



# **ECRI REPORT ON AUSTRIA**

## **(fourth monitoring cycle)**

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## Foreword

The European Commission against Racism and Intolerance (ECRI) was established by the Council of Europe. It is an independent human rights monitoring body specialised in questions relating to racism and intolerance. It is composed of independent and impartial members, who are appointed on the basis of their moral authority and recognised expertise in dealing with racism, xenophobia, antisemitism and intolerance.

In the framework of its statutory activities, ECRI conducts country-by-country monitoring work, which analyses the situation in each of the member States regarding racism and intolerance and draws up suggestions and proposals for dealing with the problems identified.

ECRI's country-by-country monitoring deals with all member States of the Council of Europe on an equal footing. The work is taking place in 5 year cycles, covering 9/10 countries per year. The reports of the first round were completed at the end of 1998, those of the second round at the end of 2002, and those of the third round at the end of the year 2007. Work on the fourth round reports started in January 2008.

The working methods for the preparation of the reports involve documentary analyses, a contact visit in the country concerned, and then a confidential dialogue with the national authorities.

ECRI's reports are not the result of inquiries or testimonial evidences. They are analyses based on a great deal of information gathered from a wide variety of sources. Documentary studies are based on an important number of national and international written sources. The in situ visit allows for meeting directly the concerned circles (governmental and non-governmental) with a view to gathering detailed information. The process of confidential dialogue with the national authorities allows the latter to provide, if they consider it necessary, comments on the draft report, with a view to correcting any possible factual errors which the report might contain. At the end of the dialogue, the national authorities may request, if they so wish, that their viewpoints be appended to the final report of ECRI.

The fourth round country-by-country reports focus on implementation and evaluation. They examine the extent to which ECRI's main recommendations from previous reports have been followed and include an evaluation of policies adopted and measures taken. These reports also contain an analysis of new developments in the country in question.

Priority implementation is requested for a number of specific recommendations chosen from those made in the new report of the fourth round. No later than two years following the publication of this report, ECRI will implement a process of interim follow-up concerning these specific recommendations.

**The following report was drawn up by ECRI under its own and full responsibility. It covers the situation up to 3 July 2009 and any development subsequent to this date is not covered in the following analysis nor taken into account in the conclusions and proposals made by ECRI.**



## SUMMARY

**Since the publication of ECRI's third report on Austria on 15 February 2005, progress has been achieved in a number of areas covered by the report.**

There have been major changes on the legislative front with the adoption by the *Länder* in 2005 and 2006 of the Equal Treatment Acts, which complement the federal acts that came into force in 2004, thus completing the process of transposing Directives 2000/43/EC<sup>1</sup> and 2000/78/EC<sup>2</sup> into Austrian law. At federal level, the new legislation prohibits discrimination on the basis of "ethnicity" in the areas of employment, social protection, social benefits, education, access to goods and services and the provision of goods and services available to the public, including housing, and, in the field of employment, discrimination on the grounds of beliefs or religion. It states that differences in treatment based on citizenship are legitimate only in matters relating to the admission, residence and status of stateless persons and non-EU citizens. Discrimination, both direct and indirect, harassment, instruction to discriminate and retaliation are prohibited. Positive action, on the other hand, is permitted.

As well as judicial remedies, victims can turn to non-judicial, specialised bodies: the new federal legislation widens the mandate of the Commission for Equal Treatment and the Office of the Ombudspersons for Equal Treatment and establishes a separate body to deal with discrimination in employment in the federal public sector. At provincial level, each of the nine *Länder* has, in the areas within their competence, either widened the mandate of existing bodies or set up new ones.

The new federal legislation also makes it an administrative offence to publish discriminatory job advertisements.

In the field of education, the authorities have taken steps to address the disadvantaged educational position of non-Austrian children and have continued their efforts to implement the principle of intercultural education. In the field of employment, legislative amendments which came into force in January 2006 extend the right to stand for election to the Chamber of Labour (hitherto reserved for Austrian citizens) and works councils (hitherto reserved for EEA citizens) to all employees, irrespective of their nationality. In the field of housing, long-term resident third country nationals, in all the *Länder*, are now eligible for social housing on the same terms as Austrian citizens.

Generally speaking, the situation of the Roma in Austria has improved in recent years, including in terms of their exposure to racism and discrimination.

As regards migrants, people who came to Austria for the purpose of family reunification can now obtain a permit entitling them to work after one year of residence. There have also been moves to facilitate integration, such as the setting-up in Vienna of a special department within the municipal council. At the same time, the conclusion of an agreement between the federal government and the *Länder* and the adoption of new legislation have paved the way for an improvement in the care provision for asylum seekers without resources, and unaccompanied minor asylum seekers in principle receive specialised care and are the subject of appropriate monitoring.

Lastly, efforts to raise awareness and provide training for those working in the criminal justice system in the statutory provisions and issues relating to racism and xenophobia have been vigorously pursued, and in Vienna there have been encouraging moves to recruit police officers of immigrant background.

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<sup>1</sup> Implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

<sup>2</sup> Establishing a general framework for equal treatment in employment and occupation.

**ECRI welcomes these positive developments in Austria. Despite the progress made, however, some points continue to give cause for concern.**

With regard firstly to legal standards, the report notes that Austria is not a party to Protocol No. 12 to the European Convention on Human Rights, which lays down a general prohibition of discrimination. In addition, naturalisation remains, in principle, subject to renunciation of previous citizenship and, except for those which come under the Prohibition Statute<sup>3</sup>, the criminal law provisions against racism and intolerance are rarely applied; the same is true of Austria's criminal administrative law. The provision which requires employers, when making staff cuts, to dismiss foreign workers first (Section 8(2) of Act No. 218/1975) has not been repealed. Furthermore, the new federal legislation on equal treatment makes an inappropriate distinction between employment and other fields and contains a number of gaps. The specialised bodies responsible for combating discrimination lack the kind of structural independence required to command full public confidence and, particularly in the case of the Office of the Ombudspersons for Equal Treatment, do not have the resources they need to carry out their tasks. Overall, the fragmented nature of the new anti-discrimination legislation and the number of institutions and procedures involved renders the Austrian system complex in a way that is liable to alienate the public and undermine its effectiveness.

In the field of education, non-Austrian children continue to suffer a disadvantage compared with Austrian children; in particular, they are over-represented in schools for pupils with special needs. There are still major disparities between citizens and non-citizens in the employment sector, and it has also been found that foreign nationals and visible minorities are discriminated against in access to housing and services intended for the public. There are no legal provision prohibiting discriminatory housing advertisement.

Black people and Muslims are especially vulnerable to racism and discrimination and the Roma, who continue to suffer a socio-economic disadvantage compared with the rest of the population, still face serious difficulties. Antisemitic prejudice remains very much alive in Austria and there are reports of Jewish, and also Muslim, memorials, cemeteries and places of worship being desecrated. Migrants still have to contend with a restrictive family reunification policy based on a system of annual quotas, and the "integration contract" which they are required to fulfil in order to obtain a long-term residence permit has a coercive element that would be better replaced by incentives and measures to promote integration. Asylum seekers, meanwhile, are faced with a negative climate generated, to a large extent, by certain politicians and media, and have access to only limited legal support.

More generally, the issue of racism and xenophobia in political discourse and in certain sections of the media is all the more worrying as the authorities do not appear to have taken any meaningful steps to find solutions.

The response of the criminal justice system to allegations of racist or discriminatory behaviour on the part of the police continues to fall short, in that there is still no fully independent investigation body and, although the authorities are giving the matter serious attention, training for law enforcement officials in non-discrimination and policing in a multicultural society could stand to be improved.

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<sup>3</sup> See paragraph 18 below

**In this report, ECRI asks the Austrian authorities to take further steps in a number of areas; it makes a series of recommendations, including the following.**

ECRI strongly recommends that the Austrian authorities ratify *inter alia* Protocol No. 12 to the European Convention on Human Rights. It also recommends that they adopt a more flexible approach to dual nationality and repeal Section 8(2) of Act No. 218/1975.

ECRI recommends that the authorities take steps to ensure that the criminal administrative law provisions for combating discrimination are duly applied, and that they make it a criminal administrative offence to publish discriminatory advertisements for housing.

ECRI recommends that the authorities embark on a reform of the equal treatment legislation, with a view to enhancing protection against racial discrimination and simplifying and harmonising the standards, legal mechanisms and institutions involved.

ECRI recommends that the authorities take urgent steps to provide more financial and human resources to the Ombudsperson for Equal Treatment in the field of employment, irrespective of ethnicity, religion and beliefs, age and sexual orientation, and to the Ombudsperson for Equal Treatment, irrespective of ethnicity and gender, in other areas, so as to enable them to fully perform all the tasks that have been assigned to them. It further recommends that the requisite measures be taken forthwith to ensure that their full independence is enshrined in law and in practice, and to enable them to apply to the courts whenever they deem necessary.\*

ECRI recommends that the authorities evaluate as soon as possible the effectiveness of the measures taken to rectify the disadvantaged educational position of non-Austrian children and consider, if necessary, a more radical reform of the school education system. It reiterates its recommendations that the authorities take meaningful steps to reduce the disparity between citizens and non-citizens in the field of employment, and carry out research into discriminatory practices and barriers or exclusionary mechanisms in public and private sector housing affecting the housing possibilities of minority groups, in order to inform targeted policy responses.

ECRI recommends that the Austrian authorities abolish the quota system for family reunification and encourages them to adopt a national action plan for integration, based on a two-way approach to integration, with the focus on seeking mutual recognition between the majority population and the minority groups concerned.

ECRI recommends that the Austrian authorities ensure that asylum seekers have access to appropriate legal support throughout the asylum procedure, not least with regard to any detention measures that might be imposed on them.

ECRI strongly recommends that the authorities systematically condemn, in the strongest possible terms, all forms of racism and xenophobia in political discourse, and reiterates its call for the adoption of *ad hoc* measures to combat the use by political parties or their representatives of racially inflammatory or xenophobic discourse.

ECRI recommends that the authorities promote the reestablishment of a regulatory mechanism for the press, compatible with the principle of media independence, that would make it possible to enforce compliance with ethical standards and rules of conduct including the refusal to promote, in any form, racism, xenophobia, antisemitism or intolerance. It suggests that the authorities consider enacting legislation, if there is no other option.\*

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\* The recommendations in this paragraph will be subject to a process of interim follow-up by ECRI no later than two years after the publication of this report.

ECRI reiterates its recommendation that the authorities ameliorate the response of the criminal justice system and of the persons responsible for internal control within the different police units to allegations of racist or discriminatory behaviour on the part of the police. It reiterates in particular its call for the establishment of a fully independent body with powers to investigate individual complaints of human rights violations on the part of the police, including acts of racism and racial discrimination.\*

ECRI reiterates its strong recommendation that the authorities introduce a comprehensive and coherent data collection system that would make it possible to assess the situation with regard to the different minority groups in Austria and to determine the scale of any manifestations of racism and direct and indirect racial discrimination. It further recommends that they develop and implement, in close consultation with civil society, a long-term national strategy for combating racism and intolerance, including a comprehensive, long-term information and awareness campaign against racism and intolerance.

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\* The recommendations in this paragraph will be subject to a process of interim follow-up by ECRI no later than two years after the publication of this report.

## FINDINGS AND RECOMMENDATIONS

### I. Existence and implementation of legal provisions

#### International legal instruments

1. In its third report on Austria, ECRI recommended that the Austrian authorities ratify Protocol No. 12 to the European Convention on Human Rights (in force since 1 April 2005) without delay.
2. Austria has not ratified this instrument. As in the third monitoring cycle, the Austrian authorities have stated that their position in this matter stems from a concern to avoid adding to the workload of the European Court of Human Rights. They have further indicated that, by the same token, they do not in any case intend to ratify Protocol No. 12 as long as Protocol No. 14 to the European Convention on Human Rights (ratified by Austria on 23 January 2006), which amends the control system of the Convention with a view to maintaining and improving its long-term effectiveness, has not entered into force.
3. ECRI firmly reiterates that Protocol No. 12 is one of the most important international instruments for combating racial discrimination, and that its ratification by Austria would make it possible to combat this phenomenon more effectively at national level.
4. ECRI strongly recommends that Austria ratify Protocol No. 12 to the European Convention on Human Rights.
5. In its third report, as in its second, ECRI called on Austria to ratify the Revised European Social Charter and the UNESCO Convention against Discrimination in Education, and to sign and ratify the Convention on the Participation of Foreigners in Public Life at Local Level, recommending that the Austrian authorities apply the provisions contained in Chapters A, B and C of this last instrument. ECRI further recommended that the Austrian authorities ratify the Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems, and that they sign and ratify the United Nations Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.
6. The Austrian authorities have stated that the process of ratifying the Revised Social Charter is ongoing, that the relevant Ministries, the *Länder* and the social partners are currently examining which measures have to be adopted for its implementation, and that further steps will be taken in the light of this examination. They added that Austria intends to sign and ratify the UNESCO Convention against Discrimination in Education. They have also stated that they are going to consider ratifying the Additional Protocol to the Convention on Cybercrime in connection with the transposition of the EU Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law. They have made it clear, however, that they do not intend to sign the Convention on Participation of Foreigners in Public Life at Local Level, and that it has been decided not to sign the United Nations Convention on the Protection of the Rights of All Migrant Workers and Members of their Families; in ECRI's opinion, this is regrettable as both of these conventions have the potential to play an important role in combating racism and discrimination.

7. ECRI strongly encourages Austria to pursue and conclude, as soon as possible, the process of ratifying the Revised Social Charter, to sign and ratify the UNESCO Convention against Discrimination in Education and to ratify the Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems.
8. ECRI strongly recommends that Austria sign and ratify the Convention on the Participation of Foreigners in Public Life at Local Level and the United Nations Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.

### **Constitutional provisions and other basic provisions**

9. Made up of various laws and special provisions, the Austrian Constitution includes a number of equality clauses of varying scope: Article 14 of the European Convention on Human Rights, which merely prohibits discrimination in the enjoyment of the rights and freedoms recognised by this same Convention and its Additional Protocols (which have constitutional status); Article 2 of the Basic Law of the State (*Staatsgrundgesetz*) and Section 7 of the Constitutional Federal Act of 1 October 1920, as amended in 1929 (*Bundesverfassungsgesetz*), which establish the general principle that “all citizens” are equal before the law but do not specifically mention the racial criterion; Articles 66 and 67 of the Treaty of Saint Germain of 1919 which, in common with the other two texts, guarantees equality to “Austrian citizens”; Section 1 of the Act of 3 July 1973 implementing the International Convention on the Elimination of All Forms of Racial Discrimination, paragraph 1 of which prohibits racial discrimination in any form, stating that “legislation and implementing measures must refrain from making distinctions on the sole basis [*dem alleinigen Grund*] of race, skin colour, descent or national or ethnic origin”, and paragraph 2 of which states that this provision “shall not prevent Austrian citizens from being granted special rights or being subjected to special obligations insofar as this is not contrary to Article 14 of the European Convention on Human Rights”.
10. Although the Austrian authorities had informed ECRI that the Constitutional Court had interpreted this last provision as prohibiting discrimination in a general way and as also covering differential treatment between Austrian citizens and non-citizens, ECRI was not entirely convinced that federal constitutional law unambiguously enshrined the principle of equal treatment. Accordingly, in its third report, it underlined the importance of enhancing protection against discrimination on the basis of nationality and of avoiding the use of restrictive expressions such as “difference of treatment solely or exclusively based on” [*dem alleinigen Grund*] when defining discrimination; noting that an “Austrian Convention” (*Österreich-Konvent*) had been set up to consolidate all the constitutional provisions in a single document, it invited the Austrian authorities to take this opportunity to review the existing constitutional provisions against racism and racial discrimination in the light of its General Policy Recommendation No. 7.
11. The Austrian authorities have informed ECRI that the “Austrian Convention” submitted its report and proposals to Parliament in 2005, but that the plans to consolidate the country’s constitutional texts have so far been unsuccessful owing to lack of agreement between the ruling parties. ECRI remains convinced of the need – notwithstanding the clarification provided by the case-law of the Constitutional Court – to include in the Constitution a clause enshrining in unambiguous terms the principle of equal treatment, the state’s commitment to

promoting equality, and the right of individuals to be free from discrimination on grounds such as race, colour, language, religion, nationality and national or ethnic origin.

12. ECRI reiterates its recommendation that the Austrian authorities revise their constitutional provisions against racism and racial discrimination in the light of its General Policy Recommendation No. 7 on national legislation to combat racism and racial discrimination and, in particular, that protection against discrimination on the basis of nationality be enhanced.

### **Citizenship legislation**

13. In its third report, ECRI noted that a large number of persons were living in Austria without Austrian citizenship even though they satisfied the requirements for naturalisation. Considering the requirement to renounce previous citizenship in order to obtain Austrian citizenship to be a particularly important factor in this context, ECRI recommended that the Austrian authorities initiate a public debate with a view to adopting a more flexible approach to dual nationality, especially for persons born in Austria.
14. The Austrian authorities have given no indication that such a debate is under way. Nor have they suggested that they, for one, are willing to consider adopting a more flexible approach in this matter. If anything, indeed, the general trend in recent years has been towards a tightening of the statutory requirements for obtaining Austrian citizenship through naturalisation (resulting in a sharp decline in the number of naturalisations: 35,000 in 2005, 26,256 in 2006 and 14,041 in 2007<sup>4</sup>).
15. The Austrian authorities have pointed out that the requirement to renounce previous citizenship in order to obtain Austrian citizenship is designed to restrict the possibilities for multiple nationality, in keeping with Austria's commitments under the Convention of 6 May 1963 on the Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality. This Convention states *inter alia* that nationals of the Contracting Parties who are of full age and who acquire the nationality of another Party shall lose their former nationality and cannot be authorised to retain their former nationality (Chapter I, Article 1). ECRI observes, however, that in the second Protocol to this Convention, opened for signature in Strasbourg on 2 February 1993 (and which has not been signed by Austria), this principle is balanced, among other things, against the need for migrants who have settled permanently in Council of Europe member states to complete their integration by acquiring the nationality of the host state. It notes, *inter alia*, that where a national of a Contracting Party acquires the nationality of another Contracting Party on whose territory either he was born and is resident, or has been ordinarily resident for a period of time beginning before the age of 18, each of these Parties may provide that he retains the nationality of origin. ECRI further notes that the Parties to the Convention of 6 May 1963 – of which Austria is one – concluded, in 2007, an agreement on the interpretation of Article 12, paragraph 2, under which any Contracting Party may at any time, in so far as it is concerned, denounce Chapter I of the Convention on the Reduction of Cases of Multiple Nationality. ECRI sees this not only as evidence of the current trend in European states towards a more flexible approach to the issue of dual nationality, but also as confirmation that it remains open to Austria to adopt such an approach, in keeping, moreover, with the European Convention on Nationality (ratified by Austria on 6 November 1997) which, in particular, leaves it to internal law to determine whether the acquisition of its nationality is subject to renunciation of the nationality of origin.

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<sup>4</sup> Federal Chancellery, News from Austria, No. 04/08.

16. ECRI reiterates its view that the requirement to renounce the nationality of origin in order to obtain Austrian nationality carries with it the risk that many non-citizens who are otherwise eligible to apply for naturalisation will be deterred from doing so and consequently deprived of the opportunity to thus support their integration process in Austria.
17. ECRI recommends that the Austrian authorities review their approach to dual nationality, in particular by allowing persons who arrived in Austria before the age of 18 or who were born there to acquire Austrian citizenship without having to renounce their nationality of origin.

### **Criminal law provisions against racism**

18. Section 283 of the Criminal Code punishes incitement – in a manner likely to jeopardise public order – to hostile action against a church or religious community established in the country or a group defined by their affiliation to such a church or religious community, or to a race, nation, ethnic group or state (paragraph 1); it also punishes publicly agitating against such a group or insulting or disparaging it, in a manner that violates human dignity (paragraph 2). At the same time, under Section 115 of the same code, it is an offence to insult, in public or in the presence of several others, mock, injure or threaten to injure a third person; Section 117(3) states that such offences shall be prosecuted *ex officio* by the Public Prosecutor (*Ermächtigungdelikt*), subject to the victim's consent, if they are committed by reason of the injured party's membership of one of the groups mentioned in Section 283(1) and if there has been a violation of human dignity. In addition, Section 33(5) of the Criminal Code establishes racist and xenophobic motivation as an aggravating circumstance for all crimes. The Prohibition Statute (*Verbotsgesetz*) and the Insignia Act (*Abzeichengesetz*) contain other relevant provisions, such as making it an offence to set up, support or promote Nazi organisations aimed at undermining the sovereignty of the state or jeopardising public order, to participate in such organisations, to deny or trivialise Nazi crimes using means accessible to several persons, to disseminate printed or other material of a racist nature, to wear in public Nazi insignia or to distribute them, etc.
19. In its third report, noting that 2003 had seen a marked increase in the number of offences and charges brought under the Prohibition Statute, most of the offences having reportedly been committed by juveniles and young adults belonging to the skinhead movement, ECRI encouraged the Austrian authorities to pursue their efforts to counter far-right groups or groups inspired by National Socialist ideology and their activities. It appears from the available data and the information supplied to ECRI by civil society and the Austrian authorities that the authorities are continuing to address this issue with due diligence by rigorously implementing the Prohibition Statute, and that there has been no significant increase in the activities of these organisations in Austria in recent years.
20. ECRI further noted in its third report that Section 283 of the Criminal Code was rarely applied by the courts. It conceded that this might be partly due to the fact that, where it was linked with National Socialist ideas, behaviour that constituted an offence under Section 283 was in fact prosecuted under the Prohibition Statute. Another reason, in its view, was that in order for Section 283(1) to be applied, the act of incitement must be likely to jeopardise public order and target a specific group, and that the elements constituting the offences contained in Section 283 were not clearly defined, which resulted in them being construed very narrowly in case-law. ECRI accordingly recommended that the Austrian authorities keep the effectiveness of the existing criminal law provisions against racism and xenophobia under close review and, in particular, that the legislation aimed at countering forms of racism and xenophobia other than those linked to

the above-mentioned organisations be complemented or fine-tuned, with attention being drawn to ECRI's General Policy Recommendation No. 7. ECRI regrets to note that the criminal law provisions in question – which do not appear to have been applied any more extensively in recent years – have remained unchanged, despite, moreover, similar requests not only from civil society but also from the Committee on the Elimination of Racial Discrimination<sup>5</sup>. It is hopeful, however, that they will be suitably revised in the light of the EU Council Framework Decision referred to above.

21. ECRI recommends that the Austrian authorities pursue their efforts to combat far-right groups or groups inspired by National Socialist ideology and their activities.
22. ECRI recommends that the authorities take into account its General Policy Recommendation No. 7 on national legislation to combat racism and racial discrimination when incorporating into Austrian law the obligations arising from the EU Council Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law (2008/913/JAI).
23. In its third report, ECRI recommended that the Austrian authorities collect comprehensive statistical data on the implementation of all criminal law provisions against racism and intolerance and, in particular, Section 33(5) of the Criminal Code. ECRI further encouraged them to step up their efforts to train all those working in the criminal justice system in the existing provisions against racism and xenophobia and to continue raising these persons' awareness of the need to actively counter all such manifestations.
24. ECRI notes that the official statistics still cover only offences under the Prohibition Statute or Section 283 of the Criminal Code; racist insults as such (Sections 115 and 117(3) of the Criminal Code combined) and cases involving the application of Section 33(5) of the Criminal Code are not listed separately. Also, unless there is a link with the activities of extremist groups, the statistics do not provide any information on who committed these offences, and give only a partial picture of who the victims are (the offences covered are divided into five categories: racist, antisemitic, xenophobic and, since 2007, anti-Muslim and "others"). The result is that, at the time of writing, the authorities still had no official statistical system that would make it possible to carry out a comprehensive assessment of the effectiveness of the Austrian criminal justice system in combating racism. It would appear that things are changing, however. The Austrian authorities have informed ECRI that a working group has been set up in the Ministry of Justice to develop a more victim-oriented system of collecting criminal justice data, that would include data on the racist or xenophobic motivation of any offences. The working group is due to present its initial findings at the end of 2009 and the new arrangements could come into effect in 2010. Apparently, too, a directive issued by the Minister for the Interior in 2006 calls on police officers to consider the possible racist, xenophobic or antisemitic nature of all offences reported to them and to immediately inform the Federal Agency for State Protection and Counter-Terrorism (*Landesamt für Verfassungsschutz und Terrorismusbekämpfung*). Also, since January 2009, prosecutors have reportedly been instructed to inform the Ministry of Justice of any cases being handled by them which might come under Section 33(5) of the Criminal Code.
25. As regards awareness-raising and training for those working in the criminal justice system, the Austrian authorities have pointed out that as part of their initial training, police officers are now required to complete a compulsory 56-hour module on fundamental rights, one of the aims of which is to sensitise them to diversity and discrimination issues. The trainees are further required to attend a

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<sup>5</sup> CERD/AUT/CO/17, § 15

3-day seminar on eliminating prejudice, including notably ethnic prejudice. Serving officers can also attend the seminar as part of their on-going training. By the end of 2008, some 4,500 law enforcement officials had participated in training of this kind, i.e. more than a fifth of the total number. There are also other optional training opportunities for serving officers, under the programme entitled "policing in a multiethnic society" (*Polizeiliches Handeln in einer multiethnischen Gesellschaft*), for example. The Austrian authorities have further indicated, *inter alia*, that as part of their basic training, judges and prosecutors are required to attend not only seminars on combating racism and discrimination but also, since 2008, a 3-day course on fundamental rights. In addition, serving judges and prosecutors have access to optional on-going training in the form of seminars on a wide range of topics, including combating discrimination. In 2007, "Judges' week" (*RichterInnenwoche*), a major annual gathering of the legal professions, focused on issues relating to fundamental rights, including non-discrimination, and in 2008 there were numerous seminars to commemorate the events of 1938. Judges and prosecutors also have the opportunity to attend training courses on racism and discrimination run by bodies such as the European Judicial Training Network (EJTN) and the Academy of European Law (ERA).

26. ECRI is pleased to note the thoroughness with which this matter is being addressed in Austria. Referring however to its General Policy Recommendations No. 1 on combating racism, xenophobia, antisemitism and intolerance and No. 11 on combating racism and racial discrimination in policing, it wishes to emphasise how important it is that racist and xenophobic offences should actually be prosecuted. With regard specifically to Section 33(5) of the Criminal Code, it has been informed that this provision is very rarely applied, a fact not disputed by the Austrian authorities. Indeed, no court decision implementing this provision has been noted. According to some NGOs, this is due to the fact that racist and xenophobic motives are not given serious consideration at any stage in the procedure: either by the police when recording complaints – despite the above-mentioned 2006 directive – or later on, by the public prosecutor's office and the trial courts. This tends to support the view that the efforts to raise awareness and train those working in the criminal justice system in action against racism, xenophobia and discrimination and in the application of the relevant statutory provisions need to be stepped up.
27. ECRI encourages the Austrian authorities to press ahead with the reform of the system of collecting statistical data on the implementation of the criminal law provisions against racism and intolerance; it recommends that they extend it to include all incidents perceived as being racist by the victim or any other person – including in particular incidents which might constitute an offence under Section 33(5) of the Criminal Code – and provide for the collection of information not only on charges brought, convictions and acquittals but also on the complaints filed, whether or not they lead to prosecution.
28. ECRI encourages the authorities to pursue and further develop the activities to raise awareness among those working in the criminal justice system of the need to counter racism, xenophobia, antisemitism and intolerance to provide them with training in this area. It recommends that such programmes be made a compulsory part of on-going training, and that special emphasis be placed on awareness-raising and training in the implementation of the relevant criminal law provisions.

## Administrative law, civil law and anti-discrimination bodies

29. In its third report, ECRI recommended *inter alia* that the Austrian authorities adopt civil and administrative anti-discrimination legislation in all key fields of public life and set up a specialised body to combat racism and racial discrimination. Since then, there has been a marked improvement in the situation, with the transposition into Austrian law of Directives 2000/43/EC<sup>6</sup> and 2000/78/EC<sup>7</sup>. As regards the areas covered by ECRI, the new federal legislation consists of the following acts, which came into force on 1 July 2004: the (new) Equal Treatment Act (*Gleichbehandlungsgesetz*), on discrimination on the basis of “ethnicity” (*ethnische Zugehörigkeit*) and, in the field of employment only (excluding the public sector), on the basis of religion or beliefs, age or sexual orientation; the “federal” Equal Treatment Act (*Bundes-Gleichbehandlungsgesetz*), on discrimination based on gender, ethnicity, religion or beliefs, age or sexual orientation in the context of employment of federal civil servants; the Commission for Equal Treatment and the Office of the Ombudspersons for Equal Treatment Act (*Bundesgesetz über die Gleichbehandlungskommission und die Gleichbehandlungsanwaltschaft*). By March 2006, moreover, the nine *Länder* had adopted the necessary equal treatment legislation to complement the transposition of the directives, in the areas within their competence<sup>8</sup>. Some of the laws enacted are more ambitious than those adopted at federal level (basically in that they extend the scope of the protection against discrimination on non-ethnic grounds to areas not related to employment).

### - Criminal administrative law

30. At the time when the third report on Austria was adopted, the country’s administrative law included two provisions for combating discrimination. The first was Section IX (1) 3 of the Introductory Act to the Code of Administrative Procedure of 1991 (*Einführungsgesetz zu den Verwaltungsverfahrensgesetzen 1991; EGVG*), under which discriminating against a person solely on the basis of their race, skin colour, national or ethnic origin, beliefs, religion or disability, or preventing them from accessing places or services intended for the public, without good cause, constitutes an administrative offence punishable by a fine of up to EUR 1,090 (merely making discriminatory comments is apparently not enough to constitute an offence: the victim must have suffered a tangible disadvantage; *Unabhängiger Verwaltungssenat* of Vienna; 15 January 1996, UVS-03/P/48/001129/96). The second provision was Section 87 of the Trade Licence Act (*Gewerbeordnung*), under which a trading licence may be withdrawn if its holder is guilty of discrimination on one of the grounds mentioned above. These provisions – which ECRI considered insufficient on their own – have been supplemented by the introduction of a new administrative offence, namely publishing discriminatory advertisements for employment (Sections 23 and 24 of the Equal Treatment Act; the penalty is a caution in the case of a first offence, and a fine of up to EUR 360 thereafter).

31. The authorities do not appear to have taken any particular steps to provide increased training for those working in the administrative justice system in the implementation of these provisions, which, by and large, are still not being applied. The Office of the Ombudspersons for Equal Treatment has informed

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<sup>6</sup> Implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

<sup>7</sup> Establishing a general framework for equal treatment in employment and occupation.

<sup>8</sup> According to the explanations provided, the legislation relates mainly to the employment of local and provincial civil servants and forestry and agricultural workers.

ECRI that of 112 complaints filed between January 2005 and September 2006, 103 were dismissed by the administrative authorities, and that only 7 cases have been examined at second instance under Section IX (1) 3 EGVG since it came into force. In January 2005, for example, an anti-racism NGO which had identified about a hundred housing or job advertisements specifying for instance “no foreigners” or “for Austrians only” had applied to the administrative authorities under Section 24 of the Equal Treatment Act and Section IX (1) 3 EGVG. It was told that it had no standing to bring an action under the former and that it had no right to be informed of any action taken on complaints relating to the latter as it was not a party to the proceedings. The NGO then turned to the People’s Ombudsperson (*Volksanwalt*) who examined all the procedures conducted in Vienna under Section IX (1) 3 EGVG over the above-mentioned period and found that the provision in question had been applied inconsistently, that only a small number of complaints had actually resulted in (small) fines and that the authorities were still inclined to treat breaches of the anti-discrimination regulations as trivial. According to the Office of the Ombudspersons for Equal Treatment, another reason why the criminal administrative law provisions are never or hardly ever implemented is that, although victims of administrative offences can file a complaint (*Bestrafungsantrag*) with the local administrative authorities (*Bezirksverwaltungsbehörde*), they do not have standing as a party to the proceedings, cannot lodge an appeal and are not even informed of the outcome of the proceedings.

32. ECRI recommends that the Austrian authorities take steps to ensure that the criminal administrative law provisions designed to combat discrimination are duly applied, including if necessary amendments to facilitate their implementation and increased awareness-raising and training for those working in the administrative justice system. In addition, referring to its General Policy Recommendation No. 7 on national legislation to combat racism and racial discrimination, it invites the authorities to consider reforming the procedure, so that victims of violations of these provisions can take part in court proceedings.

- *Civil law and anti-discrimination bodies*

33. The new federal legislation prohibits discrimination on the basis of “ethnicity” (*ethnische Zugehörigkeit*) in the fields of employment, social protection (including social security and health care), social benefits, education, access to goods and services and the provision of goods and services available to the public, including housing. While that possibly also covers discrimination on linguistic grounds, discrimination on the basis of beliefs or religion is not expressly prohibited, other than in the field of employment. Nationality and national origin used not to feature in the list of prohibited grounds; indeed, the law expressly stated that the principle of equal treatment did not cover differences in treatment based on citizenship. A welcome amendment to the Equal Treatment Act, however, which came into force on 1 August 2008, makes it clear that differences in treatment based on citizenship are legitimate only in matters relating to the admission, residence and status of stateless persons and non-EU citizens. Discrimination, both direct and indirect, harassment, instruction to discriminate and retaliation are prohibited. Positive action, on the other hand, is permitted. Victims can apply to specialised, non-judicial bodies (see below). They also have access to the civil courts – where representation by counsel is usually mandatory – and the labour courts. They can claim compensation for non-pecuniary loss and, in principle, either seek compensation for pecuniary loss or ask the courts to order measures to eliminate discrimination.

34. With regard to the anti-discrimination bodies, the new federal legislation referred to above widens the mandate of the Commission for Equal Treatment and the Office of the Ombudspersons for Equal Treatment – which used to deal only with

gender equality – and establishes a separate body to tackle discrimination in employment in the federal public sector (the federal commission for equal treatment, *Bundes-Gleichbehandlungskommission*). Structurally speaking, these institutions come under the Federal Ministry for Women's Issues. At provincial level, each of the nine *Länder* has, in the areas within their competence, either widened the mandate of existing bodies or set up new ones; the bodies thus created vary greatly in terms of their structure and sphere of action.

35. The Office of the Ombudspersons for Equal Treatment, whose independence is enshrined in law, comprises three institutions: the ombudsperson for equal treatment between women and men in the field of employment (in the private sector); the ombudsperson for equal treatment in the field of employment (in the private sector), irrespective of ethnicity, religion and beliefs, age and sexual orientation; the ombudsperson for equal treatment, irrespective of ethnicity and gender, in other areas. Anyone who believes they have been discriminated against on one of the grounds prescribed by law can apply to the competent ombudsperson who, as well as providing information and free, confidential legal advice, can negotiate with the person responsible for the alleged discrimination (such as an employer) in order to reach a friendly settlement and, failing that, refer the matter to the Commission for Equal Treatment, where he or she takes part in the Commission's deliberations as an expert with the right to ask questions and to file motions. The tasks of the ombudspersons also include carrying out research and surveys and publishing reports and recommendations on discrimination issues. Every two years, they submit a progress report to the Austrian Parliament containing their observations.
36. The Commission for Equal Treatment is an administrative body, divided into three chambers (*Senaten*) along the same lines as the Office of the Ombudspersons for Equal Treatment. Each chamber is chaired by a federal official appointed by the Minister for Women's Issues; the other members, who are all volunteers, are appointed by ministries and social partners (whom they represent). Each chamber delivers expert opinions on matters within its competence, either *proprio motu* or at the request of one of the interest groups represented in it or of the Office of the Ombudspersons for Equal Treatment. The Ombudspersons, employers, members of works committees and the victims themselves can ask the commission to examine individual cases; representation by counsel is not mandatory. If the competent chamber finds that the principle of equal treatment has been infringed, it will ask the person or body responsible to put an end to the discrimination and will advise on the measures to be taken to this end; it cannot impose penalties. If the person or body does not comply, the interest groups represented in the chamber or the Office of the Ombudspersons for Equal Treatment can bring a civil action to obtain a declaratory judgment; while the court is not bound by the commission's opinion, it must at least have regard to it and if it disagrees with the opinion, explain why. The "federal" commission for equal treatment has similar functions in relation to the employment of federal civil servants.
37. In ECRI's view, the new federal legislation is certainly an improvement. It is, however, deeply disappointed to note the distinction that is made in terms of discriminatory grounds between employment and other areas; referring to its General Policy Recommendation No. 7, it wishes to emphasise that, in its view, the law should provide that the prohibition of discrimination on a ground such as race, skin colour, language, religion, nationality or national or ethnic origin applies equally in all areas. More generally, it appears to ECRI that lawmakers have confined themselves to the minimum required by the transposition of Directives 2000/43/EC and 2000/78/EC. ECRI further notes that numerous other criticisms have been levelled by civil society. For example, it is felt that Austrian lawmakers

have not taken sufficient steps to alter the burden of proof: once the plaintiff has produced evidence of discrimination, the respondent merely has to show that it is more likely that there was another reason for the difference in the treatment complained of. It is also felt that the penalty for discriminatory job advertisements is too lenient, and the scope of the prohibition of harassment too narrow. NGOs, furthermore, cannot apply to the courts in their own right and, while they can represent victims before the Equal Treatment Commission, they can only do so before the courts in cases where representation by counsel is not mandatory; only one NGO (*Klagsverband zur Durchsetzung der Rechte von Diskriminierungsopfern*) has the right to intervene as third party, and no third party intervention is permitted in proceedings relating to the employment of federal civil servants. Other points where NGOs have expressed criticisms are:

- the fact that, in the case of discriminatory non-recruitment or non-promotion, compensation for non-pecuniary loss is limited to EUR 500 if the employer can show that the damage caused by discrimination consists solely in the failure to consider an application. The European Committee of Social Rights, moreover, has ruled that imposing this upper limit is not in conformity with Article 1 § 2 of the European Social Charter<sup>9</sup>;
- the fact that the law covers neither discrimination which is not directed against specific individuals, nor discrimination by association, nor racial profiling;
- the fact that there is no criminal administrative law provision on discriminatory advertisements for housing; etc.

38. The development of the specialised bodies is also a positive step. ECRI notes, however, that being attached to the Chancellery, the federal bodies lack the kind of structural independence needed for full public confidence in an area such as combating racism (a similar problem arises with the provincial bodies). This is true not only of the Commission but also of the Office of the Ombudspersons for Equal Treatment as, in Austrian law, in order for a body to be fully independent, a constitutional provision is required. The fact, too, that they come under the Ministry for Women's Issues probably means there is less awareness of their competencies in areas other than gender equality, and a recent study published by the European Union's Fundamental Rights Agency shows that few people know of their existence<sup>10</sup>. It would also appear that the bodies are not being provided with adequate resources. This is patently the case with the Office of the Ombudspersons for Equal Treatment: in 2008, it had only three full-time lawyers and one half-time lawyer to deal with all matters other than gender equality in the field of employment. All the lawyers were based in Vienna and the total budget for training and awareness-raising was only EUR 40,000. Under these circumstances, it is difficult for the Office to provide effective support to potential victims of racial discrimination outside the capital, and to perform some important tasks, such as conducting research and surveys on this subject and large-scale awareness-raising activities. ECRI further considers that the length of the procedure before the Equal Treatment Commission (according to the information received, it often lasts several months, even up to a year) is liable to deter individuals from making use of it, thus undermining the effectiveness of the system put in place by lawmakers.

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<sup>9</sup> Conclusions XIX-1 (24 October 2008)

<sup>10</sup> EU-MIDIS at a glance, Introduction to the FRA's EU-wide discrimination survey; in Austria, 84% of respondents with a Turkish background and 82% of those from the former Yugoslavia said they did not know of any organisation offering support or advice to people who had been discriminated against.

39. Overall, ECRI was struck by the fragmented nature of the anti-discrimination legislation (more than 20 laws at federal and *Land* level) and by the number of agencies and procedures involved. All this gives the existing system a degree of complexity which cannot be explained by the country's federal structure alone and which is liable not only to alienate the public but also to undermine its effectiveness. This is a weakness that has been highlighted not only by civil society but also by a number of international bodies<sup>11</sup>.
40. ECRI recommends that the Austrian authorities embark on a reform of the equal treatment legislation, with a view to improving protection against racial discrimination and simplifying and harmonising the standards, legal mechanisms and institutions involved. It refers them to its General Policy Recommendations No. 2 on specialised bodies to combat racism, xenophobia, antisemitism and intolerance at national level, and No. 7 on national legislation to combat racism and racial discrimination, and urges them to involve in this process not only the institutions concerned but also civil society, in particular the specialised NGOs.
41. ECRI recommends that the authorities take urgent steps to provide more financial and human resources to the Ombudsperson for Equal Treatment in the field of employment, irrespective of ethnicity, religion and beliefs, age and sexual orientation, and to the Ombudsperson for Equal Treatment, irrespective of ethnicity and gender, in other areas, so as to enable them to fully perform all the tasks that have been assigned to them. It further recommends that the requisite measures be taken forthwith to ensure that their full independence is enshrined in law and in practice, and to enable them to apply to the courts whenever they deem necessary.

## II. Discrimination in various fields

### Education

42. There appears to be no data collection or monitoring of racist incidents in schools, nor any recent, country-wide study on this subject.
43. Referring to its General Policy Recommendation No. 10 on combating racism and racial discrimination in and through school education, ECRI invites the Austrian authorities to set up a system to monitor racist incidents at school and compile data on these phenomena. It further suggests that they carry out a national survey on racism and direct discrimination in schools.
44. In its third report, ECRI recommended that the authorities step up their efforts in terms of implementing the principle of intercultural education, stressing the need for thorough training of all teachers in this area, the need to ensure that the number of teachers who provided education in German as a second language or in a non-German mother tongue was adequate and the need for sustainable funding of initiatives aimed at putting the principle of intercultural education into practice.
45. Making pupils aware of cultural differences and presenting diversity as a positive force have been recognised cross-curricular teaching objectives since the 1990s and, in its third report, ECRI noted that various activities had been conducted in this field, based around the provision of training for head teachers and teachers and the provision of information to parents. Some NGOs complain, however, that there is no real strategy in this area and it seems that, in the case of initial teacher training, only nursery school teachers receive training in intercultural education as a matter of course. The authorities have, however, pointed out that, in 2006-2007, under a programme entitled "inter-culturality, an opportunity", and

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<sup>11</sup> CERD/C/AUT/CO/17, §§ 12 and 24; CommDH(2007)26, §§ 53-54; ACFC/OP/II(2007)005, § 42

then again in 2007-2008, as part of the European Year of Intercultural Dialogue, the Ministry of Education supported various school projects relating to interculturality and education in German as a second language or in a mother tongue other than German. This same ministry has adopted an action plan to promote language training for the period 2008-2010, which aims *inter alia* to improve teacher training in these areas, and the federal government which came to power after the 2008 elections has pledged to continue this policy. ECRI further notes that, overall, mother tongue education is available in eighteen languages other than German, and that the number of children following these programmes, the number of hours taught and the number of teachers involved have remained stable, as has the proportion of the children concerned receiving such education (approximately 20%). With specific regard to access for persons belonging to national minorities to mother tongue or bilingual education, ECRI refers to the latest reports and opinions on Austria produced by the Committee of Experts on the Charter for Regional or Minority Languages<sup>12</sup> and the Advisory Committee on the Framework Convention for the Protection of Minorities<sup>13</sup>, from which it is clear that difficulties remain, especially outside the areas traditionally inhabited by these minorities.

46. ECRI encourages the Austrian authorities to continue their efforts to implement the principle of intercultural education.
47. In its third report, ECRI recommended that the authorities address the disadvantaged educational position of non-citizen children and take the necessary measures to rectify this, urging them in particular to address the disproportionate representation of those children in special needs schools (*Sonderschulen*) designed for children with disabilities.
48. Various studies show that the situation has remained unchanged. The drop-out rate for children of immigrant background is four times higher than for Austrian children, and a significantly higher proportion of children whose mother tongue is not German end up on the track that leads to shorter studies and early entry into working life (*Hauptschule*) without receiving a full secondary education. In 2006-2007, furthermore, 2.33% of these children were in *Sonderschulen* (the national average was 1.56%), and they accounted for 26.5% of all special needs pupils, even though they made up only 15.5% of the general school population.
49. The authorities have, however, taken steps to rectify this situation, with the focus on providing more German language teaching at the pre-school stage. Since 2006, children of pre-school age who do not have a sufficient command of German can attend special language support programmes in nursery schools, to enable them to catch up before they enter primary school (similar provision is available in primary and, to some extent, secondary education). There have also been local initiatives along these lines. The authorities have further stated that the federal minister for education has issued a circular<sup>14</sup> on the factors to be taken into account when assessing whether a child requires special needs education, which states that under no circumstances is mere lack of proficiency in the language of instruction to serve as a criterion here; the authorities point out that the federal government formed after the 2008 general elections has pledged to continue this policy. 2008 also saw the setting-up within the Federal Ministry of Education of a department for migration, intercultural education and language policy, whose task is to co-ordinate efforts to implement strategies for the integration of migrants in the education system.

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<sup>12</sup> ECRML(2005)1 and ECRML(2009)1

<sup>13</sup> ACFC/OP/II(2007)005

<sup>14</sup> Circular No 19/2008, 5 August 2008

50. ECRI welcomes these measures. Although it is obviously too early to assess their effectiveness, they show that the authorities are determined to raise the bar and ensure that these children enjoy the same opportunities as others. ECRI observes, however, that the measures fail to address a cause of inequality that has been highlighted not only by NGOs but also by recent research such as that conducted under the OECD's PISA programme<sup>15</sup>. It is the early streaming of children (from the age of 10) on either a vocational (*Hauptschule*) or an academic track (*Allgemeinbildende Höhere Schule*): a high proportion of children from disadvantaged socio-economic backgrounds are channelled into vocational education from a very early age, effectively shutting them out of higher education.
51. ECRI recommends that the Austrian authorities evaluate as soon as possible the effectiveness of the measures taken to rectify the disadvantaged educational position of non-Austrian children and consider, if necessary, a more radical reform of the school education system; it reiterates its view that the problem of the over-representation of non-citizen children in special needs schools needs to be addressed as a matter of priority. It calls on the authorities to draw inspiration from its General Policy Recommendation No. 10 on combating racism and racial discrimination in and through school education.

## Employment

52. Various documents<sup>16</sup> point to the continuing existence of major disparities between citizens and non-citizens in the field of employment: the unemployment rate for non-EEA citizens is noticeably higher than for Austrians. They face an increased risk of losing their jobs, have lower incomes and standards of living, and tend to be concentrated in industries characterised by a high degree of job insecurity, low wages, limited career opportunities, irregular working hours and tough working conditions. They also have great difficulty in getting their qualifications recognised.
53. At the same time, while the number of discriminatory job advertisements has reportedly declined since the entry into force of Section 24 of the aforementioned Equal Treatment Act, racism and direct discrimination continue to be a feature of the employment sector in Austria. This is clear from reports received *inter alia* from the Fundamental Rights Agency, the Office of the Ombudspersons for Equal Treatment and NGOs. The Office of the Ombudspersons has indicated that a high proportion of the complaints of ethnic or religious discrimination which it receives concern employment (206 out of 375 in 2006; 226 out of 397 in 2007) and draws particular attention to the case of Muslims – especially women wearing headscarves – who are excluded from jobs because employers fear negative reactions from customers. ECRI notes, however, that the authorities have provided support for various projects run by NGOs and the social partners, which are aimed at combating racism and discrimination in employment and promoting diversity within firms.
54. ECRI reiterates its recommendation that the Austrian authorities take significant steps to reduce the disparity between citizens and non-citizens in the employment sector. It also reiterates its recommendation that issues relevant to the position of non-citizens and persons of immigrant origin and other relevant minority groups on the labour market be given greater consideration in the national action plans for employment.

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<sup>15</sup> Programme for International Student Assessment

<sup>16</sup> See in particular the summary provided in the Raxen National Focal Point for Austria, Data Collection Report 2007, October 2007, and Update, January 2008

55. In its previous reports, ECRI called for the repeal of Section 8(2) of the Aliens Employment Act No. 218/1975, which requires employers, when making staff cuts, to dismiss foreign workers first. This provision, which was found by the European Committee of Social Rights to be incompatible with Article 1 § 2 of the European Social Charter<sup>17</sup>, was amended in July 2005: it now applies only to foreign workers when they first enter the labour market. According to the European Committee of Social Rights, however, although the scope of the disputed provision has been reduced, Section 8(2), which also provides that in the event of reduced activity in the company, the employment contracts of foreign nationals may be terminated if such action might prevent shorter working hours for all workers, still constitutes discrimination based on nationality and is therefore incompatible with Article 1 § 2 of the Charter<sup>18</sup>. ECRI further notes that the authorities, which have merely informed it that Section 8(2) is not applied in practice, have provided no evidence that this difference in treatment is objectively and reasonably justified.
56. ECRI strongly recommends that the authorities repeal Section 8(2) of the Aliens Employment Act No. 218/1975.
57. Legislative amendments which came into force in January 2006 extend the right to stand for election to the Chamber of Labour (hitherto reserved for Austrian citizens) and works councils (hitherto reserved for EEA citizens) to all employees, irrespective of their nationality, in keeping with the recommendations made by ECRI in its previous reports. ECRI welcomes this move. It appears, however, that few foreign workers actually sit on these bodies.
58. ECRI recommends that the Austrian authorities cooperate with the labour market partners in order to identify any practical barriers to the election of foreign workers to the Chamber of Labour and works councils, and ways of removing such barriers.

### **Housing and goods and services intended for the public**

59. In its third report, ECRI recommended that research be carried out into discriminatory practices and barriers or exclusionary mechanisms in public and private sector housing affecting the housing possibilities of minority groups, in order to formulate targeted policy responses. It further recommended that access by non-EU citizens to social housing be improved.
60. ECRI is pleased to note that since 2006, following the transposition of Directive 2003/109/EC<sup>19</sup>, long-term resident third country nationals, in all the *Länder*, are now eligible for social housing on the same terms as Austrian citizens.
61. The authorities give no indication of having carried out the recommended research. Various documents, however, point to the existence of direct discrimination against foreign nationals and visible minorities when it comes to obtaining access to housing. The Office of the Ombudspersons for Equal Treatment states, in particular, that discriminatory advertisements for housing are fairly common, and suggests introducing a specific administrative criminal offence, similar to that which exists in the field of employment. It also appears from these documents that, compared with Austrian citizens, non-EU citizens often have less secure tenancy agreements and that a greater proportion of them live in cramped, poorly furnished, inadequately heated flats; they are more likely

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<sup>17</sup> Conclusions XIV-1, XVII-1 and XVIII-1

<sup>18</sup> Conclusions XIX-1 (24 October 2008)

<sup>19</sup> Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents

to experience problems of overcrowding, and pay more for the same quality of housing. According to NGOs, moreover, racist neighbourhood conflicts are commonplace.

62. Direct discrimination, particularly against black people, is also a problem when it comes to accessing goods and services intended for the public, such as shops, restaurants and nightclubs. A high proportion of the complaints received by the Office of the Ombudspersons for Equal Treatment concern this sector. This highlights the need, mentioned earlier in this report<sup>20</sup>, to ensure the effective implementation of Section IX (1) 3 of the Introductory Act to the 1991 Code of Administrative Procedure and Section 87 of the Trade Licence Act.
63. ECRI recommends that the Austrian authorities adopt statutory provisions prohibiting discriminatory advertisements for housing and establishing a specific criminal administrative offence, similar to that referred to in Sections 23 and 24 of the Equal Treatment Act on job advertisements, and ensure that they are implemented.
64. ECRI reiterates its recommendation that the Austrian authorities carry out research into discriminatory practices and barriers or exclusionary mechanisms in public and private sector housing affecting the housing possibilities of minority groups, in order to inform targeted policy responses.

### **Administration of justice**

65. In its third report, ECRI noted that non-citizens were seriously over-represented in the prison population, that, in particular, 60% of pre-trial detainees were reported to be non-citizens, and that the differential between pre-trial detention and final convictions was remarkably higher for non-citizens than for Austrian nationals. It recommended that the authorities undertake research on the incidence of direct and indirect racial discrimination in the criminal justice system, particularly as regards pre-trial detention and imprisonment. The authorities, who do not appear to have acted on this recommendation, have stated that in November 2008, 3,348 of the 8,063 persons detained in the Austrian penal system were foreign nationals (i.e. 41.52%) awaiting trial for a criminal offence.
66. ECRI reiterates its recommendation that the Austrian authorities undertake research on the incidence of direct and indirect racial discrimination in the criminal justice system, particularly as regards pre-trial detention and imprisonment, so as to be able to adopt targeted measures where necessary.

### **Sport**

67. Inside football stadiums, overt forms of behaviour such as verbal abuse of black players and the display of antisemitic banners are not uncommon. The authorities say they are aware of the problem and are keeping a watchful eye on the most extreme groups of supporters in particular. The 2008 European Football Championship, which was held in Austria and Switzerland in June 2008, is said to have been exemplary in this respect, presumably thanks to the joint efforts of the authorities, the organisers and NGOs, with their strong focus on prevention and awareness-raising.
68. Football, however, is reportedly the only sport where public racist incidents are recorded, and there do not seem to be any official studies or arrangements for collecting data on racism and direct and indirect discrimination in sport in general. According to non-governmental sources, however, the area of sport in Austria is not easily accessible to foreign nationals and minorities. Very few of them are

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<sup>20</sup> See above "Criminal administrative law"

involved in the administration of sport, for example. Certain regulations, moreover, are liable to lead to exclusion or segregation. In ECRI's view, this is manifestly the case with the championship rules (*Meisterschaftsregeln*) of the Austrian football federation (*österreichischer Fussball-Bund*), which, in amateur football, limit the number of non-Austrian nationals to a maximum of three per team and, in parallel, state that clubs may be registered as "foreigners only", in which case only 3 Austrian players per team are allowed.

69. ECRI recommends that the Austrian authorities carry out a study on racism and direct and indirect discrimination in sport, with a view to identifying measures to rectify the situation. In this respect, it draws their attention to its General Policy Recommendation No. 12 on combating racism and racial discrimination in the field of sport.
70. ECRI recommends that the authorities contact the Austrian football association as soon as possible to have it review the rule which imposes conditions based on nationality for the composition of amateur football teams.

### III. Racism in public discourse

#### Exploitation of racism and xenophobia in politics

71. In its third report, as in its second, noting with concern the widespread use of racist and xenophobic discourse in politics in Austria, ECRI recommended that an annual debate be instigated in Parliament on the subject of racism and intolerance. It further reiterated its call for not only increased efforts to implement the criminal law provisions, but also the adoption of *ad hoc* measures targeting more specifically the use of racially inflammatory or xenophobic discourse by exponents of political parties, including, in particular, legal provisions allowing for the suppression of public financing for those political parties whose members are responsible for racist or discriminatory acts.
72. The annual debates which ECRI called for have not taken place and no specific measures appear to have been adopted. Yet the situation remains very worrying. The far-right parties, which won almost 30% of the vote in the 2008 general elections, are openly exploiting prejudices against minorities, immigrants, refugees, asylum seekers, Jews and Muslims. The problem is particularly acute during campaigning for European, national and local elections: there have been numerous reports of manifestos, slogans and remarks by candidates or leaders of these parties stigmatising in particular migrants, refugees, asylum seekers and Muslims. During the campaign for the European elections in June 2009, the problem was further exacerbated by the use by these parties of racist and xenophobic arguments in the context of the discussion on the enlargement of the European Union.
73. ECRI further notes that civil society has criticised the ruling parties and politicians for failing to sufficiently condemn this sort of behaviour, and in some cases even succumbing to the use of xenophobic stereotypes themselves, for electoral reasons. ECRI notes for its part that the institutional response to this serious problem has been ambiguous. On the one hand, for example, anti-Muslim statements made by the candidate of one of the above-mentioned far-right parties in the Graz city council elections were duly and very strongly condemned by senior figures, including the President and the federal Chancellor, and Parliament lifted the immunity of the individual concerned in November 2008 so that she could be prosecuted under Section 283 of the Criminal Code; on the other hand, a member of the same party, who also belongs to a controversial far-right organisation, was elected Deputy Speaker of the *Nationalrat*, the lower house of Parliament.

74. Referring to its declaration of 17 March 2005<sup>21</sup>, ECRI reiterates, in the strongest possible terms, that it categorically condemns the use of racist, antisemitic and xenophobic elements in political discourse. Political parties must resist the temptation to approach issues relating to minority groups in general, and to asylum seekers, refugees and immigrants in particular, in a negative fashion; on the contrary, they must take a firm stance against all forms of racism, discrimination and xenophobia and formulate a clear political message in favour of diversity and pluralism.
75. ECRI strongly recommends that the Austrian authorities systematically condemn, in the strongest possible terms, all forms of racism, xenophobia and antisemitism in political discourse.
76. ECRI reiterates its call for the adoption of *ad hoc* measures to combat the use by political parties or their representatives of racially inflammatory or xenophobic discourse and, in particular, of legal provisions allowing for the suppression of public financing for parties which promote racism or xenophobia. In this respect, it draws the authorities' attention to the relevant provisions of its General Policy Recommendation No. 7 on national legislation to combat racism and racial discrimination.

## Media

77. In its third report, ECRI encouraged the authorities to impress on the media, without encroaching on their editorial independence, the need to ensure that reporting did not contribute to creating an atmosphere of hostility and rejection towards members of minority groups and the need to play a proactive role in countering such an atmosphere. It considered that the adoption and implementation of codes of self-regulation could be useful here. It emphasised the importance of giving media professionals special training on the role of reporting in a diverse society, and the need for persons of immigrant origin to be better represented in the media profession.
78. This recommendation was intended as a response to the publication in the press of discriminatory advertisements for jobs and housing, and to the fact that certain sections of the press were contributing to the "ethnicisation" of crimes and sensationalist reporting on immigration and asylum issues. The authorities do not appear to have taken any meaningful steps to find a solution to this worrying problem and, except for a reduction in the number of discriminatory job advertisements (probably due to the fact that they have been banned under the new federal legislation on equal treatment, which also punishes employers and agencies which place such advertisements<sup>22</sup>), the situation has not improved. In this respect, ECRI is especially concerned about the irresponsible editorial policy operated by some newspapers, which is contributing to the spread of racist and xenophobic stereotypes.
79. ECRI notes that discrimination based on race, ethnic origin, religion, nationality or gender is expressly prohibited by the code of conduct for the Austrian press (*Ehrenkodex für die österreichischer Presse*) which was introduced by the press's self-regulatory body (the Austrian Press Council, *österreichischer Presserrat*), and has been signed by numerous newspapers and magazines. The Austrian Press Council, however, has not been functioning since 2002, owing to the departure of the Austrian Newspaper Association (*Verband österreichischer Zeitungen*) to which most of the Austrian press belong. Since then, Austria has

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<sup>21</sup> ECRI Declaration on the use of racist, antisemitic and xenophobic elements in political discourse

<sup>22</sup> See above "Criminal administrative law"

had no effective press regulatory body, which no doubt partly explains the unfortunate developments referred to above.

80. ECRI therefore considers that, in the circumstances described above, a press regulatory mechanism needs to be established in Austria, that would make it possible to enforce compliance with ethical standards and rules of conduct including the refusal to promote, in any form, racism, xenophobia, antisemitism or intolerance. In ECRI's view, the current situation might warrant legislative action, with due regard, of course, for the principle of media independence. ECRI further notes that, in the case of broadcasting, Austrian lawmakers have stepped in not only to incorporate in the programming principles of both private and public broadcasting companies a ban on incitement to hatred on grounds of race, religion and nationality, but also to establish mechanisms of this kind. The general feeling, indeed, is that the criticisms levelled here at sections of Austria's written press do not apply to the broadcast media, even though problems do occasionally arise.
81. With regard in particular to the representation of persons of immigrant origin in the media professions, this is clearly poor. For example, there are almost no journalists of immigrant origin or belonging to ethnic minorities in the daily press or in regular programmes on public TV. There have been some moves to correct this problem, mainly by independent media, and the setting-up in 2005 of the Okto cable TV station (*Wiener Community-TV Okto*; although financed by the city of Vienna, it has independent status), which is creating broadcasting opportunities for minorities other than national ones, is a step in the right direction. ECRI has also been informed that the public broadcaster ORF2 has a weekly programme entitled *Heimat, Fremde Heimat* (Homeland, foreign homeland) which seeks to inform minorities, including ethnic minorities, about issues that specifically affect them and to inform the majority population, and which is presented by journalists who are themselves from minority backgrounds. The fact remains, however, that ethnic minorities have very little visibility in the mainstream media.
82. In its third report, ECRI also recommended that the authorities ensure adequate availability of electronic media in the languages of national minorities, and ensure that the public service adequately catered for the needs of all minority groups that made up Austrian society, including groups other than national minorities. The law requires the Austrian broadcasting corporation (*Österreichischer Rundfunk und Fernsehen*; ORF) to broadcast a reasonable proportion of programmes in the languages of national minorities, and allows it to co-operate with private broadcasters for this purpose. ECRI refers here to the latest opinions and reports on Austria produced by the Advisory Committee on the Framework Convention for the Protection of Minorities<sup>23</sup> and the Committee of Experts on the Charter for Regional or Minority Languages<sup>24</sup>, from which it appears that problems still exist in this area, even though there has been some progress. There are no similar provisions for other minorities and, in the Austrian public broadcasting landscape, *Heimat, Fremde Heimat* is the exception rather than the rule.
83. ECRI recommends that the Austrian authorities promote the reestablishment of a regulatory mechanism for the press, compatible with the principle of media independence, that would make it possible to enforce compliance with ethical standards and rules of conduct including the refusal to promote, in any form, racism, xenophobia, antisemitism or intolerance. It suggests that the authorities consider enacting legislation if there is no other option.

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<sup>23</sup> ACFC/OP/II(2007)005

<sup>24</sup> ECRML(2005)1 and ECRML(2009)1

84. More generally, ECRI reiterates its recommendation that the authorities impress on the media, without encroaching on their independence, the need to ensure that reporting does not contribute to creating an atmosphere of hostility and rejection towards members of minority groups and the need to play a proactive role in countering such an atmosphere. It also reiterates its suggestion that the authorities should encourage them to this end to not only adopt and implement codes of self-regulation, but also provide special training for media professionals on the role of reporting in a diverse society, and to improve the representation in media professions of persons of immigrant origin or belonging to ethnic minorities.
85. ECRI encourages the authorities to pursue their efforts to improve the availability of electronic media in the languages of national minorities, and recommends that they ensure that public service broadcasting caters for the needs of all minority groups, including groups other than national minorities.

#### Internet

86. The criminal legislation on racist or neo-Nazi behaviour<sup>25</sup> applies to offences committed via the Internet, and Internet access providers can themselves be prosecuted for the content of the sites hosted on their servers. The Internet is monitored in this respect by the Federal Agency for State Protection and Counter-Terrorism (*Verfassungsschutz und Terrorismusbekämpfung*) of the Ministry of the Interior, which has set up a facility to enable users to report any neo-Nazi, racist or antisemitic material published on the Internet; they can also report it to the ISPA (*Internet Service Providers Austria*) which works with the Ministry of the Interior and service providers. The Internet is also monitored by the Federal Criminal Police Office (*Bundeskriminalamt*), which cooperates with the Federal Agency for State Protection and Counter-Terrorism. The scheme seems to have paid off, as the authorities have told ECRI that there have been relatively few cases of the Internet being used to disseminate racist, xenophobic or antisemitic comments and material. Some NGOs, however, point to signs that the problem may have intensified in recent years.

87. ECRI encourages the Austrian authorities to pursue their efforts to prevent the Internet from being used to disseminate racist, xenophobic or antisemitic comments and material, and recommends that they maintain a high level of vigilance in this respect. It draws their attention to its General Policy Recommendation No. 6 on combating the dissemination of racist, xenophobic and antisemitic material via the Internet.

#### IV. Racist violence

88. There are reports of acts of violence against property such as the desecration of Muslim or Jewish cemeteries, places of worship and memorials, which are often ascribed to far-right sympathisers; the NGOs have confirmed that several such alarming incidents are reported each year. There is nothing to indicate, however, that racist violence against persons is a major problem in Austria. Fears have nevertheless been expressed about a possible worsening of the situation, as certain events recorded by the authorities could be seen as early signs of an increase in violent incidents involving skinheads, in particular between these groups and young people belonging to ethnic minorities<sup>26</sup>.

89. ECRI strongly encourages the Austrian authorities to ensure that all acts of racist violence, whether directed against property or people, are thoroughly

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<sup>25</sup> See above "Criminal law provisions against racism"

<sup>26</sup> Raxen National focal point for Austria, Data collection Report 2007

investigated with a view to prosecution, and to keep a close watch on far-right groups and skinheads, while at the same time bearing in mind that racist violence can be committed by other persons as well.

## V. Vulnerable/target groups

### Black persons

90. A study by the European Monitoring Centre on Racism and Xenophobia published in May 2006<sup>27</sup>, together with the findings and reports produced by NGOs, show that the situation described in ECRI's third report still obtains today: in Austria, black people are especially vulnerable to racism and discrimination, notably in the fields of employment, housing and access to public places and in their dealings with the police. They suffer from being associated, in the minds of some, with drug trafficking, prostitution and abuse of the asylum system. ECRI remains convinced that this situation is closely connected with the hostile rhetoric used by certain political parties and certain sections of the press and also with the behaviour of some officials, in particular among the police.

91. ECRI reiterates its recommendation that the Austrian authorities take steps to effectively combat and prevent racism and discrimination against black people. In this respect, it considers that the situation calls *inter alia* for the introduction of a campaign specifically aimed at improving the public image of this section of the population. It invites the authorities to involve civil society, in particular NGOs representing the interests of black people, in both the design and implementation of these measures.

### Muslims

92. The situation with regard to racism and discrimination against Muslims remains problematic. In particular, a number of women and girls who wear headscarves continue to encounter problems in their everyday lives, on the labour market, in schools and other educational establishments and in public areas. During election campaigns in particular, the far-right parties engage in overtly anti-Muslim rhetoric - which is neither universally nor systematically condemned by the other parties and their representatives - focusing on the alleged Islamisation of Austria. There are recurring cases of Muslim cemeteries and graves being desecrated, and practising Muslims who wish to build mosques face considerable, in some cases insurmountable, difficulties. In 2007, for example, a plan to build a Muslim centre on the outskirts of Vienna sparked a mass protest by local residents and, more recently, in Carinthia and Vorarlberg, the town planning laws were amended in what appears to be an indirect attempt to make it more difficult to build mosques.

93. ECRI reiterates its recommendation that the Austrian authorities take steps to effectively combat and prevent racism and discrimination against Muslims. In this respect, it draws their attention to its General Policy Recommendation No. 5 on combating intolerance and discrimination against Muslims, and invites them to involve civil society, in particular the NGOs representing the interests of Muslims, in both the design and implementation of these measures.

### Jews

94. ECRI refers here to the section of the report entitled "Antisemitism" (below).

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<sup>27</sup> EUMC, Migrants' experiences of Racism and Xenophobia in 12 member States, Pilot Study

## Roma

95. Generally speaking, the situation of the Roma in Austria has improved in recent years, including in terms of their exposure to racism and discrimination. The fact that the extermination of the Roma by the Nazis is now recognised and commemorated is also a positive sign. It is clear from NGO reports<sup>28</sup>, however, that the Roma continue to suffer a socio-economic disadvantage compared with the rest of the population, and still face serious difficulties in the areas of education, employment and housing: they are under-represented at all levels of education, have a high educational drop-out rate and, except in Burgenland, are often being placed in special needs classes (*Sonderschule*); their access to the labour market is limited; they have difficulty obtaining housing and, in rural areas, often live apart from the rest of the population. This is at least partly due to the lingering prejudice against them, prejudice which continues to be peddled by certain sections of the press and public figures and which also affects the police's attitude towards them. ECRI's attention has also been drawn to the plight of non-autochthonous Roma who are liable to suffer double discrimination.
96. ECRI recommends that the Austrian authorities pursue their efforts to combat racism and discrimination against the Roma, especially in the field of education, and, to this end, involve civil society, in particular the NGOs representing Roma interests, in the design and implementation of new measures. It draws their attention to its General Policy Recommendation No. 3 on combating racism and intolerance against Roma/Gypsies.

## Other national minorities

97. In its third report, ECRI expressed particular concern at the "climate of hostility reportedly promoted against the Slovenian minority in Carinthia" and in which the then Governor was reported to have played an active role, especially in connection with his open refusal to implement rulings of the Constitutional Court granting certain rights to the members of this group. ECRI notes in particular that, despite the efforts of the federal authorities and NGOs like the so-called Carinthian Consensus Group (*Kärntner Konsensgruppe*), the Constitutional Court decision of 13 December 2001 requiring topographical signs to be bilingual in areas where Slovene speakers form more than 10% of the population, has still not been executed. It is concerned about this situation, as it poses a serious threat to the rule of law. For all other matters, ECRI refers to the latest opinion on Austria produced by the Advisory Committee on the Framework Convention for the Protection of Minorities<sup>29</sup> and to the reports of the Committee of Experts on the Charter for Regional or Minority Languages<sup>30</sup> on the implementation of this instrument in Austria.
98. ECRI urges the authorities, at every level, to take all necessary measures to ensure the execution of the Constitutional Court decision of 13 December 2001.

## Non-citizens: migrants and asylum-seekers

99. The law governing the reception and status of non-citizens has changed since the third report, following the adoption in 2005 of legislation on the aliens police, asylum and settlement and residence. Known as the *Fremdenrechtspaket* ("package" of laws on aliens), these new provisions have been criticised by civil society, which sees them as engendering discrimination.

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<sup>28</sup> See also: ACFC/OP/II(2007)005

<sup>29</sup> ACFC/OP/II(2007)005

<sup>30</sup> ECRML(2005)1 and ECRML(2009)1

- *Migrants*

100. ECRI notes that the Austrian system of immigration control continues to be based on an annual immigration quota (which the *Länder* share among themselves), divided between labour immigration and – the biggest share – immigration for the purpose of family reunification. Spouses and under-age children of nationals of countries not members of the European Economic Area who are lawfully resident in Austria may obtain a settlement permit on this last ground. Where an application is rejected because the quota has been exceeded, the person is placed on a waiting list. The waiting period, which varies from one *Land* to another, can be as much as three years, after which applicants are exempt from the quota constraint. ECRI fails to see why immigration control requires families to be separated for such prolonged periods. It further observes that the new legislation makes family reunification more difficult, by significantly increasing the minimum income that applicants are required to have (which is reportedly why the number of people admitted for family reunification purposes fell in 2006<sup>31</sup>). It further notes that, compared with those of the 27 other countries covered by the Migrant Integration Policy Index (MIPEX)<sup>32</sup>, Austria's family reunification policy is classified as one of the least favourable. ECRI is concerned about this, since what is at stake is the fundamental right to respect for family life.
101. In its previous reports, ECRI also expressed concern at the precariousness of the status of many immigrants. On this point, it should be noted that a new type of residence permit was introduced in 2005, in connection with the transposition of the aforementioned directive 2003/109/EC. The "long-term EU residence permit" (*Aufenthaltsstitel Daueraufenthalt-EG*) is designed to replace the certificate of residence (*Niederlassungsnachweise*) mentioned in the third report; it can be obtained by foreign nationals who, *inter alia*, have been lawfully resident in Austria for at least five years and have fulfilled the terms of the new "integration agreement" (see below), and it gives full access to the labour market. The situation of people arriving in Austria for family reunification purposes has also reportedly improved: although in principle, such persons are granted a restricted residence authorisation (*Niederlassungsbewilligung-beschränkt*), making access to the labour market conditional on the grant of a specific work permit, they can now obtain, after a year, an unrestricted residence authorisation (*Niederlassungsbewilligung-unbeschränkt*), which gives them access to the labour market.
102. With specific regard to the issue of integration, ECRI recommended that the authorities provide non-citizens without sufficient knowledge of the German language with German language training that met their needs. Noting in this context that the "integration contract" (*Integrationsvereinbarung*) introduced in Austria in 2002 as a condition for permanent or long-term residence in the case of third country nationals was based around the requirement to attend German and civic education classes or else face sanctions, up to and including deportation, ECRI pointed out that coercion was not an appropriate way to achieve integration.
103. The new Settlement and Residence Act which came into force in January 2006 retains this system (certain categories of people are exempt, however, either by law – on the grounds of their age or health, for example – or if they can show that they already have a sufficient command of German). The new Act explains that

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<sup>31</sup> International Migration Outlook: SOPEMI – 2008 Edition – OECD

<sup>32</sup> MIPEX measures policies to integrate migrants in 25 EU Member States and 3 non-EU countries. MIPEX is led by the British Council and Migration Policy Group, and produced by a consortium of 25 organizations, including Universities, research institutes, think-tanks, foundations, NGOs and equality bodies (<http://www.integrationindex.eu>).

the purpose of the “integration contract” is the acquisition of a basic knowledge of German, sufficient for writing, reading and participating in social, economic and cultural life in Austria. It divides the contract into two modules. The first focuses on learning to read and write in German, and the relevant classes (75 hours) are normally reimbursed by the state. The second module (300 hours of classes compared with 100 under the former arrangement) is aimed at helping the student to acquire a higher level of German (A2) than before; the state refunds half of the course fee (i.e. up to EUR 750) if the “integration contract” is completed within two years after receiving the settlement permit; the rest is payable by the individuals concerned, although help is available from other agencies (the city of Vienna, for example, contributes up to EUR 300). The authorities have explained that the courses can be taken at 92 accredited institutes, in 300 different locations. Failure to complete the “integration contract” can still lead to non-renewal of the settlement permit and, ultimately, deportation. The authorities emphasise, however, that there has been only one case of expulsion so far (in February 2008), that 95% of the candidates pass first time and that those who fail can re-enrol. They also say that the response to the scheme has been positive, not least because a better knowledge of German makes it easier to find employment. ECRI still has some doubts, however, about the coercive aspect of the scheme. As it has already pointed out, the threat of sanctions is not the best way to persuade non-citizens to attend integration classes; the focus, rather, should be on incentives and measures to promote integration.

104. ECRI accordingly welcomes the setting-up in Vienna of department MA17, *Integrations- und Diversitätsangelegenheiten*, which has a non-coercive approach and works with civil society to promote integration and diversity. Itself staffed by people of different origins, it provides newly arrived immigrants with the help they need to find their way around in their new environment, and supports measures and projects aimed not only at integrating foreigners, through German language teaching, for example, but also at promoting public acceptance of diversity and fostering inter-culturality. ECRI strongly encourages this approach, based on the idea that integration is a two-way process, involving mutual recognition between the majority population and minority groups: effective action against racism and intolerance requires collective acceptance of diversity.
105. ECRI observes that in Austria, integration is, to a large extent, a local matter. There is, for example, no federal integration policy as such, nor a particular federal ministry with responsibility for this matter. The authorities have stated, however, that the Federal Ministry of Interior is preparing a national action plan for integration (NAP), and that a first step has been the creation of the “Integration Platform” that brings together all stakeholders from the local, provincial and federal level to work out the NAP, which, according to the authorities shall be adopted in the autumn of 2009.
106. In its third report, noting that in Vienna, the right to vote and to stand for election in local elections had been granted to non-EU citizens with 5 years of residence, ECRI recommended that similar measures be introduced throughout Austria. In June 2004, however, the Constitutional Court found this measure to be incompatible with the federal Constitution, with the result that a constitutional amendment is now required for foreigners to take part in local elections. The authorities have stated that in the absence of a consensus between the 9 *Länder* on this issue, no such amendment is envisaged. In ECRI’s view, this is regrettable, as allowing foreigners to participate in local elections is likely to make for a more integrated society. It notes, however, that some municipalities have set up advisory bodies whose members are designated by local migrant associations (*Migrantenvereine*), which include non-EU citizens, enabling them to

have a say in local affairs; the advisory committee on integration – *AusländerIntegrationsbeirat* – in Linz is one example.

107. ECRI recommends that the Austrian authorities strictly ensure that, in terms of both their application and their design, the conditions for family reunification are compatible with non-citizens' right to respect for family life. In particular, it recommends that the quota system for family reunification be abolished.
108. ECRI recommends that the authorities ensure that the training provided in connection with the "integration contract" is of good quality, tailored as far as possible to individual competencies and needs and inexpensive. It further recommends that they closely monitor the application of the sanctions provided for and ensure that their impact is not disproportionate to the aim being pursued, and suggests that they look into the possibility of replacing the coercive aspect of the "integration contract" with incentives and measures to promote integration.
109. ECRI encourages the authorities to adopt a national action plan for integration, based on a two-way approach to integration, with the focus on promoting mutual recognition between the majority population and the minority groups concerned.
110. ECRI reiterates its recommendation that the authorities grant non-EU citizens the right to vote and to stand as candidates in local elections, and invites them to initiate a debate with a view to amending the federal Constitution to this end. It recommends that, as an interim measure, they encourage the setting-up at local level of advisory bodies whose members would be elected by non-EU citizens.

- *Asylum seekers*

111. In its third report ECRI expressed great concern at the negative climate concerning asylum seekers in Austria, noting in particular that public statements by politicians disregarded the fundamental nature of the right to asylum and tended to depict asylum seekers, explicitly or by inference, as economic migrants and a threat to security, economic stability and, in some cases, preservation of national identity. It also noted that certain categories of asylum seekers were particularly stigmatised and underlined that some media had contributed to the establishment of this climate and that public debate on this issue was taking an increasingly intolerant line, with at times racist and xenophobic overtones.
112. ECRI notes that no significant progress has been made in recent years. The events which took place in Carinthia in 2008 are an illustration of this. In January the then Governor sent a populist, xenophobic letter to the inhabitants of one of the major towns in the *Land*, where violent acts, ascribed to Chechen asylum seekers, had been perpetrated, inviting them to denounce "violent" asylum seekers (*gewalttätige Asylwerber*) so that he could initiate their deportation and ensure Carinthia would remain safe. Later in the year he announced the opening, in a secluded former children's home, of a special camp for asylum seekers (*Sonderanstalt für Asylwerber*) suspected of violence, where four or five people had already been placed "as a security measure to protect the people of Carinthia". He subsequently announced, using loaded terms, that one of the objectives was to concentrate Chechen asylum seekers there with a view to facilitating their subsequent deportation; his spokesman specified that the centre was not solely intended for people who already had a criminal conviction and that the aim was to place those concerned under constant supervision so that no criminal acts could be committed.
113. ECRI recalls in the strongest possible terms that asylum seekers are people potentially fleeing persecution or a risk of persecution by reason of their "race", religion, nationality, membership of a particular social group or political opinion, or the risk of a violation of their right to life or their right not to be subjected to torture

or to inhuman or degrading treatment or punishment, or who are fleeing an armed conflict that places them in danger. They must not, whether in words or in deeds, be treated as criminals or as individuals suspected of having committed an offence.

114. ECRI nonetheless wishes to underline that it also perceives some encouraging signs. It regards as very positive projects such as the ones entitled *Miteinander Vielfalt erleben* ("Let's experience Diversity together"), *Neuland, Menschen von Nebenan* ("Next door People") and *TschetschenInnen-Europäer wie wir* ("Chechens, Europeans like us"). The latter, for example, financed by the Ministry of the Interior and the European Refugee Fund and managed by a local NGO, aims to combat the prejudice encountered by Chechen asylum seekers and refugees in Carinthia.
115. ECRI firmly reiterates its recommendation to the Austrian authorities that they refrain from generalisations and stigmatising remarks concerning asylum seekers, or specific groups of asylum seekers.
116. ECRI strongly encourages the authorities to implement at national level, in association with civil society, in particular NGOs representing the interests of asylum seekers and refugees, a campaign aimed at improving the public image of this section of the population.
117. In its third report, as it already had done in the second, ECRI expressed concern about the fact that asylum seekers were placed in detention pending the examination of their applications, and that this measure had become systematic in certain *Länder*. It also expressed concern - although noting that the situation appeared to be improving - at the practice of separating families by detaining the adult male and accommodating his wife and children in distant facilities for asylum seekers.
118. ECRI notes that the number of asylum seekers in detention considerably increased following the entry into force, in January 2006, of the new Aliens Police Act. Section 76(2) of this Act provides that an asylum seeker may be held in pre-deportation detention (*Schubhaft*) by decision of the police authorities alone in the following cases: 1) where an enforceable deportation order has been issued; 2) where a deportation procedure has been initiated; 3) where, before the filing of an application for international protection, an enforceable deportation order or an enforceable residence ban had been imposed; 4) where it may be assumed, on the basis of the outcome of the interrogation, search and photographing and fingerprinting procedures, that the alien's application for international protection will be rejected owing to Austria's lack of responsibility for examining the application. Although 662 asylum seekers were in pre-deportation detention in 2005 (or 9% of the total), those in this situation in 2006 numbered 2,700 (31%). Many of these cases of detention had their basis in the fourth paragraph of Section 76(2) of the Act, which in principle concerns situations covered by Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the member state responsible for examining an asylum application lodged in one of the member states by a third country national (known as "Dublin II").
119. ECRI however notes with satisfaction that, following a judgment by the Federal Constitutional Court of 14 June 2007 (G 14/07), ruling that each situation must be the subject of a specific examination and that detention must be proportionate to the aim being pursued and be utilised only as a last resort, the number of asylum seekers in pre-deportation detention has significantly decreased (1,330 cases founded on Section 76(2)§4 in 2006, 773 in 2007, 331 in 2008, and some fifty by the end of April 2009). The authorities are now making greater use of the more

lenient measures (*gelinderes Mittel*) provided for in Section 77 of the Act (1,158 cases in 2007, 1,809 in 2008 and 440 by the end of April 2009). It seems that, as a consequence, the number of family separations has considerably decreased. The authorities also informed ECRI of measures aimed at significantly improving the conditions under which foreigners are detained pending their deportation, including plans for the construction of a specially designed building.

120. ECRI strongly recommends that the authorities ensure that detention of asylum seekers is used only as a last resort and that, if necessary, it takes place in facilities suited to their specific status. It encourages them to pursue their efforts to avoid separating the members of asylum seekers' families.
121. In its third report ECRI urged the authorities to ensure that no asylum seeker was left destitute, recommending to this end that they establish a legally enforceable right of access to federal care and make available adequate housing capacities. It also recommended that they monitor practice in the reception centres where asylum seekers were accommodated pending a decision on the admissibility of their application and ensure that appropriate standards were observed there.
122. ECRI notes that care provision for asylum seekers has significantly improved in recent years: whereas, in its second report, it noted that, up to 2004, only between 20 and 30% of asylum seekers benefited from basic federal care, the authorities have indicated that 90% now receive federal or provincial support to cover their essential needs in terms of accommodation, food provision, health care and so on. Moreover, decisions to refuse basic care provision can now be appealed against before independent administrative panels (*Unabhängige Verwaltungssenate*). This is the outcome of the conclusion, in 2004, of an agreement between the federal government and the *Länder* (*Grundversorgungsvereinbarung*) and the passing, in 2005, of a new federal Basic Welfare Support Act (*Bundesgesetz, mit dem die Grundversorgung von Asylwerbern im Zulassungsverfahren und bestimmten anderen Fremden geregelt wird ; Grundversorgungsgesetz – Bund 2005 – GVG-B 2005*) and of legislation at *Land* level.
123. The federal Act makes it obligatory for the federal government to provide basic welfare assistance to indigent asylum seekers during the admissibility procedure and to those whose application has been declared inadmissible (or whose application has been rejected on the merits and whose appeal does not have suspensive effect). At this stage the persons concerned are in principle accommodated in reception centres under the responsibility of the federal authorities; according to non-governmental sources, these facilities would be of an acceptable standard overall if it were not for overcrowding in certain cases, the excessively strict regulations in force there and inadequate social counselling. After their applications have been declared admissible and until a decision is taken on the merits, indigent asylum seekers are cared for by the *Länder* (the federal government bears 60% of the cost). According to non-governmental sources, they are not able to choose the areas to which they are sent and, for economic reasons, are accommodated in often isolated facilities, which are of a variable quality. The authorities also indicated that, in some *Länder*, asylum seekers are regularly required to move to other accommodation, which poses problems for the children's schooling, especially since the asylum procedure can take some time.
124. Recognised refugees are taken care of by the integration fund (*Österreichischer Integrationsfonds*), which provides them with support intended to facilitate their integration, in particular with regard to housing, language learning and access to jobs.

125. As stated in the third report, unaccompanied minor asylum seekers in principle receive specialised care and are the subject of appropriate monitoring. However, according to non-governmental sources, insufficient provision has been made for specific reception facilities and it happens that unaccompanied minors find themselves in standard reception centres.
126. ECRI recommends that the Austrian authorities ensure that no asylum seekers are left destitute and, in particular, that all have access to acceptable accommodation.
127. ECRI recommends that the Austrian authorities ensure that unaccompanied minor asylum seekers benefit from specific care provision, particularly regarding their accommodation, and appropriate monitoring.
128. In its third report ECRI expressed concerns about legislation that came into force in 2004. The aim was to speed up asylum procedures and the provisions related, *inter alia*, to limitation of stay for asylum seekers in Austria during the appeals procedure, refusal to initiate a procedure for applications submitted at the border by asylum seekers coming from Switzerland and Liechtenstein and the ban, with a few exceptions, on submitting fresh facts in the appeal procedure. The authorities have indicated that these provisions are no longer in force: they were partly invalidated by the Constitutional Court, and - as mentioned above - the asylum law was subsequently amended. ECRI nonetheless notes that another measure intended to speed up the procedure, more recently adopted by Parliament, has met with fierce criticism. This concerns the elimination of the second judicial instance in asylum matters: decisions taken by the Federal Asylum Office (*Bundesasylamt*) can now be appealed on the merits, only before the Asylum Court (*Asylgerichtshof*), which with effect from July 2008 replaced the Independent Federal Asylum Review Board (*Unabhängiger Bundesasylsenat*); asylum seekers whose applications are rejected are therefore deprived of the possibility of appealing on the merits to the Administrative Court (*Verwaltungsgerichtshof*), although in principle this remedy is available in all matters.
129. ECRI is also concerned about the limited nature of the legal assistance available to asylum seekers without resources. Except for those who have been able to enter into contact with an NGO offering legal counselling, they have no access to this kind of support in the initial reception centres during the first interview with the Federal Asylum Office aimed at determining the application's admissibility. However, if following this interview the office deems that the application is a priori inadmissible, the person concerned is referred to a legal adviser (*Rechtsberater*) provided by the Ministry of the Interior, who, after interviewing the asylum seeker, accompanies them to a second interview with the office. According to non-governmental sources, the legal advisers have little time to devote to each case, with the result that their contribution is of variable benefit. Asylum seekers whose requests are dismissed at this stage and who wish to appeal have no access to a public system of free legal support; they are dependent on the NGOs, which do not have offices in the initial reception centres and have only limited resources. Asylum seekers whose applications are declared admissible are taken care of by the *Länder* during the procedure on the merits. The authorities are obliged by law to give them access to specialist advisers (*Flüchtlingsberater*); in practice, to this end the Ministry of the Interior concludes contracts with the NGOs present in the towns where the Federal Asylum Office's field agencies are located and funds a number of hours of counselling per week. The advisers assist asylum seekers with the post-admissibility procedure, including on appeal, except before the Constitutional Court (where representation by counsel is mandatory). Nonetheless, according to non-governmental sources, the resources mobilised in this way are generally inadequate (in the Linz field agency, for example, the

adviser is apparently present only five hours a week) and the material conditions offered to these advisers on the field agencies' premises are often scarcely conducive to effective action (there is not always an office set aside for their use and they also sometimes have no Internet access, access to interpretation, etc.). In addition, since asylum seekers are usually accommodated outside the major conurbations, sometimes in very isolated locations, they are not easily able to attend appointments with the advisers in the federal asylum office's agencies. Legal aid in the strict sense is possible only in connection with proceedings before the Constitutional Court.

130. Lastly, asylum seekers placed in detention centres pursuant to Section 76(2) of the Aliens Police Act have access only to social counselling and voluntary return assistance: they do not have a right to receive legal support so as to challenge their deprivation of liberty. According to non-governmental sources, asylum seekers without financial resources who had no legal representation before they were placed in detention are thus deprived of the possibility of doing so.

131. ECRI recommends that the Austrian authorities ensure that asylum seekers have access to appropriate legal support throughout the asylum procedure, not least with regard to any detention measures that might be imposed on them.

## VI. Antisemitism

132. ECRI observes that commemoration of the Holocaust is institutionalised in Austria. It notes, for example, that the anniversaries of the *Kristallnacht* pogrom (9 November 1938) and the liberation of the concentration camp of Mauthausen (5 May 1945) are commemorated through events involving senior officials, and that in 2005 a high-level Austrian delegation attended the ceremonies to mark the 60<sup>th</sup> anniversary of the liberation of Auschwitz. It further notes that Austria co-sponsored the United Nations Resolution condemning any attempt to deny or minimise the Holocaust, adopted in 2007. At the same time, dissemination of revisionist material via the Internet is said to have declined since the introduction of the European arrest warrant. Recent statements by the leader of one of the far-right parties, however, calling for the abolition of the Prohibition Statute (*Verbotsgesetz*), are a source of grave concern for ECRI, which notes that this is the first time a party represented in Parliament has openly voiced such demands. Antisemitic stereotypes are still very much alive in Austria<sup>33</sup> and the available statistics show no signs of a decrease in antisemitic incidents. In particular, cases involving the desecration of memorials, Jewish cemeteries and synagogues are not uncommon. Various factors, moreover, support the finding made in ECRI's third report that antisemitism is no longer the preserve of individuals inspired by National-Socialist or other far-right ideologies; it has also surfaced among Muslim fundamentalists and representatives of the extra-parliamentary far left.

133. ECRI reiterates its recommendation that the Austrian authorities continue and intensify their efforts to address all manifestations of antisemitism, including those not directly connected with National Socialist ideology. It draws their attention to its General Policy Recommendation No. 9 on combating antisemitism.

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<sup>33</sup> This is clear from the surveys conducted on a regular basis by the Anti-Defamation League. The survey carried out in 2008/2009 (Attitudes Toward Jews in Seven European Countries February 2009) indicates that 47% of respondents in Austria thought that the statement "Jews are more loyal to Israel than to this country" was "probably true" (compared with 47% in 2007); 36% the statement that "Jews have too much power in the business world" (compared with 37% in 2007); 37% the statement that "Jews have too much power in international financial markets" (compared with 43% in 2007), and 55% the statement that "Jews still talk too much about what happened to them in the Holocaust" (compared with 54% in 2007).

## VII. Conduct of law enforcement officials

134. In its third report, ECRI noted that Austrian NGOs had been receiving allegations of ill-treatments by police officers, many of them involving non-citizens or Austrian citizens belonging to ethnic minorities. It also noted that persons belonging to minority groups, in particular Blacks, were widely reported to have been disproportionately subject to police checks and to have been verbally abused in a racist way, harassed or even physically abused by law enforcement officials. In the absence of public, official statistics concerning *inter alia* the ethnic origin of the people filing complaints about the police and of a specific record of the complaints made about racist behaviour, it is not possible to accurately gauge the extent of this problem. That the problem continues to exist, however, is clear from the findings and conclusions of NGOs, which are borne out by the work of the Human Rights Advisory Board (*Menchenrechtsbeirat*)<sup>34</sup>, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment of the Council of Europe<sup>35</sup>, the United Nations Committee against Torture<sup>36</sup>, the United Nations Committee on the Elimination of Racial Discrimination<sup>37</sup> and the United Nations Human Rights Committee<sup>38</sup>. The media, moreover, regularly report cases of ill-treatment by the police that could be linked to racial prejudice, such as the beating-up in February 2009 in the Vienna metro of a black American teacher, Mike B., by undercover police officers who mistook him for a drug dealer.
135. In its previous reports, ECRI recommended that the authorities ameliorate the response of the criminal justice system and of the persons responsible for internal control within the different police units to allegations of racist or racially discriminatory behaviour on the part of the police, calling in particular for the establishment of an independent body with powers to investigate individual complaints of human rights violations on the part of the police, including acts of racism and racial discrimination. ECRI further recommended that the authorities condemn publicly and unequivocally any manifestation of racist or racially discriminatory behaviour on the part of the police and that they make it clear publicly and at a high level that such manifestations would not be tolerated, and would be promptly and thoroughly investigated and punished.
136. The developments in the Wague case – mentioned in the third report – and a later, similar case, suggest that there is still much room for improvement. In 2003 Mr Wague, a Mauritanian national, had been taken in hand by the Vienna police following an altercation with his employer. After being forcibly restrained, he lost consciousness and was left unattended for a time. He died before he could be taken to hospital. The police officers involved were not suspended and, before the investigation had even begun, their superiors and the Minister for the Interior publicly declared that the police had acted lawfully. Even though the Independent Administrative Panel (*Unabhängiger Verwaltungssenat*) concluded otherwise in January 2004 and ruled that Mr Wague's fundamental rights had

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<sup>34</sup> The Human Rights Advisory Board (HRAB) was set up in 1999, in response to repeated recommendations by the CPT to visit places of detention under police authority and to monitor the administrative and coercive power exercised by the police and security services with reference to human rights. Although the HRAB is administratively attached to the Federal Ministry of the Interior and makes recommendations to the Minister for the Interior, its operational independence is guaranteed by a constitutional provision. In 2007, it examined around 200 complaints filed in 2004 against police officers for ill-treatment, and found that over half of the complainants were non-Austrians or of non-Austrian origin (11% were of Sub-Saharan origin).

<sup>35</sup> CPT/Inf (2005) 13

<sup>36</sup> CAT/C/AUT/CO/3

<sup>37</sup> CEDR/C/AUT/CO/17

<sup>38</sup> CCPR/C/AUT/CO/4

been infringed, no disciplinary action was taken and there was no official apology. The doctor who accompanied the police during the events and only one of the police officers involved were convicted in 2005 of involuntary manslaughter and given suspended prison sentences of 7 months (which were reduced to 4 months on appeal in 2007). The later case concerns Bakary J., a Gambian national who, in 2006, resisted attempts to deport him. The three police officers in whose custody he had been placed took him to a vacant building where they were joined by a fourth officer and proceeded to threaten and assault him, inflicting serious injuries. Charged with physically and mentally abusing a prisoner, the first three officers were given (in August 2006) 8-month suspended sentences and the fourth officer, a 6-month suspended sentence, the court having found various mitigating factors in their favour (previous good conduct, the difficult and stressful nature of their work, and Bakary J.'s refusal to co-operate). The four officers had been suspended from duty during the trial but in December 2006, the Vienna police disciplinary board allowed them to return to duty and handed down fines (equivalent to five months' salary in the case of the first three officers and four months' salary in the case of the fourth), which were reduced by the appeals board in September 2007. On application by the Ministry of the Interior, however, the Administrative Court (*Verwaltungsgerichtshof*) found in October 2008 that the board had underestimated the seriousness of the breaches committed by the officers in question and ordered that its decision be revised. ECRI notes that the attitude of the authorities in this case has certainly been different from that displayed in the Wague case, in that they refrained from expressing support for the officers concerned while the criminal proceedings were pending, suspended them from duty and seem to want proper disciplinary action to be taken. It also observes, however, that the authorities failed to take this opportunity to publicly condemn the potentially racist aspect of the events and that after the trial, the Interior Minister made a public reference to the victim's criminal record possibly in an attempt to mitigate the police officers' actions. More generally, there are various factors to indicate that the investigations conducted by the police into allegations of ill-treatment by officers remain slow and inadequate, that prosecutors are reluctant to prosecute them, that the courts are inclined to give too much weight to the police's version of events and that complainants continue to find themselves facing counter-charges for resisting the police or defamation.

137. Anyone who believes they have been ill-treated by the police can file a complaint with the Independent Administrative Panel for violation of their individual rights (*Massnahmenbeschwerde*) or for failure to comply with the Ministry of the Interior directive on the action of the public security services<sup>39</sup> (*Richtlinienbeschwerde*), which provides *inter alia* that police officers and gendarmes "must refrain from any behaviour or activities that might give rise to the impression of prejudice or that could be perceived as discrimination" on the grounds, *inter alia*, of race, colour, national or ethnic origin or religion. This body, however, is only competent to decide whether the police acted lawfully; it cannot investigate, make decisions about individual responsibility, impose penalties or award compensation; representation by counsel is not mandatory, but there is no entitlement to legal aid and applicants who lose their case must bear the cost of the proceedings. Individuals can, however, also complain to the police about any failure to comply with the above-mentioned directive: their complaint will be examined by a superior of the officer complained of, who will carry out an internal inquiry and inform the complainant whether they believe there was misconduct, and who may invite the complainant to a meeting with a view to reaching a friendly settlement. The complainant is not told what, if any, disciplinary action is

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<sup>39</sup> Verordnung des Bundesministers für Inneres, mit der Richtlinien für das Einschreiten der Organe des öffentlichen Sicherheitsdienstes erlassen werden (Richtlinien-Verordnung - RLV) BGBl. Nr. 266/1993

to be taken. Where the alleged behaviour constitutes a criminal offence, the victim can file a complaint either with the prosecutor's office or with the police, which must in that case report it to the prosecutor's office within 24 hours. On receiving a complaint of this kind, the prosecutor's office is bound to undertake an investigation. In the case of allegations of serious ill-treatment, the investigation will normally be carried out by the Bureau for Internal Affairs (*Büro für Interne Angelegenheiten*; BIA), which must also be notified of any complaints of this kind and may decide to carry out an investigation itself. The BIA is a special unit within the police, which is responsible for investigating allegations of ill-treatment or corruption on the part of public officials. Where the offences are of a less serious nature, the investigation will normally be conducted by the Special Investigations Office of the Vienna Federal Police Department (the BBE – *Büro für Besondere Ermittlung* –, which comes under the authority of the Vienna chief of police) or, in the other *Länder*, by other police units.

138. The Austrian authorities emphasise that the BIA is an independent body which, although attached to the Ministry of the Interior, is located in another department (Sektion IV, *Service und Kontrolle*), away from the police (Sektion II, *Generaldirektion für die öffentliche Sicherheit*), and receives no instructions concerning the conduct of the investigations with which it is charged. The fact, however, that the BIA is part of the Interior Ministry and is staffed by officials from units within this same ministry who, after being assigned for a given period, then return to their original posts, and the close organic connection with the police that this engenders mean that the BIA lacks the kind of structural independence required for victims of police misconduct to have full confidence in the system, and hence for the system to be effective. Austrian civil society, too, reports a certain lack of public confidence in the current system of investigation. In ECRI's view, however, public confidence in the system is particularly important when the police behaviour complained of is of a racist or discriminatory nature. Further noting that the BIA investigates only the most serious allegations and referring in particular to its General Policy Recommendation No. 11<sup>40</sup>, ECRI emphasises the need to establish a fully independent body to investigate any alleged racial discrimination or racially motivated misconduct on the part of the police. In its view, such independence requires, *inter alia*, that the body in question be structurally separate from the Ministry of the Interior and be seen to have no connection with the police.

139. ECRI recommends that the Austrian authorities set up a system to collect data on the ethnic origin of persons who file complaints against the police and to specifically record complaints of racist behaviour.

140. ECRI reiterates its recommendation that the authorities ameliorate the response of the criminal justice system and of the persons responsible for internal control within the different police units to allegations of racist or racially discriminatory behaviour on the part of the police. In particular, it reiterates its call for the establishment of an independent body with powers to investigate individual complaints of human rights violations on the part of the police, including acts of racism and racial discrimination.

141. ECRI reiterates its recommendation that the authorities condemn publicly and unequivocally any manifestation of racist or racially discriminatory behaviour on the part of the police and that they make it clear publicly and at a high level that manifestations of racism shall not be tolerated, and shall be promptly and thoroughly investigated and punished.

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<sup>40</sup>General Policy Recommendation No. 11 on combating racism and racial discrimination in policing, June 2007, CRI(2007)39; see in particular paragraph 10 and the explanatory memorandum

142. With regard in particular to racial profiling, ECRI, in its third report, recommended that the authorities ensure that national legislation concerning identity checks and national and international standards on protection from arbitrary arrest and detention were strictly abided by in all circumstances. More specifically, it recommended that they consider introducing a system of registration in connection with police checks that would enable individuals to document how frequently they were checked, in order to identify possible patterns of direct or indirect racial discrimination. The authorities, however, have told ECRI that the Ministry of the Interior sees no need to introduce a registration system of this kind, and that there is no statutory basis for doing so. It appears from NGO reports, however, that, while the situation has improved in recent years, racial profiling is still going on in Austria. Referring to its General Policy Recommendation No. 11 on combating racism and racial discrimination in policing, ECRI wishes to emphasise that, in order to effectively combat such practices, it is essential to identify them and gauge their extent; this calls for the adoption of a specific approach to monitoring and assessing police practice.
143. ECRI recommends that the Austrian authorities give due emphasis, in police training, to the need to avoid racial profiling, so that any action taken is effectively based on the existence of reasonable suspicion that an offence has been, or is going to be, committed and not on prejudice. It further reiterates its recommendation that a system be introduced that would make it possible to gauge the extent of such practices, with a view to improve the standards where necessary.
144. ECRI also recommended in its third report that the authorities continue their efforts to provide adequate initial and on-going training in human rights to law enforcement officials, notably in non-discrimination and policing in a multicultural society. ECRI notes that the training efforts in association with NGOs have been vigorously pursued in recent years and even expanded. In particular, as has already been stated, initial police training now includes a compulsory 56-hour module on fundamental rights. Trainees are further required to attend a 3-day seminar on eliminating prejudice, including notably ethnic prejudice. Serving officers can also attend this seminar as part of their on-going training. By the end of 2008, some 4,500 police officers had participated in training of this kind, i.e. more than a fifth of the total number. The programmes, which are supplemented by other optional training for serving officers, now include instruction in the use of non-racist language by the police, as recommended by the Human Rights Advisory Board and ECRI. ECRI welcomes these moves. Given, however, that awareness-raising and training for police officers are key factors in the fight against racism and racial discrimination in policing, ECRI considers that programmes of this type should be a compulsory part of on-going training.
145. ECRI recommends that the Austrian authorities continue their efforts to provide law enforcement officials with training in human rights, focusing on the fight against all forms and manifestations of racial discrimination, xenophobia, antisemitism and intolerance and on policing in a multicultural society, and make it a compulsory part not only of their initial, but also of their on-going training.
146. ECRI is interested to note the appointment in the Vienna police of a human rights co-ordinator, to improve the internal culture in this area and act as a contact point for NGOs.
147. In its third report, ECRI reiterated its call for the adoption of measures to ensure adequate representation of members of minority groups in the police. ECRI observes that at the time of writing, the Austrian police is still largely mono-ethnic. It welcomes, however, the “Vienna needs you” campaign (*Wien braucht dich*) conducted in Vienna in 2007 in an effort to recruit police officers of immigrant

background, the long-term goal being to ensure that each of the city's 100 police stations has at least one officer of immigrant origin. Some 170 people fitting this description applied to join the police. Many of them, however, apparently failed the entrance examination and, according to the authorities, there are only about thirty people of immigrant origin among the 540 or so police cadets in Vienna in 2009. In ECRI's view, it is crucial not only to continue conducting campaigns of this kind, so as to gradually increase the percentage of police officers from minority groups, but also to extend them to the rest of the country. It is interested to note, therefore, that increasing the representation of minority groups within the police remains a priority for the federal government that came to power after the 2008 elections.

148. ECRI encourages the Austrian authorities to pursue their efforts to implement measures designed to ensure that persons belonging to minority groups are adequately represented in the police.

#### **VIII. Monitoring racism and racial discrimination, awareness-raising and co-operation with NGOs**

149. The authorities have stated that they are not planning to collect data broken down by national and ethnic origin because people belonging to minorities are against it. ECRI is aware of this problem. Following discussions with members of civil society, however, the ECRI delegation felt that attitudes had changed and that there was no longer categorical opposition. Observing that Austrian law does not specifically prohibit such practices, ECRI wishes to reiterate the importance of data of this kind for, *inter alia*, assessing how minority groups stand in such key areas as employment, housing, education and health, and for developing effective anti-discrimination measures.

150. At the same time, ECRI believes that the activities of the Austrian authorities in this area would be more effective if they were based on a long-term, national strategy for combating racism and intolerance, developed and implemented in close consultation with civil society, and necessarily including - apart from the specific awareness-raising measures recommended in this report - a comprehensive, long-term information and awareness campaign against racism and intolerance. Lastly, ECRI observes that there are in Austria many NGOs dedicated to combating racism, defending fundamental rights and/or protecting the interests of minority groups, which have been instrumental in achieving progress in these areas. It considers it essential that the authorities provide these organisations with on-going support, so that they have sufficient, stable funding to perform their tasks.

151. ECRI reiterates its strong recommendation that the Austrian authorities introduce a comprehensive and coherent data collection system that would make it possible to assess the situation with regard to the different minority groups in Austria and to determine the scale of any manifestations of racism and direct and indirect racial discrimination. In this respect, it recommends that they consider collecting data broken down according to categories such as ethnic or national origin, religion, language and nationality in order to identify any manifestations of discrimination, taking care to ensure that such collection is effected, in all cases, with due regard for the principles of confidentiality, informed consent and the voluntary self-identification of persons as belonging to a particular group. This system should be developed in close co-operation with all the relevant actors, including civil society organisations. It should also take account of any double or multiple discrimination that might exist.

152. ECRI recommends that the authorities develop and implement, in close consultation with civil society, a long-term national strategy for combating racism

and intolerance, including a comprehensive, long-term information and awareness campaign against racism and intolerance. It further recommends that the authorities provide on-going support to the NGOs dedicated to combating racism, defending fundamental rights and/or protecting the interests of minority groups, so that they have sufficient, stable financial resources to perform their tasks.

## INTERIM FOLLOW-UP RECOMMENDATIONS

The three specific recommendations for which ECRI requests priority implementation from the Austrian authorities are the following:

- ECRI recommends that the authorities take urgent steps to provide more financial and human resources to the Ombudsperson for Equal Treatment in the field of employment, irrespective of ethnicity, religion and beliefs, age and sexual orientation, and to the Ombudsperson for Equal Treatment, irrespective of ethnicity and gender, in other areas, so as to enable them to fully perform all the tasks that have been assigned to them. It further recommends that the requisite measures be taken forthwith to ensure that their full independence is enshrined in law and in practice, and to enable them to apply to the courts whenever they deem necessary.
- ECRI recommends that the Austrian authorities promote the reestablishment of a regulatory mechanism for the press, compatible with the principle of media independence, that would make it possible to enforce compliance with ethical standards and rules of conduct including the refusal to promote, in any form, racism, xenophobia, antisemitism or intolerance. It suggests that the authorities consider enacting legislation if there is no other option.
- ECRI reiterates its recommendation that the authorities ameliorate the response of the criminal justice system and of the persons responsible for internal control within the different police units to allegations of racist or racially discriminatory behaviour on the part of the police. In particular, it reiterates its call for the establishment of an independent body with powers to investigate individual complaints of human rights violations on the part of the police, including acts of racism and racial discrimination.

A process of interim follow-up for these three recommendations will be conducted by ECRI no later than two years following the publication of this report.



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## **APPENDIX: GOVERNMENT'S VIEWPOINT**

### **The following appendix does not form part of ECRI's analysis and proposals concerning the situation in Austria**

ECRI, in accordance with its country-by-country procedure, engaged into confidential dialogue with the authorities of Austria on a first draft of the report. A number of the authorities' comments were taken on board and integrated into the report's final version (which, in line with ECRI's standard practice, could only take into account developments up until 3 July 2009, date of the examination of the first draft).

The authorities also requested that the following viewpoint be reproduced as an appendix to the report.



## **Observations by the Republic of Austria in respect of the fourth report by the European Commission against Racism and Intolerance (ECRI) on Austria**

November 2009

### **General Observations:**

Austria remains fully committed to the fight against racism, xenophobia, anti-Semitism and strives to continuously improve the conditions within our society through legal provisions and their implementation and equally important through awareness-raising and education. This is an ongoing process based on a firm commitment, openness, understanding and dialogue.

Austria attaches great importance to the monitoring process by the European Commission against Racism and Intolerance (ECRI). The Fourth Report on Austria contains important findings and recommendations which constitute a good basis for further effort. Some of the findings are of a more general nature and thus make it difficult to identify concrete follow-up measures.

### **Specific Observations:**

#### **1. Legal Provisions:**

##### **1.1 International Legal Instruments and constitutional provisions**

**With regard to ECRI recommendations concerning the ratification of Protocol No.12 to the European Convention on Human Rights and the revision of the constitutional provisions against racism and racial discrimination, in particular, that protection against discrimination on the basis of nationality be enhanced (paras 4 and 12):** The Austrian federal constitutional law (article 7 of the Federal Constitutional Act, in connection with article 2 of the Basic State Law) stipulates a general prohibition of discrimination. The Austrian Constitutional Court has applied this non-discrimination rule for decades as a general principle of equality that must be observed both by the legislator and the law enforcing authorities and may be used as a basis by every individual affected to pursue court action.

The Federal Constitutional Act Prohibiting Racial Discrimination was already adopted in 1973. The ban on discrimination against foreigners has been interpreted by the Austrian Constitutional Court by reference to the aforementioned constitutional laws. In several of its decisions the Austrian Constitutional Court has stated that *any differentiating treatment against and among foreigners is only admissible if, and only to the extent, that there is a discernible reasonable ground and the differentiating treatment is not disproportionate*. This principle is firmly established in case law together with the general principle of equality under Austrian constitutional law. Discrimination is therefore only legitimated in those cases in which objective differentiating characteristics are applied; identical legal consequences must therefore apply to identical sets of facts, major differences concerning the facts of a case must lead to correspondingly different arrangements. Any

discrimination that is solely based on nationality, race, colour of skin, origin or national or ethnic origin is therefore inadmissible in all cases. This interpretation of the Federal Constitutional Act Prohibiting Racial Discrimination does therefore not restrict the prohibition of discrimination in any manner. Rather, what is permitted is solely the differentiating treatment of nationals of different States on the basis of factual criteria such as on grounds of preferential treatment pursuant to bilateral or multilateral agreements or visa agreements.

Article 1 (1) of the Federal Constitutional Act Prohibiting Racial Discrimination protects foreigners the same way as article 7 of the Federal Constitutional Act, in connection with article 2 of the Basic State Law, protects Austrian nationals from discrimination by stating that all Austrian nationals are equal before the law. The case law of the Constitutional Court has clarified sufficiently that the Federal Constitutional Act Prohibiting Racial Discrimination not only protects foreigners against discrimination in relation to other foreigners but also against discrimination in relation to Austrian nationals (see decision VfSlg. 15.668/1999, as well as the decision of 25 November 2002, file number B 792/02, and most recently the decision of 21 June 2004, file number 531/02).

The prohibition of discrimination and the proportionality principle are to be applied by both the legislature and the administration. In our view, no loopholes are discernible so far in Austria's anti-discrimination legislation and the existing Conventional guarantees are also constantly being further developed by the European Court for Human Rights (ECHR).

Even though Austria does not intend to ratify Protocol No. 12 for the time being, Austria supports in principle a general discrimination ban as an expression of a common European value.

## **1.2 Citizenship Legislation:**

**Concerning ECRI's recommendation to the Austrian authorities to review their approach to dual nationality (paras 15 and 17):** The Austrian legislation on citizenship is established also along the lines of the European Council Convention on the Reduction of Cases of Multiple Citizenship. Pursuant to the Convention, there is, apart from persons entitled to asylum, only one case where Austrian citizenship may be acquired without a need to present a proof of giving up the previous citizenship Austria does not intend to deviate from this European Council Convention.

## **1.3 Criminal Law Provisions:**

**Concerning awareness-raising and training of the need to counter racism, xenophobia, anti-Semitism and intolerance for those working in the criminal justice system (paras 25 and 28):** Austria offers a wide range of awareness-raising programs in this context. A complete listing would go beyond the scope of this report. a.) *Police officers:* the training programs mentioned in para 25 of the report show only a small part of the awareness raising and training conducted. Specialized training courses are continuously maintained and expanded where necessary. The efforts to make ongoing training compulsive – so far it is done on a voluntary basis – continue. b.) *Judges and Public*

*Prosecutors:* every future judge and public prosecutor goes through a mandatory four year initial training period. Within the initial training future judges and prosecutors attend special seminars that focus on the treatment of victims in court, on anti-racism and on anti-discrimination. Since the beginning of 2008 all future judges and prosecutors receive an additional three-day training course on human rights issues. Additional training is voluntary. It offers a wide range of seminars, e.g. on the treatment of victims (including minors) in courts, on the consequences of judicial decisions on asylum-seekers and on anti-discrimination. These seminars are very well-attended by members of the courts and by public prosecutors. For example, in 2007, the "Judges week" (RichterInnenwoche), which is the largest and most important annual conference for the judiciary, was dedicated solely to human rights issues. In 2008, the year of commemoration of the events in 1938, a series of seminars were held, among others: a guided tour to a former synagogue, which was recently renovated; an organized trip for 120 people to Hartheim castle, which was used by the Nazis as an euthanasia centre, under the motto "to serve justice – to prevent injustice" (Recht sprechen - Unrecht verhindern), followed by a workshop on the topic of how the judiciary can encourage its individuals to stand up for one's beliefs; an introduction to Islam and many more. Furthermore, judges and public prosecutors are given the possibility to participate in a number of international training courses on anti-racism and anti-discrimination as provided by i.a. by ERA and EJTN . c. ) *Court Officers and Public Servants:* Corresponding to the recommendation, that programmes to raise awareness of the need to counter racism, xenophobia, anti-Semitism and intolerance be made a compulsory part of on-going training for those working in the criminal justice system, as well as that special emphasis be placed on awareness-raising and training in the implementation of the relevant criminal law provisions, the Austrian Ministry of Justice has developed and is continuing to further develop numerous measures which shall ensure that court officers and public servants treat all parties fair and equally, independent of their race, sex or nationality. It starts with the basic training of court officers and public servants, which includes special training units with focus on the adequate treatment of and contact with parties as well as with witnesses and victims of crimes. In the on-going training numerous courses and workshops dealing with communication, especially under difficult and stressful situations, are offered to the public officers and servants. These courses and workshops have included as a main topic the "correct and adequate treatment of persons coming to courts and/or public prosecution offices".

#### **1.4 Administrative law, civil law and anti-discrimination bodies (para 29-41):**

##### **Fragmentation of anti-discrimination regulations (page 8, 1<sup>st</sup> paragraph; page 9, 3<sup>rd</sup> paragraph; recommendation no. 39):**

On the basis of the anti-discrimination directives of the EU (Council Directive 2000/43/EC, Council Directive 2000/78/EC, Council Directive 2004/113/EC), equal treatment has become a cross-sectional matter affecting a number of domains and going far beyond the initially established competence within the labour law.

With the new Equal Treatment Act (*Gleichbehandlungsgesetz, GIBG*) the Federal Government has aimed at integrating in the domestic realm all

equal treatment provisions, going beyond labour law, in order to avoid fragmentation and facilitate access to the law.

Despite this uniform approach, individual aspects of equal treatment are incorporated in the specific laws as well. This mixed approach seems more realistic and practice-oriented.

Through inter-ministerial dialogue and regular contacts between all stakeholders the Federal Government stays committed to an effective and coordinated system of equal treatment legislation.

**Hierarchy (page 8, 1<sup>st</sup> paragraph; page 9, 3<sup>rd</sup> paragraph; recommendations 29, 33 and 37) :** Austria's legislation is in line with European Community law and it supports ongoing efforts of the European Commission towards **harmonisation of all grounds of discrimination**.

The Equal Treatment Act is not a rigid system, but rather forms part of a dynamic process with the aim of safeguarding equality of persons. One of the core issues of the current amendment process concerns the harmonisation of discrimination.

**Burden of proof:** The anti-discrimination directives, the equal treatment directives and Directive 2004/113/EC stipulate that the EU Member States are obliged to ensure, in accordance with their national judicial systems, that, when persons establish before a court or other competent authority prima facie evidence of discrimination, it is the culprit who has to prove that there has been no breach of the principle of equal treatment. The burden of proof clause contained in the Austrian Equal Treatment Act meets exactly this requirement. It does not only ease the standard of proof but eventually shifts the burden of proof, meaning that in case of prima facie discrimination the culprit has to establish that he/she did not discriminate against the plaintiff.

**Discrimination by association (recommendation no. 37):** Following the rulings of the European Court of Justice (case no. C-303/06, Coleman), this item is on the agenda of inter-ministerial talks concerning the amendment of the Equal Treatment Act.

**Maximum compensation (recommendation no. 37):** It is important to note that the provisions regarding maximum compensation in cases where discrimination is based on the fact that the candidate's application was disregarded in a discriminatory way, comply with the requirements of the rulings of the European Court of Justice (case no. C-180/95, Draehmpael).

**Administrative penal proceedings regarding discriminatory job advertisements (recommendation nos. 31, 32 and 37):** The Ombuds Office for Equal Treatment (*Anwaltschaft für Gleichbehandlung*) is responsible for compliance with the equal treatment principle. Due to its expertise, this organisation is best qualified to identify discriminatory job advertisements.

In this context, the awareness-raising aspect seems to be of importance. Discriminatory job ads are not always formulated with discriminatory intent, but are often a result of lack of awareness. In these cases misconduct can be countered by issuing a reminder. In case of repeated violation, however, the offence will be sanctioned by law.

**Ensuring the independence of the Equal Treatment Commission (Gleichbehandlungskommission) and The Ombuds Office for Equal Treatment, assignment to the Federal Minister for Women and Civil Service (page 8, 1<sup>st</sup> paragraph; page 9, 4<sup>th</sup> paragraph; recommendation nos. 38 and 41):**

As a consequence that the responsibility of the Equal Treatment Commission and Ombuds Office for Equal Treatment for equal treatment of men and women was established prior to the extension of the scope of the Equal Treatment Act in 2004, these matters were transferred to the Federal Ministry for women's affairs.

When the scope of the Equal Treatment Act was extended, the new responsibilities were allocated to the Equal Treatment Commission and Ombuds Office for Equal Treatment in order to create uniform access to the law for those concerned and to make use of the existing expertise.

Section 3 para. 5 of the Equal Treatment Commission and Ombuds Office for Equal Treatment Act (*Bundesgesetz über die Gleichbehandlungskommission und die Gleichbehandlungsanwaltschaft, GBK/GAW-Gesetz*) explicitly stipulate that Ombuds Office for Equal Treatment may conduct independent investigations regarding discrimination and publish reports.

The legal basis for reinforcing its independence is provided in the amendment of the Federal Constitution (B-VG) and Enactment of the First Law on Adjustment of Constitutional Provisions (*Bundesverfassungsrechtsbereinigungsgesetz*) which entered into force on 1 January 2008. According to the new clause in Art.20 para 2 B-VG certain types of organisational bodies can be exempted from instructions (expert assessment bodies, bodies involved in arbitration, mediation and interest groups such as the Equal Treatment Commission and the Ombuds Office for Equal Treatment); it binds the legislator in this case to provide for supervisory rights in compliance with the duties of the instruction-free body.

**Effectiveness of proceedings before of the Equal Treatment Commission (recommendation no. 38):** the Equal Treatment Commission through its informal proceedings provides easy access for filing complaints of discrimination. Many of the individuals concerned avoid legal action before the court but consider the proceedings before the Equal Treatment Commission more convenient to present cases of discrimination.

Proceedings before the Equal Treatment Commission are subject to confidentiality. This provides some degree of protection to the discriminated individual, who is often under extreme psychological stress, particularly in the case of harassment; thus further victimisation can be avoided. Informants are also subject to confidentiality, which makes it easier to witnesses to provide information.

Last but not least, the Equal Treatment Commission acts as a preventive body through its recommendations and as an arbitration body through mediation outside formal court proceedings.

The large number of cases filed demonstrates that the proceedings before the Equal Treatment Commission are appreciated and considered suitable for dispute settlement in cases of discrimination.

With the new Equal Treatment Act (Federal Law Gazette I no. 98/2008) the instruments for enforcing the equal treatment principle were improved,

procedural mechanism are made more efficient by for example establishing deputies for the chairperson(s), introducing a deadline for the expert's reports of the Equal Treatment Commission and introducing mandatory publication of all findings of the Equal Treatment Commission on the website of the Federal Chancellery.

**Collective action (*Verbandsklage*) (recommendation no. 37):**

Community law stipulates that all persons who feel that their rights have been violated through non-compliance with the principle of equal treatment must be granted the possibility to lodge a complaint.

In case of a violation of the equal treatment principle, the Equal Treatment Act provides for

- compensation for financial damage, i.e. actual harm (*positiver Schaden*) and loss of profit or
- creating/restoring a discrimination-free situation and, in both cases, additionally
- compensation for the immaterial damage and the personal injury suffered.

These claims have to be asserted at court.

Furthermore, as regards legal protection, Community law requires that the Member States ensure that associations, organisations or other legal entities which, in accordance with the criteria laid down by their national laws, have a legitimate interest in ensuring that the provisions of the anti-discrimination directives are observed, may engage, either on behalf of or in support of the complainant, with his or her approval, in any legal and/or administrative proceedings provided for the enforcement of the claims.

The option for NGOs to file a suit by virtue of their own right, i.e. irrespective of the individual case, for example by collective action (*Verbandsklage*), is not provided.

One possibility of participating in the judicial proceedings is in the form of a third-party intervention (*Nebenintervention*), i.e. an intervention by a third party in support of the plaintiff. According to the provisions of the Austrian Code of Civil Procedure, an intervener is a person who has a legal interest in the proceedings and who participates, without being a party to the proceedings, in a lawsuit pending between other persons in support of one of the parties.

This type of intervention is principally open to everybody. It was modified with respect to the Litigation Association of NGOs against Discrimination (*Klagsverband zur Durchsetzung der Rechte von Diskriminierungsopfern*) for the enforcement of rights of discrimination victims' to the effect that the Litigation Association does not have to produce an explanation for its legal interest, which is taken for granted. The Litigation Association may participate in the proceedings to support the plaintiff (= the discriminated individual) if the plaintiff so wishes.

The Litigation Association is an organisation of specialised institutions dealing with various forms of discrimination. Especially legal entities that focus on anti-discrimination and equality can become members.

In this context, Section 26 of the Code of Civil Procedure should be mentioned, according to which the parties can also have authorised representatives to act on their behalf in the court proceedings. This also

applies to representatives or employees of NGOs, unless there is a statutory requirement to be represented by a lawyer in the proceedings.

As regards labour law proceedings, § 40 para. 2 no. 4 of the Labour and Social Court Act (*Arbeits- und Sozialgerichtsgesetz, ASGG*) stipulates that there is a possibility to be represented by a "suitable person" in proceedings of the first instance. Representatives or employees of NGOs can hence also act as such representatives.

The Chambers of Labour (*Kammern für Arbeiter und Angestellte*) and the Austrian Federation of Trade Unions (*Österreichischer Gewerkschaftsbund*) also represent their members in labour and social court proceedings.

**NGO dialogue (recommendation no. 40):** Dialogue with NGOs takes place on a regular basis. NGOs were involved in the legislative process of the new equal treatment legislation as well as in preparing special events like the European Year of Equal Opportunities for All in 2007.

In the framework of the European Community action programme to combat discrimination (2001-2006) and its follow-up programme PROGRESS, a wide range of national projects in the field of equal opportunities, run by NGOs, have and still are being promoted.

**Equal Treatment legislation from the viewpoint of the *Länder*:** The legal situation in the federal states, in particular their laws against discrimination, is insufficiently dealt with in the report (see p.7, second paragraph, or p.17, footnote 8). The deficiencies highlighted in the report (see for instance on p.9, fourth, fifth and sixth paragraph, p. 18 item 33, p.19 item 37 and on p.45, first bullet) do not apply to the Anti-discrimination Act of Vorarlberg, to mention one example. This law provides an extensive non-discrimination rule not only with respect to ethnic affiliation, but also with respect to religion or ideology, disability, age, sexual orientation or gender. The non-discrimination rule applies not only to employment and labor, respectively, but equally to social protection including social security and health services, social benefits, education as well as access to and supply with goods and services that are available to the public including housing (as far as these issues are part of the legislative competence of the federal state).

Concerning anti-discrimination bodies in the federal *Länder*, the example of Vorarlberg demonstrates that the independence of equal treatment bodies is ensured by law. In Vorarlberg two anti-discrimination authorities ("Landesvolksanwalt" – State Ombudsman and "Patientenanwalt" – patients counsel) are installed whose full independence is guaranteed. During the establishment of the Anti-discrimination Act of Vorarlberg the number of staff members of the Ombudsman Board has been increased.

## **2. Discrimination in various fields**

### **2.1 Education (para 42-51):**

**Measures to combat racism, xenophobia and anti-Semitism in schools:** As part of the educational work against racism, a number of initiatives were taken in recent years. Especially as part of the educational principle governing political education, which applies to all types of schools, many different measures were taken in order to combat prejudices, racism, racial discrimination, xenophobia and anti-Semitism and to promote consideration for diversity, pluralism and mutual respect. Education in the field of human rights is rooted in school curricula in several places. For

example, the educational objective of the curricula for general compulsory schools and upper-level general compulsory schools requires that classroom teaching contribute actively to a democracy oriented to human rights. The curricula of the classroom subject "political education" in upper-level general schools, middle-level vocational schools and upper-level vocational schools include human rights as a compulsory subject.

**Para 43: ECRI recommendation to set up a system to monitor racist incidents at school and compile data on these phenomena:** Austria acknowledges the importance of monitoring racist incidents at schools and agrees that a system of data collection should be developed. Such efforts could be facilitated by the development of further guidance and good practice through regional institutions like for example the Vienna-based European Union Agency for Fundamental Rights.

The collection and exchanging of "best practices" of school projects in the field of anti-racism, intercultural dialogue and intercultural learning would be another option to provide a good basis for developing strategies to combat racism and racial discrimination in schools.

**ECRI's recommendation regarding measures to rectify the disadvantaged educational position of non-Austrian children (para 51):** Austria would like to point to one of the pilot projects which was launched by the Ministry of Education, Arts and Culture in 2008 with setting up the "*Neue Mittelschule*" (New Secondary School) as a new form of general secondary school for all 10 to 14-year-olds in Austria. Preventing early streaming at the age of 10 and enabling all 10 to 14-year-olds to attend these pilot schools regardless of their social, cultural and language backgrounds or their individual performances at the age of 10 was one major objective. Together with this structural change there is a strong focus on quality as these New Secondary Schools have an obligation to individualise teaching and learning processes so as to encourage, promote and challenge all children equally.

Furthermore, education in the respective mother-tongue is available altogether in 20 languages other than German with an increase of students, teachers and teaching units.

Austria would like to underline that in areas with a higher-than average migrant population (like Vienna), the school administration has over the years constantly paid particular attention to the problem of the disadvantaged educational position of non-Austrian children. In Viennese compulsory schools 13 languages are offered for "mother-tongue education". School projects to promote interculturality and multilingualism such as the European Primary School, European Middle School, European High School, International Regional College, CentroLING, "Grenzenlose Nachbarschaft" (Neighbourhood without borders), "Bildungsraum Centrepe" are being implemented successfully. Language proficiency within the "German-as-second language"- programmes is being promoted, especially in order to facilitate the entry into schools. In order to provide better access to higher education the pilot project "*Wiener Mittelschule*" sought to avoid early drop-out and counter potential disadvantage for students with migration background.

## **2.2 Housing and goods and services intended for the public (para 59-64):**

**ECRI recommendation of creating a statutory provision governing discrimination-free wording of property advertisements** (page 8, 2<sup>nd</sup> paragraph; page 9, 2<sup>nd</sup> paragraph; recommendation nos. 61 and 63): Austria would like to point out that this issue is on the agenda of inter-ministerial talks concerning the amendment of the Equal Treatment Act.

## **3. Racism in public discourse (para 71-87)**

### **3.1 Media (para 77-85):**

**With regard to the re-establishment of a regulatory mechanism for the press, to reporting and to the improvement of the availability of electronic media in the languages of the minorities:** Any effort of national authorities to "impress on the media" has to be in strict compliance with the autonomy and independence of media as guaranteed under constitutional law and the European Convention on Human Rights which also forms part of Austria's constitutional law. According to the case law of the Austrian Constitutional Court, the national Austrian Broadcasting Corporation (ORF) is independent from any governmental interference in fulfilling its statutory mandate (VfSlg. 13.336/2009)

All Austrian newspapers are bound by the "Code of Honour of the Austrian Press" which naturally condemns xenophobic and racist reporting.

The re-establishment or new foundation of an Austrian self-regulatory body (Austrian Press Council; *österreichischer Presserat*) for the enforcement of relevant journalistic standards is foreseeable and the national authorities support this initiative. The Austrian Parliament has passed an ordinance within the "*Budgetbegleitgesetz* " 2009, BGBl.I Nr. 52/2009 to provide financial support so as to assure the independence of such self-regulatory bodies.

**Concerning ECRI's recommendation to provide special training for media professionals on the role of reporting in a diverse society and to improve the representation in media professions of persons of immigrant origin or belonging to ethnic minorities and to improve the availability of electronic media in the languages of national minorities (para 84, 85):** The Austrian Broadcasting Corporation (ORF) has taken several measures in this context in the past years, including an exchange of editors with the Croatian Public Service Broadcaster and workshops on diversity management of its staff. The Austrian Broadcasting Corporation is also actively involved in the work of the European Broadcasting Union (EBU) with the aim of gathering experience and exchanging best practice relating to diversity and training at European level. The basic training course for new journalists in the Austrian Broadcasting Corporation includes a workshop with representatives of ZARA (German acronym of "*Zivilcourage und Anti-Rassismus-Arbeit*") concerning "linguistic interaction with Austrians of immigration background". A staff information event on "media and migrants" is going to be organised in cooperation with the Audience Council of the Austrian Broadcasting Corporation. This event will give advice on media use on the one hand and the appropriate use of language in news coverage and reporting on the other hand.

The Austrian Broadcasting Corporation has a mandate pursuant to § 5 ORF-G which stipulates that an adequate part of programs has to be broadcasted in the minority languages. The Austrian Federal Communication Senate ("*Bundeskommunikationssenat*") has ruled that the Austrian Broadcasting Corporation has to guarantee the presence of certain minority groups in the programs. The inclusion of minority languages is one of the main criteria in obtaining a broadcasting license (e.g. broadcasters "Okto" and "Radio Agora").

### **3.2 Internet (para 86-87):**

In close cooperation with the Federal Agency for State Protection and Counter-Terrorism of the Ministry of the Interior, the Criminal Investigation Service Austria (*Bundeskriminalamt* (.BK)) plays an important role in the screening of web pages. In case of racist, xenophobic or anti-Semitic comments or material being found, the Federal Agency for State Protection and Counter Terrorism is immediately notified via a gateway. Urgent tracing operations and announcements are handled by the .BK, after which the competent offices take over.

### **4. Racist violence (para 88-89)**

Austria is fully committed to combating all forms of racist violence. Concerning the investigation and prosecution of criminal acts, the Austrian Criminal Code of Procedure CCP does not leave any flexibility as to which acts should be investigated, prosecuted or indicted and which should not be. The strict principle of legality (principle of compulsory prosecution, Art. 18 paragraph 1 and 2 Austrian Federal Constitutional Act and Section 4 of the Austrian Criminal Code of Procedure – CCP) imposes inter alia a duty on the state to prosecute all crimes if there is sufficient evidence to expect a conviction. Another principle stipulated by Section 2 of CCP is the principle of ex officio investigation, whereby the criminal police or public prosecutor is obliged to conduct investigations in respect of any charges brought to his/her knowledge. The investigation is governed by the principle of ascertaining the truth (Section 3 CCP – *Objektivität und Wahrheitsforschung*) which obliges all authorities competent in criminal proceeding to investigate all circumstances and facts that could have an impact on the verdict.

### **5. Vulnerable/target groups (para 90-96)**

#### **Black persons (para 90-91):**

Efforts within the police to counter potential prejudice towards minority groups are successfully undertaken through different projects such as the project "*Polizei und Afrikaner*" (Police and Africans) or "*Polizeiliches Handeln in einer multikulturellen Gesellschaft*" (Acts of Police in a multicultural society), through which confidence-building measures and direct contacts between police officers and minority members are promoted. In the framework of training programs for police officers, seminars like "A World of Difference" are regularly being held together with the Anti-Defamation League since 2001. The participation in both basic and advanced training courses is compulsory for law enforcement officers.

Awareness-raising activities and the promotion of intercultural dialogue are an integral part of a wide range of programs to combat racism and intolerance in Austria.

### **Muslims (para 92-93):**

The Islamic community has been legally recognized in Austria since 1912 and is one of 13 religious communities recognized as corporations under public law. This status confers specific rights on the Islamic community, particularly in the area of education. Since 1982, Islamic religious instruction is offered in public schools. There are no legal or other restrictions on the wearing of religious symbols in public in Austria. Wearing of religious symbols, like headscarves is primarily regarded as an expression of the freedom of religion of the individual and is protected by constitutional law.

Austria currently counts 400 000 Muslims among its inhabitants. The long history of co-existence with Islam and its adherents has played a positive role which influences the present situation in Austria. It is characterized by flexibility, pragmatism and a commitment to dialogue.

In response to the developments since 9/11 a series of measures, including the detailed collection of data regarding racist and discriminatory incidents and specific state security activities to counter this phenomenon were adopted.

**Concerning amendments of regional Town Planning laws (para 92)** and the underlying allegation of discriminatory measures to prevent the building of Mosques it is worth noting that Art.9 of the ECHR, which has the rank of constitutional law in Austria, guarantees the right to worshiping, including the existence of buildings dedicated to this purpose. The latest amendment of the Town Planning Act of Vorarlberg (which was cited in the ECRI report) has introduced specific requirements for the establishment of highly frequented venues. These requirements apply to all highly frequented venues designed for more than 150 visitors, not only to mosques.

### **Roma (para 95-96):**

The ethnic group of the Roma is an autochthonous group in Burgenland (they have lived there and have been native to the region for almost 300 years). Roma have also settled e.g. in Vienna and Linz mostly in the recent past. Roma associations, in and outside of Burgenland, receive funding from the State earmarked for the promotion of ethnic groups. This special funding focuses primarily on preserving the five main Roma languages spoken in Austria, as well as on supporting Roma children and juveniles through (extra-mural) teaching assistance. By financially supporting the establishment of the most frequently spoken variants of Romany languages in Austria in written form, bilingual newspapers were founded and, for example, Roma ethnic stories recorded in two languages, which is an important contribution to preserving Roma cultures. The production of bilingual teaching material for language classes is supported as well. The Minorities School Act for Burgenland, Federal Law Gazette 1994/641, expressly stipulates in its § 14 (1) that it is a statutory requirement to teach in the Romany language.

In general, the Roma enjoy the same rights and the same legal protection as all other Austrian nationals, as well as all other people living in Austria.

### **Other national minorities (para 97-98):**

**Implementation of the Constitutional Court judgment of December 2001 (para. 98):** In its current work programme for the XXIV<sup>th</sup> legislative period (2008 until 2013) the Austrian Government has committed itself to aim for the implementation of the Austrian Constitutional Court's rulings on topographical signs in Carinthia on the basis of a highest possible consensus with the autochthonous national minority groups and on the basis of existing proposals.

The Government programme also contains a package of additional measures in favour of Austria's autochthonous national minority groups: A revision of the National Minority Act (*Volksgruppengesetz*) with a view to amendments in cooperation with the Minorities' Advisory Boards; and funding for inter-cultural projects which promote the interaction of autochthonous national minority groups in the framework of financial support for minorities (*Volksgruppenförderung*).

In December 2009 the Federal Chancellor will host a conference on this issue to which stakeholders are invited.

### **Non-citizens: migrants and asylum-seekers (para 99-131):**

**Migrants (para 100-110):** with regard to para 107 of the ECRI report it is important to note that the regulations of the Residence and Settlement Act (SRA) concerning family reunification are in compliance with Directive 2003/86/EC of 22 September 2003 on the right to family reunification and with the right to respect for private and family life according to Art.8 ECHR. The quota requirement for family reunifications ceases to have effect three years after submitting the application, which is in compliance with Art. 8 of Dir.2003/86/EC. Due to the amendments to the SRA of April 2009, concerning the residence titles for humanitarian reasons, the issuance of a quota free residence permit *ex officio* or upon justified application in case of prevailing grounds according to Art. 8 ECHR is now provided for in Art. 43 para 2 and Art. 44 para 3 SRA. Art. 8 ECHR is explicitly taken into account in the SRA: according to §11 para 3 SRA, a residence permit may be issued to an alien, notwithstanding the legal prerequisites according to paragraph 2 Z 1-6 or a prevailing impediment to granting a residence permit as to paragraph 1 Z 3, 5 or 6, if it is essential for preserving the applicant's private or family life pursuant to Art.8 ECHR. The procedural cure as well as the submission of application within Austria is granted upon justified application if it is essential for the maintaining of privacy or family life. A residence title can only be withdrawn, according to Art. 28 para 4, if this is required in order to achieve the objectives specified in Art.8, para 2 ECHR.

**Para.108 concerning the quality of training in connection with the "integration contract":** The courses which have to be passed in compliance with the integration agreement, in particular the German language integration course, are certified and evaluated by the Austrian Integration Fund (ÖIF). Descriptions of course contents, educational objectives, teaching methods and qualification of the teaching staff, as well as number of teaching units can be found in the regulations on the integration agreement. The Austrian Integration Fund (ÖIF) may withdraw the accreditation if educational objectives, teaching methods or qualification of the teaching staff do not meet the specified objectives. Thus, it is ensured that courses offered within the scope of the integration agreement

are of high quality and individually adjusted. The costs of the courses are determined by the organizers of the courses. With regard to alphabetization courses, costs (up to 375 EURO) are fully reimbursed by the State (*Bund*) under the condition that the course is successfully completed within one year after the beginning of the contract. For certain family members the *Bund* refunds 50% of the costs of the course, if the integration agreement is successfully completed within two years from the beginning of the contract. A fulfilled integration agreement is a prerequisite for an unlimited residence permit and for subsequent Austrian citizenship.

**Para 109 concerning a national integration plan:** A National Action Plan for Integration (NAPI), which is being drafted at the moment, will provide a basis for the Government's policies in the field of integration. The Federal Ministry of the Interior coordinates the development of the NAPI. Stakeholders at all levels are involved in this process. A steering group, composed of representatives of the federal ministries, provinces, cities, municipalities, social partners and main NGOs, is in charge of developing and drafting the NAPI. Work on the NAPI has made considerable progress so that the final version should be available in the near future.

### **Asylum seekers (para 111-131)**

**Para 126 :** All asylum seekers are entitled to receive basic welfare support. The services offered are in compliance with, and in certain fields even exceed the standards of the Reception Directive. The provision of accommodation is a core service and as such only refused when one or more criteria of Art. 16 of the Reception Directive are met. Such a refusal is subject to legal scrutiny.

**Para 127 :** The Basic Welfare Support Agreement and its corresponding federal and regional regulations – which are in accordance with Art. 19 of the Reception Directive – include provisions regarding persons in need of special protection. The personal interests of unaccompanied minors are complementary safeguarded by the Youth Welfare Offices which pay particular attention to the individual development needs. With regard to the requested provision of accommodation in general, we wish to refer to the remarks made in reply to recommendation 126. In case that Art. 16 of the Reception Directive on unaccompanied minors (withdrawal of reception conditions) is applied, the protective provisions for children and young persons are subsidiarily applied. This ensures that UAMs are not left destitute under any circumstances.

**Para 130:** The report suggests that asylum seekers detained pursuant to Section 76(2) of the Aliens Police Act have access only to social counselling and voluntary return assistance, but no right to receive legal support. While it generally holds true that individuals must arrange their legal representation themselves, there are specific provisions for asylum seekers which provide them with legal aid funded by the state. Section 64 and 66 of the Asylum Act 2005 provide for legal advisors (*Rechtsberater*) and refugee advisors (*Flüchtlingsberater*) respectively, who are mandated to provide legal aid in procedures under the Asylum Act. Refugee advisors are also tasked with providing aid in procedures under the Aliens Police Act, insofar as the use of an attorney is not required by law. Similar procedures for other migrants (third-country nationals illegally residing in the country) will

be put in place pursuant to the EU Return Directive (Directive 2008/115/EG dated December 16th, 2008).

**Para 131:** The Austrian asylum procedure provides for adequate legal facilities to ensure broad legal advice for asylum seekers. Financial support is provided by the Ministry of Interior and within the European refugee fund (EFF).

## **6. Antisemitism:**

Austria is strongly committed to the fight against anti-Semitism and all related forms of intolerance. Austria's legislation regarding the prohibition of neo-Nazi activities, including Holocaust denial, is strict and implemented consistently by prosecutors and courts. However, legal measures alone are not sufficient. We have to continue to combat anti-Semitism at its roots. The International Holocaust Task Force (ITF), which Austria chaired successfully in 2008, has become a valuable partner in improving efforts towards promoting Holocaust education, remembrance and research and thus contributes to the fight against anti-Semitism, extremism, discrimination and all those attitudes that, as the tragedy of this unprecedented genocide shows, lead to crimes against humanity and the worst violations of human rights and dignity. Together with our EU partners Austria is also committed to promote the fight against anti-Semitism in other relevant international fora, such as the OSCE and the UN. Austria attaches the utmost importance to education and awareness-raising in schools. In cooperation with Yad Vashem each year about 50 Austrian teachers are being trained there.

Since 2001 the Austrian Ministry of Interior cooperates successfully with the "Anti Defamation League" in organizing anti-bias training programs for law enforcement officers. All newly recruited officers have to undergo such a training course, which aim at enhancing their capacity for dealing with ethnic diversity.

## **7. Conduct of law enforcement officials (para 134-148)**

**Para 140: concerning the ECRI recommendation to establish an independent body with powers to investigate individual complaints of human rights violations on the part of the police, including acts of racism and racial discrimination.**

The Federal Bureau for Internal Affairs (BIA) is an autonomous agency of the Austrian Federal Ministry of the Interior that is set up outside the classical law enforcement structures. In its capacity as an independent autonomous organizational unit which is not bound by instructions regarding the cases it handles, it conducts security and criminal police investigations in cases of suspected corruption or malpractice by public officers, as defined by the Austrian Penal Code, including cases of human rights abuse. In such cases, the BIA cooperates directly with the competent public prosecutor's offices and courts. According to the Austrian Constitution, the competence of law enforcement is split into the Federal Ministry of Interior and the Federal Ministry of Justice. In order to ensure absolute independence of all investigations, the new Code of Criminal Procedure (CCP) stipulates that the criminal police is required to send reports on the ongoing investigation to the public prosecutor who monitors the respective investigation.

According to Section 195 CCP the court has to order the continuation of the investigation by the public prosecutor on the request of the victim, if the dismissal of the investigation in regard of Section 190 to 192 CCP was based on 1) an infringement of the law or on an incorrect application of the law or 2) serious doubts about the accuracy of the facts on which the decision on the dismissal is based occur or 3) new facts or evidence are presented which may be considered as sufficient grounds to accuse (according to Section 210 CCP) or to continue with diversions measures (Section 198 to 209 CCP). If the public prosecution service considers the request justified the investigation has to be continued. Otherwise the file and a reasoned statement by the public prosecution service have to be forwarded to the court. According to Section 196 CCP before deciding upon the request, the court has – with regard to the public prosecutions reasoning – to provide the possibility of a statement to the defendant and the person who requested the continuation. If the court grants the request the prosecution service has to continue with the criminal proceeding. Further legal remedies against the courts decision are not admissible. (The Act on Reform of the Criminal Code of Procedure which entered into force as of 1 January 2008, published in Federal Gazette I Nr 19/2004, already established in Section 195 and 196 CCP the right to request the continuation of the investigation for victims and other interested parties on which the court of appeal had to decide in case that the public prosecutor did not continue the investigation on his own. Section 195 and 196 CCP in the current version were amended and entered into force as from 1 June 2009, published in Federal Gazette I Nr 52/2009.) Thus, the independent court finally has to decide whether the dismissal of the investigation by the public prosecutor had been justified or the investigation shall be continued upon request.

A new federal law has recently been passed by the parliament providing for the implementation by January 1, 2010 of a specialised federal agency for preventing and fighting corruption (Federal Law Gazette No.72/2009). According to this law, the agency will have nation-wide jurisdiction. The agency will be set up outside the Directorate-General for Public Security, i.e. outside the classical law enforcement hierarchies. Furthermore, an independent commission will be established, which, inter alia, will be responsible, under certain circumstances, to observe legal rights of complainants. Pursuant to the aforementioned law, the members of the commission will act fully independent and will not be bound by any instructions. Thus, the establishment of the agency is of utmost importance in order to continue and strengthen objective and independent investigations as well as to maintain and reinforce public confidence in the system. The jurisdiction of the newly set up independent structure will also cover cases of suspected corruption or malpractice by public officers, as defined by the Austrian Penal Code, including cases of human rights abuse.

**Para 141:** Austria would like to reiterate, that racist behavior by police officers is not tolerated and will be prosecuted through penal, administrative penal and disciplinary measures.

**Para 143:** Since 2001 the Austrian Ministry of Interior cooperates successfully with the US "Anti Defamation League" in organizing anti-bias training programs for law enforcement officers. All newly recruited officers have to undergo such a training course, which aim at enhancing their capacity for dealing with ethnic diversity.

#### **8. Monitoring racism and racial discrimination, awareness-raising and co-operation with NGOs (para 149-152)**

Austria is aware of the importance of monitoring racism and racial discrimination, the importance of awareness-raising and cooperation with NGOs in this context.

A wide range of awareness-raising measures have been successfully implemented over the past years at different levels and in different fields.

The National Plan of Integration, which is currently being prepared, will provide a long-term national integration strategy and will also include measures to combat racism and discrimination.

Austria attaches great importance to the cooperation with NGOs. Regular meetings and ad hoc consultations with NGOs are an integral part of the decision-making process at the political level.

Austria considers the establishment of a comprehensive and viable data collection system for monitoring racism and racial discrimination an important tool to combat racism but equally a big challenge to implement. National efforts are there to some extent. Guidelines to collect data according to objective criteria would still have to be elaborated. In this context regional cooperation could be instrumental.



