

OPINION

OF THE COMMISSIONER FOR HUMAN RIGHTS,

MR. ALVARO GIL-ROBLES,

on the creation of a national body for counteracting discrimination in Poland

Introduction

1. During his visit to Poland in November 2002, the Commissioner for Human Rights of the Council of Europe paid considerable attention to the issues of racial and gender discrimination both in his discussions with national authorities and with representatives of civil society. His subsequent report on the human rights situation in Poland identified a number of areas in which legislative and institutional improvements could be made.

2. Foremost amongst these concerns were the need for a comprehensive gender equality Act and for a reinforcement of the institutional framework for addressing both gender and racial discrimination. Whilst a draft Law on the Equal Status of Women and Men is currently before Parliament, progress in respect of the establishment of effective anti-discrimination institutions has been slower, despite the passing of the December 31st 2003 deadline for the implementation of EU Directives 2000/43, on the implementation of the principle of equal treatment between persons irrespective of racial or ethnic origin. The implementation deadline for Directive 2002/73, on the implementation of the principle of equal treatment for women and men, which requires the creation of a similar body for the prevention of gender discrimination, has been set for July 19th 2005.

3. The responsibility for drafting proposals in these areas has been handed to the Government Plenipotentiary for the Equal Status of Women and Men, who has submitted a number of proposals over the last year. The Committee of the Council of Ministers has not yet approved any of these proposals thereby delaying the preparation of draft legislation in this area.

4. The latest proposals prepared for the consideration of the Council of Ministers remain at the stage of guidelines. It is not the purpose of this opinion to offer a comprehensive analysis of draft proposals. It is rather the purpose to stress, firstly, the importance of the rapid establishment of a long overdue institutional framework, and broadly to identify a number of features, particularly regarding the independence of any body established, which, in the Commissioner's view, merit special attention.

5. The Commissioner submits this opinion in accordance with Articles 5 (1) and 8 (1) of Resolution (99) 50 of the Committee of Ministers on the Commissioner for Human Rights. Article 5(1) states that "the Commissioner may act on any information relevant to the Commissioner's functions", including "information addressed to the Commissioner by governments, national parliaments, national ombudsmen or similar institutions in the field of human rights, individuals and organisations." In accordance with Article 8(1) "the Commissioner may issue recommendations, opinions and reports." The Commissioner is required by Article 3(d) to "facilitate the activities of national ombudsmen or similar institutions in the field of human rights".

I. The creation of single, comprehensive national anti-discrimination body

6. Whilst earlier proposals foresaw the creation of separate institutions for the promotion of gender and racial equality, the current preference of the Polish Government would appear to be for a single institution that would cover all forms of discrimination, including, therefore, gender, race, disability, age, religious belief and sexual orientation. A single institution has, indeed, many advantages beyond the considerations of cost. The expertise required in different anti-discrimination fields is often similar; a single institution is likely to benefit from a clearer strategy and greater public profile and influence. A single institution will also avoid problems relating to overlapping mandates. It is important, however, that internal responsibilities in the respective areas of anti-discrimination are clearly demarcated so as to avoid the impression of the marginalisation of the promotion and protection of the rights of certain groups.

7. Attention should also be paid to the competences of existing human rights structures and the specific needs of each country when establishing anti-discrimination bodies. Indeed, the functions of an anti-discrimination body can be fulfilled either through the establishment of a separate specialised body or by incorporating these functions in the mandate of an existing national institution with a general human rights mandate.

8. With respect to Poland the only existing human rights institution capable of incorporating these functions is the national Ombudsman, or Human Rights Commissioner. It would, however, not be advisable to add many of the functions typically associated with anti-discrimination bodies to the mandate of the Polish Ombudsman: the provision of legal assistance, the possibility of mediating in respect of disputes in the private sector and the elaboration of training programmes, to list but some of these functions, would require significant modifications to the mandate of the Ombudsman that would risk unsettling the institution's primary role, without bringing additional benefits.

9. A separate institution would therefore appear to be most appropriate. Care should, however, be taken to avoid possible conflicts of interest arising from overlapping mandates in the drafting of any anti-discrimination body's founding statute.

II. The competences of an anti-discrimination institution

10. The EU Racial and Gender Equality Directives, 2000/43 and 2002/73, require Governments to confer at least the following functions on national anti-discrimination institutions: providing independent assistance to victims of discrimination, conducting independent surveys, publishing independent reports and making recommendations on issues concerning discrimination. ECRI's General Policy Recommendations No.s 2 and 7, suggest that national institutions for combating racism be attributed with the following additional functions: educating the public and training government agencies on issues related to discrimination; reviewing the contents and effects of existing and planned national legislation and policies in the light of relevant international standards; advising public authorities at all levels on issues related to discrimination; handling complaints concerning alleged cases of discrimination with a view to resolving them through mediation or, possibly, through the power to impose binding settlements on the parties.

11. The Commissioner welcomes the fact that the Polish Government has indicated a willingness to accommodate all the salient, indeed, vital, additional functions suggested in ECRI's Recommendations, with the exception of quasi-judicial powers.

III. The independence of national anti-discrimination bodies

12. Whilst the EU Directives require that bodies created to combat discrimination are mandated to conduct independent studies and surveys and provide independent legal assistance, and permit the integration of the anti-discrimination into existing national human rights structures, they do not explicitly require, though they do not preclude, the creation of institutions whose independence is established by law. It might be noted, however, that the important qualifications concerning the independence of all three of the activities required by the Directives entails, at the very least, structures and guarantees for ensuring such independence. ECRI's General Policy Recommendations No.s 2 and 7, in contrast, explicitly encourages the creation, by statute, of independent specialised bodies to combat racism and racial discrimination at the national level.

13. From his discussions with the Polish authorities the Commissioner understood that there is still some reluctance to create an institution both structurally and statutorily independent from Government. Recently suggested alternatives include the possibility of establishing a single, separate body incorporated into the administrative and decision making apparatus of the Government, under the authority of an individual nominated by the Prime Minister, with the rank of Secretary State and the authority to sit in the Council of Ministers. The creation within an existing Ministry of a separate section responsible for fulfilling the functions listed above has also been proposed.

14. Whilst the latter proposal would evidently fail to satisfy the high expectations for the anticipated body, it is indeed difficult to see how *any* body incorporated into the structure of government, and consequently lacking the necessary independence, could effectively carry out the important functions expected of an anti-discrimination institution. Indeed the experience of a number of countries to have adopted this model tends rather to this conclusion.

15. The provision of independent reviews of government policy and the practises of state institutions, the provision of opinions on draft laws, mediation functions, legal assistance, awareness raising programmes and the provision of a focal point for the concerns of relevant civil society organisations are all functions that are likely to prove less effective when concentrated in an organ of Government than they would be if conferred on a properly independent institution.

16. One of the most important functions of anti-discrimination institutions is to act as a public watchdog. The lack of formal independence of a governmental body will, however, inevitably result in questions being raised as to the independence of its reporting on government policy and administrative practises, even where such reviews are commissioned from outside sources. This problem is evidently acute where the individual responsible for running the body is nominated by the Prime Minister and is a member of the Government. The willingness and ability of the organ to address the policies and practises of fellow ministries would likely be compromised. Also, the effect of the head of the institution's tenure being conditional on both the internal politics of Government and on the swings in parliamentary elections risks undermining the continuity necessary for the satisfactory fulfilment of the post's functions.

17. Such a lack of confidence and continuity may negatively affect relations with relevant NGOs and civil society organisations, the support and encouragement of which should form a key part of any such institution's mandate. There is a clear risk, therefore, that governmental bodies end up falling between two stools: being perceived within Government as too obstructive and by civil society as too tentative.

18. Mediation conducted under the auspices of a governmental structure also raises a number of difficulties. Even without the authority to impose binding settlements, it is difficult to see how a government body could effectively mediate in respect of conflicts involving public structures as one of the parties. A government structure would find itself mediating in respect of cases in which one of the parties was under the authority of the Government that the institution was itself part of. Even elaborate formula for guaranteeing the independence of the mediators are unlikely to dispel the suspicion of possible conflicts of interest, undermining from the outset the very purpose of mediation. It is equally difficult to imagine effective mediation in the private sphere, where there is likely to be reluctance on the part of the defending entity to engage government structures in the kind of dialogue necessary for the success of mediated settlements. Moreover, the proper conduct of mediation procedures entails certain disclosure obligations on the parties involved, which would be difficult to attribute to an organ of Government.

19. The mediation function is an example of a service that anti-discrimination institutions are intended to provide to individual citizens. The provision of legal assistance is another, as are general awareness-raising programmes. These services depend on the confidence ordinary citizens have in the institution's functions; including them in the structure of government risks undermining their credibility.

IV. The co-existence of Governmental and Independent Bodies

20. Effective anti-discrimination institutions play two essential roles. They provide, firstly, as noted above, certain valuable services to individual citizens and organisations. They also offer a source of independent expertise and advise on government policy and administrative practises, capable of making recommendations and reviewing draft legislation. This second function naturally requires that anti-discrimination institutions enjoy close contacts with, and the confidence of, Governments. There is some danger, however, that the necessary proximity to Government will give rise to a temptation to subsume this second role within the functions of Government, and, having done so, to place even the first role within the same Government structure. To incorporate these roles within the structure of the Government itself would, however, run counter to the very purposes that such institutions are supposed to serve.

21. It is, indeed, the case that there is a need at the governmental level for a structure at once able to feed anti-discrimination concerns into the decision-making process and to co-ordinate and supervise the responses of different Ministries to anti-discrimination concerns and policies. Such coordinating structures can, however, easily and appropriately be established either within a given Ministry, such as, for instance, the Ministry of Labour and Social Affairs or its equivalent, or at an inter-Ministerial level.

22. There is room, however, indeed a need, for two separate structures; one governmental, for the purposes outlined above, and one independent, for the broader supervisory and service-providing functions. The independent body would be able to offer independent expertise and, at the same time, a useful interface between national administrations, civil society and individual citizens. It would, of course, have to establish an effective working relationship with the Government and public administration, and might do so in particular through cooperation the relevant governmental organ.

23. A final consideration might arise in respect of the cost of an independent structure. It may appear as though the co-existence of a coordinating body at the Governmental level and an independent statutory body would entail considerable additional expenditure. However, whilst an independent institution would, indeed, require funding commensurate with its tasks, there is no reason to believe that its personnel, office and operating costs would exceed those that might be anticipated for a governmental equivalent. Indeed, it might even operate on less if it were able effectively to cooperate with civil society and other human rights institutions. At the same time, a streamlined coordinating governmental structure need not nearly be so large and might easily be established out of existing administrative resources.