



European Network Against Racism
Réseau européen contre le racisme
Europäisches Netz gegen Rassismus

COMMISSION CONSULTATION CONCERNING A POSSIBLE NEW INITIATIVE TO PREVENT AND COMBAT DISCRIMINATION OUTSIDE EMPLOYMENT

Response of the European Network against Racism (ENAR)

October 2007

The European Network against Racism (ENAR) is a network of some 600 European NGOs working to combat racism in all EU Member States. Its establishment was a major outcome of the 1997 European Year against Racism. ENAR is determined to fight racism, xenophobia, anti-Semitism and Islamophobia, to promote equality of treatment between EU citizens and third country nationals, and to link local/regional/national initiatives with European initiatives. Further information is available at: www.enar-eu.org.

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INTRODUCTION

ENAR welcomes this opportunity to engage with the European Commission and other stakeholders. This is an important chance to move forward on the issue of gaps in protection under the European anti-discrimination law framework, building on and securing what is already there. It is also an opportunity to move the debate forward towards a fruitful discussion of how to take further action to address discrimination and inequality in the EU, building on the significant work already done by all stakeholders.

The right to non-discrimination and equality before the law, including equal protection of the law without discrimination, constitutes a universal right recognised by various international, regional and domestic legal sources¹. Along with complimentary non-legal mechanisms, these sources form the basis of human rights frameworks established to protect these rights and to address negative social realities such as inequality, discrimination, exclusion and disadvantage.

In this context, ENAR believes that while non-discrimination is essential, it forms one strand in a holistic approach to addressing inequality and disadvantage of different groups within society. Those subject to discrimination must be empowered to claim their rights as part of a rights based approach that actively seeks to promote equality and eliminate discrimination, recognising both the commonalities and differences of different groups. As each individual has an age, a gender, a sexual orientation and an ethnicity, and some have or acquire a religion or a disability, discrimination may be experienced on multiple grounds. Thus there is a need to shape approaches to addressing the complexity of discrimination, disadvantage and exclusion in such a way as to better reflect these social realities.

THE CONSULTATION

In preparing the ENAR response to the Commission consultation, the secretariat undertook two significant exercises. Firstly the ENAR secretariat conducted a desk research exercise to map out previous positions that had been put before the Commission and other actors in calling for action to address gaps in the anti-discrimination framework and the results of the many years of network dialogue that ENAR has undertaken on anti-discrimination and equality. The exercise revealed that significant and consistent evidence had been presented over a number of years, and the most relevant are attached to this submission.²

¹ For example, Article 7 of the United Nations Universal Declaration on Human Rights states that “All are equal before the law and are entitled without any discrimination to equal protection of the law.”

² These are: From racism to equality?, Realising the potential of European anti discrimination law, ENAR policy seminar, Brussels, October 6-7 2006; Letter to Commissioner Spidla in response to the European Commission Communication on the Application of Directive 2000/43/EC of 29 June 2000 implementing

Secondly, we issued a questionnaire to all ENAR Coordinations requesting their feedback on the questions posed. A number of useful responses were received (7 in total). This was followed up by a discussion within the ENAR Policy and Lobbying Committee. One concern that was raised regarding the process of the consultation is that this is a debate and discussion that ENAR has engaged in over many years and that the current consultation may be asking those involved to repeat evidence and information that is already held by the Commission.

While we recognise that this debate is new and developing for many, ENAR members felt that there should have been a greater awareness shown of the extent of the discussion that had already taken place, including with the Commission itself. We feel that there is an opportunity to do this in moving forward to the next stages of the consultation exercise and through continuing this constructive dialogue throughout the process of bringing forward the new initiative envisaged.

Additionally, while we recognise the need for evidence on which to base decision-making, ENAR is concerned that the consultation must avoid any tendency towards a 'hierarchy of inequality' approach with each ground required to argue for 'most disadvantaged' status in order to qualify for protection. In this context, it must be recognised that for many groups affected there will be little official data and the Commission must not allow such gaps to present barriers to action, especially as this would perpetuate the problems discussed below regarding measures to tackle multiple discrimination.

1. NEED AND NATURE OF ANY INITIATIVE

- ***1.a) Is there clear evidence of discrimination on any of the grounds covered by article 13 of the treaty, i.e. sex, religion or belief, disability, age or sexual orientation against which people have no legal protection?***

In recognising the need for "New Initiatives designed to prevent and combat discrimination outside the labour market"³ the Commission has made a significant step in recognising the existence of gaps in the existing anti-discrimination framework at the European level, and the need for EU action to address this. However, as race is not included in this question, and the consultation is limiting itself to 'discrimination outside employment', ENAR is concerned that it suggests that the Commission is satisfied that there is 'no problem' on race, which of course is not true. As we discuss below there are important areas of activity where discrimination occurs which are not covered under the Race Equality Directive or under the Gender Goods and Services

the principle of equal treatment between persons irrespective of racial or ethnic origin, published on 30 October 2006, January 2007; ENAR's assessment of the impact and implementation of Directive 2000/78/EC, and contribution to the European Commissions five year report, December 2005 and ENAR's assessment of the impact and implementation of Directive 2000/43/EC, and contribution to the European Commissions five year report, October 2005.

³ European Commission Annual Policy Strategy for 2008

Directive (which has a narrower scope), leaving even more areas in which there is no protection against discrimination.

Almost all respondents to the ENAR questionnaire agreed that ethnic and racial minorities in their country experienced discrimination against which they have no legal protection. Those that did not believe this to be the case indicated that the legislation in their country was comprehensive, but that there were still significant problems in practice and that it was not fully implemented. This was the case, for example, in the Netherlands and in Hungary.

Where there are concerns regarding the legislation, these related to the gaps in protection and, in particular, to inconsistencies resulting in different standards of protection. So, for example, the UK chose to adopt the minimum standards of the Race Equality and Framework Employment Directives separately from the existing anti-discrimination legislation and this has led to a situation where even the UK Government has accepted the need for a more 'coherent legislative framework' and discussion is ongoing as to the form that needs to take.

This view from the ENAR members is backed up by the available research data. Despite the frequent lack of official data, there is clear evidence in a plethora of reports that demonstrate the continuing inequality and discrimination experienced by racial and religious minorities in the European Union. These include those produced by ECRI in the Council of Europe, those produced by the Fundamental Rights Agency of the European Union, building on the work undertaken by the EUMC, and those produced by NGOs working in this area.

In many instances, the data highlights the existence of legal protection under the Race Equality Directive and the Framework Employment Directive, with the key issue as the effective transposition and implementation of the existing legal standards. It cannot be doubted that in many countries the transposition of these Directives has led to significant advances in legal protection. Nevertheless, much of the data points to the existence of gaps in legal protection.

The ENAR Shadow Reports⁴ demonstrate clearly that the anti-racism NGO community identify significant levels of discrimination and inequality that lack

⁴ The European Network against Racism (ENAR) Shadow Reports for Europe provide a unique mechanism to collect and present the views of civil society on the state of racism in EU member states and across Europe. The reports provide an update on and analysis of the issues relating to racism and religious discrimination across Europe and identify commonalities in the experience of racism. The 2005 Shadow Report for Europe was based on a comparison of national reports from 20 of the (then) 25 EU Member States. The 2006 Shadow Report for Europe, which is currently in production and the preliminary findings are used in this paper, is based on a comparison of national shadow reports from 26 of the 27 EU member states.

legal redress, including in the areas of employment, accommodation and housing, education, health, policing and racial profiling, racist violence and crime, access to goods and services in the public and private sector and in relation to the media, including the internet. The data from the Shadow Reports demonstrate, in particular, the lack of legal protection for third country nationals, including asylum seekers and refugees and those with irregular legal status.

The ENAR Shadow Report 2005 demonstrates the existence of religious discrimination, including Islamophobia and anti-Semitism across Europe, a finding that is confirmed by the preliminary findings of the ENAR European Shadow Report 2006. The most recent report by the UN Special Rapporteur on contemporary forms of racism presented to the Human Rights Council in September this year⁵, highlighted the clear and continuing existence of religious discrimination, and included many examples from EU Members of striking forms of religious discrimination within the private, public and political spheres. The Special Rapporteur also highlighted the reality that such religious discrimination, and in particular its sanctioning from the political sphere, both creates and perpetuates racism and racial discrimination.

The report 'Trends and Developments 1997-2005 – Combating Ethnic and Racial Discrimination and Promoting Equality in the European Union'⁶ produced by the Fundamental Rights Agency also identifies key areas of continuing discrimination and lack of access to rights, including segregation, inequalities faced by the Roma and lack of access to housing and education for asylum seekers and their families.

Another area where there is clear evidence is in relation to the existence of multiple discrimination that lacks effective protection in many member states. For example, in the UK a 2004 judgement found that a victim of discrimination must identify the specific discriminatory treatment on each ground separately, a decision which led to an Asian woman failed to prove discrimination as she could not identify the aspects of her claim of less favourable treatment that related to one ground only.⁷

- **1.b) What areas should any new initiative cover? In what areas other than employment do you find that discrimination is most widespread?**

On the basis of such data and the many years of deliberation that has taken place within the ENAR network, the following have come forward as key areas

⁵ Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Doudou Diène, on the manifestations of defamation of religions and in particular on the serious implications of Islamophobia on the enjoyment of all right, submitted to the United Nations Human Rights Council, A/HRC/6/6, 21 August 2007

⁶ Trends and Developments 1997-2005: Combating Ethnic and Racial Discrimination and Promoting Equality in the European Union, European Union Agency for Fundamental Rights, 2007

⁷ Briefing note on multiple discrimination, Justice and the Equality & Diversity Forum, UK, 2007

where there is a need for an initiative to ensure effective protection against discrimination and action to tackle inequality:

⇒ **The lack of effective protection for Third Country Nationals, against Nationality Discrimination and in the areas of Asylum And Immigration**

The ENAR Shadow Reports identify Third Country Nationals, and in particular undocumented migrants and asylum seekers as among the ‘communities vulnerable to racism’.⁸ While the Race Equality Directive made important steps forward in protection against discrimination by applying the principle of non-discrimination on grounds of race and ethnic origin to third country nationals, the ENAR Shadow Reports demonstrate that the lack of protection against nationality discrimination on the one hand and the exclusion of immigration matters on the other have left third country nationals unprotected from much discrimination. They also demonstrate that this “sends a message that discrimination against third country nationals is acceptable”⁹. This problem was particularly highlighted by the Estonian Coordination in responding to the questionnaire, is demonstrated in the ENAR Shadow Report 2005 and preliminary findings from the ENAR Shadow Reports covering 2006 confirm that this is a continuing, and possibly worsening, problem.

ENAR has consistently highlighted this significant gap and called for the abrogation of Article 3.2 of the Race Equality Directive which allows for an unacceptable derogation from the principle of equal treatment, allowing ‘any difference in treatment’ arising from nationality and the legal status of third country nationals. Derogations and exemptions allowed under existing anti-discrimination legislation have been mis-used by Member States to evade their obligation to ensure that asylum and immigration laws are neither discriminatory nor have discriminatory effects.¹⁰ It has also been used to evade “political commitment to ensure fair treatment of third country nationals, for example regarding access to jobs, social housing criteria, welfare limitations, discretionary controls and detention centres.”¹¹ So, for example, in Cyprus the only reference to migrants in the National Report on Strategies for Social Protection and Social Inclusion 2006 – 2008 is where the report states the need for better monitoring and management of employment of third country nationals so as not to become a potential threat for the inclusion of the other vulnerable groups of society.¹²

⁸ See *ENAR Shadow Report 2005*, at p. 7. This trend is confirmed in the ENAR Shadow Report 2006, forthcoming.

⁹ *ENAR Shadow Report 2005*

¹⁰ See, for example, *ENAR General Policy Paper on Third Country Nationals*, November 2006; *ENAR response to the Commission Communication on the Application of Directive 2000/43/EC*, January 2007; *ENAR Assessment of Directive 2000/78/EC*, December 2005.

¹¹ Report of the *ENAR policy Seminar: ‘From racism to equality? Realising the potential of European anti-discrimination law’* October 2006

¹² *Enar Shadow Report 2006, Racism In Cyprus*, Dora Georgiou, Anthoula Papadopoulou and Doros Polykarpou, KISA – Action for Equality, Support, Anti-racism, 2007

The ENAR submission to the European Commission assessing the Framework Employment Directive found that:

“ENAR members have noted that in the absence of a *real* common European labour market, implementing common anti-discrimination protections will not only be difficult to assess, but the task itself will remain complicated. On the one hand, discrepancies in the protection of the rights of migrant workers have a direct relationship to how migrants experience discrimination in the labour market, while on the other hand national labour market laws and regulations directly affect, and in some cases prevent, migrant workers from enjoying protections granted by anti-discrimination legislation.”^{13,14}

⇒ **Multiple discrimination and multiple identities, including the lack of protection on grounds of religion or belief and on intersectional grounds of race and religion or belief**

ENAR believes that comprehensive protection against discrimination on all grounds is essential to a healthy democratic society and has consistently highlighted the difficulties that the lack of such a comprehensive legal framework creates. For example, in the ENAR assessment of Directive 2000/78/EC it was stated that:

“The biggest issue in terms of the application of the Directive is the **hierarchy of protection** that exists between protections under the Directive 2000/43 for race/ethnicity, and the protections for religion or belief under Directive 2000/78.”¹⁵

There is clear evidence of discrimination against religious minorities in reports from the EU, including those published most recently by the Fundamental Rights Agency.¹⁶ In addition, evidence from NGOs, such as ENAR’s Shadow Reports, clearly demonstrates the existence of this phenomenon throughout the EU:

“The intersection between racism and religious discrimination is a complex one and it is clear that religious minorities are targets of

¹³ In its 2004 Annual report the EUMC noted the ‘mixed messages’ which characterise the fights against discrimination in employment in European Member States, the EUMC stated that “There are mixed messages emerging from, on the one hand, policies to combat discrimination in the labour market, and, on the other hand, policies in certain Member States that restrict the rights of third country nationals,” EUMC (2005), *Annual Report 2004*, p. 10.

¹⁴ ENAR assessment of the transposition of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation into national law, submitted to the European Commission December 2005.

¹⁵ *ibid*

¹⁶ See, for example, *Report on Racism and Xenophobia in the Member States of the EU*, EU Agency for Fundamental Rights, 2007

racism. ... Muslims and Jews are reported consistently as the religious minorities most vulnerable to racism in the reports. Other religious minorities that experience racism and religious discrimination include Buddhists, Sikhs and Jehovah Witnesses.”¹⁷

Discrimination against ethnic minority communities is a very complex and serious reality in European societies. Racism is not limited to discrimination based on the ethnic or racial origin of a person but also on the basis of all elements of an individual or communities’ culture or identity, including religion or belief. Discrimination on the grounds of religion and belief are often inextricably linked to racism and racial prejudice; frequently it is not possible to distinguish between these forms of oppression. Thus the lack of comprehensive protection against religious discrimination leads to a lack of protection against racial discrimination as religion or belief are often used to justify racial discrimination, and can be used to obscure racist motivations.¹⁸ For example, in the UK the leader of the British National Party escaped conviction for incitement to racial hatred on the basis that statements made in a speech were targeted as religion, rather than race.¹⁹

Schiek, Waddington and Bell (eds) highlight that:

“...it will be hard to determine if there is any legislative protection available if, for example, legislation only offers protections in the field of social services to cases of race based discrimination. This is particularly problematic in cases of intersectional discrimination, where it will be very difficult and often artificial to separate the various grounds and to classify a case as based *primarily (author’s emphasis)* on one ground or the other. This may result in strange and arbitrary classifications, as exemplified by the fact that in the UK Sikhs and Jews have been held to constitute ethnic groups..., whereas Muslims and Rastafarians have not.”²⁰

Similar concerns apply to other forms of multiple/intersectional discrimination, such as the cross over between gender and race discrimination. This has been demonstrated by a number of research reports and is currently the subject of research commissioned by the European Commission. Thus not only is there discrimination faced by, for example, Asian Muslims, which is not adequately recognised by the law, but also the law has difficulty in recognising and finding appropriate responses to, for example, an Asian Muslim woman who wears the hijab and the specific form of discrimination that she faces. It also lacks the ability to respond appropriately to sensitive issues related to the intersection of identities such as ‘in-group discrimination’ where, for example, a woman belonging to a minority community faces racism from women

¹⁷ ENAR Shadow Report 2005, p. 7

¹⁸ See ENAR General Policy Paper on Religious Discrimination, November 2005.

¹⁹ See BBC report ‘BNP and leader no longer racist’, Tuesday 7th November 2006.

²⁰ Cases, Materials and Texts on National, Supranational and International Non-Discrimination Law, Schiek, D, Waddington, L, and Bell, M (eds) 2007 at p. 172

belonging to the majority community *and* discrimination from within her ethnic community on the basis of gender, but is reluctant to speak out as to do so could re-enforce existing prejudice and stereotypes against all members of the group and further entrench their (and her) own vulnerability.²¹

⇒ **Institutional discrimination, structural or systemic discrimination and segregation, including spatial and educational segregation**

Research evidence demonstrates that the current legal framework is limited in its ability to address these issues. For example, in relation to the segregation of Roma in education, a recent report by the European Roma Rights Centre concluded:

“Although by the transposition of the EU Race Equality Directive, Member States of the EU enhanced protection against discrimination, the current anti-discrimination framework is not sufficient to challenge systemic discrimination and/or segregation of Roma in education. Anti-discrimination laws provide remedies for individuals who had suffered due to actions or inaction of an identifiable perpetrator. School segregation of Roma, however, has been shown to be the result of both individual decisions as well as the complexity of rules, practices and traditions which make up the educational systems.”²²

Additionally, the report ‘Trends and Developments 1997-2005 –Combating Ethnic and Racial Discrimination and Promoting Equality in the European Union’ published by the FRA highlights the continuing existence of spatial segregation of minorities in many European countries.

As regards institutional, structural or systemic discrimination ENAR members have consistently highlighted this as a concern, including in calling for stronger positive action measures in order to complement and support the ability of anti-discrimination law to tackle entrenched and long standing inequality and this call has been explicitly recognised in the Commission Communication on the application of Directive 2000/43/EC, published on 30th October 2006. The need to consider positive duties on public authorities to take a proactive approach to tackling inequality and preventing discrimination has also been highlighted in this context.

²¹ See *ENAR Factsheet no. 33 Multiple Discrimination*, 2007 for a detailed discussion.

²² ERRC study *The Impact Of Legislation And Policies On School Segregation Of Romani Children* February 2007

⇒ **The lack of protection against discrimination on grounds of racial or ethnic origin in the area of criminal justice, which in many countries is defined as outside the scope of the race equality legislation**

Another significant gap in protection under the current legal framework relates to the coverage of policing and criminal justice. The ENAR Shadow Report 2005 found that:

“The main problem areas in terms of policing relate to: institutional racism; the use of racial profiling, over-policing; a lack of trust in the police force; lack of available data; lack of recording of racist violence and crime as such; lack of independent complaints mechanisms for complaints against the police themselves; poor relations between the police and ethnic and religious minority groups (especially youth); policing issues with regard to asylum seekers, including in places of detention; and stereotypes held by police that associate ethnic and religious and minority groups with terrorism, drug dealing and irregular immigration.”²³

Specifically, the problem of racial profiling, defined as “The use by the police, with no objective and reasonable justification, of grounds such as race, colour, language, religion, nationality or national or ethnic origin in control, surveillance or investigation activities”²⁴, has been highlighted by many ENAR members. Evidence from ENAR members indicates that the official sanctioning of racial profiling, and the de facto implementation of such approaches, particularly in the context of counter-terrorism measures, is increasingly problematic for ethnic and religious minority communities. While the extent of racial profiling is difficult to ascertain given the lack of data and the fact that racial profiling has not been sufficiently considered by either researchers or policy-makers, the ENAR Shadow Reports demonstrate racial profiling as a widespread practice in the European Union. This is confirmed by preliminary findings from the ENAR Shadow Reports covering 2006. Racial profiling is a direct derogation of the principle of non-discrimination and undermines the enjoyment of fundamental rights.²⁵

In recognition of the important role of the legal framework on anti-discrimination, ECRI has specifically called for Governments “To ensure that legislation prohibiting direct and indirect racial discrimination cover the activities of the police”, both in its General Policy Recommendation no 7 and most recently in General Policy Recommendation no 11.

²³ ENAR Shadow Report 2005, p. 22

²⁴ ECRI General Policy Recommendation Number 11

²⁵ See the forthcoming ENAR General Policy Paper on Counter-Terrorism and combating discrimination

2. THE NATURE AND EFFECTIVENESS OF NON-LEGISLATIVE MEASURES AND OF MEASURES TO ACCOMPANY LEGISLATION

- **2.a) Do you believe that non legislative measures, for example, awareness raising, training for specific groups, exchange of best practice, open method of co-ordination, could effectively deal with the remaining problems?**

As we stated above, many ENAR members feel that a significant amount is still to be achieved using the existing legal framework. Many countries are yet to adequately transpose the Race Equality and Framework Employment Directives, and there is a need to use the full range of powers and sanctions available to the European Commission to address this. There is also a need for the existing provision to be better used. There is still a lot of work to be done in enabling domestic courts to fully utilise the provisions on the shift in the burden of proof, in enabling NGOs to undertake their key role in supporting the victim, and in more strongly promoting the use of positive action to address inequalities. Significant attention is needed on enabling access to justice for victims of discrimination, and to monitoring the situation of racism in Europe and measuring the impact of anti-discrimination laws in practice.

There is also a real need to ensure coherence with other policy areas. ENAR is particularly concerned that policies on migration and on counter-terrorism can undermine gains made in the area of anti-discrimination. It must be ensured in moving forward that we continue to make best use of what we already have, and that any attempt of suggestion that the 'problem is solved' by the existence of legislation is rejected. Legislation provides the minimum acceptable standards within the European Union. It can only be effective if parallel policy and practice, including education and training, are in place to implement the law.

Nevertheless, ENAR is also convinced that legislation is essential in providing coherent and comprehensive protection against discrimination. Non-legislative measures cannot on their own deal with the reality of discrimination. The evidence presented above clearly demonstrates that the problems of racism, religious discrimination and inequality in Europe require a strong legal framework that includes protection for all grounds of discrimination and the ability to challenge multiple discrimination *and* non-legislative measures that can turn rights on paper into a reality.

- **2.b) If legislation is proposed, what accompanying measures would support effective implementation?**

The reality is that the experience of discrimination is multi-dimensional. There is a need for both a clear prohibition of discrimination which aims to deal with the prejudice, stereotyping and discrimination more broadly. On the other

hand, there is also a clear need for measures to tackle the inequality and disadvantaged position of different groups within society. One without the other fails to recognise the complexity of the issue.

ENARs experience of the implementation of the Race Equality Directive highlights both positive and negative experiences. The significance of the existence of legal protection against discrimination in employment, vocational training, education, social protection, social advantages, and access to goods and services including housing, applicable to all EU Member States cannot be underestimated. The Directive also includes some significant provisions, not least the shift in the burden of proof and the recognition of the possibility of positive action. In addition, it has been clear that the specific role of NGOs provided for in the Race Equality Directive in supporting the victim, dialogue with Member States and monitoring transposition and enforcement has been seen by the anti-racist community as an important recognition of the unique role of NGOs. In addition to this, the support provided by the Community Action Programme Against Discrimination has been a significant factor in raising awareness of the existence of legal rights and in building the capacity of NGOs to support victims of discrimination to realise those rights.

Nevertheless, ENARs experience in the implementation of the Race Equality Directive has highlighted limitations in the implementation of the legal framework where reflection is needed on whether additional accompanying measures could help. It is likely that the same problems will arise with any new legal framework unless they are fully considered as part of any new proposals:

- The reference to positive action in the Directive has not led to increased activity aimed at addressing the legacy of systematic discrimination;
- There remains a lack of awareness of rights and a lack of dissemination of information at the national level, which is an explicit duty on each Member State;
- There is inadequate support for victims of discrimination in seeking an effective remedy;
- In many countries there are difficulties with engagement by Governments with NGOs;
- There is a lack of compliance by Member States with the legal standards;
- Sanctions for unlawful discrimination and harassment rarely, if ever, meet the standard of “effective, proportionate and dissuasive”;
- There is a lack of ‘mainstreaming’ non-discrimination and equality;
- Institutional racism and systematic and systemic discrimination remain key issues that are untouched by the current legal provisions;

- There is a lack of adequate data (both monitoring data and research data) on the situation of racial, ethnic and religious minorities, leading to problems with the application of the shift in the burden of proof and the prohibition of indirect discrimination.

From this experience of the ENAR network, the following recommendations have emerged:

- Stronger legal provisions requiring positive action to tackle disadvantage with complementary measures for the promotion of positive action and to support its implementation;
- To enable better access to redress for unlawful discrimination and strategic litigation, especially where discrimination and disadvantage are institutionalised and adversely affect members of a 'protected' group, the legislation should require member states to ensure that NGOs and specialised bodies may engage both in support of *and* on behalf of complainants with their consent in judicial and/or administrative enforcement procedures;
- A high level of sanctions are needed for member states that do not comply and for those proven to contravene the legislation;
- Without adequate data it is impossible to implement and evaluate policies and law that seek to protect against discrimination. It is important that the situation relating to the EU Data Protection Directive, in the context of ethnic data collection, are clarified. The collection of such data is compatible with the Directive and ENAR agrees with the Commissions conclusion that the scarcity of ethnic data in most Member States might hinder the monitoring of Community legislation. It is crucial that efforts to enhance data collection across the EU are continued, including the collection of data on multiple discrimination/multiple identities;
- Anti discrimination and the promotion of equality should be mainstreamed across all DGs and across all policies, including funding (such as Structural Funds etc) and procurement. There is also a real need to make interconnections between policy areas to ensure policy coherence and that gains made in the area of anti-discrimination are not inadvertently undermined by developments elsewhere. Therefore the Commission should consider using equality impact assessment as a good practice tool to mainstream equality into policy and practice. Additionally, there should be a greater focus on non-discrimination and equality as human rights and how discrimination links with disadvantage, including through the Lisbon Agenda and social inclusion policies;
- Information and training is needed for government officials and the legal professions (civil servants, police) and civil society such as NGOs, schools and the wider education community;
- Greater use of the role of the media is vital to create public awareness of the legislation and of any failures of Member States to implement the legislation;

- Negative political rhetoric must be challenged, particularly regarding asylum seekers and the Muslim community, for example by considering the myths and stereotypes, by the use of the media, ‘Myth-busting’ campaigns (targeting political parties), and research to establish factual situations.
- Questioning stereotypes and recognising the contribution of diversity to society, including working on the school curriculum to demonstrate positive aspects of diversity.

3. ADVANTAGES AND DISADVANTAGES OF DEALING IN ONE SINGLE INITIATIVE WITH DISCRIMINATION OUTSIDE THE LABOUR MARKET NOT CURRENTLY COVERED BY EU LEGISLATION

- **3.a) What is the best approach to tackle multiple discrimination?**

And:

- **3.b) How could a single initiative address the specificities of the different types of discrimination?**

There are a range of different options that the Commission needs to consider in taking forward any new initiatives, including as they apply to multiple discrimination. ENAR does not propose to give the answer to precisely what approach would be the most effective. Rather, the evidence that we have gathered over the years and the discussions within the Network lead us to the following requirements that must be met by any initiative:

- There can be no reduction in the existing level of protection, either directly or indirectly;
- ‘Levelling up’: The same level of protection must be provided for all grounds of discrimination;
- The legal framework must recognise and accommodate complaints based on multiple and intersectional grounds. This could be accommodated by, for example, the inclusion of a provision such as “ a discriminatory practice includes a practice based on one or more prohibited grounds of discrimination or on the effect of a combination of prohibited grounds”²⁶;
- Legal protection must be appropriate to the nature and manifestation of different forms of discrimination, including where appropriate specific measures to recognise the different experiences of inequality of different groups, including those with multiple identities;
- Victims of all forms of discrimination must have effective and real access to justice;
- Action to address inequality needs to be taken forward with the participation of those directly affected;

²⁶ Taken from ‘Multi-dimensional discrimination: Justice for the whole person’ a Briefing for Justice and the Equality and Diversity Forum, UK 2007

- There needs to a greater focus on how discrimination links with disadvantage, by going beyond comparisons of treatment to human rights issues;
- There needs to be clear coherence between EU policy areas and all EU policies must be framed on equality and non-discrimination principles.

4. EXCEPTIONS

- **4.a) What exceptions to the general rule of equal treatment should be allowed (genuine and determining occupational requirements, positive action, protection of privileges based on certain characteristics)?**

There are legitimate exceptions to the general rule of equal treatment, that can clearly be justified, such as the ability of NGOs and service providers to provide targeted, dedicated services to those most in need. Thus it is legitimate to have services that are only open to women who have been victims of domestic violence, or to offer counselling services dedicated to the needs of victims of torture from a particular country.

However, exceptions in anti-discrimination law must be very narrowly drawn and must permit discrimination only where this can be objectively justified against very strict, limited criteria. Unjustified and/or blanket exemptions by their nature weaken protection and create inconsistency and incoherence in the legal framework, denying justice for victims of discrimination. This has been seen in the evidence presented above in relation to the blanket exemption of “any treatment which arises from the legal status of the third country nationals and stateless persons”²⁷.

ENAR believes that in considering exceptions to the general rule of equal treatment the following should be applied:

- Any specific exceptions to the basic general rule of equal treatment must meet a very strict test of justification. They must have a legitimate aim and be both appropriate and necessary to achieve that legitimate aim (the proportionality test);
- There should be no general justification for direct discrimination;
- Positive Action should be the only basis for a general exception as it is a requirement for the achievement of the goal of equality for the most vulnerable.

²⁷ Article 3.2 RED

5. ROLE OF EQUALITY BODIES

- **5.a) Should the role of equality bodies be widened to go beyond their current remit of discrimination based only on race?**

The inclusion in the Race Equality Directive of a requirement to establish a National Equality Body was one of the most welcome aspects of the legislation. In putting in place this requirement there was an explicit recognition that more than basic legislation was needed, and that there was a real need to engage in complementary activities, including the need to support victims of discrimination.

In addition to the requirement under the Race Equality Directive, there also already exists (under Article 12 Directive 2004/113) an obligation on member states to establish an equality body for sex.

ENAR agrees that similar support should be available to all grounds of discrimination under the European anti-discrimination framework, including in relation to ensuring support for victims of religious discrimination and multiple discrimination. Nevertheless, there is a danger that in addressing all grounds, the result is addressing none. Therefore it must be ensured in bringing forward any proposals that National Equality Bodies remain both mandated and required to explicitly address race discrimination and that the competence of national equality bodies is the same for all grounds of discrimination.

- **5 b) How can it be ensured that they can operate effectively?**

The ENAR Shadow reports have demonstrated that while in many countries the introduction of national equality bodies was seen as a significant and positive step, in other countries there have been significant delays in establishing such a body, while in others concerns were raised regarding the effectiveness of the national equality body, with some regarded as having little power:

“In Italy no cases were brought in 2005 despite the fact that the National Office Against Racism and Discrimination (UNAR) dealt with 282 cases in that year. The report on Latvia argues that there is evidence that there is a lack of financial and political support for the National Human Rights Office, which hinders the capacity of the Office in becoming a strong player in the struggle against racism. Lack of resources was also highlighted in the report on Ireland, where decisions have been made to prioritise certain cases on the basis that insufficient resources exist to engage in further work.”²⁸

Preliminary findings from the Shadow Report covering 2006 confirm that such concerns persist.

ENAR’s experience in relation to National Equality bodies has resulted in the following concerns that have hindered their effective functioning:

²⁸ ENAR Shadow Report 2005, p. 27

- In many cases national equality bodies remain weak and under-effective;
- In some countries there is concern regarding the independence of equality bodies and hence their ability to meet the requirements for independent advice, surveys and reports in the Race Equality Directive;
- Many equality bodies fail to fulfil the competence of support to victims of discrimination in bringing legal cases, or do so in an extremely limited way;
- Concern about the emergence of conflicts between the quasi-judicial responsibility of some equality bodies and the mandate to support victims of discrimination to bring a claim;

ENAR believes that pressure must be put on member states for full compliance, and in particular that implementation bodies be effective and not just bodies “on paper”, but with all necessary resources, both human and financial, in line with the requirements of the United Nations ‘Paris Principles’ relating to the Status of National Human Rights Institutions. Additionally, National Equality Bodies need to develop effective relationships with NGOs representing groups facing discrimination, particularly those that are the most vulnerable.

CONCLUSION

ENAR strongly welcomes the current consultation and the commitment to bringing forward new initiatives in the area of anti-discrimination. This is an important recognition that while much has been achieved, much remains to be done and we look forward to engaging with the Commission and other stakeholders in this important dialogue over the next few months.



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