

REPORT ON MEASURES TO COMBAT DISCRIMINATION

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

COUNTRY REPORT

Update 2005

The Netherlands

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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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Short list of abbreviations / translations:

GETA = General Equal Treatment Act

ADA = Age Discrimination Act

DDA = Disability Discrimination Act

ETC = Equal Treatment Commission

Tweede Kamer (der Staten Generaal) = Second Chamber of Parliament.²

¹ This report builds on the first country report by Marianne Gijzen, who in turn based her work on earlier reports written by Lisa Waddington and Marianne Gijzen for disability, Kees Waaldijk for sexual orientation and Marcel Zwamborn for race and ethnicity, religion and belief. Information provided by these *rapporteurs* was included in this report by the current author, as far as it was still accurate and up to date in February, 2006. The current author wishes to express her gratitude for her kind permission to use this material.

² Parliamentary papers, motions or amendments or letters from the government to Parliament are referred to in the footnotes by the Dutch system of reference: Tweede Kamer (=Second Chamber), parliamentary years (e.g. 2000-2001), number of the bill / subject matter (e.g. 20 239) and the number of order, (e.g. 20 239, nr. 4), followed by a page number. In this example: Tweede Kamer 2000-2001, 20 239, nr. 4, p. 13. Only the titles of these papers have been translated here.

Staatsblad = Law Gazette³

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.

In the Netherlands there is only one level of (central) government that issues anti-discrimination legislation or equal treatment legislation. The principles of equality and non-discrimination are captured by various realms of the law. Of importance are: the Constitution (*Article 1* of the Constitution enshrines a constitutional equality and non-discrimination guarantee), private and public employment law, *specific* additional statutory non-discrimination acts and, criminal law. Moreover since the Netherlands' constitutional system adheres to a "monist theory" of international law, international equality guarantees automatically filter into the national legal system (this is provided in *Articles 93 and 94* of the Constitution). In respect of the law-making procedure, statutory acts (*wetten in formele zin*) are the product of concerted action between the government on one hand, and both Chambers of Parliament (*Eerste en Tweede Kamer der Staten Generaal*) on the other. The Parliament may delegate legislative details to the government which may adopt governmental decrees or ministerial decrees. Private employment contracts are regulated by book 7 of the Civil Code (*Burgerlijk Wetboek*) and by specific statutory non-discrimination acts. Moreover, regulation may occur via Collective Labour Agreements (*CAO's*) per sector or per employer. The employment of most public employees is regulated by the Public Servants Act (*Ambtenarenwet*). For each sector of public employment there normally is also a Collective Labour Agreement.⁴ The following non-discrimination and equal treatment provisions are of key importance.

- Article 1 of the Constitution enshrines a constitutional equality and non-discrimination guarantee. (See below, par. 1 of this report for more details.)
- International non-discrimination provisions (e.g. Article 26 ICCPR and Article 14 ECHR) can directly be applied in court proceedings. Sometimes also provisions from UN CERD or UN CEDAW are called upon directly before Dutch Courts.⁵
- EC-Treaty provisions and Directives can be directly applied under certain conditions.⁶
- The Criminal Code entails some specific provisions criminalising discriminatory speech and publications (articles 137d-137f) and criminalising discriminatory acts in the performance of one's job or one's enterprise (articles 137g and 429quater). Discrimination is defined in article 90quater of the Criminal Code.⁷

³ The system of reference to Acts that have been published in the Law Gazette is as follows: Title of the Act, Law Gazette, year, number. Only the titles have been translated into English.

⁴ See Kees Waaldijk, (see footnote 62).

⁵ This is not often successful, since the courts often deem these provisions not sufficiently clear and precise to apply them directly. A famous successful case is the one between women's organisations and a political party that does not allow women to become a full member. This case was won by the women's ngo's on the ground that this constituted a breach of the non-discrimination principle of the CEDAW-Convention. See Rb Den Haag [District Court, The Hague] 7 September 2005, *LJN* AU2091 and *LJN* AU2088.

⁶ These are the normal conditions for applicability of EC-Law in the Member States.

⁷ This definition is substantially different from the definition in the Directives and from the definition of 'onderscheid' (distinction) that is used in the equal treatment legislation. The criminal code definition is more in line with the one in article 1 of the UN CERD.

- The Civil Code entails some specific articles prohibiting sex discrimination in labour contracts (articles 7:646 – 7:649.); it also puts a duty on employers to create safe working conditions (art. 7:658).
- The Civil Servants Act (articles 125g and 125 h) contains similar provisions for the civil service sector.
- The Act on Working Conditions contains provisions concerning (sexual) harassment at the workplace and aggression and violence at the workplace.
- The Equal Treatment Act for men and women in the workplace regulates among others the topic of equal pay.⁸

In the framework of the implementation of the Directives the following equal treatment legislation is of crucial importance:⁹

- *Age as a ground for discrimination*

Implementation of the discrimination ground *age* has been achieved by the adoption of the *Wet van 17 december 2003, houdende gelijke behandeling op grond van leeftijd bij de arbeid, beroep en beroepsonderwijs* (*Wet Gelijke Behandeling op grond van Leeftijd bij de Arbeid*).¹⁰ In this report this Act shall be referred to as the *Age Discrimination Act*. (Hereinafter: ADA) The ADA entered into force on 1st of May 2004.¹¹ It is stressed that implementation of the ground ‘age’ occurred differently from that of the ground ‘disability’. Implementation of *age* has been achieved in Dutch law by a *single staged process*. This means that the *bill on age discrimination* was aimed at the implementation of both the *age specific* and the *common provisions*¹² of the Directives ‘in one go’. As will be highlighted hereinafter, this contrasts with the *modus* of implementation of *disability* which occurred via a *two staged process*.

- *Disability as a ground for discrimination*

Like *age*, *disability* has been regulated out with the general framework of the GETA. Implementation of the ground *disability* occurred in contrast to *age* along the way of a *two-staged process* for reasons of political expediency.

1). *In the first stage* of implementation, the *disability specific* provisions of the Employment Framework Directive were implemented by the *Wet van 3 april 2003 tot vaststelling van de Wet Gelijke Behandeling op grond van Handicap of Chronische Ziekte*.¹³ This Act entered into force on 1 December 2003 (except for Articles 7 and 8 of the Act which relate to ‘public transport’).¹⁴ This Act shall in this report be referred to as the *Disability Discrimination Act*. Hereinafter: DDA)

⁸ Since gender discrimination is not a topic that this Network deals with this Act will not be discussed in this Report.

⁹ In this report we will concentrate on these Acts.

¹⁰ Act of 17 December 2003, concerning the equal treatment on the ground of age in employment, occupation and vocational training [Act on Equal Treatment on the Ground of Age in Employment]. *Staatsblad* 2004, 30.

¹¹ The Act's entering into force has been determined by a governmental decision. See: Besluit van 23 februari 2004, houdende vaststelling van de datum van inwerkingtreding van de Wet gelijke behandeling op grond van leeftijd bij de arbeid, [Governmental Decision of 23 February 2004 concerning the establishment of a date of the entering into force of the Act on Equal Treatment on the ground of age in employment] *Staatsblad*. 2004, 90.

¹² *Common provisions* are those provisions which are found in both the Race and Employment Framework Directive and which are applicable to all grounds covered by these Directives. See *Memorie van Toelichting bij de EG Implementatiewet AWGB, Tweede Kamer, 2002-2003, 28 770, nr. 3, p. 7* [Explanatory Memorandum to the EC Implementation Act]. Examples are: the definitions of discrimination, the burden of proof, positive action, remedies, victimisation etc.

¹³ Act of 3 April 2003 concerning the establishment of the Act on Equal Treatment on the grounds of disability or chronic disease, *Staatsblad* 2003, 206.

¹⁴ The Act's entering into force has been determined by a governmental decision. See: Besluit van 11 augustus 2003, houdende vaststelling van het tijdstip van inwerkingtreding van de Wet gelijke behandeling op grond van handicap of chronische ziekte, *Staatsblad* 2003, 329. [Governmental Decision of 11 August 2003, concerning the establishment of a date of the entering into force of the Act on Equal Treatment on the grounds of disability or chronic disease, *Law Gazette* 2003, 329].

2). In the second stage of implementation, the common provisions were implemented by means of the adoption of the *Wet van 21 februari 2004 tot wijziging van de Algemene Wet Gelijke Behandeling en enkele andere wetten ter uitvoering van richtlijn 2000/43/EG en richtlijn 2000/78/EG (EG-Implementatiewet AWGB)*.¹⁵ ‘Common provisions’ are provisions found in both the Employment Framework Directive and in the Race Directive which are applicable to all grounds for discrimination (including thus disability). This Act shall in this report be referred to as the *EC Implementation Act*. This Act *inter alia* complements the DDA in the first stage of implementation in that it inserts the “common provisions” into that Act. The *EC Implementation Act* entered into force on the 1st of April 2004.¹⁶

- *Race, religion and belief and sexual orientation as grounds for discrimination*

The above grounds have been covered by Dutch law since 1994 by the *Algemene Wet Gelijke Behandeling*.¹⁷ In this report this Act shall be referred to as the *GETA*. (Hereinafter: *GETA*.) The 1994 Act has been amended and complemented by the *EC Implementation Act* already referred to above. Importantly, the Dutch government has deemed it desirable to extend many of the amendments that were legally required for the grounds covered *both* by the 1994 Act *and* the Directives (*i.e.*, race, religion/belief, sexual orientation) to other grounds that are also covered by the *GETA* (*i.e.*, political opinion, sex, nationality and civil status).¹⁸ (NB: Disability and Age are not covered by the *GETA* but are regulated in separate laws; see above.)

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.*¹⁹

1. Arguably, the absence of the distinction in the ADA as between ‘direct’ and ‘indirect’ age distinction, may fall short of the requirements under Directive 2000/78. This is especially so, given the existence of an identical ‘objective justification test’ for cases of direct and indirect age distinction. [See para. 2.2. under B of this report].
2. Definition of indirect discrimination: it is arguable that the Dutch legislator might need to bring the definition of ‘indirect distinction’ more in line with the Directives’ requirements. [See para. 2.3. of this report].
3. The accumulative conditions in the harassment definition arguably fall short of the Directives’ non regression clause’. [See para. 2.4. of this report].
4. Arguably, the Dutch government interprets the prohibition of ‘instruction to make a distinction’ unduly narrow. [See para. 2.5. of this report].

¹⁵ Act of 21 February 2004 regarding the amendment of the General Equal Treatment Act en some other Acts in order to implement Directive 2000/43/EC and Directive 2000/78/EC (EC Implementation Act AWGB). It is noted that *AWGB* stands for *Algemene Wet Gelijke Behandeling i.e., General Equal Treatment Act* which dates as of 1994.

¹⁶ The Act’s entering into force has been determined by a governmental decision. See: *Besluit van 11 maart 2004, houdende vaststelling van het tijdstip van inwerkingtreding van de Wet van 21 februari 2004 tot wijziging van de Algemene Wet Gelijke Behandeling en enkele andere wetten ter uitvoering van richtlijn 2000/43/EG en richtlijn 2000/78/EG (EG Implementatiewet AWGB)*, *Staatsblad* 2004, 120. [Governmental Decision of 11 March 2004, concerning the establishment of the date of the entering into force of the Act of 21 February 2004 regarding the amendment of the General Equal Treatment Act en some other Acts in order to implement Directive 2000/43/EC and Directive 2000/78/EC (EC Implementation Act AWGB), *Law Gazette* 2004, 120.

¹⁷ *Algemene Wet Gelijke Behandeling* [General Equal Treatment Act] of 1994, *Staatsblad*. [Law Gazette] 230.

¹⁸ Explanatory Memorandum to the EC Implementation Act, p. 3.

¹⁹ The European Commission has asked the Dutch government to clarify some aspects of the implementation that are of special concern to the Commission but have not yet been made public.

5. Arguably an unduly restrictive approach is adopted by the Dutch government as regards the ‘personal applicability’ of the Statutory Acts covered in this report. [See para. 3.1.3. of this report.]
6. Partially reversed burden of proof – not applicable in victimisation claims. Arguably this falls short of EC requirements. [See para. 6.4. of this report].
7. Arguably there is a problem with the requirement that sanctions be ‘effective’, ‘dissuasive’ and ‘proportionate’. [See para. 6.5. of this report].
8. Arguably the competencies of the ETC are not in line with Article 13 of the Race Directive, since the ETC can not assist victims of discrimination. [See para 7 of this 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 Dutch government did notify (16.12.2003) the use of three extra years for the implementation into Dutch law of the ground ‘age’. However, eventually, the ADA entered into force on the 1st of May 2004 and thus, the requested extra time has not been made use of (See however Article 18 of the GETA which enshrines a transitional provision on retirement before the age of 65.)

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)

Introduction

The following overview contains only cases that are dealt with on the basis of the ADA, DDA and GETA).²⁰ Relatively few cases are brought to the attention of the Dutch Courts.²¹ Most cases are brought before the ETC.²² In the year 2005, the ETC gave 245 *Opinions*²³ (as against 179 in 2004). One third of them dealt with discrimination on the ground of age. The explanation of this high percentage is that the ADA is new and that there is a lot of uncertainty about how to interpret this law. From all of these judgements and *Opinions* only

²⁰ This means that we will not give an overview of criminal law cases or cases that have been decided upon with the use of Constitutional or International Law provisions.

²¹ See the Annual Report of the ETC, which will be published in June 2006. The present author thanks the ETC for allowing her to have a look at the printing proofs in order to write this report.

²² All *Opinions* by the Equal Treatment Commission are available at www.cgb.nl and can easily be searched on the basis of the case's reference number. The parties' names are kept anonymous in the Commission's case law.

²³ The decisions of the ETC are non-binding. See also para. 7 of this report.

very few can be discussed in this overview.²⁴ A lot of the other cases were about gender discrimination, a topic which is not covered by this report. In the following some of the most remarkable / important cases will be discussed.²⁵

Race and ethnic origin:

*ETC: Case 2005-25, of 18 February 2005:*²⁶ The local government of Tiel (a small town in the Netherlands) conducts a policy to spread the (aspirant) pupils who's *parents* are of non-Dutch origin, who have lower or no education and who do manual labour.²⁷ This means that each publicly funded primary school in this town should not have more than a certain percentage of such pupils. If a school already has reached this percentage the child will not be accepted and will have to go to another school, even if this is outside its own neighbourhood. The ETC first establishes that the 'service' to provide education falls under the scope of the GETA. Next it examines the practice of this policy and finds that the first factor (non-Dutch origin of the parents) in fact is decisive. It then decides that this constitutes a form of 'hidden' direct discrimination on the ground of race for which the GETA allows no justification.²⁸ *Held: breach.* It is debated in the Netherlands whether the way in which the ETC constructs this category of *hidden direct discrimination* is the correct way. The ETC does so by equating a neutral criterion (national origin) with a suspect criterion (race) and then concluding that this is unjustifiable direct discrimination.²⁹

ETC: Opinion 2005-75, case of 25 April 2005: An employee complains that there was harassment on the ground of race since he was insulted on this ground. The ETC applies the new definition of harassment in the GETA (art. 1a GETA) and concludes that the requirements to conclude that the contested behaviour indeed constituted harassment were not met because the insult was one single incident. However, the ETC rules that in Article 5 of the GETA it is provided that any 'distinction' in the working conditions is unlawful. This norm indeed has been breached by the occurrence of the incident. *Held: breach.* From this *Opinion* it can be concluded that the ETC finds *harassment* a special (more serious) kind of 'making a distinction'.³⁰

Age:³¹

ETC: Opinion 2005-180, of 3 October 2005: This concerns the case that a temporary contract of a young employee in a supermarket was not substituted into a permanent contract. According to the applicant this decision was due to her age and she submitted a case under the ADA. The ETC applied the rules of the (partial) reversal of the burden of proof (Article 10 GETA, also applicable in ADA cases). The applicant stated that she had heard rumours that

²⁴ It should be noted that some of the case law of the courts and the Opinions of the ETC have raised a tremendous amount of academic and political debate in the Netherlands. We will return to this in para 9 of this report.

²⁵ For this overview the present author used the article by S.D. Burri, *Rechtspraakoverzicht gelijke behandeling. Selectie van rechterlijke uitspraken en oordelen van de Commissie Gelijke Behandeling, juli tot en met november 2005*, *Sociaal Maandblad Arbeid* 2006-1, p. 30-37. She also thanks the editor (Susanne Burri) and the authors of the *Oordelenbundel* of the ETC for the year 2005, in which there are chapters on each of the non-discrimination grounds that are covered by the GETA, the DDA and the ADA, for letting her use these materials. These are: *Age*: M. Heemkerk & M.J.J. Dankbaar; *Disability*: W. Brussee & M. Kroes; *Race*: P.R. Rodrigues; *Religion and Belief*: B.P. Vermeulen & C.M. Zoethout; *Sexual Orientation*: C. Waaldijk. The *Oordelenbundel 2005* will be published in June 2006 by Kluwer, Deventer. See also the diagram that is presented in para 9 of this Report.

²⁶ Also published in *AB* 2005, 230 with a case note of C.W. Noorlander.

²⁷ See also para 9 of this report under the heading of 'race'.

²⁸ This *Opinion* has also been discussed by B.P. Vermeulen in the annual *Oordelenbundel* of the ETC: 'De toelaatbaarheid van spreidingsbeleid en aanverwante maatregelen in het onderwijs' [The admissibility of policies to spread pupils.] In: S.D. Burri (ed.) *Oordelenbundel 2005*. Kluwer, Deventer June 2006, forthcoming.

²⁹ This method has been accepted in the case of pregnancy, which is equated with direct sex discrimination.

³⁰ See also Opinion 2005-30. See also below, para 2.4..

³¹ See also the comments made in para 9 of this report.

the management found 18 and 19 year old employees ‘too expensive’. According to the ETC, this ‘fact’ is reflected in the general picture that exists in the media about the human resource policies of super markets and that also flows from other complaints that are brought to the attention of the ETC. All together this ‘picture’ is enough to substantiate the criterion “ *if a person who considers herself to have been wronged*”). *Held: breach.*

Hof Den Haag [Court of Appeal, the Hague] 24 March 2005, JAR 2005, 98: A case of the FNV and CNV (two national organisations of employees) against the State, based on international non-discrimination provisions³², concerning the lack of a legal regulation of minimum wages for the 13 and 14 year old.³³ The Court of Appeal decided that the lack of such regulation constitutes unlawful age discrimination for which there is not sufficient justification. The Court’s test was based on Article 26 ICCPR. However, the Court added that the outcome would have been the same would the ADA have been in force at the time when the court proceedings were initiated and subsequently would have been applied. *Held: breach.*

ETC Opinions 2005-128-129 and 130 of 14 July 2005: These (joined) cases– brought on the basis of the ADA - concerned differentiation on the ground of age in a Social Plan (made up between social partners) for redundancy payments in the course of a large scale reorganisation plan.³⁴ The case came down to the question whether an older person (i.e. over the age of 57,5 years old) needs to use the special arrangement for older workers in the Social Plan or that he is free to choose to be resigned in the normal way (termination of the employment contract and application of the so-called cantonal judges formula), which can be more profitable under circumstances.³⁵ The ETC (and the judges) ruled that the special rules for the redundancy payment of older people are not objectively justified (not meeting the criterion of proportionality). *Held: breach.*

ETC Opinion 2005-178 of 30 September 2005: The case concerned the exception in article 8 ADA which concerns the exception of pension schemes from the applicability of this Act.³⁶ The question was whether a special pension arrangement for civil servants that are born before the first of January 1948 constitutes a ‘pension scheme’ that falls under this exception. The arrangement allows the civil servants to have an early retirement. Both the District Judge and the ETC concluded that this arrangements must be seen as a pension scheme as defined in the ADA (and in the Explanatory Memorandum to this Act). *Held: no breach.* This decision can be criticised against the general rule of the ECJ that all exceptions to the non-discrimination principle should be interpreted narrowly.³⁷

ETC Opinion 2005-49, 2005-50 and 2005-135 of 25 March and 21 July 2005: These three cases concerned age discrimination in the liberal professions. Doctors and psychiatrists only get paid for their work by medical insurance companies when they have a service contract with one of these companies. The ETC is of the opinion that in general it can be accepted as an argument that elderly people (over 65) will sometimes have trouble in performing their medical profession accurately. Whether this needs to be tested in every individual case

³² Since the ADA was not in force at the time the case was first submitted to the (district) court.

³³ See also para 9 of this Report where another aspect of this case is discussed.

³⁴ This was also disputed in some cases that were brought before cantonal courts. See e.g. Ktr. Amsterdam 14 juni 2004, *JAR* 2004, 262 and Ktr Sneek, 31 mei 2005, *LJN* AT7230. See for an elaborated discussion of these cases S.D. Burri, ‘Rechtspraakoverzicht gelijke behandeling. Selectie van rechterlijke uitspraken en oordelen van de Commissie Gelijke Behandeling, juli tot en met november 2005’, *Sociaal Maandblad Arbeid* 2006-1, p. 30-37 and M. Heemskerk & M.J.J. Dankbaar, ‘Leeftijd’ [Age].

³⁵ See also par. 4.7.5 of this report.

³⁶ See for a similar case: Rb. Breda [District Court Breda] 24 augustus 2005, *PJ* 2005, 119.

³⁷ Heemskerk & Dankbaar refer to the following cases of the ECJ: ECJ 4 June 2002, *PJ* 2002, 99 (*Beckmann*); ECJ 6 November 2003, *PJ* 2004, 71 (*Martin*). According to these authors this was also the conclusion of Lutjens in his case note to the Opinion of the ETC: Lutjens, *PJ* 2005, 122.

depends on the question whether there are valid methods available to carry out such testing.³⁸
Held: breach in the first two cases, no breach in the third case.

Disability and Chronic Illness:

ETC Opinion 200-146 of 5 November 2004: the respondent, a school, refuses a disabled job-applicant for the post of receptionist by reason of an alleged lack of authority. The Commission stresses that Article 17 of Directive 2000/78 explicitly states that employers cannot be obliged to hire candidates who cannot fulfil the essential requirements for the job. If a disabled person cannot perform the essential job requirements and, if a reasonable accommodation cannot alter this situation, an employer may lawfully refuse her. However, in the case at hand it did not concern a person who was not suitable for the post at hand. The Commission took the view that none of the Article 3 exceptions of the DDA applied. Direct disability distinction. *Held: breach.*

Court of Appeal, the Hague, 31 March 2005 (LJN AT2882): Collective action of a great number of NGO's against the State. The NGO's claimed that the new system for reimbursing costs of transport (called the Valys system) to disabled people is discriminatory. The Court of Appeal held that the State has the liberty to make policy choices and it did not test whether this was in breach of any international or national standard concerning non-discrimination.³⁹
Held: no breach.

ETC Opinion 2005-133, of 19 July 2005: The claimant stated that the employer had refused to change his temporary contract into a permanent contract because of his disability. The ETC considered that the claimant had not notified the employer about the nature of his (psychological) problems (that caused malfunctioning) and therefore could not expect the employer to take measures (provide a reasonable accommodation). *Held: no breach.* This case touches upon the complicated matter whether an applicant for a job needs to notify the employer about the existence of a disability or chronic illness. According to the Law on Medical Examinations [Wet Medische Keuringen] an applicant is not obliged to undergo medical examinations in the course of the application procedure. This can conflict with the DDA.⁴⁰

ETC Opinion 2005-234, of 13 December 2005: The claimant has a whiplash as a consequence of a car accident. In this case the ETC *inter alia* interpreted the word 'disability' in a broad way. It states that the overall goal of the ADA asks for a 'broad minded' interpretation. Also, in this case the ETC stated that the comparison to be made is between disabled persons and non-disabled persons. The complainant had compared himself to other disabled persons, who did indeed get equal treatment. However, the fact that the employer treated the other disabled persons equally did not mean that he could not have treated the applicant unequally. *Held: breach.*

Religion and Belief:

³⁸ A similar conclusion can be drawn from case law of the Centrale Raad van Beroep [the Highest Administrative Court] and Hof Den Bosch [the Court of Appeal Den Bosch]: CRvB 17 februari 2005, TAR 2005, 70; Hof Den Bosch 10 mei 2005, JAR 2005, 149. These were cases concerning 'functional age dismissal' in the (voluntary) fire departments. At the time that these cases were initiated before the courts the ADA was not yet in force. The Courts therefore use Article 26 ICCPR.

³⁹ See W. Brussee & M. Kroes, 'Handicap en chronische ziekte' [Disability and Chronic Illness]. In: S.D. Burri (ed.) Oordelenbundel 2005. Kluwer, Deventer June 2006, forthcoming.

⁴⁰ See W. Brussee & M. Kroes, 'Handicap en chronische ziekte' [Disability and Chronic Illness]. In: S.D. Burri (ed.) Oordelenbundel 2005. Kluwer, Deventer June 2006, forthcoming. The authors also discuss the following Opinions that deal with this same issue: 2005-40, 2005-41, 2005-44, 2005-186 and 2005-187. See about the conflict between the DDA and general labour law norms concerning the duty to inform the employer about disabilities P.M. ** Aart Hendriks NJB 2006, pp. **

ETC Opinion 2004-112 of 8th September 2004. Headscarve case; classical instance of indirect religious distinction in the area of goods and services. The respondent was a restaurant that conducted a policy according to which customers were prohibited from wearing headgear. As a consequence of this policy four Muslim women who by reason of their belief wear headscarves were refused entry into the restaurant. Prima facie indirect religious distinction which could not be ‘objectively justified’. Although the respondent’s aim was legitimate, the means used to achieve it were neither appropriate nor necessary. *Held: breach.*

ETC Opinion 2005-222 of 15 November 2005: A Muslim woman was refused a job as a teacher of the Arab language when she applied for a post in a Muslim school. The reason for this was that she refused to wear the headscarf. The ECT first decided that this is a case of direct discrimination on the ground of religion or belief. In the view of the ETC the Muslim school did not succeed in proving that wearing the headscarf was a necessary condition for maintaining or realising the (religious) founding principles of the school. *Held: breach.*

ETC Opinion 2005-67 of 15 April 2005: A complainant stated that a distinction on the ground of ‘belief or philosophy of life’ was made because she did not get a job on the ground that the employer suspected that she was a member of a certain religious group. Is the ‘belief’ of Osho⁴¹ to be considered as a religion? In this Opinion the ETC gives a general guideline as to what is to be considered as a religion. Central in the distinction between ‘religion’ and ‘philosophy of life’⁴² is that in the first a ‘high authority’ (‘God’) is central. Also, it should not be an individual opinion.⁴³ However, the employer did make an unlawful distinction on the ground of philosophy of life; the way the employer asked questions about her beliefs even could be qualified as harassment. *Held: breach.*

Sexual Orientation:

ETC Opinion 2004-116 of 21 September 2004: Two (homosexual) applicants were excluded from participation in a dancing competition organised by the respondent. In this case the Commission revised its earlier stance taken in *Case 1997-29* where it perceived a similar case as an instance of *indirect sexual orientation distinction*. However, the Commission in the current case perceived the alleged distinction as a *direct* sexual orientation distinction. According to the Commission, the refusal to let same sex partners participate in a dancing competition directly flows from taking the dominant heterosexual norm as a starting point. Therefore, the contested rule is *not neutral* notwithstanding that neither *hetero*-sexuals are allowed to dance with a partner of the same sex. No applicable exception. *Held: breach.*

ETC Opinion 2005-5 of 18 January 2005: A medical research institute that works for the pharmaceutical industry advertised for heterosexual men (and their partners) to participate in a test for a medicine that would prevent a premature ejaculation. Homosexual couples were excluded from the survey. According to the ETC, the exclusion amounted to direct discrimination on the ground of sexual orientation for which the law does not allow a justification. *Held: breach.* In a commentary to this Opinion Waaldijk observes that this case demonstrates that sometime an exception (like ‘genuine ‘sex’ requirement’) could be necessary.⁴⁴

⁴¹ The Bagwan Shree Rajneesh philosophy.

⁴² The other protected ground in the GETA. Belief is as such not a protected ground. See para 2.1.1. of this report.

⁴³ See also 2005-162 (Rastafarians) and 2005-22 (Nazireërs).

⁴⁴ C. Waaldijk: ‘Seksuele gerichtheid en burgerlijke staat’ [Sexual orientation and civil status]; in: Oordelenbundel 2005, red. S.D. Burri, Kluwer Deventer June 2006 (forthcoming.). Waaldijk mentions a second case that demonstrates this necessity in his view: Opinion 2005-58, which was about a dating site on the internet.

1. GENERAL LEGAL FRAMEWORK

Constitutional provisions on protection against discrimination and the promotion of equality

- 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?*

Article 1 of the Dutch Constitution (1983 version) reads as follows: *All who are in the Netherlands⁴⁵, shall be treated equal in equal circumstances. Discrimination on the grounds of religion, belief, political opinion, race, sex or on any other ground, shall be prohibited.*

A Parliamentary motion to explicitly include ‘disability’ and ‘chronic disease’ in the list of covered grounds was accepted in 2001.⁴⁶ The government was of the opinion that this was covered by ‘any other grounds’. Nevertheless, it has investigated the possibility for an expansion of the list in Article 1.⁴⁷ In 2004, the ETC has advised to government to expand the list of Article 1 of the Constitution to all of the grounds that are covered by the GETA, the ADA and the DDA.⁴⁸ In reaction to that the government announced that for the time being it would stick to its earlier opinion, and at the same time commissioned an in-depth study into this matter by specialists in constitutional law.⁴⁹

As regards the *material scope* of Article 1 there are no boundaries to that. This means that the constitutional provision applies to all the fields of social and economic life that are covered by the Directives and beyond.

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

The Constitutional equality guarantee is beyond doubt directly applicable both in *vertical relations* and in *private horizontal relations*. However, there is some discussion about what the equal treatment or non-discrimination norm really entails in the latter case. In order to ensure the applicability of the equality principle in private relations, the Constitutional guarantee has been elaborated in criminal law provisions and in specific statutory Equal Treatment Acts (see para. 0.1.) Formal Statutory Acts (i.e., Acts made by the government and the Parliament) may not be subjected to Constitutional review by the Courts, and thus, neither to a Constitutional ‘equality’ review. This follows from Article 120 of the Dutch Constitution.⁵⁰

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

⁴⁵ The personal scope of Article 1 of the Constitution extends to any person on the territory of The Netherlands.

⁴⁶ “Motie Rouvoet”, *Tweede Kamer*, 2001-2002, 28 000 XVI, nr. 63 06-12-2001 [“Motion Rouvoet”]. It is noted that in respect of ‘disability and chronic disease’ the discussion on an (explicit) expansion of Article 1 of the Constitution to include these grounds had already taken place during the Parliamentary debates on the AWGB. See the amendment handed in by Groenman which however did not receive sufficient Parliamentary support *Tweede Kamer*, 1992/1993, 22 014, nr. 15.

⁴⁷ Brief van de Minister van Binnenlandse Zaken en Koninkrijksrelaties, *Tweede Kamer*, 2001-2002, 28 000 XVI, nr. 112. [Letter of the Minister of Internal Affairs] See also *Tweede Kamer* 2005-2006, 29 355 nr 24 (in which the government announces the installment of the commission of experts).

⁴⁸ Cgb-advies 2004/03, 26/02/2004. [Advice of the ETC] All publications of the Commission can be found on its web site: www.cgb.nl

⁴⁹ *Tweede Kamer*, 2003-2004, 29 355, nr.7. [Letter of the Minister of Internal Affairs]. The Report will be published in April 2006.

⁵⁰ Dutch courts do however have the power to strike down parliamentary legislation that violates any directly applicable provision of international law (*viz.* Articles 93 and 94 of the Constitution). With respect to discrimination, the Dutch courts rather frequently have to consider whether some piece of legislation violates art. 14 of the European Convention on Human Rights, art. 26 of the International Covenant on Civil and Political Rights, or any other international or European equality provision.

See above, sub b.

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.

Sex (including pregnancy), religion, belief, political opinion, race, nationality, hetero- and homosexual orientation, civil status, discrimination on the grounds of employment duration, discrimination on the grounds of the employee's permanent/ fixed-term contract, age and disability. Article 1 of the Constitution is 'open-ended'.

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 terms *racial or ethnic origin, religion, belief, disability, age, sexual orientation* have not been defined by Dutch law. The law applies *symmetrically* in the sense that both persons of the dominant group (ethnic majority, religious majority, non-disabled people, young/ old people⁵¹ and heterosexuals) and the 'oppressed' group [ethnic minority, religious minority, disabled people, old people/ young people and homosexuals] are covered.

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')

With regard to the interpretation of concepts such as 'race', 'ethnic origin', 'religion', 'belief', 'disability', and 'sexual orientation' the following may be said in the light of the case law and the *travaux préparatoires* of the GETA.

- *Race*: The Explanatory Memorandum to the GETA⁵² stresses that "race" is a broad concept which must be interpreted in line with the UN CERD (New York, 1966).⁵³ The concept embraces: *race, colour, descent* and *national*⁵⁴ or *ethnic origin*.⁵⁵ In the EC Implementation Act, which has amended the GETA, the government has not deemed it necessary to explicitly enshrine the notion of 'ethnic origin' in the Act as this is sufficiently captured by 'race' as a concept.⁵⁶

⁵¹ More than with any other ground it is difficult to establish who is the oppressed/ dominant group in the context of age discrimination. The reason for this is, as observed by Veldman, that with regard to "age" one may distinguish many different groups (50+/50-/ 25+/30-/ young people/ old people). See A. Veldman, "*Wet Leeftijdscriminatie gooit veel overhoop*" in *Sociaal Recht*, 2003, pp. 363-364, p. 363.

⁵² Memorie van Toelichting bij de Algemene Wet Gelijke Behandeling, Tweede Kamer, 1990-1991, 22 014, nr. 3. [Explanatory Memorandum to the GETA].

⁵³ Many indications of what constitutes a 'race' can also be found in the discussions between government and parliament during the drafting of the criminal code provisions against racial discrimination in 1971. It appears that the same interpretation has been given to these provisions in criminal law as in the equal treatment law, since both are meant to (also) implement the UN CERD. See J.L. van der Neut: "*Discriminatie en Strafrecht*", Arnhem 1986. [Van der Neut, Discrimination and Criminal Law, published in Arnhem, 1986.]

⁵⁴ It is to be noted that the notion of "national origin" only embraces nationality in an *ethnic* sense. Nationality in a *civic* sense is covered by the non-discrimination ground "nationality".

⁵⁵ Explanatory Memorandum, p. 13.

⁵⁶ Explanatory Memorandum to the EC Implementation Act, p. 3. Also, J.H. Gerards and A.W. Heringa, *Wetgeving Gelijke Behandeling*, Kluwer Deventer 2003, pp. 28-30.

The ETC uses as a yardstick whether the applicant(s) belong to a *coherent group with collective physical, ethnic, geographical or cultural characteristics and which distinguishes itself from other groups by common features or a common behaviour*. (See e.g., Opinions 1997-119 and 1998/57). However, it is not always easy to draw the line between race, ethnicity and religion. As long as all three grounds are protected in the same sense (as far as personal and material scope of the legislation is concerned and as far as the exceptions to the non-discrimination ground are similar for each of these grounds) this is no problem. However, this is not the case in the Dutch legal system (where race and ethnicity is covered more broadly than the ground religion.). This issue will be discussed in more detail in par. 9 of this report. (Integratiewet.)

- *Religion and Belief*: In the Explanatory Memorandum to the EC Implementation Act, the government made it clear that it wishes to stick to the term *levensovertuiging* [*philosophy of life*], rather than introducing the term *overtuiging* [*belief*], the term used by Directive 2000/78. According to the government there is no material difference between these two terms.⁵⁷ In addition to *levensovertuiging*, the Dutch Act also covers *religion* [*godsdiens*]. It is established case law by the ETC that the right not to be discriminated against on the ground of religion incorporates *both* the right to hold a religion or belief, *and*, the right *to behave* in accordance with that religion and belief.⁵⁸

- *Disability and Chronic Disease*: the concepts of ‘disability’ and ‘chronic disease’ have not been defined in the DDA. The government has deemed it unnecessary and undesirable to do so.⁵⁹ The *symmetric nature* of the DDA makes, that this Act is applicable to both disabled and non-disabled people.⁶⁰ According to the Explanatory Memorandum to the DDA, the concept of ‘disability’ [*handicap*] may embrace not only physical impairments, but also mental impairments and psychological impairments.⁶¹

- *Age*: The ADA applies *symmetrically*: both young and old people are protected by the Act. The word ‘age’ has not been defined by the legislator. However, not only direct references to someone’s age are considered to be distinctions on the ground of age. Also classifications like ‘young’, ‘old’, ‘adult’, ‘pensioner’, or ‘students’ are considered to be instances of direct age discrimination. Since the ADA allows for objective justifications (open system) both in the case of direct and indirect discrimination, the boundaries between what kind of classification constitutes direct or indirect discrimination is not problematic.

- *Sexual orientation*⁶²: The GETA employs the terminology ‘hetero- or homosexual orientation’, to refer to the terminology (in English) used by Directive 2000/78 i.e., ‘sexual orientation’. The Dutch government opted for the term ‘orientation’ [*gerichtheid*] rather than ‘preference’ [*voorkeur*] given the vagueness of the latter term. The term ‘orientation’ expresses better than the term ‘preference’, that not only *individual emotions* are covered by this notion, but also *concrete expressions thereof*. A major other reason for the government’s preference for the term ‘orientation’ above ‘preference’ has been that the latter term was

⁵⁷ Explanatory Memorandum to the EC Implementation Act, p. 3.

⁵⁸ See e.g., opinion 1997/46 and recent opinions 2004/112, 2004/148. Also: Explanatory Memorandum to the GETA, pp. 39-40. And, similarly, Memorie van Antwoord bij de Algemene Wet Gelijke Behandeling, 1990-1991, 22 014, nr. 5, pp. 39-40 [Memorandum in Reply to the GETA].

⁵⁹ Explanatory Memorandum DDA Tweede Kamer 2001-2002, 28 169, nr. 3, p. 9.

⁶⁰ Explanatory Memorandum to the DDA, *Ibid.*, p. 9.

⁶¹ *Ibid.*, p. 24.

⁶² The meaning of ‘sexual orientation’ in Dutch equal treatment law placed in the context of EC law has extensively been discussed by Kees Waaldijk in his sexual orientation report. See: Kees Waaldijk, ‘The Netherlands’, in: Kees Waaldijk & Matteo Bonini-Baraldi (eds.), *Combating sexual orientation discrimination in employment: legislation in fifteen EU member states*, Report of the European Group of Experts on Combating Sexual Orientation Discrimination, Leiden: Universiteit Leiden 2004, p. 341-375, online at www.emmeijers.nl/experts and at www.eu.int/comm/antidiscrimination.

likely to embrace ‘*pedophile orientation*’. The notion ‘*hetero- or homosexual orientation*’ does cover ‘*bisexual orientation*’ but it excludes ‘*transsexuality*’ and ‘*transvestism*’. Discrimination on the ground of ‘*transsexuality*’ or ‘*transvestism*’ is regarded a form of *sex discrimination*.⁶³

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)?*

The ADA makes no restrictions whatsoever to the scope of this ground for discrimination. All people are protected, both young and old people [the law applies *symmetrically*]. There is no cut-off point.

2.1.2 Assumed and associated discrimination

Discrimination on the ground of a *wrongly assumed race, religion/belief or sexual orientation, disability/ chronic disease or age*, also falls under the protective scope of the GETA, the DDA and the ADA. However, only the DDA *explicitly* states this in the legal definition of ‘direct distinction’ [*direct onderscheid*].⁶⁴ Article 1 “b” of the Act reads as follows: “*direct distinction: a distinction between persons on the ground of an actual or assumed disability or chronic disease*” [underlining is mine]. It is submitted that the word “*assumed*” has perhaps superfluously been added to the definition given that the Dutch Supreme Court and the ETC have taken the view, that also the *ascription* of a discrimination ground is protected by the Equal Treatment Legislation.⁶⁵

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?*

Article 1 ‘b’ of the GETA enshrines the legal definition of a ‘direct distinction’ on the grounds of *inter alia*, race, religion/ belief, and sexual orientation. This definition will be analysed in detail hereinafter under paragraph 2.2. The wordings of Article 1 ‘b’, do not require that the alleged distinction is *de facto* based on the race, religion/ belief, or sexual orientation, *of the alleged victim*.⁶⁶ Under the GETA the ETC has rendered case law in which it accepted that a person A could be discriminated against by a person B on the grounds of a person’s C race. Also, with regard to the ground ‘sexual orientation’, the Commission has ruled that distinctions based on the sex of a person’s partner are regarded as distinctions on the ground of sexual orientation.⁶⁷

In the Parliamentary discussions on the DDA it is stated that what matters is not (actually) having a disability but being discriminated against as compared with a person who does have or does not have a disability. Some commentators have explained this to mean that persons associated with disabled people are protected as well. However, in order to ‘profit’ from the right to reasonable accommodation, or from positive action measures, logically a person must be ‘disabled’ or ‘chronically ill’.

As regards *age* there is no explicit reference to this issue in the legislative history. Article 1(1) of the ADA enshrines the definition of *distinction* [*onderscheid*]. It reads as follows:

⁶³ See Gerechtshof [Court of Appeal] Leeuwarden, 13 January 1995 Nederlandse Jurisprudentie 1995 nr. 243; and for example Opinions 98-12 and 00-73 of the ETC. These cases are all cited by Kees Waaldijk, see footnote 62.

⁶⁴ The difference in terminology as between ‘discrimination’ (*discriminate*) and ‘distinction’ (*onderscheid*) will be clarified hereinafter, under paragraph 2.2.

⁶⁵ See opinion 02/84 of the ETC with references to the judgement by the Dutch Supreme Court of 26 February 1993, NJ 1993, 507.

⁶⁶ See also Kees Waaldijk (footnote 62).

⁶⁷ See opinions 97-47 and 97-48; opinion 99-08; opinion 99-13.

“In this Act, distinction shall mean distinction on the grounds of age or on the grounds of other characteristics or conduct that results in discrimination on the grounds of age”.

It does not necessarily follow from this definition that the phrase *on the grounds of age*, *per se* refers to the age of the affected person. By analogy to the reasoning adopted under the GETA on this matter, a person who is disadvantaged by reason of her being associated with an old or young person, is likely to be protected under the ADA.

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

A. Preliminary observations:

The use of the word distinction

In the Netherlands the word ‘distinction’ is used in the GETA, instead of ‘discrimination’. (There is a prohibition of making direct and indirect distinctions on certain non-discrimination grounds.) Although the government is taking the stance that there is no substantive difference between these words, this choice of terminology has raised a lot of critique by (among others) the Council of State (*Raad van State*), which is the highest advisor of the government in drafting new legislation. The Council has advised the government to abandon the neutral concept *distinction* and has shown itself to be an advocate of using the more normative concept of *discrimination*.⁶⁸ The main reason for this preference was to bring the terminology of Dutch equal treatment law in line with EC Equality Law.⁶⁹ In 2005, the government has commissioned an in-depth study on this matter.⁷⁰ This report is expected to be sent to parliament in the autumn of 2006.

Formal v. substantive equality

Dutch equal treatment law largely advocates the *formal*, rather than *substantive*, equality approach. Thus, all persons and not only those belonging to the ‘disadvantaged groups’ in society are protected by the law. Unjustified *distinctions* are assessed at the level of the individual, not at the level of the group to which the individual belongs.⁷¹ Moreover, positive action measures are perceived as being an exception to the central norm which dovetails with the formal equality approach. In a substantive approach, such measures would form part and parcel of the central norm.⁷² It is however submitted that in various regards the substantive approach makes its presence felt. A-symmetry can be found in the context of ‘pregnancy’ and in certain other contexts.⁷³ The substantive approach especially permeated in the duty for the employer (or other addressees of the law) under the DDA to make *effective accommodations* for disabled people. Thus, through this concept it is recognised that the equality principle not

⁶⁸ See: “Advies van de Raad van State en nader Rapport”, *Tweede Kamer*, 2001-2002, 28 169, B, p. 5-6. [Advisory Opinion of the Council of State] and “Implementatie van de richtlijnen inzake gelijke behandeling, Advies Raad van State en nader rapport”, *Tweede Kamer*, 2001-2002, 28 187, A, p. 4-5. [“Implementation of the Directives on Equal Treatment, Advisory Opinion of the Council of State”].

⁶⁹ The same advice had also been given by the Interdepartmental Commission European Law [ICER i.e., *Interdepartementale Commissie Europees Recht*]. See: ICER, Implementatie Richtlijnen op grond van Artikel 13 EG Verdrag, conclusie en aanbevelingen, ICER 2001/54, p. 2. [ICER, Implementation of the Article 13 Directives, conclusions and recommendations, p. 2].

⁷⁰ Independent experts will write a report on this issue during the course of the so-called ‘second evaluation of the GETA’. Another reason for doing this research is the fact that the Dutch government intends to bring together all of the equal treatment laws into one integrated law. It should be clear beforehand, what terminology should be applied in this new law. See also par. 9 of this report.

⁷¹ *Eerste Kamer*, 1992-1993, 22 014, nr. 212b, p. 4 and nr. 212c, p. 8, cited by K. Wentholt, “Het verbod om onderscheid te maken”, in: I.P. Asscher-Vonk and C.A. Groenendijk, *Gelijke Behandeling: Regels en Realiteit*, (1999) (Den Haag, SDU uitgevers), pp. 89-130, p. 91.

⁷² T. Loenen, *Het Gelijkheidsbeginsel*, Ars Aequi Cahiers, Rechtstheorie deel 2, (1998) (Nijmegen: Ars Aequi Libri), pp. 66-67.

⁷³ See the following opinions by the Equal Treatment Commission: 98/131, 02/188, 03/47 cited by Kees Waaldijk in the Sexual Orientation Report of 24 August 2004.

only covers the unequal treatment of equals, but also the equal treatment of unequals [*Thlimmenos doctrine*].⁷⁴

B. Direct discrimination under the Age Discrimination Act⁷⁵

a) How is direct discrimination defined in national law?

Article 1(1) of the ADA defines a *distinction* as follows:

“In this Act, distinction shall mean distinction on the grounds of age or on the grounds of other characteristics or conduct that results in distinction on the grounds of age”.

Article 1(1) transposes Articles 2(1) and 2(2) under ‘a’ and ‘b’ of Directive 2000/78 (regarding the concepts of direct and indirect discrimination).⁷⁶ Clearly, *direct discrimination* is implemented by the phrase ‘*distinction on the grounds of age*’, and *indirect discrimination* by the phrase ‘*[distinction] on the grounds of other characteristics or conduct that results in distinction on the grounds of age*’.

This Article intends to implement Articles 2(1), and 2(2) under “a” (*direct discrimination*) and under “b” (*indirect discrimination*) of Directive 2000/78. In contrast to the conventional approach adopted in Dutch equal treatment legislation, no distinction has been made in the ADA as between *direct distinction* and *indirect distinction*. Thus, in this regard the legal approach for *age* clearly differs, compared with the other grounds for discrimination.⁷⁷ The government has pointed out that Article 6 of Directive 2000/78 provides for a possibility of ‘objective justification’ for instances of *direct age discrimination*.⁷⁸ Given that both direct and indirect age discrimination may be ‘objectively justified’,⁷⁹ in the government’s view, any distinction between these two concepts becomes redundant.⁸⁰

In its commentary on the *bill on Age Discrimination*⁸¹, the Equal Treatment Commission has advised the government to make the conventional schism between direct and indirect distinction within the proposed Statutory ADA. In the Commission’s view, the sort of distinction (direct or indirect) that is at stake in a given case may have an impact upon the *modus* of review and upon the burden of proof.⁸² However, the advice of the ETC has not altered the government’s approach explained above.⁸³

⁷⁴European Court of Human Rights in *Thlimmenos v. Greece*, where the Court held that “the right not to be discriminated against (...) is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different” (ECHR 06-04-2000). Similarly: ECJ, Case C-342/93 *Gillespie* [1996] ECR I-475.

⁷⁵ The template questions shall be dealt with firstly, in the context of the ADA (under Heading A), secondly, in the context of the DDA (under Heading B), and thirdly, in the context of the GETA (under Heading C).

⁷⁶ Explanatory Memorandum to the ADA,, p. 4.

⁷⁷ Explanatory Memorandum to the ADA, p. 17.

⁷⁸ ‘Objective justification’ as well as the other exceptions to the prohibition of age discrimination shall be dealt with in paragraph 4.7. of this report in much detail. In this paragraph, the objective justification test is only mentioned, in order to explain the absence of a distinction in the Dutch ADA as between ‘direct distinction’ and ‘indirect distinction’.

⁷⁹ *Indirect age discrimination* can be ‘objectively justified’ on the basis of Article 2(2) “b” under *i* of Directive 2000/78.

Direct age discrimination can be ‘objectively justified’ on the basis of Article 6 of Directive 2000/78.

⁸⁰ Explanatory Memorandum to the ADA, , p. 17.

⁸¹ Voorstel van Wet Gelijke Behandeling op grond van leeftijd bij de Arbeid, beroep en beroepsopleiding (Wet Gelijke Behandeling op grond van Leeftijd bij de Arbeid), Tweede Kamer, vergaderjaar 2001-2002, 28170, nrs. 1-2 [Bill for an Act on Equal Treatment on the ground of age in Employment, occupation and vocational training], Second Chamber of Parliament, 2001-2002, 28170, nrs. 1-2].

⁸² Commentaar van de Commissie Gelijke Behandeling inzake het voorstel voor een Wet gelijke behandeling op grond van leeftijd (2001) [Commentary by the Equal Treatment Commission on the Bill for the Act on Equal Treatment on the ground of age (2001)] available at www.cgb.nl.

⁸³ See also, Wet Gelijke Behandeling op grond van leeftijd, Nota naar Aanleiding van het Verslag, Tweede Kamer, 2001-2002, 28170, nr. 5, pp. 26-27. [Act on Equal Treatment on the grounds of Age, Second Chamber of Parliament, 2001-2002, 28170, nr. 5, pp. 26-27.

In the literature, the absence of the conventional schism between direct and indirect distinction has been criticised. In the view of Grapperhaus⁸⁴ for example, the absence of this distinction even results in the Dutch legislative approach, falling short of the requirements imposed upon the member states by Directive 2000/78. In Grapperhaus' opinion, the objective justification test for indirect age discrimination contained in Article 2(2) 'b' under *i* of Directive 2000/78, is *different* from that of direct age discrimination contained in Article 6 of the Directive. It follows from well established case law by the European Court of Justice, that the objective justification test for indirect discrimination cases consists of three separate requirements: 1). *A legitimate aim*; 2). *Appropriateness*; 3). *Necessity*. This is now reflected in Article 2(2) 'b' under *i* of the Directive. Grapperhaus has argued that the test in Article 6 of Directive 2000/78 contains in addition to these three requirements, a *fourth* requirement, namely, the requirement that an exception to direct age discrimination must find an 'origin' within the national law of a member state. Grapperhaus extracts this fourth requirement from the phrase enshrined in Article 6 of the Directive *i.e.*, '*within the context of national law*'.

In essence, Grapperhaus interprets this clause as meaning that any *concrete* exception to *direct* age discrimination invoked in a given case, must find an origin within the national law. It is not fully clear what is meant by the phrase '*within the context of national law*' and it is ultimately for the European Court of Justice to provide clarifications on this. However, it is possible, that this clause constitutes an *additional requirement* in the 'objective justification test'. If it is accepted that a fourth requirement is indeed enshrined in the Article 6 test, then the absence of the distinction between *direct and indirect age distinction* in the Dutch ADA appears to be falling short of the Directive's requirements. Attaching an identical 'objective justification test' to *direct and indirect distinction* within the Act on Age Discrimination appears, in reference to the above reasoning, in contravention of Directive 2000/78.

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).

In the context of the ADA both *direct and indirect age distinction* may be objectively justified. This follows from Article 7(1) under "c" of the ADA. This Article intends to transpose Article 6(1) of Directive 2000/78. Given that the ADA also contains exceptions that have explicitly been inserted by the legislator, this Act follows a '*half open system*' of non discrimination law. This differs fundamentally from the '*closed system*' underpinning the GETA and the DDA. (See below.)

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?

Article 1(1) of the ADA defines *distinction* as follows:

"In this Act, distinction shall mean distinction on the grounds of age or on the grounds of other characteristics or conduct that results in distinction on the grounds of age".

Article 1(1) transposes Articles 2(1) and 2(2) under 'a' and 'b' of Directive 2000/78 (regarding the concepts of direct and indirect discrimination).⁸⁵ Clearly, *direct discrimination* is implemented by the phrase '*distinction on the grounds of age*', and *indirect discrimination* by the phrase '*[distinction] on the grounds of other characteristics or conduct that results in distinction on the grounds of age*'. At this junction only direct discrimination will be dealt with.

⁸⁴F.B.J. Grapperhaus, "Het verbod op onderscheid op grond van leeftijd in arbeid en beroep", *Ondernemingsrecht* 2002-12, pp. 356-363

⁸⁵Explanatory Memorandum to the ADA., p. 4.

Directive 2000/78 defines direct discrimination in Article 2(2) under ‘a’ which reads: “*direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1 [which includes the ground ‘age’ RH]*”.

A ‘less favourable treatment’ implies the existence of a *detriment* [nadeelsvereiste] and of a *comparative exercise* [vergelijkbaarheidstoets]. With regard to the detriment part, the case law by the ETC indicates that an applicant must, in order for him/her to successfully lodge a complaint, have suffered a sufficiently *measurable* (meetbaar) and *real* (werkelijk) *detriment*. Moreover, the alleged detriment must be *protected by law* (door het recht beschermd belang)⁸⁶

The sub elements contained in the Directive’s definition i.e., *one person, treated, less favourably than another, is/has been/ would be treated, comparable situation* may, if an extensive reading is adopted, all be embraced by the single word *distinction* in the Dutch equal treatment legislation. However, this would really depend on the interpretation by the courts and the ETC. The Dutch definition leaves it in a state of uncertainty whether or not a past or a hypothetical comparator is permitted for. It is not clear from the legal text nor from the Explanatory Memorandum, with whom an alleged victim of direct age distinction is to be compared. In order to avoid any misunderstandings, it would have been better had the Dutch government explicitly incorporated the sub elements laid down in the Directive’s definition, in the Dutch definition.⁸⁷ However, a broad interpretation of the Dutch definition could guarantee that all the elements enshrined in the Directive’s definition of direct discrimination are duly covered.

The ADA’s definition of *direct distinction* only mentions the word ‘*distinction*’, whereas its counterpart definitions in the GETA and the DDA use the wording ‘*distinction between persons*’ (Article 1 ‘b’ of both last-mentioned Acts. This slight difference in legal drafting might be explained as follows. It follows explicitly from the Explanatory Memorandum to the ADA, that *direct age distinction*, might not only occur if a *person’s age* forms the basis of a given decision but also where *age categories* are employed in a given decision-making process.⁸⁸ In fact, then a distinction is made between *groups of persons*, rather than between *persons*.

A last question is *when* a distinction is a distinction *on grounds of age*? It is established case law from the ETC that the relevant ground(s) (e.g., *age*) for an alleged distinction, need(s) not be the *sole reason* for that distinction. It suffices for establishing a distinction *on the grounds of age*, that *age* has been a material factor in making up for the alleged distinction. Or in the wording of the Commission: “[it suffices that the ground at stake] *has also played a role*”.⁸⁹

C. Direct discrimination under the Disability Discrimination Act

a) How is direct discrimination defined in national law?

⁸⁶See the detailed analysis by J.H. Gerards, “Het toetsingsmodel van de CGB voor de beoordeling van indirect onderscheid”, in: *Gelijke Behandeling: Oordelen en Commentaar*, Kluwer 2003, pp. 77-95, and, J.H. Gerards and A.W. Heringa, *Wetgeving Gelijke Behandeling*, Kluwer Deventer 2003, pp. 43-44.

⁸⁷See Kees Waaldijk “Combating sexual orientation discrimination in employment: legislation in fifteen EU Member States, Report of the European Group of Experts on Combating Sexual Orientation Discrimination. (see footnote 62). Waaldijk has come to similar conclusions on the basis of his analysis of “direct discrimination” in the context of sexual orientation law.

⁸⁸For example, the governmental decree on ‘dismissal’ (*Ontslagbesluit*) employs age categories in a situation of collective dismissal for the purpose of determining the order of who should be dismissed first.

⁸⁹See the recent opinion by the Equal Treatment Commission concerning an instance of age discrimination, *opinion 2004-130* and in which the Commission refers to other opinions in which this same stance is reflected (e.g., opinions 1995-15; 1999-34; 2001-113, RN 2002, 1507, annotated by M.S.A. Vegter and 2004-26).

Article 1 of the DDA reads as follows:

In this Act the following definitions shall apply:

- a. Distinction: direct and indirect distinction as well as the instruction to make distinction;*
- b. Direct distinction: distinction between persons on the ground of an actual or an assumed disability or chronic disease;*
- (..)*

What was said above with regard to direct age distinction is also applicable here.

- 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).*

Direct disability discrimination cannot be ‘objectively justified’ given that the DDA rests upon a ‘closed system’ of justification grounds.

- c) If the definition is based on ‘less favourable treatment’ does the law specify how a comparison is to be made?*

It is unclear from the definition of direct distinction in the DDA, *with whom* a disabled person must be compared in case of an alleged instance of direct distinction. The matter is not clarified in the Explanatory Memorandum to the Act. There is case law of the ETC in which this topic has been discussed. (*ETC Opinion 2005-234, of 13 December 2005*; See para 0.3. above.)

D. Direct discrimination under the General Equal Treatment Act (inter alia: race, religion and belief, sexual orientation)

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

Article 1 of the GETA reads as follows:

In this Act and in the provisions based upon this Act the following definitions shall apply:

- a. Distinction: direct and indirect distinction, as well as the instruction to make a distinction;*
- b. Direct distinction: distinction between persons on the grounds of religion, belief, political opinion, race, sex, nationality, hetero-or homosexual orientation or marital status;*
- (...)*

What has been said above in regard to direct age and disability distinction applies *eo ipso* with regard to the definition of direct distinction in the GETA.

- 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).*

Direct distinction cannot be ‘objectively justified’. The GETA entails a ‘closed system’ of justification grounds.

- c) If the definition is based on ‘less favourable treatment’ does the law specify how a comparison is to be made?*

What has been said in the context of direct age distinction under question c, is also applicable here.

➔ 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.*

Yes, this allowed, however both in case of civil court procedures and in procedures before the ETC as well as in Criminal Court Procedures ; however, in the latter case this needs to be prepared very carefully in order that this would not amount to “uitlokking” (= provocation). (See case law, below.)

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

The ETC has given several opinions in the past about the criteria for situation testing.⁹⁰ Situations testing mostly occurs when two groups of youngsters want to be admitted to a discotheque.⁹¹ One of the requirements is that the two groups are comparable in appearance – especially in clothing and hairdos. (Except, of course, for their ethnic or racial ‘appearance’.) Another requirement is that both groups actually try to get in under the same circumstances (e.g. both groups don’t have a membership card) and at the same night.⁹² Also, there should not be a long time between the two test-situations.⁹³

The following case law has been summarised by **Dick Houtzager**, senior staff member of the National Bureau against Racial Discrimination (LBR). His text is included in this report with his explicit permission.

Test litigation in The Netherlands, text by Dick Houtzager:

“Courts in the Netherlands have accepted situational testing as a method to prove discrimination. Both in civil as well as in criminal litigation, testing has been allowed as sufficient proof.

Civil law:

President District Court of Zutphen, 26 June 1980, NJ 1981, no. 29

Facts: A., a member of the ngo ‘Open Doors’, and a number of other people of different ethnic background and skin colour, went in the course of an evening at different times to Discotheque X, with the objective to test whether the discothèque had a discriminatory door policy. The ethnic minority persons of the ngo were refused; they were told they were not members of the discotheque. Similar couples of Dutch origin were allowed in; they were not checked on their membership.

The ngo brought the case before the court for preliminary ruling.

On the request of A. and the ngo ‘Open Doors’, the President of the Court, in a preliminary decision, forbids Discotheque X to refuse entrance to mr A. on the grounds of his race or his skin colour or his belonging to an ethnic minority group.

The defence brought forward that the ngo and its members had provoked the disco into a criminal offence. The President dismissed this line of reasoning, stating that “it is by no means plausible that the plaintiffs had an interest that the respondent in the pursuance of his

⁹⁰ See e.g. Opinions 98-39, 97-133, 97-64 t/m 66, 97-62.

⁹¹ A recent case where this was applied in the situation of job application is Opinion 2005-136 in which a young man with a foreign surname has applied for a job; a friend with a Dutch surname applied for the same job, sending more or less the same letter of application. The ETC accepted this as evidence of a case of discrimination.

⁹² See Opinion 97-133.

⁹³ See Opinion 98-39.

profession would refuse services to members of the ngo Open Doors, on the grounds of racial discrimination.”

Criminal law:

Local Court of Amsterdam, 4 January 1982, RR no. 36

Facts: T. and B., both with an ethnic minority background, and H. and B., both native Dutch persons, separately asked to enter Disco Y. T. and B. were refused on the pretext that they were not members. The other couple, H. and B., were allowed in a little time later, although they were not members of the club.

T. and B. reported this as a criminal offence at the police, who investigated the case. The public prosecutor brought the case before the local court. T. and B. joined in as civil parties and requested damages.

The defence claimed that the plaintiffs had abetted a punishable offence, which had gone to Y in order to see whether Y discriminated, and to prove that through the use of witnesses.

The court argued: `We reject this defence. Nor T. and/or B. nor one of the other witnesses has intentionally stimulated the discrimination and in no way it has been made plausible that they had an interest in the defendant's discriminatory behaviour against T. and/or B.`

The defendant was sentenced to a fine of Euro 240. The plaintiffs were awarded symbolic damages of Euro 0.50 each.

District Court of Amsterdam, 20 March 1992, RR no. 287

Situational testing of a number of discotheques, carried out by the Anti-discrimination agency (ADA) in Hilversum.

The defence claimed that the proof was inadmissible, because the test had been carried out as an investigation by the ADA, without guidance and supervision of the police or the public prosecutor.

The court dismissed this defence, stating that the police had made up a report after the reporting of the offence by the ADA. The requirement that investigation by an ADA should be carried out under supervision of the Public Prosecutor finds no basis in the law.

Apart from the courts, the Equal Treatment Commission (CGB)⁹⁴ has confirmed in a number of cases that situational testing is admissible as a way to prove discrimination.

See: ETC 10 June 1997, no. 1997-65

The Anti discrimination agency (ADA) in Enschede has carried out a situational test at a number of discotheques. The persons of ethnic minority background, included in the test couples, were refused, whilst the native Dutch persons were allowed in. In the complaint, submitted before the CGB, the ADA stated that the groups, participating in the test could be assumed to be average discotheque visitors. They had no relationship with the ADA; they had no criminal past; they could not be distinguished from the average discothèque visitor as far as hairdo, clothing, shoes etcetera were concerned; the persons participating did have a sufficient command of the Dutch language to communicate with the doorman.

The CGB considered: `the Commission is of the opinion that by means of situational testing, depending on the circumstances, proof of unequal treatment can be given.”

⁹⁴ The CGB acts as the Dutch specialised body, in accordance with the Racial Equality Directive. It is a semi-court, which delivers opinions in discrimination cases. The opinions are non-binding.

(end of text by Dick Houtzager)

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

Situation testing is used by NGO's and sometimes as an individual initiative (see e.g. ETC Opinion 2005-136, discussed in a footnote above, under a.)

Recently there has been a lot of debate on the necessity of using this method. In November 2004 the National Bureau against Racial Discrimination (LBR) and the National Association of Anti-Discrimination Bureau's published a report on 'discrimination in the bar and restaurant (=horeca in Dutch) sector'.⁹⁵ As a reaction to this the Labour Party (opposition) published a 'plan van aanpak' [plan how to tackle this problem] and asked the government for measures. The government replied with a letter to Parliament in which it gives an analysis of the problematic and in which it also discusses *inter alia* the possibilities to use situation testing.⁹⁶ The government recommends that these tests are carefully prepared and are executed in close co-operation between the Anti-Discrimination Bureau, the Public Prosecutors Office and the Police.

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

A. Indirect discrimination under the Age Discrimination Act

a) How is indirect discrimination defined in national law?

Article 1(1) of the ADA reads as follows:

"In this Act, distinction shall mean distinction on the grounds of age or on the grounds of other characteristics or conduct that result in discrimination on the grounds of age".

As has already been stated, *indirect discrimination* is covered in the phrase "*distinction (...) on the grounds of other characteristics or conduct that results in discrimination on the grounds of age*".⁹⁷

A comparative analysis of the Dutch definition with the definition given in the Directive warrants the following comments:

1.) The Directive's definition unequivocally enshrines a *detriment element* as follows from the phrase *at a particular disadvantage*. This is not the case with the Dutch definition. However, as has been explained in detail above in *paragraph 2.2.*, the Equal Treatment Commission's case law indicates that a *measurable and existing detriment* which is *protected by law* is called for in the establishment of a claim. Even if this did not follow from the case law, the Dutch definition would still be in conformity with that of the Directive, since the former would then adopt a wider standard than the latter. This is permitted since an EC Directive only lays down *minimum standards*. (See also Article 8(1) of Directive 2000/78).⁹⁸

⁹⁵ LBR and LVADB, 'Geweigerd?! Discriminatoir deurbelid in de horeca'. Rotterdam, November 2004.

⁹⁶ See Tweede kamer 2004-2005, 29 800 VI, nr. 165.

⁹⁷ In paragraph 2.2. section B, under question a, it has been explained that no clear-cut distinction has been made in the ADA as between *direct* and *indirect* distinction. For reasons extensively dealt with before, this is in my view in contravention of the requirements imposed by Directive 2000/78. Similarly, the absence of the conventional schism has been criticised by the ETC and in academic literature.

⁹⁸ See also Consideration 28 of Directive 2000/78. And as for Directive 2000/43, Article 6(1) and Consideration 25 of the Directive.

2.) It might be argued that under the Directive's definition of indirect discrimination, an applicant can more easily establish a case of indirect discrimination than under the Dutch definition. Under the Directive's definition, an applicant needs to establish that the group to which the applicant belongs (*e.g.*, persons between over 60 years old) would be put *at a particular disadvantage*. In Dutch law, an applicant must in most instances establish a case of indirect distinction on the basis of numbers and statistics. Although facts of common knowledge can be forwarded to support statistical evidence, these are generally not accepted as an exclusive means of evidence. Only in very obvious cases does the ETC *not* require statistical numbers or 'common knowledge facts'.⁹⁹

3.) As has been observed by Waaldijk¹⁰⁰, the Directive's wording *apparently neutral provision, criterion or practice*, is (problematically) reduced in the Dutch definition to *other [i.e., other than age] characteristics or conduct that result in discrimination on the grounds of age*. The difference seems to be that whereas under the Dutch definition, a prohibited distinction can only be the result of a *characteristic or conduct* that makes *already* a certain distinction on the basis of a non-prohibited personal status, under the Directive indirect discrimination might also arise out of a general (non distinguishing) provision or practice. This indeed appears to be falling short of the Directive's requirements. Moreover, it is not quite clear why the Dutch definition speaks of *characteristics or conduct*, whereas the Directive makes use of the wording *apparently neutral provision, criterion or practice*. In all, it is recommended that the Dutch legislator bring the definition of 'indirect age distinction' more in line with the definition of indirect discrimination in Directive 2000/78.

4.) In order to be complete, it is submitted that with regard to *indirect distinction*, the focus is upon the *effects* of the contested 'behaviour'. It is thus irrelevant whether or not the alleged perpetrator had the intent to discriminate.¹⁰¹ This is both recognised in EC and Dutch law.

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

Article 7(1) under 'c' of the ADA provides that:

7(1) The prohibition of distinction (i.e., direct and indirect distinction as well as the instruction to make distinction Mg) does not apply if the distinction:

(...)

c.) is otherwise objectively justified by a legitimate aim and the means to reach that aim are appropriate and necessary.

Article 7(1) under 'c' of the ADA mirrors the core material elements of the objective justification test in indirect discrimination cases as laid down by Article 2(2) "b" under *i* of Directive 2000/78.

This also reflects the stance taken by the European Court of Justice in indirect discrimination cases, which has been followed by the ETC and the Dutch courts.

c) Is this compatible with the Directives?

Yes, it is (see under *b. supra*).

⁹⁹J. Gerards, "Het toetsingsmodel van de CGB voor de beoordeling van indirect onderscheid", in: *Gelijke Behandeling: Oordelen en Commentaar*, Kluwer 2003, pp. 77-95, pp. 81-83.

¹⁰⁰Kees Waaldijk [See footnote 62]. Waaldijk has made the argument to follow, in the context of the concept of indirect sexual orientation discrimination. However, it can be extrapolated to the current discussion on indirect age distinction.

¹⁰¹I.P. Asscher-Vonk, "Towards one Concept of Objective Justification" in: T. Loenen and P.R. Rodrigues, *Non-Discrimination Law – Comparative Perspectives*, (1999) (The Hague: Kluwer Law International) p. 39-51, at p. 43.

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

No, this is not specified in the law, nor by the Explanatory Memorandum to the ADA. The intrinsic nature of *indirect discrimination* makes, however, that the comparison is to be drawn at a *group level*, rather than at the individual level (as is the case with *direct discrimination*). See below, par. 2.3.1. of this report (on statistical evidence).

B. Indirect discrimination under the Disability Discrimination Act

a) How is indirect discrimination defined in national law?

Article 1 ‘c’ of the DDA defines *indirect distinction* as follows:

“indirect distinction: distinction on the ground of other qualities or acts than those meant by indent “b” which result in direct distinction”. [Indent b defines ‘direct distinction’ as follows: distinction between persons on the ground of an actual or an assumed disability or chronic disease”]

The conclusions with respect to indirect age distinction, also apply here. In addition to that it can be observed that, according to the Directive’s definition, an applicant who claims an instance of indirect disability discrimination must *have a particular disability*. This requirement does not explicitly follow from the wordings of the definition in the DDA. It may thus be argued that the DDA provides greater protection than the Employment Framework Directive in this respect..

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

Article 3(2) of the DDA, after having been amended by the *EC Implementation Act*, explicitly enshrines all the elements of the objective justification test as laid down in Article 2(2) ‘b’ under *i* of Directive 2000/78. (*legitimate aim; appropriateness; necessity*).

c) Is this compatible with the Directives?

Yes, it is.

C. Indirect discrimination on the grounds of race, religion/belief and sexual orientation covered by the General Equal Treatment Act

a) How is indirect discrimination defined in national law?

Article 1 under ‘c’ of the GETA enshrines the following definition of indirect distinction:

“indirect distinction: distinction on the ground of other qualities or acts than those meant by indent “b” (i.e., (inter alia) religion, belief, (..) race, (...) hetero-or homosexual orientation (...) Mg) which result in direct distinction”.

All what has been said above under sub question *a* in regard to the grounds *age and disability*, applies *eo ipso* at this junction.

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

Article 2(1) of the GETA as amended by the *EC Implementation Act*, entails an objective justification test for indirect distinction cases which fully mirrors the well-known elements of ‘*legitimate aim*’, ‘*appropriateness*’, ‘*necessity*’.¹⁰²

¹⁰²Before the amendments brought about by the *EC Implementation Act*, these 3 elements of the test had not been explicitly enshrined. The amendment was made by *Article I, under E subsection 1* of the *EC Implementation Act*, which amended

c) *Is this compatible with the Directives?*

Yes, it is.

➔ 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.*

Yes, this is permitted. There are no specific conditions to be admissible in court.

The ETC uses the standard consideration that the contested rule, practice, etc has to effect a category of persons that is protected by one of the non-discrimination grounds “in overwegende mate”, which can be translated as: the rule, etc. has to effect this category *predominantly*. See e.g. Opinion 2003-91.

In this context the ETC always stresses the point that this should not be calculated on the basis of absolute figures, but should be seen relatively (as a percentage).¹⁰³ In a number of cases the ETC has given the standard rule that people in the alleged indirectly discriminated group (e.g. women) should at least be disadvantaged by the apparently neutral rule or practice *1.5 times as often* as people from the comparator-group (e.g. men). However, since 2004 the ETC has not explicitly mentioned this standard or criterion anymore. Recently the ETC has started to use another methods of calculation, especially in cases where the (absolute) numbers are very small. (See e.g. Oordeel 2003-91 and 2003-92). It comes down to an extremely complicated way of calculating the chance that a particular group will have more negative effects than another group.¹⁰⁴

Facts of common knowledge are taken into account, either in the absence of relevant statistics or, to support such statistics.¹⁰⁵ However, facts of common knowledge are not accepted as an *exclusive* means of evidence. Only in plainly clear cases does the ETC *not* require statistical numbers or ‘common knowledge facts’.¹⁰⁶

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

Yes, this is used very often by the ETC (see cases that are mentioned above), but it is not known to what extend this is done by the courts since judgements on equal treatment cases by (district) courts are not registered (and researched) separately.

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

There are a great many indirect discrimination cases in which data collection plays a role, especially in cases that are dealt with by the ETC. The way in which the ETC deals with this issue has been discussed above. All *Opinions* that are mentioned there can be found at the Commission’s web site: www.cgb.nl

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

Article 2(1) of the GETA 1994. However, the ETC anyhow adhered to these 3 elements in its case law, also before implementation of the Article 13 Directives.

¹⁰³See also J.H. Gerards and A.W. Heringa, *Wetgeving Gelijke Behandeling*, Kluwer Deventer 2003, pp. 45-49, especially at p. 46-47 with references to the case law.

¹⁰⁴ See the article by Kees Waaldijk: Wanneer telt (on)gelijke behandeling van (on)gelijke gevallen als indirect onderscheid? (When does (un)equal treatment of (un)equal cases count as indirect discrimination?) In: Susanne Burri (ed) *Gelijke Behandeling, Oordelen en Commentaren 2004.*, Kluwer, Deventer 2005, pp. 149-160.

¹⁰⁵J. H. Gerards and A.W. Heringa, *Wetgeving Gelijke Behandeling*, Kluwer Deventer 2003, pp. 45-49.

¹⁰⁶ J. H. Gerards, “Het toetsingsmodel van de CGB voor de beoordeling van indirect onderscheid”, in: *Gelijke Behandeling: Oordelen en Commentaar*, Kluwer 2003, pp. 77-95, pp. 81-83.

For this purpose for some of the grounds there is the Wet Bescherming Persoonsgegevens (WBP). (Personal Data Protection Act). According to Article 16 (*) of this Law information about someone's race, political convictions, religion or belief, health, sexual life and membership of a trade union are "special data" or "classified data". Also, information about criminal sentences are classified. This means that for collecting and using these data there are strict conditions and rules. These data can only be compiled and used by institutions that have been granted this authority by law or with the explicit permission of the persons whom it concerns.

In Article 18 of this Law (*) an exception to this rule is made for the case of positive action. Under the strict condition of serving this particular goal and of proportionality and subsidiarity, the collection and use of data about people of non-Dutch origin is permissible.

The supervision of this legislation is in the hands of the Dutch Data Protection Authority. Information about their activities can be found at their web site.

<http://www.dutchdpa.nl>

Registration of disability is not classified. For this ground the following can be said:

Employers are allowed / not prohibited to do register who is disabled. At the request of the Ministry of Health (VWS), the Sociaal and Cultureel Planbureau (SCP; a governmental research institute that collects data in many fields) publishes a so-called "gehandicapten monitor". (Officially called: rapportage gehandicapten; to be found at: <http://www.scp.nl/publicaties/boeken/9037701043.shtml>

In order to assemble this overview, employers are asked to provide information about the number of disabled people in their workforce to the SCP. This is voluntary information. Besides, the Ministry of Employment and Social Affairs is responsible for the implementation of the Law for the Reintegration of Disabled People (Wet REA). In this framework the Ministry assembles information about employers that apply for subsidies that help them to employ people with a handicap.

As far as the classifications or categories are concerned the following can be observed:

Race:

In the Netherlands both government and academics tend to (but are not obliged to) use the definition of "allochtoon" which is used by the Central Bureau for Statistics (CBS). (Allochtoon is a word much used in the Netherlands, roughly meaning: someone who is not born in the Netherlands or who does not have parents who are Dutch.) This definition can be found on their web site:

<http://www.cbs.nl/nl-NL/default.htm>

The CBS uses the word "herkomstgroepering" (grouping according to country of origin). This means: a distinguishing mark or feature that indicates with which country a person has a factual tie, considering the country of birth of the parents of his/her own country of birth. As far as the "herkomstgroepering" is concerned, the CBS makes the primary distinction between "autochtoon" and "allochtoon". Next it makes a further distinction within the category "allochtoon" by numbering the generations: a first generation allochtoon is categorised according to the country where he/she is born, a second generation allochtoon is categorised

according to the country where his/her mother was born, unless this is also the Netherlands, in which case he/she will be classified as a second generation allochtoon from the country where his/her father was born. In this category of second generation allochtoon people a distinction is made between persons with one non-Dutch parent and persons whose parents both are of non-Dutch origin. In the third place a distinction is made between allochtoon people who are from western and non-western origin. This is because there are big differences in the social-economic and the cultural situation in the countries of origin. In the group non-western origin the four main categories are: Turkey, Morocco, Surinam and the Netherlands Antilles. Sometimes a more refined classification is used, according to the purpose of the survey or monitoring activity.

A ‘trend’ that becomes more and more popular, also with the government, is the so-called ‘etno selection’ for marketing and policy-development purposes. By ‘etno-selection’ is meant: the construction and analysis of huge databases in which the behavior of people¹⁰⁷ is matched with (*inter alia*) their ethnic or social background. The Dutch government itself uses this instrument quite often, e.g. in the framework of its (migrant) integration policies. This is described and criticized by Corien Prins in a contribution to the *Nederlands Juristenblad* [the weekly Dutch Journal for Lawyers].¹⁰⁸ One of the conclusions of this author is that this mechanism is more and more used for exclusionary purposes instead of for positive action purposes.

Religion: It is not known whether there is a standard usage of a classification of various religions in official publications or statistics. The CBS uses for the standard surveys of developments in the population the following categories: Roman Catholics, Protestants (divided in the main Churches in the Netherlands) and other religions. For other surveys more refined lists of religions or churches are used.

Disability:

Classification of disabled persons is a sensitive issue in the Netherlands. In the DDDA the legislator has chosen not to define the word disability. This is because the government is of the opinion that the question what constitutes a handicap is not only dependent on the physical or psychological features / characteristics of the individual, but also depends on the physical and social environment that allows / does not allow people to participate on an equal footing. The government in the explanatory memorandum to the Bill mentions only two characteristics: it should concern a personal handicap to participate which is permanent and which can not be cured by medication or other medical treatments.

The SCP, in constituting the “gehandicapten monitor”, uses the International Classification of Functioning, disability and health (WHO, 2001).

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.

Pre-implementation of Directives 2000/43 and 2000/78 ‘harassment’ was not defined as a concept in Dutch *equal treatment legislation*. However, the ETC’s case law provided that *the right to equality and non discrimination in regard to ‘employment conditions’ including*

¹⁰⁷ E.g. buyers preferences, housing preferences, educational preferences, etc.

¹⁰⁸ Corien Prins, ‘Etno-selectie’, in : *Nederlands Juristenblad* [Dutch Journal for Lawyers] of February 3, 2005 (2005, vol. 8, p. 411).

‘working conditions’, encapsulates a person’s right to be freed from ‘ground-related’ harassment in the workplace.¹⁰⁹ (NB: see also the additional remark, below.) It also follows from the Commission’s case law that the employer’s duty of care brings with it that he must have in place an *adequate complaints mechanism*.¹¹⁰ This is also the case after implementation of the new ‘harassment provision’ (see below) has taken place.¹¹¹

Post-implementation of the Directives Article 1a of the GETA reads as follows:

1. *The prohibition of distinction laid down in this Act shall also include a prohibition of harassment.*
2. *Harassment as referred to in the first subsection shall mean conduct related to the characteristics or behaviour as referred to in Article 1 under “b” (i.e., the grounds covered by the Act including race, religion, sexual orientation Mg) and, which has the purpose or effect of violating the dignity of a person and (my emphasis) creating an intimidating, hostile, degrading, humiliating or offensive environment.*
3. *Article 2, Article 5 subsections 2-6, Article 6a subsection 2 and Article 7 subsections 2 and 3 shall not apply to the prohibition of harassment contained in this Act. (These contain exceptions to the central norm. Harassment is per se prohibited Mg).*

Similar provisions are laid down in Article 1a of the DDA and in Article 2 of the ADA. The provision that age-related harassment can never be justified is laid down in Article 7(2) of the ADA.

There are two differences, as compared to the Directive’s definition:

- the word ‘unwanted’ is lacking
- the word ‘and’ is used, instead of ‘or’.

The first is not a problem, since this offers more protection to potential victims of discrimination. The second point is more problematic, since it may be harder for complainants to prove both elements of the definition.¹¹²

b) Is harassment prohibited as a form of discrimination?

Yes, it is. See under question *a* above.

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

The 1994 Act on Working Conditions enshrines a prohibition of *sexual harassment* and of *aggression and violence* at the workplace.¹¹³ The former prohibition is of help for women (and men) but also for *homosexual women and men*. The latter prohibition offers protection to other groups, including racial and religious minorities, disabled people and older/young people. The latter prohibition is formulated broadly: it does not only offer protection against *ground-related* harassment but also against mobbing more generally. Harassment may also be litigated under the provisions of private employment law and tort law. If the harassment takes

¹⁰⁹ See inter alia the following Opinions of the ETC: 96/88, 97/82, 97/91, 2001/131, 2003/138.

¹¹⁰ I.P. Asscher Vonk & W.C. Monster, *Gelijke Behandeling bij de Arbeid*, Kluwer Deventer 2002, p. 165. Also, opinion 99/48 25 May 1999 AB 1999, nr. 353.

¹¹¹ See e.g. Opinion 2005-125, discussed by P. R. Rodrigues, ‘Ras en nationaliteit’ [Race and nationality]. In: Oordelenbundel 2005, ed. S.D. Burri, Kluwer, Deventer June 2006 (forthcoming).

¹¹² See R. Holtmaat, ‘(Seksuele) Intimidatie en (on)gelijke behandeling: nieuwe normen, nieuwe praktijken? Enkele overwegingen bij de nieuwe EG-Richtlijnen op dit terrein en de wijze waarop deze in Nederland worden geïmplementeerd.’ In: D. de Wolff: *Gelijke behandeling, Oordelen en Commentaar 2003*. Kluwer, Deventer 2004, pp. 89-106. See also: D. Houtzager and N. Bochhah, “Onderscheid op grond van ras bij de arbeid: nieuwe ontwikkelingen”, 2004, 7/8 Sociaal Recht, pp 272-278, p. 274.

¹¹³ See the 1994 in the Act on Working Conditions (*Arbeidsomstandighedenwet 1998 which amended the 1994 version in certain regards*, Staatsblad 1999, 184. It has also been defined in the Schools Inspectorate Act of June 2002 [Wet op het Onderwijstoezicht Staatsblad 2002, nr. 387.]

the form of physical abuse it can be prosecuted as a criminal offence (e.g. maltreatment or rape). If the abuse takes the form of verbal offences, criminal procedures are also possible.¹¹⁴

NB: Additional remark

From the case law of the ETC in 2005, it becomes clear that the ETC differentiates between ‘discriminatory treatment’ and ‘harassment’.¹¹⁵ Discriminatory treatment, in the sense of offensive attitudes, speech or other ‘maltreatment’ can be examined besides harassment. According to Rodrigues, this indicates that the ETC sees harassment as an *aggravated form* of discriminatory treatment, for which no justifications can be brought forward. For instance: one case of discriminatory insult is not enough to constitute a case of harassment, but nevertheless it can be qualified as (forbidden) discriminatory treatment.¹¹⁶

2.5 Instructions to discriminate (Article 2(4))

Does national law prohibit instructions to discriminate?

Prior to implementation of the Article 13 Directives a prohibition of the *instruction to make distinction* was indeed *implied* within the GETA.¹¹⁷ However, in order to avoid any misunderstanding, Article 1 under ‘a’ of the Act was complemented with the phrase ‘*as well as the instruction to make distinction*’. In its post-implementation format, Article 1 under ‘a’ reads:

Article 1

In this Act the following definitions shall apply

a. Distinction: direct and indirect distinction, as well as the instruction to make distinction. (...).

The counterpart provisions in the ADA and DDA are *Article 1(2) and Article 1 under ‘a’ respectively*.

It has been indicated by the government that the notion of *instruction (opdracht)*, refers to ‘*opdracht*’ in the meaning of Article 7:400 of the Dutch Civil Code. This Article regulates the law on a *contract for the provisions of services*.¹¹⁸ In the explanatory memorandum to the ADA, the government mentions the example of an employer who instructs a recruitment agency to select for a given job only persons under the age of 30 (in absence of a sound justification for this). According to the explanatory memorandum, in a scenario such as the one given, both the person who *gives* the contested instruction and the person who *carries out the instruction*, act in contravention of the central norm. If the ‘recipient’ of the instruction refuses to abide by it and as a consequence thereof, he/she suffers damage he/she can hold the person who *gave* the instruction liable for that.

The ETC has suggested that the prohibition of ‘instruction to make a distinction’, should also include a prohibition of the *passive toleration* of an existing discriminatory situation or act.¹¹⁹

The Commission’s advice in this regard has not been followed by the government. The latter, unconvincingly, defended its own stance by saying that an *instruction to make a distinction* implies *active* rather than *passive* behaviour. This mirrors a narrow interpretation of the verb *to instruct*. The government nevertheless has indicated that the toleration of existing

¹¹⁴ A complete overview of the legal norms has been given in: R. Holtmaat: Seksuele intimidatie op de werkplek; een juridische gids; Ars Aequi Libri, Nijmegen 1999, p. 1-249. [Sexual intimidation in the workplace; a legal guidebook.]

¹¹⁵ These are not synonyms, like the government seems to suggest in the Explanatory Memorandum *EC Implementation Act*. See P. R. Rodrigues, ‘Ras en nationaliteit’ [Race and nationality]. In: Oordelenbundel 2005, ed. S.D. Burri, Kluwer, Deventer June 2006 (forthcoming).

¹¹⁶ Rodrigues refers to the Opinions 2005-30, 2005-75 and 2005-167.

¹¹⁷ Explanatory Memorandum *EC Implementation Act*, p. 7.

¹¹⁸ Explanatory Memorandum to the ADA, note 55 *supra*, p. 18.

¹¹⁹ Advice by the ETC, 2001/03, 30 May 2001, p. 6 and 2001/04, 13 June 2001, p. 4.

discriminatory conduct or acts might nevertheless be embraced by the prohibition of making (direct or indirect) *distinction*.¹²⁰

A last and important point is the following. According to the government's explanation on the issue of '*instruction to make distinction*', an instruction which has been given *within the employment relationship* (e.g., the scenario where a director instructs a member of the personnel department to merely recruit (e.g.,) youngsters) is *not covered* by the prohibition of *instruction to make a distinction*. In the government's view, such a scenario is embraced by the *exercise of authority* by the employer over the employee within the employment relationship (*gezagsuitoefening in het kader van de arbeidsovereenkomst*). Any *distinction* that might occur within this *exercise of authority* can only be attributed to the *employer*, to the exclusion of the *employee*.¹²¹ This reasoning might fall short of what the Directives had in mind with the prohibition of *instruction to make distinction*. In the present author's view, the Dutch government interprets the prohibition of *instruction to make distinction* unduly narrow.

➔ 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?*

Article 2 of the DDA reads as follows: "*The prohibition of making distinction also includes the duty for the person to whom the prohibition is addressed, to make effective accommodations in accordance to the need for this, unless doing so would constitute a disproportionate burden upon her*".

Instead of the term *reasonable*, which is the term used in Article 5 of the Directive, Article 2 of the DDA employs the term *effective*. In the government's view, the latter term reflects better than the term *reasonable*, that an accommodation must have the pursued *effect*.¹²²

The test whether an employer is under a duty to provide an accommodation to a disabled person who so requires, runs as follows¹²³:

A. Is the accommodation that has been asked for "effective"?

This means two separate questions need to be answered

1. Is the accommodation that has been asked for *appropriate*: does it really enable the disabled person to do the job?
2. Is the accommodation that has been asked for *necessary* (is it a pre-condition to do the job?)

If the conclusion is that no accommodation exists that could be effective to help the disabled person do the job properly, the claim will be denied. If the answer to both questions is 'yes', the second part of the test (B) will be done. The outcome of this two-fold test may be that *another* (e.g. cheaper) accommodation than the one that was asked for is also effective and

¹²⁰Explanatory Memorandum to the ADA, note 55 *supra*, p.18.

¹²¹*Ibid.* p. 19.

¹²²Explanatory Memorandum to the DDA, p. 25.

¹²³This can be concluded from the Explanatory Memorandum to the DDA.

that it will help the disabled person to stay in the job or to do the job. In that case, the second part of the test (B) will focus on this particular cheaper accommodation.

B. Can the employer reasonably be expected to pay for this particular accommodation?

This part concerns the question whether supplying the accommodation puts a disproportionate burden on the employer.

National law does not define what a disproportionate burden would be. However, there are some indicators. According to the Explanatory Memorandum to the DDA, this ‘balancing exercise’ between the interests of the disabled person *v.* those of the employer must be carried out in the light of ‘open norms’ of civil law (*i.e.*, the duty of the good employer and the notion of ‘reasonableness’).¹²⁴ If financial compensation exists for the realisation of the effective accommodation, the accommodation cannot be regarded as ‘disproportionate’.¹²⁵

The government also underscored *Consideration 21* of the Preamble to Directive 2000/78¹²⁶ and added that the duration of the employment contract may be a weighty factor.¹²⁷

A final note concerns the explicit statement by the ETC (Opinion 2005-160) that the employers defence that he does not in any way make a distinction between disabled and non-disabled people does not mean that he is in compliance with the ADA. Equal treatment in unequal (labour) circumstances leads to inequality, according to the ETC.

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?

A failure to meet this duty in principle counts as a form of *distinction*, which is prohibited.¹²⁸ However, the text of Article 2, in conjunction with that of Article 1 (*definitions of direct and indirect distinction*) and 3 (*regarding the exceptions to the central norm*), does not shed light upon the question whether an omission to bring about an *effective accommodation*, constitutes *direct, indirect or a third form of distinction*.¹²⁹

With regard to the duty to provide an ‘effective accommodation’, Article 2 of the DDA provides that if this constitutes a *disproportionate burden* on the employer this duty shall not exist (*cf.* Article 5 of Directive 2000/78).

Article 3(1)¹³⁰ enshrines 3 exceptions to the *central norm* (*i.e.*, the prohibition to make distinction which according to Article 2 also includes the duty to make effective accommodations). In brief, the exceptions are: *public security and health* (indent ‘a’), *supportive social policies* (indent ‘b’) and *positive action measures* (indent ‘c’). Thus, a textual reading of Article 3(1) suggests that these three exceptions could also lift the effective accommodation duty, as this falls within the central norm. However, logically and in accordance with what the government has observed in its explanatory memorandum, *only* the exception in indent ‘a’ (*public security and health*) can have the effect of ‘lifting’ the duty

¹²⁴ Explanatory Memorandum to the DDA, p. 25-30.

¹²⁵ This follows from the explanatory memorandum to the DDA, p. 28. However, this is not explicitly mentioned in Article 2 of the Act.

¹²⁶ On the factors to be considered when determining whether making a reasonable accommodation would amount to a disproportionate burden.

¹²⁷ It is submitted that this might however trigger indirect *sex* discrimination since women are more likely than men to be employed on the basis of a fixed term contract.

¹²⁸ See *Opinion* 2004-140 of the ETC, where it held: “Het betreft een op zichzelf staande vorm van onderscheid die in de overige gelijkebehandelingswetgeving (nog) niet voorkomt.” [It concerns a *sui generis* form of (making a) distinction, which does not yet occur in the other equal treatment laws.”] In this *Opinion* the ETC seems to suggest that the duty to provide a reasonable accommodation should also be included in the sex equality laws, the GETA and the ADA.

¹²⁹ See Lisa Waddington and Aart Hendriks, ‘The expanding concept of Employment Discrimination in Europe: From Direct and Indirect Discrimination to Reasonable Accommodation Discrimination. In: International Journal of Comparative Labour Law and Industrial Relations, Winter 2002, p. 403-427.

¹³⁰ Article 3(2) moreover stipulates that indirect differentiation can be objectively justified.

enshrined in Article 2.¹³¹ Consequently, the other two exceptions in indents ‘b’ and ‘c’ cannot be invoked by employers with respect to their effective accommodation duty. It is indeed difficult to perceive in what ways the exceptions in indents ‘b’ (‘supportive social policies’) and ‘c’ (‘positive action measures’) could be applicable in a case concerning the failure of bringing about an ‘effective accommodation’.

It is noted that the DDA does not enshrine an exception in regard to the armed forces, which would however have been allowed for by Article 3(4) of Directive 2000/78.

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

No.

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?

Yes, it does. The Ministry of Housing, Environmental Planning and Milieu has a so-called ‘Bouwbesluit’. [A decree on how to build houses and offices, et cetera.] Also the Ministry of Education has detailed instructions as to how to build schools. The Ministry of Transport has regulations as to how buses and trains should be constructed. However, the present author is not familiar with the details of this legislation (which is very technical; e.g. specifying the height of stoops, the breadth of doorways, et cetera.) A failure to comply with such legislation can not be relied upon in a discrimination case based on the DDA. Except for the reasoning that a reasonable accommodation has been asked for by a disabled person and the employer was already – under this other legislation – obliged to provide this particular facility (e.g. a door that is wide enough to let wheelchairs pass through).

In this framework it is worth noting that the government has not yet decided when the articles 7 and 8 of the DDA will enter into force.¹³² A letter (to Parliament) in which this decision is made public was expected in the spring of 2006, but has not yet been send.

➔ 2.7 Sheltered or semi-sheltered accommodation/employment¹³³

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

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

a) The aim of sheltered employment is to help disabled people find a suitable full-time job that enables them to work independently as far as possible. These are generally people who are unable to work in the regular labour market because of mental or physical disabilities. Around 95,000 people with an occupational disability are employed under the terms of the Sheltered Employment Act (WSW). Most of the people in this group work in a sheltered work company. The Cabinet’s aim is to get more people in the WSW target group out of the SW environment and into jobs with regular employers (supported employment).

¹³¹ Explanatory Memorandum to the DDA, p. 33.

¹³² Article 7 defines the term public transport. In article 8 unequal treatment in public transport is prohibited.

¹³³ The answers to these questions have been provided by Lydia Lousberg, Ministry of Social Affairs and Employment, for which the author of the current report is very grateful.

The first phase of modernisation of the WSW started in 2004. One of the first steps is that as of 2005 the *Centre for Work and Income* will assess who is eligible for a job in a sheltered workplace. That used to be the responsibility of local authorities. The second phase is aimed at increasing the number of disabled people who find work outside of sheltered workplaces. This means finding supervised jobs with regular employers or placement in service of a sheltered work company.

b) Sheltered employment is being seen as employment. This means that the equal treatment laws (including the DDA) apply fully to this type of employment. The wages are according to the norms set in Collective Agreements for the relevant sectors. Nevertheless, this work can not be equated fully to work on the regular labour market. It falls under the exception that is made in Article 3 para 1, sub b of the DDA. This provision enshrines for a possibility for *supportive social policies* for disabled people. (See also para 5 of this report as regards the description of this exception.)

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 principle in Dutch law is that “all persons in the Netherlands shall be treated equally in equal circumstances”, as provided for in Article 1 of the Constitution. Thus, the protective scope provided by criminal law, civil law, (specialised) equal treatment legislation and administrative law covers *any person on the territory of the Netherlands*.¹³⁴

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?

For purposes of protection against discrimination no such distinction is made. As far as liability is concerned: see below.

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?

No single Article in the ADA, the DDA and the GETA specifies *to whom* the prohibition of making distinction, including harassment, is addressed. Although, and as will be seen under

¹³⁴ In article 2(5) GETA in case of nationality discrimination (also covered by the GETA) the following exception exists: *The prohibition on discrimination on the grounds of nationality contained in this Act shall not apply:*
(a) if the discrimination is based on generally binding regulations or on written or unwritten rules of international law and
(b) in cases where nationality is a determining factor. This clause is generally understood in such a way that especially immigration law and nationality law is exempted from the equal treatment legislation.

paragraph 3.2. concerning ‘material scope’, all of the three Acts specify the *areas of social life* to which each Act applies, the Acts remain silent on the matter of ‘personal applicability’.¹³⁵ With regard to the employment area, *i.e.*, the only area that is commonly covered by the three Acts, the central norm is addressed not only to *private and public employers*, but also to *organisations from employers, organisations of workers, employment offices, (public) job agencies, pension funds, some external advisors, (“liberal”) professionals, bodies of liberal professionals, training institutions, schools, universities etc.*¹³⁶ However, from this it is not clear whether colleagues or third persons can be held liable under the Acts. The matter was explicitly raised in the Parliamentary discussions on the implementation of the Directives. It follows clearly from these discussions, that the government has not intended to render the non discrimination Acts applicable in relationships between colleagues, let alone in relationships with third persons.¹³⁷ The government defends this by noting that between colleagues *inter se*, there is no contract or relationship of authority.¹³⁸ However, it was indicated by the government that those employees who in name of their employer, exercise authority over their co-employees *are* addressees of the central norm. *De facto*, such an employee functions in the capacity of employer.¹³⁹ The purported inapplicability of the Dutch Acts in relationships between colleagues *inter se*, appears particularly problematic in the context of work-related *harassment*. In its current format and in the light of the Parliamentary comments, the law prevents an alleged victim of harassment from holding a colleague or a third person directly liable for the contested acts. The only way to do this would be by seeking recourse to the general provisions of *tort law* enshrined in the Dutch Civil Code.

The employer’s vicarious liability for harassing acts by a *third person* was for example at stake in ETC *Opinion 97/82*. The case concerned racial harassment of a nurse, by a patient. The Commission repeated its stance that the employer is under a legal duty to prevent from occurring acts of harassment done by persons under his supervision. The Commission took the view that, although the alleged harassing acts were not done by a colleague worker but by a third person, this did not circumscribe whatsoever the employer’s duty of care.¹⁴⁰

However, and this also follows from the ETC’s case law *pre implementation* of the Directives, there rests a *general duty of care* upon *the employer* to maintain a discrimination-free and safe workplace. An employee’s right not to be discriminated against in his or her employment and working conditions, embraces the right to be free from discrimination and harassment at the workplace.^{141 / 142}

Beyond the scope of Dutch equal treatment legislation, the following is essential to take account of. The employer may be held vicariously liable for discriminatory or harassing acts done by colleague workers under *general private employment law*. The relevant Articles upon which a claim can be based are 1. *the good employer’s practice (Article 7:611 of the Civil Code)*; 2. *the employer’s general duty of care (i.e., the employer’s liability for damages*

¹³⁵E. Cremers-Hartman, “Werkingssfeer AWGB (Art. 3, 4 sub c, 5 lid 1, 6, 7 lid 1 AWGB”, in I.P. Asscher Vonk, and C.A. Groenendijk *Gelijke Behandeling: Regels en Realiteit*, The Hague 1999 SDU Uitgevers, pp. 29-88, p. 33.

¹³⁶*Ibid.*

¹³⁷ Explanatory Memorandum to the ADA, p. 19 (where this was said in the context of harassment). Also, Parliamentary Papers Second Chamber of Parliament, 2002-2003, 28770, nr. 5, p. 28.

¹³⁸Kees Waaldijk “Combating sexual orientation discrimination in employment: legislation in fifteen EU Member States, Report of the European Group of Experts on Combating Sexual Orientation Discrimination. [Final Version, offered to me by Dr. Kees Waaldijk, available with the author].

¹³⁹ Explanatory Memorandum to the ADA, p. 19 (where the government observed this in the context of harassment).

¹⁴⁰ Although and as will be explained under ‘enforcement issues’, the Commission’s opinions are not binding, an opinion by the Commission that has been ruled in the victim’s favour can still be valuable in terms of recognition of the complaint and of emotional satisfaction. See: A. Geers, “Intimidatie op de werkplek”, in G. van Manen (ed.) *De Rol van het Aansprakelijkheidsrecht bij de verwerking van persoonlijk leed*, Boom 2003, pp. 183-198, p. 194.

¹⁴¹ See also, I.P. Asscher-Vonk and W.C. Monster, *Gelijke Behandeling bij de Arbeid*, Kluwer, Deventer 2002, 164.

¹⁴² See for example opinion 2004/08 (race and religion).

suffered by an employee in the performance of job-related duties, laid down in Article 7:658 of the Civil Code). Both of these Articles are directed at the employer's liability for acts done by the employer himself, or by others over whom the employer has control. It is disputed in legal circles whether Article 7:658, can form the legal basis for claims that regard mere *psychological damage, rather than physical damage*.¹⁴³ / ¹⁴⁴ It is submitted that damage resulting from discriminatory treatment and harassment is most often of a *psychological kind*. Although the Dutch Supreme Court has given no decisive answer, the *lower courts* have been prepared to accept Article 7:658 Civil Code, in cases of *sexual harassment*, as a basis for financial compensation of psychological damage resulting from sexually harassing acts.¹⁴⁵

Some conclusions:

A. In the light of the presumed broad scope of personal applicability of Directive 2000/43 and 2000/78, it appears that the Dutch government's view namely, that the Dutch non discrimination Acts are directed to employers and other organisations but not to employees (and third persons), is unduly restrictive.

B. According tot case law of the ETC the person *exercising authority* may be held responsible for acts of distinction including harassment done by employees or third persons. According to case law of the Civil Courts (including the High Court) these persons can also be held responsible and accountable under general civil law provisions / procedures.

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?

Yes, it does. However, Article 17 of the ADA enshrines an exception (which is of a temporary kind): till 1st January 2008 at the latest, the ADA shall not apply to the military service. In the DDA and the GETA, there are no exclusions to the Acts' scope concerning the armed forces.

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?

¹⁴³A. Geers, *supra*, pp. 183-198, p. 188 with further references to the literature on this question. Also, M.S.A Vegter, "Aansprakelijkheid werkgever voor psychische schade werknemer als gevolg van seksuele intimidatie van de werknemer", in *Aansprakelijkheid, Verzekering en Schade*, nr. 5, October 2001, pp. 133-140, p. 134.

¹⁴⁴With regard to Article 7:611 of the Civil Code, the Dutch Supreme Court has decided that this Article may be relied upon to claim compensation for damages of a mere psychological kind. See HR 11 juli 1993, NJ 1993 667 (*Nuts/Hofman*) cited by A. Geers, *supra*, pp. 183-198, p. 188, footnote 12.

¹⁴⁵See M.S.A Vegter, "Aansprakelijkheid werkgever voor psychische schade werknemer als gevolg van seksuele intimidatie van de werknemer", in *Aansprakelijkheid, Verzekering en Schade*, nr. 5, October 2001, pp. 133-140, p. 134-135 where she extensively elaborates on the case law. The relevant cases to which she refers are Rb Rotterdam [Rotterdam District Court] 30 september 1999, JAR 1999, 230. Pres. Rb Amsterdam [President of Rotterdam District Court] 22 februari 2001, *Rechtspraak Nemesis* 2001, 1319. Kantongerecht [Cantonal Court] Harderwijk 25 april 2001, JAR 2001, 118. In the last case referred to, an amount of about €14.000 (at the time Fl. 30000) was awarded for psychological damages.

Article 5(1) of the GETA prohibits from making unlawful distinctions in the context of employment. No unlawful distinctions shall be made with regard to the following areas:

- a. *public advertising of employment and procedures leading to the filling of vacancies;*
- b. *employment mediation (inserted by the EC Implementation Act);*
- c. *the commencement or termination of an employment relationship;*
- d. *the appointment and dismissal of civil servants;*
- e. *terms and conditions of employment;*
- f. *permission for staff to receive education or training during or prior to employment;*
- g. *promotions;*
- h. *working conditions (inserted by the EC Implementation Act).*

The ADA and DDA enshrine counterpart provisions in *Article 3* and *Article 4* respectively. These Articles reflect exactly the same material scope, although sometimes the sequence of subsections differs. Both public and private labour relations are covered. The central norm applies to the entire employment process i.e., from the moment of notice of a vacancy, to the commencement of the employment relationship or public appointment, until its termination.¹⁴⁶

In the General Equal Treatment Act, *self-employment* is covered by Article 6. This Article provides that “*it shall be unlawful to make distinctions with regard to the conditions for and access to the liberal professions and with regard to pursue the liberal professions or for development within them*”. The counterpart Articles reflecting an identical content as Article 6, are *Article 4* of the ADA and *Article 5* of the DDA. It is to be noted that the term “self employment” is not used in the mentioned Articles which instead speak of the “liberal profession”. The term “liberal profession” (“free occupation”) might be slightly narrower in scope than “self-employment” (the term used in the Directives). However, the problem can easily be circumvented by attaching a broad interpretation to the term “liberal profession” in order to guarantee that not only doctors, architects etc are covered, but also free lancers, solo traders, entrepreneurs *etc.*¹⁴⁷ This might seem odd for a British reader since in English, the term ‘liberal profession’ is quite a lot narrower than self-employment and could not easily be approximated. However, in the Dutch equality legislation context the usage of ‘liberal profession’ has not led to problems. The ETC has at all times attached a very broad meaning to this notion. Discrimination is thus also prohibited in such working relationships where the hierarchy between the ‘employer’ and ‘employee’ is absent.

The public sector is dealt with in the same way as the private sector.

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.

The above areas are fully covered by Article 5(1) of the GETA, subsections *c, d, e, h*. In the ADA by Article 3 subsections *c, d, e, h*. In the DDA by Article 4 subsections *b, c, e, h*.

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))

¹⁴⁶ See for example, the Explanatory Memorandum to the DDA, p. 34. The same applies *eo ipso* in the context of the ADA and the GETA.

¹⁴⁷ See Kees Waaldijk [See footnote 62].

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.

The prohibition of distinction in the areas of *vocational training and guidance* is laid down in Article 5 of the ADA and in Article 6 of the DDA. Both Articles are identical.

Subsection *a* of both Articles lays down the prohibition of distinction with regard to *vocational guidance*. (*loopbaanoriëntatie en beroepskeuzevoorlichting*).

Subsection *b* renders the central norm applicable to *education oriented towards entry to and functioning in the labour market* (*onderwijs gericht op toetreding tot en functioneren op de arbeidsmarkt*). In short, this might be referred to as ‘vocational training’ although this term is not as such used within the respective Articles. However, both Articles are located under a heading which reads: *vocational training*. And de facto, this heading only consists of Article 6 and Article 5 of the ADA and DDA respectively.

The explanatory memorandums to the Acts provide guidance as to what is meant by subsection *b*. Hereinafter, this will be analysed in reference to the Explanatory Memorandum to the DDA. However, all what will be said applies *eo ipso* to the ADA.

Subsection “b” covers education which is a last step prior to entering the labour market including retraining and further training courses.¹⁴⁸ *In concreto* this embraces: practical education (*praktijkonderwijs*), (which forms part of ‘secondary education’); technical and vocational training for 16-18 year-olds (*middelbaar beroepsonderwijs*); technical and vocational training for 18+ (*hoger beroepsonderwijs*) and university education. However, regular ‘secondary education’ (*voortgezet onderwijs*) is not covered.¹⁴⁹ The *establishments* that are covered are not only those which are recognised or subsidised by the Ministry, but also those establishments which are not recognised or subsidised by the Ministry or whose regulation is left to the market.¹⁵⁰

Subsections *a* and *b* of Articles 5 and 6 of the ADA and DDA respectively, are not directed to a specific addressee. These subsections are therefore directed to ‘everybody’. As to subsection *b*, this is addressed to *public education, private/denominational education, and, education that is not publicly funded*.¹⁵¹

Subsection *b* covers more than Article 3(1) ‘b’ of the Employment Framework Directive. The Directive only prohibits discrimination at the stage of ‘entry to’ vocational training. The Dutch Acts cover the entire path from registration until termination of education.¹⁵²

In the GETA, Article 7, which is located under title 4 of the Act which reads *other (i.e., other than employment and self employment) provisions in the socio-economic area*, renders the central norm applicable to (in brief):

- *The supply of or permission of access to goods or services which also embraces all forms of education;*¹⁵³
- *The provision of career orientation and guidance (loopbaanoriëntatie);*
- *Advice or information regarding the choice of an educational establishment or career.*

¹⁴⁸Explanatory Memorandum to the DDA, p. 38.

¹⁴⁹*Praktijkonderwijs* is an exception to this, given that this is oriented towards those who will not obtain a diploma in regular secondary education or by vocational training. *Praktijkonderwijs* prepares pupils for relatively simple jobs on the labour market.

¹⁵⁰Explanatory Memorandum to DDA, p. 38.

¹⁵¹Explanatory Memorandum to the DDA, p. 37.

¹⁵²Explanatory Memorandum to the DDA, p. 37-38.

¹⁵³ The material scope of the GETA covers the entire field of education. It thus offers here a wider protection than the Directives.

It is furthermore specified in Article 7 that the Act only applies to the above areas if the alleged discriminatory acts are committed: *a. in the course of carrying on a business or exercising a profession; b. by the public service; c. by institutions which are active in the field of housing, social services, health care, cultural affairs or education or, d. by private persons not engaged in carrying on a business or exercising a profession in so far as the offer is made publicly.* This does entirely cover that what is mentioned in Article 3(1) 'b' of the Directives.

It is to be emphasised that the material scope regarding goods, services and the entire education field as laid down in Article 7 of the GETA, applies to all grounds that are covered by the Act. In this regard the Dutch law goes far beyond that what is strictly required by Directive 2000/78.

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))

A new Article 6a in the GETA provides the following: *“it shall be unlawful to make distinctions with regard to the membership of or involvement in an employers’ organisation or trade union, or a professional occupational organisation, as well as with regard to the benefits which arise from that membership or involvement”.* Article 5a of the DDA is identical to this, as well as article 6 of the ADA.

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)

In order to implement Article 3(1) “e” (and “f” see hereinafter under para. 3.2.7.) the *EC Implementation Act* complements the GETA with a *new Article 7a*.

Subsection 1 of this new Article reads as follows: *“without prejudice to Article 7, it shall be unlawful to make distinctions on the ground of race in social protection, including social security and social advantages”.*

It appears from the Explanatory Memorandum to the *EC Implementation Act*, that *health care* is embraced by the wide notion of “*social protection*”. The government indicates in the explanatory memorandum that “(...) *the notion of social protection covers [inter alia] (...) all aspects of healthcare, welfare and social security*”.¹⁵⁴

It is debated in the Netherlands whether this means that all ‘unilateral’ acts by government (e.g. legislation, granting subsidies, etc) are now covered.¹⁵⁵ Such governmental acts are until now excluded from the scope of the equal treatment laws. The question whether this should be changed is now subject of a study by independent academic experts who are appointed by the government to conduct the second (external) 5-year term evaluation of the functioning of the GETA. Their report is to be expected in the autumn of 2006.

¹⁵⁴ Explanatory Memorandum to the EC Implementation Act, p. 14.

¹⁵⁵ The government has indicated, that the fact that unilateral governmental acts are now covered within the specific context of Article 7a, shall not be understood to mean that all unilateral governmental acts now fall within the GETA’s material scope.

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?

Yes. The extension mentioned in the previous section (above this question) is restricted to racial discrimination. As indicated by Waaldijk, the other grounds are only protected by the constitutional and international prohibitions of discrimination in the above areas of social life.¹⁵⁶

➔ 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.

Social advantages is explicitly mentioned in Article 7a (see the definition of this Article in the previous sub-paragraph). Subsection 2 of Article 7a specifies that “*the concepts of social protection, social security and social advantages, mentioned in subsection 1, can be defined by governmental decree. A governmental decree determined pursuant to the first sentence, shall not be recommended earlier than four weeks after which the draft has been submitted to both Chambers of the Parliament*”.

No such decree has been adopted thus far. However, interpretative tools regarding the meaning of “*social advantages*” are laid down in the Explanatory Memorandum to the *EC Implementation Act*. Also, its relationship with “*social security*” is explained in the Memorandum. “*Social security*” concerns the legal social insurance schemes which cover the risks that occur if a person loses his income as a result of (e.g.,) unemployment, illness, disability, age and decease. It moreover covers child benefits.¹⁵⁷

With regard to the notion of “*social advantages*” it is observed by the government in the Explanatory Memorandum, that this notion must be interpreted in the light of ECJ case law rendered in the context of *Regulation 1612/68* on free movement of workers.¹⁵⁸ In the government’s view, the notion of *social advantages* refers to advantages of an economic and cultural kind which may be granted by both private and public entities. These may include student grants, public transport reductions and reductions for cultural or other events. Advantages offered by private entities are for example reductions to entry prices for cinema and theatre.¹⁵⁹

➔ 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.

¹⁵⁶ See Kees Waaldijk, footnote 62.

¹⁵⁷ Explanatory Memorandum to the EC Implementation Act, p. 14.

¹⁵⁸ See for example the ECJ’s case law in Case C-261/83 *Castelli* of 12 July 1984 and Case C-249/83 (*Hoecx*) of 27 March 1985, as referred to in the explanatory memorandum to the EC Implementation Act, p. 15.

¹⁵⁹ Explanatory Memorandum to the EC Implementation Act, p. 15.

The GETA is integrally applicable to all aspects of education, including all types of schools (Article 7). This thus applies to “race” and “ethnic origin” but also to “religion/belief” and “sexual orientation” (as well as all other grounds covered by the GETA). In this regard, Dutch law goes beyond the requirements imposed by the Directives.¹⁶⁰ Vocational training that is given before or during the employment relationship is regulated by Article 5(1) under “e” (now “f”) of the GETA.

A problematic that has been dealt with under the guise of anti-discrimination or equal treatment law, is the fact that many boards of schools (or local governments that are in charge of publicly funded schools) have designed / want to design rulings that enhance a spreading of children of different cultural background over schools, in order to avoid the existence of “black schools” (i.e. schools with a great majority of non-Dutch nationals). (See ETC Opinion 2005-25 (Tiel), discussed in para 0.3.)

There is some discussion going on in the Netherlands about the issue whether local governments have the right to spread people of certain non-Dutch decent or people with low incomes as far as housing and schools are concerned, in order to prevent ‘black “ghetto’s” or “black schools” to emerge.

In fact this is the topic of the discussion about the so-called “Rotterdamwet”.¹⁶¹ (See also Chapter 9 of this report.) The ETC brought out an advice on this topic.¹⁶² There is considerable debate about the question whether equal treatment legislation is unduly restrictive as far as the possibilities for local government are concerned to develop such policies.¹⁶³ One of the reasons for ‘black schools’ to develop is the fact that in the Netherlands schools on a religious or other ‘denotative’ basis have the Constitutional guaranteed freedom to conduct their own policies (e.g. as far as admittance of pupils is concerned). (See Article 23 of the Constitution.) A restricted admittance policy of Christian schools (to only Christian pupils) is supposed to be (inter alia) the cause of the growth of ‘black’ public schools.¹⁶⁴ Some Members of Parliament therefore initiated a bill in which this freedom is to be restricted in the future. This proposed law would grant pupils an unrestricted admittance to virtually any school and would pose a corresponding obligation to these schools to accept everybody. Only schools that – during at least 10 years – have followed a very strict policy to only admit their “own” pupils, would be exempted from this obligation.¹⁶⁵ It is highly debatable whether this would be in line with the constitutional guaranteed freedom for religious movements to have their own schools. Some commentators think that first Article 23 of the Constitution needs to be abolished before such a law could be enacted.

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.

¹⁶⁰ See also, Notitie over de Implementatie van Richtlijn 2000/78/EG en Richtlijn 2000/43/EG [Memorandum concerning the Implementation of Directive 2000/78/EC and Directive 2000/43/EC], Tweede Kamer, 2001-2002, 28 187, nr. 1, p. 10-11].

¹⁶¹ Tweede kamer 2004-2005, 30 091. Law of 20 December 2005, Stb 2005, 726. The ETC has advised against such policies. See e.g. ETC-Advice 2005-03. See also below, in this subsection.

¹⁶² See Advies CGB inzake huisvestingsbeleid gemeente Rotterdam, 7-7-2005, Nr. 2005/03. To be downloaded from www.cgb.nl See also Opinion 2005-25 (Tiel), as discussed in para 0.3 of this Report.

¹⁶³ See e.g. Mark Bovens & Margo Trappenburg, ‘Segregatie door Anti-Discriminatie [Segregation through anti-discrimination]; in: ed. R. Holtmaat, *Gelijkheid en (andere) grondrechten*, [Equality and (other) Constitutional Rights] Kluwer, Deventer 2004, pp. 171-186.

¹⁶⁴ I.e., schools that are governed by local public authorities.

¹⁶⁵ See Tweede kamer 2005-2006, 30 417. (Initiatiefwet van Hamer, c.s.) See for a commentary on this bill B.P. Vermeulen & C.M. Zoethout, ‘Godsdienst, levensovertuiging en politieke gezindheid’ [Religion, philosophy of life and political conviction]; in: S.D. Burri (ed.) *Oordelenbundel 2005*. Kluwer, Deventer June 2006, forthcoming.

The access to and supply of goods and services is covered by Article 7 of GETA. Subsection 1 of Article 7 provides as follows:

“It shall be unlawful to make distinctions in offering or permitting access [the underlined part was added by the EC Implementation Act MG] to goods and services, in concluding, implementing or terminating agreements on the subject (...), if such acts of distinction are committed¹⁶⁶:

- a. in the course of carrying on a business or exercising a profession;*
- b. by the public service;*
- c. by institutions which are active in the field of housing, social services, health care, cultural affairs or education; or*
- d. by private persons not engaged in carrying on a business or exercising a profession, in so far as the offer is made publicly.*

This is applicable to all grounds covered by the GETA. *In this regard, Dutch law extends beyond the Article 13 Directives’ requirements.* Unilateral governmental decisions are not covered by the realm of Article 7.¹⁶⁷ All governmental acts are however “governed” by Article 1 of the Constitution.

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

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

Housing is captured by Article 7(1) subsection “c” GETA. It applies to all aspects of housing. No *specific* exceptions apply as regard housing other than those exceptions which will be dealt with below.

4. EXCEPTIONS

Preliminary observation: The GETA and the DDA are based on a ‘closed’ system of non discrimination law: exceptions to the central norm are explicitly and exhaustively listed within these Acts. The ADA is based on a ‘half open’ system of non discrimination law: certain exceptions have been explicitly enshrined within the Act alongside a possibility for objective justification (for both direct and indirect distinction).

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?

The GOR-exception only exists for the grounds *race* and *sex* (the latter is not dealt with in this report). As far as race is concerned, this has been laid down in Article 2(4) of the GETA¹⁶⁸:

¹⁶⁶ It is to be noted that the limitations to follow under “a” – “d” are also applicable with regard to the remainder of areas covered by Article 7 i.e., 2. the provision of career orientation and guidance [*loopbaanoriëntatie*]; 3. advice or information regarding the choice of an educational establishment or career, and which have been analyzed above.

¹⁶⁷ J.H. Gerards & A.W. Heringa, *Wetgeving Gelijke Behandeling*, Kluwer Deventer 2003, pp. 72-73, with references to the case law by the ETC.

¹⁶⁸ Subsection b was inserted by the *EC Implementation Act*. With the insertion of a new subsection *b* the government has intended to follow more closely the wordings of the Directive. See Explanatory Memorandum to the EC Implementation Act,

“The prohibition of making distinctions on the grounds of race as it is contained in this Act, shall not apply:

- a. in cases where a person’s racial appearance is a determining factor, provided that the aim is legitimate and the requirement is proportionate to that aim;*
- b. if the distinction concerns a person’s [outer] racial appearance and constitutes, by reason of the nature of the particular occupational activity concerned, or of the context in which it is carried out, a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate to that objective.”*

In contrast to Article 4 of Directive 2000/43 that speaks of a *characteristic related to racial or ethnic origin*, the Dutch provision specifies that only *outer racial appearances* may constitute a *genuine occupational requirement*.¹⁶⁹ This means that *race in se* is not regarded as a permissible ground for a given distinction.¹⁷⁰ Only *physical differences* (skin colour, hair type etc.) may form a basis for a distinction, to the exclusion of *sociological differences*. (E.g. The GETA does not allow a care institution, which looks after the well being of young Moroccan delinquents, to express in a job advertisement a preference for a *Moroccan* social worker.¹⁷¹) This exception has been elaborated in a governmental decree of 1994.¹⁷² The Decree exhaustively indicates to which categories the Article 2(4) exceptions apply. The Decree exhaustively indicates to which categories the Article 2(4) exceptions apply. These are:

- a. The profession or activity of actor, dancer or artist insofar that the profession or activity regards the performance of a certain role (elaboration of subsection ‘b’ Mg);*
- b. Mannequins, models for photographers, artists etc., insofar as in reasonableness requirements can be imposed upon outer appearances (elaboration of subsection ‘b’ Mg);*
- c. Participation in beauty contests insofar as appearances connected with a person’s race, are vital in the light of the contest’s aims (elaboration of subsection ‘a’ Mg);*
- d. The provision of services that can only be provided to persons having certain outer appearances (elaboration of subsection ‘a’ Mg). (The examples given by the government are special hair dress services for people with ‘afro-hair’ or skin treatment for persons with a particular skin type).*

For the grounds religion or belief, sexual orientation, disability and age the exception of the GOR was not deemed necessary.¹⁷³

Religion, belief, sexual orientation

Although Directive 2000/78 would have allowed for it (Article 4(1) of the Directive) no genuine occupational requirements exception has been enshrined in the GETA for these grounds. In fact, the Act only allows for such a defence with regard to the grounds *race* and *sex*. However, in the context of the exceptions of Article 5(2) of the GETA, institutions founded on religious principles, or on political principles, or schools founded on the basis of religious denomination may impose requirements on the occupancy of a post which, in view of the organisation’s purpose, are necessary to live up to its founding principles. The Article

p. 10. However, pre implementation the ‘genuine occupational requirement exception’ was also covered by the more general wording of subsection a of Article 2(4).

¹⁶⁹Explanatory Memorandum to the EC Implementation Act, p. 10.

¹⁷⁰J.H. Gerards and A.W. Heringa, *Wetgeving Gelijke Behandeling*, Kluwer Deventer 2003, p. 129.

¹⁷¹See also Opinion 1997/51 of the Dutch Equal Treatment Commission.

¹⁷²*Besluit Gelijke Behandeling* van 18 Augustus 1994, Stb 657 [Governmental Decree on Equal Treatment].

¹⁷³On the ground of case law of the ETC in 2005, Waaldijk makes a case for including this exception for the ground of sexual orientation. See C. Waaldijk: ‘Seksuele gerichtheid en burgerlijke staat’ [Sexual orientation and civil status]; in: Oordelenbundel 2005, red. S.D. Burri, Kluwer Deventer June 2006 (forthcoming.).

5(2) exceptions are not so much rationalised by the idea of ‘genuine occupational requirements’ though. They were regarded necessary in order to reconcile the constitutional principle of equality with other constitutional principles, namely the freedom of religion and the freedom of education as well as the freedom of political opinion.

- *Disability*

Genuine and occupational requirements, have not been defined under the DDA. The government’s view is that, in contrast to *race* and *sex*, no scenario is imaginable in which ‘disability’ would constitute a genuine occupational requirement.¹⁷⁴ An amendment was submitted by a member of Parliament in this respect, however, without any effect.¹⁷⁵

- *Age*

Since ADA makes no distinction as between ‘direct’ and ‘indirect’ distinction, and since ‘objective justification’ is provided for both types of ‘distinction’ (Article 7(1) ‘c’ of the Act), the government considered a separately enshrined exception regarding ‘genuine occupational requirements’, a redundant exercise. In this view, in cases in which ‘age’ is considered a genuine occupational requirement, this can be assessed via the objective justification test.¹⁷⁶ Conceptually speaking, this is arguably open to criticism’ In fact, the Article 4(1) exception of the Directive is in this view apparently regarded as a species of the Article 6 exception of the Directive.¹⁷⁷ It would have been preferable, had the government explicitly enshrined the genuine occupational requirements exception and out with the context of the *age specific defences* of Article 6 of the Directive as implemented in Article 7 of the ADA.

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?*

With regard to the matter of “*religious ethos*” the GETA on the one hand sets *boundaries to the Act’s scope of applicability* and on the other hand, provides for *exceptions*. With regard to ‘boundaries’, it is noted that the Act does not apply to the *internal affairs* of churches, of other religious communities, or of associations of a spiritual nature. The rationale for this lies in the principle of *freedom of religion* and in the *division between state and church*. The profession of priest, rabbis, imams, etc., are exempted from the scope of the Act.¹⁷⁸ It is to be noted that only purely *internal* affairs of Churches fall outside the scope of the GETA. Thus, for example, the employment relationship between a gardener/ a cleaner with a Church or a religious community falls within the scope of the GETA. This is arguably different for the employment relationship between a sexton and the Church. As observed by Gerards and Heringa, the more the legal relationship is disconnected from the rationales of freedom of religion and the division between state and church, the less likely is it to be considered as a purely internal affair.¹⁷⁹

With regard to ‘exceptions’ the following needs to be said.

- *Article 5(2) ‘a’ of the General Equal Treatment Act*

¹⁷⁴Explanatory Memorandum to the DDA, footnote 39 *supra*, p. 35.

¹⁷⁵Amendement Terpstra, *Tweede Kamer*, 2001-2002, 28 169, nr. 11 (26-06-02) [Amendment Terpstra, Second Chamber of Parliament, 2001-2002, 28 169, nr. 11 of 26-06-02). This amendment was rejected.

¹⁷⁶Explanatory Memorandum to the ADA, p. 35.

¹⁷⁷See F.B.J. Grapperhaus, “Het verbod op onderscheid op grond van leeftijd in arbeid en beroep”, *Ondernemingsrecht* 2002-12, pp. 356-363, p. 362.

¹⁷⁸See K. Waaldijk, footnote 62.

¹⁷⁹J.H. Gerards and A.W. Heringa, *Wetgeving Gelijke Behandeling*, Kluwer Deventer 2003, p. 105.

This Article contains an exception to the prohibition of distinction in employment for *institutions founded on religious or ideological principles*. It reads as follows:

“[the prohibition of distinction in employment shall not apply to] the freedom of an institution founded on religious or ideological principles to impose requirements which, having regard to the institution’s purpose, are necessary for the fulfilment of the duties attached to a post; such requirements may not lead to distinction on the sole ground of political opinion, race, sex, nationality, heterosexual or homosexual orientation or civil status”.

- *Article 5(2) ‘c’ of the General Equal Treatment Act*

Subsection *c* provides that religious distinctions may lawfully be made by private educational establishments. Article 5(2) *c* reads as follows:

“[the prohibition of distinction in employment shall not apply to] the freedom of a private educational establishment to impose requirements on the occupancy of a post which, in view of the establishment’s purpose, are necessary for it to live up to its founding principles, although such requirements may not lead to discrimination on the sole ground of political opinion, race, sex, nationality, heterosexual or homosexual orientation or civil status”.

Institutions under *a* may only make distinctions that are necessary *for the effective performance of the job*. Distinctions under *c*, must (only) *be necessary in order for the establishment to effectively realise its founding principles*.¹⁸⁰ This implies, that establishments under *c*, are granted more leeway in making distinctions than institutions under *a*. After all, establishments under *c*, may impose requirements that are not directly linked up with the performance of a person’s duties within that establishment.¹⁸¹ Establishments under *c*, may even impose requirements upon the acts of (would be) employees which take place *outside* the sphere of the establishment, if this is necessary for the effective realisation of the establishment’s founding principles.¹⁸²

Do the exceptions under article 5 (2) *a* and article 5 (2) *c* comply with Article 4(2) of Directive 2000/78?

The exception under article 5 (2) a

The exception under *a* in the Dutch Equal Treatment Act is slightly differently formulated than its counterpart definition in the Directive. The Directive uses as main yardstick whether, while having regard to the organisation’s ethos, *a person’s religion or belief* constitutes a *genuine, legitimate and justified occupational requirement*, by reason of the nature of the occupational activities or of the context in which they are carried out. In the Dutch Equal Treatment Act, it is of prime interest, *that the distinction made be necessary for the fulfilment of the duties attached to a post*. If one regards the exception under *a*, in the light of the case law of the ETC, it appears to me that the Dutch law is in conformity with the Directive. The word ‘necessary’ implies that the requirements must be ‘legitimate’ and ‘justified’. That the requirements must be ‘genuine’ is also reviewed by the Commission. It has been seen that the Commission looks at the institution’s statutes and at what the institution does in practice, in order to realise its religious and ideological foundations. The Commission’s line of reasoning is largely based upon the guidance given in the Parliamentary Documents to the Article 5(2) ‘a’ exception.

The exception under article 5 (2) c

¹⁸⁰ Tweede kamer 1991-1992, nr. 3, *Explanatory Memorandum*, p. 18.

¹⁸¹ Tweede Kamer 1991-1992, nr. 3, *Explanatory Memorandum*, p. 8 and p. 17.

¹⁸² J.H. Gerards and A.W. Heringa, *Wetgeving Gelijke Behandeling*, Kluwer Deventer 2003, p. 109.

It has been stressed that the imposed requirements need *not necessarily be linked up with a person's job performance*. Even behaviour outside the establishment might be a factor that can be taken into account by the establishment in its decision as to whether or not a given person 'matches' with the founding principles underlying the establishment. Requirements must however be 'necessary' for the effective realisation of the institution's founding principles. It is recalled that Article 4(1) of the Directive provides that (...) *a person's religion or belief constitutes a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos* (...). It can be argued that the Directive more than the Dutch exception, establishes a link with the person's (would be) occupation. In this view, the Dutch exception under 'c' is interpreted too broadly and therefore is not in conformity with Directive 2000/78.

The 'sole ground' construction

Article 4(2) of the Directive specifies that the difference in treatment 'should not justify discrimination on another ground'. This so-called 'sole ground construction' is equivalent to the clause in Article 4(2) of the Employment Framework Directive which states that "(...) this difference of treatment (...) should not justify discrimination on another ground".

The Dutch text provides that, 'requirements may not lead to a distinction *on the sole ground of* political opinion, race, sex, nationality, hetero-or homosexual orientation or civil status'. What is meant by these phrases? Basically, in the Dutch context, the phrase means that the grounds referred to except for religion or belief, may never constitute an *autonomous ground* for the (contested) distinction/ job requirements.¹⁸³

The 'sole ground construction' aims at eliminating the possibility that a distinction is *de facto* made on the grounds of political opinion, race, sex, nationality, hetero-or homosexual orientation or civil status, *under the guise of* exceptions which are permitted by the law (i.e., the exceptions enshrined in 'a' and 'c' for the grounds religion and belief).

In essence, the construction has played an important role with regard to the question whether a Christian School may lawfully refuse cohabitating homosexuals for a teaching position. It is stated clearly in the Parliamentary Documents that the 'sole fact' that a person is homosexual, may *in se* not lead to the refusal to hire such a person/ to dismiss her.¹⁸⁴ However, this may be different if 'additional circumstances'¹⁸⁵ are taken into account.¹⁸⁶ / ¹⁸⁷ The Directive's wording in Article 4(2) seems not to permit whatsoever that 'additional circumstances' play a material role unless such circumstances coincide with the person's religion or belief. The interpretation attached by the government and which has been followed by the Equal Treatment Commission regarding 'additional circumstances' appears unduly broad and therefore, not in conformity with the Directive.¹⁸⁸

¹⁸³The Explanatory Memorandum points out that in respect of the grounds 'race' and 'sex' it is difficult to see how 'accessory circumstances' or 'concomitant' behaviour could possibly result in the justification of a discriminatory act. The Memorandum only gives one example of justified discrimination on the grounds of race. The example given is that of Jewish associations which impose differentiating requirements on the ground of Jewish descent. The differentiation is a direct consequence of the Jewish belief. The special relationship in this example between *descent* on the one hand and *religion and belief* on the other hand may at certain instances justify the discriminatory act. See: Parliamentary Documents 1991-1992, nr. 3, *Explanatory Memorandum*, p. 19.

¹⁸⁴See Parliamentary Documents First Chamber of Parliament, 1992-1993, 22 014 nr. 212 c pp. 10-11.

¹⁸⁵In the Parliamentary comments the example is given of a teacher in social studies at a denominational school. This teacher is homosexual and cohabitates with a same sex partner. According to the example, the teacher may in reasonableness be expected to elaborate in his classes upon the concept of "marriage". See Parliamentary Documents 1990-1991 *Memorandum in Reply*, p. 41.

¹⁸⁶Parliamentary Documents 1991-1992, nr. 3, *Explanatory Memorandum*, p. 18-19. Parliamentary Documents II 1990/91, 22 014 nr. 5, p. 49.

¹⁸⁷See also Opinion 1999-38 of the Equal Treatment Commission and J.H. Gerards and A.W. Heringa, *Wetgeving Gelijke Behandeling*, Kluwer Deventer 2003, p. 105.

¹⁸⁸Also Kees Waaldijk, Sexual Orientation Report of 24 August 2004.

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 and belief and other rights to non-discrimination?

See *Opinion 1999-38* of the ETC¹⁸⁹ in which the ETC considered the ‘sole ground construction’ in the context of Article 5(2) under ‘c’. The ETC came to the conclusion that the a priori refusal of a homosexual person without granting her a chance to express her viewpoints makes that the Article 5(2) under ‘c’ exception can not be successfully relied upon.¹⁹⁰ There are no new opinions on this topic.

4.3 Armed forces and other specific occupations

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)?

No such exceptions exist; see para. 3.2.1. of this report.

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

No, there are not.

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?

Article 1 of the Constitution provides that “all persons in the Netherlands shall be treated equally in equal circumstances”. Protection against discrimination offered by Article 1 of the Constitution, by criminal law, by civil law and under the specific Statutory Anti-Discrimination Acts, is not tied to any nationality requirement.

Nationality discrimination is prohibited by the GETA. Thus, the Dutch Act goes beyond the requirements stemming from Directive 2000/43. Distinction on the grounds of nationality is in principle prohibited as follows from Article 1 of the Act. However, Article 2(5) of the Act enshrines exceptions to this. The prohibition on the grounds of nationality shall not apply, if the distinction is based upon *generally binding rules* (i.e., Statutory Acts and Acts by the administration such as governmental decrees) or on *written or unwritten rules of international law*. Moreover, the prohibition shall not apply in such cases where ‘nationality’ is a determining factor (e.g., nationality requirements imposed upon players for the national football team).

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

Article 2(5) GETA (cited above) existed before the Directives were adopted. This provision has not been changed since.

➔ 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

¹⁸⁹ See also opinion 1996-39.

¹⁹⁰ J.H. Gerards and A.W. Heringa, *Wetgeving Gelijke Behandeling*, Kluwer Deventer 2003, p. 109.

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.

General information on the situation of same-sex couples in the Netherlands: ¹⁹¹

Registered partnership was introduced on 1st of January 1998 in the Netherlands, both for same and opposite sex couples.¹⁹² Distinction between married and registered partners (or, between registered and non registered partners) constitutes *direct distinction* on the ground of marital (civil) status, *prohibited* by the GETA.¹⁹³ Since the year 2001 same sex couples can legally marry in the Netherlands.

Distinctions based on the sex of a person's *partner*, are regarded as distinctions on the ground of *sexual orientation*. This follows not only from the Parliamentary Documents but it has also been confirmed by the ETC in various of its *Opinions*.¹⁹⁴ It is therefore prohibited to make distinctions between same-sex and opposite-sex partners, with the same civil status. However, in two cases which had arisen prior to the ECJ's *Grant* judgment, the ETC regarded the distinction between same-sex and opposite-sex partners as a form of *direct sex discrimination*. In one case, the organiser of ballroom dancing competitions wished to learn whether the rule that only *opposite* sex couples could participate in these competitions was in conformity with the principle of equal treatment. The Commission held: *direct sex distinction* and, *indirect distinction on the ground of sexual orientation* which could not be justified.¹⁹⁵ In the other case, the Commission held '*direct sex distinction*' and it did not look altogether at the question of sexual orientation.¹⁹⁶ Both cases had arisen outside the employment context. The ETC has recently revised its stance in Case 2004/116 of 21 September 2004. In this case the rule that only opposite sex partners may participate in the respondent's dancing competition was regarded as an instance of direct sexual orientation distinction as well as direct sex distinction.

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

No, this will be regarded as a distinction based on marital or civil status, which is prohibited under the GETA.

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

No, this will be considered to be direct discrimination on the ground of sexual orientation.

4.6 Health and safety

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

¹⁹¹ This paragraph is based entirely upon the sexual orientation report by Kees Waaldijk (see footnote 62.). This applies also to any information found in the footnotes.

¹⁹² Articles 80a-80e of Book 1 of the Dutch Civil Code, as amended by the Act of 5 July 1997 (Staatsblad [Law Gazette] 1997, nr. 324; and hundreds of provisions in other Acts, as amended by the *Aanpassingswet Geregistreerd Partnerschap* (Registered Partnership Adjustment Act) of 17 December 1997, Staatsblad [Law Gazette] 1997, nr. 660. Both laws came entered into force on 1st January 1998.

¹⁹³ See also, Opinion 99-13 by the Equal Treatment Commission (requirement of the same number of days off for the employee's partnership registration, as for his wedding).

¹⁹⁴ See Opinions 97-47 and 97-48; opinion 99-08; opinion 99-13.

¹⁹⁵ Opinion 97-29.

¹⁹⁶ Opinion 98-10. The scope of this report is too short to consider this case in more detail.

Yes, see Article 3(1) 'a' of the DDA reads as follows:

“The prohibition of distinction shall not apply if:

a. the distinction is necessary for the protection of public security and health;
(...)”

A similar counterpart exception has not been enshrined in the GETA or in the ADA. However, safety and security issues may come at the surface in the 'objective justification test' for indirect discrimination cases. For example, a prohibition of headscarves during gymnastics for reasons of safety and security can be objectively justified.

The exception in the DDA must be interpreted narrowly. It follows from the Parliamentary History that a high threshold is set for any successful reliance upon this exception. If an employer claims that a distinction on the ground of disability is necessary for reasons of health, safety or security, he must duly motivate his claim. If there is a possibility to take away the risk by means of an effective and reasonable accommodation, it is not possible to rely on the exception.¹⁹⁷ There are a few points that need further clarification. Under the 1998 Working Conditions Act and under private employment law, the employer has a duty to eliminate/ reduce much as possible any risk to the health and well being of his employees. It is not clear from the Parliamentary History or from existing case law whether an employer can exclude a disabled person on the ground that the work will pose a risk to the disabled person's own health or safety (but not the health and safety of others). Neither is it clear whether a disabled individual can decide for him/ herself that he/ she wishes to accept such a risk. Moreover, it is not clear whether the employer would be excluded from liability should the disabled individual suffer harm in such circumstances.

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. However, safety and security issues may come at the surface in the 'objective justification test' for indirect discrimination cases. For example, a prohibition to wear a headscarf during gymnastics for reasons of safety and security, can for this reason be objectively justified.

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 ?

Direct and indirect age distinction may both be 'objectively justified' under Article 7(1) 'c' of the ADA. With regard to the 'compliance' question above, see *para. 2.2. above*, under *heading B*, under *subheading 'a'*.

As far as the 'Mangold-test' is concerned: this test is quite strict. The Dutch government, until now, more or less assumed that whenever the legislator had laid down a criterion based on age, this was objectively justified as soon as the legislator had given some 'good reasons' for

¹⁹⁷ See also A.C. Hendriks, *Wet Gelijke Behandeling op grond van handicap of chronische ziekte*, Actualiteiten Sociaal Recht, Kluwer Deventer 2003, p. 66-67.

doing this.¹⁹⁸ It means that every legal norm that contains a differentiation based on age needs to be justified. The government has made a start with this during 2004-2005. Every Department of the Government was obliged to make a report in which it gives an inventory of age criteria in its legislation and has to give the reasons why these criteria exist.¹⁹⁹ This issue will be discussed in more detail in para 9 of this report..

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

Yes, it does. Article 7(1) indents 'a' and 'b' enshrine two exceptions that are deemed a priori to be 'objectively justified'. Yes, it does. Article 7(1) indents 'a' and 'b' enshrine two exceptions that are deemed a priori to be 'objectively justified'.

Indent 'a': provides that the prohibition of age distinction shall not apply if the distinction is based on employment- or labour market policies which are aimed at promoting labour participation of certain age categories provided that such policies are enshrined in a Statutory Act or in a Governmental Decree.²⁰⁰ [Transposition of Art. 6(1) of Directive 2000/78].

Indent 'b': the prohibition of age distinction shall not apply if the distinction regards the termination of the employment relationship, either by reason of having reached the statutory retirement age (65), or, of a *higher* (not lower!)²⁰¹ age than that provided this higher age has been laid down by Statutory Act or governmental decree, or has been mutually agreed on by the parties involved. [Transposition of Art. 6(2) of Directive 2000/78]. *Article 16* of the Act provides that the prohibition of age distinction shall, until 2 December 2006, *not* apply to distinctions regarding termination of the employment contract as a result of having reached the – by the employment contract agreed- retirement age *lower than* the statutory retirement age, *provided* this had been agreed on before 1 May 2004 (when the ADA entered into force). After that time, 'objective justification' is called for.

Article 8 of the ADA renders the central norm inapplicable in regard to (occupational) pension provision (supplementary to pension provision on the basis of social security law) and in regard to actuarial calculations for pension provision. Article 8(2) provides in essence, that the prohibition of age distinction shall not apply to the admission or entitlement to pension provision²⁰², nor to the fixing under such provision of different ages for employees or categories of employees. Article 8(3) renders the central norm inapplicable in regard to the use of age criteria in actuarial calculations. [Transposition of Art. 6(2) of Directive 2000/78].

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

¹⁹⁸ See Explanatory Memorandum ADA. See for the consequences of the Mangold test also M. Heemskerk & M.J.J. Dankbaar, 'Leeftijd' [Age]. In: S D.Burri (ed.) Oordelenbundel 2005. Kluwer, Deventer June 2006, forthcoming.

¹⁹⁹ This was requested by the Second Chamber of Parliament; see the letter to the Minister of Social Affairs, dd 14 June 2004, 85-04-SZW. The answers were sent to Parliament in the course of 2005. See Tweede Kamer 2004-2005, 28 170, nr 30: Inventory of the Ministry of Social Affairs; Idem nr. 31: Inventory of the Ministry of Housing; Idem, nr. 32: Inventory of the Ministry of Finance; Idem, nr. 33: Inventory of the Ministry of Foreign Affairs; Idem nr. 34: Inventory of the Ministry of Health; Idem nr. 35: Inventory of the Ministry of Education; Idem nr. 36: Inventory of the Ministry of Transport and Water Management; Idem nr. 38: Inventory of the Ministry of Agriculture and Nature; Idem nr. 39 + 44: Inventory of the Ministry of Internal Affairs and Kingdom Relations; Idem nr. 41: Inventory of the Ministry of Justice. The report of the Ministry of Social Affairs and Employment is available on the internet; see www.minszw.nl

²⁰⁰ A concrete example of this exception concerns the *Act on a Minimum Wage and Minimum Holiday Allowance (Wet Minimumloon en Minimum Vakantietoelag)*. This Act contains both a maximum and a minimum age limit of 65 and 23 years old respectively. The Act's purpose is the promotion of employment in general and paid employability for young persons specifically. See Explanatory Memorandum to the ADA, pp. 28-30. The indent 'a' exception reflects the exception of *Article 6(1)* of Directive 2000/78.

²⁰¹ It follows from the Explanatory Memorandum that indent 'b' does not apply to dismissal based upon reaching a pensionable age which is *lower* than 65 years. See Explanatory Memorandum to the ADA, p. 32.

²⁰² A concept defined in Article 8(1) of the ADA.

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.

Article 7(1) 'a', enshrines an exception for labour market policies that are aimed at the promotion of labour participation of certain age categories. No special conditions exist for persons with caring responsibilities.

This article reads as follows:

1. The prohibition on discrimination shall not apply if the discrimination:

a) is based on employment or labour-market policies to promote employment in certain age categories, provided such policies are laid down by or pursuant to an Act of Parliament;

b) (...)

➔ 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?

Yes, this is possible on the ground of article 7 (1) of the ADA. An objective justification is necessary for such age limits.

➔ 4.7.4 Retirement²⁰³

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?

The right to receive a state pension (AOW) at the age of 65 is independent from the question whether the person has (or has had) a paid job or not.

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?

²⁰³ The answers to these questions have been provided by Lydia Lousberg, Ministry of Social Affairs and Employment, for which the author of the current report is very grateful.

The date on which benefits can be collected under these schemes completely depends on the conditions under which such schemes are contractually agreed. Some schemes are more flexible as others as far as individual wished to work longer are concerned.

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?

No, there is not such a mandatory retirement age in any provision in the Dutch law that regulates the dismissal of workers.

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

Yes, see article 7(1) sub b:

This article reads as follows:

1. The prohibition on discrimination shall not apply if the discrimination:

(a) (...)

(b)) relates to the termination of an employment relationship because the person concerned has reached pensionable age under the General Old Age Pensions Act (AOW), or a more advanced age laid down by or pursuant to an Act of Parliament or agreed between the parties;

The government holds the view that this exception is fully in compliance with the Directive. This view has not been contested in Parliament nor in academic literature, as far as it is known.

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)?

Yes, they do, without any exception. As long as someone is an employee according to the definitions of these laws, they are protected by the ADA, not matter his/her age.

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

No, they are not.

4.7.5 Redundancy

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

Yes, it does. However, it has been provided for in employment law, that in case of the restructuring of a company, the so-called 'last in first out' principle may be used as a yardstick in the choice as to whom to dismiss first. The principle works to the advantage of older workers (and constitutes 'indirect distinction' of younger workers). The principle has also been accepted in case law. The Explanatory Memorandum to the ADA explicitly says

that the use of this principle may be '*objectively justified*' under Article 7(1) 'c' of the Act. It is noted that the '*last in first out*' principle currently forms object of debate in the Dutch Parliament.²⁰⁴

Article 7 (1) c ADA reads as follows:

1. The prohibition on discrimination shall not apply if the discrimination:

(..)

c) is otherwise objectively justified by a legitimate aim and the means used to achieve that aim are appropriate and necessary.

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

Yes, it is. Compensation is calculated on the basis of the so-called 'cantonal courts formula' (*kantonrechtersformule*) i.e., $a \times b \times c$.²⁰⁵ The factor *a* stands for the employee's number of years of service. This factor is connected to the employee's age. Until 40 years old, every full year of service counts for 1, between 40-50 years old it counts for 1.5, and, as from 50 years old it counts for 2. (Factor *b* reflects a remuneration component (monthly gross salary) and factor *c* is a 'correction factor').

In 2005 the *Kantonrechter* (cantonal court) of Sneek decided that a "Social Plan" whereby the Trade Unions and the Management of a Company, in a case of a large scale reorganisation, agreed to make an age distinction whereby this 'cantonal courts formula' was 'neutralised' (correction factor $c = 1$) only for employees under the age of 57 (while for the employees over 57 there was a general wage compensation scheme in place) amounted to unlawful age discrimination.²⁰⁶ The case came down to the question whether a person over the age of 57 years old needs to use the special arrangement for older workers in the Social Plan or that he is free to choose to be resigned in the normal way (termination of the employment contract and normal application of the so-called cantonal judges formula), which would be more profitable. The ETC (and the judges) ruled that the special rules for the redundancy payment of older people are not objectively justified (not meeting the criterion of proportionality).

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, it does not.

4.9 Any other exceptions

²⁰⁴ On 18th December 2003 the Second Chamber of Parliament accepted a Motion (Motion by the MPs Verburg, Weekers, Bakker and Noorman den Uyl) which begged the government to reconsider the usage of the *last in first out principle* in cases of dismissal for reasons related to the economic situation of a company. See Tweede kamer, 2003-2004, 29 200, XV, nr. 48). See also the recent Note on Reconsideration of the Last in First Out Principle in cases of dismissal for reasons related to the economic situation of a company, available at www.szw.nl.

²⁰⁵ See H.L. Bakels, I.P. Asscher Vonk, W.J.P.M. Fase, *Schets van het Nederlands Arbeidsrecht*, Kluwer Deventer 2003, p. 179.

²⁰⁶ Ktr Sneek, 31 mei 2005, *LJN* AT7230. See also par. 0.3. of this report.

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

In the context of the GETA, the following exceptions have not been mentioned so far:

1. Article 5(3) of the GETA: exception regarding the private nature of the employment relationship.
2. Article 7(2) of the GETA: grants private educational establishments the freedom to impose requirements governing admission to or participation in the education that the establishment provides. Article 7(2) accords with the exception in Article 5(2) 'c' of the GETA (see para. 4.2. of this report), however, Article 7(2) applies to the *entry of pupils* to denominational schools [and thus not to employment].
3. Article 7(3) of the GETA: contains an exception regarding the private nature of the circumstances at which the legal relationship sees. (e.g., a woman who rents a room *in her own house* may lawfully require that the person who rents the room is female).
4. The internal affairs of associations fall outside the scope of the GETA. This follows from the Parliamentary History and is not explicitly provided for in any Article of the Act.

➔ 5. POSITIVE ACTION

(Article 5 Directive 2000/43, Article 7 Directive 2000/78)

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?

Do measures of positive action exist in your country? Which are the most important?

Refer, in particular, to the measures related to disability and any quotas for access of disabled persons to the labour market.

1. Article 2(3) of the GETA in its post-implementation format imposes the following conditions to positive action measures and policies:

1. The initiative must be a *specific measure*; 2. the measure is aimed at the conferral of a preferential position for women or for people belonging to ethnic minorities; 3. the measure is aimed at the *removal* or the *reduction* of factual inequalities; 4. there must be a *proportionate* relationship between the measure and the objective pursued. This last element is not required by Directive 2000/43. The Dutch definition leaves *less scope* for affirmative action policies and programmes, since it does not allow measures which aim at *preventing*, in addition to *removing* or *reducing* disadvantages.²⁰⁷

2. Article 3(1) subsection 'c' of the DDA enshrines a positive action exception to the prohibition of distinction under that Act. The same conditions as described above apply here. Article 3(1) under 'b', enshrines for a possibility for *supportive social policies* for disabled people. In contrast to 'positive action measures', these are not 'time restricted'. The Dutch government has introduced several supportive measures designed to promote the reintegration of disabled people in society over the past years. The 1998 Act on the Reintegration of Disabled People in Employment (*Wet op de (Re)integratie Arbeidsgehandicapten*, hereinafter: *REA*)²⁰⁸ is of particular importance. This Act aims at creating a coherent set of measures which facilitate the (re)integration of 'employment disabled people' ('*arbeidsgehandicapten*') in employment. The means to achieve this objective are in essence: faster payment of expenses (related to (re)integration) to employers; flexible application of qualifications for benefits and, a reduction of the risks for employers.²⁰⁹ The *REA* also has the purpose of achieving a clear allocation of responsibilities between the various actors involved with (re)integration. The *REA* enshrines the *possibility* for prescribing a *quota i.e.*, the obligation

²⁰⁷ See Explanatory Memorandum to the EC Implementation Act, p. 9.

²⁰⁸ *Wet op de (Re)integratie Arbeidsgehandicapten*, wet van 23 April 1998, *Stb.* 290, meest recentelijk gewijzigd bij de wet van 15 december 1999, *Stb.* 564 [Act on the Reintegration of Disabled People in Employment, Act of 23 April 1998, *law gazette* 290, most recently amended by the Act of 15 December 1999, *law gazette*, 564].

²⁰⁹ D. Beekman & E.J. Kronenburg Willems, *Wet op de (Re)integratie arbeidsgehandicapten*, PS Special Wet *REA*, (1998).

for employers to employ a certain number of ‘employment disabled persons’. However, this possibility has not been made use of so far. In essence the *REA* aims at reducing or taking away objections by employers to the employment of disabled persons.

In 2004 the government started a trajectory called ‘inclusief beleid’ [inclusive policy]. The government made a start with this policy with the *Action Plan* called *Equal Treatment in Practice* (Actieplan gelijke behandeling in de praktijk.)²¹⁰ This forms a kind of *mainstreaming* of specific (permanent) social policies concerning the improvement of the position of disabled people. Five Departments of the Government were asked (by the Ministry of Health) to send in their policy plans.²¹¹ The proposals covered a wide range of measures, from making electronic voting machines that can be handled by blind persons, to adaptation of houses to the needs of old people and people with wheelchairs.

In 2005 there was a discussion on the question whether the possibility to develop and apply positive action schemes should be extended to the other grounds that are covered in the GETA and to the age discrimination.

The government has published a draft report and got comments from *inter alia* the ETC. Although the ETC recognises that in Dutch society there is hardly any structural disadvantage on the ground of age, religion or sexual orientation, the ETC is of the opinion that positive action measures should in principle be possible for all groups that are protected in Article 13 EC Treaty. The main reason for this is that it is important that the equal treatment legislation is consistent and transparent and contains the same system of exceptions for all non-discrimination grounds. In May 2005, a final “Nota” [Memorandum] was sent to Parliament.²¹² The government concluded that it is not necessary to change the Dutch equal treatment legislation in view of the case law of the ECJ and the implementation of Directive 2000/43, 2000/78 and 2002/73. In this Memorandum the measures that the government employs in this respect are described in great detail.

6. REMEDIES AND ENFORCEMENT

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

In relation to each question, 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)?

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

The statutory equal treatment acts do not entail a *compulsory* judicial procedures.²¹³ If discrimination occurs in the sphere of private employment, the conventional civil (labour) law procedures apply. If it occurs in public employment, the ordinary procedures of administrative

²¹⁰ Tweede Kamer 2003-2004, 29 355 nr. 1.

²¹¹ See Tweede Kamer 2004-2005, 29 355 nr 11 and Idem nr. 14 and 15. It concerns the Ministries of Internal Affairs and Kingdom Relations, Education, Social Affairs and Employment, Transport and Water Management, Housing, and the Ministry of Healthcare.

²¹² Nota Voorkeursbehandeling: Tweede Kamer 2004-2005, 28 770, nr. 11. [Memorandum on Preferential Treatment]

²¹³ See K. Waaldijk, Sexual Orientation Report of 24 August 2004.

law apply.²¹⁴ In addition, the equal treatment acts provide for a special (non compulsory) procedure before the ETC.²¹⁵ The Commission is a semi-judicial body which renders *non binding Opinions*.

After it has rendered an Opinion, a complaint may still be lodged before the conventional civil/ administrative courts if the applicant wishes to obtain a *binding* judgment. The Commission is a low threshold body: no legal representation is required. Moreover, the procedure before the Commission does not cost anything. As for civil law and administrative law procedures in court there is a system of free legal aid for people with low incomes.

To the current author's knowledge no specific rules exist requiring that courts/ buildings/ Commission are physically accessible. Neither is it specified anywhere to the author's knowledge that information must be provided in braille. No special procedures exist for dealing with individuals with a learning disability. Sign language interpretation must legally seen not be provided to the author's knowledge. The person who feels discriminated against can file a petition at the ETC *in writing* (Article 12 GETA). For non-Dutch people this is not always an easy task and therefore it is possible to specify the complaint during an interview at the Commission's office.²¹⁶ By analogy, special provisions might be made for persons with a disability.

b) Are these binding or non-binding?

The normal judicial procedures lead to a legally binding judgement. The ETC is a semi-judicial body which renders non binding *Opinions*.

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

Yes, this is possible. With regard to time limits, the following is said. Administrative law procedures: the *General Act on Administrative Law* provides that in principle an appeal must be lodged *within 6 weeks* counted as from the day *after the day* on which the contested decision has been made known. Civil law procedures: *Ex* Article 8(2) of the GETA (Art. 9(2) DDA and Art. 11(3) ADA) an applicant who wishes to contest the lawfulness of the termination of an employment contract (discriminatory dismissal/ victimisation dismissal) must do so *within 2 months* after the termination of the employment contract. (See also: Articles 7:647(2), 7:649(2) and 7:648(1) of the Civil Code).²¹⁷ A legal claim with regard to the nullification of the employment contract can no longer be made after 6 months have passed after the day on which the employment contract was terminated (Article 8(3) of the GETA/ Art. 9(3) DDA/ Art. 11(4) ADA). With regard to procedures before the Commission: Article 14 (1) 'c' of the GETA only sets a requirement of *reasonableness*. (This also applies in the context of procedures lodged under the DDA and ADA).

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

What are the criteria for an association to engage in judicial or other procedures?

a) in support of a complainant?

b) on behalf of one or more complainants?

²¹⁴ The civil court has competence in cases in which discriminatory contractual agreements (goods and services supplied by the government) are at stake. And, with regard to unilateral governmental decisions e.g., concerning the allocation of social security benefits/ social advantages, administrative procedures apply.

²¹⁵ The procedure before the ETC and the Commission's competencies will be examined in paragraph 7 on Specialised Bodies.

²¹⁶ This information comes from J. Goldschmidt, *Equality law and the work of the Equal Treatment Commission in the Netherlands*, available with the author.

²¹⁷ J.H. Gerards and A.W. Heringa, *Wetgeving Gelijke Behandeling*, Kluwer Deventer 2003, p. 199.

Under Article 3:305a and 305b of the Civil Code and Article 1:2(3) of the General Act on Administrative Law interest groups can take legal action in court. Provided that their statutory goals are to cover this particular interest (e.g. disability rights). When they bring a claim on their own behalf they do not need to stand up for a concrete victim; a fortiori they do not need a victim's permission (if there is such a concrete victim). The partially reversed burden of proof also applies here. Interest groups also have the right to ask the ETC to start an investigation. The interest group must have full legal powers and it must follow from its statutes that it represents the interests of those whose protection is the objective of the statutory equality acts. (Article 12(2) 'e' of the GETA).

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).

Article 10(1) GETA reads as follows: *“if a person who considers herself to have been wronged through ‘distinction’ as referred to in this Act established before a court facts from which it may be presumed that distinction has taken place, it shall be for the respondent to prove that the contested act was not in contravention of this Act”*. The equivalent Articles in the DDA and ADA are Articles 10(1) and 12(1) respectively. Subsection 2 of these three Articles provides that the partially reversed burden of proof also applies in group actions under Article 3:305a Civil Code and Article 1:2(3) of the *General Act on Administrative Law*. Strictly spoken, the partially reversed burden of proof does not apply in procedures before the ETC. The exception in Article 8(5) and 10(5) of the Directives is applicable. However, on a voluntary basis the Commission nevertheless applies it in its case law.

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)

All three Acts protect against victimisation dismissal and against other forms of disadvantage as a result of the fact that a person has invoked the statutory equality act or has otherwise **assisted** in proceedings under these Acts, e.g. by means of a testimony. See Articles 8(1) and Article 8a. Article 8(1) reads as follows: *“If an employer terminates an employee's employment in contravention of section 5, on the grounds that the employee has invoked section 5, either at law or otherwise, or has provided assistance in relation to it, such termination shall be invalid”*.

Article 8a reads as follows: *“Adverse treatment in reaction to a person's reliance either at law or otherwise on this Act or provision of assistance in relation to it shall be prohibited”*. Equivalent Articles are enshrined in the DDA (Articles 9(1) and 7a respectively) and in the ADA (Articles 11(2) and 10 respectively). The burden of proof rules (see above) do not apply in victimisation cases.²¹⁸

Persons who help the victim are protected by Article 8a.

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

²¹⁸ See Tweede Kamer, 2002-2003 28 770, nr. 5, p. 35, referred to by Kees Waaldijk (see footnote 62).

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.

Sanctions in case of discrimination are applied by the courts. According to Article 8(1) of the GETA, Article 11(1) and 11(2) ADA, and Article 9(1) DDA, discriminatory dismissals and victimisation dismissals are invalid (void) (*vernietigbaar*). This applies both with regard to public and private employment. The employee can invalidate the termination of the contract and can thereupon claim wages. He can also claim to be reinstalled in the job. Or, he can claim compensation for pecuniary damages under the sanctions of general administrative/contract or tort law. Contractual provisions which are in conflict with the GETA, the ADA and the DDA, shall be null and void. This follows from Article 9, Article 13 and Article 11 of these Acts respectively.

Articles 13(2), 13(3) and 15 of the GETA mentions some additional sanctions. Sanctions under these Articles are imposed by the Commission, not by the courts. Under Article 13(2), the ETC may make recommendations when forwarding its findings (in an Opinion) to the party found to have made unlawful distinction. Under Article 13(3) the ETC may also forward its findings in an Opinion to the Ministers concerned, and to organisations of employers, employees, professionals, public servants, (consumers of goods and services) and to relevant consultative bodies. Under Article 15(1) the ETC may bring legal action with a view to obtaining a ruling that conduct contrary to the relevant equal treatment legislation is unlawful, requesting that such conduct be prohibited or eliciting an order that the consequences of such conduct be rectified.²¹⁹ This power must be regarded in light of the fact that the Commission's Opinions are not binding. The Commission has never made use of this possibility.

In case the case has been brought by interest groups the sanctions are similar.

It is seriously doubted in academic legal circles, whether the range of sanctions available under the equal treatment legislation is in conformity with the requirement that sanctions be '*effective, proportionate and dissuasive*'.²²⁰

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

The question whether there is a ceiling is not applicable, since most of the sanctions are not in terms of (money) compensation but offer other 'remedies' (see above). In case a compensation is given there is no official ceiling.

c) Is there any information available concerning:

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

- 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?

This information is not available for two reasons:

²¹⁹ Unless the person affected by the alleged discriminatory conduct has made reservations (*Article 15(2) of the GETA*). In theory this could amount to a court order, e.g. to make a desegregation plan for schools; however: the Dutch courts are very careful not to interfere with what they call the discretionary powers of the administration and of government.

²²⁰ See the report by Kees Waaldijk (footnote 62), with references to R. Holtmaat, "Uit de Keuken van de Europese Unie: de Gelijkebehandelingsrichtlijnen op grond van Artikel 13 EG Verdrag", in T. Loenen et al., (eds.) *Gelijke Behandeling: Oordelen en Commentaar 2000*, Deventer Kluwer 2001, pp. 105-124 and to I.P. Asscher-Vonk, 'Sancties' & Conclusie Juridische Analyse', in I.P. Asscher-Vonk & C.A. Groenendijk (eds.) *Gelijke Behandeling Regels en Realiteit*, Den Haag SDU 1999, pp. 202-234 and pp. 301-319.

A. There hardly ever is compensation in terms of money. This only occurs when, for example, the judge agrees to the dismissal since employment relationships have been disturbed, and in that case sets a relatively high sum for compensation because of the termination of the contract.

B. no information can be given on this topic without an extensive survey into the case law of the cantonal courts and the district courts. Most of the time, such cases are not published in official law journals. Also, the registration of cases within the court system is not systematically done on the basis of the legal provisions at stake. So, it might very well be that a lot of cases are registered under the heading of a general provision like 'breach of labour contract' (with no specification about the reasons for this) or tort. This means that such a survey would extend far beyond the time that is available for up-dating this country report. Very generally speaking it can be noticed that Dutch courts are very restrictive in granting damages that are not strictly 'material damages' (e.g. wages that were not paid). Immaterial damages (e.g. hurt feelings) will only minimally be compensated for.

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?*

Yes: The ETC is the officially designated body by which the governments implements Article 13 of the Race Directive.

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.*

It is an independent quasi-judicial body; its members are installed by the government for a fixed period of time (5 years). It is funded by the government (from the budget of five Ministries). It is accountable to the government by means of an annual report and by independent financial auditing. Every 5 years an internal and an external evaluation report is published (and sent to government and parliament). The annual budget of the ETC amounts to 5 million Euro. It has 9 Members and a Chair and a staff of approximately 45 persons (mostly academic lawyers).

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 ETC deals with all non-discrimination grounds in the GETA, DDA, ADA as well as more specific grounds (like the type of duration of the employment contract). The Commission's principal function is to investigate alleged cases of discriminatory practices or behaviours. Besides, the ETC may investigate structural instances on its own accord²²¹ and may give advice public parties who want to know whether their policies are or are not in

²²¹ The possibilities to do so have been extended by the so-called Evaluatiewet AWGB [Wet tot wijziging van de Algemene Wet Gelijke Behandeling; Evaluatiewet Awgb of 15 September 2005, Stb 2005, 516. (The law that amended the GETA on the basis of proposals that stemmed from the first evaluation of the Act over the period 1994-1999.)

contravenance to the law. It may also give advice to the government in discrimination issues, including proposals for new legislation or proposals for amendments of legislation.

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, they do, with the **exception of assisting victims**. This role is seen as conflicting with the role of investigating individual complaints and giving an opinion about them. In this respect one can conclude that the Dutch equality body is not in conformity with the requirements of Article 13 of the Race Directive. (However, there are other institutions in the Netherlands that are subsidized by the government and that do have the task of assisting victims, like for instance the National Bureau on Combating Racism and the local Anti-Discrimination Bureaus. Formally, they are not designated bodies in the sense of Article 13 of the Race Directive, but they do have this function.)

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

Yes, they do, but they never make use of this opportunity.

f) *Is the work undertaken independently?*

Yes it is. They have a position as a semi-judicial body and the experts that are Members of the Commission all have an independent status.

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.

All of these can be found at the Commission's website www.cgb.nl as well as in the Commission's annual reports. Besides this, the Commission publishes a yearly "Oordelenbundel" [Volume of Opinions], which not only contains the most important *Opinions*, but also review articles in which the most important developments in the case law of the ETC are analysed by independent experts / academics.²²² In 2005 the second 5-year (internal) evaluation of the GETA was published by the ETC.²²³ After it has been completed with an external evaluation report²²⁴ it will be discussed by parliament. If necessary, amendments of the law will be made on this ground.²²⁵

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)*

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) and*

²²² The "Oordelenbundels" are published by Kluwer publishers, Deventer.

²²³ ETC: Het verschil gemaakt; Evaluatie AWGB en werkzaamheden CGB 1999-2004. [To make the difference; Evaluation of the GETA and the work of the ETC 1999-2004.] Published by the ETC (Utrecht), May 2005.

²²⁴ Which will be done by the University of Tilburg on the assignment of the Ministry of Internal Affairs.

²²⁵ This happened after the first evaluation over the period 1994-1999. However, the changes were only effectively made in 2005!

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)

The Ministry of Social Affairs and Employment is primarily responsible for activities to enhance compliance with the equal treatment legislation, esp. as far as this legislation applies to employment relationships. This Ministry has taken the initiative for many different activities to inform the general public about the (new) legal standards, to inform social partners and to stimulate their involvement in the implementation of the legal non-discrimination norms. Also the Ministry is actively engaged into promoting studies and surveys in this field. The same goes for the Ministry of Health and Welfare. Information about their concrete activities can be found at: Information on Websites (www.szw.nl and www.vws.nl).

The following activities have been undertaken in the past years:

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

- Information on Websites of the Ministries (<[file://www.szw.nl](http://www.szw.nl)> www.szw.nl and <[file://www.vws.nl](http://www.vws.nl)> www.vws.nl ;
- Advertisements on websites and papers (May and September 2004);
- Publication of (up to date) information brochures;
- Publication of informative Articles in professional and non professional journals and in the News letter of the Equal Treatment Commission.
- Symposium for persons working in personnel departments, works councils, and collective agreement negotiators in October 2003;
- Campaign “Discrimination? Phone right away” [‘Discriminatie? Bel Gelijk’] (Publication Campaign concerning a telephone helpline), financed by the European Commission and the joint Ministries and which has started in June 2004;
- Campaign Discrimination? Not against me! [Discriminatie? Niet met mij!], (project on empowerment) financed by the European Commission and the joint Ministries and which has started in 2005;
- With regard to ‘disability and chronic disease’: social discussion through the European Year of people with a disability and through the campaign ‘The Challenge for’ [Campagne ‘De uitdaging voor...’] a help desk has been set up.
- In 2005 information sessions are coming up (in joint cooperation with the Dutch association of personnel managers and the Equal Treatment Commission) and publication of Articles is foreseen.

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) and

- The Ministry of Social Affairs and Labour set up the (informal) Network *Equal Treatment* in 2003. Participants in this network are: NGOs, the social partners and the relevant Ministries (see under para. 10 of this report). The Network convenes twice a year in order to exchange information on equal treatment. Twice a year the Newsletter of the Equal Treatment Commission is published.
- The NGOs participate in the management commissions of various projects and campaigns including the campaign ‘Discrimination? Phone right away!’. For other projects: see part C hereinafter.
- With regard to disability and chronic disease: a subsidy has been granted to various NGOs with a view to the provision of information (The Chronically Ill and Disability Council; the Federation of Old People’s associations’; LFB commonly strong (*LFB Onderling Sterk*). Moreover, with regard to the helpdesk mentioned above under A, a cooperation has taken place between the Equal Treatment Commission, the Commission ‘the Working Perspective’ [*Commissie Het Werkend Perspectief*] and Handicap and Study [*Handicap & Studie*].
- With regard to the ground ‘age’: a subsidy has been granted to the National Bureau Age Discrimination, for the project called ‘age and employment’ (see further under C hereinafter).

- With regard to the ground 'race': The National Bureau against Race Discrimination and the Dutch Institute of Psychologists – and under the auspices of the Ministry of Social Affairs and Labour - jointly work on a procedure concerning the taking of psychological tests with ethnic minorities.

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)

1. The Ministry of Social Affairs has executed the so-called 'Article 13 Project' which consists of the following:

- Small and medium sized companies courses & training (information sessions for Intermediates).
- Small and medium sized companies courses & training (information sessions for personnel managers).
- Small and medium sized companies/ AV Breed training (promotion of expertise of Collective Agreement Negotiators of branche organisations via the small sized and intermediate companies courses & training).
- Providing information: Articles have been written and have appeared multiple professional journals.
- Big Companies Project [*Grote Bedrijven Project*]: interviews with big companies on equal treatment.

2. Participation of the Social Partners in the Network Equal Treatment. Info on this Network has been given under B above.

3. Project 'Age and Employment' (for which a subsidy has been granted by the Ministry of Social Affairs and Labour to the National Bureau on Age Discrimination). This project sees at the promotion of expertise of inter alia: works councils, employers, trade unions, personnel managers and employment mediators.

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?

Article 9 of the GETA, Article 13 of the ADA and Article 11 of the DDA stipulate that 'agreements' which are in contravention of the equal treatment legislation shall be null and void.

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

The Ministry of Social Affairs and Employment made an inventory in 2005. Also, other Ministries were required to do so. See for a description of these documents and the references, para 4.7.1 and para 9 of this report.

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.*

In this section a number of developments / observations will be described that could not find a place in the previous paragraphs. First some general issues (concerning all grounds) will be discussed, next some developments for each of the grounds will be mentioned.

Towards one Human Rights Institute?

For some years there has been discussions going on about the question whether the Netherlands needs a Human Rights Institute (e.g. in the form of an Ombudsman or an Independent Body). There were also voices that such an institute would have to include or integrate existing institutes, like the ETC, the National Ombudsman, the Commission for Protection of Personal Data and the Study and Information Center on Human Rights (SIM, a department of the University of Utrecht). In 2005, these institutions have issued an Advice for the government on this topic.²²⁶ They state that the existing institutes should closely co-operate, but should not be abolished as independent institutes. The government has agreed to these proposals. Currently this group of institutes is working on setting up a new 'overall' institute within the buildings of the SIM in Utrecht. This new institute will have the following tasks: to run a help desk where people can ask to what institute they should turn with complaints or questions, to give advice to the government or to private parties, to monitor human rights infringements, to enhance international co-operation in the field of human rights protection, to participate in educational and training activities (e.g. for judges) and to work on public awareness raising.

Towards one integrated Equal Treatment Act?

There are many different equal treatment Acts in the Netherlands. The government strives for one new Integrated Equal Treatment Act in which all of these provisions will be brought together.²²⁷ In that framework there are discussions about the question whether all discrimination grounds should be protected in exactly the same way and whether the terminology (*onderscheid* = distinction) should be changed. It is expected that a bill will be send to Parliament before the summer of 2006.

Some changes on the basis of the first evaluation of the GETA

A full 5 years after the first evaluation of the GETA took place (both by the ETC and external experts) some minor changes in the GETA were adopted in the so-called 'Evaluatiewet AWGB' [Evaluation Act GETA].²²⁸

The main change was the extension of the mandate of the ETC. Article 12 (1) reads as follows:

"The [Equal Treatment] Commission may, in response to a request in writing, conduct an investigation to determine whether discrimination as referred to in this Act, the Equal Opportunities Act or section 646 of Book 7 of the Civil Code has taken or is taking place, and may publish its findings. The Commission may also conduct an investigation on its own initiative to determine whether such discrimination is systematically taking place *in the public service or in one or more sectors of society*, and publish its findings." (Italics added.)

In this provision, following the amendments, the words "in the public service or in one or more sectors of society" have been erased. This means that surveys now can be conducted in

²²⁶ To be downloaded from: http://www.cgb.nl/download/adviezen/advies_2005_03.pdf

²²⁷ See Tweede Kamer 2002-2003, 28 169, nr 30, Idem 28170, nr. 12 en TK 2004-2005, 29 311, nr. 8. The government has presented a draft bill to the ETC and various NGO's who have commented on it. It is now expected to be send to Parliament before the summer of 2006.

²²⁸ Stb 2005, 516.

all sectors. The new law has thereby lifted some obstacles to the Equal Treatment Commission performing its function in the sense of Article 13 of the Race Equality Directive (performing independent surveys; see Article 13 (2)).

Numbers of cases dealt with by the ETC²²⁹

Tabel 11 - Dicta en Opinions²³⁰ in 2005

	Total dicta		Total Opinions	
	Absolute	%	Absolute	%
Sex	53	18	48	20
Race	30	10	23	9
Nationality	7	2	6	2
Religion	17	6	15	6
Sexual Orientation	2	1	2	1
Civil status	11	4	9	4
Political conviction	1	0	0	0
Philosophy of life	2	1	1	0
Working hours	22	8	13	5
Temporary/permanent employment	9	3	7	3
Disability/Chronic Illness	36	12	33	13
Age	100	34	88	36
Total	290	100	245	100

Effectiveness of the equal treatment legislation in the light of ‘dark numbers’

In the course of its second (internal) evaluation the ETC has done research into the question whether people who feel that they are discriminated against do use the legal means to stand up against this.²³¹ From the research it appears that 15% of the population appears to have experienced some sort of discrimination, which would amount to 2 million people. The outcome of this survey shows that only 11% of these people take some sort of legal action against this. The barriers are especially high among people from ethnic minorities. In this evaluation report the Commission recommends to strengthen the structures / institutions that have a role in assisting and supporting victims of discrimination.²³² Possibly, this is one of the causes that only 34 cases of racial and ethnic discrimination were dealt with by the ETC in 2005.

Instruments to enhance compliance with equal treatment norms

²²⁹ This diagram was supplied to the author of the present report by the ETC. (The translations are mine.) It will be published in the annual report for 2005 (forthcoming). All annual reports can be downloaded from:

<http://www.cgb.nl/downloadables.php>

²³⁰ Dicta are the separate issues that the ETC decides upon; Opinions are the written outcome of a procedure before the ETC. There could be more than one issue in one Opinion.

²³¹ ETC: Het verschil gemaakt; Evaluatie AWGB en werkzaamheden CGB 1999-2004. [To make the difference; Evaluation of the GETA and the work of the ETC 1999-2004.] Published by the ETC (Utrecht), May 2005

²³² See also P. R. Rodrigues, ‘Ras en nationaliteit’ [Race and nationality]. In: Oordelenbundel 2005, ed. S.D. Burri, Kluwer, Deventer June 2006 (forthcoming). Rodrigues also refers to the Monitor Rassendiscriminatie 2005 [Racial Discrimination Monitor], ed. I. Boog; Rotterdam LBR 2006 (forthcoming).

In 2004, the Ministry of Social Affairs and Employment commissioned a research into the instruments that can be used to enhance compliance with equal treatment rules.²³³ The report was published and sent to Parliament in October 2005.²³⁴ The researchers conclude that there are various methods to enhance changes in the way decisions are being made within enterprises. In his letter to Parliament the Minister summarises the main conclusions from the research. In all cases governments are using instruments to bring about changes in the conditions under which decisions in labor organizations concerning e.g. hiring and firing personnel are being made. These instruments, therefore, always target employers, whether directly or indirectly, but other parties are called to participate as well: unions, works councils, individual employees. The three principal instruments are: A. Information and Employee empowerment, B. Negotiating and Contracting with organisations, and C. Generating co-operation and learning within organisations. In his letter the Minister makes clear that in his view all three strategies are followed in the Netherlands. No concrete changes of governmental policies were announced on the basis of the recommendations in the report.

The Ministry of Social Affairs and Employment also commissioned a study into the question how enterprises and companies implement the equal treatment laws in the workplace.²³⁵ Not only the equal treatment Acts (GETA, DDA and ADA) were examined, but also relevant other norms like the Medical Examination Act, Recommendations and guidelines with regard to recruitment of personnel and the Affirmative action policies with regard to women, people with a certain ethnic background and disabled people. The Institute that did the research (IVA, Tilburg) first looked at the familiarity with these norms. It found that this depends to a great extent to the 'freshness' of the norms (e.g. gender discrimination is better known of than disability discrimination because these laws have existed for a longer period). Also, small companies (less than 100 employees) and companies in the market sector are less well aware of the norms. The same observations are made with respect to the question in how far these norms are respected. The third factor that was examined was the attitude towards this legislation. It was found that the organisations subscribe to the objectives of these laws to a great extent. However, at the same time it is found that companies have the feeling that these laws may endanger their autonomy to a too great extent.

Racial and ethnic discrimination:

In his overview for the '*Oordelenbundel 2005*' [Volume of Opinions] Rodrigues rightfully points out that the social and political climate in the Netherlands has become more 'harsh' for immigrants. A climate of intolerance is developing rapidly. According to this author, this can also partly be attributed to a number of measures that the government itself is taking. As such he mentions the following laws / proposals for new legislation in which directly or indirectly a distinction based on 'origin' is being made:

- The so-called 'Rotterdamwet' has been adopted by Parliament, despite the warning of the ETC that this law (on the basis of which local governments can withhold a housing permit to low-earning people) will have indirect discriminatory effects for ethnic minorities or immigrants.²³⁶

²³³ The study was done by the Hugo Sinzheimer Institute of the University of Amsterdam: T. van den Berge, R. Knegt, M.H. Schaapman & I. Zaal: 'Policy Instruments to enhance compliance with equal treatment rules.' (The Report is written in English.) Published by the Ministry of Social Affairs and Employment, The Hague, 2005.

²³⁴ See letter from the Minister of Social Affairs and Employment, Tweede Kamer 2005-2006, 28 170 nr. 43.

²³⁵ R. Hermanussen & T. Serail: *Gelijke behandeling in bedrijf* [Equal treatment in company]. IVA Tilburg June 2005, published by the Ministry of Social Affairs and Employment, the Hague 2005. (With a summary in English.)

²³⁶ Tweede kamer 2004-2005, 30 091. Law of 20 December 2005, Stb 2005, 726. The ETC has advised against such policies. See e.g. ETC-Advice 2005-03. See also below, in this subsection.

- The bill for the so-called ‘inburgeringswet’ (social integration law) classifies between various categories of people, who do and don’t have to do an exam in order to become a Dutch national.^{237 / 238}

Various Reports and Memoranda need to be mentioned here:

In April 2005 the government presented a survey to Parliament from which it became very apparent that racial and ethnic discrimination in the labour market is persistent and wide spread.²³⁹ In May 2005 the Minister of Social Affairs and Employment responded with a policy Memorandum, ‘Arbeidsmarkt en etnische minderheden. [Labor market and ethnic minorities.]’²⁴⁰ The Minister acknowledges the problems and describes an array of measures. These include *inter alia* a media campaign to make immigrants more aware of their rights and improving psychological tests for job assessments.²⁴¹ In addition, the Minister also presented a Memorandum on ‘Law enforcement and discrimination in the labour market’ [Rechtshandhaving en discriminatie op de arbeidsmarkt].²⁴² In this Memorandum it is (again) stressed that the ETC has to play the most important role in this respect. A suggestion, made by the researchers, to use the instrument of *naming and shaming* of employers who discriminate, is rejected by the government.

In addition to all this the Minister of Justice has published a Memorandum on ‘Combating discrimination and law enforcement’ [Discriminatiebestrijding en rechtshandhaving].²⁴³ In this Memorandum the Minister discusses the Criminal Code provisions (Articles 90 quarter, 137d, e, f and g and 429 quarter). The Minister is satisfied that the number of subpoena’s has increased considerably in 2004 and that the number of dismissals in 2003 and 2004 has decreased. The Minister also describes that new guidelines have been given to the public prosecutor offices about more strict policies that should be followed concerning subpoena’s and dismissals of reported cases of discrimination. The National Expert Centre for Discrimination within the Public Prosecutors Office has been extended. Also, there will be a continuation of the special discrimination task force within the police. Several other measures are announced, especially in the sphere of government support to ngo’s that are active in combating (especially racial) discrimination.

The last policy paper, from the side of the government, that needs to be mentioned here, is the so-called ‘vierde Voortgangsbrief gelijke beloning’ [fourth letter that reports on the progress that is made in the field of equal pay].²⁴⁴ In this letter the government acknowledges that research has shown that equal pay is not only a gender issue, but more and more also an issue of racial and ethnic discrimination.²⁴⁵ The ETC responded to the measures that the government announced in the letter by means of an Advice [Advies inzake de vierde

²³⁷ Tweede kamer 2005-2006, 30 308.

²³⁸ As far as the “Inburgeringswet” is concerned is concerned, it should be mentioned that the Permanent Commission of Expert in the Field of International Migration and Criminal Law has deemed these proposals discriminatory. This Advice was discussed in the *Nederlands Juristenblad* [Dutch Journal for Lawyers] of February 3, 2005 (2005, vol 5, p. 295.) One of the aspects that was criticized by this commission is that in order to implement this law the government will have to construct databases with information about the descent of people, which might be threatening from privacy-protection perspective.

²³⁹ Tweede Kamer 2004-2005, 27 223, nr 65. The title of the report is: ‘Etnische minderheden op de arbeidsmarkt; Beelden en feiten, belemmeringen en oplossingen.’ [Ethnic minorities in the labour market; images and facts, obstacles and solutions.]

²⁴⁰ Tweede Kamer 2004-2005, 27 223, nr 66.

²⁴¹ See P. R. Rodrigues, ‘Ras en nationaliteit’ [Race and nationality]. In: Oordelenbundel 2005, ed. S.D. Burri, Kluwer, Deventer June 2006 (forthcoming)

²⁴² Tweede Kamer 2004-2005, 27 223, nr 73.

²⁴³ See Tweede kamer 2005-2006, 30 300 VI, nr. 26.

²⁴⁴ Letter of the Minister of Social Affairs and Employment, 3 December 2004, AV/IR/2004/78946.

²⁴⁵ The government refers to the report ‘De arbeidsmarktpositie van werknemers 2002’ [the labourmarket position of employees in 2002] that was issued by the Labour Inspectorate.

Voortgangsbrief gelijke beloning].²⁴⁶ In this Advice the ETC comes with a long list of recommendations to improve the policies to combat pay discrimination. The last one of these summarizes them adequately, in the present author's view: It is recommended: "To choose a less non-committed approach to combating wage discrimination." The ETC recommends setting specific targets (streefcijfers) and to adopt a duty for employers to report about the tools that they have applied to erase wage discrimination. Another suggestion is to use the instrument of contract compliance and to include the norm of equal wages in the tools that are used for assessing the quality of enterprises.

At the request of the Minister of Immigration and Integration, a group of stakeholders (both from within and outside the government) have issued a report called 'Perspectief op Gelijke Behandeling' [Perspective on Equal Treatment] about the future of the Anti-Discrimination Bureaus (ADB's) in the Netherlands.²⁴⁷ Ant-discrimination bureaus are NGO's who are subsidized by the national and local governments. The report describes their situation as regards their tasks, their functioning, their co-operation, and (most importantly) their financial situation. It also gives a great many recommendations as regards the improvement of their functioning and of their financial position. The functioning of the ADB's is of crucial importance in respect of the necessary assistance to victims of discrimination (Article 13 Race Directive). The ETC does not have this function. The Minister of Immigration has announced that she will send a Memorandum with the government's proposals [Plan van Aanpak Discriminatiebestrijding] to Parliament before the summer of 2006.

Discrimination on the ground of age:

As mentioned above (see the *Introduction* to para 0.3: Overview of case law) there were a great many cases before the courts and before the ETC about the legality of distinctions on the ground of age. This case law has raised a lot of debate. Very briefly summarised these debates concern the following issues:

- Is the fact that the legislator made a certain age distinction in itself sufficient to constitute an objective justification for the legislator? This concerns the "Mangold test". It has already been noted (para 4.7.1, above) that the Dutch government has investigated which age criteria do exist in the legislation and what are the objective justifications for them.²⁴⁸ This debate also concerns the boundaries of the powers of the judiciary and the ETC: can they declare something to be an unlawful 'distinction' when the legislator has wilfully declared that there is an objective justification for this distinction? The debate touches upon the old debate in the Netherlands about the possibility constitutional review.²⁴⁹
- Related to this issue is the question whether third parties (e.g. employers or social partners who construct a collective labour agreement) can rely on legislation where a similar age distinction has been made. This issue came up where social partners constructed additional (pre)pension schemes that fitted in with the fiscal regime for

²⁴⁶ CGB-advies 2005/02, to be downloaded from www.cgb.nl

²⁴⁷ The Advice has been sent to Parliament on February 13, 2006. See TK 2005-2006, 30300 VI, nr. 117.

²⁴⁸ See also the inventory that was made by the National Expert Centre on Age Discrimination (LBL): E. Smolenaars, *65 jaar als uiterste houdbaarheidsdatum*, Utrecht: LBL 2005. From this inventory it appeared that the 65-year criterion exists 898 times in 386 official Acts, regulations and decrees.

²⁴⁹ This is not allowed when it concerns official Acts of the national government. However, these can be tested against international law. See also Hof Den Haag [Court of Appeal, the Hague] 24 maart 2005, *JAR* 2005, 98, where the Court of Appeal stated that a verdict (i.e. of a district court) never can contain the instruction to make new legislation or to amend existing legislation.

such ‘savings’. According to various commentators this is not *per se* an objective justification.²⁵⁰

- Much debate is going on about what factors can be accepted as ‘objectively justifying’ distinctions on the ground of age. It becomes clear from the case law that the following factors are not *per se* a justification ground:
 - a. The fact that the legislator has included or maintained a certain age criterion in its (own) legislation.
 - b. The fact that the criterion is included in a collective agreement between social partners and is (also) otherwise widely socially accepted as a ‘reasonable’ criterion.
 - c. The fact that abolishing the criterion would cost money.²⁵¹ As far as age discrimination is concerned the ETC seems to make a nuance: if the equal treatment on the ground of age would constitute a ‘disproportionate burden’ this could be brought forward as an objective justification.²⁵²
- Collective agreements do in fact contain a lot of age criteria. Research, published in 2005, shows that 121 out of 122 investigated collective agreements contained age criteria that were not motivated at all.²⁵³ In order to stimulate that the social partners become more aware of the reasons of applying age criteria the Minister of Social Affairs and Employment has expressed the intention to formally ask social partners to always express themselves about the reasons for including such criteria in the collective agreement.²⁵⁴
- Should the objective justification test, which has been developed in the context of indirect gender discrimination, be applied in exactly the same way when testing direct and indirect age discrimination? Age seems a different criterion (different from e.g. sex or race) requiring a different way of testing. There are several arguments for this stance; two of them are heard most often: (1) age is not a fixed category (you will change age all your life, you will not change skin color)²⁵⁵ and (2) it is very difficult to assess with whom the complainant should compare herself.²⁵⁶ The author of the present report is of the opinion that especially the proportionality test (i.e.: the test whether a given measure is proportionate, in the sense that it is absolutely necessary to reach the (otherwise) legitimate goal of the measure) should be applied less strict in case of age discrimination.²⁵⁷ The judges / the ETC should leave some margin of

²⁵⁰ See Mark Heemskerk, ‘Leeftijdscriminatie bedriegt arbeidsvoorwaarden; Hoe demonteer ik de tijdbom van leeftijdsdiscriminatie?’ In: *Nederlands Juristenblad* 2005, vol 8, p. 412-419. See also: M. Heemskerk, ‘Leeftijdsonderscheid bij pensioen. De gevaren van overgangsrecht en de solidariteit tussen de generaties.’ Publication of the Vrije Universiteit Amsterdam. To be downloaded from: www.vuexpertisecentrumpensioenrecht.nl See also: E. Lutjens, ‘Leeftijdsonderscheid bij pensioen: een tikkende tijdbom bij grenspaal 55?’, *P&P* 2005, Vol 12.

²⁵¹ This is fully in line with case law by the ECJ, the Dutch Supreme Court and the ETC; see e.g. ECJ 24 February 1994, C-343/92 (*Roks e.a.*), *Jur.* 1994, p. I-587-604; HR 24 April 1992, *NJ* 1992, 689; ETC Opinion 2002-165; 2003-23, 2004-16 and 2005-83. See also: R.C. Tobler, ‘Enkele opmerkingen over rechtvaardiging van indirecte discriminatie om economische redenen in het EG-recht’, in: S.D. Burri (ed.), *Gelijke behandeling oordelen en commentaar 2004*, Deventer: Kluwer 2005, p.123-134. (These references are derived from the contribution of Heemskerk & Dankbaar for the *Oordelenbundel 2005*.)

²⁵² *ECT Opinion 2005-181*. See also Heemskerk & Dankbaar (see previous footnote).

²⁵³ J.J.H. Schrama, C. Klaassen & E.C. Junger-van Hoorn, *Onderscheid naar leeftijd in CAO's*, Den Haag: SZW 2005.

²⁵⁴ Tweede Kamer, 2004-2005, 28 170, nr. 40, p. 3-4. See about this issue also M. Heemskerk & M.J.J. Dankbaar, ‘Leeftijd’ [Age]. In: S.D. Burri (ed.) *Oordelenbundel 2005*. Kluwer, Deventer June 2006, forthcoming.

²⁵⁵ This argument has also been used by the Dutch Supreme Court, HR 8 oktober 2004, *PJ* 2004, 124; *JAR* 2004, 258.

²⁵⁶ See M. Heemskerk & M.J.J. Dankbaar, ‘Leeftijd’ [Age]. In: S.D. Burri (ed.) *Oordelenbundel 2005*. Kluwer, Deventer June 2006, forthcoming. See also Mark Heemskerk, ‘Leeftijdscriminatie bedriegt arbeidsvoorwaarden; Hoe demonteer ik de tijdbom van leeftijdsdiscriminatie?’ In: *Nederlands Juristenblad* 2005, vol 8, p. 412-419.

²⁵⁷ She has expressed this opinion in an unpublished *Memorandum* for the Algemeen Burgerlijk Pensioenfond. In this paper she also refers to the work of Janneke Gerards, who developed a model for testing discrimination cases, in which model there is place to differentiate the strictness of the test according to the nature of the various non-discrimination grounds. See J. Gerards, ‘*Judicial Review in Equal Treatment Cases*’, Leiden/Boston: Martinus Nijhoff Publishers 2005. See also: Gerards, ‘Het toetsingsmodel van de CGB voor de beoordeling van indirect onderscheid’. In: *Gelijke Behandeling: Oordelen en Commentaar [Oordelenbundel 2002]*, Kluwer 2003, pp. 77-95 and Gerards ‘Proportionaliteit en gelijke behandeling’, .H. Gerards, ‘Proportionaliteit en gelijke behandeling’, in: A. Nieuwenhuis, B. Schueler en C. Zoethout (red.), *Het proportionaliteitsbeginsel in het publiekrecht*, Deventer: Kluwer 2005, p. 79-110.

appreciation to the legislator / social partners or employers as to what measures they choose to reach their legitimate aims. Otherwise the court / ETC runs the risk of becoming a policy maker themselves, by way of assessing which tools are adequate to reach a certain goal. It is questionable whether they are equipped to make such assessments at all.²⁵⁸

- Should employers have the right to ask the ETC or the judge to declare certain (often by means of a Collective Agreement) contractually agreed benefits for older workers null and void when they themselves have designed these benefits? This became a point for discussion when employers started to withhold extra holidays from older workers with the argument that these extra holidays were illegal from a point of view of the ADA.²⁵⁹ Some lawyers state that this is not possible since the overall goal of the ADA is to protect employees from discrimination, not to facilitate employers to cut down on their expenses.²⁶⁰
- Also much debated is which references to a certain age are acceptable in job advertisements.²⁶¹ Very often the requirement of a certain age is 'camouflaged' by the employer. Examples are 'the applicant will have to fit into a dynamic and flexible team' or 'the candidate needs to have at least 10 years of experience'. According to the ADA any reference to age in such ads must be accompanied by an explanation why having a certain age is required. (Article 9 GETA.) This also goes for indirect references to age. In 2005, the ETC published a report in which guidelines for job advertisements (on the basis of their case law) have been given.²⁶² The National Expert Centre on Age Discrimination (LBL) also published guidelines for drafting (ADA-proof) job advertisements.²⁶³
- A further point of interest is the fact that the ETC published an advice on the topic of selection criteria for 'vakkenvullers' (the job of shelf filler) in the supermarket branch.²⁶⁴ In this publication the ETC summarizes the criteria that it has developed in many such cases that were brought to their attention.²⁶⁵ Supermarkets often only want young people (between 16-18 years old) for supplying their stores. These youngsters (often pupils or students) are paid only the minimum wage for these age categories. From this case law of the ETC (and the subsequent publication) it appears that financial arguments can play a role in the justification test. This is the case when this argument is used in the context of enhancing the labor market participation of young people, which is also the reason behind the (low) minimum wages for the age categories of 16-18 year old people.²⁶⁶
- The government does not want stop its policies of combating age discrimination at issuing non-discrimination norms (in the ADA) but has also announced some further policy instruments, mainly with a view of stimulating the (labor) participation of older people. Most important are the so-called 'route planner' for the discussion about the pensionable age of 65 years.²⁶⁷ This concerns mainly measures to take away any legal or other obstacles for elderly people to stay in the labor market. This topic is related to

²⁵⁸ In the same sense Mark Heemskerk, 'Leeftijdscriminatie bedriegt arbeidsvoorwaarden; Hoe demonteer ik de tijdbom van leeftijdscriminatie?' In: *Nederlands Juristenblad* 2005, vol 8, p. 412-419 at p. 415.

²⁵⁹ See for example: Rb Rotterdam [District Court of Rotterdam] 15 June 2005, *LJN*: AT7822. See also ETC, *Opinions* 2004-118, 2004-150 and 2005-66, 2006-69 and 2006-110. See for a commentary M.S.A. Vegter, 'Extra vakantiedagen voor oudere werknemers', in *Sociaal Recht* 2004-11, p. 379-380.

²⁶⁰ See E.H. van Stigt Thans, 'Leeftijdscriminatie en seniorenendagen'. In: *Nederlands Juristenblad*, 2006, vol 7., p. 376-377.

²⁶¹ E.g. *ETC Opinion* 2005-198.

²⁶² See ETC: *Leeftijdsonderscheid in advertenties*, advies 2005/06, Utrecht: CGB 2005. To be found at: www.cgb.nl

²⁶³ See: http://www.leeftijd.nl/arbeid/checklist_advertenties/hoel.html.

²⁶⁴ Commissie Gelijke Behandeling, *Te jong te oud*, advies 2006-02, Utrecht: CGB 2006. To be found at: www.cgb.nl

²⁶⁵ In 2005 these were the decided in the *Opinions* 2005-83, 2005-139, 2005-179 and 2005-180.

²⁶⁶ On the basis of Article 7 sub a of the ADA, which refers to labour market policies of the government. See M. Heemskerk & M.J.J. Dankbaar, 'Leeftijd' [Age]. In: S.D. Burri (ed.) *Oordelenbundel* 2005. Kluwer, Deventer June 2006, forthcoming.

²⁶⁷ See Tweede Kamer 2004-2005, 28 170, nr. 29 and nr. 37.

another topic, which is called ‘vergrijzing’ (graying): the aging of the population. (In 2010 the ‘baby boomers who were born after World War II will become pensioners.) In that regard the ministry of Health and Welfare has issued a policy plan called “Vergrijzing en het integrale ouderenbeleid”. [Graying and integral policies for elderly people.]²⁶⁸

Sexual orientation

Compared to the number of cases in the field of age discrimination the number of cases on discrimination on the ground of sexual orientation is remarkably low. In 2005 only 3 cases on this ground were dealt with by the ETC.²⁶⁹ Nevertheless, this can not be seen as a signal that discrimination on the ground of sexual orientation is not a problem any more. In some sectors of society acceptance of homosexuality seems to decrease instead of to increase. E.g., in newspapers there were various reports of gay or lesbian teachers being threatened or harassed, often by Muslim pupils or students. The government issued a policy paper on ‘homo emancipation policy’ [Homo emancipatiebeleid] for the period 2005-2007.²⁷⁰ In this paper the government announced that it has three goals for this period: (a) to enhance the social acceptance of homosexuality; (b) to enhance the integration and ‘social bonding’ of some groups of vulnerable homosexuals (e.g. elderly men and homosexual immigrants); (c) to enhance security and to combat discrimination. The government describes that the accent has moved from ‘equal treatment’ to issues such as ‘leefbaarheid’ (‘wellness’), safety, integration, personal responsibility and inclusive policies (another term for what in English speaking countries might be called mainstreaming). With personal responsibility it means that the work of the ngo-sector becomes more important and has to be (more) self reliant. The government takes the stance that equal treatment and non-discrimination of homosexuals is a ‘non-negotiable’ norm.

Disability

Disability has been added as a non-discrimination ground in the criminal law provisions that prohibit discriminatory speech and publications²⁷¹ and discrimination while conducting a professions or having an enterprise.²⁷² The provision prohibiting the latter is the criminal code ‘counterpart’ of the non-discrimination clauses in Labour Law (Civil Code) and in the Equal Treatment Act (DDA). However, this is a misdemeanour provision, not a crime.^{273 / 274}

There still is discussion whether disability should be added in the list in Article 1 of the Constitution. See para 1 of this report.²⁷⁵

See also the remarks in para 2.6 about accommodations and in para 5 about inclusief beleid.

Religion

²⁶⁸ See Tweede Kamer 2004-2005, 29 389, nr. 5 and nr. 6. See also the report by the ‘Parlementaire themacommissie ouderenbeleid’ [Parliamentary thematic commission for policies concerning elderly people]: Tweede kamer 2005-2006, 29 549 nr.s 4 and 5.

²⁶⁹ C. Waaldijk: ‘Seksuele gerichtheid en burgerlijke staat’ [Sexual orientation and civil status]; in: Oordelenbundel 2005, red. S.D. Burri, Kluwer Deventer June 2006 (forthcoming.)

²⁷⁰ Tweede Kamer 2004-2005, 27 017, nr. 11.

²⁷¹ Articles 137d-f Criminal Code.

²⁷² Article 429quater Criminal Code.

²⁷³ Disability was not included in 137g Criminal Code where it is prohibited to discriminate in a profession or enterprise on the ground of (inter alia) sex or race. This Article is a crime-provisions and is sanctioned more severe than the misdemeanour provision of 429quater.

²⁷⁴ See Staatsblad 2005-111 and 211.

²⁷⁵ In April 2006 the Commission of Constitutional Law experts issued its report.

The debate about religious discrimination now takes place within the context of the debate on the multicultural society.²⁷⁶ The central question is whether ‘deviant’ religious opinions should always be respected, or that there are boundaries to religious freedom and religious equality. With ‘deviant’ is meant: opinions that are contrary to (in the Western world) generally accepted (human rights) norms such as equality of men and women or the right to express oneself according to one’s sexual preference (homosexuality). As has been clarified under the heading of ‘sexual orientation’ the government takes the firm stance that the norm of equal treatment of homosexuals is ‘not negotiable’. This means that discrimination on this ground can not be justified with reference to a religious conviction. A factor that plays a role in this discussion is the freedom of speech, which allows people to say ‘nasty’ things about religious beliefs. An example of this is the ‘acting out’ of the liberal party Member of Parliament Ayaan Hirsi Ali, who (*inter alia*) wrote in the newspapers that the prophet Mohammed was a notorious child abuser. She also made a film about violence against Muslim women in which texts from the Koran – justifying this violence – were written all over a naked body of a woman. Subsequently, the maker of the film (Theo van Gogh) was murdered by a Muslim man, who justified his deed while referring to his religion. Later this man was found to be a member of the so-called “Hofstad groep”, a group of young Muslim men who were preparing terrorist acts. (11 of them have been convicted in court.) In this respect there is a lot of concern about the education of young Muslim people by Imams or in separate Muslim schools.

There are two aspects of this general debate that are of interest here: the aspect of dress codes and security and the aspect of the freedom to found schools according to one’s religious beliefs.²⁷⁷

As far as dress codes are concerned there is a lot of case law from the ETC concerning a wide range of issues, mostly dealt with as cases of direct religious discrimination.²⁷⁸ In relation to the issue of terrorism especially wearing a “Burka” in public places raised a lot of concern. The issue was debated in Parliament, where a motion was accepted in which the government was asked to draft legislation in which wearing ‘face covering gowns’ in public places will be banned altogether.²⁷⁹ The government has not yet reacted to the motion. This is a highly disputable measure, since this may be ‘overreacting’ and restricting religious freedom in a disproportionate manner (which would make the government vulnerable from a point of view of complying to the ECHR-standards concerning religious freedom!).

Another motion was accepted (but later withdrawn) in which the government was asked not to give work permits to Imams who come from Arab countries to the Netherlands to teach in Mosques. The motion suggested that this would only have to become effective when there are enough (publicly funded and controlled!) educational institutes in the Netherlands where

²⁷⁶ B.P. Vermeulen & C.M. Zoethout, in their contribution to the Oordelenbundel 2005 (see above), mention a range of publications on this issue. We have copied these here for reasons of being as complete as possible in this report: Michiel Hegener, *Vrijheid van godsdienst*, uitgeverij Contact, Amsterdam/Antwerpen 2005; B.P. Vermeulen, ‘Religieus pluralisme als uitdaging aan de “neutrale” rechter’, *Trema*, special mei 2005, p. 243-250; M. Galenkamp, ‘Religieuze overtuigingen en het discriminatieverbod, Enkele bedenkingen bij het leerstuk van interpretatieve terughoudendheid’, *Trema*, special mei 2005, p. 251-256; Ch. Samkalden, ‘Pluriforme gedachten over de nota Grondrechten in een pluriforme samenleving’, *NJCM-Bulletin* 2005, p. 44-59.

²⁷⁷ See B.P. Vermeulen & C.M. Zoethout, ‘Godsdienst, levensovertuiging en politieke gezindheid’ [Religion, philosophy of life and political conviction]; in: S.D. Burri (ed.) *Oordelenbundel 2005*. Kluwer, Deventer June 2006, forthcoming. See for this topic also above, in this paragraph, under the heading of ‘race’.

²⁷⁸ See par 0.3. of this report. An example where the Burka was discussed by the ETC in 2005 is case 2005- 86, where an institute for social welfare required clients not to wear a Burka while discussing their problems with the social welfare worker. This was a disproportionate measure, according to the ETC.

²⁷⁹ See Tweede Kamer 2005-2006, 29 754, nr. 41; See also: Minutes of the Second Chamber 2005-2006, p. 2546-2546

Imams are educated and trained.²⁸⁰ The Advisory Committee for Issues concerning Foreigners (ACVZ) brought out an Advice, stating that such a measure would not be acceptable from the point of view of religious freedom and the principle of equal treatment and would not be in line with the general principle of separation of State and religion.²⁸¹

10. CO-ORDINATION AT NATIONAL LEVEL

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

For various (legislative) procedures and paths, frequent co-operation exists between the Ministries of: *Interior and Kingdom Affairs, Justice, Education/Culture/Science, Social Affairs and Labour* and *Health/Welfare/Sports*. For certain specified projects, the Ministries of *Housing, Planning and Environment* and *Traffic and Water* are also involved. The co-ordination can be mirrored in the following way:

- Equal Treatment in Employment: (inter alia: Equal Treatment Act Men/Women): *Ministry of Social Affairs and Labour*.
- Age Discrimination: *Ministry of Social Affairs and Labour*.
- Disability Discrimination: *Ministry of Health Welfare and Sports*
- General Equal Treatment Act + Constitutional provisions: *Ministry of the Interior and Kingdom Relations*.
- Criminal law provisions regarding discrimination: *Ministry of Justice*

Annex

1. Table of key national anti-discrimination legislation

2. Table of international instruments

²⁸⁰ See Tweede Kamer 2004-2005, 29854, nr. 10. (This motion was withdrawn later on.)

²⁸¹ See ACVZ, *Toelating en verblijf voor religieuze doeleinden*, [Admittance and residence permits for religious purposes.] Den Haag 2005.

ANNEX 1: TABLE OF KEY NATIONAL ANTI-DISCRIMINATION LEGISLATION**WEBSITES: www.cgb.nl (and www.overheid.nl).**

Name of Country

THE NETHERLANDS

Date

DECEMBER 2005

Title of Legislation (including amending legislation)	In force from:	Grounds covered	Civil/Administrative/ Criminal Law	Material Scope	Principal content
This table concerns only key national legislation; please list not more than 10 anti-discrimination laws (which may be included as parts of laws with wider scope). Where the legislation is available electronically, provide the webpage address.	Please give month / year			e.g. public employment, private employment, access to goods or services	e.g. prohibition of direct and indirect discrimination or creation of a specialised body
1. The Act on Equal Treatment between Women and Men 1989 (NB: after that year the Act has been amended several times).	1989 (Law Gazette 1989, 168).	Sex	Civil law and administrative law	<i>Grosso modo</i> : Access to employment (public and private), remuneration, the liberal profession, vocational training and pension provision. (pension provision since 1999).	Prohibition of direct and indirect distinction. Protection against victimisation. The Equal Treatment Commission has competence to give Opinions regarding the interpretation of the Act.
2. Articles 7:646 and 7:647 of the Civil Code.		Sex	Civil Law	Equal Treatment between men and women within employment (7:646) and protection against victimisation dismissal	Prohibition of direct and indirect distinction. [Direct sex distinction also includes distinction on the ground of

				(7:647).	pregnancy/maternity]. Protection against discriminatory and victimisation dismissal. Equal Treatment Commission has competence with regard to Article 7:646 Civil Code.
3. General Equal Treatment Act	1994 (Law Gazette 1994, 230).	Religion, belief, political opinion, race, sex, nationality, hetero-or homosexual orientation, civil status.	Civil and administrative law.	Employment, goods and services, education, health, and, <i>social security and advantages</i> (for the ground 'race' only).	Prohibition of direct and indirect distinction, instruction to discriminate, prohibition of harassment, protection against victimisation, competence of Equal Treatment Commission.
4. Act on Prohibition of Distinction on the ground of Employment Duration (Article 7:648 of the Civil Code and 125g of the Civil Servants Act	1996	Employment duration (arbeidsduur).	Civil and administrative law	Employment (private and public)	Prohibition of distinction (<i>no</i> distinction is made between <i>direct</i> and <i>indirect</i> distinction). Both are susceptible for 'objective justification'. Protection against discriminatory and victimisation dismissal. Competence of Equal Treatment

					Commission.
5. Act amending the Act on Equal Treatment between men and women and Titel 7.10 of the Civil Code in order to implement the EC Burden of Proof Directive in cases of discrimination on the ground of sex.	2000 (Law Gazette 2000, 635).	Sex	Civil and administrative law	Employment and Pension Provision	Introduction of the partially reversed burden of proof.
6. Act on the Prohibition of Distinction on the ground of the employee's temporary contract/permanent contract (Article 7: 649 of the Civil Code).	2002 (Law Gazette 2002, 560)	Temporary contract/permanent contract	Civil Law	Conditions of Employment	Prohibition of distinction (<i>no</i> distinction is made between <i>direct</i> and <i>indirect</i> distinction). Both are susceptible for 'objective justification'. Protection against discriminatory and victimisation dismissal. Competence of Equal Treatment Commission.
7. Act on Equal Treatment on the ground of Age in Employment	1 st of May 2004.	Age (both young and old age)	Civil and administrative law	Employment (public and private).	Prohibition of distinction, instruction to discriminate, harassment, victimisation, competence equal treatment commission

8. Act on Equal Treatment on the ground of disability or chronic disease	1 st of December 2003	Disability and chronic disease	Civil and administrative law	Employment (public and private) and transport	Prohibition of distinction, instruction to discriminate, harassment, victimisation, competence equal treatment commission
9. EC Implementation Act General Equal Treatment Act 2004	1 st of April 2004	Amends (inter alia) the General Equal Treatment Act + the Disability Discrimination Act with a view to compliance with the Article 13 EC Directives	Civil and administrative law		
10. Article 1 of the Constitution	1983	religion, belief, political opinion, race, sex or on any other ground (open ended clause).	Constitutional Law	Predominantly vertical relations but might also have an effect in horizontal relations.	Equality guarantee and prohibition of discrimination (pejorative concept).

Name of country **The NETHERLANDS** **DECEMBER 2005**

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	No	Yes	Yes

Protocol 12, ECHR	Yes	Yes	No	Yes	Yes
Revised European Social Charter	Yes	No	This cannot be said at this stage, since reservations are usually made at Ratification.	Ratified collective complaints protocol? Signed: yes. Ratified: No.	Yes
International Covenant on Civil and Political Rights	Yes	Yes	No	Yes	Yes
International Convention on Economic, Social and Cultural Rights	Yes	Yes	No	Not applicable	Yes
Convention on the Elimination of All Forms of Racial Discrimination	Yes	Yes	No	Yes	Yes
Convention on the Elimination of Discrimination Against Women	Yes	Yes	No	Yes	Yes
ILO Convention No. 111 on Discrimination	Yes	Yes	No, not to the author's knowledge		Yes