

REPORT ON MEASURES TO COMBAT DISCRIMINATION

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

COUNTRY REPORT/UPDATE 2006

Sweden

Ann Numhauser-Henning

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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:

human european consultancy
Hooghiemstraplein 155
3514 AZ Utrecht
Netherlands
Tel +31 30 634 14 22
Fax +31 30 635 21 39
office@humanconsultancy.com
www.humanconsultancy.com

the Migration Policy Group
Rue Belliard 205, Box 1
1040 Brussels
Belgium
Tel +32 2 230 5930
Fax +32 2 280 0925
info@migpolgroup.com
www.migpolgroup.com

Information from previous country reports has been used.
These full reports are available on the European Commission's website:

http://europa.eu.int/comm/employment_social/fundamental_rights/policy/aneval/mon_en.htm

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INTRODUCTION

0.1 The national legal system¹

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

Swedish legislation is based on a strong domestic tradition of Germanic law, but it has also been influenced by foreign law. An important difference in relation to the majority of continental legal systems is that Sweden has abstained from large-scale codifications along the lines of the Bürgerliches Gesetzbuch in Germany. In comparison with Anglo-American law, a major difference is that Swedish law is based to a considerably greater extent on written law, while case law plays a smaller, though important role. Thus the Swedish legal system, both by virtue of its systematic structure and its contents, may be said to be somewhere between the Continental European and Anglo-American systems.

Power to enact laws is vested in the Swedish Parliament (the Riksdag), which consists of a single chamber with 349 members. The Government, however, has the power to issue decrees concerning less important matters. To some extent this power stems directly from the Instrument of Government (one out of four Swedish constitutional laws, see further Sec. 1 below). But the Government can also be granted power to issue decrees by means of acts of law passed by the Riksdag. Legal instruments relating to the personal status of private subjects or the personal and economical relations between private subjects – that is matters of civil law – fall under the exclusive competence of the Parliament and must thus be regulated by law.² Employment legislation falls under this category. Neither local nor regional authorities have any legislative powers in this field.

As regards employment/labour law generally – so far, at the centre of non-discrimination legislation – legislation is scattered over a number of different acts, the two most important being the 1982 Employment Protection Act³ and the 1976 Codetermination at the Workplace Act⁴. The former contains rules on the hiring of employees, including modes-of-employment, as well as rules regarding dismissals. The latter includes the central rules on collective labour law. Other important laws are the Trade Union Representatives Act⁵, the Working Hours Act⁶, the Working Environment Act⁷, the Annual Leave Act⁸ and the Parental Leave Act⁹. The non-discrimination legislation now amount to a number of different acts listed in Annex II and described in the following Sections. All the acts mentioned apply both to the private and the public sector. It as a general rule nowadays that work as a civil servant is ruled by contracts and collective agreements largely the same way as regarding private employment and the same rules apply. However, some special rules for the public, and especially the State

¹ As for this Section, a special thanks to Paul Lappalainen and his Disability Report of April 2004.

² Art. 2 of Ch. 8, Instrument of Government

³ Lag (1982:80) om anställningsskydd.

⁴ Lag (1976:580) om medbestämmande i arbetslivet.

⁵ Lag (1974:358) om facklig förtroendemans ställning på arbetsplatsen.

⁶ Arbetstidslag (1982:673).

⁷ Arbetsmiljölagen (1977:1160).

⁸ Semesterlagen (1977:480).

⁹ Föräldraledighetslagen (1995:584).

sector, still apply. These regard mainly the hiring process, where some constitutional rules on objectivity apply, and industrial actions.¹⁰

As regards the lawmaking process, in Sweden the groundwork in the preparation of bills is laid by commissions of inquiry, legal experts in the ministries, and Riksdag standing committees. Legislative initiative lies predominantly with the Government. Its right to make legislative proposals to Parliament is guaranteed by the Constitution.¹¹ Another alternative is that the Riksdag, on the basis of bills introduced by individual members, requests that an inquiry be made concerning legislation on a certain issue.

Swedish legislative commissions, likely to prepare any bill of importance, are noted for carrying out detailed inquiries published in a special series known as Swedish Government Reports (Statens offentliga utredningar, SOU). The results of their work are generally presented in a report that reviews the field concerned (often with references to legal systems in other countries), a general justification of the changes proposed, and detailed draft proposals with commentaries on each clause. To a certain extent, inquiries into matters of legislation are carried out in the ministry principally concerned, with the assistance of the ministry's own officials.

When a commission has finished its work, its recommendations are examined by the legislation department of the ministry concerned. The commission's report is then sent out for written comment by interested authorities and organisations.¹² On the basis of the report and the invited comments, the matter is analysed by experts within the ministry. The minister concerned and the Government then adopt a position on the issue. If a decision is made to proceed with the matter, the ministry will prepare a bill which is presented to the Riksdag.

The most important part of the Riksdag's legislative work is performed within standing committees. The committee deals with the Government's bills and with members' bills containing various amendments. This results in a committee report. The bill and the report are subsequently dealt with at a plenary session of the Riksdag which, after a debate, votes on the bill.

The Swedish lawmaking process thus generates a voluminous body of printed matter which is important in applying the legislation. Given the care taken in these materials to formulate the reasons and intent of the law, it becomes natural for courts, authorities and individual lawyers to rely on them as important sources of interpretation.

Primary responsibility for the enforcement of legal rules devolves upon the courts and the various administrative authorities. As in other European countries, the court system occupies a special position. The difference between adjudicative and administrative authorities is less in Sweden than in most European countries, although there is a clear borderline between the courts and the administrative agencies.

As for the *general courts*, Sweden has a three-tier hierarchy: the district courts (tingsrätt), the courts of appeal (hovrätt), and the Supreme Court (Högsta domstolen). As a general principle it may be said that the general courts enforce civil law and criminal law legislation.

¹⁰ See the 1994 Public Employment Act (lag 1994:260 om offentlig anställning).

¹¹ Art. 3 in Ch. 4 of the Instrument of Government.

¹² This is done at the choice of the Government. Since such reports are public documents any organisation, etc., may send in their comments, though.

The task of *the administrative courts* may be described as one of maintaining due observance of the law within the public administration—at central, regional and local level. They deal with decisions by public authorities such as for instance tax regulations and the social security system. The proceedings take a form corresponding quite closely to the proceedings at the courts of general jurisdiction. However, in contrast to general courts, proceedings in writing are predominant. Thus appeals concerning assessment for taxation as well as appeals against certain decisions of administrative authorities and against decisions of local authorities are dealt with by county administrative courts (*länsrätter*). Appeals against judgements of these county courts are made to the administrative courts of appeal (*kammarrätter*). The highest administrative tribunal is the Supreme Administrative Court (*Regeringsrätten*).

The Labour Court is a special court with the task of trying labour disputes. Certain cases can be brought directly before the Labour Court, while other cases (presented by individuals *not* supported by their professional organisation or – in matters of discrimination – by an Ombudsman) are to first be brought before a district court. Thereafter they can be appealed to the Labour Court. The decisions of the Labour Court are final and cannot be appealed. Workplace discrimination cases are thus ultimately to be tried before the Labour Court, either as the court of first instance or as an appeals court.

The national administration is conducted by the Government and the various ministries and is organized in a well-developed network of administrative authorities. The central administrative agencies have a relatively independent position regulated in general by instructions laid down by the Government.

There are also the special institutions of control called the Ombudsmen. Outside Sweden, the best known of these institutions is probably the Office of the Parliamentary Ombudsmen (*Riksdagens Ombudsmän* or *Justitieombudsmännen*, JO), the first of whom was appointed in 1809. In a number of areas there are Ombudsmen who are not appointed by the Riksdag but by the Government and who have similar duties of surveillance in their own spheres. In the area of discrimination there are an Equal Opportunities Ombudsman (*JämO* - sex equality), an Ombudsman Against Ethnic Discrimination (*DO*), a Disability Ombudsman (*HO*), an Ombudsman against discrimination due to sexual orientation (*HomO*), a Child Ombudsman (*BO*), and a Press Ombudsman for the General Public. For more information, see below in Sec. 7.

In order to understand the functioning of Swedish labour law, and thus important parts of the non-discrimination legislation, it is crucial to have in mind the special role designated to the social partners. Swedish labour market is characterised by a high degree of organisation density; this is true of employees and employers alike. It is difficult to obtain exact figures on the degree of affiliation, but it is roughly 85 percent among workers as well as among salaried employees. Furthermore, the organisation pattern is firmly established, and there is relatively little inter-trade-union rivalry. This organisational structure is reflected in collective bargaining. There are collective agreements at three levels: national, industry-wide and local. In most instances, the relationship between an employer/employers' organisation and the union is firm and long-standing. Orderly and peaceful ways for the parties to meet, to bargain and to settle disputes still can be said to characterise 'the Swedish model' for industrial relations. Labour Law generally assigns to established unions – i.e. unions that uphold a collective agreement with the employer in question – a privileged position. Though Swedish law does not provide for exclusive representation, established unions *de facto* often speak for the entire employee community. The role of the social partners is also reflected in the fact that

important issues are still outside the scope of law, for instance wages.¹³ Another important feature, due to the crucial role played by the social partners and collective bargaining, is the frequent use of what is generally referred to as ‘semi-mandatory rules’. Even important rules may be overridden by collective agreements.

Non-discrimination legislation is always mandatory. Nevertheless, the industrial relations structure and the role played by the social partners are crucial also to non-discrimination law as regards employment. Thus, both the individual claiming having been discriminated against and the one who got the job, the comparator as regards equal pay, etc., are likely to be members of the same union. Different wage-levels as regards work of equal value are regularly the outcome of collective bargaining, etc. Moreover, at the Labour Court there is a strong representation of the social partners. There has been intense discussion on pay issues as being best kept outside the court system, and also on the Swedish Labour Court as not the appropriate forum to deal with such claims.¹⁴ The litigation in discrimination claims is currently under the consideration.

0.2 State of implementation

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

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

Although a late starter in the field of non-discrimination legislation, Swedish domestic law today contains a considerable number of explicit bans on discrimination; i.e. on the grounds of sex, ethnicity (always including race), religion and other belief, sexual orientation and disability as well as against part-time workers and fixed-term workers. These non-discrimination provisions are to be found in a number of specific laws as listed in Annex 1 to this report. Thus, in the area of employment law there are four laws that ban discrimination on the grounds of sex,¹⁵ ethnicity and religion and other belief,¹⁶ disability¹⁷ and sexual orientation¹⁸, respectively. There is also a law prohibiting discrimination of part-time and fixed-term workers, implementing the European Council’s Directives 1997/81/EC and 99/70/EC.¹⁹ Furthermore, there is a law from 2001 that applies to discrimination in higher education on grounds of sex, ethnicity and religion and other belief, disability or sexual orientation.²⁰ Since 2003 there is also the Prohibition of Discrimination Act (2003:307) banning discrimination on the grounds of ethnicity, religion and other belief, sexual orientation, disability and now also sex in other areas of society than working life, such as goods and services (including housing) and social security and related benefits systems. Since 1 April 2006 there is now also the Act on a ban against discrimination and other degrading

¹³ There is thus no legislation on minimum wages, for instance.

¹⁴ For an English version of this debate, see *Legal Procedure in Discrimination Cases, etc.*, Lag & Avtal, Stockholm 2002.

¹⁵ The (1991:433) Equal Opportunities Act (jämställdhetslagen).

¹⁶ The (1999:130) Act on Measures against Discrimination in Working Life on grounds of Ethnicity, Religion or other Belief (the Ethnic Discrimination Act, lagen om åtgärder mot etnisk diskriminering i arbetslivet).

¹⁷ The (1999:132) Prohibition of Discrimination in Working Life of People with Disability Act (the Disability Discrimination Act, lagen om förbud mot diskriminering i arbetslivet av personer med funktionshinder).

¹⁸ The (1999:133) Act on a Ban against Discrimination in Working Life on grounds of Sexual Orientation (the Sexual Orientation Discrimination Act, lagen om förbud mot diskriminering i arbetslivet på grund av sexuell läggning).

¹⁹ The 2002 Act on a Ban against Discrimination in Working Life of Part-time and Fixed-term Workers.

²⁰ The (2001:1286) Equal Treatment of Students at Universities Act (the Students at Universities Discrimination Act, lagen om likabehandling av studenter i högskolan).

treatment of children and pupils.²¹ The Act applies to pre-school facilities, school-age childcare, primary and secondary school and municipal adult education. The Act is intended to promote equal rights for children and pupils and to combat discrimination on grounds of sex, ethnic origin, religion or other belief, sexual orientation and disability. There are also criminal law provisions such as the provision that bans unlawful discrimination by merchants on the grounds of ethnicity and homosexual orientation in regard to the provision of goods and services²² and the 'hate speech' provision, which makes it a criminal offence to spread a message which is threatening or degrading to a group of persons.²³

Similar acts concerning workplace discrimination on the grounds of ethnicity (and religion and other belief), sexual orientation and disability were thus adopted and went into effect in 1999. These are referred to as the 1999 Acts. These laws can be said to have anticipated the Article 13 Directives and drew heavily on the Burden-of-Proof Directive. In addition the 1991 Equal Opportunities Act concerning sex discrimination was amended in 2000 basically to bring it into line with the 1999 anti-discrimination laws. Later on, in 2003, the 1999 Acts were amended in order to better fulfil the requirements of the Article 13 Directives. Further amendments were made in 2005 and 2006.

Directive 2000/43/EC (hereafter the Race Directive) is thus implemented through the 1999 Ethnic Discrimination Act as regard employment issues, the 2001 Student at Universities Discrimination Act as regards higher education and the 2003 Prohibition of Discrimination Act as regards other areas covered by the Directive. There are also some rules in the Penal Code of relevance to the Directive, i.e. Secs. 8 and 9 Chapter 16 the Penal Code. To a large extent, Swedish law is in conformity with the Directive. Nevertheless, there are some flaws in the implementation which should be brought to attention:

- The prohibition of instructions to discriminate has been criticised to have been drafted too narrowly (the 1999 Act)
- The protection against discrimination or victimisation does not fully cover self-employed persons (the 1999 Act)
- The scope of application does not explicitly include 'working conditions' (the 1999 Act)
- Discrimination and harassment from fellow workers or third parties are not as such prohibited (the 1999 Act)
- There are statutory limits to economic damages in certain situations related to the Employment Protection Act (the 1999 Act)
- Discrimination against legal persons is not prohibited (the 1999 and 2003 Act)
- There are no rights for other NGOs than unions or employers' organisations to engage themselves on behalf or in support of victims of discrimination (the 1999, 2001 and 2003 Acts)
- The rule providing an exception from the ban on direct discrimination applicable to higher education may be regarded as too wide (the 2001 Act)
- Private individuals are not covered by the prohibition of discrimination in the 2003 Act.

Directive 2000/78/EC (hereafter the Framework Employment Directive) is implemented through all the three 1999 Acts as regard employment issues, the 2001 Student at Universities

²¹ Lag (2006:67) om förbud mot diskriminering och annan kränkande behandling av barn och elever (the Pupils Discrimination Act). Prop. 2005/06:38.

²² Chapter 16 Sec. 9 in the Penal Code.

²³ Chapter 16 Sec. 8 in the Penal Code. The provision has its counterpart also in the Freedom of the Press Act and the Fundamental Law on Freedom of Expression. Individual persons are not protected by these provisions but can instead rely on the slander or verbal abuse provisions of the Penal Code.

Discrimination Act as regards higher education, the 2003 Prohibition of Discrimination Act as regards other areas covered and also not covered by the Directive and, finally, by the 2006 Act concerning basic education. (There are also some rules in the Penal Code of relevance to the Directive, i.e. Secs. 8 and 9 Chapter 16 the Penal Code.) To a large extent, Swedish law is in conformity with the Directive and, especially as regard religion and other belief as well as sexual orientation, domestic law goes beyond the requirements of the Directive. This is also true with regard to discrimination on the grounds of disability (which is partly but to a lesser extent than the aforementioned grounds) covered by the 2003 Act covering areas outside working life. The Government is of the opinion that protection against discrimination, in principle, should be as harmonised as possible regardless of the protected group. Note that with the adoption of the new 2006 Act prohibiting discrimination in education mentioned above Sweden goes beyond the requirements of the directive, the new Act covering all grounds but age. However, as regards the ban on age discrimination Sweden has still not implemented the Directive. Sweden took advantage of the option to deter the transposition. Even so, the ban on age implementation was due to be implemented at the latest by the 2 of December 2006, which it was not. No implementation measures have thus been undertaken so far but a bill to the purpose is expected during 2007.²⁴

There are some flaws in the implementation – a part from the fact that so far the ban on age discrimination thus is not implemented at all – also in relation to the Employment Framework Directive which should be brought to attention:

- The prohibition of instructions to discriminate has been criticised to have been drafted too narrowly (the 1999 Acts)
- The protection against discrimination or victimisation does not fully cover self-employed persons (the 1999 Acts)
- The scope of application does not explicitly include 'working conditions' (the 1999 Acts)
- Discrimination and harassment from fellow workers or third parties are not as such prohibited (the 1999 Acts)
- There are statutory limits to economic damages in certain situations related to the Employment Protection Act (the 1999 Acts)
- There are no rights for other NGOs than unions or employers' organisations to engage themselves on behalf or in support of victims of discrimination (the 1999 Acts as well as the 2001 and 2003 Acts)
- Discrimination against legal persons is not prohibited (the 1999 Acts as well as the 2003 Act)

The four different laws concerning discrimination in the workplace on the grounds of sex, ethnicity, disability and sexual orientation are quite similar in terms of definitions, nature and scope of legal protection. This applies in particular in regard to ethnicity, disability and sexual orientation after the amendments that went into effect on 1 July 2003. The protection against discrimination related to sex was similarly improved as of 1 July 2005.²⁵

²⁴ Following four years of investigations, the Discrimination Inquiry Commission (DIC) by the end of February 2006 presented its findings concerning a consolidated legislation against discrimination covering all grounds of discrimination and areas of society, see report SOU 2006:22. According to the DIC's proposal, the current seven domestic acts dealing with discrimination will be replaced by a single 'Prohibition and other Measures against Discrimination Act' covering all grounds and areas of society including sexual identity and age, both of which have not previously been explicitly covered by non-discrimination legislation. The ban on age discrimination is proposed to apply in working life whereas its application in other areas such as the provision of goods and services including housing, social security, health care, etc. has been considered to require further investigation. The current Swedish government has declared its intention to, in the main, go through with this proposal by means of presenting a bill to the Parliament during 2007.

²⁵ Sex was added to the prohibitions under the 2003 Act regarding labour market policy operations, the start-up and operation of business activities, practising professions, membership etc. of employee or employer organisations, goods,

A fundamental reform of the Swedish anti-discrimination legislation is thus in the process. The former government had commissioned²⁶ a special Inquiry Commission with parliamentary representation and a number of additional experts, to consider the possibilities of creating a more coherent anti-discrimination legislation covering all grounds of discrimination and possibly also completely new areas in society. Consolidation of the ombudsmen was also to be examined, and so was the question whether legal persons should be protected and whether the 2003 Act should apply also to private individuals. The Committee was also to propose legislation that fulfils the requirements of the EC Directive in regard to age discrimination. The Committee's proposal was presented in February 2006.²⁷ It was the subject of a consultation process during 2006 and the current government has declared its intention to present a bill on the subject to the Parliament during 2007. The exact contents of such a bill is not yet known but it is likely to in the main follow the Committee's proposal.

0.3 Case-law

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

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

➔ Please use this section not only to update, complete or develop last year's report, but also to include information on important and relevant case law concerning the equality grounds of

services (including private insurance) and housing, the social insurance and related benefits systems and the unemployment insurance system.

²⁶ Dir. [Government instructions for Committees] 2002:11. The instructions may be found – albeit in Swedish only – at the Government's web site: www.regeringen.se. Go to the site of the Ministry of Industry [Näringsdepartementet] and click on the section 'Direktiv' (instructions/commissions for committees and special investigators).

²⁷ See SOU 2006:22. According to the DIC's proposal, the current seven domestic acts dealing with discrimination will be replaced by a single 'Prohibition and other Measures against Discrimination Act' covering all grounds and areas of society. The new Act is proposed to cover not only sex, ethnicity, religion and other belief, sexual orientation and functional disability but also sexual identity and age, both of which have not previously been explicitly covered by non-discrimination legislation. The proposed Act is divided into four chapters: Chapter 1 contain introductory provisions and definitions, Chapter 2 deals with working life. Chapter 3 with education and other areas of society, and Chapter 4 contain rules on how the supervision of compliance with the Act should be arranged. Additionally, the Commission proposes that the four existing Ombudsmen (the Equality Ombudsman, the Ombudsman against Ethnic Discrimination, the Disability Ombudsman and the Ombudsman against Discrimination on the grounds of Sexual Orientation) be merged into one authority - the Office of the Ombudsman against Discrimination. The new Act is intended to be first and foremost a consolidated version of all existing legislation. New grounds to be covered, however, are sexual identity ('transpersons') and age for which new rules will be introduced. A novelty is also that the new Act is suggested to cover not only natural persons but also legal persons in the areas of society where this is considered justified. Another new feature is that the discrimination prohibition concerning goods, services and housing will apply to anyone (also private persons) providing such items to the public. A point of departure has been that protection should be as equal as possible for the various grounds of discrimination. However, as regards the protection in areas of society such as goods, services and housing, public meetings and public events, the social insurance system and social services, health and medical services, etc., further investigations are considered to be required before the discrimination prohibition based on age can be formulated. The new Act is suggested to be introduced in 2008. It was the subject of a consultation procedure during 2006.

the 2 Directives, even if it does not relate to the legislation transposing them (e.g. if it concerns previous legislation unrelated to the transposition of the Directives)

0.3.1. The 1999 Acts against Discrimination in Working Life²⁸

Ethnicity and Religion or Belief.

The Race Directive is as regard employment issues (mainly) implemented through the (1999:130) Ethnic Discrimination Act. One case presented to the Labour Court was gained by DO (the Ombudsman against Ethnic Discrimination) since the other party never showed up but was later on re-opened and settled,²⁹ whereas another case initiated by DO was settled.³⁰ Eight of the other cases were initiated by DO, six by the trade union concerned and two by an individual claimant. Two of the cases, 2003 No. 63 and 2005 No. 21, are clearly related to religion and belief. All but one of the cases tried by the Labour Court were lost by the employee-side alleging discrimination. The case where ethnic discrimination was found to be present resulted in rather low damages, 40 000 SEK (approx. 4,450 Euro). In 2006 there are also two cases related to religion tried on other grounds than discrimination.³¹ – A part from this case law, the statistics as regard the cases of alleged discrimination presented to the Discrimination Ombudsman (DO) is of great interest here, see further Sec. 7 below.

Labour Court case 2002 No. 128 (judgment 4 December 2002)

DO v. Tjänsteföretagens Arbetsgivarförbund and GfK Sverige Aktiebolag.

Z.D. was a young woman, born in Bosnia but a Swedish resident since the age of ten. She applied for a position advertised by a marketing company. The work implied doing market evaluations through phone interviews. During the recruitment process – in between two planned interviews – Z.D. phoned the company. On this occasion the person in charge of the recruitment commented that Z.D. did not speak perfect Swedish. The conversation was terminated by the company and no more contacts were made with Z.D. The Labour Court – applying a reversed burden of proof³² – found that the recruitment process was terminated by the company for reasons (among others) related to the language skills of Z.D. These language requirements were not justified by the tasks to be performed and thus amounted to indirect discrimination according to the 1999 Act. (The company did not even try to defend the language requirements but argued other reasons not to hire Z.D.) This was the first case in

²⁸ The last and final instance in these cases is the Labour Court and a number of the decisions can be found at its website www.arbetsdomstolen.se – however, only in Swedish.

²⁹ Labour Court case 2001 No. 52. Damages for the violation caused by the alleged discrimination were set to 200 000 SEK (approx. 22,222 Euro). Later on this case was thus re-opened and then settled between the parties, see case 2002 No. 4.

³⁰ Labour Court case 2002 No. 27.

³¹ Labour Court case 2006 No. 104 and 123. The first case concerned the transition of a teacher against her will in conflict with the rules in the collective agreement at issue (the municipality agreement). The agreement required 'weighty reasons' for such a transition. Such reasons were not found to be at hand. On the contrary the Labour Court found the reason for the transition to be related to the employee's membership in the Lutheran Church Filadelfiaförsamlingen. 80 000 SEK (approx. 8 800 Euros) in damages for the violation was awarded to the victim. Case No. 123 also concerned the transition of an employee member of the Filadelfiaförsamling. Aslo this case was as the transition was concerned tried against the collective agreement in the municipality sector and weighty reasons were not found to be at hand and the employer was thus in breach of the collective agreement. Moreover, the Court found the reasons for the transition to be related to the religion of the employee and the indemnisation was set to 50 000 SEK (approx. 5 500 Euros). The case also concerned immediate dismissal. The dismissal was declared null and void since the employer had reacted to late to late on certain criminal behaviour – here damages were set to 80 000 SEK (approx. 8 800 Euros). Both cases were indirectly related to a murder taking place in the local parish of the Filadelfiaförsamling given extreme attention by Swedish media at the time of the employer decisions.

³² This case, and several of the others, took place before the express rule on the reversed burden of proof was introduced in 2003.

which the Labour Court made a finding of ethnic discrimination under the relevant act, SEK 40 000 (approx. 4,450 Euro) was awarded in damages to the job applicant.

Labour Court case 2003 No. 55 (judgment 18 June 2003)

DO v. Försäkringskassaförbundet and Jämtlands läns Allmänna Försäkringskassa

I.P. was born 1947 in the Czech Republic and became a Swedish resident in 1972. She had upheld successive fixed-term contracts with the local social security agency. When she, in difference to ten other employees in 'a similar situation' was not offered a renewal, the Court found a prima facie case of discrimination to have been proven, and it was for the employer to 'justify' his actions. The Court found it proven that 'personal reasons' such as lacking ability to adjust and co-operate and not related to ethnicity was the employer's reasons not to renew the contract. Of interest here is the Labour Court's statement that, as regards the burden of proof, it is decisive that the employer convincingly show that reasons not related to ethnicity is behind his actions, whereas 'it is not a general requirement that the employer's reasons are especially qualified, such as to also justify the no-application of other labour law regulations, for instance, the rules on priority to re-hiring' (in the Employment Protection Act, my remark). The case was lost by DO and the plaintiff.

Labour Court case 2003 No. 58 (judgment 27 August 2003)

DO v. Swede-Eye AB

M.S. originated from India but was adopted in Sweden already as a baby. M.S. applied for a position as a receptionist in an Optic store. She was not among the 8 persons interviewed for the position although she – from a formal point of view - was equally or better qualified than the person finally appointed. The Labour Court, however, accepted that the employer's merit-evaluation process was founded on assessments related to age (similar to that of the one person otherwise working in the store) and selling experience, not really reflected in the position advertisement. According to the Court, there was not 'a similar situation' at hand and a prima facie case of discrimination thus not proven. Moreover, the employer had shown that those of the about 100 applicants for the position who had mainly working experience from the nursing sector were set aside from the beginning, among them M.S. The case was thus lost despite evidence of ethnicity-related remarks from a company representative following the appointment.

Labour Court case 2003 No. 63 (judgment 10 September 2003)

DO v. DemÅplock i Göteborg AB

This judgement from the Labour Court concerned a woman who for religious reasons wore a head scarf and who applied for an employment in a company which demonstrates food products in food stores. In a telephone call between the woman and the company it was not said or asked what religion the woman had or if she wore a head scarf. The parties agreed to meet the following day. On this occasion the company representative explained that the woman cannot wear a head scarf when demonstrating food products, because she is supposed to be the 'face of the company in contact with its customers'. The representative furthermore said that it will 'take a hundred years before people will accept' that kind of clothing in public. She also assured the woman that she had nothing against people from other parts of the world or against any other religion. The Labour Court concluded in its decision that the action by the company was not discriminatory because the employment procedure was terminated when the company the day before the meeting between the representative and the woman had employed another person who had better skills than her. The Law (1999:130) is therefore not applicable. Even though the company, before the representative saw the woman,

might have considered employing her occasionally in the future, this does not mean that there is an employment relationship between the parties. The woman is not either to be regarded as an employment seeker. Furthermore there is no requirement in Swedish Law for the employer to notify employment seekers who did not get the employment they applied for. - In the case there is little discussion about the relationship between religion and ethnicity. The Labour Court refers to the recent changes in the Law, which *inter alia* means that the requisite 'religion and belief' is included in the text, but mentions only in one sentence the relationship between religion and ethnicity: 'It is unquestionably so that C.D-K is Muslim by confession. She thereby has, through her religion, an ethnic belonging that is comprised by the Law.'³³

Labour Court case 2003 No. 73 (judgment 24 September 2003)

DO v. Sveriges Verkstadsförening and Westinghouse Atom AB

H.A. was an engineer born and educated in Iran and consecutively also in Sweden. He applied for a position with Westinghouse Atom AB (the Company). DO alleged discrimination since H.A., who was at least as qualified for the position as other applicants and more qualified than the person finally appointed, was not selected for an interview nor appointed. From a prior telephone conversation between H.A. and the person responsible for the recruitment the latter found him 'aggressive'. The Labour Court, however, discarded discrimination since it found it proven that H.A.'s application never reached the person in charge of the recruitment process due to an administrative mistake. The administrative routines as such were not proven discriminatory either. The case was thus lost.

Labour Court case 2004 No. 8 (judgment 11 February 2004)

DO v. Malmö kommun

M.A. was born in Iran in 1960 and became a Swedish resident in 1989. She applied for a deputyship at the Municipality of Malmö but was not chosen for an interview, nor appointed. The Court found the allegations to be precluded. In its judgment the requirements for the union's 'knowledge' of the relevant circumstances – starting the period of limitation - are discussed in detail.

Labour Court case 2004 No. 22 (judgment 31 March 2004)

A.T. v. Copenhagen Malmö Port Aktiebolag

A.T. was born in a non-European country and became a Swedish resident in 1980. During the period 1982-1997 he was employed by the Port Company on successive fixed-term contracts. In 1997 he got a regular employment of indefinite duration. The plaintiff, alleging he had been deprived of working tasks implying over-time work and, thus, higher earnings on the grounds of his non-European origin, was found not to have showed a *prima facie* case of discrimination both by the Malmö District Court in the first instance and by the Labour Court itself. Other alleged discriminatory practices on behalf of the employer was not found proven either.

Labour Court case 2004 No. 68 (judgment 7 July 2004)

Oberoende Fackföreningens Centralorganisation v. Sveriges Verkstadsförening and Ericsson AB

³³ The case concerned alleged multiple discrimination, i.e. on religious grounds and on the grounds of sex. It was clarified by the Court that one ombudsman, in this case DO, has got the right to act on other discrimination acts than his 'own', additionally.

The case concerned four employees, represented by a ‘minority’³⁴ organisation, claiming discrimination on the grounds of ethnicity when they were all dismissed as a consequence of labour shortage on the basis of a collective agreement deviating from the legislated seniority rules. The redundancy agreement ‘list’ (avtalsurlistan) included some 500 employees and was made by the employer and the established trade union holding a collective agreement at the work-place, in accordance with the rules in the 1982 Employment Protection Act. The Labour Court found it not proven – against the testimonies of the employer and the union representatives – that ethnicity was ever an argument in these negotiations and a prima facie case of discrimination was thus not proven.

Labour Court case 2005 No. 3 (judgment 19 January 2005)
DO v. Comsol AB

This case concerned a woman of Russian origin, born in 1960 and a Swedish resident since 1992. She applied for a position as an accountant and was, according to DO, directly and indirectly discriminated against when she was dismissed from the recruitment process following a telephone conversation with the company’s representative, not chosen for an interview and not appointed for the position. During the conversation the fact that the woman was of Russian origin and the fact that she did not speak perfect Swedish were touched upon. The conversation resulted in a request of complementary information on her merits, however, and did not amount to a discriminatory decision on behalf of the employer, according to the Labour Court. Nor did the plaintiff show that she was in a ‘similar situation’ with the other ones selected for an interview or the man finally appointed, since the verifications presented to the employer did not rightly reflect her merits. Finally, it was not demonstrated that the employer really applied indirectly discriminatory requirements as regard language skills or requirements of a Swedish education. The case was lost.

Labour Court case 2005 No. 14 (judgment 26 January 2005)
Lärarförbundet v. Almega and Khalid El Mouselhi (the Modern School of Sweden)

M.B. was born in Iran and became a Swedish resident in 1991. She applied for a post as pre-school teacher at the School in June 2002. No one was appointed. Later – in July – a post as a pre-school teacher was advertised and later on given to another person. M.B. had sent in her application by FAX and the case concerns whether her application ever caught the eye of the School’s recruiter. Given the circumstances the Court finds that the plaintiff has not been able to prove this and thus not to state a prima facie case of discrimination. The case was lost.

Labour Court case 2005 No. 21 (judgment 9 February 2005)
Svenska Kommunalarbetareförbundet v. Föreningen Vårdtagarna and Attendo Care Aktiebolag

A part-time nurse at a nursing home for elderly people had taken on an extra job at the nursing home assisting with certain ‘activities’. (Her work involvement amounted to 68% of full-time in its totality.) When her religion (Nonconformist Lutheran) prevented her to taking part in the many activities which related to traditional feasts and formed a considerable part of the extra job, the employer withdrew her involvement in the extra tasks leaving her with the original part-time work as a nurse (56% of full-time). No discrimination was considered to have taken place, as the employer would have been expected to have treated a hypothetical comparator who refused to carry out the same tasks for other reasons than religion in a similar way. With regard to the discrimination issue the case was thus lost.

³⁴ I.e. an organisation not holding a collective agreement with the employer.

Labour Court case 2005 No. 47 (judgment 27 April 2005)
NK. v. Nor Di Cuhr Aktiebolag in Norrköping

A man of Bosnian origin (NK) applied for a position within a company within the deadline stated in the job advertisement. The position was however given to a Swedish woman (LH) before the deadline expired. The Labour Court stated that in order for NK to be protected by the 1999 Act he must be considered an applicant. In this case it was evident that the company in appointing LH effectively terminated the recruitment procedure before NK had even filed his application. There is no general obligation for a private employer to wait for the deadline for applications to expire before making an applicant a recruitment offer. Since the recruitment procedure had ceased NK was not being considered an applicant within the meaning of the law. Accordingly, there was no reason for the Labour Court to discuss the issue of ethnic discrimination and the case was dismissed.

Labour Court case 2005 No. 98 (judgment 19 October 2005)
DO v. the Municipality of Norrköping

The claimant from former Yugoslavia was among four job applicants for a position as a municipal architect who were invited for an interview. As a result of his lack of Swedish language skills, demonstrated during the interview he was disregarded for the position. The Ombudsman, representing the victim, claimed that his language skills had been misinterpreted and that this amounted to direct discrimination on the grounds of ethnicity. In the alternative, she argued that the language requirements amounted to unlawful indirect discrimination. The Court found that the interview had actually gone bad and that this was not a case of direct discrimination. The question was then whether the language requirements amounted to indirect discrimination. No, said the Court. The position as the municipal architect implied acts of public governance and it was objectively justified, adequate and necessary to require good (though not perfect) knowledge of written and spoken Swedish of the person to be appointed. The case was thus lost.

Labour Court case 2005 No. 126 (judgment 21 December 2005)
Sveriges Civilingenjörsförbund v. the Municipality of Klippan

The claimant from former Yugoslavia was among the job applicants for a position but was not among those invited for an interview. The Labour Court found that according to the information concerning his merits available to the Municipality at the time of the invitations he was not similarly qualified as those invited. Discrimination was not found to be at hand and the case was lost.

Labour Court case 2006 No. 60 (judgment 10 May 2006)
Svenska Kommunalarbetareförbundet v. Region Skåne

The claimant from Kosovo was among the job applicants for a position as a truck-driver at the University Hospital in Lund but was not among the 8 applicants invited for an interview. The claimant was found to have proven a prima facie case of discrimination – he was as qualified as at least three of the persons invited for an interview. The hospital was, however, found to have been able to show that he was omitted not on grounds of ethnicity but since his local knowledge of the hospital under-ground transportation system – by the employer showed to be vital to the employment process - had not been made known to the hospital in the employment application. The case was lost.

Labour Court case 2006 No. 96 (judgment 20 September 2006)
SEKO (a public employee trade union) v. the State

The claimant, a women of Bosnic origin, working with the the Swedish Prison and Probation Service applied for a higher position with the employer but a Swedish man and colleague was appointed instead. The claimant was found not to have proven a prima facie case of discrimination – she was not in a similar position as the man appointed since he was the more qualified – and the case was lost.

Disability

The Employment Framework Directive is as regards discrimination on the grounds of disability (mainly) implemented through the (1999:132) Disability Discrimination Act. The law has been tried on five occasions by the Labour Court in the (first and) last instance. In two other cases claims were presented to the Labour Court but the cases were settled.³⁵ One of the five cases listed below was initiated by the Disability Ombudsman (HO) whereas in the other four cases the claimant was the trade union of the person alleging discrimination. – A part from this case law the number of allegations presented to HO is of great interest for the relevant picture of disability discrimination in Sweden. These statistics are presented in Sec. 7 below.

Labour Court case 2003 No. 22 (judgment 12 March 2003).
HO v. Almega and Human Assistans Intressenter Stockholm AB

The judgment concerned the application of the rules on the time limits to present a claim (Secs. 29 and 31 the 1999 Disability Discrimination Act and Secs. 64-66 the 1976 Codetermination at the Workplace Act) in the case the corresponding union did not chose to represent the plaintiff but action was taken by HO. The Court found the allegations to be within the time limits of the law.³⁶

Labour Court Case 2003 No. 47 (judgment 4 June 2003)
Svenska Metallindustriarbetarförbundet v. Skandinaviska Raffinaderi Aktiebolag Scanraff and Kooperationens Förhandlingsorganisation

The plaintiff applied for a job as systems operator (driftoperatör) at an oil refinery. The plaintiff was offered the job subject to a physical exam. The doctor thereafter recommended a probationary employment (provanställning) due to the plaintiff's diabetes. However, the applicable collective bargaining agreement did not allow for a probationary employment. Thus, due to the plaintiff's illness the company decided to not employ him.

The Labour Court concluded that there was no support for the claim that the tasks of a systems operator in this case would involve any significant security risks that have a connection to his illness. Furthermore, the Court did not find it likely that shift work as such would involve special health risks for the plaintiff. Given these conclusions it was clear that the plaintiff had the necessary objective qualifications for the job. Thus, by not employing the plaintiff, the defendant directly discriminated in the manner proscribed by the law.

³⁵ Labour Court case 2003 No. 42 (HO v. Sveriges Verkstadsförening and Ericsson AB) and case 2003 No. 79 (HO v. Almega and Human Assitans Intressenter Stockholm AB). The first case concerned discriminatory dismissal, the latter discrimination regarding the recruitment of a nurse. In the latter case an applicant was turned down since she was a dyslectic. The settlement resulted in damages - 25 000 SEK (approx. 2,780 Euro).

³⁶ The cases was later on settled, see foot-note 31 above.

As to the issue of damages, the Court took the following into account. The plaintiff, by being denied the job, was subjected to a serious injury to dignity. On the other hand, the company based its actions upon the opinion of the company doctor. However, the company should have applied the general ideas of the need of a test to the individual before them – i.e. his particular circumstances and the actual effects of his illness. Due to the circumstances involved the Court determined that a relatively low amount of damages should be awarded – SEK 30 000 (approx. 3,330 Euro).

Labour Court case 2003 No. 76 (judgment 8 October 2003).
SEKO v. Staten genom Kriminalvårdsstyrelsen

The case concerned a warder at a Swedish prison employed in 1994, since 1997 with certain managerial tasks. As part of a reorganisation at the workplace, this and five other such supervising warder positions were internally advertised. The plaintiff was among the ‘applicants’ for one of these positions but was not appointed. Instead he continued as an ordinary warder without managerial tasks. The Court first stated that both the former tasks of employment and the current ones were within his employment duties as agreed upon. He had thus not been separated from his employment and, moreover, the changes undertaken were within the employer’s prerogative to distribute and allocate work. However, there was also the question whether the changes constituted such an ‘intrusive measure against an employee’ due to functional disability as prohibited in Sec. 5 the 1999 Disability Discrimination Act. The parties agreed that the plaintiff had a disability – back pains due to a traffic accident suffered in the year 2000 – which resulted in rather frequent sick-leaves. However, the Labour Court found that there was no evidence whatsoever that the decision not to appoint the plaintiff for managerial tasks was anyhow related to this disability.³⁷ The case was thus lost.

Labour Court case 2005 No. 32 (judgment 30 March 2005)
Sveriges Civilingenjörsförbund and MK v. T&N Management Aktiebolag

An employee (MK) who was diagnosed with multiple sclerosis was issued with a redundancy notice about three months after the employer was informed of his disease. The issue before the Court was whether the company had discriminated against MK on the grounds of his disability and/or disregarded Secs. 7 or 22 of the 1982 Employment Protection Act, i.e. the requirement of just cause and the seniority rules. MK was made redundant in a reorganisation of the company whereas two other employees who had worked for a considerably shorter period of time for the company were exempted as they were designated so-called ‘key-employees’ according to Sec. 22 of the Employment Protection Act, and therefore had not been included in the short list for redundancy. The Court found that MK had been treated less favourably in comparison to the two other employees even though they had all been in comparable situations. The temporal connection between MK informing about his disease and the employer issuing the redundancy notice gave reason to believe that MK was treated less favourably because of his disability. The Court then stated that the defence put forward was not convincing enough to find that the company had discharged its burden of proof providing sufficient evidence that the redundancy of MK lacked any connection with his disability. The company was ordered to pay economical damages and damages for the violation (100,000 SEK or about 9,500 Euro) caused by discrimination.

The Labour Court case 2006 No. 97 (judgment 27 September 2006)

³⁷ The judgment in the Labour Court case 2003 No. 76 is not transparently argued in relation to the burden of proof rule. It is not clear whether the plaintiff’s side is considered to have fulfilled its burden of proof and the employer’s side there after did justify their decision or whether the plaintiff’s side is considered not to have presented a prima facie case of discrimination.

SAC v. the Swedish Church

The claimant, a priest in the Swedish Church, was denied a position as missionary in Brasil due to him being allergic to certain food. According to the applicable collective agreement a condition for such a position was that the employee in question had been accepted for insurance company contracted by the Swedish Church. The claimant had been accepted for such insurance but to a higher cost due to his allergy. Nevertheless, the employer took the decision not to appoint the claimant due to his allergy and the risks it implied. The Labour Court found direct discrimination on the grounds of disability to be at hand. The 1999 Disability Discrimination Act was found to be applicable despite the work was going to be carried out in Brasil since the parties were Swedish subjects and the employment entered into in Sweden and the allergy was clearly a disability covered by the Act. What was known about his allergy was not reason enough to deny him the position. The Employer was ordered to pay the claimant 50 000 SEK (approximately 5 500 Euros) in damages for the violation.

Sexual Orientation

There are yet no reported cases of sexual orientation discrimination in employment based on the (1999:133) Sexual Orientation Discrimination Act tried before the Labour Court. The so far only case concerning such discrimination was submitted by HomO in 2002, but the Labour Court never got to decide the case since a settlement was reached.³⁸ Statistics of the complaints presented to HomO's office are accounted for in Sec. 7 below.

0.3.2 The 2001 Discrimination of Student at Universities Act

This Act can be said to implement the Race Directive as regards the area of higher education. Since the Act covers also discrimination on the grounds of sex, religion or belief, sexual orientation and disability, it can also be said to relate to the Employment Framework Directive. So far, to my knowledge, only one case based on this Act has reached the general court system – see the Supreme Court case below. A number of decisions taken by universities may, however, be appealed to the Board of Appeal of Higher Education (Överklagandenämnden för högskolan) within the administrative system. The decisions of the Board can be found on its website www.onh.se/avgoranden. The application of this Act is one of the areas under the Ombudsmen's supervision. On such statistics, see further Sec. 7 below.

Ethnicity

Supreme Court judgment of the 21 December 2006 in case T 400_06

The State v. Lönn and Midander

Uppsala University decided to reserve ten percent of the openings on their Law Programme for applicants 'with both their parents foreign born'. Such 'alternative selection criteria' for ten percent of the openings were admitted through legislation introduced in January 2003, in order to enhance pluralism (mångfald).³⁹ The plaintiffs claimed, however, that the selection criteria were discriminatory under the 2001 Student at Universities Act, which does not give express scope for preferential treatment. The practice was tried against the exception rule under the ban on direct discrimination: 'the prohibition does not apply if the treatment is justified taking in to account a special interest that is manifestly more important than the interest of preventing discrimination at the university'.

³⁸ Labour Court case 2002 No. 76. The settlement reached implied damages on 35 000 SEK.

³⁹ Secs. 10 and 16c Ch. 7 in the (19993:100) Higher Education Ordinance.

The Supreme Court found – as had previous the Appeal Court Svea Hovrätt and the District Court Uppsala tingsrätt - the University's practice to be contrary to the ban on direct discrimination contained in the 2001 Student at Universities Act. The general exception contained in Sec. 7 the Student at Universities Act did not, according to the Supreme Court, cover 'strong' positive action, i.e. giving preference to somebody with inferior merits. Since the practice at issue was considered incompatible already with domestic legislation 'there was no need to test the practice in relation to Community Law'. The plaintiffs, two women applicants with higher credits who would otherwise have been admitted into the Law Programme at Uppsala University, was rendered damages for the violation caused with, each, 75 000 SEK (approx. 8,330 Euro).

As was only just described, the interpretation of the rule at issue was argued wholly within domestic legislation and not in relation to the relevant Community Law provisions, something which make the sentence somewhat less interesting. The Uppsala District Court, in the first instance, had earlier argued along the lines of the European Court of Justice's case law related to the Equal Treatment Directive, not admitting positive action when there was a clear difference in merits.

Disability

The Board of Appeal of Higher Education (Reg. No. 42-334-03)

In this case the Board decided that a requirement to submit a written thesis was not as such discriminatory to a dyslectic student. The Board stated that requirements on study results and examination cannot as such amount to discrimination when objectively justified and appropriate and necessary to reach that goal.

0.3.3. The 2003 Prohibition of Discrimination Act

There is, to the author's knowledge, so far only one judgment based on this Act from the highest court – see below under Sexual Orientation. A great number of complaints was however registered by the different Ombudsmen during 2005 and case-law is bound to develop in the near future.

Sexual Orientation

The Supreme Court, case T 2100-05 (judgment March 28 2006)

HomO v. Restaurang Fridhem Handelsbolag

HomO filed the first law suit (on any discrimination ground) on the basis of the 2003 Act on 12 December 2003 to the Stockholm District Court in 2004. The case concerned a complaint from a lesbian woman who, together with her girlfriend and some friends, was forced to leave a restaurant after having kissed her girlfriend on the premises. The District Court found that the plaintiff had not been able to show the actual circumstances claimed – i.e. the non-offensive character of the kissing incident and that the order to leave the restaurant was not the result of the plaintiff's behaviour following the restaurant's complaint – and thus not a prima facie case of discrimination. The Appeal Court, however, found a prima facie case of discrimination to have been proven and discrimination to be at hand. Damages were set to 50,000 SEK (approx. 4,700 Euro). The case was recently decided upon by the Supreme Court. The Supreme Court agreed with the Appeal Court that a prima facie case of discrimination was at hand but set the damages to only 15,000 SEK (approx. 1,410 Euro). With regard to the

(limited) effects of the discriminatory act at hand the lower damages were deemed to be more in line with Swedish legal practices in this field.

0.3.4. The 2006 Pupils Discrimination Act.

There is, to the author's knowledge, so far no judgment from a higher court based on this Act.

0.3.5 Penal Law

The Supreme Court, NJA 1999 s 639 (judgment Oct 20 1999)

Nima S vs. Karl Erik W.

Illegal Discrimination – National Origin

Iran-born Nima S applied for renting an apartment owned by a company in which the defendant was a partner. The Court held that it had been shown that the defendant had pointed out to Nima S that a conflict with an Iranian tenant had previously emerged, that a neighbouring tenant did not like Iranians and that his national origin therefore was a disadvantage. The Court held though that it had not been proven that the defendant had made clear to Nima S that he would not come in question for tenancy, however it was reasonable to believe that the defendant did not let Nima S compete on the same conditions as other applicants for tenancy. There were however other circumstances pointing in another direction. In a message sent to all the applicants, among these Nima S, six weeks after the day of the discriminatory declarations, the defendant explained that the tenancy question still had not been determined. This supported the defendant's claim that Nima S was treated as an applicant among others. The defendant further claimed that he after the talks with Nima S started investigating his financial situation and found some uncertainties and that Nima S had no taxable income in 1996. The tenancy was later given to a physician with stable finances. The Court therefore held that it could not be considered proven that the defendant had not let Nima S compete on the same conditions as the other applicants due to his national origin. The defendant was therefore acquitted.

The Supreme Court, NJA 1999 s 556 (judgment Sep 13 1999)

Ritva B vs. Stefan and Fredrik L.

Illegal Discrimination - Ethnic Origin

For crime preventing purposes, a store laid down a prohibition denying persons dressed in wide, long and heavy skirts entrance to the store. The Roma woman Ritva B was denied entrance because she was dressed in traditional clothes. The Court held that the prohibition was shaped in a way that it in practice solely and generally applied to Roma women, something the defendants must have realized. The motive stated by the defendants – that such skirts may be used as a means of assistance for theft in the store – could not be considered making the special treatment acceptable but rather apt to stress the discriminating character of the special treatment. Thus, the prohibition was held to imply illegal discrimination of Roma women. The defendants were therefore to pay a 1800 SEK (approx. 200 Euro) fine and 5000 SEK (approx. 550 Euro) damages. The shop was not asked to stop prohibiting entry to persons wearing wide long and heavy skirts. This was a criminal law case, however, and to continue such illegal practices would of course imply a continued criminal offence.

The Supreme Court, NJA 1996 s 768 (judgment Dec 19 1996)

André S, Aliow A and Yoro S vs. Conny K.

Illegal Discrimination - Race and Skin Colour – Non-Systematic Discrimination

The plaintiffs, all black, were denied entrance to a restaurant where the defendant worked as a bouncer. The reason given was that it was a live music evening, that the restaurant was full and that table reservations were required. The defendant later stated that he could not remember the exact reason why he turned the plaintiffs away. The Court began by stressing the difficulties in proving illegal discrimination in cases where no systematic discriminatory behaviour can be established. Since the evidence did not support such a behaviour the question became whether the investigation could show that the defendant on the actual evening decided to turn away guests because of their race or skin colour. Although it had not been shown that the restaurant was full it had not been elucidated that there was not another motive for the defendant's action. It could not be excluded that the plaintiffs – who had gone to the restaurant not with the motive to visit but to, as participants of a TV-program, investigate whether they should be illegally discriminated, and according to Yoro S with an expectation to be turned away – made such a negative impression on the defendant that he therefore decided to turn them away. That impression need not have had any connection with their race or skin colour. – No criminal offence was considered to be at hand.

The Supreme Court, NJA 1994 s 511 (judgment Sep 12 1994)

Aron O vs. Rudolf A.

Illegal Discrimination – National Origin and Skin Colour – Sanction Measuring

Rudolf A, owner of a tenancy property, told one of his tenants, who was moving out, that he would let her suggest a new tenant. When he was contacted by the person suggested, Aron O's cohabitee, he was at first interested in giving her the contract but changed his opinion when he found out that she would be sharing the apartment with Aron O. The court held that it had been shown that this was due to the colour of Aron O's skin. Rudolf A was therefore found guilty of illegal discrimination. In assessing the sanction the court stressed that there are reasons to look severely upon illegal discrimination that takes place on such an, for the individual, important area as the housing market. The Court therefore stuck with the large fine ordered by the Court of Appeal, 37 500 SEK (approx. 4,160 Euro).

The Appeal Court Hovrätten över Skåne och Bleking, case B 3145-05 (judgment 22 December 2006)

The Prosecutor v. Marinos

The case has its background in situation testing. A group of law students was testing a number of restaurants and night-clubs from an ethnic discriminations point of view. At trial here was a 'door-man' giving access to a group of Swedish looking students whereas he denied three other – non-Swedish looking – groups entrance. There were video-clips to prove the discrimination. In contrast to the Local Court (Malmö Tingsrätt) who convicted the man in the first instance, the Appeal Court did not find a criminal offence to be at hand. The Swedish ethnic group was rather let in by a colleague of the 'door-man' and neither the video-clips nor the statements in court gave a clear view of the motives for the dissimilar treatment of the different groups. According to the door-man there was a requirement of being on the guest-list, which he (wrongly) thought was met by the Swedish-looking group.

The Supreme Court, case B 1050-05 (judgment 29 November 2005)⁴⁰

The General Prosecutor v. Åke Green

⁴⁰ www.hogstادمstolen.se/2005/Sammanst.htm (English translation of the case).

Religion and incitement to hatred against homosexuals

A pastor held a long sermon entitled 'Is homosexuality congenital or the powers of evil meddling with people' where he developed his religious beliefs with regard to homosexuality blaming homosexuals for aids, linking them to the sexual abuse of children and characterising them as 'a serious cancerous growth on the body of society'. A District Court had sentenced him to 1 month of prison for incitement to hatred according to Chapter 16 Sec. 8 the Swedish Penal Code, whereas the Court of Appeal acquitted him upon appeal.

The Supreme Court upheld the judgment of the Court of Appeal. The statements made by the pastor could not be considered to be direct expressions of Biblical verses but implied insulting judgments about the group in general overstepping the limits of an objective and responsible discourse regarding homosexuals. The statements could therefore be deemed to have expressed contempt for homosexuals as a group according to the meaning of Chapter 16 section 8 of the Penal Code as expressed in the *travaux préparatoires*. However, Chapter 16 section 8 also has to be interpreted in the light of the Swedish Constitution and the European Convention of Human Rights. The Constitutional provisions regarding freedom of religion and freedom of speech respectively, were not found to constitute a reason not to convict the pastor. As regards the European Convention of Human Rights, the Supreme Court did find, however, that it was 'likely that the European Court of Human Rights, in a determination of the restriction of (the defendant's) right to preach his Biblically-based opinion that a judgment to convict would constitute, would find that this restriction is not proportionate, and would therefore be a violation of the European Convention of Human Rights. Despite the pastor's extreme statements they could not be labeled a 'hate speech', the Court said.

Hovrätten för Nedre Norrland, case B 802-05 (judgment 14 December 2005)

The General Prosecutor v. FV et al

Incitement to hatred against homosexuals

The four plaintiffs had been spreading some hundred leaflets at the premises of a public school blaming homosexuals for aids and linking them to the sexual abuse of children. The Appeal Court acquitted the men referring to the Supreme Court judgment in the Green case (see above). As the Supreme Court did in Green, the Appeal Court found that the statements could be deemed to have expressed contempt for homosexuals as a group according to the meaning of Chapter 16 section 8 of the Penal Code as expressed in the *travaux préparatoires* but that Chapter 16 section 8 also had to be interpreted in the light of the ECHR and that a judgment to convict would constitute a violation of the European Convention on Human Rights. – The case is now pending before the Supreme Court.⁴¹

0.3.5. Other

Finally, the author would like to mention here two decisions (of a guiding character) by the Swedish National Board of Education⁴².

One concern two girls with Burqa/Niqab in a Swedish school (Decision No. 58-2003:2567). A high school/gymnasium (grade 10 to 12) decided that two pupils, aged 16 and 19, were not allowed to wear burqa at tests or national tests. This decision was made after a dialogue with the two girls. The school submitted thereafter the issue to the National Board on Education, asking whether or not it is acceptable to demand that they are identifiable by showing their

⁴¹ See also the case B 3017-05 from Göta Hovrätt (judgment 12 April 2006) concerning presumed hatred against homosexuals and Roma people on the webpage of an extremist (national) party.

⁴² The National Board on Education has the competence to adopt guidelines for all schools in the country. The Board can furthermore answer questions from schools, such as this one concerning the two girls, on general matters. These answers are normative.

face at certain occasions. The Board decided that it is acceptable for schools to prohibit burqa, but not without education and dialogue about the common values, equality between gender and democracy upon which the Swedish educational system relies. In its motivation, the Board said that it is possible with the existing legal statutes and the constitution to prohibit the use of burqa in schools if these cause danger and disorder in school, if they offend others by being offending religious manifestations, or if they cause pedagogical problems. The prohibition is made on local level.

- The Board never reasoned on discrimination.

The other case concerned a young girl, who started her first year of compulsory basic schooling in the private school Minervaskolan in Umeå (Decision 22-05-2006 No. 52-2006:689). From the start and for religious reasons she wore a head-scarf. This was against the general school rules prohibiting the use of any type of hat, etc., during class-hours. The principal made clear that she had to abide to the rules or change school. As a result of the denial of her right to wear a head-scarf the girl changed school.

The Swedish National Board of Education concluded that a prohibition to wear a head-scarf at school was contrary to the requirement of providing a school 'open to all pupils' according to Chapter 9 Sec. 2 in the School Act. According to the Board the choice of clothing is a personal choice normally not to be guided by school rules. Prohibitions are only acceptable if there are order or safety reasons for doing so. To prohibit a pupil to wear a head-scarf in accordance with general school rules is to deny such a pupil access to schooling from religious reasons.

The right to wear a head-scarf is thus considered a part of the freedom of religion and would now – after 1 of April 2006 – also amount to discrimination according to the 2006 Act prohibiting discrimination in basic education, not at stake here. The Board has in another decision (Dnr 58-2003:2567) stated, however, that it is possible to prohibit the use of burqa in schools if these causes danger and disorder in school, if they offend other by being offending religious manifestations, or if they cause pedagogical problems.

Internet link source and additional information: www.skolverket.se

1. GENERAL LEGAL FRAMEWORK

Constitutional provisions on protection against discrimination and the promotion of equality

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

Swedish constitutional law is comprised by four different statutes, i.e. the Instrument of Government, the Act of Succession to the Throne, the Freedom of the Press Act and the Fundamental Law on Freedom of Expression (Regeringsformen, Successionsordningen, Tryckfrihetsförordningen and Ytrandefrihetsgrundlagen, respectively). The one of interest to this report is the 1975 Instrument of Government. Basically, it contains provisions regarding the fundamental principles of Government, fundamental rights and freedoms, the role of the Head of State, the Parliament, the Government, courts of law and other bodies of public administration as well as basic rules for legislation, financial powers, the State's relations to other states, Parliamentary control and situations of war or danger of war.

The 1975 Instrument of Government replaced the first one stemming from 1809. The original one showed rather little influence from the European enlightenment movement and did not pay much attention to individual rights. The current Instrument of Government is somewhat different in this respect. Amendments relating particularly to fundamental rights and freedoms were also made throughout the years following 1975.

Art. 2 (the first two paragraphs) in the first chapter of the Instrument of Government states: 'Public power shall be exercised with respect for the equal worth of all and for the freedom and dignity of the individual.

The personal, economic and cultural welfare of the individual shall be fundamental aims of public activity. In particular, it shall be incumbent upon the public administration so secure the right to work, housing and education, and to promote social care and social security and a good living environment.'

In addition paragraph 4 of Article 2 was amended recently. It now declares:

'The public institutions shall promote the ideals of democracy as guidelines in all sectors of society and protect the private and family lives of private persons. Public institutions shall work to ensure that all persons shall be able to achieve participation and equality in society. The public institutions shall counteract discrimination against persons on the grounds of gender, skin colour, national or ethnic origin, language or religious affiliation, disability, sexual orientation, age or other circumstance that relates to the individual as a person.' (Lag 2002:903.)

Chapter 2 of the Instrument of Government contains an enumeration of the protected fundamental individual rights. - In Article 15 we find a rule that states that legislation entailing discrimination of individuals belonging to minorities as to race, colour or ethnic origin is prohibited. Apparently, this provision does not entail religion, but insofar ethnicity involves worship it is probably also included in the prohibition against discrimination. (The prohibition is also valid for non-citizens according to Chapter 2 Section 22 paragraph 1 point 7.) - In Article 16 we find a similar rule banning legislation entailing sex discrimination including a permissive rule on positive action to promote the underrepresented sex. - Also worth mentioning in this context is the constitutional freedom of religion, which is one of the few absolute rights among the rights set forth in the constitution. These rules, too, do not support individual claims. This is true both with regard to the State and to private actors. Their implication is that all Acts of Parliament and other legal regulations must satisfy these basic requirements of non-discrimination. However, it should be noted that laws can be declared unconstitutional by the courts only if the violation is manifest (*uppenbart*). According to Article 14 of Chapter 11 of the Instrument of Government: 'If a court or other public body finds that a provision conflicts with a rule of fundamental law or other superior statute, or finds that a procedure laid down in law has been disregarded in any important respect when the provision was made, the provision may not be applied. If the provision has been approved by the Parliament (*Riksdag*) or by the Government, however, it shall be waived only if the error is manifest'. This limitation requiring that that the law adopted by the Parliament not only violates, but is a manifest violation of the Constitution, means that, as a practical matter, this constitutionality of laws are rarely challenged in Swedish courts.

In regard to employment in the public sector covered by the national government there is a constitutional requirement (Instrument of Government Chapter 1, Article 9) that decisions regarding an offer of employment shall be based solely on objective grounds, such as skills and merits, and it is therefore never justifiable to treat any job applicant unfavourably on the basis of irrelevant factors.

Strictly speaking, this does not apply to local government employees. However, in practice this applies because of the constitutional rule in Chapter 1, Article 9 of the Instrument of Government, which states that all exercise of public authority, shall be grounded on an objective basis. These rules, too, are not the basis for individual claims on damages, etc, but hiring decisions within the Civil Service can to some extent be subject to administrative appeal, e.g. on the grounds that undue consideration has been given to other factors than those allowed by the Constitution.

It should also be noted that The European Convention on Human Rights has been incorporated into national legislation.⁴³ Moreover, Article 23 of Chapter 2 of the Instrument of Government prescribes that ‘No act of law or other provision may be adopted which contravenes Sweden's undertakings under the European Convention for the Protection of Human Rights and Fundamental Freedoms’. The European Convention on Human Rights has thus received a quasi-constitutional status. This means that any law that contradicts the rights set forth in the Convention is void and must not be applied. Thus the Government has an obligation not only not to violate the Convention but also to uphold the respect and protection for the rights established in it.

b) Are constitutional anti-discrimination provisions directly applicable?

Article 2 of the first chapter of the Instrument of Government is mainly a declaration of the political programme of the welfare state. It does not grant any legally enforceable right to anybody. The new paragraph 4 is expected to play the role of a guiding principle for public authorities rather than being a statement of law that will be implemented by the courts. The term ‘counteract’ [motverka] would seem to include an obligation to abolish any remaining discriminatory legislation as well as an obligation on all public bodies themselves to refrain from discriminating acts. Since this amendment is also not legally binding, the only kind of control is political. As regards the enumeration of protected individual rights in Chapter 2 of the Instrument of Government, these rules, too, do not support individual claims. This is true both with regard to the State and to private actors. Their implication is that all Acts of Parliament and other legal regulations must satisfy these basic requirements of non-discrimination.

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

No, it can not.

2. THE DEFINITION OF DISCRIMINATION

2.1 Grounds of unlawful discrimination

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

Swedish domestic law today contains a considerable number of explicit bans on discrimination; i.e. on the grounds of sex, ethnicity, religion and other belief, sexual orientation and disability as well as against part-time workers and fixed-term workers. These non-discrimination provisions are to be found in a number of specific laws as listed in Annex 1 to this report. Discrimination on the grounds of age is not yet covered by a ban on non-discrimination although this should have been the case as of 3 December 2006.

⁴³ Convention for the Protection of Human Rights and Fundamental Freedoms, Adopted in Rome on 4 November 1950. Entered into force on 3 September 1953, Lag (1994:1219) om den europeiska konventionen angående skydd för de mänskliga rättigheterna och de grundläggande friheterna.

2.1.1 Definition of the grounds of unlawful discrimination within the Directives

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

Is there a definition of disability on national level and how does it compare with the concept adopted by the European Court of Justice in case C-13/05, Chacón Navas, Paragraph 43, according to which "the concept of 'disability' must be understood as referring to a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life".

Racial or ethnic origin, including religion or belief

The 1999 Ethnic Discrimination Act as well as the 2001 Students at Universities Act originally contained a definition of ethnicity considered to comprise also the ground religion or belief. Thus, Section 3 of the 1999 Act talks of 'ethnic belonging' and defines it in the following way: 'Ethnic belonging means that someone belongs to a group of people who have the same race, colour, national or ethnic background or religious belief'. The same definition was included in the 2001 Act (Sec. 2). The concepts 'religion' and 'belief' were thus basically subsumed under 'ethnic belonging'. When transposing the Article 13 Directives by introducing the 2003 Prohibition of Discrimination Act this was changed, however. The 2003 Act differs systematically between the ground 'ethnic belonging' and 'religion or other belief', though the level of protection is the same for both grounds. Ethnic belonging is now defined as 'that someone belongs to a group of people who have the same national or ethnic background, race or colour' (Sec. 4 par. 1 in the 2003 Act). Religion and other belief (*religion eller annan trosuppfattning* in Swedish) are not given any explicit definition. - Both the 1999 Act and the 2001 Students at Universities Act were amended in parallel in 2003 so that the definitions are now the same under all relevant Acts including the 2006 Pupils Discrimination Act.

Disability

According to Sec 2 the 1999 Disability Discrimination Act disability is defined as follows: 'Disability means every permanent physical, mental or intellectual limitation of a person's functional capacity as a consequence of an injury or illness that existed at birth, arose thereafter or may be expected to arise.' Identical definitions are found in the 2001 Student at Universities Act (Sec. 2), the 2003 Prohibition of Discrimination Act (Sec. 4 par. 3) and the 2006 Pupils Discrimination Act.

The definition is thus stated in general terms, a requirement being that the limitation is 'permanent', i.e. the limitations in functional capacity must be long-lasting. For example, a person with a broken arm will not be covered by the law since the disability caused is of a passing nature. There is no threshold of 'severity', nor a reference to the ability to engage in 'normal life activities' or 'professional life' for that matter. (The latter is part of the assessment as regards 'similar situation') However, until there is a clear case law on the point it will be difficult to more closely define the issues. – Illnesses that can be expected to limit functional capacity in the future are covered by the law. Among others this include HIV, cancer and multiple sclerosis (MS). According to the authors's opinion, the definition of disability within national law meets the requirements of Community law as stated in C-13/05, Chacón Navas (compare pp. 43 and 45 the judgment). It is notable, that Swedish law does not require an impairment which actually hinders the participation of the person concerned in professional life. However, this should be no problem since the Directive of a minimum character.

Sexual orientation

The 1999 Act concerning sexual orientation uses the term '*sexuell läggning*' (sexual disposition) in Swedish. Its legal definition is given in Sec. 2 of the Act, where it says that the term includes homosexual, bisexual and heterosexual orientation. In the *travaux préparatoires*, the Government indicates that the intention is to create a legal protection that covers the whole population as all individuals in principle belong to one of these three categories.⁴⁴ The same definition is used in the 2001 Equal Treatment of Students at Universities Act (Sec. 2), the 2003 Prohibition of Discrimination Act (Sec. 4 par. 2) and the 2006 Pupils Discrimination Act (Sec. 2). All provisions that apply to homosexual preference or behaviour are thus equally applicable to bisexual preference – and for that matter heterosexual – behaviour. The only possible exception being the penal provision on unlawful discrimination, which speaks explicitly about a person's homosexuality.

From what is said in the *travaux préparatoires* it could be concluded that sexual *behaviour* would not be covered by the prohibition of discrimination. In its Bill to Parliament proposing the 1999 Sexual Orientation Discrimination Act, the Government seeks to clarify that a variety of sexual conducts that may be found in individuals regardless of whether they are homosexual, bisexual or heterosexual are not protected by the discrimination prohibition.⁴⁵ The remarks in the Bill run the risk of leading to the erroneous conclusion that the anti-discrimination provisions would only cover differences in treatment related to the orientation or preference itself and never on grounds of sexual behaviour. This, however, is not the case. 'To avoid, however, that e.g. employers try to circumvent the anti-discrimination legislation by simply submitting that the difference in treatment in a given case was due not to the victim's being homosexual, but to the fact that she was having homosexual relations, Parliament decided to make the following clarification. The fact that a person is living together with someone of her own sex in an intimate relationship, whether in a registered partnership or not, or the fact that she is *at all* having sexual relations with someone of her own sex, must be considered as a natural expression of the sexual orientation itself, the same way that this is the case for heterosexuals. Therefore, an employer may not take into account any behaviour that has such a natural link to the sexual orientation itself, whichever orientation that may be; unless he can prove that the behaviour has a definite relevance for the aptitude of the employee to perform her duties on the job. This clarification will have a strong effect on the interpretation by the courts since its wording is clear and it is included in the Parliament Standing Committee report, which led to the adoption of the Act.'⁴⁶

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

During the drafting of the 2003 Act transposing the directives, a legislative and several government authorities and other parties discussed the concept of belief. The problem addressed was how to find an adequate translation for 'belief'. In those cases this notion already occurs in legislation it is almost consequently referred to as "worship" (*religion*) or "religious faith" (*trosuppfattning*), i.e. with a meaning very close to the concept of religion. The Government Commission in its report suggests a word similar to conviction (*övertygelse*). Most parties who were involved in the discussion on this report agreed upon the ambiguity of using conviction since it entails also political or cultural conviction.

⁴⁴ Transsexuality is a question of gender, not of sexual orientation

⁴⁵ Prop. 1997/98:180, page 22.

⁴⁶ Ytterberg, Sexual Orientation Report of 28 July 2004.

The Government finds in its proposal, that the word faith is the most adequate in this context due to its close relation to “religion”.⁴⁷ Faith also comprises atheism and agnosticism, which religion does not.

Besides this debate on the translation of the Directive requisites there has been a discussion on whether or not the Act should contain a legal definition of religion and belief. The Government Commission did in its report suggest that there should be a legal definition and that belief be understood as “basic values concerning ideology or other issues of ethic character”.⁴⁸ This definition was criticised by the Legislative Council in its preview of the draft legislation for being unclear and ambiguous. Instead it suggested that religion and belief is defined as “a religious, philosophical or another such ideology”.⁴⁹ The Government argues that both this definition and that made by the Commission are too extensive and will lead to problems of application and interpretation. Moreover, the currently used requisites, faith and worship, are not defined in the legal texts themselves, but through case law. Since this seems to be unproblematic the Government left the definition out of the 2003 Act (as well as the other laws on discrimination). Any eventual issue of interpretation is left to the authorities and the courts to take upon them.⁵⁰ This was also the view of the recent Discrimination Committee and their proposal does not contain a definition as regard religion and other belief.⁵¹

The lack of definition of the ground of religion, in the light of the definitions of other grounds, when coupled with the lack of constitutional provision, gives the impression that the ground has not been given the same attention.⁵²

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

As was already indicated above, Sweden has not as yet implemented the Directive as regards discrimination on the grounds of age. Nothing can thus be said as regard eventual restrictions.

d) Please describe any legal rules (or plans for the adoption of rules) or case-law (and its outcome) in the field of anti-discrimination which deal with situations of multiple discrimination.

There are no special rules which deal with situations of multiple discrimination and no such rules make part of the proposal of the recent Discriminations Committee.⁵³ There are examples from case-law where the alleged discrimination has been related to multiple grounds – such as Labour Court case 2006 No. 96, both sex and ethnic discrimination. Since the claimants have not been able to show even a prima facie case of discrimination the issue of multiple grounds of discrimination has not really been dealt with by the Court.

2.1.2 Assumed and associated discrimination

⁴⁷ Proposition 2002/03:65, pp. 81-82.

⁴⁸ SOU 2000:43, p. 155.

⁴⁹ The Legislative Council’s official statement 2003-03-06, in proposition 2002/03:65, p. 344.

⁵⁰ Proposition 2002/03:65, p. 82.

⁵¹ SOU 2006:22 p. 311.

⁵² See further, Christina Johnsson, Religion report of May 2003.

⁵³ SOU 2006:22.

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

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

As will be described in next section (2.2), the definition of (direct) discrimination is in principle identical in all the relevant national statutes that are the 1999 Acts, the 2001 Students at Universities Act, the 2003 Prohibition of Discrimination Act and the 2006 Pupils Discrimination Act. An employer, an higher education institution or a goods and services provider, etc., may not disfavour anyone of the protected groups by treating her or him worse than the employer, etc., treats, has treated or would have treated someone else in a comparable situation, if the disfavour 'is connected' to the protected ground. As from July 2003 – when the 2003 Act was introduced and the 1999 Acts as well as the 2001 Students at Universities Act were amended in parallel – there is no link whatsoever to the discriminated person's *own* disability, sexual orientation, etc. as a prerequisite for the relevant legislation to apply. Any discrimination which relates to the protected ground is prohibited. Discrimination on the grounds of a mistaken assumption about a person's characteristics is thus also covered by the provisions as is discrimination of a person for reasons of his or her relation to a person of the protected group.⁵⁴

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

a) How is direct discrimination defined in national law?

The definition of direct discrimination is in principle identical in all the relevant national statutes, which are the 1999 Acts, the 2001 Students at Universities Act, the 2003 Prohibition of Discrimination Act and the 2006 Pupils Discrimination Act. An employer, a higher education institution or a goods and services provider, etc., may not disfavour anyone of the protected groups by treating her or him worse than the employer, etc., treats, has treated or would have treated someone else in a comparable situation, if the disfavour is connected to the protected ground. This situation applies as from July 2003 – when the 2003 Act was introduced and the 1999 Acts as well as the 2001 Students at Universities Act were amended in parallel. Sec. 3 in the 1999 Act on Sexual Orientation is representative: 'An employer may not disfavour a job applicant or an employee by treating her or him worse than the employer treats, has treated or would have treated someone else in a comparable situation,⁵⁵ if the disfavour is connected to sexual orientation'.⁵⁶ This definition is designed in close adherence to Art. 2.2.1. in Directive 2000/43/EC.

⁵⁴ Prop. 2002/03:65 p. 91. The 1999 Acts – as well as the 2001 Act – was originally somewhat differently designed. As reflected in *the travaux préparatoires* (Bet.1998/99:AU4, pages 19-20), it was indeed never the intention of the legislator that the rule should be limited in this way and it was thus subsequently amended.

⁵⁵ For a job applicant a comparable situation means that they have applied for the same job and they basically have the same merits in terms of education, experience and personal suitability. A comparable situation for employees means equivalent work tasks, education and experience. As regards disability discrimination in particular, it must be determined if the disability affects the ability to carry out the work. A comparable situation can be determined to exist if the person with a disability has the capacity to carry out the 'most essential' elements of the job. A person has a right to an individual determination based on their own capacity and circumstances. See the Labour Court case 2003 No. 47 (diabetes).

⁵⁶ Similar definitions of direct discrimination are thus to be found in Sec. 8 the 1999 Ethnic Discrimination Act, Sec. 3 the 1999 Disability Discrimination Act, Sec. 7 the Student at Universities Act and Sec. 3 par. 1 the 2003 Prohibition of Discrimination Act.

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

The ban on direct discrimination is limited by the possibility of justification (see further also Sec. 4 below). In the 1999 Act on Sexual Orientation the exception is redacted as follows: 'The ban against direct discrimination does not apply in connection with decisions on employment, promotion or education for promotion if a particular sexual orientation is necessary owing to the nature of the work or the context in which it is performed'. This bona fide occupational quality-defence clause is to be found also in the other 1999 Acts.⁵⁷ It is designed in not too close adherence to Art. 4 in the Article 13 Directives, respectively, since the rule in the 1999 Acts is limited to situations of recruitment, promotion and education for promotion.

In the 2001 Student at Universities Act the possibility to justify direct discrimination is somewhat more generally stated: 'The prohibition does not apply if the treatment is justified taking in to account a special interest that is manifestly more important than the interest of preventing discrimination at the university' (Sec. 7 par. 2).⁵⁸ Also the 2003 Act is differently designed, with the general definition of the discrimination concepts in Sec. 3 (Sec. 3.1 as regards direct discrimination) followed by the coverage of the ban on discrimination and eventual exceptions area by area. This will be dealt with in Sec. 3 and 4 below. The 2006 Pupils Discrimination Act does not contain any explicit exceptions.

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

There is yet no regulation related to age-discrimination.

➔ 2.2.1 Situation Testing

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

Situational testing is not explicitly touched upon in Swedish law and thus there is no definition, nor any explicit procedural law dealing with the conditions for admissibility. However, situational testing can be permitted and the value of such evidence has to be assessed in accordance with the circumstances at issue.

b) Is there any reluctance to use situational testing as evidence in court (e.g. ethical or methodology issues)? In this respect, does evolution in other countries influence your national law (European strategic litigation issue)?

There is no such reluctance, to the author's knowledge. Nor can there be said to be any direct influence on national law from other countries. The fact that a project on situation testing has been carried together with the ILO (see d below) may be a hint, though, of an international orientation as regards this issue.

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

There is yet not any important case-law with regard to situational testing. However, a number of cases was during 2005 presented to different district courts, see d) below.

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

⁵⁷ See Sec. 10 the 1999 Ethnic Discrimination Act and Sec. 5 the 1999 Disability Discrimination Act.

⁵⁸ In the *travaux préparatoires* the example of giving preference to an equally qualified person of the underrepresented sex was mentioned, Prop. 2001/02:27 p. 41. The exemption rule was applied to give men representing the underrepresented sex preference before an equally qualified woman in the Education Board of Appeal case No. 46-811-02. Compare, however, also the case from Uppsala District Court.

The Swedish Integration Board (Integrationsverket), a national authority under the Government, has since 2004 been involved in a project on situation testing together with the ILO. A workshop in October 2004 resulted in a report covering, among other things, hitherto experiences of situation testing in Sweden.⁵⁹ These were regarded as, hitherto, hardly non-existent in the area of employment. As part of the project the ILO has now carried out a study based on situations testing of pairs of job applicants with a Middle East and Swedish background, respectively, applying for 1 431 jobs in Sweden. It was three times as hard for individuals of Middle East origin as compared to the Swedes to even be taken in consideration for a job.⁶⁰ Also DO, the Ethnicity Ombudsman, is involved with an investigation on situation testing as a method against discrimination and situation testing was also recommended to DO as a tool by the structural discrimination inquiry commission.⁶¹ No action has been taken and the method is not yet in use in the employment area, though. However, as mentioned above, a number of cases of alleged illegal discrimination on the grounds of ethnicity based on the Penal Code, on the one hand, and on the 2003 Act on the other was brought to different district courts in 2005. The background situation was groups of law students (of Swedish origin and immigrants, respectively) ‘testing’ equal treatment practices of restaurants and night-clubs. In some of these cases discrimination was found to have been proven by the respective District Court. However, in the first Appeal Court judgment Hovrätten över Skåne och Blekinge (case B 3145-05, judgment 22 December 2006) recently found no criminal offense proven on the basis of the evidence presented (video-clips). The Court stated that it was not proven by the video-clip (or by the rest of the investigation) what were the motives behind the actions of a colleague of the prosecuted guard, nor what insights the guard himself might have had on these motives.

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

- a) *How is indirect discrimination defined in national law?*
- b) *What test must be satisfied to justify indirect discrimination?*
- c) *Is this compatible with the Directives?*

Also the concept of indirect discrimination is harmonised and is thus the same regardless of the non-discrimination act at issue or in the 1999 Acts, the 2001 Students at Universities Act, the 2003 Prohibition of Discrimination Act and the 2006 Pupils Discrimination Act, together implementing the Article 13 directives in this respect.⁶² This situation applies as from July 2003 – when the 2003 Act was introduced and the 1999 Acts as well as the 2001 Students at Universities Act were amended in parallel. As an example I will quote Sec. 4 in the 1999 Act on Sexual Orientation: ‘An employer may not disfavour a job applicant or an employee by applying a provision, a criterion or a method of procedure that appears to be neutral but which in practice disfavours persons with a particular sexual orientation. However, this does not apply if the provision, criterion or method of procedure can be justified for a reasonable goal and the means are appropriate and necessary in order to achieve the goal.’⁶³ This definition is

⁵⁹ Tillämpningen av Situation testing – metodologi i analysen av arbetsmarknadsdiskriminering (summary in English) www.integrationsverket.se/templates/ivPublication_6720.aspx.

⁶⁰ The report is to be presented in February 2007. A synthesis report ‘Discrimination against native Swedes of immigrant origin in access to employment’ can be found on the following webpage, www.integrationsverket.se/tpl/NewsPage_4067.aspx.

⁶¹ SOU 2005:56, Det blågula glashuset – strukturell diskriminering i Sverige, p. 590. Se Flash report P137.

⁶² The Penal Code provision on unlawful discrimination in principle only prohibits direct discrimination. It has, however, been interpreted by the Supreme Court as prohibiting also such apparently neutral conditions, which in practice have a negative impact *almost exclusively* on one single ethnic group (roma women). The case concerned a department store that would not allow entrance to customers dressed in long, wide and heavy skirts.

⁶³ See Sec. 9 the 1999 Ethnic Discrimination Act, Sec. 4 the 1999 Disability Discrimination Act, Sec. 8 the 2001 Student at Universities Act and Sec. 3.2 the 2003 Prohibition of Discrimination Act.

designed in fairly close adherence to Art. 2.2.b. in Directive 2000/43/EC and 2.2.b in Directive 2000/78/EC, respectively. The Swedish regulation uses the expression ‘in practice disfavour’ instead of ‘put... at a *particular* disadvantage’, which seems to indicate a somewhat broader scope than the corresponding directives.⁶⁴ Furthermore, there is in Swedish law no explicit reference to the comparison with other persons. The expression ‘objectively justified’ is changed to ‘justified for a reasonable goal’. Since there is no case law to speak about it is too early to tell whether these differences have any real implications and what ‘the test to be satisfied’ in these situations really is. Some guidance may be given by the application of the regulation on sex equality.

Some guidance is also given in the *travaux préparatoires* to the acts at stake. For instance, as regards the 1999 Sexual Orientation Discrimination Act, the example of presumably unlawful indirect discrimination given is that of a childcare centre requiring prospective employees to have experience of raising biological children of their own. Another example could be if a requirement is made that a person be married to qualify for a job. As regards disability, according to the Disability Ombudsman, for example, requiring a driver’s license can be a form of indirect discrimination. A license is a necessary requirement for a job as a taxi driver, but does not have to be essential, for example, in regard to a job as a journalist.

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

There are as yet no bans on age discrimination in Swedish domestic law.

➔ 2.3.1 Statistical Evidence

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

Since indirect discrimination requires group impact to be compared, of course, statistical evidence is permitted. The use of statistical evidence is not regulated in any special way and such evidence will have to be assessed according to the circumstances.

b) Is the use of such evidence commonly used? Is there any reluctance to use statistical data as evidence in court (e.g. ethical or methodology issues)? In this respect, does evolution in other countries influence your national law?

In areas outside sex-discrimination statistical evidence is, to the knowledge of the author, not frequently used. However, such evidence is not viewed upon with reluctance either. Due to the situation – scarce case law – it is impossible to say whether judges are influenced by the evolution in other countries.

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

There is no case-law in the areas of discrimination outside sex discrimination using statistics to the knowledge of the author. As regards sex discrimination statistics have first and foremost been used in cases concerning equal pay but to some extent also employment. Also in these cases, there has been no real legal dispute as regards the statistics as such.

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

The (1998:2004) Act on Personal Information (Personuppgiftslagen) contains the general rules on the right to register personal information. There is a general prohibition to register (among other things) such ‘sensitive personal information’ as ethnicity, religion or other

⁶⁴ The wording ‘in practice’ might suggest that actual suffering is required under the Swedish law. This is not the case – the question is whether a certain treatment ‘typically’ would disfavour persons of a certain group, Prop. 2002/03:65 pp. 92 ff.

belief and information concerning health and sexual life including sexual orientation (Sec. 13). However, as regards employers it is permitted to keep record on these things 'only to the extent this is really necessary for the employer to meet the requirements of labour law' (Sec. 16(a)). With regard to health authorities there is also a right to register such sensitive information when necessary for medical reasons, in which case there is a corresponding rule on secrecy (sec. 18). In Sec. 16 there is also a general exception whenever legal claims make keeping record of sensitive information necessary in an individual case and this is also the case when the person registered has explicitly agreed to the registration (Sec. 15). Punitive and economic damages can be claimed in case of actual practices not complying with these norms. Such claims are presented to the ordinary court system and a group claim could thus, at least theoretically, be made. - Against this background information is as the general rule not kept monitoring ethnicity or religion, sexual orientation and disability. On the other hand, the sex and the age of an individual are as a rule always known.

For general statistics purposes there is, however, the population register (folkbokföringsregistret) managed by the tax authorities. This register contains information (among other things) on the place of birth and nationality of a person as well as the place of birth of his/her parents and the date of taking up residence in Sweden. Religion and belief as such are not registered but the membership of a church may be registered (as regards the Swedish church, always). Information on disability or sexual orientation is not included in the population register.

2.4 Harassment (Article 2(3))

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

b) Is harassment prohibited as a form of discrimination?

The three 1999 Non-Discrimination Acts, the 2003 Discrimination Prohibition Act, the 2006 Pupils Discrimination Act and the 2001 Equal Treatment of Students at Universities Act all contain provisions defining harassment as a form of prohibited discrimination. These definitions of harassment are somewhat broader than the one found in the Directive, in that they do not require that the behaviour also creates an intimidating, hostile, degrading, humiliating or offensive environment, but only that it violates the dignity of a person. The provisions omit the qualification of 'unwanted', a criterion which is understood to be an integral part of the term 'harassment' in Swedish ('trakasserier'). There are also rules that oblige an employer/university, which has knowledge about the fact that an employee/student feels that she has suffered harassment related to a protected ground to investigate the matter and, when appropriate, to take action to prevent such harassment from continuing. This obligation applies also to situations where the employer/university cannot in any way be held responsible directly for the harassment itself.

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

As regard additional sources on the concept of harassment the following may be said. Several of the non-discrimination acts of relevance to this report, such as the 1999 Ethnic Discrimination Act and the 2001 Student at Universities Act (as well as the 1991 Equal Opportunities Act), contain rules on active measures involving the duty of establishing equal treatment plans and perform preventive work as regards harassment. It is thus fairly common that individual employers may have elaborated codes of conduct applicable at the workplace. Furthermore, the different ombudsmen have a duty to follow up the application of the non-

discrimination acts in their respective fields of competence. They have elaborated a number of publications giving guidance as regards how to deal with harassment. Such material has no real legal standing, though, but is only of an informative character. However, there are also the rules stipulated by the Swedish Work Environment Authority (Arbetsmiljöverket) under the 1977 Work Environment Act. Here we find regulation AFS 1993:17 on Harassing Differential Treatment in Working Life. These rules cover any type of harassment at the work-place, including harassment covered by non-discrimination legislation, and are complemented by general guidelines. The rules and guidelines are of a procedural character and do not contain any definitions, etc., of interest.

2.5 Instructions to discriminate (Article 2(4))

Does national law prohibit instructions to discriminate?

The 2003 Discrimination Prohibition Act in its Sec. 3 par. 5 includes a provision, which prohibits orders or instructions to discriminate against someone, directly, indirectly or through harassment.⁶⁵ The provision covers orders or instructions given to someone who is under the command of, or in a position of dependency of, the instructor. The same goes for someone who has a contractual obligation to carry out a task for the instructor. When the Act was introduced a corresponding ban was added to the 1999 Acts as well as the 2001 Students at Universities Act through amendments. Also the 2006 Pupils Discrimination Act contains such a ban.⁶⁶

The provisions prohibiting instructions to discriminate have been criticised for having been given a narrow drafting and, in certain cases, accompanied by guidelines in the *travaux préparatoires* for their interpretation that are limiting, thereby not living up to the standards required by the Directive.

It may be said that it is quite difficult currently to assess the effectiveness of these measures without any relevant case law.

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

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

The 1999 Disability Discrimination Act specifies the concept of reasonable accommodation in Sec. 6: 'The prohibition contained in Section 3 also applies when an employer upon employment, promotion or training for promotion by providing support and adaptation measures may create a situation for a person with a disability that is similar to that for persons without such a disability and it may reasonably be required that the employer implements such measures.'

⁶⁵ Art. 3(4) and art. 3(1-3).

⁶⁶ See Sec. 9b the 1999 Ethnic Discrimination Act, Sec. 4b the 1999 Sexual Orientation Act, Sec. 4b the 1999 Disability Discrimination Act, Sec. 8b. the 2001 Student at Universities Act and Sec. 12 the 2006 Pupils Discrimination Act, respectively.

It is not really possible to specify what accommodations 'may be reasonably required' according to Swedish law since case law so far is scarce nor is it possible to specify what would be recognised as a disproportionate burden. The following adaptation measures were mentioned in the legislative materials accompanying the act as examples that could be required of an employer: improvements related to physical accessibility, the acquisition of technical support, and changes in work tasks, time schedules or work methods. The reasonableness of requiring measures to be undertaken can vary depending on the employer. This determination must be made from case to case depending on such factors as, for example, the company's ability to bear the costs, the ability to undertake a measure, the problems caused for the employer by the measure and the expected length of the employment. According to the Disability Ombudsman, the mere possibility of obtaining a government subsidy will not be taken into account in assessing reasonableness. This can however be taken into account if it becomes apparent during the recruitment process that the subsidy will be received.

The rule on reasonable accommodation in the 1999 Act was earlier limited to cases of 'employment (i.e. recruitment), promotion or training for promotion'. Recently, the scope of the rule was broadened so as to cover all situations covered by the 1999 Act, i.e. also salary and other employment conditions, the distribution of work and dismissal and other intrusive measures against an employee. As regard the already employed also other rules inherent in general labour law apply. Here, it is especially the 1977 Working Environment Act and the employer's duty of 'rehabilitation measures'⁶⁷ as regard the already employed in combination with the 1982 Employment Protection Act, which impose a duty of fairly far-reaching accommodation.⁶⁸ The scope of the duty is based on a reasonable balancing of interests. In the case of a large employer with substantial resources the duty to provide a 'reasonable accommodation' will presumably go substantially beyond the essential functions of the job.

As regards indirect discrimination accommodation concerns will be taken into account within the assessment of justification process.

Also the 2001 Student at Universities Discrimination Act contains a rule on reasonable accommodation. The 2001 Act can be said to a certain extent – i.e. as regards vocational training within the area of higher education – to implement Directive 2000/78/EC. According to Sec. 10 the 2001 Act, the 'prohibition contained in Section 7 against direct discrimination when a university decides on entry to higher education and underlying education, also applies when the university, by making premises accessible and usable, can create a situation for a person with disability that is similar with that for persons without such disability, provided it is reasonable to require that the university takes such measures'.

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

By the reference to Sec. 3 (the ban on direct discrimination) the duty of reasonable accommodation is made an integrated part of the concept of direct discrimination itself. 'Reasonable accommodation' is required in determining whether or not a similar situation exists, and thus for determining whether or not discrimination has occurred. The key issue is

⁶⁷ The goal of rehabilitation is the employee's return to the workplace or to provide support for an individual in maintaining his position in the workplace. Rehabilitation in relation to working life is additionally regulated in the General Social Insurance Act (lag om allmän försäkring (1962:381)).

⁶⁸ See further, for instance, Inghammar, Discrimination of People with Disabilities. Normative Aspects of Disability and Work in a Swedish, English and EC Context, in: Numhauser-Henning (ed.), *Legal Perspectives on Equal Treatment and Non-Discrimination*, Kluwer Law International, The Hague 2001.

if the individual involved can be placed in a similar situation. If this can be achieved through reasonable adaptation of the workplace, the employer cannot take the disability into account and doing so amounts to discrimination.

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

There is no specific requirement related to providing reasonable accommodation in relation to the laws related to the other grounds of discrimination. However, it is possible that the law concerning ethnic discrimination will in the future be interpreted in a manner which requires some form of reasonable accommodation in relation to, for example, religious minorities.⁶⁹ Employers have a duty to undertake active measures to ensure that the workplace is more inclusive in terms of persons with different ethnic and religious backgrounds. It is also possible that such measures (reasonable accommodation or active measures) will be more general requirements required of employers under a more comprehensive anti-discrimination law.

d) Does national law require buildings and infrastructure to be designed and built in a disability-accessible way? If so, could and has a failure to comply with such legislation be relied upon in a discrimination case based on the legislation transposing Directive 2000/78?

Yes, building regulations include rules on accommodation/accessibility. As regards public authorities there is a general duty to assess accessibility in all their activities and to develop accessibility plans to this end.⁷⁰ Such rules may be relied upon, for instance, in an argument on 'reasonable' accommodation. To my knowledge, though, there is no case law to reflect this.

➔ 2.7 Sheltered or semi-sheltered accommodation/employment

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

Open-labour-market integration for the disabled workers is the main policy in Sweden. However, sheltered employment is also a possibility (but no individual right) for those too disabled to obtain other employment and whose needs cannot be met in any other way, according to the Ordinance (2000:630) on special measures for persons with an employment handicap. Sheltered employment is offered by a public company, Samhall AB, and employs about 22,000 disabled workers. There is also 'sheltered employment in the public sector' targeting especially the socially and mentally handicapped and covering about 5000 disabled.

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

Sheltered work is regarded as employment but is, however, not covered by the Employment Protection Act. Some employment protection is, nevertheless, offered through collective agreements in the area, though. The laws against discrimination make no exception for employees in sheltered employment.

3. PERSONAL AND MATERIAL SCOPE

⁶⁹ To the knowledge of the author there has been no discussion on 'language accommodation measures'. However, there is a right to time-off during language studies (in Swedish) according to the (1986:163) Act on a right to leave for studies in Swedish for immigrants.

⁷⁰ Ordinance (2001:526).

3.1 Personal scope

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

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

There are no explicit references to nationality or residence made in the different non-discrimination acts as a requirement for protection. However, as regard the 1999 Acts, an employer is, as a general rule, not considered to be under the obligation to, for instance, employ a person not holding a necessary residence or work permit – on the contrary, this is regarded as a criminal offence. Furthermore, with regard to the 2003 Act, this covers a number of areas, such as the application of social security regulations, where at least residence requirements are plenty.

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

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

All the Swedish non-discrimination acts at stake here, that is the 1999 Acts, the 2001 Student at Universities Act, the 2006 Pupils Discrimination Act and the more general in scope 2003 Prohibition of Discrimination Act, protects explicitly natural persons only. The 1999 Ethnic Discrimination Act refers to employees, applicants, aso., the 2001 Act to students and applicants and the 2003 Act – in the very definition of the discrimination concepts - to ‘individual persons’. Nevertheless, as regards the acts applicable to working life, there is in the back-ground the general ‘concept of employee’, a compulsory concept not for the parties concerned to decide upon. Within this concept it is perfectly possible for the Labour Court, in the last instance, to ‘look through’ and thus neglect the fact that a contract may be agreed between the employer and a legal entity run by the ‘employee’ alone.

The Ombudsmen against discrimination have unanimously criticised the fact that no explicit protection against discrimination is provided for legal persons, something which is according to them required by the Directive.⁷¹ The recent Discrimination Inquiry Commission has proposed a protection also for legal persons in a number (but not all) areas covered by non-discrimination legislation.⁷²

3.1.3 Scope of liability

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

⁷¹ The Ombudsman against discrimination due to sexual orientation, Hans Ytterberg, argues in the following way: ‘First of all, we have pointed to the fact that art. 3(1) Directive provides that the Directive shall apply to *all* persons and that recital 12 states that *any* direct or indirect discrimination as regards the areas covered by the Directive should be prohibited throughout the Community. Furthermore, membership of employers’ associations (which is one area explicitly covered by the Directive) is almost exclusively relevant for legal persons, at least in Sweden. It would therefore make little sense to prohibit discrimination with respect to such membership but at the same time exclude legal persons from that protection.’

⁷² SOU 2006 :22 pp. 332 and following.

The scope of liability varies among the non-discrimination instruments concerned.

If we first turn to the 1999 Acts applicable to working life, these Acts apply to employers – whether natural or legal persons. The employer – and necessarily so if a legal person – may be held liable also for the acts of peer-workers representing him in different situations. The term includes anyone employed to represent the employer in relation to other employees, i.e. management on different levels. As regards sub-contractors, assuming that the sub-contractors at issue are completely independent, employers can be assumed to have no liability for the acts of sub-contractors. However, since the 2003 amendments, as regard the bans on discrimination (direct, indirect, harassment and instructions to discriminate) the user is responsible for certain discriminatory treatment also in relation to not hired trainees and leased temporary workers at the work-place. Moreover, if an employer uses a job agency to recruit staff, the employer is still responsible for any discriminatory treatment that occurs during the recruitment process. However, discriminatory actions by the public labour exchange are not the responsibility of the employer.⁷³

Concerning harassment, an employer has an obligation to investigate and implement measures against harassment also between employees. Harassment in between employees does not according to Swedish domestic law amount to discrimination *per se*, though, should the employer as such not be held responsible. Thus, an employer who becomes aware that an employee considers her or himself to have been exposed to the harassment shall investigate the circumstances surrounding the reported harassment and in relevant cases implement the measures that may reasonably be required to prevent continuance of the harassment. An employer will thus become liable for the damages that result due to the employer's failure to investigate and implement reasonable measures to prevent harassment by another employee. The latter indicates that this law does not apply to harassment by clients. However, it is possible that this situation will be covered by the various rules related to an employer's responsibility for the work environment which includes a responsibility for the psycho-social work environment (The 1977 Work Environment Act).

The prohibition of discrimination in the 2001 Equal Treatment of Students at Universities Act is, correspondingly, directed against 'the university'. That term also includes anyone employed to represent the university in relation to students. The corresponding harassment provisions in the 2001 Students at Universities Act⁷⁴ have a slightly more open wording than the 1999 Acts. They stipulate that a university must investigate and, when necessary, take action against any conduct, which a student is subject to, which violates her dignity in relation to the university studies. This covers harassment from other students or from teachers, but covers also such harassment from e.g. an entrepreneur running the student canteen or during a vocational practice period. The 2006 Pupils Discrimination Act has a similar wording (Sec. 8).

The discrimination prohibition in the 2003 Discrimination Prohibition Act is directed against the respective legal entity concerned, as such. Therefore, in the case of e.g. the public labour exchange, the state itself would be the object of the prohibition. Correspondingly, the public entity responsible for issuing permits and authorisations etc, as well as the labour unions, professional organisations or employers' associations concerned (see 16.2.7 above), as such would be the objects of the prohibition in their respective areas. Employees representing these

⁷³ Prop. 1997/98:180, pages 35-36; bet. 1998/99:AU4, page 52. Such conduct would however be covered by art. 5 of the 2003 Discrimination Prohibition Act and could also constitute a criminal offence under the unlawful discrimination provision of the Penal Code.

⁷⁴ Art. 4 and 6.

legal entities could however not be held liable as individuals for such discrimination (art. 16 of the Act).

Individual employees cannot be held personally liable under the civil law non-discriminations acts. Harassment, for instance, may however on occasion amount to a criminal offence. Labour Law contains disciplinary sanctions, aso.

3.2 Material Scope

3.2.1 Employment, self-employment and occupation

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

Generally speaking, the 1999 Acts, together covering discrimination in working life on the grounds of ethnicity, religion and other belief, sexual orientation and disability, all contain prohibitions on direct and indirect discrimination and harassment and instructions to discriminate whenever an employer, whether private or public and regardless of the number of employees,

- takes a decision to employ, decides to take in a job applicant for an employment interview or undertakes other measures during the employment process,
- makes a decision concerning promotion or chooses an employee for education that will lead to promotion,
- makes a decision on or implements other measures concerning work experience,
- makes a decision on or implements other measures concerning other education or vocational counselling,
- applies salary or other employment conditions,
- leads or distributes work or
- dismisses, terminates, lays off or undertakes other intrusive measures against an employee.⁷⁵

For the purposes of this provision persons who, without being employees, apply for, or undergo, practical work experience with an employer are considered as applicants for employment or employees, respectively.⁷⁶ Since 2003 there is also a rule in the 1999 Acts stating that temporary workers hired out by Temporary Work Agencies are to be treated as employees, and the User thus as the employer, as far as regard the ban on retaliatory actions and the duty to investigate and undertake measures against harassment.⁷⁷

As regards the self-employed, these are not covered by the 1999 Acts. (Recall, however, what was earlier said about the compulsory ‘concept of an employee’ in the Swedish context.) The 2003 Prohibition of Discrimination Act, however, cover the self-employed ‘in connection with qualification, certification, authorisation, registration, approval or similar arrangements that are needed or may be of importance in enabling an individual to engage in a certain occupation’ (Sec. 6), as regard labour market political measures (Sec. 7) and as regard

⁷⁵ See Sec. 10 the 1999 Ethnic Discrimination Act, Sec. 5 the 1999 Disability Discrimination Act and Sec. 5 the 1999 Sexual Orientation Act.

⁷⁶ Art. 2a of the 1999 Sexual Orientation Discrimination Act. aso

⁷⁷ Such temporary workers are legally the employees of the Temporary Work Agency.

financial services (Sec. 9). The same goes for discrimination with respect to self-employment and membership or involvement in labour unions or employers' unions as well as professional organisations (Sec. 8).

Ytterberg in his Sexual Orientation report of the 28 July 2004 made the following remark: 'With respect to self-employment, the Act does not seem to fully implement the Directive. Self-employed business partners, for example, apparently are not protected against harassment or other forms of discrimination from one another, a situation which to me clearly seems to be covered by the Directive (see art. 2(3) and 3 of the Directive). It is also a situation which has appeared in the requests for advice and support that the Ombudsman's office has come across since the entering into force of the Act.'

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

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

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

The 1999 Acts on Ethnic (and religion and other belief), Sexual Orientation and Disability Discrimination,⁷⁸ respectively, cover, as indicated above, employer decisions on employment, including selection criteria, recruitment conditions and promotion in both the private and public sector and regardless of the professional hierarchy. To the author's opinion the regulation as regards employees meets the requirements of the directive.

It was not until 2003, however, that rules applicable to employment agencies were introduced. According to Sec. 5 in the 2003 Prohibition of Discrimination Act the bans on discrimination now apply also to employment agencies services, whether of a public or a private provider, as well as other decisions on labour-market political measures thus better meeting the Directive requirements on equal conditions for access to employment.

As regards the self-employed, these are not covered by the 1999 Acts. (Recall, however, what was earlier said about the compulsory 'concept of an employee' in the Swedish context.) The 2003 Prohibition of Discrimination Act, however, cover the self-employed 'in connection with qualification, certification, authorisation, registration, approval or similar arrangements that are needed or may be of importance in enabling an individual to engage in a certain occupation' (Sec. 6), as regard labour market political measures (Sec. 7) and as regard financial services (Sec. 9). The same goes for discrimination with respect to self-employment and membership or involvement in labour unions or employers' unions as well as professional organisations (Sec. 8).

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

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

A certain flaw in the implementation of the Directive is the fact that the 1999 Acts does not explicitly cover 'working conditions', but only 'employment conditions'⁷⁹ The Government

⁷⁸ No bans on age discrimination were yet introduced.

⁷⁹ Compare SOU 2004:55 pp. 258 ff. The expression 'employment conditions' would arguably in the Swedish context imply a more limited scope, notably only such terms or conditions for the employment which are regulated by an employment

has dismissed hitherto amendment proposals arguing that the protection against discriminating employment conditions and managerial decisions leading or distributing work is enough to implement the Directives.⁸⁰

The 1999 Acts on Ethnic (and religion and other belief), Sexual Orientation and Disability Discrimination, respectively, are fully applicable to dismissals.

b) In respect of occupational pensions, how does national law ensure the prohibition of discrimination on all the grounds covered by Directive 2000/78 ?

As regard occupational pensions these are, in parallel with the jurisprudence of the ECJ, considered as a sort of pay and are thus covered by the ban on discrimination concerning 'salary and other employment conditions' contained in the 1999 Acts on Ethnic (and religion and other belief), Sexual Orientation and Disability Discrimination, respectively.

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

Note that there is an overlap between 'vocational training' and 'education'. For example, university courses have been treated as vocational training in the past by the Court of Justice. Other courses, especially those taken after leaving school, may fall into this category. Does the national Anti-discrimination law apply to vocational training outside the employment relationship, such as that provided by technical schools or universities ?

'Vocational training' is not defined by the law. However, the 1999 Acts as amended provide protection against discrimination to persons in vocational training under the control of an employer. In addition there is protection against discrimination in labour market programmes according to the 2003 Prohibition of Discrimination Act covering all grounds of discrimination, or, ethnic (including religion and other belief), sexual orientation and disability discrimination.

If vocational guidance, vocational training, advanced vocational training or retraining, including practical work experience, is carried out within the system of higher education the 2001 Students at Universities Act will most often be applicable. Should such education take place within the general school system the 2006 Pupils Discrimination Act applies.

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. 8 of the 2003 Prohibition of Discrimination Act provides that discrimination on grounds of (sex,) ethnicity, religion or other belief, sexual orientation or disability is forbidden in relation to membership or participation in an association of employees (i.e. a labour union), an association of employers or an association of persons of a certain profession, and the benefits awarded by such organisations to their members. This implementation measure seems to me to meet the requirement of both the Article 13 Directives, with the remark that age thus is not covered yet.

contract (individual or collective), whilst the Directive requires also factual circumstances under which work is carried out, to be covered by the prohibition against discrimination.

⁸⁰ Prop. 2004/2005:147 pp120-122.

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

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

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

The original 2003 Prohibition of Discrimination Act in the area of social assistance, social security including unemployment benefits and health and sickness benefits in kind, only covered discrimination on the grounds of ethnic origin, religion or belief. However, the Act was subsequently amended so as to put sexual orientation at the same level with those grounds for the purpose of prohibiting sexual orientation discrimination also with respect to social security benefits, health care etc., as of January 2005.⁸¹ As of July 2005 the 2003 Act to also cover discrimination on the grounds of sex with regard to (inter alia) social security and related benefits.⁸² – Disability is, however, not covered by these rules in the 2003 Act, nor is age.

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

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

The original 2003 Prohibition of Discrimination Act included a ban on discrimination in the area of social assistance (in Swedish *socialtjänsten mm.*) covering the grounds ethnic origin and religion and belief, which should fairly well meet the requirement of Art. 3(1)(f) in the 2000/43/EC Directive. Also in this respect, the Act was recently amended so as to put sexual orientation at the same level of protection as of January 2005.⁸³ This rule covers a number of varying services and benefits mainly provided by municipalities but does thus not, as for now, cover disability, sex or age. However, the ban on discrimination regarding goods and services provided by public *or* private actors should cover discounts etc., as well as relevant services in general provided by private actors. This ban does cover ethnic origin, religion and other belief, sexual orientation, sex *and* disability.

The illicit discrimination crime comprised in the Swedish Penal Code contains some provisions making it a criminal offence for anyone running a private business to treat customers unfavourably because of their homosexuality or ethnicity. The provision covers also anyone employed in such a private enterprise or acting on behalf of it, as well as anyone acting in their capacity of employee within the public administration, when dealing with the public. This means that discriminatory treatment in areas like health care, education and social security under certain circumstances can be considered a criminal offence.

⁸¹ See further Flash report, October 2004, by Numhauser-Henning.

⁸² SOU 2004:55.

⁸³ See further Flash report, October 2004, by Numhauser-Henning.

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

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

This is an issue where the Swedish law until recently failed to meet the requirements of Directive 2000/43/EC. There is the 2001 Student at Universities Act prohibiting discrimination on the grounds of, not only, ethnic origin but also religion or belief, sex, sexual orientation and disability. That Act only applies to the area of higher education. However, the Parliament on 8 February 2006 adopted a new Act on a ban against discrimination and other degrading treatment of children and pupils.⁸⁴ The Act applies to pre-school facilities, school-age childcare, primary and secondary school and municipal adult education. The Act is intended to promote equal rights for children and pupils and to combat discrimination on grounds of sex, ethnic origin, religion or other belief, sexual orientation and disability. It entered into force on 1 April 2006. The new law also covers students who are otherwise harassed or have their dignity violated by other students or the school's personnel.⁸⁵

The specific situation of Roma in the Swedish schooling system is described in the Discrimination Ombudsman's (DO) report 'Discrimination against Romanies in Sweden' from 2004. Actual complaints of discrimination have been few⁸⁶ but the general problem of discrimination in education as an obstacle to Romanies is now attracting attention and is likely to be addressed on a broader scale of active measures in the near future. In the DO report just mentioned the DO is spelling out 'an action programme' to further the situation of Romanies. Both concerning jobs and education Romanies are thus found to be often at a disadvantage. It is said to be hard for Romany youths to benefit of their rights to education on equal terms due to structural obstacles such as the sparse awareness of Romanies in the public, the lack of competent Romany personnel in school and the relative absence of educational traditions within the Romany group itself. Contacts with state and municipal authorities are characterized by dependency, vulnerability and a long standing distrust. As far as the DO is concerned this distrust is said to be based on the limitations of the legislation and on the limited possibilities for acting of the DO as many Romanies perceive it. 'Hence the focussing on the individual, which is the DO's normal way of working, proves insufficient both for a description of discrimination of Romanies and for counteracting and forestalling discrimination. There is, today, according to the report a great need for one single authority with an overall responsibility for minority issues, which could work with both perspectives.' Proposals for the future include 'situation testing' as a method of making discrimination more evident in individual cases, preferential treatment of Romanies concerning education and labour market, access to general welfare policies and the special fields opened by the adopted minority policies and a special committee to investigate the treatment of Romanies and other vulnerable groups within the judicial system. Other proposals concern that the Living History Forum should be commissioned to gather and disseminate awareness of the history of Romanies and of anti-Gypsyism and that an institute of Romany studies is started at one of the Swedish universities.⁸⁷

⁸⁴ Lag (2006:000) om förbud mot diskriminering och annan kränkande behandling av barn och elever. Prop. 2005/06:38.

This new Act is basically neglected throughout this report since the cut-off date was set to 2006-01-31.

⁸⁵ This is thus a new piece of legislation and there is, of course, yet no case law. Hitherto debate has focussed on 'other degrading treatment' (mobbing) more generally and no been articulated as acts of discrimination.

⁸⁶ DO reveals only four such complaints made – case no. 897-2003, 526-1004, 290:1997 and 897-1999.

⁸⁷ See further, www.do.se.

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

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

The 2003 Prohibition of Discrimination Act already when first introduced included a ban on discrimination in the area of supply of goods and services, including housing, covering the grounds ethnic origin and religion and belief, sexual orientation and disability, which should meet the requirement of Art. 3(1)(h) in the 2000/43/EC Directive and certainly goes beyond the requirement of the Directive 2000/78/EC. As of 1 July 2005 sex was added to the protected grounds. The bans apply only to professionally provided goods and services however. It does thus not apply to private transactions.⁸⁸

Even before the introduction of the 2003 Act according to *criminal law*, there was a ban on discrimination which concerned both those who supplies goods and services for professional purposes as well as employees at the state and local authorities. It is prohibited for them to discriminate in the line of their work on the ground of race, religion and homosexuality.

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

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

As was already indicated above, the ban on discrimination in the area of goods and services in the 2003 Prohibition of Discrimination Act also includes housing. The ban covers not only ethnicity but also religion and other belief, sexual orientation, disability and since 1 July 2005 also sex. There are no explicit exception rules except as regards sex - the ban does not cover housing especially provided for women (such as sheltered living for battered women). However, as has also been indicated above, the ban applies only to the provision of housing services provided for professional reasons. It thus does not apply when, for instance, a private individual refuses to sell his or her flat or small house to an individual from one of the protected groups. According to the proposal of the Discriminations Inquiry Committee also private transactions should be covered if an exception is not necessary due to private integrity/privacy. As an example of the latter situation the renting-out of a room within a private household is mentioned⁸⁹

4. EXCEPTIONS

4.1 Genuine and determining occupational requirements (Article 4)

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

In the 1999 Act on Sexual Orientation the exception from the ban on direct discrimination is since the amendments in 2003 redacted as follows: 'The ban against direct discrimination does not apply in connection with decisions on employment, promotion or education for promotion if a particular sexual orientation is necessary owing to the nature of the work or the

⁸⁸ According to the proposal of the Discriminations Inquiry Committee also such transactions are to be covered whenever an exception is not necessary for reasons due to private integrity, SOU 2006:22 pgs 490 onwards.

⁸⁹ SOU 2006:22 pgs 490 onwards.

context in which it is performed'.⁹⁰ This bona fide occupational qualities-defense clause is to be found also in the other 1999 non-discrimination acts.⁹¹ It is designed in not too close adherence with the Article 13 Directives, respectively. In the 1999 Acts it is limited to situations of recruitment, promotion and education for promotion. In the *travaux préparatoires* to the amendment, it is made clear that the typical examples born in mind for the use of this exceptional clause are that a Muslim organisation has the right to demand that an imam be of Muslim belief, that an organisation for equal rights for gays and lesbians or an interest organisation, which caters for a certain immigrant group may have the right to require that for some 'core' positions the employees themselves be homosexual or have that same immigrant background. At the same time it is underlined that the exception from the prohibition of discrimination must always be given a very narrow interpretation.⁹² In an organisation only the positions 'visible' to the public can come into question, not an entire organisation per se and automatically. The employer, must, furthermore, have a strong motive for applying the exemption; the position must clearly have demanded that the discrimination takes place. Religious communities do not have any favourable status here, but they are explicitly mentioned in the preparatory work, along with other examples. Whether the Swedish implementation will meet the directives' requirement on legitimacy and proportionality can only be judged in the light of case law. So far, there are no cases put to the test.

In the 2001 Student at Universities Act the possibility to justify direct discrimination is somewhat more generally stated: 'The prohibition does not apply if the treatment is justified taking in to account a special interest that is manifestly more important than the interest of preventing discrimination at the university' (Sec. 7 par. 2). The exception in the 2001 Students at universities Act was recently put to the test in a case tried at Uppsala District Court.⁹³ Positive action giving preference to applicants with two foreign-born parents to ten per cent of the openings on the law programme was, despite the importance given to multi-culture in the area of higher education expressed elsewhere in higher education legislation, considered not to be within the scope of the exception.

Also the 2003 Act is differently designed, with the general definition of the discrimination concepts in Sec. 3 followed by the coverage of the ban on discrimination and eventual exceptions area by area. This will be dealt with in the following Sections.

4.2 Employers with an ethos based on religion or belief

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

There are no such exceptions for religious organisations/employers, see further Sec. 4.1 above.

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

⁹⁰ Prop. 2002/03:65, page 185. The exception provision has been redrafted to make clearer what situations are covered.

⁹¹ See Sec. 10 the 1999 Ethnic Discrimination Act and Sec. 5 the 1999 Disability Discrimination Act.

⁹² Prop. 2002/03:65, page 185-187.

⁹³ Case / 2171-04, Midander and Lönn v. the State, judgment 2005-01-12. The judgment was affirmed by the Appeal Court and the case is now pending before the Supreme Court.

The general rule on exemption applies and there are thus no such exceptions for religious organisations/employers. As for case law, the Supreme Court's case on balancing freedom of speech and religion against the rights of homosexuals could be mentioned, though.⁹⁴

4.3 Armed forces and other specific occupations

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

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

There are not special provisions in the non-discrimination acts for the armed forces, nor for the police, prison or emergency services. Any special interest will have to be taken into account within the application of the general exception, see Sec. 4.1 above. There is, so far, no case law of relevance. - As was already indicated on several occasions, there is as yet no legislation in force banning age discrimination.

4.4 Nationality discrimination

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

a) How does national law treat nationality discrimination?

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

Within Swedish non-discrimination legislation there are no exceptions related to nationality, whatsoever. As regard other legislation there are some (but rare) occasions where Swedish nationality is required, though.⁹⁵

➔ 4.5 Work-related family benefits

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

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

Civil status is not *in itself* a prohibited ground for discrimination. General employment protection rules against e.g. unfair dismissals, as well as principles of good practices in the labour market, would however in many cases cover discrimination between married and unmarried partners. In Sweden, generally speaking, non-married couples are the rule rather than the exception and benefits only for married people makes no sense. Swedish anti-discrimination legislation as such contains no exceptions for differences in treatment based on marital status or civil status. When it comes to discrimination between married spouses and registered partners, as was pointed out by Hans Ytterberg in this Sexual orientation report of 28 July 2004 'the whole *raison d'être* of the Swedish Registered Partnership Act⁹⁶ was to

⁹⁴ Judgment 29 November 2005 in case B 1050-05, see Sec. 0.3.4 above.

⁹⁵ See further, SOU 2000:106, Medborgarskapskrav i svensk lagstiftning, where an inventory is made.

⁹⁶ Lag (1994:1117) om registrerat partnerskap [Act (1994:1117) on Registered Partnership]; original *travaux préparatoires*: bet. 1993/94:LU28.

create a legal frame-work for homosexual couples, which corresponds to that of civil marriage for heterosexuals. The legal consequences of a registered partnership under Swedish law are also virtually identical to those of a marriage. A difference in treatment caused by the fact that an individual is living in a registered partnership with someone of her own sex instead of being married to someone of the opposite sex (or for that matter vice versa) would therefore most probably qualify as direct sexual orientation discrimination under Swedish law. ... Such a difference in treatment would also qualify as indirect sexual orientation discrimination, since same-sex couples cannot marry and different-sex couples cannot register partnership under Swedish law. It is worth mentioning that the Swedish Parliament on the 29 of April 2004 approved with overwhelming majority a proposal to order the Government to set up a special commission with the task to look into the possibilities of opening up the legal institution of marriage itself (and not just registered partnership/civil union) also to same-sex couples.⁹⁷ There is no reported case law from the courts on the matter.

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

Any difference in treatment linked to the fact that an employee or an applicant for employment has a partner of the same sex instead of having a partner of the opposite sex (or vice versa) is to be considered as sexual orientation discrimination. The principle issue used to arise in relation to the Penal Code provision on unlawful discrimination.^{97 98}

4.6 Health and safety

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

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

In the 1999 Acts there are no exceptions a part from the generally framed one on genuine and determining occupational requirements. - Regarding the disabled, it is relevant for the employer to take into consideration not only security issues/the health and safety of others at the workplace, but also a disabled person's own health or safety. However, when the risk involved is not absolutely clear the desire of the disabled person him-/herself is decisive. In the Labour Court case 2003 No. 47 the risks of shift work for an employee with diabetes were not proven and the denial to employ him was deemed to constitute direct discrimination.

With regard to the 2003 Prohibition of Discrimination Act as of January 2005 this Act bans any discrimination (i.e. direct and indirect discrimination, harassment and instructions to discriminate) in the area of health and sickness benefits in kind on the grounds of ethnicity, religion or other belief and sexual orientation (Sec. 13). With regard to sexual orientation, however, there is an express exception clause with regard to the legislation on insemination as well as *in vitro* fertilisation (Sec. 13 par. 2). The protection in the area of health and sickness benefits in kind does thus not cover disability (or sex).

⁹⁷ Art. 9(4) of C. 16, Penal Code.

⁹⁸ One of the first initiatives taken by the Office of the Ombudsman against Discrimination on grounds of Sexual Orientation was to initiate (out of court) proceedings against the parties to collective bargaining agreements for all employees working in the public administration. These collective agreements all included a definition of spouse/partner for the purposes of survivor's pensions, which discriminated against informal cohabitants of the same sex (i.e. who had not registered their partnership) compared to unmarried heterosexual couples. The result of these proceedings was that all the relevant collective bargaining agreements were subsequently amended to include a sexual orientation neutral definition of spouse/partner/cohabitant, since the existing provisions were illegal under the 1999 Sexual Orientation Discrimination Act. Ytterberg in his Sexual Orientation Report of 28 July 2004.

4.7 Exceptions related to discrimination on the ground of age

➔ 4.7.1 Direct discrimination

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

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

c) Does national legislation allow occupational pension schemes to fix ages for admission to the scheme or entitlement to benefits under it taking up the possibility provided for by article 6(2) ?

The Directive 2000/78/EC has not yet been implemented as regards discrimination on the grounds of age.

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

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

Within labour market policy regulations there are a number of rules which expressly refers to age, aimed at promoting the vocational integration of young and old people, respectively.

There is in labour law a number of rights relating to parenting, see especially the (1995:584) Parental Leave Act.

➔ 4.7.3 Minimum and maximum age requirements

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

There are yet no rules on non-discrimination as regards age and thus no exceptions!

➔ 4.7.4 Retirement

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

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

According to the new Swedish statutory pension scheme introduced in 1998 there is no fixed retirement age. The income-related public pension scheme opens up for part-time or full-time retirement from the age of 61. You can also postpone your retirement, continue to work for as long as you like and continue to add to your pension benefits, the scheme being construed on a principle of life-long earnings. However, the right to the basic pension scheme –

‘guaranteed pension’ – requires the beneficiary to be 65 years of age. - It is OK to collect a pension and still work – both the pension and the income is due to taxation.

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

All occupational pension schemes contain – mostly flexible – rules on pensionable age. They can thus normally be deferred if an individual wishes to work for longer. You can also collect a pension and still work.

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

National law does not *require* an employee to retire at any special age. Within employment law there is, on the contrary, *a right* for the employee to stay on until he or she reaches the age of 67 despite what may have been accorded between the parties.⁹⁹ According to the 1982 Employment Protection Act there is, however, at that age (67) also a right for the employer to terminate the employment without giving just cause (something which is normally required at dismissal). If the employer does not make use of this right at this precise moment, just cause for dismissal is still needed but the employee is only given a one month notice period and no right to re-employment.

d) Does national law permit employers to set retirement ages (or ages at which the termination of an employment contract is possible) by contract, collective bargaining or unilaterally?

As was already indicated above, within employment law there is a right for the employee to stay on until he or she reaches the age of 67 despite what may have been agreed between the parties.¹⁰⁰

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

According to the 1982 Employment Protection Act there is at that age (67) a right for the employer to terminate the employment without giving just cause (something which is normally required at dismissal). If the employer does not make use of this right at this precise moment, just cause for dismissal is still needed but the employee is only given a one month notice period and there is no right to re-employment.

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

There are no differences with regard to sex.

4.7.5 Redundancy

⁹⁹ The rule outlaws also collective agreements stipulating a lower retirement age, something which has been criticised by the ILO, Case No. 2171, GB 286/11 (part II), March 2003. The law (Sec. 32 a the 1982 Employment Protection Act) has not yet been revised, though.

¹⁰⁰ The rule outlaws also collective agreements stipulating a lower retirement age, something which has been criticised by the ILO, Case No. 2171, GB 286/11 (part II), March 2003. The law (Sec. 32 a the 1982 Employment Protection Act) has not yet been revised, though.

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

The Swedish 1982 Employment Protection Act differs between dismissal on personal grounds (which requires just cause) and dismissal for shortage of work or business reasons. In the latter case, just cause is regarded to exist (the decision as to whether there is a shortage of work rests entirely with the employer) but lay-offs have to be carried out in accordance with the 'last-in-first-out' principle. This, arguably, may be regarded as amounting to indirect age discrimination. Moreover, in the event of equal periods of employment senior age priority applies directly. There is also special protection for the disabled (preference, i.e. the seniority rule does not necessarily apply) and employees aged 45 or more (allowed to count qualifying employment after the age of 45 twice, with a maximum of five years extra). - Regardless of the reason for the dismissal the notice period (in between 1-6 months) required relate to the prior period of employment and is, thus, indirectly related to age.

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

There are no legal provisions on redundancy payment in Sweden.

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

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

In Swedish non-discrimination legislation there are no such exceptions.

4.9 Any other exceptions

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

In Swedish non-discrimination legislation there are no such exceptions.

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

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

The 1999 Acts prohibiting discrimination in working life on the grounds of ethnicity, religion or other belief, sexual orientation and disability, respectively, do not expressly provide for positive action in the form of preferential treatment, i.e. as an exception from the bans on discrimination.¹⁰¹

However, the 1999 Ethnic Discrimination Act contains rules on 'active measures'. From an EC-law perspective such measures are also within the realm of positive action in a more general meaning. The Act requires that the employers carry out a goal-oriented work to actively promote ethnic diversity in working life.¹⁰² The domains in which these measures are

¹⁰¹ As regards sex discrimination, however, there is an express scope for positive action in Swedish domestic law. The EOA ban on direct discrimination also contains the *permissive* rule on positive action: 'The prohibition (on direct discrimination, my remark) does not apply if the treatment is an element in efforts to promote equality in working life and it does not involve the application of pay or other terms of employment for work which is regarded as equal or of equal value'.

¹⁰² Section 4 of the 1999 Ethnic Discrimination Act.

to be taken are concerning employment conditions and recruitment of employees, for instance in advertising.¹⁰³ There is no case law to guide us as regard the limits of such actions.

Furthermore, as regards the disabled the ban in the 1999 Act is 'asymmetric'.¹⁰⁴ The law does not protect the non-disabled from discrimination. Currently the law allows for positive action measures on behalf of the disabled. In other areas of labour law as well as labour market policy regulations there is a number of special measures available in relation to the disabled in regard to working life. Their purpose is to directly or indirectly compensate for disadvantages linked to disability. In some cases, for example, wage subsidies are available. An individual may also have a right to certain support measures in order to regain or retain his/her work capacity. These measures are regulated in the Act on General Social Insurance (lagen (1962:381) om allmän försäkring). Employers are required to maintain a good work environment, which means not only the physical aspects but the psycho-social as well. This also means that certain types of accommodations should be made in regard to employees with disabilities. This can also relate to the physical accessibility of the workplace. These issues are regulated in the Work Environment Act (Arbetsmiljölagen (1977:1160) and the Work Environment Decree Arbetsmiljöförordningen (1977:1166) as well as by the ban on discrimination in the 1999 Disability Discrimination Act.

The 2001 Students at Universities Act does not permit positive action in the meaning of accurate preferential treatment either.¹⁰⁵ However, as the 1999 Ethnic Discrimination Act the 2001 Act contain rules on active measures with regard to all the grounds covered by it, i.e. sex, ethnicity, religion or other belief, sexual orientation and disability. The university shall within the framework of its activities conduct goal oriented work to actively promote the equal rights of students irrespective of their belonging to any of the protected groups.¹⁰⁶ The universities are also required to take measures to prevent and preclude conduct that violates a person's integrity if the conduct is related to her ethnic belonging, i.e. ethnic harassment. There is a requirement on the Universities to adopt plans to this end on a yearly basis.

The 2003 Prohibition of Discrimination Act occasionally allows preferential treatment. The provisions banning discrimination in labour market activities (non-employment related training etc.) specifically state that the discrimination ban does not apply to the application of measures that are intended to promote equal opportunities regardless of *ethnicity*.

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

The 1999 Ethnic Discrimination Act as well as the 2001 Student at Universities Act thus contains rules on 'active measures'. Such measures are locally decided upon, i.e. by an individual employer or university, and frequently concern advertising practices and the like. - National law does not prescribe a quota system for the disabled. There are, however, a number of labour-market political measures such as subsidised wage schemes and sheltered employment targeting disabled people. With regard to dismissals on grounds of redundancy there is also the provision in Sec. 23 the 1982 Employment Protection Act that a disabled person having being accommodated at the workplace may stay on despite the last in-first out principle. As regards

¹⁰³ Section 5 and 7 of the 1999 Ethnic Discrimination Act.

¹⁰⁴ Compare the penal provision on unlawful discrimination. Since this provision only forbids discrimination on grounds of a person's homosexuality, a treatment that favours homosexuals over heterosexuals would not be outlawed by this provision.

¹⁰⁵ Compare the Supreme Court judgment in case T 400 06, referred to under Sec. 0.3 above.

¹⁰⁶ Section 3 of the Equal Treatment of Students at Universities Act.

indigenous minorities such as the Sami and the Roma, there are special rights and supportive measures as regard the use of their native language as well as access to media¹⁰⁷ and as regards the Sami also on land rights and reindeer management

6. REMEDIES AND ENFORCEMENT

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

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

As will be described further below (see Sec. 7) there are special bodies introduced in the form of Ombudsmen to make the enforcement of non-discrimination legislation efficient. It's the task of the respective Ombudsman to investigate any complaints of discrimination. This include provision of advice but also the task – at the Ombudsman's discretion - to represent the victim of discrimination in settlement proceedings or, ultimately, in a court of law. Should the individual concerned be a member of a trade union this privilege of the Ombudsman is subsidiary to the right of the trade union to represent its member, however.

Civil processes under the 1999 Acts are to be dealt with in accordance with the Labour Disputes Act.¹⁰⁸ Depending on whether the person who alleges discrimination is or is not a member of a trade union, and in the former case whether the trade union is willing to take up the claim, the case may be heard in the first instance either by the District Court (*tingsrätt*) with ordinary judges as in other civil cases or the Labour Court (*Arbetsdomstolen*) with a special composition comprising both judges with judicial background and members from both sides of the labour court.¹⁰⁹ Whereas it is the injured individual who has *locus standi* as the plaintiff at the District Court, it is the trade union which has that position when claims are dealt with at the Labour Court in the first (and last) instance. A law-suit taken to the District Court in accordance with the described rules may always be appealed to the Labour Court, whereas a decision of the Labour Court – whether in first or second instance – is not subject to further appeal. As was already indicated, also the Ombudsman can bring a case directly to the Labour Court with the individual's consent, if the Ombudsman considers that the case is of importance for legal practice or for other reasons. - Individuals can (but must not), when not represented by their union or an Ombudsman, rely on private attorneys, but this means a risk of greater costs if the case is lost. - Procedures are the same regardless of whether the case concerns a private or a public employee. However, as regard State employees there is, due to the constitutional rules as regard objective grounds on hiring, sometimes also the alternative/or complementary way to appeal against a decision through administrative procedures.

The Ombudsmen thus may represent also a student or an applicant for higher education according to the 2001 Student at Universities Act. In these cases the claim is presented to the ordinary court system, i.e. to the relevant district court in the first instance, and the ordinary rules on civil process apply. The same apply to the 2003 Prohibition of Discrimination Act. - Some decisions covered by the 2001 Act can be appealed against within the administrative system.

¹⁰⁷ Compare the Government Bill prop. 2005/06:112 on public television and radio.

¹⁰⁸ Lagen (1974:371) om rättegången i arbetstvister.

¹⁰⁹ As regards the Swedish Labour Court, see, for instance, the European Court of Human Rights judgment of 26 October 2004 in the case of AB Kurt Kellermann v. Sweden.

According to the 2001 Act, the 2003 Act and the 2006 Act a discrimination claim must be presented within two years from the alleged discriminatory act took place.¹¹⁰

The relatively few cases presented to the court system shall not be taken as a proof that action is not taken in cases of discrimination. The statistics from the Ombudsmen's office show that a considerable number of cases are settled out of court. The same is probably true about the trade unions. Most complaints are settled during the mandatory negotiations foregoing a claim to the Labour Court. In these cases remedies much the same as in the case law of the Labour Court are agreed upon – or even better since the parties concerned lower their costs by an early settlement.

As regard the costs of litigation, etc., both in the case the trade union takes on a claim and when this is done by an Ombudsman, they must cover the costs should the case be lost, something which is, of course, very convenient for the individual concerned. If the individual him- or herself brings a claim to court he or she risks to have to pay the costs of the trial should the case be lost

When relevant, criminal procedures may be initiated by a public prosecutor or the private party herself. The Ombudsmen does not have legal standing before the courts in criminal procedures.

b) Are these binding or non-binding?

In the area of employment, both in cases of discrimination taken on by the Ombudsman and those where a member is represented by his or her trade union the procedure is first to try to settle the case outside court. In the case of a trade union such reconciliation settlements are mandatory.

Also according to the 2001 Act the Ombudsman is supposed to try and settle the case outside court, if possible, but there is no formal requirement on settlement proceedings. The same apply to the 2003 Prohibition of Discrimination Act.

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

Yes, as long as it is within the time limits for the claim at issue. Dismissal claims are regulated by the 1982 Employment Protection Act and time limits are complicated and rather short. If the claim consists in declaring a dismissal null and void we are talking about weeks from the occurrence of the act or – in certain cases - 1 month after the expiry of the employment. If the claim regards only indemnification we are talking about four months. Are we talking about wage compensation the 1976 Co-operation in Working Life Act applies. Here the general time limit is four months from knowledge of the act within a maximum of two years from its occurrence.¹¹¹

¹¹⁰ Sec. 19 the 2001 Student at Universities Act and Sec. 23 the 2003 Prohibition of Discrimination Act, respectively.

¹¹¹ If someone brings an action as a result of *notice of termination or summarily dismissal* the rules in the 1982 Employment Protection Act (LAS) apply. To have a dismissal declared null and void the employer shall be notified about the claim within two weeks of the dismissal. A law-suit shall be presented within two weeks thereafter, or, should conciliations negotiations have taken place, within two weeks from terminating such negotiations (Sec. 40 LAS). As regard damage claims, the employer shall be notified about the claim within four months after the damaging activity occurred and a law-suit shall be presented within four months after that, or, should conciliations negotiations have taken place within four months from terminating such negotiations (Sec. 41 LAS). – With regard to *any other action* the rules in the Co-Determination in the Workplace Act (MBL) apply. Conciliations negotiations must be required by the relevant trade union within four months from knowledge of the damaging act and within two years from the act itself (Sec. 64 MBL). A law-suit shall be presented within three months after terminating such negotiations (Sec. 65). If an employee cannot be represented by a trade union he or she must present the

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

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

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

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

a) in support of a complainant

Other than the unions and the ombudsmen there are not really any organisations that today support victims in bringing their complaints. However, there are an increasing number of local anti-discrimination bureaux that provide advice to victims. Assuming the victim has agreed, organisations (or at least individuals from such organisations) can support such complaints and act on behalf of the victim. According to Swedish procedural law, anyone can engage in proceeding or support a complaint, and that is valid also for the religious communities. There are, thus, no special regulations on the rights of the churches in this matter. Nonetheless, some religious communities engage themselves in the work of the private anti-discrimination agencies in the country, along with other NGOs such as the Swedish Red Cross and Save the Children.

Thus, under the 1999 Discrimination Acts, labour unions have legal standing to litigate discrimination cases where one of their members is involved. (As a matter of fact, the rights of the Ombudsmen to represent a victim is secondary to this right of the organisation.) Student bodies do not have the corresponding legal standing under the 2001 Equal Treatment of Students at Universities Act. No other interest organisations have legal standing as such, neither under these two acts, nor under the 2003 Discrimination Prohibition Act, in possible violation of art. 9(2) in the Directive.¹¹² The Government motivates the current solution by arguing that the Directives do not necessarily make it mandatory to give organisations a right to file their own complaints in the same manner that the Labour organisations have in the current legislation. It is sufficient, according to the proposition, that the member of an organisation has a right to make a lawsuit.¹¹³

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

There is – however, only outside employment law - a possibility in Swedish Law to make a group petition (*the Act on group petitions, Lag [2002:599] om grupprättegång*). This means that a person can make a lawsuit on behalf on her- or himself but with legal consequences for other persons, even though they are not parties to the case. That kind of lawsuit can be made also by organisations. However, it is not possible for organisations to act as a representative or agent for an individual.¹¹⁴

claim to the court within four months from knowledge of the damaging act and within two years from the act itself (Sec. 66 MBL).

¹¹² Compare, however, SOU 2004:55 where the investigations committee came to the conclusion that the Swedish solution is in compliance with the Directives, p. 322.

¹¹³ Proposition 2002/03:65, p. 167.

¹¹⁴ See, for instance, prop. 2002/2003:65 p. 167.

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

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

A shared burden of proof of discrimination is enforced by all the non-discrimination acts relevant to this report. Since 2003 there is a separate but harmonized burden of proof rule such as the following chosen from Sec. 23 a in the 1999 Sexual Orientation Discrimination Act and applicable to all kinds of discrimination (direct, indirect or in the form of harassment or instructions to discriminate: ‘If a person who considers that he or she has been discriminated against or subjected to retaliatory actions shows circumstances that give cause to assume that he or she has been discriminated against or subjected to retaliatory actions, it is the employer that shall prove that discrimination or retaliatory actions have not occurred.’¹¹⁵ In practice, the same rule was applied also prior to the 2003 amendments.¹¹⁶

The presumed victim of discrimination must be able to present facts that make it possible to assume that discrimination has occurred (a similar situation and disfavourable treatment). Thereafter the burden of proof is shifted to the other party who must show that the disfavourable treatment did not have a connection with the disability. No intent to discriminate is required.

As can be concluded from the case law presentation in Sec. 0.3 above, very few cases on alleged discrimination have been won, though, so far. In most cases this is due to the plaintiff’s failure to even prove a prima facie case of discrimination, according to the Labour Court.

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

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

Victimization is also forbidden. It is defined in the preparatory work as acts, statements and omission to act which leads to a damage or a sense of discomfort for the individual and are disadvantageous for her or him because the condition or situation she or he is in deteriorates. According to Sec. 8 of the 2003 Prohibition of Discrimination Act ‘An employer may not subject an employee to reprisals on the grounds that the employee has reported the employer for discrimination, pointed out discrimination or participated in an investigation under this Act.’ A similar rule – referring to the university or ‘the alleged discriminator’, respectively - is found in the 1999 Acts and the 2001 Student at Universities Act, respectively.¹¹⁷

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

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

¹¹⁵ See also Sec. 36a the 1999 Ethnic Discrimination Act, Sec. 24a the 1999 Disability Discrimination Act, Sec. 17a the 2001 Student at Universities Act and Sec. 21 the 2003 Prohibition of Discrimination Act.

¹¹⁶ Compare, for instance, the Labour Law case 2002 No. 128 referred to above in Sec. 0.3.

¹¹⁷ Sec. 8 the 1999 Disability Discrimination Act, Sec. 7 the 1999 Sexual Orientation Discrimination Act, Sec. 12 the 1999 Ethnic Discrimination Act and Sec. 11 the 2001 Student at Universities Act.

First we will see to the 1999 Acts applicable to working life. A contract (collective or individual) is invalid to the extent that it prescribes or permits discrimination and a discriminatory provision or legal act may be declared invalid if so requested by the employee. There is also a right to *damages for the violation* caused by the discrimination and – in cases not regarding hiring or promotion – *for the economic loss* that arises. However, in recruitment and promotion cases, the individual is not considered to have a right to obtain the employment or promotion in question.¹¹⁸ As is usually the case in Swedish labour law, if it is reasonable, damages can occasionally be reduced or lapse completely. Depending on the discriminatory act other labour law provisions may apply in parallel, such as the rules of the LAS in cases of dismissal or those of the MBL in cases a collective agreement is violated.

According to the 2001 Student at Universities Act as well as the 2006 Pupils Discrimination Act there is only a right to damages *for the violation* caused by the discrimination (sec. 13) since no economic damages are likely to have occurred. As regard some decisions there is also the possibility to appeal by administrative means offering the solution of a non-discriminatory decision. - Sanctions in the form of declarations of invalidity (Sec. 15) and damages *for the violation* caused apply also to the 2003 Discrimination Prohibition Act.

Injunctions have a very limited use in Sweden. Hitherto, the author knows of no cases related to discrimination where an injunction has been used.

Violations of the penal provision on unlawful discrimination are punished by a fine or imprisonment for a time not exceeding one year and can also result in the obligation to pay financial compensation.

Sanctions are normally applied to e.g. the employer, university, labour union or employers' association as such. This follows from expressions such as 'employer' or 'university' in the provisions on financial compensation. Harassment by fellow workers or students may, however, also come under general criminal law provisions on such behaviour, e.g. as harassment, verbal abuse, threats or assault. In such cases, a complaint may result in sanctions also against the individual directly responsible for the actions.

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

As was already indicated above, where a notice of termination or a summarily dismissal is at issue, there is a direct link to the appropriate rules in LAS. This imply that the special rule in Sec. 39 LAS on a limited right to compensation for economic loss following the expiring of an employment is applicable also in discrimination cases. Damages for economic losses are thus related to the qualifying time of employment with a maximum of the sum of 32 months' wages with 10 years of employment (or 48 months if aged 60 years or more). – Interest is paid on damages.

The rule on limited economic compensation in Sec. 39 LAS has been called into question putting a limit to compensation. A recent investigations committee has suggested that this reference to Sec. 39 LAS is eliminated to better comply with Community.¹¹⁹ The suggestion was not followed by the government in the subsequent amendments, though.

c) Is there any information available concerning:

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

¹¹⁸ In the state sector, however, the Public Law character of the constitutional provisions as regard objective grounds on hiring has as the consequence that a discriminatory decision may be appealed through administrative procedures and the discriminated be installed in the position in question.

¹¹⁹ SOU 2004:55 pp. 309 ff.

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

Very few cases have been won in the area of discrimination so it is difficult to speak about average amounts of damages. From the case-law presented above one can conclude that the damages for the violation caused by the discrimination have fluctuated between 40,000 and 100,000 SEK (4,450 and 11,110 euro) depending on the situation and the circumstances, such as whether we are dealing with a flaw in the recruitment process or a wrongful dismissal. It is doubtful whether these damages awards can be said to be "effective, proportionate and dissuasive" as required by the Directives. Nonetheless there seems to be an increasing awareness of the regulation against discrimination and its effectiveness given the increasing number of complaints submitted. In addition the unions seem to be focussing more and more on increasing their members' awareness of the different anti-discrimination laws in working life. As to sanctions, Swedish law generally provides for very low levels of damages. Damages of for example even SEK 80 000 (approx. 8,900 Euro) will hardly deter a larger employer. But combined with the threat of publicity, it is possible that the cases have had some effect on the willingness to settle such cases. It is also important to note that a court can only award damages (or void a contract), whereas a settlement can lead to the victim getting the job he or she applied for.

Concerning *the principle of equivalence*, as was already indicated above, the civil processes under the 1999 Acts are to be dealt with in accordance with the general Labour Disputes Act and the sanctions prescribed are the ones usually present in Swedish labour law, i.e. both damages for the violation caused and for the economic loss at hand. Moreover, direct references are made to the LAS and MBL. When damages are decided upon, the Labour Court regularly make reference to the level of damages paid in labour law disputes generally.¹²⁰ To my opinion, there is no doubt that the principle of equivalence is met.¹²¹

As regards *the principle of effectiveness* it is my opinion that Swedish regulations in this area on an overall basis do meet the standards of Community Law. The high rates of trade union affiliation normally imply that the individual employee can turn to his or her union for support in cases of discrimination, and in cases the individual is not organised or the union fails to support him or her there is always the appropriate Ombudsman. However, as regard actions as a result of notice or termination or summarily dismissal the reference to the rule on limited economic compensation in Sec. 39 LAS thus has been called into question putting a limit to compensation. One could also call into question the restricted right to damages for economic loss as regards cases of recruitment, promotions and sexual harassment.¹²²

7. SPECIALISED BODIES

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

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

¹²⁰ Compare, for instance, the Labour Court in case 2002 No. 45 and 2002 No. 102, respectively.

¹²¹ Same opinion, SOU 2004:55 pp. 309 ff.

¹²² Compare SOU 2004:55 p. 313.

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

As was already indicated above (Secs. 0.1 and 0.2) there is at present an Equal Opportunities Ombudsman (JämO - sex equality), an Ombudsman Against Ethnic Discrimination (DO) (please note that DO covers also discrimination of the grounds of religion and other belief) a Disability Ombudsman (HO) and an Ombudsman against discrimination due to sexual orientation (HomO) in the area of non-discrimination, all appointed by the Government.

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

The Ombudsmen are designated by the Government and State funded, decision taken by the Swedish Parliament on a yearly basis based on Government recommendations and as part of the general State budget. The Ombudsmen are accountable to the Government.

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

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

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

The ombudsmen who counteract discrimination on various grounds (JämO, DO, HO and HomO) are the key public institutions for the promotion of equal rights in their respective fields. Each of these ombudsmen has the right to investigate complaints concerning discrimination according to all the here relevant non-discrimination acts as well as the right to represent individuals in cases that are of importance in terms of case law or otherwise (compare Sec. 6 above). However, the Ombudsmen shall also give advice and support more generally to individuals and institutions, engage in education, information and opinion shaping efforts – including independent surveys, reports and recommendations - to combat discrimination in their respective areas, propose to the Government legal and other measures that may be of use to combat discrimination and monitor international developments.

In the following the author of the report will deal with each one of the Ombudsmen related to the areas covered by the Article 13 Directives, i.e. DO, HO and HomO.

The Ombudsman against Ethnic Discrimination (DO)

DO undertakes a lot of activities reflected on the web-site: www.DO.se . DO is thus a Government agency for the promotion of equal treatment without regard to ethnicity, race *and* religion or belief. The DO institution is based on the (1999:131) Act on the Ombudsman against Ethnic Discrimination.

On the web-page both statistics regarding DO's activities and examples of decisions and settlements can be found. DO received 844 requests in 2005 as compared to 794 in 2004 and 758 in 2003. Out of the 844 requests in 2005 334 concerned the 1999 Act on discrimination in employment, 17 the 2001 Student at Universities Act and the rest (493) the 2003 Act on Discrimination in other areas of society. - There are not separate statistics with regard to religion and belief. Regrettably, no later statistics have been available.

The Disability Ombudsman (HO)

HO develops a lot of activities reflected on the web-site: www.ho.se .The Ombudsman's mandate was established in the Disability Ombudsman Act (1994:749), and further elaborated in The Disability Ombudsman Instructions Ordinance (1994:949), both later amended.

On the web-page both statistics regarding HO's activities and examples of decisions and settlements can be found. With regard to the 1999 Act on employment discrimination, HO received 79 complaints in 2005 as compared to 81 in 2004 and 50 in 2003. In areas outside employment according to the 2003 Act HO received 124 complaints in 2005 or twice as many as in 2004. 18 complaints related to the 2001 Student at Universities Act. Many other complaints (1200) related to accessibility issues in areas of society not yet covered by non-discrimination legislation. No later statistics have been available.

A National Accessibility Centre (Tillgänglighetscentret – see www.ho.se) has been established as a part of the office. The Centre is to promote the development of an accessible society – a society in which all people, regardless of disability, can participate. This can involve anything from barriers that keep out those in wheelchairs to information brochures that exclude those without perfect sight.

The Ombudsman against Sexual Orientation Discrimination (HomO)

HomO undertakes a lot of activities reflected on the web-site: www.HomO.se . The Ombudsman's mandate is regulated in the (1999:170) Ordinance containing Instructions for the Office of the Ombudsman against Discrimination because of Sexual Orientation.

On the web-page both statistics regarding HomO's activities and examples of decisions and settlements can be found. The total number of requests received in 2005 amounted to 858. 47 of these concerned discrimination: 9 related to the 1999 employment discrimination act, 5 to the 2001 Student at Universities Act and 22 to the 2003 Act. Later statistics have not been available.

f) Is the work undertaken independently?

As is the case with other Government authorities the Ombudsmen have an independent status reaching their own decisions in individual matters. The separation of powers is a constitutional principle and the Swedish Government according to Chapter 11 Sec. 2 the Instrument of Government may not interfere with a Governmental Agency on how to act in an individual case or how they should apply legislation. A recent investigations committee, assessing the implementation of Directive 207/76/EEC, was of the opinion that the (Equal Opportunities) Ombudsman did meet the requirements of that directive in every way.¹²³

8. IMPLEMENTATION ISSUES

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

Describe briefly the action taken by the Member State

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

The Government acts mainly through the creation of the special bodies that the Ombudsmen only just described represent. As was already described, the different Ombudsmen develop a considerable amount of activities throughout society in the fields covered by non-discrimination legislation, for instance in the form of special projects, supervision of individual institutions, informative brochures and other publications, etc.

To a varying degree, these bodies co-operate with each other and also with other state agencies in these endeavours. One example of how this is done is that the HomO regularly participates in the training programmes of the Prosecutor General, directed at all public

¹²³ SOU 2004:55 p. 350. This is also my opinion.

prosecutors. The same goes for the training programmes for judges organised by the National Courts Administration.

According to the (2001:526) Ordinance on the Responsibility of Public Agencies to Effectuate the Governments Disability Policy any public authority is under the obligation to make information available also for different groups of disabled people through a number of means.¹²⁴

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

As was already indicated there is in Sweden a fairly weak role played by NGOs other than trade unions and employer organisations, may be with the exception of the different organisations within the movement of the disabled. To the extent there are NGO's the Ombudsmen have an on-going dialogue. As for the Government, the consultations procedures anticipating any bill or other legislative initiative traditionally have ensured a dialogue with the relevant organisations. To my knowledge, the improvement of such a dialogue within and outside these processes is consistent concern. The increasing dialogue between policymakers and NGOs is also reflected by the support provided for the establishment of a national NGO-centre against racism as well as to local NGO-run anti-discrimination bureaux.

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

As was already indicated, the social partners traditionally play a key role on Swedish labour-market and a variety of issues are collectively bargained and regulated by means of collective agreements. This is also true with regard to non-discrimination issues, albeit to a lesser extent than as regard other working conditions. A characteristic feature of the Swedish law on sex discrimination – the Equal Opportunities Act – is the requirement on employers (with 10 or more employees) to have equality plans. Such a requirement is also present in the 2001 Student at Universities Act regarding all the grounds covered. However, in the 1999 Acts (and the 2003 Act) there are no such specific requirements. Moreover, all the Ombudsmen are involved in an ongoing dialogue with both employers' and employees' organisations concerning the promotion of diversity and counteracting discrimination. The Government has an ongoing dialogue with the social partners.

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

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

These may include general principles of the national system, such as, for example, "lex specialis derogat legi generali (special rules prevail over general rules) and lex posteriori derogat legi priori (more recent rules prevail over less recent rules).

The relevant mechanisms are precisely the different Ombudsmen supervising the non-discrimination acts in their entirety and the possibilities this provide for individual claimants. In addition the role played by the trade unions to support their members must also be mentioned.

¹²⁴ See further the 'Guidelines for an Accessible Public Service' by the Disability Ombudsman, www.tillgangslighet.se.

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

The task of proposing legislation in order to implement the Directive into Swedish national law was given to a special investigator, who presented her report in the spring of 2002.¹²⁵ However, the investigator did not, as required by art. 16(a) of the Directive, carry out any general screening of laws and administrative provisions for incompatibilities with the requirements of the Directive (at least not in any comprehensive way).¹²⁶ This is probably more problematic in the area of ethnic discrimination, particularly with respect to indirect discrimination. Obvious examples of problematic provisions would include requirements regarding Swedish citizenship or to have a degree or diploma from a Swedish educational institution to be able to exercise certain professions. - According to Ytterberg (the acting HomO), there are no discriminatory laws and provisions with respect to sexual orientation discrimination in employment or occupation still in force.¹²⁷ However, according to Lappalainen the measures undertaken thus far seem to have been insufficiently thorough, at least in terms of examining regulations or administrative provisions. The government enquiry basically asserted that this was not needed, without making more than a cursory analysis.

9. OVERVIEW

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

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

It may be too early to say if the amendments of the laws to implement the Directives are effectively implemented. As can be seen from the above, case law in the field of discrimination is, so far, mainly based on the 1999 Acts, stemming from the Labour Court and still scarce. Even more limited in number are the cases where discrimination has been found to be at hand. This does not necessarily say anything about the presence of discrimination and a lot of cases are, of course, settled outside court. In the areas recently covered by non-discrimination legislation, i.e. the 2003 Act, the number of complaints presented to the Ombudsmen is increasing rapidly and some of these cases are now reaching the ordinary courts. It may also be fair to say that the system of laws and the implementation of the principle of equal treatment are – despite their relative harmonisation recently – still somewhat disparate and in some parts not very effective. This is a circumstance that the Swedish Government is aware of and which is addressed in the proposal on a Single-Act regulation presented by the Discrimination Inquiry Commission early in 2006. The government has announced its will to present a bill based on this proposition during 2007. Here should also be mentioned the obvious infringement of Directive 2000/78/EEC on behalf of Sweden not having implemented yet a protections against discrimination on the grounds of age.

10. CO-ORDINATION AT NATIONAL LEVEL

¹²⁵ Report SOU 2002:43: *An Extended Protection against Discrimination* [Ett utvidgat skydd mot diskriminering, bet. SOU 2002:43].

¹²⁶ Idem., page 143.

¹²⁷ Ytterberg, Sexual Orientation report of 28 July 2004.

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

Hitherto, responsibilities in this area were scattered on several ministers and ministries. *Non-discrimination in working life on all grounds but sex* was the responsibility of the Labour Market Minister at the Ministry of Industry and Employment. *Sex Discrimination* was the responsibility of a special Minister (in this quality also with the Ministry of Industry and Employment) who was, however, also responsible for *ethnic integration, democracy and human rights developments within the Swedish society generally*, now at the Justice Department. *Non-discrimination within schools and the higher education sector* were mainly the responsibility of the Ministry of Education. Since 1 January 2007, however, there is a new Ministry of Integration and Equality (Integrations- och jämställdhetsdepartementet) to deal with all of these issues as well as democracy issues and human rights issues, generally. The responsible minister is Nyamko Sabuni, a black woman with immigrant back-ground.

Annex

1. Table of key national anti-discrimination legislation

2. Table of international instruments

ANNEX 1: TABLE OF KEY NATIONAL ANTI-DISCRIMINATION LEGISLATION

Name of Country: **Sweden**

Date 01/2006

Title of Legislation (including amending legislation)	In force from:	Grounds covered	Civil/Administrati ve/ Criminal Law	Material Scope	Principal content
<p>This table concerns only key national legislation; please list not more than 10 anti-discrimination laws (which may be included as parts of laws with wider scope). Where the legislation is available electronically, provide the webpage address.</p> <p>Any legislation is available (in Swedish only) at the following web-page: www.notisum.se. Below you will find another web-page indicated only in case the Act at issue is available there in English.</p>	Please give month / year			e.g. public employment, private employment, access to goods or services	e.g. prohibition of direct and indirect discrimination or creation of a specialised body
<p>The (1962:700) Penal Code, Chapter 16 Sec. 9 (with later amendments, 1970:224, 1970:225, 1986:444 and 1987:610)</p> <p>www.homo.se</p>	1970 (07/1987)	Ethnicity, religion and belief, sexual orientation	Criminal Law	Access to goods and services	Ban on discrimination

The (1991:433) Equal Opportunities Act (with a number of later amendments) www.jamombud.se	01/1992	Sex	Civil law	Public and private employment	Prohibition of direct and indirect discrimination, sexual harassment regulations and rules on active measures
The (1999:130) Prohibition of Ethnic Discrimination Act (with two later amendments: 2000:762 and 2003:308) (the Ethnic Discrimination Act) www.do.se	05/1999 (01/2001) (07/2003)	Ethnicity, religion and belief	Civil law	Public and private employment	Prohibition of direct and indirect discrimination as well harassment, rules on active measures
The (1999:132) Prohibition of Discrimination in Working Life of People with Disability Act (with one amendment, 2003:309) (the Disability Discrimination Act) www.handikappombudsman.nen.se	05/1999 (07/2003)	Disability	Civil law	Public and private employment	Prohibition of direct and indirect discrimination as well as harassment

The (1999:133) Act on a Ban against Discrimination in Working Life on grounds of Sexual Orientation (with one amendment, 2003:310) (the Sexual Orientation Discrimination Act) www.homo.se	05/1999 (07/2003)	Sexual orientation	Civil law	Public and private employment	Prohibition of direct and indirect discrimination as well as harassment
The (2001:1286) Equal Treatment of Students at Universities Act (with one amendment, 2003:311) (the Students at Universities Discrimination Act) www.handikappombudsman.nu	03/2002 (07/2003)	Sex, ethnicity, religion and belief, sexual orientation and disability	Civil and Administrative Law	Higher education sector	Prohibition of direct and indirect discrimination as well as harassment, rules on active measures
The (2002:293) Act on a Ban against Discrimination in Working Life of Part-time and Fixed-term Workers	07/2002	Part-time and fixed-term workers	Civil law	Public and Private employment	Prohibition on direct and indirect discrimination
The (2003:307) Prohibition of Discrimination Act (with one amendment, 2004:1089) www.homo.se	07/2003 (01/2005)	Ethnicity, religion and belief, sexual orientation and disability	Civil law	Labour-market policy operations, the start-up and operation of business activities, practising professions, membership etc. of	Prohibitions of direct and indirect discrimination as well as harassment

				certain organisations, goods, services and housing, social assistance, the social insurance and related benefits systems and the unemployment insurance system, health and sickness benefits in kind	
The (2006:000) Act on a ban against discrimination and other degrading treatment of children and pupils (the Pupils Discrimination Act)	04/2006	Sex, ethnicity, religion and belief, sexual orientation and disability	Civil law	Pre-school facilities, school-age childcare, primary and secondary school and municipal adult education	Prohibitions of direct and indirect discrimination as well as harassment and rules on active measures

ANNEX 2: TABLE OF INTERNATIONAL INSTRUMENTS

Name of country: **Sweden**

Date: January 2007

Instrument	Signed (yes/no)	Ratified (yes/no)	Derogations/ reservations relevant to equality and non-discrimination	Right of individual petition accepted?	Can this instrument be directly relied upon in domestic courts by individuals?
European Convention on Human Rights (ECHR)	Yes 28-11- 1950	Yes 04-02- 1952	No	yes	yes
Protocol 12, ECHR	-	-	-	-	-
Revised European Social Charter	Yes 03-05- 1996	Yes 29-05- 1998	Art. 8.2, 8.4, 8.5, 12.4, E	Ratified collective complaints protocol? Yes Signed 09-11-1995 Ratified 29-05- 1998	no
International Covenant on Civil and Political Rights	Yes 29-09- 1967	Yes 06-12- 1971	no	no	no
Framework Convention for the Protection of National Minorities	Yes 1995	Yes 09-02- 2000	no?	no	no
International Convention on Economic, Social and Cultural Rights	Yes 29-09- 1967	Yes 06-12- 1971	no	no	no
Convention on the Elimination of All	Yes 05-05-	Yes 06-12-	no	yes	no

Forms of Racial Discrimination	1966	1971			
Convention on the Elimination of Discrimination Against Women	Yes 07-03-1980	Yes 02-07-1980	no	no	no
ILO Convention No. 111 on Discrimination	Yes ?	Yes 20-06-1962	no	no	no
Convention on the Rights of the Child	Yes ?	Yes 1990	no	no	no