

REPORT ON MEASURES TO COMBAT DISCRIMINATION
Directives 2000/43/EC and 2000/78/EC

COUNTRY REPORT
Spain
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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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INTRODUCTION

0.1 The national legal system

Public Administration as defined in the Spanish Constitution (SC) of 1978 is structured in three levels: Central Government, Autonomous Communities (regional governments) and Local Authorities. Central Government has a series of exclusive powers (SC, art. 149). These include criminal and procedural law, civil legislation, labour and social security law, the basic structure and coordination of healthcare, the basic structure of education and the basic legal system for Public Administration. The Autonomous Communities manage some of these fields (such as health and education) and also have the power to adopt legal regulations developing or complementing Central Government legislation in some fields.

Conflicts of powers between Central Government and the Autonomous Communities are resolved by the Constitutional Court (SC, art. 161).

In some of the fields mentioned in Directive 2000/43, such as social advantages and access to and supply of goods and services which are available to the public, including housing, all three tiers of government (Central, Regional and Local) have jurisdiction.

International treaties signed by Spain are included in the internal legal system (SC, art. 96). Spain has ratified practically all of the international instruments combating discrimination. Such is the case for United Nations, International Labour Organization (ILO) and European Council conventions. The *Universal Declaration of Human Rights* is mentioned in Article 10.2 of the SC as a source of interpretation of provisions relating to fundamental rights. The *International Convention on the Elimination of All Forms of Racial Discrimination* was ratified by Spain in 1969, the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights* in 1977 and the *Convention on the Elimination of All Forms of Discrimination against Women* in 1980. Also in relation to the social sphere, there is *ILO Convention 97 on Migration for Employment* (ratified in 1967) and *ILO Convention 111 on Discrimination (Employment and Occupation)* (ratified in 1967). Within the framework of the Council of Europe, Spain ratified the *Convention for the Protection of Human Rights and Fundamental Freedoms* in 1979, but has not yet ratified *Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms*. Spain has also signed up to the *European Social Charter* (ratified in 1980) and the *Convention on the Legal Status of Migrant Workers* (ratified in 1980).

Spain is a non-confessional State: the Constitution of 1978 clearly proclaims a separation between Church and State. In practice, religions are treated in different ways. Catholicism is the dominant religion: it is expressly mentioned in the Constitution and enjoys the closest official relationship with the Government as well as financial support. The relationship between the State and the Catholic Church is defined by four international treaties of 1979 between Spain and the Holy See, covering economic, religious education, military and judicial matters. Jews, Muslims and Protestants have a recognised influence in Spanish Society according to the Government, and therefore have acquired official status through bilateral agreements (signed in 1992). Other religions are covered by the Constitution, but have no special agreements with the State.

Directives 2000/43 and 2000/78 were jointly transposed in Law 62/2003 of 30 December on fiscal, administrative and social measures (*Ley 62/2003, de 30 de diciembre, de medidas fiscales, administrativas y de orden social*) (arts. 27 to 43), published on 31 December 2003 in the Spanish

Official Journal (BOE); in Chapter III (“*Medidas para la aplicación de la igualdad de trato*” – Measures for the application of equal treatment) of Title II (“*De lo social*” – Social measures). This law, and therefore the transposition of both Directives, came into force on 1 January 2004.

They were transposed (under the former centre-right government) with no debate in society at large (there was no formal dialogue with the two sides of industry (employers and trade unions) or with NGOs, as suggested by the Directives), and no political or parliamentary debate. Moreover, the transposition was effected in a law known in parliamentary terms as “*Ley de acompañamiento*” (Accompanying Law), in which over fifty existing laws are amended. This use of accompanying laws to amend many other laws has been repeatedly criticised, for example, by the Spanish Economic and Social Council (ESC), which has to report urgently on bills for accompanying laws. In its report on last year’s bill (adopted on 7 October 2003), the ESC points to “a deterioration of legal guarantees as a result of the use of a law regulating a profusion of disparate matters and that is not easily accessible to or comprehensible by the citizens affected by it,” and remarks that the bill “is not confined to matters directly related to the implementation of the Finance Bill and is used on occasion to introduce legal amendments of a significance greater than that pertaining to a bill supplementing the Finance Bill.”¹

Chapter III of Law 62/2003, by which both Directives are transposed, has three sections:

- ✓ The first section (arts. 27-28) contains a general transposition of the definitions of direct and indirect discrimination, harassment and instructions to discriminate given in the two Directives.
- ✓ The second section (arts. 29-33) transposes various aspects of Directive 2000/43 on equal treatment irrespective of racial or ethnic origin. The scope of the provisions is defined in accordance with art. 3 of the Directive, except as regards employment and training. They include the possibility of adopting positive action measures for certain groups in order to compensate for disadvantages linked to racial or ethnic origin, the entitlement of legal entities to engage in proceedings concerning matters of racial or ethnic origin, and the reversal of the burden of proof. The section also establishes a “*Consejo para la promoción de la igualdad de trato y la no discriminación de las personas por el origen racial o étnico*” (Council for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin).
- ✓ The third section (arts. 34-43) includes measures on equal treatment and non-discrimination at work. It transposes fully provisions relating to employment and training in Directive 2000/43 and Directive 2000/78. It first specifies the possibility of adopting positive action measures for certain groups in order to compensate for disadvantages experienced at work for the various reasons specified in the two Directives, and introduces the reversal of the burden of proof. Then, in arts. 37-41, it amends various labour laws so as to adapt them to the Directives (*Estatuto de los Trabajadores* (Workers’ Statute), *Ley de Integración Social de los Minusválidos* (Law on the Social Integration of the Disabled), *Ley de Procedimiento Laboral* (Law on Procedure in Industrial Disputes), *Ley sobre Infracciones y Sanciones en el Orden Social* (Law on Infringements and Penalties in the Social Sphere) and *Ley sobre el desplazamiento de trabajadores en el marco de una prestación de servicios transnacional* (Law on the relocation of workers in the framework of the provision of transnational services)). Finally, in arts. 42 and 43, it provides for the promotion of equality on various grounds in collective bargaining and the promotion of equality plans to address questions of disability in companies.

¹ For a critique of the transposition of both directives in Spain see Cachón (2004b) and Arias y Hierro (2005).

In the field of disability, Law 51/2003 of 2 December 2003, on Equal Opportunities, Non-discrimination, and Universal Access for Persons with Disability (*Ley 51/2003, 2 diciembre, de igualdad de oportunidades, no discriminación y accesibilidad universal de las personas con discapacidad*) also made progress in the direction indicated by Directive 2000/78. This Law is to be supplemented as regards sanctions by the “Bill on offences and sanctions in the field of equality for disabled people” (*Proyecto de Ley de Infracciones y sanciones en materia de igualdad de las personas con discapacidad*) which the government recently tabled in Parliament (13 January 2006). There is also a bill passing through Parliament recognising sign language and speech aid systems (*Proyecto de Ley de que reconoce la lengua de signos y los sistemas de apoyo a la comunicación oral*), adopted by the Spanish government on the same date.

Law 13/2005 amending the Civil Code with regard to the right to contract matrimony (*Ley 13/2005, de 1 de Julio, por la que se modifica el Código Civil en material de derecho a contraer matrimonio*) allows homosexual couples to marry with the same rights as heterosexual couples.

0.2 State of implementation

The most important points where national law is in breach of the Directives are the following:

- ✓ The terms “has been or would be treated” (Directive 2000/43 and Directive 2000/78, art. 2.2.a) are not included in the Spanish definitions of direct discrimination.
- ✓ There are two differences in relation to art. 2.2.b of the Directive. The first is that the Directive refers to a “provision, criterion or practice”, whereas the Spanish law refers to a “legal or administrative provision, a clause of a convention or contract, an individual agreement or a unilateral decision”. All these situations are referred to as “provision”, and the words “criterion or practice” are not included. The second is that the Directive says “persons” in the plural and the Spanish transposition says “person” in the singular.
- ✓ Law 62/2003 does not specify how indirect discrimination is to be justified.
- ✓ The words “hostile” and “degrading” are not included in the Spanish definitions of harassment.
- ✓ The seventh additional provision of the Law 62/2003, entitled “Non-applicability to immigration law”, states that the articles transposing the Directives shall not affect the regulations provided “in respect of the entry, stay, work and establishment of aliens in Spain in Organic Law 4/2000”. The “justification” of this provision is based on article 3.2 of Directives 2000/43 and 2000/78. But it should not be forgotten that Law 4/2000 regulates issues that are liable to be affected by Directives as “work and establishment” and this exclusion is not in art. 3.2. of Directives.
- ✓ Although Section Two of Chapter Three of Title Two of Law 62/2003 states that “the aim of this section is to establish measures to ensure that the principle of equal treatment and non-discrimination on the grounds of racial or ethnic origin is real and effective in education, health, social benefits and services, housing and, in general, the supply of and access to goods and services”, neither this section of Law 62/2003 nor any other part of it provides any such measures to make the principle of equal treatment “real and effective”.
- ✓ The principle of protection against victimisation is transposed but only in the labour field.

- ✓ Sanctions have only been established in the labour field (Directive 2000/78), but not in the other fields covered by the Directive 2000/43 on ground of racial or ethnic origin, except in the criminal field (The *Bill on offences and sanctions in the field of equality for disabled people*, which began its passage through Parliament in January 2006, establishes sanctions in all fields for discrimination on the ground of disability.)
- ✓ Law 62/2003 recognises the possibility that legal entities and associations may engage “on behalf” of the complainant, but only in employment field and not “or in support”, as stated in art. 10 of Directive 2000/43. (This omission has few practical consequences because there is a general recognition that entities and associations may become involved if they “have a legitimate interest”; see section 6.2.)
- ✓ In relation to the Council for the promotion of equal treatment there are two difficulties: its independence is uncertain for at least two reasons: first, because the definition of its functions omits the word “independent”, which appears three times in Art. 13.2 of the Directive, once in each description of the body’s three functions; and second, because its make-up is of an essentially governmental nature; its effectiveness is questionable because the body will not have a budget of its own; instead it will receive “the necessary support for the performance of its functions” from the Ministry of Labour. (Currently – January 2006 – the government is preparing a Royal Decree to set up the Council and to meet the requirements of independent exercise of functions and efficacy).

The Spanish government decided not to use the additional period for the implementation of Directive 2000/78 (art. 18) in relation to age and disability of up to 2 December 2006, but transposed the Directive in Law 62/2003. In both cases Spanish law meets the requirements of Directive 2000/78.

0.3 Case-law

In Spain only judicial decisions by the highest courts, the Constitutional Court and the Supreme Court, set binding precedents.

The first Supreme Court judgments referring to Directive 2000/78 were given in the Social Division on 9 March 2004², annulling the clauses of collective agreements forcing workers to retire at age 65, because there is no national provision permitting such compulsory retirement. In its legal arguments the Supreme Court made extensive use of the considerations and articles of Directive 2000/78 and concluded that it is discriminatory on the grounds of age to force workers to retire at 65 if there is no provision justifying differences of treatment based on age “by legitimate employment policy, labour market and vocational training objectives”.

On this issue the courts have made many pronouncements. For example, four subsequent Supreme Court judgments have reproduced this doctrine, expressly quoting Directive 2000/78 in their legal grounds³. These judgments have led to an amendment of the Law on the Workers’ Statute (see below in point 2.1.1 and point 4.7).

² See judgments of the Supreme Court (Social Division), both of 9 March 2004 and both concerning AENA (Aeropuertos Nacionales y Navegación Aérea) (n° 765/03 and n° 2319/03)

³ Judgments of the Supreme Court (Social Division) 3427/03 of 6 April 2004; 6506/03 of 15 December 2004; 1744/04 of 1 June 2005; and 495/05 of 21 December 2005.

1. GENERAL LEGAL FRAMEWORK

Constitutional provisions on protection against discrimination and the promotion of equality

Equality and non-discrimination

Equality is one of the “higher values of the legal system” established by the Spanish Constitution of 1978⁴ (art. 1.1), together with liberty, justice and political pluralism.

The Constitution proclaims the general principle of equality and non-discrimination in its article 14: “Spaniards are equal before the law and may not in any way be discriminated against on the grounds of birth, race, sex, religion, opinion or any other condition or personal or social circumstance.” As Puente (2003) points out, “this provision has a special place within the text of the Constitution (in Chapter II, but before its two Parts, namely those concerning “Fundamental Rights and Civil Liberties” and “Rights and Obligations of Citizens”). It is this which has made it possible to recognise the fundamental right to both equality and to non-discrimination. Article 14 thereby guarantees the two specific functions of the principle of equality: placing objective limits on the exercise of power, and providing for the rights of the individual.” Rubio-Marín (2004) notes that the constitutional equality principle in art. 14 is interpreted as requiring the legislator to show that difference in treatment is justified by objective and reasonable grounds. The inclusion of an open-ended list of prohibited grounds of discrimination means that when differentiations are made on these grounds, or on those which could be included (such as, presumably, sexual orientation, age and disability), the degree of judicial scrutiny will be higher, as it will in principle be assumed that differentiation on those grounds is illegitimate.

Article 16 of Spanish Constitution proclaims that the “Freedom of ideology, religion and worship of individuals and communities is guaranteed, with no other restriction on their expression than that necessary to maintain public order according to the law.” And that “Nobody may be compelled to make statements regarding his religion, beliefs or ideology.”

Moreover, art. 10.2 of the Spanish Constitution recognises the interpretative applicability of the main international treaties on human rights. This article of the Spanish Constitution states that “provisions relating to fundamental rights and freedoms recognised by the Constitution shall be interpreted pursuant to the Universal Declaration on Human Rights and the chief international treaties and agreements ratified by Spain.” The most notable international instruments combating discrimination have been ratified during Spain’s democratic period (since 1976), and these instruments have shaped the Constitution and laws passed since then. Such is the case of the Universal Declaration on Human Rights; the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; the Declaration on the Elimination of all forms of Intolerance and of Discrimination based on Religion or Belief or the European Convention on Human Rights.

Disability, age and sexual orientation are not expressly included in this article. But case-law tends to include them as “any other condition or personal or social circumstance”. The Constitutional Court, in judgment no. 269/1994 of October 1994⁵, ruled that disability is included in the generic phrase “any other personal or social circumstance”. Rubio-Marín (2004) notes that “although the provision does not refer to sexual orientation explicitly, because of its well-recognised open-ended nature, sexual orientation would probably be covered. There are some lower court rulings but no

⁴ Constitución Española (Spanish Constitution) of 27 December 1978 (BOE, 29 December 1978).

⁵ See *Sentencia del Tribunal Constitucional* (Constitutional Court Decision), 3 October 1994, 269/1994.

constitutional cases explicitly confirming this. However, in view of Framework Directive 2000/78 and other ECJ and ECHR case-law (e.g. *Salgueiro da Silva Mouta v. Portugal*⁶) it would be almost unthinkable for the Constitutional Court to decide otherwise. This is so because art. 10.2 of the Constitution makes it mandatory for constitutional rights to be interpreted in the light of relevant international standards. Indeed, in its interpretation of the constitutional concept of *sex* discrimination, the Court has systematically invoked European Directives and case-law of both the ECJ and the ECHR”.

The Spanish Constitutional Court has developed the principle of equality since its early judgments, adopting the doctrine of the European Court of Human Rights, which requires objective and reasonable justification for differential treatment. Judgment 200/2001⁷ contains a reminder of doctrine on discrimination:

- ✓ That the principle of equality does not mean the prohibition of all unequal treatment, but that differentiation must be analysed as to whether it is reasonable or not.
- ✓ That on occasion, different treatment of different situations may be required, resulting in the achievement of real and effective equality.
- ✓ That temporary positive measures may be taken in order to achieve true equality for the disadvantaged group.
- ✓ In the case of disability, the doctrine accepts the constitutionality of quotas, and in general of measures promoting equal opportunities for people affected by various forms of disability.

The Constitution also states that “Aliens in Spain shall enjoy the civil liberties guaranteed by this Title, on the terms established by treaties and the law” (art. 13).

Promotion of equality

While art. 14 of the Spanish Constitution contains a formal recognition of equality and non-discrimination, art. 9 provides the positive obligation for the public authorities to promote equality (promotional equality), since they must “promote conditions that ensure that the freedom and equality of individuals and of the groups that they form are real and effective; to remove obstacles that impede or hamper the fulfilment of such freedom and equality; and to facilitate the participation of all citizens in political, economic, cultural and social life”. This article of the Constitution conceptualises positive action or promotional measures not as exceptions to the principle of equality but rather as constitutionally legitimate ways to implement equality.

Moreover, article 49 adds that “The public authorities shall implement a policy of welfare, treatment, rehabilitation and integration for those with physical, sensory or mental disabilities, to whom they shall give the necessary specialist attention and specific protection so that they may enjoy the rights that this Title provides for all citizens.”

The Spanish Constitutional Court⁸ has ruled that the principle of equality is not breached by action on the part of the public authorities to counter the disadvantages experienced by certain social groups “even when they are given more favourable treatment, for the aim is to give different treatment to effectively different situations”.

Applicability of the constitutional principles of equality and non-discrimination

⁶ European Court of Human Rights, 21 December 1999, appl. no. 33290/96.

⁷ See *Sentencia del Tribunal Constitucional* (Constitutional Court Decision), 4 October 2001, 200/2001.

⁸ See *Sentencia del Tribunal Constitucional* (Constitutional Court Decision), 1 July 1987, 128/1987.

Constitutional equality and anti-discrimination provisions are directly applicable. Article 53 of the Constitution introduces guarantees of fundamental rights and freedoms and also of the principle of equality and non-discrimination. The second paragraph of this article refers to the ability of any citizen to file a claim to protection under article 14 “by means of preferential and summary proceedings in the ordinary courts and, where appropriate, by lodging an action for infringement of fundamental rights and freedoms with the Constitutional Court.”

The equality and non-discrimination clause can be enforced against both public and private players (see, for example, Law 62/2003, art. 27.2).

2. THE DEFINITION OF DISCRIMINATION

2.1 Grounds of unlawful discrimination

In the Spanish Constitution the grounds of unlawful discrimination expressly mentioned (art. 14) are:

- ✓ birth
- ✓ race
- ✓ sex
- ✓ religion
- ✓ opinion or
- ✓ any other condition or personal or social circumstance.

Law 62/2003 transposing Directives 2000/43 and 2000/78 expressly mentions the grounds of racial or ethnic origin, religion or belief, disability, age or sexual orientation (art. 27).

The Workers’ Statute (arts. 4.2.c and 17.1, in the revised text given in art. 37 of Law 62/2003) expressly mentions gender, marital status, age, origin, racial or ethnic origin, social condition, religion or beliefs, disability, political ideas, sexual orientation, affiliation or non-affiliation to a union, or language within the state of Spain, or family ties with other workers in a company.

The Criminal Code (Organic Law 10/1995), in its section on offences in relation to the exercise of fundamental rights and civil liberties guaranteed by the Constitution, punishes “those who incite discrimination...”, and those who disseminate defamatory information against groups on racist, anti-Semitic or other grounds relating to ideology, religion, beliefs, family background, belonging to a race or ethnic group, national origin, gender, sexual orientation, illness, or disability (art. 510). The Criminal Code specifies as an aggravating circumstance of criminal responsibility the fact of “committing an offence on racist, anti-Semitic or other grounds relating to the ideology, religion or beliefs of the victim, the ethnic group, race, or nation to which he belongs, his gender or sexual orientation, or any illness or disability that he suffers from” (art. 22.4). Art. 314 punishes offences against workers’ rights, referring to “Those responsible for serious discrimination in a public or private workplace against any person by reason of his ideology, religion or beliefs, ethnic group, race or nationality, gender, sexual orientation, family background, illness or disability, legal or trade-union representation of workers, family relationship with other employees, or use of any of the official languages within the State of Spain...”.

Organic Law 7/1980 on Religious Freedom (art. 1.2) proclaims the principle of non-discrimination, providing that “religious beliefs shall not constitute a basis for inequality or discrimination before

the law. Religious grounds may not be cited to prevent anyone from performing any work, activity, responsibility or public office.”

In summary, the different grounds of unlawful discrimination expressly mentioned in Spanish law are the following:

gender,
racial or ethnic origin,
religion or beliefs,
disability,
age,
sexual orientation,
marital status,
origin,
social condition,
political ideas, ideology,
affiliation to a union,
language within the State of Spain,
family ties with other workers in the enterprise.

2.1.1 Definition of the grounds of unlawful discrimination within the Directives

National law on discrimination does not define the terms racial or ethnic origin, religion or belief, age, or sexual orientation, and neither does the Workers’ Statute or the Criminal Code.

Disability

Disability is defined in general legislation on social security and disability. Social security legislation gives two definitions of disability: a) As regards contributory benefits, the “situation of workers who, after undergoing prescribed treatment and receiving medical discharge, suffer severe anatomical or functional impairment that may be objectively determined and is likely to be permanent, and that diminishes or removes their ability to work”; and b) As regards non-contributory benefits, “impairments likely to be permanent, whether physical or mental, congenital or otherwise, that alter or render ineffective the physical, mental or sensory capacity of those suffering from them” (art. 136.1 and 2 of the General Social Security Law).

The definition of disability in the Law on the Social Integration of the Disabled (Law 14/1982) is much more extensive than that given by the Social Security Law in that it refers to the consequences of the impairment and the integration of disabled people not only in work but also in other fields such as education and society. In general terms it defines a person with disability as “any person whose capacity for integration in education, work, or society is found to be diminished as a consequence of a impairment, congenital or otherwise, that is likely to be permanent, in their physical, mental, or sensory capacities” (art. 7). And Law 51/2003 on equal opportunities provides that: “For the purposes of this Law, persons with a disability shall be deemed to be those with a recognised degree of impairment equal to or greater than 33 per cent. In any event, those with a recognised entitlement to social security pensions for permanent disability rated as total, absolute or severe shall be deemed to be affected by a impairment equal to or greater than 33 per cent, together with passive-class pensioners with a recognised entitlement to a retirement pension or a pension for retirement due to permanent incapacity” (art. 1.2). This situation must be recognised by the relevant

official bodies, according to the procedure regulated in Royal Decree 1971/1999 of December 23 on the recognition, declaration, and rating of degrees of disability. The body's decision may be challenged before the courts.

Religion

Religion is not defined in Spanish legislation. The principles of religious freedom, neutrality and non-discrimination prohibit the Spanish legislature from doing so. There is, however, a negative definition of religion in article 3.2 of the Organic Law on Religious Freedom. This article states in its second paragraph that "activities, intentions and entities relating to or engaging in the study of and experimentation on psychic or parapsychological phenomena or the dissemination of humanistic or spiritual values or other similar non-religious aims do not qualify for the protection provided in this Act". The legislation specifies only what religion is not, not what it is.

In spite of this, for a long time the practice of the General Directorate for Religious Affairs (under the Ministry of Justice) was to refuse to register religious denominations on the Register of Religious Entities on the grounds of these denominations' lack of religious aims. However, the situation has changed since Constitutional Court Judgment 46/2001 of 15 February. In this case, the Unification Church (Iglesia de la Unificación) challenged the Resolution of the General Director for Religious Affairs of 22 December 1992 and the judgments of the Audiencia Nacional Court (30 September 1992) and the Supreme Court (14 June 1996) refusing the inclusion of this church on the Register.

The administrative resolution maintained that the Unification Church lacked a true religious nature, and was beyond the scope of protection under the Law on Religious Freedom (according to article 3.2). The resolution stated in its reasoning that in order to speak properly of a church or a religious denomination, it had to have, among other defining features, a body of adherents other than the organisation's leading members. It also stated that, in order to determine the concept of religion, "it is a widely held opinion, reflected in the Spanish Academy Dictionary, that the elements making up the concept of religion are: a) an organic whole of dogma or beliefs related to transcendence, a higher Being or a Divinity; b) a body of moral rules regulating the individual and social behaviour of the adherents to a religious denomination, derived from that dogma; c) concrete and definite acts of worship, an external manifestation of the relationship between the adherents to a religious denomination and the higher Being or Divinity; and d) as a consequence of the existence of acts of worship, although this is not an essential element, ownership of places to which the adherents may go to perform such acts... In conclusion, in order for a group or organisation to be properly described as religious, the following prerequisites must be met: 1) Belief in the existence of a higher Being, transcendent or otherwise, with whom communication is possible; 2) Belief in a body of doctrine (dogma) and rules of behaviour (moral rules), somehow derived from this higher being; 3) ritual practice, whether individual or collective (worship), constituting the adherents' institutional means of communication with the higher Being."

The Constitutional Court, however, asserted that the administrative resolution violated the right to religious freedom, in its collective meaning, because when registering religions, the State can only check – not prejudice – that the entity is not excluded by article 3.2, and that its activities do not violate the entitlement of others to the free exercise of rights and freedoms, or are not detrimental to public safety, welfare or morality – the elements defining public order protected by the law in a democratic society, according to article 16.1 of the Constitution. It seems that, in administrative practice as well as in case-law, there was an implicit notion up to 2001 of religion coming from the Judeo-Christian tradition, and to a more limited extent, from the Islamic one. However, after this

judgment, it seems clear that the government cannot judge the religious beliefs and structures of entities wishing to join the Register, and must confine itself to verifying that, in view of their statutes, goals and aims, these entities are not excluded by article 3.2⁹.

Age

Up to 2001 the tenth additional provision of the Spanish Workers' Statute authorised clauses in collective agreements for the termination of employment contracts when workers reached retirement age (at 65), without prejudice to the provisions of social security regulations. In 2001 this provision was repealed because, as was argued in the preamble of the law repealing it¹⁰, it "was based on demographic and labour-market realities different from those of today". But some collective agreements continued to include these clauses. Two Supreme Court rulings of 9 March 2004 (both referring to the collective agreement of AENA) declared these clauses illegal (see paragraph 0.3).

On 3 December 2004 the trade unions and employers' organisations signed an agreement with the Government to reintroduce that provision into the Workers' Statute and thereby enable social partners to include clauses in collective agreements on the termination of contracts when employees reach the ordinary retirement age, provided that certain conditions are met.

On 29 June 2005 the Spanish Parliament passed a Law¹¹ inserting a "Tenth Additional Provision" into the Law on the Workers' Statute. This Provision states that "collective agreements may include clauses allowing the employment contract to be terminated when the employee reaches the ordinary retirement age as established in social security regulations", but adds two provisos: 1) the measure "is to be linked to objectives consistent with the employment policy expressed in the collective agreement, such as improving the stability of employment, conversion of temporary contracts into permanent contracts, maintaining employment, recruitment of new workers, or any other objectives aimed at enhancing the quality of employment." And 2) a clause is introduced stating that "a worker whose employment contract is terminated must have covered the minimum contribution period, or a longer one if so provided in the collective agreement, and must meet the other prerequisites specified by social security legislation for entitlement to a contributory retirement pension."

This Law resolves the problems raised by the Supreme Court ruling of 9 March 2004 in that, on one hand, a law will be passed enabling such compulsory retirement clauses to be included in collective agreements, and on the other, they will not be discriminatory because they are to be "objectively and reasonably justified", as they will be linked to "legitimate employment policy, labour market and vocational training objectives", as stated in art. 6 of Directive 2000/78.

2.1.2 Assumed and associated discrimination

There is no mention in Spanish legislation of discrimination based on assumed characteristics, nor of discrimination based on association with persons with particular characteristics. Both the Workers' Statute and Law 62/2003 transposing Directives 2000/43 and 2000/78 and the Criminal Code speak only of personal characteristics and not of "assumed characteristics". But

⁹ This legal argument was developed by Verónica Puente (2003 and 2004).

¹⁰ In Royal Decree 5/2001 of 2 March on urgent measures to reform the labour market in order to promote employment and to improve the quality thereof (BOE [Official State Gazette], 3 March 2001).

¹¹ Law 14/2005 on clauses in collective agreements concerning employees' reaching the ordinary retirement age (*Ley 14/2005, de 1 de Julio, sobre cláusulas de los convenios colectivos referidas al cumplimiento de la edad ordinaria de jubilación*, BOE, 2 July 2005).

discrimination on the grounds of “assumed characteristics” may be regarded as implicitly included in these laws.

The same goes for “association with persons with particular characteristics”. Although not explicitly covered by anti-discrimination legislation, it may be assumed to be implicitly covered. This assumption is backed up by the fact that the right of association (like that of assembly and the right to belong to a trade union) is regulated in art. 22 of the Constitution (within the section on fundamental rights and civil liberties).

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

Law 62/2003 (art. 28.1.b) defines direct discrimination as “where a person is treated less favourably than another in a comparable situation on grounds of racial or ethnic origin, religion or beliefs, disability, age or sexual orientation”¹².

The expressions “has been or would be treated” (Directive 2000/43 and Directive 2000/78, art. 2.2.a) are not included in the Spanish definitions of direct discrimination.

The law does not permit justification of direct discrimination generally, or in relation to particular grounds.

In relation to age discrimination, the definition is based on “less favourable treatment”, but the law does not specify how a comparison is to be made.

Law 62/2003 (art. 38) provides the same definition of direct discrimination as in Law 13/1982, of 7 April, on Social Integration of Disabled People (*Ley de Integración Social de los Minusválidos*, LISMI). Art. 37.3 of this Law states that direct discrimination “shall be taken to occur where a person is treated less favourably than another in a comparable situation on the grounds of his or her disability”.

The seventh additional provision of Law 62/2003, entitled “Non-applicability to immigration law”, states that the articles transposing the Directives shall not affect the regulations provided “in respect of the entry, stay, work and establishment of aliens in Spain in Organic Law 4/2000”. This means that a different definition of direct (and indirect) discrimination remains in force in this Organic Law, which applies to aliens (chiefly non-Community citizens). Art. 23.1. of OL 4/2000 defines as discrimination “any act which, directly or indirectly, implies a distinction, exclusion, restriction or preference with regard to an alien on the basis of race, colour, descent, national or ethnic origin, or religious convictions and practices, and which has the aim or the effect of negating or restricting the recognition or exercise, in conditions of equality, of human rights and fundamental freedoms in the political, economic, social or cultural sphere”. Despite the fact that the Law says “directly or indirectly”, it may be noted that the content of the article corresponds to the concept of direct

¹² The Law on the rights and duties of aliens (OL 4/2000) (*Ley Orgánica 4/2000, de 11 de enero, de derechos y libertades de los extranjeros en España y de su integración social*), has two articles devoted to “anti-discrimination measures”. It defines discrimination as “any act which, directly or indirectly, entails a distinction, exclusion, restriction or preference in relation to a foreigner on the grounds of race, colour, descent or national or ethnic origin, or religious beliefs and practices, and whose purpose or effect is to negate or limit the recognition or exercise, in equal conditions, of human rights and fundamental freedoms in the political, economic, social or cultural spheres.” In addition, it defines indirect discrimination as “any treatment stemming from criteria having an adverse effect on workers on account of their being foreigners or members of a particular race, religion, ethnic group or nationality.” OL 4/2000 makes no reference to provisions or practices; moreover, it refers only to “workers”, whereas the Directive refers to “persons” in general. This was the first reference in Spanish legislation to indirect discrimination, in a law whose scope is confined to aliens. The seventh additional provision of Law 62/2003 states that what is provided in Chapter III (i.e. transposition of Directives 2000/43 and 2000/78) does not affect the Law regulating the rights and freedoms of aliens in Spain (OL 4/2000).

discrimination, although it does not use the expression “is treated less favourably” from art. 2.2.a of Directive 2000/43.

2.2.1. Situation testing

Situation testing is not expressly provided for in Spanish law, but nor is it forbidden. It might therefore be used as a form of evidence in discrimination cases. To date, no judgments have made use of situation testing. The NGOs have never used this possible form of evidence in Spain.

The method was used in sociological research conducted by the ILO in 1995, in the framework of comparative research between European countries¹³.

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

Law 62/2003 (art. 28.1.c) defines indirect discrimination as “where a legal or administrative provision, a clause of an agreement or contract, an individual agreement or a unilateral decision, though apparently neutral, would put a person of a certain racial or ethnic origin, religion or beliefs, disability, age or sexual orientation at a particular disadvantage in relation to others, provided that such provision is not objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary”¹⁴.

Law 62/2003 does not specify how indirect discrimination is to be justified. Only the general provision in art. 2.2.b is included (“unless [the indirect discrimination] is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary”).

There are two differences in relation to art. 2.2.b of the Directive. The first is that the Directive refers to a “provision, criterion or practice”, whereas the Spanish law refers to a “legal or administrative provision, a clause of a convention or contract, an individual agreement or a unilateral decision”. All these situations are referred to as “provision”, and the words “criterion or practice” are not included. The second is that the Directive says “persons” in the plural and the Spanish transposition says “person” in the singular. This use of the singular generates a certain ambiguity in the law as to whether a group of persons as such is covered.

In the field of disability, Law 51/2003 defines indirect discrimination in similar terms as “where a legal or regulatory provision, a clause of an agreement or contract, an individual agreement or a unilateral decision, or a criterion or practice, or an environment, product or service, though apparently neutral, may put a person at a particular disadvantage in relation to others owing to a disability, provided that such a provision is not objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary” (art. 6). For its part, Law 13/1982, on the Social Integration of Disabled People, states that indirect discrimination “shall be taken to occur where an apparently neutral legal or administrative provision, a clause of a convention or contract, an individual agreement or a unilateral decision would put a person of a racial or ethnic origin,

¹³ Colectivo IOE, *Labour market discrimination against migrant workers in Spain*, Geneva, ILO, 1996.

¹⁴ Prior to the transposition of the Directives into Spanish law the concept of “indirect discrimination” was established only in the Immigration Law (see note 7). But the first ruling of the Constitutional Court on this matter is Judgment 145/1991, 1 July 1991, according to which, within the prohibition contained in art. 14 of the Spanish Constitution must also included “not only the notion of direct discrimination, meaning prejudiced differential treatment due to gender where gender is the object of direct consideration, but also the notion of indirect discrimination, which includes treatment not formally discriminatory from those which they are derived, due to the factual differences among workers of both sexes, prejudiced unequal consequences due to the differentiated and unfavourable impact that formally equal or reasonably unequal treatment have on the workers of one or the other sex due to the difference of sex”. The Constitutional Court made similar rulings in its judgments 58/1994 of 28 February and 147/1995 of 16 October.

religion or beliefs, disability, age or sexual orientation at a particular disadvantage compared with other persons, provided that such a provision is not objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary” (art. 37.3). And in relation to the obligation to make a reasonable accommodation (see section 2.6) it adds that “the employer is obliged to adopt appropriate measures, according to the needs of each specific situation in order to enable disabled people to have access to employment, to do a job, to advance in a profession and to undergo training, unless such measures would entail an excessive burden for the employer (art. 37bis.2).

Law 62/2003 does not specify how a comparison is to be made in relation to age discrimination.

The Law on the rights and duties of aliens (OL 4/2000), stipulates that “indirect discrimination is defined as any treatment stemming from criteria that have an adverse effect on workers on account of their being aliens or belonging to a particular race, religion, ethnic group or nationality” (art. 23.2.e). It refers only to “workers”, whereas the Directive refers to “persons” in general, and it makes no reference to provisions or practices (as the Directives).

2.3.1. Statistical Evidence

Though this is not expressly provided for in law, the complainants have a right to require or request that respondents provide data that may be necessary for them to determine whether there is a *prima facie* case of discrimination. But statistical evidence is not in common use. In the civil and administrative fields (the spheres of application of Directives 2000/43 and 2000/78) there are no agencies or authorities that can conduct formal investigations. In criminal cases, the public prosecution service can conduct all investigations deemed necessary. Statistical evidence has not been used in any judgments.

As regards national rules which permit data collection, age and disability are treated very differently from ethnic or racial origin, religion or belief or sexual orientation.

Organic Law 15/1999 of 13 December on the protection of personal data (*Ley Orgánica 15/1999 de Protección de Datos de Carácter Personal*) includes *ethnic or racial origin, religion or belief* and *sexual orientation* among “specially protected personal data”. Article 7 of that Law provides, pursuant to article 16 of the Spanish Constitution, that “no one may be forced to disclose details of his ideology, religion or beliefs. Only with the express written consent of the person concerned may personal data revealing ideology, trade-union affiliation, religion or beliefs be processed (...).” The Law further provides that “personal data referring to racial origin, health and sexual life may only be gathered, processed and transferred where, for reasons of general interest, a law so provides or the person concerned consents expressly thereto.”

As a result, employers may not gather data on the ethnic or racial origin, religion or beliefs or sexual orientation of their workers. But there are some exceptions to this general rule, such as those arising from art. 4.2 of Directive 2000/78.

Schools, housing, and health service providers are not allowed to gather data including people’s names. But for statistical purposes (and hence anonymously) some data are indeed gathered.

The national census gathers no information on racial origin, religion or sexual orientation.

The situation is different in the field of *disability*. Spanish laws not only allow but actually encourage the keeping of records inasmuch as employers (and institutions in other social fields as

education, etc.) must gather such data about their workforce if they wish to benefit from the various measures for promoting job creation in which the disabled are specially protected.

Data relating to *age* may be collected with no legal impediments.

2.4 Harassment (Article 2(3))

At present only discriminatory harassment is given special treatment in Spanish law¹⁵

Law 62/2003 (art. 28.1.d) defines harassment as “all unwanted conduct related to racial or ethnic origin, religion or convictions, disability, age or sexual orientation that takes place with the purpose or effect of violating the dignity of a person and creating an intimidating, humiliating or offensive environment”. The words “hostile” and “degrading” (Directive 2000/43 and Directive 2000/78, art. 2.3) are not included in the Spanish definitions of harassment.

Paragraph 2.2 of the same article adds: “Harassment on the grounds of racial or ethnic origin, religion or belief, disability, age or sexual orientation is considered, in all cases, as a discriminatory act”.

Law 62/2003 also amends the Workers’ Statute. Art. 4.2.e of the Law states that workers are entitled “to their privacy and to due respect of their dignity, including protection against verbal or physical offences of a sexual nature”. This provision has been invoked by the courts to protect workers mostly against sexual harassment, and only more recently against other forms of harassment¹⁶. Law 62/2003 (art. 37.2) adds the right to be protected “against harassment on the grounds of racial or ethnic origin, religion or belief, disability, age or sexual orientation”.

Besides, a new paragraph has been added to article 54.3 (g) of the Workers’ Statute, considering “harassment on the grounds of racial or ethnic origin, religion or belief, disability, age or sexual orientation, towards the employer or the people that work in the enterprise” as grounds for a disciplinary dismissal.

Until the enactment of Law 62/2003, the only definition of harassment in Spanish legislation was contained in the Penal Code, with the regulation of the crime (only) of sexual harassment (“whoever asks for sexual favours, for himself or a third party, in the field of an employment, teaching or service relationship, continued or habitual, and with that behaviour creates an objective and serious intimidating, hostile or humiliating situation for the victim, will be punished as a perpetrator of sexual harassment”). Rubio-Marín (2004) notes that art. 184.1 of the Criminal Code refers to those who in the framework of an employment relationship (hence not necessarily the employer) solicit a sexual favour for themselves or for a third party and by that behaviour cause an objective and seriously intimidating, hostile or humiliating situation for the victim (no intent is thus required but the situation cannot be measured only by the victim’s sensitivity, given the requirement of objectivity). The punishment is increased when the person who harasses does so taking advantage of his or her hierarchical position in employment; when he or she either explicitly or implicitly threatens the worker with harming his or her legitimate career expectations (art. 184.2), or when the victim is especially vulnerable because of age, sickness or situation (art. 184.3). All these prohibitions are understood to refer both to persons of different genders and to persons of the same gender.

¹⁵ See Serrano, 2005 and Gimeno, 2005.

¹⁶ See *Sentencia del Juzgado de lo Social de Gerona* [Social Court of Gerona], 17 September 2002, and *Sentencia del Tribunal Supremo*, 23 July 2001 describing forms of moral harassment (See Gimeno, 2005).

Law 62/2003 (art. 28.2), and Law 51/2003 on disability (art. 4) specify harassment as a form of discrimination.

2.5 Instructions to discriminate (Article 2(4))

Law 62/2003 (Art. 28.2) provides that “any instruction to discriminate against persons on the grounds of racial or ethnic origin, religion or belief, disability, age or sexual orientation, will be considered discrimination”.

Instructions to discriminate may also be considered to be covered by art. 314 of the Criminal Code, when it specifies “causing discrimination” as an infringement against workers’ rights, as well as art. 23.2.b of OL 4/2000 on the rights of aliens, when it states that all acts imposing stricter conditions on aliens than on Spaniards are discriminatory acts.

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

National law has implemented the duty to provide reasonable accommodation for disabled people both in general terms (in Law 51/2003) and in employment (in Law 13/1982).

In art. 7 of Law 51/2003, reasonable accommodation is defined as “measures to adapt the physical, social, and attitudinal environment to the specific needs of persons with a disability which effectively and practically, without involving a disproportionate burden, facilitate accessibility or participation for a person with disability on the same terms as for other citizens”. The material scope of this Law is telecommunications, built-up public spaces and buildings, transport, goods and services available to the public, and relations with public administration. In order to determine whether the burden arising from “reasonable accommodation” is proportionate or not, the Law provides that “account shall be taken of the cost of the measure, the discriminatory effects on disabled persons if it is not adopted, the structure and characteristics of the person, entity or organisation that is to put it into practice, and the possibility of obtaining official funding or any other aid.”

Art. 37.2 bis of Law 13/1982 on the Social Integration of the Disabled (LISMI), introduced by Law 62/2003 transposing Directive 2000/78, provides that: “Employers are obliged to take appropriate measures to adapt the workplace and to make the company accessible, according to the needs of each specific situation, with the aim of enabling persons with a disability to have access to employment, to do a job, to advance in a profession and to undergo training, except for measures that would impose an excessive burden on the employer”.

For the purpose of determining whether a burden is disproportionate, art. 7.c of Law 51/2003 states that “In order to determine whether a burden is proportionate, the following shall be taken into account: the cost of the measure, the discriminatory effects on disabled persons if it is not adopted, the structure and characteristics of the person, entity or organisation that is to put it into practice, and the possibility of obtaining official funding or any other aid. To this end, the competent Public Authorities may establish a public aid plan to help cover the costs arising from the obligation to make reasonable accommodation.”

Art 37.3 bis of Law 13/1982 provides for its part that “To determine whether the burden is excessive, it is necessary to consider whether it is sufficiently offset by public measures, aid or subsidies for the disabled, along with the financial and other costs involved by the measures and the size and turnover of the organisation or company.”

The failure on the part of the company to comply with its obligation to provide reasonable accommodation constitutes indirect discrimination, as established in art. 37.3 of LISMI, that may be justified only if such accommodation would constitute a disproportionate burden. When a disabled person is fit to work or to undergo training, the absence of such accommodation cannot be justified by a company decision involving unfavourable treatment of a disabled worker. Such a decision would be discriminatory, except in the said case of disproportionate burden.

The Cooperation Agreements with the various religious communities (Evangelical, Jewish and Islamic)¹⁷ contain specific regulations to ensure reasonable accommodation for employees of particular religions. The three Agreements contain provisions on religious holidays and special diets. The weekly days of rest of the Seventh Day Adventists (Friday evening and all of Saturday) and Jewish communities (Friday evening and all of Saturday) can be granted instead of the day provided by article 37.1 of the Workers' Statute as the general rule (Saturday afternoon or Monday morning and all of Sunday), but only with the agreement of all the parties, which case-law has interpreted as being possible only if this is asked for by the employee before the signing of the contract¹⁸.

Moreover, members of the Islamic communities belonging to the Islamic Commission may request to stop work every Friday from 13.30 to 16.30 and one hour before sundown during Ramadan. This right is also subject to an agreement with the employer, and the hours not worked must be made up¹⁹.

In the case of the Islamic Commission and the Jewish community, there is a list of religious holidays that can replace those established in article 37 of the Workers' Statute, again with the agreement of both parties.

As for special diet (adaptation of food to Islamic religious precepts and mealtimes during the Ramadan fast), this possibility is provided only for Muslims interned in public centres or establishments and on military premises, as well as in public and subsidised private schools, where requested, and not as an obligation, since article 14.4 of the Agreement clearly states only that in this case "attempts shall be made". In the field of employment, therefore, there are no provisions on this issue.

There are no other accommodations on grounds of racial or ethnic origin, sexual orientation or age.

¹⁷ Law 24/1992, of 10 November, adopting the cooperation agreement between the State and the Federation of Evangelical Religious Entities of Spain; Law 25/1992, of 10 November, adopting the cooperation agreement between the State and the Jewish Communities of Spain; and Law 26/1992, of 10 November, adopting the cooperation agreement between the State and the Islamic Commission of Spain.

¹⁸ The Constitutional Court (19/1985, 13 February) provided, on the subject of the weekly day of rest for a Seventh Day Adventist employee (albeit before the signature of the Cooperation Agreement with the Federation of Evangelical Religious Entities of Spain), that one party to the contract cannot impose modifications in working conditions on the other party, and also that the consideration of Sunday as the general day of weekly rest (article 37.1 of the Workers' Statute) is based not on a religious rule but on a secular tradition.

¹⁹ There is an interesting doctrine on this subject in the Judgment of the Madrid High Court of 27 October 1997. In this case, pursuant to a request for adaptation of working hours, the Court – not referring once to the Cooperation Agreement – states that although the courts of first instance should make employers adapt working hours, thus allowing their employees properly to meet their religious obligations, as well as not making them behave in a way incompatible with their beliefs, the worker must show loyalty and good faith, indicating his or her religious faith and the special working hours arising from it when applying for the job.

2.7. Sheltered or semi-sheltered accommodation/employment

There are two forms of support for disabled employment: semi-sheltered employment on the ordinary labour market and sheltered employment centres (Centros Especiales de Empleo, CEEs).

There are two types of measure for supporting employment for the disabled on the regular labour market:

- 1) (Public and private) companies with more than 50 employees are obliged to have 2% of disabled people in their workforce.
- 2) Semi-sheltered employment: the public authorities provide various forms of aid (subsidies, reductions in companies' social security contributions, subsidies to adapt workstations and other kinds of aid) for various types of employment contract governed by general labour regulations: permanent contracts, temporary contracts and stand-in contracts for substituting other disabled workers.

In sheltered employment centres (see section 5), disabled people's employment relationship is a "special employment relationship", with the form of any current employment contract but with certain peculiarities, which also appear in the working conditions.

CCEs can enter into contracts with "collaborating companies" (*empresas colaboradoras*) on the ordinary labour market to allow disabled workers at the CEE to provide their services in such companies. These are known as "employment enclaves" (*enclaves laborales*) and form bridges between the sheltered labour environment of CEEs and the ordinary labour market.

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)

The personal scope of protection against discrimination is general for all residents in Spain. The law does not make distinctions regarding equal treatment of Spaniards, nationals of other EU countries and non-EU nationals. There are no citizenship/nationality requirements for protection under the relevant national laws transposing the Directives.

The seventh additional provision of Law 62/2003, entitled "Non-applicability to immigration law", states that the articles transposing the Directives shall not affect the regulations provided "in respect of the entry, stay, work and establishment of aliens in Spain in Organic Law 4/2000". The "justification" of this provision is based on article 3.2 of Directives 2000/43 and 2000/78. But it should not be forgotten that Law 4/2000 regulates issues that are liable to be affected by Directives as "work and establishment" and this exclusion is not in art. 3.2. of Directives.

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

The prohibition of discrimination sanctioned in the Constitution and in the Workers' Statute apply to both natural and legal persons. In the Criminal Code only natural persons are considered perpetrators of crimes under the Spanish legal order.

Art. 27.2 of Law 62/2003 states that its measures for applying the principle of equal treatment apply to every person, both in the public and the private sector. As Rubio-Marín (2004) indicate, for the private sector, the prohibition on discrimination and violating workers' fundamental rights is mainly addressed to the employer but can also be made applicable to managers, and presumably to co-workers or the labour union.

3.1.3 Scope of liability

Liability for discrimination only applies to a (natural or legal) person who commits discrimination or harassment and issues instructions to discriminate.

Employers or (in the case of racial or ethnic origin) service-providers (e.g. landlords, schools, hospitals) can not be held liable for the actions of employees or for actions of third parties (e.g. tenants, clients or customers). Likewise, trade unions or other professional associations can not be held liable for actions of their members.

3.2 Material Scope

The material scope of the prohibition of discrimination is of a general nature.

All the fields mentioned by Art. 3 of Directive 2000/43 on racial or ethnic origin are covered by the general principle of equality laid down in art. 14 of the Spanish Constitution.

Although Directive 2000/78 only refers to the employment field, discrimination on the grounds of religion or belief, disability, age or sexual orientation is prohibited in all areas, public and private; and not only in the fields mentioned in Directive 2000/43 (social protection, social advantages, education, access to and supply of goods and services available to the public, including housing), but also in other possible fields, even if there is not an explicit anti-discrimination provision, because of the general and direct application of article 14 of the Constitution.

3.2.1 Employment, self-employment and occupation

National legislation applies the principle of non-discrimination to all sectors of public and private employment and occupation, including contract work, self-employment and holding statutory office.

The Constitution (art. 23.2) explicitly sanctions the fundamental right of access in equal conditions to public office and functions (which includes public employment) and makes reference to the leading principles of the civil service including merit and capacity (art. 103).

Art.34 of Law 62/2003 defines the scope of application of the measures dealing with equal treatment and non-discrimination in employment on all the grounds of Directives 2000/43 and 2000/78 as “measures [which] are aimed at the real and effective accomplishment of the principle of equal treatment and non-discrimination in relation to access to employment, membership of or involvement in organisations of workers or employers, working conditions, professional promotion and vocational and continuous professional training, access to self-employment or to occupation and membership of and involvement in any organisation whose members carry on a particular profession”.

Art. 4.2.c. of Workers' Statute (modified by Law 62/2003, art. 37) recognises that workers are entitled in the working relationship "not to be subjected to direct or indirect discrimination in employment nor, once occupied, on the grounds of sex, marital status, age within the limits set in the present law, racial or ethnic origin, social condition, religious or belief, political ideas, sexual orientation, membership or non-membership of a trade union, or for language reasons within Spain".

The Criminal Code (art. 314) provides that an offence is committed against workers' rights by "whosoever causes serious discrimination in public or private employment", but it does not specify what constitutes "serious discrimination".

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))

The second part of art. 3.1.a of the Directives specifies that conditions for access to employment, to self-employment or to occupation "includes selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion". All this specification is missing in the Spanish transposition law. But it may be considered unnecessary because the references to equal access to employment are clear and sufficient in the aforesaid legislation.

Moreover, Law 56/2003 of 16 December on Employment specifies as the foremost general objective of employment: "To guarantee real equality of opportunities and non-discrimination, taking into account what is provided in article 9.2 of the Spanish Constitution, in access to employment and in actions aimed at providing such access, along with a free choice of profession or trade without discrimination, on the terms provided in article 17 of the Workers' Statute."

And art. 16.2 of the Workers' Statute (as modified by Law 62/2003, art. 37), regulating non-profit employment agencies, guarantees equal treatment and non-discrimination on all of the grounds mentioned in the Directives in access to employment through such agencies.

All labour regulations affect labour relations in both the private and public sectors. The employment of civil servants is regulated by the Civil Service Statute.

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

Non-discrimination in employment and working conditions, including pay and dismissals is expressly recognised in art. 17.1 of Workers' Statute (modified by Law 62/2003, art. 37) entitled "Non-discrimination in working relations": "Shall be regarded as null and void all legislative provisions, clauses of collective agreements, individual agreements and unilateral managerial decisions which provide for unfavourable direct or indirect discrimination on the grounds of age or disability, or which provide for favourable or adverse discrimination in employment, whether in relation to remuneration, working hours, or other working conditions, on the grounds of sex, origin, include racial or ethnic origin, marital status, social condition, religious or belief, political ideas, sexual orientation, membership or non-membership of a trade union, adherence to trade union agreements, or family ties to other workers in the enterprise, or by reference to the languages of the Spanish state".

Art. 8.12 of the Law on Violations and Sanctions of the Labour Laws (modified by Law 62/2003, art. 41) considers as very serious infringements “unilateral decisions by the employer which involve unfavourable direct or indirect discrimination for reasons of age or disability or which contain positive or adverse discrimination relating to remuneration, working time, training, promotion, and other employment conditions, on the grounds of sex, origin, include racial or ethnic origin marital status, social condition, religious or belief, political ideas, sexual orientation, membership or non-membership of a trade union, adherence to trade union agreements, family ties with other workers in the enterprise, language within the Spanish State”.

Article 37 of the Law of Social Integration of the Disabled (LISMI) (modified by Law 62/2003, art. 38) promotes equality of treatment of persons with disability in the ordinary system of work.

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))

The Workers’ Statute (art. 4) recognises promotion and professional training as rights. And these are protected against discrimination on all of the grounds included in the Directives.

Art. 34 of Law 62/2003 includes this subject on all the grounds of Directives 2000/43 and 2000/78: “measures are aimed at the real and effective accomplishment of the principle of equal treatment and non-discrimination in relation to access to (...) professional promotion and vocational and continuous professional training (...)”. Given the structure of the education and training system in Spain, this text includes all aspects covered by art. 3.1.b of Directive 2000/43.

The Organic Law on Qualifications and Vocational Training (Law 5/2002 of 19 June) states that one of the principles of the national system of qualifications and vocational training is “access, on equal terms for all citizens, to the various forms of vocational training” (art. 2).

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))

Art. 34 of Law 62/2003 include this subject on all the grounds of Directives 2000/43 and 2000/78: “measures are aimed at the real and effective accomplishment of the principle of equal treatment and non-discrimination in relation to (...) membership of or involvement in organisations of workers or employers (...) or to occupation and membership of and involvement in any organisation whose members carry out a particular profession”.

Art. 17.1 of Workers’ Statute and art. 8.12 of the Law on Violations and Sanctions of the Labour Laws (both modified by Law 62/2003, art. 37 and 41) also include this field of equal treatment.

3.2.6 Social protection, including Social Security and healthcare (Article 3(1)(e) Directive 2000/43)

Art. 29.1 of Law 62/2003 states that “the aim of this section (of this Chapter of the Law) is to establish measures to ensure that the principle of equal treatment and non-discrimination on the grounds of racial or ethnic origin is real and effective in education, health, social benefits and services, housing and, in general, the supply of and access to goods and services”. There is a general recognition of the principle of non-discrimination on the grounds of racial or ethnic origin in these areas in line with art. 3.1. of Directive 2000/43; so discrimination in these fields is

unlawful, but neither this section of Law 62/2003 nor any other part of it provides any such measures to make the principle of equal treatment “real and effective”.

This same consideration applies to the four following sections.

Law 62/2003 does not contain any specific provision in relation to the exception in Article 3(3), Directive 2000/78 on the grounds of religion or belief, age, disability and sexual orientation.

Various social security and social protection provisions establish differences on grounds of age (and of other conditions, but not religion or beliefs, disability, sexual orientation or racial or ethnic origin).

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

See art. 29.1 of Law 62/2003 in section 3.2.6. All considerations in that paragraph are applicable to the field of social advantages.

Any clauses introducing differences of treatment in “social advantages” on the grounds of racial or ethnic origin, religion or beliefs, disability or sexual orientation would be discriminatory. But not on the grounds of age if the differences are “objectively and reasonably justified by a legitimate aim”. For example, it is common practice for there to be special discount rates for the young and elderly in public transport and some private transport.

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

See art. 29.1 of Law 62/2003 in section 3.2.6. All considerations in that paragraph are applicable to the field of education.

Equal treatment and non-discrimination have been consolidated as basic principles of education in Spain. For example, the first three principles of quality listed in the *Bill of the Organic Law on Education* (LOU)²⁰ refer to equal treatment and equal opportunities as follows: “a) Quality in education for all pupils, regardless of their social condition and circumstances; b) Fairness, guaranteeing equality of opportunities, educational inclusion and non-discrimination, and acting to offset personal, cultural, economic and social inequalities, especially those due to disability; c) Transmission and application of values fostering personal freedom, responsibility, democratic citizenship, solidarity, tolerance, equality, respect and justice, and that help overcome discrimination of any kind.” LOU also refers to equality between men and women as another principle: “Development of equality of rights and opportunities and promotion of real equality between men and women.”

The debate on school segregation has taken on a high profile in Spain with the large rise in the number of immigrants and foreigners of school age over the past six years. Foreign children, like Roma children, are mostly concentrated in state schools. The passage of LOU through Parliament in 2005 was marked by a fierce campaign against it by conservative organisations because, among other issues, LOU seeks to establish a more even distribution of pupils with special needs between state schools (*centros públicos*) and state-subsidised private schools (*centros privados concertados*). One of the key points of the political debate was the clash between the (so-called) right of parents to freely choose a school for their children, and the right to education and access on equal terms. LOU

²⁰ The Bill for an Organic Law on Education (*Proyecto de Ley Orgánica de Educación*) has already been passed by the Congress of Deputies and currently (January 2006) is going through the Senate.

strikes a balance between these principles, stating that “families may apply for admission to schools to which they wish to send their children” (art. 86.3), but also providing the possibility of setting up “committees or other bodies to guarantee admission”. It also provides that “the various tiers of government shall ensure that pupils with special needs for educational support are distributed evenly between schools. To this end, they shall establish the proportion of pupils with these characteristics to be admitted into each state school and subsidised private school, and shall ensure that schools have the staffing and funding required for such support” (art. 38). It also provides that “in no event shall there be discrimination on the grounds of birth, race, sex, religion, opinion or any other personal or social condition or circumstance” (art. 84.3).

The LOU bill also provides that the various tiers of government “shall develop compensatory actions in relation to persons, groups and regions in adverse situations and shall provide the necessary economic resources and support for this.” “Groups” refers in particular to Roma people and immigrants.

The Law on the Social Integration of Disabled People attempts to integrate the disabled into “the ordinary system of general education, receiving, in this case, the support and resource programmes recognised by the Law”. A Special Education system is planned that will provide long or short-term education, to disabled people who find it impossible to participate in the ordinary educational system, one of which aim is professional training.

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

See art. 29.1 of Law 62/2003 in section 3.2.6. All the considerations in that paragraph are applicable to access to and supply of goods and services which are available to the public.

The law has not made a distinction between goods and services available to the public and those only available privately.

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

See art. 29.1 paragraph 3.2.6 of Law 62/2003. All the considerations in that paragraph are applicable to the field of housing.

The 2005-2008 National Housing Plan²¹ is of universal scope, but is targeted in particular at the groups which have most difficulty in gaining access to decent housing, specifically including disabled people and their families. The Plan also expressly mentions immigrants and, implicitly, Roma people (within “groups in a situation, or at risk, of social exclusion”).

4. EXCEPTIONS

4.1 Genuine and determining occupational requirements (Article 4)

Law 62/2003 (art. 34.2.2) reproduces the occupational requirement exception of art. 4.1 of the Directive which provides that “The differences based in a characteristic related to any the causes referred to in the previous paragraph (all the grounds of the Directives 2000/43 and 2000/78) do not

²¹ Adopted by Royal Decree 801/2005, of 1 July, adopting the 2005-2008 National Plan for the promotion of public access to housing (BOE, 13 July 2005).

assume discrimination when, owing to the nature of the specific professional activity that it deals with or the context in which it is carried out, such a characteristic constitutes an essential and determinant professional requirement, provided that the objective is legitimate and the requirement is proportionate”.

Prior to the transposition of the Directives into Spanish law, art. 17.2 of the Workers’ Statute stated that “exclusions, reservations and preferences in respect of unrestricted employment may be established by law”. Convention 111 of the International Labour Organization (ILO), which stipulates that there is no discrimination if distinctions, exclusions or preferences are based on qualifications required for employment, was also applicable. With regard to “legitimate and proportionate”, this expression was not defined in Spanish legislation but the Constitutional Court has used the concept of “objective and reasonable justification” in discrimination cases (STC 22/1981).

4.2 Employers with an ethos based on religion or belief

Law 62/2003 provides for non-discrimination in employment on the grounds of religion or beliefs and amends other laws (such as the Workers’ Statute) in this respect, but makes no reference to organisations with an ethos based on religion or beliefs. For organisations with a specific ethos, article 6 of the Organic Law on Religious Freedom states that “Registered Churches, Faiths and religious Communities shall be fully independent and may lay down their own organisational rules, and internal and staff by-laws. Such rules, as well as those governing the institutions they create to accomplish their purposes, may include clauses on the safeguard of their religious identity and character, as well as the due respect for their beliefs, without prejudice to the rights and freedoms recognised by the Constitution and in particular those of freedom, equality and non-discrimination”. In my opinion, this provision is in operated in practice in ways which appear to confirm to art 4.2 of Directive 2000/78 as explained below.

As Puente (2004) pointed out, these clauses regulate employment relationships in these institutions. In these private organisations with a specific ethos, the exemptions operate in practice at three stages of the employment relationship: the first being access to employment; the second being during the performance of an activity within the organisation; and the third being dismissal as a consequence of that activity.

In the first phase, before a contract is signed, the general rule is that religious reasons cannot be cited for refusing to employ someone. Moreover, according to article 16.2 of the Constitution, nobody may be compelled to make statements regarding his/her religion, belief or ideology, which means that there is a prohibition on asking about the ideology or beliefs of the worker. However, in these organisations, questions on religion and belief, and the request to workers to accommodate their private lives to the ethos of the enterprise seems legitimate if the activity to be carried out is linked with the ideological orientation pursued by the organisation. This is connected to what has been said about the situation of teachers of Christianity in state schools. In recent years there have been problems in recruiting teachers of Christianity in state schools where the ecclesiastical authorities have learned that the teachers were living with partners without being married, and as a result refrained from recruiting such teachers, or dismissed them.

In the second stage, during the employment relationship, the employees have to show respect for the ideology of the enterprise. This respect for ideology also extends to out-of-work activities, if they contravene this ethos. In the third stage, although the general rule says that discriminatory

dismissal is void, in these organisations it will not be considered discriminatory if there has been behaviour hostile to their ethos.

Conflicts may arise between the rights of organisations with an ethos based on religion or beliefs and other rights to non-discrimination, and these have been addressed both in the case-law of the Constitutional Court and in constitutional doctrine. According to general constitutional doctrine, since the principle of “good faith” has to rule in work relations (art. 5.a of the Workers’ Statute), employees in ideological or confessional organisations can be asked to conform to a minimal extent with the organisation’s ethos²². Rubio-Marín (2004) have pointed that both doctrine and courts have made it explicit that even within ideological institutions one has to distinguish between “ideological” and “neutral” employment positions within the organisation. Only the former are about transmitting the ideology of the institution and thus those in which ideological affinity can be expected²³. For example, given the longstanding rejection of homosexuality by the Catholic faith this brings up interesting issues concerning religious institutions. In relation to those, especially to private religious schools, the Constitutional Court has considered that, once again, the most relevant factor to be taken into consideration is what the job itself consists of. If it is strictly linked to spreading the schools’ ethos, constraints will be more justifiable than if the job consists in developing some purely technical expertise or is restricted to the pure transmission of knowledge²⁴. According to some academic texts, this would allow employers in this kind of institutions to inquire about the worker’s sexual orientation (Vicente 1998). On the other hand some scholars have pointed out that it is a worker’s conduct and not his sexual preference per se that could be seen as violating the institution’s ethos so that it is only when the conduct is notorious and has the capacity to discredit the institution’s ethos that measures can be taken (Fernández 1985).

On 26 February 1999 the Spanish Ministers of Education and Justice and the chairman of the Catholic Bishops’ Conference signed an agreement on financial and employment arrangements for teachers of religion. As a result, the bishop of each diocese makes decisions on the recruitment, activities and dismissal of teachers and the State pays their wages and compensates them in the event of dismissal. This situation has given rise to many conflicts in recent years and various court rulings have been given against dismissals of teachers of Christian religion. These dismissals have generally resulted from arbitrary decisions by the diocese (and have therefore been declared unfair or void), deeming that teachers have become unsuitable for their work as a result of getting divorced, drinking in bars, belonging to a trade union, etc. The Bill for an *Organic Law on Education* (LOU), currently being debated by Parliament (January 2006), is set to satisfactorily resolve this problem. Its Third Addition Provision, relating to teachers of religion, provides that:

“1. Teachers of religion must meet the qualification requirements stipulated for the various forms of education regulated by this Law, along with those stipulated in the agreements between central government and the various religious denominations.

2. Teachers not belonging to public education staff and that teach religion in state schools shall be employed, in accordance with the Workers’ Statute, by the respective levels of government. Their employment status shall be regulated with the participation of teachers’ representatives. They shall be awarded their posts according to objective criteria of equality, merit and ability. These teachers shall receive the emoluments for temporary teachers in the respective level of education. They shall in all cases be proposed by religious bodies and automatically re-employed each year. The relevant tiers of government shall determine whether contracts are full time or part time, according to the needs of schools. Their dismissal, where appropriate, shall be pursuant to the law.”

²² See *Sentencia del Tribunal Constitucional* (Constitutional Court Decisión), 27 March 1985, 47/1985.

²³ See *Sentencia del Tribunal Constitucional* (Constitutional Court Decisión), 12 June 1996, 106/1996.

²⁴ See *Sentencia del Tribunal Constitucional* (Constitutional Court Decisión), 13 February 1981, 5/1981.

4.3 Armed forces and other specific occupations

No explicit reference is made in the transposition of Directive 2000/78 to the exception for the armed forces in relation to age or disability discrimination under Article 3.4.

However, the law regulating access to the armed forces (Law 17/1999 of 18 May on Staff Regulations for the Armed Forces) provides that “Entry into military training centres shall be by public competition (... guaranteeing) the constitutional principles of equality, merit and ability (...). Applicants must (among other conditions) (...) be eighteen or older, and not have passed the age limits provided in the regulations²⁵ (...). The tests to be passed during recruitment (...) shall serve to demonstrate the applicants’ necessary psychological and physical aptitudes (...)” (art. 63).

Similar rules are applicable to employment in the police, prison or emergency services.

4.4 Nationality discrimination

The Law on the rights and duties of aliens (OL 4/2000) include direct and indirect discrimination by nationality but uses definitions which are not similar to Directives 2000/43 and 2000/78. Moreover indirect discrimination refers only to aliens who are “workers” not to “persons” as in Directive 2000/43. The definition of harassment by nationality is not included.

As we said earlier (see section 3.1.1), the seventh additional provision of the Law 62/2003, entitled “Non-applicability to immigration law”, states that the articles transposing the Directives shall not affect the regulations provided “in respect of the entry, stay, work and establishment of aliens in Spain in Organic Law 4/2000”. The “justification” of this provision is based on article 3.2 of Directives 2000/43 and 2000/78. But it should not be forgotten that Law 4/2000 regulates issues that are liable to be affected by Directives as “work and establishment” and this exclusion is not in art. 3.2. of Directives.

As the Law on the rights and duties of aliens (OL 4/2000) requires foreigners to be in a legal situation in order to enjoy full protection of their rights, equality for them is not guaranteed in the labour market, education and training, social protection, social advantages, and access to and supply of goods and services, until they have regularised their situation and procured a residence permit (and a work permit in the case of workers). This law does not affect Community citizens, who are covered by specific regulations and cannot be discriminated against in relation to Spaniards. Community citizens of the ten new Member States (except for Cyprus and Malta) are covered by temporary rules²⁶.

Law 17/1999 on Staff Regulations for the Armed Forces was amended by Law 32/2002 of 5 July in order to allow foreigners to become professional soldiers. This Law provides that “Foreigners that are nationals of countries legally identified as having special and traditional historical, cultural and linguistic ties with Spain may become professional soldiers (...)”. No complaint has been lodged against this law differentiating between Latin Americans and other foreign nationals, because of the “special and traditional historical, cultural and linguistic ties” linking their countries and Spain

²⁵ Royal Decree 1735/2000, of 20 October, adopting the General Regulations on Entry and Promotion in the Armed Forces (BOE, 21 October 2000), sets a minimum age of 23 for entry into the general forces, but the age limit is different for the various corps and scales in the army, and exceptions are provided for those joining the army from other armed corps such as the Civil Guard (art. 16).

²⁶ The corresponding annexes of the new Member States’ accession treaties (except in the cases of Cyprus and Malta) provide the possibility of applying restrictions on the free circulation of workers from those countries in the European Union for a period of seven years. In Spain a transitional period of two years has been set, due to end on 1 May 2006.

according to the law. Royal Decree 2266/2004 of 3 December increased the maximum quota of foreign nationals in the professional army and navy to seven per cent of the total.

Royal Decree 8/2004 of 5 November on allowances for those taking part in international peace and security operations introduced a differentiation on the grounds of nationality that may be discriminatory. This Decree (arts. 1 and 2) recognises the right of “Spanish” soldiers taking part in such operations to receive allowances. Although an Instruction from the Under-Secretariat of the Ministry of Defence issued on 23 December 2004 recognises the right of foreign soldiers in the Spanish army to receive allowances of the same amount as those established for Spaniards, the Decree may be considered to infringe the principle of equal treatment on the grounds of origin or nationality.

4.5 Work-related family benefits

Before commenting on the current situation, it is interesting to point out that Law 13/2005 amending the Civil Code with regard to the right to contract matrimony (*Ley 13/2005, de 1 de Julio, por la que se modifica el Código Civil en material de derecho a contraer matrimonio*, BOE, 2 July 2005) in the preamble states that “Spanish society in our time has become much richer, more pluralistic and more dynamic than that in which the Civil Code was enacted. Couples of the same sex cohabiting on a basis of affection have become increasingly recognised and accepted in society, overcoming deep-rooted prejudices and stigmas. Today it is widely acknowledged that cohabitation in such couples is a means for a large number of people to develop their personalities, and through which such people provide each other with emotional and financial support, albeit with no status other than that of a strictly private relationship, given the lack of formal recognition in law, up until now.” This provision is designed to end “a long history of discrimination on the ground of sexual orientation.” It establishes “a framework for personal fulfilment enabling those who freely adopt a sexual and emotional preference for persons of their own sex to develop their personalities in equal conditions”.

Law 13/2005 has amended art. 44 of the Civil Code, which states that “Men and women are entitled to contract matrimony pursuant to the provisions of this Code”, and a new paragraph has been added providing that that “Both parties’ being of the same sex shall neither prevent them from contracting matrimony nor diminish the effects thereof.” A further 16 articles are also amended, with the terms “men/women” (*hombre/mujer*) being replaced by “spouses” (*cónyuges*). (These articles refer to the rights and duties of spouses, custody of children, donations and financial provision, etc.) An additional provision states generally that “Legal provisions containing any references to ‘marriage’ shall be deemed applicable regardless of the sex of the spouses.” This amendment of the Civil Code, so simple in its form, means that homosexuals are henceforth entitled to get married with exactly the same rights (custody of children, adoption, inheritance, etc.) as currently enjoyed by heterosexual couples.

According to the Spanish Centre for Sociological Research (CIS), two out of three Spaniards are in favour of homosexual marriages. However, the Law has been strongly opposed by some conservative sectors of society close to the Catholic Church. Two weeks before the Law was passed, a demonstration was held with the presence of 20 of Spain’s 80 Catholic bishops. The result of the parliamentary vote on 30 June was 187 in favour and 147 against.

Both the General Social Security Law and the Workers’ Statute recognise a number of rights of the “spouse” and the status of matrimony, in some cases explicitly and in others implicitly. The Social Security Law, for example, recognises *inter alia* the spouse’s rights to a survivor’s pension (art.

174), to an allowance for burial costs (art. 173), and to compensation in the event of the other spouse's death due to an occupational accident (art. 177). The Workers' Statute provides for 15 days of marriage leave (art. 37.3.a), up to four days for serious illness or decease of the spouse (art. 37.3.b), and if one of the spouses moves to a new location and the other works in the same company, the latter is entitled to be transferred to the same area (art. 40.3), and so on.

Two specific current questions are connected with registered partnerships and unregistered de facto unions. As Rubio-Marín (2004) say, in Spain there is no general statute on civil unions with a generalised system of registry for partnership. The socialist government has promised to change this during its current mandate. In 1994 a municipality established the first municipal register without regard to the couple's sexual orientation and this example was then followed by hundreds of other municipalities and several autonomous communities. Registration is no substitute for marriage. The regional statutes on de facto unions attach to it some legal force, mostly the option that partners stipulate their economic regime. Most collective agreements extending benefits to non-marital partnerships require that the partnership be registered. In spite of registration, the marital status of the partners is not changed, nor are there any consequences that ensue regarding the children of the partners. It is interesting to note that as far as public employment in the region is concerned, these regional statutes extend to registered partners the same benefits, permits, health and social benefits as those enjoyed by married couples.

The situation is more complicated in the case of unregistered de facto unions. Many collective agreements make up for the legislative vacuum in the protection of non-married partners by explicitly stating that the privileges granted to married partners should extend to stable or de facto unions. The explicit inclusion of same-sex partners, however, is exceptional. It is far more common to either refer to different-sex partners, or to de facto stable unions without any further specification. Given that employers tend to interpret the clauses in the most restrictive ways - excluding same-sex partners in the process - there is growing litigation in this regard. The results have thus far been erratic. The National Railway Company (*RENFE*), for instance, has been sued on various occasions and although it has lost in front of the lower courts it has systematically appealed with various degrees of success. It has finally changed its rules to extend benefits to same-sex partners²⁷.

4.6 Health and safety

Law 31/1995 of 8 November on the Prevention of Occupational Hazards provides regulations for the protection of workers especially at risk from certain hazards, such as disabled workers. Art. 25 of the Law states that "Employers shall specially guarantee the protection of workers who, owing to their personal characteristics or known biological condition, including those with a recognised physical, mental or sensorial disability, are especially at risk from the hazards involved in their work. To this end, employers must take these aspects into account in hazard assessments and, subsequently, shall take the necessary preventive and protective measures." The Law further states that "Workers shall not be employed in posts in which, in view of their personal characteristics or known biological condition, or duly recognised physical, mental or sensorial disability, they may put themselves, other workers or other persons connected to the company in a dangerous situation, or, generally, where they are patently in a temporary condition rendering them unsuitable for the psychological and physical requirements of their respective posts of employment."

²⁷ See Rojo (2005).

There are no other 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.).

4.7 Exceptions related to discrimination on the ground of age

4.7.1 Direct discrimination

Spanish legislation does not permit general direct discrimination on the ground of age but the legislation permits differences of treatment based on age for some activities within the material scope of Directive 2000/78. These exceptions are “objectively and reasonably justified by a legitimate aim”.

In the social security field there are issues that need studying from the perspective of possible discrimination on the ground of age, also related to employment. In some social benefits, age is the reason for the benefit to be allocated. In others age is a factor limiting protection, as such benefits cannot be granted fully to all citizens. This second case may give rise to problems of discrimination. In any event sufficient justification is required. The justification cited by law is normally the difficulty for older workers of re-entering the labour market. In other cases the justification is the different positions of social security contributors, even those performing no paid activity, and benefit receivers, in order to determine differences of treatment in social security (Blázquez, 2005).

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

There are many employment policy programmes (detailed in the National Employment Plans and on occasion funded by the European Social Fund) with participant age limits, normally designed to favour young people (under 25) and older workers. For both groups there are training support and employment support measures in the form of partially subsidised contracts. In the case of young people the employment measures are work experience contracts, job-training contracts and subsidised permanent contracts. In the case of older workers there are subsidised permanent contracts for persons aged 45 to 55 in some cases, and for those aged over 52 in others. There is also a job-seeker’s allowance programme for older workers at a particular disadvantage on the labour market (see Cachón 2004a).

The unemployment benefit system also makes age distinctions. For example, those aged over 52 who have used up their contributory unemployment benefit are entitled to an unemployment allowance until they reach retirement age, and those aged over 45 with family responsibilities that have used up their contributory unemployment benefit are entitled to a variable allowance depending on certain circumstances. “Active job-seeking income” is granted to those aged over 45 who satisfy certain conditions.

4.7.3 Minimum and maximum age requirements

The Workers’ Statute (art. 6) sets the minimum age for access to employment at 16. This is also the minimum age for access to vocational training.

There is no general rule establishing a maximum working age, since the provision of the Workers' Statute in 1980 setting a maximum age of 69 was declared unconstitutional by the Constitutional Court in 1981²⁸. Nor is there a maximum age for taking part in vocational training.

The Workers' Statute, which regulates dismissal proceedings, applies equally to all workers without distinction of age.

Public service is an exception, as retirement is mandatory at 65 (with exceptions such as judges, who can retire at 72, or publicly employed university professors, who can retire at 70).

4.7.4. Retirement

Workers may begin to receive a public pension at age 65, provided the other requirements provided in the law (General Social Security Law, art. 161) are met. But this does not mean that 65 is the age of obligatory retirement from work and the labour market. This age applies both for contributory pensions and for non-contributory pensions and may be lowered by the government for "those groups or professional activities whose work is of an exceptionally laborious, toxic, dangerous or unhealthy nature, and which have high levels of disease or mortality," or in the case of "disabled people with a degree of disability equal to or greater than 65 per cent." Early retirement may be taken from age 61 provided that certain requirements specified in the General Social Security Law (art. 161) are met.

There have been no recent changes in the regulations on retirement age, but the policies that used to promote early retirement are being progressively rolled back, so that the average retirement age is now 63.

The retirement age is of a voluntary nature. The rule requiring people to retire at no later than 69 was declared unconstitutional (See section 4.7.3). But retirement at 65 is compulsory in the civil service (Law 30/1984 on Civil Service Reform, art. 33), except for members of public corps with special regulations such as judges (compulsory retirement at 72) or university professors (compulsory retirement at 70), among others.

On 3 December 2004 trade unions and employers' organisations signed an agreement with the Government to reintroduce into the Workers' Statute a provision which permits the social partners to include clauses in collective agreements on the termination of contracts when employees reach the ordinary retirement age, provided that certain conditions are met. On 29 June 2005 the Spanish Parliament passed a Law inserting a "Tenth Additional Provision" into the Law on the Workers' Statute. This Provision states that "collective agreements may include clauses allowing the employment contract to be terminated when the employee reaches the ordinary retirement age as established in social security regulations" and adds two provisos (See sections 0.3 and 2.1.1).

The conditions are the same for women and men.

4.7.5 Redundancy

Spanish law allows no distinctions on the grounds of age in the case of redundancy. But in practice many redundancies in companies affect the youngest employees (because they have been in the company for less time) or the oldest (because they have access to early retirement schemes).

²⁸ See *Sentencia del Tribunal Constitucional* (Constitutional Court Decisión), 2 July 1981, 22/1981.

Redundancy payments are provided for in the Workers' Statute (Title I, Chapter III, Section IV). Officially, such payments are not affected by the worker's age, but in practice they are, because their amount is linked how long the worker has worked for the company.

The current regulations on this matter are in line with Directive 2000/78. Actual practice in companies may also be said generally to conform to the Directive, but in some cases indirect discrimination on the ground of age does occur, and should, where appropriate, be dealt with by the courts.

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)

Spanish legislation does not reproduce explicitly the exceptions mentioned in the Directive 2.5 regarding measures necessary for the maintenance of public order and the prevention of criminal offences, for the protection of health and the rights of freedoms of others.

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

The principle of "positive action" is rooted in the Spanish Constitution: article 14 formally recognises equality before the law, without discrimination on any of the grounds listed in the Constitution, while article 9.2 requires the public authorities to promote "the conditions to ensure that the freedom and equality of individuals and of the groups that they form are real and effective". The positive action required by art. 9.2 should not be regarded only as a "legitimate exception" but as a guarantee that the principle of equality is to be made effective. In this connection, the Constitutional Court has repeatedly held that affirmative action measures are not to be seen as discriminatory. Rather, the Court has interpreted that actions by public authorities to remedy the employment disadvantage of certain socially marginalised groups is actually required by a commitment to equality properly understood.

Positive action has been present in labour, educational and other provisions since the Spanish constitution was passed in 1978 (Cachón 2004a).

In the field of employment, the Workers' Statute (art. 17.2) stipulates that the Parliament may regulate "exclusions, reservations and preference" in employment for certain groups at a disadvantage on the labour market. And (art. 17.3) that the Government "may regulate measures of reservation, duration or preference in employment".

In the educational field the Law on the Education System (*Ley Orgánica General del Sistema Educativo*) of 1990 stipulates that "In order to render effective the principle of equality in the exercise of the right to education, the authorities develop compensatory actions aimed at persons, groups and territorial regions with unfavourable situations, and provide the necessary financial resources" (art. 63).

In Law 62/2003 (which transpose the Directives) there are three articles (30, 35 and 42) which develop positive action. Art. 35 in field of employment and occupation on all grounds of Directives provides that "with a view to ensuring full equality on the grounds of racial or ethnic origin, religion or belief, disability, age or sexual orientation, the principle of equality shall not prevent maintaining or adopting specific measures in favour of certain groups in order to prevent or compensate for

disadvantages that they may encounter”. Art. 42 provides that “collective agreements may include measures aimed at combating every form of employment discrimination, to encourage equality of opportunities and to prevent harassment on the grounds of racial or ethnic origin, religion or belief, disability, age or sexual orientation”.

Art. 30 of the same Law, referring to the various spheres of employment included in Directive 2000/43 on the grounds of racial or ethnic origin, states that: “In order to guarantee full equality irrespective of racial or ethnic origin, the principle of equal treatment shall not prevent the maintenance or adoption of special measures benefiting certain groups, designed to prevent or to offset any disadvantages that they suffer as a result of their racial or ethnic origin.”

The 3rd “National Action Plan for Social Integration in the Kingdom of Spain” (2005-2006) includes special measures to support those who are most vulnerable, which may be regarded as positive action measures. The measures cover many spheres of activity of the public authorities: education, housing, health, training, employment and social services. One of the groups given special attention is the Roma people. The Roma also have a special plan for “Roma Development” and a “National Roma Council” (see section 7).

Disability

In the field of disability there has been a great range of positive action measures since the implementation of Law 13/1982 on the Integration of the Disabled (LISMI). Its aim (art. 38) is the complete personal fulfilment of the disabled and their total social integration so that the necessary assistance and protection to the seriously disabled is provided, discrimination due to disability is prohibited, and a quota system and other measures supporting professional integration for the disabled are provided. The Constitutional Court (STC 269/1994, October 1994) has recognised the legality of a quota for disabled persons in the selection of employees.

Law 51/2003 of 2 December on equality of opportunities, non-discrimination and universal accessibility for the disabled provides a series of positive action measures to combat the discrimination suffered by disabled people (art. 8):

- “1. Positive action measures shall be those forms of specific support intended to prevent or to offset the disadvantages or special difficulties experienced by disabled people on entering and taking part in the various spheres of political, economic, cultural and social life, in keeping with the various types and degrees of disability.
2. The public authorities shall adopt additional positive action measures for disabled people that objectively experience a greater degree of discrimination, or lesser equality of opportunities, such as women with disabilities, disabled people with severe handicaps, disabled people that cannot represent themselves, or those who suffer greater social exclusion owing to their disabilities, along with disabled people that live in a rural environment.
3. Furthermore, within the framework of official policy for protecting the family, the public authorities shall adopt special positive action measures in respect of families with disabled members.”

Art. 9 of this Law specifies the contents of measures for positive action on the ground of disability; these measures may consist of

- ✓ Additional support:
 - Financial support
 - Technical support
 - Personal assistance

- Specialist services
- Special support and services for communication
- ✓ Rules, criteria, or more favourable practices

These measures shall be minimum provisions, without prejudice to any other measures that may be established by the Autonomous Communities in the spheres of their jurisdiction.

The Law (art. 12-16) anticipates promotional measures of equality, together with measures of positive action, that have as an aim a policy of encouragement, and among those cited are:

- Awareness training
- Measures to ensure that administrative programmes of quality contemplates the situation of the disabled.
- Measures of innovation and technical development.
- The participation of organisations representing disabled people.
- Plans and programmes for accessibility and non-discrimination.

The LISMI sets out three systems for integrating disabled persons into the workplace: a) integration in an ordinary workplace, seeing that this system is preferential; b) occupation in Special Work Centres, when the worker exceeds a certain grade of disability (disability above 33%); and c) occupational centres, when owing to the degree of disability, they can not access either of the other options.

Various measures exist to support integration into ordinary employment, which we can describe as positive actions or assumptions of reverse discrimination:

- ✓ A quota system (the workforces of public and private companies with 50 or more employees must include at least 2 per cent of disabled workers)
- ✓ Incentives²⁹
 1. Permanent Contracts
 - a. Subsidy (aid of 3,900 euros to companies for each permanent contract)
 - b. Bonuses in social security contributions (reduction of companies' social security contributions, offset by the public employment services)
 - c. Support for professional training
 - d. Bonuses for adapting work stations (subsidies for adapting work stations)
 - e. Fiscal measures
 2. Temporary contracts
 - a. Reduction, in force up to 1992, or bonuses in companies' social security contributions.

The *Special Employment Centres* are those that firstly, are for those of more than 70% disability, and secondly that have as objectives: a) productive work and regular participation in economic activity; b) to help disabled workers secure paid work, such as services supporting rehabilitation and social integration; and c) to integrate the largest number possible of disabled into a normal work routine. Workers that can be integrated through these centres are those that have a disability equal or superior to 33% that means that their capacity to work is limited to the same degree.

The objective of the *Occupational Centres* is the social and personal integration of disabled people whose capacity remains below the limits that permit integration using the formula of the Special Work Centres.

²⁹ Initially established in Royal Decree 1441/1983, of 11 May, regulating measures for the promotion of employment for the disabled. Subsequent legislation has amended this Royal Decree's provisions.

The LISMI obliges public and private companies of more than 50 workers to employ 2% disabled workers. However, repeated failure to comply with this provision resulted in the publication of Royal Decree 27/2000 of January 14 on alternative measures for complying with the quota in favour of disabled workers. This rule lays out two types of substitute measures: a) contracts for supplies and services with Special Work Centres; b) donations in cash to foundations and public associations that have as an objective, among others, of promoting the professional integration of disabled people.

This quota of employment of disabled persons is equally applicable to bodies of public administration. Law 39/1984 of August 2 (modified by Law 53/2003 of December 10 on the public employment of the disabled) establishes that “In offers of public employment a quota will be applied of not less than five percent of vacancies to be filled by persons with a disability whose degree of disability is equal to or exceeds 33 percent, so that over time two percent of the effective totals of the State Administration will be disabled . The disabled people must pass selection tests and will then be assigned a grade of disability and of compatibility with tasks and functions to be performed, thus regulating the work to be carried out” (This Law was recently developed by Royal Decree 2271/2004 regulating access to public employment and the provision of posts for the disabled. This Decree expressly mentions Directive 2000/78).

The law does not provide special subsidies to compensate for low levels of performance by a disabled worker in ordinary work, but provides a subsidy of 50% of the minimum wage in the case of employment in Special Work Centres.

Accessibility currently poses many problems: there are many public and private buildings which have not been adapted and many public and private services are not adapted to the needs of certain groups of citizens, and information in Braille and sign language is not provided.

The “1st National Accessibility Plan 2004-2012” adopted on 25 July 2003 is currently being implemented. This plan is a strategic framework of actions intended to ensure that new environments, products and services are made to be accessible to greatest possible number of citizens (Design for All) and that those already existing are suitably adapted. The following are the Plan’s five objectives:

1. To consolidate the Design for All model and encourage its implementation in new products, environments and services. To disseminate information on the application of accessibility.
2. To introduce accessibility as a basic criteria of quality in public management.
3. To create a complete and efficient regulatory system for the promotion of accessibility which is immediately applicable on the ground.
4. To adapt environments, products and services to the Design for All criteria in a progressive and balanced manner.
5. To promote accessibility of new technologies.

To this end, 18 strategies have been adopted, implemented by 58 specific actions. Although the 1st Plan has a duration of 9 years, it is scheduled in three periods of three years each. The first period is now in progress (2004-2006).

In this context, on 12 July 2004 a Cooperation Agreement was signed between the Ministry of Labour and Social Affairs and the ONCE Foundation for cooperation in the social integration of disabled people with a view to developing a universal accessibility programme.

On 13 January 2006 the Government approved the Bill recognising sign language and speech aid systems (*Proyecto de Ley por el que se reconoce la lengua de signos y los sistemas de apoyo a la*

comunicación oral). The Bill recognises Spanish sign language as a language of those deaf people in Spain that freely decide to use it, along with the study, knowledge and use thereof. It will also provide and guarantee support for communication by deaf, hearing-impaired and deaf-blind people.

The Bill states that the education authorities shall provide what is necessary to promote the learning of Spanish sign language by deaf, hearing-impaired or deaf-blind pupils that freely opt to learn it.

As to its use, the law will promote the use of sign-language interpreters for deaf, hearing-impaired and deaf-blind people and the provision of communication aids, where required, in various public and private spheres: 1) publicly provided goods and services (education; training and employment; health; culture; sport and leisure); 2) transport; 3) relations with public administration; 4) political participation; and 5) the media, telecommunications and the information society.

The Bill also establishes a “Centre for the Linguistic Standardisation of Spanish Sign Language”. The purpose of this body will be to investigate, promote and disseminate this language and to supervise its use.

This Bill, apparently the first of its kind in Europe, responds to a long-standing demand by Spanish associations representing deaf, hearing-impaired and deaf-blind people. Its aim is to facilitate deaf people’s access to information and communication, taking into account their heterogeneity and their specific needs.

6. REMEDIES AND ENFORCEMENT

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

The Constitution provides in Art. 53 that all fundamental rights (as is the case of equality) are protected by the ordinary courts of law. The Organic Law on the protection of fundamental rights establishes that this protection will be made effective, in the first place, by a special procedure, preferential and summary, which is regulated in the main procedure laws in all jurisdictional orders: civil, criminal, labour or administrative. Moreover, appeals for protection in respect of such rights may be lodged at the Constitutional Court once ordinary proceedings have been exhausted. The Law on the rights and freedoms of aliens stipulates that foreigners are entitled to legal aid under the same conditions as Spaniards.

There are also conciliation procedures for civil and social matters. As well as having recourse to the ordinary courts and to the Constitutional Court, victims of discrimination may appeal to the Ombudsmen (at both national and regional level) when the issue concerns acts by the public administration, as well as to the Employment Inspectorate (in matters of employment and Social Security) and to the Education Inspectorate, both private and public employment or education.

Conflicts regarding either private employment or the hired personnel of public entities (subject to labour law) are resolved by the social jurisdictional branch composed by the *juzgados de lo social de única instancia* (specialised social and labour first and only instance courts), *las salas de lo social de los Tribunales de primera y segunda instancia* (first instance and appeal chambers specialised in social and labour law), *Tribunales Superiores de Justicia* (regional high courts) and *la Audiencia Nacional* (national appeals court) and the *sala de lo social del Tribunal Supremo* (the social and labour law chamber of the Supreme Court).

When the conflicts are due to an action by the administration subject to administrative (and not labour) law, the jurisdictional branch which is competent is the *jurisdicción contencioso-administrativa* (administrative disputes jurisdiction) which requires the prior exhaustion of whatever administrative appeals there may be and which is formed by *juzgados y tribunales contenciosos administrativos, en primera y segunda instancia* (first instance and appellate administrative disputes courts), and by the *sala de lo contencioso-administrativo del Tribunal Supremo* (the administrative disputes chamber of the Supreme Court). The *Tribunal Supremo* (the highest instance within the ordinary judiciary) is in charge of dealing with appeals to unify contradictory doctrine of lower courts and its decisions are generally binding and thus constitute a source of law.

In the field of employment, articles 63-68 of the Law on Procedure in Industrial Disputes (RDL 2/1995) provides a compulsory conciliation procedure to be followed before any judicial appeal is lodged.

Art. 40 of Law 62/2003 (which transposes the Directives) modifies art. 181 of the Law on Procedure in Industrial Disputes: “Actions for the defence of other fundamental rights and civil liberties, including the prohibition of discriminatory treatment and harassment (...)” may be heard in social courts using a special urgent procedure. As Rodríguez (2004) says, instituting this type of action is conditional, firstly, on presenting the period of prescription or predicted expiration of the acts and conduct with which the discrimination deals, and secondly, on the clear expression of the constituent facts of the discrimination.

Equally, the worker considered the victim of labour discrimination, can make a claim in the criminal courts (art. 314 of the Criminal Code) but given the way the crime is described it has very few chances of being successful.

A person can bring a case after the employment relationship has ended.

Law 51/2003 on equal opportunities for disabled people establishes a voluntary system of arbitration to solve conflicts that may arise in matters of equal opportunities and discrimination (art. 17). Art. 18 refers to disabled people’s right to effective legal protection. It begins with a declaration: “The legal protection of the right to equal opportunities for persons with a disability will include the adoption of all necessary measures to end the violation of the right and prevent ulterior violations, thus re-establishing to the victim the full exercise of this right”. And art. 19 recognises the legitimacy of the juridical person legally equipped for the defence of the rights and interests of the individual disabled person and to obtain reparation for this individual person.

The litigants must have a lawyer and, if they win the action, the judge may require the respondent to pay that lawyer’s costs. If they cannot afford a lawyer, they may request a free duty lawyer.

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

Claims in respect of discrimination are normally supported by various organisations, such as NGOs working with Roma or immigrants, NGOs active in combating racism or trade unions. These organisations are entitled to be party to legal proceedings. The Constitution entitles any physical or legal person invoking a legitimate interest to be party to proceedings relating to the violation of fundamental rights and freedoms.

Current Spanish legislation provides only for the intervention of “organisations or other legal persons that have a legitimate interest” in the administrative sphere. This is stated in general terms in Law 29/1998 of 13 July regulating Contentious-Administrative Jurisdiction, which stipulates that: “The following are entitled to contentious-administrative jurisdiction: a) Physical or legal persons having a legitimate right or interest. b) Corporations, associations, trade unions and groups and bodies referred to in article 18 that are affected or which are legally entitled to defend legitimate collective rights and interests”. (Art. 19.1.) Moreover, OL 4/2000 on the Rights and Freedoms of Aliens stipulates that organisations for the defence of immigrants which are legally constituted in Spain may intervene in procedures in legal matters regarding aliens. (Arts. 20.3 and 4.). The OL 4/2000 on the Rights and Freedoms of Aliens stipulates that organisations for the defence of immigrants which are legally constituted in Spain may intervene in procedures in legal matters regarding aliens (Art. 20.3 y 4).

The Law on Labour Procedure in its regulation on capacity and procedural legitimisation, mentions in article 16 workers, or their legitimate representatives if they are legally incompetent or if the plaintiff is a legal entity. Article 17 makes it possible for trade unions and employers’ associations of being authorised to defend their own economic and social interests, but no mention of other organisations is made in this article. Furthermore, article 20 states that trade unions may appear in court in the name and interest of member workers who authorise them to do so, in defence of their individual rights. However, this opportunity is only open to trade unions.

Law 62/2003 (art. 31) provides that “legal entities legally authorised to defend legitimate collective rights and interests may engage on behalf of the complainant, with his or her approval, in any judicial procedure in order to ensure the principle of equal treatment based on racial or ethnic origin”. The words “on behalf” are included, but not “or in support”, as stated in art. 10 of Directive 2000/43. Moreover, this article refers to the principle of equal treatment on the grounds of racial or ethnic origin and only in fields other than employment. In this field, the aforementioned provisions of the Law on Procedure in Industrial Disputes remain in force.

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

Law 62/2003 (which transposes the Directives) introduces a shift in the burden of proof into the Spanish legal system (although it was foreseen in labour procedure, for discrimination based on sex in art. 96 of Law on Social Procedure and for infringement of the freedom of the unions in Art.179). For civil, administrative and labour procedures the law provides that if well-founded evidence of discrimination on the grounds of racial or ethnic origin (in all fields of Directive 2000/43) and religion or belief, disability, age or sexual orientation (in employment) are inferred from the allegations of the plaintiff, it shall be for the respondent to bring forward a reasonable and objective justification, sufficiently proven, of the actions taken and their proportionality.

Art.32 (for discrimination in fields different of employment on ground of racial or ethnic origin) and art. 36 (for discrimination in employment on all grounds of Directives) of Law 62/2003 provides that “in those civil and administrative procedures in which from the facts alleged by the plaintiff one may conclude the existence of well founded evidence of discrimination on the grounds of racial or ethnic origin, religion or belief, disability, age or sexual orientation with respect to matters falling within the scope of this section, it shall be for the respondent to give an objective and reasonable and sufficiently proved justification of the measures adopted and their proportionality” (the text of art. 32 is similar but on ground of racial or ethnic origin in others fields).

The Labour Procedure Law (art. 96) also provides for a shift in the burden of proof, and after the reform introduced by Law 62/2003 (art. 40) it now mentions not only discrimination on the ground of sex but also on all the grounds of Directives. It states: “in procedures in which the allegations of the plaintiff are based on evidence founded on discrimination for reason of sex, racial or ethnic origin, religion or beliefs, disability, age or sexual orientation, it shall rest with the respondent to provide sufficient proof of the objective and reasonable justification of the measures taken and of their proportional nature.”

The Constitutional Court has established case-law on the burden of proof. In order to use this rule for reversing the burden of proof, the victim needs to show “the existence of evidence that generates a reasonable suspicion, appearance or presumption in favour of such an affirmation; it is necessary on the part of the victim to produce ‘realistic proof’” (STC 207/2001)³⁰; and in another judgment it indicates the “requirement for a principle of proof revealing the existence of a general discriminatory panorama or of facts that leads to the strong suspicion of discrimination ...” (STC 308/2000)³¹.

In criminal cases, the rule is presumption of innocence. The Spanish Constitution states that all persons have the right to the presumption of innocence (art. 24.2). The Constitutional Court points out that this presumption is “the cardinal principle of criminal procedure, which implies that any person accused of infringements is presumed innocent until the contrary is proved. This presumption of innocence shall only be removed if an independent court, which is impartial and established by law, declares the person’s guilt in a proceeding which observes all the guarantees” (STC 209/1999)³².

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

The principle of protection against victimisation is transposed but only in the labour field.

Before the transposition, the Workers' Statute (art. 55.5) declared invalid those dismissals related to any of the grounds of discrimination covered by the Constitution or the legal system or which entail the violation of workers’ fundamental rights and freedoms.

Law 62/2003 (art. 37) introduces changes into the Workers’ Statute and in Law 5/2000 on infractions and remedies in social domain. The new version of art. 17.1 sanctions the nullity of those administrative regulatory provisions, conventional or contractual clauses, agreements or unilateral decisions of the employer which discriminate on all the grounds of the Directives; and a new paragraph (art. 17.2) has been added. This paragraph states that “the decisions of the employer amounting to adverse treatment of workers as a reaction to a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment and non-discrimination shall likewise be void of effect”.

Similarly, Law 62/2003 (art. 41) has introduced modifications to Law 5/2000 on infractions and remedies in the social sphere. Art. 8 of Law 5/2000 contains a list of very serious infractions in the area of labour relations. With the reform of Law 62/2003, art. 8.12 now adds to those decisions that amount to discrimination reference to those that “amount to an adverse treatment of workers as a reaction to a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment and non-discrimination”.

³⁰ See *Sentencia del Tribunal Constitucional* (Constitutional Court Decision), 22 October 2001, 207/2001.

³¹ See *Sentencia del Tribunal Constitucional* (Constitutional Court Decision), 18 December 2000, 308/2000.

³² See *Sentencia del Tribunal Constitucional* (Constitutional Court Decision), 21 November 1999, 209/1999.

There are no legal provisions concerning the victimisation of persons other than the complainant (as might be the case of witnesses), but judges should also apply protection against victimisation to them.

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

Sanctions have only been established in the labour field (Directive 2000/78), but not in the other fields covered by Directive 2000/43 on ground of racial or ethnic origin, except in the criminal field. A bill providing for sanctions for discrimination in the field of disability in various spheres of employment is currently going through Parliament (January 2006).

The Law on Infringements and Sanctions in the Social Order (approved by Royal Decree 5/2000 of 4 August 2000) provides financial penalties for legal, contractual, and conventional infractions by natural or legal persons and private and public employers when these affect employees in the service of the various tiers of public administration (civil servants are governed by special provisions). It ranges the sanctions from light, to serious, and very serious. The Law 62/2003 (art. 41) modified Law 5/2000 to better comply with the Directives, mostly by making more evident that such discrimination, including harassment and victimisation, amounts to a very serious infraction.

Art 8.12 has been amended to include among very serious infringements in the context of employment “unilateral decisions of the employer meaning unfavourable direct or indirect discrimination on the ground of age or disability, or favourable or adverse treatment relating to remuneration, working time, training, promotion, and other working conditions, on the grounds of sex, origin, comprised racial or ethnic origin, marital status, social condition, religion or belief, political ideas, sexual orientation, membership or non-membership of a trade union, adherence to trade union agreements, family ties with other employees, or language within the Spanish State, as well as decisions of the employer meaning unfavourable treatment of workers as a reaction to a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment and non-discrimination”. The sanction for such infringements is a fine ranging from 3,005 euros to 90,152 euros depending on the seriousness.

A new paragraph (13, in art. 8) has been added, specifying “harassment on the grounds of racial or ethnic origin, religion or belief, disability, age or sexual orientation when it takes place within the realm of prerogatives of the management, whoever the agent may be, as long as, when known by the employer, the latter does not undertake the necessary measures to prevent such infractions” as a very serious infringement in the context of labour relations.

Art. 16.2 has been amended to include among very serious infringements in the context of employment “to establish employment conditions, be it through publicity, diffusion or in any other way that amounts to discrimination, favourable or adverse, to access to employment on the grounds of sex, origin, comprised racial or ethnic origin, marital status, social condition, religion or belief, political ideas, sexual orientation, membership or non-membership of a trade union, adherence to trade union agreements, family ties with other employees, or language within the Spanish State”.

Law 62/2003 also modified art. 54.2 of the Workers’ Statute by adding subparagraph g) which includes “harassment of the employer or other employees in the undertaking on the grounds of racial or ethnic origin, religion or belief, disability, age or sexual orientation” as gross contractual misconduct by the employee, punishable by disciplinary dismissal.

Moreover, the reform of art. 17 of the Workers' Statute and of art. 181 of Employment Procedure by Law 62/2003 makes null and void any administrative regulatory provisions, conventional or contractual clauses, agreements or unilateral decisions by the employer which amount to discrimination and that once the employer's action has been declared null and void, a judicial decision will provide for an immediate cessation of the damaging behaviour, a return to the situation prior to the violation of the worker's rights, a reparation of the consequences derived from the action, and compensation for the resultant harm (see paragraph 3.2.3).

As for sanctions, the Law on Offences and Sanctions in the Social Sphere was amended by Law 62/2003. According to the new law, unilateral decisions of an employer involving unfavourable direct or indirect discrimination on the grounds of age or disability, or favourable or adverse treatment relating to remuneration, working time, training, promotion, and other working conditions, on the grounds of gender, racial or ethnic origin, marital status, social condition, religion or belief, political ideas, sexual orientation, membership or non-membership of a trade union, adherence to trade union agreements, family ties with other employees, or language within the Spanish State, as well as decisions of the employer entailing unfavourable treatment of workers as a reaction to a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment and non-discrimination are very serious offences. The sanction for such offences is a fine ranging from 3,005 euros to 90,152 euros depending on the seriousness of the offence. Additionally, these sanctions, once they are no longer subject to appeal, will be made public.

These infringements are punishable with a fine. For each of the three levels of seriousness (minor, serious and very serious), there are three degrees (minimum, medium and maximum). The degree of the fine is set in consideration of the following factors: negligence and intention of the offender, fraud or collusion, failure of previous warning and requirements of the Labour and Social Security Inspection, company finances, number of workers or beneficiaries affected in the case, harm caused and quantity defrauded, as circumstances that can aggravate or moderate the degree applying to the infraction committed (Law 5/2000, art. 39). In the minimum degree the fine may range from €3,005 to €12,020; in the medium degree, from €12,050 to €48,081; and in the maximum degree, from €48,081 to €90,152. Additionally, these sanctions, once they can no longer be appealed, will be made public.

Art. 18.2 of Law 51/2003 on equality for disabled people states that "Any payment or compensation to which the corresponding claim may give rise shall not be limited by a previously established ceiling. Compensation for moral damage shall be payable even where there are no damages of a pecuniary nature and shall be set according to the circumstances of the infringement and the seriousness of the injury."

The failure to comply with quotas or alternative measures for the promotion of persons with disabilities is punished with a fine of €301 to €3005 (art. 15 Law 5/2000).

The Law on Procedure in Industrial Disputes, amended by Law 62/2003, lays down a special procedure for violations of fundamental rights and civil liberties enshrined in the Constitution. With the amendment introduced by Law 62/2003, this procedure covers the acts of discrimination or harassment specified in the Directives. If the court rules in favour of the complainant in respect of acts of discrimination or discriminatory harassment, the court will declare that act void, require the previous state of affairs to be restored, and provide for "reparation of the consequences of the act, including any appropriate compensation." That is, the Law requires compensation (reparation and

financial damages) for the victims of discriminatory acts, the amount of which is to be set by the court.

Moreover, art. 314 of the Criminal Code is applicable. This provides “imprisonment from six months to two years or a fine of 12 to 24 months” for those “that do not restore the situation of equality before the Law when required to do so or following an administrative penalty, making good any corresponding financial damage” when employers have been convicted of “serious discrimination in the workplace, public or private, against a person for reason of their ideology, religion, beliefs, ethnicity, race or nation, gender, sexual orientation, family situation, illness or disability, retaining legal or workers’ union representation, relationship with other company workers, or for use of any official languages within the state of Spain...”.

But beyond the field of employment it is worth noting that the Criminal Code (art. 22) provides as a general aggravating circumstance the commission of any offence “motivated by racism, anti-Semitism or any other kind of discrimination relating to the victim’s ideology, religion or beliefs, the ethnic group, race or nation to which he belongs, his gender or sexual orientation, or any illness or disability from which he suffers.”

The Criminal Code expressly punishes offences against fundamental rights and civil liberties. Art. 510 provides prison sentences of one to three years and a daily fine for six to 12 months for “any person inciting discrimination, hatred or violence against groups or associations on racist, anti-Semitic or other grounds relating to ideology, religion or beliefs, family situation, its members’ membership of an ethnic group or race, their national origin, gender or sexual orientation or any illness or disability from which they suffer”, and any person “disseminating defamatory information” about groups with these same characteristics. And art. 511 provides prison sentences of six months to two years, a daily fine of 12 to 24 months and disqualification from public office or employment for a period of three years for “any individual responsible for a public service who denies the provision of service to a person entitled thereto on the grounds of his ideology, religion or beliefs, national origin, gender, sexual orientation or family situation or any illness or disability from which he suffers”, or where these acts are committed on the same grounds against an association or the members thereof. If any of these acts are committed by a public servant, he will moreover be disqualified from public office or employment for a period of two to four years. Art. 512 provides disqualification from the exercise of a profession, trade, industry or business, for a period of one to four years, for “those who, in the exercise of their professional or business activity, deny the provision of a service to a person entitled thereto on the grounds of his ideology, religion or beliefs, his membership of an ethnic group, race or nation, his gender, sexual orientation or family situation or any illness or disability from which he suffers.”

The Government approved on 13 January 2006 the Bill on offences and sanctions in the field of equality for disabled people (*Proyecto de Ley de infracciones y sanciones en materia de igualdad de las personas con discapacidad*) which is currently going through Parliament (January 2006). Law 51/2003 of 2 December on Equal Opportunities, Non-Discrimination, and Universal Access for Persons with Disability, and Law 62/2003 of 30 December on Fiscal, Administrative and Social Measures, which transposed Directive 2000/78 into Spanish law, did not establish an adequate system of sanctions in cases of discrimination on the ground of disability, as provided in article 17 of the Directive. The Bill is designed to fill this legal gap.

The Bill defines as “administrative offences” any infringements of disabled people’s rights to equal opportunities, non-discrimination and universal access involving direct or indirect discrimination, harassment or non-compliance with requirements for accessibility and reasonable accommodation,

along with non-compliance with legally established positive action measures, especially where there are economic benefits for the offender. These offences may be “minor”, “serious” or “very serious”. Offences will be punished with fines ranging from a minimum of 301 euros to a maximum of one million euros, depending on their seriousness. The criteria taken into account in the scale of sanctions will be the offender’s intention, negligence, fraud, non-compliance with prior warnings, company turnover and the number of people affected.

This Bill complies with the provisions on disability in article 17 of Directive 2000/78 (Sanctions), and it was drawn up after dialogue with NGOs, as required by article 14 of the Directive: the Bill has been negotiated with the Spanish Committee of Representatives of the Disabled (CERMI) and was reported on favourably by the National Disability Council. The Autonomous Regions were also consulted when it was being drafted.

There is no information concerning the extent to which the available sanctions have been shown to be effective, proportionate and dissuasive, as is required by the Directives.

There is no information available concerning the average amount of compensation available to victims.

7. SPECIALISED BODIES

Council for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin

Law 62/2003 (art. 33) establishes a Council for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin (*Consejo para la promoción de la igualdad de trato y no discriminación de las personas por el origen racial o étnico*). This Council has the following characteristics:

- ✓ It is attached to the Ministry of Labour and Social Affairs (Directorate-General for the Integration of Immigrants).
- ✓ Its functions include the three functions described in Art. 13.2 of the Directive, but the word “independent” does not appear in the definitions of these three functions in the Law.
- ✓ Its make-up is of a fundamentally governmental nature, as the Law states that the Council is to be formed by all the ministries with responsibilities in the areas referred to by Art. 3.1 of Directive 2000/42, with the participation of the Autonomous Regions, local authorities, employers’ organisations and trade unions, and other organisations representing interests related to racial or ethnic origin.
- ✓ The Ombudsman may establish co-operation and collaboration mechanisms with the Council.
- ✓ Its make-up and functions should have been regulated by a royal decree within three months of the Law being passed (i.e. before 1 April 2004). But as of January 2006 this royal decree has not been approved yet.

The difficulty with the proposed body is that it may be hard to guarantee its independence and effectiveness. Its independence is uncertain for at least two reasons: first, because the definition of its functions omits the word “independent”, which appears three times in Art. 13.2 of the Directive, once in each description of the body’s three functions; and second, because its make-up is of an essentially governmental nature, so it appears to be a typical internal consultative body within the

Spanish government, albeit with a (minority) presence of social partners and NGOs. Its effectiveness is questionable because the body will not have a budget of its own; instead it will receive “the necessary support for the performance of its functions” from the Ministry of Labour.

It is necessary to wait for the royal decree that will regulate the composition and functioning of the specialised body in order to make a more concrete appraisal. The new incumbents of the Spanish Ministry of Labour are aware of certain limitations in the transposition of Directive 2000/43 and are highly receptive to proposals concerning the anti-discrimination body. They recognise that there has been a lack of social dialogue in the transposition process and that an opportunity has been missed to publicise the fight against discrimination. The new incumbents of relevant posts at the Ministry have already begun to hold talks with the most prominent NGOs working with immigrants, immigrants’ organisations and trade unions.

Law 30/2005 of 29 December on the National Budget for 2006 (*Ley de Presupuestos Generales del Estado para 2006*, Spanish Official Journal, 30 December 2005) establishes for the first time a specific budget for this Council (with a amount of 200,000 euros for 2006).

The Ministry of Labour and Social Affairs is currently (January 2006) working on a draft of the Royal Decree /2006 which will regulate the composition, competences and specific rules of the Council for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin (*Borrador de Real Decreto por el que se regula la composición, competencias y régimen de funcionamiento del Consejo para la Promoción de la Igualdad de Trato y no Discriminación de las Personas por el Origen Racial o étnico*). This Royal Decree will set the Council up. This draft royal decree furthermore establishes “a Foundation, attached to the Office of the State Secretary for Immigration and Emigration, aimed at promoting measures set out for the integration of the immigrants and the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin”. It also establishes that “Foundation’s Board of Trustees will include members of the Permanent Commission of the Council for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin”. The Foundation will act as the operational arm of the Council (and so the two bodies should not be regarded as separate).

Thus the Spanish authorities intend to set up both the Council and the Foundation in 2006, giving them the functions specified in Directive 2000/43 in a more independent manner than in Law 62/2003, and providing them with human and financial resources enabling them to perform their functions effectively.

In Spain the inclusion of the other grounds of discrimination in this Body is not being discussed. Only L. Cachón (2004b) has advocated this idea.

In any case, the Ombudsmen (national or regional, whenever they exist) are not deprived of their competences. The national Ombudsman acts as the Parliamentary High Commissioner for the defence of the rights contained in Title 1 of the Constitution – *inter alia* equality and non-discrimination on account of birth, race, sex, religion, opinion or any other condition or personal or social circumstance– supervising the state administration’s activity and reporting to Parliament. The Ombudsman, according to Law 62/2003, may establish co-operation and collaboration mechanisms with the aforementioned Council.

National Disability Council

On the other hand, the Royal Decree 1865/2004 of 6 September regulates the *National Disability Council* recreated in Law 51/2003 on equal opportunities, non-discrimination and universal accessibility for disabled people. This Council replaces the State Council for People with Disabilities and has wider functions in the field of equal opportunities and non-discrimination. This is a major step forward in the transversal co-ordination of the various tiers of government, on policy in the field of disability and participation in policymaking by organisations representing the various types of disability.

The National Disability Council is an inter-ministerial collegiate advisory body that institutionalises the collaboration of associations for disabled people and their families with national government with a view to defining and co-ordinating a policy of integral care for the disabled. It is attached to the Ministry of Labour and Social Affairs (Department of Social Services, Families and Disability). In addition to the chair (who will be the Minister of Labour) and two vice-chairs, the Council has 15 members representing various bodies within national government, 15 members representing associations of disabled people of various kinds, and four expert advisors. The body will have a Special Permanent Bureau responsible for promoting equal opportunities, non-discrimination and universal accessibility for disabled people.

Its functions include the mandatory production of non-binding reports on draft regulations affecting equal opportunities, non-discrimination and universal accessibility. It is therefore a body with powers in the field of equal treatment in employment and occupation in line with Directive 2000/78, developing in the provisions of articles 13 and 14 of the Directive.

National Roma Council

Royal Decree 891/2005³³ of 27 July set up the National Roma Council (*Consejo Estatal del Pueblo Gitano*) “as a collegiate participatory and advisory body on general and specific public policy affecting the integral development of the Roma population in Spain” (art. 1). The Council is attached to the Ministry of Labour and Social Affairs through the Secretariat for Social Services, Families and Disability. Its overriding purpose is “to promote participation and cooperation of Roma associations in the development of general policy and the promotion of equal opportunities and treatment for the Roma population” (art. 2). Its functions therefore include “drawing up opinions and reports on regulatory projects and other initiatives related to the Council’s purposes (...) and that affect the Roma population, and, in particular, the development of regulations on equal opportunities and equal treatment” (art. 3).

Of the 40 members forming the Council, half come from central government and the other half are representatives of Roma associations.

The Council is already up and running. It has no specific budget, as it is an official advisory body. The measures it recommends are to be implemented by other bodies.

³³ Royal Decree 891/2005 of 27 July setting up the National Roma Council (*Consejo Estatal del pueblo gitano*) (BOE, 26 August 2005).

8. IMPLEMENTATION ISSUES

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

Transposition

The Directives were transposed in Spain with no formal social dialogue, neither with social partners nor NGOs with a legitimate interest in the fields of the Directives (there are many of these, and they are well organised); nor was there any dissemination of information on the Directives either before, during or after the transposition.

Elsewhere we described the process as a “hidden transposition” (Cachón 2004b) because:

- ✓ there was no specific law transposing the Directives that might have made it possible to disseminate and publicise the work of the Spanish Parliament and Community policy on equal treatment set out in the Directives;
- ✓ “equal treatment” does not appear in the Law’s title;
- ✓ the bill was not tabled as a government bill but left to the initiative of the Parliamentary Group supporting the government (which presented the text that the government had been working on) in the form of a large number of amendments to the Accompanying Law (*Ley de acompañamiento*) in Parliament, which made the overall proposition incomprehensible except to those familiar with the issue and with legislative processes;
- ✓ the bill was not submitted for consideration by the Council of State (the highest government advisory body) or the Economic and Social Council (an advisory body made up of social partners);
- ✓ the bill was not submitted for consultation with NGOs with a legitimate interest in the field;
- ✓ no member of the government made a statement about it at any time;
- ✓ there was no parliamentary debate because the Parliamentary Group that tabled the amendments refused to defend them, and thus the Spanish Parliament did not spend a single minute debating the contents of the Directives (though there were a few brief critical references from opposition groups to the way in which the process was conducted).

Dissemination

The new government administration (in office since April 2004) is aware of the fact that the Directives have not been properly disseminated during the transposition process, and that this transposition has been made without the necessary dialogue with social partners and NGOs. The new people in charge see the fight against discrimination as one of the key areas for action. The new Government has passed regulations developing the Law on the rights and duties of aliens (OL 4/2000)³⁴ based on a broad social and political consensus following a period of dialogue and negotiation. In the coming months it is due to pass a Royal Decree regulating the Council for the Promotion of Equal Treatment. It is currently (January 2006) carrying out technical studies in parallel with consulting social organisations with a legitimate interest. The Secretary of State for Immigration, the Director General for the Integration of Immigrants and other public servants are holding numerous meetings with social organisations and NGOs.

³⁴ Royal Decree 3393/2004 of 30 December. On the basis of this Royal Decree a “regularisation” process was developed for immigrants in an irregular situation in Spain regarding employment contracts (the result was the regularisation of more than 570,000 immigrants in an irregular situation between February and May 2005).

In 2005 the “Support fund for the reception and integration of immigrants” (with funding of 120 million euros for 2005 and 186 million euros for 2006) established equality and non-discrimination as regards immigrants as its governing principles and undertook actions in three fields:

- ✓ Support for programmes to combat racism and xenophobia;
- ✓ Training in equal treatment and non-discrimination for public employees and representatives of organisations; and
- ✓ Transfer of knowledge and best practice.

Moreover, the Directorate General for the Integration of Immigrants has been running various programmes co-financed with European funds aimed at creating the necessary instruments to protect and support victims of racial or ethnic discrimination in the context of the Operational Programme to Combat Discrimination (*Programa Operativo de Lucha contra la Discriminación*). These programmes seek to facilitate access to employment for certain groups that have particular difficulties integrating themselves into the labour market on equal terms.

In the next few months a “Strategic Plan for Citizenship and Integration” (*Plan Estratégico de Ciudadanía e Integración*), designed to establish strategic guidelines to promote the integration of immigrants in Spain, is to be adopted. One of the key points of the Plan, which has considerable funding for 2006, is equal treatment and combating discrimination in all types of discrimination,. This involves the following five objectives:

1. Creating necessary and effective instruments for protecting and supporting victims of discrimination on the grounds of racial or ethnic origin.
2. Including equal treatment in all public policy.
3. Combating discrimination on the grounds of racial or ethnic origin in the framework of the combat against all forms of discrimination.
4. Providing suitable instruments for the systematic collection of data on equal treatment and discrimination.
5. Involving the public in combating discrimination and promoting equal treatment.

To achieve these aims, the Plan is to implement a number of action programmes, in collaboration with various levels of government and NGOs, such as:

- ✓ Activating and strengthening of the Council for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin, and supporting the establishment of anti-discrimination units in various tiers of government;
- ✓ Promotion of the Spanish Observatory against Racism and Xenophobia (set up by Organic Law 14/2003³⁵ “to conduct studies and analyses, and with the competence to formulate proposals for action in the field of combating racism and xenophobia”;
- ✓ Integral programme of support to victims of discrimination;
- ✓ Training of specialist staff and public employees in combating racial or ethnic discrimination;
- ✓ Campaign of awareness-raising and information on equal treatment and non-discrimination;
- ✓ Establishment of a data collection system on equal treatment and racist and xenophobic acts;
- ✓ Creation of forums for dissemination of knowledge and exchange of best practice;
- ✓ Drawing up of codes of conduct on equal treatment in public services and promotion of codes of conduct on equal treatment in private companies and services;

³⁵ Organic Law 14/2003 of 20 November revising Organic Law 4/2000 of 11 January on the rights and freedoms of aliens in Spain and their social integration (BOE, 21 November 2003).

- ✓ Signing of various international instruments on human rights and the protection of migrant workers' rights.

The “Strategic Plan for Citizenship and Integration” is also to implement measures to encourage action by NGOs to combat discrimination.

Law 30/2005 of 29 December on the National Budget for 2006 (*Ley de Presupuestos Generales del Estado para 2006*, Spanish Official Journal, 30 December 2005) establishes a specific budget for this Plan (totalling 186 million euros for 2006).

Social dialogue

Collective agreements are used to implement the principles of the Directives. On 30 January 2003, the representatives of the Spanish Confederation of Employers' Organisations (CEOE), the Spanish Confederation of Small and Medium-Sized Companies (CEPYME) and the trade unions *Comisiones Obreras* (CCOO) and *Unión General de Trabajadores* (UGT) signed the Multi-Industry Agreement for Collective Bargaining 2003 (ANC 2003). This agreement set out the criteria and contents that served as guidelines at various levels of collective bargaining in Spain in 2003 (and has been renewed for subsequent years).

Chapter V (entitled “Criteria relating to employment, internal flexibility, professional qualification and equal treatment in employment”) contains sections on “Equal treatment in employment”, as follows:

“The situation in employment and unemployment is uneven. Certain groups of workers have greater difficulty in finding work, either because of socio-cultural factors or prejudices or because of labour market conditions.

Regarding the latter, collective bargaining should help to remedy any phenomena of inequality through the application of the principle of equal treatment expressly provided for in employment law, and through the promotion of specific actions aimed at eliminating direct or indirect discrimination. The general clauses on equal treatment in the collective agreements are appropriate instruments for helping to combat possible discrimination.

Such measures may be taken in general terms in some groups; in the case of women, through access to employment, and vocational diversification and promotion; in the case of young people, through the promotion of stable employment for the young; in the case of immigrants, through the application of the same conditions that apply to other workers; and in the case of disabled workers, by promoting their integration into employment”.

This Agreement was renewed for 2004 through an agreement signed by the organisations on 22 December 2003 and for 2005 through an agreement signed on 4 March 2005 (in the coming weeks the ANC for 2006 will be signed). Although it would be necessary to follow the collective negotiations in the various sectors and companies in order to see how the ANC has developed over these years, the inclusion of this anti-discrimination clause in line with art. 11.2 of the Directive must be described as a very positive development.

Dialogue with NGOs

The structures in place to encourage dialogue with non-governmental organisations are:

- ✓ The *Forum for the Social Integration of Immigrants*, created by Law 4/2000, is a collegiate consultative, informative and advisory body on immigrant integration. It consists of 10

representatives from public administration, 10 from immigrants' associations and 10 from social support organisations, including trade unions and employers' organisations with an interest and involvement in the field of immigration³⁶.

- ✓ The *Advisory Commission on Religious Freedom*, created by the Organic Law on Religious Freedom (OL 7/1980), is charged with reviewing, reporting on and producing proposals with respect to issues relating to the enforcement of the Law, religious discrimination being one of these issues. Representatives of the Churches, Denominations and Religious Communities or Federations, appointed by the Ministry of Justice, participate in this body.
- ✓ The *National Disability Council* was recreated by Law 51/2003 on equal opportunities, non-discrimination and universal accessibility for disabled people. This Council has 15 members representing associations of disabled people of various kinds and its functions include issuing of reports on draft regulations affecting equal opportunities, non-discrimination and universal accessibility.

There is no special structure of social dialogue on age and sexual orientation.

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

Art. 17.1 of the Workers' Statute declares null and void discriminatory legislative provisions, clauses of collective agreements, individual pacts, and unilateral decisions by discriminatory employers.

There are no laws, regulations or rules contrary to the principle of equality still in force on the grounds of Directives.

In the field of sexual orientation, the inequality caused by the fact that homosexual couples have no access to certain social benefits was resolved in 2005 when Parliament passed a law amending the Civil Code that will allow homosexual couples to get married with the same rights as heterosexual couples (see section 4.5).

9. OVERVIEW

The transposition of Directives 2000/43 and 2000/78 has supplemented and notably improved legal instruments in Spain for combating discrimination, especially in employment.

The challenge is now to apply the new regulations implementing the Directives, and the first step is disseminate them among the various players in the judicial system (judges, public prosecutors and lawyers), civil servants (labour and education inspectors, among others), the social partners (trade unions and employers' organisations), employers and workers, NGOs with a legitimate interest in the field, and groups that may be affected by discriminatory processes such as Roma, immigrants, minority religions, homosexuals, disabled people, etc.

One instrument of great importance in this area is the Council for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin (*Consejo para la promoción de la igualdad de trato y no discriminación de las personas por el origen racial o*

³⁶ It is regulated by Royal Decree 3/2006 of 16 January regulating the make-up, competences and procedural rules of the Forum for the Social Integration of Immigrants (BOE, 17 January 2006).

étnico), which should quickly become operational, with guarantees as to its independence in the performance of its functions and the effectiveness of its work.

In this field the Strategic Plan for Citizenship and Integration, which establishes action plans to promote the integration of immigrants in Spain, will also be highly important. Two of its key points are equal treatment and combating discrimination.

In the field of disability, there are two notable bills currently passing through Parliament: one to provide sanctions in cases of discrimination on the ground of disability and another to recognise and facilitate the use of sign language.

10. COORDINATION AT NATIONAL LEVEL

Although the transposition of Community directives is the responsibility of the Ministry of Justice under the coordination of the Ministry of Foreign Affairs, the department that drew up the texts transposing Directives 2000/43 and 2000/78 was the Ministry of Labour and Social Affairs (Directorate-General for Labour). The Directorate-General responsible for developing the regulations applicable to the Council for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin is the DG for the Integration of Immigrants. The department responsible for developing policies to support the disabled is the Secretariat for Social Services, Families and Disability.

Most of the anti-discrimination issues covered by this report are within this department's remit. But we should note that there are other departments with responsibilities in matters of racial or ethnic origin, both in ministries and in other tiers of government such as the Autonomous Communities and Town Councils.

Annex

1. Table of key national anti-discrimination legislation

2. Table of international instruments

3. Bibliography

ANNEX 1: TABLE OF KEY NATIONAL ANTI-DISCRIMINATION LEGISLATIONName of country **SPAIN**

Date

January 2006

| <i>Title of Legislation</i> | <i>In force from:</i> | <i>Grounds covered</i> | <i>Civil/Administrative/ Criminal Law</i> | <i>Material Scope</i> | <i>Principal content</i> |
|--|-----------------------|---|---|---------------------------|--|
| <i>Constitución Española de 27 Diciembre 1978</i> Spanish Constitution of 27 December 1978 www.administracion.es http://www.tribunalconstitucional.es/CONSTITUCION.htm | 12.1978 | All. Explicitly: race, sex, religion, opinion and “other personal or social condition or circumstance” | Constitution | All | Principle of equality, non-discrimination and positive action |
| <i>Ley 62/2003, de 30 de diciembre, de medidas fiscales, administrativas y de orden social</i> Law 62/2003, of 30 December, of fiscal, administrative and social measures www.administracion.es http://www.boe.es/boe/dias/2003-12-31/pdfs/A46874-46992.pdf | 1.2004 | All grounds of Directives | Administrative/ Labour | All | Title II, Chapter III, art. 27 al 45 transposes Directives 2000/43 and 2000/78. Creates specialised body on racial or ethnic origin |
| <i>Real Decreto Legislativo 1/1995, 24 marzo, Estatuto de los Trabajadores</i> Royal Legal Decree 1/1995, 24 Mars, Workers’ Statute www.administracion.es http://www.mtas.es/publica/EstatutoTrab/contenido/EstatutoTrabajadores.pdf | 5.1995 | All grounds of Directives | Administrative Labour | Employment and occupation | All rights and duties connected with labour, employment and occupation |
| <i>Real Decreto Legislativo 2/1995, 7 abril, Ley de Procedimiento Laboral</i> Royal Legal Decree 2/1995, 7 April, Law on Employment Procedure www.administracion.es http://www.mtas.es/Guia2004/leyes/rdlg0295.html | 5.1995 | All grounds of Directives | Administrative Labour | Employment and occupation | Formal procedures on labour, employment and occupation |
| <i>Real Decreto Legislativo 5/2000, 4 agosto, Ley sobre Infracciones y Sanciones en el Orden Social</i> Royal Legal Decree 5/2000, 4 August, Law on Infractions and Sanctions of Social Order www.administracion.es | 1.2001 | All grounds of Directives | Administrative Labour | Employment and occupation | Infractions and Sanctions of Social Order labour, employment and occupation |

| | | | | | |
|---|---------|---|-----------------------|---|--|
| http://www.mtas.es/Guia2004/leyes/RD LG500.html | | | | | |
| <i>Ley 13/1982, 7 abril, de Integración Social de los Minusválidos</i> Law 13/1982, 7 April, on the Social Integration of Disabled www.administracion.es http://www.mtas.es/Guia2004/leyes/L13 82.html | 5.1982 | Disability | Administrative Labour | Social integrations of disabled people | Prevention and assistance; rehabilitation; employment integration; social services |
| <i>Ley 51/2003, 2 diciembre, de igualdad de oportunidades, no discriminación y accesibilidad universal de las personas con discapacidad.</i> Law 51/2003 of 2 December on Equal Opportunities, Non-discrimination, and Universal Access for Persons with Disability www.administracion.es http://www.boe.es/boe/dias/2003-12-03/pdfs/A43187-43195.pdf | 12.2003 | Disability | Administrative Labour | Equal opportunities, non-discrimination, and universal access for persons with disability in all fields | Equal opportunities for the disabled; Improving employment and living conditions |
| <i>Ley Orgánica 7/1980, 5 julio, de Libertad Religiosa.</i> Organic Law 7/1980 of 5 July on Religious Freedom www.administracion.es | 7.1980 | Religion | Administrative Labour | Religious Freedom | Religious Freedom |
| <i>Ley Orgánica 4/2000, 11 enero, sobre derechos y libertades de los extranjeros en España y su integración social.</i> Organic Law 4/2000 of 11 January on the rights and freedoms of aliens in Spain and their social integration http://dgei.mir.es | 2.2000 | Nationality All grounds of the Directives for aliens | Administrative Labour | Administrative situation of aliens | Direct and indirect discrimination; all administrative situations relating to aliens |
| <i>Ley Orgánica 10/1995, 23 noviembre, del Código Penal</i> Organic Law 10/1995 of 23 November, Criminal Code www.administracion.es | 5.1996 | All grounds of the Directives | Criminal Law | All criminal rules | Crimes against the rights of workers; all aspects of discrimination |

ANNEX 2: TABLE OF INTERNATIONAL INSTRUMENTS

| Name of country | SPAIN | | | Date | January 2006 |
|---|----------------------------|------------------------------|---|---|---|
| <i>Instrument</i> | <i>Signed (yes/no)</i> | <i>Ratified (yes/no)</i> | <i>Derogations/ reservations relevant to equality and non-discrimination</i> | <i>Right of individual petition accepted?</i> | <i>Can this instrument be directly relied upon in domestic courts by individuals?</i> |
| European Convention on Human Rights (ECHR) | Yes | Yes 1979 | reservation regarding art. 5 and 6 on the disciplinary regime of the armed forces | Yes | Yes |
| Protocol 12, ECHR | NO | | -- | -- | -- |
| Revised European Social Charter | Yes | NO | -- | -- | -- |
| International Covenant on Civil and Political Rights | Yes | Yes 1977 | None | Yes | Yes |
| Framework Convention for the Protection of National Minorities | Yes | Yes 1995 | None | Yes | Yes |
| International Convention on Economic, Social and Cultural Rights | Yes | Yes 1977 | None | No | Yes |
| Convention on the Elimination of All Forms of Racial Discrimination | Yes | Yes 1969 | None | Yes | Yes |
| Convention on the Elimination of Discrimination Against Women | Yes | Yes 1984 | None | Yes | Yes |
| Convention on the Rights of the Child | Yes | Yes 1991 | None | Yes | Yes |
| ILO Convention No. 111 on Discrimination | Yes | Yes 1967 | None | No | Yes |

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