



Combating Discrimination

A Training Manual



Combating Discrimination A Training Manual

human european consultancy in partnership with the
Migration Policy Group



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human european consultancy, based in the Netherlands, provides consultancy services to non-governmental organisations (NGOs), governments, inter-governmental organisations (IGOs) and development agencies in the areas of health care, social protection, labour relations and human rights.

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The *Migration Policy Group* is an independent organisation committed to policy development on mobility, migration, diversity, equality and anti-discrimination by facilitating the exchange between stakeholders from all sectors of society and generating effective responses to these challenges and opportunities.

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Introduction

Welcome to this training manual!

This training tool was developed as part of the EU-funded project 'Capacity Building of Civil Society dealing with Anti-Discrimination' with the aim of providing training on European and national anti-discrimination law and policy to non-governmental organisations in the 10 Member States which joined the European Union on 1 May 2004 as well as in Bulgaria, Romania and Turkey.

NGOs have a vital role to play in making anti-discrimination legislation understood and enforced on the ground. They are essential in speaking on behalf of and defending those they represent as well as raising awareness, of both victims and potential victims of discrimination who are all too often unaware of their rights, and also of the general public.

The manual was used by national trainers conducting national training seminars in each involved country. Participants came from a wide variety of non-governmental organisations and associations covering all grounds of discrimination – racial and ethnic origin (including Roma), religion or belief, age, disability and sexual orientation.

The main purpose of this project (November 2004-October 2005) was to build up the capacity of civil society by improving NGOs' knowledge on the two EU anti-discrimination Directives (2000/43/EC and 2000/78/EC) and relevant national legislation and policies in this area. NGOs were trained to become a key interlocutor of the authorities and to assist the victims of discrimination.

The project focused on three activities:

- **Needs analysis**

A stakeholder/needs analysis was carried out in each of the 13 countries to assess the capacity and extent of organisations representing civil society. This analysis gave input to the training specifications and helped to identify the target groups for participation in the national seminars and their needs. This information was based on the answers provided by the NGOs involved.

- **Training the Trainers**

In each of the 13 countries, six local trainers were selected, some coming themselves from minority groups (for list see http://ec.europa.eu/employment_social/fundamental_rights/civil/civ_en.htm). Four 'Train the Trainers' seminars targeting the national trainers took place in March 2005.



- **National seminars**

National seminars took place mainly in June 2005, with about 50 participants per country, and the trainers were able to use their skills and knowledge. The material for the national seminars consisted of the training modules which can be found in this manual translated into national languages, and into some minority languages.

The material in this manual was designed for the recipients of the training.

We hope the material in this manual will be useful for individuals and organisations active in the fight against discrimination wherever they may be in the European Union. Following the success of the training seminars in the new Member States and Romania, Bulgaria and Turkey the European Commission has decided to fund a follow-up of this training exercise in all 25 Member States and in Romania, Bulgaria and Turkey in 2006 as well as to include social partner organisations in these countries among the participants.

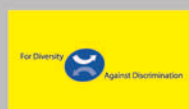
The project is a European Commission initiative funded by the Action Programme to Combat Discrimination (2001-2006). It was carried out by **human european consultancy** (www.humanconsultancy.com) in partnership with the **Migration Policy Group** (www.migpolgroup.com) and local partners in each of the 13 countries.





1. Key concepts in the training

- 1.1. Introduction to the European Union
- 1.2. Brief introduction to the Council of Europe
- 1.3. The concept of discrimination in EU law and policy
- 1.4. Definition of other concepts in the Directives
- 1.5. Shift of the burden of proof
- 1.6. Non-implementation of EU law



1. Key concepts in the training

Intended learning outcomes

- For the participants to gain a basic knowledge of the nature of European law and institutions
- For the participants to gain an understanding of the concept of discrimination

1.1. Introduction to the European Union

The European Union (EU) comprises twenty-five Member States: Austria, Belgium, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden and the United Kingdom.

There are, at present, two acceding and two candidate countries: Bulgaria, Romania, Croatia and Turkey.

The EU institutions

There are **four principal institutions** which are entrusted with carrying out the tasks of the EU:

A. The Council of the European Union

- Legislative arm based in Brussels (Belgium)
- The Council has six key responsibilities:
 - To **pass European laws**: in many fields it legislates jointly with the European Parliament;
 - To **co-ordinate the broad economic policies** of the Member States;
 - To **conclude international agreements** between the EU and one or more States or international organisations;
 - To **approve the EU's budget**, jointly with the European Parliament;
 - To **develop the EU's Common Foreign and Security Policy**; and
 - To **co-ordinate co-operation between the national courts and police forces** in criminal matters.
- Consists of representatives of the Member States at ministerial level (one representative per Member State) who are authorised to commit their governments



- The Presidency of the Council is held on a rotation basis by Member States for six-month periods
- The President of the Council represents the EU in international affairs

B. European Commission

- Executive arm based in Brussels (Belgium)
- The European Commission has four main roles:
 - To **propose legislation** to the Parliament and the Council;
 - To **manage and implement EU policies** (e.g. discrimination policies) and the budget;
 - To **enforce Community law** (jointly with the Court of Justice); and
 - To **represent the EU** on the international stage, for example by negotiating agreements between the EU and other countries.
- Consists of one Commissioner per Member State, appointed by the governments for five-year terms, acting impartially and independently, with responsibility for a particular policy area.

For some more details of the Commission's actions in the field of discrimination see 1.3 below.

C. European Parliament

- The Parliament has three main roles:
 - It shares with the Council the **power to legislate**;
 - It exercises **democratic supervision over all EU institutions**, and in particular the Commission. It has the power to approve or reject the nomination of all Commissioners, and it has the right to censure the Commission as a whole; and
 - It shares with the Council **authority over the EU budget**. At the end of the procedure, it adopts or rejects the budget in its entirety.
- The monthly plenary sessions are held in Strasbourg (France) – the Parliament's 'seat'. Parliamentary committee meetings and any additional plenary sessions are held in Brussels (Belgium), whilst Luxembourg is home to the administrative offices (the 'General Secretariat').
- Members of the European Parliament (MEPs) are directly elected by universal suffrage every five years; any EU citizen may stand for election and EU citizens may vote in whichever Member State they live in.
- MEPs may not concurrently serve in a national government but may hold a seat in a national parliament; they sit in multinational political parties.
- Committees are set up to deal with particular issues. There is a Committee on Employment and Social Affairs, one on Women's Rights and Gender Equality and





one on Civil Liberties, Justice and Home Affairs, but there is not as yet a Committee dedicated to other equality issues. The Committee on Petitions responds to petitions submitted by individuals who consider that their protected EU rights have been violated (see National Context – Section 3.2 Administrative and legal channels for challenging violations of anti-discrimination legislation).

D. European Court of Justice (ECJ)

- Main court of the EU, based in Luxembourg
- Consists of one judge per Member State, assisted by eight Advocate-Generals whose role is to present reasoned opinions on the case to the ECJ
- Judges appointed by joint agreement of the governments of the Member States for renewable six-year terms
- Main jurisdiction:
 - Requests for a **preliminary ruling**: if a national court is in any doubt about the interpretation or validity of an EU law it may, and sometimes must, ask the ECJ for advice. This advice is given in the form of a 'preliminary ruling' (see further National Context – Section 3.2 Administrative and legal channels for challenging violations of anti-discrimination legislation);
 - Proceedings for **failure to fulfil an obligation**: the Commission or Member States can initiate proceedings if they have reason to believe that a Member State is failing to fulfil its obligations under EU law (see further National Context – Section 3.2 Administrative and legal channels for challenging violations of anti-discrimination legislation); and
 - **Appeals on points of law** only against judgments by the Court of First Instance, which was created in 1989 to alleviate the workload of the ECJ, and which is also based in Luxembourg.
- Decisions are reached by majority. There are no dissenting opinions; judgments are signed by all the Judges who took part in the deliberations and are read in open court.

General principles and sources of EU law

The EU must act within the limits of its powers as set out in the Treaties. The principle of subsidiarity regulates the lawfulness of the exercise of competence: in areas which do not fall within its exclusive competence (i.e. where competence is shared with the Member States) the EU can only take action if the objectives of that action cannot be sufficiently achieved by the Member States.

In cases of conflict, EU law is supreme over national law. This is to ensure the uniformity of EU law and its interpretation by the national courts. The ECJ has held that the EU constitutes a new legal order for whose benefit the Member States have limited their sovereign rights, and that a national court is under a duty to give full effect to provisions of EU law



even if this means refusing to apply conflicting national law, whether adopted prior or subsequent to the particular piece of EU legislation.

The sources of EU law can be divided into three categories:

- Primary sources: The Treaties between the Member States, and agreements with third countries.
- Secondary sources: Regulations, Directives, Decisions, Recommendations and Opinions.
- Other sources: General Principles of EU law developed through the case law of the ECJ, and 'soft law' (e.g. guidelines and resolutions).

Treaties

- The EC Treaty and Protocols, as amended by the Merger Treaty of 1965 and the Acts of Accession (1972: UK, Ireland, Denmark; 1979: Greece; 1985: Spain, Portugal; 1995: Austria, Finland, Sweden; 2003: Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, Slovenia; 2005: Bulgaria, Romania)
- The Euratom Treaty
- The Single European Act of 1986
- The Treaty on European Union (of Maastricht) of 1992
- The Treaty of Amsterdam of 1998
- The Treaty of Nice of 2000

Secondary Sources

Article 249 of the EC Treaty states:

'[...]

A **regulation** shall have general application. It shall be binding in its entirety and directly applicable in all Member States.

A **directive** shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.

A **decision** shall be binding in its entirety upon those to whom it is addressed.

Recommendations and **opinions** shall have no binding force.'



Regulations

- Binding law
- Directly applicable: come into force by virtue of their publication in the *Official Journal of the European Union*, from the date specified in them, or in the absence thereof, from the twentieth day following that of their publication
- Do not require any national implementing measures
- Can be relied upon in national courts by individuals
- General application – apply to and in all Member States

Directives

- Binding law in the Member State to whom it is addressed
- Enter into force either on the date specified in them or on the twentieth day after their publication in the *Official Journal of the European Union*
- But **require domestic implementing measures** within a certain time period from adoption
- Member States must ensure that they adopt implementing measures before the expiry of the time deadline so that national law reflects the terms of the Directive – this process is called transposing the Directive
- Before the expiry of the time period, Directives cannot be relied upon in national courts
- Once the time period has expired, can be relied upon in national courts by individuals but only against the State or agents of the State and if certain conditions are met (see below at 1.6)
- Member States can be **liable for non-implementation** or for imperfect transposition of a Directive (see further below at 1.6)

Decisions

- Binding law
- But only on those to whom it is addressed, e.g. a company which has been found in breach of competition law
- Can be relied upon in national courts by individuals

Other sources

Case law/General principles of EU law

- Fundamental human rights (including the European Convention on Human Rights, see further below at 1.2)
- Equality/non-discrimination (see further below at 1.3)
- Proportionality



- Legal certainty/legitimate expectations/non-retroactivity
- The right to be heard
- Legal professional privilege

1.2. Brief introduction to the Council of Europe

The Council of Europe was created at the end of the Second World War for the purpose of promoting European unity, protecting human rights and facilitating social and economic progress. It has 46 Member States, including all EU Member States and candidate countries. The Council of Europe created the European Convention for the Protection of Human Rights and Fundamental Freedoms. The European Court of Human Rights is based in Strasbourg, and oversees the implementation of the Convention.

Article 14 of the Convention provides some protection against discrimination, as does the 12th Protocol to the Convention which entered into force on 1 April 2005. At the time of writing this manual (April 2005), out of the 13 countries involved in the present project only Cyprus has ratified and will therefore be bound by the 12th Protocol.

1.3. The concept of discrimination in EU law and policy

Background

The principle of non-discrimination is a general principle of EU law. It is also expressly mentioned in a number of distinct contexts in the Treaties.

The EU Charter of Fundamental Rights was solemnly proclaimed in December 2000 and is as of yet not legally binding. It forms part of the new Constitutional Treaty, and if this Treaty is ratified by all 25 Member States, it will become binding. The process of ratification is going on across the EU at present. Article 21(1) of the Charter states:

'Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.'

Further, Article 13 of the EC Treaty states:

'Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.'





This is not a direct prohibition, but rather an empowering provision which enables the EU to take action against the forms of discrimination listed (see General Principles above). Prior to these developments, there was extensive EU legislation and case law on the prohibition of discrimination on grounds of nationality and gender.

The EU has, pursuant to Article 13, put in place a three-part strategy to combat discrimination:

- **A Directive to implement equal treatment irrespective of racial or ethnic origin** (Council Directive 2000/43/EC)
- **A Directive establishing a framework for equal treatment in employment and occupation on the grounds of religion or belief, disability, age and sexual orientation** (Council Directive 2000/78/EC)
- The Community Action Programme 2001-2006 (Decision 2000/750/EC) to combat discrimination on all the grounds listed in Article 13 (other than sex). The programme has three principal objectives:
 - to assist in analysing and evaluating the extent and nature of discrimination in the EU and the effectiveness of measures to combat it;
 - to help to build the capacity of the actors in the Member States of the EU and at European level who are active in the fight against discrimination;
 - to promote and disseminate to practitioners and opinion-formers the values and practices underlying the fight against discrimination.

The PROGRESS Programme 2007-2013 will bring together a number of existing European programmes under one heading, including the anti-discrimination programme. The nature of the existing programmes will remain largely unchanged.

Definition of discrimination

To discriminate means to differentiate or to treat differently when there is no relevant difference between two persons or situations, or to treat in an identical way situations which are in fact different. The two anti-discrimination Directives, which provide the basis for this training, prohibit both **direct** and **indirect** discrimination and provide the same definition of discrimination.

Direct discrimination has occurred if one person is treated **less favourably** than another is, has been or would be treated in a **comparable situation**, on **any of the grounds** on which discrimination is prohibited.

The problem in establishing that direct discrimination has taken place is that it is not always easy to identify the 'correct comparator'. You need to find someone whose situation you can compare to the situation of the person who claims to be a victim of discrimination. Only if these are in the same or similar situations can the comparison take place. Sometimes it will be impossible to identify an available actual comparator, and a case can then be made



for a hypothetical comparator. This should build on the treatment of a real person without the relevant characteristics (e.g. someone from a mainstream religion as opposed to a minority religion) in slightly different circumstances.

However, once it has been established that two people in the same or similar situation have been treated differently, it would be hard to show that this difference was permissible. The Directives provide for certain narrowly and precisely drawn exceptions. These include genuine occupational requirements, positive action, reasonable accommodation for disabled persons and specified exceptions for age discrimination.

For example, if an employer denies a worker a pay rise because of the worker's sexual orientation, and another worker in the same situation is given the pay rise, it is likely that this would constitute discrimination in violation of Employment Framework Directive (2000/78/EC). However, if a worker is denied a pay rise due to his age, this might be permissible under Article 6, which allows Member States to provide that differences of treatment on grounds of age shall not constitute discrimination if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, and if the means of achieving that aim are appropriate and necessary. Such differences may, according to the Directive, include the fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment (see more on this below).

The Directives also prohibit **indirect discrimination**. Indirect discrimination occurs where an **apparently neutral** provision, criterion or practice would put persons belonging to a protected group at a **particular disadvantage** compared with other persons. This is so unless the provision, criterion or practice in question is **objectively justified** by a legitimate aim and the means of achieving that aim are appropriate and necessary.

As with direct discrimination, identifying correct comparators can be difficult. An example which has often been given in the past as a possible instance of indirect discrimination based on sex (which is not covered by the Directives but by other provisions of EU law) is that of a substantial difference in pay between full-time and part-time workers, where the part-time workers are exclusively or predominantly female. Another example can be an apparently neutral provision in a company's internal rules requesting a particular dress code if this dress code leads to the exclusion of a person or a group of persons.

The permitted legal justifications must be applied rigorously.

For example, justification may in some cases be valid when an employer demands high standards of literacy and fluency in the national language. If the job in question involves tasks where these skills are absolutely necessary, e.g. for a language teacher or professor of literature, the employer is likely to be justified in demanding them. However, if the job involves manual labour, such a requirement is unlikely to be justifiable (see more on genuine and occupational requirements below at 1.4).

The Directives also provide that **harassment** is a form of discrimination. Harassment is defined as unwanted conduct related to the grounds on which discrimination is prohibited with the





purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment, intended or not. As is clear, the definition of harassment includes a wide range of unwanted conduct. When making an assessment of whether harassment has taken place, a comparator does not need to be identified.

The Directives further state that **an instruction to discriminate** should be considered as a form of discrimination and is prohibited.

Finally, the Directives include **victimisation** under the list of prohibited acts. The Member States need to put in place measures that are necessary to protect individuals from any adverse treatment (such as dismissal) as a reaction to a complaint or proceedings aimed at enforcing compliance with the principle of equal treatment. It is important that not only the person who has been discriminated against is protected, but also those who provide evidence as part of a discrimination complaint, or are involved in some other way in the complaint.

1.4. Definition of other concepts in the Directives

Material scope of the Directives

The Employment Framework Directive (2000/78/EC), Article 3, protects against discrimination in the following areas:

- Access to employment, self-employment and occupation (including promotion)
- Access to vocational guidance and training
- Employment and working conditions, including dismissal and pay
- Membership of workers', employers' or professional organisations

The Race Directive (2000/43/EC), Article 3, provides much wider protection against discrimination and includes the following:

- Access to employment, self-employment and occupation (including promotion)
- Access to vocational guidance and training
- Employment and working conditions, including dismissal and pay
- Membership of workers', employers' or professional organisations
- Education
- Social protection, including social security and health care
- Social advantages
- Access to and supply of goods and services which are available to the public, including housing





Personal scope of the Directives

The Directives prohibit discrimination by natural or legal persons in the public sector and the private sector. This means that an individual owner of a business has the same responsibility not to discriminate on any of the protected grounds as does a large private corporation, a municipality or a government department.

The Directives protect individuals, that is, natural persons, against discrimination. Additionally the Directives provide that protection against discrimination should also apply to an organisation that has the status of legal person where the organisation suffers discrimination on grounds of the racial or ethnic origin of its members, where this accords with national traditions and practice.

Nationality

The Directives protect any person who is present in a Member State against discrimination on any of the prohibited grounds (racial or ethnic origin, disability, religion or belief, sexual orientation and age) **regardless of the person's nationality**. Thus a person of Ukrainian nationality who is discriminated against in Hungary on grounds of ethnic origin or disability or sexual orientation is protected in the same way as Hungarian nationals in Hungary who experience such discrimination. The Directives specifically exclude discrimination **on grounds of nationality**, so that if discrimination is on grounds of being Romanian, or not being Hungarian, the Directives would not apply (please see Race Directive (2000/43/EC), recital 13 and Article 3.2; Employment Framework Directive (2000/78/EC) recital 12 and Article 3.2).

Distinct from the anti-discrimination Directives there is, of course, the EU Treaty right to freedom of movement of persons across the EU, which provides some protection against nationality discrimination for citizens of EU Member States and their families. There is also other EU legislation concerning the rights of certain non-EU citizens (third country nationals) who are residing or working in EU Member States.

Exceptions to the prohibition of discrimination in the Directives

As the purpose of the Directives is to provide a framework for combating discrimination, the Directives permit discrimination only very exceptionally and only where certain tests are satisfied.

Genuine occupational requirement

For all prohibited grounds the Directives permit an exception to meet genuine occupational requirements. Thus an employer may select a person for a particular post where, due to the nature of the work involved or the context in which it is carried out, it is a 'genuine and determining occupational requirement' that the person should have a characteristic related to racial





or ethnic origin, disability, religion or belief, sexual orientation or age **provided that the objective is legitimate and the requirement is proportionate**. For example, if a film director decided that only a black actor could play Nelson Mandela in a movie, it would be a genuine occupational requirement to employ a black person. Applying a genuine occupational requirement in respect of one ground should not justify discrimination on any other ground; so in this example, it would not be legitimate to discriminate on grounds of sexual orientation.

Long-established assumptions about the type of person required to do a particular job may not meet the test of legitimate objective and proportionality. For example, an employer is unlikely to be able to demonstrate that to work as a receptionist a person must be 'young and energetic'; such a requirement is likely to be discriminatory on grounds of age and disability.

Differences of treatment on grounds of age

The Employment Framework Directive (2000/78/EC), Article 6, permits, but does not require, Member States to include some further exceptions that would allow differential treatment on grounds of age including:

- Setting special conditions on access to employment and training, on employment and occupation, including dismissal and pay, for young people, older workers and people with care responsibilities in order to protect them or to promote their vocational integration;
- Fixing minimum age, experience or seniority for access to employment or advantages linked to employment;
- Fixing a maximum age for recruitment, based on the training requirements of the post or the need for a reasonable period of employment before retirement.

Any such exception must still be objectively and reasonably justified by a legitimate aim, which could include legitimate employment policy, labour market or training objectives, and the means of achieving that aim must be appropriate and necessary.

Positive action

The Directives recognise that to achieve full equality in practice will require more than prohibiting current or future discrimination; therefore they permit measures to prevent or compensate for the historic disadvantages suffered by groups defined by racial or ethnic origin, religion or belief, disability, sexual orientation or age. If particular groups have never been employed to do particular types of work, positive action could involve training people from such groups to prepare them for such work. It could also involve taking additional, planned, targeted steps when seeking to recruit new employees, publicising posts in different ways in order to encourage members of such groups to apply and offering support if necessary.



Reasonable accommodation for disabled people

Article 5 of the Employment Framework Directive (2000/78/EC) requires employers to take appropriate steps where needed in a particular case, to enable a disabled person to have access to, participate in or advance in employment or to undergo training unless this would impose a 'disproportionate burden' on the employer. For example:

- To enable a deaf employee to undergo training her employer could provide a sign language interpreter.
- After an accident at work a manual worker is unable to continue in his manual job; the employer could provide appropriate training and transfer him to an office job.
- A wheelchair-user replies to an advertisement for an administrative assistant. The address is on the 4th floor. If the employer has offices on several floors including the ground floor, the employer could arrange for the work of the administrative assistant to be done in the ground floor office and move another employee who is able to climb stairs to the 4th floor. If, however, the employer has offices only on the 4th floor and there is no lift, then there may be no reasonable measures (without disproportionate burden) the employer can take to enable this person to do this job.
- To enable a blind person who uses a guide dog to get to work more easily, the employer could change their working hours so they do not have to come in the rush hour.

An employer cannot claim that the burden, including financial burden, of providing reasonable accommodation for a disabled person is 'disproportionate' if funding or other assistance is available to assist employers in such circumstances.

Legal standing

Both Directives provide that associations and organisations with a legitimate interest can support victims of discrimination or take legal action on their behalf (with their approval). Criteria defining which organisations have a 'legitimate interest' are established by national law.

Dialogue with civil society

The Directives require Member States to promote dialogue with social partners to encourage workplace agreements, codes of conduct, etc. and with NGOs with a view to promoting the principle of equal treatment.

Specialised bodies

In the Race Directive (2000/43/EC) there is an obligation on each Member State to designate a body to promote equal treatment. Their main tasks are to provide independent



assistance to victims of discrimination, conduct independent surveys and studies, publish independent reports and make recommendations.

Dissemination of information

The Directives require Member States to take measures to widely publicise both their existing laws on equal treatment and non-discrimination and any new measures they adopt to bring their laws in line with the Directives.

Reporting

Member States must report to the EU on the application of the Race Directive (2000/43/EC) by 19 July 2005 and on the application of the Employment Framework Directive (2000/78/EC) by 2 December 2005, and every five years thereafter.

Sanctions

In transposing the Directives, Member States must ensure there are sanctions for infringement of their national anti-discrimination laws and that these sanctions are applied. Sanctions for discrimination must be 'effective, proportionate and dissuasive'; that is, they should provide appropriate personal redress for the victim and should deter both the particular respondent and others from comparable acts of discrimination in the future. Sanctions may comprise the payment of compensation, for which no upper limits can be imposed.

1.5. Shift of the burden of proof

Recognising the difficulty of proving discrimination, Article 8 of the Race Directive and Article 10 of the Framework Employment Directive provide for the shift of the burden of proof as follows:

'... when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.'

The burden of proof cannot be shifted in criminal proceedings. In some Member States it will not apply to investigative procedures. It is equally important to note that the shift of the burden of proof is not limited to court proceedings but that it extends to proceedings before any competent (i.e. administrative) authority.



The notion of the shift of the burden of proof made its way into EU law through ECJ case law handed down in connection with equal pay cases – where a woman could show difference in gender and difference in pay, and the court needed the employer to provide an explanation. The most frequently cited case in this regard is *Enderby v. Frenchay Health Authority and the Secretary of State for Health*, C-127/92.

There followed Council Directive 97/80/EC on the burden of proof in cases of discrimination based on sex. The shift of the burden of proof has been closely linked to the importance of delivering effective judicial protection against acts of discrimination. The shift of the burden of proof which the Directives allow is, however, not automatic. The onus of proof does not shift as soon as a plaintiff simply claims that he was discriminated against but only after s/he **establishes facts from which it may be presumed** that discrimination has occurred. What these facts might be is dependent on domestic legislation and case law.

Evidence of discrimination

The Directives refer to discrimination ‘on grounds of’ racial or ethnic origin, religion or belief, disability, sexual orientation and age. Case law in countries like the United Kingdom and national legislation transposing the Directives has generally clarified that ‘on grounds of’ can include protection against discrimination where the victim has the actual characteristics in question or is perceived to have such characteristics or is associated with persons having such characteristics. For example, if someone is excluded from a restaurant because the proprietor says ‘No Roma’ this is likely to be direct discrimination on grounds of racial or ethnic origin, whether the person is in fact Roma or whether their appearance suggests that they are Roma or because they are with Roma friends.

Thus, a plaintiff who does not profess himself in court as belonging to the Roma minority, can at the same time claim that he was discriminated on the ground of his perceived ethnic origin.

This approach is likely to be particularly important in sexual orientation cases, since victims will not need to prove that they have a particular sexual orientation but merely to establish facts to show that they have suffered less favourable treatment or harassment on grounds of their perceived sexual orientation or their association with people of a particular sexual orientation.

There are many procedural instruments that can assist victims of discrimination to establish that discrimination may have occurred. Such instruments include testing, the use of statistics, video and audio recordings and the so-called questionnaire procedure. Testing is commonly used in the United States to prove direct discrimination in employment, housing and access to services. In Belgium testing is a piece of evidence acknowledged by law. NGOs in Central and Eastern Europe also use testers – job-seekers for instance – who are selected because all of their characteristics are comparable, except for the one (most often race) on the basis of which discrimination occurs.

Audio and video recordings can be used as evidence in some countries – e.g. in the Czech Republic – but not in others. In the United Kingdom the questionnaire procedure enables





rejected job-seekers to seek an immediate response from the employer as to the reasons for their rejection. Courts and tribunals in the United Kingdom can draw inferences of discrimination from the answers given to the questionnaire or from the failure of the employer to respond in time or respond at all.

Both the Race Directive (2000/43/EC) and the Employment Framework Directive (2000/78/EC) expressly mention in their preambles that statistics may be used in cases of indirect discrimination.

1.6. Non-implementation of EU law

Where a State which is a member of the EU has not provided for the **full** (and **correct**) transposition of a Directive (see nature of Directives above) into national law by the time the date for implementation has passed, an individual may nevertheless be able to rely on the provisions of the Directives before national courts. This is known as the principle of 'direct effect'. The aggrieved individual will have to show that the provision relied on is a precise and unconditional principle which is sufficiently operational to be applied by a national court and which is therefore capable of governing the legal position of individuals. However, it is generally held that the principle of direct effect applies only to complaints directed against a public body or 'emanation of the State'.

As such, in relation to litigation between private individuals or entities, Directives also have the so-called 'indirect effect'. As discussed above, States and in particular domestic courts are obliged to do everything possible to achieve the results outlined in the Directives. Indirect effect therefore requires domestic courts to interpret existing national law, as far as possible, in line with the Directive that should have been implemented.

It is ultimately for the ECJ to decide which terms of the anti-discrimination Directives have direct or indirect effect.

If a State **fails to implement** a Directive within the time frame provided, the State is liable for damage that this causes to the individual. This is referred to as Francovich damages as the principles were first laid down in the case of Francovich and Bonifaci v. Italy (Joined Cases C-6/90 and C-9/90) decided by the European Court of Justice in 1991.

In the Francovich case the ECJ listed three conditions which are both **necessary** and **sufficient** to establish liability under this principle. These are:

- The rule that has been infringed should entail the granting of rights to individuals;
- The content of such rights must be ascertainable on the basis of the provisions of the Directive in question; and
- There must be a causal link between the breach of the State's obligation and the loss and damage suffered by the injured individual.

In addition, the breach of EU law must also be sufficiently serious for the individual to be entitled to damages.



The Francovich damages remedy has been developed by the ECJ in later cases. It is now clear that it is available for all breaches of EU law by a Member State, including failure to implement a Directive **properly**, in addition to complete non-implementation.

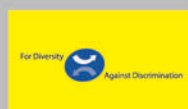
Materials

The text of the two Directives and possibly summaries (see 'National Context' Section).



2. The role of Non-Governmental Organisations (NGOs) in combating discrimination

- 2.1. What is a NGO?
- 2.2. What is the role of a NGO in the field of combating discrimination?
- 2.3. What can a NGO do concretely to combat discrimination?
- 2.4. What does a NGO need to fulfil its role?
- 2.5. Why are NGOs better placed than other organisations to work towards combating discrimination?
- 2.6. What are the obstacles for NGOs and how might these be overcome?



2. The role of Non-Governmental Organisations (NGOs) in combating discrimination

Intended learning outcomes

- For the participants to have explored the roles NGOs can and should play in combating discrimination

2.1. What is a NGO?

A NGO is a local, national, or international group, with a legally established constitution, a clear purpose and visible activities, with a governing body which has the authority to speak for its members. It is normally a non-profit organisation, not affiliated with any Government or private-sector entity, or any political party. Its aims are usually to promote well-being by addressing social and legal problems, and by seeking to play an equal role with other democratic institutions in the development and progress of civil society.

2.2. What is the role of a NGO in the field of combating discrimination?

When considering what role they can play in combating discrimination, NGOs should take full advantage of the special role that has been given to them under Articles 7 and 12 of Council Directive 2000/43/EC, and Articles 9 and 14 of Council Directive 2000/78/EC.

In order for a country to achieve its goals of peace, democracy, good governance, health, prosperity and equality, NGOs are essential to successful development.

The role of NGOs as instruments of civil society in the fight against discrimination can include:

- Providing a means for expressing and actively addressing the needs of people who are discriminated against
- Supporting victims of discrimination in their access to justice
- Promoting diversity and equality in society
- Establishing the mechanisms to influence decision-making



- Mainstreaming non-discrimination and equal treatment in policies
- Challenging authorities and corporations to act against discrimination
- Monitoring, documenting and denouncing discrimination
- Maintaining equality on the political agenda and encouraging mobilisation

A NGO can

- Work in partnership with other NGOs to achieve shared aims;
- Empower groups to engage in campaigns, to be self-advocates and to assert and enforce their rights;
- Work, where appropriate, *in partnership with Governments* to achieve common aims and objectives;
- Work, where appropriate, *against Governments* when those Governments are promoting policies which are contrary to the NGO's objectives;
- Deliver services efficiently and effectively *within the framework of Government* policies, where appropriate, and to adopt, where appropriate, strategies consulted and negotiated between NGOs and Government;
- Deliver services efficiently and effectively *outside the framework of Government* policies when this is necessary and appropriate to promote the NGO's objectives, and to adopt, where appropriate, strategies contrary to Government policies;
- Ensure the co-ordination of its own services and to engage Government in discussions on the *co-ordination of services between the Government and NGOs*;
- Provide professionally researched advice to Governments on issues of concern;
- Advocate and campaign for change as a response to need;
- Guide and contribute significantly to legislative and policy-making processes, by providing properly researched advice and by briefing politicians in both Government and opposition and other persons of influence;
- Be vigilant 'watchdogs' – pointing out where Governments and corporations are actively discriminating, or failing in their obligations to combat discrimination or where they need to improve their performance, and serving to enforce the operation of checks and balances that characterise democratic society. In this role, NGOs must target Government and the business community by advocacy, lobbying and negotiating functions, when required;





- Challenge, by appropriately selected mechanisms acts, omissions, administrative practices or policies which are contrary to the NGO's objectives;
- Keep track of and ensure that advantage is taken of all new developments in combating discrimination, e.g. new legislation (national, EU and international), new policies (national, EU and international), new sources of funding, and landmark judicial decisions (at national, EU and international level);
- Be open, transparent and accountable to its membership and to the public;
- Increase the strength of NGO participation in civil society by forming networks and coalitions, and promoting original initiatives and solutions. This can help to reduce prejudice within society, thus favouring equality;
- Work openly and in a spirit of collaboration with other NGOs operating in related fields and avoid conflicts and disputes between NGOs;
- Put pressure on a state to ratify international instruments which allow for the international spotlight to be shone on Government practices;
- Supply national and international bodies with vital and reliable information which they should draw on when examining a country's record on discrimination.

In summary, the role of many NGOs can be to check, monitor and criticise the actions of Governments and private bodies, to supplement and complement the role of Government in combating discrimination and to help individuals and groups assert their rights.

2.3. What can a NGO do concretely to combat discrimination?

The following is a suggested list of activities and services that an NGO can carry out or provide in order to help combat discrimination on all grounds:

- Awareness-raising
- Monitoring/Influencing the development of policy and law
- Support to individual victims and to individuals forming part of a collective complaint
- Litigation
- Alternative Dispute Resolution, including mediation
- Campaigning, advocating changes in practice (as distinct from policy or law)



2.4. What does a NGO need to fulfil its role?

- Human resources
- Skills
- Knowledge
- Expertise
- Openness
- Transparency
- Accountability (NGOs have been at the forefront of debates regarding accountability and transparency – key issues for voluntary action)
- Funding
- Non-discriminatory attitudes within its own organisation
- Appropriate national legislation in place regarding its establishment and functioning

2.5. Why are NGOs better placed than other organisations to work towards combating discrimination?

- Voluntary organisations play a crucial role in engaging with communities at the local, regional, national and international level.
- While disaffection with politics grows, engagement in voluntary and community activities is a way for people to contribute to public life by donating their time or money and supporting issues which are of concern to them.
- Voluntary organisations have increasingly become places where people can debate and engage in issues that affect them, and where they feel they can advocate for change.

2.6. What are the obstacles for NGOs and how might these be overcome?

- Complex rules surrounding the requirements that NGOs must meet in order to be registered. NGOs seeking registration should make sure they have a detailed familiarity with these rules and have taken the correct steps and obtained the documents required for compliance.
- Prohibition on organisations carrying out certain activities if not registered. Organisations have to decide how important this is and whether or not to register.





- Prohibition on certain activities even after registration. NGOs need to comply with the national law, or, if it is arbitrary or disproportionate, challenge it by the appropriate mechanism.
- Lack of standing in order to participate in relevant political debates. NGOs will need to be sure that they brief an individual or organisation that does have standing.
- Lack of standing in order to bring complaints. NGOs can support and assist those who do have standing, or seek to reform the rules.
- Perception of affiliation to Government or a political party threatening acceptance as an impartial advocate of issues. A good NGO needs to be careful to espouse a cause, not to be affiliated to a political party and steps should be taken to ensure that this is the case.
- Lack of knowledge and skills, particularly in organisational and financial management or the use of IT. NGOs should ensure that they understand the importance of good organisational and financial management. They must either acquire the services (paid or unpaid) of qualified professionals or undertake appropriate training (or both).
- Lack of funding and limited resources, lack of information and guidance on accessing available national, EU and international funds. National equality commission, NGO co-ordination bodies, local EU representations and regional international donors should be contacted to identify suitable sources of funding.
- Tax/other relevant laws of the donor or recipient country that may not be supportive of NGOs. For example, a considerable obstacle to the health and sustainability of the NGO sector in Japan is the fact that previously Japan had not granted tax deductible status to most of its not-for-profit organisations. The US experience, on the other hand, has shown that tax benefits for not-for-profit organisations help stimulate contributions from the public and promotes private charitable giving from the for-profit sector.
- Lack of effective 'partnership' between Government and NGOs. The Government, for-profit community, and NGOs need to recognise each other as integral partners, of equal stature, with a distinct and vital role to play in development. Governments enact and enforce rules and regulations that define the policy environments needed for NGO activities to take root. For-profit corporations can offer know-how, resources, and technical assistance, while NGOs offer practical on-the-ground knowledge, relationships, and networks needed to get the job done in a way that renders the final product sustainable.
- Under-utilisation of potential support from the business sector. NGOs should seek to achieve 'business engagement'. A growing number of NGOs are now engaging businesses in 'partnerships' aimed at collaboratively addressing key issues.
- Inability to reach some parts of the community due to insensitivity, imposition of externally chosen legal or political aims, cultural or language barriers. NGOs should ensure



that *their own organisations* have a diverse workforce with personnel trained in discrimination awareness issues, awareness of the social and political history, including history of exclusion and discrimination of the groups within the community and, where relevant, a range of language skills.

- Poor management or employment practices occur frequently in NGOs and can damage morale and can impede the effectiveness of the NGO. Examples are lack or absence of an organised infrastructure or hierarchy, and/or a lack or absence of a management system. This may be due to a number of factors, including minimal funding, resources, time, resistance to taking on the role of employer, continuity of personnel (especially in an organisation where there is a high turnover of enthusiastic volunteers), low staff morale or downright chaos, and results in NGOs not reaching their full efficiency potential. This can be overcome by agreed allocation of management roles, specific management training, competent internal administration and regular review of administrative and employment matters.

Materials

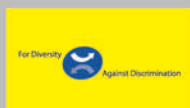
For example, the Council of Europe document 'Fundamental Principles on the Status of NGOs in Europe' – www.coe.int/T/E/NGO/public/PrincFondam%20en%20engl.pdf.

This document exists in English, French, Albanian, Bulgarian, Latvian, Lithuanian, Russian and Serbian.



3. Thematic subjects

- 3.1. Awareness-raising
- 3.2. Monitoring/Influencing the development of policy and law
- 3.3. Support to individual victims



3. Thematic subjects

Intended learning outcomes

- For the participants to have explored various activities and services that NGOs can undertake and provide in order to help combat discrimination on a practical level

3.1. Awareness-raising

Although some people are consciously prejudiced against certain groups and knowingly discriminate against them, many more members of society are unaware that their conduct and attitudes are discriminatory. This lack of awareness is sometimes one of the first hurdles to be overcome in the efforts made to work towards equality. There are many ways for NGOs to communicate knowledge and information on equality issues to the social partners and the wider national community.

Many victims of discrimination are unaware of their rights and what to do or where to go for help.

Self or institutional awareness-raising

Research carried out by major funders and NGO consortia has shown that, for NGOs to work effectively, they not only need to raise awareness of the issues they espouse but also the public's awareness of themselves as organisations. This is a separate but related issue to raising awareness of the discrimination issues they seek to address. It is also often overlooked.

NGOs specifically dealing with discrimination issues therefore need to develop parallel strategies to raise awareness of **themselves** and their own aims and objectives as well as of the discrimination issues their work seek to address. This strategy might include:

- Establishing a visible presence by participating in relevant meetings and events or by joining committees/taskforces on issues of importance. Such events may be ideal places to meet and set up individual meetings with other organisations looking for partners, as well as donors, who can fund services directly. For a dialogue with the Government on support for such activities, where needed, NGOs can rely in particular on Article 14 of Council Directive 2000/78/EC and Article 12 Council Directive 2000/43/EC.
- Co-operating together with other organisations – i.e. other NGOs with a shared (although perhaps diverse) focus on discrimination issues. This can include meeting, co-ordinating activities, and identifying priorities for the community.



- Acquiring materials and technical expertise – for example:
 - Asking for a specialist in the discrimination field to provide technical assistance or to be seconded to that NGO;
 - Requesting specific areas of training;
 - Establishing partnership with other organisations to implement specific programmes;
 - Understanding the relationship of NGO programmes to long-term Government plans. It is important for NGOs to be able to state collectively where their activities fit into these larger plans. Some NGOs are often better able to address an unmet need, offer an alternative viewpoint, and stimulate debate on issues that are not yet mainstreamed by the Government.

In raising their own profile, NGOs will also be raising awareness of the particular areas of discrimination which are their interest.

Awareness-raising of equality issues

What is the purpose of awareness-raising?

- Changing attitudes, behaviours and patterns, mobilising support in favour of new policies, promoting the implementation of an equality agenda, etc.

Who are the target groups?

- Public opinion, victims or potential victims, public and private sector employers, providers of services including housing, educational bodies, enforcement authorities, etc.

How can it be done?

- By providing information, by organising campaigns, by educating and training, by doing research and making it public, by networking and building alliances, by doing media work.
- By identifying examples of conscious or unconscious discrimination which occur, particularly where these involve inhuman or degrading treatment.
- By providing reasons, understandable by and acceptable to the community at large, why such discrimination is prohibited and the significance of the fact that this prohibition is written into law.





- By personalising the understanding of what suffering discrimination is like (i.e. educating people to *empathise* with the victims of discrimination) and moving away from seeing the victims as 'others'.
- By providing information about:
 - the law relating to discrimination rights;
 - the legislation giving effect to those rights, and in particular the duty on States under Article 12 Council Directive 2000/78/EC and Article 10 of Council Directive 2000/43/EC to disseminate information about the content of the Directives by all appropriate means;
 - the powers that exist to protect people against discrimination;
 - preventative measures;
 - the routes to challenging violations of anti-discrimination legislation; and
 - the details of relevant organisations and authorities specifically established to deal with particular areas of discrimination.

Various methods for awareness-raising in the community at large are set out in the 'Skills and tools' Section.

3.2. Monitoring/Influencing the development of policy and law

NGOs can have an important role to play in monitoring and influencing the development of policy and law as they are uniquely well-placed to bring grass roots knowledge of the problems and thoughtful consideration of possible solutions to the attention of the authorities. NGOs need to make a policy decision as to whether this is an activity they have the expertise and capacity to undertake (see 'Skills and tools' Section).

What to monitor?

- Implementation of legislation and policies
- Practices and attitudes in determined sectors (public administrations, employment, access to services, etc.)
- Effects of policies on vulnerable groups.



How to do it?

- By undertaking research, by collecting data, by developing indicators.

Good monitoring will lead to relevant and reliable information and is a prerequisite for effective lobbying.

Monitoring using research and lobbying approaches can include:

- Trying to get Government to take up issues through meeting or writing to ministers and civil servants;
- Responding to consultation documents;
- Using the political process;
- Briefing MPs on issues and trying to get them to put down motions for debate;
- Working closely with Government (if appropriate) when the opportunity arises (taking part in working groups and task forces, etc.);
- Working closely with other NGOs on equality issues;
- Working closely with relevant Equality and Diversity Forums;
- Monitoring the effect of new laws, and where new laws have an adverse impact on particular groups bringing this to the attention of Government, other NGOs, etc.

3.3. Support to individual victims

Support

NGOs must recognise their capacity in relation to supporting victims of discrimination. In this context, NGOs can rely on Article 9(2) of Council Directive 2000/78/EC and Article 7(2) of Council Directive 2000/43/EC.

Some NGOs will have the skills and resources to provide detailed advice and support including legal representation. Other NGOs may be able to help the victim diagnose that the treatment they have received may constitute unlawful discrimination and assist with some initial inquiries. Another group of NGOs may lack skills and experience even to embark on basic diagnosis and should immediately refer the person to a more suitable source of advice and assistance. NGOs must be careful not to try to do more in this area than they feel capable of doing. This is why conducting a skills audit is so important (see 'Skills and tools' Section).

NGOs should provide broad-based support to individual victims of discrimination. This support must always take into account the sensitivities of the victims and the range of emotions which they will be experiencing (anger, lack of self-esteem, reluctance to disclose or





repeat insults – verbal or otherwise – sense of isolation, fear of losing their livelihood, fear of reprisals, fear of victimisation), this support should also take into account the expectations of the victim in relation to a possible action to be undertaken, etc.

Providing professional but sympathetic support is essential. This support can take various forms, e.g.:

- Setting up a dedicated helpline, served by trained advisers to record and monitor instances of discrimination.
- Providing victims with information about their rights in simple layman's language.
- Providing specialist information and advice to victims as to the most appropriate mechanism for challenging the discrimination they have suffered.
- Providing realistic information and advice about the likely outcome of pursuing a complaint.
- Providing (or providing access to) professional counselling to assist in the rebuilding (or building) of self-esteem.
- Putting victims in touch with other victims if they would find this helpful.
- Identifying the victims' objectives in pursuing a complaint and reconciling this with the NGO's policies and objectives.
- Proposing, when appropriate, possibilities of informal resolution (e.g. mediate between a victim who has been denied an apartment and the owner in order to make him reconsider his decision).
- Establishing a legal team able to provide the necessary legal support for acts of discrimination to be challenged (see Article 13 Council Directive 2000/43/EC and Article 9 Council Directive 2000/78/EC).
- Supplying specialist research and statistical information and advice on equality issues.

In addition, in cases of employment and occupation discrimination, if the NGOs have established constructive links with the employers bodies ('le patronat') and any statutory enforcement bodies such as the labour inspectorate, they may be in a position to collectively address the employers in a way which is more comfortable for the victims.

Litigation

Various options exist for NGOs wishing to use litigation to combat discrimination:

- Using the services of lawyers who work directly for the NGO (either paid or pro bono) to litigate cases. The acquisition of the necessary specialist knowledge and skills by those lawyers is essential.



- Establishing a team of lawyers affiliated to the NGO with the relevant expertise who are able and willing to litigate on behalf of individuals or groups.
- Establishing links with law firms and encouraging them to acquire the necessary expertise to take up cases whether for payment (if funds are available) or pro bono if they are not.
- Ensuring familiarity with national legal aid provisions so as to be able to use these on behalf of impecunious victims.
- Developing a litigation policy suitable to the NGO's policies and objectives, the national system and to the incidence of complaints. NGOs may decide to adopt a litigation strategy, or set litigation priorities, or offer an across the board service. Each has its advantages and disadvantages but whichever option is selected the criteria for taking up cases must be transparent both to the NGO and to the victims who approach it for assistance.
- Litigating before national judicial bodies (including constitutional complaints where these are possible), in particular ensuring that NGOs use the rights accorded by Article 9 of Council Directive 2000/78/EC and Article 7 of Council Directive 2000/43/EC.
- Where discrimination-related criminal offences have been committed, such as incitement to racial hatred, homophobic assault, religiously motivated violence, ensuring that prosecutors and investigating judges carry out their tasks with due diligence, bringing legal action where appropriate to ensure that this is done.
- Supporting victims as civil parties in any discrimination-related criminal prosecution.
- Where such criminal offences have been committed and no charges are brought by the prosecutor, advising victims regarding the possibility of bringing a private prosecution, where this is allowed by national law, and, where appropriate, assisting them to do so.
- Taking complaints (individual or collective) to international bodies such as the European Court of Human Rights (in particular under Protocol 12, see 'Key concepts' Section) UN Human Rights Committee (under the International Covenant on Civil and Political Rights), the Committee on the Elimination of Racial Discrimination, the Council of Europe's Committee of Social Rights under the European Social Charter where appropriate acceptances have been made by the State concerned.¹
- Ensuring referrals of important points of interpretation of the EU Directives are made to the ECJ by national courts (see Section on 'National law and procedure').
- Alerting the European Commission to administrative practices which violate the Directives with a view to the initiation of infringement proceedings and providing the necessary information and support to the Commission when such proceedings are initiated.

¹ Technically, of the above mentioned only complaints taken to the European Court of Human Rights are, strictly speaking, correctly classified as litigation, but the procedures are quasi judicial in nature and are thus included here rather than in the section on ADR.





Alternative Dispute Resolution (ADR)

Conciliation procedure is specifically referred to in Article 7(1) of Council Directive 2000/43/EC and Article 9(1) of Council Directive 2000/78/EC.

ADR takes many different forms in the Member States of the EU and the Council of Europe, and might include conciliation, mediation and arbitration.

In some countries ADR is a true alternative to litigation. The parties typically have access to a trained mediator or mutually agreed arbitrator, or a panel of arbitrators, who assist them in coming to a mutually acceptable agreement which brings the complaint/dispute process to a conclusion. The agreement may have no legal force but can often solve both the surface and the underlying problem more satisfactorily than litigation. If either party reneges on the agreement, both parties will still have access to court.

In some systems, the agreement reached in this way may be binding and can be enforced in the courts if either party reneges on it.

Many countries of Central and Eastern Europe have developed more formal systems of mediation which are regulated by specific laws on mediation and which involve the services of a judge as mediator or arbitrator, without recourse to formal legal proceedings. Typically the agreements reached at the end of such mediated discussions will be registered with the court and are enforceable. If the parties cannot reach an agreement, recourse can be had to the ordinary courts.

Sometimes more than one of these systems exists and there is a certain degree of overlap.

Both mediation and arbitration are highly-skilled professional activities. In many countries Colleges of Mediation and/or Arbitration have been established to ensure that the highest standards are met. NGOs may wish to acquire those skills for themselves so that their personnel can put themselves forward as credible mediators. Alternatively they may wish to forge links with trained mediators on whose services they can call on behalf of victims of discrimination.

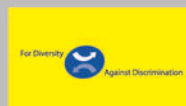
Other national and international ADR non-judicial mechanisms may also be appropriate, e.g. complaints to the relevant national ombudsman, petitioning the European Parliament.



4. Skills and tools when working towards combating discrimination

4.1. Skills

4.2. Tools



4. Skills and tools when working towards combating discrimination

Intended learning outcomes

- For the participants to have explored the skills and tools required for a NGO, as an organ of civil society, to combat discrimination

4.1. Skills

NGOs need to carry out a 'skills audit' within their organisation so as to establish **what skills** are needed **to achieve the organisation's main objectives** in its work towards combating discrimination, and what skills are lacking within the organisation in the context of fulfilling its identified objectives.

The organisation will need to consider if it has, and/or needs to acquire, **knowledge and expertise**, from:

- its own staff or
- its own membership or
- links with other NGOs

by identifying whether it has and/or needs any of the following (not all these skills are needed by all NGOs).

The purpose of the audit is to identify the skills that each NGO needs to carry out its main objectives:

- Personnel with legal skills
- Personnel with mediating/arbitrating skills
- Personnel with counselling skills
- Personnel with training skills
- Personnel with good interpersonal and networking skills
- Personnel with good public relations and communication skills
- Personnel with awareness of and familiarity with political processes



- Personnel with the necessary language skills to access appropriate international materials or processes
- Personnel with experience of working with the media
- Personnel with marketing skills
- Personnel with fund-raising skills
- Personnel with technical IT skills.

Where a skills lack is identified, NGOs will need to go on to identify the steps they must take to remedy this lack, e.g. by;

- Recruitment of appropriate staff;
- Recruitment of appropriate volunteers;
- Using contacts with other NGOs for example for training, mentoring, skills exchanges, etc.;
- Securing the availability of appropriate skills by, for example, establishing links with local businesses, professionals, or training providers;
- Applying for funding if necessary.

4.2. Tools

NGOs will need to conduct a ‘tools audit’ within their organisation so as to establish which ‘tools’ they are using and/or could be using to assist them in achieving their identified main objectives.

4.2.A General

Campaigning

The political arena

The organisation should use the local and national political arena and processes by campaigning and sub-campaigning politically on specific issues (e.g. for new legislation, and also to extend existing legislation to cover a wider group of people and situations) or to change discriminatory practices.

Campaigns should be aimed at politicians, local authorities and other decision-makers. The NGO should brief ministers on the true facts around the issues for which the campaign is





being run. The NGO should make its views known on draft bills and laws and should demand that authorities and Government agencies do their job in helping people properly.

The public at large

The public is a powerful tool and hence campaigning work should also be undertaken publicly. Such campaigns should seek to influence public opinion by keeping the public properly informed on issues. Changing public opinion is a vital part of any campaign because if the public does not care, the campaign will become pointless. Furthermore, if the public is not made to see that discrimination rights are fundamental, then nor will the politicians who count their votes.

Networking and building alliances

Interaction with target groups is an important part of networking. Talking with relevant groups and forums (e.g. if dealing specifically with age discrimination, speaking with Older People's Forums) to get their views is a good starting point. Networking in this way will help the organisation to build a database of up-to-date useful contacts.

In addition, networking with other groups and organisations with a shared objective in combating discrimination – or other related shared aims (for example improving standards in rural schools) – is an ideal way of sharing knowledge and information, and building relationships and hence contacts, and broadening the base and strengthening the impact of any campaign.

NGOs can, for example, invite other organisations working in similar fields to 'round table' discussions where they can try to agree on aims for lobbying and campaigning and share information on projects in which they are involved.

This united 'team-playing' will also seek to avoid any duplication of work or efforts (and hence costs) in the same field. This is important, especially if organisations might be competing for the same funding. The economical benefits of working together and sharing knowledge also releases funds which can then be used in other ways, again, perhaps on a joint or united basis.

Building alliances with other sectors will allow a better exchange of information, a better co-ordination of strategies and will make it possible to mobilise a larger support in favour of an equality agenda.

By holding its own seminars, and getting invited to speak at other relevant conferences/events, the organisation will raise its own profile, radiate awareness of discrimination issues, and further its contacts database.

Building alliances with other groups in civil society which can reach further and deeper into politics and economics like trade-unions, universities and think tanks, consumer organisations, media, etc. is also very important.



Research

The NGO's views which will be put forward through campaigning, working with the media, etc. need to be backed up by rock-solid research, carried out to a high professional standard into the issues and the people affected. The research plays a significant role in influencing policy-makers at the highest levels of Government.

Some of the best and most effective research is carried out by those NGOs who have the expertise, skills and resources to execute this work to the high professional standard that is necessary for it to be respected. Many NGOs do not have these skills and should not embark on such work without them. Poor quality research can damage both the NGO and the cause. Instead, NGOs can often contribute to the research of experts by providing them with the data which they need.

Accordingly, the organisation should consider whether it has the necessary skills to undertake its own research as well as, resources permitting, commissioning research from experts on topics related to discrimination. Bigger NGOs may wish to manage such externally commissioned research projects and prepare reports once the research projects are concluded. Carrying out surveys of awareness and statistical analyses through the use of questionnaires is a useful way of collecting information.

NGOs can then compile and produce comprehensive research reports, working papers and/or shorter research findings documents, evidence and case studies, publications on policy issues, regular newsletters, statistical briefings, summaries of findings, and fact sheets and make these available through publication and in other ways (e.g. through a policy library or a website).

NGOs may carry out electronic or postal mailouts of information to those on its database several times a year, publicising research and statistical activities within the research and policy communities.

This knowledge will help the NGO to develop pilot projects to put its theories into practice where it matters – in the community.

The Media

In the current society of 'mind-media' control, the media is possibly the most powerful tool of all in ensuring general awareness and influencing public opinion. Working with the media is therefore key and the organisation should make it a priority to find journalists (radio, TV, news-websites as well as print media) to talk to and to work with. It should endeavour to devote much time and energy into issuing press releases and encouraging press campaigns on equality and human rights issues.





The media can also be an effective tool in broadcasting and disseminating relevant information. The organisation should therefore use the media to inform and educate people by ensuring they reach the right people by identifying target groups.

Accordingly the NGO could consider taking the following steps:

- Issuing press releases when new policies are unveiled by local or national Government;
- Issuing press releases when landmark or newsworthy judgments are handed down;
- Holding press conferences;
- Inviting members of the media to attend regular training courses organised by the NGO;
- Writing letters to newspapers with a view to getting them published;
- Finding out the names of relevant journalists in newspapers/TV/radio, etc. dealing with discrimination and adding these to the contacts database;
- Regularly briefing such journalists on relevant issues; and
- Monitoring the media in order to detect inaccurate information, biased opinions, discriminatory images and stereotypes, and working with the media to eliminate this.

Training

It needs to be addressed to a whole range of different audiences. The content of the training will obviously depend on the target group (enforcement authorities, journalists, schools, etc.).

Once an organisation has

- built up **its own profile** (see 'Thematic subjects' Section) and
- acquired the **necessary training expertise**,

it will be in a position to offer training to promote equality.

The organisation should consider running well-publicised training seminars and workshops, particularly for lawyers, judges, officials in local authorities, private sector employers and service providers through their associations. It may wish to target a particular group, such as prosecutors, to encourage prosecutions for criminal offences such as incitement to racial hatred.



Part of the professional skill of providing training is designing and providing training materials and information packs as a supplementary way of disseminating information.

Obviously the type of training courses will depend on

- the profile
- the objectives and
- the skills

of the NGO.

4.2.B IT-related

Website Creation

Each NGO should consider having its own website. It needs to give careful consideration to the specific purpose it is intended to serve and weigh up costs and benefits. This is a more practical possibility for small NGOs in the target countries than in western Europe where website design, creation and maintenance is very expensive.

See also below about possible help from outside IT experts.

Knowledge Management

One of the problems of busy NGOs is that they hold vast amounts of very important information, but often in the heads of key workers, who will say that they are too busy being activists and lobbying for change or dealing with victims to take time to record what they know, what they are doing, how and why. When they are away others are not able to take over and when they leave the organisation has a huge information gap.

NGOs need to be far more rigorous in establishing simple systems for recording information that everyone within the organisation can access. It may be that this is done in part by weekly meetings where attendance is compulsory so everyone knows what is being done, and then an additional system for record keeping, contact lists, reports on outcomes of key meetings, etc.

A variety of knowledge management systems will be an important tool in helping the organisation to function efficiently. Maintaining the contacts, legal (and other) precedents, and other relevant databases will ensure that the organisation keeps itself organised and up-to-date.

It should be able to store information about individuals' ongoing and recently published research on its system, and furthermore, should have a way of sharing and exchanging contacts and other information with other parties.





If a NGO handles its own advice, complaints or litigation caseload then an integral part of its knowledge management will be its case management system, which will track and record all cases which the organisation is handling. This can be very simple, as sophisticated **case management** systems are likely to be beyond the resources of many NGOs.

IT is a tool which no modern organisation can do without. NGOs should carefully identify their IT needs and consider what other relevant IT software would add value to their services and further their potential. Obviously there will be cost implications involved here, particularly if there are no appropriately trained personnel (see 'Skills and tools' Section) available. Perhaps another organisation/business with which the NGO has established links (see Section on 'The role of NGOs') could 'second' an IT expert to the NGO on a regular basis.

4.2.C EU-related

NGOs should ensure that they provide the Commission with information which complements, supplements and if necessary criticises and corrects the information provided to the Commission by their national Government under Article 19 of Council Directive 2000/78/EC and Article 17 of Council Directive 2000/43/EC.

4.2.D Other International

NGOs should ensure that they provide the relevant committees under, for example, the European Social Charter, the Convention on the Elimination of Racial Discrimination, the Convention on the Rights of the Child and the International Covenant on Civil and Political Rights with information on the measures taken to combat discrimination (or the absence of those measures) that complements, supplements, and if necessary criticises and corrects the information provided to those committees by their national Governments (see Section on 'National law and procedure').

Example material

- A list of organisations which provide training on marketing, communication, and other 'soft' skills
- A country-specific list (and contact details) of the Members of Parliament
- A country-specific list of all Human Rights and Equality bodies/organisations
- A country-specific list of all relevant Equality Forums
- A country-specific list of organisations to whom it would be possible to outsource research projects
- Precedent examples of research reports, working papers and/or shorter Research Findings documents, case studies, newsletters, statistical briefings, or fact sheets



- A country-specific list of all newspapers and publications
- A country-specific list of journalistic/media contacts
- Precedent examples of press releases
- A country-specific list of IT training companies
- A list of other useful IT software applications to establish a 'Knowledge Management' system
- A country-specific list of the international instruments that particular country has ratified.





Annex: Template for the training module 'Discrimination in the national context'

1. The transposition of the Directives into national law
2. Procedures – administrative and legal channels appropriate for challenging violations of anti-discrimination legislation
3. Societal issues



Annex: Template for the training module 'Discrimination in the national context'

The text in this Annex is a template to be used by the training organisation to draft a training module explaining the national legislation and institutions in their country.

Intended learning outcomes

- For the participants to be familiar with the national provisions and procedures which have been/have to be adopted to transpose the Directives, and to have verified that the transposition has been/can be properly carried out
- For the participants to be familiar with the administrative and legal channels available at national and international level to redress instances of discrimination, and to have learnt how to use those remedies appropriately
- For the participants to be able to restate the main principles of the Directives, and the national implementing provisions, and to have critically assessed the impact the Directives and the national implementing provisions have had/will have in their work
- For the participants to become aware of how the international community has seen their country's record in the relevant field, and to understand how to use this information

1. The transposition of the Directives into national law

How and when were the Directives transposed?

If appropriate, examine the text of the Directives and compare with the text of the relevant national law or layperson's guide. Identify relevant constitutional provisions, any organic laws, specific provisions of the labour laws, etc. that are relevant.

Identify any gaps which have been left by the transposition. In countries which have not yet transposed, identify the gaps in national law which will need to be filled.

If the Directives were **adapted** into national law (rather than simply being adopted as national law) compare the national provisions to the provisions of the Directives themselves. Identify any discrepancies.

Were (or will) both Directives (be) transposed together?



What public discussion, if any, took place in the Parliament, and/or the media at the time of transposition? If a discussion took place, what issues did it focus on?

Was there any difference in the public reaction to the two Directives?

Have the required institution/s for the promotion of equal treatment regardless of racial or ethnic origin been set up in accordance with Article 13 of Council Directive 2000/43/EC? What is the scope of their competence? How do those institutions measure up to the intention of the Directives?

Identify and list the specific differences which the Directives have introduced into the whole system for national protection against discrimination.

In which cases are the Directives broader than previous national protection? In which cases does the pre-existing national protection exceed the requirements of the Directives?

The Directives do not outlaw all forms of discrimination. Identify and list the aspects of discrimination commonly occurring in the country which are NOT covered by the Directives (this is a 'trailer' for the section on societal issues and does not have to be very deep at this stage).

What have those Committees of CEDAW, CERD, ICCPR and CoRoC said about discrimination in the national context?

What has been the public reaction of the Government, if any, to these comments?

What opinion polls, if any, or comparable assessments have been taken to identify the extent of the impediment which public opinion will prove to be, to the effective implementation of the Directives?

What measures, if any, have been taken by the Government to address this?

What are the national NGOs doing to address this? (See also Section on 'The role of NGOs'.)

What research, if any, is being carried out in national academic institutions on the kinds of discrimination covered by the Directives?

2. Procedures – administrative and legal channels appropriate for challenging violations of anti-discrimination legislation

According to the Directives, there is a requirement that their implementation shall in no circumstances be grounds to reduce the level of protection **already provided** for under national law.





The European Court of Human Rights and the European Court of Justice (see Section on 'Key concepts') have made it clear that the protection of fundamental rights must be 'practical and effective not theoretical and illusory'.

2.A Employment and occupation related – all grounds

1. Identify the remedies which exist at local or national level for challenging employment and occupation-related discrimination on the grounds of race or ethnic origin, religion or belief, disability, age or sexual orientation as set out in national laws giving effect to Council Directives 2000/43/EC and 2000/78/EC.

- Informal resolution
- Collective bargaining by trade union
- Employer's internal grievance procedures
- Administration channels including referrals to the labour inspectorate
- Legal remedies including
 - (i) civil law remedies
 - (ii) administrative law remedies
 - (iii) private criminal prosecutions
 - (iv) public criminal prosecutions
- Complaints to ombudsperson(s)
- Complaints to Equality Commission/Body
- Other channels such as local councils, parliamentary investigation, etc. (specify)
- Collective action

If the administrative and legal remedies are different depending on

- whether a **public authority** or **private body** is accused of discrimination, or
- the situation in which discrimination has occurred

specify the different channels that must be used for pursuing complaints relating to discrimination



2. Identify applicable situations, e.g.

- Advertising of posts
- Recruitment procedures
- Selection
- Terms and conditions
- Pay
- Discrimination in the workplace
- Dress codes
- Working hours
- Suspect groups e.g. part-time workers
- Workplace disciplinary procedures
- Promotion
- Allowances and bonus payments
- Dismissal (procedural and substantive)
- Social security payments (in as much as they are classified in EU law as 'pay')
- Occupational pensions
- Issue of permits and licences (in as much as they are covered by common Article 3)
- Access to vocational training, including vocational training in prisons (in as much as it is covered by common Article 3)

3. Which internal or administrative remedies (if any) have to be exhausted before recourse can be had to the remedies set out above?

2.B Non-employment or occupation-related – race and ethnic origin

1. Identify the remedies which exist at local or national level which are appropriate for challenging discrimination on the grounds of race or ethnic origin as set out in national legislation giving effect to Council Directive 2000/43/EC.





- Informal resolution
- Administrative channels
- Legal remedies including
 - (i) civil law remedies
 - (ii) administrative law remedies
 - (iii) private criminal prosecutions
 - (iv) public criminal prosecutions
- Complaints to ombudsperson(s)
- Complaints to Equality Commission
- Other channels such as local councils, parliamentary investigation, etc. (specify)
- Collective action

If the administrative and legal remedies are different depending on

- whether a public authority or private body is accused of discrimination, or
- the situation in which discrimination has occurred

specify the different channels that must be used for pursuing complaints relating to discrimination

2. Identify applicable situations (see Article 3 of the Directive)

- Social protection including social security and health care
- Social advantages (give examples)
- Education
- Housing
- Access to and provision of goods and services provided to the public, including welfare services, banking, insurance, etc.
- Access to premises open to the public, e.g. restaurants, hotels, leisure facilities



3. Which internal or administrative remedies (if any) have to be exhausted before recourse can be had to the remedies set out above?

2.C Where a choice of avenues for raising either an employment-related or a non-employment related complaint exists:

Identify the **purpose** of making the complaint.

Identify the criteria that should be used by NGOs to select the mechanism appropriate to the identified purpose(s).

- What outcome does the complainant want?
- Object of complaint – is it justice for the individual or raising awareness of discrimination?
- Urgency of resolution of complaint and time likely to be taken for procedures to be completed
- Time limits applicable to different procedures and whether the complainant can comply with them
- Possibility of quashing the adverse decision complained of
- Whether or not a legally binding solution is sought and required, and available
- Assessment of facts – matching facts to requirements of remedies
- Assessment of available evidence – appropriateness and sufficiency of evidence for mechanism to be used
- Whether or not legal representation is required or highly desirable
- Availability of legal assistance
- Possibility of financial compensation for victim(s)
- Possibility of re-instatement or re-engagement (if desired in employment cases)
- Suitability of complaint for awareness-raising
- Impact on public opinion of different mechanisms
- Possibility of group complaints
- Possible costs and fees incurred by using a particular mechanism



2.D What are the technical procedural requirements of each available remedy?

What are the time limits applicable to the remedy?

Specify any formal requirement (e.g. notarisation of documents, sworn statements, whether documents have to be originals, copies or certified copies, etc.)

What 'soft' specific or general evidence can be included – e.g. specific or background newspaper reports?

Check whether the national Equality Commissions have already produced guidance to assist in relation to taking complaints to them or to other bodies.

Provide names, addresses, telephone numbers and email addresses of the appropriate individuals to contact in each body, plus the same information for possible sources of assistance (e.g. NGOs).

2.E What support exists at national level for accessing the different procedures, and what can be done to overcome any impediments/obstacles?

Impediments/obstacles can include:

- Lack of legal aid
- Lack of pro bono legal assistance
- Lack of familiarity with the Directives and/or national anti-discrimination provisions on the part of judges, ombudspersons, administrative review bodies
- Costs (which may be court costs or risk of costs if the case is lost)
- Access to courts and court procedures (physical access – where are the courts in relation to where the complainant lives, what facilities for disabled access, for interpreters, etc.)

Support can include:

- Possibility of being represented by a trained NGO or trade union advice worker or lawyer
- Resources which national Equality Commissions have available to support individual complaints
- Legal aid



2.F Referrals to the European Court of Justice

Where there is a disputed issue of EU law and the judge is uncertain how to interpret a provision of EU law, a referral can be made by a national court to the European Court of Justice in Luxembourg under Article 234 of the Treaty. The parties to the proceedings can ask the national judge to grant a request for such a referral, or the judge can decide spontaneously to refer the case. Any court may make a referral, but only the national court of last instance is obliged to do so.

This may be a highly effective procedure because:

- Requesting a referral can concentrate the mind of the presiding judge and ensure that s/he gives proper consideration to the complaint, especially to the fact that it raises issues of European rights.
- National bodies, particularly public bodies, are impressed by its high profile and may take steps to avoid the exposure of discrimination at national level to pan-European scrutiny.
- The European Court is the only body that can give a definitive interpretation of the terms used in the Directives.

However this is a specialised procedure and expert EU lawyers familiar with its use need to be retained. In addition, it is important to note that the national case is ‘stayed’ (put aside) until the ECJ has decided the issue before it, and this delay (of sometimes two years) can have serious consequences for the complainant.

2.G Petitions to the European Parliament

The Committee on Petitions of the European Parliament can receive petitions from citizens of the Union who wish the Committee to investigate their complaint/s that their rights under European Union law are not being properly respected.

2.H Alerting the European Commission to discriminatory administrative practices

It is also possible to write directly to the Commission, which may often be a quicker process than that outlined above under 3.2.G. This could be done with a view to encouraging the Commission to initiate infringement proceedings against the offending State.

The Commission and the Parliament would be bound by the EU Charter of Fundamental Rights’ provision on the right to good administration (Article 41) if adopted:





- Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union.
- This right includes
 - the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;
 - the right of every person to have access to his or her file, while respecting the legitimate interest of confidentiality and of professional and business secrecy;
 - the obligation of the administration to give reasons for its decisions.
- Every person has the right to have the Community remedy any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States.
- Every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language.

2.I Complaints to the European Court of Human Rights

In addition, when all effective national legal remedies have been exhausted, a person may, if the case concerns issues covered by the European Convention on Human Rights, apply to the European Court of Human Rights in Strasbourg (see 'Key concepts' Section).

This can be done under Article 14 of the Convention provided another Article is also engaged or, if the country has ratified it, under Protocol 12 to the Convention.

Collective complaints can also be made under the Council of Europe's European Social Charter.

2.J Other international remedies

Where the state is a party to the 1st Optional Protocol to the International Covenant on Civil and Political Rights, or has accepted the right of individual petition under the Convention on the Elimination of all forms of Racial Discrimination or the Convention on the Elimination of Discrimination Against Women, complaints can be brought to those Committees.

NGOs should also ensure that they alert the Committees which examine the State's periodic reports under the ICCPR, CERD, CEDAW and the Convention on the Rights of the Child to instances of discrimination.



2.K Professionalism

Everyone in a NGO who takes up the case of an individual or a group of individuals must be aware of the need to observe high standards of professionalism, including confidentiality and efficient management of case files. For individuals whose cases the NGO is not able to assist with, the NGO should be able to provide relevant information and, wherever possible, referrals to another agency that is able to provide further advice and support.

3. Societal issues

Discuss the concepts of tolerance and plurality in the context of the issues which exist nationally. Discuss the need to be willing to face sensitive and difficult issues.

Identify the vulnerable groups and suspect situations in the national context

Describe the specific areas in which the suspect groups are at risk of suffering discrimination (employment for the specified categories, race across the board).

Recognise, **and ensure that those being trained recognise**, that apparently liberal NGOs often harbour their own prejudices.

Identify, in the national context, the groups who are discriminated against, not only by mainstream society, **but also by the other groups** which are discriminated against, e.g. some religious groups may be viewed with intolerance by lesbian and gay rights groups and vice versa; disabled rights groups may be racially intolerant; all groups may have unconscious prejudice against the elderly or the young; within a broad grouping e.g. disability, there may be disputes as to the entitlement of certain people to claim to be disabled.

Materials

The texts of the two Directives and relevant national legislation, and where available non-legal summaries (see Section 1)

Extracts from media and parliamentary coverage of their adoption

Extracts from the **relevant** parts of the examination of the national periodic reports to the CEDAW, CERD, CoRoC, and ICCPR Committees, as well as material from the ILO

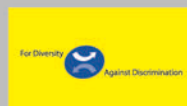
National Materials on the European Social Charter including details of ratification of the revised Charter

Extracts from other research carried out on the relevant discrimination in the national context

Extracts from any national academic literature on the subject



Notes



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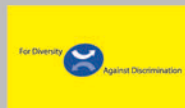
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