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Country report

Non-discrimination

Finland

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Country report

Non-discrimination

Finland

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EXECUTIVE SUMMARY

1. Introduction

Until the end of the 1980s, Finland was one of the most culturally homogeneous countries in Europe. The number of immigrants was minimal. In the 1990s a major shift from emigration into immigration took place, and the number of foreign citizens grew from 26 300 in 1990 to 168 000 in 2010. Currently the number of foreigners represents some 6 % of the total population of 5 470 000.

Finland is home to a number of national minorities, such as the Roma (10 000 people), Jewish, Tatar and Russian minorities, as well as the indigenous Sámi people (9 000). In addition to the traditional Finnish Roma minority, some 500 people belonging to the Roma minority come annually to Finland from Romania and Bulgaria. Their social and economic standing is much worse than the Finnish Roma minority, who have additionally been able to maintain much of their cultural traditions such as Roma clothing and language.

Religious diversity in Finland has increased during the past 20 years, as the size of Islamic communities has grown from 30 000 to 60 000 people due to the arrival of immigrants from Muslim countries. Their percentage of the population is still less than 1 %. At present, 73 % of the population belongs to the Evangelical Lutheran Church. Other religious groups are considerably smaller, the next largest community being the Russian Orthodox Church (1 %). Around 23 % of the population do not belong to any religious community.

A considerable change in attitudes has taken place with respect to matters relating to sexual orientation. Homosexuality was penalised in criminal law until 1971, discrimination on the basis of sexual orientation was prohibited in 1995, and in 2001 the Act on Registered Partnerships guaranteed registered same-sex couples an almost equal position on marriage. In 2014 the Parliament changed the Marriage Act in order to open marriage to include same-sex couples. The change comes into force in March 2017. The Lutheran church has also accepted ministers who are homosexual or transsexual.

It is quite generally seen as a fact that age discrimination exists in Finland. In one survey, every third respondent saw that discrimination on the basis of age takes place 'frequently' or 'every now and then in his or her workplace. However, there have been only a few court cases dealing with age discrimination.

Regarding the situation of people with disabilities, the legal and political focus has remained on the specific services that people with disabilities need, i.e. on the traditional social policy approach, but not so much on equal treatment. The focus is, however, gradually shifting towards a more equal rights-based approach, which the renewal of the Non-Discrimination Act has strengthened.

NGOs representing different discrimination grounds have for several years experienced good cooperation in the work against discrimination.

2. Main legislation

The main provisions pertaining to discrimination have been laid down in the Constitution, the Non-Discrimination Act and the Penal Code. As a general clause, a prohibition on discrimination is also included in many statutory acts.

Section 6 of the Constitution¹ provides for equality and prohibits discrimination. The main thrust of this constitutional guarantee of non-discrimination is to ensure formal equality, i.e. the principle that people in similar circumstances are to be treated similarly, but it also aims to reach full, substantive equality in practice.

The constitutional prohibition of discrimination may be directly invoked in courts, and regular laws are to be interpreted in accordance with it. So far the constitutional anti-discrimination provision has been applied mainly in situations involving the use of public power, but it may, in some instances, have a bearing on relationships between private parties as well.

The new Non-Discrimination Act,² which entered into force on 1 January 2015, is the main instrument transposing the EU directives on equal treatment (the Racial Equality Directive and the Employment Equality Directive) into national law. The current Non-Discrimination Act repealed the prior Non-Discrimination Act, which was in force from 2004 to 2014.³

Substantially, the Non-discrimination Act offers the protection required by the two EU directives on equal treatment, and in many respects it goes beyond the minimum requirements set forth in them.

The Penal Code⁴ has two provisions on discrimination. The first covers discrimination, inter alia, in the provision of services and in the discharge of public duties, while the second covers discrimination in the field of employment. There is a considerable amount of case law under the first provision, mainly regarding ethnic discrimination. Punishment for discrimination laid down by law is in the form of fines or imprisonment for up to six months. In practice the sentence for discrimination has been fines.

All the main domestic anti-discrimination provisions prohibit, either explicitly or implicitly, discrimination on the basis of a wide variety of grounds, including age, ethnic and racial origin, religion, belief, sexual orientation and disability. Gender equality is addressed in the Constitution and in the Penal Code, and in a separate law of general application, the Act on Equality between Women and Men. Finnish legislation does not explicitly address multiple discrimination.

The Åland Islands, which is an autonomous Swedish-speaking province of Finland with about 29 000 inhabitants and has legislative powers in certain particular subject areas such as employment, education and social welfare, has adopted its own set of non-discrimination laws. These laws prohibit discrimination on the grounds of ethnic origin, religion and belief, disability, age, sex and sexual orientation. The legislation in the Åland Islands complies with the directives.

3. Main principles and definitions

The new Non-Discrimination Act expanded the scope of protection against discrimination. The Act is applicable to all public and private activities, excluding private life, family life and practice of religion. The protection against discrimination is equal regardless of whether the discrimination is based on origin, age, disability, religion, belief, sexual orientation, nationality, language, opinion, political activity, trade union activity, family relationships, state of health or other personal characteristics.

¹ The Constitution (731/1999) [*perustuslaki*].

² The Non-Discrimination Act (1325/2014) [*Yhdenvertaisuuslaki*].

³ Obviously there is no case law on applying the new Non-Discrimination Act yet. Also the case law on the repealed Non-Discrimination Act is very limited. The main reason being that risk of having to pay the legal cost of the defendant greatly affects the possibilities taking the cases of discrimination into court.

⁴ The Penal Code [*rikoslaki* (39/1889)].

Proportionate differential treatment that aims at advancing genuine equality or preventing or reducing effects of discrimination is not discrimination according to the Non-Discrimination Act.

The Non-Discrimination Act sets an obligation to promote equality to public authorities, education providers, educational institutes and employers. These are required to draw up a plan to promote equality. The obligation to draw up an equality plan concerns employers who regularly have a staff of at least 30 employees. In this way the national legislation goes beyond the minimum requirements laid down in the directives.

Public authorities, education providers and employers must, where necessary, make reasonable accommodations to ensure that employees with disabilities have equal access to services, work or education and training. Persons with disabilities must also have equal access to goods and services. The disability of a person must be taken into account in provision of services, for example, by arranging accessible passage for those who need it whenever possible. Employers were already obliged under the former legislation to make reasonable accommodations, but this is a new obligation for providers of goods and services, such as hotels, restaurants and retailers.

The Non-Discrimination Act carefully follows the wording and concepts of the EU directives on equal treatment (the Racial Equality Directive and the Employment Equality Directive) in the majority of the definitions used in the Non-Discrimination Act.

The definition of direct discrimination (if someone is treated less favourably than the way another person is treated, has been treated or would be treated in a comparable situation) and indirect discrimination (where an apparently neutral provision, criterion or practice puts a person at a particular disadvantage compared with other persons) are directly derived from the directives.

Also, in employment differential treatment is only allowed within the exception provided in the directives for genuine and determining occupational requirements. It is further required that the treatment is based on the nature of the particular occupational activities concerned or of the context in which they are carried out providing that the treatment is proportionate.

Where the Finnish Non-Discrimination Act differs from the directives in their scope of applicability is the general justification for differential treatment in areas outside employment. According to the Non-Discrimination Act's definition of direct discrimination, differential treatment is justified if the treatment is based on legislation and the treatment has an acceptable aim and the means used are in due proportion for achieving this aim.

The Non-Discrimination Act sets a duty to provide reasonable accommodation in order to provide a person with disabilities with equal access to authorities, and to receive education as well as goods and services. This obligation to reasonable accommodation extends to authorities, those providing education and those providing goods and services, but there is no duty to provide reasonable accommodation in respect of other grounds in the public or the private sector.

In employment the employer is liable for reasonable accommodation in order to provide a person with disabilities equal access to employment, cope at work and advance in their career. Failure to meet the duty of reasonable accommodation is directly defined as discrimination in the Non-Discrimination Act.

4. Material scope

The new Non-Discrimination Act expands the material scope of protection against discrimination. The act is applied to all public and private activities, excluding private life, family life and the practice of religion. This means that all activity of authorities (both governmental and municipal), education, providing goods and services and employment is included in the scope of the act.

Therefore in employment the scope includes, whatever the branch of activity and at all levels of the professional hierarchy, in both private and public sectors: conditions for access to employment, to self-employment or to occupation including selection criteria; recruitment and working conditions and promotion; vocational guidance; all types of vocational training and retraining; and membership of and involvement in an organisation of workers or employers.

As the scope extends to all activity of authorities and all provision of goods and services it includes among other situations: education; social and health services; social benefits and advantages; military or civilian service, including voluntary military service for women; and provision of housing and other supply of services and goods available to the public.

The material scope of the act does not differ depending on the protected grounds for discrimination. Discrimination is similarly prohibited on the five grounds protected in the directives: ethnic origin,⁵ age, disability, religion or belief and sexual orientation, as well as on other grounds included in the Finnish Non-Discrimination Act: nationality, language, opinion, political activity, trade union activity, family relationships, state of health or other personal characteristics.

The protection offered is primarily for natural persons and legal persons are not protected as a general rule. The liability for discrimination applies to both natural and legal persons.

The laws adopted by the Åland Islands ban discrimination on the grounds of ethnic origin, religion and belief, disability, age and sexual orientation as follows: discrimination in the area of employment is prohibited on all grounds; discrimination in the area of health and social services is prohibited on the grounds of ethnic origin, religion and belief and sexual orientation; discrimination in the areas of education and provision of goods and services is prohibited on the grounds of ethnicity, religion and belief, disability and sexual orientation.

5. Enforcing the law

As regards areas covered by the Non-Discrimination Act, a victim of discrimination may turn to the Non-Discrimination Ombudsman for advice and assistance in having the discrimination examined. Persons who consider that they have been discriminated against may also ask the Ombudsman to lead conciliation proceedings. In cases other than employment the Ombudsman may issue statements on any discrimination case submitted to him. The statements of the Ombudsman are not legally binding.

The National Non-Discrimination and Equality Tribunal may confirm a settlement between the parties or prohibit the continuation of a conduct that is contrary to the prohibition of discrimination or victimisation. The tribunal does not have jurisdiction in employment. The decisions of the tribunal are binding, but can be appealed against in Administrative

⁵ The Non-Discrimination Act uses the term 'origin', which is defined in the government proposal as including ethnic origin, national origin, social origin, race and colour of skin.

Court. 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.

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 other less severe cases of discrimination the Occupational Health and Safety Authority can issue an improvement notice. The improvement notices the Occupational Health and Safety Authorities issue are legally binding.

As regards the exercise of public powers, employment, education and provision of goods and services, a victim of discrimination may file a claim, in a district court, for compensation under the Non-Discrimination Act. The payment of compensation is not connected to criminal liability. The compensations that have been awarded in recent years have ranged from EUR 4 000 to EUR 10 000.

When applying the Non-Discrimination Act the burden of proof shifts from the complainant to the respondent. First it is up to the complainant to establish facts from which it may be presumed that the prohibition of discrimination has been violated then it is for the defendant to demonstrate that the prohibition of discrimination has not been violated.

If a discriminatory decision is made in the exercise of public powers, the victim of discrimination may make use of the rectification procedure or some other ordinary channel of appeal. They may also turn to the Parliamentary Ombudsman or the Chancellor of Justice in order to file a complaint. These bodies may not amend or annul a particular decision, but may bring legal action against an official and/or issue their opinions on the correct interpretation of the law.

Only the victims of discrimination and not, for example, NGOs acting in support or on behalf of the victims of discrimination can initiate and have a legal standing in discrimination cases in courts. But an organisation with an interest in advancing equality and the Non-Discrimination Ombudsman have a right to bring a specific case before the National Non-Discrimination and Equality Tribunal if the person who considers that he or she has been discriminated against gives his or her consent to this.

Some human rights NGOs provide expert advice to the victims on how to bring legal action and they have used situation testing in exposing discrimination. The use of statistical evidence is possible, but since the evaluation of the evidence is based on free weighing, it is always up to the court what, if any, weight will be given to such evidence.

Discrimination is an offence punishable under the Penal Code⁶ most importantly in the provision of goods and services and employment. A person found guilty of discrimination may be convicted to fines or to imprisonment for up to six months. Most of the discrimination cases to which the Penal Code has been applied have dealt with denial of access to restaurants or other places open to the public on the grounds of ethnic origin. There have also been some cases where the Penal Code prohibition has been applied to discrimination based on religion or disability.

⁶ The Penal Code [*rikoslaki* (39/1889)], Chapter 11 Section 11 and Chapter 47 Section 3.

6. Equality bodies

To meet the requirements of the Racial Equality Directive the Ombudsman for Minorities was set up in 2001 to provide assistance to victims of ethnic discrimination. From the beginning of 2015 the name of that Ombudsman was changed to the Non-Discrimination Ombudsman and the competences were expanded to cover all grounds of discrimination except gender and gender identity, which remain the task of the Equality Ombudsman.

The designated tasks of the Ombudsman include assisting the victims of discrimination in pursuing their complaints concerning discrimination, assisting in planning the promotion of equality, giving general recommendations in preventing discrimination, conducting independent surveys concerning discrimination, publishing independent reports and promoting equality and taking measures to advance reconciliation in following the Non-Discrimination Act.

In individual cases the Ombudsman can also give a justified statement on the prevention, continuation or repetition of discrimination unless the question falls within the competences of the Occupational Health and Safety Authorities – i.e. employment.

The National Non-Discrimination and Equality Tribunal does not carry out 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. The tribunal is an independent and impartial judicial body whose decisions are binding and can be appealed against.

7. Key issues

The Non-Discrimination Act of 2004 required authorities and those providing education to draw up a plan for fostering ethnic equality. Even though the requirement was only on ethnic equality, from the beginning the Ministry of Labour advice was to draw up such plans for all grounds of discrimination. Equality plans covering multiple grounds have since then been drafted in hundreds of municipalities, other authorities and lots of other organisations such as NGOs, student unions and companies, even though for many it is a voluntary plan. In their equality plans organisations and companies have been analysing how their services and functions meet the actual needs of various clients, what kind of reasonable accommodations are needed and how equality in the workplace can be secured. What started as voluntary equality plans in companies will be mandatory from 2017 when the requirement for companies employing more than 30 employees to draft an equality plan will come into force according to the new Non-Discrimination Act. All the equality plans will have to evaluate the realisation of equality, taking into consideration all discrimination grounds.

The legislative process of renewing the Non-Discrimination Act was exceptionally long and difficult. It started in 2003 when the Parliament required, while passing the first Non-Discrimination Act, legislation that would bring all discrimination grounds to the same level of protection as employment.

The Government proposal that was finally presented to the Parliament in 2014 would have weakened the concept of direct discrimination in areas where EU anti-discrimination directives are not applicable, but this was not approved by the Parliament. After the Constitutional Law Committee had consulted academics and NGOs the Parliament accepted a strengthened prohibition of indirect discrimination where differential treatment is only allowed if it has an acceptable aim from the perspective of human rights and the means used are appropriate and necessary for achieving this aim.

The concept of direct discrimination used in areas where EU anti-discrimination directives are applicable is unique. It generally justifies differential treatment, such as on the basis

of ethnic origin, if the treatment is based on legislation and has an acceptable aim and the means used are in due proportion for achieving this aim.

During the preparation of the new Non-Discrimination Act one of the major disagreements was about the competences of the Non-Discrimination Ombudsman in employment. Unlike in most European Union member states, the former equality body of Finland, the Ombudsman for Minorities, did not have a major role in combating discrimination in employment. After the European Union had started infringement procedures against Finland, the legislative compromise was to grant the forming Non-Discrimination Ombudsman a possibility to give a recommendation on the prevention of discrimination in employment. The specific interpretation of the prohibition of discrimination in employment remains the responsibility of the Occupational Health and Safety Authorities.

In analysing whether the available sanctions are effective, proportionate and dissuasive as required by the directives, the following elements can be summarised. 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 Non-Discrimination and Equality Tribunal. On the other hand, some particularly robust remedies, such as reinstatement, are not available. As the compensation for discrimination can only be requested in the District Court the risk of having to pay the legal cost of the defendant greatly affects the real possibilities of seeking remedies against discrimination.

RÉSUMÉ

1. Introduction

La Finlande a été jusqu'à la fin des années 1980 l'un des pays les plus homogènes d'Europe sur le plan culturel. Le nombre d'immigrants y était minime. Un changement s'est opéré au cours des années 1990: l'immigration a pris le pas sur l'émigration et le nombre de citoyens étrangers est passé de 26 300 en 1990 à 168 000 en 2010. Le nombre d'étrangers représente aujourd'hui 6 % environ de l'ensemble de la population (5 470 000 habitants).

La Finlande abrite un certain nombre de minorités nationales telles que les minorités rom (10 000 personnes), juive, tatare et russe ainsi que le peuple indigène des Sámi (9 000 personnes). Outre la minorité rom finlandaise traditionnelle, quelque 500 Roms arrivent chaque année en Finlande en provenance de Roumanie et de Bulgarie: ils sont dans une situation sociale et économique beaucoup plus précaire que les membres de la minorité rom finlandaise, lesquels sont d'ailleurs parvenus à maintenir largement leurs traditions culturelles (tenues vestimentaires et langue en particulier).

La diversité religieuse s'est accentuée en Finlande au cours des vingt dernières années avec des communautés islamiques passant de 30 à 60 000 personnes par suite de l'arrivée d'immigrants en provenance de pays musulmans. Leur pourcentage reste cependant inférieur à 1 % de la population. À l'heure actuelle, 73 % de la population appartient à l'Église évangélique luthérienne. Les autres groupes religieux sont sensiblement plus restreints, le plus important d'entre eux étant l'Église orthodoxe russe (1 %). Environ 23 % des Finlandais ne font partie d'aucune communauté religieuse.

Un changement considérable a été observé au niveau des attitudes vis-à-vis des questions d'orientation sexuelle. L'homosexualité était érigée en infraction pénale jusqu'en 1971. La discrimination fondée sur l'orientation sexuelle a été interdite en 1995 et la loi de 2001 sur les partenariats enregistrés a conféré aux couples de même sexe un statut pratiquement équivalent au mariage. En 2014, le Parlement a modifié la loi sur le mariage afin d'ouvrir celui-ci aux couples homosexuels. Cet amendement prend ses effets en mars 2017. L'Église luthérienne accepte désormais des pasteurs homosexuels ou transsexuels.

La discrimination liée à l'âge est généralement perçue comme une réalité en Finlande. Un sondage a montré qu'un tiers des personnes interrogées estimaient qu'une discrimination fondée sur l'âge survenait «fréquemment» ou «de temps à autre» sur leur lieu de travail. Le contentieux judiciaire en la matière reste cependant peu abondant.

En ce qui concerne la situation des personnes souffrant d'un handicap, l'objectif politique et juridique reste axé sur les services spécifiques dont les personnes handicapées ont besoin – autrement dit sur une approche traditionnelle de politique sociale plutôt que sur l'égalité de traitement. On observe toutefois une réorientation progressive vers une approche fondée davantage sur l'égalité des droits, que la réforme de la loi sur la non-discrimination a renforcée.

Des ONG représentant différents motifs de discrimination entretiennent depuis plusieurs années de bonnes relations de coopération dans le cadre de leur action contre la discrimination.

2. Législation principale

Les principales dispositions en matière de discrimination figurent dans la Constitution, la loi sur la non-discrimination et le code pénal. On trouve également une interdiction de discrimination dans de nombreux actes législatifs au titre de clause générale.

L'article 6 de la Constitution⁷ consacre l'égalité et interdit la discrimination. L'idée maîtresse de cette garantie constitutionnelle est d'assurer une égalité formelle, autrement dit de consacrer le principe selon lequel les personnes doivent être traitées de façon similaire dans des situations similaires; mais également de parvenir concrètement à une égalité totale et véritable.

L'interdiction constitutionnelle de discrimination peut être directement invoquée en justice, et l'interprétation des lois ordinaires doit lui être conforme. La disposition constitutionnelle interdisant la discrimination a été principalement appliquée jusqu'ici à des situations impliquant l'usage du pouvoir des autorités publiques, mais elle peut également concerner, dans certains cas, les relations entre parties privées.

La nouvelle loi sur la non-discrimination,⁸ qui a pris ses effets le 1^{er} janvier 2015, est le principal instrument transposant en droit interne les directives de l'UE relatives à l'égalité de traitement (directive sur l'égalité raciale et directive sur l'égalité dans le domaine de l'emploi). L'actuelle loi sur la non-discrimination abroge la loi antérieure du même nom, qui a été en vigueur de 2004 à 2014.⁹

La loi sur la non-discrimination offre la protection exigée par les deux directives européennes relatives à l'égalité de traitement, et va même à de nombreux égards au-delà de leurs exigences.

Le code pénal¹⁰ comporte deux dispositions concernant la discrimination. La première vise notamment la discrimination dans l'offre de services et dans l'exercice de charges publiques, tandis que la seconde vise la discrimination dans le domaine de l'emploi. Il existe une jurisprudence considérable invoquant la première disposition, principalement concernant la discrimination ethnique. La discrimination est sanctionnée par la loi sous la forme d'amendes et de peines d'emprisonnement pouvant atteindre six mois. Dans la pratique, elle est sanctionnée par des amendes.

Les principales dispositions nationales de lutte contre la discrimination interdisent toutes, de manière explicite ou implicite, la discrimination fondée sur un large éventail de motifs, y compris l'âge, l'origine ethnique et raciale, la religion, les convictions, l'orientation sexuelle et le handicap. L'égalité des sexes est abordée dans la Constitution et dans le code pénal, ainsi que dans une loi séparée d'application générale, à savoir la loi relative à l'égalité entre femmes et hommes. La législation finlandaise n'aborde pas explicitement la question de la discrimination multiple.

Les îles Åland, une province finlandaise autonome de langue suédoise qui compte 29 000 habitants environ et possède un pouvoir législatif dans certains domaines particuliers tels que l'emploi, l'enseignement et la protection sociale, ont adopté leur propre ensemble de lois antidiscrimination. Ces lois interdisent la discrimination fondée sur les motifs de l'origine ethnique, de la religion et des convictions, du handicap, de l'âge, du sexe et de l'orientation sexuelle. La législation des îles Åland est conforme aux directives.

⁷ La Constitution (731/1999) [*perustuslaki*].

⁸ La loi sur la non-discrimination (1325/2014) [*Yhdenvertaisuuslaki*].

⁹ Il va de soi qu'il n'existe pas encore de jurisprudence sur l'application de la nouvelle loi sur la non-discrimination, et la jurisprudence découlant de la loi abrogée était elle-même peu abondante – la raison principale étant que le risque de devoir payer les frais de justice de la partie défenderesse réduit fortement les possibilités de porter une affaire de discrimination devant les tribunaux.

¹⁰ Le code pénal (39/1889) [*rikoslaki*].

3. Principes généraux et définitions

La nouvelle loi sur la non-discrimination élargit le champ de protection contre la discrimination. Elle s'applique à toutes les activités publiques et privées, à l'exclusion de la vie privée, de la vie familiale et de la pratique religieuse. La protection est la même quel que soit le motif de discrimination: origine, âge, handicap, religion, convictions, orientation sexuelle, nationalité, langue, opinions, activité politique, activité syndicale, relations familiales, état de santé ou autre caractéristique personnelle.

Aux termes de cette loi, une différence de traitement proportionnée, destinée à faire progresser une véritable égalité ou à prévenir ou réduire des effets discriminatoires, n'est pas constitutive d'une discrimination.

La loi sur la non-discrimination impose aux autorités publiques, aux prestataires de services éducatifs, aux établissements d'enseignement et aux employeurs une obligation de promouvoir l'égalité. Les employeurs occupant régulièrement 30 personnes au moins sont tenus dans le cadre de cette obligation de définir un plan de promotion de l'égalité. La législation nationale va ainsi au-delà des exigences minimales visées par les directives.

Les autorités publiques, les prestataires de services éducatifs et les employeurs doivent, s'il y a lieu, procéder à des aménagements raisonnables pour assurer aux travailleurs handicapés une égalité d'accès aux services, au travail ou à l'enseignement et la formation. Les personnes handicapées doivent également bénéficier d'une égalité d'accès aux biens et aux services. Le handicap d'une personne doit être pris en compte dans le cadre de la prestation de services (aménagement si possible d'un passage accessible à ceux qui en ont besoin, par exemple). L'ancienne loi obligeait déjà les employeurs à procéder à des aménagements raisonnables, mais il s'agit ici d'une nouvelle obligation à l'intention des fournisseurs de biens et de services tels que les hôtels, les restaurants et les commerçants.

La loi sur la non-discrimination respecte scrupuleusement le libellé et les concepts des directives de l'UE relatives à l'égalité de traitement (la directive sur l'égalité raciale et la directive sur l'égalité dans le domaine de l'emploi) en ce qui concerne la plupart des définitions qu'elle contient.

La définition de la discrimination directe (situation dans laquelle une personne est traitée moins favorablement qu'une personne n'est traitée, n'a été traitée ou ne serait traitée dans une situation comparable) et celle de la discrimination indirecte (situation dans laquelle une disposition, un critère ou une pratique apparemment neutre défavorise particulièrement une personne par rapport à d'autres) sont directement tirées des directives.

De même, une différence de traitement en matière d'emploi est uniquement admise dans le cadre de la dérogation prévue par les directives en rapport avec les exigences professionnelles véritables et déterminantes. Il est exigé en outre que le traitement se fonde sur la nature des activités professionnelles spécifiquement visées ou du contexte dans lequel elles s'exercent, et que le traitement en question soit proportionné.

C'est en ce qui concerne la justification générale d'une différence de traitement dans des domaines en dehors de l'emploi que la loi finlandaise sur la non-discrimination diffère des directives en termes de champ d'application. En vertu de la définition de la discrimination directe contenue dans la loi nationale, un traitement différencié est justifié s'il se fonde sur la législation, s'il a un objectif acceptable et si les moyens utilisés sont dûment proportionnés à la réalisation de cet objectif.

La loi sur la non-discrimination contient une obligation d'aménagement raisonnable visant à ce qu'une personne handicapée bénéficie d'une égalité d'accès aux administrations publiques, d'un enseignement et de biens et de services. Cette obligation d'aménagement raisonnable s'étend aux pouvoirs publics, aux prestataires de services éducatifs et aux fournisseurs de biens et de services, mais aucune obligation de ce type n'est prévue pour les autres motifs, que ce soit dans le secteur public ou le secteur privé.

Dans le domaine professionnel, l'employeur est tenu de procéder à un aménagement raisonnable pour qu'une personne handicapée puisse avoir un accès égal à l'emploi, effectuer son travail et progresser dans sa carrière. Un non-respect de l'obligation d'aménagement raisonnable est directement défini comme une discrimination par la loi sur la non-discrimination.

4. Champ d'application matériel

La loi sur la non-discrimination étend le champ matériel de la protection contre la discrimination. Elle s'applique à toutes les activités publiques et privées, à l'exclusion de la vie privée, de la vie familiale et de la pratique religieuse – ce qui implique que le champ d'application de la loi couvre toute activité des autorités (gouvernementales et municipales), l'éducation, la fourniture de biens et de services, et l'emploi.

Dans le domaine de l'emploi, ce champ d'application couvre donc, quelle que soit la branche d'activité et quel que soit le niveau de la hiérarchie professionnelle, tant dans le secteur privé que dans le secteur public: les conditions d'accès à l'emploi, à l'emploi indépendant ou au travail, y compris les critères de sélection; le recrutement et les conditions de travail ainsi que la promotion; l'orientation professionnelle; tous les types de formation professionnelle et de recyclage; et l'affiliation et l'engagement dans une organisation de travailleurs ou d'employeurs.

Étant donné qu'il s'étend à l'ensemble de l'activité des autorités et à l'ensemble de la fourniture de biens et de services, le champ d'application de la loi sur la non-discrimination inclut entre autres: l'enseignement; les services sociaux et de santé; les prestations sociales et avantages sociaux; le service militaire ou civil, y compris le service militaire volontaire pour les femmes; et la fourniture de logements ou d'autres services et biens mis à la disposition du public.

Le champ d'application matériel de la loi ne varie pas selon le motif protégé: la discrimination est interdite de la même manière pour les cinq motifs visés par les directives – à savoir l'origine ethnique,¹¹ l'âge, le handicap, la religion et les convictions, et l'orientation sexuelle – et pour les autres motifs couverts par la loi finlandaise sur la non-discrimination: la nationalité, la langue, les opinions, l'activité politique, l'activité syndicale, les relations familiales, l'état de santé et toute autre caractéristique personnelle.

La protection offerte concerne principalement les personnes physiques, et les personnes morales ne sont, en règle générale, pas couvertes. La responsabilité d'une discrimination s'applique à la fois aux personnes physiques et aux personnes morales.

Les lois adoptés par les îles Åland interdisent comme suit la discrimination fondée sur l'origine ethnique, la religion et les convictions, le handicap, l'âge et l'orientation sexuelle: la discrimination dans le domaine de l'emploi est interdite pour tous les motifs; la discrimination dans le domaine des services sociaux et de santé est interdite lorsqu'elle se fonde sur l'origine ethnique, la religion et les convictions, et l'orientation sexuelle; la

¹¹ La loi sur la non-discrimination utilise le terme «origine», défini dans la proposition gouvernementale comme incluant l'origine ethnique, l'origine nationale, l'origine sociale, la race et la couleur de la peau.

discrimination dans les domaines de l'éducation et de la fourniture de biens et de services est interdite lorsqu'elle se fonde sur l'origine ethnique, la religion et les convictions, le handicap et l'orientation sexuelle.

5. Mise en application de la loi

Pour ce qui concerne les domaines couverts par la loi sur la non-discrimination, une victime de discrimination peut s'adresser au Médiateur finlandais pour la non-discrimination afin d'obtenir des conseils et une assistance en vue de l'examen de son cas. Une personne estimant avoir fait l'objet d'une discrimination peut également demander au Médiateur de mener une procédure de conciliation. En dehors du domaine de l'emploi, le Médiateur peut faire une déclaration sur toute affaire qui lui est soumise – laquelle déclaration n'est pas juridiquement contraignante.

Le Tribunal national contre la discrimination et pour l'égalité peut confirmer un règlement entre les parties ou interdire la poursuite d'un comportement enfreignant l'interdiction de discrimination ou de rétorsions. Le Tribunal n'est pas compétent en matière d'emploi. Ses décisions sont exécutoires, mais peuvent faire l'objet d'un appel auprès de la Cour administrative. Le Tribunal peut également ordonner à une partie de remplir ses obligations en lui imposant une amende conditionnelle. Une ordonnance de paiement de cette amende conditionnelle est prononcée dans le cadre d'une procédure distincte à la demande de la partie requérante, au cas où l'injonction d'interdiction n'est pas suivie d'effet.

Dans le domaine de l'emploi, le respect de la loi sur la non-discrimination par les employeurs est contrôlé par l'autorité pour la sécurité et la santé au travail. Celle-ci peut recevoir des communications émanant de salariés et procéder à des inspections sur place dans le secteur privé. Au cas où elle estime qu'il existe des motifs probables de suspicion quant à une discrimination (telle que décrite par le code pénal), l'autorité en question doit le signaler à un procureur. Lorsque les faits discriminatoires sont moins graves, l'autorité pour la sécurité et la santé au travail peut adresser une notification d'amélioration – laquelle revêt un caractère exécutoire.

En ce qui concerne l'exercice de l'autorité publique, l'emploi, l'éducation et la fourniture de biens et de services, une victime de discrimination peut réclamer, en vertu de la loi sur la non-discrimination, une indemnisation auprès d'un tribunal de district. L'indemnité versée n'est pas liée à une responsabilité pénale. Les montants alloués ces dernières années se sont situés entre 4 000 et 10 000 euros.

L'application de la loi sur la non-discrimination s'accompagne d'un renversement de la charge de la preuve, qui passe de la partie requérante à la partie défenderesse. Il appartient d'abord à la partie requérante d'établir les faits conduisant à présumer un non-respect de l'interdiction de discrimination; il incombe ensuite à la partie défenderesse de démontrer que l'interdiction de discrimination n'a pas été violée.

Lorsqu'une décision discriminatoire est prise dans le cadre de l'exercice d'une autorité publique, la victime de discrimination peut faire appel à la procédure en rectification ou à toute autre voie de recours ordinaire. Elle peut également se tourner vers le Médiateur parlementaire ou le Chancelier de la justice pour porter plainte. Ces instances ne sont pas habilitées à modifier ou annuler une décision particulière, mais elles peuvent intenter une action contre un fonctionnaire et/ou émettre un avis sur l'interprétation correcte de la loi.

Seules les victimes – et non, par exemple, des ONG agissant en soutien ou au nom des victimes – peuvent engager des poursuites et ester en justice dans une affaire de discrimination. Mais une organisation ayant un intérêt à faire progresser l'égalité, de même que le Médiateur pour la non-discrimination, ont le droit de porter une affaire

spécifique devant le Tribunal national contre la discrimination et pour l'égalité à condition que la personne s'estimant lésée y consente.

Certaines ONG de défense des droits de l'homme fournissent des conseils d'expert aux victimes concernant les modalités d'une action en justice, et ont utilisé des tests de situation pour faire état de la discrimination. L'utilisation de preuves statistiques est possible mais, étant donné que l'appréciation des preuves se fonde sur une libre pondération, il appartient toujours à la juridiction saisie de décider du poids – éventuel – qu'elle accorde à ce type d'élément probant.

La discrimination est un délit punissable au titre du code pénal,¹² surtout dans le cadre de l'emploi et de la fourniture de biens et de services. Une personne déclarée coupable de discrimination peut être condamnée à des amendes ou à une peine d'emprisonnement allant jusqu'à six mois. La plupart des affaires de discrimination auxquelles le code pénal a été appliqué concernaient un refus d'accès à des restaurants ou autres lieux ouverts au public en raison de l'origine ethnique. L'interdiction contenue dans le code pénal a également été appliquée, dans quelques cas, à une discrimination fondée sur la religion ou le handicap.

6. Organismes de promotion de l'égalité de traitement

Afin de satisfaire aux exigences de la directive sur l'égalité raciale, la Finlande a institué en 2001 le Médiateur pour les minorités, chargé d'aider les victimes de discrimination ethnique. Le nom de ce Médiateur a été changé début 2015 pour devenir le Médiateur pour la non-discrimination; ses compétences ont été étendues afin de couvrir tous les motifs de discrimination hormis le genre et l'identité de genre, qui continuent de relever du mandat du Médiateur pour l'égalité.

Les tâches assignées au Médiateur comprennent une aide aux victimes de discrimination pour engager une procédure, une assistance au niveau de la planification de la promotion de l'égalité, la formulation de recommandations générales en matière de prévention de la discrimination, la réalisation d'études indépendantes concernant la discrimination, la publication de rapports indépendants et la promotion de l'égalité, et l'adoption de mesures visant à favoriser la conciliation dans l'application de la loi sur la non-discrimination.

Le Médiateur peut également, dans des situations particulières, faire une déclaration motivée à propos de la prévention, de la continuation ou de la répétition d'une discrimination, à moins que la question relève de la compétence des autorités finlandaises pour la sécurité et la santé au travail, à savoir l'emploi.

Le Tribunal national contre la discrimination et pour l'égalité n'effectue pas les tâches spécifiées à l'article 13 de la directive sur l'égalité raciale, et ne peut dès lors être considéré comme un «organisme pour la promotion de l'égalité de traitement» tel que visé par ledit article. Le Tribunal est une instance judiciaire indépendante et impartiale dont les décisions sont exécutoires et peuvent faire l'objet d'un appel.

7. Points essentiels

La loi de 2004 sur la non-discrimination exigeait des autorités et des prestataires de services éducatifs qu'ils élaborent un plan de promotion de l'égalité ethnique. Bien que l'exigence portait uniquement sur l'égalité ethnique, le ministère du Travail a recommandé dès le départ que les plans en question incluent l'ensemble des motifs de discrimination. Des plans en faveur de l'égalité couvrant des motifs multiples ont été

¹² Code pénal (39/1889) [*rikoslaki*], chapitre 11, article 11, et chapitre 47, article 3.

élaborés depuis lors par des centaines de municipalités, d'autres autorités et toute une série d'organisations telles que des ONG, des associations étudiantes et des entreprises, même s'il s'agit très souvent d'un plan volontaire. Les organisations et entreprises ont analysé dans ce contexte la manière dont leurs services et fonctions répondaient aux besoins réels de différents clients; quels sont les types d'aménagement raisonnable nécessaires; et comment l'égalité peut être garantie sur le lieu de travail. Ces plans initialement volontaires au sein des entreprises deviendront obligatoires à partir de 2017 avec l'entrée en vigueur de la disposition de la nouvelle loi sur la non-discrimination prévoyant que toute entreprise occupant plus de trente personnes est tenue d'élaborer un plan de promotion de l'égalité. Tous ces plans devront évaluer la mise en œuvre de l'égalité en tenant compte de l'ensemble des motifs de discrimination.

Le processus législatif de réforme de la loi sur la non-discrimination a été exceptionnellement long et difficile. Il a démarré en 2003 lorsque le Parlement a requis, lors de l'adoption de la première loi sur la non-discrimination, une législation faisant en sorte que tous les motifs de discrimination bénéficient du même niveau de protection que l'emploi.

La proposition gouvernementale finalement présentée au Parlement en 2014 aurait affaibli le concept de discrimination directe dans les domaines auxquels les directives antidiscrimination de l'UE ne s'appliquent pas, et le Parlement ne l'a pas approuvée. Après que la Commission du droit constitutionnel ait consulté des universitaires et des ONG, le Parlement a accepté une interdiction renforcée de discrimination indirecte autorisant uniquement un traitement différencié qui a un objectif acceptable dans une perspective de droits de l'homme et qui utilise des moyens appropriés et nécessaires pour l'atteindre.

Le concept de discrimination directe appliqué dans les domaines relevant du champ d'application des directives antidiscrimination de l'UE est unique: il justifie de façon générale le traitement différencié, sur la base de l'origine ethnique notamment, lorsque le traitement en question se fonde sur la législation, qu'il poursuit un but légitime et que les moyens utilisés pour atteindre ce but sont dûment proportionnés.

L'un des grands points de désaccord survenus lors de la préparation de la nouvelle loi sur la non-discrimination concernait les compétences du Médiateur pour la non-discrimination dans le domaine de l'emploi. À l'inverse de la plupart des États membres de l'Union européenne, l'ancien organisme finlandais en charge de l'égalité, à savoir le Médiateur pour les minorités, ne jouait pas de rôle majeur dans la lutte contre la discrimination dans l'emploi. Après que l'Union européenne ait lancé des procédures d'infraction à l'encontre de la Finlande, le compromis législatif a consisté à donner au futur Médiateur pour la non-discrimination la possibilité de formuler une recommandation concernant la prévention de la discrimination en matière d'emploi. L'interprétation spécifique de l'interdiction de discrimination dans l'emploi continue de relever de la compétence de l'autorité en charge de la sécurité et de la santé au travail.

L'analyse quant au caractère efficace, proportionné et dissuasif des sanctions exigé par les directives permet de dégager les éléments suivants: d'une part, les victimes peuvent obtenir réparation sous la forme d'une indemnité, engager une procédure pénale et obtenir une ordonnance de cessation de l'infraction de la part du Tribunal contre la discrimination et pour l'égalité. D'autre part, plusieurs types de réparation particulièrement robustes, telle la réintégration, ne sont pas disponibles. Du fait qu'une indemnisation pour discrimination peut exclusivement être réclamée devant un tribunal de district, le risque de devoir payer les frais de justice encourus par la partie défenderesse réduit fortement les possibilités réelles d'intenter un recours contre une discrimination.

ZUSAMMENFASSUNG

1. Einleitung

Bis Ende der 1980er Jahre war Finnland eines der homogensten Länder Europas. Die Zahl der Einwanderer war minimal. In den 1990ern wandelte sich das Land vom Auswanderungs- zum Einwanderungsland und die Anzahl ausländischer Staatsbürger stieg von 26.300 im Jahr 1990 auf 168.000 im Jahr 2010. Derzeit stellen ausländische Staatsbürger rund 6 % der Gesamtbevölkerung von 5.470.000.

Finnland hat einige nationale Minderheiten, wie die Roma (10.000 Personen), Juden, Tataren und Russen sowie die indigenen Samen (9000). Zusätzlich zur traditionellen finnischen Roma-Gemeinschaft kommen jährlich rund 500 Roma aus Rumänien und Bulgarien nach Finnland. Ihre soziale und wirtschaftliche Lage ist wesentlich schlechter als die der finnischen Roma-Minderheit, die außerdem einen Großteil ihrer kulturellen Traditionen, z. B. Trachten und ihre Sprache, bewahren konnten.

In den letzten 20 Jahren hat die religiöse Vielfalt in Finnland zugenommen und aufgrund der Einwanderung aus islamischen Ländern ist die muslimische Gemeinschaft von 30.000 auf 60.000 Mitglieder gewachsen. Ihr Anteil an der Bevölkerung liegt aber immer noch unter 1 %. Heute gehören 73 % der Bevölkerung der evangelisch-lutherischen Kirche an. Die anderen religiösen Gemeinschaften sind wesentlich kleiner, die zweitgrößte Glaubensgemeinschaft ist die russisch-orthodoxe Kirche (1 %). Rund 23 % der Bevölkerung gehören keiner Glaubensgemeinschaft an.

Bei Fragen der sexuellen Ausrichtung haben sich die gesellschaftlichen Einstellungen stark gewandelt. Homosexualität wurde bis 1971 strafrechtlich verfolgt. Im Jahr 1995 wurde Diskriminierung aufgrund der sexuellen Ausrichtung verboten und 2001 gewährte das Gesetz eingetragenen Partnerschaften gleichgeschlechtlicher Paare eine Rechtsstellung, die im Wesentlichen der einer Ehe entspricht. 2014 reformierte das Parlament das Ehegesetz, um die Eheschließung gleichgeschlechtlicher Paare zu ermöglichen. Das überarbeitete Gesetz wird im März 2017 in Kraft treten. Auch die lutherische Kirche akzeptiert inzwischen homosexuelle oder transsexuelle Seelsorger.

Es gilt als Tatsache, dass Altersdiskriminierung in Finnland existiert. In einer Umfrage gab jeder dritte Befragte an, dass Diskriminierung aufgrund des Alters an seiner Arbeitsstelle „häufig“ oder „gelegentlich“ vorkommt. Es gibt jedoch nur wenige Fälle, in denen vor Gericht gegen Altersdiskriminierung geklagt wurde.

In Bezug auf Menschen mit Behinderungen liegt der rechtliche und politische Schwerpunkt weiterhin auf den speziellen Dienstleistungen, die behinderte Menschen benötigen, d. h. auf dem traditionellen sozialpolitischen Ansatz und weniger auf dem Konzept der Gleichbehandlung. Ein eher auf die Menschenrechte bezogener Ansatz gewinnt jedoch langsam an Gewicht und wurde durch die Reform des Antidiskriminierungsgesetzes gestärkt.

NRO, die besonders von Diskriminierung betroffene Gruppen vertreten, arbeiten seit vielen Jahren erfolgreich im Kampf gegen Diskriminierung zusammen.

2. Wichtigste Gesetze

Die wichtigsten Bestimmungen zum Thema Diskriminierung sind in der Verfassung, im Antidiskriminierungsgesetz und im Strafgesetzbuch verankert. Außerdem ist ein Verbot von Diskriminierung in vielen Rechtsvorschriften als allgemeine Bestimmung enthalten.

Artikel 6 der Verfassung¹³ regelt die Gleichstellung und verbietet Diskriminierung. Diese verfassungsmäßige Garantie der Nichtdiskriminierung gewährleistet vor allem eine formale Gleichstellung, d. h. dass Menschen in einer vergleichbaren Situation gleich behandelt werden, sie bezweckt jedoch auch eine vollständige und wesentliche praktische Gleichstellung.

Das in der Verfassung verankerte Diskriminierungsverbot kann direkt vor Gericht geltend gemacht werden und nachgeordnete Gesetze müssen gemäß diesem Verbot ausgelegt werden. Bisher wurden die in der Verfassung verankerten Diskriminierungsbestimmungen vor allem genutzt, um gegen Handlungen der öffentlichen Hand zu klagen, doch dies könnte in wenigen Fällen auch Auswirkungen auf die Beziehungen zwischen privaten Parteien haben.

Das neue Antidiskriminierungsgesetz¹⁴ trat am 1. Januar 2015 in Kraft und ist das wichtigste Rechtsinstrument zur Umsetzung der EU-Richtlinien zur Gleichbehandlung (Richtlinie zur Gleichbehandlung ohne Unterschied der Rasse und Richtlinie zur Gleichbehandlung im Bereich der Beschäftigung) in finnisches Recht. Das neue Antidiskriminierungsgesetz hebt das bisherige Antidiskriminierungsgesetz auf, das von 2004 bis 2014 in Kraft war.¹⁵

Im Wesentlichen bietet das Antidiskriminierungsgesetz den von den Gleichbehandlungsrichtlinien der EU geforderten Schutz und geht in vielen Punkten über die dort festgelegten Mindestanforderungen hinaus.

Das Strafgesetzbuch¹⁶ hat zwei Bestimmungen über Diskriminierung. Die erste betrifft unter anderem Diskriminierung bei der Bereitstellung von Dienstleistung und die Ausübung staatlicher Pflichten, die andere bezieht sich auf Diskriminierung im Arbeitsleben. Zur ersten Bestimmung gibt es ein umfassendes Fallrecht, insbesondere in Bezug auf ethnische Diskriminierung. Die gesetzliche Strafe für Diskriminierung ist eine Geldstrafe oder eine Haftstrafe von bis zu sechs Monaten. In der Praxis wurden bisher ausschließlich Geldstrafen verhängt.

Alle wichtigen finnischen Diskriminierungsbestimmungen verbieten, explizit oder implizit, Diskriminierung aufgrund zahlreicher Diskriminierungsgründe wie Alter, Rasse oder ethnischer Zugehörigkeit, Religion, Weltanschauung, sexueller Ausrichtung und Behinderung. Die Gleichstellung der Geschlechter ist in der Verfassung, im Strafgesetzbuch und in einem eigenen Gesetz mit weitem Anwendungsbereich, dem Gesetz über die Gleichstellung von Frau und Mann, verankert. Das finnische Recht hat keine ausdrücklichen Bestimmungen zur Mehrfachdiskriminierung.

Åland, eine autonome schwedischsprachige Region Finnlands mit rund 29.000 Einwohnern und einer eigenen Gesetzgebung in bestimmten Bereichen wie Beschäftigung, Bildung und Sozialfürsorge, hat eigene Antidiskriminierungsgesetze verabschiedet. Diese Gesetze verbieten Diskriminierung aufgrund von ethnischer Zugehörigkeit, Religion und Weltanschauung, Behinderung, Alter, Geschlecht und sexueller Ausrichtung. Die Gesetze von Åland entsprechen den europäischen Richtlinien.

¹³ Die Verfassung (731/1999) [*perustuslaki*].

¹⁴ Antidiskriminierungsgesetz (1325/2014) [*Yhdenvertaisuuslaki*].

¹⁵ Offensichtlich gibt es noch keine Rechtsprechung zum neuen Antidiskriminierungsgesetz. Auch das Fallrecht zum aufgehobenen Antidiskriminierungsgesetz ist äußerst begrenzt. Die Gefahr, die Rechtskosten des Beklagten übernehmen zu müssen, hält viele davon ab, Diskriminierungsfälle vor Gericht zu bringen.

¹⁶ Das Strafgesetzbuch [*rikoslaki* (39/1889)].

3. Wichtigste Grundsätze und Begriffe

Das neue Antidiskriminierungsgesetz hat den Schutz vor Diskriminierung auf weitere Bereiche ausgeweitet. Das Gesetz gilt für alle öffentlichen und privaten Bereiche mit Ausnahme des Privatlebens, Familienlebens und der Religionsausübung. Das Schutzniveau vor Diskriminierung ist immer gleich, unabhängig davon, ob die Diskriminierung aufgrund von Herkunft, Alter, Behinderung, Religion, Weltanschauung, sexueller Ausrichtung, Nationalität, Sprache, Überzeugung, politischer Aktivität, gewerkschaftlicher Aktivität, familiären Beziehungen, Gesundheitszustand oder anderen persönlichen Merkmalen erfolgt.

Eine verhältnismäßige Ungleichbehandlung, mit der eine wirkliche Gleichstellung erzielt oder die Folgen von Diskriminierung ausgeglichen werden sollen, gilt nach dem Antidiskriminierungsgesetz nicht als Diskriminierung.

Das Antidiskriminierungsgesetz verpflichtet staatliche Stellen, Bildungsträger, Bildungsinstitute und Arbeitgeber zur Förderung der Gleichstellung. Dazu müssen diese einen Gleichstellungsplan ausarbeiten. Jeder Arbeitgeber, der regelmäßig mindestens 30 Arbeitnehmer beschäftigt, muss einen Gleichstellungsplan erstellen. Darin geht das finnische Recht über die Mindestanforderungen der Richtlinien hinaus.

Staatliche Stellen, Bildungsträger und Arbeitgeber müssen, wenn nötig, angemessene Vorkehrungen treffen, mit denen gewährleistet ist, dass Menschen mit einer Behinderung den gleichen Zugang zu Dienstleistungen, Beschäftigung und beruflicher Bildung erhalten. Außerdem muss Menschen mit Behinderungen der gleichberechtigte Zugang zu Gütern und Dienstleistungen ermöglicht werden. Bei der Bereitstellung von Dienstleistungen muss die Behinderung einer Person berücksichtigt werden, beispielsweise durch barrierefreie Wege. Arbeitgeber waren bereits nach dem alten Gesetz zu angemessenen Vorkehrungen verpflichtet, neu ist diese Pflicht für die Anbieter von Gütern und Dienstleistung wie Hotels, Restaurants und Händler.

Das Antidiskriminierungsgesetz folgt bei den meisten Begriffsbestimmungen eng dem Wortlaut und den Begriffen der EU-Richtlinien zur Gleichbehandlung (Richtlinie zur Gleichbehandlung ohne Unterschied der Rasse und Richtlinie zur Gleichbehandlung im Bereich der Beschäftigung).

Die Definitionen von unmittelbarer Diskriminierung (wenn eine Person in einer vergleichbaren Situation eine weniger günstige Behandlung erfährt, als eine andere Person erfährt, erfahren hat oder erfahren würde) und mittelbarer Diskriminierung (wenn dem Anschein nach neutrale Vorschriften, Kriterien oder Verfahren Personen gegenüber anderen Personen in besonderer Weise benachteiligen können) wurden direkt aus den Richtlinien übernommen.

Im Bereich Beschäftigung ist eine Ungleichbehandlung ausschließlich aufgrund von wesentlichen und entscheidenden beruflichen Anforderungen gemäß den Vorgaben der Richtlinien erlaubt. Außerdem muss die Ungleichbehandlung aufgrund der Art der speziellen beruflichen Tätigkeit oder der Bedingungen ihrer Ausübung notwendig und angemessen sein.

Das finnische Antidiskriminierungsgesetz unterscheidet sich von den Richtlinien insofern, dass Ungleichbehandlung auch außerhalb des Arbeitslebens gerechtfertigt werden kann. Gemäß der Definition von unmittelbarer Diskriminierung im Antidiskriminierungsgesetz ist eine Ungleichbehandlung gerechtfertigt, wenn die Behandlung einer Rechtsvorschrift entspricht, einen rechtmäßigen Zweck verfolgt und die Mittel zur Erreichung dieses Zwecks angemessen sind.

Das Antidiskriminierungsgesetz enthält eine Pflicht zu angemessenen Vorkehrungen, die Menschen mit Behinderungen den gleichen Zugang zu Behörden, zu Bildung sowie zu Gütern und Dienstleistungen ermöglichen. Diese Pflicht zu angemessenen Vorkehrungen gilt für Behörden, für Bildungsträger und für die Anbieter von Gütern und Dienstleistungen, jedoch nicht im Hinblick auf anderen Gründe für öffentliche oder private Bereiche.

Im Arbeitsleben ist der Arbeitgeber verpflichtet, angemessene Vorkehrungen zu treffen, um Menschen mit Behinderungen den gleichberechtigten Zugang zur Beschäftigung, die Ausübung eines Berufes und den beruflichen Aufstieg zu ermöglichen. Die Vernachlässigung dieser Pflicht zu angemessenen Vorkehrungen ist im Antidiskriminierungsgesetz als Diskriminierung definiert.

4. Sachlicher Anwendungsbereich

Das neue Antidiskriminierungsgesetz dehnt den Schutz vor Diskriminierung auf weitere sachliche Anwendungsbereiche aus. Das Gesetz gilt für alle öffentlichen und privaten Bereiche mit Ausnahme des Privatlebens, Familienlebens und der Religionsausübung. Das heißt, dass alle behördlichen Tätigkeiten (staatlich und kommunal), Bildung, Bereitstellung von Gütern und Dienstleistungen und Beschäftigung unter den Anwendungsbereich des Gesetzes fallen.

Deshalb gilt das Gesetz für alle Personen in öffentlichen und privaten Bereichen unabhängig von Tätigkeitsfeld und beruflicher Position in Bezug auf: die Bedingungen beim Zugang zu Beschäftigung, selbständiger und unselbständiger Erwerbstätigkeit – einschließlich der Auswahlkriterien, Einstellung, Arbeitsbedingungen und beruflichen Aufstieg, Berufsberatung, alle Formen der Berufsausbildung, beruflichen Weiterbildung und Umschulung und die Mitgliedschaft und Mitwirkung in einer Arbeitnehmer- oder Arbeitgeberorganisation.

Da unter das Gesetz auch alle behördlichen Tätigkeiten und die Bereitstellung von Gütern und Dienstleistungen fallen, gilt es unter anderem für folgende Bereiche: Bildung, Sozial- und Gesundheitsdienste, soziale Vergünstigungen, Militär- oder Zivildienst einschließlich des freiwilligen Militärdienstes für Frauen, Bereitstellung von Wohnraum und sonstige Versorgung mit Dienstleistungen und Gütern, die der Öffentlichkeit zur Verfügung stehen.

Der sachliche Anwendungsbereich des Gesetzes ist für alle geschützten Diskriminierungsgründe gleich. Diskriminierung ist nach dem finnischen Antidiskriminierungsgesetz aufgrund der fünf in den Richtlinien genannten Diskriminierungsgründe (ethnische Zugehörigkeit,¹⁷ Alter, Behinderung, Religion oder Weltanschauung und sexuelle Ausrichtung) sowie aufgrund von Nationalität, Sprache, Überzeugung, politischer Aktivität, gewerkschaftlicher Aktivität, familiären Beziehungen, Gesundheitszustand und anderer persönlicher Eigenschaften gleichermaßen verboten.

Der Schutz gilt vor allem für natürliche Personen, juristische Personen sind in der Regel nicht geschützt. Allerdings sind sowohl natürliche als auch juristische Personen für Diskriminierung haftbar.

Die Gesetze der Region Åland verbieten Diskriminierung aufgrund von ethnischer Zugehörigkeit, Religion und Weltanschauung, Behinderung, Alter und sexueller Ausrichtung in folgendem Umfang: im Arbeitsleben ist Diskriminierung wegen aller Diskriminierungsgründe verboten, Diskriminierung im Gesundheits- und Sozialdienst ist

¹⁷ Das Antidiskriminierungsgesetz verwendet den Begriff „Herkunft“, der gemäß der Definition der Regierungsvorlage ethnische Herkunft, nationale Herkunft, soziale Herkunft, rassische Zugehörigkeit und Hautfarbe umfasst.

aufgrund von ethnischer Zugehörigkeit, Religion und Weltanschauung und sexueller Ausrichtung verboten, Diskriminierung in der Bildung und beim Zugang zu Gütern und Dienstleistungen ist aufgrund von ethnischer Zugehörigkeit, Religion und Weltanschauung, Behinderung und sexueller Ausrichtung verboten.

5. Rechtsdurchsetzung

Im Anwendungsbereich des Antidiskriminierungsgesetzes können sich Opfer von Diskriminierung an den Antidiskriminierungs-Ombudsmann wenden, der sie bei der Durchsetzung ihrer Rechte berät und unterstützt. Personen, die sich als Opfer von Diskriminierung fühlen, können den Ombudsmann auch um ein Schlichtungsverfahren bitten. Außerhalb des Arbeitslebens kann der Ombudsmann zu jedem Diskriminierungsfall, der ihm vorgelegt wird, ein Gutachten abgeben. Die Gutachten des Ombudsmanns sind rechtlich nicht bindend.

Das Nationale Schiedsgericht für Nichtdiskriminierung und Gleichstellung kann eine Einigung zwischen den Parteien herbeiführen oder Handlungen verbieten, die eine Diskriminierung oder Viktimisierung darstellen. Es hat keine Zuständigkeit im Bereich Beschäftigung. Die Entscheidungen des Schiedsgerichts sind bindend, man kann jedoch gegen die Entscheidungen beim Verwaltungsgericht Berufung einlegen. Das Schiedsgericht kann eine Partei auch durch eine bedingte Geldstrafe zur Erfüllung ihrer Verpflichtungen zwingen. Wenn die Untersagungsverfügung nicht eingehalten wird, kann der Betroffene die Verhängung einer bedingten Geldstrafe in einem gesonderten Verfahren beantragen.

Im Arbeitsleben werden Verstöße von Arbeitgebern gegen das Antidiskriminierungsgesetz von der Arbeitsschutzbehörde verfolgt. In der Privatwirtschaft kann sie Beschwerden von Arbeitnehmern entgegen nehmen und vor Ort Inspektionen durchführen. Wenn sie Anhaltspunkte für Diskriminierung im Sinne des Strafgesetzbuchs findet, muss sie den Fall an die Staatsanwaltschaft übergeben. In weniger schweren Fällen von Diskriminierung kann die Arbeitsschutzbehörde Verbesserungsvorschläge machen. Diese Verbesserungsvorschläge der Arbeitsschutzbehörde sind rechtlich nicht bindend.

Bei der Ausübung staatlicher Gewalt, im Arbeitsleben, Bildungswesen und beim Zugang zu Gütern und Dienstleistungen können Opfer von Diskriminierung bei einem ordentlichen Gericht auf eine Entschädigung nach dem Antidiskriminierungsgesetz klagen. Die Zahlung einer Entschädigung ist nicht mit einer strafrechtlichen Haftung verknüpft. Die in den letzten Jahren zugesprochenen Entschädigungssummen lagen zwischen 4000 und 10.000 Euro.

Bei Klagen nach dem Antidiskriminierungsgesetz geht die Beweislast vom Kläger auf den Beklagten über. Zunächst muss der Kläger Beweise vorlegen, die nahe legen, dass ein Verstoß gegen das Diskriminierungsverbot stattgefunden hat. Dann muss der Beklagte nachweisen, dass er nicht gegen das Diskriminierungsverbot verstoßen hat.

Wenn bei der Ausübung staatlicher Gewalt eine diskriminierende Entscheidung getroffen wurde, können die Diskriminierungsopfer ein Berichtigungsverfahren oder ein anderes reguläres Beschwerdeverfahren einleiten. Sie können aber auch beim parlamentarischen Ombudsmann oder beim Justizkanzler eine Beschwerde einreichen. Diese Stellen können einzelne Entscheidungen zwar nicht ändern oder aufheben, sie können jedoch ein Verfahren gegen den Beamten einleiten und/oder ein Gutachten zur korrekten Rechtsauslegung erstellen.

Vor Gericht können nur die Opfer der Diskriminierung Klagen wegen Diskriminierung einreichen und vor Gericht vertreten, nicht jedoch beispielsweise NRO, die das Opfer unterstützen oder in seinem Namen handeln. Eine Organisation mit einem Interesse an der Förderung der Gleichstellung und der Antidiskriminierungs-Ombudsmann sind jedoch

berechtigt, einen konkreten Fall vor das Nationale Schiedsgericht für Nichtdiskriminierung und Gleichstellung zu bringen, wenn die Person, die diskriminiert wurde, ihre Einwilligung gibt.

Einige Menschenrechtsorganisationen unterstützten Opfer durch juristische Beratung bei ihrer Klage und haben bereits Situationstests verwendet, um Diskriminierung nachzuweisen. Die Verwendung statistischer Daten ist möglich, aber es liegt immer im Ermessen des Gerichts, ob und wie stark derartige Beweise gewichtet werden.

Diskriminierung ist ein Straftatbestand nach dem Strafgesetzbuch,¹⁸ insbesondere bei der Bereitstellung von Gütern und Dienstleistungen und im Arbeitsleben. Personen, die einer Diskriminierung für schuldig befunden wurden, können zu einer Geldstrafe oder zu bis zu sechs Monaten Haft verurteilt werden. Im Großteil der Diskriminierungsfälle, die nach dem Strafgesetzbuch verhandelt wurden, ging es um die Verweigerung des Zugangs zu Restaurants oder sonstigen Orten, die der Öffentlichkeit zur Verfügung stehen, aufgrund der ethnischen Zugehörigkeit. Es gab jedoch auch strafrechtlich relevante Fälle von Diskriminierung aufgrund von Religion oder Behinderung.

6. Gleichbehandlungsstellen

Um die Anforderungen der Richtlinie zur Gleichbehandlung ohne Unterschied der Rasse zu erfüllen, wurde im Jahr 2001 die Stelle des Ombudsmann für Minderheiten eingerichtet, der Opfer von ethnischer Diskriminierung unterstützen soll. Seit Anfang 2015 hat der Ombudsmann den Titel Antidiskriminierungs-Ombudsmann und seine Zuständigkeiten wurden auf alle Diskriminierungsgründe außer Geschlecht und Geschlechtsidentität ausgeweitet, für die weiterhin der Gleichstellungs-Ombudsmann zuständig ist.

Zu den Aufgaben des Ombudsmanns gehören die Unterstützung von Diskriminierungsopfern bei entsprechenden Klagen vor Gericht, die Planung von Maßnahmen zur Förderung der Gleichstellung, allgemeine Empfehlungen zur Verhinderung von Diskriminierung, die Durchführung unabhängiger Studien, die Veröffentlichung unabhängiger Berichte und allgemein die Förderung der Gleichstellung und einvernehmlicher Maßnahmen zur Umsetzung des Antidiskriminierungsgesetzes.

In konkreten Fällen kann der Ombudsmann ein begründetes Gutachten zur Prävention, Fortsetzung oder Weiterführung von Diskriminierung erstellen, sofern der Fall nicht in die Zuständigkeit der Arbeitsschutzbehörden fällt, also in den Bereich Beschäftigung.

Das Nationale Schiedsgericht für Nichtdiskriminierung und Gleichstellung ist nicht für die in Artikel 13 der Richtlinie zur Gleichbehandlung ohne Unterschied der Rasse genannten Aufgaben zuständig und gilt damit im Sinne dieses Artikels nicht als „Stelle, deren Aufgabe darin besteht, die Verwirklichung des Grundsatzes der Gleichbehandlung zu fördern“. Das Schiedsgericht ist ein unabhängiges und unparteiisches richterliches Organ, dessen Entscheidungen bindend sind und gegen die Berufung eingelegt werden kann.

7. Wichtige Punkte

Das Antidiskriminierungsgesetz von 2004 verpflichtete Behörden und Bildungsträger zur Ausarbeitung eines Gleichstellungsplans zur Förderung ethnischer Gleichstellung. Obwohl nur die ethnische Gleichstellung gefordert war, empfahl das Arbeitsministerium von Anfang an Gleichstellungspläne in Bezug auf alle Diskriminierungsgründe. Seitdem wurden in hunderten von Kommunalbehörden, anderen Behörden und vielen weiteren Organisationen wie NRO, Studentenwerken und Unternehmen Gleichstellungspläne für

¹⁸ Das Strafgesetzbuch [*rikoslaki* (39/1889)], Kapitel 11 Artikel 11 und Kapitel 47 Artikel 3.

viele Diskriminierungsgründe erstellt, obwohl dies in vielen Fällen auf freiwilliger Basis erfolgt ist. In diesen Gleichstellungsplänen analysierten Organisationen und Unternehmen, ob ihre Dienstleistungen und Funktionen die tatsächlichen Bedürfnisse aller Kunden erfüllen, welche angemessenen Vorkehrungen notwendig sind und wie die Gleichstellung am Arbeitsplatz gewährleistet werden kann. Was als freiwilliger Gleichstellungsplan in Unternehmen begonnen hat, wird ab 2017 zur Pflicht, wenn das neue Antidiskriminierungsgesetz Unternehmen mit mehr als 30 Mitarbeitern verpflichtet, einen Gleichstellungsplan zu erstellen. Die Gleichstellungspläne müssen die Umsetzung von Gleichstellung anstreben und dabei alle Diskriminierungsgründe berücksichtigen.

Das gesetzgeberische Verfahren zur Reformierung des Antidiskriminierungsgesetzes war außergewöhnlich langwierig und problematisch. Es begann bereits 2003, als das Parlament bei der Verabschiedung des ersten Antidiskriminierungsgesetzes ein Gesetz forderte, dass für alle Diskriminierungsgründe in allen Bereichen dasselbe Schutzniveau vorsieht wie im Bereich Beschäftigung.

Der Gesetzentwurf der Regierung, der dem Parlament 2014 endlich vorgelegt wurde, schwächte den Begriff der unmittelbaren Diskriminierung in allen Bereichen, die nicht unter die Antidiskriminierungsrichtlinien der EU fallen. Diesen Entwurf lehnte das Parlament ab. Nach Konsultationen des Verfassungsrechtsausschusses mit Wissenschaftlern und NRO akzeptierte das Parlament ein verstärktes Verbot der mittelbaren Diskriminierung, bei dem Ungleichbehandlung nur unter den Bedingungen zulässig ist, dass sie ein aus Sicht der Menschenrechte rechtmäßiges Ziel hat und dieses Ziel mit angemessenen und notwendigen Mitteln erreicht.

Der Begriff der unmittelbaren Diskriminierung in Bereichen, die unter die Antidiskriminierungsrichtlinien der EU fallen, ist einzigartig. Sie erlaubt Ungleichbehandlung, z. B. aufgrund der ethnischen Zugehörigkeit, grundsätzlich, wenn die Behandlung einer Rechtsvorschrift entspricht, einen rechtmäßigen Zweck verfolgt und die Mittel zur Erreichung dieses Zwecks angemessen sind.

Bei den Vorarbeiten zum neuen Antidiskriminierungsgesetz war einer der wichtigsten Streitpunkte die Zuständigkeit des Antidiskriminierungs-Ombudsmanns für den Bereich Beschäftigung. Anders als in den meisten anderen EU-Mitgliedstaaten spielte die frühere finnische Gleichbehandlungsstelle, der Ombudsmann für Minderheiten, keine wichtige Rolle im Kampf gegen Diskriminierung im Arbeitsleben. Nachdem die Europäische Union ein Vertragsverletzungsverfahren gegen Finnland eingeleitet hatte, bestand der gesetzgeberische Kompromiss darin, dem früheren Antidiskriminierungs-Ombudsmann die Möglichkeit zu geben, Empfehlungen zur Prävention von Diskriminierung im Arbeitsleben auszusprechen. Die konkrete Auslegung des Diskriminierungsverbots im Bereich Beschäftigung bleibt in der Zuständigkeit der Arbeitsschutzbehörde.

Um einzuschätzen, ob die verfügbaren Sanktionen wirksam, verhältnismäßig und abschreckend sind, wie von den Richtlinien gefordert, können die folgenden Punkte zusammengefasst werden: Einerseits können Opfer Schadenersatzansprüche geltend machen, strafrechtlich Anzeige erstatten und eine Verfügung des Schiedsgerichts für Nichtdiskriminierung und Gleichstellung beantragen. Andererseits sind besonders wirksame Rechtsmittel, wie die Wiedereinstellung, nicht verfügbar. Da Entschädigungen für Diskriminierung nur vor dem Amtsgericht eingeklagt werden können, schränkt das Risiko, die Rechtskosten der Gegenpartei zahlen zu müssen, den Rechtsschutz gegen Diskriminierung in der Praxis stark ein.

INTRODUCTION

The national legal system

The main provisions pertaining to discrimination have been laid down in the Constitution, the Non-Discrimination Act and the Penal Code. As a general clause, a prohibition on discrimination is also included in many statutory acts. Section 6 of the Constitution provides for equality and prohibits discrimination. The main thrust of this constitutional guarantee of non-discrimination is to ensure formal equality, i.e. the principle that people in similar circumstances are to be treated similarly, but it also aims to reach full, substantive equality in practice. The constitutional prohibition of discrimination may be directly invoked in courts, and regular laws are to be interpreted in accordance to it.

The Non-Discrimination Act entered into force on 1 February 2004. It was repealed at the end of 2014 and a new act with the same name – the Non-Discrimination Act - entered into force on 1 January 2015. The Non-Discrimination Act is the main instrument transposing the EU directives on equal treatment (the Racial Equality Directive and the Employment Equality Directive) into national law. So far, there have only been a few cases applying the new Non-Discrimination Act, but as much of the wording and many of the concepts are identical, the limited case law available from the repealed act is still significant.

The scope of the repealed Non-Discrimination Act by and large followed the minimum requirements of the Racial Equality Directive and the Employment Equality Directive, but in some areas, such as education, protection was also provided for a wide range of grounds. In providing goods and services including housing, social benefits and advantages, the protection provided against discrimination only on the basis of ethnic origin. The main principle of the legislative reform was to expand the protection provided for ethnic minorities to all grounds of discrimination. The scope of the new Non-Discrimination Act is wide, covering both public and private activities, but excluding private life, family life and the practice of religion. Protection is provided on the grounds of origin, age, disability, religion, belief, sexual orientation, nationality, language, opinion, political activity, trade union activity, family relationships, state of health or other personal characteristics.

The Penal Code has two provisions on discrimination. The first covers discrimination, inter alia, in the provision of services and in the discharge of public duties, while the second covers discrimination in the field of employment. There is a considerable amount of case law under the first provision, mainly regarding ethnic discrimination. Punishment for discrimination laid down by law is in the form of fines or imprisonment for up to six months. In practice the sentence for discrimination has been fines.

Gender equality is addressed in the Constitution and in the Penal Code, and in a separate law of general application, the Act on Equality between Women and Men.

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 have competence over matters relating to e.g. civil servants employed by the Province of Åland or one of the municipalities in the Åland Islands, healthcare, social welfare, education, self-employment, promotion of employment, and some aspects of the 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 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 1 December 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 also applicable in the Åland Islands.

List of main legislation transposing and implementing the directives

The main pieces of legislation transposing and implementing the two anti-discrimination directives are:

- Non-Discrimination Act (1325/2014) [*Yhdenvertaisuuslaki*],¹⁹ date of adoption 30 December 2014; entry into force 1 January 2015; grounds protected: origin, age, disability, religion, belief, sexual orientation, nationality, language, opinion, political activity, trade union activity, family relationships, state of health or other personal characteristics; material scope: both public and private activities, excluding private life, family life and the practice of religion
- Act on the Non-Discrimination Ombudsman (1326/2014) [*Laki yhdenvertaisuusvaltuutetusta*],²⁰ date of adoption 30 December 2014; entry into force 1 January 2015; grounds protected: origin, age, disability, religion, belief, sexual orientation, nationality, language, opinion, political activity, trade union activity, family relationships, state of health or other personal characteristics; material scope: both public and private activities, excluding private life, family life and the practice of religion
- Act on the Non-Discrimination and Equality Tribunal (1327/2014) [*Laki yhdenvertaisuus- ja tasa-arvolautakunnasta*],²¹ date of adoption 30 December 2014; entry into force 1 January 2015; grounds protected: gender, gender identity, origin, age, disability, religion, belief, sexual orientation, nationality, language, opinion, political activity, trade union activity, family relationships, state of health or other personal characteristics; material scope: both public and private activities, excluding private life, family life and the practice of religion
- Provincial Act on Prevention of Discrimination in the Province of Åland (66/2005) [*Landskapslag om förhindrande av diskriminering i landskapet Åland*], date of adoption 10 November 2005, entry into force 1 December 2005; grounds protected: ethnic belonging, religion and other conviction, age, disability and sexual disposition, material scope: applicable in the Åland Islands; civil servants employed by the ÅI or by one of the ÅI's municipalities, schools, social care and health care, some aspects of the provision of goods and services.²²

In the Finnish legislative system, Government proposals (pertinent preparatory works or *travaux préparatoires*) are an important source of information for interpreting the legislation. The Government proposal for a particular legislative act is not legally binding but is frequently used by courts and academics in explaining and interpreting the concepts and purpose of a particular piece of legislation. As the text of non-discrimination

¹⁹ The Non-Discrimination Act (1325/2014) [*Yhdenvertaisuuslaki*], <http://www.finlex.fi/fi/laki/ajantasa/2014/20141325>.

²⁰ Act on the Non-Discrimination Ombudsman (1326/2014) [*Laki yhdenvertaisuusvaltuutetusta*], <http://www.finlex.fi/fi/laki/ajantasa/2014/20141326>.

²¹ Act on the Non-Discrimination and Equality Tribunal (1327/2014) [*Laki yhdenvertaisuus- ja tasa-arvolautakunnasta*], <http://www.finlex.fi/fi/laki/ajantasa/2014/20141327>.

²² Provincial Act on Prevention of Discrimination in the Province of Åland (66/2005) [*Landskapslag om förhindrande av diskriminering i landskapet Åland*] http://old.regeringen.ax/composer/upload/modules/lagar/afs2005_nr66.pdf.

legislation is also concise and often does not include definitions, the definitions mentioned in respective Government proposals are frequently referred to in this report.

1 GENERAL LEGAL FRAMEWORK

Constitutional provisions on protection against discrimination and the promotion of equality

The Finnish constitution includes the following articles dealing with non-discrimination:

- Section 6(1) of the Constitution [*perustuslaki* (731/1999)] is a general clause: 'Everyone is equal before the law'.
- Section 6(2) defines the prohibition of discrimination and the protected grounds: '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.'
- Section 6(3): is a children's rights article: '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.'

These provisions apply to all areas covered by the directives. Their material scope is broader than those of the directives. The constitutional anti-discrimination provisions are 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.²³

The constitutional equality clauses can be enforced against private actors (as opposed to the State). 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 ground for claiming damages or as a ground for determining that a specific clause of an agreement is to be considered 'unjust'.²⁴

²³ 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.

²⁴ Martin Scheinin, 'Yhdenvertaisuus ja syrjinnän kieltä' [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.

2 THE DEFINITION OF DISCRIMINATION

2.1 Grounds of unlawful discrimination explicitly covered

The following grounds of discrimination are explicitly prohibited in national law: origin, age, disability, religion, belief, sexual orientation, nationality, language, opinion, political activity, trade union activity, family relationships, state of health or other personal characteristics.

2.1.1 Definition of the grounds of unlawful discrimination within the directives

Section 8 of the Non-Discrimination Act lists the grounds of discrimination but does not define them in the text of the statute. This is due to two reasons. Most importantly, discrimination is prohibited by an open-ended list of grounds, first listing 13 grounds explicitly (origin, age, disability, religion or belief, sexual orientation, nationality, language, opinion, political activity, trade union activity, family relationships, state of health) and then referring to 'other personal characteristics' as prohibited grounds of discrimination. Therefore, it is not crucial to define the prohibited grounds of discrimination in a precise way as any 'personal characteristic' is thought to cover the situation anyway.

Second, the Government proposal²⁵ (pertinent preparatory works or *travaux préparatoires*) for the Non-Discrimination Act defines the grounds for discrimination referring also to the recent case law of the Court of Justice of the European Union (CJEU) and European Court of Human Rights (ECHR).

The Government proposal explains that there is no change in the definitions of the grounds of unlawful discrimination between the repealed Non-Discrimination Act and the new Non-Discrimination Act, which came into force from 2015. There is no case law on applying the repealed act to indicate that the definitions of the grounds protected in the Racial Equality Directive and the Employment Equality Directive would have a narrower interpretation in the new act than in the directives.

The Finnish term for sexual orientation was in the repealed Non-Discrimination Act and in the Finnish translation of Directive 2000-78-EU '*sukupuolinen suuntautuminen*' which can also be translated as 'gender orientation'. In the new Non-Discrimination Act the term for sexual orientation has been changed into '*seksuaalinen suuntautuminen*' which is more commonly used in general discussion and preferred by the National Lesbian, Gay, Bisexual, Transgender, Intersex organisation. The Government proposal does not define sexual orientation any further, but it is generally understood to include homosexual, heterosexual or bisexual orientation.

The term for ethnic origin in the repealed Non-Discrimination Act was 'ethnic or national origin'. This term has been replaced in the new Non-Discrimination Act as regards the word 'origin'. It is defined in the Government proposal as including ethnic origin, national origin, social origin,²⁶ race and colour of skin.²⁷ There is no doubt that the concepts of race and ethnic origin are to be interpreted as being included in the concept of origin as used in the new Non-Discrimination Act.

²⁵ Pages 66-68 of the Government proposal on the Non-Discrimination Act 19/2014 [*Hallituksen esitys yhdenvertaisuuslaiksi 19/2014 vp*] <http://www.finlex.fi/fi/esitykset/he/2014/20140019>.

²⁶ The term 'social origin' [*yhteiskunnallinen alkuperä*] is also used in the Government proposition for the Constitution (HE309/1993). The proposition for the Constitution uses the term with reference to the International Covenant on Civil and Political Rights, where 'social origin' is used in Article 2.

²⁷ Page 66 of the Government proposal on the Non-Discrimination Act 19/2014.

The Government proposal explains that the prohibition of discrimination on the ground of age would protect all ages, young as well as grown up.²⁸

On the definition of religion and belief, the Government proposal explains that the difference between these two is not always easy to distinguish, although belief is connected more to conviction than to religion. It is further defined that the belief protected in the Non-Discrimination Act is required to be permanent to a certain extent.²⁹ Other terms included in the list of prohibited discrimination grounds in the act such as 'opinion' and 'political activity' complement the protection against discrimination on the basis of an individual's views and values.

The Government proposal explains that the definition of health in the Non-Discrimination Act refers to both physical and mental health. The Government proposal refers to the Court of Justice of the European Union decision HK Danmark (C-335/11 and C-337/11) and explains that an illness combined with long-lasting effects preventing participation in employment can also be considered a disability.³⁰

On disability, the Government proposal briefly explains that there is no unambiguous definition in Finnish legislation. The Government proposal then refers to the UN Convention on the Rights of Persons with Disabilities by stating that, according to Article 1 of that convention, persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments, which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others. Additionally, the Government proposal mentions that disability can be congenital or it can be caused by accident.³¹

2.1.2 Multiple discrimination

In Finland, prohibition of multiple discrimination is not included in the law. The requirement for specific prohibition of multiple discrimination and clarifying who should supervise this prohibition was one of the disagreements in preparing the recent overall renewal of the Non-Discrimination Act.³² Neither the Government proposal nor the Employment and Equality Committee report give reasons why multiple discrimination was not addressed in the Non-Discrimination Act.

In Finland, the following case law deals with multiple discrimination: the Rovaniemi Appeal Court confirmed the decision of the Oulu District Court when it awarded compensation separately on the basis of gender discrimination (applying the compensation statutes of the Equality Act) and on the basis of disability discrimination (applying the compensation statutes of the Non-Discrimination Act). The City of Oulu, which lost the case in the District Court, had stated in the Appeal Court that compensation cannot be awarded based on both acts as there was only one discriminatory act when the visually impaired claimant was not reinstalled to her previous position after returning from maternity leave.³³

²⁸ Page 66 of the Government proposal on the Non-Discrimination Act 19/2014.

²⁹ Page 66 of the Government proposal on the Non-Discrimination Act 19/2014.

³⁰ Page 67 of the Government proposal on the Non-Discrimination Act 19/2014.

³¹ Page 67 of the Government proposal on the Non-Discrimination Act 19/2014.

³² See Review on Comments on Government proposal on the Renewal on Non-Discrimination Act [Yhdenvertaisuuslainsäädännön uudistamista koskeva hallituksen esitys, Lausuntotiivistelmä], Ministry of Justice, Helsinki 2013;
http://oikeusministerio.fi/fi/index/julkaisut/julkaisuarkisto/1380025809050/Files/OMML_46_2013_lausuntotiiv_18_s.pdf.

³³ Rovaniemi Appeal Court 23 October 2014, 483/23.10.2014, S13/536.

2.1.3 Assumed and associated discrimination

a) Discrimination by assumption

In Finland, section 8 of the Non-Discrimination Act [*Yhdenvertaisuuslaki* (1325/2014)] prohibits discrimination based on perception or assumption of what a person is.

b) Discrimination by association

In Finland, section 8 of the Non-Discrimination Act [*Yhdenvertaisuuslaki* (1325/2014)], prohibits discrimination based on association with persons with particular characteristics. It is clearly stated in the Government proposal for the act that explicit prohibition of discrimination by association in the Non-Discrimination Act is to be interpreted in line with the Coleman case (C-303/06, 17.7.2008).³⁴

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

a) Prohibition and definition of direct discrimination

In Finland, direct discrimination is prohibited in section 8 of the Non-Discrimination Act [*Yhdenvertaisuuslaki* (1325/2014)].

It is defined in section 10 of the Non-Discrimination Act [*Yhdenvertaisuuslaki* (1325/2014)] as:

‘if a person ... is treated less favourably than another person was treated, is treated or would be treated in a comparable situation.’

b) Justification of direct discrimination

There are two general concepts around the justification of direct discrimination and one regarding employment in the Non-Discrimination Act [*Yhdenvertaisuuslaki* (1325/2014)]. The first one is applicable to situations governed by the Racial Equality Directive: education in general or when using public power or performing public administrative tasks. The second one applies to all other situations except employment). The third one applies to employment including recruitment and self-employment.

- In the situations governed by the Racial Equality Directive, education in general, when using public power or performing public administrative tasks, the following applies: differential treatment is allowed only if the treatment is based on legislation, the treatment has an acceptable aim and the means used are in due proportion for achieving this aim.³⁵
- This general justification of direct discrimination in situations governed by the Racial Equality Directive does not derive from the directive and may be too widely formulated. The Government proposal for the Non-Discrimination Act lists safeguards that would prevent legislation or applying discriminatory acts or other legislation.³⁶ These include the Constitutional Law Committee’s task to analyse the constitutionality of legislative proposals and their relation to international human

³⁴ Page 68 in the Government proposal on the Non-Discrimination Act 19/2014.

³⁵ Section 11(1) of the Non-Discrimination Act, in Finnish: *Erilainen kohtelu ei ole syrjintää, jos kohtelu perustuu lakiin ja sillä muutoin on hyväksyttävä tavoite ja keinot tavoitteen saavuttamiseksi ovat oikeasuhtaisia.* <http://www.finlex.fi/fi/laki/ajantasa/2014/20141325>.

³⁶ Page 71 in the Government proposal on the Non-Discrimination Act 19/2014.

rights treaties³⁷ and the courts' responsibility not to apply acts in conflict with the Constitution.³⁸

- In other situations it is not required that differential treatment is based on legislation, but then the aim needs to be acceptable from the perspective of basic rights and human rights and the means used are in due proportion for achieving this aim.³⁹
- In employment, differential treatment is allowed based on genuine and determining occupational requirements, age and habitual residence. Occupational requirements are explained later in part 4.1. and differential treatment based on age in part 4.7.1.
- Differential treatment in employment is possible also on the basis of habitual residence if: '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 differential treatment arises from age limits adopted in qualification for retirement or invalidity benefits within the social security system.'⁴⁰

2.2.1 Situation testing

a) Legal framework

In Finland, equality laws and 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 preclude the use of situation testing.

Courts are at liberty to freely regard as admissible any type of evidence. 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'.

b) Practice

In Finland, situation testing is used in practice. Several criminal proceedings (e.g. on discrimination) have been initiated on the basis of situation tests, which implies the permissibility of the method. 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.

³⁷ Section 74 of the Constitution.

³⁸ Section 106 of the Constitution.

³⁹ Section 11(2) of the Non-Discrimination Act, in Finnish: *Erilainen kohtelu on kuitenkin oikeutettua siinäkin tapauksessa, että kohtelun oikeuttamisperusteista ei ole säädetty, jos kohtelulla on perus- ja ihmisoikeuksien kannalta hyväksyttävä tavoite ja keinot tavoitteen saavuttamiseksi ovat oikeasuhtaisia.*

⁴⁰ This rather exceptional detail – differential treatment because of habitual residence – in the otherwise quite exception-free Non-Discrimination Act originates from a statement by the Deputy Chancellor of Justice who criticised a municipality in Finland for providing summer jobs only to those young people who live in the municipality without legal bases for this action.

Section 12 (2) of Non-Discrimination Act, in Finnish: *'Ikään tai asuinpaikkaan perustuva erilainen kohtelu on lisäksi oikeutettua, jos kohtelulla on objektiivisesti ja asianmukaisesti perusteltu työllisyyspoliittinen tai työmarkkinoita koskeva tavoite taikka jos erilainen kohtelu johtuu eläke- tai työkyvyttömyysetuuksien saamisedellytykseksi vahvistetuista ikärajoista.'*

The first record of situation testing in discrimination was when a Finnish NGO (the Finnish League for Human Rights) conducted situation testing in the autumn of 2002 to investigate whether restaurants deny entry to 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 11 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 before 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 to the members of the test group while allowing entry to the members of the majority population. Criminal charges were brought against 13 persons but only three 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) Prohibition and definition of indirect discrimination

In Finland, indirect discrimination is prohibited in section 8 of the Non-Discrimination Act [*Yhdenvertaisuuslaki* (1325/2014)].

It is defined in section 13 of the Non-Discrimination Act [*Yhdenvertaisuuslaki* (1325/2014)]. The definition of indirect discrimination carefully follows the definition in the directives:

'where an apparently neutral rule, criterion or practice puts a person at a particular disadvantage compared with other persons.'⁴¹

b) Justification test for indirect discrimination

The definition of a justification test for indirect discrimination is in section 13 of the Non-Discrimination Act [*Yhdenvertaisuuslaki* (1325/2014)] and carefully follows the definition in the directives:

'unless that rule, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.'⁴²

It is clearly stated in the Government proposal for the act that the interpretation of the act must happen following the jurisprudence of the Court of Justice of the European Union and other international human rights bodies, including the European Court of Human Rights.⁴³

c) Comparison in relation to age discrimination

⁴¹ Section 13 in Finnish: 'Syrjintä on välillistä, jos näennäisesti yhdenvertainen sääntö, peruste tai käytäntö saattaa jonkun muita epäedullisempaan asemaan henkilöön liittyvän syyn perusteella.'

⁴² Latter part of Section 13 in Finnish reads: '*paitsi jos säännöllä, perusteella tai käytännöllä on hyväksyttävä tavoite ja tavoitteen saavuttamiseksi käytetyt keinot ovat asianmukaisia ja tarpeellisia.*'

⁴³ Page 68 of the Government proposal on the Non-Discrimination Act 19/2014.

The Non-Discrimination Act [*Yhdenvertaisuuslaki* (1325/2014)] does not specify how a comparison is to be made in relation to age discrimination.

2.3.1 Statistical evidence

a) Legal framework

In Finland, there are national rules permitting data collection under sections 11 and 12 of the Personal Data Act [*henkilötietolaki* 523/1999]]. According to section 11 the processing of sensitive data is prohibited. Personal data are deemed to be sensitive, if they relate to or are intended to relate to:

1. race or ethnic origin;
2. the social, political or religious affiliation or trade-union membership of a person;
3. a criminal act, punishment or other criminal sanction;
4. the state of health, illness or disability of a person or the treatment or other comparable measures directed at the person;
5. the sexual preferences or sex life of a person; or
6. the social welfare needs of a person or the benefits, support or other social welfare assistance received by the person.

The prohibition of gathering sensitive data affects the possibilities of producing statistical data for designing positive action measures even if statistical data without personal information is not prohibited. It is noticeable that age is not considered to constitute sensitive data.

In Finland, statistical evidence is permitted by national law in order to establish indirect discrimination.

The procedural laws do not specifically address this issue. Normally courts are at liberty to freely regard as 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

‘after 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.’

b) Practice

In Finland, statistical evidence in order to establish indirect discrimination is used in practice. Indeed, statistical evidence has been presented in the courts, deemed admissible and used *in ratio decidendi*.⁴⁴

But 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.⁴⁵

The use of statistical evidence may be more widespread in the area of gender discrimination, although no data are 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 are available it will likely be deemed admissible as evidence. The issue of statistical evidence is not subject to discussion at the national

⁴⁴ See e.g. KHO 2001:38, KHO 2006:93 and KKO 2004:59.

⁴⁵ E.g. cases KHO 2001:38 and KHO 2006:93 involved simple statistical analyses of the treatment received by people of different ages.

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 of national discussion either.

2.4 Harassment (Article 2(3))

a) Prohibition and definition of harassment

In Finland, harassment is prohibited in national law in section 8 of the Non-Discrimination Act [*Yhdenvertaisuuslaki* (1325/2014)], where it explicitly constitutes a form of discrimination.

It is defined in section 14 of the Non-Discrimination Act [*Yhdenvertaisuuslaki* (1325/2014)] as follows:

'The deliberate or de facto infringement of the dignity of a person is harassment if the infringing behaviour relates to a reason referred to in section 8(1), and as a result of the reason, a degrading or humiliating, intimidating, hostile or offensive environment towards the person is created by the behaviour.'

According to section 8(2), harassment constitutes discrimination, as referred to in the Non-Discrimination Act. Therefore, the burden of proof provisions defined in section 28 of the Act apply also to harassment.

In the Supreme Administrative Court's decision from 9 March 2011⁴⁶ the question was whether broadcasting a TV programme (called 'Romano-TV') on national television breached the prohibition of harassment (and discrimination) in the Non-Discrimination Act. The court decided that broadcasting a TV programme is included in the concept of 'service' where the discrimination is prohibited. The decision confirms a wide interpretation of the scope of the Non-Discrimination legislation in supply of goods and services. Subsequently it was examined whether the programme violated the dignity of the Roma population in Finland. This was important as it confirms the principle that the prohibition of harassment in providing services extends to groups, not just individuals.

b) Scope of liability for harassment

In Finland, where harassment is perpetrated by an employee the employer and the employee are liable. Section 14 (2) of the Non-Discrimination Act [*Yhdenvertaisuuslaki* (1325/2014)] especially defines it as discrimination if the employer neglects to take the action it can after being informed of harassment of an employee.⁴⁷ It is not clear if a similar lack of reaction is automatically seen as discrimination if it happens e.g. in schools.

2.5 Instructions to discriminate (Article 2(4))

a) Prohibition of instructions to discriminate

In Finland, instructions to discriminate are prohibited in section 8 of the Non-Discrimination Act [*Yhdenvertaisuuslaki* (1325/2014)] where instructions or orders to discriminate are defined as discrimination. Instructions are not defined in the act itself, but the Government proposal opens up the definition. According to the *travaux préparatoires* instructions, guidelines or orders that relate to or create discrimination are

⁴⁶ Supreme Administrative Court, 09.03.2011, Reference number 588, Ref. 3870/1/09.

⁴⁷ Section 14 (2) reads in Finnish: 'Työnantajan menettelyä on pidettävä syrjintänä, jos työnantaja saatuaan tiedon siitä, että työntekijä on joutunut työssään 1 momentissa tarkoitetun häirinnän kohteeksi, laiminlyö ryhtyä käytettävissään oleviin toimiin häirinnän poistamiseksi.'

discrimination if the one giving instructions, guidelines or orders has a power to impose these obligations.⁴⁸

In Finland, instructions explicitly constitute a form of discrimination even if the instructions have not been followed.⁴⁹

b) Scope of liability for instructions to discriminate

In Finland, both the instructor and the discriminator are liable. When considering the consequences of discrimination, i.e. the obligation to pay compensation to the victim, the general principles of law applicable in the Finnish legal system determine the responsibility. As a general rule an employer is liable for the action or lack of action by an employee.⁵⁰

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

a) Implementation of the duty to provide reasonable accommodation for people with disabilities in the area of employment

In Finland, the duty to provide reasonable accommodation for people with disabilities is included in the law. It is defined in the Non-Discrimination Act [*Yhdenvertaisuuslaki* (1325/2014)]. According to Section 15(1), the employer is obliged to provide reasonable accommodation in order to provide a person with disabilities with equal access to employment and to allow them to manage their work tasks and advance in their career.

Section 15(2) of the Non-Discrimination Act [*Yhdenvertaisuuslaki* (1325/2014)] defines the elements that need to be taken into account in assessing the reasonableness of the accommodation:

- the needs of the person with disabilities;
- the size, financial position and the nature and extent of activity of the employer;
- estimated costs for reasonable accommodation measures;
- financial support available for reasonable accommodation measures.

The employer also has a special duty to give a written explanation to a person with disabilities who considers that they have been discriminated against in a recruitment situation or during employment.⁵¹

b) Practice

There is no case law in the field of employment on applying the new Non-Discrimination Act, which entered into force at the beginning of 2015. The case law from the repealed Non-Discrimination Act, which had a similar duty, is almost non-existent.

c) Definition of disability and non-discrimination protection

The definition of disability is the same in claiming reasonable accommodation and in the statutes that provide non-discrimination protection.

⁴⁸ Page 69, Government proposal on the Non-Discrimination Act 19/2014.

⁴⁹ Page 69, Government proposal on the Non-Discrimination Act 19/2014.

⁵⁰ Chapter 3 — Vicarious liability of employers and public corporations, section 1, (1) states: 'An employer shall be vicariously liable in damages for injury or damage caused by an employee through an error or negligence at work' Tort Liability Act (412/1974) <http://www.finlex.fi/fi/laki/ajantasa/1974/19740412>.

⁵¹ Non-Discrimination Act [*Yhdenvertaisuuslaki* (1325/2014)], Section 15(3).

d) Duties to provide reasonable accommodation in areas other than employment for people with disabilities

In Finland, section 15 of the Non-Discrimination Act [*Yhdenvertaisuuslaki* (1325/2014)] sets a duty to provide reasonable accommodation in order to provide a person with disabilities equal access to authorities and to receive education as well as goods and services. This obligation to reasonable accommodation extends to authorities, those providing education and public and private providers of goods and services.

The elements that need to be taken into account in assessing reasonable accommodation are the same inside and outside the field of employment:

- the needs of the person with disabilities;
- the size, financial position and the nature and extent of activity of the actor;
- the estimated costs for reasonable accommodation measures;
- the financial support available for reasonable accommodation measures.⁵²

Among the few cases applying the new Non-Discrimination Act are two cases⁵³ outside the field of employment. On providing reasonable accommodation in the field of goods and services, the Non-Discrimination and Equality Tribunal confirmed that the duty to provide reasonable accommodation cannot be overruled by referring to the need to comply with the requirements in other legislation. The tribunal also confirmed that the duty on reasonable accommodation extends to the decision-making process of the authority in deciding, for example, on financial benefits.

e) Failure to meet the duty of reasonable accommodation for people with disabilities

In Finland, failure to meet the duty of reasonable accommodation is directly defined as discrimination as part of the definition of discrimination in the Non-Discrimination Act.⁵⁴ Failure to meet the duty of reasonable accommodation has the same consequences as other forms of discrimination, i.e. the duty to pay financial compensation.⁵⁵ The National Non-Discrimination and Equality Tribunal cannot order a particular accommodation to be made, but it can forbid the continuation of discrimination, i.e. denial of reasonable accommodation, and it may impose a conditional fine to enhance its prohibition or order.⁵⁶ The statutes concerning shifting the burden of proof also apply to situations that involve assessing reasonable accommodation duties.

f) Duties to provide reasonable accommodation in respect of other grounds

In Finland, there is no duty in the public or the private sector to provide reasonable accommodation in respect of other grounds. However, the obligation set in the Constitution on authorities to 'guarantee the observance of basic rights and liberties'⁵⁷ can be interpreted to require authorities to alter their procedures in order to lower the threshold of equal access for all.

g) Accessibility of services, buildings and infrastructure

⁵² The Non-Discrimination Act [*Yhdenvertaisuuslaki* (1325/2014)], Section 15.

⁵³ See Case law section in 12.2. below.

⁵⁴ The Non-Discrimination Act [*Yhdenvertaisuuslaki* (1325/2014)], Section 8.

⁵⁵ The Non-Discrimination Act [*Yhdenvertaisuuslaki* (1325/2014)], Section 28.

⁵⁶ The Non-Discrimination Act [*Yhdenvertaisuuslaki* (1325/2014)], Section 20(3).

⁵⁷ The Constitution of Finland [*Perustuslaki* (731/1999)], Section 22 - *Protection of basic rights and liberties* reads: 'The public authorities shall guarantee the observance of basic rights and liberties and human rights.'

In Finland, national law requires new services available to the public, new buildings and new infrastructure to be designed and built in a disability-accessible way.⁵⁸ The Government proposal for the Non-Discrimination Act clearly distinguishes accommodation measures from requirements of the Land Use and Building Act and Degree, but in individual cases it is possible that failure to comply with the Land Use and Building Act and Degree at the same time constitutes discrimination as prohibited in the Non-Discrimination Act.

In Finland, the Non-Discrimination Act does not contain a general duty to provide accessibility by anticipation for people with disabilities. In the Government proposal⁵⁹ it is stated that the starting point is the needs of a person with a disability in individual situations. On the other hand the Government proposal explains that for those providing goods and services for a wide audience it can be required that they prepare in advance for most common adaptation needs e.g. for visually impaired and physically disabled persons.⁶⁰

h) Accessibility of public documents

There is no general legal requirement to translate documents into Braille.

According to Section 17(3) of the Constitution, 'The rights of persons using sign language and of persons in need of interpretation or translation aids owing to disability shall be guaranteed by an act.' The Act on Interpretation Services⁶¹ guarantees for deaf people at least 180 hours, and for deafblind people at least 360 hours, of interpretation services yearly and the interpretation needed for secondary education.

⁵⁸ Land Use and Building Act [*Maankäyttö- ja rakennuslaki* (132/1999)], Section 117(3), Land Use and Building Decree [*Maankäyttö- ja rakennusasetus* (895/1999)], Section 53.

⁵⁹ Page 81, Government proposal on the Non-Discrimination Act 19/2014.

⁶⁰ Page 81, Government proposal on the Non-Discrimination Act 19/2014.

⁶¹ Section 6 of the Act on Interpretation Services (133/2010).

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)

In Finland, there are no residence or citizenship/nationality requirements for protection under the Non-Discrimination Act, which transposes the directives.

3.1.2 Protection against discrimination (Recital 16 Directive 2000/43)

a) Natural and legal persons

In Finland, section 8 of the Non-Discrimination Act [*Yhdenvertaisuuslaki* (1325/2014)], does not cover legal persons for the purpose of protection against discrimination. As a general rule, only natural persons are protected. The Government proposal⁶² and the Parliament's Employment and Equality Committee Opinion⁶³ both stress that in some exceptional cases protection may extend to protecting legal persons. The Government proposal gives an example of discriminating against an association or religious community that can have a direct effect on the natural persons forming these legal persons.⁶⁴

In Finland, section 2(1) of the Non-Discrimination Act [*Yhdenvertaisuuslaki* (1325/2014)] defines that the act is applicable in both public and private activities. This means that the act covers both natural and legal persons for the purpose of liability for discrimination.

Section 2(2) of the Non-Discrimination Act defines that only legal acts that fall within the scope of private affairs and family life are exempt from the scope of applicability of the act.

b) Private and public sector including public bodies

In Finland, section 8 of the Non-Discrimination Act [*Yhdenvertaisuuslaki* (1325/2014)] does not cover legal persons either in the public or private sectors for the purpose of protection against discrimination. As a general rule, only natural persons are protected. The Government proposal⁶⁵ and the Parliament's Employment and Equality Committee Opinion⁶⁶ both stress that in some exceptional cases protection may extend to protecting legal persons. The Government proposal gives an example of discriminating against an association or religious community that can have a direct effect on the natural persons forming these legal persons.⁶⁷

In Finland, section 2 of the Non-Discrimination Act [*Yhdenvertaisuuslaki* (1325/2014)], covers the private and public sectors including public bodies for the purpose of liability for discrimination.

⁶² Page 67-68, Government proposal on the Non-Discrimination Act 19/2014.

⁶³ Page 4, Parliament Employment and Equality Committee <https://www.eduskunta.fi/pdf/TyVM+11/2014>.

⁶⁴ Page 68, Government proposal on the Non-Discrimination Act 19/2014.

⁶⁵ Page 67-68, Government proposal on the Non-Discrimination Act 19/2014.

⁶⁶ Page 4, Parliament Employment and Equality Committee <https://www.eduskunta.fi/pdf/TyVM+11/2014>.

⁶⁷ Page 68, Government proposal on the Non-Discrimination Act 19/2014.

3.2 Material scope

3.2.1 Employment, self-employment and occupation

In Finland, section 2 of the Non-Discrimination Act [*Yhdenvertaisuuslaki* (1325/2014)] applies to all sectors of private and public employment, self-employment and occupation, including contract work, self-employment, military service, holding statutory office, for the five grounds. The definition of employer in section 4 is wide and includes employment in the private and public sectors, contract workers and trainees in the workplace.

As the scope of the act is wide, covering 'both public and private activities' (section 2), the act does not make any references to or specifications about the material scope of the act. Accordingly there is no reference to self-employment. But when defining the justification for direct discrimination in section 11(2)(2), the Non-Discrimination Act refers to:

- conditions for access to self-employment or means of livelihood, and support for business activities;
- membership and involvement in an organisation of workers or employers or other organisations whose members carry out a particular profession, including the benefits provided by such organisations;
- thereby indirectly confirming that these situations are included in the material scope of the act.

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))

In Finland, the material scope of the Non-Discrimination Act [*Yhdenvertaisuuslaki* (1325/2014)] as defined in section 2 includes 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 for the five grounds in both private and public sectors as described in the directives.

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

In Finland, the Non-Discrimination Act [*Yhdenvertaisuuslaki* (1325/2014)], as defined in section 2, includes working conditions including pay and dismissals, for all five grounds and for both private and public employment.

3.2.3.1 Occupational pensions constituting part of pay

As the scope of the act is wide, covering 'both public and private activities' (section 2), the act does not make any references to or specifications about the material scope of the act. Accordingly there is no reference to occupational pensions constituting part of pay, but considering the wide scope of the act there is nothing to suggest that occupational pensions would not be covered by the prohibition of discrimination.

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, by the Act on Employee's Pension [*työntekijän eläkelaki* (395/2006)], which leaves no room for discretion for employers. The amount of salary directly dictates the amount of occupational pension.

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))

In Finland, the Non-Discrimination Act [*Yhdenvertaisuuslaki* (1325/2014)], as defined in section 2, applies to vocational training outside the employment relationship, such as that provided by technical schools or universities, or such as adult lifelong learning courses.

As the scope of the act is wide, covering 'both public and private activities' (section 2), the act does not make any references to or specifications about the material scope of the act. Accordingly there is no reference to training, guidance or retraining, but considering the wide scope of the act there is nothing to suggest that these would not be covered by the prohibition of discrimination.

The Non-Discrimination Act clearly applies to both employment and education and makes no difference to protected grounds when applying to employment and education.

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))

In Finland, the Non-Discrimination Act [*Yhdenvertaisuuslaki* (1325/2014)], at section 8, explicitly lists trade union activity as one of the prohibited grounds for differential treatment. Therefore, membership of and involvement in workers' organisations is included in the material scope of the Non-Discrimination Act for all five grounds and for both private and public employment. The term used, 'trade union activity', does not include membership or involvement in employers' organisations. As the list of prohibited grounds of differential treatment is not exhaustive and includes the term 'other personal characteristics', it is clear that membership or involvement in employers' organisations is included in the material scope of the Non-Discrimination Act. The Government proposal gives participating NGO activities as one of the examples of what is included under the term 'personal characteristics'.

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

In Finland, the Non-Discrimination Act [*Yhdenvertaisuuslaki* (1325/2014)], includes social protection, including social security and healthcare as formulated in the Racial Equality Directive. In Finland, the material scope of the Non-Discrimination Act does not differ depending on the protected grounds for discrimination. Therefore, all grounds mentioned in the act – origin, age, disability, religion, belief, sexual orientation, nationality, language, opinion, political activity, trade union activity, family relationships, state of health and other personal characteristics – are within the material scope of the Non-Discrimination Act.

3.2.6.1 Article 3.3 exception (Directive 2000/78)

There is no direct reference in the Non-Discrimination Act [*Yhdenvertaisuuslaki* (1325/2014)] to exceptions enabled in article 3.3 of the Employment Equality Directive. As explained in part 2.2.b and later in parts 4.1 and 4.7.1, the only justification for differential treatment in employment must be based on genuine and determining occupational requirements (4.1.), age (4.7.1.) or habitual residence (2.2.b). Exceptions allowing differential treatment based on age may be relevant in regard to payments made by state schemes in relation to different retirement ages.

Section 12(2) allows differential treatment in employment because of age if:

'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 differential treatment arises from age limits adopted in qualification for retirement or invalidity benefits within the social security system.'⁶⁸

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

In Finland, the Non-Discrimination Act [*Yhdenvertaisuuslaki* (1325/2014)] includes social advantages as formulated in the Racial Equality Directive. As the scope of the act is wide, referring to 'both public and private activities' (section 2), the act does not make any references to or specifications about the material scope of the act. The former Non-Discrimination Act⁶⁹ explicitly mentioned social advantages as formulated in the Racial Equality Directive in the material scope of the act. The announced goal of the current Non-Discrimination Act was to extend the material scope of the legislation to all private and public activity.⁷⁰ Therefore, nothing leads to the conclusion that the act is not intended to cover this requirement in the directives.

In Finland, the lack of definition of social advantages does not raise problems.

In Finland, the material scope of the Non-Discrimination Act does not differ depending on the protected grounds for discrimination. Therefore, all grounds mentioned in the act – origin, age, disability, religion, belief, sexual orientation, nationality, language, opinion, political activity, trade union activity, family relationships, state of health and other personal characteristics – are within the material scope of the Non-Discrimination Act.⁷¹

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

In Finland, section 2 of the Non-Discrimination Act [*Yhdenvertaisuuslaki* (1325/2014)] includes education as formulated in the Racial Equality Directive. As the scope of the act is wide, referring to 'both public and private activities' (section 2), the act does not make any references to or specifications about the material scope of the act. However, the act makes a distinction between those who have a legislation-based position in providing education as opposed to when education is provided as part of providing goods and services (such as language courses, etc.) Only in the former case is there a special duty to purposefully and methodically foster equality.⁷²

In Finland, the material scope of the Non-Discrimination Act does not differ depending on the protected grounds for discrimination. Therefore, all grounds mentioned in the act – origin, age, disability, religion, belief, sexual orientation, nationality, language, opinion, political activity, trade union activity, family relationships, state of health and other personal characteristics – are within the material scope of the Non-Discrimination Act.

a) Pupils with disabilities

⁶⁸ Section 12(2) of the Non-Discrimination Act reads in Finnish: *'Ikään tai asuinpaikkaan perustuva erilainen kohtelu on lisäksi oikeutettua, jos kohtelulla on objektiivisesti ja asianmukaisesti perusteltu työllisyyspoliittinen tai työmarkkinoita koskeva tavoite taikka jos erilainen kohtelu johtuu eläke- tai työkyvyttömyysetuuksien saamisedellytykseksi vahvistetuista ikärajoista.'*

⁶⁹ Non-Discrimination Act [*Yhdenvertaisuuslaki* (21/2004)], Section 2(2)(2).

⁷⁰ Page 36, Government proposal on the Non-Discrimination Act 19/2014.

⁷¹ There is no age-related justification for differential treatment in social advantages e.g. in granting invalidity benefits. The only age-related exceptions are in employment – see 4.7.1.

⁷² Section 6 of the Non-Discrimination Act.

In Finland, the general approach to education for pupils with disabilities does not raise problems. The educational policy has been based on the principle of community schooling since the early 1980s. According to this principle students attend school in their own residential area and there is no segregation of pupils with disabilities.⁷³ The general principle of inclusion is accepted as a basis for educational policy, but some critics point out that too many students are transferred to special needs education classes because of the attitude of the teachers.⁷⁴ The proportion of pupils receiving special support (special needs education) has declined evenly in the last few years. In 2011 about 8 % of all pupils in basic education were given special support while the corresponding figure was 7.3 % in 2013.⁷⁵

b) Trends and patterns regarding Roma pupils

In Finland, there are specific patterns in education regarding Roma pupils such as a high dropout rate. The situation regarding the basic education of Roma pupils was studied for the first time by the National Board of Education 10 years ago (2000–01). In 2010–11, the National Board of Education conducted a follow-up study by interviewing a total of 240 Roma children and young people in the age group for receiving basic education, as well as their guardians. Responses to an online questionnaire were received from 1 341 school principals.

The first study on the basic education of Roma pupils conducted by the National Board of Education indicated that the problems related to school attendance faced by Roma children are associated with having to repeat the year and numerous absences. A significant number of Roma children received special needs teaching, and they participated in pre-primary education less often than children belonging to the majority population. Dropping out of school was also more common than in the majority population. The study also found that Roma children did well in arts and crafts, that they were sociable, and that they had good manners.

The latest study points to positive trends, for example in attending pre-primary education and teaching of the Romani language, and in successful cooperation between Roma homes and schools. Roma children continue to participate in pre-primary education less often than children of the majority population, but their participation rate has gone up significantly in the last 10 years. While an increasing share of Roma pupils are doing well in basic education, one out of five of all Roma pupils continue to have significant problems in their school attendance.

Roma students' high number of absences has been identified as a factor that impedes their success at school. The absences are often caused by family reasons. The National Board of Education's study shows, however, that Roma children are more easily persuaded to stay at home for various reasons than children of the majority population. In interviews with Roma pupils, bullying at school also came to light to some extent as a cause of unauthorised absences.⁷⁶ Neither the Non-Discrimination Ombudsman nor its predecessor Ombudsman for Minorities published information on cases of discrimination

⁷³ Finnish National Board of Education http://www.edu.fi/erityinen_tuki/yhteinen_koulu_kaikille.

⁷⁴ Prof. Timo Saloviita http://users.jyu.fi/~saloviit/tutkimus/inclusion.html#INKLUUSIO_MEILL%C4_JA_MUUALLA.

⁷⁵ http://www.oph.fi/english/current_issues/101/0/statistics_of_the_month_proportion_of_pupils_in_basic_education_receiving_intensified_or_special_needs_support_2011_2013.

⁷⁶ 'Steering and monitoring of the implementation of the national policy on Roma. Working group report.' Ministry of Social Affairs and Health, Finland, 2014.

at schools, although the Ombudsman for Children has published a study on the welfare of Roma children.⁷⁷

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

In Finland, section 2 of the Non-Discrimination Act [*Yhdenvertaisuuslaki* (1325/2014)] covers access to and supply of goods and services as formulated in the Racial Equality Directive.

In Finland, the material scope of the Non-Discrimination Act does not differ depending on the protected grounds for discrimination. Therefore, all grounds mentioned in the act – origin, age, disability, religion, belief, sexual orientation, nationality, language, opinion, political activity, trade union activity, family relationships, state of health and other personal characteristics – are within the material scope of the Non-Discrimination Act.

3.2.9.1 Distinction between goods and services available publicly or privately

Section 2(2) of the act defines that only legal acts that fall within the scope of private affairs and family life are exempt from the scope of applicability of the act. In the Government proposal⁷⁸ for the act it is further defined, for example, that putting a flat up for rent is included in the sphere of prohibition of discrimination.

Even if the material scope of the Non-Discrimination Act is wide and only legal acts that fall within the scope of private affairs and family life are exempt from the scope of applicability of the act, there are some restrictions on the right to compensation because of discrimination. According to section 23 of the Non-Discrimination Act, the person who has been discriminated against is entitled to receive compensation only from the authority, employer, education provider or supplier of goods or services who has discriminated against them. Therefore, compensation cannot be received from a manufacturer who has produced inaccessible goods, for instance.⁷⁹

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

In Finland, the Non-Discrimination Act [*Yhdenvertaisuuslaki* (1325/2014)] covers housing as formulated in the Racial Equality Directive. As the scope of the act is wide, referring to 'both public and private activities' (section 2), the act does not make any references to or specifications about its material scope.

The former Non-Discrimination Act⁸⁰ explicitly mentioned housing as formulated in the Racial Equality Directive in the material scope of the act. The announced goal of the current Non-Discrimination Act was to extend the material scope of the legislation to all private and public activity.⁸¹ Therefore, nothing leads to the conclusion that the act is not intended to cover this requirement in the directives. For years, the discrimination against Roma people in the area of housing was the biggest individual reason for contacting the Ombudsman for Minorities. Statistics from the Non-Discrimination Ombudsman regarding cases applying the new Non-Discrimination Act, which came into force on 1 January 2015, are not available yet. There is not yet any case law in the area of housing involving the new Non-Discrimination Act.

⁷⁷ Pekka Junkala & Sanna Tawah: 'More Similar than Different.' Helsinki 2009. The Welfare of Roma Children and Youth and the Realisation of their Rights in Finland, <http://lapsiasia.fi/wp-content/uploads/2015/04/romanilasten-hyvinvointi.pdf>.

⁷⁸ Page 56, Government proposal on the Non-Discrimination Act 19/2014.

⁷⁹ See 6.5(a) below on applicable sanctions in cases of discrimination.

⁸⁰ Non-Discrimination Act [*Yhdenvertaisuuslaki* (21/2004)], Section 2(2)(2).

⁸¹ Page 36, Government proposal on the Non-Discrimination Act 19/2014.

In the Government proposal⁸² for the Act, it is further defined that putting a flat up for rent is included in the sphere of prohibition of discrimination. The duty to provide reasonable accommodation in order to provide a person with disabilities with equal access to goods and services extends to public and private providers of goods and services. What is reasonable accommodation depends on, among other things, the size, financial position and the nature and extent of activity of the actor concerned.⁸³ Therefore, an individual landlord who only has one apartment to rent could be required to make smaller modifications than a company that is making a substantial profit by renting many apartments.

In Finland, the material scope of the Non-Discrimination Act does not differ depending on the protected grounds for discrimination. Therefore, all grounds mentioned in the act – origin, age, disability, religion, belief, sexual orientation, nationality, language, opinion, political activity, trade union activity, family relationships, state of health and other personal characteristics – are within the material scope of the Non-Discrimination Act.

3.2.10.1 Trends and patterns regarding housing segregation for Roma

In Finland, there are patterns of housing discrimination against the Roma. A study published by the Ombudsman for Minorities showed that almost half, some 48.5 %, of the Roma respondents who have been active on the housing market, have experienced discrimination on the ground of their ethnic origin when applying for rental housing financed through state subsidies, typically rental housing belonging to the municipality or city.

Although Roma have rarely informed the Ombudsman for Minorities about discrimination experienced when seeking privately financed rental housing, the survey responses indicate that discrimination is experienced on the so-called private housing market even more often than when applying for rented housing from a municipality or city. More than half of respondents – 54.7 % – note that they have been discriminated against on the grounds of their ethnic origin when attempting to rent or buy housing on the private housing market.⁸⁴ No statistics are available yet on the work of the Non-Discrimination Ombudsman in applying the new Non-Discrimination Act to housing cases.⁸⁵

Housing segregation does not appear to be a major problem for the Roma. Part of the reason for this may be that Finland is a large country and the Roma community is small. Housing discrimination against the Roma, especially as regards private rentals and to some extent municipal housing, is widespread.⁸⁶

⁸² Page 56, Government proposal on the Non-Discrimination Act 19/2014.

⁸³ The Non-Discrimination Act [*Yhdenvertaisuuslaki* (1325/2014)], Section 15.

⁸⁴ Page 5 'Being Different In Everyday Life –Survey On Roma's Experiences Of Discrimination', Helsinki, 2013, http://www.syrjinta.fi/documents/10181/10850/54366_romanitutkimus_tiivistelma_eng_final.pdf/555a7857-41b2-48f2-848b-224c5a32f665.

⁸⁵ The new Non-Discrimination Act came into force on 1 January 2015.

⁸⁶ Roma housing discrimination cases from previous years are presented in previous reports such as <http://www.humanconsultancy.com/Publications/2012-FI-Country%20Report%20LN%20final.doc?Web=1>.

4 EXCEPTIONS

4.1 Genuine and determining occupational requirements (Article 4)

In Finland, section 12 of the Non-Discrimination Act [*Yhdenvertaisuuslaki* (1325/2014)] provides an exception for genuine and determining occupational requirements. The wording of section 12(1) defines that a difference of treatment is justified if the treatment is based on a genuine and determining occupational requirement and the treatment is based on the nature of the particular occupational activities concerned or on the context in which they are carried out providing that the treatment is proportionate. There is very little case law on employment discrimination and no case law on the application of genuine and determining occupational requirements.

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

In Finland, the Non-Discrimination Act [*Yhdenvertaisuuslaki* (1325/2014)] does not provide for an exception for employers with an ethos based on religion or belief.

However, in the Government proposal the question is addressed in conjunction with the questions of genuine and determining occupational requirement and it includes a reference to article 4(2) of the Directive 2000/78.⁸⁷ The Government proposal cites the article 4(2) definition that a difference of treatment based on a person's religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitutes a genuine, legitimate and justified occupational requirement. Additionally, the Government proposal states that 'setting such a requirement cannot lead to discrimination on another ground.'⁸⁸

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

In Finland, the Non-Discrimination Act [*Yhdenvertaisuuslaki* (1325/2014)] does not provide an exception for the armed forces in relation to age or disability discrimination (article 3(4), Directive 2000/78).

4.4 Nationality discrimination (Article 3(2))

a) Discrimination on the ground of nationality

In Finland, the Non-Discrimination Act [*Yhdenvertaisuuslaki* (1325/2014)] does not include exceptions relating to difference of treatment based on nationality.

In Finland, nationality (as in citizenship) is explicitly mentioned as a protected ground in section 8 of the Non-Discrimination Act [*Yhdenvertaisuuslaki* (1325/2014)].

b) Relationship between nationality and 'race or ethnic origin'

Nationality is one of the explicitly prohibited grounds of discrimination recognised by the Non-Discrimination Act [*Yhdenvertaisuuslaki* (1325/2014)].

⁸⁷ In the Government proposal the question is addressed in conjunction with the questions of genuine and determining occupational requirement and it includes a reference to article 4(2) of the Directive 2000/78.

⁸⁸ Page 72, Government proposal on the Non-Discrimination Act 19/2014.

The issue of the overlap and interface between nationality and ethnic origin as a ground 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 ground of (foreign) nationality may constitute indirect ethnic discrimination since the majority of foreign nationals have an ethnic origin other than Finnish.⁸⁹

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.

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

a) Benefits for married employees

In Finland, it would constitute unlawful discrimination under section 8 of the Non-Discrimination Act [*Yhdenvertaisuuslaki* (1325/2014)] if an employer provided benefits only to those employees who were married. This would constitute discrimination on the basis of family relationships, which is a protected ground in the act.

b) Benefits for employees with opposite-sex partners

In Finland, it would constitute unlawful discrimination under section 8 of the Non-Discrimination Act [*Yhdenvertaisuuslaki* (1325/2014)] if an employer provided benefits only to those employees with opposite-sex partners. This would constitute discrimination based on sexual orientation, and possibly also based on family relationships.

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

a) Exceptions in relation to disability and health/safety

In Finland, there are no exceptions in relation to disability and health and safety (article 7(2), Directive 2000/78) in the Non-Discrimination Act [*Yhdenvertaisuuslaki* (1325/2014)].

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 cooperation 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.⁹⁰ 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.⁹¹ This requirement is absolute (non-negotiable) in nature.

According to section 12 of the Occupational Health and Safety Act, employers shall take into account disabled employees and their capacities when designing the work

⁸⁹ See e.g. the decision of the Tribunal of 22 September 2006.

⁹⁰ Section 10 of the Health and Safety Act [*työterveyslaki* (738/2002)].

⁹¹ Section 11 of the the Health and Safety Act [*työterveyslaki* (738/2002)].

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.

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

4.7.1 Direct discrimination

In Finland, the Non-Discrimination Act [*Yhdenvertaisuuslaki* (1325/2014)] does not provide a general exception for direct discrimination on age.

a) Justification of direct discrimination on the ground of age

In Finland, it is possible, in specified circumstances, to justify direct discrimination on the ground of age.

In Finland, section 12(2) of the Non-Discrimination Act [*Yhdenvertaisuuslaki* (1325/2014)] provides an exception for direct discrimination on age only in employment.

Section 12(2) defines that differential treatment in employment is possible on the basis age if:

‘it has a justified purpose that is objectively and appropriately founded and derives from employment policy or the labour market or when the differential treatment arises from age limits adopted in qualification for retirement or invalidity benefits within the social security system.’⁹²

The wording of section 12(2) 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 boils 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 12(2) of the Non-Discrimination Act. However, section 12(2) refers only to the aim of the treatment, which thus does not invite examination of whether the requirements of the proportionality principle have been followed.

Again, the situation would have been clearer if the law had incorporated an express reference to the requirement that the means employed have to be ‘appropriate and necessary’, so that it was been clear that it is 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.

b) Permitted differences of treatment based on age

In Finland, section 12(2) of the Non-Discrimination Act [*Yhdenvertaisuuslaki* (1325/2014)] permits differences of treatment based on age for some activities within the material scope of Directive 2000/78.

⁹² Section 12(2) of Non-Discrimination Act, in Finnish: *‘Ikään tai asuinpaikkaan perustuva erilainen kohtelu on lisäksi oikeutettua, jos kohtelulla on objektiivisesti ja asianmukaisesti perusteltu työllisyyspoliittinen tai työmarkkinoita koskeva tavoite taikka jos erilainen kohtelu johtuu eläke- tai työkyvyttömyysetuuksien saamisedellytykseksi vahvistetuista ikärajoista.’*

Section 12(2) defines that differential treatment in employment is possible on the basis of age only if:

'it has a justified purpose that derives from employment policy or the labour market or when the differential treatment arises from age limits adopted in qualification for retirement or invalidity benefits within the social security system.'⁹³

However, the defined purpose is wide. A couple of examples arise from current legislation. A specific act exists that governs employment relationships of young employees, who are defined in the act as being those who are employed and under 18 years.

The Act on Young Employees [*laki nuorista työntekijöistä* (998/1993)] makes specific provisions with regard to, for example, the maximum working time allowed and occupational health and security.

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

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) contexts in connection to a legal proceeding brought forward by a claimant under the applicable laws, in particular the Non-Discrimination Act.

- c) Fixing of ages for admission or entitlements to benefits of occupational pension schemes

In Finland, section 12(2) of the Non-Discrimination Act [*Yhdenvertaisuuslaki* (1325/2014)] allows occupational pension schemes to fix ages for admission to the scheme or entitlement to benefits, taking up the possibility provided for in article 6(2) of Directive 2000/78.

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

In Finland, special conditions are 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.

The Act on Young Employees [*laki nuorista työntekijöistä* (998/1993)], which is to be applied to those who are under 18 and employed, demands that employers must ensure that the work carried out by a young employee is not detrimental to his or 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).

⁹³ Section 12(2) of Non-Discrimination Act, in Finnish: *'Ikään tai asuinpaikkaan perustuva erilainen kohtelu on lisäksi oikeutettua, jos kohtelulla on objektiivisesti ja asianmukaisesti perusteltu työllisyyspoliittinen tai työmarkkinoita koskeva tavoite taikka jos erilainen kohtelu johtuu eläke- tai työkyvyttömyysetuuksien saamisedellytykseksi vahvistetuista ikärajoista.'*

As regards pregnant employees, the Employment Contracts Act provides that necessary accommodations to work and the 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 childcare leave (chapter 4, sections 3-6) and absence for compelling family reasons (chapter 4, section 7).

4.7.3 Minimum and maximum age requirements

In Finland, there are 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 someone 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 (or older) may conclude and terminate an employment contract (section 3 of the act), while an employment contract of someone younger than 15 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.

4.7.4 Retirement

a) State pension age

In Finland, there is no state pension age at which individuals must begin to collect their state pensions. A person is entitled to a state old-age pension when he or she reaches 65 (*kansaneläkelaki* (347/1956)). Whether a person is entitled to this pension depends on the amount of other benefits (including other types of pensions) that she or he receives. A person is entitled to a reduced-rate state old-age pension after turning 62. A pension must in any case be applied for.

The fact that a person receives an old-age pension does not preclude her or him from working. A person may also postpone the application of the pension, in which case she or he is entitled to an increase in the amount of the pension.

b) Occupational pension schemes

In Finland, there is a normal age when people can begin to receive payments from occupational pension schemes and other employer-funded pension arrangements.

An employee can start to enjoy an employment-related old age pension at any point during her or his 63-68 years. Those who are 62 are entitled to an 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.

If an individual wishes to work longer, payments from occupational pension schemes can be deferred. The old-age pension does not start automatically, but must be applied for. One does not need to start collecting the 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 Self-Employed Persons' Pensions Act or the Farmers' Pensions Act do not need to stop working to be eligible to receive a pension. This group includes self-employed persons and farmers. Other employees are required to retire from their jobs to be eligible to receive the old-age pension, but this is without prejudice to their right to conclude new employment contracts.

The applicable employee pension law depends on the insured person's place of work and type of employment.⁹⁴ A single person can enjoy several types of pension simultaneously, including the national (i.e. state) old-age pension and an employment-related old-age pension.

c) State imposed mandatory retirement ages

In Finland, there is no state-imposed mandatory retirement age. The rules regarding retirement age and pension have been amended in the past 15 years in an attempt to attract employees to stay longer in working life.

Section 6(1)(a) of the 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, unless the employer and employee agree otherwise. If an employee decides to retire before turning 68, she or he is in practice expected to terminate his or 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. 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, unless a new fixed term has been agreed to between the parties.

d) Retirement ages imposed by employers

In Finland, national law permits employers to set retirement ages (or ages at which the termination of an employment contract is possible) by contract and collective bargaining.

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 in an employment contract that is for 'an indefinite term'. 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 25 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.

⁹⁴ These laws cover both public and private sector employment and self-employment: 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).

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 with retirement ages, and that employers and employees often agree to include these rules in their employment contracts.

e) Employment rights applicable to all workers irrespective of age

The law against dismissal applies to all instances of dismissal, but the termination of the employment contract due to an employee reaching 68 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, 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.

f) Compliance of national law with CJEU case law

In Finland, national legislation is in line with the CJEU case law on age regarding compulsory retirement.

In November 2011 the Supreme Administrative Court decided that a Decree on Police Administration, which set a lower obligatory retirement age for those policemen who belong to the management of the Central Bureau of Investigation, was discriminatory and against Directive 2000/78. In the academic comments on this decision there has been no reference to other decrees or acts that would set a lower obligatory retirement age without objectively and reasonably justified aim, by appropriate and necessary means. This does not, of course, mean that such cases could not arise. Also after *Hörmfeldt* [C-1141/11] it is not clear whether the aims that led to the setting of the general compulsory retirement age of 68 in Finland would be seen as justified and required by the directive.

4.7.5 Redundancy

a) Age and seniority taken into account for redundancy selection

In Finland, national law permits 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 or dismissal of employees may be based only on 'appropriate and weighty reasons'.

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

b) Age taken into account for redundancy compensation

In Finland, national law provides for compensation for redundancy. This compensation may be affected by the age of the worker.

Compensation for redundancy is to be paid only in situations where the laying off or dismissal was based on grounds that breach the Employment Contracts Act, for instance, if the decision was based on discriminatory considerations or if there were genuinely no grounds for redundancy. The compensation must be equivalent to the pay due for a minimum of three months or a maximum of 24 months.

Depending on the reason for terminating the employment relationship, the following factors must be taken into account in determining the amount of compensation: estimated time without employment and estimated loss of earnings, the remaining period of a fixed-term employment contract, the duration of the employment relationship, the employee's age and chances of finding employment corresponding to his or her vocation or education and training, the employer's procedure for terminating the contract, any motive for termination originating on the part of the employee, the general circumstances of the employee and the employer, and other comparable matters.⁹⁵

As the age of the employee is only one factor in considering compensation for the damage caused by the dismissal, the legislation seems to be in conjunction with the proportionality required by Article 6 of Directive 2000/78.

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)

In Finland, national law does not include exceptions that seek to rely on article 2(5) of the Employment Equality Directive.

4.9 Any other exceptions

In Finland, other exceptions to the prohibition of discrimination (on any ground) provided in the Non-Discrimination Act [*Yhdenvertaisuuslaki* (1325/2014)] are as follows:

In addition to the exceptions related to discrimination on the ground of age, as described above, section 12(2) of the Non-Discrimination Act allows for differential treatment because of domicile.⁹⁶ This exception is clearly outside the scope of the directives, however.

Positive action is allowed under section 9, according to which:

'Proportionate differential treatment that aims to promote de facto equality, or to prevent or remove the disadvantages attributable to discrimination, does not constitute discrimination.'

⁹⁵ Chapter 12 section 2 of the Employment Contracts Act [*Työsopimuslaki* (55/2001)].

⁹⁶ Differential treatment based on age or *domicile* is also justified if the treatment has an objectively and appropriately justified employment policy objective or an objective concerning the labour market, or if the differential treatment is attributable to the age limits that have been set for qualification for retirement or invalidity benefits.

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

a) Scope for positive action measures

In Finland, positive action in respect of all grounds of discrimination including origin, religion or belief, disability, age or sexual orientation, is provided for in section 9 of the Non-Discrimination Act [*Yhdenvertaisuuslaki* (1325/2014)].

Section 9 states:

‘Proportionate differential treatment that aims to promote de facto equality, or to prevent or remove the disadvantages attributable to discrimination, does not constitute discrimination.’

Furthermore, the act obliges all public authorities and those private sector organisations using public power or performing public administrative tasks, providers of education and those employers who employ more than 30 employees, to take steps to foster equality. In this way the national legislation goes beyond the minimum requirements laid down in the article 13 directives.⁹⁷

b) Main positive action measures in place on national level

The Non-Discrimination Act, which was in force until the end of 2014, required authorities to purposefully and methodically foster equality and draw up a plan for the fostering of ethnic equality (equality plan). The new Non-Discrimination Act extends this task to cover all grounds and extends the responsibility in addition to authorities to providers of education and to those employers who employ more than 30 employees. These measures form the most significant combination of positive action in Finnish society.

The equality plans are supposed to cover all protected grounds of discrimination in the Non-Discrimination Act (origin, age, disability, religion, belief, sexual orientation, nationality, language, opinion, political activity, trade union activity, family relationships, state of health or other personal characteristics), and they do not require up-to-date statistical information about employees’ different characteristics. Therefore, the baseline of the equality plans differs from that of gender equality plans, which are required to include statistical information about women and men in different jobs and about their pay.

According to section 5 of the new Non-Discrimination Act it is the responsibility of an authority to evaluate the realisation of equality in their activities and take necessary action to foster equality. Taking into consideration the operational environment, resources and other circumstances, the measures promoting equality must be effective, practical and proportional. The authority must have a plan of necessary measures to foster equality. This task of equality planning does not extend to the Lutheran or Orthodox Church or those private companies that employ fewer than 30 employees using public power or performing public administrative tasks. The Non-Discrimination Ombudsman supervises compliance with equality planning tasks.

Section 6 of the act sets a similar requirement for those providing education and the educational institutions. This means that schools need to have an equality plan taking into consideration all discrimination grounds and measures to improve the equality of students. These plans have also included ways to develop schools and universities to be

⁹⁷ Section 6 of the Non-Discrimination Act [*Yhdenvertaisuuslaki* (1325/2014)].

more accessible in the process of selecting students, providing more translations and interpretation services and preventing and tackling discrimination in services.⁹⁸

Section 7 of the Non-Discrimination Act requires employers to evaluate the realisation of equality in the workplace and, taking into consideration the needs of the workplace, to improve the working conditions and processes relating to recruitment and to decision-making pertaining to employees. Taking into consideration the operational environment, resources and other circumstances, the measures promoting equality must be effective, practical and proportional. It is the task of the Occupational Health and Safety Authorities to supervise compliance with equality planning tasks.

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, for example, the legislator and the judiciary to actively secure the de facto realisation of rights, which may necessitate the taking into account of the specific situation of vulnerable groups.

The Act on Equality Between Women and Men [*laki naisten ja miesten tasa-arvosta* (609/1986)] 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).

⁹⁸ See e.g. Equality Planning Guide published by the Ministry of Interior, 2010 <http://yhdenvertaisuus-fi-bin.directo.fi/@Bin/22392f86c41f3392798dd01f2ff323bc/1437599117/application/pdf/174203/Equality%20planning%20guide.pdf>.

6 REMEDIES AND ENFORCEMENT

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

- a) Available procedures for enforcing the principle of equal treatment

In Finland, the following 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 regards all grounds covered by the two directives:

As regards, inter alia, employment, education, provision of goods and 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 have to investigate the matter under the leadership of a prosecutor (pre-trial investigation).

As regards to exercise of public powers, employment, education and provision of goods and services, a victim of discrimination may file a claim, in a district court, for compensation under the Non-Discrimination Act [*Yhdenvertaisuuslaki* (1325/2014)]. The payment of compensation is not connected to criminal liability.

As regards areas covered by the Non-Discrimination Act, a victim of discrimination may turn to the Non-Discrimination Ombudsman for advice and assistance in having the discrimination examined. Persons who consider that they have been discriminated against may also ask the Ombudsman to lead conciliation proceedings. In cases other than employment the Ombudsman may issue statements on any discrimination case submitted to him. The statements of the Ombudsman are not legally binding.

The National Non-Discrimination and Equality Tribunal may confirm a settlement between the parties or prohibit the continuation of a conduct that is contrary to the prohibition of discrimination or victimisation. The tribunal does not have jurisdiction in employment. The decisions of the tribunal are binding, but can be appealed against in Administrative Court. The tribunal may also order a party to fulfil its obligations by imposing a conditional fine. An order for the payment of the conditional fine is given in separate proceedings on request of the applicant in case the prohibition order is not followed.

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 other less severe cases of discrimination the Occupational Health and Safety Authority can issue an improvement notice.⁹⁹ The improvement notices that the Occupational Health and Safety Authorities issue are legally binding. 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.

⁹⁹ Section 13, Act on Occupational Safety and Health Enforcement and Cooperation on Occupational Safety and Health at Workplaces [*Laki työsuojelun valvonnasta ja työpaikan työsuojeluyhteistoiminnasta* (44/2006)].

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 in a legally binding way, but they may, for example, issue admonitions or order criminal prosecution against a public official.

Victims of discrimination can, of course, use their right to appeal to a court against a discriminatory decision or make a complaint to a higher supervisory authority, e.g. in social and health care or education.

b) Barriers and other deterrents faced by litigants seeking redress

The services of the Non-Discrimination Ombudsman, the National Non-Discrimination and Equality Tribunal, the Occupational Health and Safety Authority and the Parliamentary Ombudsman or the Chancellor of Justice are free of charge and are meant to be used even without the help of a lawyer. Claiming compensation because of discrimination must be done in district courts and involve the risk of paying the respondents' legal fees if the case is lost, which in practice deters those seeking redress from claiming compensation for discrimination.

c) Number of discrimination cases brought to justice

In Finland, only limited statistics are available on the number of cases relating to discrimination that are brought to justice.

The Non-Discrimination Ombudsman has not yet published¹⁰⁰ any statistics on her activities during the first year of activity. The last published report¹⁰¹ on the activities of the predecessor to the Non-Discrimination Ombudsman – the Ombudsman for Minorities – is from 2013. The total number of discrimination cases reported to the Ombudsman was 285 in 2013. Additionally, the Ombudsman received 134 cases of 'other inappropriate treatment', such as harassment, defamation, ethnic agitation, violence, threat of violence or other offensive treatment. There is no statistical information available on the outcome of the actions taken by the Ombudsman.¹⁰²

The Occupational Health and Safety Authorities do not publish national statistics. Their latest available data¹⁰³ at time of writing showed that the biggest of the five regional divisions (the Southern Finland Division) received 226 cases relating to discrimination in 2014. The majority of the cases related to health issues (80 cases), 27 cases concerned nationality, language or origin, 23 cases were about age discrimination, three cases were about sexual orientation discrimination and three cases concerned disability discrimination. The Southern Finland Division monitors 44 % of Finnish wage earners/workplaces.

d) Registration of discrimination cases by national courts

¹⁰⁰ Latest statistics checked 05.03.2016.

¹⁰¹ Latest statistics checked 05.03.2016.

¹⁰² page 28 of the Annual Report of the Ombudsman for Minorities in 2013, http://www.syrjinta.fi/documents/10181/10834/56048_vv_vuosikertomus_2013_verkko_suomi.pdf/074956e0-9cfe-4727-bfd3-c4127b03d31d.

¹⁰³ Supervision of the prohibition of discrimination in the Southern Finland Division of the Occupational Safety and Health Administration [*Syrjintäkieltojen valvonta Etelä-Suomen aluehallintoviraston työsuojelun vastualueella*], 2014, latest statistics checked 05.03.2016.

In Finland, discrimination cases are not registered as such by national courts.

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

a) Engaging on behalf of victims of discrimination (representing them)

In Finland, associations, organisations and trade unions are not entitled to act on behalf of victims of discrimination in courts, but can bring a discrimination case to the National Non-Discrimination and Equality Tribunal in cases other than employment.

As a general rule in the Finnish legal system, both natural and legal persons such as registered associations (NGOs, trade unions) have legal status and therefore can have rights and obligations. However, only those whose rights or obligations are directly at stake can have legal standing in court in a particular case. Therefore, interested organisations do not have legal standing in discrimination cases and they may not bring legal action on behalf of victims of discrimination or become third parties or even (usually) act as an *amicus curiae*.

In accordance with section 21 of the Non-Discrimination Act, an organisation with an interest in advancing equality or the Non-Discrimination Ombudsman have a right to bring a specific case before the National Non-Discrimination and Equality Tribunal if the person who considers that they have been discriminated gives his or her consent to this. The Government proposal opens up the concept that an organisation with an interest in advancing equality can be, for example, a human rights association or an association representing consumers or social partners.¹⁰⁴

b) Engaging in support of victims of discrimination

As explained above, in Finland, associations, organisations and trade unions are not entitled to act in support of victims of discrimination, but can initiate a case with the National Non-Discrimination and Equality Tribunal in issues other than employment.

The new Non-Discrimination Act requires that a court must, in cases concerning the application of the Act, allow the Non-Discrimination Ombudsman the opportunity to be heard insofar as the matter pertains to the authority of the Ombudsman. Additionally, the prosecutor must allow the Non-Discrimination Ombudsman the opportunity to be heard prior to bringing charges for discrimination (Chapter 11, section 11 of the Criminal Code).

In practice, the courts send a notice to the Office of the Non-Discrimination Ombudsman and inform her of the opportunity to be heard in court in relation to the case or to send her written opinion on the case.

c) Actio popularis

In Finland, national law does not allow associations, organisations and trade unions to act in the public interest on their own behalf, without a specific victim to support or represent (*actio popularis*).

As a general rule in the Finnish legal system, both natural and legal persons such as registered associations (NGOs, trade unions) have legal status and therefore can have rights and obligations. However, only those whose rights or obligations are directly at stake can have legal standing in court in a particular case. Therefore, interested

¹⁰⁴ Page 87, Government proposal on the Non-Discrimination Act 19/2014.

organisations do not have legal standing in discrimination cases and they may not bring legal action on behalf of victims of discrimination or become third parties or even (usually) act as an *amicus curiae*. Organisations can only provide legal representation to alleged victims through a power of attorney, but cannot pursue matters on their behalf.

The exception to the above is the right of the Non-Discrimination Ombudsman to be heard as an *amicus curiae*.¹⁰⁵ A court must, in a case concerning the application of the Non-Discrimination Act, allow the Non-Discrimination Ombudsman the opportunity to be heard insofar as the matter pertains to the authority of the Ombudsman. Additionally, the prosecutor must allow the Non-Discrimination Ombudsman the opportunity to be heard prior to bringing charges for discrimination (Chapter 11, section 11 of the Criminal Code).

d) Class action

In Finland, national law does not allow associations, organisations and trade unions to act in the interest of more than one individual victim (class action) for claims arising from the same event.

Class action has been possible only in relation to disputes between consumers and entrepreneurs since October 2007, and only the Consumer Ombudsman can take the matter to court as a class action.¹⁰⁶ Class action is not possible in discrimination cases.

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

In Finland, section 28 of the Non-Discrimination Act [*Yhdenvertaisuuslaki* (1325/2014)] requires a shift of the burden of proof from the complainant to the respondent. According to section 28 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 in applying the Non-Discrimination Act before the Discrimination Tribunal, before the ordinary courts (e.g. to a claim for compensation according to section 23 of the Non-Discrimination Act) and in relation to the Occupational Health and Safety Authorities. It does not, however, apply to proceedings brought under acts other than the Non-Discrimination Act, such as the Tort Liability Act [*vahingonkorvauslaki* (412/1974)].

The general interpretation of the burden of proof is that it is not sufficient to claim that differential treatment has happened because of a protected ground such as disability or sexual orientation. As a rule the claimant must produce some indications that differential treatment was due to the prohibited ground of discrimination after which the burden of proof shifts to respondents. There is no precedent on the question of shift in the burden of proof yet.

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

In Finland, there are legal measures of protection against victimisation in section 16 of the Non-Discrimination Act [*Yhdenvertaisuuslaki* (1325/2014)].

Section 16 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.

¹⁰⁵ Section 27, Non-Discrimination Act [*Yhdenvertaisuuslaki* (1325/2014)].

¹⁰⁶ Act on Class Action [*ryhmäkannelaki* (444/2007)].

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.¹⁰⁷ No necessary personal connection to the (alleged) discrimination is needed. Secondly, the scope of persons protected from victimisation is wide: not only 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.

Thirdly, the range of protected actions taken in response to victimisation is wide. It covers bringing legal action to a court, ombudsman, discrimination tribunal or any other competent authority, in addition to which the filing of a complaint or a crime report, or even the contacting of a human rights organisation or a lawyer, is covered.¹⁰⁸

A person who has suffered victimisation may be awarded compensation in accordance with section 23 of the Non-Discrimination Act. The reversed burden of proof applies in assessing victimisation.

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

a) Applicable sanctions in cases of discrimination – in law and in practice

Section 23 of the Non-Discrimination Act [*Yhdenvertaisuuslaki* (1325/2014)] provides the victim of discrimination or the one who has been the target of victimisation with a right to compensation from the authority, employer or provider of education or training or goods and services who has discriminated or targeted victimisation.

The award of compensation is without prejudice to the possibility of obtaining 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 the Tort Liability Act, but it will be applied independently.

Discrimination is an offence punishable under sections 11:11 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 25 of the Non-Discrimination Act, a court may amend or ignore contractual terms that are contrary to the prohibition of discrimination or victimisation. If circumstances so warrant, a court may also amend other parts of the contract or declare the contract void. No restorative measures, such as the reinstatement of employment, are available in Finnish legislation.

The National Non-Discrimination and Equality Tribunal may issue an order for injunctive relief, i.e. to prohibit the continuation or repetition of discrimination in its sphere of authority i.e. outside employment. The tribunal may also order a party to fulfil its obligations by imposing a conditional fine.

b) Ceiling and amount of compensation

¹⁰⁷ Page 83, Government proposal on the Non-Discrimination Act 19/2014.

¹⁰⁸ Page 83, Government proposal on the Non-Discrimination Act 19/2014.

There is no minimum or maximum amount of compensation under the Non-Discrimination Act. In Section 24(1) it is stated that the amount of compensation must be in line with the severity of the act and consideration shall be given to the type and extent of the discrimination and its duration.

There is no data available as to whether any compensation claims have been presented in the district courts since the new Non-Discrimination Act came into force on 1 January 2015. Between 2008 and 2011, 15 cases of discrimination were decided by district courts. Courts found discrimination in 10 of the cases and awarded compensation in all of them. The compensations awarded ranged from EUR 4 000 to EUR 10 000. The medium compensation awarded was EUR 5 500.¹⁰⁹

c) Assessment of the sanctions

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

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 National Non-Discrimination and Equality Tribunal. The National Non-Discrimination and Equality Tribunal cannot order a particular accommodation to be made, but it can forbid the continuation of discrimination (i.e. denial of reasonable accommodation) and may impose a conditional fine to enhance its prohibition or order. On the other hand, some particularly robust remedies, such as reinstatement, are not available.

As the compensation for discrimination can only be requested in a district court the risk of having to pay the legal cost of the defendant greatly affects the real possibilities of seeking remedies against discrimination.

¹⁰⁹ Altonen et. al p. 42 in '*Riitelemien on pienelle ihmiselle raskasta*'. a study commissioned by Ministry of Interior, 2013 <http://www.intermin.fi/julkaisu/132013?docID=44691>.

7 BODIES FOR THE PROMOTION OF EQUAL TREATMENT (Section 13 Directive 2000/43)

- a) Body/bodies designated for the promotion of equal treatment irrespective of racial/ethnic origin according to Article 13 of the Racial Equality Directive

The office of the Ombudsman for Minorities was created in preparation for transposing the directives in 2001, and later amended in 2004. In conjunction with replacing the old Non-Discrimination Act with the new Non-Discrimination Act [*Yhdenvertaisuuslaki* (1325/2014)], the name and scope of work for the Ombudsman was changed by the Act on the Non-Discrimination Ombudsman [*Laki Yhdenvertaisuusvaltuutetusta* (1326/2014)].¹¹⁰

The former Ombudsman for Minorities supervised compliance with the prohibition of discrimination only on the basis of ethnic origin, but the new Non-Discrimination Ombudsman supervises compliance with the Non-Discrimination Act with regard to all grounds of discrimination, although not in relation to employment. Compliance with the provisions on equality in working life in individual cases will continue to be supervised by the occupational safety authorities, which are not considered to be equality bodies.

Even though the Non-Discrimination Ombudsman does not supervise prohibition against discrimination in employment, the Ombudsman has other duties and powers relating to equality on all protected grounds in working life in order to better comply with requirements set in the article 13 of the Racial Equality Directive. These duties include providing independent assistance to victims of discrimination in pursuing their complaints about discrimination, conducting independent surveys concerning discrimination and publishing independent reports and making recommendations on any issue relating to such discrimination.

The National Non-Discrimination and Equality Tribunal does not have responsibility for 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. The tribunal is an independent and impartial judicial body whose decisions are binding and can be appealed against.

- b) Status of the designated body/bodies – general independence

The Non-Discrimination Ombudsman is an independent body; this independent status has an express legal basis in section 1 of the Non-Discrimination Ombudsman Act. The Ombudsman's office is administratively attached to the Ministry of Justice. 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 be abolished only by an act of at least the same level. The number of staff of the Non-Discrimination Ombudsman is 16 employees and the annual budget is EUR 1.4 million.

- c) Grounds covered by the designated body

The grounds that the Non-Discrimination Ombudsman is authorised to deal with are: origin, age, disability, religion, belief, sexual orientation, nationality, language, opinion, political activity, trade union activity, family relationships, state of health and other personal characteristics.

- d) Competences of the designated body/bodies – and their independent exercise

¹¹⁰ Non-Discrimination Ombudsman Act (1326/2014).

The competences and duties for the Non-Discrimination Ombudsman are laid down in section 3 of the Non-Discrimination Ombudsman Act according to which the tasks of the Ombudsman are: to supervise the observance of the Non-Discrimination Act outside employment and prevent discrimination by conducting surveys and publishing reports; to give advice and recommendations; to promote information exchange, education and training and to participate in European and international cooperation.

In applying the Non-Discrimination Act the competences for the Non-Discrimination Ombudsman are further specified in section 19(1) of the Non-Discrimination Act, according to which the Ombudsman can

- assist the victims of discrimination in pursuing that their complaints are being examined;
- assist in the planning of promoting equality;
- give general recommendations in preventing discrimination and promoting equality; and
- take measures to advance reconciliation in following the act.

In Section 19(2) it is also defined that in individual cases the Ombudsman can also give a justified statement on the prevention of, continuation of or repetition of discrimination unless the question falls within the competences of Occupational Health and Safety Authorities i.e. employment. It is noticeable that the directive requires the equality bodies to be able to make recommendation on any issue relating to discrimination (article 13(2) compared to section 19(1) of the Non-Discrimination Act, which uses the term 'general recommendations', which has a narrower mandate.

e) Legal standing of the designated body/bodies

In Finland, the Non-Discrimination Ombudsman has no legal standing to bring discrimination complaints or to intervene in legal cases concerning discrimination in courts as explained in part 10.2. above. However, the Non-Discrimination Ombudsman can bring a discrimination case to the National Non-Discrimination and Equality Tribunal in issues other than employment.

In accordance with section 21 of the Non-Discrimination Act, the Non-Discrimination Ombudsman has a right to bring a specific case before the National Non-Discrimination and Equality Tribunal if the person who considers themselves to have been discriminated against gives his or her consent to this.¹¹¹

The Non-Discrimination Ombudsman also has a right to be heard as an *amicus curiae* when a discrimination case (not concerning employment) is heard by a court.¹¹² A court must, in a case concerning the application of the Non-Discrimination Act, allow the Non-Discrimination Ombudsman the opportunity to be heard insofar as the matter pertains to the authority of the Ombudsman. Additionally, the prosecutor must allow the Non-Discrimination Ombudsman the opportunity to be heard prior to bringing charges for discrimination (Chapter 11, section 11 of the Criminal Code).

f) Quasi-judicial competences

In Finland, the Non-Discrimination Ombudsman is not a quasi-judicial institution as it does not make binding decisions or decisions that may be appealed against. The Ombudsman may, however, in issues other than employment, give a justified statement

¹¹¹ Page 87, Government proposal on the Non-Discrimination Act 19/2014

¹¹² Section 27, Non-Discrimination Act [Yhdenvertaisuuslaki (1325/2014)].

on the prevention of, continuation of or repetition of discrimination.¹¹³ These statements are often the basis of the reconciliation negotiations between the victim and the perpetrator of discrimination. As illustrated in chapter 12.2 of this report, only a few cases of discrimination are brought before the court. Where it is the intention of the victim to take a case to court, it is common practice to take it first to the Non-Discrimination and Equality Tribunal.

In employment the Ombudsman cannot issue a justified statement – a statement based on legal analysis about whether discrimination has happened – on an individual case, but is allowed to give a general recommendation – e.g. on how to avoid discrimination – also in relation to employment. The rationale behind the difference of mandates is to maintain the Occupational Health and Safety Authorities' monopoly in giving an interpretation of the legislation on employment.

The National Non-Discrimination and Equality Tribunal does not have responsibility for 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. The tribunal is an independent and impartial judicial body whose decisions are binding and can be appealed against.

g) Registration by the body/bodies of complaints and decisions

The Non-Discrimination Ombudsman has not yet published¹¹⁴ any statistics on her activities during the first year of activity. The last published report¹¹⁵ of the activities of the predecessor to the Non-Discrimination Ombudsman – the Ombudsman for Minorities – is from 2013. The total number of discrimination cases reported to the Ombudsman was 285 in 2013. Additionally, the Ombudsman received 134 cases of 'other inappropriate treatment', such as harassment, defamation, ethnic agitation,¹¹⁶ violence, threat of violence or other offensive treatment.

In a news report by Finnish Broadcasting Company Yle, the new Ombudsman for Non-Discrimination, Ms Kirsi Pimiä, noted that the number of contacts to the Ombudsman has increased dramatically since the period of the predecessor Minority Ombudsman. She commented that the office had received notification of almost 500 cases of discrimination, and that all of the prohibited discrimination grounds listed in the Non-Discrimination Act were represented among these cases. 203 cases of discrimination were reported on grounds of origin and 90 on grounds of disability in 2015.¹¹⁷

The increase in the number of reported cases of discrimination and the fact that all grounds are represented show that groups other than ethnic minorities, such as sexual minorities and people with disabilities, have been making use of the services of the new Non-Discrimination Ombudsman.

h) Roma and Travellers

¹¹³ Section 19(2) of the Non-Discrimination Act.

¹¹⁴ Latest statistics checked 05.03.2016.

¹¹⁵ Latest statistics checked 05.03.2016.

¹¹⁶ According to section 10 of the Penal Code (39/1889) on ethnic agitation: A person who makes available to the public or otherwise spreads among the public or keeps available for the public information, an expression of opinion or another message where a certain group is threatened, defamed or insulted on the basis of its race, skin colour, birth status, national or ethnic origin, religion or belief, sexual orientation or disability or a comparable basis, shall be sentenced, for ethnic agitation, to a fine or to imprisonment for up to two years. <http://www.finlex.fi/fi/laki/kaannokset/1889/en18890039.pdf>.

¹¹⁷ Yle news, 16.3.2016, http://yle.fi/uutiset/yha_useampi_kokee_syrjintaa_yhteydenotot_lisaantyneet_huimasti/8746105. Link checked 17.5.2016.

The Ombudsman for Minorities, which was replaced by the Non-Discrimination Ombudsman from 2015, consistently brought forward problems experienced by the Roma community. In 2013, it published a study of the discrimination faced by Roma in Finland.¹¹⁸ Since the sphere of activity for the Non-Discrimination Ombudsman has changed from ethnicity to all grounds of discrimination, it seems that there is not so much emphasis on Roma issues any more.

¹¹⁸ 'Being Different In Everyday Life – Survey On Roma's Experiences Of Discrimination', Helsinki, 2013, http://www.syrjinta.fi/documents/10181/10850/54366_romanitutkimus_tivistelma_eng_final.pdf/555a7857-41b2-48f2-848b-224c5a32f665.

8 IMPLEMENTATION ISSUES

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

A consultative body, the Advisory Board on Minority Issues (*vähemmistöasiain neuvottelukunta*) was set up in 2005. The functions of the board included the issuing of proposals and statements on how the supervision and monitoring of the realisation of equal treatment is to be developed, safeguarding the rights and position of foreigners, developing means of cooperation between government (administration) and NGOs in matters relating to supervision, and monitoring the realisation of equal treatment. The Advisory Board was composed of a chairman, vice-chairman and a maximum number of 14 other members with alternate members. Key ministries, social partners, the Directorate of Immigration, an association of municipalities and five NGOs were represented on the board. Social partners were represented. The Advisory Body worked in close cooperation with the Ombudsman for Minorities, and was based on the repealed Non-Discrimination Act. The body ceased to exist at the end of 2014, as the previous Non-Discrimination Act was repealed. A new Advisory Board on Non-Discrimination was established by a Government decree in January 2016.¹¹⁹ The scope of the Board follows the new, broader scope of action of the Non-Discrimination Ombudsman, and the members of the Board will represent a wide range of discrimination grounds (disability, age, sexual orientation, religion etc.).

The Unit for Democracy, Language Affairs and Fundamental Rights within the Ministry of Justice maintains the Equality.fi website, which provides resources for authorities, organisations and those interested in equality and non-discrimination. The website includes training material, together with information on legislation, research, ongoing campaigns and different minorities.¹²⁰

There are a number of bodies that deal with discrimination/equality in relation to Roma. These include, most importantly, the Advisory Board on Romani Affairs (RONK), which was established 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 Finnish society, to improve their living conditions and socio-economic status, and to promote their culture. The Advisory Board on Romani Affairs functions in conjunction with the Ministry of Social Affairs and Health. There are also four regional advisory boards for Roma affairs that act at the regional level. The Advisory Board for Ethnic Relations seeks to promote interaction between Finland's ethnic minorities and the authorities, NGOs, political parties and social partners, and to provide the ministries with immigrant and minority policy expertise in the interests of promoting an ethnically equal and diverse society. There are also three regional advisory boards for ethnic relations.

An effort to take the Roma into account has also been made in the area of dissemination of information, and some of the available materials are specifically targeted at the Roma or at employers with a view to promoting employment opportunities for Roma.¹²¹

¹¹⁹ Government Decree on the Advisory Board on Non-Discrimination [Valtioneuvoston asetus yhdenvertaisuusasiain neuvottelukunnasta (39/2016)]
<https://www.edilex.fi/saaduskokoelma/20160039.pdf>.

¹²⁰ http://www.yhdenvertaisuus.fi/welcome_to_equality.fi/ (retrieved 05.03.2016)

¹²¹ See e.g. www.equality.fi; and www.romanit.fi (retrieved 05.03.2016)

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

a) Mechanisms

Section 25 of the Non-Discrimination Act [*Yhdenvertaisuuslaki* (1325/2014)] provides that discriminatory contractual terms and statutes of a company, an association or a trust are void. A court may, in a case that is being processed by it, change or ignore contractual terms that are contrary to the prohibition of discrimination if it would be unreasonable to apply the contract otherwise unaffected.

b) Rules contrary to the principle of equality

As regards the former Non-Discrimination Act (21/2004), which was in force until 31 December 2014, there were no laws, regulations or rules contrary to the principle of equality as regulated by that act and the directives. The new Non-Discrimination Act, which came into force on 1 January 2015, has a wider scope of applicability. During its first year of application, there have been no reports of any regulations or rules that may be contrary to the principle of equality as prescribed in the Non-Discrimination Act.

9 COORDINATION AT NATIONAL LEVEL

The responsibility for developing non-discrimination policies and legislation is with the Unit for Democracy, Language Affairs and Fundamental Rights at the Ministry of Justice. The Ministry of Justice set up a working group in October 2015, with representatives from all ministries. The group aims to prepare a National Fundamental and Human Rights Action Plan during 2016.

10 CURRENT BEST PRACTICES

- Equality planning.
The Non-Discrimination Act of 2004 required authorities and those providing education to draw up a plan for the fostering of ethnic equality. Even though the requirement applied only to ethnic equality, Ministry of Labour advice from the beginning was to draw up the plan to include all grounds of discrimination in the plans. Equality plans covering multiple grounds have since been drafted in hundreds of municipalities, other authorities and lots of other organisations such as NGOs, student unions and companies, even though for many it is a voluntary plan. In the plans, organisations and companies have been analysing how their services and functions meet the actual needs of various clients, what kind of reasonable accommodations are needed and how equality in the workplace can be secured. The current Non-Discrimination Act [*Yhdenvertaisuuslaki* (1325/2014)] has created an obligation, which was previously ministerial advice, whereby the new Non-Discrimination Act requires equality plans to be drawn up on all grounds of discrimination by the end of 2016.
- The Discrimination-free Zone campaign is an information campaign to combat discrimination. It enables organisations and work communities to declare their commitment to the principle of non-discrimination.
The organisation declaring itself a discrimination-free zone completes an online declaration form and receives in exchange a Discrimination-free Zone sign, which must be displayed somewhere on its premises for all to see. The idea of the campaign is to make commitment to equality visible. Such a declaration is a signal to employees, job-seekers and customers that the organisation welcomes everyone irrespective of gender, age, ethnic background, religion or belief, opinion, state of health, disability or sexual orientation. Already more than 600 work communities and organisations around Finland have joined the campaign.
- The Diversity Charter
For years, FIBS (Finnish Business and Society), a corporate responsibility network, has been gathering interested companies to develop their work on diversity. The companies have signed the Diversity Charter, which shows their commitment to equal opportunities and diversity in their staff and goods and services that they offer to general public. Their work of arranging diversity trainings and seminars is widely recognised among the business community and those NGOs representing groups vulnerable to discrimination.
- Discrimination research and monitoring
The Discrimination Monitoring Group consists of representatives from a number of public authorities, research institutes, NGOs, and equality, gender equality and independent bodies. Currently the group is organised by the Ministry of Justice. The group has commissioned yearly studies on discrimination in different areas of life bringing discrimination, which is often hidden, to the public discussion and to the knowledge of the responsible authorities.

11 SENSITIVE OR CONTROVERSIAL ISSUES

11.1 Potential breaches of the directives (if any)

- The general justification of direct discrimination in situations governed by the Racial Equality Directive does not derive from the directive and may be too widely formulated. Section 11(1) of the Non-Discrimination Act legislates for a general justification definition that applies in situations governed by the Racial Equality Directive:
'differential treatment is only allowed if the treatment is based on legislation, the treatment has an acceptable aim and the means used are in due proportion for achieving this aim.'¹²²

11.2 Other issues of concern

- The compensation for discrimination can only be requested in a district court where the risk of having to pay the legal cost of the claimant greatly affects the real possibilities of seeking remedies against discrimination. In its report on the Non-Discrimination Act the Constitutional Law Committee of the Parliament proposed that the National Non-Discrimination and Equality Tribunal should be able to decide on the compensation.¹²³ The Employment and Equality Committee of the Parliament, however, did not amend the Government proposal in this regard.
- The Non-Discrimination Ombudsman and the National Non-Discrimination and Equality Tribunal do not have a role in interpreting the Non-Discrimination Act in regard to employment. The Constitutional Law Committee of the Parliament considers this to be problematic considering how central the area employment is to safeguarding equal treatment.¹²⁴ The Constitutional Law Committee considered it important that the Employment and Equality Committee studies the possibilities of safeguarding expertise and unity in this respect.
- Associations or organisations working for the benefit of victims do not have any major role to play in judicial or administrative processes. They do not have any general *locus standi* to take a case to court to pursue a matter in their own name, not even with the consent of the complainant. Neither can associations become third parties to such proceedings or act as an *amicus curiae*. This state of affairs arises from national legislation on rules of procedure.

¹²² See 2.2. above for direct discrimination justification.

¹²³ Page 10. Constitutional Law Committee's report 31/2014
https://www.eduskunta.fi/FI/vaski/Lausunto/Documents/pevl_31+2014.pdf.

¹²⁴ Page 10. Constitutional Law Committee's report 31/2014.

12 LATEST DEVELOPMENTS IN 2015

12.1 Legislative amendments

The overall reform of the non-discrimination legislation, included repealing the old Non-Discrimination Act and laying down new provisions: the Non-Discrimination Act, the Act on the Non-Discrimination Ombudsman and the Act on the Non-Discrimination and Equality Tribunal came into force on 1 January 2015.¹²⁵

The main goal of the legislative reform was to expand the protection provided for ethnic minorities to all grounds of discrimination. This was done by extending the material scope of Non-Discrimination Act to cover both public and private activity on all grounds. Most important, this means that the prohibition of discrimination in the provision of goods and services (including housing, social services and advantages) was expanded to cover all grounds of discrimination. Similarly the responsibility for public authorities and employers with more than 30 employees to draw up a plan for fostering equality was expanded to all discrimination grounds. The protection provided to ethnic minorities by the former Ombudsman for Minorities and the Non-Discrimination Tribunal was expanded to all grounds. The possibilities for the successor of the Ombudsman for Minorities - the Non-Discrimination Ombudsman to assist victims of discrimination also in employment (as required by the directives) - were improved in the Parliament by adding that the Ombudsman may also issue general statements on employment discrimination. In this way the Parliament acted on the pending infringement procedure against Finland on the missing competences of the equality body.

On 3 March 2015, the Finnish Parliament passed the Act on the Ratification of the Convention on the Rights of Persons with Disabilities and its Optional Protocol.¹²⁶ However, the date of the coming into force and delivery of the ratification documents was left undetermined. The Parliament decided on ratification just a month before its legislative period ended. The Government's legislative proposal¹²⁷ regarding the rights of people with intellectual disabilities to self-determination, which is considered essential to complete the ratification process, was presented to the Parliament in October 2015. In March 2016 the proposal was still under discussion by parliamentary committees.¹²⁸

12.2 Case law

There have been only a few cases applying the new Non-Discrimination Act during its first year of existence. The members of the tribunal applying the new legislation, the National Non-Discrimination and Equality Tribunal, were appointed only in July 2015. However, in its first meetings in late 2015, the Tribunal made some significant interpretations of the new legislation. Some of them may be challenged in the appellate courts during 2016.

Name of court: The National Non-Discrimination and Equality Tribunal (henceforth 'the Tribunal')

Date of decision: 14 December 2015

Names of the parties: not available

Reference number: 21/2015

Link:

<http://yvtltk.fi/material/attachments/ytaltk/tapausselosteet/tapausselosteet2015/GA3RX>

¹²⁵ See 0.2 – List of main legislation transposing and implementing the directives – earlier in this report.

¹²⁶ Act on the Ratification of the Convention on the Rights of Persons with Disabilities (373/2015).

¹²⁷ HE 96/2015 vp, Hallituksen esitys eduskunnalle laiksi kehitysvammaisten erityishuollosta annetun lain muuttamisesta, https://www.eduskunta.fi/FI/vaski/HallituksenEsitys/Documents/HE_96+2015.pdf.

¹²⁸ Status checked 06.03.2016.

[RkIL/YVTltk-tapausseloste- 14 12 2015-kohtuulliset mukautukset-TE toimisto.pdf](#) last accessed 17 February 2016

Brief summary: The Tribunal prohibited the public employment and business authorities from continuing to discriminate against a student who had applied for unemployment benefit to finance her studies. The student did not meet the requirements of the legislation in using the employment benefit for her studies, but the legislation allowed for a derogation of these statutes if there was 'a specific reason'. The tribunal considered that the authority should have interpreted the disability and the need for reasonable accommodation of the student to be one such specific reason. By neglecting the reasonable accommodation measures, the authority had discriminated against the disabled student.

Name of court: The National Non-Discrimination and Equality Tribunal (henceforth 'the Tribunal')

Date of decision: 14 December 2015

Names of the parties: not available

Reference number: 31/2015

Link:

http://yvtltk.fi/material/attachments/ytaltk/tapausselosteet/tapausselosteet2015/tTdYps85n/TS_14_12_2015_kohtuulliset_mukautukset-verkkopankkitunnukset.pdf last accessed 17 February 2016

Brief summary: The Tribunal prohibited a bank from discriminating against a blind customer by denying her the use of passwords needed to use her bank account electronically. The customer had admitted that she would need the help of an assistant to use the passwords unless they were provided in Braille. The bank justified the denial by referring to legislation which states that a person cannot divulge the codes needed to use electronic banking to anyone, and justified the denial of service based on security reasons.

The Non-Discrimination Tribunal stated that the Non-Discrimination Act has primacy in relation to other legislation, and that simply referring to other legislation does not justify discriminatory treatment. The tribunal referred to the obligation of the Non-Discrimination Act to provide reasonable accommodation in providing services to persons with disabilities and ordered the bank to make 'due and appropriate adjustments necessary' for blind persons to receive banking services on equal terms with other persons, including obtaining passwords to use online bank services. The Tribunal imposed a conditional fine of EUR 50 000 in order to enforce compliance with its injunction.

Name of court: The Supreme Court

Date of decision: 10 June 2015

Names of the parties: not available

Reference number: KKO 2015:14

Link: <http://korkeinoikeus.fi/fi/index/ennakkopaatokset/precedent/1433846010211.html> last accessed 17 February 2016

Brief summary: In this precedent-setting judgment, the Supreme Court confirmed that a person is not required to speak the truth when being asked about sexual orientation or political activity in a recruitment interview; and that the threshold for the 'acceptable reason' justification for differential treatment in applying the Penal Code's prohibition of discrimination is high, even though the burden of proof does not shift when applying the Penal Code.

The Supreme Court issued fines against the CEO of a media company, applying the Penal Code's provisions against employment discrimination because of sexual orientation and family relations. The Supreme Court found that the CEO had discriminated against the editor-in-chief of a newspaper by terminating her work contract. The work contract was terminated before it had started because the CEO became aware that the editor-in-chief was living with another woman and had given false information about the political activity

of her spouse. During the recruitment interview, the editor-in-chief had not corrected the belief of the CEO, who was under the impression that she was living with a man. The editor-in-chief had also said during the interview that her spouse was not politically active.

The Supreme Court found that there had been direct discrimination on the basis of both sexual orientation and family relations, whereas the Appeal Court had defined the sexual orientation discrimination to be indirect discrimination and had found no discrimination on the basis of family relations in applying the Penal Code.

The Supreme Court referred to Coleman (C-303/06, 17.7.2008), and interpreted the prohibited discrimination ground of 'family relations' in the Penal Code to include situations where a person is discriminated against because of the political opinion of a spouse. The Supreme Court noted that, even though the Penal Code does not expressly prohibit discrimination by association, it can be interpreted to include it. According to the Supreme Court, the Penal Code's provisions on the prohibition of discrimination express the equality principle in the Constitution, and the interpretation of prohibition of discrimination should not differ in civil and penal legislation without weighty reasons.

Name of court: Eastern Finland Administrative Court

Date of decision: 17 June 2015

Names of the parties: not available

Reference number: 15/0193/4; 10955/14/1205

Link: http://www.oikeus.fi/hallintooikeudet/ita-suomenhallinto-oikeus/material/attachments/oikeus_hallintooikeudet_ita-suomenhallinto-oikeus/oikeustapauksia2015/z6Wm7eVx1/pankkipalveluiden_saamista_koskeva_valitus.pdf, last accessed 28 February 2016

Brief summary: The Eastern Finland Administrative Court upheld the decision of the National Discrimination Tribunal, which had prohibited ethnic discrimination in the provision of banking services after a bank had not accepted A's Estonian passport as proof of identity. The tribunal also implicitly interpreted nationality as being part of ethnic origin.

The Administrative Court agreed with the tribunal when it considered that no legislation or other official instructions had prevented the bank from accepting the petitioner's Estonian passport as proof of identity. According to the Administrative Court, the provisions against money laundering do not require or justify any general refusal to accept foreign passports.

ANNEX 1: TABLE OF KEY NATIONAL ANTI-DISCRIMINATION LEGISLATION

Please list below the **main transposition and anti-discrimination legislation** at both federal and federated/provincial level.

Country: Finland

Date: 31 December 2015

Title of legislation (including amending legislation)	Title of the law: Non-Discrimination Act ¹²⁹ Abbreviation: NDA Date of adoption: 30.12.2014 Entry into force: 1.1.2015 Latest amendments: No Web link: http://www.finlex.fi/fi/laki/ajantasa/2014/20141325 Grounds protected: origin, age, disability, religion, belief, sexual orientation, nationality, language, opinion, political activity, trade union activity, family relationships, state of health or other personal characteristics.
	Civil/administrative/criminal law: Civil law
	Material scope: both public and private activities, excluding private life, family life and practice of religion
	Principal content: prohibition of direct and indirect discrimination, harassment, instruction to discriminate
Title of legislation (including amending legislation)	Title of the law: Non-Discrimination Ombudsman Act Abbreviation: - Date of adoption: 30.12.2014 Entry into force: 1.1.2015 Latest amendments: No Web link: http://www.finlex.fi/fi/laki/ajantasa/2014/20141326 Grounds covered: origin, age, disability, religion, belief, sexual orientation, nationality, language, opinion, political activity, trade union activity, family relationships, state of health or other personal characteristics
	Civil/administrative/criminal law: Administrative law
	Material scope: both public and private activities, excluding private life, family life and practice of religion
	Principal content: creation of a specialised body
Title of legislation (including amending legislation)	Title of the law: The Act on Non-Discrimination and Equality Tribunal (1327/2014) [<i>Laki yhdenvertaisuus- ja tasa-arvolautakunnasta</i>] Abbreviation: - Date of adoption: 20.12.2014 Latest amendments:- Entry into force: 1.1.2015 Web link: http://www.finlex.fi/fi/laki/ajantasa/2014/20141327 Grounds covered: gender, gender identity, origin, age, disability, religion, belief, sexual orientation, nationality, language, opinion, political activity, trade union activity, family relationships, state of health or other personal characteristics
	Civil/administrative/criminal law: Administrative law
	Material scope: both public and private activities, excluding private life,

¹²⁹ The old Non-Discrimination Act (which was in force 2001-2014) was repealed by this new Non-Discrimination Act from the beginning of 2015 expanding the protection to cover all grounds of discrimination.

	family life and practice of religion. In the field of employment only on grounds of gender and gender identity.
	Principal content: Creation of a quasi-juridical body

ANNEX 2: TABLE OF INTERNATIONAL INSTRUMENTS

Country: Finland

Date: 31 December 2015

Instrument	Date of signature (if not signed please indicate) Dd/mm/yyyy	Date of ratification (if not ratified please indicate) Dd/mm/yyyy	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)	5.5.1989	10.5.1990	None	Yes	Yes
Protocol 12, ECHR	4.11.2000	17.12.2004	None	Yes	Yes
Revised European Social Charter	3.5.1996	21.6.2002	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	11.10.1967	19.10.1975	None	Yes	Yes
Framework Convention for the Protection of National Minorities	1.2.1995	3.10.1997	None	Not applicable	Yes, to the extent the rights provided are justiciable (in practice extremely limited)
International Covenant on Economic, Social and Cultural Rights	11.10.1967	19.10.1975	None	Not applicable	Yes, to the extent the rights provided are justiciable
Convention on the Elimination of All Forms of Racial Discrimination	6.10.1966	14.7.1970	None	Yes	Yes

Instrument	Date of signature (if not signed please indicate) Dd/mm/yyyy	Date of ratification (if not ratified please indicate) Dd/mm/yyyy	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 Discrimination Against Women	17.7.1980	4.9.1986	None	Yes	Yes
ILO Convention No. 111 on Discrimination	25.6.1958	23.4.1970	None	Not applicable	Yes
Convention on the Rights of the Child	26.1.1990	20.6.1991	None	Not applicable	Yes
Convention on the Rights of Persons with Disabilities	30.3.2007	Parliament decided on ratification 5.3.2015 but the ratification is still pending	None	Yes (signed and decided by the Parliament, but pending)	Yes

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