

ECRI

European Commission against Racism and Intolerance
Commission européenne contre le racisme et l'intolérance

CRI (2003) 8

European Commission against Racism and Intolerance

ECRI GENERAL POLICY
RECOMMENDATION N°7
ON NATIONAL LEGISLATION TO
COMBAT RACISM AND RACIAL
DISCRIMINATION

Adopted on 13 December 2002

Strasbourg, 17 February 2003



COUNCIL OF EUROPE CONSEIL DE L'EUROPE

Secretariat of ECRI
Directorate General of Human Rights – DG II
Council of Europe
F - 67075 STRASBOURG Cedex
Tel.: +33 (0) 3 88 41 29 64
Fax: +33 (0) 3 88 41 39 87
E-mail: combat.racism@coe.int

Visit our web site : www.coe.int/ecri

The European Commission against Racism and Intolerance (ECRI):

Recalling the Declaration adopted by the Heads of State and Government of the member States of the Council of Europe at their first Summit held in Vienna on 8-9 October 1993;

Recalling that the Plan of Action on combating racism, xenophobia, antisemitism and intolerance set out as part of this Declaration invited the Committee of Ministers to establish the European Commission against Racism and Intolerance with a mandate, inter alia, to formulate general policy recommendations to member States;

Recalling also the Final Declaration and Action Plan adopted by the Heads of State and Government of the member States of the Council of Europe at their second Summit held in Strasbourg on 10-11 October 1997;

Recalling that Article 1 of the Universal Declaration of Human Rights proclaims that all human beings are born free and equal in dignity and rights;

Having regard to the International Convention on the Elimination of All Forms of Racial Discrimination;

Having regard to Convention No 111 of the International Labour Organisation concerning Discrimination (Employment and Occupation);

Having regard to Article 14 of the European Convention on Human Rights;

Having regard to Protocol No 12 to the European Convention on Human Rights which contains a general clause prohibiting discrimination;

Having regard to the case-law of the European Court of Human Rights;

Taking into account the Charter of Fundamental Rights of the European Union;

Taking into account Directive 2000/43/EC of the Council of the European Union implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, and Directive 2000/78/EC of the Council of the European Union establishing a general framework for equal treatment in employment and occupation;

Having regard to the Convention on the Prevention and Punishment of the Crime of Genocide;

Recalling ECRI's general policy recommendation No 1 on combating racism, xenophobia, antisemitism and intolerance and ECRI's general policy recommendation No 2 on specialised bodies to combat racism, xenophobia, antisemitism and intolerance at national level;

Stressing that, in its country-by-country reports, ECRI regularly recommends to member States the adoption of effective legal measures aimed at combating racism and racial discrimination;

Recalling that, in the Political Declaration adopted on 13 October 2000 at the concluding session of the European Conference against racism, the governments of member States of the Council of Europe committed themselves to adopting and implementing, wherever necessary, national legislation and administrative measures that expressly and specifically counter racism and prohibit racial discrimination in all spheres of public life;

Recalling also the Declaration and the Programme of Action adopted by the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance held in Durban, South Africa, from 31 August to 8 September 2001;

Aware that laws alone are not sufficient to eradicate racism and racial discrimination, but convinced that laws are essential in combating racism and racial discrimination;

Stressing the vital importance of appropriate legal measures in combating racism and racial discrimination effectively and in a way which both acts as a deterrent and, as far as possible, is perceived by the victim as satisfactory;

Convinced that the action of the State legislator against racism and racial discrimination also plays an educative function within society, transmitting the powerful message that no attempts to legitimise racism and racial discrimination will be tolerated in a society ruled by law;

Seeking, alongside the other efforts underway at international and European level, to assist member States in their fight against racism and racial discrimination, by setting out in a succinct and precise manner the key elements to be included in appropriate national legislation;

Recommends to the governments of member States:

- a. to enact legislation against racism and racial discrimination, if such legislation does not already exist or is incomplete ;
- b. to ensure that the key components set out below are provided in such legislation.

Key elements of national legislation against racism and racial discrimination

I. Definitions

1. For the purposes of this Recommendation, the following definitions shall apply :
 - a) “racism” shall mean the belief that a ground such as race¹, colour, language, religion, nationality or national or ethnic origin justifies contempt for a person or a group of persons, or the notion of superiority of a person or a group of persons.
 - b) “direct racial discrimination” shall mean any differential treatment based on a ground such as race, colour, language, religion, nationality or national or ethnic origin, which has no objective and reasonable justification. Differential treatment has no objective and reasonable justification if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised.
 - c) “indirect racial discrimination” shall mean cases where an apparently neutral factor such as a provision, criterion or practice cannot be as easily complied with by, or disadvantages, persons belonging to a group designated by a ground such as race, colour, language, religion, nationality or national or ethnic origin, unless this factor has an objective and reasonable justification. This latter would be the case if it pursues a legitimate aim and if there is a reasonable relationship of proportionality between the means employed and the aim sought to be realised.

II. Constitutional law

2. The constitution should enshrine the principle of equal treatment, the commitment of the State to promote equality as well as the right of individuals to be free from discrimination on grounds such as race, colour, language, religion, nationality or national or ethnic origin. The constitution may provide that exceptions to the principle of equal treatment may be established by law, provided that they do not constitute discrimination.

¹ Since all human beings belong to the same species, ECRI rejects theories based on the existence of different “races”. However, in this Recommendation ECRI uses this term in order to ensure that those persons who are generally and erroneously perceived as belonging to “another race” are not excluded from the protection provided for by the legislation.

3. The constitution should provide that the exercise of freedom of expression, assembly and association may be restricted with a view to combating racism. Any such restrictions should be in conformity with the European Convention on Human Rights.

III. Civil and administrative law

4. The law should clearly define and prohibit direct and indirect racial discrimination.
5. The law should provide that the prohibition of racial discrimination does not prevent the maintenance or adoption of temporary special measures designed either to prevent or compensate for disadvantages suffered by persons designated by the grounds enumerated in paragraph 1 b) (henceforth: enumerated grounds), or to facilitate their full participation in all fields of life. These measures should not be continued once the intended objectives have been achieved.
6. The law should provide that the following acts, *inter alia*, are considered as forms of discrimination: segregation; discrimination by association; announced intention to discriminate; instructing another to discriminate; inciting another to discriminate; aiding another to discriminate.
7. The law should provide that the prohibition of discrimination applies to all public authorities as well as to all natural or legal persons, both in the public and in the private sectors, in all areas, notably: employment; membership of professional organisations; education; training; housing; health; social protection; goods and services intended for the public and public places; exercise of economic activity; public services.
8. The law should place public authorities under a duty to promote equality and to prevent discrimination in carrying out their functions.
9. The law should place public authorities under a duty to ensure that those parties to whom they award contracts, loans, grants or other benefits respect and promote a policy of non-discrimination. In particular, the law should provide that public authorities should subject the awarding of contracts, loans, grants or other benefits to the condition that a policy of non-discrimination be respected and promoted by the other party. The law should provide that the violation of such condition may result in the termination of the contract, grant or other benefits.
10. The law should ensure that easily accessible judicial and/or administrative proceedings, including conciliation procedures, are available to all victims of discrimination. In urgent cases, fast-track procedures, leading to interim decisions, should be available to victims of discrimination.

11. The law should provide that, if persons who consider themselves wronged because of a discriminatory act establish before a court or any other competent authority facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no discrimination.
12. The law should provide for effective, proportionate and dissuasive sanctions for discrimination cases. Such sanctions should include the payment of compensation for both material and moral damages to the victims.
13. The law should provide the necessary legal tools to review, on an ongoing basis, the conformity with the prohibition of discrimination of all laws, regulations and administrative provisions at the national and local levels. Laws, regulations and administrative provisions found not to be in conformity with the prohibition of discrimination should be amended or abrogated.
14. The law should provide that discriminatory provisions which are included in individual or collective contracts or agreements, internal regulations of enterprises, rules governing profit-making or non-profit-making associations, and rules governing the independent professions and workers' and employers' organisations should be amended or declared null and void.
15. The law should provide that harassment related to one of the enumerated grounds is prohibited.
16. The law should provide for an obligation to suppress public financing of organisations which promote racism. Where a system of public financing of political parties is in place, such an obligation should include the suppression of public financing of political parties which promote racism.
17. The law should provide for the possibility of dissolution of organisations which promote racism.

IV. Criminal law

18. The law should penalise the following acts when committed intentionally:
 - a) public incitement to violence, hatred or discrimination,
 - b) public insults and defamation or
 - c) threatsagainst a person or a grouping of persons on the grounds of their race, colour, language, religion, nationality, or national or ethnic origin;
 - d) the public expression, with a racist aim, of an ideology which claims the superiority of, or which depreciates or denigrates, a grouping of persons on the grounds of their race, colour, language, religion, nationality, or national or ethnic origin;

- e) the public denial, trivialisation, justification or condoning, with a racist aim, of crimes of genocide, crimes against humanity or war crimes;
 - f) the public dissemination or public distribution, or the production or storage aimed at public dissemination or public distribution, with a racist aim, of written, pictorial or other material containing manifestations covered by paragraphs 18 a), b), c), d) and e);
 - g) the creation or the leadership of a group which promotes racism ; support for such a group ; and participation in its activities with the intention of contributing to the offences covered by paragraph 18 a), b), c), d), e) and f);
 - h) racial discrimination in the exercise of one's public office or occupation.
19. The law should penalise genocide.
20. The law should provide that intentionally instigating, aiding, abetting or attempting to commit any of the criminal offences covered by paragraphs 18 and 19 is punishable.
21. The law should provide that, for all criminal offences not specified in paragraphs 18 and 19, racist motivation constitutes an aggravating circumstance.
22. The law should provide that legal persons are held responsible under criminal law for the offences set out in paragraphs 18, 19, 20 and 21.
23. The law should provide for effective, proportionate and dissuasive sanctions for the offences set out in paragraphs 18, 19, 20 and 21. The law should also provide for ancillary or alternative sanctions.

V. Common provisions

24. The law should provide for the establishment of an independent specialised body to combat racism and racial discrimination at national level (henceforth: national specialised body). The law should include within the competence of such a body: assistance to victims; investigation powers; the right to initiate, and participate in, court proceedings; monitoring legislation and advice to legislative and executive authorities; awareness-raising of issues of racism and racial discrimination among society and promotion of policies and practices to ensure equal treatment.
25. The law should provide that organisations such as associations, trade unions and other legal entities which have, according to the criteria laid down by the national law, a legitimate interest in combating racism and racial discrimination, are entitled to bring civil cases, intervene in administrative cases or make criminal complaints, even if a specific victim is not referred to. If a specific victim is referred to, it should be necessary for that victim's consent to be obtained.

26. The law should guarantee free legal aid and, where necessary, a court-appointed lawyer, for victims who wish to go before the courts as applicants or plaintiffs and who do not have the necessary means to do so. If necessary, an interpreter should be provided free of charge.
27. The law should provide protection against any retaliatory measures for persons claiming to be victims of racial offences or racial discrimination, persons reporting such acts or persons providing evidence.
28. The law should provide for one or more independent bodies entrusted with the investigation of alleged acts of discrimination committed by members of the police, border control officials, members of the army and prison personnel.

Explanatory Memorandum to ECRI general policy recommendation N°7 on national legislation to combat racism and racial discrimination

Introduction

1. This general policy recommendation (hereafter: the Recommendation) focuses on the key elements of national legislation to combat racism and racial discrimination. Although ECRI is aware that legal means alone are not sufficient to this end, it believes that national legislation against racism and racial discrimination is necessary to combat these phenomena effectively.
2. In the framework of its country-by-country approach, ECRI regularly recommends to member States of the Council of Europe the adoption of effective legal measures aimed at combating racism and racial discrimination. The Recommendation aims to provide an overview of these measures and to clarify and complement the recommendations formulated in this respect in ECRI's country-by-country reports. The Recommendation also aims to reflect the general principles contained in the international instruments mentioned in the Preamble.
3. ECRI believes that appropriate legislation to combat racism and racial discrimination should include provisions in all branches of the law, i.e. constitutional, civil, administrative and criminal law. Only such an integrated approach will enable member States to address these problems in a manner which is as exhaustive, effective and satisfactory from the point of view of the victim as possible. In the field of combating racism and racial discrimination, civil and administrative law often provides for flexible legal means, which may facilitate the victims' recourse to legal action. Criminal law has a symbolic effect which raises the awareness of society of the seriousness of racism and racial discrimination and has a strong dissuasive effect, provided it is implemented effectively. ECRI has taken into account the fact that the possibilities offered by the different branches of the law are complementary. As regards in particular the fight against racial discrimination, ECRI recommends that the member States of the Council of Europe adopt constitutional, civil and administrative law provisions, and that, in certain cases, they additionally adopt criminal law provisions.
4. The legal measures necessary to combat racism and racial discrimination at national level are presented in the form of key components which should be contained in the national legislation of member States. ECRI stresses that the measures it recommends are compatible with different legal systems, be they common law or civil law or mixed. Furthermore, those components that ECRI considers to be key

to an effective legal framework against racism and racial discrimination may be adapted to the specific conditions of each country. They could thus be set out in a single special act or laid out in the different areas of national legislation (civil law, administrative law and penal law). These key components might also be included in broader legislation encompassing the fight against racism and racial discrimination. For example, when adopting legal measures against discrimination, member States might prohibit, alongside racial discrimination, other forms of discrimination such as those based on gender, sexual orientation, disability, political or other opinion, social origin, property, birth or other status. Finally, in a number of fields, member States might simply apply general rules, which it is therefore not necessary to set out in this Recommendation. This is the position, for example, in civil law, for multiple liability, vicarious liability, and for the establishment of levels of damages; in criminal law, for the conditions of liability, and the sentencing structure; and in procedural matters, for the organisation and jurisdiction of the courts.

5. In any event, these key components represent only a minimum standard; this means that they are compatible with legal provisions offering a greater level of protection adopted or to be adopted by a member State and that under no circumstances should they constitute grounds for a reduction in the level of protection against racism and racial discrimination already afforded by a member State.

I. Definitions

Paragraph 1 of the Recommendation

6. In the Recommendation, the term “racism” should be understood in a broad sense, including phenomena such as xenophobia, antisemitism and intolerance. As regards the grounds set out in the definitions of racism and direct and indirect racial discrimination (paragraph 1 of the Recommendation), in addition to those grounds generally covered by the relevant legal instruments in the field of combating racism and racial discrimination, such as race, colour and national or ethnic origin, the Recommendation covers language, religion and nationality². The inclusion of these grounds in the definitions of racism and racial discrimination is based on ECRI’s mandate, which is to combat racism, antisemitism, xenophobia and intolerance. ECRI considers that these concepts, which vary over time, nowadays cover manifestations targeting persons or groups of persons, on grounds such as race, colour, religion, language, nationality and national and ethnic origin. As a result, the expressions “racism” and “racial discrimination” used in the Recommendation encompass all the phenomena covered by ECRI’s mandate. National origin is sometimes interpreted as including the concept of nationality. However, in order to ensure that this concept is indeed covered, it is expressly included in the list of grounds, in addition to national origin. The use of the expression “grounds such as” in the

² ECRI understands the term “nationality” as defined in Article 2 a). of the European Convention on Nationality: “‘nationality’ means the legal bond between a person and a State and does not indicate the person’s ethnic origin”.

definitions of racism and direct and indirect racial discrimination aims at establishing an open-ended list of grounds, thereby allowing it to evolve with society. However, in criminal law, an exhaustive list of grounds could be established in order to respect the principle of foreseeability which governs this branch of the law.

7. Unlike the definition of racial discrimination (paragraphs 1 b) and c) of the Recommendation), which should be included in the law, the definition of racism is provided for the purposes of the Recommendation, and member States may or may not decide to define racism within the law. If they decide to do so, they may, as regards criminal law, adopt a more precise definition than that set out in paragraph 1 a), in order to respect the fundamental principles of this branch of the law. For racism to have taken place, it is not necessary that one or more of the grounds listed should constitute the only factor or the determining factor leading to contempt or the notion of superiority; it suffices that these grounds are among the factors leading to contempt or the notion of superiority.
8. The definitions of direct and indirect racial discrimination contained in paragraph 1 b) and c) of the Recommendation draw inspiration from those contained in the Directive 2000/43/CE of the Council of the European Union implementing the principle of equal treatment between persons irrespective of racial or ethnic origin and in the Directive 2000/78/CE of the Council of the European Union establishing a general framework for equal treatment in employment and occupation as well as on the case-law of the European Court of Human Rights. In accordance with this case-law, differential treatment constitutes discrimination if it has no objective and reasonable justification. This principle applies to differential treatment based on any of the grounds enumerated in the definition of racial discrimination. However, differential treatment based on race, colour and ethnic origin may have an objective and reasonable justification only in an extremely limited number of cases. For instance, in employment, where colour constitutes a genuine and determining occupational requirement by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, differential treatment based on this ground may have an objective and reasonable justification. More generally, the notion of objective and reasonable justification should be interpreted as restrictively as possible with respect to differential treatment based on any of the enumerated grounds.

II. Constitutional law

9. In the Recommendation, the term “constitution” should be understood in a broad sense, including basic laws and written and unwritten basic rules. In paragraphs 2 and 3, the Recommendation provides for certain principles that should be contained in the constitution; such principles are to be implemented by statutory and regulatory provisions.

Paragraph 2 of the Recommendation

10. In paragraph 2, the Recommendation allows for the possibility of providing in the law for exceptions to the principle of equal treatment, provided that they do not constitute discrimination. For this condition to be met, in accordance with the definitions of discrimination proposed in paragraph 1 b) and c) of the Recommendation, the exceptions must have an objective and reasonable justification. This principle applies to all exceptions, including those establishing differential treatment on the basis of nationality.

Paragraph 3 of the Recommendation

11. According to paragraph 3 of the Recommendation, the constitution should provide that the exercise of freedom of expression, assembly and association may be restricted with a view to combating racism. In articles 10 (2) and 11 (2), the European Convention on Human Rights enumerates the aims which may justify restrictions to these freedoms. Although the fight against racism is not mentioned as one of these aims, in its case-law the European Court of Human Rights has considered that it is included. In accordance with the articles of the Convention mentioned above, these restrictions should be prescribed by law and necessary in a democratic society.

III. Civil and administrative law

Paragraph 4 of the Recommendation

12. The Recommendation provides in paragraph 4 that the law should clearly define and prohibit direct and indirect racial discrimination. It offers a definition of direct and indirect racial discrimination in paragraph 1 b) and c). The meaning of the expression “differential treatment” is wide and includes any distinction, exclusion, restriction, preference or omission, be it past, present or potential. The term “ground” must include grounds which are actual or presumed. For instance, if a person experiences adverse treatment due to the presumption that he or she is a Muslim, when in reality this is not the case, this treatment would still constitute discrimination on the basis of religion.
13. Discriminatory actions are rarely based solely on one or more of the enumerated grounds, but are rather based on a combination of these grounds with other factors. For discrimination to occur, it is therefore sufficient that one of the enumerated grounds constitutes one of the factors leading to the differential treatment. The use of restrictive expressions such as “difference of treatment *solely* or *exclusively* based on grounds such as ...” should therefore be avoided.

Paragraph 5 of the Recommendation

14. In its paragraph 5, the Recommendation provides for the possibility of temporary special measures designed either to prevent or compensate for disadvantages suffered by persons designated by the enumerated grounds, or to facilitate their full participation in all fields of life. An example of temporary special measures designed to prevent or compensate for disadvantages linked to the enumerated grounds: a factory owner who has no black employees among his managerial staff but many black employees on the assembly line might organise a training course for black workers seeking promotion. An example of temporary special measures designed to facilitate the full participation, in all fields of life, of persons designated by the enumerated grounds: the police could organise a recruitment campaign designed so as to encourage applications particularly from members of certain ethnic groups who are under-represented within the police.

Paragraph 6 of the Recommendation

15. The Recommendation specifically mentions in paragraph 6 certain acts which should be considered by law as forms of discrimination. In theory, the application of the general legal principles and the definition of discrimination should enable these acts to be covered. However, practice demonstrates that these acts often tend to be overlooked or excluded from the scope of application of the legislation. For reasons of effectiveness, it may therefore be useful for the law to provide expressly that these acts are considered as forms of discrimination.
16. Among the acts which the Recommendation mentions specifically as forms of discrimination, the following warrant a brief explanation:
 - Segregation is the act by which a (natural or legal) person separates other persons on the basis of one of the enumerated grounds without an objective and reasonable justification, in conformity with the proposed definition of discrimination. As a result, the voluntary act of separating oneself from other persons on the basis of one of the enumerated grounds does not constitute segregation.
 - Discrimination by association occurs when a person is discriminated against on the basis of his or her association or contacts with one or more persons designated by one of the enumerated grounds. This would be the case, for example, of the refusal to employ a person because s/he is married to a person belonging to a certain ethnic group.
 - The announced intention to discriminate should be considered as discrimination, even in the absence of a specific victim. For instance, an employment advertisement indicating that Roma/Gypsies need not apply should fall within the scope of the legislation, even if no Roma/Gypsy has actually applied.

Paragraph 7 of the Recommendation

17. According to paragraph 7 of the Recommendation, the prohibition of discrimination should apply in all areas. Concerning employment, the prohibition of discrimination should cover access to employment, occupation and self-employment as well as work conditions, remunerations, promotions and dismissals.
18. As concerns membership of professional organisations, the prohibition of discrimination should cover: membership of an organisation of workers or employers, or any organisation whose members carry on a particular profession ; involvement in such organisations ; and the benefits provided for by such organisations.
19. Concerning education, the prohibition of discrimination should cover pre-school, primary, secondary and higher education, both public and private. Furthermore, access to education should not depend on the immigration status of the children or their parents.
20. As concerns training, the prohibition of discrimination should cover initial and on-going vocational training, all types and all levels of vocational guidance, advanced vocational training and retraining, including the acquisition of practical work experience.
21. As concerns housing, discrimination should be prohibited in particular in access to housing, in housing conditions and in the termination of rental contracts.
22. As concerns health, discrimination should be prohibited in particular in access to care and treatment, and in the way in which care is dispensed and patients are treated.
23. Concerning social protection, the prohibition of discrimination should cover social security, social benefits, social aid (housing benefits, youth benefits, etc.) and the way in which the beneficiaries of social protection are treated.
24. As concerns goods and services intended for the public and public places, discrimination should be prohibited, for instance, when buying goods in a shop, when applying for a loan from a bank and in access to discotheques, cafés or restaurants. The prohibition of discrimination should not only target those who make goods and services available to others, but also those who receive goods and services from others, as would be the case of a company which selects the providers of a given good or service on the basis of one of the enumerated grounds.
25. Concerning the exercise of economic activity, this field covers competition law, relations between enterprises and relations between enterprises and the State.
26. The field of public services includes the activities of the police and other law enforcement officials, border control officials, the army and prison personnel.

Paragraph 8 of the Recommendation

27. According to paragraph 8 of the Recommendation, the law should place public authorities under a duty to promote equality and to prevent discrimination in carrying out their functions. The obligations incumbent on such authorities should be spelled out as clearly as possible in the law. To this end, public authorities could be placed under the obligation to create and implement “equality programmes” drawn up with the assistance of the national specialised body referred to in paragraph 24 of the Recommendation. The law should provide for the regular assessment of the equality programmes, the monitoring of their effects, as well as for effective implementation mechanisms and the possibility for legal enforcement of these programmes, notably through the national specialised body. An equality programme could, for example, include the nomination of a contact person for dealing with issues of racial discrimination and harassment or the organisation of staff training courses on discrimination. As regards the obligation to promote equality and prevent discrimination, the Recommendation covers only public authorities; however, it would be desirable were the private sector also placed under a similar obligation.

Paragraph 10 of the Recommendation

28. According to paragraph 10 of the Recommendation, in urgent cases, fast-track procedures, leading to interim decisions, should be available to victims of discrimination. These procedures are important in those situations where the immediate consequences of the alleged discriminatory act are particularly serious or even irreparable. Thus, for example, the victims of a discriminatory eviction from a flat should be able to suspend this measure through an interim judicial decision, pending the final judgement of the case.

Paragraph 11 of the Recommendation

29. Given the difficulties complainants face in collecting the necessary evidence in discrimination cases, the law should facilitate proof of discrimination. For this reason, according to paragraph 11 of the Recommendation, the law should provide for a shared burden of proof in such cases. A shared burden of proof means that the complainant should establish facts allowing for the presumption of discrimination, whereupon the onus shifts to the respondent to prove that discrimination did not take place. Thus, in case of alleged direct racial discrimination, the respondent must prove that the differential treatment has an objective and reasonable justification. For example, if access to a swimming pool is denied to Roma/Gypsy children, it would be sufficient for the complainant to prove that access was denied to these children and granted to non-Roma/Gypsy children. It should then be for the respondent to prove that this denial to grant access was based on an objective and reasonable justification, such as the fact that the children in question did not have bathing hats, as required to access the swimming pool. The same principle should apply to alleged cases of indirect racial discrimination.

30. As concerns the power to obtain the necessary evidence and information, courts should enjoy all adequate powers in this respect. Such powers should be also given to any specialised body competent to adjudicate on an individual complaint of discrimination (see paragraph 55 of the present Explanatory Memorandum).

Paragraph 12 of the Recommendation

31. Paragraph 12 of the Recommendation states that the law should provide for effective, proportionate and dissuasive sanctions for discrimination cases. Apart from the payment of compensation for material and moral damages, sanctions should include measures such as the restitution of rights which have been lost. For instance, the law should enable the court to order re-admittance into a firm or flat, provided that the rights of third parties are respected. In the case of discriminatory refusal to recruit a person, the law should provide that, according to the circumstances, the court could order the employer to offer employment to the discriminated person.
32. In the case of discrimination by a private school, the law should provide for the possibility of withdrawing the accreditation awarded to the school or the non-recognition of the diplomas issued. In the case of discrimination by an establishment open to the public, the law should provide for the possibility of withdrawing a licence and of closing the establishment. For example, in the case of discrimination by a discotheque, it should be possible to withdraw the licence to sell alcohol.
33. Non-monetary forms of reparation, such as the publication of all or part of a court decision, may be important in rendering justice in cases of discrimination.
34. The law should provide for the possibility of imposing a programme of positive measures on the discriminator. This is an important type of remedy in promoting long-term change in an organisation. For instance, the discriminator could be obliged to organise for its staff specific training programmes aimed at countering racism and racial discrimination. The national specialised body should participate in the development and supervision of such programmes.

Paragraph 15 of the Recommendation

35. According to paragraph 15 of the Recommendation the law should provide that harassment related to one of the enumerated grounds is prohibited. Harassment consists in conduct related to one of the enumerated grounds which has the purpose or the effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. As far as possible, protection against harassment related to one of the enumerated grounds should not only target the conduct of the author of the harassment but also that of other persons. For instance, it should be possible for the employer to be held responsible, where applicable, for harassment by colleagues, other employees or third parties (such as clients and suppliers).

Paragraph 16 of the Recommendation

36. Paragraph 16 of the Recommendation states that the law should provide for the obligation to suppress public financing of political parties which promote racism. For example, public financing for electoral campaigns should be refused to such political parties.

Paragraph 17 of the Recommendation

37. Paragraph 17 of the Recommendation states that the law should provide for the possibility of the dissolution of organisations which promote racism. In all cases, the dissolution of such organisations may result only from a Court decision. The issue of the dissolution of these organisations is also dealt with under Section IV - Criminal law (see paragraphs 43 and 49 of the present Explanatory Memorandum).

IV. Criminal law

Paragraph 18 of the Recommendation

38. The Recommendation limits the scope of certain criminal offences set out in paragraph 18 to the condition that they are committed in “public”. Current practice shows that, in certain cases, racist conduct escapes prosecution because it is not considered as being of a public nature. Consequently, member States should ensure that it should not be too difficult to meet the condition of being committed in “public”. Thus, for instance, this condition should be met in cases of words pronounced during meetings of neo-Nazi organisations or words exchanged in a discussion forum on the Internet.
39. Some of the offences set out in paragraph 18 of the Recommendation concern conduct aimed at a “grouping of persons”. Current practice shows that legal provisions aimed at sanctioning racist conduct frequently do not cover such conduct unless it is directed against a specific person or group of persons. As a result, expressions aimed at larger groupings of persons, as in the case of references to asylum seekers or foreigners in general, are often not covered by these provisions. For this reason, paragraph 18 a), b), c), and d) of the Recommendation does not speak of “group” but of “grouping” of persons.
40. The term “defamation” contained in paragraph 18 b) should be understood in a broad sense, notably including slander and libel.
41. Paragraph 18 e) of the Recommendation refers to the crimes of genocide, crimes against humanity and war crimes. The crime of genocide should be understood as defined in Article II of the Convention for the Prevention and Punishment of the Crime of Genocide and Article 6 of the Statute of the International Criminal Court (see paragraph 45 of the present Explanatory Memorandum). Crimes against humanity and war crimes should be understood as defined in Articles 7 and 8 of the Statute of the International Criminal Court.

42. Paragraph 18 f) of the Recommendation refers to the dissemination, distribution, production or storage of written, pictorial or other material containing racist manifestations. These notions include the dissemination of this material through the Internet. Such material includes musical supports such as records, tapes and compact discs, computer accessories (e.g. floppy discs, software), video tapes, DVDs and games.
43. Paragraph 18 g) of the Recommendation provides for the criminalisation of certain acts related to groups which promote racism. The concept of group includes in particular *de facto* groups, organisations, associations and political parties. The Recommendation provides that the creation of a group which promotes racism should be prohibited. This prohibition also includes maintaining or reconstituting a group which has been prohibited. The issue of the dissolution of a group which promotes racism is also dealt with under Section III - Civil and administrative law (see paragraph 37 of the present Explanatory Memorandum) and below (see paragraph 49 of the present Explanatory Memorandum). Moreover, the notion of “support” includes acts such as providing financing to the group, providing for other material needs, producing or obtaining documents.
44. In its paragraph 18 h) the Recommendation states that the law should penalise racial discrimination in the exercise of one’s public office or occupation. On this point, the definitions contained in paragraphs 1 b) and c) and 5 of the Recommendation apply *mutatis mutandis*. Racial discrimination in the exercise of one’s public office or occupation includes notably the discriminatory refusal of a service intended for the public, such as discriminatory refusal by a hospital to care for a person and the discriminatory refusal to sell a product, to grant a bank loan or to allow access to a discotheque, café or restaurant.

Paragraph 19 of the Recommendation

45. Paragraph 19 of the Recommendation provides that the law should penalise genocide. To this end, the crime of genocide should be understood as defined in Article II of Convention on the Prevention and Punishment of the Crime of Genocide and Article 6 of the Statute of the International Criminal Court, i.e. as “any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: killing members of the group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group; forcibly transferring children of the group to another group”. The Recommendation refers only to penalisation of genocide and not of war crimes and crimes against humanity since these are not necessarily of a racist nature. However, if they do present such a nature, the aggravating circumstance provided for in paragraph 21 of the Recommendation should apply.

Paragraph 20 of the Recommendation

46. Paragraph 20 of the Recommendation provides that instigating, aiding, abetting or attempting to commit any of the criminal offences covered by paragraphs 18 and 19 should be punishable. This recommendation applies only to those offences for which instigating, aiding, abetting or attempting are possible.

Paragraph 21 of the Recommendation

47. According to paragraph 21 of the Recommendation, the racist motivation of the perpetrator of an offence other than those covered by paragraphs 18 and 19 should constitute an aggravating circumstance. Furthermore, the law may penalise common offences but with a racist motivation as specific offences.

Paragraph 22 of the Recommendation

48. According to paragraph 22 of the Recommendation, the law should provide for the criminal liability of legal persons. This liability should come into play when the offence has been committed on behalf of the legal person by any persons, particularly acting as the organ of the legal person (for example, President or Director) or as its representative. Criminal liability of a legal person does not exclude the criminal liability of natural persons. Public authorities may be excluded from criminal liability as legal persons.

Paragraph 23 of the Recommendation

49. According to paragraph 23 of the Recommendation, the law should provide for ancillary or alternative sanctions. Examples of these could include community work, participation in training courses, deprivation of certain civil or political rights (e.g. the right to exercise certain occupations or functions; voting or eligibility rights) or publication of all or part of a sentence. As regards legal persons, the list of possible sanctions could include, besides fines: refusal or cessation of public benefit or aid, disqualification from the practice of commercial activities, placing under judicial supervision, closure of the establishment used for committing the offence, seizure of the material used for committing the offence and the dissolution of the legal person (see on this last point paragraphs 37 and 43 of the present Explanatory Memorandum).

V. Common provisions

Paragraph 24 of the Recommendation

50. According to paragraph 24 of the Recommendation, the law should provide for the establishment of an independent specialised body to combat racism and racial discrimination at national level. The basic principles concerning the statute of such a body, the forms it might take, its functions, responsibilities, administration, functioning and style of operation are set out in ECRI's general policy recommendation no 2 on specialised bodies to combat racism, xenophobia, antisemitism and intolerance at national level.

51. The functions attributed to this body should be provided by law. The Recommendation enumerates a certain number of such functions. Assistance to victims covers provision of general advice to victims and legal assistance, including representation in proceedings before the courts. It also covers assistance in seeking friendly settlement of complaints.
52. As concerns investigation powers, in order that a national specialised body may conduct these effectively, it is essential that the law provides the latter with the requisite powers, subject to the rules of procedure of the national legal order. This includes powers granted in the framework of an investigation, such as requesting the production for inspection and examination of documents and other elements; seizure of documents and other elements for the purpose of making copies or extracts; and questioning persons. The national specialised body should also be entitled to bring cases before the courts and to intervene in legal proceedings as an expert.
53. The functions of the national specialised body should also include monitoring legislation against racism and racial discrimination and control of the conformity of legislation with equality principles. In this respect, the national specialised body should be entitled to formulate recommendations to the executive and legislative authorities on the way in which relevant legislation, regulations or practice may be improved.
54. As concerns awareness-raising of issues of racism and racial discrimination among society and promotion of policies and practices to ensure equal treatment, the national specialised body could run campaigns in collaboration with civil society; train key groups; issue codes of practice; and support and encourage organisations working in the field of combating racism and racial discrimination.
55. In addition to these functions, the national specialised body may be attributed other responsibilities. Moreover, another body could be entrusted with the adjudication of complaints through legally-binding decisions, within the limits prescribed by the law.

Paragraph 25 of the Recommendation

56. The Recommendation provides in its paragraph 25 that organisations such as associations, trade unions and other legal entities with a legitimate interest should be entitled to bring complaints. Such a provision is important, for instance, in cases where a victim is afraid of retaliation. Furthermore, the possibility for such organisations to bring a case of racial discrimination without reference to a specific victim is essential for addressing those cases of discrimination where it is difficult to identify such a victim or cases which affect an indeterminate number of victims.

Paragraph 27 of the Recommendation

57. According to paragraph 27 of the Recommendation, the law should provide protection against retaliation. Such protection should not only be afforded to the person who initiates proceedings or brings the complaint, but should also be extended to those who provide evidence, information or other assistance in connection with the court proceedings or the complaint. Such protection is vital to encourage the victims of racist offences and discrimination to put forward their complaints to the authorities and to encourage witnesses to give evidence. In order to be effective, the legal provisions protecting against retaliation should provide for an appropriate and clear sanction. This might include the possibility of an injunction order to stop the retaliatory acts and/or to compensate victims of such acts.

