

REPORT ON MEASURES TO COMBAT DISCRIMINATION

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

COUNTRY REPORT 2007

The Netherlands

Rikki Holtmaat¹

State of affairs up to 29 February 2008

This report has been drafted for the **European Network of Legal Experts in the Nondiscrimination 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

All reports are available on the European Commission's website:

http://ec.europa.eu/employment_social/fundamental_rights/policy/aneval/legnet_en.htm

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¹ This report builds on the first country report by Marianne Gijzen (2004), who in turn based her work on earlier reports written by Lisa Waddington and Marianne Gijzen for disability, Kees Waaldijk for sexual orientation and Marcel Zwamborn for race and ethnicity, religion and belief. Information provided by these *rapporteurs* was included in this report by the current author, as far as it was still accurate and up to date in February 2007.

Short list of abbreviations / translations:

ADA = Age Discrimination Act

DDA = Disability Discrimination Act

ETC = Equal Treatment Commission

GETA = General Equal Treatment Act

Staatsblad = Law Gazette²

Tweede Kamer (der Staten Generaal) = Second Chamber (of Parliament)³

² The system of reference to Acts that have been published in the Law Gazette is as follows: Title of the Act, Law Gazette (Staatsblad), year, number. Only the titles have been translated into English.

³ Parliamentary papers, motions or amendments or letters from the government to Parliament are referred to in the footnotes by the Dutch system of reference: Tweede Kamer, parliamentary years, number of the bill and the number of order, followed by a page number. Only the titles of these papers have been translated here.

INTRODUCTION

0.1 The national legal system

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

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

- Article 1 of the Constitution enshrines a constitutional equality and non-discrimination guarantee.
- International non-discrimination provisions (e.g. Article 26 ICCPR and Article 14 ECHR) can be directly applied in court proceedings. Sometimes provisions from UN CERD or UN CEDAW are also called upon before Dutch courts.⁴
- EC-Treaty provisions and Directives can be directly applied under certain conditions.⁵
- The Criminal Code ("Wetboek van Strafrecht") entails specific provisions criminalising discriminatory speech and publications (Articles 137d-137f) and discriminatory acts in the performance of one's job or one's enterprise (Articles 137g and 429quater). Discrimination is defined in Article 90quater.⁶
- The Civil Code entails specific articles prohibiting sex discrimination in labour contracts (Articles 7:646-7:649). Employers are also liable if they fail to guarantee safe working conditions. (Article 7:658).
- The Civil Servants Act (Articles 125g and 125h) contains similar provisions for the public service sector.

⁴ Very often not successful, since the courts most of the time deem these provisions not sufficiently clear and precise to apply them.

⁵ These are the normal conditions for applicability of EC-Law in the Member States.

⁶ This definition is substantially different from the definition in the Directives and from the definition of "onderscheid" (distinction) that is used in Dutch equal treatment legislation. The Criminal Code definition is more in line with the one in Article 1 of the UN CERD.

- The Act on Working Conditions (“Arbeidsomstandighedenwet”) contains provisions concerning (sexual) harassment at the workplace and aggression and violence at the workplace.
- Race and ethnic origin, religion and belief and sexual orientation are covered together with ‘political opinion’, ‘sex’, ‘nationality’ and ‘civil status’ as grounds for discrimination by Dutch law since 1994 by the General Equal Treatment Act, or GETA (“Algemene Wet Gelijke Behandeling”).⁷ The 1994 Act has been amended and complemented by the EC Implementation Act GETA. Importantly, the Dutch government has deemed it desirable to extend many of the amendments that were legally required for the grounds covered both by the 1994 Act and the Directives (*i.e.*, ‘race’, ‘religion/belief’, ‘sexual orientation’) to other grounds that are also covered by the GETA.⁸
- The Equal Treatment Act for Men and Women in Employment Act (“Wet gelijke behandeling van mannen en vrouwen bij de arbeid”), which already existed when the GETA came into force, regulates, among others, the topic of equal pay.⁹

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

Age as a ground for discrimination

Implementation of the discrimination ground *age* has been achieved by the adoption of the Act on Equal Treatment on the Ground of Age in Employment (“Wet Gelijke Behandeling op grond van Leeftijd bij de Arbeid”), hereinafter referred to as the Age Discrimination Act or ADA.¹⁰ The ADA entered into force on 1 May 2004.¹¹ Implementation of ‘age’ has been achieved in Dutch law in a *single staged process*. This means that the bill on age discrimination¹² aimed to implement both the *age specific* and the *common provisions*¹³ of the Directives. As will be discussed below, this contrasts with the *modus* of implementation of ‘disability’ which occurred via a *two-staged process*.

Disability as a ground for discrimination

Like ‘age’, ‘disability’ has been regulated outside the general framework of the GETA in a separate law. For reasons of political expediency, implementation of the ground ‘disability’ occurred in a *two-staged process*.

⁷ Staatsblad 1994, 230.

⁸ Explanatory Memorandum to the EC Implementation Act, Tweede Kamer, 2002-2003, 28 770, nr. 3, p. 3.

⁹ Since this Network does not deal with the topic of gender discrimination, this Act will not be discussed in this Report.

¹⁰ Act of 17 December 2003, concerning the equal treatment on the ground of age in employment, occupation and vocational training (“Wet van 17 december 2003, houdende gelijke behandeling op grond van leeftijd bij de arbeid, beroep en beroepsoponderwijs”), Staatsblad 2004, 30.

¹¹ Determined by Governmental Decision of 23 February 2004, concerning the establishment of a date of the entering into force of the Act on Equal Treatment on the Ground of Age in Employment (“Besluit van 23 februari 2004, houdende vaststelling van de datum van inwerkingtreding van de Wet gelijke behandeling op grond van leeftijd bij de arbeid”), Staatsblad 2004, 90.

¹² Bill for an Act on Equal Treatment on the Ground of Age in Employment, Occupation and Vocational Training (“Voorstel van Wet gelijke behandeling op grond van leeftijd bij de arbeid, beroep en beroepsoponderwijs”), Tweede Kamer, 2001-2002, 28170, nrs. 1-2.

¹³ *Common provisions* are those provisions which are found in both the Race and the Employment Framework Directive and which are applicable to all grounds for discrimination covered by these Directives. See Explanatory Memorandum to the EC Implementation Act GETA (“Memorie van Toelichting bij de EG Implementatiewet AWGB”), Tweede Kamer, 2002-2003, 28 770, nr. 3, p. 7. Examples are: the definitions of discrimination, the burden of proof, positive action, remedies, victimisation, *etc.*

- 1) In the first stage of implementation, the ‘disability’ specific provisions of the Employment Framework Directive were implemented by the Disability Discrimination Act or DDA.¹⁴ The DDA entered into force on 1 December 2003 (except for Articles 7 and 8 of the Act which relate to public transport).¹⁵
- 2) In the second stage of implementation, the *common provisions*¹⁶ were implemented by means of the adoption of the EC Implementation Act GETA.¹⁷ This Act *inter alia* complements the DDA of the first stage of implementation. The EC Implementation Act entered into force on the 1st of April 2004.¹⁸

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?

- 1 The Dutch legislator might need to bring the definition of ‘indirect discrimination’ more in line with the Directives’ requirements. [See para. 2.3 of this report.]
- 2 The accumulative conditions in the ‘harassment’ definition arguably fall short of the Directives’ ‘non regression’ clause. [See para. 2.4 of this report.]
- 3 Arguably, the Dutch government interprets the prohibition of an ‘instruction to make a distinction’ unduly narrow. [See para. 2.5 of this report.]
- 4 An unduly restrictive approach is also adopted by the Dutch government as regards the ‘scope of liability’ for discrimination. [See para. 3.1.3 of this report.]
- 5 Both Article 2(5) and Article 7(2) of the Framework Directive speak of national legislation or measures taken by the Member States government in order to protect health and safety. However, the provision under Article 3(1) sub a in the DDA does not make this restriction. It is disputable whether this is in line with the requirements of the Directive. (See para. 4.6 of this report.)

¹⁴ Act of 3 April 2003 regarding the establishment of the Act on Equal Treatment on the grounds of disability or chronic disease (“Wet van 3 april 2003 tot vaststelling van de Wet Gelijke Behandeling op grond van Handicap of Chronische Ziekte”), Staatsblad 2003, 206.

¹⁵ Determined by Governmental Decision of 11 August 2003, concerning the establishment of a date of the entering into force of the Act on Equal Treatment on the Grounds of Disability or Chronic Disease (“Besluit van 11 augustus 2003, houdende vaststelling van het tijdstip van inwerkingtreding van de Wet gelijke behandeling op grond van handicap of chronische ziekte”), Staatsblad 2003, 329. A proposal for a bill amending the DDA in this respect has been made by some members of Parliament. See Tweede Kamer 2006-2007, 30878, nrs 1-3.

¹⁶ *Common provisions* are those provisions which are found in both the Race and the Employment Framework Directive and which are applicable to all grounds for discrimination covered by these Directives.

¹⁷ Act of 21 February 2004 regarding the amendment of the General Equal Treatment Act en some other Acts in order to implement Directive 2000/43/EC and Directive 2000/78/EC (“Wet van 21 februari 2004 tot wijziging van de Algemene Wet Gelijke Behandeling en enkele andere wetten ter uitvoering van richtlijn 2000/43/EG en richtlijn 2000/78/EG (EG Implementatiewet AWGB)”).

¹⁸ Determined by Governmental Decision of 11 March 2004, concerning the establishment of the date of the entering into force of the Act of 21 February 2004 regarding the amendment of the General Equal Treatment Act en some other Acts in order to implement Directive 2000/43/EC and Directive 2000/78/EC (EC Implementation Act GETA) (“Besluit van 11 maart 2004, houdende vaststelling van het tijdstip van inwerkingtreding van de Wet van 21 februari 2004 tot wijziging van de Algemene Wet Gelijke Behandeling en enkele andere wetten ter uitvoering van richtlijn 2000/43/EG en richtlijn 2000/78/EG (EG Implementatiewet AWGB)”), Staatsblad 2004, 120.

- 6 The partially reversed burden of proof – not applicable in victimisation claims – falls short of EC requirements. [See para. 6.4 of this report.]
- 7 The requirement that sanctions be ‘effective’, ‘dissuasive’ and ‘proportionate’ seems not to be met by the Dutch legislation. [See para. 6.5 of this report.]
- 8 Apart from this, at some points the equal treatment law has been worded in such a way that a rather wide interpretation of the provision is possible, leaving e.g. more room for justifications than would seem appropriate, considering the general rule of the ECJ that exceptions to the non-discrimination principle should be interpreted restrictively. See e.g. para. 4.2 of this report where the wording of the exceptions based on Article 4(2) of the Framework Directive is discussed.

The Dutch government did notify (16.12.2003) the use of three extra years for the implementation of the discrimination ground ‘age’. Eventually however, the ADA entered into force on 1 May 2004 and thus, the requested extra time has not been made use of, apart from the transitional provision in Article 16 of the ADA concerning retirement before the age of 65. This transitional period has expired on December 2, 2006.

NB: Recently, on January 2008, the Netherlands have received a letter from the European Commission Member Mr. V. Spidla, which points at alleged inadequacies in transposing ‘employment’ Directive 2000/78/EC.¹⁹ In short, the Commission criticised

- the definitions of direct and indirect discrimination in the ETA;
- the (broadness of) the exclusion of the ban on discrimination with regard to ‘personal services’ (Article 5(3) ETA)
- the broadness of the exceptions for employment in church or religious associations (Articles 4(1) and 5(2) ETA).

Meanwhile, the Dutch government has reacted by denying the inadequacies, stating in short that the criticized exceptions are in substantive (case-)law in line with the Directive’s requirements. With regard to the definitions of direct and indirect discrimination, a parliamentary evaluation on the terminology is forthcoming²⁰. At the cut-off date of this report, no answer from the Commission is received yet.

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)

¹⁹ Letter dated on 11 January 2008, with reference to the infringement procedure of 18 December 2006, infringement No 2006/2444. Press releases from the European Commission can be found at: <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/155&format=HTML&aged=1&language=EN&guiLanguage=en> and <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/08/68&format=HTML&aged=0&language=EN&guiLanguage=en>

²⁰ Letter of the government, dated on 18 March 2008, *Kamerstukken II*, 2007-2008, 27 017 nr. 40, annex

Introduction

Apart from a few exceptions, the following overview contains cases that are dealt with on the basis of the ADA, DDA and GETA.²¹ Relatively few cases are brought to the attention of the Dutch Courts. Most cases are brought before the ETC.²² In the year 2007, the ETC gave 247 Opinions (as against 282 in 2006 and 245 in 2005). Around one third of them dealt with discrimination on the ground of age. An explanation of this high percentage is that, because the ADA is relatively new, there is a lot of uncertainty about the interpretation of this Act. Religion and belief and race are also important categories. A lot of other cases were about gender discrimination, a topic which is not covered by this report. Due to limited space, only a few court cases and ETC Opinions can be presented in this overview.²³

Race and ethnic origin:

*ETC: Case 2005-25, of 18 February 2005:*²⁴ The local government of Tiel (a small town in the Netherlands) conducts a policy to spread the (aspirant) pupils who's parents are of non-Dutch origin, who have lower or no education and who do manual labour.²⁵ This means that each publicly funded primary school in this town should not have more than a certain percentage of such pupils. If a school already has reached this percentage the child will not be accepted and will have to go to another school, even if this is outside its own neighbourhood. The ETC first establishes that the 'service' to provide education falls under the scope of the GETA. Next it examines the practice of this policy and finds that the first factor (non-Dutch origin of the parents) in fact is decisive. It then decides that this constitutes a form of 'hidden' direct discrimination on the ground of race for which the GETA allows no justification.²⁶

Held: breach.

It is debated in the Netherlands whether the way in which the ETC constructs this category of hidden direct discrimination is the correct way. The ETC does so by equating a neutral criterion (national origin) with a suspect criterion (race) and then concluding that this is unjustifiable direct discrimination.²⁷

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

²¹ We can not provide an extensive overview of criminal law cases or cases that have been decided upon with the use of Constitutional or International Law provisions.

²² Opinions by the ETC are not binding. They are called "Opinions". All publications (Opinions, etc.) of the ETC are available at www.cgb.nl and can easily be searched on the basis of the case's reference number. The parties' names are kept anonymous.

²³ It should be noted that some of the case law of the courts and Opinions of the ETC have raised a tremendous amount of academic and political debate in The Netherlands.

²⁴ Also published in AB 2005, 230 with a case note of C.W. Noorlander.

²⁵ See also para 9 of this report under the heading of 'race'.

²⁶ This *Opinion* has also been discussed by B.P. Vermeulen in the annual *Oordelenbundel* of the ETC: 'De toelaatbaarheid van spreidingsbeleid en aanverwante maatregelen in het onderwijs' [The admissibility of policies to spread pupils.] . In: S.D. Burri (ed.) *Oordelenbundel 2005*. Kluwer, Deventer June 2006.

²⁷ This method has been accepted in the case of pregnancy, which is equated with direct sex discrimination.

it can be concluded that the ETC finds *harassment* a special (more serious) kind of ‘making a direct distinction’.²⁸

District Court Amsterdam, 23 February 2006 (LJN: AV2447): A public prosecutor was accused of insulting Roma during a court case. He had said, among other things, that almost all Roma people are criminals or are found guilty of criminal offences. According to the Court, this is of course unfortunate and deplorable. However, the context in which the statements were made takes away the penal nature of the remarks. In his plea, the public prosecutor could take into account the established criminal behaviour of certain Roma groups; besides he has apologised for his generalising remarks. Therefore, he was not sanctioned.

ETC Opinion 2006-222 of 6 November 2006: A family of travelers (people who live in caravans and travel around),²⁹ consisting of three generations, complains that a local government discriminates on the ground of race (ethnic identity) by not taking their special interests into account in its housing policy. The local government decided not to continue a special waiting list for persons who want to live in a caravan because there were hardly any applications for this type of housing. The ETC concludes that it is competent to assess this housing policy on the basis of Article 7a GETA. The assessment whether there is a case of unlawful distinction is - contrary to other areas – marginally, as a consequence of the local government’s margin of appreciation to formulate its social policies, including those concerning housing. Although in this particular case there is an objective justification because the local government has proven that the measure (to abolish the special waiting list) was legitimate and that the means chosen (the general waiting list) were proportionate and effective, the ETC recommends the local government to prevent indirect discrimination in the future by giving more attention to the special needs of people who prefer housing in caravans.³⁰ *Held: no breach.*

District Court Haarlem, 8 May 2007 (LJN: BA5410):

A specific investigation into legal residency and the rightfulness of receiving welfare benefits ordered by the City Administration of Haarlem exclusively addressed to Somalian inhabitants who receive such benefits has been deemed unlawful. The Court found no sufficient objective justifications for the clear infringements on the prohibition of discrimination on the ground of race under Article 1 of the Dutch Constitution. The City Administration had put forward as a justification that they had indications that a considerable number of Somalians had moved to the United Kingdom without checking themselves out of the administrative system of the City and still received benefits.

Held: breach.

District Court The Hague, 26 April 2007 (LJN: BB0711):

The Dutch minister of Integration and Immigration policy had asked for and obtained an exemption under the Personal Details Protection Act from the Dutch Data Protection Authority (DDPA) in order to establish a database of Antillian youth (*‘Verwijsindex Antillianen’*) without work or education and with criminal records.

²⁸ See also Opinion 2005-30. See also below, para 2.4.

²⁹ The ETC decided that this group of people falls under the ground race or ethnic origin. Some of the travellers are Roma or Sinti, but not all. See also ETC Opinion 2006-5.

³⁰ The ECT did not openly refer to a more substantive notion of equality, like was done by the ECtHR in the *Thlimmenos* case. See: ECtHR, *Thlimmenos v. Greece* of 6 April 2000.

A complaint against this was lodged by a deliberative body of Dutch Antillians. According to the minister and the DDPA, the database was required to trace the Antillian youth in The Netherlands, which is particularly difficult, as young Antillians are often moving between Dutch municipalities. According to the municipalities and the minister, the registrations system is required for an effective approach to the high rates of social deprivation and criminality among the Antillian youth in The Netherlands.

The Court held that the registration of a persons race – notwithstanding the severity of the problems among Antillian youth – is a drastic and inappropriate means, as the failure of the common Civil registration system to address the problems was insufficiently established.

Held: Breach. The Dutch government has lodged an appeal with the *Raad van State*. [Council of State = highest administrative judge.]

Age:

ETC: Opinion 2005-180, of 3 October 2005: This concerns the case that a temporary contract of a young employee in a supermarket was not substituted into a permanent contract. According to the applicant this decision was due to her age and she submitted a case under the ADA. The ETC applied the rules of the (partial) reversal of the burden of proof (Article 10 GETA, also applicable in ADA cases). The applicant stated that she had heard rumours that the management found 18 and 19 year old employees ‘too expensive’. According to the ETC, this ‘fact’ is reflected in the general picture that exists in the media about the human resource policies of super markets and that also flows from other complaints that are brought to the attention of the ETC. All together this ‘picture’ is enough to substantiate the criterion “*if a person who considers herself to have been wronged*”). *Held: breach.*

Supreme Court, 10 November 2006 (LJN AY9216): The Federation of Dutch Trade Unions (FNV) and the Youth Organisation of the National Federation of Christian Trade Unions (CNV) claimed that the Kingdom of the Netherlands was discriminating on the ground of age without any justification, by distinguishing between 15-year old children and 13- and 14-year old children. For the former, there is minimum-wage legislation. For the latter there is not, notwithstanding the fact that they are allowed to work under restricted conditions. The Supreme Court stated that, in the light of international provisions (Art. 26 ICCPR; Art. 7 European Social Charter; Art. 7 ICESCR and Directive 94/33/EC),³¹ there must be an objective and reasonable justification to treat these cases differently. It assessed the legitimacy of the aim of this distinction and the effectiveness and proportionality of the means used positively. More in general, education deserves priority over the regular employment of young children. *Held: no breach.*³²

ETC Opinions 2005-128-129 and 130 of 14 July 2005: These (joined) cases– brought on the basis of the ADA - concerned differentiation on the ground of age in a Social Plan (made up between social partners) for redundancy payments in the course of a large scale reorganisation plan.³³ The case came down to the question whether an older person (i.e. over the age of 57,5

³¹ At the time when these court proceedings were initiated, the ADA was not yet in force. However, under the ADA it would most probably have been decided the same way.

³² Earlier, the Court of Appeal in The Hague had held that there was a breach of the non-discrimination principle entailed in these international provisions. See: Hof Den Haag [Court of Appeal, the Hague] 24 March 2005, JAR 2005, 98.

³³ This was also disputed in some cases that were brought before cantonal courts. See e.g. Ktr. Amsterdam 14 juni 2004, JAR 2004, 262 and Ktr Sneek, 31 mei 2005, LJN AT7230. See for an elaborated discussion of these cases S.D. Burri, ‘Rechtspraakoverzicht gelijke behandeling. Selectie van rechterlijke uitspraken en oordelen van de Commissie Gelijke

years old) needs to use the special arrangement for older workers in the Social Plan or that he is free to choose to be made redundant in the normal way (termination of the employment contract and application of the so-called cantonal judges formula), which can be more profitable under certain circumstances.³⁴ The ETC (and the judges) ruled that the special rules for the redundancy payment of older people are not objectively justified (not meeting the criterion of proportionality). *Held: breach.*

ETC Opinion 2005-178 of 30 September 2005: The case concerned Article 8 ADA which concerns the exception of pension schemes from the applicability of this Act.³⁵ The question was whether a special pension arrangement for civil servants who are born before the first of January 1948 constitutes a ‘pension scheme’ that falls under this exception. The arrangement allows the civil servants to have an early retirement. Both the District Judge and the ETC concluded that this arrangements must be seen as a pension scheme as defined in the ADA (and in the Explanatory Memorandum to this Act).

Held: no breach. This decision can be criticised against the general rule of the ECJ that all exceptions to the non-discrimination principle should be interpreted narrowly.³⁶

ETC Opinion 2005-49, 2005-50 and 2005-135 of 25 March and 21 July 2005: These three cases concerned age discrimination in the liberal professions. Doctors and psychiatrists only get paid for their work by medical insurance companies when they have a service contract with one of these companies. The ETC is of the opinion that in general it can be accepted as an argument that elderly people (over 65) will sometimes have trouble in performing their medical profession accurately. Whether this needs to be tested in every individual case depends on the question whether there are valid methods available to carry out such testing.³⁷

Held: breach in the first two cases, no breach in the third case.

ETC Opinion 2005-106, 2005-107 and 2005-240: On 17 June 2005, the Equal Treatment Commission (ETC) gave two joint opinions on age discrimination in job advertisements. The same applicant, aged 57, filed separate complaints against a consultancy agency and a company providing electricity. He claimed to have been discriminated on the ground of age, because he was rejected for a job as a lawyer. On behalf of the company, the consultancy agency put an advertisement in a national newspaper.

According to the advertisement, the requirements for the job were, *inter alia*, ‘flexibility’ and ‘fitting into the dynamic company with a not-too-high average age’. The ETC held that Article 3(a) of the Age Discrimination Act (ADA), read in conjunction with Article 1, prohibits age discrimination in public job offers. Making a distinction in the sense of the ADA also means the instruction to make a distinction. The criterion applied by the ETC is whether the job description implies that only or preferably people of a certain age category will be employed. The ETC attached particular importance to the wording of the advertisement: ‘a

Behandeling, juli tot en met november 2005’, *Sociaal Maandblad Arbeid* 2006-1, p. 30-37 and M. Heemskerk & M.J.J. Dankbaar, ‘Leeftijd’ [Age].

³⁴ See also par. 4.7.5 of this report.

³⁵ See for a similar case: Rb. Breda [District Court Breda] 24 augustus 2005, *PJ* 2005, 119.

³⁶ Heemskerk & Dankbaar refer to the following cases of the ECJ: ECJ 4 June 2002, *PJ* 2002, 99 (*Beckmann*); ECJ 6 November 2003, *PJ* 2004, 71 (*Martin*). According to these authors this was also the conclusion of Lutjens in his case note to the Opinion of the ETC: Lutjens, *PJ* 2005, 122.

³⁷ A similar conclusion can be drawn from case law of the Centrale Raad van Beroep [the Highest Social Security Court] and Hof Den Bosch [the Court of Appeal Den Bosch]: CRvB 17 februari 2005, *TAR* 2005, 70; Hof Den Bosch 10 mei 2005, *JAR* 2005, 149. These were cases concerning ‘functional age dismissal’ in the (voluntary) fire departments. At the time that these cases were initiated before the courts the ADA was not yet in force. The Courts therefore use Article 26 ICCPR.

not-too-high average age', suggesting that elderly people are less welcome. The defendant did not appeal to Article 7(1) ADA, which allows for an objective justification by a legitimate aim reached by necessary and proportionate means. Therefore, the company and the agency have made an unlawful distinction on the ground of age in its advertisement. In addition, Article 9 ADA provides that when making a distinction on the ground of age in a public job offer, the advertisement should explicitly mention the basis of this distinction. The advertisement did not do so and was therefore in violation of Article 9 ADA. As far as the actual application procedure was concerned the applicant argued that the defendant's decision to reject him was based on his age. However, his application letter does not show any relevant education, knowledge, skills and experience required for the job. The circumstance that an advertisement suggests selection on the ground of age is, in this case, insufficient to suspect that the applicant's age was the reason for not appointing him.

On 19 December 2005, the ETC gave another opinion on the matter³⁸ and used the criteria discussed above to assess alleged age discrimination in a job advertisement, describing the team as 'young and dynamic'. This constituted an unlawful distinction on the ground of age, because the defendant (...) did not succeed in proving that selection had not taken place on the basis of the applicant's age. The ETC hereby applied Article 12(1) ADA concerning the burden of proof.

Held: breach.

ETC Opinion 2007-158 and ETC Opinion 2007-162:

In the first case, a maximum work experience requirement of 3 years for a vacancy for 'junior policy advisor' at the Ministry of Foreign Affairs was deemed unjustifiable indirect distinction on the ground of age. A 38 year old man who had complained for not being invited for an interview was told by representatives of the Ministry that "applicants above 30 years would have a problem". In a comparable case, a local government managed to justify indirect distinction on ground of age by demanding a certain work experience for a "prospective policy advisor". The local government had argued successfully that the nature of the work activities demands for an applicant that is not over-qualified.

Held: breach (2007-158) and no breach (2007-162).

ETC Opinion 2007-148:

A professional oboist was demoted by his employer (an orchestra) because of reaching the age of 60, according to a regulation arranged in the collective agreement for Dutch Orchestras. The ETC deemed the procedure of the orchestra as well as the regulation in the collective agreement unlawful, for it is a direct distinction on the ground of age. The parties who had drafted the regulation in collective agreement had proceeded on the basis that musicians lose some of their skills around the age of 60, and this generic measure was meant to be "a safeguard for the quality of orchestras in deference to the musician's artistic feelings". The ETC however held that musicians deserve an individual approach.

Held: breach.

³⁸ Opinion 2005-240.

Disability and Chronic Illness:

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

Supreme Court, 22 December 2006 (LJN AY8050): Appeal from Court of Appeal, the Hague, 31 March 2005 (LJN AT2882), concerning collective action of many NGO's against the State. The NGO's claimed that the new system for reimbursing costs of public transport (the so-called 'Valys system') to disabled persons is discriminatory and therefore wrongful. The new system (2003) restricted the number of kilometres disabled persons could travel against low tariff. The Court of Appeal held that the State has the liberty to make policy choices. The Supreme Court agreed that under the ECHR the State is not obliged to maintain State-funded provisions regarding public transport on an equal standard with the former system.³⁹ *Held: no breach.*

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

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

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

⁴⁰ See W. Brussee & M. Kroes, 'Handicap en chronische ziekte' [Disability and Chronic Illness]. In: S.D. Burri (ed.) Oordelenbundel 2005. Kluwer, Deventer June 2006. The authors also discuss the following Opinions that deal with this same issue: 2005-40, 2005-41, 2005-44, 2005-186 and 2005-187. See about the conflict between the DDA and general labour law norms concerning the duty to inform the employer about disabilities Aart Hendriks NJB 2006, p. 1044.

ETC Opinion 2006-227, of 23 November 2006:

A student has been refused to become a trainee at a University Medical Centre and states that this refusal is based on the fact that her mother has a chronic disease. Implicitly the ETC acknowledges in this case that discrimination by association is also prohibited under the DDA. However, in the case at hand there was no proof of this. As for the possibility that her own (possible) future disablement could play a role, the applicant had not proven that the Medical Centre has refused to give her this position because they were afraid that she would get the same disease or that she would be mentally incapable of doing the work as a consequence of the stress caused by her mother's condition. The applicant did not prove that she herself had been disadvantaged as a consequence of disablement or association with a disabled person. *Held: no breach*

ETC Opinion 2007-26

The applicant was dismissed from a course for beautician, due to suffering of narcolepsies. The main features of this disease are an incapacity to concentrate and to stay awake during the day. The dismissal constituted a distinction on ground of chronic disease, which is forbidden by Article 6 of the DDA. Nevertheless, the ETC deemed the dismissal justified, for the applicant failed to ask for and to consult about a possible reasonable accommodations. Furthermore, the narcolepsies could be a threat to the health of third persons, namely customers, since a beautician has to handle risky apparatus and tools.

Held: no breach.

Religion and Belief:

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

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

ETC Opinion 2005-67 of 15 April 2005: A complainant stated that a distinction on the ground of 'belief or philosophy of life' was made because she did not get a job on the ground that the employer suspected that she was a member of a certain religious group. Is the 'belief' of Osho⁴¹ to be considered as a religion? In this Opinion the ETC gives a general guideline as to what is to be considered as a religion. Central in the distinction between 'religion' and 'philosophy of life'⁴² is that in the first a 'high authority' ('God') is central. Also, it should not be an individual opinion.⁴³

⁴¹ The Bagwan Shree Rajneesh philosophy.

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

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

However, the employer did make an unlawful distinction on the ground of philosophy of life; the way the employer asked questions about her beliefs even could be qualified as harassment. *Held: breach.*

ETC Opinion 2006-30 of 2 March 2006: A female police officer started wearing a headscarf. Her employer gave his consent, but stated that she would not be allowed to work for the uniformed police anymore. Her employer agreed to find another function, but meanwhile the woman was not permitted to fulfil a position in which she had public contacts. In the ETC's view, the employer was not obliged to find another function. But if he decided to do so, discrimination was prohibited. In the present case, there was direct discrimination on the ground of religion by leaving certain positions out of consideration and excluding the policewoman from public contacts. *Held: breach.*

*ETC Opinion 2006-51 of 27 March 2006:*⁴⁴ An Islamic woman was refused admittance to a school where she wanted to be trained as an educational assistant, because she had indicated that she did not want to shake hands with men. This is, according to the ETC, an expression of religious belief.⁴⁵ The ETC concluded that, since the school did not directly refer to the applicant's religion, the refusal amounted to indirect discrimination. By focussing on the behavioural codes of Dutch society, the school excluded pupils from minority cultures. There were other ways of showing respect than by means of shaking hands. Equality of men and women fundamental principle could also be upheld by asking the applicant to shake hands with neither men nor women. *Held: breach.*

ETC Opinion 2006-154 of 20 July 2006: A former student of an institute that provides education and training for religious spokesmen or leaders for a particular Christian Church (so-called 'pentecostalism') wanted to spend some more time there in order to be able to pass some exams, but had already expressed his feeling that he did not fully subscribe to the beliefs and convictions of his Church anymore. He also wanted to live together with his girlfriend. The institute refused (re)admission. The ETC examined whether the institute could be seen as an independent section of a church. This appeared to be the case, since the institute was very closely related to the Church in question and was instrumental in obtaining the main goals of the Church. The requirement that students should not have sexual relationships outside marriage was considered of central importance for the internal affairs of this institute. The admittance policy and educational functions were closely linked to its religious identity and was applied equally to all students. Therefore Article 3a of the GETA is applicable and the case falls outside the scope of equal treatment legislation. *Held: no breach.*

Court of Appeal Amsterdam 24 July 2007, LJN: BB0057: A Christian school for professional education was not allowed to refuse admittance to a student whose parents' ideas differ partially from issues of moral behaviour. The school's admittance policy involved that parents declared that they did not have television or an open internet connection at home, that they use a certain translation of the Bible and that they respect the God-given natural order between men and women. The parents of the claimant had stated that they did have some different opinions in that regard. In addition, it was known to the school board that the applicant's sister wore trousers sometimes. According to Article 23 of the Dutch Constitution, schools are allowed to set their own criteria as to which students can be admitted.

⁴⁴ See also J. Tigchelaar, 'Respect! Handen schudden II), in: *NJCM-Bulletin* 2006, nr. 6, p. 833-843.

⁴⁵ See also ETC Opinions 1998-94, 1998-95 and 2002-22.

However, in order to be accepted as an objective justification for different treatment on the round of religion, these criteria must be closely linked to the (often religious) identity of the school, they must be aimed at maintaining this identity and must be consistently kept. Contrary to the District Court's decision, the Court of Appeal decided that the claimants had managed to prove that the operated criteria were not consistently kept by the school board in other cases. The student, therefore, had to be admitted. *Held: breach.*

ETC Opinion 2006-202 of 5 October 2006: Defendant, the local government of the city of Rotterdam, rejected an applicant, who is Muslim, for the function of customer manager. The reasons for this rejection were applicant's Islamic dress style (*djaballa*) and his refusal to shake hands with women, which would obstruct applicant's functional relationship with customers. The ETC regarded respondent's rejection of applicant's Islamic dress style as direct discrimination on the ground of religion under Article 5 §1(d) of the GETA. Requesting employees to shake hands with all customers mainly affects Muslims. Although defendant's purposes (customer-friendliness and prevention of discrimination on the ground of sex) are legitimate, the means used are neither necessary nor appropriate. Therefore, this constitutes indirect discrimination. Defendant cannot prove that customers ever object to not being shaken hands with. Fear of intolerance is no substantial reason for the rejection the applicant on the ground of his refusal to shake hands with women. In addition, defendant does not have a specific policy with regard to how to treat customers and did not look for alternative ways of greeting customers. Defendant could not answer the question whether the applicant would not be rejected when he refused to shake hands with both women and men. *Held: breach.*

ETC Opinion 2007-173:

Headscarf case. A fitness centre applied a prohibition on 'religion related clothing, such as headscarf's and garments'. The ETC deemed this practice a direct discrimination on ground of religion, as an explicit link was established between the clothing regulation and a religion. (It would be *indirect discrimination* if it had been a neutral formulated clothing regulation, for which a broader range of possible justifications is applicable under the GETA) No legal justifications for this distinction were found.

Held: breach.

District Court Utrecht, 30 August 2007, (LJN: BB2648):

A female Muslim teacher on a public school had decided not to shake hands with men anymore on ground of her religious belief. The school had dismissed her on ground of a breach of confidence between employer and employee. This argument was accepted by the Court. According to the Court, the woman had failed in her duty in communicating her decision properly and, in addition to this, she should have known that her decision would cause commotion and unrest among the multi-ethnic pupils. The Court held that the freedom of religion nor any other fundamental principle was at stake in this case: in the view of the Court, it was simply a question about the reasonableness of continuing the employment contract. The school had nevertheless to pay the full dismissal compensation. In earlier instance, the ETC had deemed this a breach of the equal treatment legislation and had called on the school board to reengage the teacher. The Court however, claimed not to judge about whether or not a school board may oblige teachers to shake hands, but only to judge this case from the point of view of labour law. The Court stated that the case should not be judged on the Equal Treatment Law, as the dismissal was not based on neglect of duty or in inaptitude for the job as a teacher, but on only a breach of confidence that was caused by the careless way of announcing her decision not to shake hands anymore.

This had caused a lot of commotion on the multicultural school, which had had a negative influence on the educational climate on the school.

Held: no breach

Sexual Orientation:

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

Chairman of District Court The Hague, 26 July 2006 (LJN AY5005): In a “Kort Geding” (fast civil court procedure for urgent matters), the Chairman of the Court ruled that the Dutch General Federation for Dancing Sports did not unlawfully exclude a homosexual couple from participation in national dancing contests.⁴⁶ Although this constituted direct sex discrimination, it was justified under the clause in article 2(2) of the GETA which allows for ‘gender specific requirements’. In the case of sport competitions, a requirement could be, on the basis of a decree by the Government, the fact that there is a relevant difference in physical strength between men and women. Homosexual persons can actually participate in dancing contests, provided that they are prepared to dance with a partner of the opposite sex. *Held: no breach*.

ETC Opinion 2005-5 of 18 January 2005: A medical research institute that works for the pharmaceutical industry advertised for heterosexual men (and their partners) to participate in a test for a medicine that would prevent a premature ejaculation. Homosexual couples were excluded from the survey. According to the ETC, the exclusion amounted to direct discrimination on the ground of sexual orientation for which the law does not allow a justification.

*Held: breach.*⁴⁷

ETC Opinion 2006-20 of 27 February 2006: On the basis of national health policy, many Municipal Health Services supply cheap vaccinations against Hepatitis A and B to men with homosexual contacts, drug addicts and prostitutes on the ground of their increased risk of catching this illness. Applicant (male, heterosexual) requested a vaccination and had to pay far more than the above-mentioned groups. The ETC considered this a direct discrimination on the ground of sexual orientation, because homosexuality is the distinguishing criterion.

⁴⁶ Earlier, the ETC (Opinion 2004-116 of 21 September 2004) decided that the exclusion of this couple was direct discrimination on the ground of sex, as well as direct discrimination on the ground of sexual orientation, for which there was no legally acceptable justification. See above.

⁴⁷ In a commentary to this Opinion Waaldijk observes that this case demonstrates that sometime an exception (like ‘genuine ‘sex’ requirement’) could be necessary. C. Waaldijk: ‘Seksuele gerichtheid en burgerlijke staat’ [Sexual orientation and civil status]; in: Oordelenbundel 2005, red. S.D. Burri, Kluwer Deventer June 2006. Waaldijk mentions a second case that demonstrates this necessity in his view: Opinion 2005-58, which was about a dating site on the internet.

But, according to the ETC, such direct discrimination may be justified when the prohibition of a certain measure would be unacceptable or completely irrational. In this case, public health interests can justify an inroad to the closed system of justifications. The ETC advises the legislator to provide for such an exception by law as soon as possible.⁴⁸ *Held: no breach.* This case is particularly interesting because for the first time the ETC decided (*contra legem*) that there was a possibility for an objective justification in a clear case of direct discrimination. Thereby, the ETC – in a situation that application of this system would lead to outcomes that can in no way be deemed “rational” or “reasonable” – broke open the closed system of justification that has been laid down both in the Directives and in the Dutch equal treatment legislation.⁴⁹

ETC Opinion 2007-85: In this case, men who have had homosexual intercourse were rejected as blood donors by a blood bank on the basis of national and EU health directives. The ETC judged that rendering the possibility to donate blood, has to be regarded as rendering a service in the sense of the GETA. The ETC held again (as it did before in opinion 2006-20) that there was an extralegal objective justification for a case of direct discrimination. In this case the ETC considered the severe consequences of the risk of blood recipients for getting HIV infected blood as an objective justification, for there is still no blood test that is 100 % scientifically reliable on detecting HIV. This case is also of great importance for Dutch equal treatment law in general, as the ETC seems breaks through the closed system of legally prescribed justifications that might possible justify forms of direct discrimination.

Held: no breach.

Please describe trends and patterns in cases brought by Roma and Travellers , and provide figures – if available.

The 2003 Monitor Racism and Extremism: Roma and Sinti of the Anne Frank House and Leiden University presents the results of research on discrimination and/or unequal treatment of these ethnic groups in the Netherlands.⁵⁰ The authors do not use the term Travelers, since they consider this to express a lifestyle, or a type of housing, rather than an ethnic group.⁵¹ The monitor shows that discrimination and unequal treatment of the Roma and Sinti is considerable. Their position in education and employment is weaker than the position of other minority groups. However, Roma and Sinti are not represented in overviews by the National Federation of Anti-Discrimination Agencies and Hotlines. Furthermore, Roma and Sinti hardly ever file complaints with the Dutch Equal Treatment Commission (ECT) or the Public Prosecutor’s Office. No exact figures are available. Reasons for the absence of complaints could include the distrust of the authorities by Roma and Sinti, language barriers and the idea that complaining about discrimination or unequal treatment may make their situation worse: However, there are some recent cases of the ETC available: In 2003 the Equal Treatment Commission decided that a Christian primary school makes a direct distinction⁵² on the basis of race. The school’s admittance policy with regard to pupils from the Roma and Sinti community was directly based on their origin (2003-15).

⁴⁸ This advise was already given to the government in the Evaluation Report of the ETC of the year 2000. The government chose not to follow up on that advise until now.

⁴⁹ See T. Loenen, ‘Doorbreking gesloten systeem AWGB’, in: *NJCM-Bulletin* 2006, nr. 6, p. 823-832.

⁵⁰ P.R. Rodrigues, Maaïke Matelski, *Roma en Sinti*. Amsterdam : Anne Frank Stichting ; Leiden : Universiteit Leiden, 2003. – 63 p. - ISBN: 90-72972-92-7. Also available in English.

⁵¹ NB: this is contrary to the opinion of the Equal Treatment Commission. See the last section of this report.

⁵² In the Dutch Equal Treatment legislation the word ‘distinction’ is used instead of discrimination.

In 2006 the Commission decided that an insurance company makes an indirect distinction on the basis of race by denying a fire and theft insurance to a trailer park resident. However this distinction was considered objectively justified in view of the company's policy of a simple and fast process with products that should be suitable to be offered on the internet (2006-05).

Moreover in 2006, the Commission decided that a municipality makes an indirect distinction on the basis of race with regard to a group of trailer park residents, which is justified by its housing policy (2006-222). In 2007 the Commission decided that a company makes a direct distinction on the basis of race with regard to trailer park residents by applying different conditions for delivery of goods to the trailer park (2007-109). A final case, also in 2007, concerned an Anti-Discrimination Agency that represented trailer park residents who had been denied a mortgage on their 'chalet' in a trailer park of travelers (or Roma and Sinti). The Commission found there was no distinction on the basis of race. The mortgage bank aims its activities at a small market sector and doesn't finance (mobile) chalets, wherever they are parked. The ETC rules that considering the market position of the bank this cannot be required from it (2007-157). Two other cases concerning Roma and Sinti are included in the overview of case law, above.⁵³

⁵³ See: District Court Amsterdam, 23 February 2006 (LJN: AV2447) and ETC Opinion 2006-222 of 6 November 2006.

1. GENERAL LEGAL FRAMEWORK

Constitutional provisions on protection against discrimination and the promotion of equality

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

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

There are no boundaries to the personal and material scope of Article 1. This means that the Constitutional provision applies to everybody who actually is in the country and to all fields of social and economic life that are covered by the Directives and beyond.

A Parliamentary motion to explicitly include ‘disability’ and ‘chronic disease’ in the list of grounds was accepted in 2001.⁵⁴ In the view of the Government however, these were covered by ‘any other grounds’. Nevertheless, it has investigated the possibility for an expansion of the list in Article 1.⁵⁵ In 2004, the ETC has advised to expand the list to all grounds covered by the GETA, the ADA and the DDA.⁵⁶ Subsequently, the Government announced that for the time being it would stick to its earlier opinion and commissioned at the same time an in-depth study into the matter by experts in constitutional law.⁵⁷ This commission of experts has published its report on April 12, 2006. It concludes that it is not necessary to expand the list of grounds in Article 1 of the Constitution, since this provision has direct horizontal effect between citizens and can also be applied by judges in cases of disability, age or the other grounds of the GETA that are not covered in the list of Article 1 (*e.g.* marital status). The inclusion in the Constitution of such grounds does not offer additional protection. In addition, the commission remarks that, by endlessly extending the non-discrimination grounds in the Constitution, there is danger of inflation in the sense that discrimination will no longer be seen as a very serious matter (restricted to grave grounds). The Minister has presented the report to Parliament and subscribes to its conclusions.⁵⁸

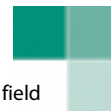
⁵⁴ Motion Rouvoet of 6 December 2001, Tweede Kamer, 2001-2002, 28 000 XVI, nr. 63 (“Motie Rouvoet”). It should be noted that, in respect of ‘disability and chronic disease’, the discussion on an (explicit) expansion of Article 1 of the Constitution to include these grounds had already taken place during the Parliamentary debates on the AWGB. See the amendment handed in by Groenman (Tweede Kamer, 1992/1993, 22 014, nr. 15), which did not receive sufficient Parliamentary support.

⁵⁵ Letter of the Minister of Internal Affairs (“Brief van de Minister van Binnenlandse Zaken en Koninkrijksrelaties”), Tweede Kamer, 2001-2002, 28 000 XVI, nr. 112. See also Tweede Kamer, 2005-2006, 29 355, nr. 24, in which the Government announces the installment of the commission of experts.

⁵⁶ ETC Advice 2004/03 of 26 February 2004.

⁵⁷ Letter of the Minister of Internal Affairs, Tweede Kamer, 2003-2004, 29 355, nr.7.

⁵⁸ Tweede Kamer 2005-2006, 29 335, nr. 28 of 1 May 2006.



b) Are constitutional anti-discrimination provisions directly applicable?

The Constitutional equality guarantee is beyond doubt directly applicable in *vertical* relations. However, there is a limitation to this. Formal statutory acts (i.e., Acts made by the Government and the Parliament) may not be subjected to Constitutional review by the Courts (according to Art. 120 of the Constitution), and thus, neither to a Constitutional ‘equality’ review.⁵⁹

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

It is widely accepted that the Constitutional equality guarantee can be applied in horizontal relations as well (Cf. High Court in Van Pelt/Martinair, 8 October 2004, NJ 2005, 117.) However, there is some discussion about what the equal treatment or non-discrimination norm entails in concrete situations and how this norm should be weighted against other constitutional rights (e.g. property rights or freedom of religion). In order to ensure the applicability of the equality principle in horizontal relations, the Constitutional guarantee has been elaborated in criminal law provisions and in specific statutory Equal Treatment Acts.

⁵⁹ However, Dutch courts do have the power to strike down legislation that violates any directly applicable provision of international law (Articles 93 and 94 of the Constitution). With respect to discrimination, the Dutch courts have to consider rather frequently whether some piece of legislation violates Art. 14 of the European Convention on Human Rights, Art. 26 of the International Covenant on Civil and Political Rights, or any other international or European equality provision.

2. THE DEFINITION OF DISCRIMINATION

2.1 Grounds of unlawful discrimination

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

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

2.1.1 Definition of the grounds of unlawful discrimination within the Directives

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

The words *racial or ethnic origin, religion, belief, disability, age and sexual orientation* are not defined in Dutch equal treatment law. These laws apply symmetrically, in the sense that both persons of the dominant group (ethnic majority, religious majority, non-disabled people, young/old people⁶⁰ and heterosexuals) and the disadvantaged group (ethnic minority, religious minority, disabled people, old people/young people and homosexuals) are covered.

Since there is no definition of disability in the DDA we can not compare it with the standards set by the ECJ in the Chacón Navas case. Dutch equality law does not define disability, but contrary to the EU level of protection, "chronic disease" is in addition to "disability" explicitly included as a ground in the DDA.⁶¹ With regard to the definition, we can derive some guidelines from the *travaux préparatoires* of the DDA and the cases of the ETC. Criteria mentioned during the preparation of the Law were (*inter alia*) the long duration of the disablement or chronic disease and the fact that – in case of disablement – the impairment is irreversible. This means that temporary disablements as a consequence of accidents are excluded.⁶² According to the Explanatory Memorandum to the DDA, the concept of "handicap" (disability) may embrace not only physical, but also mental and psychological impairments.⁶³

⁶⁰ Here it is difficult to establish who is the oppressed/dominant group in the context of age discrimination, because, as was observed by Veldman, with regard to 'age' one may distinguish many different groups (50+/50-/25+/30-/young people/old people). See A. Veldman, 'Wet Leeftijdscriminatie gooit veel overhoop', in: *Sociaal Recht* 2003, p. 363-364, at p. 363.

⁶¹ For a comparison of the EU and Dutch level of protection against discrimination of disability, see L.B. Waddington and M.H.S. Gijzen, '(Her)definitie van het begrip 'handicap in de EG en Nederlandse gelijke behandelingswetgeving', NTER nummer 12, december 2006, p. 270-279.

⁶² See Explanatory Memorandum to the ADA, Tweede Kamer 2001-2002, 28169, nr 3, p. 9 and p. 24 and nr. 5, p. 16.

⁶³ *Ibid.*, Tweede Kamer 2001-2002, 28169, nr 3, p. 24.

The Government is of the opinion that the question what constitutes a handicap is not only dependent on the physical or psychological features/characteristics of the individual, but also on the physical and social environment that allows/does not allow people to participate on an equal footing. The ETC has accepted this line of reasoning and – with a view to the goal of the ADA – interprets the terms disablement and chronic disease in a broad way.⁶⁴

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'; or a "disability", sometimes defined only in social security legislation)? Is recital 17 of Directive 2000/78/EC reflected in the national legislation against discrimination?*

As stated above, national law on discrimination does not define “disability”, but uses functional criteria like the duration, the seriousness and the irreversibility of the disablement. As far as there are definitions of “disability” in other legislation, these do not affect the material scope of “disability” as a ground of discrimination. Recital 17 of Directive 2000/78/EC expresses that the directive does not oblige employers to appoint individuals who are not capable or available for the essential functions of a post. Although this recital is not explicitly reflected in the DDA or GETA, its content is covered by Article 1 of the Dutch Constitution, which states that all men shall be treated equal “in equal cases”. In case of an individual who is not capable to perform the essential tasks of a post, the case is not considered as “equal”, and consequently there is no obligation to treat an incapable applicant equal. Article 2 of the DDA equates the failure to make reasonable adjustments for employees with disabilities with discrimination itself. Reasonable adjustments are under article 2 ‘reasonable’ for as long they do not impose disproportional loads upon the employer. The boundary between the case in which an applicant is not capable or available for “essential functions” and the case in which reasonable accommodations could be made, is to be drawn in case law.

Race: The Explanatory Memorandum to the GETA⁶⁵ stresses that ‘race’ is a broad concept, which must be interpreted in line with the UN Convention on the Elimination of Racial Discrimination (CERD).⁶⁶ The concept embraces: *race, colour, descent* and *national*⁶⁷ or *ethnic origin*.⁶⁸ The Dutch Supreme Court as well as the ETC use the CERD definition of race. In the EC Implementation Act, which has amended the GETA, the Government has not deemed it necessary to explicitly include the notion of ‘ethnic origin’ in the law, since this is sufficiently captured by this interpretation of ‘race’.⁶⁹ The ETC uses as a yardstick whether the applicant belongs to *a coherent group with collective physical, ethnic, geographical or cultural characteristics and which distinguishes itself from other groups by common features or a common behaviour*.⁷⁰

⁶⁴ See e.g. ETC *Opinions* 2005-234, 2006-227, 2007-25.

⁶⁵ Explanatory Memorandum to the GETA, Tweede Kamer, 1990-1991, 22 014, nr. 3 (“Memorie van Toelichting bij de Algemene Wet Gelijke Behandeling”).

⁶⁶ International Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965. Many indications of what constitutes a ‘race’ can also be found in the discussions between Government and Parliament during the drafting of the Criminal Code provisions against racial discrimination in 1971. It appears that the same interpretation has been given to these criminal law provisions as in equal treatment legislation, since both are meant to implement the UN CERD. See J.L. van der Neut, *Discriminatie en Strafrecht*, Arnhem: Gouda Quint 1986.

⁶⁷ It is to be noted that the notion of “national origin” only embraces nationality in an *ethnic* sense. Nationality in a *civic* sense is covered by the non-discrimination ground “nationality”.

⁶⁸ Explanatory Memorandum to the GETA, Tweede Kamer, 1990-1991, 22 014, nr. 3, p. 13.

⁶⁹ Explanatory Memorandum to the EC Implementation Act, Tweede Kamer, 2002-2003, 28 770, nr. 3, p. 3. See also J.H. Gerards and A.W. Heringa, *Wetgeving Gelijke Behandeling*, Kluwer: Deventer 2003, p. 28-30.

⁷⁰ See, e.g., *Opinions* 1997-119 and 1998-57.

However, sometimes it is difficult to draw the line between race, ethnicity and religion. If all three grounds were protected in the same sense (as far as personal and material scope of the legislation is concerned and the exceptions to the non-discrimination ground are similar for each of these grounds), that would be no problem. However, this is not the case in the Dutch legal system (where race and ethnicity are covered more broadly than the ground religion).

Religion and Belief: In the Explanatory Memorandum to the EC Implementation Act, the Government has made it clear that it wishes to stick to the term “levensovertuiging” (philosophy of life), rather than introducing the term “geloof” (belief), the term used by Directive 2000/78. According to the Government there is no material difference between these two terms. In addition to “levensovertuiging”, the GETA also covers “godsdienst” (religion).⁷¹ It is established ETC case law that the right not to be discriminated against on the ground of religion incorporates both the right to have religious or to adhere to a certain philosophy of life and the right to behave in accordance with that religion or belief.⁷²

Disability and Chronic Disease: The concepts of ‘disability’ and ‘chronic disease’ have not been defined in the DDA. The Government has deemed it unnecessary and undesirable to do so.⁷³ Some guidelines as to the meaning of this word can be derived from the discussions that took place during the enactment procedure of the DDA. These are the long duration of the disablement / chronic disease, the fact that no cure is possible and the fact that it covers physical and mental or psychological impairments. (See also the answer to question a in this section.)

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

Sexual orientation:⁷⁴ The GETA employs the terminology ‘hetero- or homosexual orientation’, to refer to the terminology (in English) used by Directive 2000/78 *i.e.*, ‘sexual orientation’. The Dutch Government opted for the term “gerichtheid” (orientation) rather than “voorkeur” (preference) The term ‘orientation’ expresses better that not only individual emotions are covered, but also concrete expressions thereof. A major other reason for the Government’s preference for the term ‘hetero- or homosexual orientation’ above ‘preference’ or simply sexual orientation, has been that the latter term might possibly include ‘paedophile orientation’.

⁷¹ Since the government does not seem to see a difference in meaning, we have translated “levensovertuiging” in belief in this report. The ETC, in the English translation of the GETA on its web site, also translates “levensovertuiging” into belief.

⁷² See, *e.g.*, ETC Opinion 1997-46 and opinions 2004-112, 2004-148 and Explanatory Memorandum to the GETA, Tweede Kamer, 1990-1991, 22 014, nr. 3, p. 39-40. And, similarly, Memorandum in Reply to the GETA, 1990-1991, 22 014, nr. 5, p. 39-40 (“Memorie van Antwoord bij de Algemene Wet Gelijke Behandeling”).

⁷³ Explanatory Memorandum to the DDA, Tweede Kamer 2001-2002, 28 169, nr. 3, p. 9.

⁷⁴ The meaning of ‘sexual orientation’ in Dutch equal treatment law in the context of EC law has extensively been discussed by Kees Waaldijk in his sexual orientation report. See: Kees Waaldijk, ‘The Netherlands’, in: Kees Waaldijk & Matteo Bonini-Baraldi (eds.), *Combating sexual orientation discrimination in employment: legislation in fifteen EU member states*, Report of the European Group of Experts on Combating Sexual Orientation Discrimination, Leiden: Universiteit Leiden 2004, p. 341-375, online at www.emmeijers.nl/experts and at www.eu.int/comm/antidiscrimination.

The notion ‘hetero- or homosexual orientation’ does cover ‘bisexual orientation’ but it excludes ‘transsexuality’ and ‘transvestism’. Discrimination on the ground of ‘transsexuality’ or ‘transvestism’ is regarded a form of sex discrimination.⁷⁵

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

The ADA makes no restrictions whatsoever to the scope of this ground for discrimination. The law applies *symmetrically* and there is no cut-off point.

- b) *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 legal rules dealing with multiple discrimination. Neither are there any plans to construct such rules. The ETC deals with a lot of cases in which various non-discrimination grounds are at stake. Multiple discrimination (or intersectional discrimination) now is discussed more and more in the Dutch legal academic world and among equal treatment specialists.⁷⁶ The fact that not all grounds are covered in exactly the same way makes it crucial which ground is brought forward by the claimant. The problem is also discussed in the second 5-year (internal) evaluation of the ETC.⁷⁷

2.1.2 Assumed and associated discrimination

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

Prohibition of discrimination on the basis of an assumed characteristic only is explicitly prohibited in the DDA (Article 1 sub b). This is prohibited under the definition of a direct distinction: “*distinction between people on the ground of a real or **alleged** disability or chronic illness*”.

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?

Article 1 sub b of the GETA contains the legal definition of a ‘direct distinction’. The wordings of this Article do not explicitly require that the alleged distinction is *de facto* based on the race, religion/ belief, or sexual orientation *of the alleged victim*.⁷⁸ Therefore, in theory, it is possible that discrimination based on association is covered as well. The same line of reasoning can be followed as regards age.

⁷⁵ Court of Appeal Leeuwarden, 13 January 1995, Nederlandse Jurisprudentie 1995 nr. 243 and, e.g., ETC Opinions 1998-12 and 2000-73.

⁷⁶ See e.g. Rodrigues & Van Walsum, *Ras en Nationaliteit*; in J.M. Gerards e.a. (eds) *Oordelenbundel 2006*. Nijmegen, Wolf Legal Publishers 2007 (forthcoming).

⁷⁷ ETC 2005: *Het verschil gemaakt* (Making the difference), Utrecht 2005. At p. 39-40.

⁷⁸ See also Kees Waaldijk *supra* footnote 65.

In the Parliamentary discussions on the DDA it is stated that what matters is not (actually) having a disability but being discriminated against as compared with a person who does have or does not have a disability. Some commentators have explained this to mean that persons associated with disabled people are protected as well.⁷⁹ In *Opinion* 2006-227 has considered an alleged case of disability discrimination by association. Implicitly the ETC acknowledges in this case that discrimination by association is also prohibited under the DDA. However, in that case there was no proof that the applicant had suffered any detriment because of the fact that someone in her environment was disabled.

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

A. Preliminary observations

The use of the word distinction

In the Netherlands, the word ‘distinction’ is used in the GETA, instead of ‘discrimination’. (There is a prohibition of making direct and indirect distinctions on certain non-discrimination grounds.) Although the Government is taking the stance that there is no substantive difference between these words, this choice of terminology has raised a lot of critique by (among others) the Council of State [*Raad van State*], which is the most important advisor of the Government in the process of drafting new legislation. The Council has advised the Government to abandon the neutral word ‘distinction’ and has demonstrated itself to be an advocate of using a more normative concept of discrimination.⁸⁰ The main reason for this preference is to bring the terminology of Dutch equal treatment legislation in line with EC Equality Law.⁸¹ In 2005, the Government has commissioned an in-depth study on this matter. This report was finalised in September 2006.⁸² The conclusion of the author is that the way in which the word distinction is used in the Dutch equal treatment legislation is in line with the meaning of the word discrimination in EU non-discrimination law. However, for other reasons, it might be preferable to change the terminology of the GETA, DDA and ADA. One of these reasons being that the word distinction might suggest that each and every differentiation between categories of people amounts to discrimination. The use of the word distinction, for that reason, is almost always immediately accompanied with the adjective ‘unjustified’. The concept of an unjustified distinction is perfectly in line with what generally is conceived of as discrimination. The Dutch government is preparing a reaction to the expert’s report that will be send to Parliament together with a bill for a law that will integrate all of the existing equal treatment laws (GETA, DDA, ADA and sex-discrimination laws).

⁷⁹ However, in our view this passage refers to the fact that the DDA contains a symmetrical non-discrimination norm, both applying to disabled persons and non-disabled persons.

⁸⁰ Advisory Opinion of the Council of State and Complementary Report (“Advies van de Raad van State en nader Rapport”), Tweede Kamer, 2001-2002, 28 169, B, p. 5-6 and Implementation of the Directives on Equal Treatment, Advisory Opinion of the Council of State and Complementary Report (“Implementatie van de richtlijnen inzake gelijke behandeling, Advies Raad van State en nader rapport”), Tweede Kamer, 2001-2002, 28 187, A, p. 4-5.

⁸¹ The same advice had also been given by the Interdepartmental Commission European Law (ICER, “Interdepartementale Commissie Europees Recht”). See ICER, *Implementation of the Article 13 Directives, conclusions and recommendations* (“Implementatie Richtlijnen op grond van Artikel 13 EG Verdrag, conclusie en aanbevelingen”), ICER 2001/54, p. 2.

⁸² M.L.M. Hertogh & P.J.J. Zoontjens (eds): *Gelijke behandeling: principes en praktijken. Evaluatieonderzoek Algemene wet gelijke behandeling*. Wolf Legal Publishers Nijmegen 2006. The part of the report on the differences in meaning between the words ‘distinction’ and ‘discrimination’ (pp 3-113) was written by prof. Rikki Holtmaat.

Formal v. substantive equality

Dutch equal treatment legislation largely advocates the *formal*, rather than *substantive*, equality approach. All persons, and not only those belonging to the ‘disadvantaged groups’ in society, are protected by the law. Unjustified distinctions are assessed on an individual level, not at the level of the group to which one belongs.⁸³ Moreover, positive action measures are perceived as being an exception to the central norm, which dovetails with the formal equality approach. In a substantive approach, such measures would form part and parcel of the central norm.⁸⁴ It is however submitted, that in various regards the substantive approach makes its presence felt. A-symmetry can be found in the context of ‘pregnancy’ and in certain other contexts.⁸⁵ The substantive approach especially permeated in the duty for the employer (or other addressees of the law) under the DDA to provide a reasonable accommodation for disabled people. Through this concept it is recognised *to a certain extent* that the equality principle not only prohibits the unequal treatment of equals, but also entails a positive duty of unequal treatment of unequals [the so-called ‘*Thlimmenos doctrine*’].⁸⁶

B. Direct discrimination under the Age Discrimination Act⁸⁷*a) How is direct discrimination defined in national law?*

Article 1(1) of the ADA defines a ‘distinction’ as follows: “*In this Act, distinction shall mean distinction on the grounds of age or on the grounds of other characteristics or conduct that results in distinction on the grounds of age*”. Article 1(1) transposes Articles 2(1) and 2(2) under (a) and (b) of Directive 2000/78 (regarding the concepts of direct and indirect discrimination). Clearly, *direct* discrimination is implemented by the phrase ‘distinction on the grounds of age’, and *indirect* discrimination by the phrase ‘[distinction] on the grounds of other characteristics or conduct that results in distinction on the grounds of age’. In contrast to the conventional approach adopted in the Dutch equal treatment legislation, no distinction has been made in the ADA as between *direct* and *indirect* distinction. In this regard the legal approach for ‘age’ differs, compared with the other grounds for discrimination.⁸⁸ The Government has pointed out that Article 6 of Directive 2000/78 provides for a possibility of ‘objective justification’ for instances of direct age discrimination.⁸⁹ Given that both direct and indirect age discrimination may be ‘objectively justified’,⁹⁰ in the Government’s view, any distinction between these two concepts becomes redundant.⁹¹ In its commentary on the *bill* for the ADA the ETC has advised the Government to make the conventional schism between direct and indirect distinction in the law.

⁸³ Eerste Kamer, 1992-1993, 22 014, nr. 212b, p. 4 and nr. 212c, p. 8, cited by K. Wentholt, “Het verbod om onderscheid te maken”, in: I.P. Asscher-Vonk and C.A. Groenendijk, *Gelijke Behandeling: Regels en Realiteit*, Den Haag: SDU uitgevers 1999, p. 89-130, at p. 91.

⁸⁴ T. Loenen, *Het Gelijkheidsbeginsel*, Ars Aequi Cahiers, Rechtstheorie deel 2, Nijmegen: Ars Aequi Libri 1998, p. 66-67.

⁸⁵ ETC Opinions 1998/131, 2002/188 and 2003/47.

⁸⁶ European Court of Human Rights in *Thlimmenos v. Greece* of 6 April 2000, where the Court held that “the right not to be discriminated against (...) is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different”. Similarly: European Court of Justice, Case C-342/93 *Gillespie* [1996] ECR I-475.

⁸⁷ The template questions shall be dealt with firstly, in the context of the ADA (under A), secondly, in the context of the DDA (under B), and thirdly, in the context of the GETA (under C).

⁸⁸ Explanatory Memorandum to the ADA, Tweede Kamer 2001-2002, 28169, nr 3, p. 17.

⁸⁹ ‘Objective justification’ as well as the other exceptions to the prohibition of age discrimination shall be dealt with in paragraph 4.7. of this report in much detail. In this paragraph, the objective justification test is only mentioned, in order to explain the absence of a distinction in the Dutch ADA as between ‘direct distinction’ and ‘indirect distinction’.

⁹⁰ *Indirect* age discrimination can be ‘objectively justified’ on the basis of Article 2(2) b under i of Directive 2000/78. *Direct* age discrimination can be ‘objectively justified’ on the basis of Article 6 of Directive 2000/78.

⁹¹ Explanatory Memorandum to the ADA, Tweede Kamer 2001-2002, 28169, nr 3, p. 17.

In the ETC's view, the sort of distinction (direct or indirect) that is at stake in a given case may have an impact upon the modus of review and upon the burden of proof.⁹² However, the advice of the ETC has not altered the Government's approach.⁹³

Although there has been some debate on this issue in academic literature⁹⁴, it seems that in practice this does not cause any difficulties.

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

In the context of the ADA, both *direct* and *indirect* distinctions on the ground of *age* may be objectively justified. This follows from Article 7(1) sub c of the ADA. This Article intends to implement Article 6(1) of Directive 2000/78. Given that the ADA also contains justification grounds that have been explicitly inserted by the legislator, this Act follows a '*half-open* system' of justifications. This differs fundamentally from the '*closed* system' underpinning the GETA and the DDA.

- b) *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?*

The words "less favourable treatment" do not appear in the definition of a prohibited distinction on the ground of age. In the view of the ETC a 'less favourable treatment' implies the existence of a *detriment* ("nadeelsvereiste") and of a *test* whether cases can be *compared* ("vergelijkbaarheidstoets"). With regard to the detriment part, the case law by the ETC indicates that an applicant must, in order to successfully lodge a complaint, have suffered a sufficiently *measurable* ("meetbaar") and *real* ("werkelijk") detriment. Moreover, the alleged detriment must be *protected by law* ("door het recht beschermd belang").⁹⁵ The sub elements contained in the Directive's definition, *i.e.*, 'one person', 'treated', 'less favourably than another', 'is/has been/would be treated', 'comparable situation', may, if an extensive reading is adopted, all be embraced by the single word 'distinction' in the Dutch equal treatment legislation. However, this depends on its interpretation by the courts and the ETC. The Dutch definition leaves it in a state of uncertainty whether or not a past or a hypothetical comparator is permitted for. It is clear neither from the legal text nor from the Explanatory Memorandum, with whom an alleged victim of direct age distinction is to be compared.

⁹² Commentary by the Equal Treatment Commission on the Bill for the Act on Equal Treatment on the ground of age ("Commentaar van de Commissie Gelijke Behandeling inzake het voorstel voor een Wet gelijke behandeling op grond van leeftijd") 2001, at www.cgb.nl.

⁹³ See Follow-up Memorandum to the bill on Equal Treatment on the Ground of Age, ("Wet Gelijke Behandeling op grond van leeftijd, Nota naar aanleiding van het verslag"), Tweede Kamer, 2001-2002, 28170, nr. 5, p. 26-27.

⁹⁴ F.B.J. Grapperhaus, 'Het verbod op onderscheid op grond van leeftijd in arbeid en beroep', *Ondernemingsrecht* 2002-12, p. 356-363.

⁹⁵ See the detailed analysis by J.H. Gerards, 'Het toetsingsmodel van de CGB voor de beoordeling van indirect onderscheid', in: *Gelijke Behandeling: Oordelen en Commentaar*, Deventer: Kluwer 2003, p. 77-95, and J.H. Gerards and A.W. Heringa, *Wetgeving Gelijke Behandeling*, Deventer: Kluwer 2003, p. 43-44. A recent case in which this approach is demonstrated is Opinion 2006-227. The ETC leans on Article 12 sub 1 of the GETA, where it is defined who have access to the ETC: only those people who have suffered from a disadvantage on the ground of unlawful distinction and who have a real interest in upholding the law.

In order to avoid any misunderstandings, it would have been better had the Dutch government explicitly incorporated the sub elements of the Directive's definition of discrimination in the Dutch definition.⁹⁶ However, a broad interpretation of the Dutch definition could guarantee that all the elements enshrined in the Directive's definition of direct discrimination are duly covered.

The ADA's definition of *direct* distinction only mentions the word 'distinction', whereas its counterpart definitions in the GETA and the DDA use the wording 'distinction between persons' (Article 1 b of both last-mentioned Acts) It follows explicitly from the Explanatory Memorandum to the ADA, that *direct* age distinction might not only occur if a person's age forms the basis of a given decision but also where age categories are employed in a given decision-making process.⁹⁷ In fact, then a distinction is made between *groups* of persons, rather than between persons.

A last question is when a distinction is a distinction on the ground of age? It is established ETC case law that the relevant ground(s) (*e.g.*, age) for an alleged distinction need(s) not be the *sole reason* for that distinction. It suffices for establishing a distinction on the grounds of age, that age has been a material factor in making up for the alleged distinction. Or, in the wording of the Commission: "[it suffices that the ground at stake] has also played a role".⁹⁸

C. Direct discrimination under the Disability Discrimination Act

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

Article 1 of the DDA reads as follows: "*In this Act the following definitions shall apply:*

a. Distinction: direct and indirect distinction as well as the instruction to make distinction;
b. Direct distinction: distinction between persons on the ground of an actual or an assumed disability or chronic disease; (...)" What is said above with regard to direct age distinction is also applicable here.

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

Direct disability discrimination cannot be objectively justified given that the DDA rests upon a '*closed system*' of justification grounds. There are some explicitly mentioned grounds for justifications (also called "exceptions"). These will be discussed in part 4 of this report. The DDA follows a so-called closed system of justifications.

⁹⁶ Kees Waaldijk, *supra* footnote 65. Waaldijk has come to similar conclusions on the basis of his analysis of direct discrimination in the context of sexual orientation law.

⁹⁷ For example, the Governmental decree on 'dismissal' ("ontslagbesluit") employs age categories in a situation of collective dismissal for the purpose of determining the order of who should be dismissed first.

⁹⁸ See the recent ETC Opinion 2004-130 concerning an instance of age discrimination and in which the Commission refers to other opinions in which this same stance is reflected (*e.g.*, Opinions 1995-15; 1999-34; 2001-113, RN 2002, 1507, annotated by M.S.A. Vegter and 2004-26).

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

As for the element of ‘unfavourable treatment’ the same applies as in the case of age discrimination. It is unclear from the definition of direct distinction in the DDA, with whom a disabled person must be compared in case of an alleged instance of direct distinction. In the Parliamentary discussions on the DDA it is stated that what matters is not (actually) having a disability but being discriminated against *as compared with* a person who does have or does not have a disability. There is case law of the ETC in which this topic has been discussed.⁹⁹ It seems that this has to be decided on a case by case basis.

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

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

Article 1 of the GETA reads as follows: “*In this Act and in the provisions based upon this Act the following definitions shall apply:*

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

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

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

In principle, the GETA entails a ‘closed system’ of justification grounds. This means that it does not provide for a general and open ‘objective justification ground’ and that only the justifications (exceptions) that the law provides for can be brought forward (see Chapter 4 of this report). The ETC has accepted on one occasion that direct discrimination may be objectively justified when the prohibition of a certain distinction would be absolutely unacceptable or completely irrational (see ETC *Opinion* 2006-20).

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

What is said in the context of direct age distinction applies here as well.

⁹⁹ See ETC *Opinion* 2005-234.



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. For what discrimination grounds is situation testing permitted? If all grounds are not included, what are the reasons given for this limitation?*

Yes, according to case law of the courts, this is allowed both in case of civil procedures and in procedures before the ETC as well as in criminal procedures. However, in the latter case this needs to be prepared very carefully in order that this would not amount to “uitlokking” (provocation). As there is no legislation in this respect, no grounds are legally excluded from the possibility of situational testing. In practice, no examples are known of situation testing for other grounds than “race”.

- 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 some reluctance to use this method, especially in cases where criminal sanctions can be imposed in case – as a result of this testing – it is shown that some categories of people are systematically disadvantaged. The criterion applied by the courts seems to be that the NGO who initiated the testing or the individual who has been a victim of discrimination during the testing, did have no real interest that the accused would indeed commit the crime of discrimination. The author of this report is not aware that in this respect developments in other EU countries have influenced the Dutch policies.

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

The ETC has given several Opinions in the past about the criteria for situation testing.¹⁰⁰ Situation testing mostly occurs when two groups of youngsters want to be admitted to a discotheque.¹⁰¹ One of the requirements is that the two groups are comparable in appearance – especially in clothing and hairdos. (Except, of course, for their ethnic or racial ‘appearance’.) Another requirement is that both groups actually try to get in under the same circumstances (e.g., both groups don’t have a membership card) and at the same night.¹⁰² Also, there should not be a long time between the two test-situations.¹⁰³

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

¹⁰⁰ See, e.g., Opinions, 1997-62, 1997-64-66, 1997-133 and 1998-39.

¹⁰¹ A recent case where this was applied in the situation of job application is Opinion 2005-136 in which a young man with a foreign surname has applied for a job; a friend with a Dutch surname applied for the same job, sending more or less the same letter of application. The ETC accepted this as evidence of a case of discrimination.

¹⁰² See Opinion 1997-133.

¹⁰³ See Opinion 1998-39.

Test litigation in the Netherlands, text by Dick Houtzager:

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

Civil law:

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

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

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

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

The defence brought forward that the NGO and its members had provoked the disco into a criminal offence. The President dismissed this line of reasoning, stating that "it is by no means plausible that the plaintiffs had an interest that the respondent in the pursuance of his profession would refuse services to members of the NGO Open Doors, on the grounds of racial discrimination."

Criminal law:

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

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

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

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

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

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

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

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

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

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

Apart from the courts, the Equal Treatment Commission (CGB)¹⁰⁴ has confirmed in a number of cases that situational testing is admissible as a way to prove discrimination. See: ETC 10 June 1997, no. 1997-65.

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

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

¹⁰⁴ The CGB acts as the Dutch specialised body, in accordance with the Racial Equality Directive. It is a semi-court, which delivers opinions in discrimination cases. The Opinions are non-binding.

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

Situation testing is used by NGOs and sometimes as an individual initiative.¹⁰⁵ Mostly it concerns job applications and admittance to bars and restaurants. Recently there has been a lot of debate on the necessity of using this method. In November 2004, the LBR and the National Association of Anti-Discrimination Bureaus (LVADB) published a report on ‘discrimination in the bar and restaurant (“horeca”) sector’.¹⁰⁶ As a reaction to this, the Labour Party (then opposition) has published a “plan van aanpak” (plan how to tackle this problem) and asked the Government for measures. The Government replied with a letter to Parliament in which it gave an analysis of the problem and in which it discussed *inter alia* the possibilities to use situation testing.¹⁰⁷ The Government recommends that these tests are carefully prepared and are executed in close co-operation between the Anti-Discrimination Bureaus, the Public Prosecutors Office and the Police.

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

A. Indirect discrimination under the Age Discrimination Act¹⁰⁸

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

Article 1(1) of the ADA reads as follows: “*In this Act, distinction shall mean distinction on the grounds of age or on the grounds of other characteristics or conduct that result in distinction on the grounds of age*”. Indirect discrimination is covered in the phrase “*distinction (...) on the grounds of other characteristics or conduct that results in discrimination on the grounds of age*”.¹⁰⁹

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

1. The Directive’s definition unequivocally enshrines a *detriment* element as follows from the phrase ‘at a particular disadvantage’. This is not the case with the Dutch definition. However, the ETC’s case law indicates that a *measurable* and *real* detriment as regards an interest which is *protected by law* is called for in the establishment of a claim. Even if this did not follow from the case law, the Dutch definition would still be in conformity with that of the Directive, since the former would then adopt a wider standard than the latter. This is permitted since the Directive only lays down *minimum standards*. (See also Article 8(1) of Directive 2000/78).¹¹⁰

¹⁰⁵ See, e.g., ETC Opinion 2005-136.

¹⁰⁶ LBR and LVADB, ‘Geweigerd?! Discriminatoir deurbelied in de horeca’, Rotterdam, November 2004.

¹⁰⁷ See Tweede kamer 2004-2005, 29 800 VI, nr. 165.

¹⁰⁸ The template questions shall be dealt with firstly, in the context of the ADA (under A), secondly, in the context of the DDA (under B), and thirdly, in the context of the GETA (under C).

¹⁰⁹ In paragraph 2.2. section B, under question a, it has been explained that no clear-cut distinction has been made in the ADA as between *direct* and *indirect* distinction. For reasons extensively dealt with before, this is in my view in contravention of the requirements imposed by Directive 2000/78. Similarly, the absence of the conventional schism has been criticised by the ETC and in academic literature.

¹¹⁰ See also Consideration 28 of Directive 2000/78. And, as for Directive 2000/43, Article 6(1) and Consideration 25 of that Directive.

2. It might be argued that under the Directive's definition of indirect discrimination, an applicant can more easily establish a case of indirect discrimination than under the Dutch definition. Under the Directive's definition, an applicant needs to establish that the group to which the applicant belongs (*e.g.*, persons between over 60 years old) would be put *at a particular disadvantage*. Under Dutch law – at least in the way it is applied by the ETC – an applicant must in most instances establish a case of indirect distinction on the basis of numbers and statistics. Although facts of common knowledge can be forwarded to support statistical evidence, these are generally not accepted as an exclusive means of evidence. Only in very obvious cases does the ETC *not* require statistical numbers or 'common knowledge facts'.¹¹¹
 3. As has been observed by Waaldijk,¹¹² the Directive's wording 'apparently neutral provision, criterion or practice', is (problematically) reduced in the Dutch definition to 'other [i.e., other than age] characteristics or conduct that result in discrimination on the grounds of age'. The difference seems to be that whereas under the Dutch definition, a prohibited distinction can only be the result of a *characteristic* or *conduct* that already makes a certain distinction on the basis of a non-prohibited ground, under the Directive indirect discrimination might also arise out of a general (non distinguishing) provision or practice. This indeed appears to be falling short of the Directive's requirements. Moreover, it is not quite clear why the Dutch definition speaks of *characteristics* or *conduct*, whereas the Directive makes use of the wording 'apparently neutral provision, criterion or practice'. It is recommended that the Dutch legislator bring the definition of 'indirect age distinction' more in line with the definition of indirect discrimination in Directive 2000/78.
 4. In order to be complete, it is submitted that with regard to *indirect* distinction, the focus is upon the *effects* of the contested 'behaviour'. It is thus irrelevant whether or not the alleged perpetrator had the intent to discriminate.¹¹³ This is both recognised in EC and Dutch law.
- b) *What test must be satisfied to justify indirect discrimination? What are the legitimate aims that can be accepted by courts? Do the legitimate aims as accepted by courts have the same value as the general principle of equality, from a human rights perspective as prescribed in domestic law? What is considered as an appropriate and necessary measure to pursue a legitimate aim?*

Article 7(1) under (c) of the ADA provides that: "*The prohibition of distinction [i.e., direct and indirect distinction as well as the instruction to make distinction] does not apply if the distinction: (...) c.) is otherwise objectively justified by a legitimate aim and the means to reach that aim are appropriate and necessary*".

¹¹¹ J.H. Gerards, 'Het toetsingsmodel van de CGB voor de beoordeling van indirect onderscheid', in: *Gelijke Behandeling: Oordelen en Commentaar*, Deventer: Kluwer 2003, p. 77-95.

¹¹² Kees Waaldijk, *supra* footnote 65. Waaldijk has made his argument in the context of the concept of indirect sexual orientation discrimination. However, it can be extrapolated to the current discussion on indirect age distinction.

¹¹³ I.P. Asscher-Vonk, 'Towards one Concept of Objective Justification', in: T. Loenen and P.R. Rodrigues, *Non-Discrimination Law – Comparative Perspectives*, The Hague: Kluwer Law International 1999, p. 39-51, at p. 43.

This provision mirrors the core material elements of the objective justification test in indirect discrimination cases as laid down by Article 2(2)(b) under (i) of Directive 2000/78. This also reflects the stance taken by the European Court of Justice in indirect discrimination cases, which has been followed by the ETC and the Dutch courts. It is very hard to summarise the wide range of possible legitimate aims. However, it is clear that legitimate aims may not be in contradiction to the principle of equality. An example in this occasion may be Opinion 2007-173, where the ETC held that a language requirement in a fitness centre in order to prevent customers having (false) feelings of being intimidated when others talk a different language, is not legitimate, because this aim fosters and affirms prejudices which are in contradiction to the principle of non-discrimination. The appropriateness and necessity of a measure is a sophisticated testing system which is also too sophisticated to summarise in short.¹¹⁴ It is shaped by the mentioned case-law in para 0.3.

c) *Is this compatible with the Directives?*

Yes, it is.

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

No, this is neither specified in the law nor by the Explanatory Memorandum to the ADA. The nature of *indirect* discrimination makes, however, that the comparison is to be drawn at a *group* level, rather than at the individual level (as is the case with *direct* discrimination).

e) *Have differences in treatment based on language been perceived as indirect discrimination on the grounds of racial or ethnic origin?*

Yes, language requirements are perceived as indirect discrimination on the ground of race. A considerable amount of cases in this respect are brought to the ETC in the last years. The ETC employs a strict functionality test to language requirements. See for example ETC Opinion 1996-29, 2003-18, 2007-173, 2008-12 and 2008-78. Generally speaking, the language requirement imposed upon employees must be strictly functional to a job. This therefore results in different standards e.g. cleaners and librarians. Dismissal or not employing persons because they are speaking with an accent doesn't seem to be justified in any case.

B. Indirect discrimination under the Disability Discrimination Act

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

Article 1 under (c) of the DDA defines 'indirect distinction' as follows: "indirect distinction: distinction on the ground of other qualities or acts than those meant by indent b which results in direct distinction".

¹¹⁴ For a brief overview, cf. J.H. Gerards, 'Het toetsingsmodel van de CGB voor de beoordeling van indirect onderscheid', in: *Gelijke Behandeling: Oordelen en Commentaar*, Deventer: Kluwer 2003, p. 77-95. An extended overview of the Dutch justification tests in equal treatment cases can be found in: J.H. Gerards, *Judicial Review in Equal Treatment Cases*, Leiden/Boston: Martinus Nijhoff Publishers 2005.

Indent b defines ‘direct distinction’ as follows: “distinction between persons on the ground of an actual or an assumed disability or chronic disease”. The observations with respect to indirect age distinction also apply here.

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

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

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

b) *Is this compatible with the Directives?*

Yes, it is.

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

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

Article 1 under (c) of the GETA enshrines the following definition of ‘indirect distinction’: “*indirect distinction: distinction on the ground of other qualities or acts than those meant by indent b [i.e., inter alia, religion, belief, (..), race, (...) hetero-or homosexual orientation (...)] which result in direct distinction*”. All what is said above with regard to the grounds ‘age’ and ‘disability’, applies *eo ipso* at this junction.

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

Article 2(1) of the GETA, as amended by the EC Implementation Act, entails an objective justification test for indirect distinction cases, which mirrors the well-known elements of legitimate aim, appropriateness and necessity.¹¹⁵

c) *Is this compatible with the Directives?*

Yes, it is.

¹¹⁵ Before the amendments brought about by the *EC Implementation Act*, these 3 elements of the test had not been *explicitly* enshrined. The amendment was made by *Article I, under E subsection 1* of the *EC Implementation Act*, which amended Article 2(1) of the GETA 1994. However, the ETC anyhow adhered to these 3 elements in its case law, also before the implementation of the Article 13 Directives.

2.3.1 Statistical Evidence

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

Yes, this is permitted. There are no specific conditions for this kind of evidence to be admissible in court. The ETC uses the standard consideration that the contested rule, practice, *etc.* has to affect a category of persons that is protected by one of the non-discrimination grounds “in overwegende mate”, which can be translated as: the rule, *etc.* has to effect this category *predominantly*.¹¹⁶ In this context the ETC always stresses the point that this should not be calculated on the basis of absolute figures, but should be seen relatively (as a percentage).¹¹⁷ In a number of cases, the ETC has given the standard rule that people in the alleged indirectly discriminated group (*e.g.* women) should at least be disadvantaged by the apparently neutral rule or practice *1.5 times as often* as people from the comparator-group (*e.g.* men). However, since 2004 the ETC has not explicitly mentioned this standard or criterion anymore. Recently, it has started to use other methods of calculation, especially in cases where the (absolute) numbers are very small.¹¹⁸ This comes down to an extremely complicated way of calculating the chance that a particular group will have more negative effects than another group.¹¹⁹ Facts of common knowledge are taken into account, either in the absence of relevant statistics or, to support such statistics.¹²⁰ However, facts of common knowledge are not accepted as an *exclusive* means of evidence. Only in plainly clear cases does the ETC *not* require statistical numbers or facts of common knowledge.

- 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?*

Yes, this kind of evidence is used quite often by the ETC (see *e.g.* the above-mentioned cases), but it is not known to what extent this is done by the courts since judgements on equal treatment cases that are issued by (district) courts are not registered (and therefore cannot be researched) separately.

No, there seems to be no reluctance to use statistical data. The author of this report is not aware of evolutions in other EU countries in this respect and can therefore not answer the last part of this question.

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

There are many indirect discrimination cases in which data collection plays a role, especially in indirect discrimination cases that are dealt with by the ETC (which has been discussed above).

¹¹⁶ See, *e.g.*, Opinion 2003-91.

¹¹⁷ See also J.H. Gerards and A.W. Heringa, *Wetgeving Gelijke Behandeling*, Deventer: Kluwer 2003, p. 45-49, especially at p. 46-47 with references to the case law.

¹¹⁸ See, *e.g.*, Opinion 2003-91 and 2003-92.

¹¹⁹ See Kees Waaldijk, *supra* footnote 44..

¹²⁰ J.H. Gerards and A.W. Heringa, *Wetgeving Gelijke Behandeling*, Deventer: Kluwer 2003, p. 45-49.

- d) *Are there national rules which permit data collection? Please answer in respect of all 5 grounds. The aim of this question is whether or not data collection is allowed for the purposes of litigation and positive action measures. Specifically, are statistical data used to design positive action measures? How are these data collected/ generated?*

Statistical data can certainly be used to design and defend positive action measures. Most of the data is generated by the Dutch Central Cultural Planning Bureau ('SCP' a Governmental research institute that collects data in many fields) and the Central Bureau of Statistics ('CBS', a Governmental institute for many kinds of statistical data).¹²¹ It must be noticed that the collection of data can be restricted by privacy and non-discrimination law (e.g. the case of the *VerwijsIndex Antillianen*, see above under para 0.3 Case-law, ground 'Race').

For this purpose for some of the grounds there is the Personal Data Protection Act ("Wet Bescherming Persoonsgegevens"), hereinafter referred to as PDPA. According to Article 16 of the PDPA, information about someone's race, political convictions, religion or belief, health, sexual life and membership of a trade union are "special data" or "classified data". Also, information about criminal sentences is classified. This means that, for collecting and using these data, there are strict conditions and rules. These data can only be compiled and used by institutions that have been granted this authority by law or with the explicit permission of the persons whom it concerns. In Article 18 of the PDPA, an exception to this rule is made for the case of positive action. Under the strict condition of serving this particular goal and of proportionality and subsidiarity, the collection and use of data about people of non-Dutch origin is permissible. The supervision of this legislation is in the hands of the Dutch Data Protection Authority. Information about their activities can be found at their web site: <http://www.dutchdpa.nl>.

Registration of disability is not classified. Employers are allowed/not prohibited to register who is disabled. At the request of the Ministry of Health (VWS), the Social and Cultural Planning Bureau publishes a so-called "Gehandicaptenmonitor".¹²² In order to assemble this overview, employers are asked to voluntarily provide information about the number of disabled people in their workforce to the SCP. Besides, the Ministry of social Affairs and Employment is responsible for the implementation of the Law for the Reintegration of Disabled People ("Wet REA"). In this framework, the Ministry assembles information about employers that apply for subsidies that help them to employ people with a handicap.

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

Race: In the Netherlands, both Government and academics tend (but are not obliged) to use the definition of "allochtoon" which is used by the Central Bureau for Statistics (CBS). ("Allochtoon" is a word much used in the Netherlands, (as opposed to "autochtoon" – indigenous), roughly meaning: someone who is not born in the Netherlands or who does not have parents who are of Dutch origin.) This definition can be found on their web site: <http://www.cbs.nl/nl-NL/default.htm>. In this respect, notice again the current discussion about the pending case of the *VerwijsIndex Antillianen*, as stated above.

¹²¹ www.cbs.nl and www.scp.nl

¹²² Officially called *Rapportage Gehandicapten*, to be found at: <http://www.scp.nl/publicaties/boeken/9037701043.shtml>.

The CBS uses the word “herkomstgroepering” (grouping according to country of origin). This means: a distinguishing mark or feature that indicates with which country a person has a factual tie, considering the country of birth of the parents of his/her own country of birth. As far as the “herkomstgroepering” is concerned, the CBS makes the primary distinction between “autochtoon” and “allochtoon”. Next, it makes a further distinction within the category “allochtoon” by numbering the generations: a *first generation* “allochtoon” is categorised according to the country where he/she is born, a *second generation* “allochtoon” is categorised according to the country where his/her mother was born, unless this is also the Netherlands, in which case he/she will be classified as a second generation “allochtoon” from the country where his/her father was born. In this category of second generation “allochtoon” people, a distinction is made between persons with one non-Dutch parent and persons whose parents both are of non-Dutch origin. In the third place, a distinction is made between “allochtoon” people who are from *western* and *non-western* origin, because there are big differences in the social-economic and cultural situation in the countries of origin. In the group of non-western origin, the four main categories are: Turkey, Morocco, Surinam and The Netherlands Antilles. Sometimes a more refined classification is used, according to the purpose of the survey or monitoring activity.

A ‘trend’ that becomes more and more popular, also with the government, is the so-called ‘etno selection’ for marketing and policy-development purposes. By ‘etno selection’ is meant: the construction and analysis of huge databases in which the behaviour of people¹²³ is matched with (*inter alia*) their ethnic or social background. The Dutch government itself uses this instrument quite often, *e.g.* in the framework of its (migrant) integration policies. This is described and criticized by Corien Prins.¹²⁴ One of the conclusions of this author is that this mechanism is more and more used for exclusionary purposes instead of for positive action purposes. Also, there are practices in the police force to register and monitor crimes and crime-suspects according to the ethnic origin of the persons involved. This is especially so, when young men from the Netherlands Antilles are involved. This practice is highly disputed among (criminal) lawyers.

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

Disability: Classification of disabled persons is a sensitive issue in the Netherlands. In the DDA, the legislator has chosen not to define the word ‘disability’. (See above, where the definitions are discussed.) The SCP, in constituting the “gehandicaptenmonitor”, uses the International Classification of Functioning, disability and health (WHO, 2001).

¹²³ *E.g.*, buyers preferences, housing preferences, educational preferences, *etc.*

¹²⁴ Corien Prins, ‘Etno-selectie’, in : *Nederlands Juristenblad* [Dutch Journal for Lawyers], 2005-8, p. 411.

2.4 Harassment (Article 2(3))

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

Pre-implementation of Directives 2000/43 and 2000/78, ‘harassment’ was not defined as a concept in Dutch equal treatment legislation. However, the ETC’s case law provided that the right to equality and non discrimination in regard to ‘employment conditions’, including ‘working conditions’, encapsulates a person’s right to be free from ‘ground-related’ harassment in the workplace.¹²⁵ It also follows from the ETC’s case law that the employer’s duty of care brings with it that he/she must have in place an *adequate complaints mechanism*.¹²⁶ This is also the case after implementation of the new ‘harassment provision’ has taken place.¹²⁷

Post-implementation of the Directives, Article 1 under (a) of the GETA reads as follows:

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

Similar provisions are laid down in Article 1 (a) of the DDA and in Article 2 of the ADA. There are two differences, as compared to the Directive’s definition:

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

The first is not a problem, since this offers more protection to potential victims of discrimination. The second point is more problematic, since it may be harder for complainants to prove both elements of the definition.¹²⁸

¹²⁵ See *inter alia* the following Opinions of the ETC: 96/88, 97/82, 97/91, 2001/131, 2003/138.

¹²⁶ I.P. Asscher Vonk & W.C. Monster, *Gelijke Behandeling bij de Arbeid*, Kluwer Deventer 2002, p. 165. Also, opinion 99/48 25 May 1999 AB 1999, nr. 353.

¹²⁷ See, e.g., Opinion 2005-125, discussed by P. R. Rodrigues, ‘Ras en nationaliteit’, in: S.D. Burri (ed.), *Oordelenbundel 2005*, Nijmegen: Wolf Legal Publishers 2006.

¹²⁸ See R. Holtmaat, ‘(Seksuele) Intimidatie en (on)gelijke behandeling: nieuwe normen, nieuwe praktijken? Enkele overwegingen bij de nieuwe EG-Richtlijnen op dit terrein en de wijze waarop deze in Nederland worden geïmplementeerd’, in: D. de Wolff, *Gelijke behandeling. Oordelen en Commentaar 2003*, Deventer: Kluwer 2004, p. 89-106. See also: D. Houtzager and N. Bochhah, ‘Onderscheid op grond van ras bij de arbeid: nieuwe ontwikkelingen’, *Sociaal Recht* 2004, p. 272-278, at p. 274.

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

Yes, it is. See Article 1 sub (a), cited above. The provision that harassment can never be justified is laid down in Article 1a (3) of the GETA and the DDA and Article 7(2) of the ADA.

From the case law of the ETC in 2005, it becomes clear that the ETC differentiates between ‘discriminatory treatment’ and ‘harassment’.¹²⁹ Discriminatory treatment, in the sense of offensive attitudes, speech or other ‘maltreatment’, can be examined besides harassment. According to Rodrigues, this indicates that the ETC sees harassment as an aggravated form of discriminatory treatment, for which no justifications can be brought forward. For instance: one case of discriminatory insult is not enough to constitute a case of harassment, but nevertheless it can be qualified as (forbidden) direct discriminatory treatment.¹³⁰

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

The 1994 Act on Working Conditions enshrines a prohibition of *sexual harassment* and of *aggression and violence* at the workplace.¹³¹ The former prohibition is of help not only for women (and men), but also for *homosexual* women and men. The latter prohibition offers protection to other groups, including racial and religious minorities, disabled people and elderly/young people. The latter prohibition is formulated broadly: it does offer protection against *ground-related* harassment and against mobbing more generally. Harassment may also be litigated under the provisions of employment law and tort law. If the harassment takes the form of physical abuse it can be prosecuted as a criminal offence (e.g. maltreatment, assault or rape). If the abuse takes the form of verbal offences, criminal procedures are also a possibility.¹³²

¹²⁹ These are not synonyms, unlike the Government seems to suggest in the Explanatory Memorandum to the EC Implementation Act. See P.R. Rodrigues, ‘Ras en nationaliteit’, in: S.D. Burri (ed.), *Oordelenbundel 2005*, Nijmegen: Wolf Legal Publishers 2006.

¹³⁰ Rodrigues refers to ETC Opinions 2005-30, 2005-75 and 2005-167.

¹³¹ Act on Working Conditions (“Arbeidsomstandighedenwet” 1998, which amended the 1994 version in certain regards), Staatsblad 1999, 184. It has also been defined in the Schools Inspectorate Act (“Wet op het Onderwijstoezicht”), Staatsblad 2002, nr. 387.

¹³² A complete overview of the legal norms has been given in: R. Holtmaat, *Seksuele intimidatie op de werkplek; een juridische gids*, Nijmegen; Ars-Aequi Libri 1999.

2.5 Instructions to discriminate (Article 2(4))

Does national law prohibit instructions to discriminate?

Prior to implementation of the Directives a prohibition of the instruction to make a distinction was indeed implied within the GETA.¹³³ However, in order to avoid any misunderstanding, Article 1 under (a) of the Act was complemented with the phrase ‘as well as the instruction to make a distinction’. The counterpart provisions in the ADA and DDA are Article 1(2) and Article 1 under (a) respectively. The prohibition to make an instruction to discriminate is applicable for the whole scope of the equal treatment legislation (as far as the GETA is concerned, this covers more than employment and employment related education and training, but also goods and services and (with respect to race) social security and social benefits). It has been indicated by the Government that the notion of *instruction* (“opdracht”), refers to “opdracht” in the meaning of Article 7:400 of the Dutch Civil Code. This Article regulates the law on *contract for the provisions of services*.¹³⁴ In the Explanatory Memorandum to the ADA, the Government mentions the example of an employer who instructs a recruitment agency to select for a given job only persons under the age of 30 (in absence of a sound justification for this).

According to the Explanatory Memorandum, in a scenario such as this one, both the person who *gives* the contested instruction and the person who *carries out* the instruction, act in contravention of the central norm. If the ‘recipient’ of the instruction refuses to abide by it and as a consequence thereof, he/she suffers damage, he/she can hold the person who *gave* the instruction liable for that.

The ETC has suggested that the prohibition of instruction to make a distinction should also include a prohibition of the *passive toleration* of an existing discriminatory situation or act.¹³⁵ This advice has not been followed by the Government. The latter defended its own stance by saying that an instruction to make a distinction implies *active* rather than *passive* behaviour. This mirrors a narrow interpretation of the verb *to instruct*. The Government has nevertheless indicated that the toleration of existing discriminatory conduct or acts might nevertheless be embraced by the prohibition of making (direct or indirect) *distinction*.¹³⁶

According to the Government’s explanation on the issue of instruction to make distinction, an instruction which has been given *within the employment relationship* (e.g., the scenario where a director instructs a member of the personnel department to merely recruit youngsters) is not covered by the prohibition of instruction to make a distinction. In the Government’s view, such a scenario is embraced by the *exercise of authority* by the employer over the employee within the employment relationship (“gezagsoefening in het kader van de arbeidsovereenkomst”). Any *distinction* that might occur within this *exercise of authority* can only be attributed to the employer, to the exclusion of the employee.¹³⁷ This reasoning might fall short of what the Directives had in mind with the prohibition of instruction to make distinction. In the present author’s view, the Dutch Government at this point interprets the prohibition of instruction to make distinction unduly narrow.

¹³³ Explanatory Memorandum to the EC Implementation Act, Tweede Kamer, 2002-2003, 28 770, nr. 3, p. 7.

¹³⁴ Explanatory Memorandum to the ADA, Tweede Kamer 2001-2002, 28169, nr 3, p.18.

¹³⁵ ETC Advice 2001-03, p. 6 and 2001-04, p. 4.

¹³⁶ Explanatory Memorandum to the ADA, Tweede Kamer 2001-2002, 28169, nr 3, p.18.

¹³⁷ *Ibid.*, p. 19.

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 people with disabilities should not be highlighted? In particular, specify when the duty applies, the criteria for assessing the extent of the duty and any definition of 'reasonable'. e.g. ➔ does national law define what would be a "disproportionate burden" for employers or is the availability of financial assistance from the State taken into account in assessing whether there is a disproportionate burden?*

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

Instead of the term *reasonable*, which is the term used in Article 5 of the Directive, Article 2 of the DDA employs the term *effective*. In the Government's view, the latter term reflects better than the term *reasonable*, that an accommodation must have the pursued *effect*.¹³⁸

The test whether an employer is under a duty to provide an accommodation to a disabled person who so requires, runs as follows:¹³⁹

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

This means two separate questions need to be answered

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

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

¹³⁸ Explanatory Memorandum to the DDA, Tweede Kamer 2001-2002, 28 169, nr. 3, p. 25.

¹³⁹ Concluded from the Explanatory Memorandum to the DDA, Tweede Kamer 2001-2002, 28 169, nr. 3.

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

This part concerns the question whether supplying the accommodation puts a disproportionate burden on the employer. National law does not define what this would be. However, there are some indicators. According to the Explanatory Memorandum to the DDA, this ‘balancing exercise’ between the interests of the disabled person v. those of the employer must be carried out in the light of ‘open norms’ of civil law (*i.e.*, the duty of the good employer and the notion of ‘reasonableness’).¹⁴⁰ If financial compensation exists for the realisation of the effective accommodation, it cannot be regarded as ‘disproportionate’.¹⁴¹ The Government also underscored Consideration 21 of the Preamble to Directive 2000/78¹⁴² and added as an additional criteria that the duration of the employment contract may be a weighty factor.¹⁴³

A final note concerns the explicit statement by the ETC¹⁴⁴ that the employer’s defence that he does not make a distinction in any way between disabled and non-disabled people does not mean that he is in compliance with the ADA. Equal treatment in unequal (labour) circumstances leads to inequality, according to the ETC.

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

A failure to meet this duty in principle counts as a form of *distinction*, which is prohibited.¹⁴⁵ However, the text of Article 2, in conjunction with that of Article 1 (definitions of *direct* and *indirect* distinction) and 3 (regarding the exceptions to the central norm), does not shed light upon the question whether an omission to bring about an *effective* accommodation, constitutes *direct*, *indirect* or a *third* way of distinction.¹⁴⁶ With regard to the duty to provide an effective accommodation, Article 2 of the DDA provides that if this constitutes a disproportionate burden on the employer this duty shall not exist (*cf.* Article 5 of Directive 2000/78).

Article 3(1)¹⁴⁷ enshrines three *exceptions* to the central norm (*i.e.*, the prohibition to make distinction which according to Article 2 also includes the duty to make effective accommodations). In brief, the exceptions are: *public security and health* (indent a), *supportive social policies* (indent b) and *positive action measures* (indent c).

¹⁴⁰ Explanatory Memorandum to the DDA, Tweede Kamer 2001-2002, 28 169, nr. 3, p. 25-30.

¹⁴¹ This follows from the Explanatory Memorandum to the DDA, Tweede Kamer 2001-2002, 28 169, nr. 3, p. 28. However, this is not explicitly mentioned in Article 2.

¹⁴² On the factors to be considered when determining whether making a reasonable accommodation would amount to a disproportionate burden.

¹⁴³ It is submitted that this might, however, trigger indirect *sex* discrimination, since women are more likely than men to be employed on the basis of a fixed term contract.

¹⁴⁴ ETC Opinion 2005-160.

¹⁴⁵ See ETC Opinion 2004-140, where it held: “*It concerns a sui generis form of (making a) distinction, which does not yet occur in the other equal treatment laws*”. In this Opinion, the ETC seems to suggest that the duty to provide a reasonable accommodation should also be included in the sex equality laws, the GETA and the ADA.

¹⁴⁶ See Lisa Waddington and Aart Hendriks, ‘The expanding concept of Employment Discrimination in Europe: From Direct and Indirect Discrimination to Reasonable Accommodation Discrimination’, In: *International Journal of Comparative Labour Law and Industrial Relations*, Winter 2002, p. 403-427.

¹⁴⁷ Article 3(2), moreover, stipulates that indirect differentiation can be objectively justified.

Thus, a textual reading of Article 3(1) suggests that these three exceptions could also ‘lift’ the effective accommodation duty, as this falls within the central norm. However, logically and in accordance with what the Government has observed in its Explanatory Memorandum, *only* the exception in indent a (*public security and health*) can have the effect of ‘lifting’ the duty enshrined in Article 2.¹⁴⁸ Consequently, the other two exceptions in indents b and c cannot be invoked by employers with respect to their effective accommodation duty. It is indeed difficult to perceive in what ways the exceptions in indents b and c could be applicable in a case concerning the failure of bringing about an effective accommodation.

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

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

No, it doesn't.¹⁴⁹

d) *Does national law require services available to the public, 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, it does. There exists no general legal obligation to grant accessibility to disabled persons in a general and anticipatory manner. As far as public spaces and buildings (in which public offices and social services are located), education, health care and infrastructures are concerned there are some specific regulations.

The Ministry for Housing, Environmental Planning and Milieu has a so-called “Bouwbesluit” [a decree on how to build houses and offices, *etc.*] This decree contains some requirements about accessibility of public buildings. Also the Ministry for Education has detailed instructions as to how to build schools. *Idem* the Ministry for health, concerning hospitals and medical service centers. The Ministry for Transport has regulations as to how buses and trains should be constructed. For some time it was expected that transport by busses and trains would be fully accessible in 2010 and 2030 respectively. In 2006 the government has sent letters to Parliament from which it becomes clear that these targets will not be met.¹⁵⁰

The present author is not familiar with the details of this type of specialized legislation (which is very technical; *e.g.* specifying the height of stoops and the breadth of doorways).

A failure to comply with such legislation can not be relied upon in a discrimination case, based on the DDA, except for the case that a reasonable accommodation has been asked for by a disabled person and the employer was already – under this other (than the DDA) legislation – obliged to provide this particular facility (*e.g.* a door that is wide enough to let wheelchairs pass through). When such other legislation exists, the employer can never state that the accommodation is not “reasonable”.

¹⁴⁸ Explanatory Memorandum to the DDA Tweede Kamer 2001-2002, 28 169, nr. 3, p. 33.

¹⁴⁹ This means that the so-called Thlimmenos doctrine of the ECHR (*Thlimmenos v. Greece* of 6 April 2000) is only applicable with respect to disablement. Perhaps the ETC or the Courts will extend this in the future, but we have no case law in this field until now.

¹⁵⁰ See Letter of the Minister of Transport, DGP/MDV/ U.05.02732, 17 May 2006 with appendixes, And Letter containing the “stappenplan NS en Prorail” DGP/SPO/U.0.602435, September 2006. The content of these documents is described in the Memorandum of Explanation to the bill about extending the scope of the DDA to transport: Tweede Kamer 2006-2007, 30878, nrs 1-3.

In this framework it is noteworthy that the Government has not yet decided when the Articles 7 and 8 of the DDA will enter into force.¹⁵¹ A letter (to Parliament) about this topic was expected in the spring of 2006, but has not yet been sent. In the mean time some members of Parliament have taken the initiative to propose two different bills in which the scope of the DDA is extended. This concerns the area of primary and secondary education and the area of public transport.¹⁵² Under the pressure of Parliament the Dutch government came with its own proposal to extend the scope to the area of primary and secondary education and to housing.¹⁵³

e) *Please explain briefly the existing national legislation concerning people with disabilities (beyond the simple prohibition of discrimination). Does national law provide for special rights for people with disabilities?*

Apart from the DDA (which only covers employment and vocational education) the Netherlands have developed a wide range of social rights and facilities for people with disabilities in the past century. Some of them consist in general (monetary) allowances for people with disabilities, while many others are granting rights to financial or material support for people with disabilities (such as wheel chairs and special adaptations at home). Also a great amount of facilities for people with disabilities is rendered by local governments. (See above (par. 0.3) for case law concerning transport.)

The main laws in this respect are:

- Wet Maatschappelijke Ondersteuning: Social Support Act

This act addresses a broad range of financial facilities, and the availability of care facilities and practical aids for – among others – people with disabilities. Many responsibilities are delegated to local governments by this act.

- Wet Arbeidsongeschiktheidsvoorziening Jonggehandicapten:

Law Disablement Allowance for Young Disabled people This act provides for an allowance for young people with disabilities, who were never able to participate in paid labour. Such an allowance is needful, as a general allowance for disability under the WAO (*Wet op de ArbeidsOngeschiktheid*, Work Disablement Act) can only be claimed with a certain employment history.

- Wet Sociale Werkvoorziening: Sheltered Employment Act.

This act provides for sheltered (or semi-sheltered) workplaces for workers with disabilities. See below under 2.7 a) for a more detailed description.

- Algemene Wet Bijzondere Ziektekosten: General Law for Special Medical Care

Under this act, expenses for special medical care can be declared. This facility could be used pre-eminently for special care that is needed due to disabilities.

¹⁵¹ Article 7 defines the term ‘public transport’. In Article 8, unequal treatment in public transport is prohibited.

¹⁵² See Tweede Kamer 2005-2006, 30 570, nrs 1-3 and Tweede Kamer 2006-2007, 30878, nrs 1-3.

¹⁵³ See Tweede Kamer 2007-2008, 30 859: Voorstel tot wijziging van de Wet gelijke behandeling op grond van handicap of chronische ziekte (Wgbh/cz) in verband met de uitbreiding met primair en voortgezet onderwijs en met wonen.



2.7 Sheltered or semi-sheltered accommodation/employment

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

The aim of sheltered employment is to help disabled people find a suitable full-time job that enables them to work independently as far as possible. These are generally people who are unable to work in the regular labour market because of mental or physical disabilities. Around 90.000 full time places are available for people with an occupational disability under the terms of the Sheltered Employment Act (“Wet Sociale Werkvoorziening”, or WSW). Most of the people in this group work in a sheltered work company. The Government’s aim is to get more people in the WSW target group into jobs with regular employers (supported employment). The first phase of modernisation of the WSW started in 2004. One of the first steps is, that as of 2005 the Centre for Work and Income (CWI) will assess who is eligible for a job in a sheltered workplace. Local authorities are responsible for the creation of the workplaces. The yearly budget for this is 2.2 million Euro. From 1 January 2007 onwards the governments intends to spend another 18 million Euro extra on a yearly basis for the implementation of this law. The second phase is aimed at increasing the number of disabled people who find work outside of sheltered workplaces. This means finding supervised jobs with regular employers or placement in service of a sheltered work company.

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

Sheltered employment is being seen as employment. This means that the equal treatment laws (including the DDA) apply fully to this type of employment. The wages are according to the norms set in Collective Agreements for the relevant sectors. Nevertheless, this work can not be equated fully to work on the regular labour market. It falls under the exception that is made in Article 3 para 1, sub b of the DDA. This provision enshrines for a possibility for *supportive social policies* for disabled people. (Compare art. 7(2) of the Framework Directive.)

3. PERSONAL AND MATERIAL SCOPE

3.1 Personal scope

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

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

The principle in Dutch law is that “all persons in the Netherlands shall be treated equally in equal circumstances”, as provided for in Article 1 of the Constitution. Thus, the protective scope provided by criminal law, civil law, equal treatment legislation and administrative law covers *any person on the territory of the Netherlands*.¹⁵⁴

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

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

For purposes of protection against discrimination, there is some discussion whether only natural persons are protected or that legal persons (e.g. an association, an institution or an enterprise) is also protected. Since the laws mainly see at labour relations, in fact it is mostly private persons that enjoy the protection of these laws. As far as liability for discrimination is concerned, no such distinction is made. This means that both natural and legal persons can be held accountable.

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?

Not a single Article in the ADA, the DDA and the GETA specifies to whom the prohibition of making distinction, including harassment, is addressed. Although all of the three Acts specify the areas of *social and economic life* to which each Act applies, the Acts remain silent on the matter of ‘personal applicability’.¹⁵⁵

¹⁵⁴ In Article 2(5) of the GETA in case of nationality discrimination (also covered by the GETA), the following exception exists: “The prohibition on discrimination on the grounds of nationality contained in this Act shall not apply:

(a) if the discrimination is based on generally binding regulations or on written or unwritten rules of international law and
(b) in cases where nationality is a determining factor.” This clause is generally understood in such a way that especially immigration law and nationality law is exempted from the equal treatment legislation.

¹⁵⁵ E. Cremers-Hartman, ‘Werkingsfeer AWGB (Art. 3, 4 sub c, 5 lid 1, 6, 7 lid 1 AWGB)’, in: I.P. Asscher Vonk and C.A. Groenendijk, *Gelijke Behandeling: Regels en Realiteit*, The Hague: SDU Uitgevers 1999, p. 29-88, at p. 33.

With regard to the employment area, *i.e.*, the only area that is commonly covered by the three Acts, the central norm is addressed not only to *private* and *public* employers, but also to organisations of employers, organisations of workers, employment offices, (public) job agencies, pension funds, some external advisors, ('liberal') professionals, bodies of liberal professionals, training institutions, schools, universities, *etc.*¹⁵⁶ However, it is not clear from this whether colleagues or third persons can be held liable under the Acts.

The matter was explicitly raised in Parliamentary discussions on the implementation of the Directives. It follows clearly from these discussions that the Government has not intended to render the non-discrimination Acts applicable in relationships between colleagues, let alone in relationships with third persons.¹⁵⁷ The Government defends this by noting that between colleagues *inter se*, there is no contract or relationship of authority. However, it was indicated by the Government that those employees who in name of their employer exercise authority over their co-employees are addressees of the central norm. *De facto*, such an employee functions in the capacity of employer.¹⁵⁸ The purported inapplicability of the Dutch Acts in relationships between colleagues *inter se*, appears particularly problematic in the context of work-related *harassment*. In its current format and in the light of the Parliamentary comments, the law prevents an alleged victim of harassment from holding a colleague or a third person directly liable for the contested acts. The only way to do this would be by seeking recourse to the general provisions of *tort law* enshrined in the Dutch Civil Code. The employer's vicarious liability for harassing acts by a third person was, for example, at stake in ETC Opinion 1997-82. The case concerned racial harassment of a nurse by a patient. The ETC repeated its stance that the employer is under a legal duty to prevent occurring acts of harassment by persons under his supervision. It took the view that, although the alleged harassing acts were not done by a colleague, but by a third person, this did not circumscribe whatsoever the employer's duty of care.¹⁵⁹ However, and this also follows from the ETC's case law pre-implementation of the Directives, there rests a *general duty of care* upon the employer to maintain a discrimination-free and safe workplace. An employee's right not to be discriminated against in his or her employment and working conditions, embraces the right to be free from discrimination and harassment at the workplace.¹⁶⁰

Beyond the scope of Dutch equal treatment legislation, the following is essential to take account of. The employer may be held vicariously liable for discriminatory or harassing acts done by colleague workers under employment law. The relevant Articles upon which a claim can be based are 1. the good employer's practice (Article 7:611 of the Civil Code); 2. the employer's general duty of care (*i.e.*, the employer's liability for damages suffered by an employee in the performance of job-related duties, laid down in Article 7:658 of the Civil Code). Both of these Articles are directed at the employer's liability for acts done by the employer himself, or by others over whom the employer has control.

¹⁵⁶ *Ibid.*

¹⁵⁷ Explanatory Memorandum to the ADA, Tweede Kamer 2001-2002, 28169, nr 3, p. 19 (where this was said in the context of harassment). See also Parliamentary Papers Second Chamber of Parliament, 2002-2003, 28770, nr. 5, p. 28.

¹⁵⁸ Explanatory Memorandum to the ADA, Tweede Kamer 2001-2002, 28169, nr 3, p. 19.

¹⁵⁹ Although and as will be explained under 'enforcement issues', the Commission's opinions are not binding, an opinion by the Commission that has been ruled in the victim's favour can still be valuable in terms of recognition of the complaint and of emotional satisfaction. See: A. Geers, 'Intimidatie op de werkplek', in: G. van Manen (ed.), *De rol van het aansprakelijkheidsrecht bij de verwerking van persoonlijk leed*, Den Haag: Boom 2003, p. 183-198, at p. 194.

¹⁶⁰ See, *e.g.*, ETC Opinion 2004-08 (race and religion). See also I.P. Asscher-Vonk and W.C. Monster, *Gelijke Behandeling bij de Arbeid*, Deventer: Kluwer 2002, p. 164.

In the past it was much disputed in legal circles whether Article 7:658 of the Civil Code could form the legal basis for claims that regard mere psychological damage, rather than physical damage.¹⁶¹ It is a fact that damage resulting from discriminatory treatment and harassment is most often of a psychological kind. In 2005 the Dutch Supreme Court did accept that Article 7:658 Civil Code can include psychological damage.¹⁶² Lower courts have accepted that, in cases of *sexual harassment*, this Article can form the basis for financial compensation of psychological damage resulting from such behaviour.¹⁶³

In the light of the presumed broad scope of the personal applicability of Directives 2000/43 and 2000/78, it appears that the Dutch Government's view that the Dutch non discrimination Acts are directed to employers and other organisations but not to employees (and third persons) is unduly restrictive. According to case law of the ETC the person *exercising authority* may be held responsible for acts of distinction, including harassment done by employees or third persons. According to case law of the Dutch Civil Courts (including the High Court), these persons can also be held responsible and accountable under general civil law provisions/procedures.

¹⁶¹ A. Geers, A. Geers, 'Intimidatie op de werkplek', in: G. van Manen (ed.), *De rol van het aansprakelijkheidsrecht bij de verwerking van persoonlijk leed*, Den Haag: Boom 2003, p. 183-198, at p. 188, with further references to the literature on this question. See also M.S.A Vegter, 'Aansprakelijkheid werkgever voor psychische schade werknemer als gevolg van seksuele intimidatie van de werknemer', in: *Aansprakelijkheid, Verzekering en Schade* nr. 5, October 2001, p. 133-140, at p. 134. With regard to Article 7:611 of the Civil Code, the Dutch Supreme Court has decided that this Article may be relied upon to claim compensation for damages of a mere psychological kind. See Supreme Court, 11 July 1993, NJ 1993, 667 (*Nuts/Hofman*), cited by A. Geers, A. Geers, 'Intimidatie op de werkplek', in: G. van Manen (ed.), *De rol van het aansprakelijkheidsrecht bij de verwerking van persoonlijk leed*, Den Haag: Boom 2003, p. 183-198, at p. 188.

¹⁶² HR 11 March 2005, RvdW 2005, 37 (ABN AMRO / Nieuwenhuys). See about this case: E.J. Houben: *Schadevergoeding bij zuiver psychisch letsel*. Arbeidsrecht 2006, nr 2. pp. 31-36.

¹⁶³ See M.S.A Vegter, M.S.A Vegter, 'Aansprakelijkheid werkgever voor psychische schade werknemer als gevolg van seksuele intimidatie van de werknemer', in: *Aansprakelijkheid, Verzekering en Schade* nr. 5, October 2001, p. 133-140, at p. 134-135, where she extensively elaborates on the case law. The relevant cases to which she refers are District Court Rotterdam, 30 September 1999, JAR 1999, 230; President of Rotterdam District Court, 22 February 2001, Rechtspraak Nemesis 2001, 1319; Cantonal Court Harderwijk, 25 April 2001, JAR 2001, 118. In the latter case, an amount of about € 14.000 (at the time NFL 30.000) was awarded for psychological damages.



3.2 Material Scope

3.2.1 Employment, self-employment and occupation

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

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

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

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

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

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

- 1) public advertising of employment and procedures leading to the filling of vacancies;
- 2) the employment of a worker via an employment agency (inserted by the EC Implementation Act);
- 3) the commencement or termination of an employment relationship;
- 4) the appointment and dismissal of civil servants;
- 5) terms and conditions of employment;
- 6) permission for staff to receive education or training during or prior to the employment relationship;
- 7) promotions;
- 8) working conditions (inserted by the EC Implementation Act).

The ADA and DDA have counterpart provisions in Articles 3 and 4 respectively. These Articles reflect exactly the same material scope, although sometimes the sequence of subsections differs. Both public and private labour relations are covered. The central norm applies to the entire employment process, *i.e.*, from the moment of notice of a vacancy, to the commencement of the employment relationship or public appointment, until its termination.¹⁶⁴

In the GETA, self-employment is covered by Article 6. This Article provides that “*it shall be unlawful to make distinctions with regard to the conditions for and access to the liberal professions and with regard to pursue the liberal professions or for development within them*”. The counterpart Articles reflecting an identical content are Article 4 of the ADA and

¹⁶⁴ See, *e.g.*, the Explanatory Memorandum to the DDA, Tweede Kamer 2001-2002, 28 169, nr. 3, p. 34. The same applies *eo ipso* in the context of the ADA and the GETA.

Article 5 of the DDA. It is to be noted that the term “self employment” is not used in the mentioned Articles which instead speak of the “liberal profession”.

The term “liberal profession” (“free occupation”) might be slightly narrower in scope than “self-employment” (the term used in the Directives). However, the problem can easily be circumvented by attaching a broad interpretation to the term “liberal profession” in order to guarantee that not only doctors, architects etc are covered, but also free lancers, solo traders, entrepreneurs, *etc.*¹⁶⁵ This might seem odd for a British reader since in English, the term ‘liberal profession’ is quite a lot narrower than self-employment and could not easily be approximated. However, in the Dutch equality legislation context the usage of ‘liberal profession’ has not led to problems. The ETC has at all times attached a very broad meaning to this notion. Discrimination is thus also prohibited in such working relationships where the hierarchy between the ‘employer’ and ‘employee’ is absent. The public sector is dealt with in the same way as the private sector.

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

- 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.*

Employment and working conditions, including pay and dismissals are fully covered by Article 5(1) of the GETA, subsections c, d, e, h. In the ADA by Article 3 subsections c, d, e, h. In the DDA by Article 4 subsections b, c, e, h.

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

Occupational pensions are included under the heading “terms and conditions of employment”. Therefore, they are fully covered under the equal treatment legislation. See Article 5 sub e GETA, Article 3 sub e ADA and Article 4 sub 2 ADA.

There is an exception in Article 8 (2) and (3) of the ADA, which states that:

The prohibition on discrimination shall not apply to the age of admission or to the pensionable age laid down in the pension scheme, nor to the establishment of different ages for admission or entitlement for employees or for groups or categories of employees.

The prohibition on discrimination shall not apply to actuarial calculations in the context of pension schemes which make use of age criteria.

In the first paragraph of this Article a pension scheme is defined:

For the purposes of this section ‘pension scheme’ shall mean a pension scheme applying to one or more persons solely in connection with their activities in a company, branch of industry, occupation or public service, which scheme supplements a statutory social security system and, in the case of a scheme applicable to a person, is not arranged privately by the person in question.

With respect to the ground ‘civil status’ there is also an exception in the field of occupational pensions in article 5(6) GETA.. Since this ground is not covered under the Directives we do not deal with this (complicated)exception here.¹⁶⁶

¹⁶⁵ See Kees Waaldijk, *supra* footnote 44.

¹⁶⁶ See I.P. Asscher-Vonk and W.C. Monster: *Gelijke behandeling bij de arbeid. Monografieën Sociaal Recht*. Kluwer, Deventer 2002, at p. 107.

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, or such as adult life long learning course?

In the first place, under all three laws (GETA, ADA and DDA) there is a prohibition to make a distinction with respect to giving permission for staff to receive education or training during or prior to the employment relationship. (Art. 5(1) sub f GETA, 3, sub f. DDA and 4 sub f ADA.)

The prohibition of making a distinction in the areas of vocational training and professional guidance is laid down in Article 5 of the ADA and in Article 6 of the DDA. Both Articles are identical. Subsection a lays down the prohibition of distinction with regard to vocational guidance (“loopbaanoriëntatie en beroepskeuzevoorlichting”). Subsection b renders the central norm applicable to education oriented towards entry to and functioning in the labour market (“onderwijs gericht op toetreding tot en functioneren op de arbeidsmarkt”). In short, this might be referred to as ‘vocational training’, although this term is not as such used within the respective Articles. *De facto* however, the heading ‘vocational training’ only consists of Article 6 and Article 5 of the ADA and DDA respectively. The Explanatory Memoranda provide guidance as to what is meant by subsection b. All what will be said about the DDA hereinafter applies *eo ipso* to the ADA.

Subsection b of these Articles covers education which is a last step prior to entering the labour market including retraining and further training courses.¹⁶⁷ *In concreto* this embraces: practical education (“praktijkonderwijs”), (which forms part of ‘secondary education’); technical and vocational training for 16-18 year-olds (“middelbaar beroepsonderwijs”); technical and vocational training for 18+ (“hoger beroepsonderwijs”) and university education. ‘Adult life long learning courses’ are not mentioned specifically but are covered by Article 5 DDA too. So regular ‘secondary education’ (“voortgezet onderwijs”) is not yet covered, but as mentioned above, legislation is forthcoming.¹⁶⁸ The establishments that are covered are not only those which are recognised or subsidised by the Ministry, but also those which are not recognised or subsidised by the Ministry or whose regulation is left to the market.¹⁶⁹ Subsections a and b of Articles 5 and 6 of the ADA and DDA respectively, are not directed to a specific addressee. These subsections are therefore directed to ‘everybody’.

¹⁶⁷ Explanatory Memorandum to the DDA, Tweede Kamer 2001-2002, 28 169, nr. 3, p. 38.

¹⁶⁸ “Praktijkonderwijs” is an exception to this, given that it is oriented towards those who will not obtain a diploma in regular secondary education or by vocational training. “Praktijkonderwijs” prepares pupils for relatively simple jobs on the labour market.

¹⁶⁹ Explanatory Memorandum to DDA, Tweede Kamer 2001-2002, 28 169, nr. 3, p. 38.

As to subsection b, this is addressed to *public education, private/denominational education, and education that is not publicly funded*.¹⁷⁰ Subsection b covers more than Article 3(1)(b) of the Employment Framework Directive. The Directive only prohibits discrimination at the stage of ‘entry to’ vocational training. The Dutch Acts cover the entire path from registration until termination of education.¹⁷¹

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

-
- The supply of or permission of access to goods or services which also embraces all forms of education;¹⁷²
 - The provision of career orientation and guidance (“loopbaanoriëntatie”);
 - Advice or information regarding the choice of an educational establishment or career.

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

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

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

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

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

¹⁷⁰ Explanatory Memorandum to the DDA, Tweede Kamer 2001-2002, 28 169, nr. 3, p. 37.

¹⁷¹ Explanatory Memorandum to the DDA, Tweede Kamer 2001-2002, 28 169, nr. 3, p. 37-38.

¹⁷² The material scope of the GETA covers the entire field of education. It thus offers a wider protection than the Directives.

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

In order to implement Article 3(1)(e) (and (f)) the EC Implementation Act complements the GETA with a new Article 7a.

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

It appears from the Explanatory Memorandum to the EC Implementation Act, that health care is embraced by the wide notion of ‘social protection’. The Government indicates in the Explanatory Memorandum that “(...) the notion of social protection covers [inter alia] (...) all aspects of healthcare, welfare and social security”.¹⁷³

There is consensus in the Netherlands that this means that also ‘unilateral’ acts by Government (legislation, granting subsidies, *etc.*) are now covered in as far as they concern the fields covered by article 3(1)e of the Race Directive.¹⁷⁴ (See also par. 3.2.9.)

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

Yes. The extension to social protection mentioned in the previous section (above this question) is restricted to racial discrimination. As indicated by Waaldijk, the other grounds are only protected by the constitutional and international prohibitions of discrimination in the above areas of social life.¹⁷⁵

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

¹⁷³ Explanatory Memorandum to the EC Implementation Act, Tweede Kamer, 2002-2003, 28 770, nr. 3, p. 14.

¹⁷⁴ The government has indicated, that the fact that unilateral governmental acts are now covered within the specific context of Article 7a, shall not be understood to mean that all unilateral governmental acts now fall within the GETA’s material scope.

¹⁷⁵ See Kees Waaldijk, *supra* footnote 65.

No such decree has been adopted thus far. However, the interpretative tools regarding the meaning of ‘social advantages’ are laid down in the Explanatory Memorandum to the EC Implementation Act. Also, its relationship with ‘social security’ is explained in the Memorandum. ‘Social security’ concerns the legal social insurance schemes which cover the risks that occur if a person loses his income as a result of (*e.g.*) unemployment, illness, disability, age and decease. Moreover it covers child benefits.¹⁷⁶ With regard to the notion of ‘social advantages’ it is observed by the Government, that this notion must be interpreted in the light of ECJ case law rendered in the context of Regulation 1612/68 on free movement of workers.¹⁷⁷

In the Government’s view, the notion of ‘social advantages’ refers to advantages of an economic and cultural kind which may be granted both by private and public entities. These may include student grants, public transport reductions and reductions for cultural or other events. Advantages offered by private entities are for example reductions to entry prices for cinema and theatre.¹⁷⁸

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 and/ or patterns of segregation and discrimination in schools, affecting notably the Roma community. If these cases and/ or patterns exist, please refer also to relevant legal/political discussions that may exist in your country on the issue.

The GETA is integrally applicable to all aspects of education, including all types of schools (Article 7). This thus applies to ‘race’ and ‘ethnic origin’ but also to ‘religion/belief’ and ‘sexual orientation’ (as well as to all other grounds covered by the GETA). In this regard, Dutch law goes beyond the requirements imposed by the Directives.¹⁷⁹ Vocational training that is given before or during the employment relationship is regulated by Article 5(1) sub f of the GETA.

A problem that has been dealt with in the framework of anti-discrimination or equal treatment legislation, is the fact that many boards of schools (or local governments that are in charge of publicly funded schools) have designed/want to design rulings that enhance a spreading of children of different cultural background over schools, in order to avoid the coming into existence of ‘black schools’ (*i.e.*, schools with a great majority of non-Dutch nationals). There is some discussion going on in the Netherlands about the issue whether local governments have the right to spread people of certain non-Dutch decent or people with low incomes as far as housing and schools are concerned, in order to prevent ‘black ghetto’s’ or ‘black schools’ to emerge.

¹⁷⁶ Explanatory Memorandum to the EC Implementation Act, Tweede Kamer, 2002-2003, 28 770, nr. 3, p. 14.

¹⁷⁷ See the ECJ’s case law in Case C-261/83 (*Castelli*) of 12 July 1984 and Case C-249/83 (*Hoecx*) of 27 March 1985, as referred to in the Explanatory Memorandum to the EC Implementation Act, Tweede Kamer, 2002-2003, 28 770, nr. 3, p. 15.

¹⁷⁸ Explanatory Memorandum to the EC Implementation Act, Tweede Kamer, 2002-2003, 28 770, nr. 3, p. 15.

¹⁷⁹ See also Memorandum concerning the Implementation of Directive 2000/78/EC and Directive 2000/43/EC (“Notitie over de Implementatie van Richtlijn 2000/78/EG en Richtlijn 2000/43/EG”), Tweede Kamer, 2001-2002, 28 187, nr. 1, p. 10-11.

In fact this is the topic of the discussion about the so-called “Rotterdamwet” in which local governments get the possibility to refuse subsidised housing to certain categories of poor people in order to avoid the emergence of “ghettos”.¹⁸⁰ The ETC has advised against such policies.¹⁸¹ There is considerable debate about the question whether equal treatment legislation is unduly restrictive as far as the possibilities for local government are concerned to develop such policies.¹⁸² One of the reasons for ‘black schools’ to develop is the fact that, in the Netherlands, schools on a religious or other ‘denotative’ basis (such as a special philosophical view on education) have the freedom - guaranteed by the Constitution - to develop an own identity and to conduct their own admittance policies. As long as such schools are complying with the general quality requirements for education, public funding for these schools is guaranteed in the Netherlands (see Article 23 of the Constitution). A restricting admittance policy of publicly funded Christian schools (to only Christian pupils) is supposed to be (*inter alia*) a cause of the growth of ‘black’ public schools.¹⁸³

In December 2005, some Members of Parliament have therefore initiated a bill in which this ‘freedom of education’ was to be restricted for all publicly funded schools, including those on a religious or philosophical basis. This proposed law would grant pupils an unrestricted right to admittance to virtually any school and would pose a corresponding obligation to these schools to accept everybody. Only schools that – during at least 10 years – have followed a very strict policy to only admit their ‘own’ pupils would be exempted from this obligation.¹⁸⁴ It is highly disputable whether this would be in line with the constitutional guaranteed freedom for religious groups to have their own schools. Some commentators think that Article 23 of the Constitution needs to be abolished first before such a law could be enacted. Due to the current (new) political circumstances, the bill has still not yet been discussed in Parliament.

With respect to Roma and travellers, the patterns of segregation in the Dutch school system don’t seem to affect these minorities in particular. Therefore, it does not seem to be necessary to put into effect legal instruments with regard to Roma and travellers’ children. In the field of education, only one case of alleged discrimination is known. In this case, a board of an association of 14 primary (Christian) schools used a quota of 15 % per establishment for pupils who speak the Dutch language as a second language, in order to combat segregation. This admittance policy was deemed to be unlawful indirect distinction against Roma and Sinti communities, on the ground of race/ethnic origin.¹⁸⁵

Several provisions are made with regard to people with disabilities in the field of education. The issue of accessibility of (school) buildings is already addressed above (Section 2.6 et seq). Besides all this, people with disabilities have certain rights to accommodation of education itself. Parents can request accommodations for their children (with disabilities). The school can claim the expenses from the government. Another example is the right to take the state

¹⁸⁰ Tweede Kamer, 2004-2005, 30 091. Law of 20 December 2005, Staatsblad 2005, 726.

¹⁸¹ See ETC Advice 2005/03 and Opinion 2005-25 (Tiel).

¹⁸² See, e.g., Mark Bovens and Margo Trappenburg, ‘Segregatie door Anti-Discriminatie’, in: ed. R. Holtmaat, *Gelijkheid en (andere) grondrechten*, Deventer: Kluwer 2004, p. 171-186. See also the report by the Raad voor openbaar bestuur (Rob): *Verschil moet er zijn; bestuur tussen discriminatie en differentiatie*. ([Council for Public Administration: *There should be difference; administration between discrimination and differentiation*.] The Hague, April 2006.

¹⁸³ I.e., schools that are governed by local authorities.

¹⁸⁴ Tweede Kamer, 2005-2006, 30 417. See for a commentary on this bill: B.P. Vermeulen and C.M. Zoethout, ‘Godsdienst, levensovertuiging en politieke gezindheid, in: S.D. Burri (ed.), *Oordelenbundel 2005*, Nijmegen: Wolf Legal Publishers 2006.

¹⁸⁵ See ETC Opinion 2003-105.

exams in adapted ways, such as a big letter exam or an extension of time for an exam in order to meet dyslexia or motor disabilities.

It is already mentioned above as well that the Dutch government has announced to extend the full scope of the DDA to primary and secondary education.¹⁸⁶

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 access to and supply of goods and services is covered by Article 7 of GETA. Subsection 1 of Article 7 provides as follows: *“It shall be unlawful to make distinctions in offering or permitting to goods and services, in concluding, implementing or terminating agreements on the subject (...), if such acts of distinction are committed.”*¹⁸⁷

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

This is applicable to all grounds covered by the GETA. In this regard, Dutch law extends beyond the Article 13 Directives’ requirements. Unilateral governmental decisions and acts do not fall under the scope of Article 7.¹⁸⁸

Since 2005-2006 a renewed discussion is taking place about the exclusion of unilateral governmental decisions and acts from the scope of the GETA. Providing goods and services (by means of e.g. laws, decrees, subsidies, etc.) by governmental institutions were completely excluded from the scope of the equal treatment laws up until Article 7a GETA came into force. (See above, par. 3.2.6.) The question whether this should be changed was subject of a study by independent academic experts who were appointed by the Government to conduct the second (external) 5-year term evaluation of the functioning of the GETA. The conclusion of these experts is that bringing all unilateral governmental decisions and acts under the scope of the GETA (and subsequently: under the enforcement by the ETC) would mean that the margins of appreciation of national and local governments about how to construct their policies and laws would be severely limited. This is partly due to the closed system of justifications (in cases of direct discrimination) that prevails in the GETA. However, not only the right to equal treatment but also other rights and liberties of citizens can be at stake.

¹⁸⁶ See Tweede Kamer 2007-2008, 30 859: Voorstel tot wijziging van de Wet gelijke behandeling op grond van handicap of chronische ziekte (Wgbh/cz) in verband met de uitbreiding met primair en voortgezet onderwijs en met wonen

¹⁸⁷ It should be noted that the limitations to follow under a-d are also applicable with regard to the remainder of areas covered by Article 7, i.e., 2. the provision of career orientation and guidance (“loopbaanoriëntatie”); 3. advice or information regarding the choice of an educational establishment or career, and which have been analyzed above.

¹⁸⁸ J.H. Gerards and A.W. Heringa, *Wetgeving Gelijke Behandeling*, Deventer: Kluwer 2003, p. 72-73, with references to ETC case law.

Balancing all interests at stake is a matter that should not be done by the judges in equal treatment cases, but by the democratically elected government or the administration (who in turn is accountable to the democratically elected government).

Besides, the need for bringing these unilateral governmental decisions and acts under the scope of the GETA could collide with some fundamental features of the Dutch legal system, e.g. the fact that the Constitution excludes the possibility of constitutional review of legislation (Article 120 of the Constitution) and that all Governmental acts are already ‘governed’ by Article 1 of the Constitution. In addition, there exists a refined system of administrative appeal / administrative courts in the Netherlands, to which cases of direct and indirect discrimination can be brought.¹⁸⁹

Another point for discussion in respect to (*inter alia*) Article 7 of the GETA is the balancing of interests between on the one hand the right of freedom of association and on the other hand the right to equal treatment. This topic has also been studied by the group of independent experts who were appointed by the Government to conduct the second (external) 5-year term evaluation of the functioning of the GETA. Does a women’s association that runs a ‘women only’ bar have to allow that men come to have a drink there as well? The policy of the ETC is to apply the equal treatment norms full scale as soon as it is established that the activities of the association are (unrestrictedly) open to the general public and take place on a commercial basis. The experts conclude that (taken International Human Rights Standards into account) the right to equal treatment does not automatically prevail over the right to free association. The ETC and the judges should have the possibility for a case by case assessment of the conflicting rights that are at stake.¹⁹⁰

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

To which aspects of housing does the law apply? Are there any exceptions? Please also consider cases and patterns of housing segregation and discrimination of the Roma and other minorities or groups.

‘Housing’ is captured by Article 7(1) subsection c of the GETA. It applies to all aspects of housing. No specific exceptions apply as regard housing other than those which will be dealt with below. It remains to be seen whether the ‘Rotterdamwet’, in which local authorities get the right to refuse to rent houses in certain area’s to persons or households with a low-income or without steady jobs and to refer them to other areas, will be deemed indirectly discriminatory on the ground of ethnic origin when a case is brought to the attention of the courts. As the measure may only be applicable to certain poor districts, it probably will not result in homelessness.

Roma and traveler people tend to live in caravans or trailers which are situated on officially designated ‘trailer parks’ (woonwagenkampen). The already mentioned lack of systematic data in this respect makes it difficult to give exact numbers on the housing situation of Roma

¹⁸⁹ M.L.M. Hertogh & P.J.J. Zoontjens (eds): *Gelijke behandeling: principes en praktijken. Evaluatieonderzoek Algemene wet gelijke behandeling*. Wolf Legal Publishers Nijmegen 2006. The part about unilateral government acts was written by prof. Zoontjens. See pp. 115-173.

¹⁹⁰ Idem. This part of the report was written by prof. Ben Vermeulen. See pp. 175-216.

and travelers. In the *Monitor Racism and Extremism*¹⁹¹ we found a quite critical assessment of the situation concerning the housing of these people in trailer parks.

It is stating that the most important issue for Roma and Sinti in the area of housing is policymaking related to caravan sites. In this respect, the *Monitor* observes a shortage of caravan sites that is estimated at somewhere around 3,000 sites.¹⁹² “This often makes it impossible for family members to pitch on the same encampment, something of great importance to the Roma and Sinti.”¹⁹³ In failing to provide enough caravan sites, the government makes it impossible for Roma and Sinti to sustain their cultural identity.

This violates the requirement to provide housing without distinguishing by ethnic background, as established in the European Racial Equality Directive.”¹⁹⁴

The only case we found about the housing situation of Roma and Sinti people concerns the already mentioned case that was decided by the ETC (Opinion 2006-222 of 6 November 2006; see section 0.3 of this Report). A family of travellers,¹⁹⁵ consisting of three generations, complained that a local government who had decided not to continue a special waiting list for persons who want to live in a caravan or trailer because there were hardly any applications for this type of housing. Although in this particular case there is an objective justification because the local government has proven that the measure (to abolish the special waiting list) was legitimate and that the means chosen (the general waiting list) were proportionate and effective, the ETC recommends the local government to prevent indirect discrimination in the future by giving more attention to the special needs of people who prefer housing in caravans.¹⁹⁶

¹⁹¹ Jaap van Donselaar and Peter Rodrigues (eds.), *Monitor Racisme & Extremisme. Zevende rapportage* (Monitor Racism & Extremism. Seventh report), Amsterdam: Anne Frank Stichting/Leiden: Leiden University 2006 <http://www.annefrank.org/upload/downloads/monitor2006-7.pdf>

¹⁹² K. Sikkema, *Roma and Sinti in Nederland, Een onderzoek naar de algemene levensomstandigheden, gezondheidssituatie en toegang tot de gezondheidszorg van de Roma and Sinti in Nederland*. Amsterdam: Dokters van de Wereld, February 2004, p.10.

¹⁹³ See also the questions to the government, *Aanhangsel Handelingen II* (Appendix parliamentary questions II), 2002/03, no. 32 and no.199.

¹⁹⁴ *Monitor*, p. 53.

¹⁹⁵ The ETC decided that this group of people falls under the ground race or ethnic origin. Some of the travellers are Roma or Sinti, but not all of them. See also ETC Opinion 2006-5.

¹⁹⁶ The ECT did not openly refer to a more substantive notion of equality, like was done by the ECtHR in the *Thlimmenos* case. See: ECtHR, *Thlimmenos v. Greece* of 6 April 2000.

4. EXCEPTIONS

Preliminary observation: The GETA and the DDA contain a ‘closed’ system of justification grounds: justifications for unequal treatment explicitly and exhaustively listed within these Acts. The ADA contains a ‘half open’ system of justifications: certain exceptions have been explicitly enshrined within the Act alongside a possibility for objective justification (for both direct and indirect distinction). In the case of harassment justifications are not possible at all.

4.1 Genuine and determining occupational requirements (Article 4)

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

The GOR-exception only exists for the grounds *race* and *sex* (the latter is not dealt with in this report). As far as race is concerned, this has been laid down in Article 2(4) of the GETA¹⁹⁷: “*The prohibition of making distinctions on the grounds of race as it is contained in this Act, shall not apply:*

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

In contrast to Article 4 of Directive 2000/43 that speaks of a *characteristic related to racial or ethnic origin*, the Dutch provision specifies that only *outer racial appearances* may constitute a *genuine occupational requirement*.¹⁹⁸ This means that ‘race’ *in se* is not regarded as a permissible ground for a given distinction.¹⁹⁹ Only *physical differences* (skin colour, hair type, etc.) may form a basis for a distinction, to the exclusion of *sociological differences* (e.g., The GETA does not allow a care institution, which looks after the well being of young Moroccan delinquents, to express in a job advertisement a preference for a *Moroccan* social worker.²⁰⁰)

This exception has been elaborated in a Governmental Decree of 1994.²⁰¹ The Decree exhaustively indicates to which categories the Article 2(4) exceptions apply.

¹⁹⁷ Subsection b was inserted by the EC Implementation Act. With the insertion of a new subsection b the government has intended to follow more closely the wordings of the Directive. See Explanatory Memorandum to the EC Implementation Act, Tweede Kamer, 2002-2003, 28 770, nr. 3, p. 10. However, pre-implementation the ‘genuine occupational requirement exception’ was also covered by the more general wording of subsection a of Article 2(4).

¹⁹⁸ Explanatory Memorandum to the EC Implementation Act, Tweede Kamer, 2002-2003, 28 770, nr. 3, p. 10.

¹⁹⁹ J.H. Gerards and A.W. Heringa, *Wetgeving Gelijke Behandeling*, Kluwer Deventer 2003, p. 129.

²⁰⁰ See Opinion 1997-51 of the Dutch Equal Treatment Commission.

²⁰¹ Governmental Decree on Equal Treatment (“Besluit Gelijke Behandeling”), 18 August 1994, Staatsblad 1994, 657. This Decree has been updated on 21 June 1997, Staatsblad 1197, 317.

These are:

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

For the grounds religion or belief, sexual orientation, disability and age the exception of the GOR was not deemed necessary.²⁰²

Religion, belief, sexual orientation: Although Directive 2000/78 would have allowed for it (Article 4(1) of the Directive), no GOR-exception has been enshrined in the GETA for these grounds. However, in the context of the exceptions of Article 5(2) of the GETA, institutions founded on religious principles, or on political principles, or schools founded on the basis of religious denomination may impose requirements on the occupancy of a post which, in view of the organisation's purpose, are necessary to live up to its founding principles. The Article 5(2) exceptions are not rationalised by the idea of 'genuine occupational requirements' though. They were regarded necessary in order to reconcile the constitutional principle of equality with other constitutional principles, namely the freedom of religion and the freedom of education as well as the freedom of political opinion. Although the rationalization is different, in practice this exception is compatible with Article 4(1) of the Framework Directive. The requirements that are set on this ground need to be closely linked to the nature and content of the job. This means that only functions that are related to the "mission" of the organisation can be exempted from the equal treatment norm. (I.e. the exception is not applicable when it concerns a gardener for a church.) It is also a requirement that the organisation applies a consistent policy in this respect. The criteria have been explained by the ETC in its Opinion 1996-118.

Disability: The GOR-exception has not been included in the DDA. The Government's view is that, in contrast to 'race' and 'sex', no scenario is imaginable in which 'disability' would constitute a genuine occupational requirement.²⁰³ An amendment was submitted by a Member of Parliament in this respect; however, without any effect.²⁰⁴

Age: Since ADA makes no distinction as between 'direct' and 'indirect' distinction and 'objective justification' is provided for both types of 'distinction' (Article 7(1)(c) ADA), the Government considered including the GOR-exception a redundant exercise. In this view, in cases in which 'age' is considered a genuine occupational requirement, this can be assessed via the objective justification test.²⁰⁵ Conceptually speaking, this is open to criticism.

²⁰² On the ground of case law of the ETC in 2005, Waaldijk, *supra* footnote 44.

²⁰³ Explanatory Memorandum to the DDA, Tweede Kamer 2001-2002, 28 169, nr. 3, p. 35.

²⁰⁴ Amendement Terpstra, Tweede Kamer, 2001-2002, 28 169, nr. 11. This amendment was rejected.

²⁰⁵ Explanatory Memorandum to the ADA, Tweede Kamer 2001-2002, 28169, nr 3, p. 35.

In this view, the Article 4(1) exception of the Directive is regarded as a species of the Article 6 exception of the Directive.²⁰⁶ In that light it would have been preferable, had the Government explicitly included the GOR-exception.

4.2 Employers with an ethos based on religion or belief

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

With regard to the exception of religious ethos, the GETA on the one hand sets *boundaries* to its scope of applicability; on the other hand it provides for *exceptions*.

Please note that the following does **not** apply to distinctions made on the grounds age and disability since the ADA and the DDA do not contain similar provisions as in the GETA (discussed below). Therefore, employers with an ethos based on religion or belief can only rely on this exception in the case of race, sex, sexual orientation or religion/belief (and the other grounds covered by the GETA: nationality, civil status and political conviction).

Boundaries to the scope of application.

The GETA does not apply to legal relationships *within* churches, other religious communities, or associations of a spiritual nature and excludes the application of equal treatment norms to ‘ministers of religion’ (priests, ministers, imams, et cetera). (See Article 3 GETA.) These are considered to be internal affairs of these (religious) organisations. The rationale for this lies in the principle of *freedom of religion* and in the *division between state and church*.

Article 3 GETA:

This Act does not apply to:

- a. *legal relations within religious communities, independent sections or associations thereof and within other associations of a spiritual nature*
- b. *the office of minister of religion.*

It is to be noted that only purely *internal* affairs of Churches fall outside the scope of the GETA. Thus, for example, the employment relationship between a gardener or cleaner with a Church or a religious community falls within the scope of the GETA. As has been observed by Gerards and Heringa, the more the legal relationship is disconnected from the rationales of freedom of religion and the division between state and church, the less likely is it to be considered as a purely internal affair.²⁰⁷ The question whether the autonomy of churches should be limited with a view to respecting the equal treatment principle was subject of a study by independent academic experts who were appointed by the Government to conduct the second (external) 5-year term evaluation of the functioning of the GETA. An extensive review was made of the international and national human rights norms that are at stake (ICCPR, ECHR, EU-legislation and the Dutch Constitution).

²⁰⁶ See F.B.J. Grapperhaus, ‘Het verbod op onderscheid op grond van leeftijd in arbeid en beroep’, *Ondernemingsrecht* 2002-12, p. 356-363, at p. 362.

²⁰⁷ J.H. Gerards and A.W. Heringa, *Wetgeving Gelijke Behandeling*, Deventer: Kluwer 2003, p. 105.

The conclusion of these experts was that Article 3 of the GETA does not exceed the criteria set by the constitutional guarantee of the freedom of religion and the protection against discrimination. Also, this Article is in line with the exceptions that are possible under the EC-Directives.²⁰⁸

Exceptions for employers on the ground of religion and belief

In this regard two provisions in the GETA are important:

Article 5(2)(a) GETA contains an exception to the prohibition of distinction in employment for *institutions founded on religious or ideological principles*. It reads as follows:

the freedom of an institution founded on religious or ideological principles to impose requirements which, having regard to the institution's purpose, are necessary for the fulfilment of the duties attached to a post; such requirements may not lead to discrimination on the sole grounds of political opinion, race, sex, nationality, heterosexual or homosexual orientation or civil status;

Article 5(2)(c) GETA provides that distinctions may lawfully be made by private educational establishments founded on religious or ideological principles.

Article 5(2)(c) reads as follows:

the freedom of an educational establishment founded on religious or ideological principles to impose requirements on the occupancy of a post which, in view of the institution's purpose, are necessary for it to live up to its founding principles; such requirements may not lead to discrimination on the sole grounds of political opinion, race, sex, nationality, heterosexual or homosexual orientation or civil status.

Institutions under sub a may only make distinctions that are necessary for the *effective performance* of the job. Distinctions made with reliance under the exception under sub c must (only) be necessary in order for the establishment to *effectively realise its founding principles*. This implies, that establishments under c are granted more leeway in making distinctions than institutions under a. After all, establishments under sub c may impose requirements that are not directly linked up with the performance of a person's duties within that establishment.

Establishments that fall under sub c may even impose requirements upon the acts of (would be) employees which take place *outside* the sphere of the establishment, if this is necessary for the effective realisation of the establishment's founding principles.²⁰⁹

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

²⁰⁸ M.L.M. Hertogh & P.J.J. Zoontjens (eds): *Gelijke behandeling: principes en praktijken. Evaluatieonderzoek Algemene wet gelijke behandeling*. Wolf Legal Publishers Nijmegen 2006. The part about the exemption of the Churches was written by prof. Ben Vermeulen. See pp. 219-248.

²⁰⁹ J.H. Gerards and A.W. Heringa, *Wetgeving Gelijke Behandeling*, Deventer: Kluwer 2003, p. 109.

The exception under article 5 (2)(a) GETA

The exception under sub (a) is formulated slightly differently than its counterpart definition in the Directive. The Directive uses as main yardstick whether, while having regard to the organisation's ethos, a person's religion or belief constitutes a *genuine, legitimate and justified occupational requirement*, by reason of the nature of the occupational activities or of the context in which they are carried out. Within the context of the GETA, it is of prime interest that the distinction made is necessary for the *fulfilment of duties* attached to a post. From the wording of this provision it follows that the imposed requirements need necessarily be linked up with a person's *job performance*. In the light of the case law of the ETC, it appears to us that the Dutch law thus is in conformity with the Directive. The word 'necessary' implies that the requirements must be legitimate and justified. That the requirements must be 'genuine' is also reviewed (and required) by the ETC. The Commission looks at the institution's statutes and at what the institution does in practice, in order to realise its religious and ideological foundations. The ETC's line of reasoning is largely based upon the guidance given in the Parliamentary Documents to the Article 5(2)(a) exception.

The exception under article 5(2)(c) GETA

From the wording of this provision it follows that the imposed requirements need not necessarily be linked up with a person's *job performance*. Also behaviour outside the establishment (e.g. living together without being married or living together with a same-sex partner) might be a factor that can be taken into account by the establishment in its decision as to whether or not a given person complies with the founding principles underlying the establishment.²¹⁰ Requirements must however be 'necessary' for the effective realisation of the institution's founding principles. The Commission looks at the institution's statutes and at what the institution does in practice, in order to realise its religious and ideological foundations. It seems that, in the light of the quite broad wording of Article 4(2) of the Directive, this exception is in line with EC law.

The 'sole ground' construction in the articles 5(2) sub (a) and (c)

This so-called 'sole ground construction' is equivalent to the clause in Article 4(2) of the Employment Framework Directive. The 'sole ground construction' aims at eliminating the possibility that a distinction is exclusively made on the grounds of political opinion, race, sex, nationality, hetero-or homosexual orientation or civil status, under the guise of exceptions which are permitted by the law (i.e., the exceptions enshrined under sub a and c for the grounds religion and belief).²¹¹

²¹⁰ See e.g. Opinion 1999-38.

²¹¹ The Explanatory Memorandum points out that, in respect of the grounds 'race' and 'sex', it is difficult to see how 'accessory circumstances' or 'concomitant' behaviour could possibly result in the justification of a discriminatory act. The Memorandum only gives one example of justified discrimination on the grounds of race. The example given is that of Jewish associations which impose differentiating requirements on the ground of Jewish descent. The differentiation is a direct consequence of the Jewish belief. The special relationship in this example between *descent* on the one hand and *religion and belief* on the other hand may at certain instances justify the discriminatory act. See Explanatory Memorandum to the GETA, Tweede Kamer, 1990-1991, 22 014, nr. 3, p. 19.

In essence, the construction has played an important role with regard to the question whether a Christian School may lawfully refuse cohabitating homosexuals for a teaching position. It is stated clearly in the Parliamentary Documents that the ‘sole fact’ that a person is homosexual, may per se not lead to the refusal to hire such a person or to dismiss him.²¹² However, this may be different if ‘additional circumstances’²¹³ are taken into account.²¹⁴ The Directive’s wording in Article 4(2) seems not to permit that ‘additional circumstances’ play a material role *unless* such circumstances coincide with the organisation’s religion or belief. Examples given by the government during the parliamentary discussions and ETC-Opinions regarding ‘additional circumstances’ are all related to behaviour or circumstances that have a relationship with the religious ethos of the organisation. Therefore, this ‘sole ground construction’ seems to be in conformity with the Directive.²¹⁵

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?*

Specific provisions in this area are Article 3 GETA and Article 5(2) GETA, which have been discussed above. As for case law, there are quite a number of cases of the ETC in which these Articles are at stake. Quite often, this concerns questions related to Islamic faith, e.g. whether the Islamic headscarf is allowed or whether a person can be asked to shake hands.²¹⁶ As far as the “sole ground” construction is concerned, see ETC Opinions 1996-39 and 1999-38 in which the ETC examined the ‘sole ground construction’ in the context of Article 5(2) under c. In 1998-38 the ETC concluded that the *a priori* refusal of a homosexual person without granting her a chance to express her viewpoints makes that the Article 5(2)(c) exception can not be successfully relied upon.²¹⁷

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)?*

Article 17 of the ADA enshrines an exception (which is of a temporary kind): until 1 January 2008 at the latest, the ADA shall not apply to the military service. In the DDA and the GETA, there are no limitations to the Acts’ scope concerning the armed forces.

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

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

²¹³ In the Parliamentary comments, the example is given of a teacher in social studies at a denominational school. This teacher is homosexual and cohabitates with a same sex partner. According to the example, the teacher may in reasonableness be expected to elaborate in his classes upon the concept of “marriage”. See Parliamentary Documents 1990-1991 Memorandum in Reply, p. 41.

²¹⁴ Explanatory Memorandum to the GETA, Tweede Kamer, 1990-1991, 22 014, nr. 3, p. 18-19. See also ETC Opinion 1996-39 and 1999-38 and J.H. Gerards and A.W. Heringa, *Wetgeving Gelijke Behandeling*, Deventer: Kluwer 2003, p. 105.

²¹⁵ This is contrary to the opinion of Marinne Gijzen, who submitted the first Country Report to the Network.

²¹⁶ See e.g. 2006-218, 2006-144, 2006-128, 2006-93, 2006-63, 2005-222, 2005-102, 2005-19, 2004-160, 2004-138, 2003-145, 2003-114, 2001-01 and 2000-67. Some of these cases have been reported in the framework of the thematic study concerning religion and belief. See: Lucy Vickers: *Religion and Belief Discrimination in Employment – the EU Law*. European Commission, November 2006.

²¹⁷ J.H. Gerards and A.W. Heringa, *Wetgeving Gelijke Behandeling*, Deventer: Kluwer 2003, p. 109.

No, there are not.

- c) *Are there cases where religious institutions can select people (on the basis of their religion) to hire or to dismiss from a job - when that job is in a state entity, or in an entity financed by the State (example: the Catholic church in Italy or Spain can select religious teachers in state schools)? In what conditions is that selection done? Is this possibility provided for by national law only, or international agreements with the Holy See, or a combination of both?*

Under article 23 of the Dutch Constitution, (Freedom of education), schools with both neutral or general foundations (in the Netherlands called ‘public schools’) and schools with a specific religious/philosophical foundation, have a right to governmental funding. As a result, teachers and other personnel in these publicly financed schools can be hired or dismissed on religious/ideological criteria, under conditions set in equal treatment legislation and case-law. In short, these criteria must be closely linked to the (often religious) identity of the school, they must be aimed at maintaining this identity and consistently kept.²¹⁸ These possibilities are provided by national law: no international agreements are concluded between The Netherlands and the Holy See in this respect.

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? Does this include stateless status? What is the relationship between ‘nationality’ and ‘race or ethnic origin’, in particular in the context of indirect discrimination? Is there overlap in case law between discrimination on grounds of nationality and ethnicity (ie where nationality discrimination may constitute ethnic discrimination as well)?*

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

Beside discrimination on the ground of race, nationality discrimination is prohibited by the GETA. Thus, the Dutch Act goes beyond the requirements stemming from Directive 2000/43. Distinction on the grounds of nationality is in principle prohibited as follows from Article 1 of the Act. However, Article 2(5) of the Act enshrines exceptions to this. The prohibition on the grounds of nationality shall not apply, if the distinction is based upon *generally binding rules* (i.e., Statutory Acts and Acts by the administration such as governmental decrees) or on *written or unwritten rules of international law*.²¹⁹ Moreover, the prohibition shall not apply in such cases where ‘nationality’ is a determining factor (e.g., nationality requirements imposed upon players for the national football team).²²⁰ Nationality discrimination does include stateless status. There is an overlap between nationality and race in the context of indirect discrimination. Because both grounds of discrimination are covered in Dutch Equal treatment

²¹⁸ See (e.g.) ETC Opinion 2004-168.

²¹⁹ See e.g. ETC Opinion 2002-61, 1998-81 and 1997-13.

²²⁰ See e.g. ETC Opinion 1996-77.

law, this fact does not cause difficulties. As stated above, in case of discrimination on ground of nationality that are not in any way related to “race”, further exceptions on the prohibition are applicable.

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

Yes, see Article 2(5) GETA (cited above); this provision existed before the Directives were adopted and has not been changed since.

4.5 Work-related family benefits

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

General information on the situation of same-sex couples in the Netherlands²²¹

Registered partnership was introduced on 1st of January 1998 in the Netherlands, both for same and opposite sex couples.²²² Distinction between married and registered partners (or, between registered and non registered partners) constitutes *direct distinction* on the ground of marital (civil) status, *prohibited* by the GETA.²²³ Since the year 2001 same sex couples can legally marry in the Netherlands.

Distinctions based on the sex of a person’s *partner*, are regarded as distinctions on the ground of sexual orientation. This follows not only from the Parliamentary Documents but it has also been confirmed by the ETC in several of its Opinions.²²⁴ It is therefore prohibited to make distinctions between same-sex and opposite-sex partners, with the same civil status. However, in two cases which had arisen prior to the ECJ’s *Grant* judgment, the ETC regarded the distinction between same-sex and opposite-sex partners as a form of direct sex discrimination. In one case, the organiser of ballroom dancing competitions wished to learn whether the rule that only *opposite* sex couples could participate in these competitions was in conformity with the principle of equal treatment. The Commission held: *direct* sex distinction and *indirect* distinction on the ground of sexual orientation which could not be justified.²²⁵ In the other case, the Commission held “*direct sex distinction*” and it did not look altogether at the question of sexual orientation.²²⁶ Both cases had arisen outside the employment context.

²²¹ This paragraph is based upon the sexual orientation report by Kees Waaldijk, supra footnote 65.

²²² Articles 80a-80e of Book 1 of the Dutch Civil Code, as amended by the Act of 5 July 1997, Staatsblad 1997, nr. 324; and hundreds of provisions in other Acts, as amended by the Registered Partnership Adjustment Act (“Aanpassingswet Geregistreerd Partnerschap”) of 17 December 1997, Staatsblad 1997, nr. 660. Both laws came entered into force on 1 January 1998.

²²³ See also ETC Opinion 1999-13 (requirement of the same number of days off for the employee’s partnership registration, as for his wedding).

²²⁴ See Opinions 1997-47 and 48, Opinion 1999-08 and Opinion 1999-13.

²²⁵ Opinion 1997-29.

²²⁶ Opinion 1998-10. The scope of this report is too short to consider this case in more detail.

The ETC has revised its stance in Case 2004/116 of 21 September 2004. In this case the rule that only opposite sex partners may participate in the respondent's dancing competition was regarded as an instance of direct sexual orientation distinction as well as direct sex distinction. However, this Opinion of the ETC was overruled by the Chairman of the District Court in The Hague (26 July 2006 (LJN AY5005) who ruled that, although this constituted direct sex discrimination, it was justified under the clause in article 2(2) of the GETA which allows for 'gender specific requirements'. (See also the summary of cases in par. 0.3 of this report.)

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

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

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

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

4.6 Health and safety

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

Yes, the DDA contains a provision that is mirroring Article 7(2) of the Directive.²²⁷ See Article 3, sub c. of the ADA.

The prohibition on making a distinction does not apply if: (c) the discrimination concerns a specific measure which has the aim of granting persons with a disability or chronic illness a privileged position in order to neutralize or ameliorate existing disadvantages and the distinction is proportionate to the objective.

However, this Article does not talk of measures that are necessary for health and safety reasons. This latter topic has been dealt with under Article 3(1) sub (a) of the DDA, which reads as follows:

"The prohibition of making a distinction shall not apply if:

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

Both Article 2(5) and Article 7(2) of the Framework Directive speak of national legislation or measures taken by the Member States government in order to protect health and safety. However, the provisions under Article 3 in the DDA do not make this restriction. This means that also measures taken by an individual employer can be brought forward as a justification for making a distinction. It is disputable whether this is in line with the requirements of the Directive.

²²⁷ This provision seems often to be confused with the Article 3 (1) sub a DDA, that mirrors Article 2(5) of the Directive, which aims at national legislation that is necessary for reasons of public health and safety. This exception is discussed later in this report under the heading 4.8.

The exception of Article 3 (1) sub (a) in the DDA must be interpreted narrowly. It follows from Parliamentary History that a high threshold is set for any successful reliance upon this exception. If an employer claims that a distinction on the ground of disability is necessary for reasons of health, safety or security, he must duly motivate his claim. If there is a possibility to remove the risk by means of an effective and reasonable accommodation, it is not possible to rely on the exception.²²⁸ There are a few points that need further clarification. Under the 1998 Working Conditions Act and under private employment law, the employer has a duty to eliminate/reduce much as possible any risk to the health and well being of his employees. It is not clear from the Parliamentary History or from existing case law whether an employer can exclude a disabled person on the ground that the work will pose a risk to the disabled person's own health or safety (but not the health and safety of others). Neither is it clear whether a disabled individual can decide for him/ herself that he/ she wishes to accept such a risk. Moreover, it is not clear whether the employer would be excluded from liability should the disabled individual suffer harm in such circumstances.

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

No. A similar counterpart exception has not been enshrined in the GETA or in the ADA. However, safety and security issues may come at the surface in the 'objective justification test' for indirect discrimination cases. For example, a prohibition of headscarves during gymnastics for reasons of safety and security can be objectively justified.

²²⁸ See also A.C. Hendriks, *Wet Gelijke Behandeling op grond van handicap of chronische ziekte* (Actualiteiten Sociaal Recht), Deventer: Kluwer 2003, p. 66-67.

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 ?*

Both direct and indirect age distinction may be ‘objectively justified’ under Article 7(1)(c) of the ADA.

As far as the ‘Mangold-test’ is concerned: this test is quite strict. The Dutch Government, until now, more or less assumed that whenever the legislator had laid down a criterion based on age, this was objectively justified as soon as the legislator had given some ‘good reasons’ for doing this.²²⁹ The case law of the Court means that every legal norm that contains a differentiation based on age needs to be justified. The Government has made a start with this during 2004-2005. Every Department of the Government was obliged to make a report in which it gives an inventory of age criteria in its legislation and has to give the reasons why these criteria exist.²³⁰

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

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

Subsection (a) provides that the prohibition of age distinction shall not apply if the distinction is based on employment- or labour market policies which are aimed at promoting labour participation of certain age categories provided that such policies are enshrined in a Statutory Act or in a Governmental Decree.²³¹ [Transposition of Art. 6(1) of Directive 2000/78].

²²⁹ See Explanatory Memorandum to the ADA, Tweede Kamer 2001-2002, 28169, nr 3. See for the consequences of the Mangold test also M. Heemskerk & M.J.J. Dankbaar, ‘Leeftijd’ [Age]. In: S D.Burri (ed.) Oordelenbundel 2005. Kluwer, Deventer June 2006.

²³⁰ This was requested by the Second Chamber of Parliament; see the letter to the Minister of Social Affairs, dd 14 June 2004, 85-04-SZW. The answers were sent to Parliament in the course of 2005. See Tweede Kamer 2004-2005, 28 170, nr 30: Inventory of the Ministry of Social Affairs and Employment; *ibid.*, nr. 31: Inventory of the Ministry of Housing; *ibid.*, nr. 32: Inventory of the Ministry of Finance; *ibid.*, nr. 33: Inventory of the Ministry of Foreign Affairs; *ibid.*, nr. 34: Inventory of the Ministry of Health; *ibid.*, nr. 35: Inventory of the Ministry of Education; *ibid.*, nr. 36: Inventory of the Ministry of Transport and Water Management; *ibid.*, nr. 38: Inventory of the Ministry of Agriculture and Nature; *ibid.*, nr. 39 + 44: Inventory of the Ministry of Internal Affairs and Kingdom Relations; *ibid.*, nr. 41: Inventory of the Ministry of Justice. The report of the Ministry of Social Affairs and Employment is available on the internet; see www.minszw.nl.

²³¹ A concrete example of this exception concerns the Act on a Minimum Wage and Minimum Holiday Allowance (“Wet Minimumloon en Minimum Vakantietoelage”). This Act contains both a maximum and a minimum age limit of 65 and 23 years old respectively. The Act’s purpose is the promotion of employment in general and paid employability for young persons specifically. See Explanatory Memorandum to the ADA, pp. 28-30. The exception under subsection (a) reflects the exception of *Article 6(1)* of Directive 2000/78.

Subsection (b) provides that the prohibition of age distinction shall not apply if the distinction regards the termination of the employment relationship, either by reason of having reached the statutory retirement age (65), or, of a *higher* (not lower!)²³² age than that provided this higher age has been laid down by Statutory Act or governmental decree, or has been mutually agreed on by the parties involved. [Transposition of Art. 6(2) of Directive 2000/78].

In addition, Article 16 of the ADA provides that the prohibition of age distinction shall, until 2 December 2006, *not* apply to distinctions regarding termination of the employment contract as a result of having reached the – by the employment contract agreed- retirement age *lower than* the statutory retirement age, *provided* this had been agreed on before 1 May 2004 (when the ADA entered into force). After that time, ‘objective justification’ is called for.

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)?*

Yes, it does. Article 8 of the ADA renders the prohibition to make a distinction inapplicable in regard to (occupational) pension schemes and in regard to actuarial calculations for pension provision. Article 8(2) provides in essence, that the prohibition of age distinction shall not apply to the admission or entitlement to pension provision²³³, nor to the fixing under such provision of different ages for employees or categories of employees. Article 8(3) renders this norm inapplicable in regard to the use of age criteria in actuarial calculations. [Transposition of Art. 6(2) of Directive 2000/78]. The Directive states that this exception may not lead to discrimination on the ground of sex. This clause has not been added in the Dutch ADA. However, this is regulated in the sex-discrimination legislation. (See Article 12b and 12c of the Equal Treatment Male/Female in Employment Act.)

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.

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

This article reads as follows: “1. *The prohibition on discrimination shall not apply if the discrimination: a) is based on employment or labour-market policies to promote employment in certain age categories, provided such policies are laid down by or pursuant to an Act of Parliament; (...)*”.

²³² It follows from the Explanatory Memorandum that subsection b does not apply to dismissal based upon reaching a pensionable age which is *lower* than 65 years. See Explanatory Memorandum to the ADA, , Tweede Kamer 2001-2002, 28169, nr 3, p. 32.

²³³ A concept defined in Article 8(1) of the ADA.



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 no explicit exceptions with such content. However, this is possible on the ground of a broad reading of the exception under Article 7(1) sub a or under Article 7(1) sub (c) of the ADA (general possibility for an objective justification).

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?

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

The Dutch government is of the opinion that dismissal on the age on which one is entitled to a AOW pension is objectively justified. The explanatory statement (MvT) tot the ADA says that the objective justification lies in the following aspects:

- dismissal at a certain age accomplishes the use of an objective criterion irrespective of people; there is no need to determine whether the employee concerned still meets the requirements or not;
- there is a general consensus for the age of 65 years as a 'limit' in the Dutch society ('groot maatschappelijk draagvlak');
- the age of 65 years underlies the social security system in the Netherlands;
- at the age of 65 employees are entitled to an income (a pension under the General Old Age Pensions Act), which consists of a benefit based on legal social security as well as of an occupational pension ('bovenwettelijke pensioen') Individuals do not need to have a history of employment in order to receive a pension under the General Old Age Pensions Act.

The ADA leaves room for social partners to agree - if required - on a higher age, until which employees can continue working after they turned 65.

The ADA prohibits compulsory retirement (dismissal) before the age of 65, unless the distinction made on ground of age is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. It is not possible to fix a lower retirement age by individual agreement nor by collective agreement, unless the distinction made on ground of age is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

- 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?*

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

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

No, there is not a general a mandatory retirement age in any provision in the Dutch law that regulates the possibilities of dismissal of workers. However, in some professions there are age limitations that are regulated by law or by the professional organisation (e.g. the National Organisation of General Practitioners).²³⁴ These are also regularly included in a Collective Labour Agreement ("Collectieve Arbeidsovereenkomst"). Furthermore, in an employment contract it can be determined that it ends at the age of 65.

A complete overview of such regulations can not be given here. The ETC decides on a case by case basis whether there is sufficient objective justification for such a fixation of a retirement age or the age on which an other contractual relationship will be ended. See e.g. ETC-Opinion 2005-49, where a General Practitioner (GP) aged 80 contested exclusion by an insurance company, the ETC concluded that there were solid methods available to test whether elderly GP's are still able to do their job properly. In fact a Registration Committee of Medical Doctors and the National Association of Medical Doctors apply these methods. Following the results of these tests the insurance company can decide whether or not to conclude a service contract with a doctor who is over the age of 65. Therefore the conclusion was that there is no objective justification for the exclusion of this particular doctor

- 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?*

Yes, see article 7(1) sub (b). This article reads as follows: "1. *The prohibition on discrimination shall not apply if the discrimination:*

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

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

²³⁴ See <http://www.leeftijd.nl/vragen/binnenkort65>.

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

Yes, these laws are applicable to all workers, without any exception. As long as someone is an employee according to the definitions of these laws, they are protected by the civil laws regulating employment rights and by the ADA, not matter his/her age.

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

No, they are not.

4.7.5 Redundancy

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

Yes, it does. However, it has been provided for in employment law, that in case of the restructuring of a company, the so-called ‘last in, first out’ principle may be used as a yardstick in the choice as to whom to dismiss first.

The principle works to the advantage of older workers (and constitutes ‘indirect distinction’ of younger workers). The principle has also been accepted in case law. The Explanatory Memorandum to the ADA explicitly says that the use of this principle may be “objectively justified” under Article 7(1) (c) of the Act. It is noted that the ‘last in, first out’ principle currently forms object of debate in the Dutch Parliament.²³⁵

Article 7(1)(c) ADA reads as follows: “1. *The prohibition on discrimination shall not apply if the discrimination: (...) (c) is otherwise objectively justified by a legitimate aim and the means used to achieve that aim are appropriate and necessary.*”

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

Yes, it is. Compensation is calculated on the basis of the so-called ‘cantonal courts formula’ (“kantonrechtersformule”), i.e., $a \times b \times c$.²³⁶ The factor *a* stands for the employee’s number of years of service. This factor is connected to the employee’s age. Until 40 years old, every full year of service counts for 1, between 40-50 years old it counts for 1.5, and, as from 50 years old it counts for 2. (Factor *b* reflects a remuneration component (monthly gross salary) and factor *c* is a ‘correction factor’).

²³⁵ On 18 December 2003 the Second Chamber of Parliament accepted a Motion (Motion Verburg, Weekers, Bakker and Noorman den Uyl) which begged the Government to reconsider the usage of the ‘last in, first out’ principle in cases of dismissal for reasons related to the economic situation of a company. See Tweede Kamer, 2003-2004, 29 200, XV, nr. 48. See also the recent Note on Reconsideration of the Last In First Out Principle in cases of dismissal for reasons related to the economic situation of a company, available at www.szw.nl.

²³⁶ See H.L. Bakels, I.P. Asscher Vonk, W.J.P.M. Fase, *Schets van het Nederlands Arbeidsrecht*, Deventer: Kluwer 2003, p. 179.

In 2005 the Cantonal Court of Sneek decided that a ‘Social Plan’ whereby the Trade Unions and the Management of a Company, in a case of a large scale reorganisation, agreed to make an age distinction whereby this ‘cantonal courts formula’ was ‘neutralised’ (correction factor $c = 1$) only for employees under the age of 57 (while for the employees over 57 there was a general wage compensation scheme in place) amounted to unlawful age discrimination.²³⁷ The case came down to the question whether a person over the age of 57 years old needs to use the special arrangement for older workers in the Social Plan or that he is free to choose to be made redundant in the normal way (termination of the employment contract and normal application of the so-called cantonal judges formula), which would be more profitable. The ETC (and the judges) ruled that the special rules for the redundancy payment of older people are not objectively justified (not meeting the criterion of proportionality). Those cases concerned a situation of large scale dismissals (reorganisation-dismissals). In practice, the formula is still being used in individual cases of dismissal.

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?

It can be maintained that Article 3(1) sub (a) of the ADA is implementing Article 2(5) of the Directive. However, in that case the requirement that measures on this ground need to be based on a law is not fulfilled. (See above, para 4.6.)

4.9 Any other exceptions

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

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

1. Article 5(3) of the GETA contains an exception regarding the private nature of the employment relationship.
2. Article 7(2) of the GETA grants private educational establishments the freedom to impose requirements governing admission to or participation in the education that the establishment provides. Article 7(2) accords with the exception in Article 5(2)(c) of the GETA, however, Article 7(2) applies to the entry of pupils to denominational schools and thus not to employment.
3. Article 7(3) concerning providing goods and services of the GETA contains an exception regarding the private nature of the circumstances at which the legal relationship sees (e.g., a woman who rents a room in her own house may lawfully require that the person who rents the room is female).²³⁸

²³⁷ Cantonal Court Sneek, 31 May 2005, LJN AT7230.

²³⁸ This topic has been discussed in great detail in the second evaluation report about the functioning of the GETA which was published in the end of 2006. See M.L.M. Hertogh & P.J.J. Zoontjens (eds): *Gelijke behandeling: principes en praktijken. Evaluatieonderzoek Algemene wet gelijke behandeling*. Wolf Legal Publishers Nijmegen 2006. The part about the relationship between equality and freedom of association and the right to privacy was written by prof. Paul Zoontjens. See pp. 175-216.

4. The internal affairs of associations fall outside the scope of the GETA. This follows from the Parliamentary History and is not explicitly provided for in any Article of the Act.²³⁹
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.*

Positive action schemes are – to a certain extent – only possible with respect to sex, race and disability.

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

1. the initiative must be a *specific measure*;
2. the measure is aimed at the conferral of a preferential position for women or for people belonging to ethnic minorities;
3. the measure is aimed at the *removal* or the *reduction* of factual inequalities;
4. there must be a *proportionate* relationship between the measure and the objective pursued. This last element is not required by Directive 2000/43. The Dutch definition leaves *less scope* for affirmative action policies and programmes, since it does not allow measures which aim at *preventing*, in addition to *removing* or *reducing* disadvantages.²⁴⁰

Article 3(1) sub (c) of the DDA enshrines a positive action exception to the prohibition of distinction under that Act. The same conditions as described above apply here.

In 2005 there was a discussion on the question whether the possibility to develop and apply positive action schemes should be extended to the other grounds that are covered in the GETA and to age discrimination. The Government has published a draft report and got comments from, *inter alia*, the ETC. Although the ETC recognises that in Dutch society there is hardly any structural disadvantage on the ground of age, religion or sexual orientation, the ETC is of the opinion that positive action measures should in principle be possible for all groups that are protected in Article 13 EC Treaty. The main reason for this is that it is important that the equal treatment legislation is consistent and transparent and contains the same system of exceptions for all non-discrimination grounds. In May 2005, a final Memorandum was sent to Parliament.²⁴¹ The Government concluded that it is not necessary to change the Dutch equal treatment legislation in view of the case law of the ECJ and the implementation of Directives 2000/43, 2000/78 and 2002/73. In this Memorandum, the measures that the Government employs in this respect are described in great detail.

²³⁹ This topic has also been discussed in great detail in the second evaluation report about the functioning of the GETA. See the previous footnote.

²⁴⁰ See Explanatory Memorandum to the EC Implementation Act, Tweede Kamer, 2002-2003, 28 770, nr. 3, p. 9.

²⁴¹ Memorandum on Preferential Treatment (“Nota Voorkeursbehandeling”), Tweede Kamer, 2004-2005, 28 770, nr. 11.

As far as the DDA is concerned, apart from positive action measures as meant in Article 7(1) of the Framework Directive, there are also general supportive measures for disabled people, as meant in Article 7(2) of the Directive. This provision has been transposed in Article 3(1) sub (b) DDA, which enshrines a possibility for supportive social policies for disabled people. In contrast to ‘positive action measures’, these are not ‘time restricted’.

The Dutch Government has introduced several supportive measures designed to promote the reintegration of disabled people in society over the past years. The 1998 Act on the Reintegration of Disabled People in Employment (“Wet op de (Re)integratie Arbeidsgehandicapten”), or REA²⁴² is of particular importance.

This Act aims at creating a coherent set of measures which facilitate the (re)integration of ‘employment disabled people’ (“arbeidsgehandicapten”) in employment. The means to achieve this objective are in essence: faster payment of expenses (related to (re)integration) to employers; flexible application of qualifications for benefits and, a reduction of the risks for employers.²⁴³ The REA also has the purpose of achieving a clear allocation of responsibilities between the various actors involved with (re)integration. The REA enshrines the *possibility* for prescribing a *quota*, i.e., the obligation for employers to employ a certain number of ‘employment disabled persons’. However, this possibility has not been made use of so far. In essence the REA aims at reducing or taking away objections by employers to the employment of disabled persons.

b) Do measures of positive action exist in your country? Which are the most important? Please provide a list and short description of the measures adopted, classifying them into broad social policy measures, quotas, or preferential treatment narrowly tailored. 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 people with disabilities to the labour market, any related to Roma and regarding minority rights based measures.

Although many companies and governmental organisations do take measures of positive action, just a few general (and legal) measures can be mentioned. In as far as such plans actually exist they concern the field of employment. As far as public employment is concerned such policies are often restricted to making remarks in advertisements that women and persons from ethnic minorities are especially invited to apply for the job. In general, there is quite a bit of resistance against positive action measures that are stronger than this (e.g. preferential treatment). Until 2003, a special act (the so called ‘Wet SAMEN’) regarding an obligation for employers to register the increase of numbers of employees from minorities and to set up a certain minorities policy was operative. Partly due to debate about the effectiveness of this act, it has been repealed.

In the past there has been some debate about this topic in Parliament when one member of the Liberal Party (VVD) proposed to abolish the positive action exception in the General Equal Treatment Act. (See TK 28 770 2003-2004, EG-implementatiewet Awgb, nr 7: amendement Luchtenveld (VVD) dd 8 October 2003). The VVD called this ‘positive discrimination’ and wanted to abolish this type of policies because of the resistance it evokes among groups that are not targeted by such policies. On the other hand the same party is strongly in favour of positive action measures that are aimed at disabled persons.

²⁴² Act on the Reintegration of Disabled People in Employment (“Wet op de (Re)integratie Arbeidsgehandicapten”) of 23 April 1998, Staatsblad 1998, 290, most recently amended by Act of 15 December 1999, Staatsblad 1999, 564.

²⁴³ D. Beekman and E.J. Kronenburg Willems, *Wet op de (re)integratie arbeidsgehandicapten, PS Special Wet REA*, 1998.

Recently, there has been started a new debate about quotas for women in the top of business and governmental organisations, fostered by Member of the European Commission Neelie Kroes and the chairwoman of the FNV (Federation of Dutch Trade Unions) Agnes Jongerius. The Dutch minister of Social Affairs Mr. Donner is against such quotas.

As far as disabled people are concerned, in 2004 the Government started a trajectory called ‘inclusive policy’ (“*inclusief beleid*”). The Government made a start with this policy with an action plan called “Equal Treatment in Practice” (“*Actieplan gelijke behandeling in de praktijk*”).²⁴⁴ This forms a kind of mainstreaming of specific (permanent) social policies concerning the improvement of the position of disabled people.

Five Departments of the Government were requested (by the Ministry for Health) to send in their policy plans.²⁴⁵ The proposals covered a wide range of measures, from making electronic voting machines that can be handled by blind persons, to adaptation of houses to the needs of old people and people with wheelchairs.

With regard to Roma people, no specific measures of positive action are taken in the Netherlands. However, it must be noticed that Roma people who are living on trailer camps (as well as other travellers) do have special attention from local governments, as their specific housing situation in many regards demands for a specific policy.

However, it seems that the Equal Treatment Commission is inclined to accept that in the case of racial or ethnic discrimination there should be more room for positive action plans. This conclusion can be derived from some (we must admit quite old!) case law of the ETC. The Commission issued opinions in two similar cases, where a city council asked explicitly for members of ethnic minorities to apply for jobs as social workers (case no. 1999-31 and 1999-32). People from Dutch origin could not apply. On the complaint of a Dutch citizen, the Commission ruled that the preferential treatment of ethnic minorities was allowed. Although the Equal Treatment Act holds the principle that positive action for women and ethnic minorities should be implemented in the same way, the Commission was of the view that this principle does not need to be effected in the same way. The effectuation of positive action depends, according to the Commission, on its legal and social context. In this regard, the Act on the stimulation of labor participation of ethnic minorities (Wet SAMEN) had to be taken into account.²⁴⁶ The Wet SAMEN requires organizations to reach a proportionate participation of ethnic minorities in their staff. Because the Wet SAMEN is an implementation of section 2.2 of the ICERD, the Equal Treatment Act needs to be interpreted in conjunction with this Convention. This means, according to the Commission, that the criteria for positive action should not be interpreted too narrowly. The objectives of the various laws include reaching de facto equality of minority groups on the labor market.

²⁴⁴ Tweede Kamer 2003-2004, 29 355, nr. 1.

²⁴⁵ See Tweede Kamer 2004/2005, 29 355, nr. 11, 14 and 15. It concerns the Ministries of Internal Affairs and Kingdom Relations, Education, Social Affairs and Employment, Transport and Water Management, Housing, and the Ministry of Healthcare.

²⁴⁶ This law has since been abolished.

6. REMEDIES AND ENFORCEMENT

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

In relation to each, 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)?

Are there available statistics on the number of cases related to discrimination brought to justice ? If so, please provide recent data.

In 2007, the ETC received 515 request to give an *Opinion* (2006: 694). The outflow of completed cases amounted to 637, from which 131 were evidently unfounded, and another 131 were withdrawn.²⁴⁷ About one third of those 131 were withdrawn as a result of a settlement. The reasons for the other withdrawals are various; they could consist of the perceived loss of importance for the complainant during the procedure, a (delayed) recognition of the remote chances for success in the case, as well as (in some instances) the fear for victimization. No statistic data is available on the number of discrimination related (criminal and civil) cases for District Courts. Registration of those cases is particularly difficult, as many accusations of discrimination come out indirectly in other (common) cases.

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

The principle of non-discrimination can be enforced by means of criminal law procedures in as far as the offences / discriminations fall under the definition of discrimination in Article 90quater of the Criminal Code. In this report, we leave aside these offences and concentrate on civil equal treatment legislation.

The GETA, DDA and ADA do not entail *compulsory* judicial procedures.²⁴⁸ If discrimination occurs in the sphere of private employment, the conventional civil (labour) law procedures apply. If it occurs in public employment, the ordinary procedures of administrative law apply.²⁴⁹ If it occurs in the contractual sphere (providing goods and services) it can be dealt with in normal civil law procedures. If it occurs in the sphere of public services with the exclusion of unilateral acts or decisions of the administration or legislator) it can be dealt with in administrative procedures. Apart from all that, an instance of discrimination can be considered a tort and be dealt with in a civil law procedure. In addition, the equal treatment legislation provides for a special (non compulsory) procedure before the ETC.

²⁴⁷ Equal Treatment Commission, *Annual Report 2007*, p. 26, 32.

²⁴⁸ See K. Waaldijk, *supra* footnote 65.

²⁴⁹ The civil court has competence in cases in which discriminatory contractual agreements (goods and services supplied by the Government) are at stake. And, with regard to unilateral governmental decisions, e.g., concerning the allocation of social security benefits/social advantages, administrative procedures apply.

The ETC is a semi-judicial body which renders non-binding Opinions. After it has rendered an Opinion, a complaint may still be lodged before the conventional civil/ administrative courts if the applicant wishes to obtain a *binding* judgment. The ETC is a low threshold body: no legal representation is required. Moreover, the procedure before the Commission does not cost anything. As for civil law and administrative law procedures in court there is a system of free legal aid for people with low incomes. To the current author's knowledge, no specific rules exist requiring that courts/ETC are physically accessible. Neither is it specified anywhere to the author's knowledge that information must be provided in Braille. No special procedures exist for dealing with individuals with a learning disability. Sign language interpretation must legally be provided to the author's knowledge. The person who feels discriminated against can file a petition at the ETC in writing (Article 12 GETA). For non-Dutch people this is not always an easy task and therefore it is possible to specify the complaint during an interview at the Commission's office. By analogy, special measures might be taken for persons with a disability.²⁵⁰

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

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

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

Yes, this is possible. With regard to time limits, the following rules are applicable.

Administrative law procedures: the General Act on Administrative Law provides that in principle an appeal must be lodged *within 6 weeks* counted as from the day *after the day* on which the contested decision has been made known.

Civil law procedures: *Ex* Article 8(2) of the GETA (Art. 9(2) DDA and Art. 11(3) ADA) an applicant who wishes to contest the lawfulness of the termination of an employment contract (discriminatory dismissal/victimisation dismissal) must do so *within 2 months* after the termination of the employment contract. (See also: Articles 7:647(2), 7:649(2) and 7:648(1) of the Dutch Civil Code).²⁵¹ A legal claim with regard to the nullification of the employment contract can no longer be made after 6 months have passed after the day on which the employment contract was terminated (Article 8(3) of the GETA/Art. 9(3) DDA/Art. 11(4) ADA).

Equal Treatment Commission procedures: Article 14(1)(c) of the GETA only sets a requirement of *reasonableness*. (This also applies in the context of procedures lodged under the DDA and ADA).

²⁵⁰ This information has been provided by the ETC-office.

²⁵¹ J.H. Gerards and A.W. Heringa, *Wetgeving Gelijke Behandeling*, Kluwer Deventer 2003, p. 199.

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

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

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

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

Article 10(1) GETA reads as follows:

“If a person who considers himself to have been wronged through ‘distinction’ as referred to in this Act established before a court facts from which it may be presumed that distinction has taken place, it shall be for the respondent to prove that the contested act was not in contravention of this Act”.

The equivalent Articles in the DDA and ADA are Articles 10(1) and 12(1) respectively. Subsection 2 of these three Articles provides that the partially reversed burden of proof also applies in group actions under Article 3:305a Civil Code and Article 1:2(3) of the General Act on Administrative Law. Strictly spoken, the partially reversed burden of proof does not apply in procedures before the ETC. However, on a voluntary basis the Commission nevertheless applies it in its case law.

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

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

All three Acts protect against victimisation dismissal and against other forms of disadvantage as a result of the fact that a person has invoked the statutory equality act or has otherwise assisted in proceedings under these Acts, e.g., by means of a testimony. See Articles 8(1) and Article 8a GETA. Article 8(1) reads as follows:

“If an employer terminates an employee's contract of employment in contravention of section 5 or on the grounds that the employee has invoked section 5, either at law or otherwise, such termination is voidable”.²⁵²

Article 8a GETA reads as follows:

“It is unlawful to disadvantage persons because they have invoked this Act, either in or out of court, or have assisted others in this respect.”

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

Equivalent Articles are enshrined in the DDA (Articles 9(1) and 7a respectively) and in the ADA (Articles 11(2) and 10 respectively).

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.*

Sanctions in case of discrimination are applied by the courts. According to Article 8(1) of the GETA, Article 11(1) and 11(2) ADA, and Article 9(1) DDA, discriminatory dismissals and victimisation dismissals are “voidable” (“vernietigbaar”).²⁵³ This applies both with regard to public and private employment. The employee can ask the court to invalidate the termination of the contract and can thereupon claim wages. He can also claim to be reinstated in the job. Or, he can claim compensation for pecuniary damages under the sanctions of general administrative/ contract or tort law. Contractual provisions which are in conflict with the GETA, the ADA and the DDA, shall be null and void. This follows from Article 9, Article 13 and Article 11 of these Acts respectively.

²⁵² The term ‘voidable’ (“vernietigbaar”) means that it is not automatically void but that this may be established during a court procedure.

²⁵³ The term ‘voidable’ (“vernietigbaar”) means that it is not automatically void but that this may be established during a court procedure.

Articles 13(2), 13(3) and 15 of the GETA mention some additional sanctions. Sanctions under these Articles are imposed by the ETC, not by the courts. Under Article 13(2), the ETC may make recommendations when forwarding its findings (in an Opinion) to the party found to have made unlawful distinction. Under Article 13(3) the ETC may also forward its findings in an Advise to the Ministers concerned, and to organisations of employers, employees, professionals, public servants, (consumers of goods and services) and to relevant consultative bodies. Under Article 15(1) the ETC may bring legal action with a view to obtaining a ruling that conduct contrary to the relevant equal treatment legislation is unlawful, requesting that such conduct be prohibited or eliciting an order that the consequences of such conduct be rectified.²⁵⁴ This power must be regarded in light of the fact that the ETC's Opinions are not binding. The Commission has never made use of this possibility. In case the case has been brought by interest groups the sanctions are similar. It is seriously doubted in academic legal circles, whether the range of sanctions available under the equal treatment legislation is in conformity with the requirement that sanctions be 'effective, proportionate and dissuasive'.²⁵⁵

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

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

c) *Is there any information available concerning:*

- *The average amount of compensation available to victims*
- *The extent to which the available sanctions have been shown to be - or are likely to be*
- *Effective, proportionate and dissuasive, as is required by the Directives?*

This information is not available for two reasons:

1. There hardly ever is compensation in terms of money. This only occurs when, for example, the judge agrees to the dismissal since employment relationships have been disturbed, and in that case sets a relatively high sum for compensation because of the termination of the contract.
2. No information can be given on this topic without an extensive survey into the case law of the cantonal courts and the district courts. Most of the time, such cases are not published in official law journals. Also, the registration of cases within the court system is not systematically done on the basis of the legal provisions at stake. So, it might very well be that a lot of cases are registered under the heading of a general provision like 'breach of labour contract' (with no specification about the reasons for this) or tort.

²⁵⁴ Unless the person affected by the alleged discriminatory conduct has made reservations (Article 15(2) GETA). In theory this could amount to a court order, e.g., to make a desegregation plan for schools; however, the Dutch courts are very careful not to interfere with what they call the discretionary powers of the administration and the Government.

²⁵⁵ See the report by Kees Waaldijk, *supra* footnote 65 and R. Holtmaat, 'Uit de Keuken van de Europese Unie: de Gelijkebehandelingsrichtlijnen op grond van Artikel 13 EG Verdrag', in T. Loenen *et al.* (eds.), *Gelijke Behandeling: Oordelen en Commentaar 2000*, Deventer Kluwer 2001, pp. 105-124 and I.P. Asscher-Vonk, 'Sancties' & Conclusie Juridische Analyse', in I.P. Asscher-Vonk & C.A. Groenendijk (eds.) *Gelijke Behandeling Regels en Realiteit*, Den Haag SDU 1999, pp. 202-234 and pp. 301-319.

3. This means that such a survey would extend far beyond the time that is available for updating this country report. Very generally speaking it can be noticed that Dutch courts are very restrictive in granting damages that are not strictly material damages (*e.g.*, wages not paid). Immaterial damages (*e.g.*, hurt feelings) will only minimally be compensated for.

As to the question whether the available sanctions have been shown to be - or are likely to be - effective, proportionate and dissuasive, as is required by the Directives, it can be observed that the sanctions do not seem to be very dissuasive. One problem is that the ETC can not impose them. Discriminatory acts or discriminatory termination of a contract are not automatically void, but need to be contested in court. Another problem is that the equal treatment legislation itself does hardly mention any sanctions. Victims have to know which sanctions normal civil law and administrative law contains. Therefore, it has been proposed to include the sanctions (that are available under civil and administrative law) in the ETC in order to clarify this point for both the victims and perpetrators of discrimination.²⁵⁶ In addition, a motion has been submitted in parliament in which the government has been asked to extend the possibilities for the Labour Inspectorate to impose sanctions in the case of gender and racial discrimination.²⁵⁷

The conclusion may be that the Directive's requirement that sanctions be 'effective', 'dissuasive' and 'proportionate' seems not to be met by the Dutch legislation.

This also seems to be the opinion of one of the political parties that now is participating in the new government (to be installed in February 2007). In November 2006 an MP of the PvdA (social democrats) offered a "black book age discrimination" to the Minister of Social Affairs and Employment, proposing at that occasion to make age discrimination a punishable act (to be fined up to 6000 Euro).

²⁵⁶ See *e.g.* Asscher-Vonk, previous footnote, at page 233.

²⁵⁷ See Tweede Kamer 2005-2006, 28 770, nr. 12.

7. SPECIALISED BODIES

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

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

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

The ETC is the first officially designated body by which the governments implements Article 13 of the Race Directive. Besides, on the first of January 2007, two non-governmental organizations, the Landelijk Bureau Racismebestrijding (LBR) and the local Anti-Discriminatie Bureaus (ADB's) have been merged into one new organization called “Art. 1”. (After Article 1 of the Constitution.) The organization now covers all of the Art. 13 ECT non-discrimination grounds and is officially designated as one of the equality bodies (in terms of Art. 13 of the Race Directive). It has mainly a role in assisting victims and in monitoring developments in society with regard to (non-)discrimination.

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

The Status of the organization “Art. 1” is that of an independent (but subsidized) non-governmental organization. The legal and financial regulation of this organization and the local bureaus that are attached to it will be regulated in a new law (that now is still under discussion in Parliament).²⁵⁸

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

The ETC deals with all non-discrimination grounds in the GETA, DDA, ADA as well as more specific grounds (like the type of duration of the employment contract). The Commission's principal function is to investigate alleged cases of discriminatory practices or behaviours.

²⁵⁸ Tweede Kamer 2007-2008, 31 439, nrs 1-3: Wet gemeentelijke antidiscriminatievoorziening.

Besides, the ETC may investigate structural instances on its own accord²⁵⁹ and may give advice public parties who want to know whether their policies are or are not in contravention to the law. It may also give advice to the government in discrimination issues, including proposals for new legislation or proposals for amendments of legislation.

The role of “Art. 1” is mainly to assist victims of discrimination and to monitor developments with respect to (non-)discrimination in society.

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

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

The role of “Art. 1” is mainly to assist victims of discrimination and to monitor developments with respect to (non-)discrimination in society.

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

The ETC does have this competence, but it never makes use of this possibility. “Art. 1” can bring claims before courts just like any other NGO, in the framework of the general “group action” possibilities that exist under Dutch civil law. (no data of numbers of class actions are available)

f) Is the work undertaken independently?

The ETC has a position as a semi-judicial body and the experts that are Members of the Commission all have an independent status. However, in 2006 there was a serious attack on the independence of the ETC by the (then) Minister of Integration and Immigration, Mrs Verdonk. She publicly disagreed with the conclusion of one of the Commission’s Opinions in which a Muslim teacher refused to shake hands both of men and women. According to the ETC this was allowed. The Minister stated that children should learn what ‘respect for both sexes’ means and that in the Netherlands we show respect by shaking hands. She suggested to abolish the ETC, whose opinions are not binding anyway. The Minister got considerable support on this issue, both in public debate as among Members of Parliament.

²⁵⁹ The possibilities to do so have been extended by the so-called Evaluatiewet AWGB [Wet tot wijziging van de Algemene Wet Gelijke Behandeling; Evaluatiewet Awgb of 15 September 2005, Stb 2005, 516. (The law that amended the GETA on the basis of proposals that stemmed from the first evaluation of the Act over the period 1994-1999.)

“Art. 1” is an independent NGO, although it receives subsidy from the government.

g) *Does the body treat Roma and Travellers as a priority issue? If so, please summarise its approach relating to Roma and Travellers.*

The ETC does not treat Roma and Travellers as a special or priority issue. It has to be noticed here that Roma, Sinti and Travellers are not represented in overviews by the National Federation of Anti-Discrimination Agencies and Hotlines. Furthermore, according to the figures, Roma and Sinti hardly ever file their complaints with the Dutch Equal Treatment Commission (ECT) or the Public Prosecutor’s Office. Reasons for the absence of complaints could include the distrust of the authorities by Roma and Sinti, language barriers and the idea that complaining about discrimination or unequal treatment may make their situation worse. With that, the social situation of Roma and Travellers in the Netherlands might be not so precarious that it demands for priority treatment.

We do not know whether the newly established “Art. 1” or their predecessors has as yet any specific programs concerning Roma or Sinti or travellers.

8. IMPLEMENTATION ISSUES

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

Describe briefly the action taken by the Member State

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

In 2007 there were a wide range of activities, co-ordinated and subsidised by the Ministry of Social Affairs and Employment, in the framework of the **European Year** of Equal Opportunities for Everybody. The Netherlands considered the participation in the Year of a highly important interest. The European Year has been used in the Netherlands to promote equality, beyond legal protection of people's rights to equal treatment.

National Action Projects in this framework were:

- In March 2007 the official opening event of the Dutch European Year 2007 Equal Opportunities took place. The main goal of this conference was to get together all the representatives of the involved organisations and to gather media attention and publicity.
- Publicity Campaigns
- To raise the awareness of the non-discrimination grounds of article 13 of the EU Treaty the attention will be focussed on all the grounds but one specific non-discrimination ground will be highlighted during one month. Every month the “relay baton” will be handed over to another organisation which is representing a specific non-discrimination ground to highlight the start and finish of the months and to connect all the non-discrimination grounds of article 13.
- Debates, lectures and symposia
- There will be organising dialogue meetings for the Year of Equal Opportunities wherein all non-discrimination grounds are covered. The theme for these meetings will be ‘equal opportunities for all’.
- ‘Science meets practice’. It is the aim of this meeting that participants will learn from already existing practices and proven experiences. The meeting will encourage active participation. It will absolutely not be the intention that science gives lectures. Science (Law, personnel administration) should be helpful and innovative by building and changing of knowledge and practice.
- Workshops for professionals. These three workshops are aimed at professionals and opinion leaders like journalists and teachers, and religious pastors.
- Lunch lectures. In the different participating ministries the NIB will organise 3-5 lunch meeting sessions about the European Year of Equal opportunities for All.

The following activities have been undertaken in the past years:

- a) to disseminate information about legal protection against discrimination (Article 10 Directive 2000/43 and Article 12 Directive 2000/78)
- 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)
- 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)
- d) to specifically address Roma and Travellers.
 - a. No specific measures are addressed on Roma and Travellers.

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).*

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

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

The Ministry for Social Affairs and Employment made an inventory of rules concerning age criteria in 2005. Also, all other Ministries were required to do so and have submitted their reports to Parliament.²⁶⁰ A final stance of the government as to which of these rules are (or are not) in compliance with the non-discrimination standards still has to be awaited.

²⁶⁰ See Tweede Kamer 2004-2005, 28 170 , nrs. 44 and 45; Tweede kamer 2005-2006, 28 170, nrs. 30 until 36, 38, 39 and 41.

9. OVERVIEW

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

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

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

Change of Government

As a result of the national elections of the Parliament in November 2006, a new Governmental coalition was formed by the Christian-Democratic Party (CDA), the Labour Party (PvdA) and the Christian Union (CU). During the election period, discrimination was not a big issue. However, the government-to be has announced that it will put much effort into combating discrimination and promoting tolerance. It remains to be seen what concrete action they will take. (See also below, under the ground sexual orientation.)

Towards one Human Rights Institute?

For some years there has been discussions going on about the question whether the Netherlands need a Human Rights Institute, or NIRM (*e.g.*, in the form of an Ombudsman or an Independent Body). There were also voices that such an institute would have to include or integrate existing institutions, like the ETC, the National Ombudsman, the Commission for the Protection of Personal Data and the Study and Information Centre on Human Rights (or SIM, a department of the University of Utrecht). In 2005, these institutions issued an Advice for the Government on this matter.²⁶¹ They stated that the existing institutions should closely co-operate, but not be abolished as independent bodies. The Minister for Government Reform and Kingdom Relations reacted positively to these proposals and gave this group of institutions funding to explore the way in which a Human Rights Institute could be set up. No definite political decision has been taken on this issue yet. Currently the group of institutions is working on setting up a new 'overall' institute within the buildings of the SIM in Utrecht. This new institute could have the following tasks: to run a help desk where people can ask to what institute they should turn with complaints or questions, to give advice to the Government or private parties, to monitor human rights infringements, to enhance international co-operation in the field of human rights protection, to participate in educational and training activities (*e.g.*, for judges) and to work on public awareness raising.

²⁶¹ To be downloaded from: http://www.cgb.nl/download/adviezen/advies_2005_03.pdf.

Towards one integrated Equal Treatment Act?

There are many different equal treatment Acts in the Netherlands. The Government strives for one new Integrated Equal Treatment Act in which all of these provisions will be brought together.²⁶² In that framework there have been discussions about the question whether all discrimination grounds should be protected in exactly the same way and whether the terminology (*distinction*, “onderscheid”) should be changed into discrimination. The Council of State has issued its advice on the proposed bill, stating that this occasion should be used to bring the legislation further in line with the requirements set by the EC-Directives. In the recent response to the European Commission’s critical letter about some (above mentioned) alleged transposition deficits, the Dutch government has announced an integrated equal treatment bill before December 2008. However, there is still nothing known about the contours of the new act, nor about the choices that might be made.

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

A full 5 years after the first evaluation of the GETA took place (both by the ETC and external experts) some minor changes in the GETA were adopted in the so-called Evaluation Act GETA (“Evaluatiewet AWGB”).²⁶³ The main change was the extension of the mandate of the ETC. Article 12 (1) reads as follows:

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

In this provision, following the amendments, the words “in the public service or in one or more sectors of society” have been erased.

²⁶² See Tweede Kamer 2002-2003, 28 169, nr. 12 and 30 and Tweede Kamer 2004-2005, 29 311, nr. 8. The Government has presented a draft bill to the ETC and various ngo’s who have commented on it.

²⁶³ Staatsblad 2005, 516.

This means that surveys now can be conducted in *all* sectors. The new Act has thereby lifted some obstacles to the ETC performing its function in the sense of Article 13 of the Race Equality Directive (performing independent surveys; see subsection 2).

Numbers of cases dealt with by the ETC²⁶⁴

Tabel 11 – Opinions in 2006 and 2007

	Total 2006		Total 2007	
	Absolute	%	Absolute	%
Sex	45	16	29	12
Race	46	16	31	13
Nationality	10	4	5	2
Religion	26	9	22	9
Sexual Orientation	3	1	4	2
Civil status	3	1	2	1
Political conviction	0	0	0	0
Philosophy of life	0	0	0	0
Working hours	7	3	7	3
Temporary/permanent employment	8	3	1	0
Disability/Chronic Illness	23	8	29	12
Age	85	30	82	33
Several grounds	27	9	35	14
Total	282	100	247	100

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

In the course of its Second (internal) Evaluation in 2004, the ETC has done research into the question whether people who feel that they are discriminated against use the legal means to stand up against this.²⁶⁵ From this research it appears that 15% of the population has experienced some sort of discrimination, which would amount to 2 million people. The outcome of this survey shows that only 11% of these people take some sort of legal action against this. The barriers are especially high among people from ethnic minorities. In this evaluation report the ETC recommends to strengthen the structures/institutions that have a role in assisting and supporting victims of discrimination.²⁶⁶ Possibly, this is one of the causes that only 34 cases of racial and ethnic discrimination were dealt with by the ETC in 2005. The number has increased to 46 in 2006, but decreased again in 2007 to 31. Still, it seems that there is serious case of under-reporting (dark numbers).²⁶⁷ As far as racial discrimination is concerned, this problem was also reported by the National Bureau against Racial Discrimination and the European Anti-Racism Network, both NGOs that operate in the anti-discrimination field.

²⁶⁴ As of February 15, 2007 (cut off date for this report) figures for the year 2006 were not yet available. All annual reports of the ETC can be downloaded from: <http://www.cgb.nl/downloadables.php>.

²⁶⁵ *Het verschil gemaakt; Evaluatie AWGB en werkzaamheden CGB 1999-2004*, published by the ETC (Utrecht) 2005.

²⁶⁶ See also P.R. Rodrigues, ‘Ras en nationaliteit’, S.D. Burri (ed.), in: *Oordelenbundel 2005*, Nijmegen: Wolf Legal Publishers 2006.

²⁶⁷ See Mr. P.R. Rodrigues and Mr. S. van Walsum: *Ras en Nationaliteit*; in J.M. Gerards e.a. (eds) *Oordelenbundel 2006*. Nijmegen, Wolf Legal Publishers 2007 (forthcoming).

In a publication they report about a study in which 24 persons who had experienced discrimination were extensively interviewed about the consequences thereof. Nine of the respondents had made an official complaint, 15 others had not taken action, mainly out of fear for the consequences thereof. Also, in some cases the victims were not familiar with the possibilities to issue a complaint. All of the victims of discrimination suffered severe consequences. These included health problems and financial problems. Almost all of the victims lost their jobs in the end. A remarkable conclusion is that at the workplace no concrete measures had been taken as a result of what happened to these victims. In none of the cases the perpetrators had been punished.

The report concludes that Anti-Discrimination Bureaus (that have the task to assist victims) and the Equal Treatment Commission (that hears and investigates complaints) are not able to effectively help the victims of discrimination, nor did the victims find support with shop stewards or members of the Works Council. In the end it was their own problem that they alone should solve.²⁶⁸ The Second *External* Evaluation Report, written by independent experts, of the GETA which was published in 2006 also concludes that there are serious problems as regards the extend that citizens know about equal treatment legislation and are able to use this legislation to stand up against discrimination.²⁶⁹

Instruments to enhance compliance with equal treatment norms

General remarks

In November 2006, the Minister of Immigration and Integration of the day (Verdonk) sent a letter to Parliament on the Government's approach to discrimination and its reaction to the *Monitor on Racial Discrimination 2005* (see below).²⁷⁰ However, the policy memorandum neither contains new information, nor does it announce any not yet existing measures in the field of non-discrimination. The new government, that has been installed in February 2007, has taken a somewhat more active approach, especially in the field of discrimination on the ground of sexual orientation (see below).

Guidelines for internal complaints procedures

On the ground of the equal treatment legislation, the employer has a duty to provide a working environment that is free from discrimination. This also applies to persons or organisations offering goods and services or providing education. Useful instruments for implementing this duty are codes of practice, complaints procedures and a concrete corporate policy to combat discrimination and harassment.

In many cases that are brought before the ETC, it becomes apparent that an internal complaints procedure within the organisation is lacking. This is why the ETC has decided to publish guidelines for a careful and correct internal complaints procedure that meets the procedural standards that are set out in the Opinions of the ETC over the past years. The ETC

²⁶⁸ Najat Bochhah: Gediscrimineerd op de werkvloer en dan? Onderzoek naar discriminatie op het werk op grond van ras, etniciteit, nationaliteit en godsdienst. (Discrimination at work, and than...? Research into discrimination at work on the ground of race, ethnicity, nationality and religion.) LBR, Rotterdam, May 2006. Internet: <http://www.lbr.nl/?node=5132>

²⁶⁹ See M.L.M. Hertogh & P.J.J. Zootjens (eds): *Gelijke behandeling: principes en praktijken. Evaluatieonderzoek Algemene wet gelijke behandeling*. Wolf Legal Publishers Nijmegen 2006. The part of the report on the sociological survey of the effects of the GETA was written by Prof. Marc Hertogh, pp. 256-361.

²⁷⁰ Tweede Kamer, 2006-2007, 30950, nr. 1.

mentions in its Checklist (February 2006) a number of criteria for such procedures, among others are the necessity to:

- investigate a complaint in a careful way, which is done by persons who are not directly involved with the complainant or the (supposed) perpetrator;
- deal with complaints in a quick and timely way;
- hear both parties and inform both parties about the outcome of the investigations and the measures that will be taken;
- take appropriate action after the investigation has been closed.

The ETC also gives some guidelines for the complaints regulations, which should be written in a clear and transparent way and should be made public within the organisation. Also, it should be clear to whom complaints can be directed. The publication of this Checklist is a sign that the ETC is taking its general tasks in regard of the implementation of equal treatment laws (instead of only dealing with individual complaints) more seriously. In the past the lack of such policies of the ETC has been a subject of criticism in the Netherlands.

Research into various methods to enhance compliance

In 2004, the Ministry of Social Affairs and Employment commissioned a research into the instruments that can be used to enhance compliance with equal treatment rules.²⁷¹ The report was published and sent to Parliament in October 2005.²⁷² The researchers conclude that there are various methods to enhance changes in the way decisions are being made within enterprises. In his letter to Parliament, the Minister summarises the main conclusions from the research. In all cases, local governments are using instruments to bring about changes in the conditions under which decisions in labour organizations concerning, e.g., hiring and firing personnel, are being made. These instruments therefore always target employers, whether directly or indirectly, but other parties are called to participate as well: unions, works councils, individual employees. The three principal instruments are: A. information and employee empowerment, B. negotiating and contracting with organisations, and C. generating co-operation and learning within organisations. In his letter, the Minister makes clear that in his view all three strategies are followed in the Netherlands. No concrete changes of policy were announced on the basis of the recommendations in the report.

The Ministry of Social Affairs and Employment also commissioned a study into the question how enterprises and companies implement the equal treatment laws in the workplace.²⁷³ Not only the Equal Treatment Acts (GETA, DDA and ADA) were examined, but also relevant other norms like the Medical Examination Act, Recommendations and Guidelines with regard to recruitment of personnel and the affirmative action policies with regard to women, people with a certain ethnic background and disabled people. The institute that did the research (IVA, Tilburg) first looked at the familiarity with these norms.

²⁷¹ The study was done by the Hugo Sinzheimer Institute of the University of Amsterdam: T. van den Berge, R. Knegt, M.H. Schaapman & I. Zaal: 'Policy Instruments to enhance compliance with equal treatment rules.' (The Report is written in English.) Published by the Ministry of Social Affairs and Employment, The Hague, 2005.

²⁷² See letter from the Minister of Social Affairs and Employment, Tweede Kamer 2005-2006, 28 170 nr. 43.

²⁷³ R. Hermanussen & T. Serail: Gelijke behandeling in bedrijf [Equal treatment in company]. IVA Tilburg June 2005, published by the Ministry of Social Affairs and Employment, the Hague 2005. (With a summary in English.)

It found that this depends to a great extent to the ‘freshness’ of the norms (e.g., gender discrimination is better known of than disability discrimination, because these laws have existed for a longer period). Also, small companies (less than 100 employees) and companies in the market sector are less well aware of the norms. The same observations are made with respect to the question in how far these norms are respected. The third factor examined was the attitude towards this legislation. It was found that the organisations subscribe to the objectives of these laws to a great extent. However, at the same time it is found that companies have the feeling that these laws may endanger their autonomy to a too great extent.

Racial and ethnic discrimination

General remarks

Over the last decade, the social and political climate in the Netherlands has become more ‘harsh’ for immigrants. A climate of intolerance is developing rapidly. This can also partly be attributed to a number of measures that the government itself is taking, like the following laws in which directly or indirectly a distinction based on ‘origin’ is being made:²⁷⁴

- The so-called “Rotterdamwet” has been adopted by Parliament, despite the warning of the ETC that this law (on the basis of which local governments can withhold a housing permit to low-earning people) will have indirect discriminatory effects for ethnic minorities or immigrants.²⁷⁵
- The so-called “Inburgeringswet” (Integration Act) on the integration of non-Dutch people in society classifies between various categories of people, who do and do not have to do an exam in order to become a Dutch national.²⁷⁶

The “Inburgeringswet” is controversial, because it obliges various categories of non-Dutch people to follow courses in the Dutch language, customs and morals and to taken an exam that will qualify them as ‘integrated’ citizens. Although there was a strong consensus in Parliament that something should be done to improve the position of immigrants, the way in which the obligation to integrate should be constructed was much debated. Especially the fact that the law distinguishes between various categories of Dutch and non-Dutch persons was criticized.

This distinction essentially refers to the ethnic origin of the persons involved. It was maintained (e.g., by the Permanent Commission of Experts in International immigration-refugee and criminal Law)²⁷⁷ that the new Act is in breach of many international covenants and treaties prohibiting discrimination on this ground. Also, it was maintained that the regulation of the databases that will be set up to register non-Dutch persons and the results of their integration exams is not in compliance with the general privacy-protection standards for databases as set out by the Personal Data Protection Act. On 3 August 2006, the Council of State advised on the matter and concluded that the proposed Act is in breach of the equality principle indeed.²⁷⁸

²⁷⁴ See P. R. Rodrigues, ‘Ras en nationaliteit’, in: S.D. Burri (ed.), *Oordelenbundel 2005*, Nijmegen: Wolf Legal Publishers 2006

²⁷⁵ Tweede kamer 2004-2005, 30 091. Law of 20 December 2005, Stb 2005, 726. The ETC has advised against such policies. See, e.g., ETC-Advice 2005-03. See also below, in this subsection.

²⁷⁶ Tweede kamer 2005-2006, 30 308. The Act came into force on 30 November 2006, Staatsblad 2006, 625.

²⁷⁷ *Nederlands Juristenblad* of February 3, 2005, at p. 295.

²⁷⁸ Advice W03.06.0236/I, Tweede Kamer, 2005/06, 30 308, nr. 106; see http://www.raadvanstate.nl/advicepubs/advicepub_show.asp?advicepub_id=5843.

Another point for discussion was whether rules concerning the integration of immigrants into a society of one of the Member States of the EU, which make distinctions on the ground of the ethnic origin of the persons who are obliged to participate in integration programs or exams, fall under the exception of Article 3(2) of Directive 2000/43. At first sight, this exception allows for a differential treatment on the ground of national origin. However, when this differential treatment turns out to be arbitrary and not proportionate, it could constitute discrimination. Nonetheless, the bill was accepted in both Chambers of Parliament and the Law came into force on 30 November 2006.

Reports and Memoranda concerning racial discrimination

In April 2005, the Government presented a survey to Parliament from which it became very clear that racial and ethnic discrimination in the labour market is persistent and wide spread.²⁷⁹ In May 2005 the Minister of Social Affairs and Employment responded with a policy Memorandum, 'Arbeidsmarkt en etnische minderheden. [Labor market and ethnic minorities.]'²⁸⁰ The Minister acknowledges the problems and describes an array of measures. These include *inter alia* a media campaign to make immigrants more aware of their rights and improving psychological tests for job assessments.²⁸¹ In addition, the Minister also presented a Memorandum on 'Law enforcement and discrimination in the labour market' [Rechtshandhaving en discriminatie op de arbeidsmarkt].²⁸² In this Memorandum it is (again) stressed that the ETC has to play the most important role in this respect. A suggestion, made by the researchers, to use the instrument of *naming and shaming* of employers who discriminate, is rejected by the government.

In addition to all this the Minister of Justice has published a Memorandum on 'Combating discrimination and law enforcement' [Discriminatiebestrijding en rechtshandhaving].²⁸³ In this Memorandum the Minister discusses the Criminal Code provisions (Articles 90 quarter, 137d, e, f and g and 429 quarter). The Minister is satisfied that the number of subpoena's has increased considerably in 2004 and that the number of dismissals in 2003 and 2004 has decreased. The Minister also describes that new guidelines have been given to the public prosecutor offices about more strict policies that should be followed concerning subpoena's and dismissals of reported cases of discrimination. The National Expert Centre for Discrimination within the Public Prosecutors Office has been extended. Also, there will be a continuation of the special discrimination task force within the police. Several other measures are announced, especially in the sphere of government support to ngo's that are active in combating (especially racial) discrimination.

²⁷⁹ Tweede Kamer 2004-2005, 27 223, nr 65. The title of the report is: 'Etnische minderheden op de arbeidsmarkt; Beelden en feiten, belemmeringen en oplossingen.' [Ethnic minorities in the labour market; images and facts, obstacles and solutions.]

²⁸⁰ Tweede Kamer 2004-2005, 27 223, nr 66.

²⁸¹ See P. R. Rodrigues, 'Ras en nationaliteit' [Race and nationality]. In: S.D. Burri ed *Oordelenbundel 2005*, Nijmegen: Wolf Legal Publishers 2006.

²⁸² Tweede Kamer 2004-2005, 27 223, nr 73.

²⁸³ See Tweede kamer 2005-2006, 30 300 VI, nr. 26.

In June 2006, the Minister of Immigration and Integration sent the *Monitor on Racial Discrimination 2005*²⁸⁴ to Parliament. The *Monitor* has been written by several independent experts in the field of racial discrimination from the National Bureau for Combating Racism (“Landelijk Bureau Racismebestrijding”), the Association of Anti-Discrimination Bureaus (so-called ADB’s), the Anne Frank Foundation and Leiden University. The report contains a detailed analysis of the phenomenon of racial discrimination. Some important facts are that from surveys it appears that a bit less than 50% of inhabitants of Turkish and Moroccan origin have experienced discrimination in the past year. For people from the Antilles or Surinam the numbers are 40 and 37 % respectively. Also, it appears that the consequences of discrimination are severe, especially when the perpetrators are public officials. A point of concern is that many victims are not aware of the possibilities to (legally) bring claims against the perpetrator. Around 75% of those who experienced discrimination have not taken any action at all, 4% have turned to a Anti-Discrimination Bureau and 8% have turned to the police. The most important reason for not complaining is that the victims are of the opinion that this would have no effect. The *Monitor* shows how important it is to conduct in-depth surveys into the prevalence and forms of discrimination.

This task (see Article 13 of the Race Directive) has not been assigned officially to the Equal Treatment Commission, but nevertheless is being fulfilled by other institutions. However, this is not regulated structurally. The institutions that composed this *Monitor* got a subsidy for this project. During the presentation of the Report the Minister (Verdonk) has announced that she will grant another subsidy for a new *Monitor* that should appear in two years time.

A second *Monitor* (the *Monitor Racism & Extremism*²⁸⁵) also signals an increase in the number of abuses and confrontations, mainly against Jews and Muslims, and an increase in more extreme right wing activities. The practice of ethnic profiling in criminal investigations may infringe human rights, because of the risk of discrimination on the ground of race, ethnic origin or religion. Restrictions on these rights should be legitimate, necessary and proportionate. Other safeguards are the requirements that cases selected for ethnic profiling should be sufficiently specific, foreseeable and judicially controllable. This *Monitor* is also one of the first scientific studies of ‘Islamophobia’ (fear or hate of Islam) in the Netherlands. Attention is shifted from problems with (different) cultures to problems with the Islam. Politicians in general and not only from the extreme right wing, now have restrictive views on immigration and integration issues.

In addition, the report argues that radical Islamic ideas are spreading rapidly amongst young Muslims in Western-Europe, due to factors at international, national level and individual factors, *i.e.* conflicts in the Middle-East, social inequality and lack of faith in democracy. Young Muslims are more susceptible to radicalism when they feel disadvantaged (*e.g.* by discrimination in the labour market), believe that their religious identity should be developed to oppose to Western society and do not trust the democratic system.

²⁸⁴ To be downloaded from <http://www.lbr.nl/?node=5378>.

²⁸⁵ Jaap van Donselaar and Peter Rodrigues (eds.), *Monitor Racisme & Extremisme. Zevende rapportage* (Monitor Racism & Extremism. Seventh report), Amsterdam: Anne Frank Stichting/Leiden: Leiden University 2006
<http://www.annefrank.org/upload/downloads/monitor2006-7.pdf>

Extreme right youth groups are also a problem. Traditional (repressive or educational) solutions are not sufficient to deal with this issue, but the German example of ‘de-radicalisation’ could be a valuable supplementary tool. Furthermore, it is noteworthy that after the murder of Theo van Gogh in November 2004, criminal sentences for racist violence are more severe.²⁸⁶ Theo van Gogh was a publicist and film maker, who had explicitly expressed his opinions against radicalisation of the Islam. Together with Ayaan Hirsi Ali, then a Member of Parliament fighting against the suppression of Muslim women, he made a controversial movie called ‘Submission’. After that, he was killed by Mohammed B., an Islamist, which, being the second political murder within two years, had a huge impact on society.

A third important report in this respect is the final report of the so-called “intervention teams inter-ethnic tensions” (2005-2006). A total number of 4 of such teams were established after the murder of Theo van Gogh. The aim was to intervene in any situation in society where severe tensions between groups of various ethnic or cultural background were intense and capable of arousing violent conflicts. The report states that these tensions are underestimated, that there is a serious danger of violent conflicts (especially between groups of young people) and that the approach by most municipal authorities is “simplistic” and not adequate at all. The authors recommend more local intervention teams to be established and a national taskforce to be established by the government.²⁸⁷

A last policy paper, from the side of the government, that needs to be mentioned here, is the so-called ‘vierde Voortgangsbrief gelijke beloning’ [fourth letter that reports on the progress that is made in the field of equal pay].²⁸⁸ In this letter the government acknowledges that research has shown that equal pay is not only a gender issue, but more and more also an issue of racial and ethnic discrimination.²⁸⁹ The ETC responded to the measures that the government announced in the letter by means of an Advice [Advies inzake de vierde Voortgangsbrief gelijke beloning].²⁹⁰ In this Advice the ETC comes with a long list of recommendations to improve the policies to combat pay discrimination. It is recommended: “To choose a less non-committed approach to combating wage discrimination.” The ETC recommends setting specific targets (streefcijfers) and to adopt a duty for employers to report about the tools that they have applied to erase wage discrimination. Another suggestion is to use the instrument of contract compliance and to include the norm of equal wages in the tools that are used for assessing the quality of enterprises. That there is a pay discrimination, also in the ranks of the civil service, is shown in a biannual research conducted by the Labour Inspection (AI), Statistics Netherlands (CBS). This bureau has researched differences in pay between natives and immigrants who are employed by the government. It classifies the data into ethnic origin and into male or female. Immigrants are paid approximately 20% less than natives. The pay difference remains at 3,7% after a correction is made for factors such as education, number of years of experience etc.

²⁸⁶ The public prosecutors now demand higher sentences (and some judges go along with that) that there is a considerable danger of escalation of the public debate since this murder has aroused fierce emotions, especially against young Muslim men.

²⁸⁷ Vrijblijvendheid Voorbij, Eindrapportage Interventieteams 2005 – 2006. Published by Forum, Utrecht.

²⁸⁸ Letter of the Minister of Social Affairs and Employment, 3 December 2004, AV/IR/2004/78946.

²⁸⁹ The government refers to the report ‘De arbeidsmarktpositie van werknemers 2002’ [the labourmarket position of employees in 2002] that was issued by the Labour Inspectorate.

²⁹⁰ CGB-advies 2005/02, to be downloaded from www.cgb.nl

The Dutch Minister of Social Affairs and Employment explains these results by the fact that immigrants more often occupy functions at a lower level than natives. A complete specification of variable circumstances is not possible. The Minister expects that the gradual entrance of immigrants into functions at a higher level will lead to a decline of the (uncorrected) pay difference.²⁹¹

At the request of the Minister of Immigration and Integration, a group of stakeholders (both from within and outside the government) have issued a report called ‘Perspectief op Gelijke Behandeling’ [Perspective on Equal Treatment] about the future of the Anti-Discrimination Bureaus (ADB’s) in the Netherlands.²⁹² Anti-discrimination bureaus are NGO’s who are subsidized by the national and local governments. The report describes their situation as regards their tasks, their functioning, their co-operation, and (most importantly) their financial situation. It also gives a great many recommendations as regards the improvement of their functioning and of their financial position. The functioning of the ADB’s is of crucial importance in respect of the necessary assistance to victims of discrimination (Article 13 Race Directive). The ETC does not have this function. On the first of January 2007, the LBR and the ADB’s have been merged into one new organization called “Art. 1”. (After Article 1 of the Constitution.) The organization now covers all of the Art. 13 ECT non-discrimination grounds and is officially designated as one of the equality bodies (in terms of Art. 13 of the Race Directive). In the mean time the government has accorded an extra budget of 6 million Euro on a yearly basis for these organizations.²⁹³ In addition, a law has been proposed in which rules are set for the registration of and dealing with complaints about discrimination on the local level. This law provides the (legal and financial) basis for local anti-discrimination bureau’s that assist victims of discrimination and monitor developments in that respect.²⁹⁴

Finally, a report has been published in which the effectiveness of criminal provisions concerning racial discrimination has been evaluated.²⁹⁵ One of the (provisional) conclusions in the report is that the directive for prosecutors to claim heavier punishments in case of a proven discriminatory motive for common crimes seems to be effective. The research part on offender profiles of the report is very interesting but does not amount directly to practical recommendations.

Discrimination on the ground of age

Since the ADA came into force, there were a great many cases before the courts and before the ETC about the lawfulness of distinctions on the ground of age.

²⁹¹ See: Centrum voor Beleidsstatistiek, ‘Beloningsverschillen verklaard? Verschillen in uurloon bij de overhead, 2004’, Voorburg/Heerlen 2006 and Letter by the Minister of Social Affairs and Employment, Tweede Kamer 2005-2006, 27 099, nr. 15.

²⁹² The Advice has been sent to Parliament on February 13, 2006. See TK 2005-2006, 30300 VI, nr. 117.

²⁹³ Tweede Kamer 2006/07, 29 754, nr. 92, p. 4-6

²⁹⁴ Tweede Kamer 2007-2008, 31 439, nrs 1-3: Wet gemeentelijke antidiscriminatievoorziening.

²⁹⁵ Chrisje Brants, Rnee Kool en Allard Ringalde: *Strafbare Discriminatie*, Boom Juridische Uitgevers 2007. The report not only deals with racial discrimination but investigates all types of discrimination that are prohibited in the Penal Code. It also investigates the question whether ‘regular’ criminal offences (like e.g. violent behaviour) should be punished more severely when the motive is discriminatory.

This case law has raised a lot of debate. Very briefly summarised these debates concern the following issues:

- Is the fact that the legislator made a certain age distinction in itself sufficient to constitute an objective justification for the legislator? This concerns the “Mangold test”. It has already been noted (para 4.7.1, above) that the Dutch government has investigated which age criteria do exist in the legislation and what are the objective justifications for them.²⁹⁶ This debate also concerns the boundaries of the powers of the judiciary and the ETC: can they declare something to be an unlawful ‘distinction’ when the legislator has wilfully declared that there is an objective justification for this distinction? The debate touches upon the old debate in the Netherlands about the possibility constitutional review.²⁹⁷
- Related to this issue is the question whether third parties (e.g., employers or social partners who construct a collective labour agreement) can rely on legislation where a similar age distinction has been made. This issue came up where social partners constructed additional (pre)pension schemes that fitted in with the fiscal regime for such ‘savings’. According to various commentators this is not *per se* an objective justification.²⁹⁸
- Much debate is going on about what factors can be accepted as ‘objectively justifying’ distinctions on the ground of age. It becomes clear from the case law that the following factors are not *per se* a justification ground:
 - a) The fact that the legislator has included or maintained a certain age criterion in its (own) legislation.
 - b) The fact that the criterion is included in a collective agreement between social partners and is (also) otherwise widely socially accepted as a ‘reasonable’ criterion.
 - c) The fact that abolishing the criterion would cost money.²⁹⁹ As far as age discrimination is concerned the ETC seems to make a nuance: if the equal treatment on the ground of age would constitute a ‘disproportionate burden’ this could be brought forward as an objective justification.³⁰⁰

²⁹⁶ See also the inventory that was made by the National Expert Centre on Age Discrimination (LBL): E. Smolenaars, *65 jaar als uiterste houdbaarheidsdatum*, Utrecht: LBL 2005. From this inventory it appeared that the 65-year criterion exists 898 times in 386 official Acts, regulations and decrees.

²⁹⁷ This is not allowed when it concerns official Acts of the national government. However, these can be tested against international law. See also Hof Den Haag [Court of Appeal, the Hague] 24 maart 2005, *JAR* 2005, 98, where the Court of Appeal stated that a verdict (i.e. of a district court) never can contain the instruction to make new legislation or to amend existing legislation.

²⁹⁸ See Mark Heemskerk, ‘Leeftijdscriminatie bedreigt arbeidsvoorwaarden; Hoe demonteer ik de tijdbom van leeftijdscriminatie?’ In: *Nederlands Juristenblad* 2005, vol 8, p. 412-419. See also: M. Heemskerk, ‘Leeftijdsonderscheid bij pensioen. De gevaren van overgangsrecht en de solidariteit tussen de generaties.’ Publication of the Vrije Universiteit Amsterdam. To be downloaded from: www.vuexpertisecentrumpensioenrecht.nl See also: E. Lutjens, ‘Leeftijdsonderscheid bij pensioen: een tikkende tijdbom bij grenspaal 55?’, *P&P* 2005, Vol 12.

²⁹⁹ This is fully in line with case law by the ECJ, the Dutch Supreme Court and the ETC; see e.g. ECJ 24 February 1994, C-343/92 (*Roks e.a.*), *Jur.* 1994, p. I-587-604; HR 24 April 1992, *NJ* 1992, 689; ETC Opinion 2002-165; 2003-23, 2004-16 and 2005-83. See also: R.C. Tobler, ‘Enkele opmerkingen over rechtvaardiging van indirecte discriminatie om economische redenen in het EG-recht’, in: S.D. Burri (red.), *Gelijke behandeling oordelen en commentaar 2004*, Deventer: Kluwer 2005, p.123-134. (These references are derived from the contribution of Heemskerk & Dankbaar for the *Oordelenbundel* 2005.)

³⁰⁰ ECT Opinion 2005-181.

- Collective agreements do in fact contain a lot of age criteria. Research, published in 2005, shows that 121 out of 122 investigated collective agreements contained age criteria that were not motivated at all.³⁰¹ In order to stimulate that the social partners become more aware of the reasons of applying age criteria the Minister of Social Affairs and Employment has expressed the intention to formally ask social partners to always express themselves about the reasons for including such criteria in the collective agreement.³⁰²
- Should the objective justification test, which has been developed in the context of indirect gender discrimination, be applied in exactly the same way when testing direct and indirect age discrimination? Age seems a different criterion (different from e.g. sex or race) requiring a different way of testing. There are several arguments for this stance; two of them are heard most often: (1) age is not a fixed category (you will change age all your life, you will not change skin colour)³⁰³ and (2) it is very difficult to assess with whom the complainant should compare herself.³⁰⁴ The author of the present report is of the opinion that especially the proportionality test (*i.e.*, the test whether a given measure is proportionate, in the sense that it is absolutely necessary to reach the (otherwise) legitimate goal of the measure) should be applied less strict in case of age discrimination.³⁰⁵ The judges / the ETC should leave some margin of appreciation to the legislator / social partners or employers as to what measures they choose to reach their legitimate aims. Otherwise the court / ETC runs the risk of becoming a policy maker themselves, by way of assessing which tools are adequate to reach a certain goal. It is questionable whether they are equipped to make such assessments at all.³⁰⁶
- Should employers have the right to ask the ETC or the judge to declare certain (often by means of a Collective Agreement) contractually agreed benefits for older workers null and void when they themselves have designed these benefits? This became a point for discussion when employers started to withhold extra holidays from older workers with the argument that these extra holidays were illegal from a point of view of the ADA.³⁰⁷ Some lawyers state that this is not possible since the overall goal of the ADA is to protect employees from discrimination, not to facilitate employers to cut down on their expenses.³⁰⁸

³⁰¹ J.J.H. Schrama, C. Klaassen and E.C. Junger-van Hoorn, *Onderscheid naar leeftijd in CAO's*, Den Haag: SZW 2005.

³⁰² Tweede Kamer, 2004-2005, 28 170, nr. 40, p. 3-4. See about this issue also M. Heemskerk and M.J.J. Dankbaar, 'Leeftijd', in: S.D. Burri (ed.), *Oordelenbundel 2005*, Nijmegen: Wolf Legal Publishers 2006.

³⁰³ This argument has also been used by the Dutch Supreme Court, HR 8 oktober 2004, *PJ* 2004, 124; *JAR* 2004, 258.

³⁰⁴ See M. Heemskerk, 'Leeftijdscriminatie bedreigt arbeidsvoorwaarden; Hoe demonteer ik de tijdbom van leeftijdscriminatie?', in: *Nederlands Juristenblad* 2005-8, p. 412-419.

³⁰⁵ She has expressed this opinion in an unpublished *Memorandum* for the Algemeen Burgerlijk Pensioenfond. In this paper she also refers to the work of Janneke Gerards, who developed a model for testing discrimination cases, in which model there is place to differentiate the strictness of the test according to the nature of the various non-discrimination grounds. See J.H. Gerards, *Judicial Review in Equal Treatment Cases*, Leiden/Boston: Martinus Nijhoff Publishers 2005. See also: Gerards, 'Het toetsingsmodel van de CGB voor de beoordeling van indirect onderscheid'. In: *Gelijke Behandeling: Oordelen en Commentaar [Oordelenbundel 2002]*, Kluwer 2003, pp. 77-95 and Gerards 'Proportionaliteit en gelijke behandeling', J.H. Gerards, 'Proportionaliteit en gelijke behandeling', in: A. Nieuwenhuis, B. Schueler and C. Zoethout (red.), *Het proportionaliteitsbeginsel in het publiekrecht*, Deventer: Kluwer 2005, p. 79-110.

³⁰⁶ In the same sense Mark Heemskerk, 'Leeftijdscriminatie bedreigt arbeidsvoorwaarden; Hoe demonteer ik de tijdbom van leeftijdscriminatie?' In: *Nederlands Juristenblad* 2005, vol 8, p. 412-419 at p. 415.

³⁰⁷ See for example: Rb Rotterdam [District Court of Rotterdam] 15 June 2005, *LJN*: AT7822. See also ETC, Opinions 2004-118, 2004-150 and 2005-66, 2006-69 and 2006-110. See for a commentary M.S.A. Vegter, 'Extra vakantiedagen voor oudere werknemers', in *Sociaal Recht* 2004-11, p. 379-380.

³⁰⁸ See E.H. van Stigt Thans, 'Leeftijdscriminatie en seniorenvrijdagen'. In: *Nederlands Juristenblad*, 2006, vol 7., p. 376-377.

- Also much debated is which references to a certain age are acceptable in job advertisements.³⁰⁹ Very often the requirement of a certain age is ‘camouflaged’ by the employer. Examples are ‘the applicant will have to fit into a dynamic and flexible team’ or ‘the candidate needs to have at least 10 years of experience’. According to the ADA any reference to age in such ads must be accompanied by an explanation why having a certain age is required. (Article 9 GETA.) This also goes for indirect references to age. In 2005, the ETC published a report in which guidelines for job advertisements (on the basis of their case law) have been given.³¹⁰ The National Expert Centre on Age Discrimination (LBL) also published guidelines for drafting (ADA-proof) job advertisements.³¹¹
- A further point of interest is the fact that the ETC published an advice on the topic of selection criteria for ‘vakkenvullers’ (the job of shelf filler) in the supermarket branch.³¹² In this publication the ETC summarizes the criteria that it has developed in many such cases that were brought to their attention.³¹³ Supermarkets often only want young people (between 16-18 years old) for supplying their stores. These youngsters (often pupils or students) are paid only the minimum wage for these age categories. From this case law of the ETC (and the subsequent publication) it appears that financial arguments can play a role in the justification test. This is the case when this argument is used in the context of enhancing the labor market participation of young people, which is also the reason behind the (low) minimum wages for the age categories of 16-18 year old people.³¹⁴
- The government does not want stop its policies of combating age discrimination at issuing non-discrimination norms (in the ADA) but has also announced some further policy instruments, mainly with a view of stimulating the (labor) participation of older people. Most important are the so-called ‘route planner’ for the discussion about the pensionable age of 65 years.³¹⁵ This concerns mainly measures to take away any legal or other obstacles for elderly people to stay in the labor market.

³⁰⁹ E.g. *ETC Opinion* 2005-198.

³¹⁰ See ETC: *Leeftijdsonderscheid in advertenties*, advies 2005/06, Utrecht: CGB 2005. To be found at: www.cgb.nl

³¹¹ See: http://www.leeftijd.nl/arbeid/checklist_advertenties/hoef.html.

³¹² Commissie Gelijke Behandeling, *Te jong te oud*, advies 2006-02, Utrecht: CGB 2006. To be found at: www.cgb.nl

³¹³ In 2005 these were the decided in the *Opinions* 2005-83, 2005-139, 2005-179 and 2005-180.

³¹⁴ On the basis of Article 7 sub a of the ADA, which refers to labour market policies of the government. See M. Heemskerk & M.J.J. Dankbaar, ‘Leeftijd’ [Age]. In: S.D. Burri (ed.) *Oordelenbundel 2005*. Nijmegen: Wolf Legal Publisher 2006.

³¹⁵ See Tweede Kamer 2004-2005, 28 170, nr. 29 and nr. 37.

- This topic is related to another topic, which is called ‘vergrijzing’ (graying): the aging of the population. (In 2010 the ‘baby boomers who were born after World War II will become pensioners.) In that regard the ministry of Health and Welfare has issued a policy plan called “Vergrijzing en het integrale ouderenbeleid”. [Graying and integral policies for elderly people.]³¹⁶
- In 2004, the government has adopted a policy-strategy “Stimuleren langer werken van ouderen” [Enhancement of longer working by elderly people.] In that framework there are regular surveys and is the issue of age discrimination mainstreamed in various policies of the government.³¹⁷ However, one of the MP’s for the Social Democratic Party (PvdA) has heavily critiqued the government for not doing enough. In November 2006 this MP offered a “black book age discrimination” to the Minister of Social Affairs and Employment, proposing at that occasion to make age discrimination a punishable act (to be fined up to 6000 Euro). It remains to be seen what this political party will do with this proposal now that it forms part of the new government.

Sexual orientation

Compared to the number of cases in the field of age discrimination the number of cases on discrimination on the ground of sexual orientation is remarkably low. In the year 2007 there were 4 ETC-Opinions that were directly related to this ground. Nevertheless, this low number can not be seen as a signal that discrimination on the ground of sexual orientation is not a problem any more. In some sectors of society acceptance of homosexuality seems to decrease instead of to increase. E.g., in newspapers there were various reports of gay or lesbian teachers being threatened or harassed, often by Muslim pupils or students. The government issued a policy memorandum on ‘homo emancipation policy’ [Homo-emancipatiebeleid] for the period 2005-2007³¹⁸ and subsequently a memorandum for the period 2008-2011 [Gewoon homo zijn: Lesbisch en homo-emancipatiebeleid 2008-2011].³¹⁹ In the first policy memorandum the government announced that it has three goals for this period: (a) to enhance the social acceptance of homosexuality; (b) to enhance the integration and ‘social bonding’ of some groups of vulnerable homosexuals (e.g. elderly men and homosexual immigrants); (c) to enhance security and to combat discrimination. The government describes that the accent has moved from ‘equal treatment’ to issues such as ‘leefbaarheid’ (‘wellness’), safety, integration, personal responsibility and inclusive policies (another term for what in English speaking countries might be called mainstreaming). With personal responsibility it means that the work of the ngo-sector becomes more important and has to be (more) self reliant. The government takes the stance that equal treatment and non-discrimination of homosexuals is a ‘non-negotiable’ norm. The latest policy memorandum the government of November 2007 [‘Gewoon homo zijn’] stipulates the principal purpose of the emancipation policy: improving the social acceptance of homosexuality through solidarity, protection of minorities, a prohibition on discrimination and respectful interaction between persons.

³¹⁶ Tweede Kamer, 2004-2005, 29 389, nr. 5 and 6. See also the report by the Parliamentary thematic commission for policies concerning elderly people (“Parlementaire themacommissie ouderenbeleid”), Tweede kamer 2005-2006, 29 549, nr. 4 and 5.

³¹⁷ See Tweede Kamer 2004-2005, 27 046 nr 5. The most recent up-date is: Tweede Kamer 2005-2006, 27 046 nr. 14.

³¹⁸ Tweede Kamer, 2004-2005, 27 017, nr. 11.

³¹⁹ Tweede Kamer, 200**

The government has announced in this Memorandum that it has reserved an extra amount of money each year (up to 10.000.000 Euro for the year 2011) for activities concerning the social acceptance of homosexuality. On the 5th of March, 2008 Minister Plasterk of Education, Culture and Science signed a Covenant with Majors and Aldermen of Amsterdam, Den Haag, Rotterdam and Utrecht. On the 17th of April a similar contract was signed with the majors of 12 towns.

The Covenant is aimed at the improvement of social acceptance of homosexuality by the Dutch population and to offer more vigorous resistance to discrimination, intimidation and violence against homosexuals. In order to achieve these goals, the four cities agreed to work together intensively over the next couple of years. They will be sharing experiences and tackle difficult issues jointly. The cities / towns will engage in various activities which will be subsidized by the national government. Each city will receive 200.000 Euro for organizing these activities. Each town gets 75.000 Euro. Education on sexual diversity will be given in schools. Education will be offered to specifically men of foreign origin. Violence against homosexuals by their families which can be labeled as ‘honor crimes’ will be combated more actively. Dialogs will be organized with religious leaders and other key figures of ethnic and religious communities to stimulate a positive attitude towards homosexuality. There will be specific trainings organized for social workers who will counsel homosexuals. Moreover, education will be given on the use of reporting of discrimination and informal relief networks for persons from foreign origin will be set up. The education aimed at younger people and the education aimed at the parents of younger people will be harmonized in order to stimulate positive results by this more coherent approach.

The signing of this Covenant between central government and local governments is a new method in combating discrimination against homosexuals. A study of the Sociaal en Cultureel Planbureau of September 2007 which was added to the memorandum ‘Gewoon homo zijn’) shows that social acceptance of homosexuality is improving, but has not yet been completed. The principle of equal rights for homosexuals is supported by 67% of the population, 21% has no opinion and 12% has a negative view. With regard to the social acceptance of homosexuals in general, 52% of the population has a positive attitude, 33% neutral and 15% negative. There seems to exist a limit to the social acceptance of homosexuality, since over the last two decades a consistent group of 5% of the population thinks that lesbian and gay people should not be able to live their lives as they wish. Religious people, ethnic minorities, younger people, elderly, people with lower education and more men than women have a negative attitude towards homosexuality. A large part of the population still has a negative attitude against same sex marriage and – adoption. Rejection of the same sex marriage seems to have increased between 2002 and 2006.

Another (earlier) research into the general feeling of insecurity among homosexuals showed that aggression against homosexuals - both male and female - has increased (‘Geweld tegen homoseksuelen’, Rotterdam 2006). Since 2005 the number of incidents against homosexuals reported in Amsterdam has increased. In particular youth of Moroccan origin is regarded to be the cause of regular harassment, for example violence against same sex couples living together. In addition, according to an article in a magazine called “Management Team”, Dutch employers agree that there still exists a ‘glass ceiling’ for homosexuals, due to social pressure to conform to heterosexual standards and ways of living.

Some multinationals however have already set up a ‘pink network’ to promote diversity policy in their organisation. The Dutch Centre for Culture and Leisure (COC; the main NGO active in the field of gay and lesbian rights) is worried about these manifestations of intolerance against homosexuals. It states that social acceptance of homosexuality should be promoted by the government.

With respect to combating discrimination, the covenant between the coalition partners that form the newly elected government that will come into office in February 2007 (CDA, PvdA and CU, see above) is a bit contradictory. On the one hand, it explicitly states that discrimination is absolutely forbidden, also as a criminal offence, and that prevention is a spear-head in the upcoming 4 years. In particular, concrete measures will be taken against discrimination of homosexuals. On the other hand, it has been agreed that civil servants will be permitted to refuse to conduct a marriage between two people of the same sex should they have conscious/religious objections, on the condition that gay marriage will still be possible in every village- or town-hall. The main NGO for gay and lesbian people, the Centre of Culture and Leisure (COC) immediately announced a campaign of monitoring civil servants who do so.³²⁰ It expects the non-discrimination law to prevail over personal values of civil servants six years after the introduction of gay marriage in the Netherlands. The local governments of a number of the major cities (among which Amsterdam and Rotterdam) immediately announced that civil servants who are employed by them will not have the right to refuse to marry gay and lesbian people.

Disability

Disability has been added as a non-discrimination ground in the criminal law provisions that prohibit discriminatory speech and publications³²¹ and discrimination while conducting a professions or having an enterprise.³²² The provision prohibiting the latter is the criminal code ‘counterpart’ of the non-discrimination clauses in Labour Law (Civil Code) and in the Equal Treatment Act (DDA). However, this is a misdemeanour provision, not a crime.³²³

In December 2006, the Minister of Health, Welfare and Sport announced a research into the extended equal treatment of disabled people or people with a chronic disease in the field of ‘offering goods and services’.³²⁴ The sectors retail business, restaurants and bars, internet services and general sport provisions will be examined on accessibility and participation in daily life.

Two initiatives have been taken by Members of Parliament to extend the scope of the DDA. One is to extend the scope to cover also public transport.

³²⁰ See http://www.coc.nl/dopage.pl?thema=any&pagina=viewartikel&artikel_id=1424.

³²¹ Articles 137d-f Criminal Code.

³²² Article 429quater Criminal Code.

³²³ Disability was not included in 137g Criminal Code, where it is prohibited to discriminate in a profession or enterprise on the ground of (*inter alia*) sex or race. This Article is a crime-provision and is sanctioned more severe than the misdemeanour provision of 429quater.

³²⁴ Tweede Kamer, 2006-2007, 29355, nr. 35.

This is already included in the DDA (Article 7 DDA); however, the implementation of this provision is postponed until an unspecified date (article 8 DDA). Some MP's did not want to wait any longer for the government to propose this implementation legislation and have submitted a bill themselves.³²⁵ The second proposal is to extend the scope of the DDA to cover also basic and secondary education and housing.³²⁶

Religion

The debate about religious discrimination takes place within the context of the debate on the multicultural society.³²⁷ The central question is whether 'deviant' religious opinions should always be respected, or that there are boundaries to religious freedom and religious equality. With 'deviant' is meant opinions that are contrary to (in the Western world) generally accepted (human rights) norms such as equality of men and women or the right to express oneself according to one's sexual preference (homosexuality). As has been clarified under the heading of 'sexual orientation' the Government takes the firm stance that the norm of equal treatment of homosexuals is 'not negotiable'. This means that discrimination on this ground can not be justified with reference to a religious conviction. A factor playing a role in this discussion is the freedom of speech, which allows people to say 'nasty' things about religious beliefs.

In December 2006, the Scientific Council for Government Policy ("Wetenschappelijke Raad voor het Regeringsbeleid"), or WRR, published an extensive study on 'Religion and the public domain'.³²⁸ Central questions are: what role can religion play in the public domain? Are there limits to the influence of the state on organizations and forms of expression of religions? And how can we deal with the differences in beliefs about the organization of the private life and society? Discrimination is not an issue explicitly dealt with, but the study sheds a new light on the above-mentioned clash between freedom of religion, the freedom of speech and the right to non-discrimination.³²⁹

³²⁵ Tweede Kamer 2006-2007, 30878, nrs 1-3.

³²⁶ Tweede Kamer 2005-2006, 30 570, nrs 1-3. This proposal by the members of Parliament has been repealed as soon as the government has proposed a bill concerning the inclusion of education as well as housing into the DDA. See 2007-2008, 30 859: Voorstel tot wijziging van de Wet gelijke behandeling op grond van handicap of chronische ziekte (Wgbh/cz) in verband met de uitbreiding met primair en voortgezet onderwijs en met wonen.

³²⁷ B.P. Vermeulen and C.M. Zoethout, (in: 'Godsdienst, levensovertuiging en politieke gezindheid, in: S.D. Burri (ed.), *Oordelenbundel 2005*, Nijmegen: Wolf Legal Publishers 2006), mention a range of publications on this issue. We have copied these here for reasons of being as complete as possible in this report: Michiel Hegener, *Vrijheid van godsdienst*, Amsterdam/Antwerpen: Uitgeverij Contact Amsterdam 2005; B.P. Vermeulen, 'Religieus pluralisme als uitdaging aan de "neutrale" rechter', in: *Trema*, Special May 2005, p. 243-250; M. Galenkamp, 'Religieuze overtuigingen en het discriminatieverbod, Enkele bedenkingen bij het leerstuk van interpretatieve terughoudendheid', in: *Trema*, Special May 2005, p. 251-256; Ch. Samkalden, 'Pluriforme gedachten over de nota Grondrechten in een pluriforme samenleving', in: *NJCM-Bulletin* 2005, p. 44-59.

³²⁸ W.B.H.J. van de Donk, A.P. Jonkers, G.J. Kronjee and R.J.J.M. Plum (eds.), *Geloven in het publieke domein. Verkenningen van een dubbele transformatie*.

³²⁹ For some additional commentary, see

http://www.amnesty.nl/bibliotheek_vervolg/thema_geloof_en_overtuiging_rapport.

Two aspects of the debate are of interest here: the aspect of dress codes and security and the aspect of the freedom to found schools according to one's religious beliefs.³³⁰

As far as dress codes are concerned there is a lot of case law from the ETC concerning a wide range of issues, mostly dealt with as cases of direct religious discrimination.³³¹ There are several laws and regulations that require the possibility of identification, e.g. regulations concerning customs and the general identification law. These give authorities the possibility to require that for example the burqa (Islamic face covering veil) or niqaab be removed in order to identify a person.³³²

In August 2006, new requirements for passport photos³³³ were introduced by way of implementing EC Regulation 2252/2004.³³⁴ The head and the face should be uncovered, unless there are medical or religious reasons for an exception. General laws in the field of health and safety in employment require that, while working with certain machinery, the hair or beard should be cut short or covered and that workers do not wear loose-fitting garments. This can mean that certain religious 'outfits' (e.g., djaballa for men or niqab for women) must be removed. Although there are no court cases about these rules and regulations, in general it is expected that - as far as they constitute indirect discrimination on the ground of religion - there is an objective justification for this (*i.e.*, public security and health and safety).

In Parliament a motion was accepted (but later withdrawn) in which the government was asked not to give work permits to Imams who come from Arab countries to the Netherlands to teach in Mosques. The motion suggested that this would only have to become effective when there are enough (publicly funded and controlled!) educational institutes in the Netherlands where Imams are educated and trained.³³⁵ The Advisory Committee for Issues concerning Foreigners (ACVZ) brought out an Advice, stating that such a measure would not be acceptable from the point of view of religious freedom and the principle of equal treatment and would not be in line with the general principle of separation of State and religion.³³⁶

In October 2005 a Member of Parliament, requested the prohibition of the *burqa* in order to secure public safety and to protect citizens in the light of the fight against terrorism. In December 2005, the motion was accepted by the Second Chamber, because all right-wing parties voted in favour of it.

³³⁰ See, B.P. Vermeulen and C.M. Zoethout, 'Godsdienst, levensovertuiging en politieke gezindheid, in: S.D. Burri (ed.), *Oordelenbundel 2005*, Nijmegen: Wolf Legal Publishers 2006.

³³¹ An example where the Burka was discussed by the ETC in 2005 is case 2005- 86, where an institute for social welfare required clients not to wear a Burka while discussing their problems with the social welfare worker. This was a disproportionate measure, according to the ETC.

³³² The Extended Identification Duty Act ("Wet op de uitgebreide identificatieplicht"), Staatsblad 2004, 300. It officially requires only to show identification papers, not to remove one's covering clothing. This is an omission in the law.

³³³ Fotomatrix Model 2006; <http://www.paspoortinformatie.nl/>.

³³⁴ COUNCIL REGULATION (EC) No. 2252/2004 of 13 December 2004 on standards for security features and biometrics in passports and travel documents issued by Member States.

³³⁵ See Tweede Kamer 2004-2005, 29854, nr. 10. (This motion was withdrawn later on.)

³³⁶ See ACVZ, *Toelating en verblijf voor religieuze doeleinden*, [Admittance and residence permits for religious purposes.] Den Haag 2005.

Due to the social sensitivity and the legal complexities of such a prohibition, the Minister of Immigration and Integration has consulted an independent committee of experts on the possibilities to carry out this motion. The committee published its report in November 2006.

The experts have investigated four options:

- a) a general prohibition of Islamic face covering veils;
- b) a specific prohibition in connection with place or function, exclusively against Islamic face covering veil;
- c) a general prohibition of all forms of face covering clothing in public;
- d) specific prohibitions in connection with place or function, of all forms of face covering clothing.

In the committee's view, Islamic face covering veils should be legally regarded as a religious expression. The freedom of religion is safeguarded by Art. 6 of the Dutch Constitution and Art. 9 of the European Convention on Human Rights (ECHR). General or specific prohibitions which are exclusively directed at Islamic face covering veils are incompatible with these rights. In addition, it is discriminatory and therefore incompatible with equality norms laid down in Art. 1 of the Constitution, Art. 14 ECHR, Art. 26 International Covenant on Civil and Political Rights (ICCPR) and the Dutch General Equal Treatment Act (GETA). Therefore, the committee concludes that the first two options (a and b) should be dismissed. As regards the option under c, the committee finds that such a general prohibition could in fact amount to indirect discrimination on the ground of religion or to a restriction of the freedom of religion. The committee admits that the freedom of religion can be subjected to restrictions when these are necessary on the ground of public order, safety and protection of the rights and freedoms of other civilians.

However, the experts are not convinced that option c is proportionate and necessary to prevent the alleged security risks. Moreover, the legislator and the judiciary will have to consider problems concerning the enforcement, effectiveness and definition of such a general prohibition. The report warns for negative consequences in society, specifically as regards stigmatization of the Muslim community. It points out that there already do exist clothing requirements in specific situations (option d), *e.g.*, in the field of identification duty, unemployment benefits and dress codes of organisations (*e.g.*, schools), which are permitted under the law. These will probably offer a sufficient solution to the problems that the Government wants to address.

In her letter of 28 November 2006 to Parliament, the Minister of Immigration and Integration reported on the official position of the Government concerning this report. On the one hand, the Government agreed that options a and b are unlawful infringements of the freedom of religion and the principle of equality. On the other hand, it had also expressed its wish to regulate face covering clothing with an eye on public order, safety and protection of other civilians. The Government believed that the *burqa* obstructs integration and emancipation of certain – Islamic – women and may cause trouble relating to communication, state neutrality and criminal investigation. The Council of Ministers therefore announced at that stage to prepare a bill to introduce a general prohibition of face covering clothing in (semi)public areas. An interdepartmental working group would analyse existing legal possibilities and specific situations for which no such solution exists as yet.

In January 2008 Mr. Kamp, a Member of Parliament for the Liberal party that is in opposition to the government (VVD), proposed a law concerning a general prohibition on wearing clothes that cover the face in public and in buildings open to the general public. The proposal is stated in general wording and therefore differs from a prior proposal, made by Mr. Wilders (the leader of the '*Partij voor de Vrijheid*', a Dutch right wing split off from the Liberal Party) concerning the prohibition of the *burqa per se* in public.

The government now has come to the conclusion that in public and in public transportation, there exist sufficient legal possibilities to deal with safety risks and hinder as a consequence of face covering clothes. The municipalities have the opportunity to create a local ban on wearing face covering clothes for a certain area of the municipality and a certain period of time. With regard to public transportation, transport services can set rules on the behaviour of passengers, to ensure peace and a quiet and safe environment. The government is prepared to provide rules to regulate this, on the basis of Art. 72, 73 en 74 the Transport of Passengers Act 2000 (de Wet Personenvervoer 2000) and will negotiate with the transport services on prohibition provisions with regard to face covering clothes.

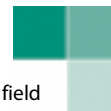
The coalition parties agreed that besides this, it is necessary to introduce a prohibition on face covering clothes in education and in public government institutions. In education, communication and identification is an important factor, which requires that teachers and students can see each other's faces. Furthermore, schools are responsible for the promotion of active citizenship and social integration and accepting face covering clothes would constitute a barrier to a correct performance of this task. These reasons constitute a justification for a direct distinction on the basis of religion. Some schools have already introduced a prohibition. In 2004 the Equal Treatment Commission ruled that a prohibition on wearing face covering clothes in schools is acceptable when the clothes hamper communication and identification and affect safety. With regard to public institutions, face covering clothes will be prohibited on the basis of the specific demands that public service entail in the area of openness and approachability. The government is of the opinion that a proper functioning of civil servants does not go together with wearing face covering clothes.

The wearing of face covering clothes hides facial expressions and creates a distance which is undesirable in public life and could entail risks for the functioning of public institutions as a whole.

As far as the right of religious groups to found their own schools is concerned there is a lot of debate going on as well. This right is guaranteed in Article 23 of the Constitution. This discussion takes place mostly in relation to the issue that the boards of such schools have the freedom to adopt their own admittance policies as far as pupils are concerned.³³⁷ In December 2005, some Members of Parliament have initiated a bill in which it was proposed to restrict this freedom. According to the bill would grant pupils an unrestricted right to admittance to virtually any school and would pose a corresponding obligation to these schools to accept everybody.³³⁸ It is highly disputable whether such a law would be in line with the guarantees of Article 23 of the Constitution.

³³⁷ This admittance policy should be distinguished from employment affairs, where the employer (being the board of a religious school) does have limited possibilities to select only teachers that have the same religion. See Article 5(2) of the GETA.

³³⁸ Tweede Kamer, 2005-2006, 30 417. See for a commentary on this bill: B.P. Vermeulen and C.M. Zoethout, 'Godsdienst, levensovertuiging en politieke gezindheid, in: S.D. Burri (ed.), *Oordelenbundel 2005*, Nijmegen: Wolf Legal Publishers 2006.



10. CO-ORDINATION AT NATIONAL LEVEL

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

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

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



Annex

- 1. Table of key national anti-discrimination legislation**
- 1. Table of international instruments**

ANNEX 1: TABLE OF KEY NATIONAL ANTI-DISCRIMINATION LEGISLATION**WEBSITES:** www.cgb.nl (and www.overheid.nl).Name of Country **THE NETHERLANDS**Date **DECEMBER 2007**

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



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



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



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

Name of country **The NETHERLANDS** **DECEMBER 2006**

Instrument	Signed (yes/no)	Ratified (yes/no)	Derogations/ reservations relevant to equality and non- discrimination	Right of individual petition accepted?	Can this instrument Be directly relied upon in domestic courts by individuals?
European Convention on Human Rights (ECHR)	Yes	Yes	No	Yes	Yes
Protocol 12, ECHR	Yes	Yes	No	Yes	Yes
Revised European Social Charter	Yes	Yes	NO	collective complaints protocol Signed: yes. Ratified: Yes	Yes
International Covenant on Civil and Political Rights	Yes	Yes	No	Yes	Yes
International Convention on Economic, Social and Cultural Rights	Yes	Yes	No	Not applicable	Yes
Convention on the Elimination of All Forms of Racial Discrimination	Yes	Yes	No	Yes	Yes
Convention on the Elimination of Discrimination Against Women	Yes	Yes	No	Yes	Yes
ILO Convention No. 111 on Discrimination	Yes	Yes	No, not to the author's knowledge	Not applicable	Yes
Convention on the Rights of the Child	Yes	Yes	No	Not applicable	
Convention on the Rights of Persons with Disabilities	Yes	No	No	Not applicable	