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Strengthening anti-discrimination policies

Document 14

**Recommendations for the legal and operational basis
of organisational structures implementing
anti-discrimination policies and
co-ordination mechanisms**

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“Strengthening Anti-discrimination Policies”
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1. Legal framework

1.1. Anti-discrimination legislation regarding the non-employment-related spheres

It is suggested to elaborate one single act containing provisions that would transpose the provisions of both Directives into Polish legal system in non-employment aspects (as these are regulated by the Labour Code for the employment sphere).

This act could be common for both civil law relations (with regard to sale, rent or service, be they free, sold, hired or exchanged) and administrative law relations, covering as well public services (e.g. education, health services, social services) and other acts based on administrative law.

This conclusion may be drawn also from comparative studies. Acts that govern the whole issue of equal treatment and non-discrimination – apart from present legislation like labour codes or civil codes – have been already introduced or are being elaborated in EU member states (e.g. Ireland) or in candidate countries (e.g. Czech Republic).

The guiding idea of the law should be to help develop a culture of equality, where discrimination is not only outlawed, but equality is seen as a gain for the whole society.

Thus the law will have to include in particular:

- Introducing the principle of equal treatment and setting a general prohibition of discrimination.
- Introducing the principle that change of action and procedures to redress existing and prevent further discrimination should be seen as of the same importance as redress and compensation for the victim.
- Introducing fair, transparent and impartial procedures to determine whether discrimination has occurred.

- Introducing definitions of direct and indirect discrimination, discrimination by association (=discrimination of a person associated with a person, who is the target of discrimination), harassment, and bullying/mobbing.
- Giving detailed description of prohibited grounds of discrimination in all relationships of public (administrative) and private (civil) nature, on the model of Article 11 of the Labour Code. The list of grounds of discrimination mentioned in the bill should be constructed as exhaustive list. Determining other possible grounds of discrimination should be left to political decision-making.
- Determining the scope of the act – at this level, it should be considered whether domestic legislation is to implement only the basic standard of protection as set by the Directives 2000/43/EC and 2000/78/EC, or whether – which is highly recommended - it should provide higher standard in regard to equal access to goods and services – incl. housing – regardless of racial and ethnic origin but also of religion and sexual orientation and of all other grounds mentioned in Art. 13 ETC. Based on consistent information of the Polish experts about problems of discrimination of single – parent families and persons suffering from HIV/Aids especially in the area of housing, it is further suggested to extend the grounds of discrimination to discrimination based on marital and family status and on discrimination based on real or perceived health status, especially HIV/AIDS.
- Introducing a broad understanding of “ground of discrimination” including discrimination based on the perception of the existence of a “ground of discrimination”.
- Clearly defining the content and scope of reasonable exemptions from the law based on considerations of protection of privacy and on considerations of religion or belief.
- Introducing provisions on the burden of proof, in accordance with both Directives;
- Ensuring effective, proportionate and deterring compensations for the victims, e.g. in the form of damages, fines, and other measures of civil and administrative law, and course of action adequate to remedy the discrimination occurred. Material compensation should be standardised in detail for discrimination in different areas taking into account the importance of the area

(e.g. access to housing, access to pubs/restaurants etc.) for everyday life and should set inflation-linked ceilings.

- Introducing measures necessary for protection of the victims and witnesses against repression for a complaint or a procedure aiming at enforcement of the principle of equal treatment and non-discrimination.
- It should be secured, that complainants in cases of alleged discrimination have legal standing and the right to represent themselves, including the right to appeal, in any penal law and administrative penal procedures concerning their case. The complainant should be entitled to be represented by a lawyer or other expert entitled by law to representation.
- Ensuring that courses of action decided by the court or within mutual agreements are implemented quickly and thoroughly.
- Introducing definitions of positive action (measure to promote redress for imbalances)

A good model may be e.g. Act on Protection of Competition and Consumers, which is composed of three parts: (a) substantial provisions, (b) systemic provisions concerning powers of the Head of Office for Protection of Competition and Consumers and structure of the Office itself, and (c) procedural provisions which govern various procedures before Head of the Office, decisions issued by the Head, and possibilities of appealing against these decisions etc.

1.2. Need of further amendments: Anti-discrimination legislation regarding the employment-related spheres

The recently amended Polish Labour Code and the amended Act on Employment and Countering Unemployment generally provide a good coverage of the scope of the two relevant directives. Nevertheless there are shortcomings, which need to be tackled.

A major shortcoming is the rather restrictive regulation on the issue of victimisation. Currently only the termination of an employment-relationship on the ground of exercising one's right to equal treatment as laid down in the Labour Code is prohibited. The wording of the Directives, however, is much broader providing protection not only against dismissal but

against any adverse treatment or adverse consequence which can be seen as a reaction to a complaint or to proceedings aimed at enforcing compliance with the principle of equal treatment (see chapter 4.7 of the Status Quo Analysis Report). Furthermore, it should be secured, that due distinction is made between an unsuccessful and a malicious claim of discrimination.

It is essential to introduce the possibility to stop victimisation and for a claim for compensation against persons who are engaged in victimisation actions. Furthermore, effective protection against victimisation can not only be granted to the person directly concerned – namely the one claiming his or her rights – but also to witnesses and others who support the claimant. This broader concept of protection against victimisation becomes especially important with regard to discrimination at the workplace as other employees might refuse to corroborate a charge of discrimination due to fears of dismissal or other adverse treatment.

In order to implement efficient protection against victimisation it would seem most appropriate to define victimisation as a form of discrimination leading to the same consequences as set out by the relevant laws.

Furthermore, employers should be made responsible to immediately take action if they get to know about discriminatory actions of employees against their colleagues, clients or customers. For this reason, discrimination against colleagues, clients or customers and bullying and harassment should be mentioned as a legitimate reason of dismissal in employment legislation. Employers, who fail to take action against acts of discrimination committed by their employees, should be made jointly liable for discriminatory actions taken by them.

With regard to the Act on Employment and Counteracting Unemployment, discrimination on the ground of sexual orientation is covered somewhat inconsistently. While it is mentioned as a prohibited ground of discrimination in Article 12.3 (prohibition of setting discriminatory criteria in information on a job vacancy, which an employer is obliged to send to the local labour office), and Article 37.13 (prohibition of discrimination by private employment agencies), it is not mentioned as such in Article 6c (section 1.3, prohibition of setting discriminatory criteria for granting work permits for non resident foreigners and promises of

such permits) and in paragraph 1a of Article 15 (prohibition of discrimination by labour offices in selection for vocational training). Furthermore, discrimination on the ground of sexual orientation is prohibited by this Act only with regard to activities of employers and private employment agencies, but not with regard to activities of public authorities. It is suggested, to implement a clear prohibition of discrimination on the ground of sexual orientation in the Articles mentioned, including the activity of public authorities.

2. Institutional framework

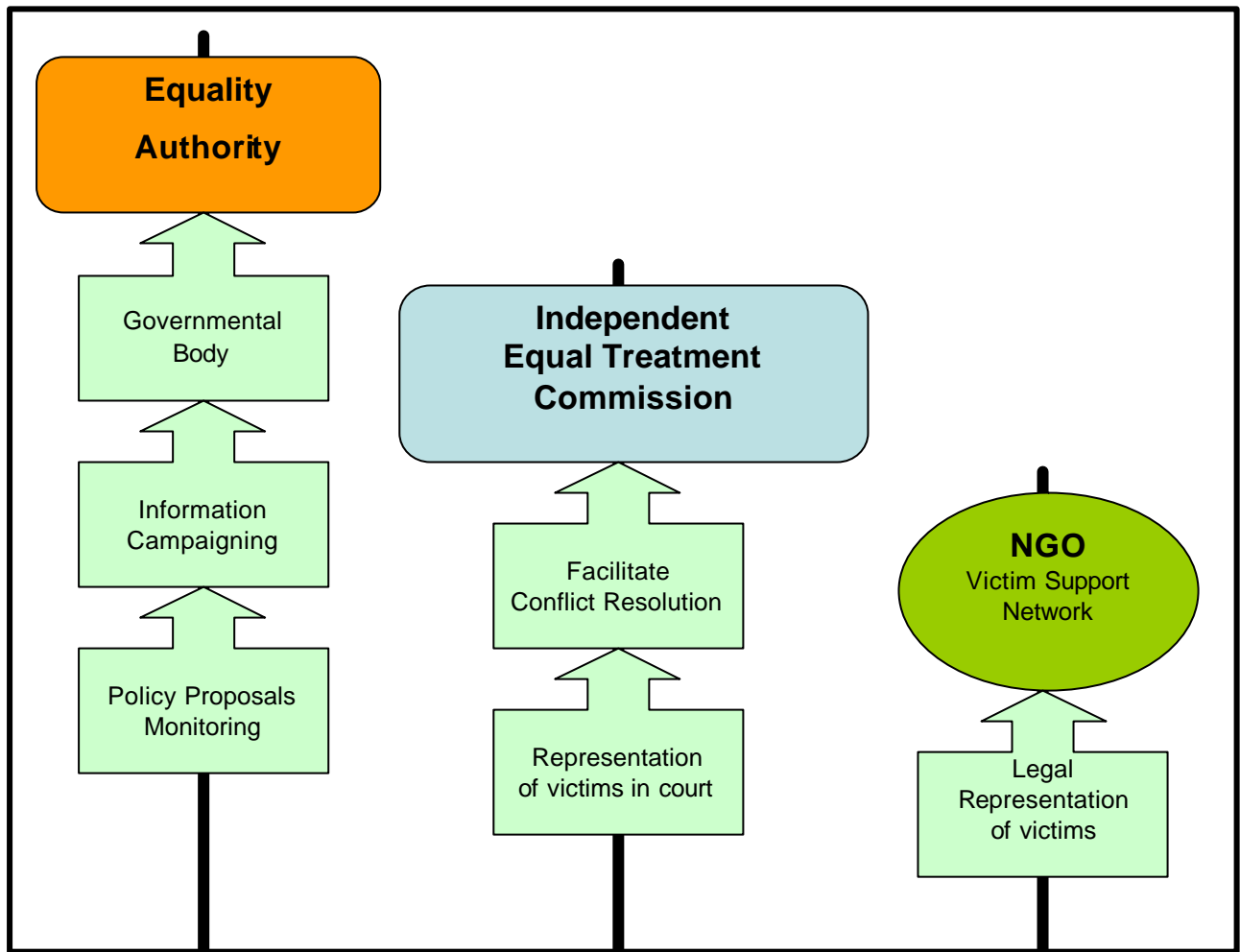
It is suggested to set up an implementation structure consisting of

- A governmental body responsible for promotion, awareness raising and policy development
- An Independent Equal Treatment Commission responsible for handling of cases
- An NGO-network responsible for victim support

In order to safeguard the right to a fair trial, we do not opt for a single body dealing as well with promotion, awareness - raising and policy development and with mediation or decision making in single cases, like e.g. the British Commission for Racial Equality. We also do not opt for an Ombudsman-like construction, as an Ombudsman per definition only has the power to intervene in relations between public authorities and citizens, which would exclude the vast area of private law relations from its remit.

In the UK and in Ireland the law allows for the construction of an independent body within the governmental structure, a possibility not foreseen in Poland. Therefore a comparable solution with an independent promotional body and an independent tribunal-like body is not possible. In our understanding, promotional and policy-related activities should become the task of a governmental body, whereas single cases should be dealt within an independent commission, whose structure and function is described below.

Victim-support and legal representation should be the task of a network of NGOs with local outlets in all provinces. The NGOs forming the network should be selected in a public call for tenders and the quality of their work should regularly be monitored.



3. The Independent Equal Treatment Commission (IETC)

3.1.1. Rights and Duties of the IETC

As an independent statutory body, the IETC should have the right to mediate claims of unlawful discrimination in relation to all areas covered by the proposed general Anti-discrimination Act. It should also give and argue its opinion on individual cases, stating whether the regulations concerning equal treatment have been infringed.

The IETC shall be obliged to consider any case brought forward, as there should be a right of the individual to be heard. Exceptions could be made for cases, which are obviously improper. In any case the claimant always has the option to bring his/her claim directly to the respective Court.

The procedure at the IETC must be free of charge.

The IETC should be entitled to:

- handle complaints and claims of persons, who feel discriminated against on the grounds laid down in the general Anti-discrimination Act;
- question and hear people, whose testimony could be of some use for these cases;
- mediate all conflicts on the basis of a proposal brought up by the Commissioner on request of the parties. Mediation before the IETC can end with a legally binding agreement of the conflicting parties.
- give non-binding decisions or proposals in a concrete case – most importantly stating whether a breach of the anti-discrimination provisions has occurred or not.
- report annually to the Equality Authority

So the work of the Commission can be basically divided into three steps:

- **Attempt to mediation**

In a first step, conflicting parties should be sent off to mediation. The IETC can therefore cooperate with a pool of mediators, who should be regularly trained and specialised in issues of discrimination. Either party may withdraw from mediation at any time – the alleged victim should lose the right to be supported by the Commission if he/she completely refuses any mediatory process.

If the conflicting parties reach an agreement there, the Commission can approve it to make it legally binding.

- **Issuing proposals and an opinion**

In cases where the mediation process fails or is rejected by the person allegedly responsible for the discrimination, the Commission starts a formal proceeding with investigation, considering evidence and in a first step issuing an opinion whether a breach of the Anti-discrimination Act has occurred. In case such a breach is found, it also issues a proposal on how the discrimination could be ended and compensated. The conflicting parties can then come to an agreement on the basis of this proposal. Again the Commission can approve this agreement in order to make it legally binding and immediately enforceable.

- **Legal representation before courts**

In cases where the parties cannot agree on an arrangement, the formal proceeding before the Commission ends without resolution. The fact that the opinion of the Commission is positive – finding an infringement of the Anti-discrimination Act still has a legal consequence as further court procedures should be free and it should oblige the Commission to find or fund free legal representation for the plaintiff in further proceedings before the courts. It makes sure that the financial risk of further proceedings

is taken away from the alleged victim. The free legal representation can be done by the Commissions' staff, external advocates, trade union lawyers or specialised NGO staff holding an university degree in law and approved by the Commission.

- **Reporting to the public**

The Commission should have the duty to publish an annual report about its work and to publish all cases dealt with in an electronically accessible database.

3.1.2. Organisation structure

The IETC should consist of the Chairperson and two Vice-chairs, appointed by a Parliamentary board following a public hearing, and of (up to) 12 additional Commissioners, appointed by these chairs. The chairs should publicly invite NGOs for nomination of Commissioners. At least five of the Commissioners have to be female and five have to be male. All Commissioners should be appointed on a full time base, their salary should be funded by the statutory budget.

The Chairs and the Commissioners must be independent in the performance of their functions, need to have graduated from law-school, and have some proven experience in the field of anti-discrimination, labour law or consumer protection.

There should be enough additional staff (professionally qualified legal advisers, administrative staff) to make sure that the Commission is able to handle the workload.

The Chairs and Commissioners should be appointed for a four years period. (Multiple) reappointment should be permitted so that the experience gained can persist within the institution.

3.1.3. Problems, risks and advantages

First of all problems we see the financial aspects of setting up such a new structure. With 15 Commissioners it still seems a quite lean institution for a large country like Poland. This aspect brings us to a second problem, the question of regional access to this commission. This access is of course not guaranteed equally with a single centralized body. This is why it is so important to see the whole proposed institutional concept as one of close cooperation. In addition we have the problem of workload. Will this structure be capable to handle all the cases in due time? To make a clear prediction is not possible for this question. To safeguard

the function of the Commission, it will be necessary to develop a very clear stock of jurisdiction rather soon. This will help to enhance faster agreements in mediation or on the basis of a proposal by the Commission. As things progress, many cases will be solved without the Commissions interference. The Commissions task will be important in developing the case law but it will be the courts that still have the last word in these issues.

4. The NGO Victim Support Network

4.1.1. Setting up the network

There is the need to establish an easily accessible victim-support-structure with regional outlets in all provinces.

Local anti-discrimination offices, which are organised by NGOs, should receive statutory funding by the local and central government and the municipalities. The whole country should have a net of these offices insure easy access to counselling and legal advice for victims of discrimination. They should be identified in an open call for tender, which should especially stress the following criteria:

- Length of existence and dedication to issues of discrimination
- Broadness of scope of discrimination grounds (sometimes cooperation of NGOs will be needed)
- Education and experience of staff especially regarding legal advice
- Accessibility of premises – regional accessibility
- Experience of cooperation with other NGOs and governmental partners
- Specific attention should be given to set up support structures in areas with a high percentage of Roma - population

The funding for the anti-discrimination offices must be guaranteed by law, contracts should last for at least five years. As the development of such a network will need time, it is suggested to start with pilot-projects in areas where NGOs prepared for this task already exist.

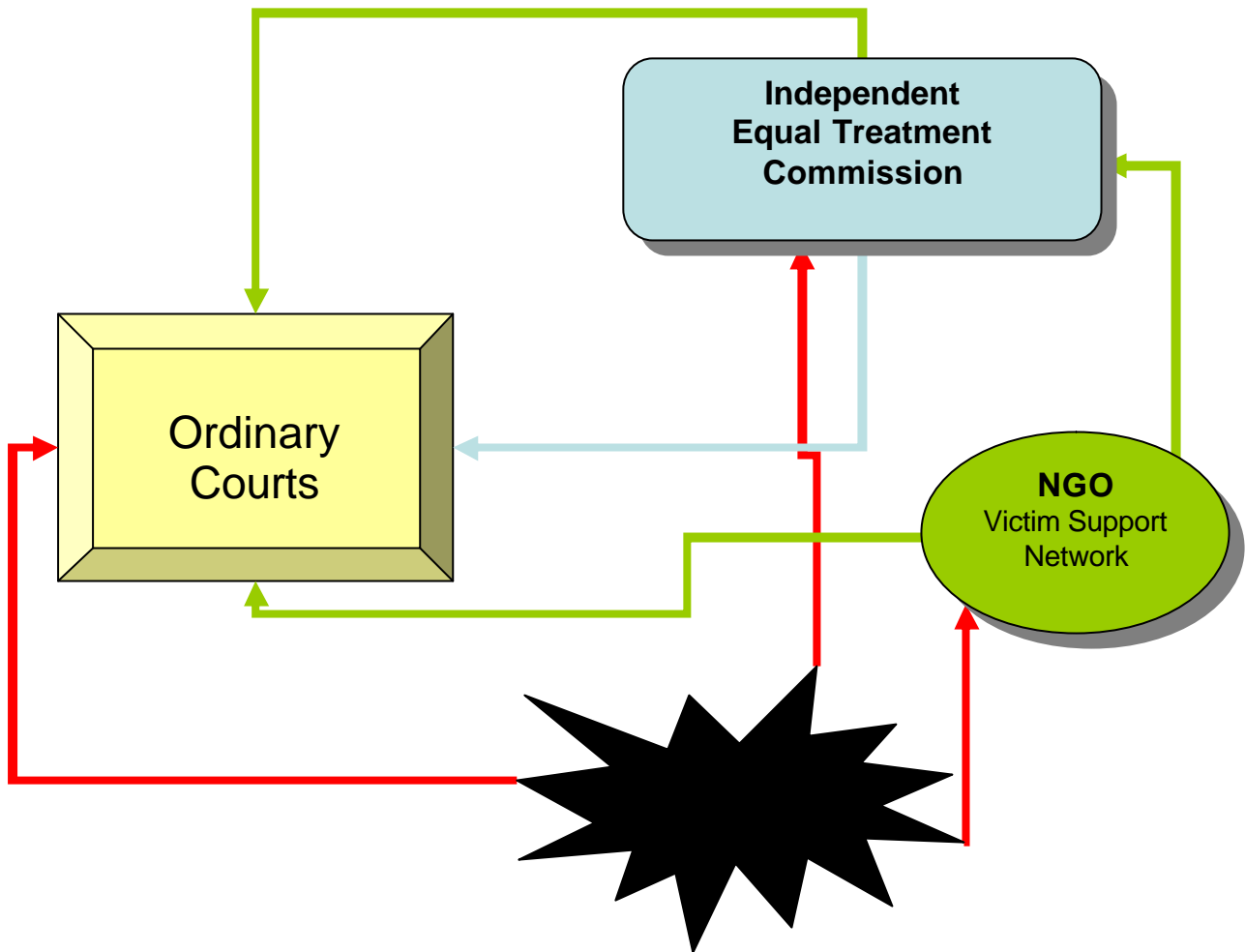
The main task of the offices is to provide legal advice; furthermore they organise awareness-raising campaigns and provide anti-discrimination training to public authorities and private companies. It is advisable to run a telephone-hotline for advice for victims of discrimination. The offices can act as a filter for the IETC, as many cases of discrimination will be first reported to a local anti-discrimination office.

In order to comply with the Directives, the scope the Code of Civil Procedure (Article 61) should be extended allowing organisations, which support the interests of victims of discrimination, to engage in any stage of the proceeding on behalf or in support of the complainant, provided that the victim consents. This right to representation can be limited to those NGOs winning the calls for tender for the local offices.

4.1.2. Problems, risks and advantages

Quality control is always an issue when working with independent and diverse structures. How to make sure that the legal advice that people receive from contracted NGOs is of a high quality? The proposed system contains a few safeguards. First of all it has to be stated that generally NGOs are very eager to work in the best way they can – especially when they were just founded with the aim to tackle discrimination. Secondly, during the assessment process – the call for tender – they have to prove that their staff is able to do the job in a state of the art manner. Thirdly there will be intensive training for them provided by the Equality Authority.

Another area of concern might be the question if NGOs will put equal effort into the tackling of all forbidden grounds of discrimination. The problem arises because usually NGOs do not deal with all issues of discrimination but concentrate on certain grounds. For example there are NGOs dealing with homosexuality while others care about the rights of elderly people or people with different ethnic background. In this case it seems advisable to spend the grants on cooperations or umbrella structures to make sure that all important grounds are regionally covered. Therefore it is not necessary that the different NGOs merge into one or even move to the same premises. It is enough when they can prove that there is staff for good legal advice in all organizations and that they are willing to cooperate in terms of legal training and sharing their experiences.



5. The Equality Authority

5.1. General considerations

In order to secure effective and continuous efforts to promote equality in society, the “Equality Authority” should be set up as a permanent governmental body funded by the regular budget. It should resort to a Minister or Secretary of State, with whom it should have to coordinate strategic planning. The Equality Authority also should have the task to oversee mainstreaming of antidiscrimination policies within the other governmental departments. It should have to annually report to parliament and the public about its work and the progress made.

5.2. Organisational Structure of the Equality Authority

The Equality Authority should be headed by a director and a deputy director appointed by the appropriate Minister or Secretary of State. The director and the deputy director should be appointed following a public call for application and a public hearing. The director and the deputy director should receive renewable employment contracts for a specified period of time, at least five to seven years. Dissolving and renewal of contract should only be possible after a public parliamentary hearing.

The director and the deputy director should be entitled to jointly appoint staff of their choice within the framework of the budget and the salary structure applicable for public institutions. There should be a duty for a public call for applications for the staff of the Equality Authority. The Equality Authority should receive a statutory budget from the general state budget, which should be appropriate to its tasks. It should be secured, that there is enough staff to handle the expected workload.

The Equality Authority should be obliged to formulate a strategic plan for three years and agree it with the appropriate Minister or Secretary of the State. To facilitate the implementation of the strategic plan, annual business plans should be set up. Both the strategic and the annual plan should be made public.

5.3. Rights and Duties of the Equality Authority

The Equality Authority shall have the following duties:

5.3.1. Promotion and Awareness Raising

A major task of the authority will be the continuous development and implementation of an effective promotion and awareness raising strategy aiming at improving the overall understanding of equality issues in society. This strategy will include advertising and public-relations activities aimed at the general public as well as the development of continuous communication and exchange with experts, NGO's and representatives of groups of potential victims of discrimination.

5.3.2. Information activities

The Equality Authority will have to publish information on antidiscrimination legislation, its implementation and case law on a regular base to keep the general public, potential victims and NGOs informed. Furthermore it will have to develop information material about best practices of implementation for specific audiences, e.g. employers, the housing sector or public authorities. It will have to regularly consult with representatives of different sectors to evaluate their needs for information. It is suggested to encourage setting up an information service on equality issues within the organisations of the relevant sectors.

5.3.3. Research and studies

The Equality Authority will have to develop a strategic program of research into different aspects of the situation of potential victims and the implementation of antidiscrimination policy and legislation. In order to facilitate this task, it is suggested to set up regular round-tables with the academic community and relevant NGOs in this field, which should help to develop a research strategy, which reflects as well the needs of the Equality Authority and the civil society organisations in this field. As a general principle, the Equality Authority should be obliged to publish all funded or co-funded studies in due time after reception of the final report.

5.3.4. Development of Codes of Practice

The Equality Authority should be obliged to develop “Codes of Practice” containing detailed and comprehensive explanations on how to implement non-discriminatory practices in specific areas of life with regard to employment and customers’ relations. These COPs should be developed in consultation with the social partners, NGOs and relevant actors and experts in the fields concerned. They should contain checklists on what procedures in specific sectors should be regarded as discriminatory, and what procedures, albeit formally non-discriminatory, might induce discrimination in effect. Furthermore they should describe examples of discrimination-free procedures in different sectors and explain methods of monitoring and reporting procedures. In this respect, the Codes of Practice issued by the British Commission for Racial Equality could serve as examples of good practice.

5.3.5. Training

The Equality Authority should have to produce training-manuals and set up regular trainings on antidiscrimination legislation, the development of case law and methods of counselling of potential victims for

- The planned NGO-network
- Judges and Lawyers
- The Police
- The Trade Unions and the Social Partners
- The Educational and Social Professions

Furthermore, it will have to support the development of training material and general antidiscrimination training for multipliers, including e.g. NGOs, youth workers, teachers, journalists etc. in order to support a broad understanding of equality issues within the general public.

To facilitate the implementation of Codes of Practice, the Equality Authority should organise and/or support the organisation of trainings on the implementation of these COPs with the trade unions, employers and service providers and NGOs. To facilitate this task, specific funds should be allocated within the budget of the Equality Authority.

5.3.6. Networking and Social Dialogue

The Equality Authority should be obliged to develop a framework for a continuous dialogue between the government, the social partners and the relevant NGOs. Round Tables including all relevant actors should be held at least once a year, and working groups of representatives of the Body against Discrimination, government representatives, social partners and NGO's

on specific topics should be installed with the task to develop strategies for specific fields of action.

To keep well informed about regional and sectoral developments, it is suggested that the Equality Authority sets up a fast-response network of experts and NGOs able to report on specific issues on request.

Specific attention should be given to regular consultations with the social partners on issues concerning the implementation of antidiscrimination practices in business and the work life. In this respect, it is suggested to implement incentives for business to develop employment equality, like e.g. public awards, and to support business alliances between companies implementing equality measures. Here the Equality Authority will need to develop a proactive role in supporting the exchange of good practices and supporting a business climate, where employment equality is seen as an asset.

To allow for a deeper integration into European developments, the Equality Authority should take part in European networks and consultations of similar bodies and organise exchange of good practice with them.

5.3.7. Reviewing of existing antidiscrimination legislation and its implementation

The Equality Authority should be obliged to review the existing antidiscrimination legislation and its implementation regularly, at least each five years. It should be entitled to make suggestions for alterations of the law and its implementation, define strategic priorities and inform about areas of concern. Furthermore, it should review the position of the Polish antidiscrimination legislation and case law with regard to European developments and inform about the exchange of practice with similar bodies in Europe. The parliament should be obliged to deal with the review of the Equality Authority.

Furthermore, the Equality Authority should be entitled to publicly comment on legal and political developments in areas falling under its competence and have the duty to comment on

draft bills and drafts of action plans whenever asked to do so by a ministry or another public body.

5.3.8. Mainstreaming of antidiscrimination measures within public administration

The Equality Authority should be given the task to oversee mainstreaming of antidiscrimination measures within other governmental departments. In order to do so, it shall have the right to consult with other departments on the development and implementation of action plans, develop codes of conducts and report to responsible Minister or Secretary of State on the results.

5.3.9. Reporting to the parliament and the public

The Equality Authority should be obliged to annually report to the parliament and the public about

- Progress in enhancing antidiscrimination policies in all relevant areas,
- Experiences with existing legal regulations and institutional structures,
- Specific areas of concern,
- The situation of specific vulnerable groups,
- Its own activities,
- The Activities of public bodies to implement equality measures
- Policy recommendations,
- Progress in enhancing antidiscrimination policies in all relevant areas,
- The applicability and efficiency of existing legal regulations and institutional structures,
- Specific areas of concern,
- The situation of specific vulnerable groups,
- Its own activities,
- Policy recommendations,
- Recommendations for amendments of legislation

These reports should be made accessible to the public in print and on the internet.