



# Learnings from the piloting of indicators for the mandate and independence of equality bodies

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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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# Introduction

EU anti-discrimination law requires the establishment of equality bodies on the grounds of gender and racial or ethnic origin in the fields covered by the relevant directives.<sup>1</sup> These bodies must as a minimum play a promotional role in an enforcement model centred on adversarial legal action by individual plaintiffs in civil courts (individual justice model) who may be supported by non-governmental organisations and trade unions, as well as equality bodies. **Data shows that in practice, bolstering the powers of equality bodies is a uniquely effective way in which access to justice can be improved.**

The significant role equality bodies play in enforcing EU anti-discrimination legislation is tangible at the national level as borne out in the annual, thematic and ad hoc reports published by the European Network of legal experts in gender equality and non-discrimination.<sup>2</sup> The available data indicates that the status, mandate and powers of equality bodies are key factors in ensuring access to justice to those subjected to discrimination, as well as in recognising and remedying unequal treatment on the grounds of age, disability, gender, racial or ethnic origin, religion or belief and sexual orientation. In line with international human rights treaty obligations, national legislation in many Member States already ensure broader mandates and more generous powers for equality bodies than the minimum required under EU anti-discrimination law. The over-transposition of EU law is augmented in many Member States by specific safeguards of independence, the provision of adequate resources, and a serious attention to the equality bodies' diagnostic and advisory functions as regards institutional and structural inequalities.

**Variance among equality body mandates and powers has engendered tangible differences in the level of protection from discrimination and inequalities in practice.** On the same token, positive examples from the national level demonstrate that reinforcing the status, mandate, and powers of equality bodies is key to improving the protection of discriminated groups. The most salient differences in the level of protection stem from the scope of national anti-discrimination law - the grounds and fields covered - and the functions of equality bodies, which range from strictly promotional to agency type institutions, with most equality bodies taking on a hybrid character.

2000 signalled a 'procedural turn' in EU anti-discrimination law, following a broader trend, whereby Member States are required to comply with institutional requirements, such as setting up or modifying specialised administrative agencies.<sup>3</sup> Once the standard setting and transposition phase was completed (even if protection is still not complete for all grounds until the present day), attention turned to the shortcomings of the enforcement regime and the disparities it produced across marginalised groups in the anti-discrimination field, where EU law mandates the establishment of promotional bodies rather than administrative agencies. As concerns collective legal action, even though not explicitly mentioned in the 2013 Commission Recommendation, injunctive and compensatory collective redress mechanisms concerning violations of rights granted under Union Law should also be available in the anti-discrimination field.<sup>4</sup> The 2018 Commission Recommendation on standards for equality bodies set out to broaden legal opportunities in relation

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<sup>1</sup> Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180, 19.7.2000, p. 22–26. Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ L 204, 26.7.2006, p. 23–36. Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, OJ L 373, 21.12.2004, p. 37–43 Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC, OJ L 180, 15.7.2010, p. 1–6

<sup>2</sup> [Home - European Equality Law Network](#)

<sup>3</sup> Muir and de Witte, 2017, pp. 139-140.

<sup>4</sup> Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law. For an analysis, see, Muir et al, 2017

to institutional enforcement (the agency model), while further bolstering the individual justice model by envisaging litigation powers for equality bodies as well.<sup>5</sup>

Much has changed in political and socio-economic conditions since 2000 and some equality bodies have faced significant challenges concerning independence, mandate, powers and resources on the one hand, and criticism concerning their efficiency, particularly as regards the prevention of discrimination on the other. Critical views tie in with the shortcomings of legal and political opportunities manifested in preference for individual enforcement and a waning commitment to equality. The efficiency of domestic enforcement regimes - especially in Member States where equality bodies have a limited set of powers - cannot be properly assessed without extending the analysis to key actors, such as courts, government departments and field-specific agencies (labour, consumer and school inspections). On a broader scale, equality bodies lacking (robust) enforcement powers will inevitably demonstrate weakness in comparison to agencies safeguarding rights granted under EU law, such as in the fields of data and consumer protection.

**Bolstering the mandate and powers of national equality bodies (NEB) while ensuring their steady resources and independence is essential but improved standards shall also guarantee that they can maintain neutrality in increasingly polarised societies.** This is the context in which Equinet pledged to contribute to the EU legislative process by piloting indicator sets on independence and mandate, and sharing lessons learnt with the wider public. The mandate indicators concern the scope and type of activities, while the independence indicators cover several aspects ranging from legislative safeguards to financial considerations. The independence indicators passed the test presented by diverse national contexts, but the mandate indicators have prompted recommendations from the five NEBs participating in the pilot as to the adequate mapping and assessment of institutional diversity.

Against this backdrop, the report (i) summarises and evaluates the learnings from the piloting of indicators on the independence and the mandate of equality bodies across the European Union; (ii) documents the amendments that have a potential to increase the quality of the indicators based on the consensus of equality bodies that piloted their use; (iii) establishes and informs stakeholders whether and to what extent these indicators can be used to evaluate the situation of equality bodies; and (iv) suggests ways in which these indicators can inform the planned legislation on standards for equality bodies.

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<sup>5</sup> Commission Recommendation of 22.6.2018 on standards for equality bodies, OJ L 167, 4.7.2018, p. 28-35.



# **Section 1:**

## **Key learnings**

This section presents the key learnings from piloting indicators on independence and mandate by five national equality bodies (NEB), namely the National Council Combating Discrimination (NCCD) in Romania, UNIA in Belgium, the Public Defender of Rights in Czechia, the Federal Anti-discrimination Agency (FADA) in Germany and the Ombud for Equal Treatment in Austria. There are of course other important aspects of equality body operations that require comparative assessment and Equinet members also discussed creating indicators on resources and specific powers, such as the promotion of equality. In the end, the Task Force decided to pilot indicators on independence and mandate because these seemed the most salient with a view to standard setting at the EU level and an initial review of compliance with secondary legislation, should it be adopted.

NEBs participating in the pilot provided written comments about the indicator sets and their representatives shared further insights during interviews conducted in January 2022. They all agreed that both sets of indicators provide an excellent opportunity for self-evaluation and self-reflection. They also agreed that comparative assessment can offer ‘good arguments’ for legislative reform at the EU level but no consensus emerged about a similar impact at the national level, although the potential of ensuring transparency both towards elected politicians and the general public was noted. The representative of the NCCD warned that the focus on compliance with EU standards may have the unintended effect of failing to measure compliance in full, meaning that in certain countries NEBs also play a part in enforcing UN and Council of Europe standards and are in turn monitored by bodies overseeing compliance with ground-specific UN treaties, Protocol 12 ECHR and the (revised) European Social Charter. It is worth noting that the regulation of equality bodies under EU anti-discrimination law paralleled international efforts to put in place national human rights institutions (NHRI) in the late 1990s and early 2000s. Afterwards, the relationship between the general and specialised institutions raised issues in some Member States, some of which have since entrusted NHRIs with the mandate and powers of NEBs.

The five NEBs made minor comments about indicators on independence, finding the purpose, as well as the questions clear and self-explanatory. Some signalled the need to clarify the meaning of multi-mandate bodies and to ask each equality body to fill in separate questionnaires in case multiple bodies operate in a Member State. In few instances, the NEBs recommended that a wider variety of response options should be provided, such as on being ‘designated’ as an equality body (in legislation or other source), internal structure (following types of operations, not just grounds or fields) and regular, rather than ‘annual’ reports that may be required by legislation or issued voluntarily. These issues are addressed separately in the amended independence indicators. While research for this report was on-going, NEBs participated in a workshop on accreditation and equality data collection. Interviewees reflected on discussions during the workshop and the consensual view emerged that presently NEBs are cautious about the establishment of an accreditation system at the EU level because in their view low scores or refusal of accreditation may inadvertently undermine institutional status and leverage in national advocacy arenas. Concern was also voiced about parallel processes at the international level – especially in the case of NHRIs acting as equality bodies – the level of experience within European Institutions and political risks attached to accreditation.

The representative of the Austrian equality body wondered whether it would be feasible and/or desirable to assess independence and mandate annually, or whether it would suffice to introduce bi-annual or less frequent monitoring. She emphasised, however that in case urgent matters arise – particularly those involving a sudden regression from existing safeguards and conditions – NEBs should have the opportunity to communicate these matters to the European Commission either directly or via Equinet, using the indicators as a baseline. Her view about independence as being primarily conditioned by local political culture was shared by the other interviewees. While research for this report was undergoing, NEBs were simultaneously responding to the consultation on indicators developed by the European Commission. The interviewees expressed their fear of assessment-fatigue, with the representative of UNIA mentioning that adequately responding to



questions about personnel and budget would require considerable investment of time and financial skills.

The indicators on mandate attracted many comments and recommendations relating to structural considerations, namely that it would be desirable to reflect the diversity of equality bodies more fully, while ensuring that the order of questions is intuitive, mirroring everyday operations. Questions could move from specific issues to a generic/systemic overview of operations, strategy and planning accompanied by a focus on individual discrimination to institutional and structural issues or the other way around. A large part of the interviews was devoted to the detailed description of operations that could not or only partly be recorded in the questionnaire despite taking up considerable time and resources at the national level. Most of these apparently country-specific details fall under the scope of assistance to victims, which is a key, yet undefined concept in EU anti-discrimination legislation as well as in the mandate questionnaire.

For instance, the FADA is established as a strictly promotional NEB, meaning that it lacks both investigative and decision-making powers. This does not, however prevent it from responding to a high number of complaints and contacts with advice, mediation services and recommendations on free legal aid/representation. In case EU legislation does not set the minimum requirements higher than the establishment of promotional NEBs, it would be important to fully capture these types of activities in the mandate indicators, particularly if considerable resources are allocated for their fulfilment.

UNIA is a prime example of NEBs that operate in a legal culture, where prior to the adoption of EU anti-discrimination law sanctions against (racial) discrimination had been provided in criminal law and where victims often prefer this remedial route. Even though on paper it lacks investigation powers itself, networking with the police and prosecution lends UNIA a say in investigations. This should ideally be depicted in the comment section, but given that this situation does not pertain to other national contexts, it does not necessitate an amendment to the questionnaire. Similarly, the Czech Public Defender of Rights' investigation powers are limited in a way that are not detectable in other national contexts. This, while it is important to record in the comment section of the current indicators that his broad powers pertaining to 'inquiries' into the practices of public institutions stand in stark contrast with the lack of formal powers when it comes to the 'assessment' of complaints against private individuals and entities, it does not necessitate the amendment of the questionnaire itself.

The NCCD is one of several NEBs that can launch ex officio investigations to uncover structural discrimination with outcomes akin to strategic litigation. Yet, if the power to launch ex officio investigation is excluded from the indicators, this aspect may stay hidden. The Ombud for Equal Treatment has robust powers to investigate complaints and refer cases to a specialised tribunal but when these two important building blocks are assessed separately – or in the case of tribunals not at all - the Austrian system may seem rather limited. In practice, this regulatory option – followed in Denmark and Ireland as well – offers important advantages: by separating investigatory and decision-making powers it enables the Ombud to remain neutral in the public eye and yields a binding decision without compelling victims to litigate. Thus, the relevant questions should extend to legal action before tribunals as well as courts.

The most important take-aways from piloting the mandate indicators can be summarised as follows. First, **the diversity of equality bodies is most tangible when it comes to providing 'independent assistance to victims'**, which merits a broad definition of the concept and thorough mapping. This can ensure that both the strengths and weaknesses of country-specific institutional set-ups and practices are depicted in a balanced manner, pre-empting a typical shortcoming of comparative assessments, namely that the questions are based on a particular institutional model or (national) example. The second and related lesson is that the

questionnaire should be accompanied by a user guide explaining key concepts and aiding respondents. Third, **strategic operations should be measured systematically rather than in relation to a particular power**, such as assistance to victims and in particular litigation. Fourth, it may simplify the mandate questionnaire if the sentences reminding respondents about the focus on law on the books or law in practice are transferred into a user guide.



## **Section 2: Improving the quality of indicators**

This section documents any amendments that have a potential to increase the quality of the indicators based on the consensus of equality bodies that piloted their use. The specific recommendations made by NEBs piloting the indicator sets are included in the amended questionnaires. Recommendations for structural changes and sequencing in the mandate questionnaire are laid out below.

## 2.1. Background note on NEB mandate

The consensual view of academics and practitioners is that the individual justice model may easily render access to justice illusory, particularly if the injustice is structural, as discrimination is more increasingly proven to be. During the debates preceding the adoption of the 2000 anti-discrimination directives concerns were expressed about the dangers of making EU anti-discrimination law vulnerable to ‘US-style’ class actions. The fear of nurturing a litigious legal culture negatively affected the directives’ enforcement regime to the extent that not only do they not require Member States to guarantee collective standing to victims of discrimination but perhaps more importantly, they do not require the establishment of agencies with investigative and decision-making powers, even though this institutional enforcement model is familiar to European legal traditions and other areas of EU law, such as consumer and data protection.

In the field of utilities regulation (telecommunications, gas and electricity) and competition policy, administrative authorities must be established “with a precisely defined function in the effective application of EU legal standards”, including participation in Europe-wide networks.<sup>6</sup> An identical regulatory approach to data protection in the fundamental rights field has engendered considerable convergence, however the equality field is yet to properly catch up with these trends.<sup>7</sup> In the current political and socio-economic context, equality bodies come under pressure on two fronts. First, in case domestic legislation does not go beyond the minimum requirements of EU anti-discrimination legislation, NEBs function as promotional bodies, therefore lacking many powers that would enable them to provide effective assistance to victims of discrimination. Second, preference for the individual justice model in the directives and the relevant General Policy Recommendation of the European Commission Against Racism and Intolerance (ECRI) conditions NEBs to engage in litigation, which is a controversial and possibly not the most effective tool to assist victims of discrimination.<sup>8</sup>

NEBs in the EU may be classified as promotional, hybrid and agency type bodies. Promotional bodies lack the power to investigate and make binding decisions, but also to directly engage in litigation on behalf of victims or in their own name. On the other end of the scale, agency type bodies have both investigative and decision-making powers, including the power to make binding decisions, and they may also be given the power to litigate in their own name. Simultaneously, however as agency type bodies have the duty to investigate complaints, they tend to focus on their inquisitorial role rather than becoming adversaries in litigation. In case they have the power to launch investigations on their own motion (ex officio) as well as to launch representative suits (actio popularis), they will likely resort to the former, because that offers the opportunity to discover facts and levy sanctions more efficiently and on a broader scale than would be possible in civil court. Agency type bodies are not likely to represent individual victims in court, because that would run counter to their duty to investigate complaints of discrimination. Both hybrid and agency type equality bodies can have the power to litigate, therefore it is the power to investigate and adopt binding decisions that sets these two types of NEBs apart.

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<sup>6</sup> Muir and de Witte, 2017, p. 140.

<sup>7</sup> Ibid.

<sup>8</sup> European Commission against Racism and Intolerance General Policy Recommendation No 2 revised on Equality Bodies to combat racism and intolerance at national level, adopted on 13 June 1997 and revised on 7 December 2017.

A cluster of equality bodies operate in Member States, where protection from discrimination was initially provided in criminal law and victims continue to rely on the investigative powers of the police and prosecution. In few Member States, specialised tribunals have been set up to decide on complaints investigated by equality bodies. In few Member States, where transposing legislation does not extend beyond the minimum requirements, equality bodies undertake a predominantly promotional role, which places a burden on victims to seek remedies from courts, field-specific agencies or the police. However, judicial proceedings are not only more expensive, complicated and lengthier than the proceedings of equality bodies, but courts generally lack the power that agency type bodies possess, including the power to indicate or initiate legislative and policy reform addressing structural and institutional discrimination, report trends and patterns of discrimination, and call to action relevant stakeholders that are not formally party to the actual legal dispute.

Many equality bodies can support individual plaintiffs in judicial proceedings, but the gaping difference between the number of complaints filed with them rather than with the courts indicates that victims' access NEBs is easier and that the justice they serve is more effective. Investigations launched by equality bodies on their own motion (*ex officio*) can also more speedily, thoroughly, and cost-effectively uncover institutional and structural discrimination than lawsuits involving large plaintiff groups, classes or representative plaintiffs. A further advantage of institutional enforcement is that it does not propel equality bodies to take a stand in high-stake adversarial proceedings and risk antagonising the public, which is a risk that litigating NEBs face. The agency model seems advantageous for victims, perpetrators and society alike not only in terms of access to justice but also in terms of financial burdens and social peace.

Key distinctions between the three types of equality bodies crystallize around investigative and decision-making powers rather than the power to litigate. All three powers may be considered to fall under 'independent assistance to victims' but there is no consensus on the definition of this concept among equality bodies, decision makers and academics, whose views deviate on the ideal type of equality body.<sup>9</sup> The key dilemma pertains to the impartiality of NEBs, which according to some requires the separation of supporting (ranging from advise to acting on behalf of victims) and decision-making functions.<sup>10</sup> The impartiality dilemma can be resolved, as for instance in the data protection field supervising authorities combine promotional, investigative and decision-making (sanctioning) powers (Article 57 and 58 GDPR).<sup>11</sup>

Whether a promotional function can be reconciled with an agency function in the anti-discrimination field stems from variance across legal and institutional cultures. Solutions at the domestic level range from separating victim support and (non-binding) decision-making to combining the widest array of functions within one NEB. For instance, in the Netherlands and Sweden support is provided by a network of specialised and publicly funded NGOs, while NEBs have the power to adopt non-binding decisions. The Swedish NEB also has the power to litigate on behalf of victims, but the infrequent use of this power has come under criticism in recent years. Agency type NEBs in Romania, Bulgaria and Hungary focus on investigating complaints, sometimes launching *ex officio* investigations and seldom litigating in their own name. Variance relating to litigation in practice is an important aspect to consider during the legislative process.

Future legislation is unlikely to forge uniformity on impartiality and domestic institutional set-ups, but this should not prevent it from broadly defining 'independent assistance to victims' so as to accommodate promotional, hybrid, as well as agency type NEBs. The key question is of course

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<sup>9</sup> Jacobsen, 2010. At page 331, Jacobsen notes that "hearing and investigating complaints is, in itself, a means of assisting victims."

<sup>10</sup> Holtmaat, 2011.

<sup>11</sup> REGULATION (EU) 2016/679 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119/1, 4.5.2016.

whether the EU minimum would move from promotional to hybrid or agency type NEBs, which is why impartiality may assume central place in future debates. It would be desirable to regulate both ‘independent assistance to victims’ and impartiality – by mandating the institutional separation of functions - in a manner that can ensure consistency across different aspects of EU fundamental rights law.

## 2.2. The mandate indicators

NEBs piloting the independence questionnaire made one major and several minor recommendations. They wondered whether in the case of multi-mandate bodies it would be feasible to measure the independence (significance) of the equality mandate. They suggested that the questionnaire provide a greater variety of responses such as partly-yes-no, and that budget related questions may be answered with reference to annual indexing over the last five years for instance.

It would facilitate responses to the mandate questionnaire if the order of themes intuitively followed the everyday operations of NEBs and grouped responses that belong together under one theme, such as status, scope of activities and overall or field and ground-specific strategies; assistance to victims; reporting and recommendations for legislative and policy reform as well as about potentially discriminatory administrative practices; surveys and research; promotion (awareness raising and training); and last but not least, EU-level information exchange.

It may be useful for the mandate questionnaire to be consistent with the structure of EU secondary law, on which national legislation and practice have been modelled for over two decades and may be modelled for some time to come. Article 13 of the Racial Equality Directive, Article 12 of the Goods and Services Directive, Article 20 of the Equal Treatment Directive (recast) and Article 11 of the equal treatment in self-employment directive set out the minimum requirements for national legislation on the competences of equality bodies. Competences concerning sex discrimination are somewhat broader than those concerning racial or ethnic discrimination, which indicates that EU-level information exchange on sex discrimination may be more efficient than on racial or ethnic discrimination and other protected grounds. This gap in competences may need to be addressed in future legislation.

1. Member States shall designate a body or bodies for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin/sex. These bodies may form part of agencies charged at national level with the defence of human rights or the safeguard of individuals' rights.
2. Member States shall ensure that the competences of these bodies include:
  - without prejudice to the right of victims and of associations, organisations or other legal entities referred to in Article 7(2)/17(2), providing independent assistance to victims of discrimination in pursuing their complaints about discrimination,
  - conducting independent surveys concerning discrimination,
  - publishing independent reports and making recommendations on any issue relating to such discrimination.

Article 20.2(d) of the Recast Gender Equality Directive and Article 11.2 (d) of directive 2010/41/EU also require equality bodies at the appropriate level exchanging available information with corresponding European bodies such as any future European Institute for Gender Equality.

EU secondary law envisions the establishment of promotional equality bodies with power to assist victims (support) and some preventive and promotional functions. The ECRI GPR (Chapter III) goes further in defining promotional functions and explicitly complements the support function with that of litigation. Furthermore, it envisages decision-making powers as a possibility and sets out investigation powers in a detailed manner, which is not replicated in the 2018 Commission Recommendation on standards for equality bodies, yet worthy of consideration when adopting new legislation. Chapter VII. 21 ‘Powers to obtain evidence and information’ stipulates that:

Equality bodies should, in particular when conducting inquiries and deciding on complaints, have powers to obtain evidence and information. They should include powers to: a. require the production of files, documents and other material for inspection, examination and making copies thereof; b. conduct on-site inspections; c. question persons; d. apply for an enforceable court order or impose administrative fines if an individual or institution does not comply with the above.

### 2.3. Recommendations for improving the mandate questionnaire

#### Theme 1 – Overview: status, scope of activities and strategic planning

The mandate questionnaire already covers status and scope of activities. Given the diversity of NEBs, it may be useful to assess not only strategic litigation but more broadly, strategic/systematically planned operations that have a baseline and a set purpose, goal or direction, preferably addressing widespread interpersonal, institutional and/or structural discrimination. Questions relating to overall or field and ground-specific strategies may be placed in the first set of indicators that provide an overview or alternatively, placed at the end of the mandate questionnaire. They may be formulated as follows:

- The equality body has:
- a. adopted an overall strategy and implements it fully
  - b. adopted an overall strategy and implements it partly
  - c. adopted an overall strategy but does not implement it
  - d. adopted partial strategy/ies and implements it/them fully
  - e. adopted partial strategy/ies and implements it/them partly
  - f. adopted partial strategy/ies but does not implement it/them

It must be borne in mind that unless exceptionally well-funded with an adequately sized department for promoting equality, agency-type institutions have relatively little room left for planning and executing a strategy because they have a duty to respond to complaints, investigate, deliver binding decisions, and respond to legal challenges. Promotional NEBs, on the other end of the scale enjoy a wide margin of appreciation when it comes to planning their activities because they are not bound by a statutory duty to investigate and decide on complaints. This may limit the number of complaints filed with promotional NEBs and orient victims to specialised agencies or courts, while simultaneously offering an opportunity to systematically map trends and patterns of discrimination. The constraints and freedoms of hybrid equality bodies vary in relation to investigation and decision-

making duties; therefore some may be more amenable to strategic planning and operations than others. Further differences may stem from legal and administrative cultures, the advocacy potential of different marginalised groups and the domestic political context.

## Theme 2 - Assistance to victims: access to justice

EU anti-discrimination law is rather vague when it comes to assistance to victims of sex and racial or ethnic discrimination. The minimum requirement is that equality bodies should have the power to “provid[e] independent assistance to victims of discrimination *in pursuing their complaints about discrimination*” (emphasis added). The provision can be understood as suggesting that assistance should be provided to victims who lodge formal complaints at any other legal forum, including the police, field-specific agencies or courts. The type of assistance is not specified therefore it may range from referral to a competent agency, oral or written advice through the provision of legal aid or intervention in the proceedings to representation by a NEB. Finally, the text does not prohibit a broader conception of ‘independent assistance to victims’ that could therefore include investigation and decision-making, as is the case in several Member States. Given the flexibility of the norm and the diverse ways in which Member States comply with it, questions under this theme should aim to collect information as extensively as possible. Otherwise, relevant data may remain unrecorded, which can easily lead to a mischaracterisation of NEBs and criticism from domestic stakeholders, whose NEBs seemingly underperform in the questionnaire. Ideally, multiple choices should be offered and the following questions could replace those presently featured in Theme 2:

**1.** Access to the equality body is ensured for people with

- physical disability
- sensory disability (blind, deaf)
- mental disability

**2.** Access to equality body is ensured for people outside the capital

- by phone
- via internet
- by post
- through regional offices/contact persons
- through regular visits outside the capital

**3.** Access to the equality body is ensured for people who do not speak the official language

- in English
- other languages widely spoken in the Member State (please add)

**4.** The equality body receives/registers complaints from

- a. individuals
- b. collectives (groups, communities, NGOs, trade unions, etc.)
- c. representative organisations

**5.** Complaint data is collected on the basis of

- a. grounds
- b. fields
- c. type of discrimination



**6.** The equality body advises complainants

- a. about merit
- b. remedial routes
- c. sanctions
- d. legal aid

**7.** The equality body's investigation powers include

- a. investigating complaints
- b. launching ex officio investigation
- c. requesting police/prosecution to investigate
- d. requesting public agencies to investigate
- e. none of the above (equality body lacks investigation powers)

**8.** The equality body has the power to

- a. require the production of files, documents and other material for inspection, examination and making copies thereof
- b. conduct on-site inspections
- c. question persons
- d. apply for an enforceable court order or impose administrative fines if an individual or institution does not comply with the above

**9.** The equality body has a right to hold hearings

- a. Yes
- b. no
- c. in certain cases (please add)

**10.** The equality body can mediate/conciliate between the parties

- a. yes and it frequently does
- b. yes but it does not frequently use this power
- c. no

**11.** The equality body's decisions concluding an investigation are

- a. binding
- b. non-binding
- c. equality body lacks power to make decisions

**12.** The equality body can impose the following sanctions

- a. publishing its decision
- b. apology
- c. order to refrain from discriminatory conduct
- d. order to reinstate the situation preceding discrimination (in integrum restitutio)
- e. fine

**13.** Before a court or tribunal, the equality body

- a. represents itself when its decision is reviewed
- b. represent complainants
- c. provides funds for legal representation

- d. intervenes
- e. may be called on as an expert
- f. submits friend of court briefs (amicus curiae)
- g. files representative action (actio popularis)
- h. files petitions with the Constitutional Court

- 14.** The equality body's enforcement powers include
- a. monitoring compliance with its decision
  - b. launching follow-up investigation
  - c. levying a fine for non-compliance
  - d. requesting other agencies/police to enforce a final decision

### Themes 3, 4 and 5

Themes 3, 4 and 5 on Reports and recommendations, Surveys and research, and Promotion of equality: consultation, awareness raising and training serve their purpose in their present form, without any additional amendments.

### Theme 6 – EU level information exchange

The current mandate questionnaire does not include questions on this theme, which can be remedied by asking the following:

- The equality body exchanges available information on discrimination with
- the Fundamental Rights Agency
  - the European Commission
  - the European Institute for Gender Equality
  - Council of Europe and UN monitoring bodies
  - the managing authorities of European Structural and Investment Funds



**Section 3:**  
**Using the indicators to**  
**evaluate equality bodies**

This section assesses whether and to what extent the indicators can be used by European Institutions, Equinet and other stakeholders to evaluate the mandate and independence of equality bodies. It also outlines the content of a user guide that can ensure that NEBs take a common approach when responding to the mandate questionnaire. The questionnaire on independence is straightforward and NEBs did not indicate difficulties in self-evaluation, therefore it seems very likely that independence indicators will provide a clear and useful overview for other stakeholders as well. NEBs piloting the indicators are hoping that the comparative analysis of responses will facilitate legislative reform at the EU and subsequently at the national level. They voiced concern about the proposed system of accreditation, while being supportive of the independence indicators as a useful advocacy tool, particularly at the EU level. Equinet's role in using the indicators was understood as remaining the same as before, i.e. collecting and comparing information for advocacy purposes with the caveat that the indicators can facilitate its capacity to ring the alarm when urgency so requires.

Consistency of responses and interpretation by stakeholders can improve if Equinet issues a user guide accompanying the mandate questionnaire. Alternatively, the blank questionnaire can include the necessary explanation (potentially in the comment box), which can be deleted by NEBs once their responses are final. A user guide can clarify when respondents are expected to provide information about the law in action and/or the law on the books. Currently, the alternating stipulations seem to break the flow of responses and lead to less rather than more clarity. Explaining more fully what aspect of the mandate a question investigates may yield more concise and easily comparable responses. The key concepts that need to be clarified in the user guide are the following:

## 1. What is a multi-mandate body/NEB?

The classic example of a multi-mandate body is a national human rights institution with competences to deal with a wide range of human rights issues. There are various mixed-mandate bodies that fall in the grey area, including those whose competences cover equal treatment + monitoring compliance with the Convention Against Torture, Directive 2014/54/EU of the European Parliament and of the Council of 16 April 2014 on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers and/or with the UN Convention on the Rights of Persons with Disabilities (UNCRPD). Clearly, the extent of the latter NEB's mandate outside equal treatment is much more limited and focused than that of a classic NHRI. Moreover, both the EU Freedom of movement Directive and the UNCRPD are related to anti-discrimination law, therefore respondents may wonder how best to characterise themselves. The questionnaires may provide multiple choices to this question, but the user guide needs to clarify whether all these combinations of mandate amount to 'multi-mandate' because subsequent questions cross-reference this characteristic.

## 2. What is a complaint?

NEBs piloting the indicators did not consistently use the terms complaint, inquiry/contact and case, which are not synonymous concepts and using them interchangeably may lead to the misrepresentation of both inputs from clients/victims and outputs/outcomes. For instance, FADA distinguishes between inquiries related to discrimination and those unrelated to discrimination, to which the NEB responds by providing information about the competent agency. In Equinet's Directory of NEBs two categories are used, namely inquiries and cases. Inquiries cover all contact irrespective whether they result in a formal complaint, while cases are conceived as files opened and processed according to NEB procedures.

### 3. What is a recommendation?

NEBs that lack the power to make binding decisions sometimes conclude their investigation with a ‘recommendation’, in other words a non-binding decision on the merits. This type of recommendation should be distinguished from recommendations about broader, systemic problems – that formulate suggestions for legislative and policy reform or a change in administrative practices.

### 4. What does adequately and regularly mean when it comes to reporting or performing other functions?

While most NEBs report to parliament or government annually, some publish activity reports less or perhaps more frequently, yet still regularly. These characteristics should be noted in the comment section. Adequacy measures the correlation between demand and supply of NEB services from the perspective of individual victims and the severity of structural discrimination. Supply is tempered by the availability of resources and strategic decisions concerning their allocation.

### 5. What are strategic litigation/activities?

This term may not be necessary to clarify if respondents are asked whether they have a strategy, and whether their performance is measured against this strategy as a benchmark. Otherwise, the term needs to be clarified, for instance with reference to Equinet’s publication on strategic litigation.<sup>12</sup>

### 6. Who are ‘those affected’ in question 6.4?

NEBs piloting the mandate indicators gave very different answers to the question of who they consult. The user guide should provide a list of those who may be affected by discrimination and the activities of NEBs, including marginalised groups and communities, as well as individuals, central and local government, its agencies and bodies, courts and tribunals, NGOs, employers, employees and trade unions, journalists, academics, etc. The 2018 Commission Recommendation on standards for equality bodies also mentions National Frameworks designated under Article 33(2) CRPD and National Roma Contact Points.

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<sup>12</sup> [Strategic Litigation Handbook – Equinet \(Equineteurope.org\)](https://equineteurope.org/)



**Section 4:**  
**Using the indicators for  
standard setting and  
legislation**

This section suggests ways in which the independence and mandate indicators can usefully be channelled into draft legislation, soft law measures or other standards for equality bodies. The overall assessment is that the independence indicators can inform legislation in their present form, with NEBs indicating that regulation pertaining to resources could be modelled on Article 52(4) GDPR, which stipulates that “Each Member State shall ensure that each supervisory authority is provided with the human, technical and financial resources, premises and infrastructure necessary for the effective performance of its tasks and exercise of its powers, including those to be carried out in the context of mutual assistance, cooperation and participation in the Board.”

The mandate indicators may need to be partly reviewed with a view to making recommendations for legislation more comprehensive and systemic. Below, the 2018 Commission Recommendation on standards for equality bodies is compared with the indicator sets, key points of convergence are flagged, and brief recommendations are made in case a gap is identified. Independence indicators are in line with the relevant provisions of the 2018 Commission Recommendation (1.2.1) and cover the provisions on resources as well (Article 1.2.2). It is notable, however that 1.2.2. (3) - placed under the title Resources - does in fact pertain to monitoring the execution of NEB decisions and any other decision taken in relation to discrimination accompanied by a requirement to promptly inform the equality body. This competence is addressed by the Equinet indicators on mandate, as monitoring decisions on discrimination seems to belong to the three core competences.

Mandate indicators are in line with the Recommendation (Chapter II - 1) when it comes to broadening the personal and material scope of NEB activities. Unlike the Recommendation, Equinet does not explicitly ask about ‘proportionate’ and ‘balanced’ resource allocation to grounds and activities (1.1.1(3)), perhaps because - as UNIA noted - if such an indicator existed, providing a comprehensive response could be cumbersome. The Equinet mandate questionnaire does, however collect relevant information under indicators 1.5, 1.6, 5.2 and 5.3. The proportionate and balanced nature of activities could be assessed through questions – and draft legislation - about the planning and implementation of a comprehensive strategy, rather than just a litigation strategy that the mandate indicators specifically address.

In relation to independent assistance, the Recommendation (1.1.2.(1)-(6)) appears somewhat broader than Equinet’s mandate indicators, while both seem to be modelled on hybrid NEBs with a slight preference towards litigation in civil court. Consequently, both documents fail to capture the full range of independent assistance-related activities, especially of promotional and agency type NEBs. Section 2 demonstrates the way in which and three reasons why this shortcoming needs to be addressed: first because generally agency type NEBs can provide fast and cost-effective access to justice to marginalised groups; second because NEBs deserve a consistent assessment regardless of their character and third because variance among NEBs is likely to remain even if new standards are adopted.

The Recommendation contains a separate section titled ‘Complaint submission, access and accessibility’ (1.2.3), which is partly taken up in the Equinet indicators. As mentioned in Section 2, structurally these questions may better fit under the theme ‘assistance to victims.’ Indent (6) has a mixed character because on the one hand it pertains to promotional activities, (‘informing the general public’ of the existence of NEBs), while on the other it pertains to assistance to victims (‘possibility to submit complaints about discrimination’).

The Recommendation’s provisions on surveys and research, as well as reports (1.1.2(7)-(10)) seem ambitious in comparison to the Equinet indicators because they are addressed to Member States and depict an ideal situation, while Equinet focuses on NEBs’ lived reality, whereby resources are scarce, and research is often undertaken by various other public and private bodies and institutions. Practice-oriented indicators can provide relevant information about actual compliance with EU standards as far as NEBs are concerned but cannot in their current form discuss the many different initiatives dedicated to collecting data about structural inequalities. Arguably, it is not the equality

bodies' task to catalogue all the relevant research, even if when planning their activities and devising their strategies, a broad-brush knowledge of existing data is necessary. Similar observations apply to the provisions on the promotion of equality (Article 1.1.1.(11)-12). In sum, care should be taken that the responsibility of equality bodies is not implicated in the potential shortcomings of Member States as concerns reporting, research and surveys on discrimination.

The Equinet indicators partly cover what is titled 'Coordination and cooperation' in the Recommendation (Article 1.3). Indent (1) pertaining to coordination among various NEBs at the domestic level with a view to consistent interpretation of the law and to potentially disproportionate focus on certain tasks lacks corresponding questions in the present indicators. Both issues may be addressed by questions on strategy and consultation. Regulating the proportionate allocation of tasks may encroach on independence, therefore this aspect should be approached with caution during the legislative process.

It is important to note that formalised processes facilitating peer review, standard setting and common action do not exist in the field of equality because EU law does not regulate the cooperation of NEBs on 'intra-community' infringements of equal treatment. Conversely, pursuant to the Consumer Protection Cooperation Regulation, cooperation between national authorities responsible for the enforcement of consumer protection laws takes place in the form of a European enforcement network (Consumer Protection Cooperation Network),<sup>13</sup> while national data protection authorities cooperate with the European Data Protection Supervisor and issue common guidelines under the auspices of the European Data Protection Board. As mentioned in Section 2, competences concerning sex discrimination are somewhat broader than those concerning racial or ethnic discrimination and other grounds, which indicates that this apparent gap in EU-level information exchange may need to be addressed in future legislation.

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<sup>13</sup> Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (Regulation on consumer protection cooperation).





# Conclusions

Equinet endorses the call for “dedicated, ambitious and realistic” legislation on equality bodies, because the “current situation endangers both the coherent implementation of EU equality legislation and strategies and the effective protection of the rights of all victims of discrimination across Europe.”<sup>14</sup> It urges the European Commission to ensure that the diversity of equality bodies be taken into account, which necessitates a focus not only on bolstering their mandate but also of their powers, particularly as concerns investigation and decision-making. Robust monitoring is key to maintaining standards and it should ideally be part of already existing processes at the international and EU level to avoid the multiplication of compliance checks. Coordination and cooperation are essential for ensuring protection against discrimination and inequalities, and its modalities need to be explored further, with a view to ensuring coherence between institutions and networks protecting EU rights holders.

The most important take-aways from piloting the indicators can be summarised as follows. The indicators on independence are clear and straightforward, while those on mandate need to reflect the diversity of equality bodies more fully, ensuring that the order of questions aptly mirrors everyday operations. Questions should either move from specific issues to a systemic overview of operations, strategy and planning accompanied by a focus on individual discrimination to institutional and structural issues or the other way around. Apparently, country-specific differences concern the scope of ‘independent assistance to victims of discrimination’, which is a key, yet undefined concept in both EU anti-discrimination legislation and the mandate questionnaire. Its broad definition and thorough mapping can ensure that both the strengths and weaknesses of domestic institutional set-ups and practices are depicted, and the institutional model does not lead to unbalanced comparison. Strategic operations should be measured systematically rather than in relation to a particular power, such as litigation. A user guide may increase the consistency of responses to the questionnaire.

Proposals for improving the quality of indicators and their use for evaluation and standard setting are manifold. It may be useful for the mandate questionnaire to be consistent with the structure of EU secondary law, on which national legislation and practice have been modelled for over two decades and may be modelled for some time to come. Major improvements should focus on strategy/strategic planning, assistance to victims and EU-level information exchange. In order to ensure that the indicators adequately accommodate promotional, hybrid and agency type equality bodies, the thrust of questions on assistance to victims should be considerably broadened and multiple choices should be offered to respondents. Major differences arise in relation to investigation and decision-making powers, therefore the indicators on these aspects should be carefully constructed, bearing in mind the relevant ECRI General Policy Recommendation that in some important aspects goes beyond the scope of the 2018 Commission Recommendation.

The questionnaire on independence builds on the ECRI GPR and the Commission Recommendation. It is straightforward and facilitates self-evaluation, therefore it is expected that independence indicators will provide a clear and useful overview for diverse stakeholders. The indicators in their present form can already reinforce the direction of legislative reform apparent in the standards existing at the European level. Equinet’s role in collecting and comparing the indicators is hoped to continue with the caveat that the indicators can facilitate its capacity to ring the alarm when urgency so requires. Importantly, consistency of responses and interpretation by stakeholders can improve if Equinet issues a user guide accompanying the mandate questionnaire.

Recommendations with the EU legislative process in mind can be summarised as follows. Independence indicators can inform legislation in their present form, with NEBs indicating that regulation pertaining to resources could be modelled on Article 52(4) GDPR, which stipulates that “Each Member State shall ensure that each supervisory authority is provided with the human, technical and financial resources, premises and infrastructure necessary for the effective

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<sup>14</sup> Kádár, 2021

performance of its tasks and exercise of its powers, including those to be carried out in the context of mutual assistance, cooperation and participation in the Board.”

The mandate indicators may need to be partly reviewed to bolster more comprehensive legislation pertaining to victims’ access to justice in a manner consistent with other aspects of EU fundamental rights, such as data protection legislation. The 2018 Commission Recommendation on standards for equality bodies provides a solid baseline, whereas its mandate-related content could usefully be restructured according to the themes and powers laid out in Section 2 (Theme 1 – Overview: status, scope of activities and strategic planning, Theme 2 - Assistance to victims, Theme 3 – Reports and recommendations, Theme 4 – Surveys and research, Theme 5 – Promotion of equality: consultation, awareness raising and training, and Theme 6 – EU level information exchange). ‘Independent assistance to victims of discrimination’ should be broadly defined in future legislation to accommodate the variance observable across national equality bodies. Ideally, it should be complemented with detailed standards on investigatory, decision-making and sanctioning powers. Domestic approaches to litigation vary greatly across the Member States, which should be taken into account during the legislative process, which should ideally rely on the assessment of this NEB function’s effectiveness so far.

Certain NEB activities may need to be more structurally placed and strategic planning-related issues brought together. Care should be taken not to implicate the responsibility of NEBs for the fulfilment of requirements addressed to Member States, particularly as concerns data collection, reporting, research and surveys on discrimination. Finally, EU law does not regulate the cooperation of NEBs on ‘intra-community’ infringements of equal treatment, while competences of EU-level information exchange concerning sex discrimination are somewhat broader than those concerning racial or ethnic discrimination and other grounds, which needs to be addressed in future legislation.



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# Equinet Member Equality Bodies

## ALBANIA

Commissioner for the Protection from Discrimination  
[www.kmd.al](http://www.kmd.al)

## AUSTRIA

Austrian Disability Ombudsman  
[www.behindertenanwalt.gov.at](http://www.behindertenanwalt.gov.at)

## AUSTRIA

Ombud for Equal Treatment  
[www.gleichbehandlungsanwaltschaft.gov.at](http://www.gleichbehandlungsanwaltschaft.gov.at)

## BELGIUM

Institute for the Equality of Women and Men  
[www.igvm-iefh.belgium.be](http://www.igvm-iefh.belgium.be)

## BELGIUM

Unia (Interfederal Centre for Equal Opportunities)  
[www.unia.be](http://www.unia.be)

## BOSNIA AND HERZEGOVINA

Institution of Human Rights Ombudsman of Bosnia and Herzegovina  
[www.ombudsmen.gov.ba](http://www.ombudsmen.gov.ba)

## BULGARIA

Commission for Protection against Discrimination  
[www.kzd-nondiscrimination.com](http://www.kzd-nondiscrimination.com)

## CROATIA

Office of the Ombudsman  
[www.ombudsman.hr](http://www.ombudsman.hr)

## CROATIA

Ombudsperson for Gender Equality  
[www.prs.hr](http://www.prs.hr)

## CROATIA

Ombudswoman for Persons with Disabilities  
[www.posi.hr](http://www.posi.hr)

## CYPRUS

Commissioner for Administration and Human Rights (Ombudsman)  
[www.ombudsman.gov.cy](http://www.ombudsman.gov.cy)

## CZECH REPUBLIC

Public Defender of Rights  
[www.ochrance.cz](http://www.ochrance.cz)

## DENMARK

Danish Institute for Human Rights  
[www.humanrights.dk](http://www.humanrights.dk)

## ESTONIA

Gender Equality and Equal Treatment Commissioner  
[www.volinik.ee](http://www.volinik.ee)

## FINLAND

Non-Discrimination Ombudsman  
[www.syrjinta.fi](http://www.syrjinta.fi)

## FINLAND

Ombudsman for Equality  
[www.tasa-arvo.fi](http://www.tasa-arvo.fi)

## FRANCE

Defender of Rights  
[www.defenseurdesdroits.fr](http://www.defenseurdesdroits.fr)

## GEORGIA

Public Defender of Georgia (Ombudsman)  
[www.ombudsman.ge](http://www.ombudsman.ge)

## GERMANY

Federal Anti-Discrimination Agency  
[www.antidiskriminierungsstelle.de](http://www.antidiskriminierungsstelle.de)

## GREECE

Greek Ombudsman  
[www.synigoros.gr](http://www.synigoros.gr)

## HUNGARY

Office of the Commissioner for Fundamental Rights  
[www.ajbh.hu](http://www.ajbh.hu)

## IRELAND

Irish Human Rights and Equality Commission  
[www.ihrec.ie](http://www.ihrec.ie)

## ITALY

National Office against Racial Discrimination - UNAR  
[www.unar.it](http://www.unar.it)

## KOSOVO\*

Ombudsperson Institution  
[www.oik-rks.org](http://www.oik-rks.org)

## LATVIA

Office of the Ombudsman  
[www.tiesibsargs.lv](http://www.tiesibsargs.lv)

## LITHUANIA

Office of the Equal Opportunities Ombudsperson  
[www.lygybe.lt](http://www.lygybe.lt)

## LUXEMBURG

Centre for Equal Treatment  
[www.cet.lu](http://www.cet.lu)

## MALTA

Commission for the Rights of Persons with Disability  
[www.crpdp.org.mt](http://www.crpdp.org.mt)

## MALTA

National Commission for the Promotion of Equality  
[www.equality.gov.mt](http://www.equality.gov.mt)

## MOLDOVA

Council on Preventing and Eliminating Discrimination and Ensuring Equality  
[www.egalitate.md](http://www.egalitate.md)

## MONTENEGRO

Protector of Human Rights and Freedoms (Ombudsman)  
[www.ombudsman.co.me](http://www.ombudsman.co.me)

## NETHERLANDS

Netherlands Institute for Human Rights  
[www.mensenrechten.nl](http://www.mensenrechten.nl)

## NORTH MACEDONIA

Commission for Prevention and Protection against Discrimination  
[www.kszd.mk](http://www.kszd.mk)

## NORWAY

Equality and Anti-Discrimination Ombud  
[www.ldo.no](http://www.ldo.no)

## POLAND

Commissioner for Human Rights  
[www.rpo.gov.pl](http://www.rpo.gov.pl)

## PORTUGAL

Commission for Citizenship and Gender Equality  
[www.cig.gov.pt](http://www.cig.gov.pt)

## PORTUGAL

Commission for Equality in Labour and Employment  
[www.cite.gov.pt](http://www.cite.gov.pt)

## PORTUGAL

High Commission for Migration  
[www.acm.gov.pt](http://www.acm.gov.pt)

## ROMANIA

National Council for Combating Discrimination  
[www.cncd.ro](http://www.cncd.ro)

## SERBIA

Commissioner for Protection of Equality  
[www.ravnopravnost.gov.rs](http://www.ravnopravnost.gov.rs)

## SLOVAKIA

Slovak National Centre for Human Rights  
[www.snslp.sk](http://www.snslp.sk)

## SLOVENIA

Advocate of the Principle of Equality  
[www.zagovornik.si](http://www.zagovornik.si)

## SPAIN

Council for the Elimination of Ethnic or Racial Discrimination  
[www.igualdadynodiscriminacion.igualdad.gob.es](http://www.igualdadynodiscriminacion.igualdad.gob.es)

## SPAIN

Institute of Women  
[www.inmujer.es](http://www.inmujer.es)

## SWEDEN

Equality Ombudsman  
[www.do.se](http://www.do.se)

## UNITED KINGDOM - GREAT BRITAIN

Equality and Human Rights Commission  
[www.equalityhumanrights.com](http://www.equalityhumanrights.com)

## UNITED KINGDOM - NORTHERN IRELAND

Equality Commission for Northern Ireland  
[www.equalityni.org](http://www.equalityni.org)

*\* 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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