

# REPORT ON MEASURES TO COMBAT DISCRIMINATION

## Directives 2000/43/EC and 2000/78/EC

### COUNTRY REPORT/UPDATE 2005

Finland  
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This report has been drafted for the **European Network of Legal Experts in the non-discrimination field** (on the grounds of Race or Ethnic origin, Age, Disability, Religion or belief and Sexual Orientation), established and managed by:

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This report has been drafted as part of a study into measures to combat discrimination in the EU Member States, funded by the European Community Action Programme to combat discrimination. The views expressed in this report do not necessarily reflect the views or the official position of the European Commission.

## INTRODUCTION

### 0.1 The national legal system

*Explain briefly the key aspects of the national legal system that are essential to understanding the legal framework on discrimination. For example, in federal systems, it would be necessary to outline how legal competence for anti-discrimination law is distributed between different levels of government.*

The Republic of Finland is a constitutional democracy. Its legal system belongs to the Scandinavian civil law tradition, with a lot of influences from Swedish and German law. What is distinct about the Finnish legal system is that there is no constitutional court, unlike in most other European countries. The Constitutional Law Committee of the Parliament plays a major role in the interpretation of the Constitution.

Three observations need to be made with respect to the legal framework on discrimination:

First, although the principle of non-discrimination is firmly grounded in the Finnish legal system, there is not much case law or legal literature in relation to this subject area. There is no established line of interpretation with regard to some of the most complex questions discussed in this report. Where available, this report relies on preparatory works (*travaux préparatoires*) and the authoritative statements of the Constitutional Committee of the Parliament, as these sources of interpretation play a strong role in the Finnish legal system in general. It should however be kept in mind that these two sources of interpretation are not strictly speaking legally binding, although they do have a lot of de facto authority.

Second, current anti-discrimination legislation in Finland is characterized by certain dualism. The older parts of the legislation, in particular the Constitution and the Penal Code, prohibit discrimination in rather general terms and explicitly cover a high number of grounds of discrimination in addition to which the respective lists of grounds are open-ended. The more recent parts of the legislation, in particular the Non-Discrimination Act [*yhdenvertaisuuslaki* (21/2004)] and the Act on Equality Between Women and Men [*laki naisten ja miesten tasa-arvosta* (609/1986)], contain more detailed provisions with regard to, for instance, the definition of discrimination. These more recent parts of the legislation have been influenced strongly by international and European anti-discrimination law, and differ to a great extent from the older parts of legislation.

Third, the Åland Islands, which is an autonomous province of Finland, has exclusive legislative competence over certain material areas covered by the two Directives as concerns its territory. The division of legislative competence between the Åland Islands and the Finnish state goes as follows: the Åland Islands has competence over matters relating to e.g. civil servants employed by the Province of Åland or one of the municipalities in the Åland Islands, health care, social welfare, education, self-employment, promotion of employment, and some parts of provision of services (e.g. transport services); the Finnish state has competence over matters such as private employment (including those employed by the authorities of the Åland Islands or one of the municipalities as employees, not civil servants), some parts of the provision of services (such as banking) and criminal and procedural law (including rules on burden of proof). Therefore some parts of the new equality legislation that was adopted in Finland in order to transpose the two Directives are not applicable with respect to the Åland Islands, which is why it was necessary for the Åland Islands to adopt its own equality legislation. The latter legislation entered into force on December 1, 2005. The two sets of

legislation differ to a great extent from each other, partly because of the different terminology used (the Åland Islands legislation was drafted in Swedish while the legislation adopted by the Finnish state was drafted in Finnish; the legislative environment of the two sets of law are completely different, although much of the law adopted by the Finnish state is applicable also in the ÅI). Therefore the Åland Islands' legislation will be separately addressed in this report under those headings that deal with matters with which the Åland Islands has exclusive competence.

## 0.2 State of implementation

*List below the points where national law is in breach of the Directives. This paragraph should provide a concise summary, which may take the form of a bullet point list. Further explanation of the reasons supporting your analysis can be provided later in the report.*

*Has the Member State taken advantage of the option to defer implementation of Directive 2000/78 to 2 December 2006 in relation to age and disability?*

The two Article 13 Directives from year 2000 were transposed into national law primarily by means of the adoption of the *yhdenvertaisuuslaki* (21/2004) [Non-discrimination Act (21/2004)], together with some amendments to existing legislation. The new legislation entered into force on February 1, 2004. This new legislation was however not applicable in the province of Åland Islands with respect to the matters that belong to its legislative competence. The European Court of Justice (ECJ) condemned Finland on 24 February 2005 for having failed to transpose the two Directives with respect to the Åland Islands. The Provincial Legislative Assembly of Åland (*Lagting*) adopted legislation transposing the two Directives in June 2005, and this new legislation entered into force in December 2005. Hence Finland was somewhat late in transposing the two Directives. Finland did not defer implementation of the Employment Equality Directive in relation to age and disability. With the adoption of these laws the transposition process is now considered as complete.<sup>1</sup>

The Non-Discrimination Act, together with amended older legislation, by and large meets the requirements set forth by the two Directives. Some minor areas of concern however remain, though the “beyond-any-doubt”-style drawing of the conclusion that the Finnish legislation is in breach would require authoritative interpretation of the precise contents of the requirements set forth by the two Directives. Before looking at these concerns, two fundamental observations must be made:

- At some points the terminology used in the domestic legislation departs from that used in the Directives and follows the terminology used in the Finnish legal system in general. The significance of this difference in terminology is however alleviated by the fact that the explanatory memorandum to the pertinent Government proposal for the Non-Discrimination Act (HE 44/2003) instructs those applying the law to interpret the Act in accordance with the wording of the two Directives.
- There are discrepancies between the Finnish language version of the two Directives, and the English language version respectively. Those who drafted the new Finnish

<sup>1</sup> There are however two exceptions to this: First, the Finnish Parliament (*eduskunta*), upon passing the new equality legislation, expressed its view that the government should prepare a proposal for an overall reform of the equality legislation that would proceed from the principle that all grounds of discrimination should enjoy equal levels of protection, i.e. that the applicable material scope and the available legal avenues should not differ from ground to ground. Second, sexual orientation is not expressly mentioned in the list of grounds in section 11 of State Civil Servant's Act [*valtion virkamieslaki* (750/1994)], because of an apparent mistake. While the list of grounds is open-ended, and there is no doubt whatsoever that sexual orientation would not be considered as a prohibited ground of discrimination in accordance with the said Act, plans are underway to include an express reference to sexual orientation also into section 11.

equality legislation used the Finnish language version as their template. The Finnish language version provides, in some respects, for weaker protection than the English language version, and this had an effect on the language of the new law. Two of the areas discussed below which cause concern (role of organizations and the definition of indirect discrimination) are areas where these concerns are attributable, at least in part, to these discrepancies in the respective texts. The author of this report has used the English version as the standard against which domestic legislation is measured.

The primary areas of concern are the following:

- Associations or organizations (working for the benefit of victims) do not have any major role to play in judicial or administrative processes. These entities have a general right to request a statement on the interpretation of the Non-Discrimination Act from the Discrimination Tribunal in matters pertaining to ethnic discrimination, but such organisations do not have *locus standi* to take a case to the court or to the Discrimination Tribunal to pursue a matter in its own name, not even with the consent of the victim. Neither can associations become third parties to such proceedings or act as *amicus curiae*. This state of affairs arises from national legislation on rules of procedure. The same procedural rules however allow any lawyer – or in certain simple and non-conflictual matters: any person – to represent a claimant with his/her approval, and to provide assistance, such as legal advice. Lawyers (and also other persons) working for an organization may thus represent a claimant under general rules of representation and procedure, and may also otherwise support the victim (e.g. by way of giving advice). Those who drafted the new equality legislation were – and are – of the view that this arrangement satisfies the requirements set forth by Article 7(2) of the Racial Equality Directive and Article 9(2) of the Employment Equality Directive, considering also preamble No 19 of the Racial Equality Directive and preamble No 29 of the Employment Equality Directive. Whether this really is the case is down to the interpretation of the full scope of the aforementioned pieces of Community law.
- The Non-Discrimination Act includes a specific provision to the effect that the Act does not cover 1) the educational system or the objectives or content of education, or 2) entry into country or residence of foreigners, or differential treatment of foreigners on the basis of their legal status. These limitations to the scope of application *may* be too widely formulated in view of Articles 3(1) (g) and 3(2) of the Racial Equality Directive. With regard to education, further analysis is called for, especially with regard to the question whether the restriction mentioned is justified in view of the fact that Article 3 refers to “the limits of the powers conferred upon the Community”. Accordingly, whether there is a breach depends on whether the educational system and the objectives and content of education belong to that category of matters that are excluded from the powers of the Community. With regard to the second concern, it should be noted that the Non-Discrimination Act excludes EU nationals from its scope in this respect, by way of speaking summarily of “foreigners” (that is: those without Finnish citizenship), and not of “third country nationals or stateless persons” in accordance with the Directives. This difference may however in practice be without material implications, because the legislation that deals with “entry into country or residence of foreigners” and that makes distinctions on the basis of “their legal status” – in the material fields covered by the Racial Equality Directive – does itself make a distinction between EU-nationals and other foreigners.<sup>2</sup>

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<sup>2</sup> The Alien’s Act [*ulkomaalaislaki* (301/2004)] makes a distinction between foreigners and EU-citizens, and e.g. stipulates that the latter do not in general need a work permit.

- As regards the definition of indirect discrimination in the Non-Discrimination Act: “particular disadvantage” in the definition of indirect discrimination has been interpreted/translated as ”erityisen epäedullinen asema”; this translates in English as ”putting a person into a *particularly* disadvantaged position”, i.e. the wording suggests that there is a threshold of severity that the disadvantage must meet to qualify as discrimination.<sup>3</sup> Whether this is in line with the Directives depends on the interpretation of the Directives. It must however be underlined that this formulation of indirect discrimination follows and is in line with the Finnish language version of the two Directives.
- It is unclear to what extent the courts in the Åland Islands will apply the shift in the burden of proof with respect to those cases that are brought under the laws adopted in the Åland Islands. This is because the rules on burden of proof belong to the legislative competence of the Finnish state, and because the requirements posed by the two Directives in this respect were transposed into national law by section 17 of the Non-Discrimination Act, which however by its wording is applicable only with respect to proceedings brought under that particular Act. The lack of expressly applicable provision on the burden of proof in this respect does however not necessarily mean that the courts would not in practice observe the shifted burden of proof, as the Finnish courts have in the past in similar cases followed a shifted (shared) burden of proof (in other than criminal law cases) even without an express provision to that effect, and as the courts in the ÅI may nevertheless apply section 17 by taking into account its objective and by disregarding its express limitations.

### 0.3 Case-law

*Provide a list of any important case-law within the national legal system relating to the application and interpretation of the Directives. This should take the following format:*

- a. Name of the court
- b. Date of decision and reference number (or place where the case is reported). If the decision is available electronically, provide the address of the webpage.
- c. Name of the parties
- d. Brief summary of the key points of law (no more than several sentences)

➔ Please use this section not only to update, complete or develop last year's report, but also to include information on important and relevant case law concerning the equality grounds of the 2 Directives, even if it does not relate to the legislation transposing them (e.g. if it concerns previous legislation unrelated to the transposition of the Directives)

#### **a. Vaasa Administrative Court**

#### **b. 27.8.2004, Ref. No. 04/0253/3**

#### **c. N/A**

**d.** The Cathedral Chapter of the Evangelical Lutheran Church had decided that the applicant was not eligible to be appointed as a chaplain (assistant vicar), as she was publicly living in a same-sex relationship and had announced that she would officially register the said relationship. The Vaasa Administrative Court annulled the decision of the Cathedral Chapter, as the decision was found to be against the law because of its discriminatory nature. The Constitution and the Non-discrimination Act provide for equality before the law and prohibit discrimination on the grounds of, inter alia, sexual orientation and “other reasons related to a

<sup>3</sup> It should be noted that it appears to be the case that the setting of a some kind of a (even low) threshold was indeed considered necessary because otherwise a non-threshold definition of indirect discrimination (which can be unintentional and not easy to identify), coupled with sanctions such as payment of major sums of compensation, could lead to unreasonable consequences.

person”. Same-sex relationship was found to constitute such “other reason related to a person”, on the basis of which it was thus not possible to discriminate. Furthermore, the right of same-sex couples to register their relationship is provided for by the Act on registered partnerships. The decision of the Cathedral Chapter might have been justified had there been an applicable legal basis for it in the form of an exception to the applicability of non-discrimination norms. No such exception was however provided for e.g. by the Church Order (which lays down rules for appointing vicars and chaplains) or the Church Act.

**a. Supreme Administrative Court**

**b. 08.08.2001/1766, KHO: 2001:38**

**c. N/A**

**d.** City of X had to cut down the number of its employees, and issued instructions according to which those above a certain age limit should be primarily targeted at, although individual assessment was required to establish who should be dismissed. The likelihood of having been given notice was two times higher in the age group 50-59 years in comparison to other age groups. The City was not able to justify its actions by providing a weighty and acceptable reason for such differential treatment on the basis of age. This was found to constitute a breach of section 2 of the Act on the Employment Security of Municipal Officeholders [*Kunnallisen viranhaltijan palvelussuhdeturvasta annettu laki* (484/1996)], which prohibited age discrimination (this prohibition pre-dated the Directives, and allowed the justification of direct age discrimination).

**a. District Court of Vaasa**

**b. 27.9.2005**

**c. N/A**

**d.** The complainant, a person with a severe sight disability was denied access to a restaurant on the grounds that her guide dog was not allowed entry to the restaurant. The district court of Vaasa found this to constitute discrimination on the basis of disability. The owner of the restaurant, who had given instructions not to let dogs into the restaurant, and the waiter who had acted in accordance with these instructions, were ordered to pay fines.

**a. Discrimination Tribunal**

**b. 31.1.2006**

**c. N/A**

**d.** The case concerned the allocation of pupils into separate school classes in the Aurinkolahti primary school. During the school year 2003-2004 two parallel school classes, 1A and 1B, had been formed in such a way that all immigrant origin pupils had been placed in class 1B. As a result, one third of the pupils in class 1B were of immigrant origin, while class 1A consisted only of pupils of Finnish origin. In their separate responses to the complaint filed by the Ombudsman for Minorities, the headmaster of the school, the City council and the City education department all submitted that the allocation of pupils had been based on pedagogical reasons, not ethnic or national origin. Allocation had been done on the basis of need for instruction in the Finnish language. According to the respondents, this arrangement made it possible to provide instruction in the Finnish language in a more efficient way, which enhances the chances of immigrant pupils to succeed in their school studies. The City education department was of the view that the provision of special language instruction in this way was in fact a positive action measure, not discrimination. The Discrimination Tribunal held, after voting 4-1, that the arrangement constituted indirect discrimination on basis of ethnic origin. The Tribunal issued a notice to the city of Helsinki (which was responsible for the school) prohibiting it to continue discriminatory treatment.

## **1. GENERAL LEGAL FRAMEWORK**

## Constitutional provisions on protection against discrimination and the promotion of equality

Provisions guaranteeing equality and non-discrimination have been given a pride of place in the Constitution, as they are placed first among fundamental rights, starting at section 6. Section 6(1) of (731/1999) Constitution [*perustuslaki* (731/1999)] reads as follows:<sup>4</sup>

Everyone is equal before the law.

Corollary to the section 6.1 are sections 6(2) and 6(3):

No one shall, without an acceptable reason, be treated differently from other persons on the ground of sex, age, origin, language, religion, conviction, opinion, health, disability or other reason that concerns his or her person.

Children shall be treated equally and as individuals and they shall be allowed to influence matters pertaining to them to a degree corresponding to their level of development.

*a) Briefly specify the grounds covered (explicitly and implicitly) and the material scope of the relevant provisions. Do they apply to all areas covered by the Directives? Are they broader than the material scope of the Directives?*

Section 6(1) extends its protection to “everyone”, that is, everyone subject to the Finnish legal system, not just citizens. Section 6(2) explicitly prohibits discrimination on the grounds of sex, age, origin, language, religion, conviction, opinion, health and disability. The list of grounds is not exhaustive, and covers also other statuses of broadly similar nature. The *travaux préparatoires* mention as other applicable grounds e.g. sexual orientation, social standing, family relations, and domicile.<sup>5</sup> The reference to “origin” is customarily taken to refer to national, ethnic and social origin. Ethnic origin is interpreted to cover “race” and colour. It may be pointed out in this context that the Finnish legislation (both the generally applicable legislation and the legislation adopted in the Åland Islands) attempts to avoid references to “race”, as that notion is held to be unscientific; however, the Penal Code does refer to “race”, probably because its provisions on discrimination were adopted with a view to implementing nationally the requirements of the UN CERD Convention, for which the concept of “race” is a central one.

The reference “before the law” in section 6(1) is usually taken to refer to the application of law, meaning that the provision is seen to act as a principle limiting the discretionary power of the person or authority applying the law. In this sense the paragraph is strongly related to conceptions of justice and the right to fair trial. The provision acts as a guarantee against arbitrary decision-making and demands that like cases should be treated alike.<sup>6</sup> Lately it has

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<sup>4</sup> NB: **all the translations of legislation in this report are unofficial.** A considerable amount of Finnish legislation has been translated into English by the Ministry of Justice or the Ministry of Labour (and are available at [www.finlex.fi](http://www.finlex.fi)), but it is submitted that those translations are at times too imprecise or even a bit incorrect for the purposes of accurate legal interpretation, which is why the author has at some points chosen to modify the translations, or to provide an alternative translation, when clearly mandated by the need to improve precision. The laws adopted by the Provincial Legislative Assembly of Åland are available at: <http://www.ls.aland.fi/lag.pbs> (no English translations available at 1.1.2006).

<sup>5</sup> HE 309/1993 [Government proposal 309/1993].

<sup>6</sup> Martin Scheinin, “Yhdenvertaisuus ja syrjinnän kieltö” [Equality and the Prohibition of Discrimination], in Hallberg et al, *Perusoikeudet* [Basic Rights], WSOY 1999, p. 233.

become a widely accepted interpretation that the provision creates obligations also towards the legislator to ensure that the legislation that is passed is in accordance with the principle of equality. In the end of the day, the main thrust of section 6(1) is to ensure equal treatment in the exercise of public powers, in particular as regards administration, law-making and judiciary.

The prohibition of discrimination in section 6(2) is rather general in scope: it prohibits both direct and indirect discrimination and its field of application has not been limited in any way. The provision does not use the concept of “discrimination” as such but speaks instead of “differential treatment without an acceptable reason”. A reason is acceptable if it serves an objectively justifiable end that is in accordance with the objectives of the fundamental rights system, and if the means used are proportionate to the ends. The non-discrimination clause of section 6(2) in combination with the obligation of authorities to promote human rights and fundamental freedoms, as laid down in section 22 of the Constitution, have been taken to mean that the legislator has an obligation to make sure that the legislation does not contain provisions that without an acceptable reason treat people differently on a prohibited ground.<sup>7</sup>

*b) Are constitutional anti-discrimination provisions directly applicable?*

One of the major objectives of the fundamental rights reform in 1995 was to increase the direct applicability of fundamental rights, and the non-discrimination provision of section 6 is widely held to be the best example of a constitutional right that is directly applicable. Section 6 has been invoked in courts.<sup>8</sup>

*c) In particular, where a constitutional equality clause exists, can it (also) be enforced against private actors (as opposed to the State)?*

Although the primary thrust of section 6 is to ensure equal treatment in the use of public powers, section 6 may in some situations have a bearing to relationships between private parties as well. Mostly this effect takes place through statutory law which implements the Constitutional principle of equal treatment, although in some situations section 6 may be more “directly applicable”, e.g. as a grounds for claiming damages or as a grounds for determining that a specific clause of an agreement is to be considered “unjust”.<sup>9</sup>

Constitutional rights prevail over provisions of statutory law where these two are in manifest conflict, although the primary means of resolving such conflicts is through “fundamental rights friendly” interpretation of statutory law.<sup>10</sup>

## **2. THE DEFINITION OF DISCRIMINATION**

### **2.1 Grounds of unlawful discrimination**

*Which grounds of discrimination are explicitly prohibited in national law? All grounds covered by national law should be listed, including those not covered by the Directives.*

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<sup>7</sup> HE 200/2000 vp. (Government proposal 200/2000).

<sup>8</sup> See e.g. Pekka Hallberg in Hallberg et al, *Perusoikeudet* [Basic Rights], WSOY 1999, pp. 704, 717, 719; Kortteinen – Makkonen, *Oikeutta rasismiin ja syrjinnän uhreille – Etnisen syrjinnän vastainen käsikirja*. Ihmisoikeusliitto 2000.

<sup>9</sup> Martin Scheinin, “Yhdenvertaisuus ja syrjinnän kieltö” [Equality and the Prohibition of Discrimination], in Hallberg et al, *Perusoikeudet* [Basic Rights], WSOY 1999, p. 260; Timo Makkonen, *Syrjinnän vastainen käsikirja*. IOM Helsinki 2003, p. 101.

<sup>10</sup> Section 106 of the Constitution.



The Constitution [*perustuslaki* (731/1999)], the Non-Discrimination Act [*yhdenvertaisuuslaki* (21/2004)] and the Penal Code [*rikoslaki* (39/1889)] provide for the generally applicable prohibitions of discrimination. In addition, discrimination is prohibited in more than ten specific statutory acts with a particular, and thus rather limited, material scope, such as the Act on Seamen [*merimieslaki* (423/1978)]. In addition, equality between women and men is governed by a specific act, namely the Act on Equality Between Women and Men [*laki naisten ja miesten tasa-arvosta* (609/1986)].

All three main anti-discrimination provisions feature an open-ended list of prohibited grounds of discrimination. As was mentioned before, the Constitution explicitly covers sex, age, origin, language, religion, conviction, opinion, health and disability as prohibited grounds of discrimination. The Non-discrimination Act covers explicitly the grounds of age, ethnic or national origin, nationality, language, religion, belief, opinion, health, disability and sexual orientation. The Penal Code explicitly covers grounds of race, national or ethnic origin, colour, language, sex, age, family ties, sexual preference, state of health, religion, political orientation and political or industrial activity.

*Åland Islands.* The Provincial Act on Prevention of Discrimination in the Province of Åland Islands [*Landskapslag om förhindrande av diskriminering i landskapet Åland* (66/2005)] prohibits discrimination on the grounds of ethnic origin (“*etnisk tillhörighet*”, literally “ethnic belonging”), religion or belief (“*övertygelse*”, literally “conviction”), disability, age and sexual orientation (“*sexuell läggning*”, literally “sexual disposition”). The list of grounds in section 1 of the Provincial Act is open-ended, but the specific bans on discrimination in subsequent sections deal only with the explicitly mentioned grounds.

### **2.1.1 Definition of the grounds of unlawful discrimination within the Directives**

*a) How does national law on discrimination define the following terms: racial or ethnic origin, religion or belief, disability, age, sexual orientation?*

The national anti-discrimination law does not define “racial or ethnic origin”, “religion”, “belief”, “disability”, “age” or “sexual orientation”, nor are any definitions provided in the pertinent preparatory works. This probably has a lot to do with the way in which discrimination is conceived in the Finnish legal system. All main non-discrimination provisions are open-ended with regard to the list of grounds, that is, they prohibit discrimination not just e.g. on the basis of ethnic origin, but also on “other reasons related to a person” as well. Therefore establishing the exact “scope” of e.g. “ethnic origin” is not so important, and it is probable that different grounds of discrimination enjoy wide protection in this regard. For instance, in the case from Vaasa Administrative Court (mentioned under heading 0.3 above), registration of same-sex relationship was taken to constitute a ground of its own, i.e. not (necessarily) a matter falling within the ambit of sexual orientation. In addition it might be mentioned that as neither direct nor indirect discrimination requires establishment of discriminatory intent, it is not material whether the perpetrator was aware of the existence of a particular discrimination ground or how he/she conceived it.

The issue of the precise definition of the grounds involved has not arisen in the case law (or at any rate the matter has not been discussed in the published decisions). It should be noted that, theoretically, according to general rules of interpretation the terms at hand are to be interpreted in a fundamental-rights-friendly manner, and in accordance with international human rights law and especially the rulings of the European Court of Justice.

*Åland Islands*. The ÅI law uses the following terminology:<sup>11</sup>

- Ethnic belonging (“etnisk tillhörighet”). This term is not defined in the law itself. According to the pertinent *travaux* (*Ålands landskapsregering, framställning nr 10/2004-2005*) this concept covers the notions of “race” and “ethnic origin”. The *travaux* further explains that the concept of “race” is not used in the law text itself because it is an “unscientific” notion and gives rise to “inappropriate associations”.<sup>12</sup> It also notes that ethnic origin is usually understood in terms of history, culture, customs and nationality.<sup>13</sup>
- Disability (“funktionshinder”). This term is not defined in the law itself. According to the *travaux* the concept of “funktionshinder” refers to stable (enduring) physical, psychological or intellectual limitations of one’s functional capacities.<sup>14</sup>
- Sexual disposition (“sexuell läggning”). This term is not defined in the law itself. It appears to be the case that this notion is to be understood in a wider sense than the concept of sexual orientation. The *travaux* points out that there are three different sexual dispositions: heterosexual, homosexual and bisexual.<sup>15</sup>
- Religion and other conviction (“religion eller annan övertygelse”). These terms are not defined in the law or its *travaux*. It is notable that the law speaks of “religion or *other* conviction”, a formulation which may be narrower or broader than the concept of “belief” (this is difficult to determine in the absence of an authoritative interpretation from the ECJ regarding what is meant by “belief” in the first place).
- Age (“ålder”). This concept is not defined in the law or its *travaux*.

*b) Where national law on discrimination does not define these grounds, how far have equivalent terms been used and interpreted elsewhere in national law (e.g. the interpretation of what is a ‘religion’)?*

Religion. The national law does not define religion as such. The Act on Freedom of Religion [*uskonnonvapauslaki* (453/2003)], which entered in force on August 2003, defines a “religious community” [*uskonnollinen yhteisö*] for the purposes of that act. According to section 2, the term “religious community” refers to the Evangelical Lutheran Church, the Orthodox Church, and communities registered under the Act. Section 7 of the Act lays down the criteria for religious communities eligible to be registered as such: The purpose of a religious community shall be to support and arrange individual, communal and public activities related to the practice or other expression of religion. These activities have to be based on some holy scriptures or other established sources regarded as holy. A community has to respect human rights and fundamental freedoms in all its activities. The purpose of a religious community shall not be the making of financial gains, and its activities shall not be primarily of economical nature. If a community does not meet all of the above-mentioned criteria, it cannot be registered as a religious community.

Not all communities have registered themselves as religious communities, as e.g. some Pentecostal congregations have registered themselves as associations.

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<sup>11</sup> The terminology used in the legislation adopted in the ÅI differs to a great extent from the terminology used in the legislation adopted by the Finnish state, partly because the latter legislation was drafted in Finnish and the former in Swedish, and partly because these laws are embedded in different legal regimes (though it must be remembered that much of the legislation adopted by the Finnish state is applicable also in the ÅI). Both Finnish and Swedish are official languages in Finland. Although Swedish-speakers amount only to some 6 % of the population, they constitute a majority in the Åland Islands.

<sup>12</sup> Section 2.1.

<sup>13</sup> *Idem*.

<sup>14</sup> Section 2.2.

<sup>15</sup> *Idem*.

Belief. “Belief” is not defined through legislation, preparatory works or case law. In the light of legal writings, it is clear that “belief” as used e.g. in the Constitution [“*omatunto*”] covers not just religious beliefs but also other outlooks on life as well.

Ethnic origin. The law does not define “ethnicity” or an “ethnic group” for any purposes. It is clear, through well-established line of interpretation, that the notion of “ethnic origin” comprises also such notions as “racial origin” and “colour”, and that the notion “origin” comprises not just ethnic, but also racial and national origin.

Sexual orientation. The legislation, preparatory works or case law do not provide for a definition of sexual orientation. The national legislation uses at times the term “sexual orientation” (“*seksuaalinen suuntautuminen*”), and at other times a term which might perhaps be translatable as “sexual orientedness” (“*seksuaalinen suuntautuneisuus*”). While the latter term is arguably closer to the term “sexual preference” than the former, it is unlikely that the distinction has any legal relevance in practice. It should be clear that both terms cover bisexual, homosexual and heterosexual orientations.

Disability. The Act on Services and Assistance for the Disabled [*laki vammaisuuden perusteella järjestettävistä palveluista ja tukitoimista* (380/1987)], section 2, defines a disabled person as a person who because of an impairment or illness has longstanding difficulties to get by ordinary activities of life. Functional capacity cannot be assessed only medically. Act on Public Employment Services [*laki julkisesta työvoimapalvelusta* (1295/2002)] on its part defines “a handicapped” as a person whose opportunities in the working life have considerably lessened due to an appropriately established impairment or illness.<sup>16</sup> Both of these definitions are specific and have no bearing on anti-discrimination law as such, though a person who meets either one of the above-mentioned criteria is undoubtedly to be considered a person with a disability also with respect to anti-discrimination law.

*c) Are there any restrictions related to the scope of ‘age’ as a protected ground (e.g. a minimum age below which the anti-discrimination law does not apply)?*

Section 7 of the Non-Discrimination Act [*yhdenvertaisuuslaki* 21/2004]) provides for a rather general restriction as regards differential treatment on the basis of age. Section 7 reads:

The following conduct is not considered discrimination under this Act: (...)

3) different treatment based on age when it has a justified purpose that is objectively and appropriately founded and derives from employment policy, labour market or vocational training or some other comparable objective, or when the different treatment arises from age limits adopted in qualification for retirement or invalidity benefits within the social security system.

The preparatory works to the Non-Discrimination Act cite several examples of situations where existing law provides for differential treatment of individuals based on their age, and holds that these distinctions are justified under section 7 of the Act. These examples relate to e.g. retirement ages and specific employment policy measures for young people. The acceptability of a distinction based on age has to be judged against its aims, which have to be legitimate, as also provided for in the Directives. The Non-Discrimination Act does not explicitly refer to the requirement that the means used have to be “appropriate and necessary” (cf. the Directives), but the significance of this omission is alleviated by the fact that the principle of proportionality is a general principle of law in the Finnish legal system, and

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<sup>16</sup> Section 7(1) of the Act.

should be ‘automatically’ taken into account in interpretation. However, it would have been a better solution, from the point of view of legal certainty, to expressly refer to that requirement in the text of the law.

The same observations apply, *mutatis mutandis*, also to the legislation adopted in the Åland Islands, in particular section 3(2) of the Provincial Act on Prevention of Discrimination.

### 2.1.2 Assumed and associated discrimination

*a) Does national law prohibit discrimination based on assumed characteristics? e.g. where a woman is discriminated against because another person assumes that she is a Muslim, even though that turns out to be an incorrect assumption.*

Section 6(1) of the Non-Discrimination Act [yhdenvertaisuuslaki 21/2004)] stipulates that “no-one shall be discriminated against on the basis of age, ethnic or national origin, nationality, language, religion, belief, opinion, health, disability, sexual orientation or any other reason related to a person”. The wording is clear in that it does not prohibit discrimination on the basis only of a person’s actual age, disability or so on (as it would if it would read “no-one may be discriminated against on the basis of *his or her* age etc”). Quite conversely, it categorically prohibits discriminating against *anyone* on the basis of the grounds mentioned. Therefore discrimination based on assumed characteristics falls within the ambit of the Non-Discrimination Act and other domestic anti-discrimination law.

*Åland Islands.* The legislation adopted in the Åland Islands, or its *travaux*, do not explicitly address this issue. The same observations that were made in respect to the generally applicable laws apply also with respect to the law adopted in the ÅI.

*b) Does national law prohibit discrimination based on association with persons with particular characteristics (e.g. association with persons of a particular ethnic group)? If so, how?*

The law or its *travaux* are not clear, but I would argue that such discrimination is clearly prohibited. One might argue, firstly, that such discrimination breaches the maxim that “no-one may be discriminated against on the basis of e.g. ethnic origin”, or secondly, that such discrimination falls into the “any other reason related to a person” –category. Either way, discrimination based on association with persons with particular characteristics is covered.

*Åland Islands.* The *travaux* to the Åland Islands equality law expressly points out that the ban on discrimination is engaged also where a person is treated adversely because someone else, e.g. wife or a daughter, has a particular ethnic origin, religion etc.<sup>17</sup>

## 2.2 Direct discrimination (Article 2(2)(a))

*a) How is direct discrimination defined in national law?*

Only the Non-Discrimination Act [yhdenvertaisuuslaki 21/2004)], implementing the two Directives, contains an express definition of direct discrimination. Direct discrimination is defined in section 6(2) of the Act as follows:

Discrimination means:

<sup>17</sup> Ålands landskapsregering, framställning nr 10/2004-2005, Section 2§1.

1) the treatment of a person less favourably than the way another person is treated, has been treated or would be treated in a comparable situation (direct discrimination).

Other parts of legislation approach discrimination differently. Section 6(2) of the Constitution [*perustuslaki* (731/1999)] prohibits “putting of a person into a different position without an acceptable reason”. Section 11:9 of the Penal Code [*rikoslaki* (391/1889)] defines discrimination as “putting a person into a manifestly unequal position or into substantially worse position than the others, without an acceptable reason”. Section 47:3 of the Penal Code defines discrimination in employment as “putting of an employee or a prospective into a disadvantageous position without a weighty, acceptable reason”.

All of these provisions arguably cover also segregation, i.e. the provision of services separately for different groups.

*Åland Islands.* The Provincial Act on Prevention of Discrimination in the Province of Åland Islands [*Landskapslag om förhindrande av diskriminering i landskapet Åland* (66/2005)], section 2(2), defines direct discrimination as follows:

Direct discrimination is taken to have occurred when a person is treated less favourably than another person is, has been, or would be treated in a comparable situation.

*b) Does the law permit justification of direct discrimination generally, or in relation to particular grounds? If so, what test must be satisfied to justify direct discrimination? (See also 4.7.1 below).*

As regards the Non-Discrimination Act, which covers the material fields of the two Directives, the law does not permit general justifications. However, the taking of positive measures is permitted, as is differential treatment that is based on a characteristic that constitutes a genuine and determining occupational requirement [sections 7(1) and (2) of the Act]. The same observations apply, *mutatis mutandis*, also with respect to the law adopted in the ÅI.

*c) In relation to age discrimination, if the definition is based on ‘less favourable treatment’ does the law specify how a comparison is to be made?*

While the definition of discrimination, including on the grounds of age, is based on the “less favourable treatment” formulation, the law, or its preparatory works, do not specify how a comparison is to be made. A reference to “a comparable situation” in the definition does not necessarily have to refer to an actual situation. A standard for comparison can also arise out of the way in which people are usually treated, or how a person has in the past treated another one in a comparable situation.<sup>18</sup> The same applies with respect to the law adopted in the Åland Islands.

### ➔ 2.2.1 Situation Testing

*a) Does national law permit the use of ‘situational testing’? If so, how is this defined and what are the procedural conditions for admissibility of such evidence in court.*

The equality laws or the procedural laws do not refer to situation testing. There are no known instances where situation testing would have been used *ex post facto* to support a claim of

<sup>18</sup> HE 44/2003 [Government proposal (44/2003)], p.42.

discrimination. An NGO has however conducted research-oriented testing, and on the basis of this research crime reports were filed with the police (see below at c)

b) *Outline important case-law within the national legal system on this issue.*

There is none. The decisions on cases that have been brought on the basis of testing have not outlined any generally applicable interpretations e.g. with respect to the criteria which have to be fulfilled for testing to be admissible as evidence, as these cases have been handled as 'ordinary' discrimination cases, and the fact that they were tried as an outcome of testing apparently played no material part in the proceedings. This state of affairs relates probably to the fact that situation testing has not been used as a method for gathering evidence to *support* a claim of discrimination (i.e. as *ex-post-facto* evidence), but as *grounds* for bringing a case to the court.

c) *Outline how situation-testing is used in practice and by whom (e.g. NGOs)*

A Finnish NGO (the Finnish League for Human Rights) conducted situation testing in fall 2002 to investigate whether restaurants deny entry for persons belonging to minorities (testers were of foreign origin or Roma and were accompanied by people of the majority ethnic group). On the basis of this investigation eleven crime reports on discrimination were filed with the police. In six of these cases discrimination was found and the accused were sentenced to fines. In four cases the public prosecutor decided not to bring charges and one case failed because it was not brought to the court within the time limit prescribed by the law.

## 2.3 Indirect discrimination (Article 2(2)(b))

a) *How is indirect discrimination defined in national law?*

Section 6(2) of the Non-Discrimination Act (*yhdenvertaisuuslaki* 21/2004) defines indirect discrimination as follows:

Discrimination means: (...)

- 2) that an apparently neutral provision, criterion or practice puts a person at a particularly disadvantageous position compared with other persons, unless said provision, criterion or practice has an acceptable aim and the means used are appropriate and necessary for achieving this aim (*indirect discrimination*);

While the Constitution [*perustuslaki* (731/1999)] does not explicitly refer to the differentiation between direct and indirect discrimination, section 6(1) of the Constitution is to be interpreted to cover both.<sup>19</sup> No established case law or doctrine exists as to how *exactly* the Constitutional prohibition of indirect discrimination is to be construed, but the base line is to evaluate the factual consequences of an action. The relevant sections in the Penal Code [*rikoslaki* (39/1889)] do not distinguish between direct and indirect discrimination, and it is highly unlikely, given the requirements of the legality principle, that they would be interpreted to cover indirect discrimination.

*Åland Islands.* Section 2(3) of the Act defines indirect discrimination:

Indirect discrimination is taken to have occurred when a facially neutral provision or a facially neutral criterion or practice particularly disadvantages particular persons,

<sup>19</sup> HE 309/1993 [Government proposal (309/1993)].

unless the provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

*b) What test must be satisfied to justify indirect discrimination?*

To be justified, a provision, criterion or practice that would otherwise be taken to constitute indirect discrimination, must have an acceptable aim and the means used shall be appropriate and necessary for achieving this aim. The law, the *travaux préparatoires*, or case law do not elaborate this test, or how it can be satisfied, any further. The *travaux* to the Non-Discrimination Act point out, as an example, that the observance of a binding legal norm can be taken as an “acceptable aim”, in addition to which it is required that the norm could not have been followed in such a way that would have been compatible with the non-discrimination law.<sup>20</sup> The same principles apply with respect to the law adopted in the Åland Islands.

*c) Is this compatible with the Directives?*

Yes, the wording of the definition of indirect discrimination follows closely that of the two Directives, except for one thing: the Non-Discrimination Act speaks of putting a person at a “particularly disadvantageous position” (as does the Finnish-language versions of the Directives), while the English-language versions of the Directives speak of putting a person at a “particular disadvantage”. It may be argued that the Non-Discrimination Act thus requires that the disadvantageous effects of a provision, criterion or practice should be rather serious or substantial to qualify as indirect discrimination, while the Directives do not require that. In effect, a certain provision, criterion or practice could be deemed to constitute indirect discrimination under the Directives, but not under the Non-Discrimination Act. This is however a matter of interpretation, of both the meaning of the Directives and the Non-Discrimination Act. In any case it should be emphasised that the Non-Discrimination Act follows and is in compliance with the Finnish language version of the two Directives.

*Åland Islands.* The formulation of the concept of indirect discrimination follows closely the wording of the two Directives.

*d) In relation to age discrimination, does the law specify how a comparison is to be made?*

No. However, according to the *travaux*, a comparator does not necessarily need to be “real”: sometimes the effects of a provision, criterion or practice can be judged against the very broad standard of “how people are usually treated”.<sup>21</sup> The same applies also with respect to the law adopted in the ÅI.

### ➔ 2.3.1 Statistical Evidence

*a) Does national law permit the use of statistical evidence to establish indirect discrimination? If so, what are the conditions for it to be admissible in court.*

The procedural laws do not specifically address this issue. Normally courts are at a liberty to freely regard admissible any type of evidence, including statistics. As procedural laws belong to the legislative competence of the Finnish state, the same rules apply with respect to the Åland Islands.

*b) Is the use of such evidence commonly used?*

<sup>20</sup> HE 44/2003 [Government proposal (44/2003)], at p. 42.

<sup>21</sup> Ibid, at p. 42.

There has apparently so far been only one case in which statistical evidence has played a significant role. This case dealt with age discrimination. The use of statistical evidence may be more widespread in the area of gender discrimination, although no data is available for the purposes of making comparisons.

*c) Please illustrate the most important case law in this area.*

The case referred to in b) has been described above in section 0.3.

*d) Are there national rules which permit data collection? Please answer in respect of all 5 grounds.*

The equality laws do not address this issue, and it falls to be dealt with under the national data protection laws. Finland has transposed the EU Data Protection Directive into its national legislation, just like all the other EU countries, and therefore its law on data protection is very similar in content with the said Directive. Collection of sensitive data (including data on ethnic origin, religion or belief, disability and sexual orientation) is not allowed except in situations prescribed by the law. Most importantly, the national data protection law permits collection of sensitive data provided that the data subject has given his or her express consent thereto [sections 11 and 12 of Personal Data Act (*henkilötietolaki* 523/1999)]. Processing of sensitive data is also allowed where necessary for the purposes of a legal proceeding and for statistical and scientific purposes. The Finnish data protection authorities (*tietosuojavaltuutettu, tietosuojalautakunta*) have not yet issued an opinion on whether employers and service providers are allowed to engage in non-anonymous monitoring to ensure that they are in keeping with the equality laws. The Act on the Protection of Privacy in Employment [*laki yksityisyyden suojasta työelämässä* (759/2004)] specifies some requirements that have to be met for any data collection to be lawful in the context of employment. The Act does not expressly tackle diversity monitoring however.

An infringement of the data protection law may give rise to both civil and criminal liability.

In Finland censuses are no longer carried out by means of collecting data from individuals, as this can be done on the basis of administrative registers. Therefore the carrying out of censuses does not involve any collection of sensitive data.

## **2.4 Harassment (Article 2(3))**

*a) How is harassment defined in national law? Include reference to criminal offences of harassment insofar as these could be used to tackle discrimination falling within the scope of the Directives.*

Section 6 of the Non-Discrimination Act [*yhdenvertaisuuslaki* (21/2004)] prohibits discrimination and defines harassment as a form of discrimination in section 6(2), paragraph 3. According to the latter provision, harassment takes place “when the dignity or integrity of a person or a population group is violated intentionally or in fact, in a manner which creates an intimidating, hostile, degrading, humiliating or offensive environment.”<sup>22</sup> This definition is wider than that of the two Directives in two respects: first, the violation of (physical) integrity is explicitly covered in addition to the violation of dignity; second, the provision covers not

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<sup>22</sup> Unofficial translation by the author. The pertinent government proposal (HE 44/2003) instructs those applying the law that the prohibition of harassment applies only “to relatively serious conduct”, which is a bit worrying statement.



just individuals but groups as well. This means that e.g. the display of intimidating or offensive symbols, such as swastikas, in a publicly accessible office may constitute harassment.<sup>23</sup> Also materials in Internet pages may constitute harassment and thus discrimination.<sup>24</sup> Harassment does thus not have to be directed against any particular person.

Also the Occupational Safety and Health Act [*työturvallisuuslaki* (738/2002)], section 28, deals with harassment, albeit only as regards workplace. According to this provision, employers have to take available measures to eliminate “harassment or inappropriate conduct” which may negatively affect the health of employees. The obligation to take action materialises when an employer becomes aware of such situation. An employer is under a duty to investigate the matter and take measures in order to eliminate harassment or other inappropriate conduct.

Some forms of harassment may constitute (petty) assault or defamation under the Penal Code [*rikoslaki* (391/1889), as amended]. Harassment may also fulfil the criteria of the offence of “discrimination” in terms of the Penal Code. An employer who “puts an employee into a disadvantaged position without an acceptable, weighty reason”, on the basis of e.g. any of the Article 13 grounds, is to be convicted to fines or imprisonment up to six months, in accordance with chapter 47, section 3 of the Penal Code. Co-workers or other persons cannot be convicted on the basis of the said article. However, failure of an employer to take action against harassment by co-workers may constitute discrimination and thus be punishable under the said article.

*Åland Islands.* In section 2(4) the Provincial Act on Prevention of Discrimination defines harassment as follows: “Harassment is taken to occur when an unwelcome conduct aims at or leads to a violation of a persons dignity and an intimidating, hostile, degrading or offensive environment is created.” This definition thus follows closely that found in the two Directives. The above-mentioned general laws, the Occupational Safety and Health Act and the Penal Code, apply also in the ÅI.

*b) Is harassment prohibited as a form of discrimination?*

In the Non-Discrimination Act, yes.

*Åland Islands.* Yes, in the Provincial Act on Prevention of Discrimination, section 2(1).

*c) Are there any additional sources on the concept of harassment (e.g. an official Code of Practice)?*

No.

## **2.5 Instructions to discriminate (Article 2(4))**

*Does national law prohibit instructions to discriminate?*

Yes. Section 6(2) paragraph 4 of the Non-Discrimination Act [*yhdenvertaisuuslaki* (21/2004)] prohibits “an instruction or order to discriminate” and defines it as a form of discrimination. Here the Non-Discrimination Act goes beyond the minimum requirements of the Directives, as section 6(2) explicitly covers not just “instructions” but “orders” as well.

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<sup>23</sup> HE 44/2003 [Government proposal (44/2003)], p. 43.

<sup>24</sup> *Idem*.

It is also a well-established line of interpretation with regard to the discrimination-related provisions in the Penal Code [*rikoslaki* (391/1889)] that instructions to discriminate constitute discrimination as such.

*Åland Islands.* Section 2(1) of the Provincial Act defines an instruction to discriminate as a form of discrimination.

## ➔ 2.6 Reasonable accommodation duties (Article 2(2)(b)(ii) and Article 5 Directive 2000/78)

*a) How does national law implement the duty to provide reasonable accommodation for disabled people? In particular, specify when the duty applies, the criteria for assessing the extent of the duty and any definition of 'reasonable'. e.g. ➔ does national law define what would be a "disproportionate burden" for employers or is the availability of financial assistance from the State taken into account in assessing whether there is a disproportionate burden?*

These questions are dealt with by section 5 of the Non-Discrimination Act:

Section 5 - Improving the access to employment and training of persons with disabilities

In order to foster equality in the contexts referred to in section 2(1), a person commissioning work or arranging training shall where necessary take any reasonable steps to help a person with disabilities to gain access to work or training, to cope at work and to advance in their [should be: his or her, TM] career. In assessing what constitutes reasonable, particular attention shall be devoted to the costs of the steps, the financial position of the person commissioning work or arranging training, and the possibility of support from public funds or elsewhere towards the costs involved.

The concept used is “*kohtuulliset toimet*”, which literally translates as “reasonable measures” (or as “reasonable steps”, as in the above translation provided by the Ministry of Labour), not reasonable accommodation. Such measures are to be taken “when necessary”, which according to the preparatory works<sup>25</sup> means that the need for reasonable accommodation is to be determined on a case-by-case basis.<sup>26</sup> In the work place, appropriate accommodation measures may relate e.g. to work conditions, organization of work, working hours, methods of work, work aids, training and work guidance. The law or the *travaux* do not provide more specific framework within which it is to be established when the duty applies.

The Act does not expressly refer to the notion of “disproportionate burden”, but operates through the general notion of reasonableness.<sup>27</sup> In determining what is or is not reasonable, one must take into account especially the costs arising thereof, the financial situation of the employer or education provider, and the availability of public funding or other resources for such purposes. According to the pertinent Government proposal<sup>28</sup> one may also take into consideration the size of the entity providing employment or education. This might be taken as an indication that less may be expected especially from small enterprises. Also such a situation may be considered unreasonable where the taking of “reasonable measures” would

<sup>25</sup> HE 44/2003 [Government proposal 44/2003].

<sup>26</sup> Substantially similar reference is included in the Framework Directive, according to which appropriate measures are to be taken “where needed in a particular case”.

<sup>27</sup> Although the notion of “disproportionate burden” is not explicitly used, the Non-Discrimination Act seems to provide, all things considered, (at least) as good protection as the Framework Directive.

<sup>28</sup> *Idem*.

alter the operation of the work place “too much” and would at the same time endanger occupational safety and health.<sup>29</sup>

An employer may receive a refund for costs that result from work and training experimentations, medical examinations, and consultations aiming to support the opportunities of a disabled person to gain or keep her/his work.<sup>30</sup> The employer may also receive compensation for such accommodation measures (with regard to changes to machines or other physical environment or e.g. the rearrangement of the method of work) that she/he has taken in order enhance the opportunity of a disabled person to gain or keep his/her work.<sup>31</sup> To be compensated for these kinds of accommodation measures, they must be *necessary* in order to eliminate or decrease disadvantage resulting from a disability or an illness.<sup>32</sup> Maximum compensation for such measures has been laid down to be €1.681,88 per person. An employer may also receive compensation in a situation in which a fellow employee provides help to a disabled employee in order to enhance his/her ability to perform his/her work properly. The maximum compensation in this case is €168,19 per month for a maximum period of one year.

Some obligations for the employer may also arise from the non-discrimination provision of the Employment Contracts Act [*työsopimuslaki* 55/2001], which prohibits the putting of persons into different position on the grounds of e.g. disability. It might be argued that if an employer is not taking the necessary accommodation measures he/she is putting a disabled person to a disadvantaged and thus different position in comparison to other employees if the disabled employee cannot perform his/her duties with the same level of effort as the other employees. This line of thinking is quite theoretical, though.

*Åland Islands.* With respect to *the Åland Islands* it has to be kept in mind that the area of *employment* is one where competence is divided between the Finnish *state* and the ÅI. Therefore the above-mentioned general law is applicable also in the ÅI as regards privately employed persons and those employed as civil servants by the state. As regards civil servants of the ÅI or one of the municipalities in the ÅI, section 6 of the Provincial Act on Prevention of Discrimination defines reasonable accommodation as follows:

The Province and its municipalities shall, in every concrete situation, take the necessary measures to enable a person with a disability, on a par with persons without a disability, to have access to a vacancy, work as a civil servant, partake in further education for civil servants and advance as a civil servant, insofar as these measures do not bring a disproportionate burden upon an employer.

As to the assessment of when a burden is disproportionate, the *travaux* only point to the preamble of the Employment Equality Directive (paragraphs 20 and 21), and note that as the preamble instructs that the size and financial status of the employer may be taken into account in the assessment, this means that quite significant demands are placed on public sector employers.

*b) Does failure to meet the duty count as discrimination? Is there a justification defence? How does this relate to the prohibition of direct and indirect discrimination?*

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<sup>29</sup> Idem.

<sup>30</sup> Employment Services Act, section 12.

<sup>31</sup> Decree on Employment Service Benefits [*asetus työvoimapalveluihin liittyvistä etuuksista* (17.12.1993/1253)], section 14.

<sup>32</sup> Idem.

The law or the *travaux* do not deal with these questions. My interpretation is this: Failure to provide reasonable accommodation may amount to discrimination, but not automatically. If a disabled person was not hired, but was in fact the best candidate for the job when obligatory reasonable accommodation measures are taken into account, then this arguably is a clear case of discrimination on the basis of disability. The same applies to equally qualified applicants: If a disabled applicant was not hired because of the costs that reasonable accommodation would have incurred, this could be considered discrimination. If one looks at the internal logic of the Non-Discrimination Act, it seems clear that a failure to accommodate is not as such taken to be a form of discrimination. This is because the definition of discrimination in section 6 of the Act does not list it as a form of discrimination (it mentions direct & indirect discrimination, harassment & instructions to discriminate, just like the Directives), in addition to which one cannot claim compensation under the Act for such a failure,<sup>33</sup> unlike for cases involving direct or indirect discrimination, harassment, instruction to discriminate or victimization. Alternatively, it may be possible to argue that failure to provide reasonable accommodation may constitute indirect discrimination, as it is about facially neutral (consistent) treatment that has disadvantageous effects for persons with disabilities. Under this scenario, it would be possible to claim compensation for a failure to provide reasonable accommodation. Only future case law will show which one of the interpretations will be chosen – both are theoretically speaking possible and correct.

A failure to accommodate cannot be justified.

*Åland Islands.* The same observations apply also with respect to the law adopted in the ÅI.

*c) Has national law implemented the duty to provide reasonable accommodation in respect of any of the other grounds?*

No. The same applies with respect to the law adopted in the Åland Islands.

*d) Does national law require buildings and infrastructure to be designed and built in a disability-accessible way? If so, could and has a failure to comply with such legislation be relied upon in a discrimination case based on the legislation transposing Directive 2000/43?*

Several acts and decrees applicable in Finland pose requirements in this respect. For instance Land Use and Building Act [*maankäyttö- ja rakennuslaki* (132/1999)] and Land Use and Building Decree [*maankäyttö- ja rakennusasetus* (895/1999)] require that buildings that are used by the administration, service providers or businesses (subject to certain conditions) have to be accessible to persons with disabilities. The equality laws or their *travaux* do not however address the question whether a failure to comply with this legislation constitutes discrimination. Such cases need to be assessed on a case-by-case basis to see whether the facts of the case are subsumed under the relevant provisions of the equality legislation (the general definitions of discrimination).

## ➔ 2.7 Sheltered or semi-sheltered accommodation/employment

*a) To what extent does national law make provision for sheltered or semi-sheltered accommodation/employment for disabled workers?*

The Finnish legal system no longer uses the term “sheltered employment”. The Social Welfare Act [*sosiaalihuoltolaki* (710/1982, as amended)] makes a distinction between two

<sup>33</sup> If an employer fails to take necessary reasonable accommodation measures, compensation may be sought under chapter 12, sections 1 and 2, of the Employment Contracts Act [*työsopimuslaki* 55/2001].

types of situations and measures: first, support measures (including financial support for employers) that promotes the employability of persons with disabilities in the open labor market (section 27d of the act), and second, “work activity” (“työtoiminta”), that aims at maintaining and promoting the functional capacities of individuals who because of their disability do not have the possibility to engage in the first type of work and whose income is primarily based on certain types of benefits (section 27 e).

In this connection it might be mentioned that the Act on Social Undertakings [*laki sosiaalisista yrityksistä* (1351/2003)] entered in force in January 2004. The Act defines the conditions under which an undertaking may be registered as a social undertaking and be eligible for certain employment policy subsidies from the state. At least 30 % of the workers of such an undertaking have to be people with disabilities or people with a history of long-term unemployment.

*b) Would such activities be considered to constitute employment under national law?*

The first type of activities may constitute employment (depending on circumstances), whereas the second type of activity (“work activity”) does not [subsections 27d(3) and 27e(2) of the Social Welfare Act]. The latter is simply a form of activity that aims at promoting the employability of people with disabilities, not employment in and of itself.

### **3. PERSONAL AND MATERIAL SCOPE**

#### **3.1 Personal scope**

##### **3.1.1 EU and non-EU nationals (Recital 13 and Article 3(2) Directive 2000/43 and Recital 12 and Article 3(2) Directive 2000/78)**

*Are there residence or citizenship/nationality requirements for protection under the relevant national laws transposing the Directives?*

The Non-Discrimination Act [*yhdenvertaisuuslaki* (21/2004)] provides protection universally for all people under the jurisdiction of Finland, irrespective of nationality, residence or any other such status. The Act actually goes beyond the Directives in that it prohibits discrimination also on the grounds of national origin and nationality. However, the material scope of the Act is limited in that it does not apply to the application of provisions governing entry into and residence in the country by foreigners (i.e. those without Finnish citizenship), or the placing of foreigners in a different position for a reason deriving from their legal status under the law (section 3(2)). Such a status may also include the type of residence permit.

*Åland Islands.* While the legislation applicable in the Åland Islands in many places makes distinctions on the basis of the right to domicile in the ÅI or on the basis of having Finnish citizenship, the equality laws are applicable to all under the jurisdiction of the ÅI irrespective of nationality or domicile.

##### **3.1.2 Natural persons and legal persons (Recital 16 Directive 2000/43)**

*Does national law distinguish between natural persons and legal persons, either for purposes of protection against discrimination or liability for discrimination?*

The Non-Discrimination Act is to be applied with respect to natural and legal persons both in public and private sectors.<sup>34</sup> It is however only individuals that are directly protected under the Act, with the exception of section 6(2), paragraph 3, which defines harassment. According to this paragraph, harassment takes place when the “dignity or integrity of a person or a population group is violated...”<sup>35</sup>

*Åland Islands.* The equality legislation adopted in the Åland Islands is to be applied with respect to natural and legal persons and provides protection to both natural and legal persons.<sup>36</sup>

### 3.1.3 Scope of liability

*What is the scope of liability for discrimination (including harassment and instruction to discriminate)? Specifically, can employers or (in the case of racial or ethnic origin) service-providers (e.g. landlords, schools, hospitals) be held liable for the actions of employees? Can they be held liable for actions of third parties (e.g. tenants, clients or customers)? Can the individual harasser or discriminator (e.g. co-worker or client) be held liable? Can trade unions or other trade/professional associations be held liable for actions of their members?*

According to the general principles of law applicable in the Finnish legal system, an employer is liable for the action or lack of action by an employee, provided that the employee has the authority to represent the employer by virtue of his/her position or otherwise. Accordingly, an employer may be liable under the Non-Discrimination Act [yhdenvertaisuuslaki (21/2004)] in such situations where an employee representing the employer discriminates against fellow employee, insofar as the matter in question falls within the material scope of the Act. However, an employer cannot be held liable in situations where discrimination by one employee against another is purely of private nature.

The prohibition of harassment in the Non-Discrimination Act pertains both to employers and employees. An employer must not engage in harassment against his/her employee, and an employee must not engage in harassment against the employer or another employee. While the Act and its *travaux préparatoires* do not say anything about the situation in which a customer harasses an employee, it appears to be so that a customer cannot be held responsible under the Non-Discrimination Act.

As concerns the Occupational Safety and Health Act [työturvallisuuslaki (738/2002)], an employer has a duty to take action irrespective of whether the action has taken place between employees or an employee and a superior. An employer has to take action also in such situations in which an employee faces harassment from the side of a customer. While in such cases the employer may not have efficient means at his disposal by which to eliminate the harassment, he should e.g. provide training and advice to the employees on how to deal with such situations.<sup>37</sup>

Service providers (such as restaurant owners) are liable for the actions of those under their command insofar as the former have failed to ensure that the latter do not engage in

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<sup>34</sup> HE 44/2003 [Government proposal 44/2003], at p. 33.

<sup>35</sup> Unofficial translation & italics by the author. For more information on the collective aspect of the prohibition of harassment, see chapter 2.4 (a) of this report.

<sup>36</sup> Lagutskottet, betänkande nr 9/2004-2005, para 2(2).

<sup>37</sup> HE 59/2002 vp [pertinent Government proposal (59/2002)].

discriminatory activities, especially if they have been aware of the existence of discrimination or a risk thereof.<sup>38</sup>

## 3.2 Material Scope

### 3.2.1 Employment, self-employment and occupation

*Does national legislation apply to all sectors of public and private employment and occupation, including contract work, self-employment, military service, holding statutory office?*

The approach of the Non-Discrimination Act [*yhdenvertaisuuslaki* (21/2004)] - which covers all the grounds mentioned in the Article 13 Directives, just like all the other domestic pieces of legislation adopted in pursuance of transposition - differs to an extent from the approach of the two Directives as regards the formulation of the list of material scope. This is not to say that the protection provided by the Non-Discrimination Act would necessarily be any narrower than that provided by the Directives. The Non-Discrimination Act is, according to its *travaux*, to be interpreted in accordance with the said Directives.

To begin with, the Non-Discrimination Act applies equally to all sectors of public and private employment and occupation.

The Act applies, firstly, to conditions for access to self-employment or means of livelihood, and support for business activities (section 2(1), paragraph 1 of the Act). By way of an example, the practicing of certain professions, such as the medical and legal professions and the selling of prescription drugs, is not open to everyone, but is regulated elsewhere in the legislation, and the effect of section 2(1), paragraph 1 of the Non-Discrimination Act is to ensure that these regulations are not discriminatory or are not applied in a discriminatory manner. Section 2(1) also prohibits discrimination in the granting of various types of support by authorities e.g. for the purposes of starting a business enterprise.

The Act applies also to recruitment conditions, employment and working conditions and personnel training and promotion (section 2(1), paragraph 2). Discrimination is thus prohibited in a comprehensive manner, e.g. as regards hiring, firing, promotion and arrangement of personnel training. The law protects not just paid employees and civil servants, but e.g. trainees as well. Section 2(2), paragraph 2, prohibits discrimination on the basis of ethnic origin in the contexts of military and non-military service. In addition, several sector-specific laws, such as Act on State Civil Servants [*valtion virkamieslaki* (750/1994)], Seamen's Act [*merimieslaki* (423/1978)], Act on Municipal Office Holders [*laki kunnallisista viranhaltijoista* (304/2003)] provide *added* protection by way of replicating the prohibition of discrimination in their respective fields of application (these provisions existed before the transposition, but were amended in the course of transposition so that e.g. their lists of prohibited grounds of discrimination match those of the two directives). Because of an apparent accident, sexual orientation was not explicitly included in the list of prohibited grounds of discrimination in the Act on State Civil Servants, but this is of no material relevance, as a) the list is open-ended and there is no reason whatsoever to expect that courts would not regard sexual orientation as a grounds of unlawful discrimination, b) the Non-Discrimination Act in itself already covers this field. Nevertheless, the express inclusion of sexual orientation into the list of grounds mentioned in the Act on State Civil Servants is being planned.

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<sup>38</sup> This line of interpretation has been confirmed also the in the practice of the Discrimination tribunal.

*Åland Islands.* The competence to legislate in the area of employment is divided between the state and the Åland Islands. The Non-Discrimination Act is applicable with respect to privately employed persons and civil servants of the state working in the ÅI. The Provincial Act is applicable with respect to those employed as civil servants by the ÅI or one of the municipalities in ÅI and those that are self-employed. Together the two legal regimes seem to completely cover the areas mentioned in the Directives.

In paragraphs 3.2.2 - 3.2.5, you should specify if each of the following areas is fully and expressly covered by national law for each of the grounds covered by the Directives.

**➔ 3.2.2 Conditions for access to employment, to self-employment or to occupation, including selection criteria, recruitment conditions and promotion, whatever the branch of activity and at all levels of the professional hierarchy (Article 3(1)(a))**

**Is the public sector dealt with differently to the private sector?**

As specified above in 3.2.1, this area is fully covered by national law, both with respect to the public and the private sphere, on all grounds covered by the Directives, and also in the Åland Islands.

**3.2.3 Employment and working conditions, including pay and dismissals (Article 3(1)(c))**

*Note that this can include contractual conditions of employment as well as the conditions in which work is, or is expected to be, carried out.*

As specified above in 3.2.1, this area is fully covered.

**3.2.4 Access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience (Article 3(1)(b))**

*Note that there is an overlap between ‘vocational training’ and ‘education’. For example, university courses have been treated as vocational training in the past by the Court of Justice. Other courses, especially those taken after leaving school, may fall into this category.*

Section 2(1), paragraph 3 of the Non-Discrimination Act covers “access to training, including advanced training and retraining, and vocational guidance”. The protection provided is thus comprehensive, and covers access to all types of training, irrespective of the entity which is providing the training. By way of an example, the Non-Discrimination Act covers access to university courses.

*Åland Islands.* Section 3(1)2 of the Provincial Act prohibits discrimination in the area of “conditions for access to vocational guidance, vocational training and retraining, including practical work experience”. Other acts prohibit discrimination e.g. in universities and schools. The legislation meets the requirements posed by Article 3(1)(b).

**3.2.5 Membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations (Article 3(1)(d))**

Section 2(1), paragraph 4 of the Non-Discrimination Act covers “membership and involvement in an organization of workers or employers or other organizations whose



members carry out a particular profession, including the benefits provided by such organizations”. In this way, the national law meets the requirements of the two Directives.

*In relation to paragraphs 3.2.6 – 3.2.10 you should focus on how discrimination based on racial or ethnic origin is covered by national law, but you should also mention if the law extends to other grounds.*

### **3.2.6 Social protection, including social security and healthcare (Article 3(1)(e) Directive 2000/43)**

To begin with it should be remembered that the domestic law, in particular through the Constitutional prohibition of discrimination and through the sanctioning of discrimination in the Penal Code, offer (from certain perspectives) for wider protection from discrimination than the equality legislation adopted in order to transpose the Directives. Therefore the fact that e.g. the Non-Discrimination Act does not ban age discrimination in health care does not mean that age discrimination in that field would be legal. It should also be kept in mind that the Constitution and the Penal Code apply in the Åland Islands as well.

It should also be reiterated that the approach of the Non-Discrimination Act [*yhdenvertaisuuslaki* (21/2004)], as regards the formulation of the list of material scope covered, differs to an extent from the approach of the two Directives. This is because the material areas in question are traditionally identified in the Finnish legal system using terminology which is to some extent different from the terminology used in the two Directives. This does not, however, necessarily mean that the protection provided by the Non-Discrimination Act would be insufficient in some respects.

The Non-Discrimination Act covers, as regards discrimination based on ethnic origin (but not other grounds), “social welfare and health care services”, and “social security benefits or other forms of support, rebate or advantage granted on social grounds” (section 2(2), paragraphs 1 and 2 of the Non-Discrimination Act). “Social welfare services” is a wide category, and covers, *inter alia*, social work, family counselling, services at home or in institutions and day care. Likewise, “health care services” is a wide category, and covers, *inter alia*, statutory health care, occupational health services, health care services provided in schools and other educational institutions including universities, nursing, dental care, mental health services and ambulance services.<sup>39</sup> “Social security benefits” covers, *inter alia*, social insurance and advantages based on it, unemployment and sickness allowances, study grants and student discounts. The “other forms of support, rebate or advantage” refer to, *inter alia*, specific loans that are available for families with small children.

In conclusion, the Non-Discrimination Act covers the material area in question.

*Åland Islands.* Section 4 of the Provincial Act specifies that discrimination on the grounds of ethnic belonging, religion or other conviction, or sexual disposition is prohibited in the areas of health care and social care. Social care covers social services, child-care, income support, social support, social credits and other similar functions that are aimed at promoting and maintaining operational capacity.

*In relation to religion or belief, age, disability and sexual orientation, does national law seek to rely on the exception in Article 3(3), Directive 2000/78?*

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<sup>39</sup> HE 44/2003 [Government proposal 44/2003], at p. 36.

No manifest instances of this could be found.

### ➔ 3.2.7 Social advantages (Article 3(1)(f) Directive 2000/43)

*This covers a broad category of benefits that may be provided by either public or private actors granted to people because of their employment or residence status, for example, e.g. reduced rate train travel for large families, child birth grants, funeral grants and discounts on access to municipal leisure facilities. It may be difficult to give an exhaustive analysis of whether this category is fully covered in national law, but you should indicate whether national law explicitly addresses the category of ‘social advantages’ or if discrimination in this area is likely to be unlawful.*

As indicated above (in 3.2.6), the Non-Discrimination Act complies with the Directive 2000/43 in this respect, by way of including an express reference to “social security benefits or other forms of support, rebate or advantage granted on social grounds” in section 2(2) of the Act.

*Åland Islands.* Section 4 of the Provincial Act, and in particular its reference to social care is wide in application, and arguably fully covers also this area.

### ➔ 3.2.8 Education (Article 3(1)(g) Directive 2000/43)

*This covers all aspects of education, including all types of schools. Please also consider cases of segregation in schools, affecting notably the Roma community. If these cases exist, please refer also to relevant legal/political discussions that may exist in your country on the issue.*

Section 2(1), paragraph 3 of the Non-Discrimination Act covers “access to training, including advanced training and retraining, and vocational guidance”. Although the English translation (by the Ministry of Labour) uses the term “training”, the authoritative Finnish language version uses the term “*koulutus*”, which could also be translated as “education”. In any way, the protection provided is comprehensive, and covers all types of training, irrespective of the entity that is arranging the training. The Non-Discrimination Act covers access to, *inter alia*, elementary schools, high schools, universities, vocational colleges and even driving schools.

According to section 3, the Act does not apply to the aims or content of education or the education system.<sup>40</sup> According to the *travaux*,<sup>41</sup> this limitation clause was taken aboard in pursuance of Article 149(1) of the Treaty Establishing the European Community, which states, *inter alia*, that the Community shall fully respect the responsibility of the Member States for the content of teaching and the organisation of education systems.

The Non-Discrimination Act prohibits discrimination in access to training/education on a wide variety of grounds, including age, ethnic or national origin, nationality, language, religion, belief, opinion, health, disability and sexual orientation, in addition to which the law covers “other personal characteristics”. People with disabilities not only enjoy protection from discrimination with respect to access to education/training, but they are also entitled, by virtue of section 5 of the Non-Discrimination Act, to reasonable accommodation measures facilitating that right in practice. In practice, pupils with learning difficulties are placed in mainstream education, in addition to which they are entitled to special training on the side.

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<sup>40</sup> The concept “education system” apparently refers to the way in which education is organized (incl. division into primary, secondary and tertiary education) and e.g. the language of instruction.

<sup>41</sup> HE 44/2003 [Government proposal 44/2003], at p. 37.

There has been one case where *de facto* segregation in a school was successfully claimed. This case has been described above at 0.3. There are reports that Roma pupils face particular challenges in schools, a fact that is reflected in their disproportionately high school drop-out rates and in being more often channelled to special education classes than other pupils.<sup>42</sup>

*Åland Islands.* Discrimination in education is prohibited in the following laws: Provincial Act on Prevention of Discrimination, covering schools; Provincial Act on Åland's Music Institute [*Landskapslagen om Ålands musikinstitut* 1995:80, as amended by law 2005:73)]; Provincial Act on Education on a High School Level [*landskapslag om utbildning på gymnasialstadienivå* (1997:52, as amended by law 2005:70)]; Provincial Act on Ålands Folk High School [*landskapslagen om Ålands folkhögskola* (1999:53, as amended by law 2005:72)] Provincial Act on University in Åland [*landskapslag om högskolan på Åland* (2002:81, as amended by law 2005:71)].

### **3.2.9 Access to and supply of goods and services which are available to the public (Article 3(1)(h) Directive 2000/43)**

*Does the law distinguish between goods and services available to the public (e.g. in shops, restaurants, banks) and those only available privately (e.g. limited to members of a private association)? If so, explain the content of this distinction.*

The Non-Discrimination Act covers, in section 2(2), paragraph 4, the “supply of or access to housing and movable and immovable property and services on offer or available to the general public other than in respect of relationships between private individuals”. In effect, no discrimination shall take place in the areas of e.g. bank and insurance services, transportation services, repair services, and the selling and hiring of premises for businesses. The prohibition of discrimination in contractual relations extends not just to conclusion/non-conclusion of agreements, but also to the content, application and termination of agreements.<sup>43</sup>

The law makes an explicit distinction between those goods and services which are available publicly and those that are available only privately. The *travaux* instructs that the powers of the Community and the basis (starting point) of the Directives have to be taken into account when interpreting this provision. Actions between purely private parties do not fall under the Non-Discrimination Act.

*Åland Islands.* This is yet another area where competence to legislate is divided. The aforementioned general law applies with respect to some types of provision of services, such as pharmaceutical services (running of a drug store) and bank services. Other types of services, such as transportation services, belong to the area of competence of the ÅI. The Provincial Act on Prevention of Discrimination prohibits discrimination in the “professional” (not strictly private) provision of goods and services, including housing (section 5 of the act).

### **3.2.10 Housing (Article 3(1)(h) Directive 2000/43)**

*To which aspects of housing does the law apply? Are there any exceptions?*

All forms of housing are covered (including rental, subletting, buying and selling of apartments) and the application of the law does not depend on the permanence of the housing arrangement. The Non-Discrimination Act excludes from its scope of application arrangements between private individuals. If housing services are however provided in a

<sup>42</sup> ECRI, Second report on Finland, adopted on 14 December 2001, CRI (2002) 20.

<sup>43</sup> HE 44/2003 at p. 36.

professional manner and as a source of livelihood, the law applies (section 2(2) paragraph 4 of the Non-Discrimination Act). The same observations apply with respect to the law adopted by the ÅI.

## 4. EXCEPTIONS

### 4.1 Genuine and determining occupational requirements (Article 4)

*Does national law provide an exception for genuine and determining occupational requirements? If so, does this comply with Article 4 of Directive 2000/43 and Article 4(1) of Directive 2000/78?*

Section 7(1), paragraph 2, of the Non-Discrimination Act [yhdenvertaisuuslaki (21/2004)] provides that “different treatment in relation to a basis of discrimination referred to in section 6(1) that is founded on a genuine and determining requirement relating to a specific type of occupational activity and the performance of said activity” is not considered discrimination under the Act.

The formulation of the said provision differs from the formulation of the respective articles in the two Directives. Firstly, the scope of the exemption in the Non-Discrimination Act is narrower than that in the two Directives. This is because unlike the Directives, the Non-Discrimination Act does not refer to the “context” in which occupational activities are carried out, but only to the “specific type” and the “performance” of occupational activity. Arguably, term “context” provides more room for justifying differential treatment on the basis of the genuine and determining occupational requirements, and in this sense the Non-Discrimination Act seems to go beyond the Directives in securing the realisation of the principle of equal treatment. Second difference with respect to the Directives is that the Non-Discrimination Act does not explicitly refer to the requirement that the objective of differential treatment must be legitimate and the requirement proportionate. The *travaux* to the Act do lay out those requirements, and seem to suggest that the requirement of legitimate objective and proportionality of requirements is implicitly embedded in the notions of “genuine and determining requirements”. Indeed, according to the general principles pertaining to the Finnish legal system, exemptions are to be construed narrowly, and the practical significance of *travaux préparatoires* is greater than in most other EU member states, in addition to which the principle of proportionality and the requirement of legitimate objective are well established in the Finnish legal system. Nevertheless, it would have been a better and clearer solution to incorporate an express requirement of proportionality and legitimate objective to the law itself, and now only future legal practice will show whether the solution now adopted in fact fully complies with the requirements of the two Directives.

*Åland Islands.* Section 3(3) of the Provincial Act on Prevention of Discrimination provides that “different treatment shall not be considered discrimination if it is due to a genuine and decisive occupational requirement based on the nature of the particular occupational activity or the context in which the activity is carried out, provided that the objective is legitimate and that the requirement is proportionate.” This exception appears to fully comply with the Employment Equality Directive.

### 4.2 Employers with an ethos based on religion or belief

*a) Does national law provide an exception for employers with an ethos based on religion or belief? If so, does this comply with Article 4(2) of Directive 2000/78?*

This situation is not tackled by any specific provision, but the legislator apparently intended such situations to be covered by the general provision on genuine and determining occupational requirements, explained above under section 4.1. Hence, under national law, the occupational requirement, to be justified, does not need to be “genuine, legitimate and justified” (as the Directives provide in this context), but “genuine and determining”. In addition, the requirements of legitimate objective and the principle of proportionality have to be taken into account as general principles of law, as pointed out in the preparatory works of the Act. According to the *travaux*, an employee or office holder who is engaged in practicing or teaching of a religion, or whose duties include representing a religious community outwards, can be expected to hold the particular religious beliefs of that community.<sup>44</sup>

Whether the national law is in compliance with the Directives is thus practically down to whether the scope of “genuine and determining occupational requirements” in Article 4(1) of the Directives is to be interpreted to be narrower than the scope of “genuine, legitimate and justified occupational requirements” in Article 4(2) of the Employment Equality Directive. As 4(2) is apparently meant to be a special case of Article 4(1), thus further widening the scope of the exemption, a natural conclusion would be that the national law thus is in compliance with the requirements put forth by the two Directives. While no simplistic conclusions can be drawn, the national law appears to provide stricter limits here for exemptions than the Employment Equality Directive, which means that it is in compliance with the latter.

Traditionally - that is: before the transposition into national law of the requirements of the two directives – the position of the Finnish legal system was that it is legally acceptable for organizations with a specific ethos based on religion or belief to employ only people who believe in that particular ethos, if the holding of such an ethos is an integral part or a requirement for carrying out the duties of that particular position. Differential treatment on the basis of religion or belief was possible provided that an “acceptable reason” could be provided for; a reason could be deemed “acceptable” if it had a legitimate objective and if the distinction made was in accordance with the principle of proportionality. It may be argued that the scope of the exemption under the current law is thus narrower than what it used to be, and therefore there is no breach of the Article 4(2) in this respect.

Church Act [*kirkkolaki* (1054/1993)] 6:1 subsection 2 prescribes that a person employed by the Evangelical Lutheran Church, whose regular duties include teaching, diaconia work or participation in church services must be a member of the Church.

*Åland Islands.* What was submitted above with respect to the Non-discrimination Act applies also with respect to the legislation adopted in the ÅI, as neither the latter has adopted any specific provisions in this regard.

*b) Are there any specific provisions or case-law in this area relating to conflicts between the rights of organisations with an ethos based on religion or belief and other rights to non-discrimination?*

Yes, see the same-sex couple case from Vaasa Administrative Court, explained under section 0.3.

### 4.3 Armed forces and other specific occupations

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<sup>44</sup> Ibid, at p. 45.

*a) Does national law provide for an exception for the armed forces in relation to age or disability discrimination (Article 3(4), Directive 2000/78)?*

We must distinguish here between those who work for the armed forces as civil servants or employees, and those who are performing their compulsory or voluntary military service. As regards the first group, no discrimination shall take place on any ground covered by the Non-Discrimination Act [*yhdenvertaisuuslaki* (21/2004)] (which covers all grounds mentioned in the two Directives and more), as regards, *inter alia*, recruitment conditions, employment and working conditions, personnel training and promotion (section 2(1), paragraph 2) or any other material area specified in section 2(1) of the Act, corresponding broadly with the areas covered by the Framework Directive.

As regards those that are performing their military service, which is compulsory for men unless they choose alternative civilian service, and voluntary for women, the Non-Discrimination Act prohibits discrimination only on the basis of ethnic origin (section 2(2), paragraph 3). However, section 50 c of the Military Service Act [*asevelvollisuuslaki* (452/1950)], provides that in the execution of the duty to perform military service, no-one may be put, without an acceptable reason, into a different position in comparison to others on the basis of race, origin, language, religion, political or other conviction, or “any comparable reason”. Any difference of treatment in the context of military service, as regards e.g. age and disability, would thus have to be judged against this provision and the prohibition of discrimination in section 6 of the Constitution. It has to be noted that these two provisions provide for a different approach to e.g. defining discrimination than the Directives and the Non-Discrimination Act, in that they e.g. allow justification of what the Directives and the Non-Discrimination Act consider direct discrimination.

*Åland Islands:* The Åland Islands is a demilitarised zone and therefore there is no presence of armed forces.

*b) Are there any provisions or exceptions relating to employment in the police, prison or emergency services (Recital 18, Directive 2000/78)?*

There are no specific provisions or exceptions in this regard.

*Åland Islands:* There are no specific provisions or exceptions in this regard.

#### **4.4 Nationality discrimination**

*Both the Race Directive and the Framework Employment Directive include exceptions relating to difference of treatment based on nationality (Art 3(2) in both Directives).*

*a) How does national law treat nationality discrimination?*

Nationality is one of the explicitly prohibited grounds of discrimination recognized by the Non-Discrimination Act [*yhdenvertaisuuslaki* (21/2004)]. The Constitution [*perustuslaki* (731/1999)] and the Penal code [*rikoslaki* (391/1889)] prohibit discrimination on the basis of “national origin”, which refers not to present, but past (ethno-national) status.

*Åland Islands:* The provincial Act on the Prevention of Discrimination does not prohibit discrimination on the basis of nationality. Quite vice versa, according to section 3(4) of the act, “provisions in the Åland Islands autonomy Act and the Act on acquisition of land in Åland (FFS 3/1975), or a law that relies on these provisions, regarding requirement of knowledge of the Swedish language or a right to domicile in Åland or Finnish nationality,

shall not be considered to constitute discrimination in accordance with subsections 1-3.” These exceptions were recognized in Protocol 2 of the Treaty of Accession of Finland to the European Communities, and thus constitute part of EU’s primary legislation.

*b) Are there exceptions in anti-discrimination law that seek to rely on Art 3(2)?*

The protection provided by the Non-Discrimination Act is limited. Section 3 of the Act provides that the Act does not apply to “application of provisions governing entry into and residence in the country by foreigners, or the placing of foreigners in a different position for a reason deriving from their legal status under the law”. What is notable is that the Non-Discrimination Act does not make a distinction here between those foreigners who are citizens of EU countries and those who are not. The concept of “foreigner” in Finnish legal order refers to all those who are not Finnish citizens [*ulkomaalaislaki* (301/2004), Aliens Act (301/2004), section 3].

*Åland Islands:* See the answer at point a). Besides that, the anti-discrimination law does not address distinctions on the basis of nationality.

## ➔ 4.5 Work-related family benefits

*Some employers, both public and private, provide benefits to employees in respect of their partners. For example, an employer might provide employees with free or subsidised private health insurance, covering both the employee and their partner. Certain employers limit these benefits to the married partners or unmarried opposite-sex partners of employees. This question aims to establish how national law treats such practices. Please note this question is focused on benefits provided by the employer. We are not looking for information on state social security arrangements.*

*(a) Does national law permit an employer to provide benefits that are limited to those employees who are married?*

Section 2:2 of the Employment Contracts Act [*työsopimuslaki* (55/2001)] prohibits discrimination on the basis of “family ties” (*perhesuhteet*), and refers to the Non-Discrimination Act for the definition of discrimination. This bans the making of distinctions between married and non-married employees, unless justified under the Non-discrimination Act (the grounds of justification being general in nature and corresponding to those of the two Directives).

*(b) Does national law permit an employer to provide benefits that are limited to those employees with opposite-sex partners?*

No. This would clearly constitute a breach of the Non-Discrimination Act, considering that the domestic law recognizes (same-sex) registered partnerships and grants them a status that is in most respects equivalent to a marriage.

## 4.6 Health and safety

*Are there exceptions in relation to disability and health and safety (Article 7(2), Directive 2000/78)?*

The Non-Discrimination Act or any of the other non-discrimination laws do not specifically address the issue. Health and safety issues at work are governed by the Occupational Health

and Safety Act [*työterveyslaki* (738/2002)], which entered into force in January 2003. Primary responsibility for protection of occupational health and safety lies with the employer, who must act in co-operation with the employees. The employer shall systematically and adequately analyse and identify the hazards and risk factors caused by the work, the working premises, other aspects of the working environment and the working conditions.<sup>45</sup> If, according to this assessment, the work may cause a particular risk of injury or illness, such work shall be done only by an employee who is competent and personally suitable for it or by another employee under the direct supervision of such an employee.<sup>46</sup> This requirement is absolute (non-negotiable) in nature.

According to section 12 of the Act, employers shall take into account handicapped employees and their capacities when designing the work environment and/or planning the work, from the point of view of occupational health and safety. The Non-Discrimination Act did not bring any changes to the legislation in this area.

Health and safety concerns may be taken into consideration when assessing whether the accommodation measures needed by a person with a disability are to be deemed unreasonable. According to the preparatory works, the requirement to take reasonable measures would be considered unreasonable if those measures would change the operation of the work place too much and would at the same time endanger occupational safety and health. The employer may however be entitled to receive a refund for costs that result from accommodation measures, and this has to be taken into account.<sup>47</sup>

*Åland Islands.* The law does not contain any exceptions referred to in Article 7(2).

*Are there exceptions relating to health and safety law in relation to other grounds, for example, ethnic origin or religion where there may be issues of dress or personal appearance (turbans, hair, beards, jewellery etc)?*

No. The same applies with respect to the legislation adopted in the Åland Islands.

## **4.7 Exceptions related to discrimination on the ground of age**

### **➔ 4.7.1 Direct discrimination**

*a) Is it possible, generally, or in specified circumstances, to justify direct discrimination on the ground of age? If so, is the test compliant with the test in Article 6, Directive 2000/78, account being taken of the European Court of Justice in the Case C-144/04, Mangold ?*

It is not possible to generally justify direct age discrimination under the Non-Discrimination Act [*yhdenvertaisuuslaki* (21/2004)]. Section 7(1) however provides that “the following conduct shall not be considered discrimination: ... 3) different treatment based on age when it has a justified purpose that is objectively and appropriately founded and derives from employment policy, labour market or vocational training or some other comparable justified objective, or when the different treatment arises from age limits adopted in qualification for retirement or invalidity benefits within the social security system”. Within these strict limits justification thus is possible.

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<sup>45</sup> Section 10 of the Act.

<sup>46</sup> Section 11 of the Act.

<sup>47</sup> See section 5 of this report for more details.



The wording of section 7(1), paragraph 3, follows rather closely the wording of Article 6 of the Employment Equality Directive. What is notable however is that the Non-Discrimination Act has omitted the reference to the requirement that the means used to achieve legitimate aims must be “appropriate and necessary”. It may be argued that the principle of proportionality (which the requirement of appropriate and necessary means basically boil down to) is a fundamental legal principle of the Finnish legal system, and it is to be taken into consideration when interpreting, in this case, whether a certain conduct or policy is in breach of section 7(1) of the Non-Discrimination Act. However, section 7(1), paragraph 3, refers only to the *aim* of the treatment, which thus does not invite the examination of whether the requirements of the proportionality principle have been followed. Again, the situation would have been clearer if the law would have incorporated an express reference to the requirement that the means employed have to be “appropriate and necessary”, and that consequently it is not enough to establish that the conduct in question had a legitimate aim. Now a literal interpretation of the text does not make room for proportionality assessment.

Some other parts of the anti-discrimination law, the Constitution and the Penal Code in particular, define discrimination in terms of differential treatment without an acceptable reason, and thus allow the justification of direct discrimination.

*Åland Islands.* Section 3(2) of the Provincial Act on Prevention of Discrimination provides that “differential treatment on the basis of age shall not be considered to constitute discrimination if it in an objective and reasonable way is justified by an aim relating to employment policy, labour market, vocational training or some other justified aim.” This provision follows closely the respective provision of the Employment Directive and is in accordance with it.

*b) Does national law permit differences of treatment based on age for any activities within the material scope of Directive 2000/78?*

Yes, within the limits specified above in the answer to question a. A couple of examples may be given. A specific act exists which governs employment relationships of young employees, who are defined by the act as being those who are employed and under 18 years old. This act, the Act on Young Employees [*laki nuorista työntekijöistä* (998/1993)] has specific provisions with regard to e.g. the maximum working time allowed and occupational health and security. According to the Act, a 15-year old person (or older) may him- or herself conclude and terminate an employment contract (section 3 of the Act), while an employment contract of a younger than 15-year old person may be concluded or terminated by his or her legal guardian.

Act on Public Workforce Services [*Laki julkisesta työvoimapalvelusta* (1295/2002)] provides for special support measures for unemployed job-seekers who are under 25 years. Under the Employment Contract Act [*työsopimuslaki* (55/2001), as amended by laws up to 304/2004], the length of a general notice period, after the passing of which an employment contract is terminated, depends on the duration of the employment relationship, and therefore often indirectly also on age (provisions concerning these matters are laid down in the Employment Contracts Act, chapter 6, section 3).

A law that makes distinctions on the basis of age cannot be challenged *in abstracto* to see if it is compatible with the Non-discrimination Act. Such an examination of compatibility may become an issue only in particular (concrete) context in connection to a legal proceeding brought forward by a claimant under the applicable laws, in particular the Non-discrimination Act.

*Åland Islands.* Some differences based on age exist. For instance, a single person starting a travel agency must be at least 25 years old [section 3 of the Provincial Act on Travel Agencies, *landskapslagen on resebyråörelse* (1975:56)]. Section 6 of the Decree on Start-up Grants for Young Farmers specifies that the applicant must not be over 40 years of age when a decision to provide a grant is made [*landskapsförordning om startstöd till unga jordbrukare* (2001:45)]. The Åland government is of the view that these and other remaining distinctions are justified as required by the applicable laws.<sup>48</sup>

#### **4.7.2 Special conditions for young people, older workers and persons with caring responsibilities**

*Are there any special conditions set by law for older or younger workers in order to promote their vocational integration, or for persons with caring responsibilities to ensure their protection? If so, please describe these.*

The Act on Young Employees [*laki nuorista työntekijöistä* (998/1993)], which is to be applied to those who are under 18 years old and employed, demands e.g. that employers must ensure that the work carried out by a young employee is not detrimental to his/her physical or mental health and that a young employee is given the necessary guidance with a view to ensuring occupational health and safety (sections 9 and 10 of the Act).

As regards pregnant employees, the Employment Contracts Act provides that necessary accommodations to work and work environment, including temporary reassignment of the employee if necessary, need to be taken if the health of the employee or the embryo is at risk. (chapter 2, section 3(2) of the Act). The Act also contains special provisions with regard to maternity, paternity and parental leave (chapter 4, section 1), work during maternity or parental allowance terms (chapter 4, section 2), different kinds of child-care leaves (chapter 4, sections 3-6) and absence for compelling family reasons (chapter 4, section 7).

#### **→ 4.7.3 Minimum and maximum age requirements**

*Are there exceptions permitting minimum and/or maximum age requirements in relation to access to employment (notably in the public sector) and training?*

Section 2 of the Act on Young Employees [*laki nuorista työntekijöistä* (998/1993)] stipulates that a person who is at least 15 years of age may be employed provided that he or she has completed compulsory education. A person who is 14-years of age may be employed subject to certain conditions, and a younger than that may be employed under strict conditions and with a specific permission from the pertinent authorities and only for specific purposes, e.g. as a child actor in a film. According to the Act, a 15-year old person (or older) may him- or herself conclude and terminate an employment contract (section 3 of the Act), while an employment contract of a younger than 15-year old person may be concluded or terminated by his or her legal guardian.

Section 8 of the Act on civil servants [*virkamieslaki* (750/1994)] stipulates that a civil servant must be at least 18 years of age. As an exception to this main rule, a person who is at least 15 years of age and who has completed compulsory schooling, can be assigned a post as a civil servant provided that the nomination is considered appropriate in the light of the carrying out of the functions of the particular position. Section 11 of the Act bans discrimination on the basis of age.

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<sup>48</sup> Ålands landskapsregering, Framställning nr 10/2004-2005.

#### ➔ 4.7.4 Retirement

*In this question it is important to distinguish between pensionable age (the age set by the state, or by employers or by collective agreements, at which individuals become entitled to a state pension, as distinct from the age at which individuals retire from work), and mandatory retirement ages (which can be state-imposed, employer-imposed, imposed by an employee's employment contract or imposed by a collective agreement).*

*a) Is there a state pension age, at which individuals must begin to collect their state pensions? Can this be deferred if an individual wishes to work for longer, or can an individual collect a pension and still work?*

There are two complementary pension systems in Finland: earnings-related pensions linked to past employment and national pensions linked to residence in Finland. Both systems include a wide range of retirement benefits for specific contingencies, including old-age pension. The applicable employee pension law depends on the insured person's place of work and type of employment (these laws include what are known in short as TEL, LEL, TaEL, MEL, YEL, MYEL, VEL, KuEL, KiEL,<sup>49</sup> and cover both public- and private sector employment and self-employment). National pension (literally called 'national pension insurance') is designed to provide minimum pension security to pensioners with insufficient earnings-related pension or none at all. A single person can enjoy several types of pensions simultaneously, including national (i.e. state) old-age pension and employment-related old-age pension.

A person is entitled to state old-age pension when he/she turns 65 (*kansaneläkeläki* (347/1956)] Whether a person is entitled to this pension depends on the amount of other benefits (including other types of pensions) she/he receives. A person is entitled to reduced-rate state old-age pension after turning 62. A pension must in any case be applied for. A person may also postpone the application of the pension, in which case she/he is entitled to an increase in the amount of the pension. The fact that a person receives old-age pension does not preclude her/him from working.

*b) Is there a normal age when individuals can begin to receive payments from occupational pension schemes and other employer-funded pension arrangements? Can payments from such occupational pension schemes be deferred if an individual wishes to work for longer, or can an individual collect a pension and still work?*

An employee can start to enjoy employment-related old age pension at any point during her or his 63-68 years. Those who are 62 years of age are entitled to early old-age pension, where the amount of pension is somewhat reduced. The old-age pension for state and local government employees can start – in some cases - before the age of 63. A voluntary supplementary pension arranged by the employer may also include the possibility of retiring on an old-age pension before the age of 63. Old-age pension does not start automatically, but must be applied for. One does not need to start collecting old-age pension even at the age 68. Such a choice increases the amount of pension one will receive later on.

Those whose employment relationship is governed by the pension laws LEL, TaEL, YEL or MYEL do not need to stop working to be eligible to receive pension. This group includes self-

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<sup>49</sup> These are: Employees' Pensions Act (TEL), the Temporary Employees' Pensions Act (LEL), the Freelance Employees' Pensions Act (TaEL), the Seamen's Pensions Act (MEL), Farmers' Pensions Act (MYEL) and the Self-Employed Persons' Pensions Act (YEL), State's Pension Act (VEL), Local Government Pensions Act (KuEL) and Evangelical Lutheran Church's Pension Act (KiEL).

employed persons, including farmers; artists and some other specific occupational groups; and those in short-term employment relationships. Other employees are required to retire from their jobs to be eligible to receive old-age pension, but this is without prejudice to their right to conclude new employment contracts.

*c) Is there a state-imposed mandatory retirement age(s)? Please state whether this is generally applicable or only in respect of certain sectors, if so please state which. Have there been recent changes in this respect or are any planned in the near future?*

The rules regarding retirement age and pension have been amended recently in an attempt to attract employees to stay longer in the working life. These most relevant laws include the following:

- Retirement Act [*työntekijäin eläkelaki* (395/1961), as amended]
- Act on Employment Contracts [*työsopimuslaki* (55/2001), as amended]
- National Pension Act [*Kansaneläkelaki* (347/1956), as amended]

The amendments in the above-mentioned laws entered into force on 1.1.2005.

Section 6:1a of Act on Employment Contracts (*työsopimuslaki* (55/2001), as amended) specifies that the employment relationship ends without further notice at the end of the calendar month during which the employee turns 68, unless the employer and employee agree otherwise. If an employee decides to retire before turning 68, (s)he is in practice expected to terminate his/her employment contract, which can then take place after the passing of a certain period of time. The Act is applicable with respect to those persons who are not self-employed or employed as civil servants.

As regards civil servants, section 35 of the Act on State Civil Servants [*valtion virkamieslaki* (750/1994)] specifies that the general retirement age is 68 years. According to the same provision, the retirement age may be set lower by a decree with respect to particular types of posts. Such lower retirement ages have been set for instance for officers of the defence forces of Finland.

*d) Does national law permit employers to set retirement ages by contract, collective bargaining or unilaterally?*

There are two types of employment relationships: fixed-term and permanent. Fixed-term contracts can be concluded only under very specific circumstances. A contract that specifies a certain retirement age would in effect be a fixed-term contract, and can be concluded only in such exceptional situations.

*e) Does the law on protection against dismissal and other laws protecting employment rights apply to all workers irrespective of age, if they remain in employment or are these rights lost on attaining pensionable age or another age (please specify)?*

The law against dismissal applies to all instances of dismissal, but the termination of the employment contract due to an employee turning 68 is not regarded as “dismissal”, and therefore the law on protection against dismissal does not apply.

*For these above questions, please indicate whether the ages are different for women and men.'*

The relevant laws do not differentiate between women and men.

#### 4.7.5 Redundancy

*a) Does national law permit age or seniority to be taken into account in selecting workers for redundancy?*

Section 7:1 of the Employment Contracts Act [*työsopimuslaki* (55/2001), as amended] demands that the laying off/dismissal of employees may be based only on “appropriate and weighty reasons”. The Act does however not regulate more precisely the factors on the basis of which selection of workers for redundancy is to be made. It is however clear that these factors may not be discriminatory. Under the case law, it is also clear that the decision of an employer not to take seniority into account when laying off/dismissing employees cannot be successfully challenged on the grounds that the employer should have taken seniority into account.<sup>50</sup>

*b) If national law provides compensation for redundancy, is this affected by the age of the worker?*

Compensation for redundancy is to be paid only on situations where the laying off/dismissal was based upon grounds that breach the Employment Contracts Act, for instance if the decision was based upon discriminatory considerations or if there really were no grounds for redundancy. In such situations, the age of the (former) employee and his/her prospects of finding new suitable employment are among the factors that may be taken into account in determining the amount of compensation [chapter 12, section 2(2) of the Act].

#### 4.8 Public security, public order, criminal offences, protection of health, protection of the rights and freedoms of others (Article 2(5), Directive 2000/78)

*Does national law include any exceptions that seek to rely on Article 2(5) of the Framework Employment Directive?*

No.

#### 4.9 Any other exceptions

*Please mention any other exceptions to the prohibition of discrimination (on any ground) provided in national law.*

Section 7 of the Non-Discrimination Act [*yhdenvertaisuuslaki* (21/2004)] provides that action taken in pursuance of an Equality Plan, which all authorities are required to draw up in order to foster ethnic equality in accordance with section 4(2) of the Act, does not constitute discrimination.

#### ➔ 5. POSITIVE ACTION (Article 5 Directive 2000/43, Article 7 Directive 2000/78)

*a) What scope does national law provide for taking positive action in respect of racial or ethnic origin, religion or belief, disability, age or sexual orientation? Please refer to any important case-law or relevant legal/political discussions on this topic.*

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<sup>50</sup> Supreme Court 1998:130 (KKO 1998:130).

As regards the general anti-discrimination framework, which is laid down in section 6 of the Constitution [*perustuslaki* (731/1999)] and sections 11:9 and 47:3 of the Penal Code [*rikoslaki* (391/1889)], it is clear that taking positive action is allowed, but not required *per se*. One exception exists, though: taking of positive action is not allowed at all in the recruitment of civil servants, as the recruitment criteria have been laid down exhaustively in the Constitution, and do not make any room for positive action. At the same time, one however has to keep in mind that, in accordance with section 22 of the Constitution, all authorities are under a specific duty to guarantee the observance of basic rights and liberties and human rights. This provision obliges e.g. the legislator and the judiciary to actively secure the *de facto* realization of rights, which may necessitate the taking into account of the specific situation of vulnerable groups. As a small step towards that direction can also be seen the evolution of the principles of good administration, which e.g. obliges the administration to take positive steps to ensure that all people before it *de facto* have the same opportunity to successfully present their case, irrespective of e.g. disability.<sup>51</sup>

As regards the more specific anti-discrimination legislation, one must refer to the Non-Discrimination Act and briefly also to the Act on Equality Between Women and Men [*laki naisten ja miesten tasa-arvosta* (609/1986)]. The latter is significant, as it contains the only express positive action duty existing in the Finnish anti-discrimination legislation by requiring that all public committees and other public bodies shall, as a main rule, be composed of representatives of both sexes at least by 40 % each (section 4a of the Act, as amended).

The Non-Discrimination Act deals with positive action primarily in section 7(2), which provides:

This Act does not prevent specific measures aimed at the achievement of genuine equality in order to prevent or reduce the disadvantages caused by the types of discrimination referred to in section 6(1) (*positive action*). Positive action must be appropriate [“proportionate” would be more accurate translation, TM] to its objective.

Furthermore, the Act obliges all authorities to take steps to foster equality, and in this way the national legislation goes beyond the minimum requirements laid down in the Article 13 Directives. Section 4 of the Act provides:

(1) In all they do, the authorities shall seek purposefully and methodically to foster equality and consolidate administrative and operational practices that will ensure the fostering of equality in preparatory work and decision-making. In particular, the authorities shall alter any circumstances that prevent the realization of equality.

(2) Each authority shall draw up a plan for the fostering of ethnic equality (*equality plan*), which must be as extensive as required by the nature of the work of the authority. The Ministry of Labour shall issue general recommendations for the content of plans referred to in this subsection.

The authorities, referred to in section 4, comprise the following: central and local government authorities, independent bodies governed by public law, authorities in the province of Åland when the latter are discharging the functions of national authorities in the province, societies governed by public law and individual actors when these are discharging public administrative functions, and non-incorporated state enterprises.

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<sup>51</sup> Juhani Kortteinen & Timo Makkonen, *Oikeutta rasismien ja syrjinnän uhreille - rasismien vastainen käsikirja* [Handbook for the Victims of Racial Discrimination], Ihmisoikeusliitto 2000, pp. 58-59.

Section 7(1) provides, furthermore, that action taken in pursuance of an equality plan adopted in accordance with section 4 of the Act and, which is adopted in order to implement the objective of the Act in practice, does not constitute discrimination.

The scope and content of an equality plan are to be determined by the extent to which the function of the authority in question has a bearing on equal treatment issues on the basis of ethnic origin. The material nature of public powers exercised and the ethnic composition of the ‘clientele’ (those to whom services are provided) are to be taken into account when determining the scope and nature of this duty. The Ministry of Labour has issued more precise instructions for the content of the equality plan.<sup>52</sup> While the duty to draw up a plan is binding, there are no hard and fast sanctions or mechanisms of enforcement attached to this duty. A number of equality plans have been adopted.

The law or the *travaux* are not very clear when it comes to the scope of positive action. One could distinguish, for instance, between the obligations of the legislator on the one hand, and the obligations of those applying the law (e.g. employers, administration) on the other, but the law or the *travaux* do not address this issue. The doctrine on positive action is rather unclear especially with regard to the boundary between positive action and legislation aiming to advance the situation of groups that are socially in a vulnerable situation.

The “traditional” interpretation regarding the Finnish legal system is that the legislator has a rather wide margin of appreciation in determining what kind of measures are necessary in a given situation, especially if the draft legislation intends to improve the situation of socially disadvantaged groups or individuals.<sup>53</sup> Most of the *travaux préparatoires* for legislation that aim at e.g. improving the employability of disabled persons do not use positive action argumentation in their reasoning. For instance, the Government proposal HE 169/2001 on legislation enhancing the employability of disabled persons refers to the constitutional obligation to promote employment (section 18.2 of the Constitution), the obligation of the public authorities to promote the realization of basic rights (section 22 of the Constitution), and the need for the realization of *these* rights not to be discriminatory *against* the disabled people (section 6.2. of the Constitution). While the objective of the legislation was indeed the promotion of employment opportunities of a specific, disadvantaged group of people, its possible character as positive action legislation was not spelled out.<sup>54</sup> The lack of clarity referred to above relates exactly to this question: was for instance this legislation needed to implement an existing right in practice, in which case it was not to be considered positive action, or was it a positive action measure “deviating” from the principle of non-discrimination? In the opinion of the author, only such pieces of legislation, or only such concrete actions, which create or make use of a clear order of preference to be applied in a concrete decision making situation are to be considered positive action provided the aforementioned requirements are fulfilled.

The responsibility to enhance and promote the employability of disabled people belongs to a large extent to the state and the municipalities. According to the section 18(2) of the Constitution

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<sup>52</sup> Kirje 9.9.2004 1100/009/2004TM.

<sup>53</sup> Martin Scheinin, “Yhdenvertaisuus ja syrjinnän kieltö” [Equality and the Prohibition of Discrimination], in Hallberg et al, *Perusoikeudet* [Basic Rights], WSOY 1999, p. 236.

<sup>54</sup> To complicate matters further, the Government proposal mentions the Employment Equality Directive and its approach on positive action in a section in which it discusses “other international obligations of relevance”. It does not, though, explicitly spell out whether the directives’ stance on positive action had any effect on the preparation of the proposal.

The public authorities shall promote employment and work towards guaranteeing for everyone the right to work. Provisions on the right to receive training that promotes employability are laid down by an Act.

This constitutional obligation is mainly implemented by the Act on Public Employment Service [*laki julkisesta työvoimapalvelusta* (1295/2002)], according to which the primary means for the enhancement of employability are provided by the public labour force services. The labour administration provides occupational rehabilitation services through 120 employment offices all over the country. People with disabilities have access to vocational guidance and guidance relating to job placement and training, employment counselling, employment-promoting training and work and training try-outs at workplaces and vocational education institutions. The municipalities on their part have, according to the Social Welfare Act [*sosiaalihuoltolaki* (710/1982)] section 17, an obligation to provide for rehabilitation and other measures supporting the employability of disabled people.

*Åland Islands.* Section 7 of the Provincial Act on Prevention of Discrimination provides that “provisions in this act do not pose an obstacle for a decision to take special measures with a view to prevent that persons are disadvantaged on the grounds of ethnic belonging, religion or other conviction, disability, age or sexual disposition, or with a view to compensating such disadvantage.” The Act does not however impose any obligations on public or private actors to promote the realization of equal treatment in practice.

*b) Do measures of positive action exist in your country? Which are the most important? Refer to measures taken in respect of all 5 grounds, in particular refer to the measures related to disability and any quotas for access of disabled persons to the labour market and any related to Roma.*

The only genuine positive action measure relates to equality between women and men. The Act on Equality Between Women and Men [*laki naisten ja miesten tasa-arvosta* (609/1986)] requires, in section 4a, that all public committees and other public bodies shall, as a main rule, be composed of representatives of both sexes at least by 40 % each.

One must also keep in mind the general obligation incumbent upon public authorities to promote the realization of equal treatment in practice, as required by the Non-discrimination Act.

Several various types of measures promoting the employability of people with disabilities exist. An employer may, for instance, receive a refund for costs that result from work and training experimentations for disabled people.<sup>55</sup> The purpose of work try-outs is to acquaint disabled persons with working life for the period of up to six months. During a try-out period the employer does not pay the disabled person wages, but the person receives remuneration either from the labour administration or the Social Insurance Institution. In order to support the access of disabled job seekers to the labour market an employer can receive an employment subsidy for a maximum of two years (up to 760 €/month). The majority of disabled persons who obtain jobs through this support are employed either by municipalities or the state.<sup>56</sup> Employment subsidy is also payable to companies that improve the vocational facilities of disabled persons and employ them provisionally. Employment subsidy is granted to companies on the basis of an employment contract concluded for a fixed period, if the

<sup>55</sup> Employment Services Act, section 12.

<sup>56</sup> Independent Living - Challenge for Disability Policy. Brochures of the Ministry of Social Affairs and Health, 1999:5.



company provides employment counselling and employment-promoting rehabilitation in the context of supported employment. Such a combination of supported employment, education and rehabilitation is valid for a maximum of two years. In this case employment subsidy is paid to the company for a maximum of ten months.

## **6. REMEDIES AND ENFORCEMENT**

### **6.1 Judicial and/or administrative procedures (Article 7 Directive 2000/43, Article 9 Directive 2000/78)**

a) *What procedures exist for enforcing the principle of equal treatment (judicial/administrative/alternative dispute resolution such as mediation)?*

Several procedures for enforcing the principle of equal treatment exist depending on the domain of life in which the breach occurred as well as on the ground of discrimination.

As regards all grounds included in the two Directives:

As regards employment and education (access to training), victim of discrimination may file a claim, in a district court, for compensation under the Non-Discrimination Act [*yhdenvertaisuuslaki* (21/2004)]. Compensation may be awarded for up to 15 000 € and even more in exceptionally serious cases. The payment of compensation is not connected to criminal liability. Discriminatory provisions included in an employment contract may be annulled or amended by an ordinary court, or by a Labour Court if the matter deals with a collective agreement.

As regards, inter alia, employment, education, provision of services, exercise of public powers and arrangement of public meetings, victim of discrimination may bring criminal charges. Discrimination is considered a crime under public prosecution in the Penal Code. This means, inter alia, that after a victim of discrimination has filed a crime report to the police, the police has to investigate the matter under the leadership of a prosecutor (pre-trial investigation).

As regards employment, compliance by employers with anti-discrimination law is supervised by the Occupational Health and Safety Authority. It may receive communications from employees, and carry out on-site inspections in the private sector, and if it considers that there are probable grounds to suspect that discrimination, as defined in the Penal Code, has taken place, it must report the case to a public prosecutor.

In case a discriminatory decision is made in the exercise of public powers, a victim of discrimination may make use of the rectification procedure or some other ordinary channel of appeal. In such situations a person who considers himself wronged can also file a complaint to the Parliamentary Ombudsman or the Chancellor of Justice of the Government. However, these overseers of legality do not have the power to alter the decisions of authorities on the basis of complaints, or to award damages, but they may e.g. issue admonitions or order criminal prosecution against a public official.

As regards ethnic discrimination specifically (that is: in addition to remedies mentioned above):

As regards other material areas covered by the Non-Discrimination Act, but not employment, a victim of ethnic discrimination may turn to the Ombudsman for Minorities

(“vähemmistövaltuutettu”), and/or the Discrimination Tribunal (“syrjintälautakunta”). In accordance with section 13 of the Non-Discrimination Act, the Discrimination Tribunal may confirm a settlement between the parties or prohibit the continuation of a conduct that is contrary to the prohibition of discrimination or victimization. The Tribunal may also order a party to fulfil its obligations under a penalty of fine. The Tribunal may also issue a statement on how non-discrimination law is to be interpreted upon the request of one or both of the parties, the Ombudsman for Minorities, a court of law, a public authority (e.g. a ministry) or an NGO.

The Ombudsman for Minorities shall, by means of instructions and advice, seek to eliminate any discriminatory practices he has identified (section 3.1 of the Act on the Ombudsman for Minorities and the Discrimination tribunal, *laki vähemmistövaltuutetusta ja syrjintälautakunnasta* (660/2001)). The Ombudsman may issue statements on any discrimination case submitted to him, and shall forward the complaint to the pertinent authorities if necessary and if agreed to by the complainant (section 3.3 of the Act), and may provide legal assistance (section 4). A person who considers having been discriminated against may also ask the Ombudsman to lead conciliation proceedings.

*Åland Islands.* Rules regarding procedural law belong to the prerogative of the state. Therefore complainants in the ÅI can file a claim in a regular court in the manner described above. Compliance with the Provincial Act on Prevention of Discrimination is supervised – on all grounds covered by the act - by the Ombudsman on discrimination (*diskrimineringsombudsman*). As a first measure, the Ombudsman shall try to get all parties to observe the law out of their free will. If there are probable grounds for suspecting that discrimination as sanctioned in the Penal Code has taken place, the Ombudsman shall inform a public prosecutor forthwith. A local office of the Occupational health and safety authority oversees compliance with non-discrimination law in the field of private employment.

*b) Are these binding or non-binding?*

The decisions of the courts of law and the Discrimination tribunal are binding.

*c) ➔ Can a person bring a case after the employment relationship has ended?*

Yes, if this takes place within the time limits prescribed in law.

*In relation to each, please note whether there are different procedures for employment in the private and public sectors.*

*In relation to the procedures described, please indicate any costs or other barriers litigants will face (e.g. necessity to instruct a lawyer?) and any other factors that may act as deterrents to seeking redress (e.g. strict time limits, complex procedures, location of court or other relevant body)?*

Up until before the entering in force of the Non-Discrimination Act, the most often used means of judicial recourse was to bring criminal charges. Several such cases dealt with denial of access, on the grounds of ethnic origin, to restaurants or other places open to the public. Even this type of action was however taken only infrequently, as there is evidence to the effect that only some fourteen per cent of the victims of ethnic discrimination file a crime report to the police.<sup>57</sup>

<sup>57</sup> Jasinskaja-Lahti, Inga et al: *Rasismi ja syrjintä Suomessa*. Helsinki: Gaudeamus 2002.

Now that the Non-Discrimination Act is in force, the situation is likely to change, as the Act eases the burden of proof in other than criminal proceedings and entitles victims of discrimination to claim compensation, which with all likelihood will prove to be a very meaningful legal remedy. One should also note that proceedings before the Discrimination Tribunal are free of charge, and are usually not so complicated as to require the use of legal council.

Persons with disabilities may obviously face particular de facto barriers in having recourse to legal processes. Section 117 of the Act on the Use of Land and Buildings [*maankäyttö- ja rakennuslaki* (132/99)] requires that buildings must be accessible and facilitate the needs of everyone, to the extent that the purpose for which the building is being used so requires. Basically this means that courts and other such premises have to be accessible, and have to accommodate e.g. people with hearing problems.

## ➔ 6.2 Legal standing and associations (Article 7(2) Directive 2000/43, Article 9(2) Directive 2000/78)

*Please list the ways in which associations may engage in judicial or other procedures*

*a) in support of a complainant*

See below.

*b) on behalf of one or more complaints (please indicate if class actions are possible)*

Interested organizations may not bring legal action on behalf of victims of discrimination or become third parties in proceedings brought by the complainants or even act as *amicus curiae*. Individual lawyers (or even other persons, subject to some restrictions), working for an organization, may, subject to general statutory restrictions for representation, bring legal action and represent the victim in a court upon his/her authorization, and may of course provide legal and other assistance such as advice. In accordance with section 14 of the Non-Discrimination Act, an association (or a range of other actors) may request the Discrimination Board to issue a statement regarding the interpretation of the law in a matter dealing with ethnic discrimination (does however not apply to matters relating to employment).

Class action does not exist as an institution in Finland, but a working group is currently preparing a legislative proposal on it. Although the matter has raised some political controversies it is likely that class action will be introduced to the Finnish legal system in near future. It is however not likely that discrimination will be among the subject areas in which class action will be possible.<sup>58</sup>

*Åland Islands.* This matter belongs to the competence of the Finnish state and therefore above observations apply also with respect to the ÅI.

## 6.3 Burden of proof (Article 8 Directive 2000/43, Article 10 Directive 2000/78)

*Does national law require or permit a shift of the burden of proof from the complainant to the respondent? Identify the criteria applicable in the full range of existing procedures and concerning the different types of discrimination, as defined by the Directives (including harassment).*

<sup>58</sup> <http://www.stm.fi/Resource.php/publishing/documents/3247/index.htm>

Under section 17 of the Non-Discrimination Act [*yhdenvertaisuuslaki* (21/2004)], in matters that are brought before a court or other competent authority in accordance with the Act, it is up to the defendant to demonstrate that the prohibition of discrimination has not been violated, if the complainant establishes information from which it may be presumed that the prohibition of discrimination has been violated. The provision does not apply to criminal cases, but does apply to proceedings before the Discrimination Tribunal and to civil proceedings (e.g. to a claim for compensation) before the ordinary courts. It does not however apply to proceedings brought under other acts than the Non-Discrimination Act, such as Tort Liability Act [*vahingonkorvauslaki* (412/1974)].

According to the pertinent *travaux préparatoires*, the shifting of the burden of proof, now codified into section 17 of the Non-Discrimination Act, was in practice customarily observed in matters relating to discrimination already before the codification.<sup>59</sup>

The provision is applicable with respect to all matters relating to any form of discrimination (direct and indirect discrimination, harassment, instruction or order to discriminate) irrespective of the ground of discrimination, but does not extend to victimization. It is not enough only to express suspicions or claims, but the complainant has to present concrete facts/information to substantiate his/her claim. Full evidence is not however required, it is enough that the information, when assessed objectively, gives rise to a presumption that discrimination has taken place.<sup>60</sup>

*Åland Islands.* This matter is within the prerogative of the state. It is however not clear whether the rule on the burden of proof in section 17 of the Non-Discrimination Act is applicable with respect to the proceedings brought under the legislation adopted in the ÅI. This is because by its wording the applicability of section 17 is restricted to matters brought under the Non-Discrimination Act itself (as by the time of its adoption it was not foreseen that specific additional legislation would need to be adopted with respect to the ÅI). It is however not necessarily the case that this state of affairs means that the requirements posed by the two Directives are not met: as was pointed out above, the courts have customarily shifted the burden of proof in discrimination cases even in the absence of a specific provision to that effect, in addition to which the courts may apply section 17 of the Non-Discrimination Act in accordance with its objective if not its wording. It remains however to be seen whether the courts in the ÅI will in practice follow the shifted burden of proof in proceedings brought under ÅI law (they will have to do so in proceedings brought under the Non-Discrimination Act).

#### **6.4 Victimisation (Article 9 Directive 2000/43, Article 11 Directive 2000/78)**

*What protection exists against victimisation? Does the protection against victimisation extend to persons other than the complainant? (e.g. witnesses, ➔ or person that help the victim of discrimination to present a complaint)*

This matter is dealt with in section 8 of the Non-Discrimination Act, which provides that no-one may be placed in an unfavourable position or treated in such a way that he or she suffers adverse consequences because of having complained or taken action to safeguard equality.

The personal and material scope of this provision is wide. The law applies, first of all, not just to employers or the person who the complainant has complained about, but to any person who

<sup>59</sup> Government proposal 44/2003 [HE 44/2003], p. 54.

<sup>60</sup> *Idem*.

takes action in response to the action by the complainant.<sup>61</sup> No necessary personal connection to the (alleged) discrimination is needed. Second, the scope of persons protected from victimization is wide: not just is the (alleged) victim of discrimination protected, but so are all those who have engaged in the proceedings or who have been involved in support of the victim, including witnesses, legal councils and representatives of NGOs who have provided advice or other assistance to the victim. Third, the range of actions which may be considered as “complaining or taking action”, in response to which victimization is then taken, is wide. It covers bringing legal action to a court, Ombudsman, Discrimination Tribunal or any other competent authority, in addition to which already the filing of a complaint or a crime report, or even the contacting of a human rights organisation or a lawyer, is covered.<sup>62</sup>

A person who has suffered victimization may be awarded compensation in accordance with section 9 of the Non-Discrimination Act. The possibility to be awarded compensation follows the material scope of the Act, meaning that for the other grounds than ethnic origin it is possible to obtain compensation only for victimization that took place in the context of employment or education.

Protection against victimization is also provided by the Penal Code [*rikoslaki* (391/1889), as amended], which in chapter 15:9 penalizes various forms of obstruction of justice, including by means of threatening or preventing e.g. a witness or an expert witness from making a statement. Acts of victimization may also constitute other offences such as slander, (petty) assault or discrimination as defined in the Penal Code.

*Åland Islands.* Section 8 of the Provincial Act on Prevention of Discrimination provides: “it is prohibited to subject individuals to adverse treatment or adverse consequences on the grounds of a complaint on discrimination.” As the provision speaks of individuals in plural, and it is not by its wording limited in any way, it is reasonable to interpret the provision in a manner which gives protection also to witnesses and those that assist or otherwise help the complainant.

## **6.5 Sanctions and remedies (Article 15 Directive 2000/43, Article 17 Directive 2000/78)**

*a) What are the sanctions applicable where unlawful discrimination has occurred? Consider the different sanctions that may apply where the discrimination occurs in private or public employment, or in a field outside employment.*

Under section 9 of the Non-Discrimination Act [*yhdenvertaisuuslaki* (21/2004)] the maximum amount of compensation is (currently) 15 000 euros, the amount being reviewed every three years by the Ministry of Labour. This maximum limit is however not absolute, as the limit may be exceeded for “special reasons” where the circumstances of the case (e.g. the length and seriousness of discrimination) so warrant. There is no minimum limit to compensation, and it is possible not to award any compensation, if that is considered reasonable given the particular circumstances of the case (section 9(2) of the Non-Discrimination Act). The (theoretical) maximum sum in compensation as provided in section 9 shall be adjusted every three years by a decree given by the Ministry of Labour (section 21 of the Act). The award of compensation is without prejudice to the possibility to obtain damages under the Tort Liability Act [*vahingonkorvauslaki* (412/1974)] or some other legislation.

Discrimination is an offence punishable under sections 11:9 and 47:3 of the Penal Code [*rikoslaki* (39/1889)] The former provision prohibits discrimination inter alia in the provision

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<sup>61</sup> Ibid, p. 46.

<sup>62</sup> Idem.

of services and the latter in employment. Under both provisions a person found guilty of discrimination may be convicted to fines or to imprisonment for up to six months.

Under section 10 of the Non-discrimination Act, a court may amend or ignore contractual terms that are contrary to the prohibition of discrimination or victimization. If circumstances so warrant, a court may amend also other parts of the contract or declare the contract void.

As regards ethnic discrimination outside the field of employment, the Discrimination Tribunal may issue an order for injunctive relief, i.e. prohibit the continuation of discrimination. The Tribunal may also order a party to fulfil its obligations under a penalty of fine.

*Åland Islands.* By virtue of section 9 of the Provincial Act on Prevention of Discrimination, the above-mentioned section 9 of the Non-Discrimination Act applies also with respect to proceedings brought under the Provincial Act. In addition, the Ombudsman on Discrimination may impose a fine in case a party continues to breach the non-discrimination law even after the Ombudsman has pointed out that the party is in breach of its obligations (section 10 of the Act).

c) *Is there any ceiling on the maximum amount of compensation that can be awarded?*

The law specifies a maximum amount of compensation (15 000 €), but this ceiling is only theoretical, as it can be exceeded for “special reasons”. By way of an example, the following may be considered as “special reasons”: the fact that the breach of equal treatment laws took place over an extended period of time; indifferent attitude on part of the respondent as regards the requirements posed by law; severity of the breach; and the extent to which the complainant felt offended by the breach.<sup>63</sup>

The rationale behind having this kind of a theoretical upper limit appears to be the following: The amount of compensation awarded to complainants is in general not very high in Finland (also in an international comparison). Therefore, by mentioning an exceptionally high sum in the text of the law, the legislator has wanted to emphasise the particular severity that a breach of equal treatment law constitutes. This same message is further emphasised by making it explicitly possible to exceed this “upper limit”.

The amount of “maximum compensation” may be adjusted every three years.

c) *Is there any information available concerning:*

➔ *- the average amount of compensation available to victims*

There is not enough case law on the application of section 9 of the Non-Discrimination Act to infer guiding principles. By way of an example it can be mentioned that in one recent case where a Roma woman was without any acceptable grounds suspected of stealing goods from a grocery store (ethnic discrimination in the provision of goods), the woman was awarded 2 000 € in compensation.<sup>64</sup>

*- the extent to which the available sanctions have been shown to be - or are likely to be - effective, proportionate and dissuasive, as is required by the Directives?*

Prior to the transposition of the Article 13 Directives, and the adoption of the Non-Discrimination Act, the most often used type of legal procedure was the bringing of criminal

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<sup>63</sup> HE 44/2003 vp.

<sup>64</sup> Vantaan käräjäoikeus, tuomio R 05/3357, 9.11.2005.

charges. However, not more than some 14 per cent of the victims of ethnic discrimination took such action,<sup>65</sup> from which one may conclude that the available sanctions prior to the changes were not effective or dissuasive, as discrimination was rampant but legal action was infrequent. The entering into force of the Non-Discrimination Act, and the consequent establishment of the Discrimination Tribunal and the possibility to claim compensation, may be expected to bring about a change in this respect. The Discrimination Tribunal may be characterized as a “low threshold body”, but as of yet (1.1.2006), the caseload of the body has not been as extensive as could have been expected and the Tribunal has issued only a handful of decisions so far. The number of claims for compensation filed in regular courts is not known, as the relevant statistics are not compiled, but it appears to be low.

In the end of the day, one may conclude that the available sanctions, because of their wide range (including criminal and civil sanctions) look promising, and may prove to be effective, proportionate and dissuasive, but it is too early yet to arrive at any definite conclusions.

## 7. SPECIALISED BODIES

### *Body for the promotion of equal treatment (Article 13 Directive 2000/43)*

*When answering this question if there is any data regarding the activities of the body (or bodies), include reference to this (keeping in mind the need to examine whether the race equality body is functioning properly). For example, annual reports, statistics on the number of complaints received in each year or the number of complainants assisted in bringing legal proceedings.*

*a) Does a ‘specialised body’ or ‘bodies’ exist for the promotion of equal treatment irrespective of racial or ethnic origin?*

The office of the Ombudsman for Minorities was established by the Ombudsman for Minorities Act [*laki vähemmistövaltuutetusta* (660/2001)], which entered in force on September 1st, 2001. The Act was amended in 2004 during the transposition process by way of law 22/2004, which inter alia changed the title of the Act into Act on the Ombudsman for Minorities and the Discrimination Tribunal (*laki vähemmistövaltuutetusta ja syrjintälautakunnasta* (660/2001), as amended).<sup>66</sup> The duties of the Ombudsman do not cover other discrimination grounds than ethnic origin.<sup>67</sup> In 2005 the office of the Ombudsman served 185 persons who complained of discrimination.

Discrimination Tribunal, which was also established in the course of the transposition of the two Directives into national law, does not have the tasks specified in Article 13 of the Racial Equality Directive, and should therefore not be considered as a ‘body for the promotion of equal treatment’ in accordance with the said provision, although the Tribunal is governed by the same Act as the Ombudsman for Minorities. The relationship between these two bodies is simply mainly that the Ombudsman may provide assistance to individuals who wish to file a complaint with the Tribunal.

*Åland Islands.* The office of the Ombudsman on Discrimination (*diskrimineringsombudsman*) was established by the Provincial Act on Ombudsman on Discrimination [*landskapslag om*

<sup>65</sup> Jasinskaja-Lahti, Inga et al: *Rasismi ja syrjintä Suomessa*. Helsinki: Gaudeamus 2002.

<sup>66</sup> For information on the Discrimination Tribunal, see section 6.1 of this report. In view of the author, the Tribunal does not constitute a “body for the promotion of equality”, as it is a body dealing with complaints and exercising judicial powers.

<sup>67</sup> Ethnic origin covers racial origin as well.

*diskrimineringsombudsmannen* (67/2005)], which entered into force on 1 December 2005. The Ombudsman is yet to be nominated (situation as of 1.1.2006).

*b) Describe briefly the status of this body (or bodies) including how its governing body is selected, its sources of funding and to whom it is accountable.*

Ombudsman for Minorities is an independent body that is administratively attached to the Ministry of Labour. Its funding comes from the state budget's general heading for the Ministry of Labour. There is no separate governing body. The Ombudsman has an obligation to produce a yearly report to the Ministry. As the body has been set up by an act of the Parliament, it can only be abolished by an act of at least the same level.

*Åland Islands.* The Ombudsman on Discrimination is an independent body under the Provincial Government, which also appoints the Ombudsman. There is no separate governing body. Funding for the body comes from the provincial budget. As the body has been set up by an act of the Provincial Legislative Assembly, it can be abolished only by another such act.

*c) Describe the competences of this body (or bodies), including a reference to whether it deals with other grounds of discrimination and/or wider human rights issues.*

The Ombudsman for Minorities deals with discrimination on the basis of ethnic origin. The duties of the Ombudsman include: 1) supervision of the observance of the Non-Discrimination Act as regards ethnic discrimination in other sectors than employment; 2) promotion of the of good ethnic (community) relations in the society, 3) monitoring and improving the status and rights of foreigners and ethnic minorities, 4) reporting on the realization of the principle of equal treatment irrespective of origin, and the issuing of proposals with a view to elimination of discrimination and other difficulties and shortcomings, 5) provide information on the situation and rights of foreigners and ethnic minorities and 6) carry out the duties laid down in Aliens Act [*ulkomaalaislaki* (301/2004)] (section 2 of the Act). The Ombudsman shall, by way of providing instructions and advice, seek to eliminate any discriminatory practices that he has identified (section 3.1), and he can issue statements on any discrimination case submitted to him and shall forward the complaint to the pertinent authorities if necessary (section 3.3), and may provide legal assistance, provided that he considers that the matter has considerable significance from the point of view of prevention of discrimination (section 4). The Ombudsman may lead conciliation proceedings (section 12 of the Non-Discrimination Act), and may take a case to the Discrimination Tribunal (section 15 of the Non-Discrimination Act).

*Åland Islands.* Under section 1 of the Provincial Act on the Ombudsman on Discrimination the Ombudsman is to "promote and secure equal treatment through combating and preventing discrimination on the grounds of ethnic belonging, religion or other conviction, disability, age and sexual disposition." The duties of the Ombudsman include: to oversee compliance with the Provincial Act on Prevention of Discrimination; through giving advice and by other means to contribute to the creation of a situation, where an individual who has been discriminated against can bring legal proceedings and by other means secure his/her rights; conduct independent surveys and publish independent reports on discrimination; make recommendations in relation to questions dealing with discrimination; oversee the conditions of civil servant's contracts; engage in a dialogue with the NGOs in Åland that have an interest in combating discrimination; provide information of discrimination laws; engage in conciliation between parties if conciliation can be assumed to prevent future discrimination (section 6 of the Provincial Act on Ombudsman on Discrimination).



d) *Does it / do they have the competence to provide assistance to victims, conduct surveys and publish reports and issue recommendations on discrimination issues?*

Yes – this applies both to the Ombudsman for Minorities and the Åland Ombudsman on Discrimination.

e) *Does the body (or bodies) have legal standing to bring discrimination complaints or to intervene in legal cases concerning discrimination?*

The Ombudsman for Minorities can bring a case to the Discrimination Tribunal or to other competent body, such as a court, provided that the complainant has given his/her consent thereto.

*Åland Islands.* The Ombudsman on Discrimination shall inform the public prosecutor if there are probable grounds to suspect that discrimination, as defined in the Penal Code, has taken place.

f) *Is the work undertaken independently?*

Yes. The State Council appoints the Ombudsman for a period of five years in the maximum (section 2 of the Decree on Ombudsman for Minorities, *valtioneuvoston asetus vähemmistövaltuutetusta* (687/2001)]. Administratively speaking the Office of the Ombudsman is connected to the Ministry of Labour of Finland, and the officers and the rest of the personnel of the Office are designated by the Ministry, but the Ombudsman is independent from the Ministry as well as from other entities and actors.

*Åland Islands:* At the time of the writing of this report the work of the Ombudsman has not yet commenced, but there are no reasons to expect that that the work would not be undertaken independently.

## 8. IMPLEMENTATION ISSUES

### 8.1 Dissemination of information, dialogue with NGOs and between social partners

*Describe briefly the action taken by the Member State*

*a) to disseminate information about legal protection against discrimination (Article 10 Directive 2000/43 and Article 12 Directive 2000/78)*

The following may be referred to in this respect:

- Six seminars on the Non-Discrimination Act were held in six major cities during the spring of 2004. A wide range of people was targeted, including those representing NGOs, municipalities and regional administration.<sup>68</sup> In 2005 inter alia the following action was taken: training was provided to those working at different ministries and other sections of the administration on how to implement the Non-Discrimination Act; Training on equal treatment was integrated into teacher training programmes; a workshop was arranged for those who teach at the police academy; “Diversity Day Conference” was held in Helsinki on 9-10.12.2006; and a webportal with a lot of practical information and practical tools was launched ([www.equality.fi](http://www.equality.fi)).

<sup>68</sup> For more details, see <http://www.join.fi/seis/pdf/equalityact.pdf>

- A leaflet on the Non-Discrimination Act has been produced by the Ministry of Labour and the SEIS-project, and is available both in print and as a pdf-file in the Internet in Finnish, Swedish, English, Sami, Russian, Arabic, Spanish, French and in sign language as well as in Braille writing.<sup>69</sup>
- The Non-Discrimination Act has been translated into English by the Ministry of Labour (it is also available in Swedish)<sup>70</sup>
- The web-page of the Ombudsman for Minorities introduces the relevant anti-discrimination legislation, and provides instructions on how to proceed if one is of the view that she/he has been discriminated against.

*b) to encourage dialogue with NGOs with a view to promoting the principle of equal treatment (Article 12 Directive 2000/43 and Article 14 Directive 2000/78)*

The following may be referred to in this context:

- Co-operation and dialogue between the administration and the NGO sector has been relatively frequent and fruitful already in the past, and there are no indications that the trend would be reversing;
- Two key NGOs were invited to partake in the working group which prepared the new anti-discrimination legislation, in addition to which a range of NGOs was heard during the preparation process and after the finalisation of the first draft;
- A new consultative body, *vähemmistöasiain neuvottelukunta* (Advisory Body on Minority Issues) has been set up. The functions of the Board include 1) issuing of proposals and statements on how the supervision and monitoring of the realisation of equal treatment is to be developed and the rights of and position of foreigners are to be safeguarded, and 2) to develop means of co-operation between government (administration) and NGOs in matters relating to supervision and monitoring of the realisation of equal treatment.<sup>71</sup> The body deals with discrimination on the basis of ethnicity. It works in close co-operation with the Ombudsman for the Minorities. The Advisory Board is composed of a chairman, vice-chairman and a maximum number of 14 other members with alternate members. Key ministries, social partners, the Directorate of Immigration, association of municipalities and five NGOs are represented in the Board.
- A number of other advisory bodies also exist. These include the Advisory Board on Youth Issues (*Valtion nuorisoasiain neuvottelukunta* NUORA), *Valtakunnallinen vammaisneuvosto* (The National Council on Disability), Advisory Board for Rehabilitation (*Kuntoutusasiain neuvottelukunta*), *Etnisten suhteiden neuvottelukunta* (Advisory Board on Ethnic Relations ETNO) and Advisory Board on Roma Affairs (*romaniasiain neuvottelukunta* RONK).
- One might also note that according to section 14 of the Constitution “[t]he public authorities shall promote the opportunities for the individual to participate in societal activity and to influence the decisions that concern him or her.” Thus there exists also a constitutional obligation to enhance a meaningful dialogue.

*c) to promote dialogue between social partners to give effect to the principle of equal treatment within workplace practices, codes of practice, workforce monitoring (Article 11 Directive 2000/43 and Article 13 Directive 2000/78)*

<sup>69</sup> <http://www.join.fi/seis/yhdenvertaisuuslaki.shtml>

<sup>70</sup> <http://www.finlex.fi/fi/laki/kaannokset/2004/en20040021.pdf>

<sup>71</sup> Section 3 of the Decree on the Ombudsman for Minorities.

The official policy line has been, already prior to the Directive, to engage the two sides of the industry in anti-discrimination and anti-racism efforts. This is partly due to the fact that the Ministry of Labour has a central role in developing and implementing official anti-discrimination policies, and that it naturally has very close links to the two sides of the industry. In addition one should take note of the following:

- Representatives of the social partners were involved in the preparation of the new equality legislation;
- Social partners are represented in the afore-mentioned new advisory body, the Advisory Body on Minority Issues (*vähemmistöasiain neuvottelukunta*).
- The social partners have reviewed the collective labour agreements to verify that they do not have discriminatory provisions.

## 8.2 Compliance (Article 14 Directive 2000/43, Article 16 Directive 2000/78)

- a) Are there mechanisms to ensure that contracts, collective agreements, internal rules of undertakings and the rules governing independent occupations, professions, workers' associations or employers' associations do not conflict with the principle of equal treatment?*

Section 10 of the Non-Discrimination Act [*yhdenvertaisuuslaki* (21/2004)] provides that a court may, in a case that is being processed by it, change or ignore contractual terms that are contrary to the prohibition provided in section 6 (on discrimination) or section 8 (on victimization) of the Act. Contractual terms are considered to include commitments relating to the size of remuneration. Section 10 applies also to collective agreements. One should also note that section 36 of the Contracts Act [*laki varallisuus oikeudellisista oikeustoimista* (228/1929)] ordains that if a clause of a contract is unreasonable or if it leads to an unreasonable situation, such a clause can be adjusted or be completely disregarded. In most cases a discriminatory clause would most probably be found to be “unreasonable”. Also the Employment Contracts Act [*työsopimuslaki* (55/2001)] has a special provision concerning employment contracts; a provision of a contract which is plainly discriminatory is to be considered null and void.<sup>72</sup>

*Åland Islands.* These matters belong to the legislative competence of the state.

- b) Are any laws, regulations or rules contrary to the principle of equality still in force?*

No. In the process of transposing the two Directives the pertinent ministries reviewed legislation in their respective administrative fields, but did not come up with any discriminatory laws, regulations or rules, and therefore it was not deemed necessary to abolish any laws.<sup>73</sup> In addition it might be mentioned, that the pertinent articles of Constitution require that the lawgiver shall not enact laws that are contrary to the principle of equal treatment. Should a court of law find that a particular legal provision however is in an apparent conflict with the principle of equal treatment as laid down in section 6 of the Constitution, it must not apply such a provision.<sup>74</sup>

<sup>72</sup>Employment Contracts Act, section 9:2.

<sup>73</sup> This is because the principle of equal treatment has been strongly embedded in the Finnish legal system already for a long time, and because the Constitutional Law Committee of the Parliament reviews all legislation that is suspected of possibly infringing basic rights.

<sup>74</sup>Section 106 of the Constitution.

*Åland Islands.* No such laws, regulations or rules appear to exist.

## 9. OVERVIEW

*This section is also an opportunity to raise any important considerations regarding the implementation and enforcement of the Directives that have not been mentioned elsewhere in the report.*

➔ *This could also be used to give an overview on the way (and if at all) national law has given rise to complaints or changes, including, eventually a reference to the number of complaints, whether instances of indirect discrimination have been found by judges, and if so, for which grounds, etc.*

Three interrelated considerations may be raised in this context:

- Firstly, as also this report implies, the Finnish legal doctrine relating to equality and non-discrimination issues is not always very detailed or precise. This is despite the fact that the Finnish legal system has for already quite some time provided protection from discrimination, albeit in a different fashion in comparison to the Article 13 Directives. The lack of clarity is in many points due to the lack of relevant case law and legal literature on the subject.
- Secondly, there is little experience outside the fields of gender and ethnic discrimination. The new legislation, or its *travaux préparatoires*, do not in any detailed fashion analyse or break down the differences between discriminations on the grounds of disability, age, sexual orientation, religion or belief. The different grounds are, where not explicitly required by the Directives otherwise, treated as essentially the same. This situation is further exacerbated by the fact, noted e.g. by Rainer Hiltunen, that awareness of those who are entrusted with enforcing the law is not sufficient with respect to these “other” grounds of discrimination.<sup>75</sup> A related conceptual problem is that e.g. disability issues are often framed in terms of social or welfare policy and not of equal treatment. This situation is also reflected in the sphere of adjudication: there are only a few if any cases on discrimination on the basis of disability, but there is a multitude of cases dealing with the adequacy of specific public services needed by people with disabilities.
- Thirdly, and perhaps in slight contradiction to what was said above under consideration number two, many in Finland are of the view that there should be greater convergence between the treatment of different discrimination grounds. Many demand that the material scope where the prohibition of discrimination is to be applied should be the same for all grounds, and that enforcement mechanisms should likewise be of similar standard. This apparent discrepancy in the treatment of different discrimination grounds has been criticized not just by human rights/disability activists,<sup>76</sup> but also by the Parliament, which has considered the current situation to be fundamentally unacceptable, and has passed a statement requiring the government to prepare a new proposal for equality legislation.<sup>77</sup> This new draft legislation is required

<sup>75</sup> Report of the European Group of Experts on Combating Sexual Orientation Discrimination: *Combating sexual orientation discrimination in employment: legislation in fifteen EU member states. Chapter 6* by Rainer Hiltunen. 2004.

<sup>76</sup> Sanna Ahola and Tuomas Himanen : Vammaisen Pakolaisena. *Pakolainen* 4/03 verkkoversio. Article available online at [http://www.pakolaisapu.fi/pak\\_4\\_03/pak4\\_03\\_juttu\\_4.html](http://www.pakolaisapu.fi/pak_4_03/pak4_03_juttu_4.html) (visited 1.1.2006).

<sup>77</sup> PTK 107/2003 vp, p.7, TyVM //2003 vp.

to take as its point of departure the principle that all discrimination grounds are to be treated equally.<sup>78</sup>

## 10. CO-ORDINATION AT NATIONAL LEVEL

*Which government department/ other authority is/ are responsible for dealing with or co-ordinating issues regarding anti-discrimination on the grounds covered by this report?*

Discrimination issues are a good example of issues where responsibility is often divided and action is taken by several government departments. However, as regards discrimination on the basis of ethnic origin, the responsibility for coordination has in practice been vested in the Ministry of Labour. Ministry of Education is usually in charge of coordination relating to matters pertaining to youth issues and religious issues, while the Ministry for Social and Health Affairs is usually in charge of matters pertaining to the elderly and the disabled.

### Annex

#### 1. Table of key national anti-discrimination legislation

#### 2. Table of international instruments

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<sup>78</sup> Idem.

# ANNEX 1: TABLE OF KEY NATIONAL ANTI-DISCRIMINATION LEGISLATION

Name of Country: FINLAND  
1.2.2006

Date

Title of Legislation (including amending legislation)	In force from:	Grounds covered	Civil/Administrative/ Criminal Law	Material Scope	Principal content
Constitution [ <i>perustuslaki</i> (731/1999)].  <b>Up-to-date legislation available online free of charge at:</b> <a href="http://www.finlex.fi">www.finlex.fi</a> (some of it also in English or other languages).	1/2000	- non-exhaustive list of grounds - grounds explicitly mentioned: sex, age, origin, language, religion, belief, opinion, health, disability - covers also “other reasons concerning a person”	Constitutional law	- very broad scope, but primary significance relates to exercise of public powers	- prohibits the putting of a person into a different position on a prohibited ground if no acceptable reason can be provided
Non-Discrimination Act ( <i>yhdenvertaisuuslaki</i> 21/2004)	2/2004	- non-exhaustive list of grounds - grounds explicitly mentioned: age, ethnic or national origin, nationality, language, religion, belief, opinion, state of health, disability, sexual orientation - covers also “other reasons relating to a person”;	Mostly administrative/civil law	- for ethnic origin: broadly the same as in Racial Equality Directive -for other grounds: employment and education/training	- principal instrument of transposition - prohibits direct and indirect discrimination, harassment and instruction and order to discriminate - lays out (some of the) duties of the Discrimination Board and the Ombudsman for

					Minorities
Chapter 11, section 9 of Penal Code, as amended by law 578/1995 ( <i>rikoslaki</i> (391/1889))	9/1995	<ul style="list-style-type: none"> <li>- non-exhaustive list of grounds</li> <li>- grounds expressly covered: race, national or ethnic origin, colour, language, sex, age, family relations, sexual orientation, health, religion, opinion, political or industrial activity</li> <li>- covers also “other comparable factors”</li> </ul>	Criminal Law	<ul style="list-style-type: none"> <li>- provision of services, practicing of a profession or a source of livelihood, exercise of public powers, organising of public events</li> </ul>	<ul style="list-style-type: none"> <li>- if discrimination is found, the perpetrator may be convicted to fines or to imprisonment for up to six months</li> </ul>
Chapter 47, section 3 of the Penal Code, as amended by law 302/2004 ( <i>rikoslaki</i> 391/1889)	as amended 5/2004	<ul style="list-style-type: none"> <li>- non-exhaustive list of grounds</li> <li>- grounds expressly mentioned include: race, national or ethnic origin, nationality, colour, language, sex, age, family relations, sexual orientation, health, religion, societal belief, political or industrial activity</li> <li>- covers also “other comparable factors/statuses”</li> </ul>	Criminal Law	<ul style="list-style-type: none"> <li>-employment, including recruitment</li> </ul>	<ul style="list-style-type: none"> <li>- if discrimination is found, the perpetrator may be convicted to fines or to imprisonment for up to six months</li> </ul>

<p>- Chapter 2, section 2 of Employment Contracts Act, as amended by law 23/2004 (<i>työsopimuslaki</i> 55/2001)</p> <p>- Chapter 2, section 11 of Civil Servant Act [<i>valtion virkamieslaki</i> (750/1994)]</p> <p>- Chapter 3, section 12 of Act on Civil Servants in Municipalities [<i>laki kunnallisesta viranhaltijasta</i> (304/2003)]</p> <p>- Chapter 2, section 15a of Seaman's Act [<i>merimieslaki</i> (423/1978)]</p>	as amended 2/2004	<p>- non-exhaustive lists of grounds</p> <p>- grounds expressly mentioned include: age, health, disability, national or ethnic origin, nationality, sexual orientation, language, religion, opinion, belief, family relations, activity in an employees association, political activity</p> <p>- covers also "other comparable factors"</p>	Civil law	Various types of employment	- refers to Non-Discrimination Act as to the applicable definition of discrimination + e.g. for applicable rules re burden of proof
Provincial act on Prevention of Discrimination in the Province of Åland ([ <i>Landskapslag om förhindrande av diskriminering i landskapet Åland</i> (66/2005)])	12/2005	- grounds explicitly covered: ethnic belonging, religion and other conviction, age, disability and sexual disposition	Civil law	- Applicable in the Åland Islands; civil servants employed by the ÅI or one of the municipalities on ÅI, schools, social care and health care, some parts of provision of goods and services	Prohibits direct and indirect discrimination, harassment, instructions to discriminate and victimization; lays down some of the duties of the Ombudsman

## ANNEX 2: TABLE OF INTERNATIONAL INSTRUMENTS



Name of country FINLAND

Date 1.2.2006

Instrument	Signed (yes/no)	Ratified (yes/no)	Derogations/ reservations relevant to equality and non-discrimination	Right of individual petition accepted?	Can this instrument be directly relied upon in domestic courts by individuals?
European Convention on Human Rights (ECHR)	Yes	Yes	None	Yes	Yes
Protocol 12, ECHR	Yes	Yes	None	Yes	Yes
Revised European Social Charter	Yes	Yes	None	Ratified collective complaints protocol? Yes	Yes, to the extent the rights provided in ESC, as revised, are justiciable
International Covenant on Civil and Political Rights	Yes	Yes	None	Yes	Yes
→ Framework Convention for the Protection of National Minorities	Yes	Yes	None	Not applicable – no individual communications procedure in existence	Yes, to the extent the rights provided are justiciable
International Convention on Economic, Social and Cultural Rights	Yes	Yes	None	Not applicable - No individual communications procedure yet in existence	To the extent the rights provided in ICESR are justiciable
Convention on the Elimination of All Forms of Racial Discrimination	Yes	Yes	None	Yes	Yes
Convention on the Elimination of	Yes	Yes	None	Yes	Yes

Discrimination Against Women					
ILO Convention No. 111 on Discrimination	Yes	Yes	None	Not applicable	Yes
➔Convention on the Rights of the Child	Yes	Yes	None	Not applicable	Yes