; High Commissioner for Migration (ACM), Portugal; National Council for Combating Discrimination in Romania; Commission for Protection of Equality in Serbia; Slovak National Centre for Human Rights in Slovakia; Advocate of Principle of Equality in Slovenia; and Equality Ombudsman in Sweden.

2. EQUALITY POLICY STRATEGIES

2.1 Context

Key equality policy strategies are now a focus for review and renewal as their current implementation periods come to a close. These encompass: the European Disability Strategy 2010-2020; the Strategic Engagement for Gender Equality 2016-2019; the List of Actions by the Commission to Advance LGBTI Equality for 2016 to 2019, and the EU Framework for National Roma Integration Strategies up to 2020.

Equality bodies, most often with multi-ground mandates, engage directly with some or all of these policy areas in their work. There are gaps identified by equality bodies, from their experience, in the array of ground-based equality policy strategies being pursued at European level. In particular, equality policy strategies are noted as being required on the ground of racial or ethnic origin, in relation to Islamophobia, and on the ground of age.

Economic inequality and discrimination on the basis of socio-economic status are highlighted by equality bodies, in particular those that include such a ground in their mandate, as requiring a specific equality policy focus. This focus is noted by equality bodies as being an issue in its own right and, specifically as an issue that intersects with all the other grounds covered by their mandates, particularly in contexts of austerity or economic stress. It is an issue that goes beyond a social protection or charitable focus in being a clear discrimination issue in the experience of equality bodies with this ground as part of their mandate. Action on this area of equality is usefully pursued as a part of more identity-based equality strategies as well as under the umbrella of the European Pillar of Social Rights.

2.2 Horizontal issues

The issues currently being addressed in the various equality policy strategies remain of priority concern. The policy initiatives implemented as a part of these strategies continue to make a contribution to their resolution and, in some cases have created the conditions for further policy initiative. There is, therefore, a need for continuity identified by equality bodies in the next generation of equality policy strategies.

There are a framework of issues that equality bodies identify as being central to all of the proposed equality policy strategies and as requiring policy action under each of them. These are:

1. Access to justice, specifically in cases of discrimination, harassment and violence, hate speech and hate crime, including strengthening the contribution of equality bodies.
2. The elimination of structural and institutional discrimination, in particular to uncover and address systemic forms of exclusion in the way institutions go about their business and policy processes are ordered and driven.
3. The achievement of substantive equality, where discrimination is combated, the practical and policy implications of diversity are understood and accommodated, and positive action is deployed to achieve new outcomes for groups.
4. Change in culture and cultural norms, establishing and pursuing creative and cutting-edge approaches to shifting public and political discourse, enabling the contribution of the mainstream media, eliminating stereotypes and stigma, and addressing the backlash against equality and human rights.
5. Effective responses to hate crime and hate speech and the promotion of alternative narratives based on EU values of equality.
6. Intersectionality, where equality policy strategies address the lived reality that all people live out their lives at the intersections between the various non-discrimination grounds, leading to specific situations, experiences and needs that must be understood and addressed.
7. Mainstreaming the goal of substantive equality across all grounds and their intersections in policy-making and budgetary policies in a more effective and sustained manner.
8. Investment in equality through the European Structural and Investment Funds and action on equality under the European semester needs to continue, intensify, and expand across all the non-discrimination grounds.
9. Collection and analysis of equality data across all the non-discrimination grounds.

It would be important, from the experience of equality bodies, that new iterations of these equality policy strategies would have political standing, which would require that they take the form of a Communication from the European Commission, a statement of EU policy. There is a commitment from the new Commission to upgrade the status of the Strategic Engagement for Gender Equality 2016-2019⁴ to that of a Gender Equality Strategy in its next iteration. In December 2018, a group of 19 Member States presented a joint Non-Paper

⁴ [Strategic Engagement for Gender Equality 2016-2019](#), DG Justice and Consumers, European Commission, Brussels, 2015.

seeking adoption of a comprehensive LGBTI strategy.⁵ This was followed by a consultative event on LGBTI equality organised by the Finnish Presidency with the European Commission.⁶ This now forms part of the Commission's work programme for 2020.

2.3 European Disability Strategy

The UN CRPD is the cornerstone for an ambitious evolution of the European Disability Strategy. It should provide the framework for a comprehensive strategy. The work of equality bodies on the disability ground affirms the importance of the priority areas identified in the current strategy and the need for continuity in pursuing current objectives, despite progress made.⁷ Equality bodies emphasise the importance of further work on the nine horizontal issues in section 2.2 above as well as action to:

- expand the focus on accessibility achieved to date, to advance an accessible built environment, public spaces, housing and transportation;
- ensure full, effective and prompt implementation of the European Accessibility Act;
- promote progress and provide guidance on making reasonable accommodation and the practice of organisations in making adjustments that achieve accessibility in work and in the provision of goods and services;
- provide guidance on and implement positive action strategies for the achievement of full equality in practice for persons with disabilities across all policy fields;
- advance participation of people with disabilities in decision-making, both in political life and in the economic arenas;
- progress de-institutionalisation and independent living; and
- enhance and secure the right to vote.

2.4 Gender Equality Strategy

The work of equality bodies on the gender ground affirms the importance of the priority areas identified in the current 'strategic engagement' and the need

5 [Joint Non-Paper on the Future of the LGBTI List of Actions](#), Brussels, 2018.

6 [Introductory Paper to the Conference, Advancing LGBTI Equality in the EU: from 2020 and beyond](#), Brussels, 2019.

7 These are: accessibility; participation; equality; employment; education and training; social protection; health; external action.

for continuity in pursuing current objectives, despite progress made.⁸ Equality bodies emphasise the importance of further work on the nine horizontal issues in 2.2 as well as action on:

- reconciliation issues including: the role of men; monitoring implementation of the Work Life Balance Directive;⁹ and elimination of discrimination at recruitment and of pregnancy-related or leave-related discrimination;
- pay transparency including: further legislation at European and Member State levels; more effective implementation of equal pay for work of equal value provisions in equal treatment legislation; and progress on the gender pensions gap;
- gender based violence including: elimination of sexual harassment including implementation of ILO Convention 190 Concerning the Elimination of Violence and Harassment in the World of Work; more coordinated and efficient functioning of institutions with a role in the area of gender based violence, prevention, and human trafficking; and adequacy of support services; and ratification and full implementation of the Istanbul Convention.¹⁰
- women in poverty including: targeting the specific needs of women in poverty; realising the potential for mainstream anti-poverty policies to benefit women; and responding to the intersections of the grounds of gender and socio-economic status;
- care work including: the under-valuing of paid care work; gender segregation in the field of paid care work; and the unequal distribution of unpaid care work between women and men;
- digitalisation including: impact of discrimination; digital violence; lack of access to work, and clash with data protection;
- artificial intelligence including its impact on equality; and
- sexual health and rights including discrimination in access to health.

2.5 LGBTI Strategy

The work of equality bodies on the sexual orientation ground affirms the importance of the priority areas identified in the current 'list of actions' and the need

8 These are: equal economic independence for women and men; equal pay for work of equal value; equality in decision-making; dignity, integrity and ending gender-based violence; and promoting gender equality beyond the EU.

9 [Directive \(EU\) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU](#)

10 [Council of Europe Convention on preventing and combating violence against women and domestic violence](#), Council of Europe, Istanbul, 2011.

for continuity in pursuing current objectives, despite progress made,¹¹ Equality bodies emphasise the importance of further work on the nine horizontal issues in 2.2 as well as action in:

- the field of education is identified for specific action. This relates principally to the prevalence of issues of bullying and harassment on the basis of real or imputed sexual orientation and gender identity. Teachers need training in how to deal with this if and when it happens, and how to prevent it through classroom interventions. The importance of including a focus on LGBTI people in education curricula is noted.
- enabling leadership on LGBTI equality by the state, with Member States implementing equality policy strategies on LGBTI issues with the potential to make systematic progress on LGBTI equality. Key actors in the public sector need specific support and good practice models need to be made available.
- progressing marriage equality, and legal recognition of same sex families building on rights established in relation to free movement.
- progressing legal gender recognition, and accessible gender reassignment treatment.
- addressing wellbeing, eliminating minority stress, providing for mental health, and preventing suicide.
- enabling access for Lesbian women to IVF treatment and the full range of reproductive rights; and
- building a profile for and adequacy of response to the particular situations, experiences, and needs of trans and intersex people.

2.6 Framework for National Roma Integration Strategies

The work of equality bodies on Roma equality affirms the importance of the priority areas identified in the current framework strategy and the need for continuity in pursuing current objectives, despite some progress made.¹² The importance of robust monitoring of progress is noted. Equality bodies emphasise the importance of further work on the nine horizontal issues in 2.2 as well

¹¹ These are: improving rights and ensuring legal protection of LGBTI people and their families, in key areas of EU competence; strong monitoring and enforcement of existing rights of LGBTI people and their families under EU law; reaching citizens, fostering diversity and non-discrimination; supporting key actors responsible to promote and advance equal rights for LGBTI people in the EU; figures and facts for policy makers on LGBTI challenges at the EU: data collection and research activities; and external action: LGBTI issues in enlargement, neighbourhood and third countries.

¹² These are: ensure that all Roma children complete at least primary school; cut the employment gap between Roma and the rest of the population; cut the gap in health status; and cut the gap in access to housing and public utilities.

as action on:

- empowerment in public life and resources for community organisations to engage in community development and advocacy;
- barriers to free circulation and the inclusion of migrant Roma in national strategies;
- difficulties for Roma in securing adequate personal documentation and use of civil registration systems; and
- forced sterilisation of women and segregation in maternity services.

The work of equality bodies, and the slow progress on equality for Roma, suggests the need for a significant review and re-think of the concept of 'Roma Integration' and the nature of the 'Strategies' that might be best suited to its achievement.

3.1 Vision

Equality bodies, based on their experience, have a particular understanding of the equal treatment legislation that is required and that must be effectively implemented to eliminate discrimination and advance full equality in practice. While significant progress has been made at European and Member State levels on equal treatment legislation and its implementation, equality bodies, based on this understanding, point to significant gaps that remain to be addressed.

These gaps include:

1. Provision for protection from discrimination has still to be levelled up across all the discrimination grounds and hierarchies persist. This issue is most apparent in:
 - a. the absence of the proposed horizontal equal treatment Directive to address discrimination outside the workplace on the grounds of age, disability, religion or belief, and sexual orientation;
 - b. the lack of coverage of discrimination in areas such as education on the ground of gender in Directive 2004/113/EC; and
 - c. the exclusion of nationality under the ground of racial or ethnic origin, and exemptions for provisions and conditions related to entry and residence of third country nationals in Directive 2000/43/EC.
2. The range of protected grounds covered by the EU equal treatment Directives is limited and is not sufficiently comprehensive. There should be:
 - a. an alignment with those grounds that are set out in Article 21 of the Charter of Fundamental Rights;
 - b. a ground of gender identity and gender expression explicitly identified;
 - c. a ground of socio-economic status or disadvantage established;
 - d. use of a non-exhaustive list of grounds as is the experience of many equality bodies¹³ and as per the European Convention on Human Rights and the EU's Charter of Fundamental Rights; and
 - e. clear and effective provisions on prohibiting multiple discrimination and promoting intersectional equality.

13 Crowley N., [Equality Bodies Making A Difference](#), European Network of Legal Experts on Gender Equality and Non-Discrimination & European Commission, Brussels, 2018. This identifies that Of the 43 equality bodies surveyed, 26 cover more grounds than those set out in Article 19 of the Treaty on the Functioning of the European Union and 10 of these equality bodies work to an open list of grounds

3. The reasonable accommodation provisions on the ground of disability are an important response to the need for adaptation to respond to practical issues of diversity. The manner in which diversity is expressed across the other grounds often has practical implications. Thus, provisions for reasonable accommodation should be provided for all discrimination grounds, in both employment and service provision. This would ensure an adequate and appropriate response to diversity and enhance the elimination of discrimination and the achievement of full equality in practice.
4. Legal duties on the public and private sectors to promote equality in a proactive and systematic manner, while more widely applied across the Member States, are not available in all jurisdictions.¹⁴ They are found to enable more effective and proactive approaches to the elimination of discrimination and the promotion of equality and their potential has been noted by equality bodies playing a role in their implementation.
5. There are gaps in the provisions made in relation to discrimination, in particular:
 - a. the failure to name particular types of discrimination such as: systemic discrimination; discrimination by association and by imputation or assumption; segregation; hate speech; announced intention to discriminate; instruction to harassment or victimisation; aiding discrimination; and incitement to discriminate.
 - b. the failure to cover particular forms of activity such as: all elements of the field of education provision, in terms of both educational content and process; and the functions of the public administration, including such as policing and migration.
6. The lack of provisions for the designation of an equality body under Directive 2000/78/EC is problematic, given the central role played by equality bodies in the implementation of the equal treatment Directives and the importance of sustaining this as a standard across all fields.

The identification of these gaps emerges from the barriers experienced by equality bodies in fully realising the potential of equal treatment legislation and from the positive experience of equality bodies in Member States where these gaps have already been addressed in national legislation. There are examples across the Member States for each of these gaps being effectively addressed at national level.

¹⁴ Crowley N., [Making Europe More Equal: A legal duty?](#) Equinet, Brussels, 2016.

3.2 Issues of implementation

Equality bodies identify a range of issues they face in implementing the equal treatment Directives. These include:¹⁵

Sanctions, in cases where discrimination is found, are often found to be too low or too narrowly drawn. There are instances of limits being placed on sanctions; sanctions being kept at the lower end of a spectrum apparently allowed; lack of provision for monetary sanctions; and no provision being made for punitive damages (though this is not possible for some Member State legal systems) and for non-monetary orders. Sanctions are not always applied in the absence of a specific victim. Compensation for economic loss does not always apply to applicants for jobs or for promotion who were unsuccessful due to discrimination. 'Effective, proportionate, and dissuasive' sets an important standard for sanctions and European level guidance could usefully be developed on this standard.

In **Austria**, it is reported that both in court and in agreeing settlements the statutory minimum compensation in the case of harassment is often not understood as a lower limit for a single infringement, but rather as a general compensation for harassment. The level of damages in the area of equal treatment awarded in Austria is too low to have a deterrent effect within the meaning of the Directives. In general, the Austrian legal system only provides punishments with a penalty character outside the criminal law area within very narrow limits.

In **Croatia**, sanctions are assessed at a low level, in both civil and misdemeanour proceedings. The fines awarded in civil cases for discrimination do not generally exceed HRK 50,000 (EUR 6,666.00), regardless of whether they are more serious forms of discrimination, the circumstances of the case, and the profiles of the perpetrator and the victim of discrimination. In misdemeanour proceedings for the purpose of discrimination, fines are generally set below the legal minimum, regardless of the circumstances of the commission of the offence and, in some cases, independent of the repetition of the offence by the same perpetrator.

In **Poland**, it is reported that victims of discrimination may only sue for the discriminatory act, and few decide to do this due to the low level of compensation that can be awarded by the Court. The Commissioner for Human Rights cannot issue binding decisions or impose fines.

In **Slovenia**, an issue is reported in how sanctions are defined in the equal treatment legislation. According to the legislation, sanctions can be issued in a range from the lowest to the highest, However, there is a legal problem due to which only the lowest possible sanctions can be issued. The Minor Offence Act states that where sanctions

¹⁵ A number of examples of the issues are provided for illustrative purposes. Further research would be required for a comprehensive picture.

are defined in a range from the lowest to the highest, a special authorisation has to be included in the law that allows the supervisory authority to issue sanctions above the minimum amount. There is no such authorisation in PADA.

In **Sweden**, there are no sanctions applicable if there is no individual victim. The Discrimination Act as it is formulated does not cover situations where, for example, a discriminatory hiring policy or rule is made public but has not been applied to a specific individual. The equality body in its supervisory decisions has applied the Feryn findings, (Feryn, C-57/97, and Asociația Accept, C-81/12), notably to discriminatory job-adverts, but on finding a violation, there are no sanctions unless it can be shown that a particular person has been affected.

Burden of Proof provisions have been difficult to implement and, in particular, have faced barriers of interpretation and application by the Courts. In some jurisdictions, the threshold for the shift in the burden of proof is set too high. In others, there are limitations in the manner of transposition of the provisions into national law. This is a topic that would benefit from European level guidance.

In **Austria**, according to the burden of proof regulation of the Austrian Equal Treatment Act, a person who feels discriminated against has to substantiate the facts of discrimination. The employers or other responsible persons must then prove that it is more likely that another motive than that prohibited by the Equal treatment Act was the rationale for the different treatment. In practice, even the presentation of unequal treatment presents a major obstacle because much evidence is held by the employer or service provider. According to the implementation of the provision, it is also legal practice before the courts that the victim has to look for evidence of which way the proven unequal treatment was based on a ground of discrimination. The Austrian Ombud considers this as an obstacle for effective protection against discrimination.

In Belgium, it is reported that the burden of proof has been hard to implement, and in many cases the equality body already has presented written proof (for example an email) before the shift in the burden of proof is accepted.

In France, it is reported that the definition of the burden of proof under article 4 of the law of 27 May 2008 and Article L1134-1 of the labour Code seems over favourable to the respondent as it allows justification based on “objective elements foreign to all discriminations” and does not require evidence of “absence of breach of the principle of equal treatment”

Indirect discrimination has been found to be hard to prove. This is significant given the importance of case work on this form of discrimination in addressing structural discrimination. The data, so necessary to establish a prima facie discrimination case, is often not available or not made available. There have been issues of interpretation in relation to the exemptions that apply specifically

in relation to proportionality. There is a particular challenge to communicate CJEU caselaw in this area to legal professionals more effectively to assist the work of equality bodies on this issue.

In the **Czech Republic**, difficulties are reported in establishing a prima facie case of indirect discrimination due to data collection issues where a new municipal housing policy is adopted and those who are disadvantaged by such a policy are predominantly Roma, due data collection issues.

In **Denmark**, it is reported that in the Danish Supreme Court's judgement of April 27th 2016, the Supreme Court stated that it is unclear, whether article 2, section 2b of the Employment Equality Directive on indirect discrimination applies to situations concerning discrimination by association. According to the Supreme Court a clarification of this would require a preliminary ruling of the Court of Justice of the European Union.

In **Slovenia**, it is reported that casework on indirect discrimination is almost non-existent and that, in the rare cases available, poor application of the proportionality test is evident. For example, in an employment case, the Higher Labour and Social Court maintained that not employing women who refuse to take off their headscarf was permissible because the work in question was performed in a medical institution and the prohibition of any kind of headgear was intended to prevent the spreading of infections and ensure higher standards of hygiene. The court, however, never performed an adequate proportionality test, checking whether the employer could have pursued its otherwise legitimate aim with less invasive and non-discriminatory measures, such as, for example, providing employees with sterile headscarves at the place of work.

Harassment, and specifically the potential perpetrators in relation to harassment, has been found to be difficult to address where it involves the actions of other customers in the field of service provision. There are issues faced in specific jurisdictions where: harassment is only found where the perpetrator knows the behaviour violates the dignity of the victim, and the victim makes clear that their dignity is being violated, effectively requiring intent; difficulties in determining harassment, when it takes an indirect form such as public announcements, social media or internet publications; dealing with harassment where a violation of dignity is proven but not the creation of a hostile environment: and difficulties in establishing the nature and extent of employer or service provider liability.

In **Germany**, it is reported that the cumulative nature of the preconditions for harassment (violation of dignity and creation of a hostile environment) reduce the protection against harassment. The case of an employee with a migrant background is cited, who was publicly accused of theft in his employer's canteen and then escorted out

of the canteen by security personnel. His case was dismissed in court because only one precondition was met and the incident therefore did not constitute harassment.

In **Finland**, it is reported that the concept of “creating an intimidating, hostile, degrading humiliating or offensive environment” has proven challenging in situations where the harassment has not taken place through public announcements, social media or internet publications. The courts have found it challenging to prove causality between the offending action and the creation of an intimidating environment even if the offending action has been grave and clearly violated the dignity of protected minority groups. (e.g. Decision 393/2018 of the Finnish Non-Discrimination and Equality Tribunal constituting that publicly flagging a WW II Nazi-flag is harassment).

In **Sweden**, according to the preparatory works to the Discrimination Act, there is a requirement that the person carrying out the harassment must realise that his or her behaviour violates someone’s dignity because of the protected characteristic (e.g. because of that person’s ethnicity). Furthermore, the harassed person should normally make clear to the harasser that the behaviour is perceived as a violation, save in situations where the violation is such that it must be apparent to the harasser (see Government Bill 2002/03:65 p. 97 et seq.). This understanding has accordingly been applied by the Labour Court (see case AD 2009 Nr. 4 for example).

Reasonable accommodation beyond adaptations for physical access to a job, in particular when it comes to making adaptations in the conditions and organisation of work, is under developed in its implementation. There are particular challenges evident in establishing effective approaches to making reasonable accommodation for people with intellectual disabilities. The disproportionate burden exemption to this requirement has been applied in an overly liberal manner, effectively limiting the rights of people with disabilities. This is a topic that would benefit from European level guidance.

In **Ireland**, the Irish Human Rights and Equality Commission acted as *amicus curiae* in *Daly v Nano Nagle*, a case relating to the correct interpretation of the duty to provide reasonable accommodation under the Irish equality law. Significantly, the Supreme Court held, in July 2019, that: reasonable accommodation can involve a redistribution of any task or duty in a job, as long as not disproportionate in the context of the employment in question; and there is an expectation of consultation of employees on reasonable accommodation. Therefore, while there was a lack of clarity on the correct interpretation of the Directives and legislation, this has been recently clarified by the Supreme Court.

In **Slovenia**, it is reported that reasonable accommodation is improperly and insufficiently regulated in the field of employment and work. Under the current regulation there, there is no such ad hoc obligation that would bind all employers. In principle, reasonable accommodation is provided only once the separate administrative decisions are made under the disability insurance or employment rehabilitation system.

Consequently, legislation does not clearly protect all persons with disabilities (those who do not have a recognised disability status, those already working in more flexible forms of employment) and people who could be affected by disability (i.e. discrimination by association as per the CJEU ruling in *Coleman v Attridge Law and Steve Law*). The duty to provide ad hoc reasonable accommodation in work and employment can be deduced only from CRPD (and Directive 2000/78/EC), so it does not bind all duty bearers (e.g. private individuals and other private employers because UN CRPD does not apply to them directly). Apart from UN CRPD, there is no clear norm that the refusal to provide for reasonable accommodation constitutes discrimination.

Positive action provisions are important in enabling the pursuit of substantive equality. CJEU caselaw on gender equality has set particular boundaries in this regard. There is a lack of understanding of the range for positive action among key institutions in the public and private sectors, particularly beyond the workplace, and this could usefully be a focus for European level guidance and promotion.

In **Slovenia**, it is reported that the equality body's 2018 inquiry into positive measures taken by public authorities has shown a clear lack of understanding on the part of government Ministries and services of what constitutes positive action measures, in what circumstances such measures may be taken and how they should be implemented and monitored. Positive measures with regard to the employment of certain vulnerable groups (e.g. the Roma) are virtually non-existent, and limited to temporary public works programmes.

The *exemption* under Article 3(3) of Directive 2000/78/EC of payments by state schemes, including state social security of social protection schemes, has been found to be problematic given that many of these schemes can directly relate to employment.

In **Slovenia**, an issue is reported whereby the private sector is in effect bound more strictly than the public sector due to the breadth of the exemption of Article 3(3) in a context where many social security and social protection schemes are directly or indirectly (but decisively) related to work and employment.

The provisions, under Article 12 of Directive 2000/43/EC and Article 14 of Directive 2000/78/EC, on Member State *dialogue with NGOs* on addressing and combating discrimination are under developed in their implementation. This is a topic that would benefit from European level guidance.

In the **Czech Republic**, difficulties are reported in securing a commitment from the State Office of Labour Inspection to have annual meetings with NGOs on discrimination issues (in particular racially motivated discrimination). The Labour Inspectorate's view is that having regular dialogue with NGOs does not fall within its mandate.

4.1 Commission recommendation

The 2018 Commission Recommendation on standards for equality bodies identifies recommended measures in relation to:

- mandate of equality bodies, including: grounds and scope covered; and functions covered (independent assistance, independent surveys, independent reports, recommendations of equality bodies, and promotion of equality);
- independence and effectiveness, including: independence; resources; and complaint submission, access and accessibility; and
- coordination and cooperation.

The European Commission's High-Level Group on Non-discrimination, Equality and Diversity hosted a good practice exchange seminar to build a shared understanding of this Recommendation and establish good practice directions for its implementation, involving Member States and equality bodies, in June 2019. This process of sharing and guidance development could usefully continue.

4.2 Mandate

Equality bodies point to issues of limitations in the competences they are afforded as the priority issue. In particular, their enforcement powers are at issue and they emphasise barriers to their enforcement work in this regard.

Two significant aspects emerge in this regard:

1. There are equality bodies whose litigation strategies are compromised for lack of or limitations in their competences to:
 - a. provide assistance to victims of discrimination;
 - b. bring cases to court;
 - c. act as *amicus curiae*;
 - d. file class actions;
 - e. pursue cases in relation to hate speech;
 - f. pursue casework in relation to both the public and the private sector; and
 - g. take actions in relation to the Charter of Fundamental Rights, in particular implementation of Article 21.

2. There are equality bodies whose decision-making function is compromised for lack of or limitations in their competences to:
 - a. require information from and cooperation of respondents in both the public and the private sectors;
 - b. make legally binding decisions; and
 - c. apply sanctions on foot of finding of discrimination, and, more specifically, effective proportionate and dissuasive sanctions;

This issue could usefully be a matter for review and improvement as required at Member State level.

A linked aspect emerges for multi-functional equality bodies that combine decision-making functions with promotion and prevention functions and/or support and litigation functions. The challenge identified by some equality bodies lies in the balance of prioritisation in implementing their prevention and promotion functions and their support and litigation functions as opposed to their decision-making functions, given the legal imperatives that attend their decision-making functions, obliging them to investigate and formally respond to every complaint received. Thus, while they have the competences for these other functions, they do not get the opportunity to deploy them to full effect in a context of constrained resources.

This needs to be a focus for active management by such equality bodies, with particular attention to ensuring adequate implementation of support and litigation functions. Shared work could be done by equality bodies in developing models for such active management.

A second priority issue that emerges in relation to mandate concerns the advisory function of equality bodies and the inadequacy of powers attendant on this. A number of equality bodies point to issues in making recommendations where the response from the relevant public authorities is inadequate. The recommendations are not responded to or are not given due consideration or the equality body is not engaged early enough in the policy-making or legislative process. This could usefully be a focus for agreed guidance from the European level.

Finally, some equality bodies point to risks inherent in multi-mandate settings as an issue. This is identified in terms of: complaints of discrimination rendered invisible in being dealt with under other aspects of the mandate; and mandates that have been added or expanded without accompaniment of adequate resources.

Multi-mandate bodies are challenged to develop active management approaches to implementing multiple mandates in a manner that gives visibility to and

enhances their equality mandate. Shared work could be done by equality bodies in developing models for such active management.

4.3 Independence and effectiveness

Most equality bodies point to inadequate resources as the priority issue. Resources are central to equality bodies being able to fulfil their potential to contribute to change for individuals, for organisations, and for society overall.

This issue compromises both their independence and effectiveness. Inadequate resources are directly:

- rendering some equality bodies unable to implement functions that they have been attributed including public awareness, surveys, and making recommendations;
- hindering strategic litigation by equality bodies given the potential costs involved;
- limiting the recruitment of specialist personnel required for some areas of work such as public relations; and
- limiting the opening of, and standard of, local offices, thus restricting accessibility.

The level of resources of equality bodies that can be calculated as adequate could usefully be a focus for guidance at a European level with subsequent action required at Member State level to protect and ensure such adequacy.

A number of equality bodies point to issues of organisational independence as of priority concern. This is central to their capacity to make choices in relation to and pursue strategic approaches to their mandate. The issues include:

- limitations in the level of independence allowed regarding the drawdown of funding;
- limitations in their management of finances and staff;
- the absence of a low-threshold venue, for dealing with such cases, or the lack of a functioning or adequately functioning legal aid regime putting pressure on the equality body to bring cases for individuals; and
- arrangements for accountability as inhibiting their independence, including the nature of the role afforded to Parliament to approve or reject their annual report where this is subject to a vote.

The organisational independence of equality bodies could usefully be a focus for guidance at a European level with subsequent action required at Member State level to underpin this independence.

4.4 Coordination and cooperation

Equality bodies in some jurisdictions point to fragmentation as the priority issue. This fragmentation undermines access to justice and limits the potential for coordination and cooperation just as it reinforces its importance. It can be evident in a range of forms, in particular:

- federal states with equality bodies at the different levels of governance;
- various equality bodies or equivalent bodies having mandates for different grounds or areas of discrimination in the one jurisdiction; and
- different processes and procedures in place for addressing discrimination in different fields:
 - employment or service provision; or
 - private or public sector.

This issue could usefully be a matter for mapping and guidance at European level and the implementation of improvements as required at Member State level.

4.5 Indicators

Equality bodies identify a concern at measures of effectiveness that might be used for their work. Such measures, if not well designed, can mischaracterise and limit the potential of equality bodies. This is already at issue where there is a tendency to measure effectiveness of equality bodies solely in terms of numbers of investigated complaints. Indicators used also need to focus beyond effectiveness on the other areas covered by the Recommendation.

This issue of indicators for equality bodies, including and going beyond for effectiveness, to address all areas covered by the Commission Recommendation, could usefully be a matter for guidance at European level.

Equinet has taken steps in this regard, developing indicators for mandate as addressed in the Recommendation. It plans to continue to develop indicators for other areas of the Recommendation.

5. EQUALITY DATA

Equality bodies are hampered in their work, particularly in the areas of enforcement, policy advice, and good practice design by limitations in the collection of equality data. Equality bodies identify a range of issues from their experience in relation to equality data across all jurisdictions:

- incomplete and inadequate gathering and disaggregation of equality data on the full range of groups experiencing inequality and discrimination;
- data deficiencies in the manner in which public institutions track their employment and service provision functions;
- irregular timing in the collection of equality data that does not allow comparison between data sets over time;
- failure to gather data on issues of importance for equality or to the situation and experience of particular groups experiencing inequality;
- failure to include a frame of equality data in national representative surveys; and
- failure to make available, publish or disseminate equality data gathered or to use the data gathered.

For these reasons, equality bodies have welcomed the recent work on equality data of the European Commission's High-Level Group on Non-Discrimination, Equality and Diversity. The 2019 publication 'Guidelines on improving the collection and use of equality data' holds significant potential to improve this situation.

Equality bodies have a role to play in its promotion and implementation at national level. It will be important that it continues to be promoted at European level, in particular through the High-Level Group, to secure change in the situation of equality data collection at Member State level. Specifically, there is a need to underline that GDPR is not an obstacle to collecting equality data if done in an appropriate way. A regulatory framework or legal instrument to drive equality data collection, on a mandatory basis, could also be valuable.

In **Ireland**, in September 2019, the Irish Human Rights and Equality Commission organised an event on the Guidelines with government officials to explore innovative approaches to improving the collection and use of equality and human rights data, and encourage decision-makers to reflect on their understanding of equality and human rights data collection and how the guidelines could be incorporated into their work.

Equality bodies have contributed to data collection and analysis through their policy advice, survey and research work.

- Equality bodies have developed working relationships with national statistics offices, published guidance on data collection to fight discrimination, and participated in studies on data sources for measuring discrimination.
- More directly, equality bodies have: produced data files to monitor the situation of particular groups that experience inequality; conducted studies on the inclusion of equality data in national representative surveys and included questions in such surveys; published a wide range of survey results on issues of equality and groups experiencing discrimination; and used their Annual Reports to publish detailed data in relation to equality and discrimination.

Equality data from the work of equality bodies themselves is a valuable resource, particularly in the area of enforcement. Issues have been identified by equality bodies in relation to their collection of such data, including:

- the absence of a general shared data collection system for equality bodies to produce comparative data; and
- inadequate internal data systems and data collection processes, often due to lack of resources.

Equality bodies could usefully cooperate to examine their own equality data collection systems, the barriers to such systems being effective and/or being comparative, and how best to improve and coordinate data collection by equality bodies. This work has already started under the auspices of Equinet's Working Group on Research and Data Collection.

Data on legal proceedings, beyond those addressed by equality bodies, that encompass a discrimination element are limited. This precludes a full understanding of the implementation and impact of equal treatment legislation. A central database on discrimination cases could valuably be developed at Member State level.

PART I: Implementation of the Racial Equality and Employment Equality Directives

Background questions:

- A. Based on your work and experiences, is the scope of both Directives sufficient and adequate? If something is missing from or inadequately defined under the scope of one or both Directives, please indicate the issue and specify briefly:
- B. Based on your work and experiences are there any provisions that are manifestly missing from the Directives? Please provide a brief explanation:

Implementation Questions:

1. Based on your work and experiences, have you detected any problems with the definitions or application in your jurisdiction of the following provisions of the Directives – if yes, please specify briefly and give an example(s) of the problem(s):
 - a. The grounds of discrimination
 - b. The scope of discrimination (employment and occupation, social protection, social advantages, education, access to and supply of goods and services)
 - c. Direct discrimination
 - d. Indirect discrimination
 - e. Harassment
 - f. Instruction to discriminate
 - g. Exemption made for different treatment on the basis of nationality
 - h. Genuine and determining occupational requirements
 - i. Ethos-based requirements (Employment Equality Directive Article 4(2))
 - j. Reasonable accommodation for disabled persons
 - k. Justification of differences of treatment on grounds of age
 - l. Positive action
 - m. Burden of proof
 - n. Victimisation
 - o. Defence of rights
 - p. Effective, proportionate and dissuasive sanctions
 - q. Any other provisions or issues
1. Recommendations – what recommendations for change would you make in relation to the issues that you have identified above under question 1:

2. Based on your work and experience are there any provisions of the Directives that would benefit from more guidance as to their interpretation and application?
3. Standards for equality bodies – has your equality body identified any problems relating to the following issues (based on the Commission Recommendation on standards for equality bodies) – if yes, please specify briefly and give an example(s) of the problem(s):
 - a. Grounds and fields covered by your mandate
 - b. The combination of mandates, where your body covers more than the equality mandate
 - c. Your function of independent assistance to victims (including, where relevant, strategic litigation)
 - d. Your function of issuing recommendations and/or making decisions in concrete cases of discrimination, where this is included in your mandate
 - e. Your function of independent surveys
 - f. Your function of independent reports
 - g. Your function of recommendations on policy and legislative matters
 - h. Your function of promotion of equality by information, training and supporting good practice by duty bearers
 - i. Your function of awareness raising
 - j. Independence of the equality body
 - k. Resources of the equality body
 - l. Accessibility of the equality body (including complaint submission)
 - m. Coordination and cooperation with national authorities
 - n. Coordination and cooperation with other equality bodies in your jurisdiction and internationally
 - o. Coordination and cooperation with other relevant bodies
4. Recommendations – what recommendations for change would you make in relation to the issues for equality bodies that you have identified above under question 4:
5. Equality data – has your equality body
 - a. detected problems concerning the availability of equality data that influence your ability to effectively promote equality and combat discrimination? Please specify briefly and give examples of the problem(s) and/or good practice
 - b. taken significant initiatives to tackle the identified problem(s) or to enhance the availability of equality data? Please specify briefly and give examples of the initiatives
6. Recommendations – what recommendations for change would you make

in relation to the equality data issues that you have identified above under question 6:

7. If any, please identify a good practice in your country with regard to 1) the equality body's decision-making in cases of discrimination (if this falls within your competence) 2) the appointment process of leadership of the equality body 3) the advisory function of the equality body towards the public authorities.
8. Could you please share any available data you possess for the year 2018 (within the limits of your mandate) on any of the following topics:
 - a. the number of formal complaints (listed by grounds and fields where possible) brought before the equality body on situations covered by the two Directives;
 - b. the number of cases where the equality body established discrimination on the grounds covered by the two Directives (listed by grounds and fields where possible);
 - c. the number of court cases where the equality body represented the complainant in cases covered by the two Directives;
 - d. the number of court cases where the equality body acted as amicus curiae or expert in cases covered by the two Directives;
 - e. the number of friendly settlements reached in cases handled by the equality body in situations covered by the two Directives;
 - f. the number and themes of surveys carried out and published by the equality body on issues covered by the two Directives;
 - g. the number and themes of independent reports (general reports, not in concrete cases) carried out and published by the equality body on issues covered by the two Directives;
 - h. the number and themes of recommendations from the equality body on issues covered by the two Directives.

PART II: Needs for future equality and non-discrimination policies at European level

1. The current European Disability Strategy is expiring in 2020. Based on your work and experiences what three areas for action should be prioritised by a new Commission strategy on the ground of disability? Please identify how the need for each area could be evidenced from your work
2. The current Strategic Engagement for Gender Equality is expiring in 2019. Based on your work and experiences what three areas for action should be prioritised by a new Commission strategy on the ground of gender? Please identify how the need for each area could be evidenced from your work

3. The current [List of actions to advance LGBTI equality](#) is expiring in 2019. Based on your work and experiences what three areas for action should be prioritised by new Commission policies for LGBTI persons? Please identify how the need for each area could be evidenced from your work
4. The current [EU Framework for National Roma Integration Strategies](#) is expiring in 2020. Based on your work and experiences what three areas for action should be prioritised by a new Commission strategy for Roma equality? Please identify how the need for each area could be evidenced from your work
5. Are there any other groups and/or grounds that are facing issues that should be tackled by European-level policies or strategies, based on evidence from the work of your equality body? Please describe briefly the issue and the type of evidence from your work identifying the need to tackle these issues

