

Assessing Gaps in the Racial Equality Directive

EQUINET BRIEF

COMPILED BY HILARY ATAYI, POLICY AND LEGAL ASSISTANT

Assessing Gaps in the Racial Equality Directive is published by Equinet, European Network of Equality Bodies. Equinet brings together 47 organisations from across Europe which are empowered to counteract discrimination as national equality bodies across the range of grounds including age, disability, gender, race or ethnic origin, religion or belief, and sexual orientation.

Equinet members: Commissioner for the Protection from Discrimination, **Albania** | Austrian Disability Ombudsman, **Austria** | Ombud for Equal Treatment, **Austria** | Unia (Interfederal Centre for Equal Opportunities), **Belgium** | Institute for Equality between Women and Men, **Belgium** | Institution of Human Rights Ombudsman, **Bosnia and Herzegovina** | Commission for Protection against Discrimination, **Bulgaria** | Office of the Ombudsman, **Croatia** | Ombudsperson for Gender Equality, **Croatia** | Ombudswoman for Persons with Disabilities, **Croatia** | Office of the Commissioner for Administration and the Protection of Human Rights (Ombudsman), **Cyprus** | Office of the Public Defender of Rights, **Czech Republic** | Danish Institute for Human Rights, **Denmark** | Gender Equality and Equal Treatment Commissioner, **Estonia** | Ombudsman for Equality, **Finland** | Non-Discrimination Ombudsman, Finland | Defender of Rights, **France** | Public Defender (Ombudsman), **Georgia** | Federal Anti-Discrimination Agency, **Germany** | Greek Ombudsman, **Greece** | Office of the Commissioner for Fundamental Rights, **Hungary** | Irish Human Rights and Equality Commission, **Ireland** | National Office Against Racial Discrimination, **Italy** | Ombudsperson Institution, **Kosovo*** | Office of the Ombudsman, **Latvia** | Office of the Equal Opportunities Ombudsperson, **Lithuania** | Centre for Equal Treatment, **Luxembourg** | National Commission for the Promotion of Equality, **Malta** | Commission for the Rights of Persons with Disability, **Malta** | Council on Preventing and Eliminating Discrimination and Ensuring Equality, **Moldova** | The Protector of Human Rights and Freedoms (Ombudsman), **Montenegro** | Netherlands Institute for Human Rights, **Netherlands** | Commission for Prevention and Protection against Discrimination, **North Macedonia** | Equality and Anti-Discrimination Ombud, **Norway** | Commissioner for Human Rights, **Poland** | Commission for Citizenship and Gender Equality, **Portugal** | Commission for Equality in Labour and Employment, **Portugal** | High Commission for Migration, **Portugal** | National Council for Combating Discrimination, **Romania** | Commissioner for Protection of Equality, **Serbia** | National Centre for Human Rights, **Slovakia** | Advocate of the Principle of Equality, **Slovenia** | Council for the Elimination of Ethnic or Racial Discrimination, **Spain** | Institute of Women and for Equal Opportunities, **Spain** | Equality Ombudsman, **Sweden** | Equality and Human Rights Commission, **UK – Great Britain** | Equality Commission for Northern Ireland, **UK – Northern Ireland**

**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.*

Equinet Secretariat | Rue Royale 138 | 1000 Brussels | Belgium |
info@equineteurope.org | www.equineteurope.org
ISBN 978-92-95112-54-4

© Equinet 2021 - Reproduction is permitted provided the source is acknowledged.

This is a publication of the Equinet Secretariat, prepared based on previous information and contributions provided by Equinet members. This information does not necessarily reflect the position or opinion of the European Commission.



Co-funded by the Rights, Equality and
Citizenship Programme of the European Union

Contents

Background	3
Gaps in the existing legislation	4
Addressing legislative gaps	7
Addressing legislative gaps: Standards for equality bodies	7
Addressing legislative gaps: Redress and stronger sanctions	9
Addressing legislative gaps: Hate speech and hate crimes	12
Conclusion	15
Bibliography	16

Background

Overview: Compilation of evidence based on the work and experience of equality bodies in relation to perceived gaps in Council Directive 2000/43/EC of 29th June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (the ‘Racial Equality Directive’).

This document examines possible gaps of the Racial Equality Directive (RED), in order to contribute to the continuation of the work started with the Anti-Racism Action Plan (ARAP) and the implementation report (see some relevant excerpts below). Areas of concern for equality bodies that will be highlighted in the following sections include actions by law enforcement, the need for clear mandates for equality bodies through binding legislation, stronger sanctions, and increased guidance and powers in relation to the under reporting of hate crime.

The [EU’s ARAP](#) states that:

‘The Commission will undertake a comprehensive assessment of the existing legal framework to determine how to improve implementation, whether it remains fit for purpose, and whether there are gaps to be filled. This assessment will draw on the ongoing monitoring of the transposition and implementation of EU legislation, in particular its regular dialogue with Member States and its upcoming report on the implementation of the Racial Equality Directive. Stakeholder feedback, in particular from those representing the concerns of the persons affected by racism and racial discrimination, will also be essential to identify what needs to change to maximise the extent and impact of EU action.’ (...)

‘In 2021, the Commission will **report on the application of the Directive and would follow up with any possible legislation by 2022**. The report will assess what lessons should be drawn from the Directive’s implementation and identify any gaps: one area to be looked at specifically in the context of possible new legislation is **law enforcement**. The report will also help to inform continued action to prioritise **infringement proceedings** that have a major impact.’

The [implementation report](#) from the Commission on the application of the RED and the Employment Framework Directive finishes by stating:

‘Circumstances have changed since the adoption of the Racial Equality Directive on 29 June 2000, including due to technological advances. Despite the challenges posed by the under-reporting, experiences of discrimination on the grounds of racial or ethnic origin remain widespread in the EU, following a wide range of causes, including stereotypes and bias. A further assessment would be required to determine the relationship between the persistence of racial discrimination experienced in the EU and possible shortcomings in the enforcement of EU rules. It would also allow looking into possible gaps in the scope and coverage of the legislation. Coherence between the Racial Equality Directive and other relevant EU instruments should also be analysed. Data should be gathered on the areas where incidents of discrimination materialise, including where law enforcement authorities may discriminate. Such assessment, which would need to include a consultation of all relevant stakeholders, would serve to obtain robust, good quality data to provide evidence of racial discrimination experienced on the ground.’

Gaps in the existing legislation

- **The differentiation between ethnic and racial origin from nationality and the exclusion of nationality from the protection of the RED is problematic, given that discrimination can affect a group of people whose ethnic origin or nationality is not always clearly delimited -** “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.... 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.”¹

The courts have previously referred to the difficulty in delimiting the concepts protected by the RED in the cases of Jyske Finans, C-668/15 and CHEZ Razpredelenie Bulgaria, C-83/14. The judgement found that the concept of ethnic origin cannot be determined based on a single criterion alone but considered nationality to be one of the potential criteria. Currently the Racial Equality Directive does not define the concept of ‘racial or ethnic origin’, therefore, further work is required to ensure that all groups are adequately protected within legislation – “It should be noted in that regard, that the concept of ‘ethnicity’ has its origin in the idea of societal groups marked in particular by common nationality, religious faith, language, cultural and traditional origins and backgrounds (judgment of 16 July 2015, CHEZ Razpredelenie Bulgaria, C-83/14, EU:C:2015:480, paragraph 46)”²

- **Equality bodies play a central role in the implementation of the RED, and it is important for them to maintain a high standard of protection across all fields. Racism in law enforcement and policing is prevalent, and although Member States are encouraged to increase their efforts to stop prejudiced practices in all institutions, the Racial Equality Directive does not include the field of law enforcement in its material scope and consequently it does not provide equality bodies with the power to monitor and guard against racial discrimination in this field –** “There are gaps in the provisions made in relation to discrimination, in particular: 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.”³
- **Unclear language and lack of definitions -** “There are gaps in the provisions made in relation to discrimination, in particular: 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.”⁴ This issue is noteworthy

¹ Page 15, paragraph 2, [A perspective from the work of equality bodies on: European equality policy strategies, equal treatment directives, and standards for equality bodies, Niall Crowley, Equinet, 2020](#)

² Paragraph 17, Jyske Finans, C-668/15, <https://curia.europa.eu/juris/document/document.jsf?jsessionid=71474FC8C912E24A2344A1ABA1D4A68E?text=&docid=189652&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=3086503>, 2015

³ Page 16, paragraph 3, [A perspective from the work of equality bodies on: European equality policy strategies, equal treatment directives, and standards for equality bodies, Niall Crowley, Equinet, 2020](#)

⁴ Page 16, paragraph 3, [A perspective from the work of equality bodies on: European equality policy strategies, equal treatment directives, and standards for equality bodies, Niall Crowley, Equinet, 2020](#)

also in light of the Council Presidency's recent [proposal](#) to delete some of the above concepts from the text of the so-called Horizontal Directive.

- **There is a clear need to tackle multiple discrimination at EU level that includes ethnic and race-based discrimination victims** – “The range of protected grounds covered by the EU equal treatment Directives is limited and is not sufficiently comprehensive. There should be.... clear and effective provisions on prohibiting multiple discrimination and promoting intersectional equality”⁵

The process of increasing the provisions relating to multiple discrimination and intersectional discrimination could be aided by the establishment of universal definitions- “Multiple discrimination and/or intersectional discrimination do not have a universal definition and are not expressly acknowledged in all legal systems (nationally)”⁶

The Race Directive acknowledges in its Recitals that “the Community should, in accordance with Article 3(2) of the EC Treaty, aim to eliminate inequalities, and to promote equality between men and women, especially since women are often the victims of multiple discrimination’, but places no specific requirements on Member States.”⁷

Given the Horizontal Directive proposal was the first EU wide legislative piece incorporating multiple discrimination into the EU legal discourse, its adoption would represent a major step forward in this field. It would be important to ensure that the explanatory memorandum accompanying the document once adopted contains operational guidance for member states to correctly transpose and apply provisions linked to multiple (and intersectional) discrimination.

- **Equality bodies are hampered in their work in the areas of enforcement, policy advice and good practice design due to limitations in the collection of equality data. Some of the issues identified by equality body experiences in relation to equality data are** -“the incomplete and inadequate gathering and disaggregation of equality data on the full range of groups experiencing inequality and discrimination; 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.”⁸

The lack of equality data makes it difficult to prove discrimination in multiple areas. Often, data appears to be relatively scarce and does not reflect the level of discrimination within society. It could be beneficial to introduce a regulatory framework or legal instrument to

⁵ Page 15, paragraph 3, [A perspective from the work of equality bodies on: European equality policy strategies, equal treatment directives, and standards for equality bodies, Niall Crowley, Equinet, 2020](#)

⁶ Page 25, paragraph 6, [Fighting Discrimination on the Ground of Race and Ethnic Origin, Chrysoula Malisianou, Dóra Bogárdi, Kremena Lazarova, Silvana Röstorf, Lindsey Reynolds, Veronika Bazalová, Equinet, 2016](#)

⁷ Page 40, paragraph 5, [Fighting Discrimination on the Ground of Race and Ethnic Origin, Chrysoula Malisianou, Dóra Bogárdi, Kremena Lazarova, Silvana Röstorf, Lindsey Reynolds, Veronika Bazalová, Equinet, 2016](#)

⁸ Page 27, paragraph 1, [A perspective from the work of equality bodies on: European equality policy strategies, equal treatment directives, and standards for equality bodies, Niall Crowley, Equinet, 2020](#)

reduce the obstacles identified above – “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”⁹

- **Equality bodies have noted that certain aspects, which could ensure a good national implementation of anti-discrimination legislation, go beyond their mandate and scope of work** - “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 underdeveloped in their implementation. This is a topic that could benefit from European level guidance”, example from the Czech Republic “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.”¹⁰
- **The RED would benefit from introducing preventative, institutional, and mainstreaming duties and detailed standards for the operation of equality bodies in relation to these. Although this has been used successfully in some jurisdictions, it is necessary to develop legal provisions to ensure uniformity in the application of equality duties across Member States** - “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. 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.”¹¹

⁹ Page 27, paragraph 3, [A perspective from the work of equality bodies on: European equality policy strategies, equal treatment directives, and standards for equality bodies, Niall Crowley, Equinet, 2020](#)

¹⁰ Page 21, paragraph 7, [A perspective from the work of equality bodies on: European equality policy strategies, equal treatment directives, and standards for equality bodies, Niall Crowley, Equinet, 2020](#)

¹¹ Page 16, paragraph 2, [A perspective from the work of equality bodies on: European equality policy strategies, equal treatment directives, and standards for equality bodies, Niall Crowley, Equinet, 2020](#)

Addressing legislative gaps

Addressing legislative gaps: Standards for equality bodies

The gaps mentioned above are problematic as, by leaving certain persons and fields of life unprotected, they limit the impact anti-discrimination legislation can hope to have at the national level. The following section zooms in on the role and effectiveness of equality bodies and identifies gaps in standards for equality bodies within the RED. Shortcomings in this area are prone to limiting the effectiveness and impact of equality bodies in monitoring and enforcing EU equality law.

- **The Racial Equality Directive has given equality bodies duties without adequate guidance and guarantees. As announced in the anti-racism action plan, binding legislation on standards will be essential to ensuring the independence of equality bodies** - There has been “a major breakthrough in the **recognition of and standards** for equality bodies, with the EU’s anti-racism action plan raising the possibility of proposing EU level legislation to strengthen the role and independence of equality bodies.”¹²
“The EC announced in its Anti-racism Action Plan in September 2020 that the possibility of proposing new binding legislation will be explored to help make equality bodies reach their full potential and **ensure their independence**. Equality bodies in the panel [of the roundtable] illustrated how such a regulation would be necessary and would apply in practice at the Member State level, enabling them to fulfil their vast potential and protecting them from political interference and attacks.”¹³
- **Litigation and/or decision-making powers of equality bodies should be mandated within Directive 2000/43/EC or in a separate horizontal legislation on equality bodies. The powers of equality bodies should be clearly outlined, and resources allocated to these organisations should be increased when the mandate is extended** - “Several equality bodies still lack the necessary litigation and/or decision-making powers to ensure effective support to victims of discrimination and even where the powers are there on paper, they are not always able to apply them to a significant extent in practice, partly because of insufficient resources.”¹⁴
- “EU legislation should require that all equality bodies have robust litigation powers (including for strategic litigation) with legal standing before the courts (in individual and collective complaints and ex officio) and/or authoritative decision-making powers with legally binding decisions and the capacity to issue effective, proportionate and dissuasive sanctions. If an equality body is vested with both functions, it is important to ensure a firewall between the parts of the institution carrying out these two functions”¹⁵

¹² Page 3, paragraph 1, [Legislating for stronger, more effective equality bodies: Key elements for and expectations from future EU legislation on equality bodies, Tamás Kádár, Equinet, 2021](#)

¹³ Page 3, paragraph 2, [Future of equality legislation in Europe, Jone Elizondo Urrestarazu, Equinet, 2020](#)

¹⁴ Page 4, paragraph 2, [Legislating for stronger, more effective equality bodies: Key elements for and expectations from future EU legislation on equality bodies, Tamás Kádár, Equinet, 2021](#)

¹⁵ ¹⁵ Page 7, paragraph 5, [Legislating for stronger, more effective equality bodies: Key elements for and expectations from future EU legislation on equality bodies, Tamás Kádár, Equinet, Equinet, 2021](#)

- **EU legislation should ensure that equality bodies have enough resources** - “EU legislation should provide a method for calculating a minimum adequate level of resources for equality bodies, covering staff, financial and technical assets enabling an effective performance of all functions of the body. Provisions should guarantee adequate additional resources in cases of attributing additional functions to the equality body.”¹⁶
- **The mandate of equality bodies should be expanded to cover all fields of life and all forms of discrimination. Actions of the state should also be monitored by equality bodies, especially in relation to law enforcement, as it is important for equality bodies to engage with this hard to manage area** - “all fields of life should be covered by the mandate of equality bodies. This means covering all fields currently covered by the Racial Equality Directive but including also actions by the state or its organs, such as the police. The mandate of equality bodies should cover both the public and private sectors.”¹⁷
- “The mandate of equality bodies should cover all forms of discrimination (direct discrimination, indirect discrimination, harassment, sexual harassment and instruction to discriminate) as well as victimisation and hate speech (hate speech is currently included in the mandate of around half of national equality bodies). EU legislation on equality bodies should not be used to justify any regression or narrowing of the existing mandate of equality bodies at national level.”¹⁸
- **All equality bodies should have adequate powers - to promote and mainstream equality, and to make recommendations** - “EU legislation should require all equality bodies to hold powers to effectively promote and mainstream equality, such as conducting surveys, collecting equality data, monitoring, issuing reports and raising awareness. EU legislation should guarantee that equality bodies can effectively use their power to make recommendations by ensuring that they are engaged in the legislative or policy-making process early enough and that their recommendations are responded to in an adequate manner”¹⁹.
- **Equality bodies should be given strong powers that are consistent with their needs, through the establishment of dedicated, ambitious, and realistic legislation. The legislation should provide comprehensive coverage for all areas of their work in a cohesive and clear format** - “There is a need for specific, dedicated and detailed legislation on equality bodies, given their horizontal importance for the implementation of all EU equality laws. Such dedicated EU legislation on equality bodies would ultimately ensure consistent and strong powers for and protection by equality bodies across all grounds and fields of discrimination, avoiding the risk

¹⁶ Page 8, paragraph 5, [Legislating for stronger, more effective equality bodies: Key elements for and expectations from future EU legislation on equality bodies, Tamás Kádár, Equinet, 2021](#)

¹⁷ Page 6, paragraph 4, [Legislating for stronger, more effective equality bodies: Key elements for and expectations from future EU legislation on equality bodies, Tamás Kádár, Equinet, Equinet, 2021](#)

¹⁸ Page 7, paragraph 1-2, [Legislating for stronger, more effective equality bodies: Key elements for and expectations from future EU legislation on equality bodies, Tamás Kádár, Equinet, Equinet, 2021](#)

¹⁹ Page 7, paragraph 3-4, [Legislating for stronger, more effective equality bodies: Key elements for and expectations from future EU legislation on equality bodies, Tamás Kádár, Equinet, Equinet, 2021](#)

of contributing to a perceived ‘hierarchy’ of discrimination grounds. It would also allow for sufficient detail in the legislation, something that the current regulatory model (with equality bodies mentioned in some, but not all grounds-based legislation) does not achieve.”²⁰

- **To overcome the issue of under-reporting, it is necessary to reinforce equality bodies with full independence to promote trust** - “Independence is a crucial precondition for the effective work of equality bodies in promoting equality, fighting discrimination and implementing EU equality legislation. It is necessary to establish and maintain trust in the institution from persons and groups at risk of discrimination and thereby contributes to combatting under-reporting of discrimination incidents; it allows the equality body to work without instructions or undue interference from the government or other actors; it allows the equality body to autonomously decide on and ensure the most effective use of its powers and resources; and it allows the equality body to use all its powers without fear of repercussions for the institution, its staff or equality issues in the country. EU legislation should ensure that all equality bodies are separate legal entities and/or have their own legal personality.”²¹
- **When equality bodies are provided with full independence, EU legislation should establish a monitoring system to evaluate and preserve their autonomy and integrity** - “EU legislation should introduce a regular monitoring system with clear indicators to evaluate the independence of equality bodies. These indicators should include elements of the national legal framework; the functioning of the equality body; the budget and resources; and the appointments to and dismissals from leadership positions.”²²
In order to ensure consistency, indicators should be developed for provisions included in the legislation - “Equinet has already developed such indicators on the mandate and independence of equality bodies ([here](#) and [here](#)) that can serve as inspiration for this process.”²³

Addressing legislative gaps: Redress and stronger sanctions

- **There is a strong need to increase legislative guidance on sanctions as the current provisions are minimal** - “Current legislation has also proven not to live up to its full potential regarding sanctions. There is very little guidance in the Directives in that it only mentions that sanctions “must be effective, proportionate and dissuasive”. Currently, sanctions applied across Member States do not guarantee effective redress nor do they act as an effective deterrent.”²⁴

²⁰ Page 5, paragraph 1, [Legislating for stronger, more effective equality bodies: Key elements for and expectations from future EU legislation on equality bodies, Tamás Kádár, Equinet, 2021](#)

²¹ Page 8, paragraph 2, [Legislating for stronger, more effective equality bodies: Key elements for and expectations from future EU legislation on equality bodies, Tamás Kádár, Equinet, 2021](#)

²² Page 8, paragraph 4, [Legislating for stronger, more effective equality bodies: Key elements for and expectations from future EU legislation on equality bodies, Tamás Kádár, Equinet, 2021](#)

²³ Page 6, paragraph 2, [Legislating for stronger, more effective equality bodies: Key elements for and expectations from future EU legislation on equality bodies, Tamás Kádár, Equinet, Equinet, 2021](#)

²⁴ Page 3, paragraph 4, [Future of equality legislation in Europe, Jone Elizondo Urrestarazu, Equinet, 2020](#)

- **It is necessary to enhance access to justice by providing security to victims that violations of the principle of equality lead to significant consequences. Equality bodies feel that this route should be made easier through legislation** - “by enhancing access to justice for victims of discrimination and by an evaluation and adjustment of the **effectiveness and dissuasiveness of sanctions** in discrimination cases.”²⁵
- **There are calls to move from a reparative model towards a deterrent model to prevent the societal harm from being committed. If the deterrent model is favoured, then sanctions should reflect this through increased focus on the perpetrator to prevent the societal harm** - “Some panelists [at the roundtable] proposed requiring potentially enabling punitive damages for sanctions when there is a reiteration, no collaboration with equality bodies, or lack of enforcement of recommendations. It would be necessary to have a paradigm shift that would allow us to focus more on the perpetrator and the prevention of the societal harm effected by discrimination, thereby avoiding victims becoming victims in the first place, instead of offering reparation once their rights have been violated (from a reparative model towards a deterrent model).”²⁶
- **However, it is necessary for the sanctions applied to also be effective and monetary fines have been found to act as real incentives to change (alongside other possible types of sanctions to be considered)** - “The way proposed to do that is through effective deterrents, including and focusing mainly on raising the monetary amount granted in cases of discrimination (which at the moment is too low) to raise the interest in compliance with equality law. Following successful regulation models in other areas of fundamental rights, such as the General Data Protection Regulation (GDPR), under the menace of sanctions reaching millions of Euros, companies would have a real incentive for change.”²⁷
- **Developments in artificial intelligence, although largely covered by legislation, pose a real threat to affect large groups of individually unidentified victims, thereby rendering enforcement less likely and more difficult. As a result, this has further increased the need for effective sanctions for the purpose of dissuasion** - “Referring back to sanctions, some panelists proposed that as discrimination through artificial intelligence is a massive new risk potentially affecting large groups at the same time, the visibility and media attention it has been receiving can also be turned into an opportunity, justifying the need for more effective and dissuasive sanctions.”²⁸
- **Sanctions have been found to be too low or 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

²⁵ Page 3, paragraph 6, [Recommendation for a fair and equal Europe: Rebuilding our societies after Covid-19 – Tamás Kádár, Equinet, 2020](#)

²⁶ Page 3, paragraph 4, [Future of equality legislation in Europe, Jone Elizondo Urrestarazu, Equinet, 2020](#)

²⁷ Page 3, paragraph 4, [Future of equality legislation in Europe, Jone Elizondo Urrestarazu, Equinet, 2020](#)

²⁸ Page 3, paragraph 5, [Future of equality legislation in Europe, Jone Elizondo Urrestarazu, Equinet, 2020](#)

who were unsuccessful due to discrimination. **‘Effective, proportionate, and dissuasive’ sets an important standard for sanctions and European level guidance could usefully be developed based on the standard.**”²⁹

- **Discrepancies have also surfaced amongst Member States in relation to the burden of proof and its application in the courts. Due to the inconsistency of its use, the burden of proof tool has proven difficult to implement, therefore, equality bodies consider it to be a barrier to effective protection against discrimination. This is a procedural obstacle that leads to uncertainty, it should be clarified to ensure uniformity in the application of legislation at national level – “Article 8 of the Race Equality Directive allows for shifting the burden of proof, which equality bodies reported is not always applied correctly by national courts.”**³⁰
“Article 8 of the Directive provides that when a person establishes 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. **This reversal of the burden of proof can be a useful tool for claimants, if properly understood and applied by courts.** The Swedish equality body has concerns about the way the burden of proof is implemented and interpreted in their national courts in three cases. In two of the three cases, the equality body is pressing for a reference for a preliminary ruling on this matter.”³¹
“Burden of Proof provisions have been difficult to implement and, **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.”³²

²⁹ Page 17, paragraph 2, [A perspective from the work of equality bodies on: European equality policy strategies, equal treatment directives, and standards for equality bodies, Niall Crowley, Equinet, 2020](#)

³⁰ Page 1, paragraph 4, [Fighting Discrimination on the Ground of Race and Ethnic Origin, Chrysoula Malisianou, Dóra Bogárdi, Kremena Lazarova, Silvana Röstorf, Lindsey Reynolds, Veronika Bazalová, Equinet, 2016](#)

³¹ Page 32, paragraph 7, [Fighting Discrimination on the Ground of Race and Ethnic Origin, Chrysoula Malisianou, Dóra Bogárdi, Kremena Lazarova, Silvana Röstorf, Lindsey Reynolds, Veronika Bazalová, Equinet, 2016](#)

³² Page 18, paragraph 3, [A perspective from the work of equality bodies on: European equality policy strategies, equal treatment directives, and standards for equality bodies, Niall Crowley, Equinet, 2020](#)

Addressing legislative gaps: Hate speech and hate crimes

- Hate speech should be explicitly included in the mandate of all equality bodies not just some. Those that do not have a mandate can rely on interpretative powers, but this does not provide them with the necessary resources and powers to act. The European Commission and Member States should ensure that equality bodies have mandates that explicitly enable them to address hate speech and are accorded the competences required for this** - “The mandate of equality bodies should cover all forms of discrimination (direct discrimination, indirect discrimination, harassment, sexual harassment and instruction to discriminate) as well as victimisation and hate speech (hate speech is currently included in the mandate of around half of national equality bodies).”³³

“Few equality bodies have an explicit mandate on hate speech, many have, however, interpreted their mandate to include hate speech. This situation can leave them lacking the competences and resources required to make an impact.”³⁴

In cases where equality bodies have interpreted their mandate to include hate speech, it should not be used to undermine the demand for a new mandate in accordance with the [European Commission Recommendation on standards for equality bodies of 2018 \(Chapter II.1.1\)](#) - “Any attempt to suggest that current work on hate speech by equality bodies means an explicit mandate is not needed, would be to ignore the effect that the lack of an explicit mandate has on limiting the strategic approaches that can be deployed by the equality body and serving as a **further barrier to reporting of complaints** to the equality body for limited visibility of the equality body mandate.”³⁵

“It is difficult for equality bodies to take on the issue effectively where their mandate to do so has to be implied. In such instances the equality bodies can lack adequate competences to effectively respond to the issue. There are further barriers of equality body capacity in terms of inadequate funding to taking on the issue. There is limited case law at national level on hate speech to inform legal action by the equality body on the issue.”³⁶
- Equality bodies have a limited mandate for hate speech, which has resulted in a lack of strategy in this area and decreased the effectiveness of their responses because they are often reactive, or project based** - “Many equality bodies identified the lack of a strategy to drive and guide their response to hate speech. Their response tends to be reactive or project based. This was identified as limiting the potential of their response by some equality bodies. There is a particular strategic choice for equality bodies to address hate speech directly or to understand it as a systemic problem whose root causes need to be addressed. It is possible that the lack of strategy might explain the limited focus on causal factors for hate speech in the work of equality bodies. Effective responses to hate speech would need to address the cultural phenomena that generate anxiety, fear and a value base that is alien to diversity, and the economic phenomena that create alienation.”³⁷

³³ Page 7, paragraph 1, [Legislating for stronger, more effective equality bodies: Key elements for and expectations from future EU legislation on equality bodies, Tamás Kádár, Equinet, 2021](#)

³⁴ Page 3, paragraph 1, [Extending the Agenda. Equality Bodies Addressing Hate Speech, 2018, Niall Crowley](#)

³⁵ Page 10, paragraph 2, [Extending the Agenda. Equality Bodies Addressing Hate Speech, 2018, Niall Crowley](#)

³⁶ Page 14, paragraph 2, [Extending the Agenda. Equality Bodies Addressing Hate Speech, 2018, Niall Crowley](#)

³⁷ Page 11, paragraph 3, [Extending the Agenda. Equality Bodies Addressing Hate Speech, Niall Crowley, Equinet, 2018](#)

- **There is a need for the legal base to be expanded so the European Commission can legislate on Anti-hatred legislation. Therefore, in cases where the definition of hate speech has not been correctly transposed into national law, infringement proceedings can have a major impact and provide clarity for court systems** - “Likewise, the need to explore and potentially expand the legal base for the EC to be able to legislate on Anti-hatred legislation for other grounds beyond race, the need to fully implement UNCRPD recommendations and the need for robust and disaggregated data were mentioned as crucial steps in the future of equality legislation in Europe.”³⁸
- “One of the main areas that needs to be strengthened to effectively protect vulnerable groups against hate speech and discrimination is legislation. **There are differences in the definition of hate speech and the sensitivity of the Courts to this issue across jurisdictions.** Moreover, while in some instances hate speech is not defined, in other jurisdictions, definitions of hate speech in place tend to focus on the issue of incitement to hatred across a wide range of grounds which are usually typified in Criminal codes. This in turn implies that Criminal Courts typically have exclusive competence over this topic. Another dimension of the **failure of legislation to reflect the lived experience of vulnerable groups** affected by hate speech could be glimpsed in the differences regarding the grounds covered in each country, which in some instances are very limited. For instance, in some countries, the legislation does not offer the same protection to citizens who are victims of incitement to violence, discrimination or hatred because of their religious or philosophical belief or their sexual orientation, unless these offences are motivated by racism or xenophobia. These shortcomings lead to confusion and prevent vulnerable groups’ access to justice.”³⁹
- **Access to justice, specifically in relation to hate crimes, needs to be strengthened and hate speech should be included into National Action Plans as an important component in all Member States** - “Access to justice by private individuals regarding equality law has proven to be challenging: the costs of litigation and risks are too high, and there is an overall lack of understanding among legal practitioners about equality legislation. Effective enforcement in this sense can only be guaranteed by public enforcement. Equality bodies have the infrastructure and prior knowledge to do this. Therefore, the EC request for the Member States to enable strategic litigation powers to equality bodies is a good step forward. Any regulation in this sense should allow equality bodies to apply for concrete sanctions in discrimination cases. The possibilities brought with the presentation of the Action Plan against Racism were applauded, **including the requirement for Member States to enact national anti-racism plans** and the role foreseen for equality bodies in the formulation and monitoring of these plans.”⁴⁰

“There is 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: Access to justice, specifically in cases of discrimination, harassment, and violence, hate speech and hate crime, including strengthening the contribution of equality bodies; Effective

³⁸ Page 4, paragraph 2, [Future of equality legislation in Europe, Jone Elizondo Urrestarazu, Equinet, 2020](#)

³⁹ Page 5, paragraph 3, [Equinet submission to the European Commission’s Initiative, ‘Extension of the list of EU crimes to hate speech and hate crime’, Equinet, 2021](#)

⁴⁰ Page 4, paragraph 1-2, [Future of equality legislation in Europe, Jone Elizondo Urrestarazu, Equinet, 2020](#)

responses to hate crime and hate speech and the promotion of alternative narratives based on EU values of equality; and 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.”⁴¹

- **Lack of legislative provision and enforcement framework limits the work of equality bodies where the national policy context is not conducive** - “the national policy context is not always conducive to their work, with inadequate legislative provision and enforcement frameworks that lack capacity. Most equality bodies did not report comprehensive strategies underpinning their work on hate speech. This limits their focus on root causes of hate speech and their engagement in alternative narrative work.”⁴²

As a solution to the above- “European Commission and Member States could usefully take action to enhance legislation on hate speech to ensure uniform definition, the coverage of all grounds and a mix of criminal and administrative channels to address cases.”⁴³

- **There needs to be provision of a more comprehensive strategy against hate speech as current resources are inadequate** - “Some equality bodies seek to pursue a more comprehensive strategy by combining action to protect the rights of people exposed to hate speech with action to support good practice in preventing hate speech... The Office of the Ombudsman in Croatia goes further in identifying a strategy that includes educating the relevant authorities on hate speech, casework in support of groups targeted by hate speech, and educating young people on recognising and responding to hate speech.”⁴⁴
- **There is room for more focus or legislation surrounding gendered/sexist hate speech as identified by the Gender Equality Ombudsman, Finland**- “hate speech as a significant societal problem, raise the need for legislative amendment to include gender as a motive in hate crimes, advocate for a national action plan against hate speech and hate crimes, and identify the need for study on misogyny and sexist hate speech and hate crimes”⁴⁵

⁴¹ Page 10, paragraph 1, [A perspective from the work of equality bodies on: European equality policy strategies, equal treatment directives, and standards for equality bodies, Niall Crowley, Equinet, 2020](#)

⁴² Page 3, paragraph 2, [Extending the Agenda. Equality Bodies Addressing Hate Speech, 2018, Niall Crowley](#)

⁴³ Page 25, paragraph 4, [Extending the Agenda. Equality Bodies Addressing Hate Speech, 2018, Niall Crowley](#)

⁴⁴ Page 11, paragraph 2, [Extending the Agenda. Equality Bodies Addressing Hate Speech, 2018, Niall Crowley](#)

⁴⁵ Page 20, paragraph 5. [Extending the Agenda. Equality Bodies Addressing Hate Speech, 2018, Niall Crowley, Equinet, 2018](#)

Conclusion

This document highlights some of the main gaps within the Racial Equality Directive (2000/43/EC) as identified by equality bodies through their work at the national level. Without a clear mandate or binding legislation, equality bodies have at times felt unable to use their powers to ensure anti-discrimination legislation is implemented at national level as it was intended at EU level. The need for binding legislation on standards has been identified as a crucial and urgent work that must be produced by the European Commission to provide equality bodies with the necessary independence, resources, and clarity to fulfil the needs and requirements of the Racial Equality Directive. Equinet hopes that the indicators pertaining to [independence](#) and [mandate](#) will help strengthen current legislation and serve as inspiration for future developments within this area. Furthermore, the terminology used in some provisions of the legislation, given the scarcity of guidelines provided, has been applied asymmetrically, resulting in varying levels of protection within Member States. To resolve this the European Commission could ensure greater clarification moving forward in subsequent amendments or guidance documents to Directive 2000/43/EC. Additionally, equality bodies would greatly welcome stronger powers of enforcement through strengthened legislation and sanctions that are truly “effective, proportionate and dissuasive”⁴⁶. Thus, helping them to resolve the issues they encounter, providing better access to justice in cases of discrimination and hate speech

⁴⁶ Page 17, paragraph 2, [A perspective from the work of equality bodies on: European equality policy strategies, equal treatment directives, and standards for equality bodies, Niall Crowley, Equinet, 2020](#)

Bibliography

- [Legislating for stronger, more effective equality bodies: Key elements for and expectations from future EU legislation on equality bodies \(2021\), Tamás Kádár - Equinet](#)
- [Future of equality legislation in Europe \(2020\), Jone Elizondo Urrestarazu - Equinet](#)
- [Recommendation for a fair and equal Europe: Rebuilding our societies after Covid-19 \(2020\), Tamás Kádár - Equinet](#)
- [A perspective from the work of equality bodies on: European equality policy strategies, equal treatment directives, and standards for equality bodies \(2020\), Niall Crowley - Equinet](#)
- [Compendium of Promising Practices on Ethnic Profiling \(2019\), Natasha Arnpriester, Susheela Math, Zsolt Bobis - Equinet](#)
- [Extending the Agenda. Equality Bodies Addressing Hate Speech \(2018\), Niall Crowley - Equinet](#)
- [Fighting Discrimination on the Ground of Race and Ethnic Origin \(2016\), Chrysoula Malisianou, Dóra Bogárdi, Kremena Lazarova, Silvana Röstorf, Lindsey Reynolds, Veronika Bazalová - Equinet](#)
- [Equinet submission to the European Commission's Initiative, 'Extension of the list of EU crimes to hate speech and hate crime' \(2021\) - Equinet](#)