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Country report

Non-discrimination

Sweden

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Country report

Non-discrimination

Sweden

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EXECUTIVE SUMMARY

1. Introduction

Sweden was until recently a fairly homogenous country. It is also a strongly secular country, albeit within a Lutheran Church tradition. Its population is only around 10 million. However, the proportion of foreign-born inhabitants increased from 6.7 % in 1970 to 19.1 % in 2010 and continues to rise due to high levels of immigration.¹ There is no tradition of monitoring ethnicity within society and no long-established tradition as regards non-discriminatory legislation either. From 1999, however, the Swedish Government has been very active regarding the introduction of non-discrimination legislation, both anticipating and transposing EU law. One step further on this road was taken on 1 January 2015,² when a new ground of discrimination – lack of accessibility – was created. This extended the possibility for persons with disabilities to obtain discrimination awards for failures to adopt reasonable adaptation measures to provide access to areas not covered by Directive 2000/78. The Supreme Court ruled on two cases in June 2014, clarifying the thinking on discrimination awards.³ The minimum award is now SEK 10 000 (EUR 1 100), and the basic idea is that the compensation for the violation and the prevention supplement shall be of the same amount if one person suffers discrimination and the person responsible for the activity acts diligently afterwards.

Sweden, which has had predominantly social democratic Governments during the last century, can be said to have developed a fairly comprehensive welfare state. Social and economic goods have only been articulated as rights – thus giving rise to legal claims – to a limited extent, however, and there is a weak constitutional tradition as regards fundamental rights.

In order to understand the functioning of Swedish labour law, and thus large parts of the country's non-discrimination legislation, it is crucial to bear in mind the special role designated to the social partners, whereas other NGOs have a very restricted role. The Swedish labour market is characterised by a high degree of organisational density – roughly 70 %. This is true of employees and employers alike, whether in the private or the public sector. This organisational structure is reflected in collective bargaining and in the fact that important issues are still outside the scope of law, for instance wages. As a general rule, work as a civil servant is ruled by contracts and collective agreements, largely in the same way as private employment, and the same rules apply.

The Roma people have been treated much worse compared with other ethnic minorities such as the Sami people. For instance, it was not until 1959 that the Roma people got the right to belong to a municipality. Previously, they only had the right to stay for three days. Therefore, no local authority was responsible for the schooling of their children or for their social welfare. The Roma still face more discrimination compared with other ethnic groups, but nowadays the state is aware of this and is combating it.

2. Main legislation

The 1975 Instrument of Government states that public institutions shall counteract discrimination against persons on a number of grounds. It also contains an enumeration of protected fundamental individual rights, including the right not to be discriminated against on the grounds of belonging to minorities of sex, skin colour, national or ethnic origin, language, religious affiliation, disability, sexual orientation, age or other

¹ 'Foreign born' consists of persons who themselves are foreign born or both of whose parents were born in another country.

² Act (2014:958) changing the Discrimination Act.

³ Supreme Court case T 3592-13, Equality Ombudsman v. Veolia (judgment of 26.06.2014). The second case was Supreme Court case T 5507-12, Equality Ombudsman v. Stockholm County (judgment of 26.06.2014) Nja 2014 p. 499.

circumstance that relates to the individual as a person. These rules, however, do not really grant any legally enforceable rights. The first rule is mainly a political declaration, whereas the implications of the others are that all Acts of Parliament and other legal regulations must satisfy these basic requirements of non-discrimination.

It should be noted that in 1995 the European Convention on Human Rights was incorporated into national legislation and given a quasi-constitutional status. Any law that contradicts the rights set forth in the Convention is void and may not be applied. Sweden has also signed and ratified the Revised European Charter, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of Discrimination against Women, as well as a number of relevant ILO conventions. If they are not incorporated, international agreements are not part of the internal Swedish hierarchy of laws as such, and these instruments thus cannot be directly relied upon in domestic courts of law.

Although the country was a late starter in the field of non-discrimination legislation, by 2008 Swedish domestic law contained a considerable quantity of explicit prohibitions on discrimination, which were to be found in seven specific acts.⁴ From 1 January 2009, these seven acts have been repealed and replaced with the Discrimination Act (2008:567). In 2016 the act was amended with regard to active duties.⁵ The Discrimination Act has been adapted to proposed Directive COM 2008/426, and thus goes beyond what is now required.

There are also *criminal law provisions*, such as the provision that bans unlawful discrimination by businessmen on the grounds of ethnicity, religion and sexual orientation with regard to the provision of goods and services. This provision is rarely used. There is also the 'hate speech' provision, which makes it a criminal offence to disseminate a message which is threatening or degrading to a group of persons.

Generally speaking, Swedish law may be said to be in conformity with the Article 13 Directives. Especially as regards religion and other beliefs, sexual orientation and age,⁶ domestic law goes beyond the requirements of EU law. This is also true with regard to discrimination on the grounds of disability. Nevertheless, there are some flaws in the implementation. The following flaws remain in the new Discrimination Act:

1. The protection against discrimination or victimisation does not fully cover self-employed people;
2. Discrimination against legal persons is not prohibited;
3. Discrimination and harassment from fellow workers or third parties are not prohibited as such.

⁴ The (1991:433) Equal Opportunities Act (jämställdhetslagen).
The (1999:130) Act on Measures against Discrimination in Working Life on grounds of Ethnicity, Religion or other Belief (the Ethnic Discrimination Act, lagen om åtgärder mot etnisk diskriminering i arbetslivet).
The (1999:132) Prohibition of Discrimination in Working Life of People with Disability Act (the Disability Discrimination Act, lagen om förbud mot diskriminering i arbetslivet av personer med funktionshinder).
The (1999:133) Act on a Ban against Discrimination in Working Life on grounds of Sexual Orientation (the Sexual Orientation Discrimination Act, lagen om förbud mot diskriminering i arbetslivet på grund av sexuell läggning).
The (2001:1286) Equal Treatment of Students at Universities Act (the Students at Universities Discrimination Act, lagen om likabehandling av studenter i högskolan).
The 2003 Prohibition of Discrimination Act (2003:307).
The (2006:67) Pupils Discrimination Act (lag om förbud mot diskriminering och annan kränkande behandling av barn och elever).

⁵ Act (2016:828) on changing the Discrimination Act (2008:567), adopted on 12.07.2016. The new rules are process orientated and cover all seven grounds. Employers and education providers need to continuously document their work, but they are not required to make annual plans. Apart from having a system for reporting and dealing with harassment cases, there are no specific requirements with regard to the grounds covered by this report.

⁶ The protection of age was extended to, many new areas on 01.01.2013. See Act 2012:673 on changing the Discrimination Act, and Government bill 2011/12:159.

The unwillingness to prohibit harassment from fellow workers as such is connected to a more general restriction of vicarious liability for employers. This can be illustrated with Labour Court 2007 case 45.⁷ All parties started from the fact that the Iranian person involved had been discriminated against, but no person could be held responsible since the employee at fault did not have the authority to reject his application for the job. In such cases we have a person being discriminated against by an employee who is not liable under civil discrimination law. The claimant must go through the employer and the employer can only be liable if he or she has been negligent by, for instance, not reacting promptly on being informed of an instance of harassment or by giving authority to represent the employer to an employee who has bad judgment. The principle of vicarious liability in relation to discrimination law is restricted when employees act outside their authority to an extent that is problematic in relation to discrimination law.

When implementing the prohibition of discrimination with regard to disability outside the directives, the concept of direct discrimination does not always include statistical discrimination. Is a country really allowed to have two different concepts of direct discrimination, one applying within the parts of the Discrimination Act covered by the directives and another applying to an area within the Discrimination Act but outside the directives?⁸

3. Main principles and definitions

The definition of direct discrimination in the Discrimination Act Chapter 1 Section 4 point 1 reads as follows:

Direct Discrimination: that someone is disadvantaged by being treated less favourably than someone else is treated, has been treated or would have been treated in a comparable situation, if this disadvantaging is associated with sex, transgender identity or expression, ethnicity, religion or other belief, disability, sexual orientation or age.

This definition requires a person to be disadvantaged. A discriminatory statement directed at the general public thus does not amount to direct discrimination.

An employer, an educational institution or a provider of goods and services etc. may not disadvantage any individual from any of the protected groups by treating him or her worse than the employer etc. treats, has treated or would have treated someone else in a comparable situation, if the disadvantage is *associated* with the protected ground. The protection thus covers situations of discrimination by association.

The ban on direct discrimination is limited by the possibility of justification. The new Discrimination Act reduces the ability to justify direct discrimination in comparison with the old acts. Except for age discrimination, there are no longer any examples of justifications in national law which may be too wide to be acceptable according to EC law.

The definition of indirect discrimination in the new Discrimination Act is in close adherence to the Article 13 Directives. Since there is only limited case law regarding the old acts and no case law on the new act, it is too early to tell what 'the test to be satisfied' in these situations really is.

The Discrimination Act defines harassment and instructions to discriminate as forms of prohibited discrimination. Furthermore, the legislation obliges an employer or educational

⁷ Labour Court 2007 no 45 The Ombudsman Against Ethnic Discrimination v. Laika film & amp (Judgment of 16.05.2007).

⁸ A country may allow any form of direct discrimination in areas where the directives do not require protection. An open exemption for statistical discrimination with regard to disability in the insurance field would therefore obviously be acceptable.

institution that is aware of the fact that an employee/student feels that she or he has suffered harassment related to any protected ground to investigate the matter and, when appropriate, to take action to prevent such harassment from continuing. Victimisation is also forbidden.

Lack of accessibility has become a new form of discrimination since 2015.⁹ It applies when an employer or a university, by providing support and adaptation measures, creates a situation for a person with a disability that is similar to that for persons without such a disability and it may reasonably be required that the employer/university implements such measures. The legal change extended the possibility of obtaining discrimination awards for lack of reasonable accommodation to other areas as well (albeit in a more limited way).

Multiple discrimination is a non-issue in Sweden. The same prohibitions apply to all grounds. The issue of multiple discrimination was dealt with in Labour Court 2010 No 91.¹⁰ From that case it has become clear that if the same act can be presumed discriminatory with relation to more than one ground, it is still regarded as a single discrimination event and the amount of damages is unaffected by the number of grounds involved.

4. Material scope

Regarding all areas, including working life, the new Discrimination Act contains no enumeration of the material scope. In some areas a few situations *not* covered by the prohibitions are enumerated. The material scope is thus wider than required by EC law.

The Discrimination Act applies to all aspects of the employer-employee relationship in both the public and private sector. Self-employed people are, however, not covered by the prohibition of discrimination in working life. The Discrimination Act does not protect legal persons. Self-employed persons can, however, be protected as natural persons regarding, for instance, starting or running a business and professional recognition (Ch. 2 Sec. 10). Professional organisations are prohibited from discriminating against the self-employed as well as the employed (Ch. 2 Sec. 11). Permits, the certification of approvals and financial support are other examples of areas covered by these two provisions. Several other provisions in the Discrimination Act apply to the self-employed as well as to employed persons.

5. Enforcing the law

Civil processes regarding working life under the Discrimination Act are to be dealt with in accordance with the Labour Disputes Act.¹¹ Should the individual concerned be a member of a trade union, the Ombudsman's right to represent the victim (see also section 6 below) is subsidiary to the right of the trade union to represent its member. Procedures are the same regardless of whether the case concerns a private sector or public sector employee. However, with regard to state employees, due to the constitutional rules on objective grounds in hiring, there is sometimes also the alternative or complementary route of appealing against a decision through administrative procedures.

Cases outside working life will be dealt with by the ordinary court system, i.e. the relevant district court in the first instance. Discrimination in connection with, for instance, social security (an example of an area normally falling under administrative law) is thus dealt with by the ordinary civil court system, and the ordinary rules on civil process apply.¹² The

⁹ Act (2014:958) changing the Discrimination Act (2008:567).

¹⁰ Labour Court 2010 No 91, The Equality Ombudsman v. State Employment Board (Statens arbetsgivarverk) (judgment of 15.12.2010).

¹¹ Act (1974:371) on Labour Law Procedure.

¹² Some university or higher education cases may also be brought before the Board of Appeal for Higher Education.

new Discrimination Act also gives non-profit organisations whose statutes state that they are to look after their members the right to bring actions in their own name as a party.

Relevant criminal procedures may be initiated by a public prosecutor or the private party him or herself. The Ombudsman and non-profit organisations do not have legal standing before the courts in criminal procedures.

A shared burden of proof of discrimination was introduced under the old acts. Nevertheless, very few cases of alleged discrimination have been won so far. In most cases this is due to the claimant's failure to prove a prima facie case of discrimination. The statistics from the Ombudsman's offices show that a number of cases are settled out of court, however. The same is probably true for the trade unions.

A contract (collective or individual) is invalid to the extent that it prescribes or permits discrimination, and a discriminatory provision or legal act may be declared invalid if so requested.

There is also a right to damages for the violation caused by the discrimination and – in employment cases not relating to hiring or promotion – for the economic loss that arises. Damages are known to be low in Sweden. The new Discrimination Act introduced a new form of civil damages, the discrimination award. The courts have been instructed by law to give particular attention to the aim of discouraging infringements. The level of damages was therefore expected to be higher in the future. However, with the limited case law that exists there seems to be little difference between discrimination awards and ordinary damages under the old acts. A new case from the Supreme Court from 2014 may change that.¹³ It can be interpreted to mean that SEK 30 000 (EUR 3 300) is a normal award with regard to discrimination in the area of goods and services. However, this can also be interpreted as being normal only when the service provider has never wanted the discrimination to take place, acts diligently, cautions the erring employee and apologises to the victims. The author believes that this case could result in a rise in the prevention element of the discrimination award if, for instance, the service provider has instructed an employee to treat Roma persons differently.

Generally speaking, sanctions must be said to be proportionate, effective and dissuasive.

It is also worth pointing out that it seems to be easier to establish a prima facie case and to win discrimination cases in the ordinary court system compared with the Labour Court. Furthermore, it seems to be very hard to win cases of ethnic discrimination in the Labour Court. One possible reason is that the Labour Court applies the rules on shifting the burden of proof in the Swedish Discrimination Act and EU legislation in a more restricted way compared with the ordinary courts.

One individual case in 2016 showing a clear influence from another country is that of the Karolinska institutet.¹⁴ A Muslim dental student was required to work with bare forearms due to state regulations (an ordinance on hygiene issues). The court decided that both the British expert's reason why disposable forearm protection was accepted in the UK and the Swedish experts' statements why there was a genuine hygienic concern about disposable forearm protection and a prohibition in Sweden in the form of an ordinance seemed scientific and credible, and it was not possible to believe one expert more than the other.

However, it was the education provider (the alleged discriminator) who bore the burden of proof with regard to the justification of what was potentially indirect discrimination. Therefore, the Karolinska institutet lost the case. The state had legitimate concerns, but the state's expert admitted that the British example showed that similar disposable

¹³ Supreme Court case T 3592-13, Equality Ombudsman v. Veolia (judgment of 26.06.2014), Nja 2014 p. 499.

¹⁴ Stockholm Municipal Court, case T 3905-15, Equality Ombudsman v. The Swedish State through Karolinska institutet (judgment of 16.11.2016).

protection had been used there and no one had been able to show a relevant increase of infection risk. Thus, the claimant succeeded in showing that there existed a better solution to address the legitimate concern of the education provider and was awarded SEK 5 000 (EUR 550).

6. Equality bodies

The new Equality Ombudsman is the key public institution for the promotion of equal rights. It has the right to investigate complaints concerning discrimination according to any of the non-discrimination acts mentioned. It also has the right to represent individuals in discrimination cases that are of importance in terms of case law or otherwise.

Furthermore, the Ombudsman is also required to give advice, independent assistance and support to individuals and institutions more generally; to engage in educational, informative and opinion-shaping work to combat discrimination; and to propose to the Government legal and other measures that may be of use in combating discrimination and monitoring international developments. Independent surveys and reports are important parts of this work. The Ombudsman – although appointed by the Government – has independent status to reach its own decisions in individual matters. It is state-funded, with decisions on funding being taken annually by the Swedish Parliament, based on Government recommendations. The Ombudsman is funded out of the general state budget.

As has already been indicated, the role played by NGOs other than trade unions and employer organisations in Sweden has been known to be fairly weak, perhaps with the exception of the various organisations within the disability movement. To the extent that there are NGOs, the Ombudsman has an ongoing dialogue with them. Local Anti-Discrimination Bureaus should also be mentioned here. They are beginning to take cases to court. So far they have limited their risks by only taking on cases regarding smaller amounts, and thus not taking the risk of paying the opposing parties' full legal expenses.

7. Key issues

The Equality Ombudsman is changing its priorities. There has been a reduction in the amount set for taking individual cases to court and making settlements. Instead, more priority has been given to monitoring active duties such as the duty to work according to equality plans and to carrying out wage surveys. Cases have sometimes (with the individual's consent) been transferred from individual complaints to active duties, focusing on improving future behaviour rather than seeking a discrimination award.

Somebody needs to fulfil the functions of a public prosecutor. Otherwise, only those who are rich enough to go to court will get justice. For a person who discriminates against Roma or people of African ethnic origin, for example, the risk of ending up in court is small. There was a Government inquiry on the issue, which presented its results in 2016.¹⁵ It suggested the setting up of an anti-discrimination board. That would have been an effective solution, but it is unlikely to be created.

The burden of proof problem is the most interesting problem from the point of view of principle. In the long run, it will be hard to maintain a system where it is considerably easier to prove discrimination in the civil courts, rather than in the Labour Court. The same inquiry has suggested a new wording for the rules on the burden of proof, although it found no problem in the application of this rule in the Labour Court.

¹⁵ Government White paper 2016:87.

RÉSUMÉ

1. Introduction

La Suède était récemment encore un pays assez homogène et très laïque tout en s'inscrivant dans une tradition d'appartenance à l'Église luthérienne. Sa population ne compte que 10 millions d'habitants environ, mais la proportion de résidents nés à l'étranger est passée de 6,7 % en 1970 à 19,1% en 2010 et continue de s'accroître en raison de taux élevés d'immigration.¹⁶ Il n'y a pas de tradition de suivi de l'appartenance ethnique au sein de la société, ni aucune tradition de longue date en matière de législation antidiscrimination. Depuis 1999 toutefois, le gouvernement suédois se montre très actif pour ce qui concerne l'introduction d'une législation dans ce domaine, anticipant et transposant tout à la fois le droit de l'UE. Une étape supplémentaire a été franchie dans cette voie avec l'instauration le 1^{er} janvier 2015¹⁷ d'un nouveau motif de discrimination: le manque d'accessibilité. Ce développement étend à des domaines non couverts par la directive 2000/78 la possibilité pour des personnes handicapées d'obtenir une indemnisation en cas de non-adoption de mesures d'aménagement raisonnable leur assurant un accès. La Cour suprême s'est prononcée dans deux affaires en juin 2014 en précisant l'approche en matière d'indemnités pour discrimination.¹⁸ L'indemnité minimale est désormais fixée à 10 000 SEK (1 100 euros) et l'idée de base est un montant identique pour l'indemnisation en cas de violation et pour le supplément lié à la prévention lorsqu'une personne est victime de discrimination et que la personne responsable de l'activité en cause agit ensuite avec diligence.

On peut dire que la Suède, essentiellement dirigée par des gouvernements socio-démocrates durant le siècle dernier, a développé un État-providence assez complet. La formulation des biens économiques et sociaux en tant que droits – pouvant dès lors donner lieu à un recours en justice – reste cependant limitée, de même que la tradition constitutionnelle en matière de droits fondamentaux.

Il est impératif, pour bien comprendre le fonctionnement du droit du travail en Suède et par conséquent d'importants volets de la législation antidiscrimination, de garder à l'esprit le rôle particulier assigné aux partenaires sociaux, les autres ONG n'ayant pour leur part qu'un rôle très limité. Le marché du travail suédois se caractérise par une densité organisationnelle extrêmement élevée – de l'ordre de 70% environ – tant du côté des travailleurs que des employeurs, et tant dans le secteur public que dans le secteur privé. Cette structure organisationnelle se reflète dans les conventions collectives et dans le fait que des questions importantes échappent encore au champ d'application de la loi, comme les salaires, par exemple. Le travail des fonctionnaires est régi de manière générale par des contrats et des conventions collectives; les modalités sont très similaires à celles du secteur privé et appliquent les mêmes règles.

Un traitement beaucoup moins favorable a été réservé à la population rom qu'à d'autres minorités ethniques telles que le peuple Sami. C'est ainsi par exemple qu'il a fallu attendre 1959 pour que les Roms aient le droit d'appartenir à une municipalité. Ils n'avaient jusque-là qu'un droit de séjour de trois jours avec pour conséquence qu'aucune autorité locale n'était responsable de la scolarité de leurs enfants ni de leur protection sociale. Les Roms continuent de faire l'objet d'une discrimination plus marquée que d'autres groupes ethniques, mais l'État est conscient aujourd'hui de cette situation et s'efforce d'y remédier.

¹⁶ On désigne par «nés à l'étranger» les personnes qui sont nées elles-mêmes à l'étranger ou dont les deux parents sont nés hors de Suède.

¹⁷ Loi 2014:958 modifiant la loi antidiscrimination.

¹⁸ Cour suprême, affaire T 3592-13, Médiateur pour l'égalité c. Veolia, arrêt du 26 juin 2014; et affaire T 5507-12, Médiateur pour l'égalité c. Comté de Stockholm, arrêt du 26 juin 2014, Recueil 2014 p. 499.

2. Législation principale

L'Instrument de gouvernement de 1975 dispose que les institutions publiques doivent lutter contre les discriminations fondées sur un certain nombre de motifs. Il contient également la liste des droits fondamentaux individuels protégés, y compris le droit de ne pas être victime de discrimination fondée sur l'appartenance à une minorité sexuelle, la couleur de peau, l'origine ethnique ou nationale, la langue, l'affiliation religieuse, le handicap, l'orientation sexuelle ou tout autre motif se rapportant à l'individu en tant que personne. Ces règles n'accordent cependant pas véritablement de droits juridiquement exécutoires. La première règle est essentiellement une déclaration politique, et les autres ont pour implication que les lois adoptées par le parlement et autres actes réglementaires doivent satisfaire à ces exigences fondamentales de non-discrimination.

On notera qu'en 1995, la Suède a incorporé la Convention européenne des droits de l'homme dans sa législation nationale et lui a conféré un statut quasi-constitutionnel. Toute loi qui contredit les droits inscrits dans cette Convention est nulle et ne peut être appliquée. La Suède a également signé et ratifié la Charte européenne révisée, plusieurs pactes et conventions des Nations unies, dont le Pacte international relatif aux droits civils et politiques, le Pacte international relatif aux droits économiques, sociaux et culturels, la Convention internationale sur l'élimination de toutes les formes de discrimination raciale et la Convention sur l'élimination de toutes les formes de discrimination à l'égard des femmes, ainsi qu'un certain nombre de conventions pertinentes de l'OIT. S'ils ne sont pas incorporés dans la législation, les accords internationaux ne font pas partie en tant que tels de la hiérarchie interne des lois suédoises et ne peuvent donc être directement invoqués devant les tribunaux nationaux.

Malgré un démarrage tardif dans le domaine de la législation antidiscrimination, le droit interne de la Suède contenait dès 2008 un nombre considérable d'interdictions explicites de discrimination figurant dans sept lois spécifiques,¹⁹ lesquelles ont été abrogées au 1^{er} janvier 2009 et remplacées par la nouvelle loi antidiscrimination (2008:567). Cette dernière a été modifiée en 2016 pour ce qui concerne les obligations actives.²⁰ La loi antidiscrimination a été adaptée pour tenir compte de la proposition de directive COM/2008/426 et va donc au-delà de ce qui est actuellement exigé.

Il existe également des *dispositions de droit pénal*, et notamment celle qui interdit la discrimination illégale pratiquée par des opérateurs économiques et fondée sur l'origine ethnique, la religion et l'orientation sexuelle en ce qui concerne la fourniture de biens et de services. Cette disposition est rarement appliquée. Il existe aussi une disposition visant le discours haineux, qui pénalise la diffusion d'un message menaçant ou dégradant pour un groupe de personnes.

¹⁹ La loi 1991:433 sur l'égalité des chances (*jämställdhetslagen*); la loi 1999:130 sur les mesures de lutte contre la discrimination sur le lieu de travail fondée sur l'origine ethnique, la religion ou d'autres convictions (loi sur la discrimination ethnique, *lagen om åtgärder mot etnisk diskriminering i arbetslivet*); la loi 1999:132 portant interdiction de discrimination sur le lieu de travail à l'égard des personnes handicapées (loi relative à la discrimination fondée sur le handicap, *lagen om förbud mot diskriminering i arbetslivet av personer med funktionshinder*); la loi 1999:133 portant interdiction de discrimination sur le lieu de travail fondée sur l'orientation sexuelle (loi relative à la discrimination fondée sur l'orientation sexuelle, *lagen om förbud mot diskriminering i arbetslivet på grund av sexuell läggning*); la loi 2001:1286 sur l'égalité de traitement des étudiants à l'université (loi relative à la discrimination à l'égard des étudiants des universités (*lagen om likabehandling av studenter i högskolan*); la loi 2003:307 sur l'interdiction de la discrimination; et la loi 2006:67 relative à la discrimination à l'égard des élèves (*lag om förbud mot diskriminering och annan kränkande behandling av barn och elever*).

²⁰ Loi (2016:828) portant modification de la loi antidiscrimination (2008:567), adoptée le 12 juillet 2016. Les nouvelles règles sont axées sur des processus et couvrent l'ensemble des sept motifs. Les employeurs et les prestataires d'enseignement doivent constamment documenter leur travail, mais ne sont pas tenus de faire de plans annuels. En dehors de l'existence d'un système d'établissement de rapports et de gestion des cas de harcèlement, aucune exigence spécifique n'est stipulée en rapport avec les motifs couverts par le présent rapport.

La législation suédoise peut être considérée, de façon générale, comme conforme aux directives «article 13». Elle va même au-delà des exigences du droit de l'UE en ce qui concerne plus particulièrement la religion et autres convictions, l'orientation sexuelle et l'âge.²¹ Il en va de même pour la discrimination fondée sur le handicap. Certaines failles sont néanmoins observées au niveau de la mise en œuvre et restent présentes dans la nouvelle loi sur la discrimination; il s'agit notamment des lacunes suivantes:

1. la protection contre la discrimination ou la rétorsion ne couvre pas complètement les travailleurs indépendants;
2. la discrimination à l'égard des personnes morales n'est pas interdite;
3. la discrimination et le harcèlement pratiqués par des collègues de travail ou par des tiers ne sont pas interdits en tant que tels.

Les réticences quant à l'interdiction du harcèlement pratiqué par des collègues de travail s'inscrivent dans une limitation plus générale de la responsabilité des employeurs du fait d'autrui. Cette situation est notamment illustrée par l'arrêt prononcé en 2007 par le tribunal du travail dans l'affaire n° 45.²² Tous les intervenants sont partis du fait que la personne iranienne concernée avait été victime de discrimination, mais que personne ne pouvait en être tenu pour responsable dans la mesure où l'employé fautif n'était pas habilité à rejeter la candidature du plaignant. Nous sommes donc en l'espèce en présence d'une personne faisant l'objet d'une discrimination de la part d'un salarié qui ne peut être tenu pour responsable en vertu du droit civil antidiscrimination. La partie requérante doit passer par l'employeur, lequel ne peut être tenu responsable qu'en cas de négligence – par exemple s'il ne réagit immédiatement en apprenant des faits de harcèlement ou s'il habilite pour le représenter un salarié manquant de jugement. Le principe de la responsabilité du fait d'autrui lorsque les employés agissent en dehors de leur sphère de compétence est limité au point de poser problème dans le cadre du droit antidiscrimination.

Le concept de discrimination directe n'inclut pas toujours la discrimination statistique lors de l'application de l'interdiction de discrimination en rapport avec le handicap en dehors des directives. Un pays est-il réellement autorisé à avoir deux concepts différents de la discrimination, l'un s'appliquant aux volets de la loi antidiscrimination couverts par les directives et l'autre s'appliquant à un domaine relevant de la loi antidiscrimination mais non visé par les directives?²³

3. Principes généraux et définitions

La définition de la discrimination directe stipulée dans la loi antidiscrimination (chapitre 1^{er}, article 4, premier alinéa) est libellée comme suit:

Discrimination directe: le fait qu'une personne fasse l'objet d'un traitement moins favorable que celui qui est accordé, qui a été accordé ou qui serait accordé à une autre personne dans une situation comparable, lorsque le désavantage en cause est associé au sexe, à l'identité ou à l'expression transgenre, à l'origine ethnique, à la religion ou à d'autres convictions, au handicap, à l'orientation sexuelle ou à l'âge.

Cette définition requiert qu'une personne soit désavantagée. Une déclaration discriminatoire adressée au grand public n'est donc pas constitutive d'une discrimination directe.

²¹ La protection de l'âge a été étendue à de nombreux nouveaux domaines au 1^{er} janvier 2013. Voir la loi 2012:673 sur la modification de la loi antidiscrimination et le projet de loi gouvernemental 2011/12:159.

²² Tribunal du travail, arrêt n° 45 du 16 mai 2007, Médiateur chargé de la lutte contre la discrimination ethnique c. Laika film & amp.

²³ Un pays peut autoriser toute forme de discrimination directe dans les domaines pour lesquels les directives n'exigent pas de protection. Une exemption ouverte pour la discrimination statistique en rapport avec le handicap dans le domaine de l'assurance serait dès lors manifestement admissible.

Un employeur, un établissement d'enseignement ou un fournisseur de biens ou de services, etc. ne peut désavantager une personne appartenant à l'un des groupes protégés en la traitant moins correctement que l'employeur, etc. ne traite, n'a traité ou n'aurait traité quelqu'un d'autre dans une situation comparable, si le désavantage est *associé* au motif protégé. La protection couvre donc les cas de discrimination par association.

L'interdiction de discrimination directe est limitée par la possibilité de faire valoir une justification. La nouvelle loi antidiscrimination restreint cette faculté par rapport aux lois antérieures. Hormis en ce qui concerne la discrimination fondée sur l'âge, on ne trouve plus en droit suédois aucun exemple de justification trop large pour être admissible au regard du droit de l'UE.

La définition de la discrimination indirecte contenue dans la nouvelle loi antidiscrimination est largement conforme aux directives «article 13» de l'UE. Étant donné la jurisprudence peu abondante découlant des lois précédentes, et l'absence totale de jurisprudence découlant de la nouvelle loi, il est trop tôt pour dire en quoi consiste réellement «le test à satisfaire» dans ces situations.

La loi relative à la discrimination considère le harcèlement et l'injonction de discriminer comme des formes interdites de discrimination. En outre, la législation oblige l'employeur ou l'établissement d'enseignement qui a connaissance du fait qu'un travailleur (une travailleuse) ou un(e) étudiant(e) estime avoir subi un harcèlement lié à un motif couvert par la loi, à enquêter sur l'affaire et, s'il y a lieu, à prendre des mesures pour empêcher la persistance du harcèlement en question. La rétorsion est également interdite.

Le manque d'accessibilité est une nouvelle forme de discrimination depuis 2015.²⁴ La nouvelle disposition s'applique lorsqu'un employeur ou une université, en instaurant des mesures de soutien ou d'adaptation, crée pour une personne handicapée une situation similaire à celle de personnes non handicapées, et qu'il peut être raisonnablement exigé de l'employeur/l'université qu'il/elle mette en œuvre les dites mesures. La modification juridique étend également à d'autres domaines (serait-ce de façon plus limitée) la possibilité d'obtenir une indemnité pour une discrimination causée par l'absence d'aménagement raisonnable.

Le problème de la discrimination multiple ne se pose pas en Suède. Les mêmes interdictions s'appliquent à tous les motifs. La question de la discrimination multiple a été abordée par le tribunal du travail dans son arrêt n° 91 de 2010²⁵ – dont il ressort clairement qu'un même acte peut être présumé discriminatoire par rapport à plusieurs motifs, mais qu'il n'en reste pas moins considéré comme un fait unique de discrimination et que le montant de l'indemnité n'est pas affecté par le nombre de motifs impliqués.

4. Champ d'application matériel

La nouvelle loi antidiscrimination ne contient pas de description de son champ d'application matériel, quel que soit le domaine considéré (y compris la vie professionnelle). Elle se limite à énumérer, dans certains domaines, quelques situations *non* couvertes par les interdictions. Son champ d'application matériel est donc plus large que ce qu'exige la réglementation de l'UE.

La loi antidiscrimination s'applique à tous les aspects de la relation entre employeur et salarié, à la fois dans le secteur public et dans le secteur privé. Les travailleurs indépendants ne sont en revanche pas couverts par l'interdiction de discrimination dans la vie professionnelle. La loi antidiscrimination n'étend pas sa protection aux personnes

²⁴ Loi 2014:958 modifiant la loi antidiscrimination 2008:567.

²⁵ Tribunal du travail, arrêt n° 91 du 15 décembre 2010, Médiateur pour l'égalité c. Direction des services employeurs de l'administration d'État (*Statens arbetsgivarverk*).

morales. Les travailleurs indépendants peuvent, néanmoins, jouir d'une protection en tant que personnes physiques pour ce qui concerne, par exemple, la création ou la gestion d'une entreprise, et la reconnaissance professionnelle (chapitre 2, article 10). Les organisations professionnelles ne peuvent pratiquer de discrimination à l'encontre des travailleurs indépendants, ni à l'encontre des salariés (chapitre 2, article 11). Les autorisations, la certification des approbations et les aides financières constituent autant d'autres exemples de domaines couverts par ces deux dispositions. Plusieurs autres dispositions de la loi antidiscrimination s'appliquent aussi bien aux travailleurs indépendants qu'aux salariés.

5. Mise en application de la loi

Les procédures civiles relatives à la vie professionnelle doivent, en vertu de la loi antidiscrimination, se dérouler conformément à la loi sur les conflits du travail.²⁶ Si la personne concernée est affiliée à un syndicat, le droit de ce dernier de représenter l'un de ses membres prend le pas sur celui du Médiateur de représenter la victime (voir également la section 6 ci-après). Que l'affaire concerne un travailleur du secteur privé ou du secteur public, les procédures sont les mêmes. Toutefois, en ce qui concerne les fonctionnaires, il peut également exister, en raison de règles constitutionnelles en matière de motifs objectifs d'embauche, une voie alternative ou complémentaire d'appel d'une décision via des procédures administratives.

Les affaires qui n'ont pas trait à la vie professionnelle relèvent du système judiciaire ordinaire, à savoir le tribunal de première instance compétent. Ainsi les affaires relatives à une discrimination en matière de sécurité sociale (domaine relevant généralement du droit administratif) sont-elles instruites par le système judiciaire civil ordinaire et les règles ordinaires de procédure civile s'appliquent.²⁷ La nouvelle loi antidiscrimination accorde par ailleurs aux organisations à but non lucratif, dont les statuts stipulent qu'elles ont pour objet de défendre les intérêts de leurs membres, le droit d'intenter des actions en leur nom propre, en tant que partie.

Des procédures pénales peuvent également être engagées par le procureur général ou la partie privée elle-même. Le Médiateur et les organisations à but non lucratif ne sont pas habilités à ester en justice dans le cadre de procédures pénales.

Les lois antérieures avaient déjà introduit le partage de la charge de la preuve de discrimination. Très peu de plaignants alléguant une discrimination ont cependant eu gain de cause à ce jour. Cette situation s'explique le plus souvent par leur incapacité à prouver l'existence d'une présomption de discrimination. Les statistiques publiées par les services du Médiateur attestent toutefois qu'un nombre considérable de litiges font l'objet d'un règlement extrajudiciaire. Il en va sans doute de même pour les syndicats.

Un contrat (collectif ou individuel) n'est pas valide s'il prescrit ou autorise une discrimination, et une disposition ou un acte juridique discriminatoire peut être déclaré invalide si la demande en est faite.

Il existe également un droit à réparation lorsqu'une infraction à caractère discriminatoire est commise et – dans les affaires d'emploi non liées à une embauche ou à une promotion – pour la perte économique qui en résulte. Les indemnités sont réputées faibles en Suède. La nouvelle loi antidiscrimination introduit une nouvelle forme de réparation civile, à savoir l'indemnité pour discrimination. Les juridictions sont désormais tenues par la loi d'accorder une attention toute particulière à l'objectif de dissuasion des infractions. On s'attendait dès lors à ce que le niveau des réparations allouées soit augmenté, mais la jurisprudence

²⁶ Loi 1974:371 sur les contentieux du travail (procédures judiciaires).

²⁷ Certaines affaires relatives à l'enseignement universitaire ou supérieur peuvent également être portées devant la Commission d'appel de l'enseignement supérieur.

limitée existante (aucun arrêt de la Cour suprême) semble indiquer qu'il n'y a pratiquement pas de différence entre les indemnités pour discrimination allouées par la nouvelle loi et les réparations ordinaires accordées par les dispositions antérieures. Un nouvel arrêt de la Cour suprême, prononcé en 2014, pourrait faire changer cet état de choses.²⁸ On peut en effet l'interpréter comme établissant qu'un montant de 30 000 SEK (3 300 euros) constitue une indemnité normale pour une discrimination dans le domaine des biens et des services. Ceci dit, on peut aussi interpréter qu'il s'agit d'une indemnité normale uniquement si le prestataire de service n'a jamais eu l'intention d'une discrimination, s'il agit avec diligence, s'il donne un avertissement au salarié fautif et s'il présente ses excuses aux victimes. L'auteur estime que cette affaire pourrait faire augmenter l'élément «prévention» de l'indemnité pour discrimination si le prestataire de service a donné instruction à un salarié de réserver un traitement différent aux Roms, par exemple.

On peut dire de manière générale que les sanctions sont proportionnées, effectives et dissuasives.

Il y a également lieu de souligner qu'il semble plus aisé d'établir une présomption de discrimination et d'avoir gain de cause dans le cadre du système judiciaire ordinaire que devant le tribunal du travail. Il semble de surcroît qu'il soit très difficile d'avoir gain de cause devant ce dernier lorsqu'il s'agit d'une affaire de discrimination fondée sur l'origine ethnique – l'une des explications possibles étant que cette juridiction applique de façon plus restrictive que les juridictions ordinaires les règles en matière de renversement de la charge de la preuve prévues par la loi suédoise antidiscrimination et par la législation de l'UE.

Un cas particulier montrant l'influence manifeste d'un autre pays mérite d'être mentionné en 2016: il concerne le Karolinska institutet.²⁹ Un étudiant-dentiste musulman avait été instamment prié de travailler avec les avant-bras découverts pour respecter la réglementation officielle (décret relatif à des questions d'hygiène). La juridiction saisie a conclu que la raison avancée par l'expert britannique pour justifier le fait que les protections à usage unique pour les avant-bras soient admises au Royaume-Uni et l'affirmation des experts suédois selon lesquels ces protections suscitent une véritable inquiétude en termes d'hygiène et justifient leur interdiction par décret, semblent l'une et l'autre scientifiques et crédibles, et qu'il s'avérerait impossible de croire un expert plutôt que l'autre.

La charge de la preuve incombait cependant au prestataire d'enseignement (auteur présumé de la discrimination), qui devait justifier ce qui pouvait apparaître comme une discrimination indirecte. Le Karolinska institutet a donc été débouté. L'État avait une inquiétude légitime, mais l'expert officiel a admis que l'exemple britannique montre que des protections jetables similaires étaient utilisées au Royaume-Uni et que personne n'a été en mesure de prouver de hausse pertinente du risque d'infection. La partie plaignante est donc parvenue à démontrer qu'il existait une meilleure solution pour répondre à l'inquiétude légitime du prestataire d'enseignement et une indemnité de 5 000 SEK (550 euros) lui a été attribuée.

6. Organismes de promotion de l'égalité de traitement

Le nouveau Médiateur pour l'égalité est la principale institution publique en charge de la promotion de l'égalité des droits. Il est habilité à enquêter sur des plaintes pour discrimination en vertu de n'importe laquelle des lois antidiscrimination mentionnées, et à représenter des particuliers dans des affaires de discrimination importantes en termes de jurisprudence ou à un autre titre.

²⁸ Cour suprême, affaire T 3592-13, Médiateur pour l'égalité c. Veolia, arrêt du 26 juin 2014, Recueil 2014 p. 499.

²⁹ Tribunal de Stockholm, arrêt du 16 novembre 2016 dans l'affaire T 3905-15, Médiateur pour l'égalité c. État suédois via le Karolinska institutet.

Le Médiateur est tenu en outre de fournir des conseils, ainsi qu'une assistance indépendante et un soutien aux particuliers et aux institutions de façon plus générale; de mener des actions d'éducation, d'information et de formation d'opinion en vue de combattre la discrimination; et de proposer au gouvernement des mesures juridiques et autres pouvant servir à lutter contre la discrimination et à suivre les évolutions dans ce domaine au niveau international. Les études et rapports indépendants sont également des volets importants de sa mission. Bien que désigné par le gouvernement, le Médiateur jouit d'un statut indépendant qui lui permet de prendre ses propres décisions dans des affaires individuelles. Il est financé par l'État, les décisions relatives à son financement étant prises annuellement par le Parlement suédois sur la base des recommandations du gouvernement. Le financement du Médiateur émerge au budget général de l'État.

Comme déjà indiqué, le rôle joué par les ONG en dehors des organisations syndicales et patronales est réputé assez peu développé, hormis peut-être en ce qui concerne les diverses organisations du mouvement de défense des personnes handicapées. Le Médiateur entretient un dialogue permanent avec les ONG lorsqu'elles existent. Il convient également de citer ici les bureaux locaux d'action contre la discrimination, qui commencent à intenter des actions en justice. Ils ont limité leurs risques jusqu'ici en se contentant d'affaires portant sur des montants modestes, ce qui leur évite d'être éventuellement appelés à prendre en charge l'intégralité des frais judiciaires des parties adverses.

7. Points essentiels

Le Médiateur pour l'égalité réoriente ses priorités. Le montant fixé pour porter une affaire individuelle en justice et pour procéder à des règlements a été réduit. La priorité va davantage au suivi des obligations actives telles que l'obligation de respecter les plans en faveur de l'égalité et celle de procéder à des enquêtes salariales. Dans quelques affaires, des plaintes individuelles ont été mutées en obligations actives (avec le consentement de la personne concernée) afin de se concentrer davantage sur le comportement futur que sur l'indemnisation d'une discrimination.

Quelqu'un doit assumer le rôle de «procureur général». Autrement, seuls les gens suffisamment riches pour saisir un tribunal obtiendront justice. Ainsi le risque de se retrouver devant une instance judiciaire est-il faible pour une personne pratiquant une discrimination à l'égard de Roms ou de personnes d'origine ethnique africaine, par exemple. Le gouvernement a réalisé une enquête à ce sujet et en a présenté les résultats en 2016.³⁰ Il suggère la création d'un conseil antidiscrimination – ce qui serait une solution efficace, mais dont la concrétisation est peu probable.

La question de la charge de la preuve est la plus intéressante sur le plan du principe. Il sera en effet difficile de maintenir à terme un dispositif dans le cadre duquel il est sensiblement plus facile de prouver une discrimination devant des juridictions civiles que devant le tribunal du travail. La même enquête a suggéré un nouveau libellé pour les règles relatives à la charge de la preuve, bien qu'elle n'ait constaté aucun problème d'application de cette règle au tribunal du travail.

³⁰ Livre blanc 2016 :87.

ZUSAMMENFASSUNG

1. Einleitung

Schweden war bis vor Kurzem ein ziemlich homogenes Land. Das Land ist sehr säkularisiert, jedoch mit starken historischen Verbindungen zur lutherischen Kirche. In Schweden leben rund 10 Millionen Menschen. Der Anteil der Einwohner mit Migrationshintergrund ist von 6,7 % im Jahr 1970 auf 19,1 % im Jahr 2010 gestiegen und nimmt aufgrund der hohen Einwanderungszahlen weiter zu.³¹ Für die Erfassung der ethnischen Zugehörigkeit gibt es in Schweden ebenso wenig eine Tradition wie für Antidiskriminierungsgesetze. Seit 1999 hat die schwedische Regierung jedoch mehrere Rechtsvorschriften im Bereich Antidiskriminierung ausgearbeitet, mit denen das EU-Recht teils vorweggenommen und teils umgesetzt wurde. Am 1. Januar 2015 erfolgte mit der Schaffung eines neuen Diskriminierungstatbestands – mangelnde Barrierefreiheit – ein weiterer Schritt in diese Richtung.³² Seither können Menschen mit Behinderungen auch dann eine Entschädigung wegen Diskriminierung erhalten, wenn es unterlassen wurde, angemessene Vorkehrungen zu treffen, um den Zugang zu Bereichen zu gewähren, die nicht unter die Richtlinie 2000/78 fallen. Im Juni 2014 ergingen zwei Urteile des Obersten Gerichtshofs, in denen die Frage der Diskriminierungsentschädigungen geklärt wurde.³³ Die Mindestentschädigung beträgt nun 10 000 SEK (1100 Euro), und der Grundgedanke ist, dass die Entschädigung für den Rechtsverstoß und der Präventionsaufschlag gleich hoch sein sollen, wenn eine Person diskriminiert wird und die dafür verantwortliche Person später ihrer Sorgfaltspflicht nachkommt.

Schweden, das im letzten Jahrhundert überwiegend sozialdemokratische Regierungen hatte, hat einen ziemlich weitreichenden Wohlfahrtsstaat entwickelt. Soziale und wirtschaftliche Güter sind aber nur selten als Rechte formuliert – die auf juristischem Wege eingeklagt werden können – und in Bezug auf Grundrechte hat Schweden eine schwache Verfassungstradition.

Um das schwedische Arbeitsrecht, und somit große Teile der schwedischen Gleichstellungsgesetzgebung, zu verstehen, muss man wissen, dass die Sozialpartner in Schweden eine Sonderrolle einnehmen und andere NROs nur eine beschränkte Rolle spielen. Der schwedische Arbeitsmarkt weist mit rund 70 % eine hohe Organisationsdichte auf. Dies gilt für Arbeitnehmer ebenso wie für Arbeitgeber, sowohl in der Privatwirtschaft als auch im öffentlichen Sektor. Dieser hohe Organisationsgrad spiegelt sich in der großen Bedeutung von Tarifverhandlungen wieder und auch darin, dass wichtige Fragen wie z. B. Löhne nicht gesetzlich geregelt sind. Im Allgemeinen werden Beschäftigungsverhältnisse im öffentlichen Sektor genau wie in der Privatwirtschaft durch Verträge und Tarifvereinbarungen geregelt und es gelten dieselben Regeln.

Die Roma wurden viel stärker benachteiligt als andere ethnische Minderheiten, z. B. die Samen. So erhielten sie beispielsweise erst im Jahr 1959 das Recht, sich in Gemeinden niederzulassen. Vorher durften sie sich immer nur drei Tage lang in einer Gemeinde aufhalten. Deshalb war keine kommunale Behörde für die Schulbildung ihrer Kinder oder ihre soziale Absicherung zuständig. Roma werden auch heute noch häufiger diskriminiert als andere ethnische Gruppen, der Staat hat das Problem aber inzwischen erkannt und bekämpft es.

³¹ Als „Menschen mit Migrationshintergrund“ gelten Personen, die entweder selbst oder deren beide Elternteile im Ausland geboren wurden.

³² Gesetz (2014:958) zur Änderung des Diskriminierungsgesetzes.

³³ Oberster Gerichtshof, Rechtssache T 3592-13, Ombudsperson gegen Diskriminierung / Veolia (Urteil vom 26. Juni 2014) und Oberster Gerichtshof, Rechtssache T 5507-12, Ombudsperson gegen Diskriminierung / Stadt Stockholm (Urteil vom 26. Juni 2014), Nja 2014, S. 499.

2. Wichtigste Gesetze

Das Gesetz über die Regierungsform von 1975 verpflichtet staatliche Stellen, Diskriminierung aufgrund zahlreicher Diskriminierungsgründe zu bekämpfen. Außerdem enthält es eine Aufzählung geschützter Grundrechten, zu denen auch das Recht auf Gleichbehandlung unabhängig von Geschlecht, Hautfarbe, nationaler oder ethnischer Herkunft, Sprache, religiöser Zugehörigkeit, Behinderung, sexueller Ausrichtung, Alter oder anderen personenbezogenen Merkmalen gehört. Diese Regeln gewähren aber keine juristisch durchsetzbaren Rechte. Die erste Regel ist hauptsächlich eine politische Absichtserklärung und das Recht auf Gleichbehandlung bedeutet nur, dass alle vom Parlament verabschiedeten Gesetze und anderen Rechtsvorschriften dem Grundsatz der Gleichbehandlung entsprechen müssen.

Es ist anzumerken, dass die Europäische Menschenrechtskonvention 1995 in nationales Recht überführt wurde und einen verfassungsähnlichen Status besitzt. Gesetze, die ein durch die Konvention garantiertes Recht verletzen, sind ungültig und dürfen nicht angewendet werden. Schweden hat außerdem die revidierte Europäische Sozialcharta, den Internationalen Pakt über bürgerliche und politische Rechte, den Internationalen Pakt über wirtschaftliche, soziale und kulturelle Rechte, das Internationale Übereinkommen zur Beseitigung jeder Form von Rassendiskriminierung, das Übereinkommen zur Beseitigung jeder Form von Diskriminierung der Frau und mehrere einschlägige ILO-Übereinkommen unterzeichnet und ratifiziert. Sofern sie nicht in schwedisches Recht überführt werden, sind internationale Abkommen kein Teil der schwedischen Rechtsordnung als solcher und können vor schwedischen Gesetzen nicht direkt geltend gemacht werden.

Obwohl Schweden recht spät in das Thema der Antidiskriminierungsgesetzgebung eingestiegen ist, enthielt das schwedische Recht 2008 mehrere ausdrückliche Diskriminierungsverbote, verteilt auf sieben einzelne Gesetze.³⁴ Mit Wirkung vom 1. Januar 2009 wurden diese sieben Gesetze aufgehoben und durch das Diskriminierungsgesetz (2008:567) ersetzt. 2016 wurde das Gesetz in Bezug auf aktive Pflichten geändert.³⁵ Das Diskriminierungsgesetz wurde an den Richtlinienvorschlag COM 2008/426 angepasst und geht damit über die aktuellen Vorgaben hinaus.

Es gibt auch *strafrechtliche Bestimmungen*, z. B. ein Verbot gesetzeswidriger Ungleichbehandlung aufgrund von ethnischer Zugehörigkeit, Religion und sexueller Ausrichtung bei der Bereitstellung von Gütern und Dienstleistungen, das für Unternehmer gilt. Dieses Verbot wird aber nur selten durchgesetzt. Dann gibt es noch das Verbot von „Hassrede“, nachdem die Verbreitung von Aussagen, die eine Gruppe von Menschen bedrohen oder erniedrigen, als Straftat gilt.

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- ³⁴ Das (1991:433) Gleichstellungsgesetz (*jämställdhetslagen*).
Das (1999:130) Gesetz über Maßnahmen gegen Diskriminierung im Arbeitsleben aufgrund von ethnischer Herkunft, Religion oder sonstiger Überzeugung (Gesetz gegen ethnische Diskriminierung, *lagen om åtgärder mot etnisk diskriminering i arbetslivet*).
Das (1999:132) Gesetz zum Verbot der Diskriminierung von Menschen mit Behinderung im Arbeitsleben (Behindertendiskriminierungsgesetz, *lagen om förbud mot diskriminering i arbetslivet av personer med funktionshinder*).
Das (1999:133) Gesetz zum Verbot von Diskriminierung im Arbeitsleben aufgrund der sexuellen Ausrichtung (Diskriminierungsgesetz zu sexueller Ausrichtung, *lagen om förbud mot diskriminering i arbetslivet på grund av sexuell läggning*).
Das (2001:1286) Gesetz zur Gleichbehandlung von Universitätsstudenten (Diskriminierungsgesetz zu Universitätsstudenten, *lagen om likabehandling av studenter i högskolan*).
Das 2003 Diskriminierungsverbotsgesetz (2003:307).
Das (2006:67) Schülerdiskriminierungsgesetz (*lag om förbud mot diskriminering och annan kränkande behandling av barn och elever*).
- ³⁵ Gesetz (2016:828) zur Änderung des Diskriminierungsgesetzes (2008:567), verabschiedet am 12.07.2016. Die neuen Bestimmungen sind prozessorientiert und beziehen alle sieben Diskriminierungsgründe mit ein. Arbeitgeber und Bildungsanbieter müssen ihre Arbeit kontinuierlich dokumentieren, sind aber nicht verpflichtet, jährliche Pläne zu erstellen. Abgesehen von der Existenz eines Systems für die Meldung und Bearbeitung von Belästigungsbeschwerden gibt es bezüglich der in dem Bericht erfassten Diskriminierungsgründe keine speziellen Anforderungen.

Im Allgemeinen entspricht das schwedische Recht Artikel 13 der Richtlinien. In Bezug auf Religion und andere Überzeugungen, sexuelle Ausrichtung und Alter³⁶ geht das schwedische Recht sogar über die Anforderungen des EU-Rechts hinaus. Dies gilt auch für Diskriminierung aufgrund von Behinderungen. Dennoch gibt es Schwächen bei der Umsetzung. In folgenden Punkten setzt das neue Diskriminierungsgesetz die Richtlinien nicht voll um:

1. Der Schutz vor Diskriminierung oder Viktimisierung gilt nicht in allen Teilen für selbständig Beschäftigte.
2. Die Diskriminierung von juristischen Personen ist nicht verboten.
3. Diskriminierung und Belästigung von Kollegen oder Dritten sind als solche nicht verboten.

Eine Belästigung durch Kollegen wird unter anderem deshalb nicht verboten, weil die Haftung von Arbeitgebern für fremdes Verschulden insgesamt eher restriktiv gehandhabt wird. Ein Beispiel hierfür ist Fall 45/2007 des Arbeitsgerichts.³⁷ Alle Parteien waren sich einig, dass der iranstämmige Kläger diskriminiert worden war. Allerdings konnte niemand zur Verantwortung gezogen werden, da der verantwortliche Mitarbeiter bei der Diskriminierung seine Kompetenzen überschritten hatte. In solchen Fällen wird jemand von einem Angestellten diskriminiert, der nach dem Diskriminierungsgesetz nicht haftbar ist. Die betroffene Person muss gegen den Arbeitgeber klagen, der aber nur dann haftet, wenn er fahrlässig gehandelt hat, indem er z. B. nicht reagiert, wenn ihm ein Fall von Belästigung zur Kenntnis gelangt, oder indem er sich durch einen Mitarbeiter mit schlechtem Urteilsvermögen vertreten lässt. Das Prinzip der Haftung für fremdes Verschulden stößt im Diskriminierungsrecht an seine Grenzen, wenn Mitarbeiter ihre Kompetenzen überschreiten.

Beim Verbot von Diskriminierung aufgrund von Behinderungen außerhalb der Anwendungsbereiche der Richtlinien umfasst der Begriff der unmittelbaren Diskriminierung nicht in jedem Fall statistische Diskriminierung. Darf ein Land zwei unterschiedliche Bestimmungen des Begriffs der unmittelbaren Diskriminierung anwenden, wobei eine für die Bereiche gilt, die unter das Diskriminierungsgesetz und die Richtlinien fallen, und die andere nur für Bereiche außerhalb der Richtlinien?³⁸

3. Wichtigste Grundsätze und Begriffe

Der Begriff „unmittelbare Diskriminierung“ wird in Kapitel 1 Artikel 4 Nr. 1 des Diskriminierungsgesetzes wie folgt definiert:

Unmittelbare Diskriminierung: Wenn eine Person in einer vergleichbaren Situation eine weniger günstige Behandlung als eine andere Person erfährt, erfahren hat oder erfahren würde, sofern diese nachteilige Behandlung aufgrund von Geschlecht, Transgender-Identität oder -Ausdruck, ethnischer Zugehörigkeit, Religion oder Weltanschauung, Behinderung, sexueller Orientierung oder Alter erfolgt.

Nach dieser Definition muss eine Person weniger günstig behandelt werden. Eine an die breite Öffentlichkeit gerichtete diskriminierende Aussage gilt nicht als unmittelbare Diskriminierung.

³⁶ Der Schutz vor Altersdiskriminierung wurde zum 1. Januar 2013 auf viele neue Bereiche ausgedehnt. Siehe Gesetz 2012:673 zur Änderung des Diskriminierungsgesetzes und Verordnung 2011/12:159.

³⁷ Arbeitsgericht, 2007, Nr. 45, Ombudsperson gegen ethnische Diskriminierung / Laika film & amp (Urteil vom 16. Mai 2007).

³⁸ In den Bereichen, für die die Richtlinien keinen Schutz vorschreiben, können Mitgliedstaaten jede Form der direkten Diskriminierung erlauben. Eine offene Ausnahme der statistischen Diskriminierung aufgrund von Behinderung in der Versicherungswirtschaft wäre daher offensichtlich zulässig.

Arbeitgeber, Bildungsinstitutionen oder die Anbieter von Gütern und Dienstleistungen dürfen Personen nicht aufgrund der geschützten Diskriminierungsgründe benachteiligen, indem sie ihn oder sie weniger günstig behandelt als eine andere Person in einer vergleichbaren Situation behandelt wird, worden ist oder würde, sofern die Benachteiligung mit dem geschützten Diskriminierungsgrund *zusammenhängt*. Das heißt, der Schutz gilt auch für Diskriminierung aufgrund von Assoziierung.

Für das Verbot der unmittelbaren Diskriminierung gibt es jedoch auch Ausnahmen. Allerdings sieht das neue Diskriminierungsgesetz weniger Fälle vor, in denen Ungleichbehandlung gerechtfertigt ist, als die alten Gesetze. Von der Altersdiskriminierung abgesehen enthält das schwedische Recht keine Ausnahmeregelungen, die über die nach EU-Recht zulässige gerechtfertigte Ungleichbehandlung hinausgehen.

Die Definition der mittelbaren Diskriminierung im neuen Diskriminierungsgesetz orientiert sich eng an Artikel 13 der Richtlinien. Da es zu den alten Gesetzen nur wenig und zum neuen Gesetz noch keine Rechtsprechung gibt, ist es noch zu früh, um die tatsächliche Wirkung des Gesetzes in diesen Situationen zu beurteilen.

Das Diskriminierungsgesetz rechnet Belästigung und Anweisung zur Diskriminierung zur verbotenen Form der Diskriminierung. Außerdem verpflichtet das Gesetz Arbeitgeber und Bildungsinstitutionen, die Kenntnis davon haben, dass ein Mitarbeiter oder Schüler sich aufgrund eines geschützten Merkmals für belästigt hält, den Fall zu untersuchen und gegebenenfalls Maßnahmen zu ergreifen, um die Belästigung zu unterbinden. Auch Viktimisierung ist verboten.

Mangelnde Barrierefreiheit gilt seit 2015 ebenfalls als Form der Diskriminierung.³⁹ Sie ist gegeben, wenn ein Arbeitgeber oder eine Universität einen Menschen mit Behinderung durch zumutbare Hilfs- und Anpassungsmaßnahmen in die Lage versetzen könnte, in der sich ein Mensch ohne diese Behinderungen befindet. Durch diese Gesetzesänderung kann einem Opfer nun auch in anderen Bereichen (wenn auch in begrenztem Umfang) eine Diskriminierungsentschädigung zugesprochen werden, wenn keine angemessenen Vorkehrungen getroffen wurden.

Mehrfachdiskriminierung wird in Schweden nicht thematisiert. Das Diskriminierungsverbot gilt für alle Gründe gleich. Die Frage der Mehrfachdiskriminierung wurde im Fall 2010 Nr. 91 des Arbeitsgerichts behandelt.⁴⁰ In diesem Fall wurde klargestellt, dass eine Handlung, die eine Person aus mehr als einem Grund diskriminiert, dennoch als einzelne Diskriminierung gilt und die Höhe der Entschädigung nicht von der Anzahl der Diskriminierungsgründe abhängt.

4. Sachlicher Geltungsbereich

Das neue Diskriminierungsgesetz enthält für keinen Bereich, auch nicht für das Arbeitsleben, eine Aufzählung der sachlichen Anwendungsbereiche. In einigen Bereichen werden die wenigen Situationen aufgezählt, in denen das Diskriminierungsverbot *nicht* gilt. Der sachliche Anwendungsbereich ist also breiter als im EU-Recht vorgeschrieben.

Das Diskriminierungsgesetz gilt für alle Aspekte des Verhältnisses zwischen Arbeitgeber und Arbeitnehmer im öffentlichen und im privaten Sektor. Für selbständig Beschäftigte gilt der Schutz von Diskriminierung im Arbeitsleben jedoch nicht. Das Diskriminierungsgesetz schützt auch keine juristischen Personen. Allerdings sind selbständig Beschäftigte als natürliche Person beispielsweise bei Gründung oder Führung eines Unternehmen oder bei der beruflichen Anerkennung geschützt (Kap. 2 Art. 10). Berufsverbände dürfen weder

³⁹ Gesetz (2014:958) zur Änderung des Diskriminierungsgesetzes (2008:567).

⁴⁰ Arbeitsgericht, 2010, Nr. 91, Ombudsperson gegen Diskriminierung / Verband öffentlicher Arbeitgeber (*Statens arbetsgivarverk*) (Urteil vom 15. Dezember 2010).

selbständig noch abhängig Beschäftigte diskriminieren (Kap. 2 Art. 11). Genehmigungen, Zertifizierungen und Fördermittel sind weitere Bereiche, die von diesen beiden Bestimmungen abgedeckt werden. Mehrere andere Bestimmungen des Diskriminierungsgesetzes gelten ebenfalls für selbständig und abhängig Beschäftigte gleichermaßen.

5. Rechtsdurchsetzung

Klagen zum Arbeitsverhältnis auf Grundlage des Diskriminierungsgesetzes werden nach der Arbeitsprozessordnung verhandelt.⁴¹ Wenn der betroffene Arbeitnehmer Mitglied einer Gewerkschaft ist, ist das Recht der Ombudsperson zur Vertretung des Opfers (siehe auch Abschnitt 6 weiter unten) dem Recht der Gewerkschaft zur Vertretung ihres Mitglieds untergeordnet. Bei Klagen gegen private oder öffentliche Arbeitgeber gilt dasselbe Verfahren. Allerdings schreibt die Verfassung staatlichen Arbeitgebern vor, bei Einstellungsverfahren objektive Kriterien zu verwenden. Dadurch haben Diskriminierungsoffer die alternative oder zusätzliche Möglichkeit, auf dem Wege eines Verwaltungsverfahrens gegen die Entscheidung zu klagen.

Fälle außerhalb des Arbeitslebens werden vor ordentlichen Gerichten verhandelt, d. h. in erster Instanz vor dem zuständigen Amtsgericht. Diskriminierungen im Bereich der Sozialversicherung (die normalerweise unter das Verwaltungsrecht fällt) werden also vor regulären Zivilgerichten und nach der Zivilprozessordnung verhandelt.⁴² Das neue Diskriminierungsgesetz erlaubt es gemeinnützigen Organisationen, deren Satzung die Unterstützung ihrer Mitglieder vorschreibt, in eigenem Namen als Partei Klage einzureichen.

Strafanzeige kann von einem Staatsanwalt oder von dem Betroffenen selbst gestellt werden. Die Ombudsperson und NROs dürfen sich nicht als Partei an Strafverfahren beteiligen.

Eine Teilung der Beweislast wurde bereits in den alten Gesetzen eingeführt. Dennoch wurden bisher nur sehr wenige Verfahren aufgrund mutmaßlicher Diskriminierung gewonnen. In den meisten Fällen gelingt es dem Kläger nicht, einen Anscheinsbeweis für die Diskriminierung beizubringen. Die Statistiken der Ombudsstellen zeigen jedoch, dass in einigen Fällen auch eine außergerichtliche Einigung erzielt wird. Das gilt vermutlich auch für die Gewerkschaften.

Bestimmungen in Verträgen (Tarif- oder Arbeitsverträgen) sind ungültig, wenn sie Diskriminierung vorschreiben oder erlauben, und eine diskriminierende Bestimmung oder Rechtshandlung kann auf Wunsch für unwirksam erklärt werden.

Außerdem hat das Opfer Anspruch auf Erstattung der durch die Diskriminierung entstandenen Schäden und – außer bei Einstellung und Beförderung – finanziellen Verluste. Entschädigungssummen sind in Schweden traditionell niedrig. Das neue Diskriminierungsgesetz hat eine neue Form des zivilrechtlichen Schadensersatzes eingeführt, die Diskriminierungsentschädigung. Danach sind die Gerichte verpflichtet, bei der Festlegung des Betrags insbesondere die abschreckende Wirkung zu berücksichtigen. Deshalb ist zu erwarten, dass Entschädigungssummen künftig höher ausfallen. In der begrenzten Rechtsprechung, die bisher verfügbar ist, sind jedoch kaum Unterschiede zwischen den Diskriminierungsentschädigungen und den normalen Entschädigungen nach den alten Gesetzen festzustellen. Ein neuer Fall vor dem Obersten Gerichtshof aus dem Jahr 2014 könnte dies ändern.⁴³ Das Urteil kann dahingehend ausgelegt werden, dass

⁴¹ Gesetz (1974:371) über arbeitsrechtliche Verfahren.

⁴² Fälle, in denen Universitäten oder Hochschulen beteiligt sind, können auch vor den Beschwerdeausschuss für Hochschulen gebracht werden.

⁴³ Oberster Gerichtshof, Rechtssache T 3592-13, Ombudsperson gegen Diskriminierung / Veolia (Urteil vom 26. Juni 2014), Nja 2014, S. 499.

30 000 SEK (3300 Euro) eine normale Entschädigung für Diskriminierung beim Zugang zu Gütern und Dienstleistungen darstellen. Es kann aber auch so auslegen, dass diese Summe nur in Fällen normal ist, in denen der Anbieter die Diskriminierung nicht beabsichtigt hat, seine Sorgfaltspflicht wahrnimmt, den verantwortlichen Mitarbeiter verwarnt und sich beim Opfer entschuldigt. Nach Ansicht des Autors könnte dieses Urteil dazu führen, dass der als Abschreckung gedachte Teil der Entschädigungssumme höher ausfällt, wenn der Dienstleistungserbringer einen Mitarbeiter beispielsweise angewiesen hat, Roma anders zu behandeln.

Allgemein gesprochen müssen die Sanktionen wirksam, verhältnismäßig und abschreckend sein.

Es sei außerdem darauf hingewiesen, dass ordentliche Gerichte anscheinend eher Anscheinsbeweise akzeptieren und Diskriminierungsklagen Recht geben als Arbeitsgerichte. Insbesondere Fälle von ethnischer Diskriminierung haben vor Arbeitsgerichten offensichtlich kaum eine Chance. Ein möglicher Grund besteht darin, dass die Arbeitsgerichte die Verlagerung der Beweislast, die das schwedische Diskriminierungsgesetz und die EU-Richtlinien vorsehen, restriktiver handhaben als die ordentlichen Gerichte.

Ein Einzelfall aus dem Jahr 2016, der einen klaren Einfluss eines anderen Land zeigt, ist der des *Karolinska institutet*.⁴⁴ Ein muslimischer Zahnmedizinstudent musste aufgrund entsprechender staatlicher Vorschriften (eine Hygieneverordnung) mit bloßen Unterarmen arbeiten. Das Gericht entschied, dass sowohl die Begründung des britischen Sachverständigen, warum der Einweg-Unterarmschutz im Vereinigten Königreich akzeptiert wurde, als auch die Erklärung des schwedischen Sachverständigen, warum es im Zusammenhang mit dem Einweg-Unterarmschutz in Schweden ernsthafte hygienische Bedenken und ein Verbot in Form einer Verordnung gab, wissenschaftlich und glaubwürdig zu sein schienen und es nicht möglich war, einem Sachverständigen mehr Glauben zu schenken als dem anderen.

Allerdings war es der Bildungsanbieter (der mutmaßliche Diskriminierer), dem, was die Rechtfertigung der etwaigen mittelbaren Diskriminierung betraf, die Beweislast oblag. Das Karolinska institutet verlor daher den Rechtsstreit. Der Staat hatte berechtigte Bedenken, aber der Sachverständige des Staates räumte ein, dass das britische Beispiel zeigte, dass dort ein ähnlicher Einwegschutz verwendet worden war und niemand einen maßgeblichen Anstieg des Infektionsrisikos hatte nachweisen können. Der Klägerseite gelang es also nachzuweisen, dass eine bessere Lösung existierte, um die berechtigten Bedenken des Bildungsanbieters auszuräumen, und das Gericht sprach ihr 5000 SEK (550 EUR) zu.

6. Gleichbehandlungsstellen

Die neue Ombudsperson gegen Diskriminierung ist die wichtigste öffentliche Stelle zur Förderung der Gleichbehandlung. Sie kann Beschwerden wegen Diskriminierung nach allen oben genannten Antidiskriminierungsgesetzen prüfen und Opfer in Diskriminierungsverfahren vertreten, die für die Rechtsprechung oder aus anderen Gründen eine besondere Bedeutung haben.

Aufgabe der Ombudsperson ist es außerdem, Einzelpersonen und Institutionen zu beraten und zu unterstützen, Schulungs-, Informations- und Aufklärungsmaßnahmen zum Thema Diskriminierung durchzuführen sowie der Regierung gesetzliche und andere Maßnahmen vorzuschlagen, die zur Bekämpfung von Diskriminierung und zur Beobachtung internationaler Entwicklungen beitragen. Unabhängige Befragungen und Berichte sind ein wichtiger Teil ihrer Arbeit. Die Ombudsperson wird zwar von der Regierung ernannt, ist

⁴⁴ Amtsgericht Stockholm, Rechtssache T 3905-15, Ombudsperson gegen Diskriminierung / Schwedischer Staat (*Karolinska institutet*) (Urteil vom 16.11.2016).

aber unabhängig und kann in jedem Einzelfall eigenständig entscheiden. Sie wird vom Staat finanziert, wobei das schwedische Parlament jährlich auf der Grundlage von Empfehlungen der Regierung über die entsprechenden Mittel entscheidet. Die Ombudsperson wird aus dem allgemeinen Staatshaushalt finanziert.

Wie bereits erwähnt, spielen NROs, mit Ausnahme von Gewerkschaften und Arbeitgeberverbänden, in Schweden traditionell kaum eine Rolle, wobei möglicherweise auch Organisationen, die Behinderte vertreten, inzwischen eine stärkere Rolle einnehmen. Sofern es NROs gibt, arbeitet die Ombudsperson laufend mit diesen zusammen. Außerdem sollten hier die lokalen Antidiskriminierungsstellen erwähnt werden. Auch sie reichen immer häufiger Klage vor Gericht ein. Bisher bringen sie aber nur Fälle vor Gericht, in denen es um relativ geringe Summen geht, um zu vermeiden, dass sie die vollen Rechtskosten der Gegenseite tragen müssen.

7. Wichtige Punkte

Die Ombudsperson gegen Diskriminierung verlagert derzeit ihre Prioritäten. Sie wendet weniger Mittel auf, um einzelne Fälle vor Gericht zu bringen oder außergerichtlich zu schlichten. Stattdessen konzentriert sie sich stärker darauf, aktive Pflichten wie z. B. die Umsetzung von Gleichstellungsplänen und die Erstellung von Lohnstatistiken zu überwachen. In manchen Fällen wurden (mit Zustimmung der Betroffenen) individuelle Beschwerden in aktive Pflichten überführt – Ziel ist es, künftiges Verhalten zu verbessern und nicht so sehr, Entschädigung für erlittene Diskriminierung zu erstreiten.

Jemand muss die Funktion eines „Staatsanwalts“ übernehmen, damit nicht nur diejenigen ihre Rechte durchsetzen, die sich eine Klage vor Gericht leisten können. Für eine Person, die Roma oder Menschen afrikanischer Herkunft diskriminiert, ist die Gefahr, vor Gericht zu landen, zum Beispiel gering. Die Regierung ließ eine Untersuchung zu diesem Thema durchführen, deren Ergebnisse 2016 vorgestellt wurden.⁴⁵ Es wurde die Einrichtung eines Antidiskriminierungsausschusses vorgeschlagen. Ein solcher Ausschuss wäre eine wirksame Lösung, es ist jedoch unwahrscheinlich, dass er eingerichtet wird.

Prinzipiell ist die Frage der Beweislast das interessanteste Problem. Langfristig lässt sich ein System, in dem der Nachweis von Diskriminierung vor ordentlichen Zivilgerichten viel einfacher ist als vor dem Arbeitsgericht, nicht aufrecht erhalten. In derselben Untersuchung wurde eine Neuformulierung der Beweislastregel vorgeschlagen, Probleme bei der Anwendung dieser Regel seitens des Arbeitsgerichts wurden jedoch nicht festgestellt.

⁴⁵ Regierungsweißbuch 2016:87.

INTRODUCTION

The national legal system

Power to enact laws is vested in the Swedish Parliament (the Riksdag). Authorities at the regional and local levels have no competence to enact legislation and do not issue local ordinances with regard to the two directives.

One key feature of Swedish law is that it is based to a considerably greater extent on written law, while case law plays a smaller, though important, role.

Legislative initiative lies predominantly with the Government. Its right to make legislative proposals to Parliament is guaranteed by the Constitution.⁴⁶ The process starts with a legal inquiry, and the results are sent out to several parties including democratic NGOs with an invitation to comment on the proposed legislation. The Government gives answers to comments regarding its bill and explains the new legislation, and the report from the Parliament's standing committee is debated in the Parliament. If there are political differences, the two sides normally suggest different wordings of the proposed legal change (formally the main proposal in the standing committee and a reservation of a minority in the committee), which are put to the vote. The winning side's argument in the standing committee and the Government bill (if the Government wins) are thus regarded as 'approved'⁴⁷ by the Parliament. Therefore, these two documents have considerable importance when interpreting the law.

The application of the Discrimination Act is divided between the Labour Court and the civil court system. The Labour Court deals with all aspects of the employer-employee relationship. It is a single-instance system in cases where the worker is supported by his or her trade union and the employer has a collective agreement with that union; otherwise, it is a two-instance system, with the district courts making up the first instance.

Collective agreements cover 90 % of the Swedish labour market and are very important in setting the rules. There is no national minimum wage. Generally, work as a civil servant is governed by contracts and collective agreements in largely the same way as is the case regarding private employment. Some special rules for the public, and especially the state sector, still apply. These mainly concern the hiring process, where some constitutional rules on objectivity apply.

The civil court system deals with everything that is not dealt with by a special court. Discrimination in all areas except the labour market is thus dealt with by the civil court system. It is a three-instance system, starting with the district court. In civil cases the court of appeal has to permit the appeal, and the Supreme Court has to permit a third appeal to it in both criminal and civil cases.

List of main legislation transposing and implementing the directives

The main act is the 2008 Discrimination Act (2008:567). The Swedish abbreviation is DL – there is no common English abbreviation. It covers seven grounds: sex, ethnicity, religion and belief, sexual orientation, disability, age and transgender identity and expressions. The most recent important amendment was enacted on 12 July 2016, when the rules on active duties were reformed. The new rules entered into force on 1 January 2017.⁴⁸ The new rules are process orientated and cover all seven grounds. Employers and education

⁴⁶ Ch. 4 Art. 4 of the Swedish Instrument of Government (Regeringsformen 1974:152), adopted 28.02.1975. Sometimes the opposition parties agree on a piece of legislation the Government does not want.

⁴⁷ Formally, it is only the report of standing committee that is being debated but as the Government almost always repeats what is said in the Government bill and most often wins, in practice it is the Government bill that is used as the main interpretation source as it is much more detailed.

⁴⁸ Act (2016:828) amending the Discrimination Act (2008:567), adopted on 12.07.2016.

providers need to continuously document their work, although they are not required to make annual plans. Apart from having a system for reporting and dealing with harassment cases, there are no specific requirements with regard to the grounds covered by this report.⁴⁹

The act is comprehensive. It covers all the grounds of the two directives and discrimination on the basis of sex and transgender identity, as well as expressions. The areas covered by the act are:

1. Working life;
2. Education;
3. Labour market policy activities and employment services not under public contract;
4. Starting or running a business and professional recognition;
5. Membership of certain organisations;
6. Goods, services, housing and meetings or public events;
7. Health and medical care and social services;
8. The social insurance system, unemployment insurance and financial aid for studies;
9. National military service and civilian service;
10. Public employment.

The idea behind this new act was to replace previous acts with one comprehensive act regulating all aspects of discrimination falling under civil law. Much of its content is based on seven older discrimination acts,⁵⁰ which were limited to certain grounds and certain areas. Case law regarding these previous acts, and important comments from the Government bills and standing committee reports referring to these older acts, are thus still important tools for understanding the law.

The Penal Code has two sections of relevance. The crime of unlawful discrimination covers race, skin colour, national or ethnic origin, religious confession⁵¹ and sexual orientation. It is seldom used today;⁵² victims prefer to use the Discrimination Act,⁵³ although the crime of hate-speech (which covers the same grounds) still has a function covering matters that would not fall under the Discrimination Act.⁵⁴

⁴⁹ Wage surveys for the ground of sex represent another specific requirement.

⁵⁰ The Equal Opportunities Act (jämställdhetslagen 1991:433), adopted on 30.03.1991.

The Act on Measures against Discrimination in Working Life on Grounds of Ethnicity, Religion or other Belief (Lag om åtgärder mot etnisk diskriminering i arbetslivet 1999:130), adopted on 11.03.1999.

The Prohibition of Discrimination in Working Life of People with Disability Act (Lag om förbud mot diskriminering i arbetslivet av personer med funktionshinder (1999:132), adopted on 11.03.1999.

The Act on a Ban against Discrimination in Working Life on Grounds of Sexual Orientation (Lag om förbud mot diskriminering i arbetslivet på grund av sexuell läggning 1999:133), adopted on 11.03.1999.

The Equal Treatment of Students at Universities Act (Lag om likabehandling av studenter i högskolan 2001:1286), adopted on 20.12.2001.

The 2003 Prohibition of Discrimination Act (Lag om förbud mot diskriminering 2003:307), adopted on 05.06.2003.

⁵¹ The Swedish word used is '*trosbekännelse*', which means 'confession'. Every ordinary religion has a confession but atheism and agnosticism have no confession. Unlike in the Discrimination Act, atheism and agnosticism are not protected by this statute.

⁵² When it is used the perpetrator has often committed many other (and more serious) crimes as well (e.g. robbery) and the effect of the violation of the prohibition on unlawful discrimination is marginal with regard to sentencing and damages.

⁵³ Stockholm Municipal Court, case B-16349-13, Public Prosecutor v. Jonas Taipani Thesén (judgment of 18.02.2015). The three victims were each awarded SEK 5 000 (EUR 550) in a case of refused admittance to a shop on grounds of their ethnicity. The owner was fined the same amount (100 income-related units). If the case had been considered under the Discrimination Act, the discrimination award would have been around SEK 15 000 (EUR 1 650), and the rules on shared burden of proof would have been applied. In this case, the victims called the police, who may not act in civil law disputes (including the Discrimination Act). Instead, the police collected evidence based on the violation of the Penal Code and turned the case over to the public prosecutor.

⁵⁴ The (1962:700) Penal Code – the Swedish abbreviation is BrB. The two relevant sections are Chapter 16 Sections 8 (hate speech) and 9 (unlawful discrimination). The code itself was adopted on 21.12.1962 but did not enter into force until 01.01.1965. The latest important change of the relevant sections was adopted on 25.06.2008 and entered into force on 01.01.2008. Sexual orientation was then added as a protected

1 GENERAL LEGAL FRAMEWORK

Constitutional provisions on protection against discrimination and the promotion of equality

The Constitution⁵⁵ of Sweden includes the following articles dealing with non-discrimination: the 1975 Instrument of Government, Chapter 1 Section 2, Chapter 2 Sections 12-13 and Chapter 12 Section 5. Chapter 2 Section 19 may also be mentioned, as it incorporates the ECHR and its discrimination rules.

Chapter 2 Sections 12-13: Section 12 prohibits discrimination in all forms of legislation and Section 13 is a prohibition on sex discrimination with grounds for positive action and an exemption for military service. Section 12 covers only religion, ethnicity and sexual orientation, but it covers all areas of society. It is not directly applicable. It is not possible to obtain damages based on a violation of these two articles alone. Their importance lies in the fact that any form of legislation that is discriminatory could be set aside by the courts, but a mere decision by a governmental authority is not covered by the prohibitions.

Chapter 1 Section 2 contains generally formulated goals of equal opportunity. All the grounds of the directives are covered, but as these are only policy goals they are not directly applicable in any sense.

Chapter 12 Section 5 is an instruction to the state to use only objective criteria when hiring employees. The same provision is set out in Section 4 of the Public Employee Act (1974:269). Some state appointments may be appealed to a board, in which case discrimination can be addressed on the basis of these two pieces of legislation. This part of the Instrument of Government has not been applied without Section 4 of the Public Employee Act being applied as well. This rule thus effectively covers only some state employment relations, but it applies to all grounds in the directive.

Questions of direct applicability are hard to answer – but if an answer must be given the author would say that the Constitution is not directly applicable. The traditional answer has been that the Constitution is unimportant and not directly applicable. In 1974 the Constitution was reformed and adapted to the fact that Sweden had become a democracy (more than 50 years before). However, courts were not invited to question acts of Parliament. Only if an act of Parliament was manifestly contrary to the Constitution could it be set aside. Gradually, the Constitution has become more important. The most important changes are the rule (created in 1994) in Chapter 2 Section 19 that courts should set aside Parliamentary acts that violate the ECHR and the reform in 2010 that abolished the restriction to set aside acts of Parliament only if the violation of the Constitution was manifest.

The protection from discrimination that stems from the Instrument of Government alone is clearly not sufficient to fulfil the requirements of the directives – neither with regard to the areas covered nor with regard to the grounds protected. However, the Discrimination Act applies to laws and provisions as well (unless it is expressly stated otherwise). In relation to the implementation of the directives, it is the Discrimination Act that is important.

ground. Act (2008:569) Changing the Penal Code (1962:700).

⁵⁵ Swedish constitutional law comprises four different statutes: the Instrument of Government, the Act of Succession to the Throne, the Freedom of the Press Act and the Fundamental Law on Freedom of Expression (Regeringsformen, Successionsordningen, Tryckfrihetsförordningen and Yttrandefrihetsgrundlagen respectively). The legislation of interest to this report is the 1975 Instrument of Government.

2 THE DEFINITION OF DISCRIMINATION

2.1 Grounds of unlawful discrimination explicitly covered

The following grounds of discrimination are explicitly prohibited in national law:

1. Sex;
2. Gender⁵⁶ identity or expression;
3. Ethnicity;
4. Religion or belief;
5. Disability;
6. Sexual orientation;
7. Age.

Within special labour market legislation the following workers are protected:⁵⁷

1. Part-time workers;
2. Workers on fixed-term contracts;
3. Workers taking parental leave.

The rules in the Constitution are not important in reaching the protection level required by the directives – mainly due to their lack of direct applicability.⁵⁸

2.1.1 Definition of the grounds of unlawful discrimination within the directives

i) Racial or ethnic origin

The concept of ethnicity in the new Discrimination Act is defined as 'national or ethnic origin, skin colour or similar circumstance' (Ch. 1 Sec. 5 p. 3) 'Race' and 'religion' have previously been subsumed as similar circumstances under 'ethnicity'. The reason for this is that the delimitation between actions that are an expression of ethnic belonging and actions that are an expression of religious belief is often unclear.⁵⁹ Creating one ground covering both situations eliminates the need to make that particular distinction. Nowadays the most correct way is to regard religion and ethnicity as separate grounds. The overlapping area between these two grounds is however still used as an argument for not making a legal definition of religion.⁶⁰

There is no case law where the central legal question has been about the definition of race or ethnic origin.⁶¹ A landlord taking higher rent from refugees was convicted of ethnic discrimination in 2010.⁶² Discrimination against refugees, foreigners, immigrants or any other mixed group defined by being 'non-Swedish' in the eyes of the discriminator is regarded as ethnic discrimination. Since the concept of discrimination relates to the ground and not to the person it is not necessary to determine whether or not the victim of

⁵⁶ The Swedish word 'könsidentitet', may equally correctly be translated as gender identity or sexual identity.

⁵⁷ The author believes that this protection is somewhat related to the directives; other protected groups exist, for example trade union representatives.

⁵⁸ There is a legal development towards increased direct applicability. See Section 1 of this report.

¹⁵ See: Equality Ombudsman, *Chain of Events (Kedjor av Händelser)* Report 2016:2. The majority of the 217 complaints from Muslims in 2014 came from persons who could not distinguish whether the treatment was related to their religion or to their ethnicity, and invoked both grounds.

⁶⁰ Government bill 2007/08:95 p. 122. This is not a good argument for not mentioning religion or belief when the grounds are defined. Claiming that there are seven grounds and defining only six is confusing, especially when overlap is an important argument not to define the last ground.

⁶¹ To take a headscarf case, for instance, the court would accept the classification of the victim. If she believes it to be her religion that requires the scarf, then religion is the ground in that case. If another victim believes it to be ethnic, then it is ethnic in that case. There is no legal debate about the classification.

⁶² Göta Court of Appeal, case T 1666-09, Equality Ombudsman v. Skärets fastigheter AB, (Judgment of 25.02.2010). <http://www.do.se/globalassets/diskrimineringsanden/hovratt/dom-hovratt-skaret-fastighetsbolag-omed-20068982.pdf>.

discrimination belongs to a certain ethnic group or not. All race discrimination is based on the discriminator mistakenly believing that the human race may be divided into other races.

Sweden has eliminated the word 'race' from all acts of law unless international obligations require the term to be used. According to the Government's assessment, neither Directive 2000/43 nor Directive 2000/78 require the word 'race' to be used. Directive 2000/43 requires effective protection against race discrimination, and that is achieved under the Discrimination Act. The author of this report agrees with this assessment. Directives require goals to be achieved, but implementation differs according to national traditions. Directives do not require specific words to be used in achieving those goals.

ii) Religion or belief

As described above, there is no definition of religion in the Discrimination Act itself. However, the preparatory works regarding the old acts can give some guidance. This ground covers beliefs which emanate from or are connected to religious beliefs.⁶³ Atheism and agnosticism are related to the existence or non-existence of a God and are thus counted as beliefs sufficiently connected to religion to be protected by the Discrimination Act.

There is no case law on the definition of religion or belief. In the case of a woman wearing a burqa or a niqab, the court would typically say that it is not important to investigate whether this practice in a particular case is rooted in religion or ethnicity (as it is obviously rooted in either of the two or both), because the same rules apply to both grounds.⁶⁴

There are a lot of situations where the question of definition could be important. Veganism is one prime example. If it is connected to a religious belief it is protected, but if it is only the philosophical or moral choice of the individual it is not protected. If there is a minority within a religion that chooses veganism, the connection to the religious belief may be problematic.⁶⁵ There is, in any case, no case law in Sweden on such matters. If the majority of members of a small group such as the Jehovah's Witnesses hold a moral conviction (for example, that gambling is a sin) then it is connected to religion, even if most Christians believe otherwise.⁶⁶ What has not been adjudicated upon by the courts is what should be applied to a person who claims a religious belief that is not shared by a majority of his or her congregation. If one accepts protection for a practice upheld only by a minority within a congregation or an ethnic group, the delimitation towards individual philosophical and moral choices becomes problematic. In Sweden, a Christian can often find a church mirroring his or her belief, but a Muslim must often choose to be a member of the only Mosque in the municipality.⁶⁷

iii) Disability

⁶³ Government bill 2002/03:65, p. 82.

⁶⁴ The court would normally see it as the claimant sees it. If the claimant believes that she wears the burqa for religious reasons, then it is treated as the ground of religion. Cf. Hässleholm Municipal Court, case T-1370-13, Equality Ombudsman v. Polop AB, judgment (08.04.2015).
<http://www.do.se/globalassets/diskrimineringsarenen/tingsratt/dom-tingsratt-anm-201318052.pdf>.

⁶⁵ If a member of the Pentecostal church were to argue that he or she was a vegan because of their religion, even though most members of this church are not, then there is a possibility that 'their' veganism will be regarded as ethical/personal rather than as connected to their faith.

⁶⁶ Stockholm Municipal Court, case T-10264-14, Equality Ombudsman v. the Swedish State through the National Employment Agency (judgment of 28.12.2015).
<http://www.do.se/globalassets/diskrimineringsarenen/tingsratt/dom-tingsratten-arbetsformedlingen-anm-20141037.pdf>.

⁶⁷ The court will typically accept the claimant's statement that their religious belief is important to him or her when adopting the practice in question; see Hässleholm Municipal Court, case T-1370-13, Equality Ombudsman v. Polop AB, (judgment of 08.04.2015).
<http://www.do.se/globalassets/diskrimineringsarenen/tingsratt/dom-tingsratt-anm-201318052.pdf>.

According to Chapter 1 Section 5 point 4, disability means:

'[D]urable⁶⁸ physical, mental or intellectual limitation of a person's functional capacity that as a consequence of an injury or illness that existed at birth, has arisen since then or can be expected to arise.'

The definition is thus stated in general terms, a requirement being that the limitation is 'durable', i.e. the limitations in functional capacity must be long-lasting. For example, a person with a broken arm will not be covered by the law since the disability caused is of a passing nature. There is no threshold of 'severity', or a reference to the ability to engage in 'normal life activities' or 'professional life' for that matter. The latter is part of the assessment as regards a 'similar situation'.⁶⁹ However, until there is clear case law on the point it will be difficult to define the issues more closely.

Illnesses that can be expected to limit functional capacity in the future are covered by the law. This includes HIV, cancer and multiple sclerosis (MS). It is notable that Swedish law does not require an impairment which actually hinders the participation of the person concerned in professional life. In Labour Court case 2005 no. 32, a person diagnosed with MS but not suffering any symptoms was awarded damages for disability discrimination.⁷⁰ In Labour Court case 2003 no. 42, a person applying for a post as a systems operator at an oil refinery was denied employment with reference to his diabetes.⁷¹ The employer believed him to be a security risk. This was disability discrimination. The diabetes was real, but the employer failed to show that it was a security risk. Mistakenly believing a security risk to be present and linked to a disability and consequently treating someone adversely is disability discrimination, even though the worker was not disabled in any objective sense by his diabetes.

No Swedish claimant has, to the author's knowledge, lost a case because their medical problems were not regarded as a disability. The focus on the perception of the discriminator makes it quite immaterial whether or not the disability is as severe as the discriminator believes. A mistaken assumption regarding a behaviour being caused by alcoholic intoxication was in 2009 regarded as a valid defence for a restaurant which had rejected a person with a disability.⁷² The focus in Sweden is thus on what the discriminator knows, believes or mistakenly assumes about the claimant's abilities, not on the abilities themselves. An appeal court decision from 2014 can be given as an additional example of this.⁷³ It concerns a child custody case where the municipality mistakenly believed that the two parents were unable to take care of their child. The discrimination arose because the

⁶⁸ The Swedish term '*varaktig*' is better translated as 'durable' as opposed to 'permanent'. 'Permanent' literally means 'unchanging', and we have exactly this word in the Swedish language as well. Yet in the Discrimination Act, we have chosen another word which means 'long-term' but not 'permanent'. The English translation on the Government's home page is unofficial and the author has chosen another word here.

⁶⁹ We have had no case law in Sweden where the defendant has argued that the claimant is not disabled. The legal question has always been whether the claimant would have been productive enough to be in a similar situation as a person without disability if adaptation measure X had been adopted, or how much this adaptation measure would have cost.

⁷⁰ Labour Court, case 2005 No. 32 Sveriges Civilingenjörersförbund and MK v. T&N Management Aktiebolag (judgment of 30.03.2005). See also Section 2.1.3. <https://www.notisum.se/rnp/domar/ad/AD005032.htm>.

⁷¹ Labour Court Case 2003 No. 47, Svenska Metallindustriarbetarförbundet v. Skandinaviska Raffinaderi Aktiebolag Scanraff and Kooperationens Förhandlingsorganisation (judgment of 04.06.2003). <https://www.notisum.se/rnp/domar/ad/AD003047.htm>.

⁷² Svea Court of Appeal, case T 7752-08, Equality Ombudsman v. Sturehof AB (judgment of 02.06.2009). The Appeal Court went as far as to state that if it is proven that the defendant did not know about the disability it does not matter if the defendant ought to have done so (*obiter dicta*). This case is also problematic with regard to the principle that discrimination may be involuntary. The Appeal Court points out that the material of the case shows that persons with this particular disability are sometimes wrongly perceived as drunk. The fact that the mistake is easy to make seems to rule out discrimination. <http://www.do.se/globalassets/diskrimineringsarenden/hovratt/dom-hovratt-sturehof-ho-201318302.pdf>.

⁷³ Svea Court of Appeal case T 5095-13, Equality Ombudsman v. Sigtuna Municipality (judgment of 11.04.2014). <http://www.do.se/globalassets/diskrimineringsarenden/hovratt/dom-hovratt-sigtuna-kommun-anm-2011274.pdf>.

municipality took the child into custody without objective justification and for a reason connected to the alleged disability of the parents. Irrespective of whether the parents had a small cognitive disability (as the mother had) or not (as in the case of the father), both the parents and the child received discrimination awards of SEK 150 000 (EUR 16 500) each. In such cases the amount of actual cognitive disability of the claimants in relation to a legal threshold is totally irrelevant to the outcome.⁷⁴

The area of the ECJ's case law dealing with the interaction between the person's limitation and barriers at the workplace is not a part of the definition above. In Sweden the barriers in the workplace become important when the employee demands reasonable accommodation measures on the part of the employer. According to the author, the threshold for proving a disability must be considered slightly lower in Sweden compared with the case law of the ECJ, since neither a connection to barriers in private life nor to barriers in professional life needs to be shown. In Swedish case law the question of whether the claimant actually has a disability is often unimportant, as the focus is on the perception of the discriminator and not upon the medical condition of the claimant.⁷⁵

The Swedish definition is therefore in accordance with the decision by the ECJ in joined cases 335/11 and 337/11. The claimant is normally⁷⁶ not worse off, because the Swedish definition focuses only on the discriminator's perception of functional limitations.⁷⁷

iv) Age

According to Chapter 1 Section 5 point 6 of the Discrimination Act, age is defined as 'length of life to date'. This definition includes all ages and makes it clear that the young as well as the old are protected. There is no case law on the definition itself. All case law deals either with justifications provided by the discriminator⁷⁸ or with whether or not two persons are in a similar situation.⁷⁹

v) Sexual orientation

According to Chapter 1 Section 5 point 5 of the Discrimination Act, sexual orientation is defined as 'homosexual, bisexual or heterosexual orientation'. In the preparatory works, the Government indicates that the intention is to create a legal protection that covers the whole population, as all individuals in principle belong to one of these three categories.

The dividing line between sexual orientation which is protected by the law and sexual behaviour which is not protected is made in the preparatory works to the old act. In its bill to Parliament proposing the 1999 Sexual Orientation Discrimination Act, the Government seeks to clarify that a variety of sexual conducts that may be found in individuals regardless

⁷⁴ The Appeal Court Decision is very short. A comparison may be made with the extensive reasoning in Attunda Municipal Court case T5508-12, The Equality Ombudsman v. Sigtuna Municipality (judgment of 24.04.2013). <http://www.do.se/globalassets/diskrimineringsarenden/tingsratt/dom-tingsratt-sigtuna-kommun-anm-211274.pdf>.

⁷⁵ Government bill 2007/08:95, p. 123.

⁷⁶ The Svea Court of Appeal, case T 7752-08, Equality Ombudsman v. Sturehof AB (judgment of 02.06.2009) leads to the following problem. The Appeal Court went as far as to state that if it is proven that the defendant did not know about the disability it does not matter if the defendant ought to have done (obiter dicta). This case is therefore problematic with regard to the principle that discrimination may be involuntary. The Appeal Court points out that the material of the case shows that persons with this particular disability are sometimes wrongly perceived as drunk. The fact that the mistake is easy to make seems to rule out discrimination. <http://www.do.se/globalassets/diskrimineringsarenden/hovratt/dom-hovratt-sturehof-ho-201318302.pdf>.

⁷⁷ Furthermore, there is a long tradition of interpreting the concept of disability in an extensive way so as not to exclude any persons. See Fransson-Stüber 2015, The Discrimination Act Commented, Second edition, p. 111.

⁷⁸ See for instance Labour Court 2011 No 37, Equality Ombudsman v. Aviation Employers (Flygarbetsgivarna) and Scandinavian Airlines System (judgment of 04.05.2011).

⁷⁹ See for instance Labour Court 2010 No 91, Equality Ombudsman v. Swedish Agency for Government Employers (judgment of 15.12.2010). <http://www.notisum.se/rnp/domar/ad/AD010091.htm>.

of whether they are homosexual, bisexual or heterosexual are not protected by the discrimination prohibition.⁸⁰ The remarks in the bill run the risk of leading to the erroneous conclusion that the anti-discrimination provisions would only cover differences in treatment related to the orientation or preference itself and never on grounds of sexual behaviour. This, however, is not the case.

To avoid that, employers may try to circumvent the anti-discrimination legislation by simply submitting that the difference in treatment in a given case was due not to the victim's being homosexual but to the fact that she was having homosexual relations. Parliament decided to make the following clarification:

'The fact that a person is living together with someone of her own sex in an intimate relationship, whether in a registered partnership⁸¹ or not, or the fact that she is *at all* having sexual relations with someone of her own sex, must be considered as a natural expression of the sexual orientation itself, the same way that this is the case for heterosexuals.

Therefore, an employer may not take into account any behaviour that has such a natural link to the sexual orientation itself, whichever orientation that may be; unless he can prove that the behaviour has a definite relevance for the aptitude of the employee to perform her duties on the job. This clarification will have a strong effect on the interpretation by the courts since its wording is clear and it is included in the Parliament Standing Committee report, which led to the adoption of the act.⁸² This part of the report is also recited in the Government bill for the new Discrimination Act.⁸³

In 2006 the Supreme Court⁸⁴ decided on a case where a lesbian woman, her girlfriend and some other friends from work had been asked to leave a restaurant because the lesbian pair were kissing and hugging each other. It was a 'he-said, she-said' case, with the restaurant manager claiming that they did not merely kiss and hug but were also snogging (*hångla*). The appeal court and the Supreme Court placed the burden of proof upon the restaurant and they failed to prove anything more than kissing and hugging, which is permitted. This case is considered to have provided important rules for all grounds of discrimination with regard to the division of burden of proof. However, the concept of discrimination on the ground of sexual orientation has not been perceived as problematic in Sweden. That part of the case has always seemed self-evident.

2.1.2 Multiple discrimination

In Sweden, prohibition of multiple discrimination is not included in the law. There is no statute that deals with it.

In Sweden, many cases can be said to be dealing with multiple discrimination. There are two types of cases. One type can be exemplified with Labour Court case 2010 No 91.⁸⁵ The employer was convicted of both age and sex discrimination. The omission was not to hire and not to call an elderly woman to a job interview. The employer claimed that the woman was not suitable for the job but failed to demonstrate this and thus failed to break both a

⁸⁰ Government bill 1997/98:180, p 22.

⁸¹ Registered partnerships have not existed since May 2009. At that time the institution of marriage was opened up to same-sex couples and registered partnerships were converted to marriages. Act Changing the Marriage Code 187:230 (Lag om ändring av äktenskapsbalken 2009:253) and Act on Repealing Act (1994:1117) on Registered Partnership (lag om upphävande av lagen om registrerat partnerskap 2009:260). Both adopted on 02.04.2009.

⁸² Ytterberg, Sexual Orientation Report of 28.07.2004.

⁸³ Government bill 2007/08:95, p 125.

⁸⁴ The Supreme Court (Nja 2006 p. 170): The Ombudsman Against Discrimination due to Sexual Orientation v. Restaurang Fridhem Handelsbolag (judgment of 28.03.2006).

⁸⁵ Labour Court 2010 No 91, The Equality Ombudsman v. State Employment Board (Statens arbetsgivarverk) (judgment of 15.12.2010). <http://www.notisum.se/rnp/domar/ad/AD010091.htm>.

presumption of age discrimination and sex discrimination. The Labour Court stated that two discriminations, committed by the same omission, was *not* a reason to raise the level of the discrimination award. It was treated as one single offence. The Equality Ombudsman receives around 200 cases attributed to more than one ground.⁸⁶ Most of them are of this type when the claimant wants to connect one instance of bad treatment to two or more grounds of discrimination.

The other type of multiple discrimination can be exemplified with Labour Court case 2011 No 13.⁸⁷ The case regarded two different alleged instances of harassment, one involving ethnicity and the other involving sex. The rules on burden of proof applied to each of these two offences separately, and the claimant won. The compensation is naturally higher the more offences there are, but the fact that one offence concerned ethnicity and the other sex appears not to have affected the combined level in Labour Court case 2011 No 13. The claimant would probably have got the same amount had both offences related to the same discrimination ground.

There is no case where one action/omission has been held to be more severe because it has violated a person both as a woman and as an immigrant or any other combination of grounds. In that sense there is neither legislation nor case law on multiple discrimination in Sweden and no legislation is being planned in this regard.

2.1.3 Assumed and associated discrimination

a) Discrimination by assumption

In Sweden, the Discrimination Act prohibits discrimination based on perception or assumption of what a person is.

The definition of (direct) discrimination is related to the ground and not to the person. The wording of the prohibition in Chapter 1 Section 4 point 1 of the Discrimination Act states that it applies 'if this disadvantaging is *associated* with (*har samband med*) sex, transgender identity or expression, ethnicity, religion, disability, sexual orientation and age'. Any discrimination which relates to the protected grounds is prohibited. A mistaken assumption regarding a person's religion is clearly associated with the religion ground.

The principles on mistaken assumption may cut both ways in Sweden. A mistaken assumption regarding a behaviour being caused by alcoholic intoxication was a valid defence for a restaurant which had rejected a person with a disability.⁸⁸ The appeal court quoted the preparatory works on mistaken assumptions and did its best to apply the same principle both ways.

b) Discrimination by association

⁸⁶ Cf. Equality Ombudsman, Annual Report 2012, p. 13 and 15. The total number of grounds is 1 835 and the total number of cases is 1 559. The number of grounds is thus 276 more than the number of cases.

However, there may be three grounds in some cases and parental leave is a ground, so a case concerning both sex discrimination and parental leave discrimination will show up as concerning two grounds. In 2014, 1 611 cases were considered according to the Discrimination Act, and 1 810 grounds were concerned. Equality Ombudsman Annual Report 2014, pp. 45f and 49. This year (2016) the way in which the Equality Ombudsman handles statistics has changed so that the number of cases and the number of grounds match.

⁸⁷ Labour Court 2011 No 13. The Equality Ombudsman v. Municipality of Helsingborg, (Judgment of 16.02.2011). <https://www.notisum.se/rnp/domar/ad/AD011027.htm>.

⁸⁸ Svea Court of Appeal, case T 7752-08, Equality Ombudsman v. Sturehof AB (judgment of 02.06.2009). The Appeal Court went as far as to state that if it is proven that the defendant did not know about the disability it does not matter if the defendant ought to have done so (*obiter dicta*). This case is also problematic with regard to the principle that discrimination may be involuntary. The Appeal Court points out that the material of the case shows that persons with this particular disability are sometimes wrongly perceived as drunk. The fact that the mistake is easy to make seems to rule out discrimination. <http://www.do.se/globalassets/diskrimineringsarenden/hovratt/dom-hovratt-sturehof-ho-201318302.pdf>.

In Sweden, the Discrimination Act Chapter 1 Section 4 Point 1 prohibits discrimination based on association with persons with particular characteristics:

Since the definition of (direct) discrimination is related to the ground and not to the person the prohibition applies. Treating an ethnic Swede unfavourably because he or she has a lot of Muslim friends may be associated with the ground of religion. This applies to disability as well. If a person is less favourably treated because he or she is the primary carer of a child with a disability, this treatment would be regarded as associated with the disability ground. Swedish law is in line with the requirement set out in *Coleman v. Attridge Law and Steve Law*.⁸⁹

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

a) Prohibition and definition of direct discrimination

In Sweden, direct discrimination is prohibited in national law. The definition of direct discrimination in the Discrimination Act in Chapter 1 Section 4 point 1, reads as follows:

'Direct Discrimination: that someone⁹⁰ is disfavoured by being treated less favourably than someone else is treated, has been treated or would have been treated in a comparable situation, if this disadvantaging is associated with sex, transgender identity or expression, ethnicity, religion or other belief, disability, sexual orientation or age.'

The definition of discrimination requires that a person has suffered a less favourable treatment (*missgynnande*).

A discriminatory job vacancy announcement is not a less favourable treatment.⁹¹ A discriminatory statement directed at an individual amounts to less favourable treatment, but a discriminatory statement directed at the general public does not. Swedish law is clearly not in line with the first point of the operative part of *Firma Feryn*.⁹²

A discriminatory job announcement regarding ethnicity will in Sweden be dealt with under the rules on active measures in the Discrimination Act. According to Chapter 3 Section 5 point 3, the employer shall take active measures with regard to employment and also promotion. If the employer is insufficiently active in ensuring that people of a different sex, ethnicity, religion or other belief have the opportunity to apply for vacant jobs, the Equality Ombudsman may, according to Chapter 4 Section 5, ask the Board Against Discrimination to order the employer to fulfil his or her duty *in the future* subject to a financial penalty (*vite*).⁹³ Central employees' organisations with a collective agreement can ask for such an order if the Ombudsman declines to do so. The economic penalty will gain legal force only after a district court has ordered the payment. The legality of the order itself, as well as the reasonableness of the amount, can be decided upon by the district court. The individual person who may have abstained from seeking a job cannot initiate such a process at the Board Against Discrimination themselves.

⁸⁹ Perhaps Svea Court of Appeal, case T 1912-13, can be said to confirm this. A mother was refused child insurance for a child because the child's hearing impairment was severe enough to entitle the mother to a care benefit for her. This was unlawful discrimination not only against the child but against the mother as well. Both received a discrimination award.

⁹⁰ If a group has been discriminated against, each person goes to court as an individual or makes an individual complaint with the Equality Ombudsman. It is easy to deal with many such cases together in a single process if many persons have been discriminated against in the same way by the same discriminator. A group of persons cannot be a discriminator. It is only the person (actual or legal) who is legally responsible for the activity that is regarded as a discriminator.

⁹¹ It is given as an explicit example of things falling outside the prohibition of direct discrimination, Government bill 2007/08:95, p. 499.

⁹² European Court of Justice, case C-54/07, *Centrum voor gelijkheid van kansen en voor racismebestrijding v. Firma Feryn NV* (judgment of 10.07.2008).

⁹³ This applies only to the grounds mentioned in the text.

To summarise the legal situation, a financial penalty can only be given for continued violations, not for the first offence. This is probably not in accordance with the third point of the operative part of Firma Feryn and Article 15 of Directive 2000/43.⁹⁴ This legal evaluation is thus not affected by the new Chapter 3 entering into force on 1 January 2017.

One illustrative example is the Bergsjön case. A major landlord required applicants to state their ethnic background in their application form, and used the information to avoid renting out to certain groups. The Equality Ombudsman stated that this was discrimination. The case was all over the media, and the landlord changed their practice. The high visibility of the case, together with the fact that a landlord with almost 400 apartments needed to find new tenants regularly, made it risky to ignore the Equality Ombudsman and the Tenant Union.⁹⁵ They would have eventually found an applicant who had been individually disfavoured.

A small landlord could safely have ignored the formal position of the Equality Ombudsman in this situation. The next time they rented out an apartment, everything would be forgotten. A repeated open practice of discouraging applicants from certain ethnic groups can violate an employer's active duties under Chapter 3 of the Discrimination Act, but a landlord has no such duties in Sweden. Even for repeated offences, the worst thing that can happen is that their case will be put on the Equality Ombudsman home page under the heading 'The Equality Ombudsman takes a position' (*DO tar ställning*). This is not very visible.⁹⁶

b) Justification of direct discrimination

The ban on direct discrimination is limited by the possibility of justification. In the Discrimination Act the justifications allowed regarding the labour market are regulated in Chapter 2 Section 2.

The first justification is the one that is relevant for this report, and concerns differential treatment due to the nature of the work or the context in which the work is carried out if the characteristic constitutes a genuine and determining occupational requirement that has a legitimate purpose and the requirement is appropriate and necessary to achieve that purpose.

Strong positive action for one group normally means direct discrimination against another group. There is no general clause allowing it. For special clauses allowing it in certain fields the reader is referred to Chapter 5.

⁹⁴ See Gambinius Göransson et al, The Discrimination Law p. 37.

⁹⁵ The Swedish Tenant Union has for many years worked hard against discrimination in the housing market. With around a third of Swedish tenants as members (calculated on a household basis), it is natural that some of their members were discriminated against, and thus the organisation decided to take on the case.

⁹⁶ From the Equality Ombudsman home page, you need to click on 'law and justice', and then 'Equality Ombudsman takes a position'. Here, you are presented with many positions on topics arising from cases, ranging from Roma police registration (possible ethnic profiling, but falling outside the Discrimination Act) to employers with good intentions possibly going too far in their positive actions for disfavoured groups. The media coverage was effective in the Bergsjön case. The author would here like to praise the Equality Ombudsman for using the tools provided by Swedish law so effectively in the Bergsjön case. However, these tools are still inadequate, and without the media coverage there would only have been a very minor shame factor in just being on the Equality Ombudsman's home page. The relevant section of the home page is not designed to shame the alleged discriminators – it is designed to clarify a legal position taken by the Equality Ombudsman. Sometimes their actions are considered correct after careful evaluation, sometimes they have discriminated but with a good intention (for example through positive action gone too far) and sometimes they have behaved very badly, as in the Bergsjön case.

2.2.1 Situation testing

a) Legal framework

In Sweden, situation testing is clearly permitted in national law. Swedish procedural rules are based on the principle of freedom of evidence as stated in the Code on Criminal and Civil Procedure Chapter 35 Section 1 (1942:740).⁹⁷ Evidence must be assessed in accordance with the circumstances at issue. Courts cannot declare evidence inadmissible for formal reasons. This principle applies also to illegally obtained evidence.⁹⁸ The fact that the law is silent on situation testing must, against this background, be interpreted as situation testing being clearly permitted.

b) Practice

In Sweden, situation testing is used in practice.

The former DO (the old Ethnicity Ombudsman) was involved in an investigation on situation testing as a method against discrimination, and situation testing was also recommended to the DO as a tool by the Structural Discrimination Inquiry Commission.⁹⁹

Situation testing is uncontroversial as a means of evidence, and the authorities can use public money to act as legal representatives¹⁰⁰ of claimants relying on evidence obtained by situation testing in courts.¹⁰¹ However, the authorities are reluctant to get involved themselves in situation testing as a way of obtaining evidence in individual cases. They are not forbidden from doing so or even asked to abstain from situation testing, but the instance of outspoken encouragement by the Structural Discrimination Inquiry Commission (see above) is a rare exception.

Situation testing is close to crime provocation, and crime provocation is generally not allowed in Sweden. Authorities cannot ask a citizen to commit a crime they would otherwise not have committed. In the discrimination field, however, the discriminator is asked to do something legal – for instance allowing a person to eat at a restaurant. The documentation of the refusal creates evidence of discrimination. Evidence provocation is clearly more acceptable, although limitations apply to authorities but not to private persons.¹⁰² The unclear¹⁰³ legal situation regarding these limitations made the DO argue that explicit permission to do situation testing under the Discrimination Act is necessary if the authorities are to apply situation testing as a method of gaining evidence themselves.¹⁰⁴ There is nothing on situation testing in the Discrimination Act.

Situation testing in the form of practical testing is an accepted scientific method. Because Sweden does not register factors such as ethnicity it is probably of more importance here compared with other countries. It has been used by experts on ethnic discrimination in

⁹⁷ The rules on evidence are also based on the 'principle of best possible evidence'. For instance, an affidavit is not allowed if the person could have been heard as a witness.

⁹⁸ It is perfectly possible for a police officer to be convicted for collecting evidence in an illegal way and for a criminal to be sent to prison on the basis of that same evidence.

⁹⁹ SOU 2005:56, Det blågula glashuset – strukturell diskriminering i Sverige, p. 590.

¹⁰⁰ Swedish procedural rules make the discrimination authorities the formal claimant in civil cases.

¹⁰¹ The Ombudsman Against Ethnic Discrimination represented the four claimants in the Escape case. Malmö District Court, judgment 3 of May 2006, case T 3562-05. The Appeal Court for Skåne and Blekinge, judgment of 24.04.2007, case T 1358-06. The Supreme Court, Escape Bar and Restaurant v. The Ombudsman Against ethnic Discrimination (case T-2224-07 judgment of 01.10.2008). http://yvlttk.fi/material/attachments/ytaltk/oikeustapauksiamaailmalta/pohjoismaat/FEZIEUHY7/2008-10-01_T_2224-07_Dom_skiljaktig.pdf.

¹⁰² Cf. Ombudsman Against Ethnic Discrimination Dnr 419-2005, Discrimination Tests as Evidence, p. 2.

¹⁰³ The legal situation is truly unclear. It is based on case law concerning the Police. The degree to which it applies to discrimination authorities and to civil law is unknown.

¹⁰⁴ The Ombudsman Against Ethnic Discrimination, Diskrimineringstester som bevismedel (Discrimination Tests as Means of Evidence), Dnr. 419-2005.

both the housing market and the labour market. However, it is not totally uncontroversial. In a survey commissioned by the Equality Ombudsman, it is stated that there has been so much research based on 'applications from fictive applicants' that it is not ethically acceptable to subject the employers to more such research, and therefore it is harder to finance such research.¹⁰⁵ An employer handling an application from a fictive applicant may spend considerable time reading the application and trying to contact the person for an interview. Such applications are sent to ordinary employers (and landlords) who have never agreed to be a part of any research project.

In the 2011 report 'Roads to Rights' by the Equality Ombudsman, which was directed at local organisations working with anti-discrimination, the following is said under the subheading of 'Ask more persons to apply':

'If the landlord does not answer your questions or if you suspect that you do not receive the correct treatment when seeking a rental apartment and that this is connected to a discrimination ground, you may ask one or more of your friends to apply for the same apartment. If the other person is offered a contract for the apartment and if you are in a similar situation to that person, there is reasonable ground to suspect discrimination. The Equality Ombudsman has won a case based on discrimination testing.'¹⁰⁶

In 2014 the Equality Ombudsman reached a settlement with a petrol station that refused to rent out cars to three Roma persons. The state television company had set up the situation testing scenario as part of a programme on ethnic discrimination.¹⁰⁷

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

a) Prohibition and definition of indirect discrimination

In Sweden, indirect discrimination is prohibited in national law. The definition of indirect discrimination in the Discrimination Act in Chapter 1 Section 4 point 2 reads as follows:

'Indirect Discrimination: whereby someone¹⁰⁸ is disadvantaged by the application of a provision, a criterion or a procedure that appears neutral but that may put people of a certain sex, a certain transgender identity or expression, a certain ethnicity, a certain religion or other belief, a certain disability, a certain sexual orientation or a certain age at a particular disadvantage, unless the provision, criterion or procedure has a legitimate purpose and the means that are used are appropriate and necessary to achieve that purpose.'

b) Justification test for indirect discrimination

Guidance is given in the preparatory works to both the new Discrimination Act and the previous acts. For instance, as regards the 1999 Sexual Orientation Discrimination Act, the example given of presumed unlawful indirect discrimination is that of a childcare centre requiring prospective employees to have experience of raising biological children of their own. As regards disability, according to the old Disability Ombudsman, for example, requiring a driver's licence can be a form of indirect discrimination. A licence is a necessary requirement for a job as a taxi driver, but does not have to be essential, for example, for

¹⁰⁵ See for instance Oxford Research 2013, Forskningsöversikt om rekrytering i arbetslivet (Presentation of Research on Recruiting in Working Life. (p. 38).

¹⁰⁶ Equality Ombudsman 2011, Roads to Rights, p. 34.

¹⁰⁷ Equality Ombudsman, ANM 2013/828-30 (Statoil AB).

¹⁰⁸ If a group has been discriminated against, each person goes to court as an individual or makes an individual complaint with the Equality Ombudsman. It is easy to deal with many such cases together in a single process if many persons have been discriminated against in the same way by the same discriminator. A group of persons cannot be a discriminator. It is only the person (actual or legal) who is legally responsible for the activity that is regarded as a discriminator.

a job as a journalist. The Government bill for the Discrimination Act uses language skills as an example when discussing legitimate purpose and under what circumstances a criterion can be appropriate and necessary in order to achieve such a purpose.¹⁰⁹

The basic principle behind these examples is that the courts can accept any aim as legitimate as long as it is convinced that it is of genuine importance, and this comes in degrees. The general principle of equality is the opposing principle. It has more or less the same weight in any case.

In Sweden almost all case law on the Discrimination Act relates to direct discrimination. Why there are so few cases on indirect discrimination is currently the most important question with regard to indirect discrimination and the proportionality test.

c) Comparison in relation to age discrimination

The rules on the legal proceedings are the same for all grounds in the new Discrimination Act. The justification test is also the same, with the important difference that both direct and indirect age-related differences of treatment can be defended in a proportionality test.

2.3.1 Statistical evidence

a) Legal framework

In Sweden, there are national rules on permitted data collection. These rules are not connected to the Discrimination Act and there is no special legislation helping someone to collect statistical data for a discrimination case.

Since indirect discrimination requires group impact to be compared, statistical evidence is of course permitted. The use of statistical evidence is not regulated in any special way. As Swedish procedural rules are based on the principle of freedom of evidence, such evidence will – like all other evidence – have to be assessed according to the circumstances.

The Act on Personal Information (Personuppgiftslagen) (1998:204) contains general rules on the right to register personal information. There is a general prohibition against registering (among other things) such 'sensitive personal information' as ethnicity, religion or other philosophical conviction and information concerning health and sexual life including sexual orientation (Sec. 13). However, as regards employers, it is permitted to keep a record of these things 'only to the extent this is really necessary for the employer to meet the requirements of labour law' (Sec. 16(a)).

With regard to health authorities there is also a right to register such sensitive information when necessary for medical reasons, in which case there is a corresponding rule on secrecy (Sec. 18). In Section 16 there is also a general exception whenever legal claims make it necessary to keep a record of sensitive information for an individual case, and this is also the case when the person registered has explicitly agreed to the registration (Sec. 15).

Punitive and economic damages can be claimed in cases of actual practices not complying with these norms. Such claims are presented to the ordinary court system and a group claim could thus, at least theoretically, be made. Against this background, information is not kept as a general rule on monitoring ethnicity or religion, sexual orientation and disability. On the other hand, the sex and the age of an individual are as a rule always known.

For general statistics purposes there is, however, the population register (*folkbokföringsregistret*), which is managed by the tax authorities. This register contains

¹⁰⁹ Government bill 2007/08:95, p. 491.

information on (among other things) the place of birth and nationality of a person as well as the place of birth of their parents and the date of their taking up residence in Sweden. Religion and belief are not registered as such; but membership of a church may be registered.¹¹⁰ Information on disability or sexual orientation is not included in the population register.

It would not be permissible to register ethnicity, religion and sexual orientation in order to prove that a certain criterion has an adverse impact on a certain group. The general inquiry into living conditions undertaken by Sweden Statistics includes health information on impaired vision, hearing or mobility and severe mental psychical problems. This information is relevant to the discrimination ground of disability.¹¹¹ Disability is linked to a person's health and is therefore sensitive, and a private person is unlikely to be allowed to register such things. The courts have sometimes accepted common sense reasoning where statistics cannot be produced.¹¹²

The Government wants better statistics, and the Equality Ombudsman, together with Swedish Statistics and the Swedish National Institute for Public Health, have been asked to work together to produce methods for creating statistics with regard to all grounds in the Discrimination Act. The statistics shall provide information on differences, for instance, with regard to the working environment, housing and health. It may therefore become possible to register information based on all discrimination grounds in the near future.

In November 2012 the Equality Ombudsman reported back its preliminary observations to the Government.¹¹³ The Ombudsman stated some important principles. One is that nobody shall be forced to give sensitive information regarding themselves. Nobody shall thus be forced to reveal their sexual orientation, religion etc. If they chose to reveal it, anonymity must be granted. A second important principle is that of self-categorisation. A person must be allowed to belong to the ethnicity, religion, sexual orientation etc. that he or she feels part of. There cannot be a state classification. A third principle is that groups who distrust society¹¹⁴ must be treated in a way that makes them trust the research. One way can be to make sure the research is done by persons they trust.

The current constraints affect positive action. Age and nationality are two discrimination grounds covered by this report where the author can imagine that it would be possible to use statistical data directly to construct positive measures. However, the author does not know of any such cases. In most cases, to the degree that positive action is allowed, it is

¹¹⁰ The Swedish State supports some churches by helping them to collect 'taxes'. Today, this is not a tax but an income-related membership fee. If a church wants this assistance, its members must be registered with the tax authority.

¹¹¹ The Equality Ombudsman 2012, *Statistikens roll i arbetet mot diskriminering*, p. 9.

¹¹² This can be compared to Stockholm district court judgment 28/01-2013, *Equality Ombudsman v. If Insurances*. The company refused to insure children if the parent received a form of child care benefit reserved for disabled or long-term sick children. It could not be direct discrimination as the group of children consisted of sick but not disabled children, and the Ombudsman had not proved what proportion of children receiving the benefit were disabled. Therefore, any adverse effect upon disabled children was not proven. This is only a district court case, but it is troubling in the sense that proving adverse effect on persons with disabilities must require a separation of the disabled children receiving the child care benefit from the non-disabled children receiving the same benefit.

¹¹³ The Equality Ombudsman 2012, *Statistikens roll i arbetet mot diskriminering – En fråga om strategi och trovärdighet* (The role of statistics in combating discrimination – A question of strategy and credibility).

¹¹⁴ Some groups, for instance representatives of the Roma, are worried that research may be used to stigmatise the group further. Proof of social problems – such as unemployment in the group – may be used to brand them as persons living on the taxes paid by other ethnic groups. There are big differences regarding the level of trust between the groups that may be registered and studied this way. See Equality Ombudsman 2012, *Statistikens roll i arbetet mot diskriminering*, p. 93ff. The report takes up the example of the Swedish Prime Minister stating that unemployment was very low among ethnic Swedes and therefore there was no need for a fiscal stimulus. The Prime Minister could not possibly know this, as ethnicity is not registered. Should he in the future be in a position to know this, that knowledge could be abused by not addressing the problem through a fiscal stimulus or any other means. It could also be used to find the most appropriate means to combat unemployment given information on which groups were most likely to be unemployed. Trust is at the centre of the Equality Ombudsman's preliminary report.

up to the person wanting to promote the interests of, for instance, an ethnic minority to find a permitted proxy for ethnicity which can be used for statistical purposes.

The state does not construct positive measures based on statistics, and other actors seldom do so. Statistics can be a reason for adopting a measure or for ceasing to apply it. The author of this report has never heard of a case where statistical data have been used to design positive measures on the grounds covered in this report.¹¹⁵

b) Practice

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

In Sweden, almost all case law on the Discrimination Act concerns direct discrimination. The most important question with regard to indirect discrimination is why there are so few cases concerning it. It is not possible to answer general questions about influences from other countries or other specific questions on the basis of such scarce case law.

One individual case showing a clear influence from another country is that of the Karolinska institutet.¹¹⁶ A Muslim dental student was required to work with bare forearms due to state regulations (an ordinance on hygiene issues). The court decided that both the British expert's reason why disposable forearm protection was accepted in the UK and the Swedish experts' statements why there was a genuine hygienic concern about disposable forearm protection and a prohibition in Sweden in the form of an ordinance seemed scientific and credible, and it was not possible to believe one expert more than the other.

However, it was the education provider (the alleged discriminator) who bore the burden of proof with regard to the justification of what was potentially indirect discrimination. Therefore, the Karolinska institutet lost the case. The state had legitimate concerns, but the state's expert admitted that the British example showed that similar disposable protection had been used there and no one had been able to show a relevant increase of infection risk. Thus, the claimant succeeded in showing that there existed a better solution to address the legitimate concern of the education provider and was awarded SEK 5 000 (EUR 550). The education provider did not appeal the decision of the municipal court.

The Roma registration scandal was never about statistical information.¹¹⁷

¹¹⁵ The only such case the author knows about concerns sex. The Swedish University of Agricultural Sciences had a small quota for applicants from the people's universities and decided to select applicants by lottery among those with the highest possible grades. Men were given a better chance in this lottery to a degree that depended on the under-representation of men in this particular programme.

¹¹⁶ Stockholm Municipal Court, case T 3905-15, Equality Ombudsman v. The Swedish State through Karolinska institutet (judgment of 16.11.2016).

¹¹⁷ The Roma registration scandal, in which over 4 000 people were registered, was firstly treated as involving no discrimination. Then in 2016, Stockholm District Court and, in 2017 (after the cut-off date for the report), the Svea Court of Appeal, found direct discrimination in 11 cases tried in the same legal proceedings. The police could not remember the individual reasons why each of these 11 persons were registered and could thus not break the presumption of discrimination in any of the 11 cases. The Chancellor of Justice has in 2017 decided that all innocently registered persons shall receive economic compensation for direct discrimination without going to court. In this case there was never a discussion on the impact on the Roma group compared with other groups according to the legal requirements of the prohibition of indirect discrimination. See this report Section 12.2 (only up to the cut-off date of the report).

2.4 Harassment (Article 2(3))

a) Prohibition and definition of harassment

In Sweden, harassment is prohibited in national law.

In Sweden, harassment explicitly constitutes a form of discrimination.

It is one of the six forms of discrimination enumerated in the Discrimination Act, Chapter 1. Section 4 point 4 reads as follows:

*'Harassment':*¹¹⁸ conduct that violates a person's¹¹⁹ dignity and that is associated with one of the grounds of discrimination, a certain sex, transgender identity or expression, a certain ethnicity, a certain religion or other belief, a certain disability, a certain sexual orientation or a certain age.'

The material scope is thus wide. As a general rule, all six forms of discrimination applies in all areas. There is no area where harassment is exempted, as is the case with regard to lack of accessibility.

b) Scope of liability for harassment

In Sweden, where harassment is perpetrated by an employee, the employee is almost never¹²⁰ liable and the employer is not always liable. Sometimes, no one can be held responsible.

In working life, the prohibition applies to the employer. The employer may be a natural or a legal person. According to Chapter 2 Section 1 of the Discrimination Act, a person who has the right to make decisions on the employer's behalf in matters concerning the employee shall be equated with the employer. An employer can thus only be made responsible for employees who are given the authority to represent the employer towards other employees i.e. management on different levels. A fellow worker lacks such an authorisation towards another fellow worker, thus an individual employee cannot sue a fellow worker under the Discrimination Act.

The employee sending the discriminatory email in Labour Court case 2007 No 45¹²¹ was not in a position to make decisions regarding the Iranian's job application and did thus not represent the employer. There could therefore be no discrimination even though the employer never argued that the lack of authorisation was visible to the Iranian job applicant. This restriction on the vicarious liability of employers reduces the scope of the prohibition on discrimination in a way which is problematic in relation to EU law. Labour Court case 2011 No 19¹²² is another example where the applicant, the municipal coordinator of summer training posts for pupils and S.F. herself thought that S.F. was representing the employer. The employer was at least equally to blame for this misunderstanding between her and S.F. The applicant lost the case based on formalistic legal reasoning as to whom the employer is responsible for.

¹¹⁸ Sexual harassment is then added as a special form of harassment.

¹¹⁹ If a group has been discriminated against, each person goes to court as an individual or makes an individual complaint with the Equality Ombudsman. It is easy to deal with many such cases together in a single process if many persons have been discriminated against in the same way by the same discriminator. A group of persons cannot be a discriminator. It is only the person (actual or legal) who is legally responsible for the activity that is regarded as a discriminator.

¹²⁰ Harassment might under some circumstances fall under a section in Chapter 5 of the penal code (defamation etc.).

¹²¹ Labour Court 2007 no 45 The Ombudsman Against Ethnic Discrimination v. Laika film & amp (Judgment of 16.05.2007) <http://www.notisum.se/rnp/domar/ad/AD007045.htm>.

¹²² Labour Court 2011 no 19, Equality Ombudsman v. C.N. and her private business (enskild firma) Bright Hair and Beauty Salon and Café Next Door Unlimited Partnership, (judgment of 23.03.2011) <http://www.notisum.se/rnp/domar/ad/AD011019.htm>.

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

The concept of unlawful discrimination in Chapter 16 Section 9 of the Penal Code applies to harassment as well. However, the employment sector is not covered by this provision, so neither employee nor employer can be held liable under that provision.

2.5 Instructions to discriminate (Article 2(4))

a) Prohibition of instructions to discriminate

In Sweden, instructions to discriminate are prohibited in national law.

In Sweden, instructions explicitly constitute a form of discrimination. This constitutes one of the six forms of discrimination enumerated in the Discrimination Act, Chapter 1. Section 4 point 6 defines it as follows:

'Instructions to discriminate: orders or instructions to discriminate against someone¹²³ in a manner referred to in points 1–5 that are given to someone who is in a subordinate or dependent position relative to the person who gives the orders or instructions or to someone who has committed herself or himself to performing an assignment for that person'

The material scope is thus wide. As a general rule, all six forms of discrimination apply in all areas. There is no area where instructions to discriminate are exempted, as is the case with regard to lack of accessibility.

b) Scope of liability for instructions to discriminate

The employee giving an instruction is not personally liable under the Discrimination Act in Sweden. The question is whether the employer or service provider is liable in relation to the victim.

In Sweden, where instructions to discriminate against an employee are given by another employee to a third employee, the first employee is almost never personally liable and the employer is not always liable. Sometimes no one can be held responsible, because the employer is only directly responsible for employees with managerial positions according to the Discrimination Act. This is elaborated upon in Section 2.4 (b). The same legal questions arise with regard to instructions to discriminate and all the other forms of discrimination. The cases presented in Section 2.4 (b) are relevant to all six forms of discrimination. The

¹²³ If a group has been discriminated against, each person goes to court as an individual or makes an individual complaint with the Equality Ombudsman. It is easy to deal with many such cases together in a single process if many persons have been discriminated against in the same way by the same discriminator. A group of persons cannot be a discriminator. It is only the person (actual or legal) who is legally responsible for the activity that is regarded as a discriminator.

Swedish limitations to the vicarious liability of the employer are problematic in relation to Directive 2000/78.¹²⁴

Regarding health, social security, goods and services and most other areas, the service provider is responsible for actions that any employee takes in relation to a customer or a client. Therefore, there is no limitation with regard to vicarious liability and thus no problem in those areas, and the employer will always be responsible for the action of all employees towards customers or clients.

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 Sweden, the duty on employers to provide reasonable accommodation for people with disabilities is included in the law. It is defined as the concept of lack of accessibility or inadequate accessibility.

Lack of accessibility has, from 1 January 2015, become a form of discrimination in the Discrimination Act Chapter 1 Section 4 point 3, and it applies in most of the areas covered by the act.¹²⁵ Before 2015 – when ‘reasonable accommodation’ was the term – a lack of reasonable accommodation could result in direct discrimination, because the comparable situation should be assessed as if the worker or student had been accommodated.

The new term is written in such a way that it is supposed to accommodate every area where the new broadened prohibition applies equally well. It is defined as follows:

*‘Inadequate accessibility’*¹²⁶ that a person with disability is disadvantaged through a failure to take measures for accessibility to enable the person to come into a situation comparable with that of persons without this disability where such measures are reasonable on the basis of accessibility requirements in laws and other statutes, and with consideration to

- the financial and practical conditions;
- the duration and nature of the relationship or contact between the operator and the individual, and
- other circumstances of relevance.’

This change is of no practical importance in the field of employment as – according to the preparatory works – the old legal praxis shall remain unchanged with regard to adaptation

¹²⁴ The problems with regard to vicarious liability in the labour market apply to all six forms of discrimination. This is elaborated upon under the discrimination form of harassment because it seemed to the author to be best place. Ideally it should have had a separate section before the forms of discrimination was presented. This is noted as a possible breach of the directive in Section 11.1 second bullet point.

¹²⁵ Act (2014:958) on changing the Discrimination Act (2008:567), adopted on 08.07.2014. Government bill 2013/14:198.

¹²⁶ The author presents the Government’s unofficial translation of the Discrimination Act here. The central Swedish word ‘*bristande*’ can be translated in two ways. The first is ‘lack of’ and the second is ‘shortage of’. With regard to the legal rule, ‘lack of’ describes the reality better than ‘shortage of’. In an individual case, only a person who has not received help entering a restaurant or was not helped onto a bus or train can be discriminated against. A person not wanting to ask for help cannot demand physical changes to the restaurant, bus or train. If they are helped – even if it may involve giving advance notice of their journey – the person does not lack accommodation in their individual case. If accommodation is given, there cannot be a violation merely because it is inadequate (i.e. their accessibility is much more problematic than it is for the non-disabled). ‘*Adekvat*’ and ‘*inadekvat*’ are Swedish words that could both have been used in the Discrimination Act – but which were not used. The chosen English word should be linked to both ‘lack of’ and ‘shortage’ or only to ‘lack of’. A word like ‘insufficient’ or ‘inadequate’, or any other word which to the author seems to suggest only ‘shortage of’, is the wrong choice.

measures. The protection is, however, extended to cover trainees in basic and secondary education.¹²⁷

Since the statement in the preparatory works saying that the practice in labour law shall remain unchanged is regarded as a strong legal source, there is no reason to believe that any of the practice below in section b will be affected by this legal change.

b) Practice

It is not really possible to specify what accommodations are to be classified as 'reasonable support and adaptation measures' according to Swedish law, since case law so far is scarce, nor is it possible to specify what would be recognised as a disproportionate burden and thus be seen as going beyond what is reasonable with regard to support and adaptation measures.¹²⁸ The following adaptation measures were mentioned in the legislative materials accompanying the Discrimination Act as examples of requirements made of an employer: improvements related to physical accessibility, the acquisition of technical support, and changes in work tasks, time schedules or working methods.¹²⁹ The reasonableness of requiring measures to be undertaken can vary depending on the employer.

This determination must be made from case to case, depending on such factors as the company's ability to bear the costs, the ability to undertake a measure, the problems caused for the employer by the measure and the expected length of the employment. According to the old Disability Ombudsman, the mere possibility of obtaining a subsidy will not be taken into account in assessing reasonableness. This can be taken into account, however, if it becomes apparent during the recruitment process that a subsidy will be received.¹³⁰

General legislation applying outside the field of discrimination is important here, especially the 1977 Working Environment Act and the employer's duty of 'rehabilitation measures'¹³¹ regarding the already employed, in combination with the 1982 Employment Protection Act, which imposes a duty of fairly far-reaching accommodation.¹³² These duties are sometimes more far reaching compared with the Discrimination Act. However, these far-reaching obligations apply only if the worker has a good chance of returning to work for the employer in question.

One may conclude from case 2013 no. 78 that the Labour Court is reluctant to ask the employer to permanently¹³³ change a fellow worker's task in way that makes his or her work worse in order to adapt the work of a person with disability. The case concerned a bus driver who – due to a stroke – could not drive peak hours, early mornings and late evenings. Allowing him to work day time and off peak would have required someone else to work the morning peak and the afternoon peak with a long break in between. Creating such a schedule could not be required of the employer, and the disabled worker was

¹²⁷ Government bill 2013/14:198, p. 74 and p. 115.

¹²⁸ There is a Government inquiry (DS 2010:20), which has suggested changing the wording of Ch. 1 Section 4 of the Discrimination Act and creating a non-exhaustive list of six factors that are relevant when assessing the concept of reasonable accommodation (p. 27).

¹²⁹ Government bill 2007/08:95 p. 148.

¹³⁰ Swedish employers have extensive managerial rights and cannot be made to seek subsidies.

¹³¹ The goal of rehabilitation is the employee's return to the workplace or to provide support for an individual in maintaining his position in the workplace. Rehabilitation in relation to working life is additionally regulated in the Social Security Code (Socialförsäkringsbalk 2010:110), adopted on 04.03.2010.

¹³² See further, for instance, Inghammar, *Discrimination of People with Disabilities. Normative Aspects of Disability and Work in a Swedish, English and EC Context*, in: Numhauser-Henning (ed.), *Legal Perspectives on Equal Treatment and Non-Discrimination*, Kluwer Law International, The Hague 2001.

¹³³ During the time when it was uncertain whether or not the bus driver would become healthy enough to drive at peak hours, the employer worked hard to help the driver with job training, for instance driving buses with a reserve driver present in the bus.

dismissed.¹³⁴ With regard to dismissals due to sickness leading to disability resulting in an inability to work, the Discrimination Act offers no more protection compared with the ordinary labour law rules on reasonable accommodation.

c) Definition of disability and non-discrimination protection

The definition of disability is the same in all areas of the Discrimination Act. According to Chapter 1 Section 5 point 4, disability means:

‘[D]urable¹³⁵ physical, mental or intellectual limitation of a person’s functional capacity that as a consequence of an injury or illness that existed at birth, has arisen since then or can be expected to arise.’

The definition is thus stated in general terms, a requirement being that the limitation is ‘durable’, i.e. the limitations in functional capacity must be long-lasting. For example, a person with a broken arm will not be covered by the law since the disability caused is of a passing nature. There is no threshold of ‘severity’, or a reference to the ability to engage in ‘normal life activities’ or ‘professional life’ for that matter. The latter is part of the assessment as regards a ‘similar situation’. However, until there is clear case law on the point it will be difficult to define the issues more closely.

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

In Sweden, there is a duty to provide reasonable accommodation for people with disabilities outside the area of employment.

There has been a duty, since 2015, to provide reasonable accommodation for people with disabilities in most of the areas where the Discrimination Act applies.¹³⁶ The areas covered are working life, education, labour market policy activities and employment services not under public contract, starting or running a business and professional recognition, membership of certain organisations, services, meetings or public events, health and medical care and social services, the social insurance system, unemployment insurance and financial aid for studies, national military service and civilian service, public employment.

Before 2015 the prohibition of discrimination by education providers applied when, by taking ‘reasonable measures regarding the accessibility and usability of the premises, they can see to it that a person with a disability’ is put in a comparable situation to people without such a disability.¹³⁷ This duty applied to higher education only. Today’s rules on lack of accessibility apply throughout the education sector.

The School Act (2010:800) contains a duty to accept pupils at the school of their choice unless the financial burden required is substantial according to Chapter 9 Section 15. With

¹³⁴ Labour Court 2013 no 78, Equality Ombudsman v. Veolia and the Swedish Bus and Coach Federation (judgment of 23.10.2013) <https://www.notisum.se/rnp/domar/ad/AD013078.htm>.

¹³⁵ The Swedish term ‘*varaktig*’ is better translated as ‘durable’, rather than ‘permanent’. ‘Permanent’ literally means unchanging, and we have exactly the same word in the Swedish language. Yet in the Discrimination Act we have chosen another word which means long-term but not permanent. The English translation on the Government’s home page is unofficial and the author has chosen a different word here.

¹³⁶ Act 2014 (958) on changing the Discrimination Act (2008:567), adopted on 08.07.2014. Government bill 2013/14:198. According to Chapter 2 Section 12 c the prohibition of discrimination in the form of lack of reasonable accommodation does not apply to housing, private persons offering services or goods to the general population or services and goods sold by companies with less than 10 employees (the same exception applies in the healthcare area too according to Section 13 c), and if the measure in question concerns goods and services and the buildings where it is offered and the claimant wants actions that go beyond what was required when the building was made.

¹³⁷ Chapter 2 Section 5 of the Discrimination Act (Diskrimineringslagen 2008:567, adopted on 05.06.2008).

the new rules from 2015, a violation of the School Act will also result in discrimination according to the rules on lack of accessibility in the Discrimination Act.

One example of an area where the new rules do not apply is a landlord having a tenant who becomes disabled due to an illness. The landlord might disallow the installations that would be necessary for the tenant to remain in the apartment. The fact that the municipality would have been obliged to grant an allowance for the installation, as well as paying for their future removal, does not include a duty for the landlord to permit them. Discrimination law is based on comparisons between persons with disabilities and persons without disabilities, and persons without disabilities have very limited rights to make installations in rented apartments. Should these new rules from 2015 have applied to housing, this situation would have changed but, according to Chapter 2 Section 12 c they do not apply to housing.

There is still no case law on the new rules. However, as they rely heavily on laws and other forms of legislation to provide the accommodation level which can be required,¹³⁸ the biggest change is probably that a discrimination award as a remedy becomes possible, which is valuable for the claimant, especially if civil damages were not possible before. Many public law regulations have conditional fines paid to the state as the main sanction – i.e. a court order linked to a financial penalty if not followed.

The differences between different areas occur because, for instance, the School Act and the Employment Protection Act create different levels of reasonable accommodation. Since both acts already require reasonable accommodation, the introduction of the new form of discrimination in the Discrimination Act does not create any new duties.

In a situation such as that of schools, where there is a clear legal duty to provide adaption through administrative law, the Discrimination Act still helps by providing effective further sanctions for other acts, especially public law acts, which only provide for conditional fines. The concept of lack of accessibility is – in those situations – related to accommodation required by other legislation. The idea was never to create a definition of lack of accessibility that could be used to impose high costs on service providers when adaptation is not required by other legislation.¹³⁹

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

In Sweden, failure to meet the duty of reasonable accommodation does count as discrimination because it amounts to lack of accessibility for an individual, which is a separate form of discrimination – and the third in a list of six forms of discrimination under the Discrimination Act. The key issue is whether the individual involved can be placed in a similar situation to a non-disabled person. In most cases, the required standard is set by laws and other forms of legislation. Within the labour market, the Discrimination Act itself sometimes sets out the standard required, for instance with regard to the hiring of labour. This case law is unaffected by the introduction of the new form of discrimination.

In dismissal cases and in cases outside the labour market, the new form of discrimination is not perceived as introducing any major new requirements compared with other

¹³⁸ With regard to costs within the different sectors, the Government repeatedly states that the costs are small because new requirements are not being introduced. See Government bill 2013/14:198, Chapter 13.

¹³⁹ This follows from a literal interpretation of the definition in Chapter 1 Section 4 point 3 of the Discrimination Act (Diskrimineringslagen 2008:567, adopted on 05.06.2008). If there is no legislation providing a duty to take on a certain cost, this weighs heavily in favour of the service provider. On the Equality Ombudsman home page, many examples are given where there is no express legal duty elsewhere, but where an obligation nevertheless may exist under the new rules of lack of accessibility under the Discrimination Act (<http://www.do.se/om-diskriminering/vad-ar-diskriminering/#skaliga-atgarder>). The first of these rules is that a customer may ask to have the menu read to him or her at a restaurant. The second concerns assistance in picking and packing groceries in a grocery store. The Equality Ombudsman has taken these two examples from Government bill 2013/14:198 p. 65.

legislation. The minor changes, introducing new legal demands exemplified in the preparatory works,¹⁴⁰ are such that the relevant actions were probably undertaken even where there was no legal duty to do so. Before 2015 a restaurant could refuse to have a member of staff read the menu to a blind guest because a fully sighted guest did not have this right. However, in acting this way, the management would have been likely to offend not only the blind guest but also the majority of sighted people witnessing this refusal. The new duties created are thus minor.

The difference between the restaurant example and the school example (above under d) is that the School Act has for a very long time required all schools to make reasonable accommodation towards pupils with disabilities, while there were no such duties for restaurants. Therefore, the new form of discrimination creates new duties – albeit minor ones – for restaurants but not for schools.

The proportionality test is embedded in the definition of lack of reasonable accommodation (see (a) above). According to the examples in the preparatory work, the room in which to apply this test is very limited when there is no special legislation to rely on.

The principal sanctions are the discrimination award (which is awarded in all proven discrimination cases) and the ability of the court to declare contractual clauses or actions such as dismissals null and void in some situations.

With regard to direct discrimination, the claimant must show disfavour and demonstrate a similar situation before the burden of proof shifts. In principle, the burden of proof rests with the employee at this stage. The preparatory works to the introduction of the new discrimination form of lack of accessibility are silent on the issue of burden of proof. The legal situation is thus the same as it was before. The Labour Court seldom shifts the burden of proof in reasonable adaptation cases.¹⁴¹

The new Discrimination Act – although better than the previous acts – does not clearly provide for shifting the burden of proof in cases of reasonable adaptation.

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

In Sweden, there is only a limited duty to provide reasonable accommodation in respect of other grounds in the public and the private sector.

There is no specific requirement to provide reasonable accommodation in relation to other grounds of discrimination in dealing with specific cases. For instance, no law requires a school to accommodate a group of Muslims who ask for a place to pray in that school.

The Discrimination Act contains provisions in Chapter 3 Sections 1-7 requiring employers to work actively to ensure that the workplace is accommodating towards all employees and jobseekers regardless of any of the seven grounds protected in the law against discrimination. This active duty has a public law character.

¹⁴⁰ On the Equality Ombudsman home page, many examples are given where there is no express legal duty elsewhere, but where an obligation nevertheless may exist under the new rules of lack of accessibility under the Discrimination Act (<http://www.do.se/om-diskriminering/vad-ar-diskriminering/#skaliqa-atgarder>). The first of these rules is that a customer may ask to have the menu read to him or her at a restaurant. The second concerns assistance in picking and packing groceries in a grocery store. The Equality Ombudsman has taken these two examples from Government bill 2013/14:198 p. 65.

¹⁴¹ The wording of Chapter 6 Section 3 of the new Discrimination Act (Diskrimineringslagen 2008:567 adopted on 05.06.2008) ought, however, to nudge the Labour Court towards shifting the burden of proof. So does the reasoning behind the new formulation, Government bill 2007/2008:95 p. 444. This has also happened in Labour Court case 2003 No. 47.

The new rules in Chapter 3 of the Discrimination Act, which enter into force in 2017, contain few material requirements, and no material requirement which can be said to be of a reasonable accommodation character.¹⁴²

The new discrimination ground of lack of accessibility does not apply to any ground other than disability. With regard to other grounds, the only viable option in the Discrimination Act is the concept of indirect discrimination. One example of this could be Chapter 1, Section 8 of the School Act (2010:800). It requires the municipality to give equal access to basic compulsory and secondary education to all children regardless of social or economic background. If a child has problem attending school because the school will not accommodate a religious belief of the child or their parents, the failure to accommodate may be regarded as indirect discrimination connected to religion, and the duty in the School Act to provide equal access to education (regarding all forms of social background including religious background) may be an important factor in the proportionality test.

Failure to address other specific legal duties such as the duty for employers to give immigrants time off for language studies¹⁴³ is also an example of where a discussion on the concept of indirect discrimination could be relevant.

Unfortunately, we have very little case law on indirect discrimination in Sweden.

With regard to religion, there are two cases which can be said to be about reasonable accommodation. One is from Stockholm District Court¹⁴⁴ and the other is a niqab case.¹⁴⁵

Stockholm District Court ruled in February 2010 on a case where the former Ombudsman Against Ethnic Discrimination sued the National Employment Agency. A male job seeker had refused to shake hands with a female manager at an interview. Instead, he had crossed his arms over his chest and bowed. He explained that his religion forbid him to shake hands with women. The National Employment Agency believed that, by doing this, he lost his chance of getting a training post and therefore he lost his unemployment benefits. The man was awarded SEK 60 000 (EUR 6 600) in damages. According to the District Court, the man had shown proper respect by greeting the female manager this way and the Swedish ethnic and religious majority should accept other ways of treating a female superior with respect than to shake hands with her.¹⁴⁶

The niqab case started with the school making demands on the pupil to remove her niqab. Whenever someone makes a demand on a person (such as not having the face almost totally covered) which formally applies to all groups but affects one particular group more than others, indirect discrimination may or may not occur depending on the proportionality test. An important part of this test would have been if the educational needs could have been solved by another means, for instance by the teacher asking the student more questions to compensate for the fact that the teacher cannot read the facial expressions of the pupil. Thus, for all practical purposes, reasonable accommodation is an essential element in assessing many cases of indirect discrimination.¹⁴⁷

¹⁴² The new rules emphasise the work process and give considerable freedom to the employers to choose which areas shall be given priority. Therefore, the rules in this chapter are no longer relevant with regard to reasonable accommodation.

¹⁴³ There is a right to time off during language studies (in Swedish) according to the (1986:163) Act on a right to leave for studies in Swedish for immigrants.

¹⁴⁴ Stockholm District Court, case T 7328-08, Equality Ombudsman v. National Employment Agency (judgment of 08.02.2010). Judgment not available in any free database.

¹⁴⁵ Equality Ombudsman, Case 2009/103.

¹⁴⁶ Stockholm District Court, case T 7328-08, Equality Ombudsman v. National Employment Agency (judgment of 08.02.2010). Judgment not available in any free database.

¹⁴⁷ Equality Ombudsman Case 2009/103. The School was not sanctioned. The Equality Ombudsman dropped the case, but only because the school found alternative solutions, and allowed the woman to wear her niqab if such a solution did not work, if for instance the men could not be seated behind her.

g) Accessibility of services, buildings and infrastructure

In Sweden, national law requires services available to the public, buildings and infrastructure to be designed and built in a disability-accessible way.¹⁴⁸ As regards public authorities, there is a general duty to assess accessibility in all their activities and to develop accessibility plans to this end.¹⁴⁹ The new discrimination ground of lack of accessibility, which has applied from 2015, does not apply to homes, nor to buildings where goods are sold or services provided. However, not following building regulations in other areas may lead to discrimination awards including in the education sector.

To my knowledge, however, there is not yet any case law to reflect this.

In Sweden, national law does not contain a general duty to provide accessibility by anticipation¹⁵⁰ for people with disabilities.

h) Accessibility of public documents

There are no rules requiring certain specific documents to be translated unless required by the individual.

There is a Braille Board. This is a state authority, and its task is to develop national guidelines for the use of Braille in Sweden.¹⁵¹ It is a part of the Authority of Accessible Medias. According to an ordinance from 2010¹⁵² it shall, among other things, translate literature, newspapers and societal information into audio books and Braille. This service concerns the individual sphere. A person may ask for a private letter, a book, study material or anything else to be translated. If, for instance, a student needs his or her literature translated, this is the proper authority to turn to.

From 2012 it shall also assist persons who have problems holding a book or who have dyslexia.

One cannot say that there is a general practice with regard to Braille. The Tax Authority has information in sign language, as well as in some foreign languages, but not in Braille. The National Social Insurance Board has information in Braille.¹⁵³ Each authority is required to translate information into Braille even if it is only one person that needs the information.¹⁵⁴ The authorities are free to choose which information to translate even before someone asks for it. The instruction given in Ordinance 2001:526 of the state authorities' responsibility towards realising the state disability policy is of a general character.

¹⁴⁸ The Planning and Building Act (Plan- och bygglagen 2010:900), adopted on 01.07.2010.

¹⁴⁹ Ordinance on State Authorities' Responsibilities Regarding Implementation of the Policies on Disabilities (Förordning om de statliga myndigheternas ansvar för genomförande av funktionshinderspolitiken 2001:526), adopted on 26.06.2001.

¹⁵⁰ If the building permit has been adhered to and a healthcare provider cannot accept a patient with a disability, the discrimination ground of lack of accessibility applies. Adherence to the building permit is to the healthcare provider's benefit. The most important factor will be the assessment of economic and practical difficulties. If it is too costly, the patient can be asked to turn to another provider. The fact that there was a cheap solution that was missed when the building was constructed will not be taken into account. There is no duty of anticipation outside the normal building regulations.

¹⁵¹ <http://www.mtm.se/punktskriftsnamnden>.

¹⁵² Ordinance with instructions for the Authority for Accessible Media (Förordning med instruktion för Myndigheten för tillgängliga medier 2010:769), adopted on 23.06.2010.

¹⁵³ <http://www.mtm.se/punktskriftsnamnden/namnden/>.

¹⁵⁴ The difference between translating in advance and when somebody needs something is that the civil servant can discuss what documents are needed and translate only those. During this discussion it might become clear that a certain document is not needed.

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 Sweden, there are no residence or citizenship/nationality requirements for protection under the relevant national laws transposing the directives.

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

a) Protection against discrimination

In Sweden, the personal scope of anti-discrimination covers all natural persons but in general does not cover legal persons for the purpose of protection against discrimination. This does not follow from a specific article. Some Sections of Chapter 2 of the Discrimination Act contain wording such as 'the job seeker', 'the child, pupil or student' and so on, where it is obvious that a legal person cannot fall under the protected category. In other cases where the wording is unclear there is a general statement in the preparatory works that legal persons are not protected.¹⁵⁵

The Discrimination Act thus generally protects natural persons.¹⁵⁶ Nevertheless, as regards the act's applicability to working life, the general 'concept of employee' is in the background – a compulsory concept, which is not for the parties concerned to decide upon. Within this concept it is perfectly possible for the Labour Court, in the last instance, to look beyond or ignore the fact that a contract may be agreed between the employer and a legal entity run by the 'employee' alone.

The former four Ombudsmen against discrimination have unanimously criticised the fact that no explicit protection against discrimination is provided for legal persons, something which according to them is required by the directive.¹⁵⁷ In 2006, the Discrimination Inquiry Commission proposed a protection also for legal persons in a number of (but not all) areas covered by non-discrimination legislation.¹⁵⁸ However, legal persons still have no explicit protection – which is a problem in relation to the directive.

b) Liability for discrimination

In Sweden, the personal scope of anti-discrimination law covers natural and legal persons for the purpose of liability for discrimination. The different Sections of Chapter 2 of the Discrimination Act refer to the 'employer', the 'service provider' and so on. It is clear from the wording that both natural and legal persons are covered.

¹⁵⁵ Government bill 2007/08:95, p. 91.

¹⁵⁶ Government bill 2007/08:95, p. 90.

¹⁵⁷ The last Ombudsman against discrimination due to sexual orientation, Hans Ytterberg, argues in the following way: 'First of all, we have pointed to the fact that Art. 3(1) of the Directive provides that the Directive shall apply to *all* persons and that recital 12 states that *any* direct or indirect discrimination as regards the areas covered by the Directive should be prohibited throughout the Community. Furthermore, membership of employers' associations (which is one area explicitly covered by the Directive) is almost exclusively relevant for legal persons, at least in Sweden. It would therefore make little sense to prohibit discrimination with respect to such membership but at the same time exclude legal persons from that protection.'

¹⁵⁸ SOU 2006 :22 pp. 332 and following.

3.1.3 Private and public sector including public bodies (Article 3(1))

a) Protection against discrimination

In Sweden, the personal scope of national law covers the private sector partly for the purpose of protection against discrimination. The public sector, including public bodies, are not covered.

In Sweden, the personal scope of anti-discrimination law covers only private persons with regard to protection from discrimination, and only if they are also natural persons. As no legal person can be protected from discrimination, no public body or other public sector entity can have such a protection.

b) Liability for discrimination

In Sweden, the personal scope of anti-discrimination law covers the private sector and the public sector including public bodies for the purpose of liability for discrimination.

The prohibitions for different areas in Chapter 2 of the Discrimination Act are applicable to both the private and public sectors, including public bodies. The limitation on the applicability of the Discrimination Act relates to activity areas and not to the public or private sector or to who is responsible for the activity.

A police officer arresting a criminal is a situation where the Discrimination Act does not apply. However, if the same police officer gives advice to an ordinary citizen an hour later and treats this citizen unfavourably for a reason connected to a ground of discrimination, this activity will fall under the Discrimination Act. In such a case, it will be the Police Authority (at the appropriate level) that will be held responsible under the Discrimination Act. It is the employer, the service provider and so on that are held responsible under Chapter 2 of the Discrimination Act, and it does not matter whether it is a natural or legal person nor whether it is a public or a private body.

3.2 Material scope

3.2.1 Employment, self-employment and occupation

In Sweden, national legislation applies to all sectors of private and public employment, self-employment and occupation, including contract work, self-employment, military service (not age) and holding statutory office for the five grounds. The Discrimination Act is comprehensive. With regard to employment, Chapter 2 Sections 1-4 and – with regard to self-employment – Chapter 2 Sections 10-11 are the most important.

Within the employment and self-employment sector, the following problematic implementation issues should be mentioned.

1. The principle of vicarious liability in relation to discrimination law is restricted when employees act outside their authority to an extent that is problematic. Furthermore, the legal concept of employer may be too narrow, as the employer is regarded as the legal person itself or the natural person who as a representative of this legal person makes decisions regarding the employees. The employer is thus directly responsible only when an employee discriminates against another employee *and* the latter is subordinated to or dependent upon the former.¹⁵⁹

¹⁵⁹ There is a general thinking on vicarious liability which is problematic, and Chapter 1 Section 4 point 5 and Chapter 2 Section 1 of the Discrimination Act (Diskrimineringslagen 2008:567 adopted on 05.06.2008) are two examples of this general thinking. Cf. Labour Court 2007 no 45 and 2011 no 19. In these two cases it is obvious that the applicant/trainee had every reason to believe that the person with the alleged discriminatory behaviour was acting on behalf of the employer, but there is no protection for persons acting under such a belief however well founded that belief is.

2. Discrimination and harassment from fellow workers or third parties are not prohibited directly.
3. The protection against discrimination or victimisation does not fully cover self-employed persons (see below Section 3.2.2 – two self-employed workers working together are not protected from discrimination from each other).¹⁶⁰
4. Discrimination against legal persons is not prohibited in working life.

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 Sweden, national legislation prohibits discrimination in the following areas: 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.

The Discrimination Act covers the self-employed with regard to starting or running a business and professional recognition (Ch. 2 Sec. 10). Professional organisations are prohibited from discriminating against the self-employed as well as the employed (Ch. 2 Sec. 11). Permits, approvals certification and financial support are examples of areas covered by these two provisions. There are other provisions in the Discrimination Act which apply to self-employed persons as well as to employed persons and that offer both groups the same protection. A self-employed person can also be discriminated against by the service provider if he or she needs a service as a customer or a client (Ch. 2 Sec 12), for instance if a painter buys a car for his firm.

However, no prohibition in the Discrimination Act is applicable between two or more self-employed business partners. Suppose that a private company needs a big paint job done. They want to hire four different persons. Three of them raise objections against the fourth because of her religion or sex. They convince the company not to contract her and to give the job to someone else instead – or if she is contracted, they harass her. This is a lacuna, and no specific prohibition covers this situation.

In his Sexual Orientation report of 28 July 2004, the Ombudsman Against Discrimination on the Ground of Sexual Orientation, Hans Ytterberg, made the following remark:

‘With respect to self-employment, the [now repealed 1999 Sexual Orientation Discrimination Act] does not seem to fully implement the directive. Self-employed business partners, for example, apparently are not protected against harassment or other forms of discrimination from one another, a situation which to me clearly seems to be covered by the directive (see Arts. 2(3) and 3 of the directive). It is also a situation which has appeared in the requests for advice and support that the Ombudsman’s office has come across since the entering into force of the Act.’

This critical remark can be directed at the new Discrimination Act as well.¹⁶¹

¹⁶⁰ This follows from a lacuna. Chapter 2 Sections 10 and 11 apply to the legal person that distributes financial support, decides on qualifications, issues authorisations or provides other benefits to members or the general public. No prohibition in the Discrimination Act (Diskrimineringslagen 2008:567), adopted on 05.06.2008, is applicable between two self-employed business partners.

¹⁶¹ This invites the reader to reflect over whether or not self-employed persons should be protected against discrimination from each other according to the directive. It depends on the interpretation of article 3.1(a) and article 2.3. The author is open minded on this question.

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

In Sweden, national legislation prohibits discrimination in the following areas: access to employment, 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.

The Discrimination Act Chapter 2 Section 1 speaks of any discrimination against a worker, job seeker etc., and therefore applies to all forms of working conditions including pay and dismissals.

3.2.3.1 Occupational pensions constituting part of pay

Occupational pensions are, in parallel with the jurisprudence of the ECJ, considered as a form of pay, and are thus covered by the ban on discrimination.¹⁶²

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 Sweden, national legislation prohibits discrimination in the following areas: vocational training outside the employment relationship, such as that provided by technical schools or universities, or such as adult lifelong learning courses or vocational training provided by technical schools or universities.

The prohibition of discrimination in the education sector applies to all sorts of education providers, from those teaching small children to those teaching university students. It applies to all forms of education including vocational training. In Sweden, the phrase 'vocational training' is not used as an official category when we distinguish between different forms of education. Chapter 2 Section 1 point 3 of the Discrimination Act clearly prohibits discrimination when a person applies for or participates in training with an employer, and sections 5-8 will apply to the education provider if responsibility for the training is shared between the employer and, for instance, a school. Those sections should always be read in conjunction with the definition of the six forms of discrimination in Chapter 1 Section 4 of the Discrimination Act.

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 Sweden, national legislation prohibits discrimination in the following areas: membership of and involvement in workers' or employers' organisations as formulated in the directives for all five grounds and for both private and public employment.

Chapter 2 Section 11 of the Discrimination Act provides that discrimination on all seven grounds is forbidden in relation to membership or participation in an association of employees (i.e. a labour union), an association of employers or a professional organisation, and the benefits awarded by such organisations to their members.

The prohibitions on different areas in Chapter 2 shall always be read in conjunction with the definition of the six forms of discrimination in Chapter 1 Section 4 of the Discrimination Act.

¹⁶² See for instance Labour Court 2009 no 15, Equality Ombudsman v. Stryker AB (judgment of 28.01.2009) <http://www.notisum.se/rnp/domar/ad/AD009015.htm>.

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

In Sweden, national legislation prohibits discrimination in the following areas: social protection, including social security and healthcare as formulated in the Racial Equality Directive.

Health and medical care, social services, state financial aid for studies, social insurance and related benefit systems are included in the Discrimination Act in Chapter 2 Sections 13-14. All grounds are covered. With regard to age there is an exemption for age limits set down in law with regard to health and social insurances (including student benefits), and it is generally possible to justify direct age discrimination subject to a proportionality test in most areas.

3.2.6.1 Article 3.3 exception (Directive 2000/78)

Sweden does not rely on article 3.3 of Directive 2000/78.

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

In Sweden, national legislation prohibits discrimination in relation to social advantages as formulated in the Racial Equality Directive.

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

The Discrimination Act should meet the requirement of Article 3(1)(f) of Directive 2000/43/EC. Discounts on services such as trains and municipal leisure facilities fall under the provision on goods, services and housing (Ch. 2 Sec. 12). Discounts will thus in principle fall under the prohibition. Discounts for persons with disabilities will always be allowed, as the disadvantaged group (persons without disabilities) is not protected by the Discrimination Act. Discounts based on age can be justified in a proportionality test, depending on the circumstances according to Chapter 2 Section 12 b point 4 of the Discrimination Act. Since the Discrimination Act covers all the areas required by Directive 2000/43, there will always be a section applicable to a discriminatory discount excluding certain groups. If the discount concerns the health sector, Chapter 2 Section 13 applies; if the social advantage is a social security benefit, Chapter 2 Section 14 applies.

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

The author cannot think of a single example of a social advantage under the directive that does not fall under one of the areas where the Swedish Discrimination Act applies.

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

Migrants are treated in the same way as Swedish citizens, provided that they have a right to live in Sweden. An EU-citizen who has no money to live on and no reasonable chance of finding a job, has a right as an EU citizen to visit Sweden for three months but no right to

settle and to rely on public services there.¹⁶³ They are often not allowed to place their children in a Swedish school. If they do so, they will be sent home.

An asylum seeker, on registering with the Migration Board, may, upon request,¹⁶⁴ obtain education for his or her children. For parents with a permanent or time-limited residence permit, there is a duty to send their children to school between the ages of 6 and 16, just like for Swedish parents. The Discrimination Act provides protection for all those groups.

Today, Sweden has quite a restrictive refugee policy. Only refugees (those subjected to oppression directed at a specific person) have a right to family reunification. Alternative protection grounds (*alternativt skyddsbehov*) such as the war in Syria give rise to a time-limited right of residence (in that the war may end and the country may become safe). In 2016, 28 939 persons applied for asylum in Sweden. Of these, 10 909 were children, and 2 199 were unaccompanied¹⁶⁵ persons.¹⁶⁶ The Child Ombudsman Report of 2017 describes problems with entering education. Once those problems are solved the main obstacles lie within the asylum process. It can take a long time, and the child may have to stay at an asylum centre. Uncertainty about their future will affect their studies, and this may lead in turn to a decision to reject their application and to their expulsion from Sweden.

An asylum seeker who has been denied a right of residence may contest their expulsion (it may be temporarily too risky to perform the expulsion to the country in question, and it may therefore be postponed). The child does not lose their right to schooling because the parent (as well as the child) risks expulsion. However, the parent may go underground and take the child with them. The biggest problem concerns refugees who refuse to register as asylum seekers or persons going underground when their asylum request is denied or their time-limited residence permit is not renewed.

The Swedish Child Ombudsman is critical towards Sweden for not addressing the criticism from the UN Committee on the Rights of the Child. The Ombudsman does not think that Sweden is directly violating the UN Convention on the Rights of the Child, but it does think that Sweden has serious shortcomings with respect to the convention.¹⁶⁷

The debate in Sweden is a children's rights debate rather than a discrimination debate, and the national right to decide who stays in Sweden and who is expelled is at the centre of it. The question is to what degree a child of an illegal immigrant has rights independent of the asylum grounds invoked by their parents.

The Discrimination Act applies to the schooling they get, but not to the immigration law that makes it possible for the police to pick up the child when the parents meet them after school and expel the family.

A right to education

In Sweden, national legislation prohibits discrimination in relation to education as formulated in the Racial Equality Directive.

¹⁶³ In the public debate in Sweden, they are often called EU migrants.

¹⁶⁴ A child of an asylum seeker has a right but not a duty to attend school. The Child Ombudsman has made a critical report and would like there to be a duty to attend school for these children and a time limit of one month from arrival to the start of their education. See <https://www.barnombudsmannen.se/barnombudsmannen/vart-arbete/arsrapporteringar/vi-lamnade-allting-och-kom-hit-2017/>.

¹⁶⁵ The Swedish word 'ensamkommande' is often used to signal a neutral position on the highly controversial medical age-determination process. Both the word 'child' and the phrase 'young adult' must be avoided.

¹⁶⁶ Migrationsverket. Inkomna ansökningar om asyl, 2016, p. 1.

¹⁶⁷ Child Ombudsman (2017), *Röster från barn på flykt*, pp. 14 and 6.

The relevant provisions are in Chapter 2 Sections 5-8 of the Discrimination Act. The prohibition of discrimination applies to all grounds, and the forms of discrimination are described in Chapter 1 Section 4 of the Discrimination Act.

a) Pupils with disabilities

In Sweden, the general approach to education for pupils with disabilities does not raise problems.

If discrimination occurs, the new (2015) form of discrimination, lack of accessibility, will most likely be effectively applied together with the education legislation. If, for instance, a municipality does not fulfil its duties according to the School Act, the extra sanction of a discrimination award is welcome. It is highly unlikely that an administrative court would rule that an adaptation cost was too burdensome under the School Act and the Equality Ombudsman finding, with the same costly adaptation required under the Discrimination Act.

The Discrimination Act applies to all education providers and to all forms of education, from small children to university students. The official policy is to give a child with a disability as normal life as is possible. This means that staying with the parents is preferable to living in an institution, and that going to a mainstream school is preferable to going to a special school.

For the new (2015) form of discrimination, lack of accessibility, Chapter 1 Section 4 point 3 of the Discrimination Act relies on other legislation to formulate the demands which are reasonable, for example the School Act (2010:800). According to the School Act a pupil may only be denied a place at the nearest local school, or the school of choice, if entering the school would cause a substantial (*betydande*) organisational or financial burden on the provider.¹⁶⁸ This provision applies to all pupils, but pupils with disabilities are a group that is more likely than other groups to be denied a place at their school of choice for this reason.

When it comes to reasonable accommodation in pedagogical circumstances, the starting point consists of conflicts when the child (through its parents) wants to enter an ordinary class and get support to be able to stay in this class, but the local authority wants to place the child in a special class for children with disabilities, and the local authority wins. The motive is that a local authority has a duty under the School Act to provide education according to every child's need. The expensive option of putting the child in a special class is not likely to be implemented for improper reasons.

If the child (through its parents) asks to be placed in a special class and this request is denied, the new form of discrimination, lack of accessibility, applies. Failure to fulfil the requirement of the School Act can, from 1 January 2015, result in a discrimination award.¹⁶⁹

b) Trends and patterns regarding Roma pupils

In Sweden, there is a pattern of discrimination regarding Roma pupils.

¹⁶⁸ School Act (Skollag 2010:800), adopted on 23.06.2010, Ch. 10. Sec. 30.

¹⁶⁹ The importance of the discrimination award is that it raises the victim's level of compensation. This can be illustrated by Appeal Court for Western Sweden case T-2957-15, School Inspectorate v. Municipality of Marks (judgment 15-12-22). In this case a teacher had put Scotch tape over the mouth of a three-year-old pupil for a short time. This treatment was degrading (but not connected to any discrimination ground). The School Inspectorate wanted damages under the School Act at the same level as the discrimination awards under the Discrimination Act (Diskrimineringslagen 2008:567 adopted on 05.06.2008). The court of appeal disagreed and allowed only the lower level of damages according to normal civil law principles. In Sweden, this means that damages are not meant to achieve a preventive effect.

In Sweden, Roma pupils encounter severe obstacles in the education system, however intentional segregation has nothing to do with it. Roma people live in good housing conditions and go to the same schools as the children of the majority of 'ethnic Swedes'. If they want to learn Romani Chib (the Romani language) they get extra lessons, like the children of immigrants.

The specific situation of Roma in the Swedish schooling system with regard to discrimination is described in the old Discrimination Ombudsman's (DO) report 'Discrimination against Roma in Sweden' from 2004, and has been followed up in the 2012 report by the Equality Ombudsman, 'Roma rights' (*Romers rättigheter*). A general overview can be found in a Report from the Swedish National Agency for Education, 'Roma in School'. (*Romer i skolan*).¹⁷⁰ Actual complaints of discrimination were few,¹⁷¹ and this is still the case.

It is said to be hard for Roma youths to benefit from their rights to education on equal terms due to structural obstacles. In 2008, the DO produced the report 'Discrimination of National Minorities in the Education System' (2008:2). One important weak spot is the construction of the right to education in minority languages.

There is no right to minority language education. There is only a duty for the municipalities to arrange it. One pupil is enough to activate this duty. However, when the Swedish National Agency for Education reported back to the Government in November 2013, 6 % of school heads said that the conditions necessary to provide language education did not exist.¹⁷² As a part of the National Roma Strategy, five municipalities have become pilot areas and received state funding for, *inter alia*, improving education. In these municipalities, Roma pupils were seldom encouraged to take the minority language classes, and the problems of finding qualified teachers sometimes made the municipalities wish for a low attendance.¹⁷³

Some important legal background to this discussion is provided by a case that the Equality Ombudsman took to court, claiming that the failure to provide language education in Romani Chib violates the now repealed 2006 Act on a Ban Against Discrimination and Other Degrading Treatment of Children and Pupils. The Equality Ombudsman argued that, with regard to national minorities, the treatment of children with Swedish as their mother tongue is the relevant measurement of a comparable situation.¹⁷⁴ If they, for instance, actively seek such a teacher on the national labour market, they must be equally active in finding a teacher in Romani Chib.

The Ombudsman lost the case.¹⁷⁵ The District Court stated that the relevant measurement of a comparable situation lay with other minorities. The municipality had not worked less hard to find teachers of Romani Chib compared with the mother tongues of other minorities, including refugees. The judgment was appealed, but Göta Court of Appeal decided not to take the case up.¹⁷⁶ From this case it follows that, even though it is a duty for the municipalities to provide minority languages, there is no effective legal remedy if this does not happen. There is no corresponding right on the part of the pupil for this education.

¹⁷⁰ Swedish National Agency for Education. Report 2007 no. 292.

¹⁷¹ The DO reveals only four such complaints made – cases no. 897-2003, 526-1004, 290:1997 and 897-1999. See also Equality Ombudsman 2011, Roma rights (*Romers rättigheter*), p. 51.

¹⁷² Swedish National Agency for Education (Skolverket) Report on Governmental Assignment, 2013-11-28 Dnr 2012:518 p. 3. More than 50 school heads out of 886 gave this answer.

¹⁷³ See above, p 3.

¹⁷⁴ Equality Ombudsman, 2010-11-11 OMED 2007/1109 Act 116, p. 4.

¹⁷⁵ Eksjö Municipal Court, Case T 1395-09, Equality Ombudsman against Vetlanda Municipality, judgment of 21.10.2010. <http://www.do.se/globalassets/diskrimineringsarenden/tingsratt/dom-tingsratt-vetlanda-kommun-omed-20071109.pdf>.

¹⁷⁶ Göta Court of Appeal, case T 3264-10.

The author does not think that the new form of discrimination, lack of accessibility, will make any difference here. Firstly, it applies only with regard to disability. Secondly, even if it had applied, the essential element of the judgment was the definition of a comparable situation. If it can be deemed too costly to hire a teacher for an African language, this becomes the norm for a teacher of Romani Chib as well. The case law still says that national ethnic minorities cannot be compared to the national ethnic majority.

In the 2013 report, a majority of school heads reported that their schools did not teach from a Swedish Roma perspective with regard to Roma culture, language, history or religion.¹⁷⁷ In 2014 detailed information on how a Roma perspective could be introduced in Swedish, history, societal knowledge and so on was produced to aid schools.¹⁷⁸ Each school has been given both the material for pupils and the guidance for teachers.¹⁷⁹

The author thinks that it is fair to say that the authorities are working seriously on the Roma situation, but that the individual right approach of the Discrimination Act is largely absent from this work with regard to education.

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 Sweden, national legislation prohibits discrimination regarding access to and supply of goods and services as formulated in the Racial Equality Directive.

In Sweden, national legislation includes access to and supply of goods and services as formulated in the Racial Equality Directive. The prohibition of discrimination for goods, services and housing in Chapter 2 Section 12 of the Discrimination Act applies to all grounds. The prohibition of discrimination applies to all grounds and forms of discrimination as described in Chapter 1 Section 4 of the Discrimination Act.

When age was included in the prohibition on discrimination in goods, services and housing in Chapter 2 Section 12 of the Discrimination Act in 2013, a set of special exemptions were needed. These are in new Section 12 b. Any age limit set by law is legal. The prohibition of age discrimination does not apply in the insurance sector. Establishments serving alcoholic drinks may freely set a minimum drinking age above the national mandatory minimum age of 18 years, and it is generally possible to defend all other rules on age subject to a proportionality test.

The prohibition of all forms of discrimination applies to the disability ground with regard to goods, services and housing (lack of accessibility sometimes exempted).¹⁸⁰ This has been the case since the 2003 Act on Goods and Services. The insurance companies frequently use medical conditions for risk assessments. There is no need to have a legal exemption. In 2011 Stockholm District Court stated:¹⁸¹

'Discrimination is when a person has had a disfavoured treatment compared to other persons in the same risk group. The equal treatment requirement shall thus not be

¹⁷⁷ Swedish National Agency for Education (Skolverket) Report on Governmental Assignment, 2013-11-28 Dnr 2012:518 p. 3.

¹⁷⁸ http://www.skolverket.se/om-skolverket/publikationer/visa-enskild-publikation?_xurl=http%3A%2F%2Fwww5.skolverket.se%2Fwtpub%2Fws%2Fskolbok%2Fwpubext%2Ftrycksak%2FBlob%2Fpdf3230.pdf%3Fk%3D3230 (this note shows the material for the subject of history). The Equality Ombudsman has a role in promoting the use of this material. Equality Ombudsman Annual Report 2015 p. 22 (Ds 2014:8).

¹⁷⁹ Government White Paper 2016:44, p. 66f.

¹⁸⁰ See Discrimination Act Ch. 2 Section 12 c. Exemptions apply to housing (for private persons), for companies with less than 10 employees and for requirements to adapt buildings unless the requirements are specified either in the building permit or in the formal notice permitting the building work to start.

¹⁸¹ Stockholm District Court, case T 20377-09, The Equality Ombudsman v. Trygg Hansa (judgment of 08.03.2011), p. 11. www.do.se/globalassets/diskrimineringsanden/tingsratt/dom-tingsratt-trygg-hansa-ho-2007371.pdf.

interpreted as meaning that persons with different risks of for instance developing a medical problem shall be granted insurance on the same terms’.

Therefore, it was correct of the insurance company to deny sickness insurance to a child with a hearing problem. The company could not establish whether or not the hearing problem had a root cause that made other sicknesses more likely. Until this information was available they could not design an individualised contract with higher fees or exemptions. Since this was impossible, it was not discriminatory to deny insurance altogether. The Equality Ombudsman did not appeal this verdict.

According to the author, the situation with regard to disability is problematic. An exemption is necessary with regard to age and the insurance sector, because actuarially correct assessments amount to statistical discrimination which would have been prohibited had age been an area in which the prohibition on discrimination applied. With regard to disability, the concept of statistical discrimination as a form of direct discrimination does not seem to apply. Had it done so, the Trygg Hansa case would have been decided differently.

In 2013 another case on the same line of reasoning was decided. Svea Court of Appeal found discrimination because the insurance company had denied insurance without assessing a child with a hearing impairment with enough consideration to the medical condition of this particular child. If the statistics are accurate enough with regard to the individual, statistical discrimination is not considered to be a form of direct discrimination with regard to insurances and disability.¹⁸²

All of this leads to the question of whether or not a country that extends the prohibition of discrimination to areas outside the directives is free to define the concept of direct discrimination more narrowly compared with the directive within those areas.¹⁸³

3.2.9.1 Distinction between goods and services available publicly or privately

In Sweden, national law distinguishes goods and services that are available to the public (e.g. in shops, restaurants, banks) and those that are only available privately. The Discrimination Act applies to:

‘persons who *outside the private or family sphere* are offering goods services or housing to the public.’¹⁸⁴

Directing the offer to the general public is a necessary requirement for discrimination law to apply. A private person can sell or rent out anything without regard to the Discrimination Act, as long as the offer stays within a small group of people.

¹⁸² Svea Court of Appeal, Equality Ombudsman v. If Insurances, case T 1912-13 (judgment of 08.10.2013) <http://www.sorenoman.se/documents/rattsfall/svea-hovratts-dom-den-8-oktober-2013-i-mal-t-1912-13.pdf>.

¹⁸³ The European Court of Justice regards statistical discrimination as a form of direct discrimination. Case C-236/09 (Test Achats) where the insurance providers were not allowed to use the sex of the customer in order to determine insurance fees is a prime example of that. The fact that men statistically have more accidents than women is not a valid defence for directly using a person’s sex to determine the insurance fees for cars. However, with regard to disability and insurance, statistical differences between persons with a disability and healthy persons makes them not comparable, and thus a presumption of discrimination cannot arise. Please note that the fact that the concept of direct discrimination covers statistical discrimination is so strong that the directive in question (2004/113) contained a clause exempting the insurance sector, and it was this clause that got struck down by the ECJ. The Swedish Discrimination Act could have extended the protection for disability to services and then exempted the insurance sector as in Directive 2004/113. However, extending the protection for disability to the insurance sector and then defining a comparable situation as if statistical discrimination is not a form of direct discrimination cannot be right. If an EU concept such as direct discrimination is used then it must (according to the author) be used correctly.

¹⁸⁴ Discrimination Act (Diskrimineringslagen 2008:567 adopted on 05.06.2008), Ch. 2, Sec. 12. point 1.

If an item is offered to the general public through a newspaper advert or on a sales website, it may be regarded as lying outside the private or family sphere. Selling a car or renting out a room can fall within the family sphere if it happens only occasionally. However, if someone rents out a room regularly and advertises it as soon as it is free, that may be regarded as falling within the public sphere. A private person's pursuit of an extra income may be considered to be within the public sphere.¹⁸⁵

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

In Sweden, national legislation prohibits discrimination in relation to housing as formulated in the Racial Equality Directive.

Migrants are treated like everybody else, provided that they have a right to take up residence in Sweden. A landlord taking higher rent from refugees was convicted of ethnic discrimination in 2010.¹⁸⁶

An asylum seeker is, and must remain, the responsibility of the Migration Board. If they receive a temporary or permanent residence permit, they are transferred to a municipality and are treated in the same way as other residents. The refugee crisis, whereby the number of refugees during the last month of 2015 equalled 1.6 % of the national population, has resulted in the need to construct temporary housing of a lower standard by both the Migration Board¹⁸⁷ and some municipalities in order to accommodate the refugees assigned to them.¹⁸⁸

However, when a refugee family applies for a normal municipal apartment, they shall have the same social priority as Swedish families in similar situations – i.e. the worse their current housing situation is, the higher social priority they have. Sweden has a severe housing shortage, and young Swedes with moderate incomes have problems entering the housing market. The same applies to adult migrants. They have to remain with their parents, sleep on friends' couches or share small apartments with many others in order to be able to pay black-market rents and so on. The municipalities have thus been forced to think outside the box to accommodate the newly-arrived immigrants.¹⁸⁹

A migrant thus has the same right as anyone else to move, to apply for rental contracts or to buy housing on the open market. If they are not wealthy or well-connected,¹⁹⁰ the only realistic option is to stay in their municipality. There, they can earn credits on the waiting list¹⁹¹ for the municipal housing company, and they at least get temporary housing there.

The Discrimination Act prohibits preferential treatment and discrimination regardless of which group gets the preferential treatment. Newly constructed municipal houses and apartments for families to rent are by and large distributed on a needs basis, and migrants' needs are regarded equally alongside those of 'ethnic Swedes'. Temporary housing has so far been of such a low standard and has attracted such a high level of stigma (in particular,

¹⁸⁵ Compare Government bill 2007/08:95, p. 247 and Fransson-Stüder, *Diskrimineringslagen*, p. 314.

¹⁸⁶ Göta Court of Appeal, case T 1666-09, Equality Ombudsman v. Skärets fastigheter AB, (Judgment of 25.02.2010). <http://www.do.se/globalassets/diskrimineringsarenen/hovratt/dom-hovratt-skaret-fastighetsbolag-omed-20068982.pdf>.

¹⁸⁷ <https://www.migrationsverket.se/Andra-aktorer/Fastighetsagare-och-uthyrare/Nyhetsarkiv/Nyhetsarkiv-for-fastighetsagare/2016-08-12-Avveckling-av-tillfalliga-asyloboenden.html>.

¹⁸⁸ <http://www.hd.se/2016-08-25/starka-protester-mot-flyktningbostader>.

¹⁸⁹ <https://www.hemhyra.se/nyheter/desperat-jakt-pa-flyktningbostader/>. This is a link to the Tenant Unions members paper, which gives a reliable overview of the temporary fixes currently used by the municipalities. Some are similar to what ethnic Swedes must do; others, such as temporary housing, are immigrant specific. Many immigrants enter the black market and end up in overcrowded conditions.

¹⁹⁰ It is not uncommon to have friends or family who arrived in Sweden earlier, who have a dwelling and who are willing to live in overcrowded conditions rather than forcing others to live alone in temporary housing conditions.

¹⁹¹ There is no rule requiring a municipal housing company to having a waiting list, but most do and complement it with social priority rules.

it is a prime target for racist violence) that no Swedish young person has applied for it, rather than staying with his or her parents, and people have then gone to court on the basis of a refusal to provide housing.

There is no case law in relation to the recent migration crisis and the Discrimination Act. So far, migrants have accepted the solutions offered, perhaps because they know that young 'ethnic Swedes' cannot find permanent housing either unless they are from a privileged background. This is also the way that political discussion and public policies are framed. The focus is on the severe housing shortage affecting all Swedes, not on immigration, discrimination or any other policy directed at a certain group – politicians deliberately avoid framing the question in an anti-immigrant way.

The prohibition on housing discrimination covers all grounds but does not apply to private persons who sell or rent out their property 'on sporadic occasions'.

Housing falls under Chapter 2 Section 12-12 c of the Discrimination Act. The Government bill¹⁹² to the Discrimination Act states that 'sporadic occasions'¹⁹³ (*enstaka*) of selling or renting out a dwelling should be regarded as being within the private/family sphere. Selling an apartment or a house will thus often be exempted from the law.¹⁹⁴ A realistic scenario is that an estate agent presents two possible buyers to the seller and the seller chooses the lower bid for ethnic reasons. As long as it is the seller's decision and the estate agent treats both buyers equally, there is no unlawful discrimination under the act.

Situation testing in different forms has been undertaken by, among others, the Tenants Association and researchers at Linnaeus University.¹⁹⁵ When the researchers sent out 500 identical applications signed with a name signalling a Swedish female, she got to see the apartment in 20 % of the cases. When the name signalled a Muslim man, only 4 % of the applications lead to him being shown the apartment.¹⁹⁶ In both cases the result could not lead to discrimination cases. No physical person had suffered a less favourable treatment (*missgynnande*). The invented applicants could not go to court or to the Ombudsman and the researchers themselves had not been discriminated against.

3.2.10.1 Trends and patterns regarding housing segregation for Roma

In Sweden, there is a pattern of housing discrimination against the Roma.

In Sweden, we do not register ethnicity (see above Sec. 2.3.1.a) so we cannot easily see how the Roma population live. When segregation is studied in statistical material, a proxy such as the birthplace of the individual or the parents is used. National ethnic minorities are missed out.

Objectively, Roma persons live in good housing conditions in Sweden. Many are poor and need housing allowances, and live in accommodation owned by municipal housing companies. They encounter considerable housing discrimination when they seek to buy

¹⁹² The Government bill is the document where the Government describes the new Act to the Parliament. If the Act is adopted according to the proposal of the Government – as was the case with the Discrimination Act – this bill becomes the most important source for interpreting the wording of the new Act at least before there is any case law. See Section 0.1.

¹⁹³ Sporadic occasions may be more than one occasion. A person may, for instance, sell their apartment and buy a new one with a new partner, separate, sell the apartment and buy another apartment. As long as the apartments are bought and sold for housing reasons, as opposed to financial reasons, the sales are sporadic occasions.

¹⁹⁴ Government bill 2007/08:95, p. 244.

¹⁹⁵ The Ombudsman Against Ethnic Discrimination, Discrimination on the Swedish Housing Market 2008:3.

¹⁹⁶ Ahmed A and Hammarstedt M. Discrimination on the housing market – a field experiment on the internet, Växjö 2007.

apartments or houses or try to rent on the private market.¹⁹⁷ Therefore they have to live in municipal housing company accommodation, which has a waiting list and is subject to selection criteria, although the apartments are of a good standard.

The Swedish housing market is highly segregated in the three biggest cities. This segregation is mostly two-dimensional. Some areas are 'Swedish-dense'. In those areas, the Swedish ethnic majority is predominant. Other areas are 'Swedish-sparse'. The typical ethnic neighbourhood in Sweden has no dominant group. The municipal housing companies are the predominant landlord. The average Roma would live in such a neighbourhood. There have been some cases where local politicians have made discriminatory statements like 'Vänersborg cannot absorb more gypsies'.¹⁹⁸ Such comments have been made by representatives of public housing companies as well.¹⁹⁹

The old Ombudsman Against Ethnic Discrimination had about 50 housing cases each year.²⁰⁰ Many landlords have no formal queuing system where prospective tenants can register their interest in renting an apartment.²⁰¹ Minorities suspect discrimination when a landlord prefers to let an apartment remain empty instead of accepting them as tenants. Harassments from neighbours or the landlord is another common complaint. Termination of the contract for the apartment, refusal to barter²⁰² the apartment or denied membership in a housing cooperative are also common complaints.²⁰³

Roma people bring many housing cases to the ombudsman. One case from Lidköping District Court concerned a landlord who changed the lock in order to evict a Roma family. When the lease on the apartment was signed, the landlord mistook the ethnicity of the family. He thought they were from Thailand.²⁰⁴ There are other cases in which landlords specifically refuse to let Roma rent apartments.²⁰⁵

Disability

In Sweden, general disability accessibility to buildings is primarily dealt with under property law. The new form of discrimination, lack of accessibility, does not apply to housing according to Chapter 2 Section 12 c point 1 of the Discrimination Act. Every alteration to land or a building requires a building permit unless it is a minor change. The municipality makes a general plan (*översiktsplan*), determining which areas shall be used for which purposes. Based on that plan, detailed plans covering smaller areas are made. These plans are used as a point of reference when individuals apply for building permits.

When a building permission is issued, the municipality must be satisfied that the building is conforming to the required standard with regard to persons with disabilities. New buildings are thus good from a general accessibility point of view. However, a property owner comes in contact with these regulations only when applying for a building permit.

¹⁹⁷ There are several studies indicating this, for instance the Ombudsman Against Ethnic Discrimination, Discrimination on the Swedish Housing Market 2008:3 and Ahmed A and Hammarstedt M, Discrimination on the housing market – a field experiment on the internet, Växjö 2007.

¹⁹⁸ Ombudsman Against Ethnic Discrimination, Discrimination Against Romanies in Sweden, Report on DO project 2002 and 2003. p. 16.

¹⁹⁹ See above p. 18.

²⁰⁰ 55 cases in 2008. Ombudsman Against Ethnic Discrimination, Annual Report 2008, p. 18.

²⁰¹ Equality Ombudsman (2011) Roma rights (Romers rättigheter) p. 44. This is presented as a factor making discrimination harder to address.

²⁰² The possibility to barter a contract for an apartment is a valuable right within the Swedish rent law system.

²⁰³ The Ombudsman Against Discrimination, Ethnical Discrimination in the Housing Area (Etnisk diskriminering på bostadsmarknaden PM 2006-01-01).

²⁰⁴ Lidköping Municipal Court, case T-1596-06, Ombudsman Against Ethnic Discrimination v. Jonslundstvädden (judgment of 20.05.2008). The tenant was awarded SEK 50 000 (approximately EUR 5 600). Judgment not available on the internet.

²⁰⁵ The Ombudsman Against Discrimination case no. 331-2006.

The National Board of Housing, Building and Planning (*Boverket*) has issued regulations regarding easily removable obstacles.²⁰⁶ This rule applies to public spaces, social security, the healthcare sector, infrastructure²⁰⁷ and services made available to the general public. A house, however, is not an area open to the general public, so a landlord owning a house consisting only of dwellings cannot be ordered to improve accessibility under the threat of a conditional penalty.²⁰⁸ They can only be made to do such things when they need a building permit.

If a person with a disability needs an adaptation to their home, the person asks the municipality for a housing adaptation grant. This applies to rented property as well as to property owned by the person with a disability.²⁰⁹ The tenant cannot make such alterations to the apartment without the landlord's permission. The municipality checks that permission has been given and that the landlord does not require the adaptations to be removed if the tenant leaves the apartment. The most likely reason for a landlord to refuse is the costs of removing adaptations, which are a nuisance to persons with no disabilities. There is therefore a removing allowance that can be applied for.

As lack of accessibility does not apply to housing as a form of discrimination, a landlord is free to say no to any adaptation that falls outside what a non-disabled tenant is allowed to do according to the Tenancy Act, even if all the costs are covered by grants or by the tenant him or herself.

The freedom to continue to apply norms for healthy people without adjustment for persons with disabilities (apart from instances where the Discrimination Act or some other statute clearly prohibits it) is a problematic area in Sweden. This was classified as indirect discrimination²¹⁰ by the CRPD monitoring committee in a case where a building permit was denied to a person with a disability who needed a pool for medical reasons.²¹¹

²⁰⁶ The details are published in a book from 2005 by the National Housing and Planning Authority called *Enklare utan hinder* ('Easier without obstacles').

²⁰⁷ The legislation applies to airports, bus stations and so on. There is special legislation on accessibility of the part of public transportation that does not involve the use of land or buildings.

²⁰⁸ Government white paper SOU 2015:85 has proposed new legislation extending this duty to the commonly shared areas of a multi-apartment housing unit, but not to the apartments themselves. No legal changes yet.

²⁰⁹ Section 4 Law on Housing Adaptation Allowance.

²¹⁰ Sweden was found to have violated many articles, one of them being on discrimination. The decision does not specify that the discrimination was indirect. Other articles concerned matters such as the duty to provide medical services, which has some similarities with the discrimination form of lack of accommodation. The decision focuses more on active duties to provide for necessary goods and services, rather than passive duties like abstaining from discrimination.

²¹¹ CRPD/C/7/D/3/2011, H.M v. Sweden.

4 EXCEPTIONS

4.1 Genuine and determining occupational requirements (Article 4)

In Sweden, national legislation provides for an exception for genuine and determining occupational requirements.

Chapter 2 Section 2 of the Discrimination Act is redacted as follows:

'The Prohibition in Section 1 does not prevent ... differential treatment based on a characteristic associated with one of the grounds of discrimination if, when a decision is made on employment ... the characteristic constitutes a genuine and determining occupational requirement that has legitimate purpose and the requirement is appropriate and necessary to achieve that purpose.'

In the preparatory works, it is made clear that the typical examples born in mind for the use of this exceptional clause are that a Muslim organisation has the right to demand that an imam be of the Muslim faith, that an organisation for equal rights for gays and lesbians or an interest organisation that caters for a certain immigrant group may have the right to require²¹² that for some 'core' positions the employees themselves be homosexual or have that same immigrant background. At the same time it is underlined that the exception from the prohibition of discrimination must always be given a very narrow interpretation.²¹³ In an organisation only the positions that are 'visible' to the public can come into question, not an entire organisation per se and automatically. The employer, must, furthermore, have a strong motive for applying the exemption; the position must clearly have demanded that the discrimination takes place. Religious communities do not have any favourable status here, but they are explicitly mentioned in the preparatory work, along with other examples.

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

In Sweden, national law does not provide for an exception for employers with an ethos based on religion or belief.

In Sweden, all grounds of discrimination are in principle considered equal, and special provisions would violate this equality. The general rule on exceptions in the labour market in Chapter 2 Section 2 applies and there are thus no special exceptions for religious organisations/employers.

²¹² Swedish legislation on privacy is no problem to employers. The employer is free to ask almost any sensitive questions to job seekers. A very common problem involves employers asking applicants for their medical history. The applicant has a right to privacy and cannot be forced to reveal statistics from the National Insurance Board regarding sickness benefits in the past. If the applicant uses this right, however, the employer is free to deduce that these statistics were probably unfavourable. Sickness (if it is not a disability) is not a protected ground. If the employer can rely on an exemption in the Discrimination Act, the privacy situation is the same as in the sickness case. If the applicant denies the request for information the employer is free to make his or her own deductions from this denial. If, for instance, an organisation representing homosexuals wishes to employ a new chairperson and asks applicants about their sexual orientation, Swedish law on privacy only protects the right of the individual applicant not to answer the question. If the employer interprets the refusal to answer as the applicant being heterosexual and therefore does not hire the applicant, there is no problem with privacy law.

²¹³ Government bill 2002/03:65, pp. 185-187. Government bill 2007/08:95, pp. 155-157.

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

In Sweden, national legislation provides for an exception for the armed forces in relation to age but only with regard to conscription and military education according to Chapter 2 Sections 15-16 of the Discrimination Act, (Article 3(4), Directive 2000/78).

For ordinary military employees the employment rules of the Discrimination Act apply and there are no special exemptions.

Chapter 2 Sections 15-16 also cover enrolment inspection, admission tests and other examinations of personal circumstances under the National Total Defence Service Act (1994:1809). The act still applies, but nowadays the state does not force any person to do military service against their wishes. Conscription will be reintroduced in 2018.²¹⁴

4.4 Nationality discrimination (Article 3(2))

a) Discrimination on the ground of nationality

In Sweden, national law includes exceptions relating to difference of treatment based on Swedish citizenship. There are no exceptions relating to aspects of nationality other than citizenship.

In Sweden, nationality (as in citizenship) is not explicitly mentioned as a protected ground in national anti-discrimination law.

In Sweden, national origin is explicitly mentioned as part of the protected ground of ethnicity in national anti-discrimination law. According to Chapter 1 Section 5 point 3 of the Discrimination Act, ethnic origin is defined as 'national or ethnic origin, skin colour or other similar circumstance'. Citizenship is thus not explicitly mentioned, but it falls under the definition of ethnicity, 'national origin or other similar circumstances'.

According to Chapter 11 Section 11 of the Instrument of Government, Swedish citizenship is required for judges. Chapter 6 Section 2 says that Government ministers must have Swedish citizenship. The Chancellor of Justice, the Parliamentary Ombudsman and the three Auditors General are the other examples where Swedish Nationality is required by the Instrument of Government.²¹⁵

Positions where the person is elected by the Parliament require Swedish citizenship according to the Parliament Act (1974:153) Chapter 7 Section 11. This act has a semi-constitutional status. As regards other legislation, there are some (rare) occasions where Swedish citizenship is required.²¹⁶

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

National origin or citizenship are two of many factors that can lie at the heart of ethnicity.²¹⁷ The overlap is thus recognised by the law, and no person can be left unprotected. A stateless person will always have an ethnic/national origin. The word 'race' is deliberately

²¹⁴ In March 2017 the Government decided to reintroduce conscription, starting in 2018. As only 4 000 out of a yearly cohort of 100 000 persons shall serve and as their willingness to serve shall be a selection criterion, there is a strong possibility of it becoming a reality only for those who want to serve.

²¹⁵ Government bill 2009/10:80, p. 333.

²¹⁶ See further, SOU 2000:106, *Medborgarskapskrav i svensk lagstiftning*, where an inventory is made.

²¹⁷ According to Chapter 1 Article 5 point 3 of the Discrimination Act (Diskrimineringslagen 2008:567 adopted on 05.06.2008), ethnic origin is defined as 'national or ethnic origin, skin colour or other similar circumstance'.

omitted. In Sweden discrimination on this basis will be regarded as ethnic discrimination on a ground similar to that of skin colour.²¹⁸

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

a) Benefits for married employees

In Sweden, it does not constitute unlawful discrimination in national law if an employer provides benefits only to those employees who are married.

Civil status is not *in itself* a prohibited ground for discrimination. There is no difference in the marital status between same-sex spouses and opposite-sex spouses.

General employment protection rules against unfair dismissals, for example, as well as principles of good practice in the labour market, would, however, cover discrimination between married and unmarried partners in many cases. In Sweden, generally speaking, non-married couples are the rule rather than the exception, and it would make no sense to have benefits only for married people. Swedish anti-discrimination legislation contains no exceptions as such for differences in treatment based on marital status or civil status.

b) Benefits for employees with opposite-sex partners

In Sweden, it constitutes unlawful discrimination in national law if an employer provides benefits only to those employees with opposite-sex partners.

When it comes to discrimination between married spouses and registered partners, as was pointed out by Hans Ytterberg in the Sexual Orientation Report of 28 July 2004, 'the whole *raison d'être* of the Swedish Registered Partnership Act²¹⁹ was to create a legal framework for homosexual couples, which corresponds to that of civil marriage for heterosexuals.'

On 1 April 2009 the Swedish Parliament went one step further and decided to amend the Marriage Code to allow two persons to marry regardless of whether they are of the opposite sex or not. This modification entered into force in May 2009. At the same time, the Registered Partnership Act was abolished and registered partnerships were converted into marriages. This was done in order to emphasise that a homosexual family of parents and children is essentially the same as a heterosexual family.

Swedish law clearly does not permit benefits that are limited to those with opposite-sex partners. That would constitute direct discrimination according to Chapter 1 Section 4 point 1 of the Discrimination Act.

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

In Sweden, there are no exceptions in relation to disability and health and safety (Article 7(2), Directive 2000/78).

The ordinary exception in Chapter 2 Section 2 of the Discrimination Act applies to the employer.

²¹⁸ The reasons for omitting the word 'race' are discussed in Section 2.1.1 of this report, and the author believes that this national tradition is acceptable with regard to Directive 2000/43. One reason is that this enhances the protection offered. In some countries, nationality discrimination is regarded as indirect race discrimination. In Sweden, direct discrimination on any ground similar to skin colour will be treated as direct discrimination based on that ground, (i.e. immigrants, foreigners) and thus would be very hard to justify.

²¹⁹ Act on Registered Partnership (Lag om registrerat partnerskap 1994:1117), adopted on 23.06.1994; original preparatory work: bet. 1993/94:LU28. Now repealed.

Regarding persons with disabilities, it is relevant for the employer to take into consideration not only security issues and the health and safety of others at the workplace, but also the health and safety of a person with a disability themselves. However, the burden of proof can sometimes be shifted to the employer.²²⁰ In Labour Court case 2003 No. 47,²²¹ the risks of shift work for an employee with diabetes were not proven and the refusal to employ him was deemed to constitute direct discrimination.

If, for instance, a turban is prohibited by a work environment rule, it will become a case of possible indirect discrimination, and this will be resolved by a proportionality test according to the rules of the Discrimination Act. We have no such case law.

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

4.7.1 Direct discrimination

In Sweden, national law provides an exception for direct discrimination on age in Chapter 2 Section 2 Points 3 and 4 of the Discrimination Act.

a) Justification of direct discrimination on the ground of age

In Sweden, it is generally possible to justify direct discrimination on the ground of age.

Chapter 2 Section 2 Point 3 of the Discrimination Act allows age limits without the need to justify them with regard to the right to a pension or to survivor's or invalidity benefits in individual contracts or collective agreements. The next point allows:

'differential treatment on grounds of age, if there is a legitimate purpose and the means that are used are appropriate and necessary to achieve that purpose'.

On the surface, this test is in compliance with the test in Article 6 of Directive 2000/78.

There is a general possibility to justify age discrimination by a legitimate aim if the means are appropriate and necessary in pursuit of this aim. The preparatory works for the Discrimination Act describe the scope for justification as being quite wide. Age limits are common in collective agreements and the system as such works well according to the Government. Therefore, the courts are encouraged to look at a collective agreement in a holistic way, including its relationship with relevant social security provisions, rather than singling out individual clauses in a collective agreement for scrutiny in isolation.²²² At the same time, the Government rejected demands for a presumption of collective agreements being compatible with Directive 2000/78.²²³ Any benefit in a collective agreement can be seen as a 'certain advantage linked to employment' within the meaning of article 6.1.b. It is in my opinion likely that the scope for justification becomes too wide unless the Labour Court makes a narrow interpretation of the law. Two examples from the *travaux préparatoires* of conditions fulfilling a legitimate aim and normally being both appropriate and necessary are that:²²⁴

²²⁰ Formally, Chapter 6 Section 3 of the Discrimination Act (Diskrimineringslagen 2008:567 adopted on 05.06.2008) applies to all forms of discrimination. In practice, a shift of the burden of proof has only happened in situations which could easily have occurred regarding other grounds such as sex or ethnicity (see for instance footnote below). The author knows of no case where the shift of burden of proof has been decisive in a reasonable adaptation case.

²²¹ Labour Court 2003 no 47, Swedish Metal Workers Union v. Scandinavian Refinery Ltd (Scanraff) and Cooperative Employers Organisation (judgment of 04.06.2003).

²²² Government bill 2007/08:95, p. 177.

²²³ Government bill 2007/08:95, p. 177.

²²⁴ Government bill 2007/08:95, p. 179.

- Better conditions regarding paid vacation are justified because older workers need more rest than younger workers in order to be able to work until they retire;
- Better conditions regarding periods of notice for dismissals for older workers are also justified as an aid to help them work until retirement.

In Labour Court case 2011 No. 37,²²⁵ the Labour Court made a narrow interpretation of the scope for different treatment with regard to age. There was a redundancy situation regarding cabin crew. According to the Employment Protection Act a principle of seniority shall apply. The persons who have been employed for the longest time shall keep their job. This rule is semi-mandatory, however, and can thus be modified by collective agreements. A collective agreement permitted the employer to dismiss all persons above the age of 60, as they were entitled to a full pension (roughly 70 % of previous pay) within the employer's pension scheme. The case concerned 25 of those persons.

The employer argued that there was no direct age discrimination. The company needed to reduce the workforce. Being dismissed was less hard on those who had a right to a full pension, therefore there were legitimate social reasons to choose those above the age of 60 for dismissal, and thus no indirect discrimination had occurred either.

The Labour Court decided that there was direct discrimination because the age and the pension right were directly linked to each other. The Labour Court said that both the wish to distribute employment fairly between generations and the wish to ensure that the remaining employees were not all close to the pensionable age were arguments that could be valid in defending different treatment according to age under Chapter 2 Section 2 Point 4 of the Discrimination Act. Voluntary retirement schemes could thus be acceptable. However, it was not proportionated to force retirement on all those who had reached the age of 60.

The dismissals were declared void. The 25 persons thus kept their employment and they were each awarded SEK 125 000 (EUR 13 800) in a combination of a discrimination award and non-pecuniary damages according to the Employment Protection Act.²²⁶

So far, the interpretation seems to be in conformity with the directive as far as discrimination against the elderly is concerned.

b) Permitted differences of treatment based on age

In Sweden, national law permits differences of treatment based on age for any activities within the material scope of Directive 2000/78.

The general exemption in Chapter 2 Section 2 point 4 of The Discrimination Act will allow any treatment that passes the proportionality test.

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

In Sweden, national law allows occupational pension schemes to fix ages for admission to the scheme or entitlement to benefits, taking up the possibility provided for by article 6(2).

There is a specific exception in the Discrimination Act for age limits in pensions, survivor's benefits and disability benefits, in individual contracts and collective agreements.²²⁷

²²⁵ Labour Court 2011 no 37, Equality Ombudsman v. Aviation Employers (Flygarbetsgivarna) and Scandinavian Airlines System (judgment of 04.05.2011).

²²⁶ The reform of 2013 extending the protection for age discrimination did not affect the prohibition of discrimination in the labour market.

²²⁷ Discrimination Act (Diskrimineringslagen 2008:567 adopted on 05.06.2008) Ch. 2 Sec. 2 point 3.

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

In Sweden, there are special conditions set by law for older and younger workers in order to promote their vocational integration, and for persons with caring responsibilities to ensure their protection.

Within labour market policy regulations there are a number of rules which expressly refer to age, aimed at promoting the vocational integration of young and old people, respectively. Age limits are uncontroversial. There is, for instance, a 'work guarantee' for people younger than 25. It was introduced as an amendment to the Ordinance on a Work Guarantee for Young Persons, and has the aim of ensuring that a young person gets a proper place in an education programme or traineeship within three months of registering with the National Employment Agency.²²⁸

There are also a number of rights in labour law relating to parenting – see in particular the Parental Leave Act (1995:584).

4.7.3 Minimum and maximum age requirements

In Sweden, there are no exceptions permitting minimum and/or maximum age requirements in relation to access to employment (notably in the public sector) and training.

Minimum or maximum age requirements will be dealt with under the proportionality test in the Discrimination Act Chapter 2 Section 2 point 4 (See Sec. 4.7.1.).

4.7.4 Retirement

a) State pension age

In Sweden, there is no state pension age at which individuals must begin to collect their state pension. If an individual wishes to work up to a very old age or live on their savings, the pension can be postponed without any upper limit, with each month of postponement resulting in an actuarial increase of the pension level. A person who finds an employer who is willing to keep them on up to the age of 90 could thus earn a state pension several times higher than their former wages.

An individual can collect a pension and still work.

According to the Swedish statutory pension scheme introduced in 1998²²⁹ there is no fixed upper pension age. The income-related public pension scheme opens up for part-time or full-time pensions from the age of 61.

People may also postpone their pensions, continue to work for as long as they like and continue to add to their pension benefits, the scheme being construed on a principle of lifelong earnings and actuarially correct calculations on expected remaining lifetime when they take out the pension. Postponing the pension payments for one month raises the pension by approximately 0.6 % around the age of 65. It is permitted to collect a pension and still work – both the pension and the income are taxable.

²²⁸ Ordinance (2007:813) on work guarantee for young persons, (updated up to SFS 2016:819). The words 'work guarantee' have been put inside quotation marks because the act contains goals and not a legally enforceable guarantee.

²²⁹ Chapters 62-67 of the Social Security Code (Socialförsäkringsbalk 2010:110), adopted on 04.03.2010.

However, the right to the basic pension scheme – the ‘guaranteed pension’ – requires the beneficiary to be 65 years of age. Even this pension can be postponed and thus increased in accordance with actuarial principles.

b) Occupational pension schemes

In Sweden, there is no normal age when people can begin to receive payments from occupational pension schemes and other employer-funded pension arrangements.

If some individual wishes to work for longer, payments from such occupational pension schemes can often be deferred.

An individual sometimes cannot collect an occupational pension and still work full-time with their employer.

There are over 300 occupational pension schemes in Sweden.

Generally speaking, occupational pension schemes contain (mostly flexible) rules on pensionable age. Pensions can thus normally be deferred if some individual wishes to work for longer, and they will provide more income in such cases.²³⁰ It is possible to collect a pension and still work. The age of 55 is the earliest age at which a pension fund can allow a person to start withdrawing their pension.²³¹ Many occupational pension schemes thus have this age limit; 60 and 65 are other common age limits.

It is not uncommon for an occupational pension scheme to be related to retirement, and thus it is not possible for a person who keeps working full-time for the same employer to claim a pension as well.

c) State imposed mandatory retirement ages

In Sweden, there is no state-imposed mandatory retirement age.

d) Retirement ages imposed by employers

In Sweden, national law permits employers to set the retirement age at 67 years by contract or unilaterally.

Within employment law there is a right for the employee to stay on until he or she reaches the age of 67, despite what may have been agreed between the parties.²³² At this point it is possible for the employer to unilaterally terminate the employment with one month’s notice. This was accepted by the ECJ in the Hörnfeldt case.²³³ On a general level, most Swedes accumulate a viable pension by the age of 67. This age limit is therefore proportional and can be defended as an integral part of the general labour market system.

However, in the Keolis case,²³⁴ the employer legally dismissed bus drivers at the age of 67. The employer then offered to re-hire the staff on a fixed short-term hourly basis (for

²³⁰ Collective agreements on pensions are very diverse. The normal practice today is that a young person belongs to a prefunded system based on actuarial principles. Elderly workers quite often belong to a defined benefits system, and some systems have a combination of a defined contribution with guaranteed defined benefits for those with many years of participation. Such systems do not always work on actuarial principles (with regard to the defined benefit part) if the worker decides to postpone their retirement.

²³¹ Act on Income Taxation (Inkomstskattelag 1999:1229 adopted on 16.12.1999) Chapter 58 Section 8 sets this age as the lowest possible for favourable tax treatment.

²³² The rule outlaws also collective agreements stipulating a lower retirement age, something which has been criticised by the ILO, Case No. 2171, GB 286/11 (part II) March 2003. The law (Sec. 32 a of the 1982 Employment Protection Act) has not yet been revised, though.

²³³ European Court of Justice, Case 141/11, Torsten Hörnfeldt v. Posten AB, (judgment of 05.07.2012).

²³⁴ Labour Court, Case 2015 no 51, the Equality Ombudsman v. Keolis AB (judgment of 16.09.2015).

instance filling in at short notice for permanently employed drivers calling in sick). When they reached the age of 70, their employment was not renewed. This was considered as direct age discrimination. The Labour Court thus stated that the permission to dismiss with regard to the Discrimination Act (or to refuse to prolong temporary employment) without individual assessment exists only at the age of 67. Only at this age is there explicit permission in the Employment Protection Act for dismissals without just cause.²³⁵

e) Employment rights applicable to all workers irrespective of age

The law on protection against dismissal and other laws protecting employment rights do not apply in the same way to all workers irrespective of age if they remain in employment on attaining pensionable age or another age.

The Swedish 1982 Employment Protection Act differentiates between dismissal on personal grounds (which requires just cause) and dismissal for shortage of work or business reasons.

In the latter case, just cause is considered to exist (the decision as to whether there is a shortage of work rests entirely with the employer) but lay-offs have to be carried out in accordance with the last-in, first-out principle according to Section 22.

Regardless of the reason for the dismissal, the notice period (in between 1-6 months) required relates to the prior period of employment and is thus indirectly related to age.

At the age of 67 the worker loses the right to seniority according to Section 33 of the Employment Protection Act and can thus be dismissed in a redundancy case. The same section also gives the employer the right to dismiss the worker with one month's notice at this age. Should the employer not do this, the old employee cannot be dismissed for personal reasons without a just cause any more, but presumably the protection will be much weaker. We have no case law on this. Employers normally dismiss workers who reach 67 years. If they want to keep the worker, they give the worker a fixed-term contract - which there is no restriction on if the worker is 67 years or older according to Section 5 point 4 of the Employment Protection Act.²³⁶ The fact that the Discrimination Act could be applicable to the refusal to renew such a contract at an age significantly above 67 – as was decided in the Keolis case²³⁷ – was a surprise to many people, including the author.

Redundancies and collective agreements are problematic in Sweden. It is not unusual for central collective agreements to give people over the age of 60 access to early retirement if there is a redundancy situation.²³⁸ Such arrangements encourage the local trade union to agree to local collective agreements allowing elderly workers to be dismissed in redundancy situations instead of applying the last-in, first-out principle. If all those over the age of 60 are dismissed, it becomes a case of direct discrimination, which is prohibited.²³⁹ However, if 50 % of the employees over 60 whose preference was to work until early retirement are dismissed and 25 % of the younger workers are dismissed, it would become a case of possible indirect discrimination and, since collective agreements have a strong standing in the Swedish labour market model, they are almost certain to pass a proportionality test. Facilitating the dismissals of elderly persons in local collective

²³⁵ In the Employment Protection Act, there is a free choice on fixed-term contracts once the worker is 67 or older. However, the Discrimination Act still applies to any refusal to prolong employment that may be discrimination. This is problematic, as a fixed-term contract that expires when the person reaches the age of 67 can be a valid termination without the need to apply the special exemption for dismissals at 67.

²³⁶ See the Keolis case above (e).

²³⁷ Labour Court, Case 2015 no 51, the Equality Ombudsman v. Keolis AB (judgment of 16.09.2015).

²³⁸ See further discussions in Government White paper 2012:28, pp. 316-320. The Government inquiry has found these collective agreements to be problematic because they encourage early retirement, something that the state pension system discourages.

²³⁹ See Labour Court 2011 no 37, Equality Ombudsman v. Aviation Employers (Flygarbetsgivarna) and Scandinavian Airlines System (judgment of 04.05.2011). The case is described in section 3.9.1.

agreements is an important reason for employers to want central collective agreements providing early retirement for workers over 60 who are made redundant.

f) Compliance of national law with CJEU case law

In Sweden, national legislation is in line with CJEU case law on age regarding compulsory retirement. At the age of 65 every person who has lived 40 years in Sweden gets a liveable pension, and employment protection continues to 67 years for everyone.

4.7.5 Redundancy

a) Age and seniority taken into account for redundancy selection

In Sweden, national law permits and requires seniority to be taken into account in selecting workers for redundancy.

The Swedish 1982 Employment Protection Act differentiates between dismissal on personal grounds (which requires just cause) and dismissal for shortage of work or business reasons.

In the latter case, just cause is regarded to exist (the decision as to whether there is a shortage of work rests entirely with the employer) but lay-offs have to be carried out in accordance with the last-in, first-out principle according to Section 22.

Moreover, in the event of equal periods of employment, senior age priority applies directly. There is also special protection for persons with disabilities (preference, i.e. the seniority rule does not necessarily apply).

Regardless of the reason for the dismissal, the notice period (between 1 and 6 months) required relates to the prior period of employment and is thus indirectly related to age.

b) Age taken into account for redundancy compensation

In Sweden, national law does not provide compensation for redundancy.

Collective agreements for white-collar workers and for workers in the public/state sector sometimes provide packages including extra unemployment benefits, re-training on favourable terms and even early retirement if the worker being made redundant is over 60.²⁴⁰

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 Sweden, 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 Sweden, other exceptions to the prohibition of discrimination (on any ground) provided in national law are the following:

- Age limits set in laws are accepted within social security according to Chapter 2 Section 14 b point 1 of the Discrimination Act.

²⁴⁰ See further descriptions and discussions of such collective agreements in relation to the sustainability of the Swedish pension system in Government White Paper 2012:28, pp. 316-320.

- Age limits set in laws for goods and services are permitted according to Chapter 2 Section 12 b point 1 of the Discrimination Act.
- Age limits in the insurance sector are permitted according to Chapter 2 Section 12 b point 2 of the Discrimination Act.
- Minimum age limits for places that are allowed to serve alcohol is permitted according to Chapter 2 Section 12 b point 3 of the Discrimination Act.
- Age limits set in laws governing healthcare and social services are also permitted according to Chapter 2 Section 13 b point 1 of the Discrimination Act.
- The discrimination ground of lack of accessibility does not apply to housing according to Chapter 2 Section 12 c point 1 of the Discrimination Act.
- Lack of accessibility as a form of discrimination does not apply to private persons according to Chapter 2 Section 12 c point 2 of the Discrimination Act.
- The discrimination ground of lack of accessibility does not apply to companies with less than 10 employees in the goods and services sector according to Chapter 2 Section 12 c point 3 of the Discrimination Act.
- A seller of goods or provider of services who has fulfilled the building regulations at the time the premises were built cannot be asked to do any further adaptation. The discrimination ground of lack of accessibility does not apply to housing according to Chapter 2 Section 12 c point 4 of the Discrimination Act.
- Harassment with regard to age need not be investigated with regard to conscripts and persons in military education programmes according to Chapter 2 Section 16 of the Discrimination Act. If they are employed by the military, normal rules apply.

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

a) Scope for positive action measures

In Sweden, positive action in respect of racial or ethnic origin, religion or belief, disability, age or sexual orientation is provided for in national law, however there is no general clause allowing it. The Discrimination Act applies to discrimination arising out of positive action.

Positive action in relation to persons with disabilities is generally allowed. Measures benefiting this group may disfavour persons with no disabilities, but that group is not protected by the Discrimination Act and thus the discrimination is lawful. The law is 'asymmetric'.

In other areas of labour law as well as labour market policy regulations, a number of special measures are available in relation to persons with disabilities with regard to their working life. Their purpose is to directly or indirectly compensate for disadvantages linked to disability. In some cases, for example, wage subsidies are available. An individual may also have a right to certain support measures in order to regain or retain his/her work capacity. These measures are regulated in the Social Insurance Code (2010:110 Socialförsäkringsbalk) Chapters 29-31. Employers are required to maintain a good work environment, which means not only the physical aspects but the psycho-social aspects as well. This also means that certain types of accommodation should be made for employees with disabilities. This can relate to the physical accessibility of the workplace. These issues are regulated in the Work Environment Act (Arbetsmiljölagen (1977:1160) and the Work Environment Decree (Arbetsmiljöförordningen) (1977:1166), as well as by the Discrimination Act.

With regard to age, direct discrimination can in almost all areas be justified by a proportionality test. Positive action measures would normally pass such a test.

Ethnicity and religion have an exemption from the prohibition of discrimination regarding labour market policy activities and for people's universities (Ch. 2 Sec. 6 and 9). A right for members of certain religions to refuse military service is also explicitly exempted (Ch. 2 Sec. 15).

However, the Discrimination Act also contains rules on 'active measures'. From an EU law perspective, such measures are within the realm of positive action in a more general meaning. The act requires that employers continuously carry out goal-oriented work, under all discrimination grounds, to actively promote people in their working life.²⁴¹ Education providers are also required to undertake continuous goal-orientated work with regard to all grounds (Ch. 3 Sections 1-3).

Both employers and education providers need to have a ready-made procedure in place to handle instances of sexual²⁴² harassment and other harassment on any ground that may be reported by students/pupils/employees (Ch. 3 Secs. 6 and 18).²⁴³

²⁴¹ Chapter 3 Sections 1-3 of the Discrimination Act (Diskrimineringslagen 2008:567), adopted on 05.06.2008.

²⁴² Sexual harassment is harassment connected to sexual desire, and can happen between persons of the same sex as well as between persons of the opposite sex. In Sweden this is so uncontroversial that it would have been very strange to mention it in the law. There is at least one same-sex harassment case in the courts that the author knows of. For reasons of anonymity the author refers here only to the Equality Ombudsman's case number ANM 2015/2431.

²⁴³ With regard to employers, this duty includes victimisation too. As regards active measures, the Ombudsman works as a regulatory authority, visiting employers and universities, checking their equality plans and so on. If somebody fails to fulfil their duties, the Board Against Discrimination may – on the Ombudsman's application – issue an order to comply with a specific request before a certain date (or for the future), subject to a financial penalty under Ch. 4 Sec. 5 of the Discrimination Act. The financial penalty will gain legal force only after a

If there is no exemption, positive action must not lead to direct discrimination. Positive actions required by law and leading to indirect discrimination have a good chance of passing the proportionality test.

b) Main positive action measures in place on national level

Positive actions are mostly decided upon locally, i.e. by an individual employer or a university, and frequently concern advertising practices and the like.²⁴⁴ A list of the most commonly used positive action measures would thus require extensive research, especially if they are to be used as a basis for classifying Swedish positive action measures as mostly broad, social policy based or narrowly tailored, or as being quotas. The classifications in this report should therefore be considered preliminary. From the text below the reader can safely assume that quotas are very rare.

National law does not prescribe a quota system for persons with disabilities or for any other group. There are, however, a number of labour-market policy measures such as subsidised wage schemes and sheltered employment targeting people with disabilities. They can be classified as broad because every reason for a person being unable to hold a normal job in the long term can qualify a person for these measures.

The inquiry into the rights of Roma people proposes state funding for locally determined labour-market activities designed to meet the needs of this group.²⁴⁵ The inquiry estimates that only 10 % of the Roma people in Malmö have a normal job on the open labour market.²⁴⁶ As a part of the National Roma Strategy, five municipalities have become test places and have received state funding for, *inter alia*, making sure that the National Employment Agency assists Roma persons in a better way. This has led to broad-based activities in the five municipalities. These initiatives have created positions called 'customer resource officials with minority focus, who assist all minorities. However, all of them must either speak Romani or have good knowledge of Roma culture.²⁴⁷ The municipalities have presented figures, for example, that 20 Roma persons received employment or 10 Roma persons received training places, but no one knows how many of them would have received jobs or training places anyway.²⁴⁸ No municipality reported training places reserved for Roma persons (which would be legal, as opposed to jobs reserved for Roma persons). The author would classify these measures as broad because they were implemented in a way that benefited all minorities – but with special focus on Roma.

There is a special labour market programme for newly arrived immigrants, based on law 2010:197. It consists of a right to education on the Swedish language and Swedish society, and activities to assist immigrants entering the labour market. Validation of the immigrants' education in the home country is one such activity. The author would define these as measures narrowly tailored to address the problems of new immigrants.

With regard to dismissals on grounds of redundancy, there is a provision in Section 23 of the 1982 Employment Protection Act that a person with a disability having being accommodated at the workplace may stay on despite the last-in, first-out principle. As regards indigenous minorities such as the Sami and the Roma, there are special rights and supportive measures regarding the use of their native languages as well as access to

district court has ordered the payment. The legality of the order itself – as well as the reasonableness of the amount – can be decided upon by the district court.

²⁴⁴ The Government takes such positive measures as well, for instance with regard to employment decisions and the selection of persons to lead governmental authorities.

²⁴⁵ Government White Paper 2010:55, p. 363.

²⁴⁶ See above p. 367. The estimation is based on a local report from 2008, which in turn is based on interviews with Roma representatives. Ethnicity is not registered in Sweden, so all figures for ethnic groups need to be based on some other method of assessing the situation.

²⁴⁷ National Employment Agency, Report on Pilot Activities for Roma Inclusion 2015, p. 10.

²⁴⁸ National Employment Agency, Report on Pilot Activities for Roma Inclusion 2015, p. 15, that example is from Malmö.

media²⁴⁹ – and, as regards the Sami, measures on land rights and reindeer management. From 2011 the Sami people have had their reindeer management rights recognised in the Constitution.²⁵⁰ These are also examples of narrowly tailored positive action measures.

In education, strong forms of positive action are allowed only at the people's universities, a form of education designed to admit students who have little or no academic background. People's universities are free to design their own courses and programmes. They are not bound by the normal educational hierarchy. Some programmes result in professional qualifications (for instance as journalists or drama teachers). Admittance to such programmes often requires the same level of secondary education as mainstream universities.

Some people's universities cooperate with normal universities and let the normal university do part of the examination, and part of the programme can then be counted as an ordinary academic course, giving the student ordinary academic points. Other programmes are directed at people with very little educational background and, when admitting students to basic general courses, older students are often given preferential treatment by the people's universities. The majority of people's universities (104) are connected to an NGO. The rest (44) are operated by municipalities or regions. Many of them have their students living at the campus. There is a Roma People's University, and other people's universities can (and sometimes do) give courses aimed at and reserved for the Roma population. Creating educational programmes reserved for special groups such as immigrants, persons with disabilities or women is considered normal in this form of education.

The distinction between narrowly tailored measures and quotas is debatable. A Sami with a reindeer right cannot sell this right unless the buyer is approved as a member by the Sami village. Not everybody who is registered as a Sami with a voting right in the Sami Parliament will be recognised by a Sami village as a true Sami. With regard to Roma people there is no official register to guide the people's universities; they have to rely on the information given by the student. Since no law prohibits a Sami village from admitting a non-Sami as a member, and since a non-Roma person with a deep interest in Roma culture would have a good chance of being admitted to the Roma People's University or a Roma class at another people's university, the author views these forms of positive action as narrowly tailored measures rather than quotas.

There is no new latest form of positive action. Politically, the work guarantee for young people is important to the Government. So far, it has only resulted in ordinances making adjustments to complement the original 10-year-old ordinance.²⁵¹ The changes come from a Government bill on better adapting employment support to individual needs, with immigrants as the target group.²⁵² The question that arises when helping immigrants is thus which adjustments need to be made through ordinary legislative acts (including the work guarantee for young persons), while not creating a new form of positive action for this group alone. The adjustments take the form of additions allowing extra time or consideration of the activities that newly arrived immigrants need to engage in as falling within their work requirement under the ordinance.

One of the main goals in the educational changes was to make courses in Swedish a form of municipal adult education (*kommunal vuxenutbildning*). An immigrant learning Swedish should thus be in the same school class as a young native Swede catching up in any subject that he or she missed during secondary education. It is the ideology of the present Government not to have an integration minister proposing new forms of positive action,

²⁴⁹ Cf. Government bill 2005/06:112 on public television and radio.

²⁵⁰ Swedish Instrument of Government (Regeringsformen 1974:152), adopted on 28.02.1975, Ch. 2 Sec. 17.

²⁵¹ Ordinances 2015:148 and 2015:512.

²⁵² instance, Ordinances 2016:819 and 2017:108 changing Ordinance 2007:813 on the Work Guarantee for Young Persons; Government bill 2014/15:85 on Increased Individual Adaptation – More Effective Education in Swedish for Immigrants and Adult Education.

but instead to strive to make the ordinary wage guarantee system and the ordinary municipal adult education system – as well as all other general systems – work for immigrants too.

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 Sweden, the following procedures exist for enforcing the principle of equal treatment:

- a. Judicial proceedings in the Labour Court (starting in the civil court if the worker is represented by someone other than a trade union with a collective agreement or by the Equality Ombudsman).
- b. Judicial Proceedings in the Civil Court system.
- c. If a trade union with a collective agreement represents a member, there must be negotiations with a view to settling the conflict, which must take place before going to the Labour Court, according to Section 11 of the Co-Determination Act in conjunction with Chapter 4 Section 7 of the Labour Procedure Act (1974:371). Cases are often settled at this stage.
- d. The Equality Ombudsman also negotiates with the employer before going to the Labour Court.²⁵³ There are more settlements than cases.

It is not possible, as a general rule, to use administrative procedures to address discrimination under the Discrimination Act. No administrative body can apply the Discrimination Act directly. There are examples of solving discrimination problems through other acts. If, for instance, a parent gets a decision from the School Appeal Board that the adaptation costs necessary for accepting their child to a school are not substantial²⁵⁴ and that the school must therefore take on the cost, the discrimination is averted, but there will be no discrimination award. Some state employment decisions can be appealed as well, and the claimant will then get the job if they prove that they are better qualified, but they will not get a discrimination award.

In the Labour Court, the worker may be assisted by a trade union or the Equality Ombudsman; in the Civil Court, the Equality Ombudsman may assist the claimant.

It is the task of the Ombudsman to investigate any complaints of discrimination. This includes the provision of advice, but also the task – at the Ombudsman's discretion – of representing the victim of discrimination in settlement proceedings or, ultimately, in a court of law. Should the individual concerned be a member of a trade union, this privilege of the Ombudsman is subsidiary to the right of the trade union to represent its member.

Civil processes regarding working life under the Discrimination Acts are to be dealt with in accordance with the Labour Disputes Act.²⁵⁵ Depending on whether the employer is bound by a collective agreement, whether the person who alleges discrimination is or is not a member of the trade union with the collective agreement, and whether the trade union is willing to take up the claim, the case may be heard in the first instance either by the District Court (*tingsrätt*) with ordinary judges as in other civil cases or the Labour Court (*Arbetsdomstolen*), in a special composition comprising both judges with judicial background and members with a background in labour market organisations.²⁵⁶ Whereas it is the injured individual who has *locus standi* as the claimant at the District Court, it is

²⁵³ The law does not order this but having the Labour Court as the only instance presupposes well-prepared cases, and that includes these negotiations. Chapter 4 Section 3 of the Discrimination Act gives the Equality Ombudsman the ability to decide on a financial penalty (which can be appealed to the administrative court) if the employer does not show up.

²⁵⁴ Chapter 9 Section 15 of the School Act (Skollag 2010:800 adopted on 23.06.2010), in conjunction with Chapter 28 Section 12 point 6.

²⁵⁵ Act (1974:371) on Labour Law Procedure.

²⁵⁶ As regards the Swedish Labour Court, see, for instance, the European Court of Human Rights judgment of 26.10.2004 in the case of AB Kurt Kellermann v. Sweden.

the trade union which has that position when claims are dealt with at the Labour Court in the first (and last) instance. A law suit taken to the District Court in accordance with the described rules may always be appealed to the Labour Court, whereas a decision of the Labour Court – whether at first or second instance – is not subject to further appeal. As has already been indicated, the Ombudsman can also bring a case directly to the Labour Court with the individual's consent, if the Ombudsman considers that the case is of importance for legal practice or for other reasons.

However, as regards state employees, there are constitutional rules regarding objective grounds on hiring. If the claimant is better qualified, he or she is entitled to get the position of employment (which they cannot get under the Discrimination Act; they may only be granted a discrimination award). Using the administrative procedures relating to these rules is sometimes an alternative or complementary way to appeal against a discriminatory decision.

The Equality Ombudsman may represent victims of discrimination in all areas covered by the Discrimination Act. Cases outside working life will be dealt with by the ordinary court system, i.e. the relevant district court in the first instance. Discrimination in connection with social security, for instance, (an example of an area that normally falls under administrative law) is thus dealt with by the ordinary civil court system, and the ordinary rules on the civil law process apply.²⁵⁷

The relatively few cases presented to the court system shall not be taken as proof that action is not taken in cases of discrimination. A considerable number of cases are settled out of court. The same is probably true about the trade unions. Most complaints are settled during the mandatory negotiations prior to a claim being made before the Labour Court. In these cases remedies much the same as in the case law of the Labour Court are agreed upon – or even better ones, since the parties concerned lower their costs through an early settlement.

b) Barriers and other deterrents faced by litigants seeking redress

With regard to discrimination cases outside the labour market, there are no particular obstacles in going to court. The general time limit in the Discrimination Act is that a claim must be presented within two years from when the alleged discriminatory act took place.²⁵⁸ Individuals can (but do not have to) rely on private attorneys, but this means a risk of greater costs if the case is lost. Procedures are the same regardless of whether the case concerns a private or a public employee. If the claimant ask for less than SEK 22 000 (EUR 2 400), a simplified procedure may be used. This procedure is tailored so that a normal person does not need an attorney. The right of the winning party to recover legal costs is limited.²⁵⁹ For many people the cost of going to court is an issue. There is no place where an enforceable decision can be given that is free of charge. Therefore, the right of the Ombudsman and trade unions to go to court on behalf of victims is important for persons with limited means.

A more complicated system of rather short time limits applies in working life.²⁶⁰ Dismissal claims are regulated by the 1982 Employment Protection Act, and time limits are complicated and rather short. If the claim consists of declaring a dismissal null and void, the procedure could take place weeks from the occurrence of the act or – in certain cases – one month after the end of the employment. If the claim concerns only indemnification,

²⁵⁷ Some university or higher education cases may also be brought before the Board of Appeal for Higher Education.

²⁵⁸ Chapter 6 Section 6 of the Discrimination Act (Diskrimineringslagen 2008:567), adopted on 05.06.2008.

²⁵⁹ There is a list of allowed expenses, one hour of legal aid (SEK 1 242) claim fee (SEK 450), travelling costs, cost for witnesses, translation costs.

²⁶⁰ Chapter 6 Sections 4 and 5 of the Discrimination Act (Diskrimineringslagen 2008:567), adopted on 05.06.2008.

it could take about four months. The 1976 Co-Determination Act applies when it comes to wage compensation. Here, the general time limit is four months from knowledge of the act within a maximum of two years from its occurrence.²⁶¹ Within these time limits, it is possible to bring a discrimination suit after the employment relationship has ended.

The labour market litigation rules are built on an assumption that the worker is represented by his or her trade union. If the union does not support the worker, or if the worker is not a member, the time limits is a real barrier when it comes to access to justice.

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

If a person is poor and is not represented by the Equality Ombudsman or a trade union, it is possible to ask for legal aid in employment cases to help with the costs of going to court. In cases going to the civil courts (non employment cases), it is possible for the court to rule that both parties shall bear their own costs if the claimant loses but had good reasons (*skälig anledning*) to go to court in accordance with Chapter 6 Section 7 of the Discrimination Act.²⁶²

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

c) Number of discrimination cases brought to justice

In Sweden, there are no available statistics on the number of cases related to discrimination brought to justice.

d) Registration of discrimination cases by national courts

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

²⁶¹ If someone brings an action as a result of a *notice of termination or summarily dismissal*, the rules in the 1982 Employment Protection Act (LAS) apply. To have a dismissal declared null and void the employer shall be notified about the claim within two weeks of the dismissal. A lawsuit shall be presented within two weeks thereafter or, should conciliations negotiations have taken place, within two weeks from terminating such negotiations (Sec. 40 LAS). As regards damage claims, the employer shall be notified about the claim within four months after the damaging activity occurred, and a lawsuit shall be presented within four months after that or, should conciliation negotiations have taken place within four months from terminating such negotiations (Sec. 41 LAS). With regard to *any other action*, the rules in the Co-Determination Act (MBL) apply. Conciliation negotiations must be required by the relevant trade union within four months from knowledge of the damaging act and within two years from the act itself (Sec. 64 MBL). A lawsuit shall be presented within three months after terminating such negotiations (Sec. 65). If an employee cannot be represented by a trade union he or she must present the claim to the court within four months from knowledge of the damaging act and within two years from the act itself (Sec. 66 MBL).

²⁶² The Equality Ombudsman cannot use this rule. It only applies to private persons. An anti-discrimination bureau, as a legal person under private law, would be able to use it. See for instance Court of Appeal over Scania and Blekinge case FT 1948-12, Forum for Equal Rights v. IKEA (judgment of 18.03.2013). An anti-discrimination bureau helped a mother to sue IKEA for not letting her disabled daughter play in the playroom. She demanded SEK 20 000 (EUR 2 200) as a discrimination award. IKEA admitted that they had treated the daughter badly. They accepted SEK 20 000 as fair compensation but they would not admit to discrimination. The case was tried both by the district court and the appeal court merely because the classification of this as discrimination or not was important to both parties.

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 Sweden trade unions, the Equality Ombudsman and some non-profit organisations are entitled to act on behalf of victims of discrimination.

Labour unions have legal standing to litigate discrimination cases where one of their members is involved, according to Chapter 4 Section 5 of the Labour Procedure Act. The Equality Ombudsman can also act on behalf of a claimant. The right of the Equality Ombudsman to represent a victim is secondary to this right of the labour organisation according to Chapter 6 Section 2 passage 3 of the Discrimination Act.

Chapter 6 Section 2 of the Discrimination Act gives non-profit organisations whose statutes state that they are to look after their members the right to bring actions in their own name as a party representing an individual person. The association must have the consent of the individual and be suited to representing the individual in the case, taking account of its activities and its interest in the matter, its financial ability to bring an action and other circumstances, and its right is secondary to that of a trade union in the employment field. Anti-discrimination bureaux²⁶³ have been allowed to do this, too, although it is not entirely certain that the Discrimination Act gives them this right (they were created not for the benefit of their members but for everybody who suffers discrimination, and some of them do not allow individuals, including those they represent, to be members).²⁶⁴

b) Engaging in support of victims of discrimination

In Sweden, any organisation is entitled to act in support of victims of discrimination.

Assuming the victim has agreed, organisations (or at least individuals from such organisations) can support such complaints. According to Swedish procedural law, anyone can engage in proceedings or support a complaint according to the Code on Civil and Criminal Procedure (1942:740) Chapter 12 Section 22. The person is presented to the court and the court makes a formal decision to accept that person as a process aid (*rättegångsbiträde*). If the person is law abiding and does not risk becoming involved in the proceedings as a witness or something similar, there is no problem. A process aid (*rättegångsbiträde*) may speak on behalf of the claimant and the claimant is bound by what he or she says or does, unless the claimant immediately declares a different opinion.

There are no special regulations on the rights of the churches in this matter. Nonetheless, some religious communities engage themselves in the work of the private anti-discrimination bureaux in the country, along with other NGOs such as the Swedish Red Cross and Save the Children.

c) Actio popularis

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

When an organisation goes to court in its own name in Sweden (see above a), this must be done in order to support or represent a specific victim.

²⁶³ Local anti-discrimination bureaux are idealistic organisations whose members are other organisations and sometimes individuals. They have been created in order to combat discrimination on all the grounds of discrimination. They typically provide free legal advice to persons suffering from discrimination. They also take part in public debate, arrange seminars for the general public and so on.

²⁶⁴ See Göta Court of Appeal, Judgment of 30.09.2011, Örebro Rättighetscenter v. Götavi Invest AB, Case No FT 198-11.

d) Class action

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

There is a possibility under Swedish law, however – albeit only outside employment law²⁶⁵ – to submit a group petition (Act on Group Petitions, Lag [2002:599] om grupprättegång). This means that a person can pursue a lawsuit on their own behalf, but with legal consequences for other persons, even though they are not parties to the case.²⁶⁶ This kind of lawsuit can also be pursued by organisations.²⁶⁷ However, the act does not make it possible for organisations to act as a representative or agent for an individual.²⁶⁸ Only organisations fulfilling the demands required by the Discrimination Act can do that (see above 6.2 a).

Only groups representing either economic operators (*näringsidkare*) or consumers can use the Act on Group Petitions. The group cannot be constituted by persons sharing, for instance, a disability or an ethnicity. If a restaurant is inaccessible for persons in a wheelchair, the group victims would consist of every person with a disability who had wanted to eat there but had problems entering it. Such a group is not appropriate with regard to its size and delimitation, and the conditions for applying the Act on Group Petitions would not be present.²⁶⁹

However, if many persons with a disability buy a product suitable for their medical problems and it does not function properly, they may as consumers start a group petition case and be represented by a disability organisation.²⁷⁰

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

In Sweden, national law requires a partial shift of the burden of proof from the complainant to the respondent.

A shift of the burden of proof is required in Chapter 6 Section 3 of the Discrimination Act.

'If a person ... demonstrates reason to presume that he or she has been discriminated against ... the defendant is required to show that discrimination or reprisals have not occurred.'

This section applies to all six forms of discrimination including harassment and the new form of discrimination, lack of accessibility. The victim of discrimination must be able to present facts that make it possible to presume that discrimination has occurred (a similar situation and unfavourable treatment). Thereafter the burden of proof is shifted to the other party who must show that one of the requirements is not fulfilled or that the unfavourable treatment was not associated with the ground in question. No intent to discriminate is required.

²⁶⁵ Swedish labour law is built on the single channel model. The 'workers' influence shall be channelled *only* through the trade unions. Allowing the 'workers' to create groups and to go to court in another way would not be consistent with this model.

²⁶⁶ If a group is created the court need not treat each member of the group as a party all the time. The court must know all the members of the group. The judgment will be legally binding on all the members of the group. However, only big and principally important developments need to be communicated by the court to all the group members.

²⁶⁷ Petitions by organisations are regulated by section 5 of the law, but I am not aware of any case law on this paragraph.

²⁶⁸ See, for instance, prop. 2002/2003:65 p. 167.

²⁶⁹ See Section 8.

²⁷⁰ To the author's knowledge this has never happened.

It is hard to prove a *prima facie* case of discrimination in the Labour Court. It seems to be less difficult to prove a *prima facie* case in the ordinary court system. Håkan Sandesjö (the temporary Equality Ombudsman for most of 2011)²⁷¹ made a preliminary study for the Ministry of Integration and Equality on judgments in discrimination cases between 1999 and 2009 involving the four former discrimination Ombudsmen. The success rate in the general court system is 70.8 %. In the Labour Court the rate is 19.5 % and, if the discrimination is on the ground of ethnicity, the rate of success drops to 4.3 %.²⁷²

In their book explaining the new Discrimination Act, Fransson and Stüber point out a possible difference in the handling of the burden of proof.²⁷³ The Supreme Court treats the less favourable treatment in a similar situation as the fact that makes the presumption apply. The eased level of proof thus sometimes applies when the claimant proves a similar situation and the less favourable treatment.²⁷⁴ The Labour Court applies the presumption more narrowly. The claimant must always prove the similar situation and the less favourable treatment according to normal standards of proof. The presumption applies only to the causal link between these two facts and the discrimination ground. If that is so, the Labour Court may apply the rules on shared burden of proof in a too restricted way, especially with regard to ethnicity.²⁷⁵

The difference between the civil courts and the Labour Court have also been analysed in a Government white paper. The inquiry was supportive of the Labour Court and made a proposal for modification of the legal rule.²⁷⁶

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

In Sweden, there are legal measures of protection against victimisation.

Victimisation is forbidden in Chapter 2 Sections 18 and 19 of the Discrimination Act. It is defined in the preparatory work as acts, statements and omission to act which leads to damage or a sense of discomfort for the individual.²⁷⁷

The prohibition protects all persons involved in an investigation including witnesses and persons reporting discrimination or in other ways helping the victim. According to Chapter 6 Section 3 the reversed burden of proof applies in victimisation cases.

²⁷¹ The replacement of the former Ombudsman Katri Linna took place in February 2011. Agneta Broberg started on 1 October 2011. Sandesjö was not involved with the Equality Ombudsman when the report was made in 2010.

²⁷² Sandesjö 2010 (Jurcom AB), *Domar i diskrimineringsmål 1999-2009*, p. 11.

²⁷³ Fransson–Stüber 2015, *The Discrimination Act Commented*, second edition, Chapter 6 Section 3. Cf. Sandesjö 2010, p. 14. In cases where the rule on burden of proof has been decisive the success rate in the general court system was 90 % against 19 % in the Labour Court.

²⁷⁴ Cf. Supreme Court (Nja 2006 p. 170): the Ombudsman Against Discrimination due to Sexual Orientation v. Restaurang Fridhem Handelsbolag (judgment of 28.03.2006). The main question was whether the same-sex couple had 'snogged' or merely shown affection, and the restaurant owner failed to prove they had been snogging.

²⁷⁵ There are other possible explanations for the difference in the claimants' success rates. One possible explanation is that obvious cases of discrimination are often settled in the negotiations between the employer and the trade union at a local or central level, which must take place before going to the Labour Court if a trade union is representing one of its members. There is also an ongoing discussion, however, on whether judges appointed by trade unions and employer organisations are neutral if important parts of the collective bargaining system are affected by the outcome. Cf. Sandesjö 2010, p. 18.

²⁷⁶ Government White Paper 2016:87.

²⁷⁷ Government bill 2007/08 p. 531-532.

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

The basic sanction in the Discrimination Act is the discrimination award, which is regulated in Chapter 5 Section 1. This is complemented by the possibility to declare certain acts like termination of contracts or discriminatory contract clauses void, which is regulated in Chapter 5 Section 3. There are no other remedies open to the individual who has suffered discrimination.²⁷⁸

The concept discrimination award has been created to make it easier for the courts to allow higher damages. Discrimination awards are not supposed to be in line with the low general levels of civil damages in other legal areas. The award includes a right to *damages for the violation* caused by the discrimination. Chapter 5 Section 1 also requires the courts to give *particular attention to the purpose of discouraging future infringements*.

In working life there is a basic right to *economic damages*. However, in recruitment and promotion cases, the individual is not considered to have a right to obtain the employment or promotion in question.²⁷⁹ Economic injuries are thus not compensated for. The violation still leads to a non-economic injury, which is compensated. As is usually the case in Swedish labour law, if it is reasonable, damages can occasionally be reduced or lapse completely. Depending on the discriminatory act, other labour law provisions may apply in parallel, such as the rules of the Employment Protection Act in cases of dismissal or those of the Co-Determination Act in cases where a collective agreement is violated.

Invalidity of provisions in collective agreements and in individual contracts is possible in all areas of the law according to Chapter 5 Sec 3.

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

Violations of the penal provision on unlawful discrimination are punished by a fine or imprisonment for a period not exceeding one year and can result in an obligation to pay financial compensation in accordance with Chapter 16 Section 9 of the Penal Code.²⁸⁰ The maximum prison sentence for hate speech, as set out in Chapter 16 Section 8, is two years.

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

In such cases, a complaint may also result in sanctions against the individual directly responsible for the actions.

²⁷⁸ With regard to breaches of active duties, a court order involving a financial penalty can be issued.

²⁷⁹ In the state sector, however, a consequence of the public law character of the constitutional provisions as regards objective grounds on hiring is that a discriminatory decision may be appealed through administrative procedures, with the discriminated person installed in the position in question. Cf. Stockholm Municipal Court, case B-16349-13, Public Prosecutor v. Jonas Taipani Thesén (judgment of 18.02.2015). The three victims were each awarded SEK 5 000 (EUR 550) in a case of refused admittance to a shop. The owner was fined the same amount (100 income-related units). If the case had been considered under the Discrimination Act, the discrimination award would have been around SEK 15 000 (EUR 1 650), and the rules on shared burden of proof would have been applied. In this case, the victims called the police, who may not act in civil law disputes (including those subject to the Discrimination Act), and the police collected evidence (from the shop's video surveillance system) based on the violation of the Penal Code and turned the case over to the public prosecutor.

With regard to the sanctions under the Discrimination Act, there is no difference between the public sector and the private sector; neither is there a difference between those in or not in employment.²⁸¹

b) Ceiling and amount of compensation

The record amount was set in 2014 by Svea Court of Appeal in a child custody case. Having a child taken away from its parents was seen as the worst injury that could be suffered, and therefore the discrimination award was set at SEK 150 000 (EUR 16 500) for each of the parties involved (both parents and the child).²⁸²

There are no statistics on the average amount of compensation to victims.

It is still too early to make definitive conclusions but, so far, according to the Equality Ombudsman, the introduction of discrimination awards have not (SIC) resulted in any significant (*nämnvärd*) rise in the amount awarded.²⁸³

The Equality Ombudsman previously decided to proceed with a number of cases regarding the labour market, asking for SEK 75 000 to SEK 400 000 (EUR 8 300 to SEK 44 000). The Labour Court has previously awarded between SEK 30 000 and SEK 50 000 (EUR 3 300 to EUR 5 600) in similar cases. The Ombudsman has further settled several cases at the level of SEK 100 000 (EUR 11 000), with one record-breaking case of SEK 200 000 (EUR 22 000).²⁸⁴ This settlement is impressive in relation to the discrimination awards in AD 2010 No. 91²⁸⁵ (SEK 75 000 or approximately EUR 8 300); AD 2011 No. 37²⁸⁶ SEK 125 000 (EUR 13 800). In the former case, the Equality Ombudsman asked for SEK 300 000 (EUR 33 000); in the latter case the Ombudsman asked for SEK 400 000 (EUR 44 000) as a discrimination award and SEK 100 000 (EUR 11 000) for the violation of the Employment Protection Act. An amount of SEK 125 000 (approximately EUR 13 800) was awarded in a one-for-all compensation for the violation of both acts.

However, since the preparatory work on which the new Discrimination Act is based is vague regarding the expected new levels of compensation, there is a large amount of legal uncertainty on the matter. The Supreme Court decided two cases on the same day.²⁸⁷ In the Veolia case, a bus driver had problems closing the doors of the bus. Two immigrants were sitting together, one of them had her knee close to the button calling for the bus to stop. The bus driver walked over to them and removed her knee from the vicinity of the button (in a non-discriminatory way according to the courts). He also said that they should return to Taliban country and made a rude gesture. The discrimination award was set by the appeal court at SEK 20 000 (EUR 2 200) each.²⁸⁸ The Supreme Court decided that the violation was severe – as severe as violation by word without threats can possibly be. The violation was worth SEK 15 000 (EUR 1 650) each. Furthermore, SEK 20 000 (EUR 2 200)

²⁸¹ With regard to alternative procedures for public employees, see Section 6.1 (a) above.

²⁸² Svea Court of Appeal case T 5096, The Equality Ombudsman v. Sigtuna Municipality (judgment of 11.04.2014). <http://www.do.se/globalassets/diskrimineringsarenden/hovratt/dom-hovratt-sigtuna-kommun-anm-2011274.pdf>.

²⁸³ Equality Ombudsman, Annual Report 2012, p. 24.

²⁸⁴ Case 2009/1640 (Telenor). The case regarded parental leave but as it is the record sum it should be reported even if it is discrimination outside the grounds covered by this report.

²⁸⁵ Equality Ombudsman v. Swedish Agency for Government Employers (judgment of 15.12.2010), A.H., a 62-year-old woman applied for a position as a job coach with the Public Employment Service. She was not called to an interview and two women aged 27 and 36 were hired. A.H. was equally qualified as one of the persons hired and better qualified than the other one. Thus a presumption of age discrimination arose. She was also better qualified compared with a man who got an interview, and therefore a presumption of sex discrimination arose as well.

²⁸⁶ Collective agreement permitting the employer to dismiss all employees above the age of 60 in a redundancy case (described in section 4.7.1).

²⁸⁷ Supreme Court case T 3592-13, Equality Ombudsman v. Veolia (judgment of 26.06.2014). The Second case was Supreme Court case T 5507-12, Equality Ombudsman v. Stockholm County (judgment of 26.06.2014) Nja 2014 p. 499.

²⁸⁸ In Sweden the ground of ethnicity covers race as well.

should be added as a prevention supplement. Normally a prevention supplement should be the same amount as for the violation.

Had one person been discriminated against, that person would have received SEK 15 000 plus the full prevention fee (SEK 15 000 plus SEK 15 000).²⁸⁹ Since two persons would share the prevention fee, it was set at SEK 20 000, as SEK 30 000 would have been too hard on the perpetrator.

There are some situations where one could identify a normal level of compensation, for instance in the case of a person not being allowed to eat at a restaurant, resulting in damages of SEK 15 000 (EUR 1 700) under normal circumstances. It is unclear what will happen to these levels. The author believes that the violation itself must be smaller than in the bus case. However, some restaurant owners want to let only the right sort of people in. The prevention fee could therefore be much higher compared with the bus case, where the employer certainly did not want their bus driver to misbehave.

As to sanctions, Swedish law generally provides for very low levels of damages. Damages of for example even SEK 80 000 (EUR 8 900) will hardly deter a larger employer. For large employers or businesses the threat of publicity is real and much more important.²⁹⁰ For small employers or small businesses, the sanctions may be said to be a deterrent.

c) Assessment of the sanctions

An economic efficiency analysis of discrimination awards has been undertaken by a professor of national economics, paid for by the Equality Ombudsman.²⁹¹ From an economic standpoint, there are clear deficiencies. The most basic is that the prevention supplement seems to be too low to prevent future infringements. From an econometric efficiency standpoint, the discrimination award would sometimes need to be absurdly high if the low detection risk that exists in many areas was to be properly taken into account. The formula for multiplying the damage done to the victim by the inverse detection risk is theoretically necessary if the appropriate effort to avoid discrimination is to be undertaken by a rational employer. The author believes that, if the discrimination award is thus 'Americanised' and is totally unconnected to civil damages in other areas of law in Sweden, more harm than good will be done to the anti-discrimination cause (as is also the opinion of the economics professor writing the report).²⁹² The most interesting part of the report is the description

²⁸⁹ For those who read Swedish and have access to this fee-based database, an interesting article by Håkan Andersson, a professor who specialises in all aspects of damages, can be found here: <https://www5.infotorg.se/rb/premium/civilratt/allmanformogenhetsratt/skadestandsratt/article211549.ece?q=%25222008%253A567%2522%2B%2BANDNOT%2Bmeta.collection%253ASFSA02%2B%2BANDNOT%2Bmeta.collection%253ASFSR02%2B%2BANDNOT%2Bmeta.collection%253ASFST02%2B%2BANDNOT%2Bmeta.collection%253AREGR02%2B%2BANDNOT%2Bmeta.collection%253AKKV102&id=211549&start=1&filter=&kontext=K&rID=1429613335137&index=10&desc=Fria+s%C3%B6kord+%282008%3A567%29&sf=QD&fhe=-1&docType=plar&sortby=sortdat&db=ALLA>.

²⁹⁰ See for instance Court of Appeal on Scania and Blekinge case FT 1948-12, Forum for Equal Rights v. IKEA (judgment of 18.03.2013). An anti-discrimination bureau helped a mother to sue IKEA for not letting her disabled daughter play in the playroom. She demanded SEK 20 000 (EUR 2 200) as a discrimination award. IKEA admitted that they had treated the daughter badly. They accepted SEK 20 000 as fair compensation but would not admit to discrimination. The case was tried both by the district court and the appeal court merely because the classification of this as discrimination or not was important to both parties. The author knows of an employment case regarding promotion, where an anti-discrimination bureau sued for SEK 20 000 and settled for SEK 70 000. The settlement included a secrecy clause of high value to the discriminator.

²⁹¹ Stenek, J, En Samhällsekonomisk analys av diskrimineringsersättningen (2015-12-17), available from the Equality Ombudsman – document LED 2015/299 17.

²⁹² Cf. Stenek J (above) p. 21. He cites an example of employment discrimination where the detection risk is probably below 0.1 % and where a EUR 2 000 evaluation of the damage to the individual would result in a EUR 2 million prevention supplement. He wisely concludes that such high sums would be seen as unfair lottery winnings for the individuals receiving them and that such a system would lose public support in the long run. The Equality Ombudsman has taken no formal position on the content of this report and plans to allow the discussion to continue on issues such as whether a raised level of discrimination award could be made more acceptable if the state received the extra money.

of which discrimination situations cause most damage (some also cause damage to third parties), something which has been absent from the discussions on prevention supplements.

There has still been no expert discussion suggesting any workable changes to the sanctioning system under the Discrimination Act, and an assessment still needs to be made from a common sense starting point.

As regards *the principle of effectiveness*, it is the opinion of the author that Swedish regulations in this area do meet the standards of Community Law on an overall basis.

In the labour market, the high rates of trade union affiliation normally imply that the individual employee can turn to his or her union for support in cases of discrimination, and in cases where the individual is not organised or the union fails to support him or her, there is always the Equality Ombudsman. One could, however, call into question the absence of a right to damages for economic loss in cases of recruitment and promotions.²⁹³

Outside the labour market, the sharply reduced civil damages in cases where discrimination is proved by situation testing probably go against the principle of effectiveness, according to the author, at least with regard to night clubs.²⁹⁴ But this legal situation may change with the Discrimination Act, when the Supreme Court by law will have to give particular attention to the purpose of discouraging future infringements. The author believes that the new Supreme Court case from 2014²⁹⁵ is well reasoned, which makes it possible to state that the damage to the individual in a case where the individual willingly participates in situation testing is small, although the importance of stopping an economically profitable discriminatory behaviour by a club owner must lead to a high prevention supplement.

The Equality Ombudsman is of the opinion that the low awards to persons suffering from discrimination with regard to goods and services is a real problem (SEK 20 000 or EUR 2 400 being a normal award).²⁹⁶ However, the author believes that the 2014 Supreme Court decision may improve the situation. The clear concept of small loss to the individual (the product may have been bought elsewhere) and a situation where many people refuse Roma persons because they believe them to be stealing should result in a high prevention supplement. The situation of Roma being refused various services repeatedly and instances of a homosexual person occasionally meeting somebody with severe prejudice do not (according to the author) merit the same amount in terms of prevention supplement.²⁹⁷

The fact that harassment between fellow workers does not amount to discrimination and cannot lead to any compensation²⁹⁸ unless the employer has been negligent in dealing with the problem is another example of where the effectiveness of the legal sanctions may be questioned. The employer can only be held responsible for the additional damage resulting from his or her negligence.

²⁹³ Cf. SOU 2004:55 p. 313.

²⁹⁴ The Supreme Court, *Escape Bar and Restaurant v. The Ombudsman Against Ethnic Discrimination* (case T-2224-07 judgment of 01.10.2008). Nightclubs have strong economic incentives to give preference to high-status persons and exclude low-status persons when admitting guest. Reducing the civil damages sharply for the only effective and available means to prove such discrimination will probably lead to continued discrimination based on a cost-benefit analysis by the nightclub owner.

²⁹⁵ Supreme Court case T 3592-13, *Equality Ombudsman v. Veolia* (judgment of 26.06.2014). The second case was Supreme Court case T 5507-12, *Equality Ombudsman v. Stockholm County* (judgment of 26.06.2014) together known as *Nja 2014* p. 499. See above (b).

²⁹⁶ Equality Ombudsman Annual Report 2014, p. 54.

²⁹⁷ This part is speculative. We know only that the basic rule is that the prevention supplement should normally be equal to the damage caused by the violation. We do not know which situations merit a higher prevention supplement. In the *Veolia* case the employer reprimanded the driver and apologised to the two passengers. With Roma discrimination the shopkeeper may encourage the staff to behave differently when doing business with Roma persons, something that ought to raise the prevention supplement in a big way.

²⁹⁸ The only option for the employee is penal law provisions outside the discrimination field (e.g. rules on insult).

Concerning the principle of equivalence, the Labour Court regularly makes reference to the level of damages that are generally paid in labour law disputes. When the ordinary courts add the prevention supplement to the value of the violation itself, the result is that the discrimination award is high in relation to economic compensation in other areas.²⁹⁹ In the author's opinion, there is no doubt that the principle of equivalence has been met.³⁰⁰

²⁹⁹ See, for instance, Labour Court case 2002 No. 45 and 2002 No. 102, respectively.

³⁰⁰ Same opinion, SOU 2004:55 pp. 309 ff.

7 BODIES FOR THE PROMOTION OF EQUAL TREATMENT (Article 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 body designated for the promotion of equal treatment irrespective of racial/ethnic origin according to the Racial Equality Directive is the Equality Ombudsman. It was created in 2008 by the Discrimination Act (2008:567) and the Equality Ombudsman Act (2008:567).³⁰¹

The trade unions and the Equality Ombudsman are the main organisations that currently support victims in bringing their complaints.

There are 15 local anti-discrimination bureaux that provide advice to victims of discrimination and sometimes represent them in court.³⁰² So far they have limited the risks by taking cases regarding smaller amounts and thus not taking the risk of paying the opposite parties full legal expenses.³⁰³ Normally a local anti-discrimination bureau asks the client to contact the Equality Ombudsman if the client needs financial assistance to go to court.³⁰⁴ Local anti-discrimination bureaux are idealistic organisations³⁰⁵ working to combat discrimination on all grounds. Anyone can set up an anti-discrimination bureau. Ordinance 2002:989 on state support for activities to counteract discrimination allows organisations to apply for financial support. The ordinance requires the organisation to provide free legal advice to persons suffering from discrimination and also to take part in the public debate. It also arranges seminars for the general public and so on. Each local anti-discrimination bureau applies annually for new funding from the Agency for Youth and Civil Society, which is an authority under the Culture and Democracy Ministry. New bureaux can always be established, and they may therefore start to compete for funds. If the money allocated to this particular support is used up, the funding stops. New bureaux will then not be able to get any funding. In 2017, SEK 13.5 million (EUR 1.5 million) will be given to the 15 local anti-discrimination bureaux, each receiving an equal share through the Swedish Agency for Youth and Civil Society (an increase of SEK 1.5 million).³⁰⁶

The bureaux use the money for information and public opinion work, as well as for helping individuals. The anti-discrimination bureaux had 922 cases regarding the Discrimination Act in 2014.³⁰⁷ Nearly half (434) were about ethnic discrimination. There were 572 settlements or other local solutions (an apology can count as a local solution if the victim is satisfied).³⁰⁸ If a settlement cannot be reached and the anti-discrimination bureau strongly suspects discrimination, it normally refers the case to the Equality Ombudsman, the School Inspectorate, the Child and Pupil Ombudsman or another state institution.³⁰⁹

³⁰¹ These acts were passed at the same time by the Parliament. Chapter 4 Sections 1-6 of the Discrimination Act (Diskrimineringslagen 2008:567 adopted on 05.06.2008), together with the Equality Ombudsman Act (Lag om Diskrimineringsombudsmannen 2008:568 adopted on 05.06.2008), provide complete legal instructions with regard to the authority.

³⁰² <http://www.adbsverige.se/>. On this site the number given is 16 but only 15 of them are active and will get state support in 2017. See <https://www.mucf.se/antidiskriminerings-verksamhet>

³⁰³ Code of Legal Procedure (Rättegångsbalk 1942:740), adopted on 18.07.1942. Ch. 1 Sec. 3 d, in conjunction with Ch. 17 Sec. 8 a, says that if the procedure is about something worth less than approximately EUR 2 400 (half the basic price unit), the right of the winning party to have legal costs reimbursed by the unsuccessful party is limited in a quite narrow way.

³⁰⁴ See Equality Ombudsman Annual Report 2015, p. 43. 13 cases were transferred from local anti-discrimination bureaux to the Equality Ombudsman in 2015.

³⁰⁵ Foundations are allowed to apply for the financial support as well, but the author does not know of any existing anti-discrimination bureaux that have been created this way.

³⁰⁶ <https://www.mucf.se/antidiskriminerings-verksamhet>.

³⁰⁷ Sweden's Anti-Discrimination Bureaus, Annual Report 2014, p. 2 (still (as at 2017) the latest year available for national figures).

³⁰⁸ Sweden's Anti-Discrimination Bureaus, Annual Report 2014, p. 4.

³⁰⁹ Swedish Anti-Discrimination Bureaus Annual Report 2012, pp. 2-6.

The fact that their budgets are limited necessitates a restrictive approach regarding going to court.

The chance of a positive outcome for the claimant (settlement or other local solution) is thus high in relation to the number of cases. The focus on such settlements clearly differentiates the local anti-discrimination bureaus from the Equality Ombudsman.³¹⁰

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

The Equality Ombudsman works under the Government and the Ministry for Culture and Democracy. It is a governmental authority. In Sweden, all governmental authorities are independent when deciding individual cases according to the Instrument of Government Chapter 12 Section 2. Trying to influence any governmental authority on the handling of an individual case is one of the worst things a minister can do. Not even the Parliament is allowed to do that. Instructions – regardless of whether it is the Government or the Parliament that issues the instructions – must consist of general principles on how to act.

The Equality Ombudsman is funded by the state, but its basic instructions are given in laws. All decisions by the Ombudsman are in principle made by the Ombudsman herself. Any other person making decisions does so on delegation, with authority ultimately being traced back to the Ombudsman. Should any decision violate the law governing the activities of the Equality Ombudsman, the Chancellor of Justice (*justitiekanslern*, known as *JK*) may intervene, because the Equality Ombudsman is an authority working under the Government. The Parliamentary Ombudsman (*Justitieombudsmannen*, known as *JO*) may also intervene, because acts passed by the Parliament govern the activity of the Equality Ombudsman.

The very general nature of the instructions in the acts is important here. In the Discrimination Act there are, for instance, no rules on how to make decisions on which cases should be taken to court. Therefore, decisions of the Equality Ombudsman cannot violate any instruction and there will be no legal basis for the JK or JO to intervene. The JO and JK are the two most important supervising authorities in Sweden.

The independence of the Equality Ombudsman is enhanced in many ways, most importantly in that it receives its instructions in the form of laws enacted by the Parliament. Such instructions must by their nature be of a very general character. The general nature of these instructions protects the Equality Ombudsman from interference from the JK or JO. The Government is not allowed to use the normal tools to give general instructions to independent agencies, such as regulation letters, to control the activities of the Equality Ombudsman. The regulation letter of the Equality Ombudsman is void of instructions regarding politically sensitive choices.

There is no governing body. Such a body would have made the Equality Ombudsman less independent. Neither the Government nor any organisation has formal influence in decision making. Instead there is an advisory board regulated under Section 5 of the decree (2008:1401) with Instructions for the Equality Ombudsman. This board is chaired by the Ombudsman and has up to 10 members appointed by the Ombudsman for a term of two years.³¹¹

The Equality Ombudsman must be considered to be independent.

³¹⁰ Compare Government White Paper 2016:87, p. 244. This inquiry recommends that the Equality Ombudsman should adopt a similar policy towards local solutions.

³¹¹ This board first met on 9 February 2010. The members are highly qualified and have different academic and working experiences. They are diverse with regard to sex and ethnic background and they are paid. There is absolutely no other rule regarding their composition than the rule stating that the number shall not exceed 10. No NGO can claim a right to a seat, nor can the Ombudsman be required to appoint a certain number of members representing NGOs, employers, trade unions or any other group.

c) Grounds covered by the designated body/bodies

The Equality Ombudsman covers all seven grounds of discrimination: sex, sexual orientation, ethnicity, religion and belief, disability, age and transgender identity or expression.

The Equality Ombudsman has not taken on any individual case from a migrant or a newly arrived person. If they have done so, their home page does not show it. The Equality Ombudsman was very critical of Sweden's reform of its asylum rules with the aim of getting close to the lowest level permitted by international rules.³¹² Persons living under the threat of expulsion often avoid contacts which they believe might make the police aware of their whereabouts.

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

The Equality Ombudsman has the right to investigate complaints concerning discrimination as well as the right to represent individuals in cases that are of importance in terms of case law or otherwise. The instruction given in the Equality Ombudsman Act (2008:568) goes beyond discrimination and instructs the Ombudsman to work for 'equal rights and possibilities'.³¹³ The Ombudsman has the right to give independent advice and support more generally to individuals and institutions engaged in education, information and opinion-shaping efforts – including independent surveys, reports and recommendations – to combat discrimination and to propose legislative measures to the Government.

The competences are exercised independently. The main problem is the small number of cases being settled or decided by a court. A person who does not have the resources to go to court him or herself will find it hard to get priority with the Equality Ombudsman, which is currently focusing on cases of principal importance. Effectively protecting victims of discrimination was the focus of a governmental inquiry, which recommended that the Ombudsman investigate more cases.³¹⁴

e) Legal standing of the designated body/bodies

In Sweden, the Equality Ombudsman has legal standing to bring discrimination complaints (on behalf of identified victim(s)) or to intervene in legal cases concerning discrimination.

Chapter 4 of the Discrimination Act sets out the tasks of the Equality Ombudsman, and Section 2 refers to its right under Chapter 6 Section 2 to go to court on behalf of an individual who has suffered discrimination.

f) Quasi-judicial competences

In Sweden, the Equality Ombudsman sometimes functions in a quasi-judicial way.

When dealing with the prohibition of discrimination, the Equality Ombudsman is in principle neutral when a claimant initiates a case. After hearing both sides, the Ombudsman evaluates the evidence. On the basis of this evaluation, the Ombudsman may decide to go to court as a party on behalf of the claimant. At this point the role of the Ombudsman

³¹² Equality Ombudsman, LED 2016/57.

³¹³ Section 2.

³¹⁴ See Committee Directives 2014:10 and 2014:79 and Government White Paper 2016:87, p. 25. A case taken to the point where the alleged discriminator is asked to reply creates a basic investigation even if the Ombudsman decides not to go to court. This may cause the alleged discriminator to change their practice, and it may be helpful should the individual decide to go to court.

changes. If the Ombudsman thinks more evidence is needed for a conviction, it can actively help the claimant in obtaining it.³¹⁵

Here the Ombudsman is at an advantage compared with an ordinary lawyer, as the Ombudsman may, according to Chapter 4 Section 3 of the Discrimination Act, order the suspected discriminator to provide information, allow access to the workplace and enter into discussions. Such an order can be subjected to a financial penalty.³¹⁶ The financial penalty will gain legal force only after a district court has ordered the payment. The legality of the order itself, as well as the reasonableness of the amount, can be decided upon by the district court. The Equality Ombudsman cannot impose other sanctions on the discriminator.

As regards active measures, the Ombudsman works as a normal authority, visiting employers and universities, checking their equality plans and so on. If somebody fails to fulfil their duties, the Board Against Discrimination³¹⁷ may – on the Ombudsman's application – issue an order to comply with a specific request before a certain date (or in the future), subject to a financial penalty in accordance with Chapter 4 Section 5 of the Discrimination Act. The financial penalty will gain legal force only after a district court has ordered the payment. The legality of the order itself – as well as the reasonableness of the amount – can be decided upon by the district court.

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

In Sweden, the Equality Ombudsman registers the number of complaints and decisions (by ground, field, type of discrimination, etc.). These data are available to the public.

The Equality Ombudsman registers complaints. It received 2 252 new complaints in 2016, related to the Discrimination Act or the Parental Leave Act.³¹⁸ A total of 204 cases were carefully investigated. In 13 of them, the Ombudsman initiated court proceedings.³¹⁹

There were 613 disability cases, 572 cases regarding ethnic origin, 277 cases regarding sex, 210 cases of alleged age discrimination, 124 cases relating to the religion ground, 49 cases regarding sexual orientation and 45 cases regarding transgender identity or expression. Protection during parental leave attracted 76 cases.³²⁰

³¹⁵ This process is partly responsible for the problems with regard to refused admittance to shops and restaurants. If the claimant calls the police they may (but rarely do) dispatch a car immediately and begin an inquiry into a crime of unlawful discrimination. If there is video surveillance they may secure it. By the time the Equality Ombudsman reaches the stage of collecting evidence, they will (despite Chapter 4 Section 3 of the Discrimination Act) no longer have any real chance of securing the video, and it will become a case of he-said, she-said. If, for instance, the business owner claims that it was a busy day and every guest needed to pay in advance, this is easily checked by a Police Officer going to the scene and immediately asking other guests if they paid in advance, not by the Equality Ombudsman, who would need to register the complaint, ask the business owner to explain him or herself and hear their explanation long after the event took place. See Equality Ombudsman Annual Report 2015 p. 50, describing problems proving discrimination with regard to services when it is no longer possible to identify witnesses.

³¹⁶ Ch. 4 Sec. 4. One difference compared with the previous legal situation is that the ombudsman can issue these orders without going through a discrimination board.

³¹⁷ The board is an administrative authority. It consists of a chairman and a vice-chairman, who must be judges. There are 11 other members. Two are appointed by the Government as neutral members. Six members are appointed by the Government on the suggestion of trade unions and employer organisations, one member is appointed by the Government as representing ethnic or religious minorities in Sweden, one is appointed on the suggestion of the Disabled Associations Cooperation Organisation, and one is appointed on the suggestion of the Swedish Federation for Lesbian, Gay, Bisexual and Transgender Rights.

³¹⁸ Equality Ombudsman Annual Report 2016, p. 40 and 42. There were a further 369 other cases.

³¹⁹ Equality Ombudsman, Annual Report 2016, p. 42. Four of those cases were related to the ground of sex (counting a pregnant transgender man as a sex case like other pregnancy cases). Three cases were ethnic cases and one regarded religion.

³²⁰ Equality Ombudsman, Annual Report 2016, pp. 40-77.

There was more than a fivefold increase in sexual³²¹ harassment cases, from 18 to 105 cases in 2015. This figure remains high in 2016 (135 cases). The majority of them (100 cases) concerned the education sector and many of them were transferred from the Schools Inspectorate. The Equality Ombudsman wants the Discrimination Act changed so that cases regarding primary and secondary education become the sole responsibility of the School Inspectorate. The Equality Ombudsman believes that, when it is in charge of such cases, the offending child is branded a deliberate perpetrator of sexual acts against victims.³²²

h) Roma and Travellers

There were at least 54 new discrimination cases concerning Roma at the Equality Ombudsman, with three settlements in 2014.³²³ The Ombudsman Against Ethnic Discrimination had a special obligation to assist the Roma population. It was instructed to give extra priority to this ethnicity in the 'regulation letters' it received from the Government.³²⁴ The main goal behind its policy towards the priority groups³²⁵ was to make them able to fend for themselves, i.e. able to bring cases to the court and to the Ombudsman. Educating them about discrimination law and identifying the discrimination they face were two important aspects.

Roma are included in the Equality Ombudsman's listing of priority areas for 2012-2016. This year, two individual Roma cases which were investigated and taken to court are discussed in the annual report. The first case concerned a restaurant with a dress code such that Roma persons were refused entry, and the other case concerned custody and visiting rights.³²⁶

Reference groups consisting of representatives of the priority group and the DO provide one way of performing these functions while at the same time building networks which may continue when the DO eventually steps back. In 2013 the Equality Ombudsman started a piece of work on the discrimination of Roma within the field of housing and social services.³²⁷

As the new Equality Ombudsman gets its instructions from the Parliament by law, its regulation letter is devoid of instructions. The law describes the competence widely, and no specific ethnic group is mentioned. It is for the Ombudsman to make the correct priorities.³²⁸ A report evaluating the work on the Roma situation and following up the report 'Discrimination against Roma in Sweden' from 2004 was published in 2011.³²⁹ There have

³²¹ In Sweden, the word 'sexual' (*sexuell*) relates to sexual intercourse or acts connected to a perpetrator's desire for sexual intercourse, including improper words or acts (for instance touching certain parts of another person's body). This can apply to persons of the same sex, but there is no separate statistic. The alternative form of harassment is harassment because of a person's (here follows an enumeration of all seven grounds of discrimination). Discrimination Act, Chapter 1 Section 4 points 4 and 5.

³²² Equality Ombudsman, Annual Report 2015, p. 55f. This is also suggested by Government White Paper 2016:87. The Government has signalled that this change will take place in the near future.

³²³ Telephone call, Mattias Falk, Equality Ombudsman, 06.03.2017. The figure for this year and last year (2015 and 2016) cannot be found out easily, as ethnicity is no longer recorded. The Equality Ombudsman has to read through each file and find out which ethnicity is concerned. In 2014, Stockholm County Council requested this information and the figure was thus easily available to the author. For the last two years, that has not been the case.

³²⁴ Every authority under the Government receives a 'regulation letter' once a year. It consists, *inter alia*, of instructions from the Government to the authority for the coming year. General instructions - like an instruction to give priority to the problems of the Roma population - are normal and are not considered to affect the authority's independence.

³²⁵ National ethnic minorities including Roma, persons originating from the middle east, Muslims, persons originating from Africa, women of non-European origin.

³²⁶ Equality Ombudsman Annual Report 2016, pp. 9 and 35. In the latter case only the decision to go to court came in 2016. The Ombudsman sued and settled in 2017.

³²⁷ Equality Ombudsman, Annual Report 2013, p-8.

³²⁸ Government bill 2007/08:95, p. 378 f.

³²⁹ Equality Ombudsman 2011, *Romers rättigheter* ('Roma Rights') - the latest comprehensive report from this source.

been many cases involving Roma, and the Ombudsman will analyse these cases and give guidelines on how to work on Roma issues in the future. Roma will no longer be a special group per se. They will be seen as one of the five national minorities. One of the Equality Ombudsman's main tasks is to combat discrimination in individual cases and, since the situation for Roma is harder than for other groups, there is likely to be a high number of cases from this ethnic group in the future as well.³³⁰

A very important settlement in 2017 concerned a Roma woman whose child had been taken into custody and placed with a non-Roma family. The mother was denied visiting rights. The municipality admitted that this decision had been based on stereotypic perceptions of Roma culture and that a further factor in the mistake was the fact that the woman was not allowed to communicate in her own language. The municipality agreed to pay a discrimination award.³³¹

Cases that were investigated but not taken to court in 2016 include those of several shops and restaurants that denied Roma customers service.³³² Such cases are hard to prove.

It is fair to say that Roma remain a de facto priority group.

³³⁰ Equality Ombudsman Annual Report 2014, p 53f. The discrimination of the Roma people with regard to goods, services and housing is a priority area. The Ombudsman strives to take up some such cases each year in order to keep the risk of being taken to court in the public mind. However, the Ombudsman is doubtful with regard to the effectiveness of this strategy (low amounts of discrimination awards being one problem). Compare Equality Ombudsman Annual Report 2016 pp. 9 and 35.

³³¹ Equality Ombudsman case 2016/1971. The case was settled in March 2017, and was very sensitive. The custody decision itself was not discriminatory (the mother could not take care of the child); it was only the decision on visiting rights which was discriminatory. Therefore, no further details are given. There are two types of settlements. One type is where the perpetrator denies discrimination but accepts that a mistake has been made and offers compensation. This settlement was of the other type, whereby the municipality accepted that their mistake amounted to discrimination.

³³² Equality Ombudsman Annual Report 2016, p. 35.

8 IMPLEMENTATION ISSUES

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

- a) Dissemination of information about legal protection against discrimination (Article 10 Directive 2000/43 and Article 12 Directive 2000/78)

One example is that the Equality Ombudsman participates in the training programmes of the Prosecutor General, which are directed at all public prosecutors. The same goes for the training programmes for judges organised by the National Courts Administration. Another example is the Ombudsman's work with the Swedish National Agency for Education and the Swedish School Inspectorate regarding discrimination, harassment and other degrading treatment of children in school.

The Ombudsman further participates as an expert or as a member of different official inquiries.

According to Ordinance 2001:526 on the Responsibility of Public Agencies to Implement the Government's Disability Policy, any public authority is under an obligation to make information available for different groups of people with disabilities through a number of means.

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

As has already been indicated, a fairly weak role is played by NGOs other than trade unions and employer organisations in Sweden, with the possible exception of the different organisations within the movement of people with disabilities. To the extent that there are NGOs, the Ombudsman has an ongoing dialogue.

NGOs working with discrimination are encouraged to be members of and to form local anti-discrimination bureaus. The Equality Ombudsman cooperates both with the national organisation and with the individual bureaus.

There is an educational programme (Using the Law as a Tool) where the Equality Ombudsman, together with local anti-discrimination bureaus, educates persons from non-profit organisations (mainly members of the organisations operating the local anti-discrimination bureaus) on the Discrimination Act. This was done twice in 2016, with 50 participants each time.³³³

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

As has already been indicated, the social partners traditionally play a key role in the Swedish labour market, and a variety of issues are collectively bargained and regulated by means of collective agreements. The new rules on active duties which entered into force at the start of 2017 have made it necessary for the Ombudsman to have contacts with the Confederation of Swedish Enterprise.³³⁴ These new rules expand the role of the trade unions with regard to active duties.

- d) Addressing the situation of Roma and Travellers

³³³ Equality Ombudsman, Annual Report 2016, p.19.

³³⁴ Equality Ombudsman Annual Report 2016, p. 1.

The Roma are one of five national minorities in Sweden. The Stockholm County Administrative Board has been given special responsibility for all five national minorities. It does so in cooperation with the Sami Parliament. The four other national minorities are not represented by an organisation which can be described as 'theirs'. Thus there is no longer an organisation specifically addressing all types of problems affecting Roma and Travellers. There is, however, a duty for the Administrative Board to continue the delegation's work towards local authorities.

Furthermore, the Government has adopted a Roma strategy for social inclusion, covering the years 2012-2032. The goal is that, at the end of the period, the Roma population shall have the same living standards with regard to housing, employment, education and so on, as the majority. Compiling documentation of violations committed by the state in the last 100 years and correcting it where it is possible is one element of this plan.

The Living History Forum is a Government agency which has been commissioned with the task of promoting issues relating to tolerance, democracy and human rights – with the Holocaust as its point of reference. It disseminates information, creating a dialogue with society at large on, *inter alia*, the situation of the Roma people.

In 2016 the Equality Ombudsman shifted the focus towards the Sami people and held roundtable discussions regarding possible future 'truth commissions'. One aim was to integrate a historical perspective into the Ombudsman's current work on discrimination.³³⁵ Another important principle is that the Sami's status as an indigenous minority should affect what should be regarded as discrimination.³³⁶

Even if there is no specialised work aimed at the Roma, some activities like the 2016 investigation into discriminating practices within social services originate from complaints and are of great relevance to the Roma people.³³⁷ There are four priority areas for the Equality Ombudsman: Sami, Roma, Muslims and harassment in schools. This investigation is of great relevance both for Muslims and for Roma.

The Commission on Antiziganism presented Government White Paper 2016:44. The majority of the members of the commission are Roma. Among the recommendations made to the Government is the creation of a National Roma Centre. It is suggested that this should be a governmental board, with a high proportion of Roma members.

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

a) Mechanisms

The relevant mechanisms involve the Ombudsman supervising the Discrimination Act in its entirety and the possibilities that this provides for individual claimants. In addition, the role played by the trade unions to support their members must also be mentioned, as well as the work done by the anti-discrimination bureaus. No Swedish act allows direct discrimination in areas where the Discrimination Act prohibits it. The author has not heard of a conflict of laws with regard to this. Generally legal principles such as good faith, good practice on the labour market and so on may be said to assist in combating discrimination.

b) Rules contrary to the principle of equality

The task of proposing legislation in order to implement the directive into Swedish national law was given to a special investigator, who presented her report in the spring of 2002.³³⁸

³³⁵ Equality Ombudsman Annual Report 2016, p. 3.

³³⁶ Ibid p. 16.

³³⁷ Ibid p. 50.

³³⁸ Government White Paper, 2002:43: An Extended Protection against Discrimination (Ett utvidgat skydd mot diskriminering, bet. SOU 2002:43).

However, the investigator did not, as required by Article 16(a) of the directive, carry out any general screening of laws and administrative provisions for incompatibilities with the requirements of the directive (at least not in any comprehensive way).³³⁹

This is probably more problematic in the area of ethnic discrimination, particularly with respect to indirect discrimination. Obvious examples of problematic provisions would include requirements regarding Swedish citizenship or holding a degree or diploma from a Swedish educational institution in order to be able to exercise certain professions. According to Hans Ytterberg (the former Ombudsman Against Discrimination on the Ground of Sexual Orientation), there are no discriminatory laws and provisions with respect to sexual orientation discrimination in employment or occupation still in force.³⁴⁰ However, according to Lappalainen, the measures undertaken thus far seem to have been insufficiently thorough, at least in terms of examining regulations or administrative provisions. The Government enquiry basically asserted that this was not needed, but without making more than a cursory analysis.

Such an analysis may be carried out in the near future. It is a part of the new (2016) national strategy for human rights to work actively to identify obstacles for businesses. This may spill over into ordinary employment as well.³⁴¹

³³⁹ Idem, page 143.

³⁴⁰ Ytterberg, Sexual Orientation report of 28 July 2004. This report still holds in the sense that there is no more recent report that has investigated the issue. The general opinion seems to be that there is no need to investigate the matter again. Lappalainen disagrees with this general opinion.

³⁴¹ Riksdagens skrivelse 2016/17:29 National Strategy for Human Rights, p. 13.

9 COORDINATION AT NATIONAL LEVEL

Sweden got a new Government in 2014. There is no ministry for integration in Sweden, and there is no longer an integration minister. In the new Government's principal programme from 3 October 2014 (*regeringsförklaringen*), the following is stated:

'The idea that a government shall have an integration policy that is separate from the ordinary policies of the labour market, education or social welfare is outmoded. The post of integration minister is therefore abolished.'

The labour market minister Ylva Johansson is responsible for the coordination of integration and diversity issues and heads this work unit. The minister for culture and democracy Alice Bah Kuhnke is responsible for the work against discrimination and is the head of the discrimination unit. Alice Bah Kuhnke seems to be the most important minister with regard to this report. If there is a problem with the Swedish Discrimination Act, she will be responsible rather than Ylva Johansson, even if the problem is labour market discrimination. Active measures to promote integration in the labour market will be the responsibility of Ylva Johansson. The same is true of almost any area. Discrimination on the housing market will be Alice Bah Kuhnke's responsibility, but the planning of housing or other active measures to avoid segregation will be the responsibility of the housing minister.

The current national strategy for human rights takes effect from October 2016.³⁴² It is not a plan with a beginning and an end, and it may be changed continuously. The ideology is the same here as for integration policy. The strategy emphasises that it is for individual ministries to deal with the particularities.³⁴³ Therefore, the strategy is devoid of concrete measurable goals like promoting employment for group Y to level X.

The Government's national strategy includes a national institution for human rights under the aegis of the Parliament.³⁴⁴

It also includes some things with possibly far-reaching consequences for this report, for instance an inquiry into how well Sweden is fulfilling the EU Charter of Fundamental Rights. The Government intends to follow (without promising a formal inquiry) how well authorities apply the principle of achieving conformity with EU law when possible.

This strategy suggests a strong willingness to adhere to international law.

³⁴² Skr 2016/17:29. Strategy for the National work on Human Rights.

³⁴³ Ibid p. 13.

³⁴⁴ The Government's power to dismiss and replace the Equality Ombudsman has resulted in it being degraded from A-status according to the Paris Principles. The new institute avoids this fate by operating under the Parliament (and having a framework describing the conditions under which such dismissals may occur).

10 CURRENT BEST PRACTICES

1. The Equality Ombudsman has analysed the cases reported to it on an aggregate level. This analysis is of a different kind. It focuses on identifying the situations where people believe that they have been discriminated against either by individuals or by structures. In many of these cases there is no legal discrimination (for instance because a similar situation cannot be proved). This year (2016), discriminatory norms and practices in social services have been in focus.³⁴⁵

There has also been a report in the 2016 publication *Chains of Events (Kedjor av händelser)*, based on 217 complaints made by Muslims in 2014.³⁴⁶ Here the analysis is focused on the victims' perception of being discriminated against – not on whether discrimination could be proved in a formal legal sense in the cases concerned. One of the situations described in this report concerned clothing used in the healthcare sector (p. 41). Muslim women believed that they were being forced to show bare skin for no good reason. The institutions believed that the clothing rules were motivated by objective hygienic reasons. This leads us to the next example of best practice.

2. One case of very high importance is that of the Karolinska institutet. A Muslim student on the institute's dental programme was required to engage in clinical practice with bare forearms. She asked to wear special disposable forearm protection instead of having bare forearms, because she did not want to show this part of her body to strangers.

The institute, relying on a National Health and Welfare Board ordinance (2007:19),³⁴⁷ made a formal decision denying this request. The state (defending the content of the ordinance) said that simple rules such as having bare forearms were easier to follow in everyday situations than complex rules with alternatives, and that simplicity was important for rules that need to be followed every day and with every patient. It also said that, as the arm are harder to clean, if covered, a disposable forearm protection could contaminate the working clothes when taken off as well as increasing the amount of waste produced. The state had experts from the institute itself and from the Public Health Authority testifying that having bare arms was necessary to achieve the hygienic standards required by the ordinance.

The Equality Ombudsman had a British expert describing the reasons why British authorities believe that there is no hygienic problem with disposable forearm protection.

The court decided that both the British expert's reason why disposable forearm protection was acceptable and the Swedish experts' statements on why there were genuine hygienic reasons against them seemed scientific and credible, and it was not possible to believe one more than the other. However, it is the education provider (alleged discriminator) who bears the burden of proof with regard to the justification of possible indirect discrimination. Therefore, the state lost the case. The state had legitimate concerns, but the state's expert admitted that the British example showed that such disposable protection had been used in the UK and no one had been able to demonstrate a relevant increase of infection risk there.

The woman was awarded SEK 5 000 (EUR 550) as a discrimination award. Normally, SEK 10 000 is a minimum award (SEK 5 000 for the injury and SEK 5 000 as a prevention supplement). In this case the injury was small (*måttlig*). The denial of the woman's demand was based on a serious evaluation of the situation and was addressed in a formal decision (it was not arbitrary) and, in future, every Muslim will be correctly treated by this education provider in such situations. A prevention supplement was therefore unnecessary.

³⁴⁵ Equality Ombudsman Annual report 2016, p. 50.

³⁴⁶ Equality Ombudsman, *Kedjor av händelser*, Report 2016:2, p. 25. This is all complaints in 2014 by persons who believed that the alleged discriminator perceived them as Muslims or who were Muslims and thought that the treatment could equally well be directed at their religion or ethnic background.

³⁴⁷ Today Ordinance (2015:10).

The state did not appeal the decision. It accepted the municipal court's decision that the rule in the ordinance was disproportionate. Indeed, this case substantially changed national practice in this regard.

It is hard to see an individual Swedish dental student winning such a case. Having a British expert comparing the British norms with the Swedish norms was necessary, and only the Equality Ombudsman has the resources to win such a case.³⁴⁸ The *Chain of Events* report's identification of this practice as one that is believed to be discriminatory by many Muslims made this case important. Cases of indirect discrimination often require careful scrutiny of a justification, something that is beyond most individuals, especially if it is a governmental authority, a municipality or a school that is applying a norm in the same way as it has always been applied, and for a legitimate reason such as the safety of patients.

3. Another very interesting principal shift is the new emphasis of the Equality Ombudsman to focus on future behaviour rather than seeking compensations to victims for wrongdoings in the past. One example is a state property firm that did not allow an employee to wear a headscarf. In this case, the Equality Ombudsman transferred the case from individual complaints to active general measures. It agreed with the employer on a new policy allowing headscarves. The Equality Ombudsman has stated that changing a bad practice for the future for the sake of others as well as for oneself is one way to allow more people to get redress (*upprättelse*).³⁴⁹ This is a sharp turnaround as, only a few years ago, the Equality Ombudsman regarded settlements as problematic if the discriminator did not admit to discrimination, and merely awarding economic compensation for a non-discriminatory error was regarded as insufficient redress for the victim.

A similar case concerned a person who was perceived by staff at the municipal swimming pool as a woman and who refused to cover her breasts because (s)he regarded him/herself as a not-woman. During the investigation of this individual case, the municipality changed its general rules on covering the breasts for persons who perceive themselves differently from how others perceive them. Under the new general rules, there was no longer a reason to go to court; if the victim wanted to pursue a discrimination award, (s)he had to go to court him(her)self.³⁵⁰

The author takes a highly positive view of this change. The combination of requiring a high level of discrimination award from the doctor who intentionally refused to accommodate a religious belief and treating a case as being about active general measures (where there is no compensation for the individual but only a possible fine for future infringements) for employers and service providers who recognise that they have a policy or practice that creates unnecessary exclusion and are willing to change it helps to find solutions and a middle ground. Anti-discrimination bureaus often focus on what needs to change and regard cases solved in a similar way as having a successful outcome.

Should the headscarf case or the pool case go to court, the court would most likely award the minimum discrimination award of SEK 10 000 that the Supreme Court has set for cases of instances of minor involuntary discrimination. However, the Equality Ombudsman applies a principle of not going to court if the discriminator amends their future behaviour, which helps to take discussions to an amicable level. Newspaper discussions on the new rules for swimwear for persons with transgender identity is much more likely to have a

³⁴⁸ Stockholm Municipal Court, case T 3905-15, Equality Ombudsman v. the Swedish State through Karolinska Institutet (judgment of 16.11.2016).

³⁴⁹ Equality Ombudsman Yearbook 2015, pp. 51 and 59.

³⁵⁰ Equality Ombudsman Yearbook 2015, p. 48. This is an important difference between the anti-discrimination bureaus and the Equality Ombudsman. The anti-discrimination bureaus would have regarded the swimming pool case as having a positive outcome, whereas the Equality Ombudsman formally decided that there was discrimination but no public interest requiring it to go to court. That is why the majority of cases taken on by anti-discrimination bureaus have a positive outcome (572 out of 922 in 2014). Anti-Discrimination Bureaus, Yearbook of 2014, pp. 2 and 4. This case is mentioned in the Equality Ombudsman Annual Report 2016 (p 39) as being a prime example of an important policy principle.

positive tone if no person or organisation has been branded a discriminator and no victim is suspected of having acted for personal gain.

11 SENSITIVE OR CONTROVERSIAL ISSUES

11.1 Potential breaches of the directives (if any)

Generally, Sweden fulfils the requirement set by the directives. The following eight points are problematic according to the author:

- The protection against discrimination or victimisation does not fully cover self-employed persons (section 3.2.2).
- All forms of discrimination, including harassment and instructions to discriminate, directed at employees from fellow workers or third parties are not prohibited directly (elaborated upon in section 2.4).
- Discrimination against legal persons is not prohibited in working life (3.1.2.a).
- The principle of vicarious liability in relation to discrimination law is restricted when employees act outside their authority to an extent that is problematic. Furthermore, the legal concept of 'employer' may be too narrow, as the employer is regarded as the legal person itself or the natural person who, as a representative of this legal person, makes decisions regarding the employees. The employer is thus directly responsible only when an employee discriminates against another employee *and* the latter is subordinated to or dependent upon the former (section 2.4.b).³⁵¹
- The definition of discrimination requires that a person has suffered disfavour – less favourable treatment. A discriminatory statement directed at the general public does not fulfil this definition. A discriminatory advertisement will instead fall under Chapter 3 of the Discrimination Act, and the possible sanctions for infringements of that chapter are clearly inadequate (section 2.2.a).³⁵²
- It seems to be easier to establish a *prima facie* case and to win discrimination cases in the ordinary court system compared with the Labour Court. It further seems to be very hard to win cases of ethnic discrimination in the Labour Court (section 6.3).
- In cases concerning employment, including promotional cases, there is no right to economic compensation based on lost pay (section 6.5.a).
- When implementing the prohibition on discrimination with regard to disability outside the Directive 2000/78, a different concept of direct discrimination, which does not conform to the demands of the directive, is sometimes used (section 3.2.9).³⁵³

³⁵¹ There is a general thinking on vicarious liability which is problematic, and Chapter 1 Section 4 point 5 and Chapter 2 Section 1 of the Discrimination Act (Diskrimineringslagen 2008:567), adopted on 05.06.2008, are two examples of this general thinking. Cf. Labour Court 2007 no 45 and 2011 no 19. In these two cases it is obvious that the worker/trainee had every reason to believe that the person with the alleged discriminatory behaviour was acting on behalf of the employer, but there is no protection for persons acting under such a belief however well founded that belief is.

³⁵² This is a much bigger problem than just dealing with xenophobic advertisements, like in *Firma Feryn*, European Court of Justice, case C-54/07, *Centrum voor gelijkheid van kansen en voor racismebestrijding v. Firma Feryn NV* (judgment of 10.07.2008). Chapter 3 of the Discrimination Act (Diskrimineringslagen 2008:567), adopted on 5 June 2008, regulates the duties of employers and education providers to actively counteract discrimination, among other things, through plans. Organisations can ignore these rules until the Equality Ombudsman issues an order subject to a financial penalty (*vite*). If they obey that order, they suffer no consequence for their violation of Chapter 3 duties. If it was possible to impose a sanction for a first-time offence where no particular individual had suffered more than others, there could be real improvements to the efficiency of the Swedish Discrimination Act.

³⁵³ The European Court of Justice regards statistical discrimination as a form of direct discrimination. Case C-236/09 (*Test Achats*) where the insurance providers were not allowed to use the sex of the customer in order to determine insurance fees is a prime example of that. The fact that men statistically have more accidents than women is not a valid defence for directly using a person's sex to determine the insurance fees for cars. However, with regard to disability and insurance, statistical differences between persons with a disability and healthy persons makes them not comparable, and thus a presumption of discrimination cannot arise. Please note that the fact that the concept of direct discrimination covers statistical discrimination is so strong that the directive in question (2004/113) contained a clause exempting the insurance sector, and it was this clause that got struck down by the ECJ. The Swedish Discrimination Act could have extended the protection for disability to services and then exempted the insurance sector as in Directive 2004/113. However, extending the protection for disability to the insurance sector and then defining a comparable situation as if statistical discrimination is not a form of direct discrimination cannot be right. If an EU concept such as direct discrimination is used then it must (according to the author) be used correctly.

The Equality Ombudsman is currently working hard on harassment cases and is trying to get a preliminary ruling from the ECJ. In Sweden, the claimant must show either that the offending employee has a managerial position or that the employer knows about the harassment but has not taken action. The Equality Ombudsman wants an answer to the following questions:³⁵⁴

1. Is the limitation of responsibility to employees with managerial positions in accordance with the directives?
2. If it is in accordance with the directives, what is the subjective requirement on the knowledge of the employer: ought they know, or is a higher barrier for the claimant allowed according to EU law?

11.2 Other issues of concern

The Equality Ombudsman is truly independent. The main areas of concern are:

- The sparsity of case law on indirect discrimination;
- The cost of going to court.

The vast majority of case law in Sweden regards direct discrimination. The sparsity of case law on indirect discrimination represents a missed opportunity. The prohibition of direct discrimination is based on a formal concept of justice, which is important. The prohibition of indirect discrimination is connected to a material concept of justice, as the disparate effect on different groups are at the core of it. In Sweden, we often fail to make use of this equally important prohibition and thus miss out on the material-justice side of discrimination law.

Even though the cost of going to court is not terribly expensive from a middle-class perspective, it is clear that many of the persons who suffer the worst discrimination cannot afford to defend their rights. For a person who discriminates against Roma or persons of African ethnic origin, for instance, the risk of ending up in court is small.

One alternative is to support the anti-discrimination bureaus so that they can take more cases to court. Another alternative is to give the county boards (*länsstyrelserna*) the task of monitoring discrimination within the county. For poor people suffering from discrimination, access to justice is the most pressing problem, according to the author.

Government White paper 2016:87, on measures to improve the implementation of the anti-discrimination principle, provided some arguments for the creation of a new Anti-Discrimination Board. However, this suggestion is not backed up by a concrete legislative proposal, as the white paper only describes general principles for it. Such a board would be able to make judgments (called decisions when made by such a board) and to grant discrimination awards above the threshold of SEK 22 500 (EUR 2 250) without the claimant bearing the risk of having to pay the opposite party's legal costs.

Creating an Anti-Discrimination Board is a good option according to the author. An Anti-Discrimination Board makes it (financially) risk free for an individual to make a claim. As an example, the rental boards handle thousands of cases each year and represent an effective mechanism for dealing with bad landlords.

The suggested principles for the new Anti-Discrimination Board would be very controversial. In the labour market, non-union-affiliated workers as well as union-affiliated

³⁵⁴ Two cases regarding sex (therefore not reported here) have been heard by the Labour Court this year (2016 no. 56 and 2016 no. 38). The Ombudsman won the cases but failed to get the legal answers (the discriminators were found to have managerial positions). There is one pending case in a municipal court on alleged harassment due to sexual orientation by a university teacher towards a student, where the second question is asked.

workers whose unions decide not to take up their cases would be able to go to the new Anti-Discrimination Board, which would be allowed to ask the CJEU for preliminary rulings. The Swedish Labour Court sees itself as the guardian of the Swedish labour-market model, and one of its unofficial tasks is to make sure that EU law does not conflict with this model. Having an Anti-Discrimination Board that can ask for a preliminary ruling in a type of case where the Labour Court has decided that such a request would be problematic is therefore of huge potential importance.

Unfortunately, the author believes that no important change will be made with regard to the problem of the cost of going to court.

12 LATEST DEVELOPMENTS IN 2016

12.1 Legislative amendments

There is a new (as of 1 January 2017) Chapter 3 of the Discrimination Act dealing with active measures. From 1 January 2017, both employers and education providers will have a duty to work actively on all seven grounds of discrimination protected by the Discrimination Act. They also have to 'document' their work with active duties.

With regard to the documentation required from 2017, there are no detailed rules for employers with less than 10 employees (but they must still document their work). A list of four qualitative requirements apply to employers with 10 to 24 employees, and an additional three criteria are required of employees with 25 or more employees under Chapter 3 Sections 13 and 14. This documentation applies during (throughout) the year, rather than yearly. Education providers must still make yearly documentations with regard to pupils/students.

The rules on enforcement remain the same. If the employer or the educational provider is insufficiently active, the Equality Ombudsman may ask the Anti-Discrimination Board to order the employer to fulfil his or her duty *in the future* subject to a financial penalty (*vite*). In the field of working life, central employees' organisations with a collective agreement can ask for such an order if the Ombudsman declines to do so.

With regard to harassment, sexual harassment and victimisation, the wording is changed from 'preventing and stopping' to 'having guidelines and routines in order to prevent and stop'. An employer or an education provider can thus no longer defend the absence of a prevention routine by saying that they have never needed one.

The economic penalty will gain legal force only after a district court has ordered the payment. The legality of the order itself, as well as the reasonableness of the amount, can be decided upon by the district court.

12.2 Case law

There has been less case law than usual in 2016. What there is regarding the grounds covered in this report is reported here.

Name of court: The Appeal Court for Southern Sweden

Date of decision: 14 April 2016

Name of the parties: Equality Ombudsman v. Polop AB

Reference number: Case T-1157-15

Link: <http://www.do.se/globalassets/diskrimineringsarenanden/hovratt/dom-hovratt-sjukvard-anm-20131805-tillganglig.pdf>

Brief summary: A Muslim woman did not want to shake hands with a male doctor.³⁵⁵ The doctor then refused to give her an examination. The key question was whether this denial was grounded in a legitimate patient concern arising from the anger shown by the woman's husband (as the doctor claimed) or whether the doctor refused to perform the examination merely because he was offended by the woman's refusal to shake hands.

This was regarded as discriminatory by the District Court (believing the translator's testimony that the husband was not hostile towards the doctor), and the discrimination award was set at SEK 75 000 (EUR 8 300). The Muslim woman's refusal to shake hands was regarded as an expression of culture prompted by a religious belief, which was protected regardless of whether or not a majority of Muslims shared this idea. The doctor's

³⁵⁵ Hässleholm Municipal Court, case T-1370-13, Equality Ombudsman v. Polop AB, (judgment of 08.04.2015). <http://www.do.se/globalassets/diskrimineringsarenanden/tingsratt/dom-tingsratt-anm-201318052.pdf>.

refusal to treat her was not an expression of his religious beliefs; it was regarded as a deliberate refusal to accommodate a patient's religious belief in a situation where he easily could have done so. The prevention supplement was therefore higher than the evaluation of the injury to the victim (SEK 30 000 and SEK 45 000).

The case was then appealed and the appeal court found no proof of discrimination. The translator's testimony was not regarded as sufficient evidence for disproving the doctor's statement that the husband's anger had created a hostile situation.

Name of the court: Stockholm Municipal Court, case T 3905-15, (judgment)

Date of decision: 16 November 2016

Name of the parties: Equality Ombudsman v. The Swedish State through Karolinska Institutet

Reference number: case T 3905-15

Address of the webpage:

<http://www.do.se/globalassets/diskrimineringsarenden/tingsratt/dom-tingsratt-karolinska-2014-1987.pdf>

Brief summary: A Muslim dental student was required to work with bare forearms due to state regulations (an ordinance on hygiene issues). The court decided that both the British expert's reason why disposable forearm protection was acceptable in the UK and the Swedish experts' statements on why there were genuine hygienic concerns against them and a prohibition in the form of an ordinance in Sweden seemed scientific and credible, and it was not possible to believe one expert more than the other.

However, it is the education provider (alleged discriminator) who bears the burden of proof with regard to the justification of possible indirect discrimination. Therefore, the Karolinska institutet lost the case. The state had legitimate concerns, but the state's expert admitted that the British example showed that such disposable protection had been used in the UK and no one had been able to show a relevant increase of infection risk there. Thus, the claimant succeeded in showing that there existed a better solution to the legitimate concern of the education provider and was awarded SEK 5 000 (EUR 550).³⁵⁶

The case was not appealed.

The Roma Registration scandal

The Chancellor of Justice completed consideration of the first phase of the Roma registration scandal in 2015.

In Sweden, a violation that is regarded as less severe results in a normal level of damages of SEK 3 000. The information in the register was not disseminated outside the police, and no person suffered a loss due to that information, therefore the violation was considered to be marginally more than 'less severe', and was worth SEK 5 000.³⁵⁷ This decision was given in March 2015.

Throughout this process, the police statement that they never did any ethnic registration has been accepted – or at least not proven wrong – by all the authorities involved, most of them making their final decisions in 2013-2015.³⁵⁸ All of them have viewed this

³⁵⁶ This case is described in Section 2.3.2. It centered around statistical evidence (whether or not an increased infection risk could be present if protection was used). It is extensively described at Chapter 10 point 1 as an example of best practice.

³⁵⁷ <http://www.jk.se/beslut-och-yttranden/2014/05/1441-14-47/>.

³⁵⁸ Commission on Security and Integrity Protection (decision from December 2014) <http://www.sakint.se/dokument/rapporter-och-uttalanden/Uttalande-PM-Skaane-Uppfoelning-Kringresande.pdf>. Equality Ombudsman (decision in February 2014). <http://www.do.se/lag-och-ratt/stallningstaganden/polisens-register-kan-vara-etnisk-profilering/> Public prosecutor (decision in December 2013). The Parliamentary Ombudsman (decision from March 2015) <http://www.jo.se/PageFiles/6353/5205-2013.pdf>.

registration practice as being in violation of the Data Protection Act, but nothing more. The damages were set at the same level that a non-Roma Swedish person would have received in the same situation.

In a second phase, 11 persons have been helped by the Civil Right Defenders to bring a case before the Stockholm Municipal Court. The decision of the court was delivered on 10 June 2016.³⁵⁹

The claimants were awarded SEK 30 000 (EUR 3 300) in addition to the damages already awarded by the Chancellor of Justice. The important difference is that, while the Chancellor of Justice found only a violation of the Data Protection Act not connected to the ethnic background of the individuals, Stockholm Municipal Court found that the only reason for the registration was their ethnicity.

The Court applied a shared burden of proof. Given that the 11 claimants had proved the existence of the register and that people were registered because they were friends or relatives of three criminal Roma families or friends of friends, there was an assumption that these 11 persons were registered because they were Roma (in the case of 10 persons) or married to a Roma (in the case of one person). It was then up to the state to prove that there was another valid reason to register the persons that was not connected to ethnicity. Nobody could remember why these 11 persons had been registered in 2011, and thus the state failed to prove a valid reason that was not connected to ethnicity.

Criminal law does not fall under the Discrimination Act. The amount of SEK 30 000 was set for a violation of Article 14 of the European Convention on Human Rights. The Municipal Court pointed to the long historic discrimination against Roma persons as a reason to set the amount higher compared with what it would have done if the ethnic group had been Danish, for instance, or another group with no history of discrimination.

The Chancellor of Justice has appealed.

The Commission on Antiziganism has made a report on police registration. It emphasises how close many authorities believe the police came to ethnic discrimination. For instance, the Parliament Ombudsman has called it a 'de facto ethnic register'. It is critical towards the Data Protection Agency for stating that it was a violation of the Data Protection Act but not discrimination because, according to this act, the prohibition on ethnic registration applies only if it is the 'sole reason' (*enbart*) for the registration.³⁶⁰

This commission (with a majority of Roma members) welcomes the court case and has abstained from taking a position on the question of discrimination according to the law.

³⁵⁹ Stockholm Municipal Court, Case T 2978-15 (and 10 more cases), Fred Taikon (and 10 more claimants) v. Swedish State through the Chancellor of Justice (judgment of 10.06.2016).

³⁶⁰ Government White Paper 2016:44, p. 260.

ANNEX 1: TABLE OF KEY NATIONAL ANTI-DISCRIMINATION LEGISLATION

The **main transposition and anti-discrimination legislation** at both federal and federated/provincial level.

Country: Sweden
Date: 1 January 2017

Title of legislation (including amending legislation)	<p>Title of the law: The Discrimination Act (2008:567) No common abbreviation Date of adoption: 05.06.2008 Entering into force: 01.01.2009 Amended by Act (2016:828) changing the Discrimination Act Date of adoption: 12-07-2016 Entering into force: 01-01-2017 Web link: https://www.notisum.se/Pub/Doc.aspx?url=/rnp/sls/lag/20080567.htm Grounds protected: Sex, transgender identity or expression, ethnicity, religion and other belief, disability, Sexual orientation, and age.</p>
	<p>Civil/administrative/criminal law: Civil and administrative law.</p>
	<p>Material scope: Public and private employment, education, labour market policy activities and employment services, starting or running a business and professional recognition, member ship of certain organisations, goods services and housing, health, medical care and social services, social insurance, unemployment insurance and financial aid for studies, national military service and civilian service</p>
	<p>Principal content: Prohibition of direct and indirect discrimination, harassment, sexual harassment, victimisation, lack of accessibility and instructions to discriminate (civil law part) and rules on active measures (administrative law part).</p>
Title of legislation (including amending legislation)	<p>Title of the law: The Equality Ombudsman Act (2008:568) Abbreviation: No abbreviation Date of adoption: 05.06.2008 Entering into force 01.01.2009 Amended by Act (2014:959) changing the Equality Ombudsman Act Date of adoption: 26.06.2014 Entering into force: 01.01.2015 Grounds protected: Sex, transgender identity or expression, ethnicity, religion and other belief, disability, Sexual orientation, and age. Web link: https://www.notisum.se/Pub/Doc.aspx?url=/rnp/sls/lag/20080568.htm Grounds protected: Sex, transgender identity or expression, ethnicity, religion and other belief, disability, Sexual orientation, and age</p>
	<p>Civil/administrative/criminal law: Administrative law.</p>
	<p>Material scope: The internal work of the Equality Ombudsman</p>
	<p>Principal content:</p>

	A detailed description of the tasks of the Equality Ombudsman
Title of legislation (including amending legislation)	The (1962:700) Penal Code Abbreviation BrB Date of adoption: 21.12.1962 Entering into force: 01.01.1965 Latest relevant amendment: Act (2008:569) changing the Penal Code Entering into force 01.01.2009 Web link: https://www.notisum.se/Pub/Doc.aspx?url=/rnp/sls/lag/19620700.htm
	Grounds covered: Ethnicity, religion and other belief, sexual orientation
	Civil/administrative/criminal law: Criminal law
	Material scope: Access to goods and services, protection against hatred
	Principal content: The crimes of unlawful discrimination and hate speech.

ANNEX 2: TABLE OF INTERNATIONAL INSTRUMENTS

Country: Sweden
Date: 1 January 2017

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)	Yes 28.11.1950	Yes 04.02.1952	No	Yes	Yes
Protocol 12, ECHR	Not signed	-	-	-	-
Revised European Social Charter	Yes 03.05.1996	Yes 29.05.1998	Art. 8.2, 8.4, 8.5, 12.4, E	Ratified collective complaints protocol? Yes Signed 09.11.1995 Ratified 29.05.1998	No
International Covenant on Civil and Political Rights	Yes 29.09.1967	Yes 06.12.1971	No	No	No
Framework Convention for the Protection of National Minorities	Yes 01.02.1995	Yes 09.02.2000	No	No	No
International Covenant on Economic, Social and Cultural Rights	Yes 29.09.1967	Yes 06.12.1971	No	No	No
Convention on the Elimination of All Forms of Racial Discrimination	Yes 05.05.1966	Yes 06.12.1971	No	Yes	No

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	Yes 07.03.1980	Yes 02.07.1980	No	No	No
ILO Convention No. 111 on Discrimination	Yes 20.06.1962	Yes 20.06.1963	No	No	No
Convention on the Rights of the Child	Yes 26.01.1990	Yes 29.06.1990	No	No	No
Convention on the Rights of Persons with Disabilities	Yes 30.03.2007	Yes 15.12.2008	No	Yes	No

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