

AN EQUINET PERSPECTIVE

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# THE BIGGER PICTURE: EQUALITY BODIES AS PART OF THE NATIONAL INSTITUTIONAL ARCHITECTURE FOR EQUALITY

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VERSION FRANÇAISE AU VERSO

# EQUINET MEMBER EQUALITY BODIES

## ALBANIA

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

## AUSTRIA

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

## BELGIUM

Interfederal Centre for Equal Opportunities  
[www.diversite.be](http://www.diversite.be) and [www.diversiteit.be](http://www.diversiteit.be)

## BELGIUM

Institute for the Equality of Women and Men  
<http://igvm-iefh.belgium.be>

## BULGARIA

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

## CROATIA

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

## CROATIA

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

## CYPRUS

Office of the Commissioner for Administration (Ombudsman)  
[www.ombudsman.gov.cy](http://www.ombudsman.gov.cy)

## CZECH REPUBLIC

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

## DENMARK

Board of Equal Treatment  
[www.ast.dk](http://www.ast.dk)

## DENMARK

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

## ESTONIA

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

## FINLAND

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

## FINLAND

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

## FRANCE

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

## GERMANY

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

## GREECE

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

## HUNGARY

Equal Treatment Authority  
[www.egyenlobanasmod.hu](http://www.egyenlobanasmod.hu)

## HUNGARY

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

## IRELAND

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

## ITALY

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

## ITALY

National Equality Councilor  
[www.lavoro.gov.it/ConsiglieraNazionale/](http://www.lavoro.gov.it/ConsiglieraNazionale/)

## LATVIA

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

## LITHUANIA

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

## LUXEMBURG

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

## (FYRO) MACEDONIA

Commission for the Protection against Discrimination  
[www.kzd.mk/mk/](http://www.kzd.mk/mk/)

## MALTA

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

## MALTA

National Commission for Persons with Disability  
[www.knpd.org](http://www.knpd.org)

## NETHERLANDS

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

## NORWAY

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

## POLAND

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

## PORTUGAL

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

## PORTUGAL

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

## PORTUGAL

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

## ROMANIA

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

## SERBIA

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

## SLOVAKIA

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

## SLOVENIA

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

## SPAIN

Council for the Elimination of Ethnic or Racial Discrimination  
[www.igualdadyndiscriminacion.msssi.es/](http://www.igualdadyndiscriminacion.msssi.es/)

## SWEDEN

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

## UNITED KINGDOM - GREAT BRITAIN

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

## UNITED KINGDOM - NORTHERN IRELAND

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



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 **Equinet**  
European network  
of equality bodies

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**Equinet** brings together 42 organisations from 32 European countries which are empowered to counteract discrimination as national equality bodies across the range of grounds including age, disability, gender, race or ethnic origin, religion or belief, and sexual orientation. Equinet works to enable national equality bodies to achieve and exercise their full potential by sustaining and developing a network and a platform at European level.

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## Introduction

This *Perspective* seeks to explore and assess the institutional architecture that equality bodies form part of, as they implement their mandates to promote equality and combat discrimination. This architecture varies from country to country. Its nature, scope and reach, and the various institutions that form part of it, play a role in determining the level of independence and effectiveness of equality bodies. In turn, the level of independence and effectiveness of equality bodies has a significant influence on the quality of the functioning of the overall architecture for equality and non-discrimination.

This *Perspective* analyses the place, role and contribution of equality bodies in relation to the two key functions of this institutional architecture. The first key function is to fulfil a reactive role, providing a pathway to justice for those who have experienced discrimination. In this, the architecture involves bodies that ensure a resolution, one way or another, to a discrimination complaint. The second key function is to fulfil a proactive role, in assembling a range of different bodies to advance equality and prevent discrimination.

The importance of this institutional architecture has not been reflected in much in-depth study or analysis. Equinet has prepared this *Perspective* as a means of opening up the debate about it and its impact on the work of equality bodies. It is hoped that this will stimulate further study on the topic.

This *Perspective* contributes to a body of work being done by Equinet to promote and inform the development of European standards for equality bodies. Such standards would provide a necessary guarantee for the independence and effectiveness of equality bodies. As such, they should address the institutional architecture within which these bodies are established.

This *Perspective* is based on a Policy Formation Working Group roundtable discussion on the issues associated with different institutional architectures across Europe. A survey of Equinet members was then carried out to gather further knowledge about these architectures and provide some assessment of their impact. The Policy Formation Working Group and the Board discussed and approved a final draft of the *Perspective*. Twenty-four equality bodies from twenty-one countries provided responses to the survey<sup>1</sup>.

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<sup>1</sup> Austria, Croatia, Cyprus, Denmark (2), Finland, Germany, Greece, Hungary, Ireland, Italy, Latvia, Luxembourg, Macedonia, Malta (2), Northern Ireland, Poland, Portugal, Romania, Serbia, Slovakia, Spain, and Sweden

# Chapter 1: Starting Points

## 1.1 Equal Treatment Legislation

Equal Treatment Directives<sup>2</sup> require Member States to establish equality bodies. They give some minimal direction on their establishment and operation. In most instances, Member States have gone beyond the requirements of the Directives in establishing their equality bodies.

The Directives require that equality bodies:

- Provide independent assistance to victims of discrimination in pursuing complaints.
- Conduct independent surveys concerning discrimination, and publish independent reports.
- Make recommendations on issues relating to discrimination.

Recitals<sup>3</sup> in the Directives state that the protection against discrimination would be strengthened by the existence of an equality body exercising the above functions. This reference to ‘strengthening’ acknowledges that equality bodies form part of a wider institutional architecture in implementing their functions. However, the only explicit reference to this wider architecture is the provision that equality bodies may form part of ‘agencies charged at national level with the defence of human rights or the safeguard of individual rights’.

The Directives’ approach of setting minimal standards for the establishment and operation of equality bodies has led to great variety in the nature and scope of equality bodies established across Europe. This variety is matched in the institutional architecture within which they are located.

## 1.2 Equality Bodies

Two different types of equality bodies, which were originally identified in a study commissioned by the European Commission,<sup>4</sup> are referred to by Equinet and others: tribunal type equality bodies and promotion type equality bodies.

Predominantly tribunal type equality bodies spend the bulk of their time and resources on hearing, investigating and deciding on individual instances of discrimination brought before them. Some can and do take on certain promotional functions alongside these activities.

Predominantly promotion type equality bodies spend the bulk of their time and resources on supporting good practices, raising awareness of rights, developing a knowledge base on equality and providing legal advice and assistance to victims of discrimination.

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<sup>2</sup> Directives 2000/43/EC (addressing the ground of racial or ethnic origin), 2004/113/EC, 2006/54/EC, and 2010/41/EC (all three addressing the ground of gender)

<sup>3</sup> Recital 24 of Directive 2000/43/EC, Recital 25 of Directive 2004/113/EC, and Recital 22 of Directive 2010/41/EC

<sup>4</sup> Ammer M., Crowley N., Liegl B., Holzleithner E., Wladasch K., & Yesilkagit K., Study on Equality Bodies set up under Directives 2000/43/EC, 2004/113/EC and 2006/54/EC, Human European Consultancy & Ludwig Boltzmann Institut für Menschenrechte (BIM), European Commission, 2010

Equality bodies are key institutions in the pathway to justice in cases of discrimination. They have also been identified as ‘necessary and valuable institutions for social change’<sup>5</sup>.

Equality bodies have mandates to promote equality and to combat discrimination. This requires a proactive approach to achieving equality and preventing discrimination, and a reactive approach to addressing discrimination. They make choices in relation to the balance of their work towards achieving equality and preventing discrimination, and their work addressing discrimination. These choices depend on the powers and functions accorded to them, the resources available to them, and the political context within which they operate.

In countries where there is a single equality body, or where the equality body has been established as part of a body already involved in hearing, investigating and deciding cases in relation to individual rights, a third type of equality body can be identified. These need to be understood as a combination of tribunal-type and promotion-type bodies. They hear, investigate and decide on cases of discrimination, but also implement a range of activities to raise awareness, support good practice and conduct research.

These combined type equality bodies reflect an imperative that flows from the need to both combat discrimination and promote equality in the mandates of equality bodies. The equality body needs to occupy its place on the pathway to access justice in cases of discrimination and to serve as an institution for social change. Where it is a single equality body, it has to play both tribunal type and promotion type functions.

### *1.3 Institutional architecture*

The institutional architecture for equality bodies includes the full range of organisations involved in combating discrimination and promoting equality in the country.

It includes both statutory and non-statutory organisations, as well as organisations at national, regional and local levels of government. Alongside equality bodies, it includes Parliament, government ministries, state agencies, local authorities, other bodies concerned with individual rights, courts, tribunals, labour and other inspectorates, trade unions, and NGOs.

At the individual level, the institutional architecture provides the pathway for people that have experienced discrimination to access justice. This pathway starts with the individual complainant and the support they require, and usually ends in the courts. The equality body can play a number of roles along this pathway depending on its powers and functions.

At the societal level, the institutional architecture provides the infrastructure required to secure the social change involved in achieving full equality in practice. This infrastructure also includes those involved in enacting legislation, making policies, designing services and programmes, implementing policies and

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<sup>5</sup> Ammer M., Crowley N., Liegl B., Holzleithner E., Wladasch K., & Yesilkagit K., Study on Equality Bodies set up under Directives 2000/43/EC, 2004/113/EC and 2006/54/EC, Human European Consultancy & Ludwig Boltzmann Institut für Menschenrechte (BIM), European Commission, 2010

programmes, delivering services, and articulating the interests and needs of individuals and groups experiencing inequality.

#### *1.4 Assessment*

Independence and effectiveness have been identified as the two core indicators of an equality body's capacity to realise its potential. A key test of the institutional architecture is verifying the extent to which this architecture and the organisations involved in it, enable independence and effectiveness of equality bodies or hinder the achievement of these key indicators.

Accessibility is a further indicator that could be used in any assessment of institutional architecture. In this instance, it encompasses access in geographical, institutional, and procedural terms. It has a particular importance in terms of pathways for access to justice in cases of discrimination. In a context of high levels of under-reporting, accessibility needs to be a key characteristic of such pathways.

Another set of indicators would assist in assessing the capacity of the institutional architecture to contribute to advancing and achieving full equality in practice. It could, in essence, test whether the institutional architecture can contribute to necessary and valuable social change. Coherence of effort would be an important indicator in this regard. Overlap of initiative should be avoided. Coordination and collaboration should be possible. Shared goals and commitments would be important.

Comprehensiveness is another important indicator, touching on the scope of the institutions and the need to cover all grounds of discrimination adequately and in a harmonised manner. It also extends to the range of the institutions and their ability to ensure that all stages on the pathway for access to justice are adequately covered, and all dimensions of the work of achieving social change are addressed.



## Chapter 2. Literature Review

There has been little study of the institutional architecture for equality bodies. The issue has arisen indirectly in general studies of equality bodies or in studies on specific issues, particularly in relation to the merger of equality bodies and national human rights institutions.

The *Study of Equality Bodies published by the European Commission*<sup>6</sup> identified a typology of equality bodies in terms of predominantly promotion type and predominantly tribunal type equality bodies. It suggested that one enabling factor for equality bodies to achieve their potential is the 'establishment of separate bodies responsible for promotion and tribunal type tasks'. It found that equality bodies 'with a higher formal degree of independence enjoy a higher degree of independence as regards personnel management and the use of powers compared to bodies governed by a single head and which lack their own legal personality'.

It found that a local or regional presence for equality bodies was key to the quality and impact of their work and recommended that they respond to under-reporting with 'the development of a local/regional presence for the equality body such that the general public in any area has ready access to information on their rights under equal treatment legislation and those who feel they have experienced discrimination can receive necessary support and advice'.

The study identified the capacity of equality bodies 'to mobilise and contribute to a broader institutional drive for equality and non-discrimination' as one of the key elements in their potential. It found that this impact on the wider institutional architecture was limited but that 'equality bodies (do) influence the level of commitment, expertise and work of other stakeholders in relation to equality and non-discrimination. In particular they impact on trade unions, business networks and NGOs. This impact is valuable in further developing and extending an institutional framework that contributes to the elimination of discrimination and the promotion of equality in society'.

The *Research on Access to Justice in cases of Discrimination commissioned by the European Union Agency for Fundamental Rights (FRA)*<sup>7</sup> identifies three types of pathways to access justice:

1. Quasi-judicial type equality bodies and courts. This system can offer a choice of pathways.
2. Promotion type equality bodies and courts. This system does not offer a choice of pathways but does provide assistance to the complainant.
3. Quasi-judicial type equality bodies, promotion type equality bodies and courts. This system can offer a choice of pathways and provision of assistance.

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<sup>6</sup> Ammer M., Crowley N., Liegl B., Holzleithner E., Wladasch K., & Yesilkagit K., Study on Equality Bodies set up under Directives 2000/43/EC, 2004/113/EC and 2006/54/EC, Human European Consultancy & Ludwig Boltzmann Institut für Menschenrechte (BIM), European Commission, 2010

<sup>7</sup> Access to Justice in Cases of Discrimination in the EU: Steps to further equality, European Union Agency for Fundamental Rights, 2012

Intermediaries such as ‘NGOs, attorneys, trade unions and Chambers of Labour’ are identified as playing support roles in each type of pathway. Obstacles on the pathway include the difficulty for complainants to establish which path to follow to access justice and to which institution they should address their complaint. They include the geographical distance to the relevant complaints body. Enabling factors identified included cooperation agreements and cross-referral systems to support complainants in navigating the justice system.

The opinions offered by the FRA in this report include that ‘the EU should upgrade its legal framework to secure genuine access to justice by, for instance, ensuring the independence, to a uniform standard, of equality bodies and other institutions involved in the justice system’.

They suggest that ‘EU Member States should review their overall national systems for accessing justice with a view to minimising complexity’ and that ‘the EU and its Member States should also maximise accessibility by, for instance, reducing the fragmentation of legal provisions between grounds and areas of discrimination and by making procedures simple and transparent and decisions clear and binding’.

They also suggest that equality bodies and other institutions with an equality remit need to maintain a competent regional/local presence and that ‘equality bodies should take the lead in forging networks and promoting collaboration and cross-referral between relevant justice systems and institutions’ to reduce complexity.

The ***Study on Institutional Mechanism for Gender Equality published by the European Institute for Gender Equality***<sup>8</sup> found a trend in a growing focus on the judicial aspects of gender equality, as opposed to the development and promotion of gender equality in its broader sense. It also identifies a risk that gender equality work may be reduced to individual cases rather than addressing structural inequalities and discrimination at the societal level.

The report goes on to suggest that gender equality has been pushed off the political agenda or submerged within the broader field of equal opportunity. It notes the trend in merging gender equality bodies with equality bodies dealing with several other grounds of discrimination, and that an assessment of the consequences of this trend has yet to be made.

The ***Opinion of the Commissioner for Human Rights in the Council of Europe on National Mechanisms to Promote Equality***<sup>9</sup> identifies engagement with the wider institutional architecture as one of the roles of equality bodies, in terms of ‘encouraging a wide range of stakeholder organisations to take action to promote equality and combat discrimination’. This can enable them to achieve a ‘multiplier effect’ from their work.

It states that ‘the legal structure of the body, the processes of accountability of the body and the process of appointment of board members and of senior staff

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<sup>8</sup> Effectiveness of Institutional Mechanisms for the advancement of gender equality: Review of the implementation of the Beijing Platform for Action in the EU Member States, European Institute for Gender Equality, 2014

<sup>9</sup> Opinion of the Commissioner for Human Rights on National Mechanisms to Promote Equality, CommDH(2011)2, Council of Europe, Strasbourg, 2011

are key factors in securing independence' of the equality body. Furthermore, it adds that 'the level of resources made available to the bodies and the functions accorded to them are key factors for effectiveness'.

Stakeholder engagement is identified as enabling effectiveness. This involves equality bodies 'working with and supporting a wider institutional framework for equality' and the *Opinion* suggests that equality bodies could 'further mobilise and give practical support to these different stakeholder organisations in developing their commitment to, capacity in and work of promoting equality and combating discrimination'.

The *Opinion* recommends that Member States 'ensure that the architecture of national structures for promoting equality enables both a distinct quasi-judicial function in hearing or mediating cases under the legislation as well as a distinct promotional function. It is good practice to locate these distinct functions in different bodies'.

In its ***Perspective on the Current Challenges Facing Equality Bodies***,<sup>10</sup> Equinet identifies limitations to the effectiveness of equality bodies including 'the geographical inaccessibility of equality bodies confined to the capital city' and a 'lack of stakeholder engagement (such) that a wider infrastructure for equality and non-discrimination, beyond the individual equality body, fails to emerge'.

The survey, which provided the data used in the development of this *Perspective*, received responses from 27 equality bodies in 23 countries. Nine reported having local offices in place. Another nine reported having a strategy for a local presence, where the equality body 'works in partnership with local organisations to deliver some of its services through these organisations and where these organisations can be the first point of contact with complainants'. Seventeen reported travelling to local areas to enable access.

The survey found that equality bodies 'are challenged to improve their operations' with regard to stakeholder engagement. Thirteen bodies reported a formal engagement with NGOs, seven with the social partners, and eleven with other statutory institutions with a human rights-type mandate.

***Equinet's Perspective on Equality Bodies and National Human Rights Institutions: Making Links to Maximise Impact***<sup>11</sup> establishes that inappropriate linkages between these two mandates can undermine 'the useful emphasis on the promotion of equality that results from the existence of a separate body for the promotion of equality' and 'the distinct focus on equality and on human rights that can be secured by separate bodies' that enables 'more accurate perceptions by, and accessibility for, those who might need to avail of their different services'.

A number of gains are identified from linking equality and human rights mandates. These include 'enabling the equality mandate to benefit from the protection of international standards that have been developed for national human rights instruments and institutions', 'moving beyond the limitations of equality legislation with its defined grounds and its requirement for a

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<sup>10</sup> Equality Bodies – Current Challenges, Equinet, Brussels, 2012

<sup>11</sup> Equality Bodies and National Human Rights Institutions: Making links to maximise impact, Equinet, Brussels, 2011

comparator to prove discrimination’, ‘strengthening the voice and influence of the body due to the dual mandate held’ and ‘securing a simplicity from a citizen perspective once there is only a single institution to be approached’.

Key principles are identified to inform any linkage between these mandates, including that:

- The linkage ‘should make the work in each field more effective and efficient’.
- ‘Parity of esteem between the work of promoting human rights and that of promoting equality should be evident in the allocation of resources between and the priority accorded to the work in each area where separate bodies are concerned and, in particular, where a single body is responsible for both mandates’.
- ‘Linkages should enable a multi-dimensional approach (equality and human rights) to issues and initiatives. They should also allow for a singular or unique focus on human rights matters or equality matters where this is relevant and appropriate’.

The work of *Crowther and O’Cinneide* on *Integrating the Functions of Equality Bodies and National Human Rights Institutions in the EU*<sup>12</sup> found that ‘a trend can be detected across Europe for institutions concerned with equality and human rights to be merged together into a single integrated body, or for new institutions to be established which combine the functions associated with both National Equality Bodies and National Human Rights Institutions. This trend has accelerated in recent years’.

They identify potential in integrated bodies for a more effective engagement with the wider institutional architecture. ‘An integrated body may also be well-placed to bring together public authorities and civil society organisations operating in different areas coming within its broad remit, and to help encourage the development of a comprehensive and coordinated approach to the promotion of equality and human rights’.

Their work highlights a challenge to integrated bodies in facing ‘particular difficulties in defining their role, purpose and priorities. Their remit is often very wide, extending across the full range of human rights recognised in international human right law as well as across the different equality grounds set out in national and EU anti-discrimination law’. They identify a ‘potential that exists for fault-lines to be exposed between the equality and human rights elements of their mandates. Integrated bodies also face the particular challenge of ensuring that one area of the organisation’s mandate does not consume a disproportionate share of its energy and resources’.

A number of themes relevant to the debate on the institutional architecture for equality and non-discrimination emerge from this literature, including:

- There are different types of equality bodies, and the choices made as to which of these types to establish have implications, on access to justice in particular. The location of promotion type and tribunal type functions in

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<sup>12</sup> Crowther N. & O’Cinneide C., *Bridging the Divide: Integrating the functions of national equality bodies and national human rights institutions in the European Union*, UCL Faculty of Laws, London, 2013

separate bodies is recommended.

- The manner in which equality bodies are established has implications on their independence. A separate legal structure enhances their independence. The capacity of equality bodies to establish a regional and/or local presence enhances their effectiveness.
- There is a broader institutional architecture within which equality bodies work. The manner in which they interact with the architecture and their level of investment into this interaction, has implications on their impact. Stakeholder engagement enhances effectiveness.
- Individual access to justice needs to be facilitated alongside enabling structural change for the achievement of equality for different groups.
- There are different types of pathways for access to justice with associated issues of complexity and accessibility. There is a challenge to minimise complexity and maximise accessibility.
- The trend to establish multi-ground equality bodies is well established. A new trend has emerged with the establishment of merged equality and human rights bodies. An assessment of the impact of both trends remains to be done.
- Dual mandate bodies that address equality and human rights face challenges in according parity of esteem to both mandates, as well as in establishing their role, purpose and priorities in a manner that integrates equality and human rights. A danger of undermining the emphasis on equality and non-discrimination is identified.

## Chapter 3. Architecture for Promotion-type and Tribunal-type Functions

The institutional design of the equality bodies themselves is an important element in considering the wider institutional architecture for promoting equality and combating discrimination. There are choices to be made as to whether to establish promotion type equality bodies, tribunal type bodies, combined promotion/tribunal type bodies, or some mix of these. There are decisions to make on whether to establish the equality body as part of another body concerned with individual rights. Then there are a range of issues to be resolved relating to the legal structure and geographical positioning of the equality bodies.

### 3.1 Functions

While it can be difficult to be precise in labelling equality bodies, 13 of those that responded to the survey (54%) are predominantly promotion type, while four are predominantly tribunal types (17%). Five of the countries covered in the survey had both promotion type and tribunal type equality bodies. Seven of the equality bodies that responded are combined promotion/tribunal type equality bodies (29%). Three different architectures can be seen:

**First, separate equality bodies have been established with one playing promotion type functions and another playing tribunal type functions in several jurisdictions.** Positive elements of this institutional architecture include:

- Challenges to the impartiality of the tribunal type equality body in the hearing or considering of cases are more difficult to make.
- Relationship building with stakeholders is facilitated in promotion type functions where the equality body does not have a quasi-judicial role.
- A clarity of purpose and function can be communicated for the different equality bodies involved. This is particularly important for those who might seek support in taking cases of discrimination.

The equality body that holds the mandate to implement the promotion type functions in this arrangement has a disadvantage in not being in a position to interpret equal treatment legislation. However, the promotion type equality body might have powers to take strategic cases to court and shape the development and interpretation of the law in this way. This is even more effectively enabled when the body has powers to take cases to court in its own name, or at least to act as *amicus curiae*, alongside powers to represent claimants in court. These powers are not available to all promotion type equality bodies.

There can be further issues relating to the balance achieved when the promotion type equality body does not or cannot support more than a small number of cases under the equal treatment law. Resource limitations have a significant influence on any such decision.

**Second, in some countries, there is one equality body that implements either the promotion type functions or one that implements the tribunal type functions.**

Where the single equality body is predominantly focused on promotion, the courts can fill the gap left by the absence of a tribunal type equality body. However, in some instances the equality body does not have powers to take on or represent a case in court. Given the difficulties in access to the courts, this arrangement might compromise accessibility to the pathway to justice

Where the single body is a predominantly tribunal type body, it needs to play some promotion type functions, otherwise it might be difficult to fulfil all the functions foreseen for an equality body in the Equal Treatment Directives. Although NGOs also take on these promotion type functions, they might lack the standing and resources associated with statutory bodies to make the impact necessary from such promotion type functions.

**Thirdly, in several countries there is a single equality body that plays both promotion type and tribunal type functions.** This combined equality body has to play the two sets of functions if a proactive and a reactive approach to equality and discrimination are both to be pursued. The mix of functions is vital in a context where there is a single equality body established.

Combined promotion/tribunal type equality bodies report that the tribunal type functions tend to predominate in this arrangement. Some equality bodies suggest that the ideal would be to achieve an even balance of the two sets of functions in their work. The balance would be influenced by:

- The history of the body. If the equality body has been established within an existing institution (an Ombudsman Office or a National Human Rights Institution) it will take up the traditions of the already established body. These traditions are most often of a tribunal type nature, in cases of Ombudsman Offices, or of a promotion type nature in cases of National Human Rights Institutions.
- The resources of the body. Most combined promotion/tribunal type equality bodies have to take up whatever cases are brought to them. Promotion type functions take on a residual nature and are implemented to the extent that remaining resources allow.
- The choices of the equality body. Some combined promotion/tribunal equality bodies are in a position to make choices as to how they invest their resources. It is their leadership that determines the balance between promotion type and tribunal type functions implemented.

There is a position of authority that can be assumed by combined promotion/tribunal type equality bodies. This authority lends credence and strength to their findings and increases the likelihood that they be implemented. It also gives weight to their promotion type functions. The mix of promotion type and tribunal type functions can allow these equality bodies to compensate where there are deficiencies in the powers they have.

There are issues, however, as to which promotion type activities get prioritised in this combined setting. There is a diversity of responses from equality bodies in

this regard with some taking on a narrow range of activities and others taking on the full range of such functions.

The impartiality of combined promotion/tribunal type equality bodies can be challenged where they are seen to be pro-claimant due to implementing their promotion type functions. Such bodies can take on a mantle of neutrality to protect their tribunal type functions, but this can impair the quality of their promotion type functions. Ultimately, even if their objectivity is called into question, they can identify as being for equality rather than pro-claimant.

### 3.2 *Mandates*

Fourteen of the equality bodies that responded to the survey are *single mandate* equality bodies (58%). Five of them work on one ground of discrimination, specifically the ground of gender or the ground of racial or ethnic origin. Eight work on multiple grounds of discrimination.

In jurisdictions where there are a number of equality bodies, each with a mandate on different grounds, processes of cooperation and cross-referral have been developed between them. Sometimes this involves formal memoranda of understanding or cooperation agreements.

Some equality bodies identify the importance of a specialist focus on a particular ground as justification for confining the mandate of an equality body to one ground. Others identify confusion resulting from a plethora of equality bodies. Complainants who see their identity as being at the intersections of several grounds have issues to deal with when they face equality bodies that have a single ground mandate.

Five of the responders are *dual mandate* equality bodies, combining functions related to equality and non-discrimination with functions around human rights (21%). Five of the equality bodies have *multiple mandates* (21%). These tend to be Ombudsman Offices with a range of human rights functions that have taken on equality and non-discrimination functions.

Dual or multiple mandates are seen to allow equality bodies to take a broader and more holistic perspective on the situation and experience of individual complainants of discrimination and of groups experiencing inequality. These equality bodies can intervene in areas that are not covered by equal treatment legislation. They can handle complex cases, addressing not only discrimination but also other human rights violations, with greater ease. In some instances this allows them to find solutions that are more flexible and effective for the individual complainant.

However, these equality bodies also report issues of visibility where dual or multiple mandates make it difficult to promote the work in the field of equality and discrimination. This can diminish accessibility for those who experience discrimination. Some equality bodies report that their specialisation in discrimination cases can be less pronounced. There are particular issues for some equality bodies that were originally Ombudsman Offices in that they can lack a mandate to intervene in the private sector.

There is a challenge to get a shared understanding of the social change these dual or multiple mandate equality bodies might seek to achieve in their work. It can



be difficult to get a shared understanding of key concepts of equality and discrimination across the different departments of the organisation. Collaboration across different departments within these equality bodies can be problematic.

Merger processes to establish these bodies with dual or multiple mandates can be driven by concerns to reduce expenditure rather than to enhance the functions of advancing equality and preventing discrimination. There can be contests between the different mandates within the merger process. Equality and discrimination issues can lose out in this process without formal steps to ensure parity of esteem across the different mandates.

It is noted that the traditions of the earlier institution with wider mandates can continue to persist within the implementation of the functions of the equality body. This can be unhelpful to the objectives of advancing equality and preventing discrimination, in particular, where there has been no tradition of implementing promotion type functions in the host institution. The focus on equality issues might be lost or diminished.

Sometimes the influence is seen to work the other way, and the new functions brought by the equality body can lead to change in how the mandate of the earlier host institution is played out. In cases where the equality body is accorded new functions, its traditions can influence how it takes up and implements these new tasks.

### *3.3 Legal Structure and Geographical Positioning*

Legal structure is important when it comes to the independence of equality bodies. Eighteen of the survey responders identified that they are independent, stand-alone bodies (75%). Six equality bodies identified that they were part of a Government Ministry (25%).

Independence was clearly prized by the equality bodies responding. It was seen as crucial in dealing with politically unpopular issues and in taking on public sector organisations in cases of discrimination. There was an acknowledgement of the problems that can arise in relation to this independence when the equality body is located within a Government Ministry. This was seen as especially true for media and public relations work by the equality body.

However, it was also noted that the Ministry can put political weight behind issues being dealt with by the equality body that forms part of its structure. Another advantage noted for such equality bodies, was that the administrative burden could be left with the Ministry. Stand-alone equality bodies with their own legal structure pointed to the potential of having their independence diminished when it comes to negotiating budgets or to forms of accountability that are required of equality bodies.

Most equality bodies identified some form of accountability to a Government Ministry. Accountability to Parliament was noted as being better for independence. A small number of equality bodies identified that they were accountable to Parliament.

All the equality bodies identified that they were located in the capital city of their country. Five stated that this was not seen as offering any challenge due to the

small size of the country (21%). Seven reported that they had a small number of regional offices (31%). In two of these instances, the equality body was poised to increase the number of these. One equality body reported that it had developed a local presence through a partnership with a network of citizen information centres.

Geographical positioning and reach was seen by most equality bodies as important for accessibility, particularly in contexts of high under-reporting of incidents of discrimination. Some equality bodies conduct regional outreach initiatives to address this, but it was noted that a constant regional presence was required in order to make real inroads into under-reporting.

## Chapter 4. Architecture for Pathways for Access to Justice

### 4.1 Pathways

Pathways for access to justice take the complainant through a process beginning with making a complaint of discrimination and ending with a resolution, one way or another, of their complaint. This is one key function of the institutional architecture. The accessibility to and quality of these pathways are essential to the effectiveness of equal treatment legislation. Equality bodies enable accessibility to and along these pathways, and can offer a variety of routes to the end goal. They provide specialist expertise within these pathways.

Equality bodies play diverse and key roles along these pathways. Promotion type functions can include the provision of information on rights and how to exercise them. The equality body must often play the role of pathfinder for the complainant through complex pathways to justice, as well as offering legal advice, support and, at times, moral and emotional support. It can represent the complainant, take cases in its own right, or act as *amicus curiae*.

The tribunal type functions can include mediating, investigating, hearing and making findings in relation to complaints. They can include follow-up to complaints to ensure that the parties involved implement the decisions made by the equality body. Equality bodies implementing these functions bring specialist expertise to assessing cases of discrimination. They offer low threshold access and an environment that enables complainants to come forward.

The pathways for access to justice in cases of discrimination reflect those identified in the FRA study on access to justice, with one addition to take account of combined promotion/tribunal type equality bodies:

- In five countries, equality bodies reported a pathway for access to justice that involves a promotion type equality body, a tribunal type equality body and the courts.
- In three countries, equality bodies reported a pathway that involves a tribunal type equality body and the courts.
- In eight countries, the equality bodies reported a pathway that involves a promotion type equality body and the courts. In one instance the pathway also included broader industrial type tribunals.
- In six countries, the equality bodies reported a pathway that involves a combined promotion/tribunal type equality body and the courts.

Equality bodies in countries that have a **pathway that includes both a promotion type and a tribunal type equality body**, report advantages in securing an adequate focus on both promotion and tribunal type roles. They suggest gains in avoiding misunderstandings in relation to the impartiality required of tribunal type equality bodies given their separation from promotion type equality bodies, whose roles suggest a closer relationship with complainants. However, this gain requires that the different type equality bodies be strict in sustaining a visible and clear separation.

Equality bodies in countries that have a **pathway that includes a tribunal type equality body and the courts** report that the absence of a promotion type equality body means that they take on some of the functions usually associated with them. They note the importance of NGOs, as intermediaries in the pathway, filling gaps by taking on roles of legal assistance to victims and referring cases to the equality body.

In the eight countries that reported a **pathway that includes a promotion type equality body and the courts**, there is no equality body mandated to provide tribunal type functions. In one instance, tribunals with other roles play these functions in cases of discrimination. Examples of these include industrial or employment tribunals and administrative or civil tribunals. In the other instances, the courts offer the only venue for a hearing on the pathway to access justice in cases of discrimination.

This can lead to barriers to access to justice. Discrimination related work might be a minor element in the overall workload of these other tribunals or, in particular, the courts. Necessary specialist expertise is not developed or retained in these circumstances. Procedures might not be adapted to take into account the vulnerable position or diversity of complainants.

There can be particular barriers of costs in relation to the courts. There are instances where the courts have made few findings of discrimination, which can diminish the motivation to take a case. However, the courts do play an important role in all pathways for access to justice: they are the ultimate arbiter in resolving cases of discrimination.

Equality bodies in countries that have a **pathway that includes a combined promotion/tribunal type equality body and the courts** report a situation that is largely similar to that of the pathway involving a tribunal type equality body, a promotion type equality body and the courts. There can be tensions between the promotion type and the tribunal type functions in the equality body, leading to gaps in the promotion type functions. Again, the importance of the role played by NGOs as intermediaries in the pathway is noted.

#### *4.2 Powers of Equality Bodies*

Equality bodies in five countries report that they do not have the power to take cases to court or to represent complainants in court. Four of these are promotion type equality bodies, one is a combined promotion/tribunal type equality body, and one is a predominantly tribunal type equality body. This reflects a significant rupture in the concept of a pathway for access to justice.

There are issues related to the powers accorded to equality bodies in implementing tribunal type functions. A particular focus for attention in this regard is if decisions, findings and recommendations are not legally binding. There are different perspectives among equality bodies on this issue.

Some suggest that the authority of the body might be sufficient to get recommendations implemented. These equality bodies emphasise the importance of having sufficient resources to be able to follow-up on the recommendations that they have made. Others suggest that the power to make legally binding decisions could change the nature of the equality body and limit its focus on promotion type functions. This is emphasised by combined

promotion/tribunal type equality bodies. Most equality bodies with tribunal type functions, however, identify their inability to make legally binding decisions as a barrier to the pathway for access to justice.

### *4.3 Complexity of Pathway*

Complexities in the pathway can be identified in a significant number of countries, including: the establishment of different equality bodies for different grounds; the number of statutory bodies concerned with a diversity of workplace rights; the remit of the equality body being confined to the public sector with other institutions responsible for the private sector; and overlapping competencies between equality bodies, national human rights institutions and Ombudsman Offices.

Many equality bodies report the use of memoranda of understanding or cooperation agreements to enable cross-referral of cases, joint work on cases or cooperation in making the pathway more accessible. Some acknowledge that this cooperation is difficult to achieve in practice. Many point to the complexity of the institutional architecture as being a barrier for complainants and a contributor to under-reporting.

### *4.4 Resources of Equality Bodies*

Further issues are identified where the equality body, in playing its promotion type functions, does not have sufficient resources to respond to the needs of all complainants seeking legal support. Free legal aid is not available to any significant extent in cases dealing with discrimination and was only reported in one instance.

Some equality bodies have developed strategic litigation strategies in response to this situation. This involves them in consciously choosing to support a restricted number of cases, usually only those that have a capacity to expand the interpretation of equal treatment legislation. This can result in these bodies supporting a very low numbers of cases. The pathway for access to justice thus becomes restricted due to inadequate resources.

### *4.5 Intermediaries*

There is a range of intermediaries identified by the equality bodies that play roles similar to promotion type equality bodies along the pathways for access to justice. These intermediaries can promote awareness of rights, support complaints and/or provide legal advice and representation. These include NGOs, trade unions and legal practitioners.

These stakeholders become crucial where there is no equality body to play promotion type functions or where the equality body can only implement these functions to a limited extent due to resource constraints or limitations of mandate. Some intermediaries have a particular contribution to make in providing necessary moral and emotional support for complainants, which can lie outside the brief of the equality body.

Locally based intermediaries can play particularly important roles in the pathways for access to justice. Their local presence and proximity to those experiencing discrimination can facilitate reporting of cases of discrimination.

The trust in which they are held by groups experiencing discrimination can further enable and support this reporting. Some equality bodies have developed formal relationships with such local intermediaries to serve as official contact points.

Others have provided training and support materials to local intermediaries to enable them to contribute to access to pathways. Some have created opportunities for formal dialogue with these intermediaries. While most equality bodies point to good working relationships developed with such local intermediaries, some acknowledge that these links remain under-developed.

However, access to justice in cases of discrimination is only rarely the primary function of these intermediaries. They might have limited expertise in the area of discrimination and limited time to devote to it. These intermediaries have limited resources and might not have access to dedicated resources for this promotion type work, which restricts their engagement. Some will need to charge for their support. The range of intermediaries rarely covers the full spectrum of grounds covered by the equal treatment legislation or the full scope of the legislation. This can lead to uneven coverage of the support available and required by complainants as well as undermined comprehensiveness.

## Chapter 5. Architecture for Action on Achieving Equality

A second key function of the institutional architecture is to advance equality and prevent discrimination. Equality bodies are also a central component of the institutional architecture when it comes to this function. It is useful to examine this part of the wider institutional architecture that promotes equality and prevents discrimination separately from the parts that are central to the pathways for access to justice. This part of the institutional architecture, while still including the equality body, involves a different field of activity with different actors. It demands different types of relationships and a broader set of objectives. The work builds on and goes further than the work done through the pathways for access to justice.

This part of the institutional architecture encompasses a wider set of actors, including promotion type equality bodies and combined promotion/tribunal type equality bodies, but no purely tribunal type equality bodies or courts. It involves Government Ministries, Government agencies, and a wide range of statutory bodies, including those with a remit that encompasses discrimination, equality and human rights. It also includes civil society organisations, in particular NGOs and trade unions.

Equality bodies, due to their very specific mandate, play a significant role in securing the effectiveness of this institutional architecture to advance equality and prevent discrimination. They can act as a hub around which the organisations that make up this institutional architecture build relationships, cooperate, and work together. They can act to influence the commitment and practice of these different organisations. They can build a shared vision, understanding and commitment across organisations with diverse remits. They can drive the emergence and development of the institutional architecture required to achieve ambitious equality goals.

Equality bodies report significant levels of cooperation across the different organisations involved in this institutional architecture. These include actions to support best practices by employers and service providers, initiatives to raise awareness of equal treatment legislation, and research and survey work. One concern expressed in relation to this work was around the project nature of the activities in a context where long-term engagement is required for change to be achieved.

Equality bodies also report a range of different barriers to the effective functioning of this institutional architecture, including limited cooperation and the lack of shared vision or ambition within the architecture. They also emphasise the importance of clarity of different roles and responsibilities among the organisations involved.

They identify a complexity to this architecture that can lead to incoherence in the pursuit of equality and social change. The focus on equality and social change can be fragmented and dissipated across a diversity of focal points. There can be competition between the different organisations involved, different objectives

pursued, and different, even divergent, understandings of equality deployed. The lack of a common vision blocks coordination between the different organisations.

Equality bodies report a valued relationship with civil society organisations, particularly with NGOs representing groups experiencing inequality and discrimination. These NGOs are identified as partners in activities, particularly those seeking to address under-reporting and build awareness of rights. They are seen as sources of knowledge and information on issues of discrimination, diversity and equality for the groups that they represent.

These NGOs have been engaged in formal structures by equality bodies, the most common of which being committees or councils to advise the equality body and to keep the NGOs informed about the equality body and its work. In one instance, the formation of such an Advisory Council is required by law. In another instance, the equality body developed a stakeholder strategy to guide its relationship with the full breadth of relevant civil society organisations.

Another equality body reported processes for mutual learning where a deliberate engagement is developed to support the capacity of staff to work on a particular ground and support the NGOs representing that ground to make effective use of equal treatment legislation.

In three instances, the emergence of NGO coalitions as watchdogs for the independence and effectiveness of the institutional architecture for equality and non-discrimination was reported. Such coalitions articulate and campaign for a standard to be applied to the establishment and operation of the institutional architecture.

Limited resources can impede the contribution of equality bodies within this part of the institutional architecture. This is a particular challenge for combined promotion/tribunal type equality bodies. In a context of inadequate resources, these equality bodies inevitably cut back on their promotion functions. This is because they have no choice but to deal with all cases that come to them under their tribunal function. The same issue can apply to equality bodies that hold other mandates where there is no parity of esteem for each of the mandates.



## Chapter 6. Moving Forward

The composition of the institutional architecture for equality and non-discrimination is important for the independence and effectiveness of equality bodies, the accessibility of pathways for access to justice, coherence in the effort to advance equality and non-discrimination, and comprehensiveness in addressing all grounds, sectors and issues of concern. The range of organisations involved, the links between these organisations, and the role of equality bodies within the institutional architecture, are all important. Equally, the level of independence and effectiveness of the equality body itself is essential to the effective functioning of this architecture.

This would suggest that any European standards developed for the establishment and operation of equality bodies must include a focus on the wider institutional architecture they operate within. Independent and effective equality bodies will be the goal for any such standards and this institutional architecture is clearly a critical factor in achieving such an outcome.

This *Perspective* has only introduced this topic and established the range of issues involved. These issues relate to the equality bodies themselves:

- The number and type of equality bodies established in a country, in particular whether there is both a promotion type equality body and a tribunal type equality body established.
- The promotion or tribunal related functions of the equality body or equality bodies in a country, and the manner in which these are combined in some equality bodies.
- The combination of mandates related to mergers with national human rights institutions and Ombudsman Offices. The manner in which these mandates are combined in the operations of the equality body.
- The legal structure of the equality body, such that it is stand alone.
- The geographical reach of the equality body and the establishment of regional offices to achieve a permanent local presence.

The issues relate to the pathways for access to justice that equality bodies form part of include:

- Accessibility to the pathway for access to justice and the clarity of signage to the right point in the pathway for the complainant are important. Equality bodies are an important contributor to this accessibility.
- Pathways for access to justice that include both a tribunal type equality body and a promotion type equality body are seen to have particular advantages.
- The powers accorded to the equality body as part of this pathway can be problematic, in particular there are problems related to the lack of power for tribunal type equality bodies and combined promotion/tribunal type equality bodies to make legally binding decisions.
- Poor links between the different organisations along the pathway can result in barriers, in particular lack of access to the courts for equality bodies.

- The availability of moral and emotional support, as well as legal advice and representation for complainants from the range of organisations that make up the institutional architecture is important.
- The complexity of the pathway for access to justice can be a barrier where there is a hierarchy of coverage between grounds, different approaches for the private and public sectors, different approaches between national and regional level, and a range of institutions with overlapping functions.
- The comprehensive coverage of the pathway for access to justice for all grounds, all sectors and all issues of concern, is necessary. Until this is achieved, intermediaries can play a vital role in this regard, plugging gaps left in the statutory infrastructure.

The issues related to the framework of institutions engaged in advancing equality and preventing discrimination that include equality bodies include:

- The leadership offered by the equality body to the different organisations involved in the institutional architecture is important in driving the emergence and development of a coherent and comprehensive effort to advance equality.
- Formal structures developed between organisations are necessary for mutual learning and for building shared vision and understanding.
- The coherence of efforts across the different organisations involved is important and requires shared vision and objectives, as well as joint action and initiatives.
- The coordination and cooperation developed between the different organisations involved enhances the potential to make an impact and achieve change.
- The complexity of this part of the institutional architecture can lead to fragmentation of effort, competition between organisations, and incoherence of effort across the organisations.
- The comprehensive coverage of all grounds, sectors, and issues of concern by the organisations that make up the institutional architecture is a necessary pre-requisite for the effectiveness of the architecture.

This *Perspective* relies on a small sample of equality bodies and is based on an anecdotal self-assessment by equality bodies of the institutional architecture. It is clear that equality bodies are better at self-criticism than at critiquing the wider infrastructure they form part of. Further, more in-depth research would contribute to a fuller understanding of the issues involved in the institutional architecture towards the independence and effectiveness of equality bodies.