



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

COUNTRY REPORT 2009

FINLAND

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State of affairs up to 31 December 2009

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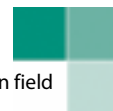
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INTRODUCTION

0.1 The national legal system

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

The Republic of Finland has been a constitutional republic with democratic traditions without interruption since 1918. Its' legal system belongs to the Scandinavian civil law tradition, with a lot of influences from Swedish and German law. What is distinct about the Finnish legal system is that there is no constitutional court, unlike in most other European countries. The Constitutional Law Committee of the Parliament plays a major role in the interpretation of the Constitution by supervising the constitutionality of proposed legislation. The Committee has also the task to supervise that the proposed legislation is in conformity with the international human rights obligations undertaken by Finland. Although the Committee is independent in its work and assisted regularly by high level legal experts, it is a political body of the Parliament, and the government coalition has always a majority in the Committee.

In the Finnish legislative system a Government proposal and the respective explanatory report are considered by the Parliament. The Constitutional Law Committee gives its opinion on whether the proposed legislation is to be enacted as ordinary legislation or is constitutional enactment required. The reports and opinions of parliamentary committees are primary in relation to the explanatory reports of the government proposals in interpretation of legislation. However, the Courts and authorities tend to utilise the explanatory reports of the government proposals as the primary source of guidance in the interpretation of new legislation and leave aside the reports and opinions of parliamentary committees unless the issue is controversial or has raised exceptional public interest.

Nevertheless, the Constitution empowers the courts to evaluate, whether the application of legal norms in an individual case would lead to a situation that would violate the fundamental rights set forth in the Constitution. If this would be the case, and the contradiction with the constitution is evident, the court is entitled either to interpret the legal norms applicable in the case to be in line with the Constitution, or if this is not possible, to set aside the contradictory legal norm, and apply instead directly the Constitution. The international human rights norms obliging Finland constitute the minimum level of protection, which cannot be set aside even with amending the Constitution. According to the case law of the Supreme Court, the international human rights conventions are directly applicable by the courts in a similar manner as are domestic fundamental rights protected by the Constitution. The authorities have a general obligation under the Constitution to give priority to fundamental rights in their interpretation and application of legal norms.

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

First, current anti-discrimination legislation in Finland is characterized by a certain dualism. The older parts of the legislation, in particular the Constitution and the Penal Code, prohibit discrimination in rather general terms and explicitly cover a high number of grounds of discrimination in addition to which the respective lists of grounds are open-ended. The more recent parts of the legislation, in particular the Non-Discrimination Act [*yhdenvertaisuuslaki* (21/2004)] and the Act on Equality Between Women and Men [*laki naisten ja miesten tasa-arvosta* (609/1986)], contain more detailed provisions with regard to, for instance, the definition of discrimination. These more recent parts of the legislation have been influenced strongly by international and European anti-discrimination law, and differ to a great extent from the older parts of legislation. Particularly the concepts of indirect discrimination, harassment and shifting the burden of proof are novelties stemming from European law. The Government of Finland, acting upon the views expressed by the Parliament, has set up Equality Committee. It is commissioned to prepare a Government proposal for new non-discrimination legislation. The Equality Committee published its Interim Report in February 2008. The Report states that its purpose is to examine the need and options for reform of the non-discrimination legislation and the related supervision mechanisms. Accordingly, it does not at this stage take a stand on the different options, but simply presents different possible models aimed at addressing the identified problems, for the purposes of opening up a public discussion on them. The Committee states that there are two basic principles that guide its work: (i) non-regression (i.e. the level of protection provided for by the existing legislation will not be downgraded) and (ii) promotion of the coherence of the legislation, so that the level of protection from discrimination would not, as a matter of principle, depend on the ground of discrimination involved. The Committee was to deliver its final proposal in October 2009, but after the extension of its mandate until the end of the year, it submitted its final report on 21.12.2009.² The work of the committee had been difficult and several of the Committee members stated discontent to the final result of the Committee work. Major reason for the discontent was that the aims set forth for the reform effort by the Ministry of Justice were not fully achieved. The Committee proposed that the scope of application of the Equal Treatment Act be expanded to make the Act applicable to all public and private activities. Matters belonging to the sphere of private life would however be excluded from the scope of application of the Act. In addition, protection from gender discrimination would still be governed by the Act on Equality between Women and Men. The duties to promote equal treatment would expand to concern all discriminatory grounds and the duties would apply to government and municipal authorities, educational institutions and employers. The Act would moreover require that reasonable accommodation be provided to accomplish the non-discriminatory treatment of people with disabilities.

² The final report can be found from http://hare.vn.fi/mHankePerusYpSelaus.asp?h_ild=12573 (retrieved on 31.12.2009).

The prohibition of discrimination would encompass direct and indirect discrimination as well as harassment and failure to provide reasonable accommodation. Provisions would also be laid down prohibiting multiple discrimination, discrimination by association and discrimination by presumption. Compliance with the Act in the world of work would be supervised by the occupational health and safety authorities. Compliance with the Act in other spheres of life would be supervised by the Ombudsman for Equal Treatment and the Equality Tribunal. The Ombudsman for Equal Treatment would replace the current Ombudsman for Minorities and the Equality Tribunal would replace the current Equality Tribunal and the (Gender) Equality Board. The cap on the compensation payable to the victim infringed against through discrimination would be eliminated and compensation could be sought on all discriminatory grounds prohibited under the Act. Both action and inaction could constitute an infringement entitling the injured party to compensation. Provisions governing the powers of the Ombudsman for Equal Treatment and Equality Tribunal in supervising compliance with the Equal Treatment Act would be laid down in the Equal Treatment Act. Provisions governing the organisation of the Ombudsman and the Tribunal as well as their other duties and powers would be laid down in separate Acts and Decrees. The proposal of the Committee is under further consideration at the Ministry of Justice, which is supposed to present a new government proposal for a new Equal Treatment Act to the Parliament by the end of the year 2010.

Second, case law under the new equality legislation has only recently begun to emerge. However, the emergence of respective case law from the higher courts has been slow and sometimes selective. There is almost a vacuum of Supreme Court case-law with regard to discrimination based on ethnic origin. Legal commentary on the subject remains scarce. Consequently, there is no established line of interpretation with regard to some of the most complex questions discussed in this report. Court practice is inconsequent and hard to find.

Where available, this report relies on preparatory works (*travaux préparatoires*) and the authoritative statements of the Constitutional Committee of the Parliament, as these sources of interpretation play a strong role in the Finnish legal system in general. It should however be kept in mind that these two sources of interpretation are not strictly speaking legally binding, although they do have a lot of de facto authority.

Third, the Åland Islands, which is an autonomous province of Finland, has exclusive legislative competence over certain material areas covered by the two Directives as concerns its territory.

The division of legislative competence between the Åland Islands and the Finnish state goes as follows: the Åland Islands has competence over matters relating to e.g. civil servants employed by the Province of Åland or one of the municipalities in the Åland Islands, health care, social welfare, education, self-employment, promotion of employment, and some parts of provision of services (e.g. transport services); the Finnish state has competence over matters such as private employment (including those employed by the authorities of the Åland Islands or one of the municipalities as employees, not civil servants), some parts of the provision of services (such as banking) and criminal and procedural law (including rules on burden of proof). Therefore some parts of the new equality legislation that was adopted in Finland in order to transpose the two Directives are not applicable with respect to the Åland Islands, which is why it was necessary for the Åland Islands to adopt its own equality legislation. The latter legislation entered into force on December 1, 2005. The two sets of legislation differ to a great extent from each other, partly because of the different terminology used (the Åland Islands legislation was drafted in Swedish while the legislation adopted by the Finnish state was drafted in Finnish; the legislative environment of the two sets of law are completely different, although much of the law adopted by the Finnish state is applicable also in the ÅI). Therefore the Åland Islands' legislation will be separately addressed in this report under those headings that deal with matters with which the Åland Islands has exclusive competence.

Fourth, the Non-Discrimination Act constitutes an extremely complex legal framework, with different scopes of application and judicial bodies depending on what is the alleged discrimination ground and what is the substance issue in question. There is inequality and inconsistency built into the legal framework. Even legal professionals are at odds in finding their way on this inconvenient legal landscape. This contributes unavoidably to the inefficiency in application of the legal framework weakening the legal protection presumed to be at hand for the benefit of the protected subjects.

0.2 Overview/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. Please clearly and briefly indicate whether the Member State had taken advantage of the option to defer implementation of Directive 2000/78 EC to 2 December 2006 in relation to age and disability?

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.

Please ensure that you review the existing text and remove items where national law has changed and is no longer in breach.

The two Article 13 Directives from year 2000 were transposed into national law primarily by means of the adoption of the *yhdenvertaisuuslaki* (21/2004) [Non-discrimination Act (21/2004)], in addition to which a number of amendments to existing legislation were made. The new legislation entered into force on 1 February 2004. This new legislation was however not applicable in the province of Åland Islands with respect to matters that belong to its legislative competence. The European Court of Justice (ECJ) condemned Finland on 24 February 2005 for having failed to transpose the two Directives with respect to the Åland Islands. The Provincial Legislative Assembly of Åland (*Lagting*) adopted legislation transposing the two Directives in June 2005, and this new legislation entered into force in December 2005. Hence Finland was somewhat late in transposing the two Directives.

Finland did not defer implementation of the Employment Equality Directive in relation to age and disability. With the adoption of these laws the transposition process is now considered as complete.³

The Non-Discrimination Act, together with amended older legislation, by and large meets the requirements set forth by the two Directives. Some areas of concern however remain, and interpretation, usually of both the EU law and the domestic law, is required to draw any conclusions as to possible non-conformity. Before looking at these concerns, two fundamental observations must be made:

- At some points the terminology used in the domestic legislation departs from that used in the Directives and follows the terminology used in the Finnish legal system in general. The significance of this difference in terminology is however alleviated by the fact that the pertinent preparatory works, which are key sources for interpretation of laws, instruct those applying the law to interpret the Act in accordance with the wording of the two Directives as well as with the case law of the Court of Justice.⁴
- There are discrepancies between the Finnish and English language versions of the two Directives. In the drafting of the new Finnish equality legislation the Finnish language version was used as their template. The Finnish language version provides, in some respects, for weaker protection than the English language version, and this had an effect on the language of the new law.

³ There are however two exceptions to this: First, the Finnish Parliament (*eduskunta*), upon passing the new equality legislation, expressed its view that the government should prepare a proposal for an overall reform of the equality legislation that would proceed from the principle that all grounds of discrimination should enjoy equal levels of protection, i.e. that the applicable material scope and the available legal redress mechanisms should not differ from ground to ground. Second, sexual orientation is not expressly mentioned in the list of grounds in section 11 of State Civil Servant's Act [*valtion virkamieslaki* (750/1994)], because of an apparent mistake. However, an express reference to sexual orientation was included into section 11 with an amendment (30.11.2007) that came into force on 1st January 2008.

⁴ Government bill 44/2003 [HE 44/2003].



- Two of the areas discussed below which cause concern (role of organizations and the definition of indirect discrimination) are areas where these concerns are attributable, at least in part, to these discrepancies in the respective texts. The author of this report has used the English version as the standard against which domestic legislation is measured.

The primary areas of concern are the following:

- Associations or organizations (working for the benefit of victims) do not have any major role to play in judicial or administrative processes.

These entities have a general right to request a statement on the interpretation of the Non-Discrimination Act from the Discrimination Tribunal in matters pertaining to ethnic discrimination, since the Tribunal can address only ethnic discrimination. However, such organisations do not have any general *locus standi* to take a case to the court or to the Discrimination Tribunal to pursue a matter in its own name, not even with the consent of the complainant. Neither can associations become third parties to such proceedings or act as *amicus curiae*. This state of affairs arises from national legislation on rules of procedure. The same procedural rules however allow any lawyer – or subject to some restrictions: any person - to represent a claimant with his/her approval, and to provide assistance, such as legal advice. Lawyers (and also other persons) working for an organization may thus represent a claimant under general rules of representation and procedure, and may also otherwise support the victim (e.g. by way of giving advice).

Those who drafted the new equality legislation were – and are - of the view that this arrangement satisfies the requirements set forth by Article 7(2) of the Racial Equality Directive and Article 9(2) of the Employment Equality Directive, considering also preamble No 19 of the Racial Equality Directive and preamble No 29 of the Employment Equality Directive. Whether this really is the case, depends on the interpretation of the full scope of the aforementioned Community law.

- The Non-Discrimination Act includes a specific provision to the effect that the Act does not cover 1) the educational system or the objectives or content of education, or 2) entry into country or residence of foreigners, or differential treatment of foreigners on the basis of their legal status. These limitations to the scope of application *may* be too widely formulated in view of Articles 3(1) (g) and 3(2) of the Racial Equality Directive.

With regard to education, further analysis is called for, especially with regard to the question whether the restriction mentioned is justified in view of the fact that Article 3 refers to “the limits of the powers conferred upon the Community”.⁵

Accordingly, whether there is a breach depends on whether the educational system and the objectives and content of education belong to that category of matters that are excluded from the powers of the Community. With regard to the second concern, it should be noted that the Non-Discrimination Act excludes EU nationals from its scope in this respect, by way of speaking summarily of “foreigners” (that is: those without Finnish citizenship), and not of “third country nationals or stateless persons” in accordance with the Directives. This difference may however in practice be without material implications, because the legislation that deals with “entry into country or residence of foreigners” and that makes distinctions on the basis of “their legal status” – in the material fields covered by the Racial Equality Directive – does itself make a distinction between EU-nationals and other foreigners.⁶

- As regards the definition of indirect discrimination in the Non-Discrimination Act: “particular disadvantage” in the definition of indirect discrimination has been interpreted/translated as “erityisen epäedullinen asema”; this translates in English as “putting a person into a particularly disadvantaged position”, i.e. the wording suggests that there is a threshold of severity that the disadvantage must meet to qualify as discrimination.⁷ Whether this is in line with the Directives depends on the interpretation of the Directives. It must however be underlined that this formulation of indirect discrimination follows and is in line with the Finnish language version of the two Directives.
- It is unclear to what extent the courts in the Åland Island will apply the shift in the burden of proof with respect to those cases that are brought under the laws adopted in the Åland Islands. This is because the rules on burden of proof belong to the legislative competence of the Finnish state, and because the requirements posed by the two Directives in this respect were transposed into national law by section 17 of the Non-Discrimination Act, which however by its wording is applicable only with respect to proceedings brought under that particular Act.

⁵ Section 6 of the Constitution prohibits discrimination also in the field of education, alleviating the effect of the limitation to some extent, but one must note that the Constitutional anti-discrimination provision conceptualizes discrimination differently than the EU directives (for instance, justification of ‘direct discrimination’ is possible), in addition to which the sanctions that follow from a breach of the said provision are not in accordance with the requirements of the EU directives.

⁶ The Alien’s Act [*ulkomaalaislaki* (301/2004)] makes a distinction between foreigners and EU-citizens, and e.g. stipulates that the latter do not in general need a work permit.

⁷ It should be noted that it appears to be the case that the setting of a some kind of a (even low) threshold was indeed considered necessary because otherwise a non-threshold definition of indirect discrimination (which can be unintentional and not easy to identify), coupled with sanctions such as payment of major sums of compensation, could lead to unreasonable consequences.



The lack of expressly applicable provision on the burden of proof in this respect does however not necessarily mean that the courts would not in practice observe the shifted burden of proof, as the Finnish courts have in the past in similar cases followed a shifted (shared) burden of proof (in other than criminal law cases) even without an express provision to that effect, and as the courts in the ÅI may nevertheless apply section 17 by taking into account its objective and by disregarding its express limitations.

- Employment laws provide that employees' and civil servants' employment relationships terminate, as a rule, when they reach 68 years of age. This happens without further notice, but the employer and employee can agree to extend the employment relationship after this point. Some argue that automatic termination of employment relationships at a specific age may constitute discrimination on the grounds of age.
- Section 2(2), subparagraph 4, of the Non-Discrimination Act prohibits discrimination in access to and supply of goods and services which are available to the public, but excludes from its scope transactions between private individuals. Some experts heard by the Constitutional Law Committee expressed the view that this does not fully comply with the requirements of Article 3(1), subparagraph (h) of the Racial Equality Directive.
- It may be asked whether the domestic remedies and sanctions are effective, proportionate and dissuasive as required by Article 15 of the Racial Equality Directive and Article 17 of the Employment Framework Directive.
- After the amending the Act on Minorities Ombudsman and Discrimination Tribunal in 2008, the Ombudsman may conduct also independent surveys and the Ombudsman decides independently the targets and how such surveys are made. Nevertheless, the explanatory report to the amendment indicates that such surveys are general by nature and it remains to be seen if even stronger mandate of inquiry is required for efficient supervision by Minorities Ombudsman. Even more important is that the increased mandate does not help, if resources of the Minorities Ombudsman remain scarce.

The government of Finland has taken, besides the setting up of the Equality Committee which prepared a Proposal for the comprehensive reform of the Finnish anti-discrimination legislation (including not just the Non-Discrimination Act but also a number of specific acts), several measures aimed at amending the existing legislation so as to ensure that it is fully in line with the Directives, particularly in view of the reasoned opinions submitted by the Commission.

First, an amendment was made to the non-discrimination provision of the State Civil Servant Act [*valtion virkamieslaki* (750/1994)]. The act, which is one of the domain-specific laws the non-discrimination provisions of which were amended in the process of transposition of the Directives, did not originally expressly refer to “sexual orientation” as one of the prohibited grounds of discrimination. The list of grounds of the Act was however open-ended (i.e. it prohibited discrimination not just on the expressly mentioned grounds but also “on other grounds related to a person”) and the preparatory works made it clear that the intention was to prohibit discrimination also on the grounds of sexual orientation also in that particular field. However, after the European Commission brought this matter formally up with the national authorities, the provision in question (Section 11 of the Act) was amended so that now “sexual orientation” is expressly mentioned as a prohibited ground of discrimination also in the State Civil Servant Act.

Second, Section 2 of the Non-Discrimination Act, which lays down the material scope of the application of the Act, was amended in order to ensure that the Act is fully applicable in the field of access to and supply of goods and services (with regard to the prohibition of ethnic discrimination). The EC Commission had started proceedings (2006/2451) against Finland due to insufficient transposition of the Directive 2000/43/EC. In its’ reasoned opinion on October 2007 the Commission considered that the scope of application of equal treatment legislation was too narrow, since Section 2, paragraph 2 (4) excludes the relations between private individuals from the scope of application and is thus in violation with Article 3 (1) h prohibiting discrimination in access to and supply of goods and services which are available to the public, including housing.

In response to the Commission proceedings the amendment of the Non-Discrimination Act concerning the scope of application [20.2.2009/84] came into force on 1 March 2009. It amends the wording of Section 2 paragraph 2 item 4 of the Non-Discrimination Act so that it will be applicable to supply of housing, other tangible or non-tangible property or services available to the general public other than in respect of legal transactions within the sphere of private and family life.

The practical application of the legislation amending the scope of application of the Non-Discrimination Act is not yet clear, since the reasoning of the proposal is somewhat controversial. It opens the interpretation of the scope of application to such practical applications that might possibly mean in practice insufficient implementation of the directive. According to the reasoning of the Bill the delimitations set forth for the private transactions (ie. prohibition of discrimination) are applicable only to such provision of goods, which by nature comes close to commercial activity. Furthermore, it is stated that rental or selling of apartments and houses which have been in the personal use of the owner is not included into the scope of application since they are considered to belong to the sphere of private and family life.

In addition, the original wording of the Act included both concepts 'access to' (saatavuus) and 'provision' (tarjonta) corresponding more or less to the wording of the Directive. In the amended version 'access to' (saatavuus) is not anymore included. The Minority Ombudsman and the National Non-Discrimination Board considered in their opinions during the drafting process that the proposed scope of application was too narrow and not necessarily implementing the Directive sufficiently. So far there have not been case-law concerning the amended scope of application.

Third, in response to the Commission proceedings, the Act on Minority Ombudsman and Discrimination tribunal was amended [7.11.2008/679] to clarify the competences of the Ombudsman for Minorities. The Commission had considered that Article 13 of the Directive had not been properly transposed, since there was no specialised body in Finland with the task of conducting independent surveys concerning discrimination. Now the Minority Ombudsman is established in Sections 1 and 2 of the Act as an independent institution vested with powers to conduct and commission independent surveys concerning discrimination. The capacity of the Minority ombudsman to conduct or commission independent surveys will depend on to what extent this will be taken into consideration on annual budgetary proposals given by the Government.

Fourth, the Non-Discrimination Act was amended with regard to the wording of the exception made for genuine occupational requirements in section 7 of the Act [14.11.2008/690]. The purpose of the amendment is to bring the said provision more clearly in line with the Directives. It provides for allowing the use of positive measures and specifically accepts positive measures for the implementation of equality plan aiming to acquire equality in practice in accordance with the purpose of the Non-Discrimination Act.

Some further interrelated considerations may be raised in this context:

- Firstly, as also this report implies, the Finnish legal doctrine relating to equality and non-discrimination issues is not always very detailed or precise. This is despite the fact that the Finnish legal system has for already quite some time provided protection from discrimination, albeit in a different fashion in comparison to the Article 13 Directives. The lack of clarity is in many points due to the lack of relevant case law and legal literature on the subject. Also the lack of teaching addressing specifically non-discrimination issues at the law faculties contribute to the weaknesses in the application of non-discrimination legislation.
- Secondly, there is still little experience outside the fields of gender and ethnic discrimination. The new legislation, or its *travaux préparatoires*, do not in any detailed fashion analyse or break down the differences between discriminations on the grounds of disability, age, sexual orientation, religion or belief. The different grounds are, where not explicitly required by the Directives otherwise, treated as essentially the same.

This situation is further exacerbated by the fact, noted e.g. by Rainer Hiltunen, that awareness of those who are entrusted with enforcing the law is not sufficient with respect to these “other” grounds of discrimination.⁸ A related conceptual problem is that e.g. disability issues are often framed in terms of social or welfare policy and not of equal treatment. This situation is also reflected in the sphere of adjudication: there are only a few if any cases on discrimination on the basis of disability, but there is a multitude of cases dealing with the adequacy of specific public services needed by people with disabilities.

- Thirdly, many experts in Finland are of the view that there should be greater convergence between the treatment of different discrimination grounds. The material scope where the prohibition of discrimination is to be applied should be the same for all grounds, and that enforcement mechanisms should likewise be of similar standard.

This apparent discrepancy in the treatment of different discrimination grounds has been criticized not just by human rights/disability activists,⁹ but also by the Parliament, which upon adoption of the Non-Discrimination Act in December 2003 passed a statement in which it requested the Government to prepare a new bill that would put the different discrimination grounds, as a matter of principle, on an equal footing when it comes to the material fields of application and remedies.¹⁰ Indeed, the Ministry of Justice established in early 2007 a committee (“Equality Committee”) for the purposes of preparing the new government proposal. The Committee presented a proposal for new, more integrated legislation, at the end of December 2009. The Committee published on 8.2.2008 an interim report in which it analysed the challenges and problems that relate to the existing legislative framework and presented different possible models by which the challenges and problems can be addressed. According to the report, the current legislation is decentralized (i.e. is a patchwork of several acts, decrees and provisions in specific acts) and is not coherent (i.e. different grounds are treated differently, different concepts and definitions apply e.g. with respect to gender discrimination and discrimination on the other grounds). The Committee states in the report that there are two basic principles that guide its work: (i) non-regression (i.e. the level of protection provided for by the existing legislation will not be downgraded) and (ii) promotion of the coherence of the legislation, so that the level of protection from discrimination would not depend on the ground of discrimination involved (as a matter of principle).

⁸ Report of the European Group of Experts on Combating Sexual Orientation Discrimination: *Combating sexual orientation discrimination in employment: legislation in fifteen EU member states*. Chapter 6 by Rainer Hiltunen. 2004.

⁹ Sanna Ahola and Tuomas Himanen : Vammaisen Pakolaisena. *Pakolainen* 4/03 verkkoversio. Article available online at http://www.pakolaisapu.fi/pak_4_03/pak4_03_juttu_4.html (visited 1.1.2006).

¹⁰ PTK 107/2003 vp, p.7, TyVM //2003 vp.

The Equality Committee identifies four goals for the reform: (i) improvement of the coherence of the content of the legislation; (ii) improvement of the promotion and supervision of equality and non-discrimination; (iii) improvement of co-operation, interaction and participation in equality and non-discrimination matters; and (iv) improvement of the clarity as well as legal and linguistic aspects of the legislation.

The Report lays down three basic options for new legislation (a single equality act, a decentralized system with several acts and an intermediate option) and three basic options for the organisation of its supervision (a single equality authority under the Parliament, a single equality authority under the Government, and extension of the mandates of the existing Ombudsmen that deal with gender equality on the one hand and ethnic discrimination on the other).¹¹ In its final report the Committee did not fully reach the aspired goals and especially employers and employees central labour market organisations did not fully endorse the proposal. However, a new government proposal is under preparation at the Ministry of Justice, but it remains to be seen what is the final substance of the proposal and when it will be given to be considered by the parliament. New parliamentary elections are forthcoming during Spring 2011, and it is now clear that the new government proposal will not be ready before autumn 2010.

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:

Name of the court

Date of decision

Name of the parties

Reference number (or place where the case is reported).

Address of the webpage (if the decision is available electronically)

Brief summary of the key points of law and of the actual facts (no more than several sentences)

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

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

¹¹ An English summary of the Interim Report can be downloaded from the following address: <http://www.om.fi/en/Etusivu/1201510078928> (retrieved 10.4.2008).

Name of the court: Vaasa Administrative Court

Date of decision: 27 August 2004

Reference number: Ref. No. 04/0253/3

Brief summary: The Cathedral Chapter of the Evangelical Lutheran Church had decided that the applicant was not eligible to be appointed as a chaplain (assistant vicar), as she was publicly living in a same-sex relationship and had announced that she would officially register the said relationship. The Vaasa Administrative Court annulled the decision of the Cathedral Chapter, as the decision was found to be against the law because of its discriminatory nature.

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

Name of the court: Supreme Administrative Court

Date of decision: 08 August 2001

Reference number: 1766, KHO: 2001:38

Brief summary: City of X had to cut down the number of its employees, and issued instructions according to which those above a certain age limit should be primarily targeted, although individual assessment was required to establish who should be dismissed. The likelihood of having been given notice was two times higher in the age group 50-59 years in comparison to other age groups.

The City was not able to justify its actions by providing a weighty and acceptable reason for such differential treatment on the basis of age.

This was found to constitute a breach of section 2 of the Act on the Employment Security of Municipal Officeholders [*Kunnallisen viranhaltijan palvelussuhdeturvasta annettu laki* (484/1996)], which prohibited age discrimination (this prohibition predated the Directives, and allowed the justification of direct age discrimination).

Name of the court: District Court of Vaasa

Date of decision: 27 September 2005

Brief summary: The complainant, a person with a severe sight disability was denied access to a restaurant on the grounds that her guide dog was not allowed entry to the restaurant. The district court of Vaasa found this to constitute (presumably direct) discrimination on the basis of disability, as defined in section 11:9 of the Penal Code. The owner of the restaurant, who had given instructions not to let dogs into the restaurant, and the waiter who had acted in accordance with these instructions, were ordered to pay fines.



Name of the court: Discrimination Tribunal

Date of decision: 31 January 2006

Brief summary: The case concerned the allocation of pupils into separate school classes in the Aurinkolahti primary school. During the school year 2003-2004 two parallel school classes, 1A and 1B, had been formed in such a way that all immigrant origin pupils had been placed in class 1B.

As a result, one third of the pupils in class 1B were of immigrant origin, while class 1A consisted only of pupils of Finnish origin. In their separate responses to the complaint filed by the Ombudsman for Minorities, the headmaster of the school, the City council and the City education department all submitted that the allocation of pupils had been based on pedagogical reasons, not ethnic or national origin. Allocation had been done on the basis of need for instruction in the Finnish language. According to the respondents, this arrangement made it possible to provide instruction in the Finnish language in a more efficient way, which enhances the chances of immigrant pupils to succeed in their school studies. The City education department was of the view that the provision of special language instruction in this way was in fact a positive action measure, not discrimination. The Discrimination Tribunal held, after voting 4-1, that the arrangement constituted indirect discrimination on basis of ethnic origin.¹² The Tribunal issued a notice to the city of Helsinki (which was responsible for the school) prohibiting it to continue discriminatory treatment.

The City of Helsinki appealed to Helsinki Administrative Court. The latter court rendered its decision on 15.6.2007, and upheld the decision of the Discrimination Tribunal. The City of Helsinki did not make any further appeal from the decision.

Name of the court: Supreme Administrative Court

Date of decision: 1 December 2006

Reference number: KHO:2006:93

Brief summary: The City of Naantali declared open a vacancy for a Building Inspector. Altogether 35 individuals applied for the job, including A, the complainant, and B, the person chosen for the job. Nine applicants were invited for interview, but A was not among them. A filed a complaint, submitting that he was better qualified than B and that he was not invited to interview because of age discrimination.

The respondent (the city) submitted that B fulfilled all the essential qualifications required for the job, and that no discrimination had taken place. According to the respondent statistical evidence confirmed the absence of age discrimination: the nine selected for the interview had been born in the years between 1950-1965; their median birth year was 1954, whereas the median birth year of all applicants was 1959. The complainant himself had been born in 1949.

¹² The Finnish anti-discrimination law and legal commentaries predominantly avoid using the term 'race' or 'race discrimination' and use 'origin', 'ethnic origin' and 'ethnic discrimination' instead (also to cover what in some countries would be called 'race' or 'race discrimination'), and this approach is followed also in this report.

The Administrative Court of Turku, which examined the case in the first instance, found no discrimination. It furthermore submitted that even though A had formally better qualifications than B, B had met all the essential qualification criteria, and therefore the City had acted within the limits of its discretionary powers in choosing who, from among all qualified applicants, was invited to interview and eventually employed. The Supreme Administrative Court focused upon the discrimination claim in its decision.

It reaffirmed that the Non-discrimination Act had to be complied with at all stages of the employment process, including short-listing and invitation to interview. It also took note of the rule regarding the sharing of the burden of proof. It however arrived at the conclusion that a *prima facie* case of age discrimination had not been made. Age discrimination could not be presumed from the fact that the applicant had not been invited to interview, as exclusion of some applicants is an inevitable part of all selection processes, nor could it be presumed from the fact that the age of the complainant differed from the average age of the other applicants. On these grounds the Court found no discrimination.

Name of the court: Discrimination Tribunal

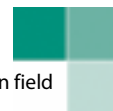
Date of decision: 7 June 2007

Brief summary: A group of four Roma women had been refused services at a clothing shop, and they were threatened with the calling in of the security if they would not leave the shop immediately, since the shopkeeper considered that the huge size of the group would endanger security in the store. The Roma were of the opinion that they were refused services due to their ethnic origin. The Roma women felt the situation annoying since there were other customers in the store and one woman of the Roma group did work as a civil servant. The Tribunal found the provision of services by the clothing shop to be discriminatory and harassing. The Tribunal issued a ban of discrimination and prohibited the shop to continue a conduct in violation of the prohibition of discrimination provided for in the Non-Discrimination Act. The Tribunal issued a conditional fine of 500 EURO on the clothing shop.

Name of the court: Discrimination Tribunal

Date of decision: 8 October 2007

Brief summary: A Roma was refused services in a restaurant ship by a sales assistant according to whom he was acting under the direct orders of the manager of the restaurant. The Tribunal considered that the evidence provided by the applicant did show that the reason for the conduct of the sales assistant was the employers' specific and direct orders to refuse services from Roma. The tribunal issued a ban on discrimination on the restaurant and imposed a conditional fine of 500 EURO.



Name of the court: Discrimination Tribunal

Date of decision: 19 November 2007

Brief summary: A Roma applicant wanted to rent an apartment in the City of Raahen. The property company had agreed to rent the apartment in question to the applicant on the condition that the Social Services of the City act as guarantor for the rent.

The Tribunal considered that the requirement for the Social Services of the City to act as guarantor for the rent is not standard procedure with regard to members of the majority population in corresponding situations. The Tribunal found that the property company had treated the applicant in a discriminatory manner because of his ethnic origin issuing a ban on discrimination on the property company and imposed a conditional fine of 2000 EURO.

An order for the payment of conditional fine is given in separate proceedings on request of the applicant in case the prohibition order is not followed.

Name of the court: Tampere District Court

Date of decision: 6 November 2008

Brief summary: A building construction entrepreneur was convicted to pay 4800 EURO in fines and liable to pay 1200 EURO in compensation for damage and 2147 EURO for legal costs for giving instructions to a real estate agent not to sell a house to a person of Roma origin who was interested to buy it. The District Court stated that such a conduct constitutes a racist crime. The real estate agent was not considered to be proven guilty of discrimination due to lack of culpability in the case. The judgment of the Tampere District Court was confirmed by the Turku Appeal Court on 24 November 2009 (nro. 2826, dnro. R 09/17), when the appeal court rejected the appeal of the parties.

Name of the court: Discrimination Tribunal

Date of decision: 27 November 2008

Brief summary: The Ombudsman for Minorities asked the National Discrimination Tribunal to find out whether the City of Rovaniemi had acted in a discriminatory manner in providing children's day care and if necessary to prohibit the continuation of the said discrimination. The National Discrimination Tribunal considered that the Sámi children did have a statutory right confirmed in the Act on Children's Day Care to enjoy day care services in their mother tongue equally with those children who had Finnish as mother tongue enjoying the same services in Finnish. The Discrimination Tribunal further considered that the City had not taken sufficient measures in order to provide properly the statutory day care services for Sámi children and imposed a prohibition of discrimination and a conditional fine of 7000 EURO on the City as requested by the Ombudsman.

The Tribunal considered that Sámi-speaking children had the same right to day care provided in their native language as Finnish-speaking children. This matter came up in a municipality situated outside the Sámi homeland.

According to the Tribunal's decision, Sámi speaking children had been subjected to discrimination on the basis of their ethnic background. The municipality may not discriminate against the Sámi in the provision of statutory services, nor may it prevent the implementation of the statutory rights of the Sámi. The decision was important also as regards the interpretation of the Non-Discrimination Act. A procedure may in itself be discriminatory, even if no particular victims are identified. The decision has been appealed with regard to the imposition of conditional fine, but not with regard to the substance of the case, by the respondent to administrative court and the proceedings are still pending.

Name of the court: Discrimination Tribunal

Date of decision: 11 December 2008

Brief summary: The Ombudsman for Minorities asked the National Discrimination Tribunal to find out whether the Municipality of Enontekiö had acted in violation of the prohibition of discrimination contained in Non-Discrimination Act and in special legislation in providing children's day care, health services, services for elderly and basic education, and if necessary to prohibit the continuation of the said discriminatory conduct of the Sámi living in the municipality.

The National Discrimination Tribunal pointed out that the municipality in question was part of the Sámi homeland, where the Sámi Language Act imposes a special duty on the authorities to ensure the availability of public services in the Sámi language. The National Discrimination Tribunal considered that Sámi children have the same statutory right to day care in their native language as Finnish-speaking children, and the Sámi are entitled to health care services, services for the elderly and basic education in the Sámi language. The municipality had not proven that it had taken adequate measures to appropriately arrange these statutory services for the Sámi-speaking population. The Tribunal considered that the municipality had discriminated against the Sámi-speaking population on the basis of their ethnic background and imposed a conditional fine of 5000 EURO on the municipality. The decision has been appealed by the respondent to administrative court and the proceedings are still pending.

Name of the court: Vaasa Appeal Court

Date of decision: 04 February 2009

Reference number: L nro 138 (Dnro. S 08/256)

Brief summary: The National Discrimination Tribunal had prohibited the municipality of Himanka from continuing or repeating ethnic discrimination against a Roma family or any other member of the Roma population relating to resident selection for rental housing, which was in violation of section 6 of the Non-Discrimination Act. In its decision, the Tribunal stated that the municipality's actions had clearly discriminated against members of the family on grounds of ethnic origin. After the National Discrimination Tribunal decision was handed down, the Ombudsman for Minorities negotiated with the municipality on behalf of the family regarding compensation to be paid to the Roma family under the Non-Discrimination Act.

Because the parties could not reach agreement on the amount of compensation, the Ombudsman for Minorities decided, for the first time ever, to assist victims of discrimination when they demanded compensation in court. In conjunction with this event, the Ombudsman also decided to take on the risk of legal costs. The compensation lawsuit was overturned in the Kokkola District Court in December 2007. The Ombudsman for Minorities continued to assist the family in their appeal to the Vaasa Court of Appeal. In February 2009, the Vaasa Court of Appeal sentenced the municipality to pay compensation to the members of the Roma family.

The compensation was EUR 3,000 for each person and in addition the legal costs were awarded to the victims to cover the legal costs of the person assisting them from the office of the Ombudsman for Minorities. The decision of the Vaasa Court of Appeal became legally valid in autumn 2009, when the Supreme Court ruled against the municipality's petition for leave of appeal.

Name of the court: Vaasa Appeal Court

Date of decision: 06 May 2009

Reference number: nro 550 (Dnro. R 07/1205)

Brief summary: A group of Roma were refused entrance or service in several restaurants. The reasoning behind the refusals were different. Among other things it was claimed that they would endanger public order and security, would not pay for the services or entrance was refused without any explanations. The court considered that there were not sufficient reasons for the allegations and therefore the reason for refusing entrance or service could only be the applicants' Roma ethnic origin. The same conclusion could be drawn also when no explanation for the refusals were given. The court sentenced 5 persons to pay fines for committing discrimination punishable under the penal code varying from 300 euro to 800 euro and to pay compensation to the victims 400 euro each.

Cases before other supervisory bodies

There are two supreme overseers of legality in Finland, the Chancellor of Justice, who reports to the Government, and the Parliamentary Ombudsman. They exercise oversight to ensure that public authorities and officials observe the law and fulfil their duties in the discharge of their functions. The aim is to ensure good administration and the observance of constitutional and human rights.

The Deputy Parliamentary Ombudsman gave a decision on 16 June 2009 (case no. 208/4/08) concerning positive treatment of immigrants, which deserve to be referred here. He examined five complaints in which the practice in Helsinki, Vantaa, Turku and Tampere of arranging periods for which swimming baths are reserved for the use of immigrant women was criticised as discriminatory. Deputy-Ombudsman pointed out that the prohibition of discrimination does not prevent separate times for immigrant women being reserved at swimming baths. Real equality can be promoted through positive special measures when discriminatory treatment has an acceptable purpose and is correctly proportionate to the desired goal.

The prohibition on discrimination that international conventions and Finnish legislation impose does not by any means prevent so-called positive special measures, whereby the intention is to promote also equality that is real and implementable in practice rather than formal equality only. The intention with the constitutional provisions is to promote specifically real equality. Real equality may presuppose, e.g., that a group which is socially, economically and otherwise disadvantaged is given better treatment than others. Thus treating certain groups of people differently does not constitute prohibited discrimination in all situations.

According to a report received by the Deputy-Ombudsman, there is a special need to arrange times reserved for immigrant women at swimming baths. This ensures that they can receive swimming lessons and promotes their integration. Nor have the reserved times been disproportionate to the total amount of time that swimming baths are open for all users. The Deputy-Ombudsman stressed that positive discrimination is permissible only as long as it is needed to redress observed shortcomings.

The Ombudsman for Minorities was contacted concerning a matter in which the parties were an immigrant entrepreneur of ethnic background and a public limited company. The entrepreneur felt discriminated against on the basis of ethnic origin because the public limited company did not select the entrepreneur's company as a contract partner. The Ombudsman for Minorities asked the National Discrimination Tribunal for an opinion on the application of the Non-Discrimination Act to the case. Among other things, the Ombudsman asked the Tribunal for its opinion concerning whether a company can be considered to be the target of ethnic discrimination if unfavourable treatment appears to be linked to the entrepreneur's ethnic origin. In its advisory opinion (15.12.2009, dnro. 2009/3384) the National Discrimination Tribunal stated that the Non-Discrimination Act does apply to such cases. The Tribunal also stated that one decisive factor concerns how directly an entrepreneur of ethnic origin is identified with the company and its operations. However, when the entrepreneurs have equal position they have usually freedom to organise their mutual business agreements as they wish without outside interference to the terms of their mutual contracts. By the end of 2009 no judicial complaint concerning the case had been started.

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

There are clear trends and patterns in cases brought up by Roma (there are no Travellers in Finland). Though we do not have precise statistics, it is clear that the Roma are vastly "overrepresented" among the complainants when it comes to discrimination in access to and provision of goods and services, including housing. To begin with, and for the sake of comparison, it is useful to take note of the fact that there are some 10.000 Roma in Finland (a rough but frequently cited estimate) and some 130.000 *foreign citizens* (the number of persons with immigrant origin is naturally much higher, at least double than that, but is not known exactly).

In the absence of ethnic monitoring we do not have precise statistics on this, but the results of a comprehensive impact assessment study of domestic non-discrimination case law submits that *in most* cases of ethnic discrimination in provision of goods and services the victim was a Roma.¹³

The most common type of discrimination in that area was denial of access to a restaurant, and the majority of the complainants in those cases were of Roma origin.¹⁴ Of the 17 such court cases that are described in the report with some detail, 14 concerned Roma, and though the sample may not be representative, it gives a general idea of the situation. The report draws a similar conclusion also with respect to other cases that involved discrimination in the provision of goods and services.

A shop owner who provided a response in a 2009 case actually admitted that the Roma really were under special surveillance. The reason for this was the earlier difficulties caused by individual Roma. In this case, the shop owner agreed to change the discriminatory behaviour and the parties reached a settlement following mediation by the Ombudsman for Minorities.¹⁵

The National Discrimination tribunal has given decisions prohibiting discrimination of Roma in five cases between 2004-2009. The cases indicate that Roma face discrimination in access to housing and services.¹⁶

Police statistics and studies confirm these findings. According to a study that analysed racist crimes reported to the police, victims of racist discrimination were *predominantly* found to be Roma.¹⁷

That Roma are discriminated against particularly in the field of provision of housing¹⁸ goods and services is clear also in view of the case law of the Ombudsman for Minorities and the national Discrimination Tribunal.

According to the Ombudsman, discrimination associated with housing has proved to be a problem that specifically concerns the Roma.¹⁹

¹³ Birgitta Lundström et al, *Yhdenvertaisuuslain toimivuus* (2008, Työ- ja elinkeinoministeriön julkaisu 11/2008), p. 128.

¹⁴ Ibid, p. 81.

¹⁵ Annual report of the ombudsman for minorities 2009, at [http://www.vahemmistovaltuutettu.fi/intermin/vvt/home.nsf/files/VV_Vuosikertomus_englanti/\\$file/VV_Vuosikertomus_englanti.pdf](http://www.vahemmistovaltuutettu.fi/intermin/vvt/home.nsf/files/VV_Vuosikertomus_englanti/$file/VV_Vuosikertomus_englanti.pdf) (retrieved 5.5.2010).

¹⁶ Issues relating to employment do not fall within the competence of the Tribunal. The decisions of the Tribunal can be found from its internet page <http://www.syrjintalautakunta.fi>.

¹⁷ Tanja Noponen, *Poliisin tietoon tullut rasistinen rikollisuus Suomessa 2006* (Helsinki: Edita 2007), p. 40.

¹⁸ See also RAXEN thematic study on Housing Conditions of Roma and Travellers (Finland), March 2009.

¹⁹ Ombudsman for Minorities, *Annual Report 2008*, p. 8, 12, [http://www.vahemmistovaltuutettu.fi/intermin/vvt/home.nsf/files/Ombudsman_For_Minorities_06/\\$file/Ombudsman_For_Minorities_08.pdf](http://www.vahemmistovaltuutettu.fi/intermin/vvt/home.nsf/files/Ombudsman_For_Minorities_06/$file/Ombudsman_For_Minorities_08.pdf) (retrieved 20.4.2009).

Based on the cases handled by the Ombudsman for Minorities, the procedure relating to permission to live in a certain area given by the local Roma community and avoidance behaviour observed by the Roma are customs that limit the rights of individuals in a way that cannot be considered acceptable. Cases related to permission to live in an area occurred in several municipalities. The procedures are very different in nature. Many housing agencies communicate orally, but in some cases Roma who contacted the Ombudsman's

Office were able to provide written proof of the housing provider's actions. In one case, a municipality informed a Roma family applying for housing of a negative written opinion given by Roma who had lived in the area for a longer period. In its cover letter, the municipality encouraged the family to take the opinion into consideration when applying for new accommodation. The housing agency also told the family that housing could not be offered due to the resistance of other Roma. In a second case, a housing rental company sent applicants a letter explaining that a representative of the local Roma community would like to talk to any Roma who were applying to move to the community. In its letter, the company also requested that this discussion be held before accommodation could be offered. The Ombudsman for Minorities investigated these cases with the municipality and housing agencies. The applicants received accommodation in both cases.²⁰

There is no evidence of similar "overrepresentation" of Roma as complainants in employment discrimination cases, but since the employment issues do not fall within the powers of either Ombudsman for Minorities or National Discrimination Tribunal, it is likely that there are a lot of cases which do not proceed to be considered by supervisory authorities. We also do not know whether the "overrepresentation" of Roma in the above-mentioned cases is due to higher risk of discrimination, higher propensity to take legal action resulting possibly from their awareness of their rights, or both. There are, for instance, no NGOs that would provide legal assistance specifically for the Roma. It has been found out that the major problems of Roma in employment are low level of education, insufficient amount of employment possibilities where they could work without having to give up their specific cultural habits, and prejudices the employers have against Roma.²¹

However, occasionally some cases arise, which are illustrative of the discrimination of Roma in employment. In 2009, a settlement was achieved in a matter where a senior officer appointed by the Ombudsman for Minorities assisted a person of Roma origin in a discrimination case that occurred during work placement. The person had taken part in labour market training, which included a work placement period. The two-week work placement was terminated after a successful first day. The reason given was feedback from customers indicating that they could not accept the trainee delivering the goods due to the person's Roma background.

²⁰ Annual report of the ombudsman for minorities 2009, at [http://www.vahemmistovaltuutettu.fi/intermin/vvt/home.nsf/files/VV_Vuosikertomus_englanti/\\$file/VV_Vuosikertomus_englanti.pdf](http://www.vahemmistovaltuutettu.fi/intermin/vvt/home.nsf/files/VV_Vuosikertomus_englanti/$file/VV_Vuosikertomus_englanti.pdf) (retrieved 5.5.2010).

²¹ "Romanien pitkä matka työmarkkinoille", Työ ja elinkeinoministeriön julkaisuja 22/2008.



The company that offered the work placement claimed that it had only agreed to a two-day work orientation period rather than a two-week placement. The company reported that it had contacted the trainee at the end of the workday and passed on the feedback, according to which the trainee had not gained the trust of the customers. The company refused to settle the matter, and consequently the senior officer appointed by the Ombudsman for Minorities assisted the trainee in taking the case to court.

The trainee applied to the District Court to find the company guilty of direct discrimination on grounds of ethnic origin in violation of section 6 of the Non-Discrimination Act (21/2004) and to pay compensation to the trainee under section 9 of the Non-Discrimination Act (21/2004). The matter was settled in a District Court hearing so that the company agreed to pay EUR 2,000 to the trainee. The settlement was confirmed by the court.²²

Also in 2009, the Ombudsman for Minorities issued an opinion relating to a case in which a person of Roma origin was not selected for a permanent position. The Ombudsman for Minorities considered that the person, who was working in a temporary public-service position, had been able to prove that they had more post-graduation experience than some of the people selected for the positions. The person involved also had more special expertise in areas such as the Roma language, which would have been beneficial in the post. The Ombudsman for Minorities considered that the person in question was treated less favourably than others in the same situation and, based on the person's statement, there was reason to assume that presumption of discrimination as referred to in the Non-Discrimination Act had occurred. The Ombudsman also drew the employer's attention to the drafting of an equality plan as required by the Non Discrimination Act. Each authority must draw up an equality plan, which must be as extensive as required by the nature of the work of the authority, and a plan must also be drawn up of the authority's role as an employer.²³

²² Annual report of the ombudsman for minorities 2009, at [http://www.vahemmistovaltuutettu.fi/intermin/vvt/home.nsf/files/VV_Vuosikertomus_englanti/\\$file/VV_Vuosikertomus_englanti.pdf](http://www.vahemmistovaltuutettu.fi/intermin/vvt/home.nsf/files/VV_Vuosikertomus_englanti/$file/VV_Vuosikertomus_englanti.pdf) (retrieved 5.5.2010).

²³ *Idem*.

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?*

Provisions guaranteeing equality and non-discrimination have been given a pride of place in the Constitution, as they are placed first among fundamental rights, starting at section 6. Section 6(1) of the Constitution [*perustuslaki* (731/1999)] reads as follows:²⁴

Everyone is equal before the law.

Corollary to the section 6(1) are sections 6(2) and 6(3):

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

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

Section 6(1) extends its protection to “everyone”, that is, everyone subject to the Finnish legal system, not just citizens. Section 6(2) explicitly prohibits discrimination on the grounds of sex, age, origin, language, religion, conviction, opinion, health and disability. The list of grounds is not exhaustive, and covers also other statuses of broadly similar nature. The *travaux préparatoires* mention as other applicable grounds e.g. sexual orientation, social standing, family relations, and domicile.²⁵ The reference to “origin” is customarily taken to refer to national, ethnic and social origin. Ethnic origin is interpreted to cover “race” and colour.²⁶

²⁴ NB: all the translations of legislation in this report are unofficial. A considerable amount of Finnish legislation has been translated into English by the Ministry of Justice or the Ministry of Labour (and are available at www.finlex.fi), but it is submitted that those translations are at times too imprecise or even a bit incorrect for the purposes of accurate legal interpretation, which is why the author has at some points chosen to modify the translations, or to provide an alternative translation, when clearly mandated by the need to improve precision. The laws adopted by the Provincial Legislative Assembly of Åland are available at: <http://www.ls.aland.fi/lag.pbs> (no English translations available at 1.1.2006).

²⁵ HE 309/1993 [Government proposal 309/1993].

²⁶ It may be pointed out in this context that the Finnish legislation (both the generally applicable legislation and the legislation adopted in the Åland Islands) attempts to avoid references to “race”, as that notion is held to be unscientific; however, the Penal Code does refer to “race”, probably because its provisions on discrimination were adopted with a view to implementing nationally the requirements of the UN CERD Convention, for which the concept of “race” is a central one.

The reference “before the law” in section 6(1) is usually taken to refer to the application of law, meaning that the provision is seen to act as a principle limiting the discretionary power of the person or authority applying the law. In this sense the paragraph is strongly related to conceptions of justice and the right to fair trial.

The provision acts as a guarantee against arbitrary decision-making, and demands that like cases should be treated alike.²⁷ Lately it has become a widely accepted interpretation that the provision creates obligations also towards the legislator to ensure that the legislation that is passed is in accordance with the principle of equality. At the end of the day, the main thrust of section 6(1) is to ensure equal treatment in the exercise of public powers, in particular as regards administration, law-making and judiciary.

The prohibition of discrimination in section 6(2) is rather general in scope: it prohibits both direct and indirect discrimination and its field of application has not been limited in any way. The provision does not use the concept of “discrimination” as such but speaks instead of “differential treatment without an acceptable reason”. A reason is acceptable if it serves an objectively justifiable end that is in accordance with the objectives of the fundamental rights system, and if the means used are proportionate to the ends.

The non-discrimination clause of section 6(2) in combination with the obligation of authorities to promote human rights and fundamental freedoms, as laid down in section 22 of the Constitution, have been taken to mean that the legislator has an obligation to make sure that the legislation does not contain provisions that without an acceptable reason treat people differently on a prohibited ground.²⁸

b) Are constitutional anti-discrimination provisions directly applicable?

Section 6 is widely held to be the best example of a constitutional right that is directly applicable. Section 6 has been invoked in courts.²⁹ It has been applied directly by the National Discrimination Tribunal when it interpreted Non-Discrimination Act and considered that segregation constituted a form of discrimination prohibited under the Act.³⁰

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

²⁷ Martin Scheinin, “Yhdenvertaisuus ja syrjinnän kieltä” [Equality and the Prohibition of Discrimination], in Hallberg et al, *Perusoikeudet* [Basic Rights], WSOY 1999, p. 233.

²⁸ HE 200/2000 vp. (Government proposal 200/2000).

²⁹ See e.g. Pekka Hallberg in Hallberg et al, *Perusoikeudet* [Basic Rights], WSOY 1999, pp. 704, 717, 719; Kortteinen – Makkonen, *Oikeutta rasismien ja syrjinnän uhreille – Etnisen syrjinnän vastainen käsikirja* [Justice to the Victims of Racism and Discrimination – a Manual Against Ethnic Discrimination]. Ihmisoikeusliitto 2000.

³⁰ See case law in part 03. of this report.



Although the primary thrust of section 6 is to ensure equal treatment in the use of public powers, section 6 may in some situations have a bearing on relationships between private parties as well. Mostly this effect takes place through statutory law which implements the constitutional principle of equal treatment, although in some situations section 6 may be more “directly applicable”, e.g. as a grounds for claiming damages or as a grounds for determining that a specific clause of an agreement is to be considered “unjust”.³¹

Constitutional rights prevail over provisions of statutory law where these two are in manifest conflict, although the primary means of resolving such conflicts is through “fundamental rights friendly” interpretation of statutory law.³²

³¹ Martin Scheinin, “Yhdenvertaisuus ja syrjinnän kieltö” [Equality and the Prohibition of Discrimination], in Hallberg et al, *Perusoikeudet* [Basic Rights], WSOY 1999, p. 260; Timo Makkonen, *Syrjinnän vastainen käsikirja*. IOM Helsinki 2003, p. 101.

³² Section 106 of the Constitution.

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.

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

All three main anti-discrimination provisions feature an open-ended list of prohibited grounds of discrimination. As was mentioned before, the Constitution explicitly covers sex, age, origin, language, religion, conviction, opinion, health and disability as prohibited grounds of discrimination.

The Non-discrimination Act covers explicitly the grounds of age, ethnic or national origin, nationality, language, religion, belief, opinion, health, disability and sexual orientation. The Penal Code explicitly covers grounds of race, national or ethnic origin, colour, language, sex, age, family ties, sexual preference, state of health, religion, belief, political orientation and political or industrial activity.

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

2.1.1 Definition of the grounds of unlawful discrimination within the Directives

- a) *How does national law on discrimination define the following terms: racial or ethnic origin, religion or belief, disability, age, sexual orientation?
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 national anti-discrimination law does not define “racial or ethnic origin”, “religion”, “belief”, “disability”, “age” or “sexual orientation”, nor are any definitions provided in the pertinent preparatory works.

This probably has a lot to do with the way in which discrimination is conceived in the Finnish legal system. All main non-discrimination provisions are open-ended with regard to the list of grounds, that is, they prohibit discrimination not just e.g. on the basis of ethnic origin, but also on “other reasons related to a person” as well. Therefore establishing the exact “scope” of e.g. “ethnic origin” is not so important, and it is probable that different grounds of discrimination enjoy wide protection in this regard. For instance, in the case from Vaasa Administrative Court (mentioned under heading 0.3 above), registration of same-sex relationship was taken to constitute a ground of its own, i.e. not (necessarily) a matter falling within the ambit of sexual orientation. In addition it might be mentioned that as neither direct nor indirect discrimination requires establishment of discriminatory intent, it is not material whether the perpetrator was aware of the existence of a particular discrimination ground or how he/she conceived it. However, in criminal proceedings normal procedural rules on intent are followed as a main rule, as was the case in judgment of the Tampere District Court (6.11.2008) described in section 3. above. Exceptionally, in criminal proceedings concerning incitement against a population group it is sufficient that the expressions as such are harmful regardless of the intent of the perpetrator.

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

Therefore there is nothing in the national law that would preclude the national courts from applying interpretations developed by the ECJ, quite vice versa, which is a positive finding given that the ECJ emphasised in *Chacón Navas* that the concepts used in the Directives are to be given an “autonomous and uniform interpretation”, i.e. that it is for the ECJ to determine the scope of these concepts.³³

Åland Islands. The ÅI law uses the following terminology:³⁴

³³ Paras 40 and 42.

³⁴ The terminology used in the legislation adopted in the ÅI differs to a great extent from the terminology used in the legislation adopted by the Finnish state, partly because the latter legislation was drafted in Finnish and the former in Swedish, and partly because these laws are embedded in different legal regimes (though it must be remembered that much of the legislation adopted by the Finnish state is applicable also in the ÅI). Both Finnish and Swedish are official languages in Finland. Although Swedish-speakers amount only to some 6 % of the population, they constitute a majority in the Åland Islands.

- Ethnic belonging ("etnisk tillhörighet"). This term is not defined in the law itself. According to the pertinent *travaux* this concept covers the notions of "race" and "ethnic origin".³⁵ The *travaux* further explains that the concept of "race" is not used in the law text itself because it is an "unscientific" notion and gives rise to "inappropriate associations".³⁶ It also notes that ethnic origin is usually understood in terms of history, culture, customs and nationality.³⁷
- Disability ("funktionshinder"). This term is not defined in the law itself. According to the *travaux* the concept of "funktionshinder" refers to stable (longstanding) physical, psychological or intellectual limitations of one's functional capacities.³⁸
This "definition", which is by no means binding, is rather well in line with the definition given by the ECJ in *Chacón Navas*, although it must be noted that the ECJ referred to the impairment having a limiting effect with regard to 'professional life' – a limitation not referred to in the Ål *travaux*.
- Sexual disposition ("sexuell läggning"). This term is not defined in the law itself. It appears to be the case that this notion is to be understood in a wider sense than the concept of sexual orientation. The *travaux* points out that there are three different sexual dispositions: heterosexual, homosexual and bisexual.³⁹
- Religion and other conviction ("religion eller annan övertygelse"). These terms are not defined in the law or its *travaux*. It is notable that the law speaks of "religion or other conviction", a formulation which may be narrower or broader than the concept of "belief" (this is difficult to determine in the absence of an authoritative interpretation from the ECJ regarding what is meant by "belief" in the first place).
- Age ("ålder"). This concept is not defined in the law or its *travaux*.

As is the case with the mainland courts, also the courts in the Åland Islands are obliged to follow the rulings of the ECJ when applying anti-discrimination law. Therefore the definitions provided by the ECJ take precedence over e.g. guidelines provided in preparatory works.

- 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?*

Religion.

The national law does not define religion as such.

³⁵ Ålands landskapsregering, framställning nr 10/2004-2005.

³⁶ Section 2.1.

³⁷ Idem.

³⁸ Section 2.2.

³⁹ Idem.



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

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

Belief.

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

Ethnic origin.

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

Sexual orientation.

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

Disability.

The Act on Services and Assistance for the Disabled [*laki vammaisuuden perusteella järjestettävistä palveluista ja tukitoimista* (380/1987)], section 2, defines a disabled person as a person who because of an impairment or illness has longstanding difficulties to manage ordinary activities of life.

Functional capacity cannot be assessed only medically. The Act on Public Employment Services [*laki julkisesta työvoimapalvelusta* (1295/2002)] for its part defines “a handicapped” as a person whose opportunities in the working life have considerably lessened due to an appropriately established impairment or illness.⁴⁰ Both of these definitions are specific and have no bearing on anti-discrimination law as such, though a person who meets either one of the above-mentioned criteria is undoubtedly to be considered a person with a disability also with respect to anti-discrimination law.

The national law does not expressly refer to the principle of merit that underlies recital 17 of the Directive 2000/78/EC (“competence, capability and availability to perform the essential functions of the post concerned”), but it would certainly not be taken to constitute discrimination if a person was not hired because he/she did not meet the said criteria.

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

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

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

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

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

⁴⁰ Section 7(1) of the Act.

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

- d) *Please describe any legal rules (or plans for the adoption of rules) or case-law (and its outcome) in the field of anti-discrimination which deal with situations of multiple discrimination. This includes the way equality body (or bodies) are tackling cross-grounds or multiple grounds discrimination. Would national or European legislation dealing with multiple discrimination be necessary in order to facilitate the adjudication of such cases?*

The law does not as such address multiple discrimination. Nor does there appear to be any case law where issues related to multiple discrimination (such as controversy over which ground of discrimination the case is (primarily) concerned with) would have emerged.

This is probably because complainants have already before taking legal action framed the complaint in a single-ground-oriented way, possibly after seeking legal advice. In practice the Ombudsman for Minorities has however sometimes directed particular advice-seekers to the Ombudsman for Equality (who deals with gender equality), and vice versa.

The ground of discrimination that a particular case involves is of legal relevance, because the material scope and the available remedies are to a significant extent different for the different grounds (e.g. religion in comparison to ethnic origin).

The Ombudsman for Minorities has indicated in its recent annual report for 2008 that approximately 4 % out of all customer contacts involved situations where there was also an other ground for discrimination in addition to ethnicity and could therefore be classified as cases of multiple discrimination.⁴¹

It seems that without further legislative acts on the European level multiple discrimination remains mostly unaddressed by the courts and other supervisory bodies.

- e) *How have multiple discrimination cases involving one of Art. 13 grounds and gender been adjudicated by the courts (regarding the burden of proof and the award of potential higher damages)? Have these cases been treated under one single ground or as multiple discrimination cases?*

At the moment it seems that the court practice does not identify multiple discrimination. The cases are adjudicated and treated under single ground.

⁴¹ The report is available in english at [http://www.vahemmistovaltuutettu.fi/intermin/vvt/home.nsf/files/VV2008_englanti/\\$file/VV2008_englanti.pdf](http://www.vahemmistovaltuutettu.fi/intermin/vvt/home.nsf/files/VV2008_englanti/$file/VV2008_englanti.pdf)

This is mainly due to the non-recognition of multiple discrimination in the present legislation.

2.1.2 Assumed and associated discrimination

- a) *Does national law (including case law) prohibit discrimination based on perception or assumption of what a person is? (e.g. where a person is discriminated against because another person assumes that he/she is a Muslim or has a certain sexual orientation, even though that turns out to be an incorrect perception or assumption).*

This matter is not expressly dealt with in the law or its *travaux*. Section 6(1) of the Non-Discrimination Act [yhdenvertaisuuslaki 21/2004] provides that “no-one shall be discriminated against on the basis of age, ethnic or national origin, nationality, language, religion, belief, opinion, health, disability, sexual orientation or *any other reason related to a person*”.⁴² Under a literal reading it appears clear that it does not just prohibit discrimination on the basis of a person’s actual age, disability or so on (as it would if it would read “no-one may be discriminated against on the basis of *his or her* age etc”). Quite conversely, it categorically prohibits discriminating against *anyone* on the basis of the grounds mentioned. Moreover, the list of prohibited grounds of discrimination is open-ended, which means that courts and other competent authorities may alternatively regard discrimination on the basis of association as a category of its own. Therefore it is at least in theory possible to deal with discrimination based on assumed characteristics under the Non-Discrimination Act and other domestic anti-discrimination laws. Whether this happens in practice is however a different matter, and we are not aware of any case law in this regard.

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

- b) *Does national law (including case law) prohibit discrimination based on association with persons with particular characteristics (e.g. association with persons of a particular ethnic group or the primary carer of a disabled person)? If so, how? Is national law in line with the judgment in Case C-303/06 Coleman v Attridge Law and Steve Law?*

The law or its *travaux* are not clear, but it can be argued that such discrimination is indeed prohibited.

One might argue, firstly, that such discrimination breaches the maxim that “no-one may be discriminated against on the *basis* of e.g. ethnic origin”, or secondly, that such discrimination falls into the “any other reason related to a person” –category. Either way, discrimination based on association with persons with particular characteristics is covered.

⁴² Emphasis added.



Åland Islands. The *travaux* to the Åland Islands equality law expressly points out that the ban on discrimination is engaged also where a person is treated adversely because someone else, e.g. wife or daughter has a particular ethnic origin, religion etc.⁴³

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

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

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

Discrimination means:

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

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

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

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

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

- b) *Are discriminatory statements or discriminatory job vacancies announcements capable of constituting direct discrimination in national law? (as in Case C-54/07 Firma Feryn)*

⁴³ Ålands landskapsregering, framställning nr 10/2004-2005, Section 2§1.

Depending on the context and gravity of such statements they can constitute libel, incitement against a population group or harassment, and since discrimination is prohibited in employment recruitment, the prohibition covers also discriminatory vacancies announcements, which are a form of direct discrimination.

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

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

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

While the definition of discrimination, including on the grounds of age, is based on the "less favourable treatment" formulation, the law, or its preparatory works, do not specify how a comparison is to be made. A reference to "a comparable situation" in the definition does not necessarily have to refer to an actual situation. A standard for comparison can also arise out of the way in which people are usually treated, or how another person has in the past been treated in a comparable situation.⁴⁴ The same applies with respect to the law adopted in the Åland Islands.

2.2.1 Situation Testing

- a) *Does national law permit the use of 'situational testing'? If so, how is this defined and what are the procedural conditions for admissibility of such evidence in court?. For what discrimination grounds is situation testing permitted? If not all grounds are included, what are the reasons given for this limitation?*

Finnish laws, including the equality laws and the procedural laws, do not refer to situation testing. Therefore the permissibility of testing is in practice determined by the general provisions of law. The Penal Code, for instance through the concept of fraud, does not appear to preclude the use of situation testing.

In addition, several criminal proceedings (e.g. on discrimination) have been initiated on the basis of situation tests, which implies the permissibility of the method.

⁴⁴ HE 44/2003 [Government proposal (44/2003)], p.42.

There are however no known instances where situation testing would have been conducted *ex post facto* (after the alleged discrimination took place) to gather evidence to support a claim of discrimination: the method itself and the weight of evidence thereby occasioned have not been up for legal evaluation yet. There may be some limits to the use of situation testing: it is not inconceivable that situation testing could justifiably give rise to a claim of compensation of damages in some circumstances (if taken to the extremes). There are no reasons to assume that the permissibility of situation testing would depend on the ground concerned.

- 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 has been, up until now, almost no discussion at the national level of the use of situational testing, let alone as a method of producing evidence in court. Evolution in other countries has not yet influenced Finnish law.

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

There is none. The decisions on cases that have been brought on the basis of testing have not outlined any generally applicable interpretations e.g. with respect to the criteria which have to be fulfilled for testing to be admissible as evidence, as these cases have been handled as 'ordinary' discrimination cases, and the fact that they were tried as an outcome of testing apparently played no material part in the proceedings.

This state of affairs relates probably to the fact that situation testing has not been used as a method for gathering evidence to *support* a claim of discrimination (i.e. as *ex-post-facto* evidence), but as *grounds* for bringing a case to the court.

- d) *Outline how situation-testing is used in practice and by whom (e.g. NGOs, equality body, etc)*

A Finnish NGO (the Finnish League for Human Rights) conducted situation testing in fall 2002 to investigate whether restaurants deny entry for persons belonging to minorities (testers were of foreign origin or Roma and were accompanied by people of the majority ethnic group). On the basis of this investigation eleven crime reports on discrimination were filed with the police. In six of these cases discrimination was found and the accused were sentenced to fines. In four cases the public prosecutor decided not to bring charges and one case failed because it was not brought to the court within the time limit prescribed by the law. Also private individuals have occasionally conducted testing experiments. For instance a group of Roma conducted situation-testing in the city of Pori in July 2006 in order to investigate whether they were allowed entry into local restaurants. Each one of the tested 16 restaurants denied entry for the members of the test group while allowing entry for the members of the majority population.

Criminal charges were in the end brought against 13 persons but only 3 of them were convicted, because other defendants were able to establish that one or more of the Roma testers had in fact been denied entry for legitimate reasons i.e. because of their prior inappropriate conduct at the restaurants concerned.

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

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

Section 6(2) of the Non-Discrimination Act (*yhdenvertaisuuslaki* 21/2004) defines indirect discrimination (in principle all discrimination grounds are covered as well here) as follows:

Discrimination means: (...)

- 2) that an apparently neutral provision, criterion or practice puts a person at a particularly disadvantageous position compared with other persons,⁴⁵ unless said provision, criterion or practice has an acceptable aim and the means used are appropriate and necessary for achieving this aim (*indirect discrimination*);

While the Constitution [*perustuslaki* (731/1999)] does not explicitly refer to the differentiation between direct and indirect discrimination, section 6(1) of the Constitution is to be interpreted to cover both.⁴⁶ No established case law or doctrine exists as to how *exactly* the Constitutional prohibition of indirect discrimination is to be construed, but the base line is to evaluate the factual consequences of an action.

The relevant sections in the Penal Code [*rikoslaki* (39/1889)] do not distinguish between direct and indirect discrimination, and it is highly unlikely, given the requirements of the legality principle, that they would be interpreted to cover indirect discrimination.

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

⁴⁵ This English translation, done by the Ministry of Labour of Finland, is somewhat imprecise. A more precise translation would read "that an apparently neutral provision, criterion or practice puts a person in a particularly disadvantageous position vis-à-vis comparators [or even more literally 'against those who are the subjects of comparison']..." The most plausible (and likely) interpretation of this text is that the 'comparators' referred to in this definition are the same that are referred to in the (preceding) definition of direct discrimination, and include past and hypothetical comparators, although the text could perhaps have been a bit more explicit about this. A complicating factor is that the Constitution and the Penal Code (that were adopted long before the Directives) define discrimination as 'putting [someone] at a disadvantage'. i.e. the legal tradition is not familiar with the concept of hypothetical comparator in particular. However, the existing legal tradition on anti-discrimination law is, because of scarcity of case law, weak to the extent that this should not become a problem, especially given that the definition in the Non-Discrimination Act is autonomous and quite elaborate.

⁴⁶ HE 309/1993 [Government proposal (309/1993)].

Indirect discrimination is taken to have occurred when a facially neutral provision or a facially neutral criterion or practice particularly disadvantages particular persons, unless the provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary

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

To be justified, a provision, criterion or practice that would otherwise be taken to constitute indirect discrimination, must have an acceptable aim and the means used shall be appropriate and necessary for achieving this aim. The law, the *travaux préparatoires*, or case law do not elaborate this test, or how it can be satisfied, any further.

The *travaux* to the Non-Discrimination Act point out, as an example, that the observance of a binding legal norm can be taken as an “acceptable aim”, in addition to which it is required that the norm could not have been followed in such a way that would have been compatible with the non-discrimination law.⁴⁷ The same principles apply with respect to the law adopted in the Åland Islands.

- c) *Is this compatible with the Directives?*

Yes, the wording of the definition of indirect discrimination follows closely that of the two Directives, except for one thing: the Non-Discrimination Act speaks of putting a person at a “particularly disadvantageous position” (as do the Finnish-language versions of the Directives), while the English-language versions of the Directives speak of putting a person at a “particular disadvantage”. It may be argued that the Non-Discrimination Act thus requires that the disadvantageous effects of a provision, criterion or practice should be rather serious or substantial to qualify as indirect discrimination, while the Directives do not require this. In effect, a certain provision, criterion or practice could be deemed to constitute indirect discrimination under the Directives, but not under the Non-Discrimination Act. This is however a matter of interpretation, of both the meaning of the Directives and the Non-Discrimination Act,⁴⁸ and it must be noted that there is not, at this time, any case law that would have interpreted these points of law. In any case it must be emphasised that the Non-Discrimination Act follows and is in compliance with the Finnish language version of the two Directives.

⁴⁷ HE 44/2003 [Government proposal (44/2003)], at p. 42.

⁴⁸ Ahtela et al note the problematic wording and submit that the phrase “particularly disadvantageous position” should not be given a meaning under which effects in question would need to be rather serious or substantial, thus implying that the phrase should not be interpreted literally. Ahtela et al, *Tasa-arvo ja yhdenvertaisuus* (Helsinki: Talentum 2006).

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

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

No. However, according to the *travaux*, a comparator does not necessarily need to be “real”: sometimes the effects of a provision, criterion or practice can be judged against the very broad standard of “how people are usually treated”.⁴⁹ The same applies also with respect to the law adopted in the Ål.

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

In the case decided by the Discrimination Tribunal on 31.1.2006, division of elementary school pupils into separate classes on the grounds of their mother tongue (Finnish/some other language) was considered to constitute indirect ethnic discrimination on the grounds that it led to de facto segregation prohibited by the Non-Discrimination Act. The Helsinki Administrative Court upheld this view in its decision of 15.6.2007.

See also the two cases in section 03. concerning Sámi, where the Tribunal was not completely clear in detail at all points whether the issue was direct or indirect discrimination. However, the statutory definition of Sámi clearly interlinks their language and ethnicity.

It must also be noted that in the Finnish anti-discrimination law ‘language’ constitutes a prohibited ground of discrimination of its own, and is expressly mentioned in the list of grounds.

2.3.1 Statistical Evidence

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

The procedural laws do not specifically address this issue. Normally courts are at liberty to freely regard admissible any type of evidence, including statistics. This principle is embodied in chapter 17, section 2 of Code of Judicial Procedure [*oikeudenkäymiskaari (4/1734)*], paragraph 1 of which provides that “[a]fter having carefully evaluated all the facts that have been presented, the court shall decide what is to be regarded as the truth in the case”. Indeed, statistical evidence has been presented in the courts, deemed admissible and used in *ratio decidendi*.⁵⁰ As procedural laws belong to the legislative competence of the Finnish state, the same rules apply with respect to the Åland Islands.

⁴⁹ Ibid, at p. 42.

⁵⁰ See e.g. KHO 2001:38, KHO 2006:93 and KKO 2004:59.

- b) *Is the use of such evidence widespread? 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?*

There have been only a few cases that have involved the use of statistical analysis, and even in these cases the analyses have been rather straightforward and simple. These cases have dealt with age discrimination.

The use of statistical evidence may be more widespread in the area of gender discrimination, although no data is available for the purposes of making comparisons. It does not appear to be the case that there would be any reluctance towards using statistical evidence in courts; if data is available it will likely be deemed admissible as evidence. The issue of statistical evidence is not subject to discussion at the national level, and it cannot be foreseen at this time that evolution in other countries would change this situation because this evolution has not itself been a subject to national discussion either.

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

Cases KHO 2001:38 and KHO 2006:93, both of which dealt with age discrimination, involved simple statistical analyses of the treatment received by people of different ages (analysis of treatment of people in different age groups, calculation and comparison of median ages of individuals subject to different kinds of treatment).

- d) *Are there national rules which permit data collection? Please answer in respect to 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?*

The equality laws do not address this issue, and the matter falls to be dealt with under the national data protection laws. Finland has transposed the EU Data Protection Directive into its national legislation and therefore its law on data protection is very similar in content with the said Directive. Collection of "sensitive data" (including data on ethnic origin, religion or belief, disability and sexual orientation; age is not considered to constitute "sensitive data") is not allowed except in situations prescribed by the law. Most importantly, the national data protection law permits collection of sensitive data provided that the data subject has given his or her express consent thereto [sections 11 and 12 of Personal Data Act (*henkilötietolaki* 523/1999)]. Processing of sensitive data is also allowed where necessary for the purposes of legal proceedings and for statistical and scientific purposes. The Finnish data protection authorities (*tietosuojavaltuutettu, tietosuoja-autakunta*) have not yet issued an opinion on whether employers and service providers are allowed to engage in non-anonymous monitoring to ensure that they are in compliance with the equality laws.



The Act on the Protection of Privacy in Employment [*laki yksityisyyden suojasta työelämässä* (759/2004)] specifies some requirements that have to be met for any data collection to be lawful in the context of employment. The Act does not expressly tackle ethnic etc monitoring however. In Finland censuses are no longer carried out by means of surveys, as the data can be compiled on the basis of administrative registers. An infringement of the data protection law may give rise to civil and/or criminal liability.

Statistical data (particularly on the socio-economic status of people with disabilities and foreigners⁵¹) is frequently compiled and used for the purposes of designing general policies, and have given rise to positive action programmes and policies. This data is compiled on the basis of administrative registers and general and targeted surveys. Systematic workplace monitoring is not used in Finland.

2.4 Harassment (Article 2(3))

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

Section 6 of the Non-Discrimination Act [*yhdenvertaisuuslaki* (21/2004)] prohibits discrimination and defines harassment as a form of discrimination in section 6(2), paragraph 3.

According to the latter provision, harassment takes place “when the dignity or integrity of a person or a population group is violated intentionally or in fact, in a manner which creates an intimidating, hostile, degrading, humiliating or offensive environment.”⁵²

This definition is wider than that of the two Directives in two respects: first, the violation of (physical) integrity is explicitly covered in addition to the violation of dignity; second, the provision covers not just individuals but groups as well.

This means that e.g. the display of intimidating or offensive symbols, such as swastikas, in a publicly accessible office may constitute harassment.⁵³ Also materials in Internet pages may constitute harassment and thus discrimination.⁵⁴ Harassment does thus not have to be directed against any particular person.

⁵¹ Statistics with regard to foreigners (i.e. people who are citizens of some other country than Finland) are compiled in the absence of ethnic data, though this means that naturalized immigrant-origin persons as well as members of traditional minorities are not included in the data.

⁵² Unofficial translation by the author. The pertinent government proposal (HE 44/2003) instructs those applying the law that the prohibition of harassment applies only “to relatively serious conduct”, which is a bit worrying statement.

⁵³ HE 44/2003 [Government proposal (44/2003)], p. 43.

⁵⁴ *Idem*.

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

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

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

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

In the Non-Discrimination Act, yes.

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

No.

2.5 Instructions to discriminate (Article 2(4))

*Does national law (including case-law) prohibit instructions to discriminate?
If yes, does it contain any specific provisions regarding the liability of legal persons for such actions?*

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

It is a well-established line of interpretation with regard to the discrimination-related provisions in the Penal Code [*rikoslaki* (391/1889)] that instructions to discriminate constitute discrimination as such, even though the law does not expressly say this.

According to the explanatory report to the Non-Discrimination Act, legal persons are liable for the conduct of their employees in accordance with the general statutory provisions concerning the sharing of responsibility. Thus, depending on the conduct or inactivity of the legal persons in relation to the discriminatory conduct of those who are acting on behalf of the legal person, legal person may be held liable in part or fully for the conduct of those acting on its behalf.

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

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

- a) *How does national law implement the duty to provide reasonable accommodation for people with disabilities? 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? Please also specify if the definition of a disability for the purposes of claiming a reasonable accommodation is the same as for claiming protection from non-discrimination in general, i.e. is the personal scope of the national law different (more limited) in the context of reasonable accommodation than it is with regard to other elements of disability non-discrimination law.*

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

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

In order to foster equality in the contexts referred to in section 2(1), a person commissioning work or arranging training shall where necessary take any reasonable steps to help a person with disabilities to gain access to work or training, to cope at work and to advance in their [should be: his or her] career.

In assessing what constitutes reasonable, particular attention shall be devoted to the costs of the steps, the financial position of the person commissioning work or arranging training, and the possibility of support from public funds or elsewhere towards the costs involved."

The concept used is "kohtuulliset toimet", which literally translates as "reasonable measures" (or as "reasonable steps", as in the above translation provided by the Ministry of Labour), not reasonable accommodation.

Such measures are to be taken “when necessary”, which according to the preparatory works⁵⁵ means that the need for reasonable accommodation is to be determined on a case-by-case basis.⁵⁶ In the workplace, appropriate accommodation measures may relate e.g. to work conditions, organization of work, working hours, methods of work, work aids, training and work guidance. The law or the *travaux* do not provide more specific framework within which it is to be established when the duty applies.

The Act does not expressly refer to the notion of “disproportionate burden”, but operates through the general notion of reasonableness.⁵⁷ In determining what is or is not reasonable, one must take into account especially the costs arising thereof, the financial situation of the employer or education provider, and the availability of public funding or other resources for such purposes. According to the pertinent Government proposal⁵⁸ one may also take into consideration the size of the entity providing employment or education.

This might be taken as an indication that less may be expected especially from small enterprises. Also such a situation may be considered unreasonable where the taking of “reasonable measures” would alter the operation of the work place “too much” and would at the same time endanger occupational safety and health.⁵⁹

An employer may receive a refund for costs that result from work and training experimentations, medical examinations, and consultations aiming to support the opportunities of a disabled person to gain or keep her/his work.⁶⁰ The employer may also receive compensation for such accommodation measures (with regard to changes to machines or other physical environment or e.g. the rearrangement of the method of work) that she/he has taken in order enhance the opportunity of a disabled person to gain or keep his/her work.⁶¹

To be compensated for these kinds of accommodation measures, they must be *necessary* in order to eliminate or decrease disadvantage resulting from a disability or an illness.⁶² Maximum compensation for such measures has been laid down to be € 2.500 per person. With regard to persons with difficult disability the amount may be up to € 3.500.

⁵⁵ HE 44/2003 [Government proposal 44/2003].

⁵⁶ Substantially similar reference is included in the Framework Directive, according to which appropriate measures are to be taken “where needed in a particular case”.

⁵⁷ Although the notion of “disproportionate burden” is not explicitly used, the Non-Discrimination Act seems to provide, all things considered, (at least) as good protection as the Framework Directive.

⁵⁸ *Idem*.

⁵⁹ *Idem*.

⁶⁰ Employment Services Act, section 12.

⁶¹ Decree on Employment Service Benefits [*asetus julkiseen työvoimapalveluun kuuluvista etuuksista* (30.12.2002/1346)], section 23.

⁶² *Idem*.

A person with a disability means a jobseeker client who has considerably lower chances of finding suitable work, keeping his/her job or advancing in his/her job because of a duly confirmed injury, illness or disability.⁶³ There is no single definition of disability or difficult disability. In practise there are several definitions referring either to medical condition, degrees of dysfunctionality and their social impacts. In the evaluation of the necessity of accommodation measures medical expert opinions are the basis of evaluation, and they may then refer to various sources including WHO International Classification of Functioning, Disability and Health. Severe disability is defined separately in regard to each service. There is no separate definition of difficult disability in the Decree on Employment Service Benefits, and therefore the issue is decided on the basis of definitions in other fields.

An employer may also receive compensation in a situation in which a fellow employee provides help to a disabled employee in order to enhance his/her ability to perform his/her work properly. The maximum compensation in this case is €250 per month for a maximum period of one year. With regard to persons with difficult disability this amount may be exceeded up to € 350 per month for maximum period of two years.

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

In the Non-Discrimination act the concept of disability is the same with regard to reasonable accommodation and prohibition of discrimination, ie. it does not specify any difference in the personal scope of application in these two situations.

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

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

⁶³ The Public Employment Services Act (1295/2002), chapter 1, Section 7, Subsection 1(6).

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

- b) *Does national law provide for a duty to provide a reasonable accommodation for people with disabilities in areas outside employment? Does the definition of "disproportionate burden" in this context, as contained in legislation and developed in case law, differ in any way from the definition used with regard to employment?*

Yes, according to the explanatory report to the Non-Discrimination Act, the provider of training is responsible for taking reasonable accommodation measures in order to facilitate the access of disabled persons to the training, including vocational training and university education.

The Basic Education Act Section 31 provides for that every disabled pupil is entitled to receive the interpretation services and assistance necessary for participating to basic education free of charge.

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

The law or the *travaux* do not deal with these questions. In theory failure to provide reasonable accommodation might amount to discrimination. If a disabled person was not hired, but was in fact the best candidate for the job when obligatory reasonable accommodation measures are taken into account, then this arguably is a clear case of discrimination on the basis of disability.⁶⁴ The same applies to equally qualified applicants: if a disabled applicant was not hired because of the costs that reasonable accommodation would have incurred, this could be considered discrimination. If one looks at the internal logic of the Non-Discrimination Act, it seems clear that a failure to accommodate is not *as such* (i.e. in all cases) taken to be a form of discrimination. This is because the definition of discrimination in section 6 of the Act does not list it as a form of discrimination (it mentions direct & indirect discrimination, harassment & instructions to discriminate, just like the Directives), in addition to which one cannot claim compensation under the Act for such a failure,⁶⁵ unlike for cases involving direct or indirect discrimination, harassment, instruction to discriminate or victimization.

⁶⁴ Similarly, Ahtela et al, *Tasa-arvo ja yhdenvertaisuus* (Helsinki: Talentum 2006), p.253.

⁶⁵ If an employer fails to take necessary reasonable accommodation measures, compensation may be sought under chapter 12, sections 1 and 2, of the Employment Contracts Act [*työsopimuslaki* 55/2001].

However, in some circumstances failure to provide reasonable accommodation might be considered to constitute indirect discrimination, as it is about apparently neutral (consistent) treatment that has disadvantageous effects for persons with disabilities.⁶⁶ Under this scenario, it would be possible to claim compensation for a failure to provide reasonable accommodation. However, there is no indication in case law or legal doctrine that failure to provide reasonable accommodation would be considered to constitute any kind of discrimination.

A failure to accommodate cannot be justified.

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

- d) *Has national law (including case law) implemented the duty to provide reasonable accommodation in respect of any of the other grounds (e.g. religion)?*

No. The Constitution provides for freedom of religion as well as for minority rights - section 17 of the Constitution provides that “the Sami as an indigenous people, the Roma and other groups have the right to maintain and develop their own language and culture” - but the implications of these provisions in spheres such as employment are not clear as the Constitution is mainly meant to regulate the use of public powers. However, in special legislation, like the Day Care Act, the Sámi language is given an equal status all over the country with the two official languages Finnish and Swedish.⁶⁷

The same applies with respect to the law adopted in the Åland Islands.

- e) *Does the national law clearly provides for the shift of the burden of proof, when claiming the right to reasonable accommodation?*

No, on the contrary Section 17 of the Non-Discrimination Act expressly delimits the scope of the shift of the burden of proof into discrimination defined in Section 6 of the Act. Only, if violation of the duty to reasonable accommodation would be considered to constitute direct or indirect discrimination under Section 6, the burden of proof could shift. However, there is no indication in case law or in learned writing that this would be the case.

- f) *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?*

⁶⁶ Similarly, Ahtela et al, *Tasa-arvo ja yhdenvertaisuus* (Helsinki: Talentum 2006), p.254.

⁶⁷ See the case in section 03. decided by the National Discrimination Tribunal in 2008 concerning the use of Sámi language in day care at the City of Rovaniemi.

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

It is required that where necessary any reasonable steps are taken to help a person with disabilities to gain access to work or training, to cope at work and to advance in their career.

Building regulations require all new buildings, in so far as its use requires, also be suitable for people whose capacity to move or function is limited. For instance, the Land Use and Building Act [*maankäyttö- ja rakennuslaki* (132/1999)] and the Land Use and Building Decree [*maankäyttö- ja rakennusasetus* (895/1999)] require that buildings that are used by the administration, service providers or businesses (subject to certain conditions) have to be accessible to persons with disabilities.

The objective in land use planning is to promote through interactive planning and sufficient assessment of impact, among other, a safe, healthy, pleasant, socially functional living and working environment which provides for the needs of various population groups, such as children, the elderly and the disabled people.

Regarding the public services, the legislation requires that municipalities ensure that services and assistance for people with disabilities are provided in the form and on the scale needed in the local community.

- g) *Does national law contain a general duty to provide accessibility for people with disabilities by anticipation? If so, how is accessibility defined, in what fields (employment, social protection, goods and services, transport, housing, education, etc.) and who is covered by this obligation? On what grounds can a failure to provide accessibility be justified?*

No.

- h) *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?*

The most important piece of legislation in this respect is the Act on Services and Assistance on the Grounds of Disability [*laki vammaisuuden perusteella järjestettävistä palveluista ja tukitoimista* (380/1987)].)

It requires in section 3 municipalities “to ensure that services and assistance for people with disabilities are provided in the form and on the scale needed in the local community and furthermore that when arranging services and assistance pursuant to this act the clients’ individual need for help must be taken into account.”

Municipalities are required, upon financial support by the state, to monitor and develop the living conditions of persons with disabilities; to work towards removing any obstacles that limit the opportunities and participation of persons with disabilities; to ensure that public services fit also persons with disabilities; to arrange daily social activities for persons with disabilities; to arrange rehabilitation and other training and guidance; to arrange sign language or other similar interpreters for at least 360 hours a year for those who need it; and to provide for “reasonable” transportation services. For severely disabled people the right to service accommodation is established as a subjective right in Section 8 of the Services and Assistance for the Disabled Act. Every intellectually disabled person is entitled to receive necessary housing services as a subjective right according to the Act on Special Care for Mentally Handicapped Persons.

Persons with hearing or speech impairments are entitled in the Constitution to interpretation services as a subjective right.

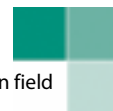
Section 53(1-3) of the Land Use and Building Decree provides for: “Administrative and service buildings, commercial and service premises in other buildings to which everyone must have access for reasons of equality, and their building sites shall also be suitable for use by persons with restricted ability to move around or function otherwise. ...For purposes of equality, buildings with work space shall be designed and built so that they provide the persons referred to in paragraph with sufficient opportunity to work, taking into account the nature of the work.”

A number of other acts and decrees are relevant in this context as well, and deal e.g. with different kinds of employment-promoting training activities and social benefits.

2.7 Sheltered or semi-sheltered accommodation/employment

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

The Finnish legal system no longer uses the term “sheltered employment”. The Social Welfare Act [*sosiaalihuoltolaki* (710/1982, as amended)] makes a distinction between two types of situations and measures: first, support measures (including financial support for employers) that promotes the employability of persons with disabilities in the open labor market (section 27d of the act), and second, “work activity” (“*työtoiminta*”), that aims at maintaining and promoting the functional capacities of individuals who because of their disability do not have the possibility to engage in the first type of work and whose income is primarily based on certain types of benefits (section 27 e).



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

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

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

3 PERSONAL AND MATERIAL SCOPE

3.1 Personal scope

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

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

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

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

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

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

The Non-Discrimination Act is to be applied with respect to natural and legal persons both in public and private sectors.⁶⁸ It is however only individuals that are directly protected under the Act, with the exception of section 6(2), paragraph 3, which defines harassment. According to this paragraph, harassment takes place when the "dignity or integrity of a person or a *population group* is violated..."⁶⁹

Åland Islands. The equality legislation adopted in the Åland Islands is to be applied with respect to natural and legal persons and provides protection to both natural and legal persons.⁷⁰

⁶⁸ HE 44/2003 [Government proposal 44/2003], at p. 33.

⁶⁹ Unofficial translation & italics by the author. For more information on the collective aspect of the prohibition of harassment, see chapter 2.4 (a) of this report.

⁷⁰ Lagutskottet, betänkande nr 9/2004-2005, para 2(2).

3.1.3 Scope of liability

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

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

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

As concerns the Occupational Safety and Health Act [*työturvallisuuslaki* (738/2002)], an employer has a duty to take action irrespective of whether the action has taken place between employees or an employee and a superior. An employer has to take action also in such situations in which an employee faces harassment from the side of a customer. While in such cases the employer may not have efficient means at his disposal by which to eliminate the harassment, he should e.g. provide training and advice to the employees on how to deal with such situations.⁷¹

Service providers (such as restaurant owners) are liable for the actions of those under their command insofar as the former have failed to ensure that the latter do not engage in discriminatory activities, especially if they have been aware of the existence of discrimination or a risk thereof.⁷²

⁷¹ HE 59/2002 vp [pertinent Government proposal (59/2002)].

⁷² This line of interpretation has been confirmed also in the practice of the Discrimination tribunal.



3.2 Material Scope

3.2.1 Employment, self-employment and occupation

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

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

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

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

The Act applies also to recruitment conditions, employment and working conditions and personnel training and promotion (section 2(1), paragraph 2). Discrimination is thus prohibited in a comprehensive manner, e.g. as regards hiring, firing, promotion and arrangement of personnel training. The law protects not just paid employees and civil servants, but e.g. trainees as well. Section 2(2), paragraph 2, prohibits discrimination on the basis of ethnic origin in the contexts of military and non-military service. In addition, several sector-specific laws, such as Act on State Civil Servants [*valtion virkamieslaki* (750/1994)], Seamen's Act [*merimieslaki* (423/1978)], Act on Municipal Office Holders [*laki kunnallisista viranhaltijoista* (304/2003)] provide *added* protection by way of replicating the prohibition of discrimination in their respective fields of application (these provisions existed before the transposition, but were amended in the course of transposition so that e.g. their lists of prohibited grounds of discrimination match those of the two directives).

Because of an apparent accident, sexual orientation was not explicitly included in the list of prohibited grounds of discrimination in the Act on State Civil Servants, but this is of no material relevance, as a) the list is open-ended and there is no reason whatsoever to expect that courts would not regard sexual orientation as a ground of unlawful discrimination, b) the Non-Discrimination Act in itself already covers this field. Nevertheless, the express inclusion of sexual orientation into the list of grounds mentioned in the Act on State Civil Servants is being planned.

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

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

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

This area is fully covered by national law, both with respect to the public and the private sphere, on all grounds covered by the Directives, and also in the Åland Islands. In case KHO:2006:93 of 1.12.2006, the Supreme Administrative Court of Finland held that discrimination at any stage of the recruitment process (in that case: invitation to interview) constitutes discrimination already in itself, irrespective of the fact that the outcome of the selection was not considered to constitute discrimination

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

In respect of occupational pensions, how does national law ensure the prohibition of discrimination on all the grounds covered by Directive 2000/78 EC? NB Case C-267/06 Maruko confirmed that occupational pensions constitute part of an employee's pay under Directive 2000/78 EC.

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.

This area is fully covered by the Non-discrimination Act.

In Finland, occupational pensions are arranged in the form of social *insurance* that employers are obliged to arrange for employees. The insurance is paid from the employee's salary by means of an automatic deduction that is performed by the employer.

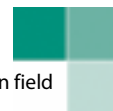
The amount of occupational pension, as well as the whole system in itself, is strictly regulated by law, the Act on Employee's Pension [*työntekijän eläkelaki* (395/2006)], which leaves no room for discretion for employers (except in matters that are not of relevance here). This Act in itself does not contain a provision that prohibits discrimination, although it is clear that the Constitutional prohibition applies both to the system itself and to its application in practice. Insofar as the above-described system falls under the concept of "employment conditions" (which is for the ECJ to determine), section 2(1) of the Non-Discrimination Act prohibits discrimination in that area for all the grounds covered by the two directives. For an example, the amount of salary affects the amount of occupational pension, and as section 2(1) of the Non-Discrimination Act prohibits discrimination in the determination of the salary for all grounds, it also indirectly provides protection from discrimination in the area of occupational pensions for all grounds. Insofar as occupational pension is considered to be a social security benefit, it is covered by section 2(2) of the Non-Discrimination Act, which prohibits discrimination on the grounds of racial or ethnic origin.

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?

Section 2(1), paragraph 3 of the Non-Discrimination Act covers "access to training, including advanced training and retraining, and vocational guidance". The protection provided is thus comprehensive, and covers access to all types of training, irrespective of the entity which is providing the training and also training outside employment relationships. By way of an example, the Non-Discrimination Act covers access to university courses and adult life long learning courses.

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



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

Section 2(1), paragraph 4 of the Non-Discrimination Act covers “membership and involvement in an organization of workers or employers or other organizations whose members carry out a particular profession, including the benefits provided by such organizations”. In this way, the national law meets the requirements of the two Directives.

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

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

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?

No manifest instances of this could be found.

Domestic law, in particular through the Constitutional prohibition of discrimination and through the sanctioning of discrimination in the Penal Code, offers (from certain perspectives) far wider protection from discrimination than the equality legislation adopted in order to transpose the Directives.

Therefore the fact that e.g. the Non-Discrimination Act does not ban age discrimination in health care does not mean that age discrimination in that field would be legal. It should also be kept in mind that the Constitution and the Penal Code apply in the Åland Islands as well.

The approach of the Non-Discrimination Act [yhdenvertaisuuslaki (21/2004)], as regards the formulation of the list of material scope covered, differs to an extent from the approach of the two Directives.

This is because the material areas in question are traditionally identified in the Finnish legal system using terminology which is to some extent different from the terminology used in the two Directives. This does not, however, necessarily mean that the protection provided by the Non-Discrimination Act would be insufficient in some respects.

The Non-Discrimination Act covers, as regards discrimination based on ethnic origin (but not other grounds), “social welfare and health care services”, and “social security benefits or other forms of support, rebate or advantage granted on social grounds” (section 2(2), paragraphs 1 and 2 of the Non-Discrimination Act).

“Social welfare services” is a wide category, and covers, *inter alia*, social work, family counselling, services at home or in institutions and day care. Likewise, “health care services” is a wide category, and covers, *inter alia*, statutory health care, occupational health services, health care services provided in schools and other educational institutions including universities, nursing, dental care, mental health services and ambulance services.⁷³ “Social security benefits” covers, *inter alia*, social insurance and advantages based on it, unemployment and sickness allowances, study grants and student discounts. The “other forms of support, rebate or advantage” refer to, *inter alia*, specific loans that are available for families with small children.

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

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

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 Non-Discrimination Act complies with the Directive 2000/43 in this respect, by way of including an express reference to “social security benefits or other forms of support, rebate or advantage granted on social grounds” in section 2(2) of the Act. Whereas the Act, case law or the *travaux* do not elaborate upon what exactly is meant by the formulation ‘support, rebate or advantage granted on social grounds’, it is clear that a dogmatically correct interpretation would have to take into account the ECJ’s case law re EC Regulation 1612/68 and the free movement of workers. It is likely that the notion ‘social grounds’ can and will be construed broadly by those applying the law, although we can’t be fully confident about this at this point in time.⁷⁴

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

⁷³ HE 44/2003 [Government proposal 44/2003], at p. 36.

⁷⁴ A plausible interpretation of ‘social grounds’ would take the word ‘social’ to refer to all activities that take place within a community (as in the notion ‘social activities’), perhaps excluding activities between private persons. That said, it is also possible to read the notion ‘social grounds’ as referring to reasons relating to low income or otherwise below-average socio-economic status (or other status determined by the authorities that triggers entitlement to some benefit).



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 and people with disabilities. If these cases and/or patterns exist, please refer also to relevant legal/political discussions that may exist in your country on the issue.

Please briefly describe the general approach to education for children with disabilities in your country, and the extent to which mainstream education and segregated "special" education is favoured and supported.

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

According to section 3, the Act does not apply to the aims or content of education or the education system.⁷⁵ According to the *travaux*,⁷⁶ this limitation clause was taken aboard in pursuance of Article 149(1) of the Treaty Establishing the European Community, which states, *inter alia*, that the Community shall fully respect the responsibility of the Member States for the content of teaching and the organisation of education systems.

The Non-Discrimination Act prohibits discrimination in access to training/education on a wide variety of grounds, including age, ethnic or national origin, nationality, language, religion, belief, opinion, health, disability and sexual orientation, in addition to which the law covers "other personal characteristics".

People with disabilities not only enjoy protection from discrimination with respect to access to education/training, but they are also entitled, by virtue of section 5 of the Non-Discrimination Act, to reasonable accommodation measures facilitating that right in practice. In practice, pupils with learning difficulties are placed in mainstream education, in addition to which they are entitled to special training on the side.

There has been one case where *de facto* segregation in a school was successfully claimed. This case has been described above at 0.3.

⁷⁵ The concept "education system" apparently refers to the way in which education is organized (incl. division into primary, secondary and tertiary education) and e.g. the language of instruction.

⁷⁶ HE 44/2003 [Government proposal 44/2003], at p. 37.

There are reports that Roma pupils face particular challenges in schools, a fact that is reflected in their disproportionately high school drop-out rates and in being more often channelled to special education classes than other pupils.⁷⁷

The basic approach in Finland with regard to education of children with disabilities is to integrate them as much as possible to normal school environment. The Basic Education Act Section 17 on special-needs education establishes that a student who has moderate learning or adjustment difficulties is entitled to special-needs education alongside other teaching. If the student has “a disability, an illness, retarded development, an emotional disturbance or a comparable cause and cannot be otherwise taught,” he or she must be admitted or transferred to special-needs education. As far as possible, special-needs education should be organized in conjunction with other education or else in a special-needs classroom or some other appropriate facility. An individual educational plan has to be designed for the student by the school.

The Basic Education Act Section 31 provides for that every disabled pupil is entitled to receive the interpretation services and assistance necessary for participating to basic education free of charge.

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

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

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

The Non-Discrimination Act covers, in section 2(2), paragraph 4, the “supply of or access to housing and movable and immovable property and services on offer or available to the general public other than in respect of relationships between private individuals”.

In effect, no discrimination shall take place in the areas of e.g. bank and insurance services, transportation services, repair services, and the selling and hiring of premises for businesses.

⁷⁷ ECRI, Second report on Finland, adopted on 14 December 2001, CRI (2002) 20.

The prohibition of discrimination in contractual relations extends not just to conclusion/non-conclusion of agreements, but also to the content, application and termination of agreements.⁷⁸

The law makes an explicit distinction between those goods and services which are available publicly and those that are available only privately. The *travaux* instructs that the powers of the Community and the basis (starting point) of the Directives have to be taken into account when interpreting this provision. Actions between purely private parties do not fall under the Non-Discrimination Act. This reflects the legislator's reading of the Directives, as the *travaux* point out that the Directives do not cover actions between private individuals.⁷⁹ At the end of the day, it is down to the ECJ to determine whether this position is legally correct.

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

- b) *Does the law allow for differences in treatment on the grounds of age and disability in the provision of financial services? If so, does the law impose any limitations on how age or disability should be used in this context, e.g. does the assessment of risk have to be based on relevant and accurate actuarial or statistical data?*

Normal risk calculations in insurance policies are accepted and they may affect the price of voluntary insurance policies. The insurance provider is entitled to have declaration of the health condition of a person seeking voluntary insurance and may also refuse such policies if the refusal is based on objective and reasonable criteria. However, with regard to involuntary insurances refusal is not possible but the price of the policy may differ according to accepted normal insurance calculations. Age or disability as such cannot be reason to differential treatment, but the criteria has to be based on objective risk calculations, ie. it has to be based on relevant and accurate actuarial or statistical data.

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 and the extent to which the law requires or promotes the availability of housing which is accessible to people with disabilities and older people.

⁷⁸ HE 44/2003 at p. 36.

⁷⁹ HE 44/2003, p. 37. The legislator is apparently relying on recital (4) of the Racial Equality Directive in support of its position, although this is not explicitly stated.

All forms of housing are covered (including rental, subletting, buying and selling of apartments) and the application of the law does not depend on the permanence of the housing arrangement.

The Non-Discrimination Act excludes from its scope of application arrangements between private individuals. If housing services are however provided in a professional manner and as a source of livelihood, the law applies (section 2(2) paragraph 4 of the Non-Discrimination Act). The same observations apply with respect to the law adopted by the Ål.

Housing segregation does not appear to be a major problem for the Roma. Part of the reason for this may be that Finland is size-wise a large country and the Roma community is small. Immigrants, on the other hand, face some de facto (but not de jure) housing segregation, in the sense that every third/every fourth immigrant lives in the greater Helsinki area (though immigrants have the right of movement within the country), and they have concentrated into certain eastern neighbourhoods of Helsinki where some 60% of the immigrants live in houses of the inhabitants of which 20% or more have an immigrant background, which shows a clear pattern of de facto segregation considering that immigrants comprise some 2,3% of the total population.⁸⁰ The city of Helsinki has implemented a policy of 'decentralization' but this has had only a limited effect at least partially because of factors that are beyond its powers and control – such as voluntary choices and arrangements made by the immigrants themselves and the persons belonging to the majority population (i.e. some of them tend to relocate to areas with fewer immigrants).⁸¹ Housing discrimination, as regards private rentals and municipal housing, against the Roma is widespread. The reach and scope of the applicable legislation is partly a problem, as the prevailing anti-discrimination law excludes from its scope legal relationships between private individuals.

Finland's National Building Code contains Barrier-free Building regulation which is binding. It consists 10 pages of detailed technical requirements for buildings promoting their accessibility and accommodation for disabled persons. Among other it contains provisions and recommendations on facilitating the accessibility for persons with wheelchair and other similar technical assistance equipment.

Subsidies and supports for housing for people with disabilities are available under the Services and Assistance for the Disabled Act's (380/1987) provisions on service accommodation, which are further defined in Section 10 of the Decree as follows:

⁸⁰ See the article in *Helsingin Sanomat*, 29.9.2006 (Marja Salmela & Jussi Rokka: 'Maahanmuuttajat kerääntyvät Helsingissä samoihin vuokrataloihin').

⁸¹ Even though it is not clear –particularly in light of the CERD Convention - whether patterns of de facto segregation may amount to a breach of its obligations by a state even in the absence of any direct involvement by the public authorities in its making, the scope of an obligation to eliminate patterns of de facto segregation, if it exists, must be limited e.g. in view of the right to freedom of movement. Ipso facto, the conclusion appears warranted that Finland (or regional authorities in Finland) are not in breach of their possible legal obligations in this regard.

“Service accommodation comprises housing and related services, which are necessary for the resident in daily life. Services referred to above in paragraph 1 may include assistance in functions pertaining to housing, such as moving, dressing, personal hygiene, food management and cleaning the housing, as well as services which are needed for promoting the health, rehabilitation and well-being of the resident.”

For severely disabled people the right to service accommodation is established as a subjective right in Section 8 of the Services and Assistance for the Disabled Act. Every intellectually disabled person is entitled to receive necessary housing services as a subjective right according to the Act on Special Care for Mentally Handicapped Persons.

According to Section 12 of the *Support and assistance for the disabled Decree* (1987/759) municipal authorities compensate people with severe disabilities for expenses incurred in home conversion and the procurement of equipment and devices needed for the home.

There is no upper cost limits set in legislation. Section 12 provides for that the municipality shall...

“...within reason compensate the costs incurred by a severely disabled person in converting his dwelling and in purchasing equipment if, because of his disability or illness, these measures are essential for him to manage his everyday affairs and he is not in need of continuous institutional care.”

The criterion “within reason” has been interpreted by the courts to mean so-called average market price and what is in the individual’s case a suitable and realistic solution. This means that any costs exceeding necessary and reasonable expenses will not be covered. Compensable housing equipment and facilities include lifts, alarms, and other equipment and facilities installed permanently in a residence. The municipality may also provide housing equipment and facilities free of charge for the use of a severely disabled person. (Tapio Rätty, *Vammaispalvelut-Vammaispalvelulain soveltamiskäytäntö*. [Services for the disabled. Practical application of the Services and Assistance for the Disabled Act] 102-104)

The Act on Residential Renovation and Energy Saving Grants (1021/2002) lays down conditions on which for example persons with disabilities may receive grants for housing repairs, lift construction and removal of obstacles to movement. Grants for residential repairs are made to elderly and disabled persons on the basis of social considerations and financial means tests. The maximum amount of grant is normally 40 per cent of the acceptable repair costs. If repairs of a person's dwelling are indispensable for removing obstacles to his/her movement, and the only alternative is that the resident moves immediately out of the dwelling, he/she may receive the maximum grant of 70 per cent of the acceptable repair costs. The same concerns situations where the necessary social and health services cannot be rendered in the dwelling unless it is repaired.



Lift construction grants and grants for the removal of obstacles to movement are made to housing corporations or owners of rental houses. Their maximum amount is 50 per cent of the acceptable repair costs.

The Act on Subsidies for Improving Housing Conditions for Special Groups (1281/2004) contains provisions on subsidies granted for the building, acquirement and modernization of interest subsidized rental houses and dwellings intended for such special groups as the disabled people. Investment grants for dwellings of special groups are made only in connection with interest subsidy loans, and in such cases the dwelling must also fulfil the criteria for granting such loans. The maximum amount of the grant is 5 per cent of the acceptable repair costs, if no particular exceptional room constructions or other arrangements are involved. The maximum grant is 20 per cent, when social, psychological or similar support is needed in order to safeguard independent habitation and this is taken into account in the dwelling. The maximum grant is 35 per cent, if special room constructions and equipments are necessary because of the resident's need for services.

4 EXCEPTIONS

4.1 Genuine and determining occupational requirements (Article 4)

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

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

The formulation of the said provision differs from the formulation of the respective articles in the two Directives. Firstly, the scope of the exemption in the Non-Discrimination Act is narrower than that in the two Directives.

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

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

4.2 Employers with an ethos based on religion or belief (Art. 4(2) Directive 2000/78)

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

This situation is not tackled by any specific provision, but the legislator apparently intended such situations to be covered by the general provision on genuine and determining occupational requirements, explained above under section 4.1. Hence, under national law, the occupational requirement, to be justified, does not need to be “genuine, legitimate and justified” (as the Directives provide in this context), but “genuine and determining”. In addition, the requirements of legitimate objective and the principle of proportionality have to be taken into account as general principles of law, as pointed out in the preparatory works of the Act. According to the *travaux*, an employee or office holder who is engaged in practicing or teaching of a religion, or whose duties include representing a religious community outwards, can be expected to hold the particular religious beliefs of that community.⁸²

Whether the national law is in compliance with the Directives is thus practically down to whether the scope of “genuine and determining occupational requirements” in Article 4(1) of the Directives is to be interpreted to be narrower than the scope of “genuine, legitimate and justified occupational requirements” in Article 4(2) of the Employment Equality Directive.

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

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

⁸² Ibid, at p. 45.

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

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

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

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

- 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 (e.g. 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?*

There are no cases or arrangements of this kind in Finland.

4.3 Armed forces and other specific occupations (Art. 3(4) and Recital 18 Directive 2000/78)

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

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

As regards those who are performing their military service, which is compulsory for men unless they choose alternative civilian service, and voluntary for women, the Non-Discrimination Act prohibits discrimination only on the basis of ethnic origin (section 2(2), paragraph 3).

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

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

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

There are no specific provisions or exceptions in this regard.

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

4.4 Nationality discrimination (Art. 3(2))

Both the Race Directive and the Framework Employment Directive include exceptions relating to difference of treatment based on nationality (Article 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?)

Nationality is one of the explicitly prohibited grounds of discrimination recognized by the Non-Discrimination Act [*yhdenvertaisuuslaki* (21/2004)]. The law, the *travaux* or the case law do not explicitly address stateless status as a possible ground of discrimination, but statelessness is generally treated as equivalent to nationality in the Finnish legal system,⁸³ and it appears fairly clear that discrimination on the grounds of stateless status would be considered to constitute discrimination on the grounds of nationality.

⁸³ A stateless person is, for instance under the Aliens Act [*ulkomaalaislaki* (301/2004)], considered to be an ‘alien’ (a citizen of a foreign country) for the purposes of that act.

The issue of the overlap and interface between nationality and ethnic origin as grounds of discrimination has not been tackled expressly in the national legislation or the preparatory works. There have been a few cases where the national Discrimination Tribunal of Finland has opined that discrimination on the grounds of (foreign) nationality may constitute indirect ethnic discrimination since the majority of foreign nationals have an ethnic origin other than Finnish.⁸⁴

The Constitution [*perustuslaki* (731/1999)] and the Penal code [*rikoslaki* (391/1889)] prohibit discrimination on the basis of “national origin”, which refers to past, not present (ethno-national) status.

Åland Islands: The provincial Act on the Prevention of Discrimination does not prohibit discrimination on the basis of nationality. Quite vice versa, according to section 3(4) of the Act, “provisions in the Åland Islands autonomy Act and the Act on acquisition of land in Åland (FFS 3/1975), or a law that relies on these provisions, regarding requirement of knowledge of the Swedish language or a right to domicile in Åland or Finnish nationality, shall not be considered to constitute discrimination in accordance with subsections 1-3.” These exceptions were recognized in Protocol 2 of the Treaty of Accession of Finland to the European Communities, and thus constitute part of EU’s primary legislation.

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

The protection provided by the Non-Discrimination Act is limited. Section 3 of the Act provides that the Act does not apply to “application of provisions governing entry into and residence in the country by foreigners, or the placing of foreigners in a different position for a reason deriving from their legal status under the law”. What is notable is that the Non-Discrimination Act does not make a distinction here between those foreigners who are citizens of EU countries and those who are not.

The concept of “foreigner” in Finnish legal order refers to all those who are not Finnish citizens [*ulkomaalaislaki* (301/2004), Aliens Act (301/2004), section 3].

4.5 Work-related family benefits (Recital 22 Directive 2000/78)

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 (e.g. Case C-267/06 Maruko) 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.

⁸⁴ See e.g. the decision of the Tribunal of 22 September 2006, available in English at: <http://www.intermin.fi/intermin/hankkeet/sltk/home.nsf/pages/indexeng> (retrieved 8.4.2008).

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

Section 2:2 of the Employment Contracts Act [työsopimuslaki (55/2001)] prohibits discrimination on the basis of "family ties" (*perhesuhteet*), and refers to the Non-Discrimination Act for the definition of discrimination.

This bans the making of distinctions between married and non-married employees, unless justified under the Non-discrimination Act (the grounds of justification being general in nature and corresponding to those of the two Directives).

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

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

4.6 Health and safety (Art. 7(2) Directive 2000/78)

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

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

The Non-Discrimination Act or any of the other non-discrimination laws do not specifically address the issue. Health and safety issues at work are governed by the Occupational Health and Safety Act [työterveyslaki (738/2002)], which entered into force in January 2003. Primary responsibility for protection of occupational health and safety lies with the employer, who must act in co-operation with the employees. The employer shall systematically and adequately analyse and identify the hazards and risk factors caused by the work, the working premises, other aspects of the working environment and the working conditions.⁸⁵ If, according to this assessment, the work may cause a particular risk of injury or illness, such work shall be carried out only by an employee who is competent and personally suitable for it or by another employee under the direct supervision of such an employee.⁸⁶ This requirement is absolute (non-negotiable) in nature.

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

⁸⁵ Section 10 of the Act.

⁸⁶ Section 11 of the Act.

Health and safety concerns may be taken into consideration when assessing whether the accommodation measures needed by a person with a disability are to be deemed unreasonable. According to the preparatory works, the requirement to take reasonable measures would be considered unreasonable if those measures would change the operation of the work place too much and would at the same time endanger occupational safety and health. The employer may however be entitled to receive a refund for costs that result from accommodation measures, and this has to be taken into account.⁸⁷

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

4.7 Exceptions related to discrimination on the ground of age (Art. 6 Directive 2000/78)

4.7.1 Direct discrimination

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

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

The wording of section 7(1), paragraph 3, follows rather closely the wording of Article 6 of the Employment Equality Directive. What is notable however is that the Non-Discrimination Act has omitted the reference to the requirement that the means used to achieve legitimate aims must be “appropriate and necessary”. It may be argued that the principle of proportionality (which the requirement of appropriate and necessary means basically boil down to) is a fundamental legal principle of the Finnish legal system, and it is to be taken into consideration when interpreting, in this case, whether a certain conduct or policy is in breach of section 7(1) of the Non-Discrimination Act. However, section 7(1), paragraph 3, refers only to the *aim* of the treatment, which thus does not invite the examination of whether the requirements of the proportionality principle have been followed.

⁸⁷ See section 5 of this report for more details.

Again, the situation would have been clearer if the law would have incorporated an express reference to the requirement that the means employed have to be “appropriate and necessary”, so that it would have been clear that it was not enough to establish that the conduct in question had a legitimate aim. As it is, the present text does not, at least on a literal interpretation, allow for proportionality assessment.

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

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

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

Yes, within the limits specified above in the answer to question a. A couple of examples may be given. A specific act exists which governs employment relationships of young employees, who are defined by the act as being those who are employed and under 18 years old.

This act, the Act on Young Employees [*laki nuorista työntekijöistä* (998/1993)] has specific provisions with regard to e.g. the maximum working time allowed and occupational health and security.

According to the Act, a 15-year old person (or older) may him or herself conclude and terminate an employment contract (section 3 of the Act), while an employment contract of a younger than 15-year old person may be concluded or terminated by his or her legal guardian.

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

A law that makes distinctions on the basis of age cannot be challenged *in abstracto* to see if it is compatible with the Non-discrimination Act.

Such an examination of compatibility may become an issue only in particular (concrete) context in connection to a legal proceeding brought forward by a claimant under the applicable laws, in particular the Non-discrimination Act.

Åland Islands. Some differences based on age exist. For instance, a single person starting a travel agency must be at least 25 years old [section 3 of the Provincial Act on Travel Agencies, *landskapslagen om resebyråverksamhet* (1975:56)]. Section 6 of the Decree on Start-up Grants for Young Farmers specifies that the applicant must not be over 40 years of age when a decision to provide a grant is made [*landskapsförordning om startstöd till unga jordbrukare*(2001:45)]. The Åland government is of the view that these and other remaining distinctions are justified as required by the applicable laws.⁸⁸

- 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, see Act on Employee's Pension [*työntekijän eläkelaki* (395/2006)].

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

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

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

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

⁸⁸ Ålands landskapsregering, Framställning nr 10/2004-2005.



4.7.3 Minimum and maximum age requirements

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

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

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

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).

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

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

There are two complementary pension systems in Finland: earnings-based pensions linked to past employment and national pensions linked to residence in Finland. Both systems include a wide range of retirement benefits for specific contingencies, including old-age pension.

The applicable employee pension law depends on the insured person's place of work and type of employment (these laws include what are known in short as TyEL, YEL, MYEL, VaEL, KuEL and KiEL,⁸⁹ and cover both public- and private sector employment and self-employment). The national pension (literally called 'national pension insurance') is designed to provide minimum pension security to pensioners with insufficient earnings-related pension or none at all. A single person can enjoy several types of pensions simultaneously, including national (i.e. state) old-age pension and employment-related old-age pension.

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

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

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

Those whose employment relationship is governed by the pension laws YEL or MYEL do not need to stop working to be eligible to receive pension. This group includes self-employed persons and farmers. Other employees are required to retire from their jobs to be eligible to receive old-age pension, but this is without prejudice to their right to conclude new employment contracts.

- c) *Is there a state-imposed mandatory retirement age(s)? Please state whether this is generally applicable or only in respect of certain sectors, if so please state which.*

⁸⁹ These are: Employees' Pensions Act (TyEL), Seamen's Pensions Act (MEL), Farmers' Pensions Act (MYEL), Self-Employed Persons' Pensions Act (YEL), State's Pension Act (VaEL), Local Government Pensions Act (KuEL) and Evangelical Lutheran Church's Pension Act (KiEL).

Have there been recent changes in this respect or are any planned in the near future?

The rules regarding retirement age and pension have been amended recently in an attempt to attract employees to stay longer in the working life.

These most relevant laws include the following:

- Retirement Act [*työntekijäin eläkelaki* (395/2006), as amended]
- Act on State Civil Servants [*valtion virkamieslaki* (750/1994)]
- Act on Municipal Office Holders [*laki kunnallisesta viranhaltijasta* 304/2003), as amended]
- Act on Employment Contracts [*työsopimuslaki* (55/2001), as amended]
- National Pension Act [*Kansaneläkelaki* (568/2007)].

The amendments in the above-mentioned laws entered into force on 1.1.2005, except for the Retirement Act which entered into force on 1.1.2007, and for National Pension Act which entered into force on 1.1.2008.

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

As regards civil servants, section 35 of the Act on State Civil Servants [*valtion virkamieslaki* (750/1994)] specifies that the general retirement age is 68 years. According to the same provision, the retirement age may be set lower by a decree with respect to particular types of posts. Such lower retirement ages have been set for instance for officers of the defence forces of Finland. As regards municipal office-holders, section 34 of the Act on Municipal Office Holders specifies that the employment relationship ends without further notice at the end of the calendar month during which the office holder reaches 68 years, unless a new fixed term has been agreed to between the parties.

Ahtela et al consider that the setting of a general retirement age, as done in Finland, possibly constitutes discrimination on the grounds of age.⁹⁰

- 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?*

⁹⁰ Ahtela, Karoliina et al, *Tasa-arvo ja yhdenvertaisuus* (Helsinki: Talentum 2006), pp. 161-162.

Retirement ages or ages at which the termination of an employment contract is possible can be set by employment contract or collective contract. A condition on retirement age can be included even in an employment contract that is for 'an indefinite term'.⁹¹ The validity of a condition regarding retirement age is assessed in accordance with the provision regarding unreasonable terms in section 10:2 of the Employment Contracts Act. In accordance with section 10 of the Non-Discrimination Act, courts may, in cases that are being processed by them, change or ignore contractual terms that are contrary to the prohibition of discrimination. Employers cannot however unilaterally impose a particular retirement age, as this could in some circumstances constitute discrimination on the basis of age.

It should however be noted that many employers have adopted particular internal rules that deal also with retirement ages, and that employers and employees often agree to include these rules in their employment contracts.⁹²

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

The law against dismissal applies to all instances of dismissal, but the termination of the employment contract due to an employee reaching 68 years is not regarded as "dismissal", and therefore the law on protection against dismissal does not apply in that regard. If the employer and the employee agree on continuation of employment after the employee has reached the age of 68 years, the ordinary provisions regarding protection against unjustified dismissal apply to the termination of such an agreement.

The relevant laws do not differentiate between women and men.

4.7.5 Redundancy

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

Section 7:1 of the Employment Contracts Act [*työsopimuslaki* (55/2001), as amended] demands that the laying off/dismissal of employees may be based only on "appropriate and weighty reasons".

⁹¹ HE 185/2004.

⁹² An employer might for instance offer for the employees a specific voluntary pension (over and above that what is required by the law; a "supplementary pension"), the entitlement to which is laid down in a specific internal regulation called "*eläkesääntö*", which is basically applied collectively to all the employees who wish to avail of this benefit. These regulations may provide for instance that employees are entitled to the supplementary pension at the age of 60, and a respective condition re retirement age is then laid down in the employment contract for the employees concerned. The system is voluntary (based on a contract between the employer and the employee), meaning that retirement ages are not imposed unilaterally by the employer.

The Act does however not regulate more precisely the factors on the basis of which selection of workers for redundancy can be made. It is however clear that these factors may not be discriminatory. Under the case law, it is also clear that the decision of an employer not to take seniority into account when laying off/dismissing employees cannot be successfully challenged on the grounds that the employer should have taken seniority into account.⁹³

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

Compensation for redundancy is to be paid only in situations where the laying off/dismissal was based upon grounds that breach the Employment Contracts Act, for instance if the decision was based upon discriminatory considerations or if there really were no grounds for redundancy.

In such situations, the age of the former employee and his/her prospects of finding new suitable employment are among the factors that may be taken into account in determining the amount of compensation [chapter 12, section 2(2) of the Act].

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

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

No.

4.9 Any other exceptions

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

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

⁹³ Supreme Court 1998:130 (KKO 1998:130).

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*

As regards the general anti-discrimination framework, which is laid down in section 6 of the Constitution [*perustuslaki* (731/1999)] and sections 11:9 and 47:3 of the Penal Code [*rikoslaki* (391/1889)], it is clear that taking positive action is allowed, but not required *per se*. One exception exists, though: there is not much room for positive action in the recruitment of civil servants, as the recruitment criteria have been laid down exhaustively in the Constitution, and therefore positive action can be used basically only as a 'tie-breaker' between equally qualified or nearly equally qualified candidates. At the same time, one however has to keep in mind that, in accordance with section 22 of the Constitution, all authorities are under a specific duty to guarantee the observance of basic rights and liberties and human rights. This provision obliges e.g. the legislator and the judiciary to actively secure the *de facto* realization of rights, which may necessitate the taking into account of the specific situation of vulnerable groups. As a small step towards that direction can also be seen the evolution of the principles of good administration, which e.g. obliges the administration to take positive steps to ensure that all people before it *de facto* have the same opportunity to successfully present their case, irrespective of e.g. disability.⁹⁴

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

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

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

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

⁹⁴ Juhani Kortteinen & Timo Makkonen, *Oikeutta rasismien ja syrjinnän uhreille - rasismien vastainen käsikirja* [Handbook for the Victims of Racial Discrimination], Ihmisoikeusliitto 2000, pp. 58-59.

- 1) In all they do, the authorities shall seek purposefully and methodically to foster equality and consolidate administrative and operational practices that will ensure the fostering of equality in preparatory work and decision-making. In particular, the authorities shall alter any circumstances that prevent the realization of equality.
- 2) Each authority shall draw up a plan for the fostering of ethnic equality (*equality plan*), which must be as extensive as required by the nature of the work of the authority. The Ministry of Labour shall issue general recommendations for the content of plans referred to in this subsection.

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

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

The scope and content of an equality plan are to be determined by the extent to which the function of the authority in question has a bearing on equal treatment issues on the basis of ethnic origin. The material nature of public powers exercised and the ethnic composition of the recipients of services are to be taken into account when determining the scope and nature of this duty. The Ministry of Labour has issued more precise instructions for the content of the equality plans.⁹⁵ While the duty to draw up a plan is binding, there are no hard and fast sanctions or mechanisms of enforcement attached to this duty. A number of equality plans have been adopted.

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

The “traditional” interpretation regarding the Finnish legal system is that the legislator has a rather wide margin of appreciation in determining what kind of measures are necessary in a given situation, especially if the draft legislation intends to improve the situation of socially disadvantaged groups or individuals.⁹⁶

⁹⁵ Kirje 9.9.2004 1100/009/2004TM.

⁹⁶ Martin Scheinin, “Yhdenvertaisuus ja syrjinnän kieltö” [Equality and the Prohibition of Discrimination], in Hallberg et al, *Perusoikeudet* [Basic Rights], WSOY 1999, p. 236.

Most of the *travaux préparatoires* for legislation that aim at e.g. improving the employability of disabled persons do not use positive action argumentation in their reasoning. For instance, the Government proposal HE 169/2001 on legislation enhancing the employability of disabled persons refers to the constitutional obligation to promote employment (section 18.2 of the Constitution), the obligation of the public authorities to promote the realization of basic rights (section 22 of the Constitution), and the need for the realization of *these* rights not to be discriminatory *against* the disabled people (section 6.2. of the Constitution).

While the objective of the legislation was indeed the promotion of employment opportunities of a specific, disadvantaged group of people, its possible character as positive action legislation was not spelled out.⁹⁷

The lack of clarity referred to above relates exactly to this question: was for instance this legislation needed to implement an existing right in practice, in which case it was not to be considered positive action, or was it a positive action measure “deviating” from the principle of non-discrimination? In the opinion of the author, only such pieces of legislation, or only such concrete actions, which create or make use of a clear order of preference to be applied in a concrete decision making situation are to be considered positive action provided the aforementioned requirements are fulfilled.

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

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

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

⁹⁷ To complicate matters further, the Government proposal mentions the Employment Equality Directive and its approach on positive action in a section in which it discusses “other international obligations of relevance”. It does not, though, explicitly spell out whether the directives’ stance on positive action had any effect on the preparation of the proposal.

Åland Islands. Section 7 of the Provincial Act on Prevention of Discrimination provides that “provisions in this act do not pose an obstacle for a decision to take special measures with a view to prevent that persons are disadvantaged on the grounds of ethnic belonging, religion or other conviction, disability, age or sexual disposition, or with a view to compensating such disadvantage.”

The Act does not however impose any obligations on public or private actors to promote the realization of equal treatment in practice

- b) *Do measures of positive action exist in your country? Which are the most important? 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.

Little or no information or analysis exists about positive action measures implemented in the private sector, e.g. by employers. Indeed, it appears that positive action measures implemented in Finland are mostly of the type of broad social policy measures. Given the somewhat uncertain meaning of the term ‘positive action’, and the fact that a high number of policy measures benefit (directly or indirectly) one or more of the equality groups, it is not possible to enumerate the policy measures concerned in any exhaustive manner. Therefore the following text simply provides some examples that relate to the Roma and persons with disabilities.

First, the following measures and projects have been taken with a view to promoting the status and situation of the Roma in the field of employment: occupational training aimed specifically at the Roma; a number of projects the aim of which has been to promote the employability of Roma through inter alia work training, apprenticeships and other similar opportunities;⁹⁸ nomination of contact persons of Romani affairs in every employment office and in the employment departments of the Employment and Economic Development Centers; staff training in employment offices on ethnic equality and Roma culture.

In the field of education, one might mention the following measures: those Roma pupils that need it are offered part-time special education in addition to the education provided under the general curriculum at mainstream schools;⁹⁹

⁹⁸ Brief descriptions of some of these measures, and links to specific projects, can be found at the following website (in Finnish): <http://www.romani.fi/Resource.phx/stm/romani/ronktiedottaa2.htm> (retrieved 27.3.2008).

⁹⁹ This part-time special education is offered to all pupils who are in need of it, including pupils with disabilities; however, the needs of Roma pupils are particularly seriously taken into account since it has been estimated that some 50 % of them are in need of some form of special education.

Roma children are given specific attention in student counseling; special school assistants, many of whom are themselves of Roma origin, are available in some municipalities; seminars and informative meetings are arranged for Roma parents; and Roma language is taught to those Roma pupils that wish to receive such language instruction (certain conditions have to be met).

Several various types of measures promoting the employability of people with disabilities exist. An employer may, for instance, receive a refund for costs that result from work and training experimentations for disabled people.¹⁰⁰ The purpose of work try-outs is to acquaint disabled persons with working life for the period of up to six months. During a try-out period the employer does not pay the disabled person wages, but the person receives remuneration either from the labour administration or the Social Insurance Institution.

In order to support the access of disabled job seekers to the labour market an employer can receive an employment subsidy for a maximum of two years (up to 760 €/month).

The majority of disabled persons who obtain jobs through this support are employed either by municipalities or the state.¹⁰¹

Employment subsidy is also payable to companies that improve the vocational facilities of disabled persons and employ them provisionally. Employment subsidy is granted to companies on the basis of an employment contract concluded for a fixed period, if the company provides employment counselling and employment-promoting rehabilitation in the context of supported employment. Such a combination of supported employment, education and rehabilitation is valid for a maximum of two years. In this case employment subsidy is paid to the company for a maximum of ten months.

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

One must also keep in mind the general obligation ("positive duty"), laid down in section 4 of the Non-discrimination Act, which requires public authorities to promote the realization of equal treatment in practice (with regard to all grounds).

¹⁰⁰ Employment Services Act, section 12.

¹⁰¹ Independent Living - Challenge for Disability Policy. Brochures of the Ministry of Social Affairs and Health, 1999:5.

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, of the following questions 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.

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

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

As regards all grounds covered by the two Directives:

As regards employment and education (access to training), a victim of discrimination may file a claim, in a district court, for compensation under the Non-Discrimination Act [yhdenvertaisuuslaki (21/2004)]. Compensation may be awarded for up to 15 560 € and even more in exceptionally serious cases. The payment of compensation is not connected to criminal liability. Discriminatory provisions included in an employment contract may be annulled or amended by an ordinary court, or by a Labour Court if the matter deals with a collective agreement.

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

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



In case a discriminatory decision is made in the exercise of public powers, a victim of discrimination may make use of the rectification procedure or some other ordinary channel of appeal. In such situations a person who considers himself wronged can also file a complaint to the Parliamentary Ombudsman or the Chancellor of Justice of the Government.

However, these overseers of legality do not have the power to amend the decisions of authorities on the basis of complaints, or to award damages, but they may e.g. issue admonitions or order criminal prosecution against a public official.

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

As regards other material areas covered by the Non-Discrimination Act, but not employment, a victim of ethnic discrimination may turn to the Ombudsman for Minorities ("vähemmistövaltuutettu"), and/or the Discrimination Tribunal ("syrjintälautakunta"). In accordance with section 13 of the Non-Discrimination Act, the Discrimination Tribunal may confirm a settlement between the parties or prohibit the continuation of a conduct that is contrary to the prohibition of discrimination or victimization.

The Tribunal may also order a party to fulfil its obligations by imposing a conditional fine. An order for the payment of conditional fine is given in separate proceedings on request of the applicant in case the prohibition order is not followed. The Tribunal may also issue a statement on how non-discrimination law is to be interpreted upon the request of one or both of the parties, the Ombudsman for Minorities, a court of law, a public authority (e.g. a ministry) or an NGO.

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

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

A local office of the Occupational health and safety authority oversees compliance with non-discrimination law in the field of private employment.

b) Are these binding or non-binding?

The decisions of the courts of law and the Discrimination Tribunal are binding, but the decisions of the Ombudsman are recommendations.

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

Yes, if this takes place within the time limits prescribed in law (1 year, 2 years, 5 years, or 10 years depending on the nature and consequences of the violation, Section 9 of the Employment Act, Section 12 of the Equality Act, Section 9 of the Non-Discrimination Act). However, the compensation clause in the Non-Discrimination Act does not cover language or "other reason".

Up until before the entering in force of the Non-Discrimination Act the most often used means of judicial recourse was to bring criminal charges. Several such cases dealt with denial of access, on the grounds of ethnic origin, to restaurants or other places open to the public. Even this type of action was however taken only infrequently, as there is evidence to the effect that only some fourteen per cent of the victims of ethnic discrimination file a crime report to the police.¹⁰²

Now that the Non-Discrimination Act is in force, the situation has changed somewhat, as the Act eases the burden of proof in other than criminal proceedings and entitles victims of discrimination to claim compensation. One should also note that proceedings before the Discrimination Tribunal are free of charge, and are usually not so complicated as to require the use of legal counsel. Comprehensive statistics about the number of cases brought to the courts/Tribunal do not presently exist.

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

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

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

a) in support of a complainant

¹⁰² Jasinskaja-Lahti, Inga et al: *Rasismi ja syrjintä Suomessa*. Helsinki: Gaudeamus 2002.

In the Finnish legal system both natural and legal persons can have rights and obligations and have legal standing.

However, only those whose rights or obligations are directly at stake have legal standing in court in a particular case. Interested organizations may not bring legal action on behalf of victims of discrimination or become third parties or even (usually) act as *amicus curiae*. Individual lawyers (or even lay individuals, subject to some restrictions), working for an organization, may, subject to general statutory restrictions for representation, bring legal action and represent a victim in a court upon his/her authorization, and may of course provide legal and other assistance such as advice.

In accordance with section 14 of the Non-Discrimination Act, an association (and a range of other actors) may request the Discrimination Tribunal to issue a statement regarding the interpretation of the law in a matter dealing with ethnic discrimination (does however not apply to matters relating to employment).

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

Organisations can only *represent* alleged victims, through a power of attorney, but cannot pursue matters on their *behalf*. Class action is not possible in discrimination cases.¹⁰³

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).

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

¹⁰³ Act on Class Action [*ryhmäkannelaki* (444/2007)].

According to the pertinent *travaux préparatoires*, the shifting of the burden of proof, now codified into section 17 of the Non-Discrimination Act, was in practice customarily observed in matters relating to discrimination already before the codification.¹⁰⁴

The provision is applicable with respect to all matters relating to any form of discrimination (direct and indirect discrimination, harassment, instruction or order to discriminate) irrespective of the ground of discrimination, but does not extend to victimization. It is not enough only to express suspicions or claims, but the complainant has to present concrete facts/information to substantiate his/her claim. Full evidence is not however required, it is enough that the information, when assessed objectively, gives rise to a presumption that discrimination has taken place.¹⁰⁵

Åland Islands. This matter is within the prerogative of the state.

It is however not clear whether the rule on the burden of proof in section 17 of the Non-Discrimination Act is applicable with respect to the proceedings brought under the legislation adopted in the Ål.

This is because by its wording the applicability of section 17 is restricted to matters brought under the Non-Discrimination Act itself (as by the time of its adoption it was apparently not foreseen that specific additional legislation would need to be adopted with respect to the Ål).

It is however not necessarily the case that this state of affairs means that the requirements posed by the two Directives are not met: as was pointed out above, the courts have customarily shifted the burden of proof in discrimination cases even in the absence of a specific provision to that effect, in addition to which the courts may apply section 17 of the Non-Discrimination Act in accordance with its objective if not its wording. It remains however to be seen whether the courts in the Ål will in practice follow the shifted burden of proof in proceedings brought under Ål law (they will have to do so in proceedings brought under the Non-Discrimination Act).

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

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

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

¹⁰⁴ Government proposal 154/2006 [HE 154/2006].

¹⁰⁵ Idem.

The personal and material scope of this provision is wide. The law applies, first of all, not just to employers or the person who the complainant has complained about, but to any person who takes action in response to the action by the complainant.¹⁰⁶ No necessary personal connection to the (alleged) discrimination is needed. Second, the scope of persons protected from victimization is wide: not just is the (alleged) victim of discrimination protected, but so are all those who have engaged in the proceedings or who have been involved in support of the victim, including witnesses, legal counsels and representatives of NGOs who have provided advice or other assistance to the victim. Third, the range of actions which may be considered as “complaining or taking action”, in response to which victimization is then taken, is wide. It covers bringing legal action to a court, Ombudsman, Discrimination Tribunal or any other competent authority, in addition to which already the filing of a complaint or a crime report, or even the contacting of a human rights organisation or a lawyer, is covered.¹⁰⁷

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

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

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

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

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

¹⁰⁶ Ibid, p. 46.

¹⁰⁷ Idem.

Under section 9 of the Non-Discrimination Act [*yhdenvertaisuuslaki* (21/2004)] the maximum amount of compensation is (currently) 15 560 euros. This maximum compensation is however theoretical, as the limit may be exceeded for “special reasons” where the circumstances of the case (e.g. the length and seriousness of discrimination) so warrant. There is no minimum limit to compensation, and it is possible not to award any compensation, if that is considered Discrimination Act]. The (theoretical) maximum sum in compensation as provided in section 9 shall be adjusted every three years by a decree given by the Ministry of Labour (section 21 of the Act).¹⁰⁸ The award of compensation is without prejudice to the possibility to obtain damages under the Tort Liability Act [*vahingonkorvauslaki* (412/1974)] or some other law. However, it is possible to make simultaneously an alternative/additional claim based on Tort Liability Act, but it will be applied independently.

Discrimination is an offence punishable under sections 11:9 and 47:3 of the Penal Code [*rikoslaki* (39/1889)]. The former provision prohibits discrimination inter alia in the provision of services and the latter in employment. Under both provisions a person found guilty of discrimination may be convicted to fines or to imprisonment for up to six months.

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

As regards ethnic discrimination outside the field of employment, the Discrimination Tribunal may issue an order for injunctive relief, i.e. prohibit the continuation of discrimination. The Tribunal may also order a party to fulfil its obligations by imposing conditional fine. There is no upper limit to the amount of conditional fine and the Tribunal may order the payment of the fine on a separate application of the petitioner if its prohibition order is not followed. So far the highest conditional fine has been 7000 Eur imposed on a municipality.

The tribunal has not yet received a single application asking for a payment of the conditional fine due to the denial to follow the prohibition order.

Åland Islands. By virtue of section 9 of the Provincial Act on Prevention of Discrimination, the above-mentioned section 9 of the Non-Discrimination Act applies also with respect to proceedings brought under the Provincial Act.

In addition, the Ombudsman on Discrimination may impose a fine in case a party continues to breach the non-discrimination law even after the Ombudsman has pointed out that the party is in breach of its obligations (section 10 of the Act).

¹⁰⁸ The amount has already been adjusted once, by TyA 60/2007.

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

The law specifies a maximum amount of compensation (15 560 €),¹⁰⁹ but this ceiling is only theoretical, as it can be exceeded for “special reasons”.

By way of an example, the following may be considered as “special reasons”: the fact that the breach of equal treatment laws took place over an extended period of time; indifferent attitude on part of the respondent as regards requirements posed by law; severity of the breach; and the extent to which the complainant felt offended by the breach.¹¹⁰

The rationale behind having this kind of a theoretical upper limit appears to be the following: The amount of compensation awarded to complainants is in general not very high in Finland (particularly in comparison to the UK and USA). Therefore, by mentioning an exceptionally high sum in the text of the law, the legislator wanted to emphasise the seriousness of breaches of equal treatment law. This same message is further emphasised by making it explicitly possible to exceed this “upper limit”. The amount of “maximum compensation” may be adjusted every three years, and has already been adjusted once (in February 2007, from 15 000 to 15 560€).

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?*

There is not enough case law on the application of section 9 of the Non-Discrimination Act to infer guiding principles. By way of an example it can be mentioned that in one recent case where a Roma woman was without any acceptable grounds suspected of stealing goods from a grocery store (ethnic discrimination in the provision of goods), the woman was awarded 2 000 € in compensation.¹¹¹

In another case, a woman who was dismissed on the grounds of a longstanding illness was awarded just satisfaction for 5000 € plus 25 000 € in compensation.¹¹² It may however be that these figures are not representative and that the average amount of compensation is lower than that.

The question whether the available sanctions are, or are likely to be, effective, proportionate and dissuasive, is difficult to answer for the following reasons:

¹⁰⁹ TyA 60/2007, section 1.

¹¹⁰ HE 44/2003 vp.

¹¹¹ Vantaan käräjäoikeus, tuomio R 05/3357, 9.11.2005.

¹¹² Edilex 16.11.2006.



First, the range of remedies and sanctions is limited but may possibly be considered sufficient. On the one hand, victims can obtain redress in the form of compensation, initiate criminal law proceedings and obtain an order of cessation from the Discrimination Tribunal in cases of ethnic discrimination. On the other hand, some particularly robust remedies are not available, such as reinstatement.

Second, we do not have the statistical data and/or comprehensive case law data needed to assess whether sanctions and remedies have in practice been 'proportionate'.

Third, the dissuasive effect of sanctions and remedies appears questionable. Whereas we do not have hard data about the levels of discrimination, the number of discrimination cases reported to the police and the Ombudsman for Minorities has increased in the recent years,¹¹³ which may indicate an increase in levels of discrimination.

This would mean that the law is not dissuasive. On the other hand, the increase in the numbers of reported discrimination may also reflect an increase of awareness of issues related to discrimination, a positive development in which the new equality law may have played a part.

Due to the above factors, and specifically the absence of more comprehensive and detailed analyses, it is difficult at this time to give a straightforward answer to the question at hand.

¹¹³ Vähemmistövaltuutettu: *Vähemmistövaltuutetun vuosikertomus 2007* (Hämeen kirjapaino Oy, 2008). Tanja Noponen: *Poliisin tietoon tullut rasistinen rikollisuus Suomessa 2006*. Poliisiammattikorkeakoulun tiedotteita 62/2007.
[http://www.poliisi.fi/poliisi/pakk/home.nsf/files/Tiedotteita%2062/\\$file/Tiedotteita%2062.pdf](http://www.poliisi.fi/poliisi/pakk/home.nsf/files/Tiedotteita%2062/$file/Tiedotteita%2062.pdf)

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) for the promotion of equal treatment, 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? (Body/bodies that corresponds to the requirements of article 13. If the body you are mentioning is not the designated body according to the transposition process, please clearly indicate so)*

The office of the Ombudsman for Minorities was established by the Ombudsman for Minorities Act [*laki vähemmistövaltuutetusta* (660/2001)], which entered in force on September 1st, 2001. The Act was amended in 2004 during the transposition process by way of law 22/2004, which inter alia changed the title of the Act into Act on the Ombudsman for Minorities and the Discrimination Tribunal (*laki vähemmistövaltuutetusta ja syrjäntälautakunnasta* (660/2001), as amended).¹¹⁴ The duties of the Ombudsman do not cover other discrimination grounds than ethnic origin.¹¹⁵ In 2006 approximately one half of the 645 cases dealt with by the office of the Ombudsman concerned discrimination.¹¹⁶

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

Åland Islands. The office of the Ombudsman on Discrimination (*diskrimineringsombudsman*) was established by the Provincial Act on Ombudsman on Discrimination [*landskapslag om diskrimineringsombudsmannen* (67/2005)], which entered into force on 1 December 2005. The Ombudsman, Veronica Larpes-Papadopoulou, took office in March 2006.¹¹⁷

¹¹⁴ For information on the Discrimination Tribunal, see section 6.1 of this report. In view of the author, the Tribunal does not constitute a "body for the promotion of equality", as it is a judicial body.

¹¹⁵ Ethnic origin covers racial origin as well.

¹¹⁶ Ombudsman for Minorities: *Annual Report of the Ombudsman for Minorities 2006*. Available at: [http://www.vahemmistovaltuutettu.fi/intermin/vvt/home.nsf/files/Ombudsman_For_Minorities_06/\\$file/Ombudsman_For_Minorities_06.pdf](http://www.vahemmistovaltuutettu.fi/intermin/vvt/home.nsf/files/Ombudsman_For_Minorities_06/$file/Ombudsman_For_Minorities_06.pdf) (retrieved 8 April 2008).

¹¹⁷ <http://www.regeringen.ax/do/index.pbs>

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

Ombudsman for Minorities is an independent body; by virtue of an amendment made in 2007, this independent status has an express legal basis in section 1 of the Act on the Ombudsman for Minorities and the Discrimination Tribunal. The Ombudsman's office is administratively attached to the Ministry of the Interior and its funding comes from the state budget's general heading for the Ministry of the Interior. There is no separate governing body. The Ombudsman has an obligation to produce a yearly report to the Ministry. As the body has been set up by an act of the Parliament, it can only be abolished by an act of at least the same level.

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

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

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

Åland Islands. Under section 1 of the Provincial Act on the Ombudsman on Discrimination the Ombudsman is to "promote and secure equal treatment through combating and preventing discrimination on the grounds of ethnic belonging, religion or other conviction, disability, age and sexual disposition."

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

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

The powers and duties of the Ombudsman for Minorities includes the provision of assistance to victims and the issuing of recommendations. The powers and duties of the Ombudsman for Minorities do not, as things stand, *expressly* include conducting of independent surveys or the publishing of independent reports on discrimination as required by article 13(2) of the Racial Equality Directive. That said, there is nothing to stop it from conducting such surveys or publishing the reports, and the Ombudsman has indeed conducted and published a few *ad hoc* studies.

The financial means available to the Ombudsman are however in practice insufficient for it to take meaningful action in this field.¹¹⁸ A Government Proposal on the amendment of the Act on the Ombudsman for Minorities and the Discrimination Tribunal has been submitted to the Parliament in June 2008, with a view to making 'conducting of surveys' one of the expressly mentioned duties of the Ombudsman. The said Government Proposal also draws attention to a need to increase the Ombuds financial resources for it to be able to carry out its new functions effectively.¹¹⁹

Åland Islands. The Ombudsman can give advice and give other assistance to victims of discrimination. It can also conduct surveys and publish reports. For an example, the Ombudsman has commissioned a victim survey on the extent of discrimination experienced in the Åland Islands. This study came out in 2007.¹²⁰

¹¹⁸ The Ombud had, in 2007, 60 000 € at her disposal for 'extra' expenses relating to her functions, such as for commissioning external research. There are 11 persons who work at the Ombud's office at the time of the writing, none of whom is employed as a 'researcher', which means that the possibility to conduct 'in-house research' is limited as well.

¹¹⁹ HE 87/2008 vp.

¹²⁰ ÅSUB; *Olika behandling i lika situation. Om diskriminering i det åländska samhället*. Rapport 2007:7. Available at: http://www.regeringen.ax/composer/upload/do/Rapport_2007_2109.pdf (retrieved 8 April 2008).

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

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

Åland Islands. The Ombud is under a duty to report a case of discrimination to the public prosecutor if certain conditions are met.

- f) *Is / are the body / bodies a quasi-judicial institution? Please briefly describe how this functions. Are the decisions binding? Does the body /bodies have the power to impose sanctions? Is an appeal possible? To the body itself? To courts?) Are the decisions well respected? (Please illustrate with examples/decisions)*

The National Discrimination Tribunal is an independent and impartial judicial body supervising the application of Non-Discrimination Act with regard to discrimination based on ethnic origin outside employment.

It can decide to give a prohibition order and impose conditional fine and order its payment upon application. Its decisions can be appealed to the administrative court. So far there has not been cases where the prohibition order would not have been followed. However, it is upon the activity of the applicant to follow up whether the prohibition order is followed. For examples of decisions by the Tribunal see part 03. case law section.

- g) *Is the work undertaken independently?*

Yes. The State Council appoints the Ombudsman for a period of five years in the maximum (section 2 of the Decree on Ombudsman for Minorities, *valtioneuvoston asetusta vähemmistövaltuutetusta* (687/2001)). Administratively speaking the Office of the Ombudsman is connected to the Ministry of the Interior of Finland, and the officers and the rest of the personnel of the Office are designated by the Ministry, but the Ombudsman is independent from the Ministry as well as from other entities and actors.¹²¹ This independent status is nowadays also formally guaranteed in law.¹²²

Åland Islands. Yes. The Ombud is an independent authority under the Provincial Government.

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

¹²¹ Section 2 of the State Council Decree on the Ombudsman for Minorities [*valtioneuvoston asetusta vähemmistövaltuutetusta* (687/2001)].

¹²² Section 1 of the Act on the Ombudsman for Minorities and the Discrimination Tribunal [*laki vähemmistövaltuutetusta ja syrjintälautakunnasta* (660/2001)].

The legal duties of the Ombudsman for Minorities include, inter alia, overseeing the observance of the Non-Discrimination Act, promotion of good ethnic relations and following up and improving the status and rights of foreigners and ethnic minorities. The law does not single out Roma or any other group. The Ombud has consistently brought forward problems experienced by the Roma. For instance for the year 2006 one of the priority areas of its work was the fight against ethnic discrimination associated with housing and other provision of goods and services to people of Roma origin.¹²³ Its Annual Report from 2006 includes a special section on housing discrimination experienced by the Roma and mentions that 40 such cases were reported to it in the course of 2006. The Ombud submits in his opinion that discrimination in housing is a serious problem and calls for more efficient intervention in that area. The Ombudsman has also drawn attention to the employment situation of the Roma.¹²⁴ In addition, Roma are represented in the Advisory Board on Minorities, the task of which is to assist the Ombudsman in the prevention of ethnic discrimination and the development of co-operation between the various authorities and the Advisory Board.

Also the national Discrimination Tribunal has given several decisions in which it has found discrimination against persons of Roma origin in the fields of access to and provision of goods and services, particularly housing.¹²⁵

¹²³ Ombudsman for Minorities, *Annual Report 2006*. Available at: [http://www.vahemmistovaltuutettu.fi/intermin/vvt/home.nsf/files/Ombudsman_For_Minorities_06/\\$file/Ombudsman_For_Minorities_06.pdf](http://www.vahemmistovaltuutettu.fi/intermin/vvt/home.nsf/files/Ombudsman_For_Minorities_06/$file/Ombudsman_For_Minorities_06.pdf) (retrieved 27.3.2008).

¹²⁴ For an example, on the basis of a memorandum produced by the Ombudsman for Minorities in 2003, the labour administration commenced a study on the factors that have an effect on the employment of the Roma.

¹²⁵ Decisions of 13.3.2007, 27.2.2007, 31.8.2007, 25.10.2007 and 24.1.2008.

8 IMPLEMENTATION ISSUES

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

Describe briefly the action taken by the Member State

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

The following may be referred to in this respect:

- Each year since the adoption of the Non-discrimination Act a number of seminars has been arranged and a range of other actions taken with a view to disseminating information. Six seminars on the Non-Discrimination Act were held in six major cities during the spring of 2004. A wide range of people was targeted, including those representing NGOs, municipalities and regional administration.¹²⁶ In 2005 inter alia the following action was taken: training was provided to those working at different ministries and other sections of the administration on how to implement the Non-Discrimination Act; Training on equal treatment was integrated into teacher training programmes; a workshop was arranged for those who teach at the police academy; "Diversity Day Conference" was held in Helsinki on 9-10.12.2005. An evaluation seminar, evaluating the action undertaken between 2001-2006 by the SEIS project, a major equality training and information campaign initiative led by the Ministry of Labour, was held in 14-15.12.2006. In 2007, altogether six major network projects were carried out, for instance for the following purposes: increasing general awareness of equality issues through TV spots; promotion of awareness of diversity through art and art teaching; promotion of inclusion in the field of sports and sports associations; a series of seminars regarding diversity at work were arranged; and a comprehensive report on discrimination in Finland was produced.¹²⁷ Since 2007 YES project (Equality is priority) has been carried out and entered into phase 3 in 2009. The project is carried out by the Ministry of Interior in co-operation with other ministries, organisations representing groups under the threat of discrimination and with respective national advisory bodies. YES is funded by the EU Commission through PROGRESS funds and will run until 2013. It is a national Action Plan to promote Non-Discrimination. YES 3 focuses on mainstreaming equality, measuring discrimination, positive measures and multiple discrimination. Within the framework of the project the Ministry of Employment and Economy published in 2009 a manual 'Multiplicity as a Possibility in the Workplace' which aims to foster equality and non-discrimination at work. The next activity will be nationwide training of municipal authorities in the preparation of municipal equality plans, which are required by the Non-Discrimination Act.

¹²⁶ For more details, see <http://www.seis.fi>

¹²⁷ www.yhdenvertaisuus.fi

- A leaflet on the Non-Discrimination Act has been produced by the Ministry of Labour and the SEIS-project, and is available both in print and as a pdf-file in the Internet in Finnish, Swedish, English, Sami, Russian, Arabic, Spanish, French and in sign language as well as in Braille writing.¹²⁸ A number of other information materials, in both electronic and print form, have been developed.¹²⁹ These include a guide for victims of discrimination, translated into nine languages, and a comprehensive training package that is publicly available for diversity and equality trainers free of charge.¹³⁰
- The Non-Discrimination Act has been translated into English by the Ministry of Labour and it is also available in Swedish.¹³¹

The web-page of the Ombudsman for Minorities introduces the relevant anti-discrimination legislation, and provides instructions on how to proceed if one is of the view that she/he has been discriminated against.

A wealth of information is provided by the web-portal www.equality.fi (also www.yhdenvertaisuus.fi), where most of the information is in Finnish, English and Swedish, and occasionally also in other languages

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

The following may be referred to in this context:

- Co-operation and dialogue between the administration and the NGO sector has been relatively frequent and fruitful already in the past, and there are no indications that the trend would be reversing;
- Two key NGOs were invited to partake in the working group which prepared the new anti-discrimination legislation, in addition to which a range of NGOs was heard during the preparation process and after the finalisation of the first draft;
- A new consultative body, *vähemmistöasiain neuvottelukunta* (Advisory Body on Minority Issues) has been set up. The functions of the Board include 1) issuing of proposals and statements on how the supervision and monitoring of the realisation of equal treatment is to be developed and the rights of and position of foreigners are to be safeguarded, and 2) to develop means of co-operation between government (administration) and NGOs in matters relating to supervision and monitoring of the realisation of equal treatment.¹³² The body deals with discrimination on the basis of ethnicity. It works in close co-operation with the Ombudsman for the Minorities. The Advisory Board is composed of a chairman, vice-chairman and a maximum number of 14 other members with alternate members.

¹²⁸ http://www.yhdenvertaisuus.fi/english/what_is_equality/legislation/

¹²⁹ See http://www.yhdenvertaisuus.fi/english/what_is_equality/legislation/ and www.seis.fi

¹³⁰ http://www.yhdenvertaisuus.net/seis-koulutusmateriaali/SEIS_koulutusmateriaali.pdf

¹³¹ <http://www.finlex.fi/fi/laki/kaannokset/2004/en20040021.pdf>

¹³² Section 3 of the Decree on the Ombudsman for Minorities.



Key ministries, social partners, the Directorate of Immigration, association of municipalities and five NGOs are represented in the Board.

- A number of other advisory bodies also exist. These include the Advisory Board on Youth Issues (*Valtion nuorisosiain neuvottelukunta* NUORA), *Valtakunnallinen vammaisneuvosto* (The National Council on Disability), Advisory Board for Rehabilitation (*Kuntoutusasiain neuvottelukunta*), *Etnisten suhteiden neuvottelukunta* (Advisory Board on Ethnic Relations ETNO) and Advisory Board on Roma Affairs (*romanasiasiain neuvottelukunta* RONK).

One might also note that according to section 14 of the Constitution “[t]he public authorities shall promote the opportunities for the individual to participate in societal activity and to influence the decisions that concern him or her.” Thus there exists also a constitutional obligation to enhance a meaningful dialogue.

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

The official policy line has been, already prior to the Directives, to engage the two sides of the industry in anti-discrimination and anti-racism efforts.

This is partly due to the fact that the Ministry of Labour used to have the main responsibility for developing and implementing official anti-discrimination policies, and that it naturally has very close links to the two sides of the industry. In addition one should take note of the following:

- Representatives of the social partners were involved in the preparation of the new equality legislation;
- Social partners are represented in the afore-mentioned new advisory body, the Advisory Body on Minority Issues (*vähemmistöasiain neuvottelukunta*).

The social partners have reviewed the collective labour agreements to verify that they do not have discriminatory provisions.

- d) *to specifically address Roma and Travellers*

This area is relatively well tackled, as there are a number of bodies that deal with discrimination/equality and that include representatives of the Roma. These include, most importantly, the Advisory Board on Romani Affairs (RONK), which was established already in 1956, the Advisory Board on Minorities, and the Advisory Board for Ethnic Relations. The task of the Advisory Board on Romani Affairs is to enhance the equal participation of the Roma population in the Finnish society, to improve their living conditions and socio-economic status and to promote their culture. The Advisory Board functions in conjunction with the Ministry of Social Affairs and Health. There are also four regional Advisory Boards for Roma Affairs which act at the regional level.

The Advisory Board for Ethnic Relations seeks to promote interaction between Finland's ethnic minorities and the authorities, NGOs, the political parties and the social partners, and to provide the ministries with immigrant and minority policy expertise in the interests of promoting ethnically equal and diverse society. There are also three regional Advisory Boards for Ethnic Relations.

An effort to take the Roma into account has been made also in the area of dissemination of information, and some of the available materials are specifically targeted at the Roma or at e.g. employers with a view to promoting the employment opportunities of Roma.¹³³

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).*

Section 10 of the Non-Discrimination Act [*yhdenvertaisuuslaki* (21/2004)] provides that a court may, in a case that is being processed by it, change or ignore contractual terms that are contrary to the prohibition provided in section 6 (on discrimination) or section 8 (on victimization) of the Act. Contractual terms are considered to include commitments relating to the size of remuneration. Section 10 applies also to collective agreements.

One should also note that section 36 of the Contracts Act [*laki varallisuusoikeudellisista oikeustoimista* (228/1929)] ordains that if a clause of a contract is unreasonable or if it leads to an unreasonable situation, such a clause can be adjusted or be completely disregarded. In most cases a discriminatory clause would most probably be found to be "unreasonable". Also the Employment Contracts Act [*työsopimuslaki* (55/2001)] has a special provision concerning employment contracts; a provision of a contract which is plainly discriminatory is to be considered null and void.¹³⁴ Occupational Health and Safety Authorities (*työsuojeluviranomaiset*) supervise compliance with the Non-Discrimination Act and labour legislation in the area of working life.

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

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

¹³³ See e.g. www.equality.fi; and www.romani.fi (retrieved 27.3.2008).

¹³⁴ Employment Contracts Act, section 9:2.



No such laws, regulations or rules should exist. In the process of transposing the two Directives the pertinent ministries reviewed legislation in their respective administrative fields, but did not come up with any discriminatory laws, regulations or rules, and therefore it was not deemed necessary to abolish any laws.¹³⁵ In addition it might be mentioned, that the pertinent articles of Constitution require that the legislator shall not enact laws that are contrary to the principle of equal treatment. Should a court of law find that a particular legal provision however is in an apparent conflict with the principle of equal treatment as laid down in section 6 of the Constitution, it must not apply that provision.¹³⁶

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

¹³⁵ This is because the principle of equal treatment has been strongly embedded in the Finnish legal system already for a long time, and because the Constitutional Law Committee of the Parliament reviews all legislation that is suspected of possibly infringing basic rights.

¹³⁶ Section 106 of the Constitution.



9 CO-ORDINATION AT NATIONAL LEVEL

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

Discrimination issues are a good example of a policy area where responsibility is divided and action is taken by several government departments. In fact, each ministry has a duty to promote equal treatment across the different grounds in its own sphere of work. For instance the Ministry of Employment and the Economy is in charge of equal treatment issues in the field of employment, including self-employment. As regards discrimination on the basis of ethnic origin, the responsibility for coordination is vested in the Ministry of the Interior. The Ministry of Education is primarily in charge of coordination relating to matters pertaining to youth issues and religious issues, while the Ministry for Social and Health Affairs is primarily in charge of matters pertaining to elderly people and people with disabilities, gender equality and at least some aspects related to LGBT-issues. The Ministry of Justice is responsible for maintaining and developing the legal order and legal safeguards as well as for overseeing the structures of democracy and the fundamental rights of citizens. In this role it has set up a committee ("Equality Committee") to prepare a reform of the Finnish non-discrimination legislation. The committee, which carries out its work independently, is comprised of representatives of sector ministries working in the field of equality and anti-discrimination



ANNEX

- 1. Table of key national anti-discrimination legislation**
- 2. Table of international instruments**

ANNEX 1: TABLE OF KEY NATIONAL ANTI-DISCRIMINATION LEGISLATION

Name of Country: Finland

Date 31 December 2009

Title of Legislation (including amending legislation)	In force from:	Grounds covered	Civil/Administrative/ Criminal Law	Material Scope	Principal content
Constitution [<i>perustuslaki</i> (731/1999)]. Up-to-date legislation available online free of charge at: www.finlex.fi (some of it also in English and/or other languages).	1/2000	- non-exhaustive list of grounds - grounds explicitly mentioned: sex, age, origin, language, religion, belief, opinion, health, disability - covers also "other reasons concerning a person"	Constitutional Law	- very broad scope, but primary significance relates to exercise of public power	- prohibits the putting of a person into a different position on a prohibited ground if no acceptable reason can be provided
Non-Discrimination Act, as amended by laws 50/2006, 978/2007, 690/2008 and 84/2009 [<i>yhdenvertaisuuslaki</i> (21/2004)]	2/2004	- non-exhaustive list of grounds - grounds explicitly mentioned: age, ethnic or national origin, nationality, language, religion, belief, opinion, state of health, disability, sexual orientation - covers also "other	Civil / administrative Law	- for ethnic origin: broadly the same as in Racial Equality Directive -for other grounds: employment and education/training	- principal instrument of transposition - prohibits direct and indirect discrimination, harassment and instruction and order to discriminate - lays out (some of

Title of Legislation (including amending legislation)	In force from:	Grounds covered	Civil/Administrative/ Criminal Law	Material Scope	Principal content
		reasons relating to a person”;			the) duties of the Discrimination Tribunal and the Ombudsman for Minorities
Chapter 11, section 9 of Penal Code, as amended by law 578/1995 [<i>rikoslaki</i> (391/1889)]	9/1995	- non-exhaustive list of grounds - grounds expressly covered: race, national or ethnic origin, colour, language, sex, age, family relations, sexual orientation, health, religion, opinion, political or industrial activity - covers also “other comparable factors”	Criminal Law	- provision of services, practicing of a profession or a source of livelihood, exercise of public powers, organising of public events	- if discrimination is found, the perpetrator may be convicted to fines or to imprisonment for up to six months
Chapter 47, section 3 of the Penal Code, as amended by law 302/2004 [<i>rikoslaki</i> 391/1889)]	as amend- ed 5/2004	- non-exhaustive list of grounds - grounds expressly mentioned include: race, national or ethnic origin, nationality, colour,	Criminal Law	-employment, including recruitment	- if discrimination is found, the perpetrator may be convicted to fines or to imprisonment for up to six months

Title of Legislation (including amending legislation)	In force from:	Grounds covered	Civil/Administrative/ Criminal Law	Material Scope	Principal content
		language, sex, age, family relations, sexual orientation, health, religion, societal belief, political or industrial activity - covers also "other comparable factors/statuses"			
<ul style="list-style-type: none"> - Chapter 2, section 2 of Employment Contracts Act, as amended by law 23/2004 (<i>työsopimuslaki</i> 55/2001) - Chapter 2, section 11 of Civil Servant Act [<i>valtion virkamieslaki</i> (750/1994)] - Chapter 3, section 12 of Act on Civil Servants in Municipalities [<i>laki kunnallisesta viranhaltijasta</i> (304/2003)] - Chapter 2, section 15a of 	2/2004	<ul style="list-style-type: none"> - non-exhaustive lists of grounds - grounds expressly mentioned include: age, health, disability, national or ethnic origin, nationality, sexual orientation, language, religion, opinion, belief, family relations, activity in an employees association, political activity 	Civil Law	Different types of employment	- refers to Non-Discrimination Act as to the applicable definition of discrimination + e.g. for applicable rules re burden of proof

Title of Legislation (including amending legislation)	In force from:	Grounds covered	Civil/Administrative/ Criminal Law	Material Scope	Principal content
Seaman's Act [<i>merimieslaki</i> (423/1978)]		- covers also "other comparable factors"			
Provincial act on Prevention of Discrimination in the Province of Åland ([<i>Landskapslag om förhindrande av diskriminering i landskapet Åland</i> (66/2005)]	12/2005	- grounds explicitly covered: ethnic belonging, religion and other conviction, age, disability and sexual disposition	Civil Law	- Applicable in the Åland Islands; civil servants employed by the Ål or one of the municipalities on Ål, schools, social care and health care, some parts of provision of goods and services	Prohibits direct and indirect discrimination, harassment, instructions to discriminate and victimization; lays down some of the duties of the Ombudsman

ANNEX 2: TABLE OF INTERNATIONAL INSTRUMENTS

Name of country: Finland

Date: 31 December 2009

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

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?
Convention on the Elimination of All Forms of Racial Discrimination	Yes	Yes	None	Yes	Yes
Convention on the Elimination of Discrimination Against Women	Yes	Yes	None	Yes	Yes
ILO Convention No. 111 on Discrimination	Yes	Yes	None	Not applicable	Yes
Convention on the Rights of the Child	Yes	Yes	None	Not applicable	Yes
Convention on the Rights of Persons with Disabilities	Yes	No	Not applicable	Signed, not ratified	Not before ratification