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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 9,6 million people. However, the proportion of foreign-born inhabitants has increased from 6.7% in 1970 to 19,1% in 2010 and continues to rise due to high 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 the 1 of January 2015² when a new discrimination ground – lack of accessibility – was created. This extended the possibility to get a discrimination award for failure to adopt reasonable adaptation measures towards persons with disabilities to areas not covered by directive 2000/78. The Supreme Court has decided two cases in June 2014 clarifying the thinking on discrimination award.³ The minimum award is now 10 000 SEK (1 100 Euro) 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, with 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 to a limited extent been articulated as rights giving rise to legal claims though, and there is a weak constitutional tradition as regards fundamental rights.

In order to understand the functioning of Swedish labour law, and thus important parts of the non-discrimination legislation, it is crucial to have in mind the special role designated to the social partners, 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, and whether in the private or the public sector. This organisational structure is reflected in collective bargaining and 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 to other ethnic minorities like the Sami people. It was for instance not until 1959 that the Roma people got the right to belong to a municipality. Before, they had only a right to stay in three days. Therefore no local authority was responsible for the schooling of their children or social welfare. It is still true that Roma faces more discrimination compared to other ethnic groups but nowadays the state is aware of it and combats it.

2. Main legislation

The 1975 Instrument of Government states that public institutions shall counteract discrimination against persons on a number of grounds and 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

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

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

³ Supreme Court case T 3592-13, Equality Ombudsman v. Veolia (judgement 2014-06-26). The Second case was Supreme Court case T 5507-12, Equality Ombudsman v. Stockholm County (judgement 2014-06-26) Nja 2014 p. 499.

or other 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 not incorporated, international agreements are not as such part of the internal Swedish hierarchy of laws and these instruments thus cannot be directly relied upon in domestic courts of law.

Although a late starter in the field of non-discrimination legislation, Swedish domestic law in 2008 contained a considerable quantity of explicit prohibitions on discrimination, which were to be found in seven specific acts.⁴ These seven acts are from 1 of January 2009 repealed and replaced with the Discrimination Act (2008:567). This act has been adapted to the 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,⁵ domestic law goes beyond the requirement 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 remains with 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 as such prohibited.

The unwillingness to make harassment from fellow workers prohibited as such is connected to a more general restriction of vicarious liability for employers. It can be

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 The protection of age was extended to many new areas the 1 of January 2013. Se Act 2012:673 on changing the Discrimination Act, and government bill 2011/12:159.

illustrated with Labour Court 2007 case 45.⁶ All parties started from the fact that the Iranian had been discriminated against, but no person could be held responsible since the erring employee did not have the authority to reject his application for the job. In these cases we have a person being discriminated against by an employee not liable under the civil discrimination law. The plaintiff 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 harassment or by giving authority to represent the employer to an employee who have bad judgement. 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?⁷

3. Main principles and definitions

The definition of direct discrimination in the Discrimination Act Ch. 1 Sec 4 first point 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 do not amount to direct discrimination.

An employer, an education 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* to the protected ground. The protection thus covers discrimination by association situations.

The ban on direct discrimination is limited by the possibility of justification. The new Discrimination Act reduces the possibility 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 acts oblige an employer or educational institution, which has knowledge of the fact that an employee/student feels that she or

⁶ Labour Court 2007 no 45 The Ombudsman Against Ethnic Discrimination v. Laika film & amp (Judgement 2007-05-16).

⁷ 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 be obviously acceptable.

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 from 2015 become a new form of discrimination.⁸ It applies when an employer or a university, by providing support and adaptation measures, may create a situation for a person with a disability that is similar to that for persons without such a disability and it may reasonably be required that the employer/university implements such measures. The legal change extended the possibility to get 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 has been dealt with in Labour Court 2010 No 91.⁹ 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 to discriminate the self-employed as well as the employed (Ch. 2 Sec. 11). Permits, approvals certification and financial support, are other examples of areas covered by these two provisions. Several other provisions in the Discrimination Act apply to self-employed as well as to employed persons.

5. Enforcing the law

Civil processes regarding working life under the Discrimination Act is to be dealt with in accordance with the Labour Disputes Act.¹⁰ Should the individual concerned be a member of a trade union the Ombudsmen'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 or a public employee. However, with regard to state employees there is, due to the constitutional rules on objective grounds in hiring, 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

⁸ Act (2014:958) changing the Discrimination Act (2008:567).

⁹ Labour Court 2010 No 91, The Equality Ombudsman v State Employment Board (Statens arbetsgivarverk) (judgement 2010-12-15).

¹⁰ Act (1974:371) on Labour Law Procedure.

apply.¹¹ The new Discrimination Act also gives non-profit organisations whose statutes states that it is to look after its 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 with the old acts. Nevertheless, very few cases of alleged discrimination have been won so far. In most cases this is due to the plaintiff's failure to prove a *prima facie* case of discrimination. The statistics from the Ombudsmen'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 are by law instructed to give particular attention to the purpose 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 seem to be little difference between discrimination awards and ordinary damages under the old acts. A new case from the Supreme Court 2014 may change that.¹² It can be interpreted as 30.000 SEK (3.300 Euros) being a normal award with regard to discrimination in the area of goods and services. However, it can also be interpreted as being normal only when the service provider never wanted the discrimination to take place, acts diligently and cautions the erring employee and apologies to the victims. The author believes that this case could result in a rise of the prevention part of 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 to the Labour Court. It further 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 to the ordinary courts.

6. Equality bodies

The new Equality Ombudsman is the key public institutions for the promotion of equal rights. It has the right to investigate complaints concerning discrimination according to any of the non-discrimination acts mentioned as well as 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 more generally to individuals and institutions; engage in education,

¹¹ Some university or higher education cases may also be brought before the Board of Appeal for Higher Education.

¹² Supreme Court case T 3592-13, Equality Ombudsman v. Veolia (judgement 2014-06-26), Nja 2014 p. 499.

information and opinion-shaping efforts to combat discrimination; and propose to the Government legal and other measures that may be of use to combat discrimination and monitor international developments. Independent surveys and reports are important parts of this work. The Ombudsman, – though appointed by the Government – has independent status to reach its own decisions in individual matters. It is state-funded, decisions on funding being taken annually by the Swedish Parliament, based on Government recommendations and as part of the general state budget.

As was already 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 different 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 be mentioned here. They are beginning to take cases to Court. So far they have limited the risks by only taking cases regarding smaller amounts and thus not taking the risk to pay the opposite parties full legal expenses.

7. Key issues

The Equality Ombudsman is changing its priorities. There is been a reduction in the amount set for taking individual cases to court and making settlements. Instead more priority is given to monitor active duties such as the duty to work according to equality plans and doing wage surveys. Somebody needs to fulfil the functions of a “public prosecutor” otherwise only those rich enough to go to court will get justice. The risk of ending up in court for a person who discriminates against for instance Roma or persons with African ethnic origin is small. There is a government inquiry looking into this issue.¹³ 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) a task to monitor discrimination within the county. For poor people suffering from discrimination access to justice is according to the author the most pressing problem.

The burden of proof problem is the most interesting problem from a principle point. In the long run it will be hard to maintain a system, where it is considerably easier to prove discrimination in the civil court system compared to the Labour court. The difference between the civil courts and the Labour Court is to be analysed in a government white paper and this inquiry may produce a proposal for modification of the legal rule.¹⁴ It has got extended time and will report to the government in December 2015.¹⁵

¹³ Committee directive 2014:10.

¹⁴ Committee directive 2014 nr 10, p. 6.

¹⁵ Committee supplementary directive 2014 nr 79.

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 9,6 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 d'une importante 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 aux domaines non couverts par la directive 2000/78 la possibilité d'obtenir une indemnisation en cas de non-adoption de mesures d'aménagement raisonnable en faveur des personnes handicapées. La Cour suprême s'est prononcée dans deux affaires en juin 2014 en précisant l'approche en matière d'indemnité 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 être invoqués 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 certains volets essentiels 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 plus défavorable a été réservé à la population rom par rapport 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. S'il reste vrai que les Roms font l'objet d'une discrimination plus marquée que d'autres groupes ethniques, l'État est conscient aujourd'hui de cette situation et cherche à y remédier.

¹⁶ On entend par personnes nées à l'étranger celles 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 énumère les 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 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.

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.²⁰ Il en va de même pour la discrimination fondée sur le handicap. Certaines failles

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 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.

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:

4. la protection contre la discrimination ou la rétorsion ne couvre pas complètement les travailleurs indépendants;
5. la discrimination à l'égard des personnes morales n'est pas interdite;
6. 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° 45.²¹ Tous les intervenants sont partis du fait que la personne de nationalité iranienne 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 non responsable en vertu du droit civil antidiscrimination. Le plaignant 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?²²

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.

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

²¹ Tribunal du travail, arrêt n° 45 du 16 mai 2007, Médiateur chargé de la lutte contre la discrimination ethnique c. Laika film & amp.

²² 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 acceptable.

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, par rapport aux lois antérieures, cette possibilité. 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, les lois obligent les employeurs et les établissements d'enseignement qui auraient 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 devenu en 2015 une nouvelle forme de discrimination.²³ La nouvelle disposition s'applique lorsqu'un employeur ou une université peut, en instaurant des mesures de soutien ou d'adaptation, créer 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 (fût-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 2010²⁴ – 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 morales. Les travailleurs indépendants peuvent, néanmoins, jouir d'une protection en

²³ Loi 2014:958 modifiant la loi antidiscrimination 2008:567.

²⁴ 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*).

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 aucune discrimination à l'encontre des travailleurs indépendants, ni à l'encontre des salariés (chapitre 2, article 11). Les autorisations, approbations, certifications et 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.²⁵ 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 public ou du secteur privé, 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.²⁶ 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 bureaux des médiateurs 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 récente 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

²⁵ Loi 1974:371 sur les contentieux du travail (procédures judiciaires).

²⁶ Certaines affaires relatives à l'enseignement universitaire ou supérieur peuvent également être portées devant la Commission d'appel de l'enseignement supérieur.

augmenté, mais la jurisprudence 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.²⁷ 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 l'interpréter comme étant 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 la partie «prévention» de l'indemnité pour discrimination si, par exemple, le prestataire de service a donné instruction à un salarié de réserver un traitement différent aux Roms.

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.

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.

Le Médiateur est tenu en outre de fournir des conseils, ainsi qu'une assistance indépendante et un soutien plus général aux particuliers et aux institutions; de mener des actions dans les domaines de l'éducation, de l'information et de la formation d'opinion en vue de combattre la discrimination; de proposer au gouvernement des mesures juridiques et autres pouvant servir à lutter contre la discrimination; et de 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 et dans le cadre du budget général de l'État.

Comme nous l'avons 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 différentes organisations du mouvement de défense des personnes handicapées. Le Médiateur entretient un dialogue permanent avec les ONG lorsqu'elles existent. Il convient de citer ici les bureaux locaux d'action contre la discrimination, qui commencent à intenter des actions en justice. Ils ont veillé jusqu'ici à limiter leur risque

²⁷ Cour suprême, affaire T 3592-13, Médiateur pour l'égalité c. Veolia, arrêt du 26 juin 2014, Recueil 2014 p. 499.

en se contentant d'affaires portant sur des montants modestes, autrement dit en évitant le risque d'être appelés à verser à la partie adverse l'intégralité des frais judiciaires.

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 d'effectuer des bilans des salaires. Quelqu'un doit assumer le rôle de «procureur général», faute de quoi seuls les gens suffisamment riches pour saisir un tribunal obtiendront justice. Le risque de se retrouver devant une instance judiciaire est faible pour une personne pratiquant une discrimination à l'égard de Roms ou de personnes d'origine ethnique africaine, et le gouvernement étudie actuellement cette problématique.²⁸ Une piste alternative consisterait à soutenir les bureaux d'action contre la discrimination afin qu'ils puissent porter davantage de cas en justice, ou à charger les préfectures (*länsstyrelserna*) de surveiller la discrimination dans leurs comtés respectifs. L'accès à la justice des personnes victimes de discrimination est, selon l'auteur, le problème le plus urgent.

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 lequel il est sensiblement plus facile de prouver une discrimination dans le système de justice civile que devant le tribunal du travail. La différence entre les juridictions civiles et le tribunal du travail va être analysée dans un livre blanc du gouvernement et cette analyse pourrait donner lieu à la formulation d'une proposition visant à modifier la règle juridique.²⁹ Le délai a été prolongé et le rapport sera transmis au gouvernement en décembre 2015.³⁰

²⁸ Directive 2014:10 de la Commission permanente du Parlement.

²⁹ Directive 2014: 10, p. 6, de la Commission permanente du Parlement.

³⁰ Directive supplémentaire 2014:79 de la Commission permanente du Parlement.

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 9,6 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 Antidiskriminierungen ausgearbeitet, mit denen das EU-Recht teils vorweggenommen und teils umgesetzt wurde. Am 1. Januar 2015³² erfolgte mit der Schaffung eines neuen Diskriminierungstatbestands – mangelnde Barrierefreiheit – ein weiterer Schritt in diese Richtung. Seither kann auch dann eine Entschädigung für Diskriminierung zugesprochen werden, wenn in Bereichen, die nicht unter die Richtlinie 2000/78 fallen, keine angemessenen Vorkehrungen für Menschen mit Behinderungen getroffen wurden. Der Oberste Gerichtshof hat im Juni 2014 in zwei Fällen geurteilt und dabei auch die Frage der Diskriminierungsentschädigung geklärt.³³ Der Mindestbetrag liegt nun bei 10.000 SEK (1100 Euro) und der Grundgedanke ist, dass die Entschädigung für die Rechtsverletzung plus Prävention der Summe entsprechen muss, die einem Opfer von Diskriminierung zusteht, wenn die für die Diskriminierung verantwortliche Person später ihrer Sorgfaltspflicht nachkommt.

Schweden hatte über den größten Teil des letzten Jahrhunderts sozialdemokratische Regierungen und einen sehr hoch entwickelten Wohlfahrtsstaat. Soziale und wirtschaftliche Güter sind aber nur selten Rechte, die auf juristischem Wege eingeklagt werden können, und bei den Grundrechten hat Schweden eine schwache Verfassungstradition.

Um das schwedische Arbeitsrecht, und damit wichtige Teile der Gleichstellungsgesetzgebung, zu verstehen, muss man wissen, dass die Sozialpartner in Schweden eine Sonderrolle einnehmen und andere NRO 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 darin, dass wichtige Fragen, 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 die Sozialfürsorge zuständig. Roma werden auch heute noch häufiger diskriminiert als andere ethnische Gruppen, aber der Staat hat das Problem inzwischen erkannt und bekämpft es.

2. Wichtigste Gesetze

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

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

³³ Oberster Gerichtshof, Fall T 3592-13, Gleichstellungsombud gegen Veolia (Urteil 2014-06-26). Der zweite Fall war Oberster Gerichtshof, Fall T 5507-12, Gleichstellungsombud gegen die Stadt Stockholm (Urteil 2014-06-26) Nja 2014 S. 499.

Das Gesetz über die Regierungsform von 1975 verpflichtet staatliche Stellen, Diskriminierung aufgrund zahlreicher Diskriminierungsgründe zu bekämpfen, und es enthält eine Aufzählung von 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 nicht Teil der schwedischen Rechtsordnung 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 Am 1. Januar 2009 wurden diese sieben Gesetze aufgehoben und durch das Diskriminierungsgesetz (2008:567) ersetzt. Dieses Gesetz wurde an den Vorschlag für eine Richtlinie 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.

Im Allgemeinen entspricht das schwedische Recht Artikel 13 der Richtlinien. In Bezug auf Religion und andere Überzeugungen, sexuelle Ausrichtung und Alter³⁵ geht das schwedische Recht sogar über die Anforderungen des EU-Rechts hinaus. Dies gilt auch

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 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.

für Diskriminierung aufgrund von Behinderungen. Dennoch gibt es Schwächen bei der Umsetzung. Das neue Diskriminierungsgesetz setzt die Richtlinien in folgenden Punkten nicht voll um:

7. Der Schutz vor Diskriminierung oder Viktimisierung gilt nicht in allen Teilen für selbständig Beschäftigte.
8. Die Diskriminierung von juristischen Personen ist nicht verboten.
9. Diskriminierung und Belästigung von Kollegen oder Dritten als solches ist 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.³⁶ Alle Parteien waren sich einig, dass der Kläger aus dem Iran diskriminiert worden war. Allerdings konnte niemand zur Verantwortung gezogen werden, weil 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. Der Kläger muss gegen den Arbeitgeber klagen, der aber nur dann haftet, wenn er fahrlässig gehandelt hat, z. B. indem er nicht reagiert, wenn ihm eine 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?³⁷

3. Wichtigste Grundsätze und Begriffe

Der Begriff „Unmittelbare Diskriminierung“ wird in Kapitel 1 Abschnitt 4 Punkt 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 sonstiger Weltanschauung, Behinderung, sexueller Orientierung oder Alter erfolgt.

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

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

³⁶ Arbeitsgericht 2007 Nr. 45 Ombudsmann gegen ethnische Diskriminierung gegen Laika film & amp (Urteil 2007-05-16).

³⁷ 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.

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 von der Belästigung eines Angestellten bzw. Schülers aufgrund der geschützten Gründe erhalten, 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.³⁸ 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.³⁹ 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 Anwendungsbereich

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 Unternehmens oder bei der beruflichen Anerkennung geschützt (Kapitel 2 Absatz 10). Berufsverbände dürfen weder selbständig noch abhängig Beschäftigte diskriminieren (Kapitel 2 Absatz 11). Genehmigungen, Zertifizierungen und Fördermittel

³⁸ Gesetz (2014:958) zur Änderung des Diskriminierungsgesetzes (2008:567).

³⁹ Arbeitsgericht 2010 Nr. 91, Gleichstellungsombud gegen den Verband öffentlicher Arbeitgeber (Statens arbetsgivarverk) (Urteil 2010-12-15).

sind weitere Bereiche, die beide Bestimmungen abdecken. 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.⁴⁰ Wenn der betroffene Arbeitnehmer Mitglied einer Gewerkschaft ist, ist das Recht der Ombudsstelle zur Vertretung des Opfers (siehe auch Abschnitt 6) 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.⁴¹ 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 Ombudsstelle und NRO dürfen sich nicht als Partei an Strafverfahren beteiligen.

Eine Teilung der Beweislast wurde bereits durch die alten Gesetze 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 Ombudsstelle 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. Das Gesetz weist die Gerichte an, 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.⁴² Das Urteil kann so ausgelegt werden, dass 30.000 SEK (3300 Euro) eine normale Entschädigung für Diskriminierung beim Zugang zu Gütern und

⁴⁰ Gesetz (1974:371) über arbeitsrechtliche Verfahren.

⁴¹ Fälle, in denen Universitäten oder Hochschulen beteiligt sind, können auch vor den Beschwerdeausschuss für Hochschulen gebracht werden.

⁴² Oberster Gerichtshof, Fall T 3592-13, Gleichstellungsbud gegen Veolia (Urteil 2014-06-26), Nja 2014 S. 499.

Dienstleistungen darstellen. Man kann das Urteil sogar so auslegen, dass diese Summe nur für Fälle normal ist, in denen der Anbieter die Diskriminierung nicht beabsichtigt hat, seine Sorgfaltspflicht wahrnimmt, den schuldigen Mitarbeiter verwarnt und sich beim Opfer entschuldigt. Nach Ansicht des Autors könnte dieses Urteil dazu führen, dass der als Abschreckung gedachte Teil der Summe noch steigt, wenn der Anbieter beispielsweise einen Mitarbeiter angewiesen hat, Roma anders zu behandeln.

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

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

6. Gleichbehandlungsstellen

Die neue Gleichstellungs-Ombudsstelle 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.

Außerdem muss die Ombudsstelle Einzelpersonen und Institutionen beraten und unterstützen, Schulungs-, Informations- und Aufklärungsmaßnahmen zum Thema Diskriminierung durchführen, der Regierung gesetzliche und andere Maßnahmen vorschlagen, die zum Kampf gegen Diskriminierung beitragen, und die internationale Entwicklung beobachten. Unabhängige Befragungen und Berichte sind ein wichtiger Teil ihrer Arbeit. Der Ombudsmann wird zwar von der Regierung ernannt, ist aber unabhängig und kann zu jedem Einzelfall ein eigenständiges Urteil fällen. Er wird vom Staat finanziert, wobei das schwedische Parlament jährlich auf der Grundlage von Empfehlungen der Regierung und als Teil des allgemeinen Staatshaushalts über die Mittel für die Stelle entscheidet.

Wie bereits erwähnt, spielen NRO, 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 NRO gibt, arbeitet die Ombudsstelle 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 Rechtskosten der Gegenseite tragen müssen.

7. Wichtige Punkte

Die Gleichstellungs-Ombudsstelle verschiebt derzeit ihre Prioritäten. Sie wendet weniger Mittel auf, um einzelne Fälle vor Gericht zu bringen oder außergerichtlich zu schlichten. Dafür konzentriert sie sich auf ihre Aufgaben bei der aktiven Überwachung der Umsetzung der Gleichstellungspläne und der Erstellung von Lohnstatistiken. Jemand muss die Funktion eines „Staatsanwalts“ ausfüllen, damit nicht nur diejenigen ihre Rechte durchsetzen, die sich eine Klage vor Gericht leisten können. So ist beispielsweise das Risiko sehr gering, wegen der Diskriminierung von Roma oder Personen afrikanischer Herkunft vor Gericht zu kommen. Derzeit befasst sich eine staatliche

Untersuchungskommission mit diesem Problem.⁴³ Eine mögliche Lösung ist die Stärkung der Antidiskriminierungsstellen, damit diese mehr Fälle vor Gericht bringen können. Eine andere besteht darin, die Provinzialregierungen (länsstyrelserna) damit zu beauftragen, Diskriminierung in ihrer Provinz zu bekämpfen. Nach Ansicht des Autors besteht das dringendste Problem darin, dass arme Menschen, die diskriminiert werden, ihre Rechte nicht durchsetzen können.

Aus prinzipieller Sicht ist die Frage der Beweislast das interessanteste Problem. Langfristig lässt sich ein System, in dem der Nachweis von Diskriminierung vor Zivilgerichten viel einfacher ist als vor Arbeitsgerichten, nicht aufrecht erhalten. Die unterschiedliche Rechtsprechung von Zivil- und Arbeitsgerichten wird in einer Regierungskommission untersucht, die dann womöglich eine Änderung der Prozessordnung vorschlägt.⁴⁴ Die Frist für die Untersuchung wurde verlängert und die Kommission wird der Regierung ihren Bericht im Dezember 2015 vorlegen.⁴⁵

⁴³ Ausschussrichtlinie 2014:10.

⁴⁴ Ausschussrichtlinie 2014 Nr. 10, S. 6.

⁴⁵ Ergänzende Ausschussrichtlinie 2014 Nr. 79.

INTRODUCTION

The national legal system

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

One key feature of the 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 NGO:s with an invitation to comment upon the proposed legislation. The government bill, where the government give answers to comments 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 suggests 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 aspect of the employer-employee relationship. It is a one-instance system, if 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 districts court making up the first instance.

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

The civil court system deals with everything 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 latest important amendment was decided on 26 June 2014 where a new form of discrimination was added, lack of accessibility.⁴⁸ This change, which entered into

⁴⁶ Ch. 4 Art. 4 of the Instrument of Government. Sometimes the opposition parties agrees on a 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 (2014:958) on changing the Discrimination Act (2008:567).

force the 1 of January 2015 resulted in an extension of the areas in which a discrimination award can be the result of failure to adopt reasonable adaptation measures, going beyond the directives. This is a comprehensive act covering all the grounds of the two directives and discrimination in the basis of sex and transgender identity and expressions as well. 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. Social insurance system, unemployment insurance and financial aid for studies,
9. National military service and civilian service,
10. Public employment, Section 17

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 acts⁴⁹ which were limited to only certain grounds and certain areas. Case law regarding these previous acts, and important comments from the government bills and standing committees 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, faith and sexual orientation. It is seldom used today,⁵⁰ the victims prefer to use the Discrimination Act, but the crime of hate-speech (which covers the same grounds) still has a function covering things that would not fall under the Discrimination Act.⁵¹

⁴⁹ 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).

⁵⁰ When it is used the perpetrator has often done many other (and more serious) crimes as well (like robbery) and the effect of the violation of the prohibition on unlawful discrimination is marginal with regard to sentencing and damages.

⁵¹ 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 the 21 of December 1962 but did not enter into force until the 1 of January 1965. The latest important change of the relevant sections was adopted the 25 of June 2008 and entered into force the 1 of January 2008. Sexual orientation was then added as a protected ground. Act (2008:569) Changing the Penal Code (1962:700).

1 GENERAL LEGAL FRAMEWORK

Constitutional provisions on protection against discrimination and the promotion of equality

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

Swedish constitutional law is comprised by four different statutes, i.e. the Instrument of Government, the Act of Succession to the Throne, the Freedom of the Press Act and the Fundamental Law on Freedom of Expression (Regeringsformen, Successionsordningen, Tryckfrihetsförordningen and Yttrandefrihetsgrundlagen, respectively).⁵² The one of interest to this report is the 1975 Instrument of Government and it includes the following articles dealing with non-discrimination:

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 the society. It is not directly applicable. It is not possible to get damages based on a violation of this article alone. Its 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 prohibition.

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 a instruction to the state to use only objective criteria when hiring employees. The same thing is said in Section 4 of the Public Employee Act (1974:269). Some state appointments may be appealed to a board and if so 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 ground 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 violates the ECHR and the reform in 2010 that abolished the restriction to set aside acts of the 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, Discrimination Act

⁵² Regeringsformen (1974:152), Successionsordningen (1810:926), Tryckfrihetsförordningen (1949:105) and Yttrandefrihetsgrundlagen (1991:1469).

applies to laws and provisions as well (unless it is expressly stated otherwise). With relation to the implementation of the directives it is the Discrimination Act that is important.

2 THE DEFINITION OF DISCRIMINATION

2.1 Grounds of unlawful discrimination explicitly covered

Within the Discrimination Act the following grounds are protected:

1. Sex
2. Sexual 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:⁵³

1. Part-time workers
2. Fixed time workers
3. Workers taking parental leave

2.1.1 Definition of the grounds of unlawful discrimination within the directives

1. 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" has previously been subsumed as similar circumstances under "ethnicity". The reason for this is that the delimitation between acts that are an expression of ethnic belonging and acts that are an expression of religious belief is often unclear. 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.⁵⁴

2. religion or belief

Thus, 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 emanates from or are connected to religious beliefs.⁵⁵ 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. A pure ethical belief, for instance veganism related to the belief that animal suffer and have feelings like humans and should not be killed, does not count as a religious belief.

3. disability

According to Ch.1 Sec 5 p. 4. disability means:

"[P]ermanent 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."

⁵³ This is the protection the author believes are somewhat related to the directives, other protected groups exist for instance trade union representatives.

⁵⁴ 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.

⁵⁵ Government bill 2002/03:65 p. 82.

The definition is thus stated in general terms, a requirement being that the limitation is "permanent", i.e. the limitations in functional capacity must be long-lasting. For example, a person with a broken arm will not be covered by the law since the disability caused is of a passing nature. There is no threshold of "severity", 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 "similar situation". However, until there is clear case law on the point it will be difficult to more closely define the issues.

Illnesses that can be expected to limit functional capacity in the future are covered by the law. Among others this 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.

The part 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 becomes important when the employee demand reasonable accommodation measures of the employer. According to the author the threshold for proving a disability must be considered slightly lower in Sweden compared to 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.

One should also remember that if the employer mistakenly believes that somebody is disabled or mistakenly believes that the disability causes a barrier when it does not, the plaintiff will win the case.

The Swedish definition is therefore in accordance with the decision by the ECJ in the joined cases 335/11 and 337/11. The plaintiff can not possibly be worse off because the Swedish definition focuses on the functional limitation only.

4. age

According to Ch 1 Sec. 5 p. 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.

5. sexual orientation?

According to Ch. 1 Sec. 5 p. 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 of whether they are homosexual, bisexual or heterosexual are not protected by the discrimination prohibition.⁵⁶ 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 e.g. employers try to circumvent the anti-discrimination legislation by simply submitting that the difference in treatment in a given case was due not to the

⁵⁶ Government bill 1997/98:180, p 22.

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 partnership⁵⁷ 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.⁵⁸ This part of the report is also recited in the Government bill for the new Discrimination Act.⁵⁹

2.1.2 Multiple discrimination

In Sweden a 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 AD case 2010 No 91.⁶⁰ 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 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 offense. The Equality Ombudsman receives around 200 cases, attributed to more than one ground.⁶¹ Most of them are of this type when the plaintiff wants to connect one instance of bad treatment to two or more discrimination grounds.

The other type of multiple discrimination can be exemplified with AD 2011 No 13.⁶² The case regarded two different alleged harassments, one regarding ethnicity and the other regarding sex. The rules on burden of proof applied to each of these two offences separately and the plaintiff won. The compensation is naturally higher the more offences there are. But the fact that one offence regarded ethnicity and the other sex appears not to have affected the combined level in AD 2011 No 13.⁶³ The plaintiff would probably have got the same amount had both offences related to the same discrimination ground.

⁵⁷ Registered partnerships do not exist since May 2009. At that time the institution of marriage was opened to same-sex couples and registered partnerships were converted to marriages. Act (2009:253) Changing the Marriage Code (1987:230), and Act (2009:260) on Repealing Act (1994:1117) on Registered Partnership.

⁵⁸ Ytterberg, Sexual Orientation Report of 28 July 2004.

⁵⁹ Government bill 2007/08:95, p 125.

⁶⁰ Labour Court 2010 No 91, The Equality Ombudsman v State Employment Board (Statens arbetsgivarverk) (judgement 2010-12-15).

⁶¹ Compare, Equality Ombudsman, Yearly Report 2012, p. 13 and 15. Total number of grounds is 1835 and the total number of cases is 1559. 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. For 2014 there were 1611 cases handled according to the Discrimination Act and 1810 grounds were concerned. Equality Ombudsman Yearly Report 2014, p.45f and 49.

⁶² AD 2011 No 13. The Equality Ombudsman v. Municipality of Helsingborg, Judgement 16 of February 2011. The case is described in section 0.3.

⁶³ AD 2011 No 13. The Equality Ombudsman v. Municipality of Helsingborg, Judgement 16 of February 2011. The case is described in section 0.3.

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.

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 Ch. 1 Sec. 4 p. 1 of the Discrimination Act, state 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 to the religion ground.

The principles on mistaken assumption may in Sweden cut both ways. 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.⁶⁴ 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

In Sweden the Discrimination Act 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 is a treatment associated to 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 to the disability ground. Swedish law is in line with the requirement set out in *Coleman v Attridge Law* and *Steve Law*.⁶⁵

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 Ch. 1 Sec. 4 first point, reads as follows:

"Direct Discrimination: that someone is disadvantaged by being treated less favourably than someone else is treated, has been treated or would be treated in a comparable

⁶⁴ Svea Court of Appeal 2009-06-02, case T 7752-08. 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 sometimes wrongly are perceived as drunk. The fact that the mistake is easy to make, seems to rule out discrimination.

⁶⁵ Perhaps Svea Court of Appeal, case T 1912-13, can be said to confirm it. A mother was refused child insurance for a child because of the child's hearing impairment was severe enough to entitle the mother to a care benefit for her. This was not only unlawful discrimination of the child but of the mother as well. Both received a discrimination award.

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 treatment⁶⁶ (missgynnannde).

A discriminatory job vacancy announcement is not a less favourable treatment.⁶⁷ 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.⁶⁸

A discriminatory job announcement regarding ethnicity will in Sweden be dealt with under active measures in Ch. 3 Sec. 7 of the Discrimination Act. If the employer is insufficiently active in ensuring that people of different sex, ethnicity, religion or other belief have the opportunity to apply to vacant jobs the Equality Ombudsman may according to Ch. 4 Sec. 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).⁶⁹ Central employees’ organisations having 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 by him- or herself initiate such a process at the Board Against Discrimination.

To summarize 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 2000/43.⁷⁰

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 regards differential treatment made for reasons of 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 of another group. There is no general clause allowing it. For special clauses allowing it in certain fields the reader is referred to Chapter 5.

⁶⁶ Disfavour is the word used in the translation made on the Parliaments home page. It is literally close to the term (missgynnannde). This term should however be constructed extensively. Therefore concept of disfavour in reality means less favourable treatment.

⁶⁷ It is given as an explicit example of things falling outside the prohibition of direct discrimination, Government bill 2007/08:95, p. 499.

⁶⁸ European Court of Justice, case C-54/07, Centrum voor gelijkheid van kansen en voor racismebestrijding vs Firma Feryn NV (judgement 2008-7-10).

⁶⁹ This applies only to the grounds mentioned in the text.

⁷⁰ See Gambinius Göransson et al, The Discrimination Law p. 37.

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 it is stated in the Code on Criminal and Civil Procedure Chapter 35 Section 1 (1942:740).⁷¹ 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.⁷² 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.

DO, the old Ethnicity Ombudsman, was involved with an investigation on situation testing as a method against discrimination and situation testing was also recommended to DO as a tool by the Structural Discrimination Inquiry Commission.⁷³

Situation testing thus is uncontroversial as a mean of evidence and the authorities can use public money to act as legal representatives⁷⁴ of plaintiffs relying on evidence obtained by situation testing in courts.⁷⁵ But the authorities are reluctant to be involved themselves in situation testing as a way of obtaining evidence in individual cases. They are not forbidden to do 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. Crime provocation is generally not allowed in Sweden. Authorities cannot ask a citizen to commit a crime they would otherwise not have committed. But in the discrimination field the discriminator is asked to do something legal – for instance allowing a person to eat at a restaurant. The documentation of the refusal creates an evidence of discrimination. Evidence provocation is clearly more acceptable but there is limitations applying to authorities but not to private persons.⁷⁶ The unclear⁷⁷ legal situation regarding these limitations made DO argue that an explicit permission to do situation testing in the Discrimination Act is necessary if they are to apply situation testing as a method of gaining evidence themselves.⁷⁸ There is nothing on situation testing in the Discrimination Act.

Situation testing in the form of practical testing is an accepted scientific method. It has been used by scientists both with regard to ethnic discrimination both in the housing market and the labour market. However – it is not totally uncontroversial – In a survey

⁷¹ The rules on evidence are also based on the “principle of best possible evidence”. An affidavit is for instance not allowed if the person could have been heard as a witness.

⁷² It is perfectly possible that a police officer is convicted for collecting evidence in an illegal way and for a criminal to be sent to prison on the basis of that same evidence.

⁷³ SOU 2005:56, *Det blågula glashuset – strukturell diskriminering i Sverige*, p. 590.

⁷⁴ Swedish procedural rules make the discrimination authorities the formal plaintiff in civil cases.

⁷⁵ The Ombudsman Against Ethnic Discrimination for instance represented the four plaintiffs in the Escape case. Malmö District Court, judgement 3 of may 2006. case T 3562-05. The Appeal Court for Skåne and Blekinge, judgement 2007-04-24, case T 1358-06. The Supreme Court, *Escape Bar and Restaurant v. The Ombudsman Against ethnic Discrimination* (case T-2224-07 judgement 2008-10-01).

⁷⁶ Compare, The Ombudsman Against Ethnic Discrimination Dnr 419-2005, *Discrimination Tests as Evidence*, p. 2.

⁷⁷ 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.

⁷⁸ The Ombudsman Against Ethnic Discrimination, *Diskrimineringstester som bevismedel (Discrimination Tests as Means of Evidence)*, Dnr. 419-2005.

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.⁷⁹ 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) that have never agreed to be a part of any research project.

In the 2011 report “Roads to Rights” by the Equality Ombudsman 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 a 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.”⁸⁰

In 2014 the Equality Ombudsman reached a settlement with a Petrol Station refusing to renting cars to three Roma Persons. The state television had set up the situation testing situation as part of a program on ethnic discrimination.⁸¹

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 Ch. 1. Sec. 4 second point, reads as follows:

“Indirect Discrimination: that someone 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

Some guidance are 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 of presumably unlawful indirect discrimination given is that of a childcare centre requiring prospective employees to have experience of raising biological children of their own. As regards disability, according to the old Disability Ombudsman, for example, requiring a driver’s license can be a form of indirect discrimination. A license is a necessary requirement for a job as a taxi driver, but does not have to be essential, for example, in regard to a job as a journalist. The government bill for the Discrimination Act uses language skill as an example when discussing

⁷⁹ See for instance Oxford Research 2013, Forskningsöversikt om rekrytering i arbetslivet (Presentation of Research on Recruiting in Working Life. (p.38).

⁸⁰ Equality Ombudsman 2011, Roads to Rights, p. 34.

⁸¹ Equality Ombudsman ANM 2013/828-30 (Statoil AB).

legitimate purpose and under what circumstances a criterion can be appropriate and necessary in order to achieve such a purpose.⁸²

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 regards 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.

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

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

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

⁸² Government bill 2007/08:95, p. 491.

For general statistics purposes there is, however, the population register (folkbokföringsregistret) managed by the tax authorities. This register contains information (among other things) on the place of birth and nationality of a person as well as the place of birth of his/her parents and the date of taking up residence in Sweden. Religion and belief as such are not registered but the membership of a church may be registered.⁸³ 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 have adverse impact on a certain group. The general inquiry into living conditions made 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.⁸⁴ 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.⁸⁵

The government wants better statistics and the Equality Ombudsman together with Swedish Statistics and the Swedish National Institute for Public Health has 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 difference for instance with regard to 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.⁸⁶ 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 self categorisation. A person must be allowed to belong to the ethnicity, religion, sexual orientation etc. he or she feels to be a part of. There cannot be a state classification. A third principle is that groups who distrust the society⁸⁷ 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 were the author can imagine that it would be possible to

⁸³ The Swedish state supports some churches by helping them to collect "taxes". Today it is not a tax but a membership fee. If a church want this help, their members must be registered with the tax authority.

⁸⁴ The Equality Ombudsman 2012, Statistikens roll i arbetet mot diskriminering, p. 9.

⁸⁵ This can be compared to Stockholm district court judgement 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 and disabled children and the Ombudsman had not proved what proportion of children receiving the benefit were disabled. Therefore 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 the disabled must require a separation of the disabled children receiving the child care benefit from the non disabled children receiving the same benefit.

⁸⁶ 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).

⁸⁷ Some groups, for instance the representatives of the Roma, are worried that research may be used to stigmatize the group further. Proof of social problems - like 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 The 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 it as ethnicity is not registered. Should he in the future be able to know it, this knowledge could be abused by not addressing the problem through a fiscal stimulus or any other mean. It could also be used to find the most appropriate mean to combat unemployment given information on which groups were most likely to be unemployed. Trust is at the center of the Equality Ombudsmans preliminary report.

use statistical data directly to construct positive measures. But the author does not know of any such cases. In most cases, to the degree that positive action is allowed, it is 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. But the author of this report has never heard of a case where statistical data have been used to design a positive measures on the grounds covered in this report.⁸⁸

b) Practice

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

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

2.4 Harassment (Article 2(3))

a) Prohibition and definition of harassment

In Sweden, harassment is prohibited in national law. It constitutes one of the six forms of discrimination enumerated in the Discrimination Act, Ch. 1. Sec. 4 point 4, reads as follows:

"Harassment:⁸⁹ conduct that violates a person's 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."

b) Scope of liability for harassment

Where harassment is perpetrated by an employee, in Sweden the employee is almost never⁹⁰ liable and 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 Ch. 2 Sec. 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

⁸⁸ The only such case the author knows 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 program.

⁸⁹ Sexual harassment is then added as a special form of harassment.

⁹⁰ Harassment might under some circumstances fall under a section in Chapter 5 of the penal code (defamation etc).

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 45⁹¹ 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 19⁹² is another example where both the applicant, the municipal co-ordinator 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. Yet the applicant lost the case based on a legal formalistic reasoning, with regard to whom the employer is responsible for.

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

The concept of unlawful discrimination in Ch. 16 Sec. 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. It constitutes one of the six forms of discrimination enumerated in the Discrimination Act, Ch. 1. Sec. 4 point 6, defines it as follows:

"Instructions to discriminate: orders or instructions to discriminate against someone 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"

⁹¹ Labour Court 2007 no 45 The Ombudsman Against Ethnic Discrimination v. Laika film & amp (Judgement 2007-05-16).

⁹² 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, (judgement 2011-03-23).

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.

Where instructions to discriminate towards an employee are given by another employee to a third employee, in Sweden the first employee is almost never personally liable and 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 discrimination forms. The cases presented in Section 2.4 (b) are relevant to all six forms of discrimination. The Swedish limitations to the vicarious liability of the employer is problematic in relation to Directive 2000/78.⁹³

In regards to health, social security, goods and services and most other areas, the service provider is responsible for actions that any employee does 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, 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 in the field of employment

In Sweden the duty to provide reasonable accommodation is covered by the law under the new name of lack of accessibility. Lack of accessibility has from 1 of 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.⁹⁴ Before 2015 – when reasonable accommodation was the term – the lack of reasonable accommodation could result in direct discrimination because the assessment of comparable situation should be assessed as if the worker or student had been accommodated.

The new term is written in a way that is supposed to fit every area equally well. It is defined as follows:

"Lack of accessibility that a person with a disability is disfavoured by a refusal to take such measures as would be needed for that person to become in a similar situation to that of another person without the disability and which are reasonable in relation to laws and other forms of legislation and with regard to economical and practical considerations, the duration and the extent of the relationship or contact between the person responsible for the activity and the individual and other circumstances of importance"

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

⁹³ The problems with regard to vicarious liability in the labour market apply to all six forms of discrimination. It 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. It is noted as a possible breach of the directive in Section 11.1 second bullit point.

⁹⁴ Act 2014 (958) changing the Discrimination Act. Government bill 2013/14:198.

adaptation measures. The protection is however extended to cover trainees in basic and secondary education.⁹⁵

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.⁹⁶ The following adaptation measures were mentioned in the legislative materials accompanying the Discrimination Act as examples that could be required of an employer: improvements related to physical accessibility, the acquisition of technical support, and changes in work tasks, time schedules or work methods.⁹⁷ The reasonableness of requiring measures to be undertaken can vary depending on the employer.

This determination must be made from case to case depending on such factors as, for example, the company's ability to bear the costs, the ability to undertake a measure, the problems caused for the employer by the measure and the expected length of the employment. According to the old Disability Ombudsman, the mere possibility of obtaining a subsidy will not be taken into account in assessing reasonableness. This can however be taken into account if it becomes apparent during the recruitment process that a subsidy will be received.⁹⁸

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"⁹⁹ as regard the already employed in combination with the 1982 Employment Protection Act, which impose a duty of fairly far-reaching accommodation.¹⁰⁰ These duties are sometimes more far reaching compared to 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.

From the case 2013 nr 78 one may conclude that the Labour Court is reluctant to ask the employer to permanently¹⁰¹ change a fellow workers 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 by the employer and the disabled worker was

⁹⁵ Government bill 2013/14:198, p. 74 and p 115.

⁹⁶ 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 6 factors relevant when assessing the concept of reasonable accommodation (p. 27).

⁹⁷ Government bill 2007/08:95 p. 148.

⁹⁸ Swedish employers have extensive managerial rights and cannot be made to seek subsidies.

⁹⁹ The goal of rehabilitation is the employee's return to the workplace or to provide support for an individual in maintaining his position in the workplace. Rehabilitation in relation to working life is additionally regulated in the General Social Insurance Act (lag om allmän försäkring (1962:381)).

¹⁰⁰ 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.

¹⁰¹ During the time when it was uncertain whether or not the bus driver would become healthy enough to drive 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.¹⁰² With regard to dismissals due to sickness leading to disability which results in an inability to work, the Discrimination Act offers no more protection compared to 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 Ch.1 Sec 5 p. 4 disability means:

“[D]urable 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 “similar situation”. However, until there is clear case law on the point it will be difficult to more closely define the issues.

d) Duties to provide reasonable accommodation outside the field of employment

In Sweden, there is from 2015 a duty to provide reasonable accommodation for people with disabilities in most of the areas where the Discrimination Act applies.¹⁰³ 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, goods and services, meetings or public events, health and medical care and social services, social insurance system, unemployment insurance and financial aid for studies, national military service and civilian service, public employment.

Before 2015 the prohibition of discrimination for 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.¹⁰⁴ This duty applied to higher education.

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 ch.9 Sec. 15. With the new rules from 2015 a violation of the School Act will result in discrimination according to the Discrimination Act as well.

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 then prohibit installations 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 to pay for the 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

¹⁰² Labor Court 2013 nr 78, Equality Ombudsman v. Veolia and the Swedish Bus and Coach Federation.

¹⁰³ Act 2014 (958) changing the Discrimination Act. 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, services and goods sold by companies with less than 10 employees (the same exception applies in the health care area too according to Section 13 c), and if the measure in question regards goods and services and concerns the buildings where it is offered and the plaintiff wants actions which goes beyond what was required when the building was made.

¹⁰⁴ Chapter 2 Section 5 of the Discrimination Act.

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 obviously 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,¹⁰⁵ the biggest change is probably that discrimination award as a remedy becomes possible, which is valuable for the plaintiff, especially if civil damages was not possible before. Many public law regulations have conditional fines paid the 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 creates different levels of reasonable accommodation. The Discrimination Act helps by providing effective sanctions for other acts. The concept of lack of accessibility is related to accommodation required by pieces of other legislation. The idea was never to create a definition that could be used to impose high costs on service providers when adaptation is not required by other legislation.¹⁰⁶

e) Failure to meet the duty of reasonable accommodation

In Sweden failure to meet the duty of reasonable accommodation does count as discrimination because it amounts to lack of accommodation, which is a separate form of discrimination and it is the third in a numeration of six forms of discrimination in the Discrimination Act. The key issue is if the individual involved can be placed in a similar situation to non disabled persons. 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 hiring. This case law is unaffected by the introduction of the new discrimination form.

In dismissal cases and in cases outside the labour market, the Discrimination Act is not perceived as introducing new requirements compared to other legislation. The principal sanctions are the discrimination award (which is awarded in all proven discrimination cases) and the possibility of the court to declare contractual clauses or actions like dismissals null and void in some situations.

With regard to direct discrimination the plaintiff must show disfavour and a similar situation before the burden shifts. In principal, the burden of proof rests with the employee at this stage. The preparatory works to the introduction of the new discrimination ground of lack of accessibility is silent on the issue of burden of proof. The legal situation thus is the same as before. The Labour Court seldom shift the burden of proof in reasonable adaptation cases.¹⁰⁷

¹⁰⁵ With regard to costs within the different sectors the Government repeatedly states that the costs are small because new requirements are not introduced. See Government bill 2013/14:198, Chapter 13.

¹⁰⁶ This follows from a literary interpretation of the definition in Chapter 1 Section 4 point 3 of the Discrimination Act. 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 home page of the Equality Ombudsman 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 in Discrimination Act (<http://www.do.se/>). The first is that a customer may ask to have the menu read to him or her at a restaurant. The second is help to pick and pack groceries in a grocery store. The Equality Ombudsman has taken these two examples from Government bill 2013/14:198 p. 65.

¹⁰⁷ The wording of Chapter 6 Section 3 of the new Discrimination Act ought however to nudge the Labour Court towards shifting the burden proof. So does the reasoning behind the new formulation, Government bill 2007/2008:95 p. 444. It has also happened in Labour Court case 2003 No. 47.

The new Discrimination Act – though better than the previous acts – does not clearly provide for the shifting of 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 which deals with individual cases. No law for instance requires a school to accommodate a group of Muslims who ask for a place to pray in that school.

The Discrimination Act contains a provision Ch. 3 Sec. 4 requiring employers to implement such measures as can be required in view of their resources and other circumstances to ensure that the working conditions are suitable for all employees regardless of sex, ethnicity, religion or other belief. The active measures have a public law character. The main sanction for violations of this section is a conditional fine.

Today this paragraph can be used to ask for specific reasonable accommodation measures in the form of for instance female changing-rooms and a willingness of the employer to accommodate a wish from workers to have vacations during religious festivities. It does not mention disability. Reasonable accommodation directed at this group but not benefiting a certain individual is thus *not* required by the law.

The conditional fine does not benefit an individual who has suffered. This is however an example when a failure to comply also might lead to indirect discrimination.¹⁰⁸ Another example 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 its 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 a important factor in the proportionality test.

Failure to address other specific legal duties like the duty for employers to give time off for language studies for immigrants¹⁰⁹ is also an example where a discussion on the concept of indirect discrimination is 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 Court¹¹⁰ and the other is a Niqab case.¹¹¹ Stockholm District Court decided in February 2010 on a case where the former Ombudsman Against Ethnic Discrimination sued the National Employment Agency. A male job seeker had at an interview refused to shake hand with a female manager. Instead he had crossed his arms over his chest and bowed. He also explained that his religion forbid him to shake hands with women. The National Employment Agency believed that by doing so he lost his chance of getting a training post and therefore he

¹⁰⁸ The new discrimination ground of lack of accessibility does not apply to any other ground than disability.

¹⁰⁹ 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.

¹¹⁰ Stockholm District Court, Equality Ombudsman (took over the case in 2009) v. National Employment Agency, judgement 2010-02-08, case T 7328-08.

¹¹¹ Equality Ombudsman, Case 2009/103.

lost his unemployment benefits. The man was awarded 60.000 SEK (6 600 Euros) 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.¹¹²

The Niqab case started with the school making demands on the pupil to remove her niqab. Whenever someone makes a demand on a person (like not having the face almost totally covered) which is formally applying to all groups but affects a 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 mean, 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 almost all cases of indirect discrimination.¹¹³

The author uses the term indirect discrimination when the alleged discriminator sets a provision, a criterion or a procedure that appears neutral but puts a special burden on individuals in a specific group, like the provision of the school that pupils should not cover their heads. The term reasonable accommodation is used for situations which arise without any connection to a provision, a criterion or a procedure created by the alleged discriminator. For instance if it is important for a person to pray with persons of the same religion and they need the school to provide a room for it. The distinction between indirect discrimination and a failure to provide reasonable accommodation is sometimes very hard to make¹¹⁴ but one should try to make it.¹¹⁵

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.¹¹⁶ As regards public authorities there is a general duty to assess accessibility in all their activities and to develop accessibility plans to this end.¹¹⁷ The new discrimination ground from 2015 of lack of accessibility does not apply to homes and neither to buildings where goods are sold or services provided. However not following building regulation in other areas may lead to discrimination awards for instance in the education sector.

To my knowledge, though, there is no case law to reflect this yet.

In Sweden national law does not contain a general duty to provide accessibility by anticipation¹¹⁸ for people with disabilities.

¹¹² Stockholm District Court, Equality Ombudsman (took over the case in 2009) v. National Employment Agency, judgement 2010-02-08, case T 7328-08.

¹¹³ 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 solution did not work, if for instance the men could not be seated behind her.

¹¹⁴ The decisive thing is whether or not the discriminator could have chosen not to put up the hindrance. An employer asking the employee to do a certain task is indeed a hard question.

¹¹⁵ Whether or not the reader agrees or disagrees with the author on the distinction between reasonable accommodation and indirect discrimination, it is still a clear fact that the Swedish Equality Ombudsman did not treat the niqab case as a case of reasonable accommodation. It was treated as a case of possible direct or indirect discrimination before it was closed.

¹¹⁶ PBL (2010:900) The Planning and Building Act.

¹¹⁷ Ordinance (2001:526).

¹¹⁸ If the building permit has been followed and a health care provider can not accept a patient with a disability the discrimination ground of lack of accessibility applies. Following the building permit is to the health care providers benefit. The most important thing will be the assessment of economical 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.

There is no general duty with regard to disability. The Discrimination Act contains a provision Ch. 3 Sec. 4 requiring employers to implement such measures as can be required in view of their resources and other circumstances to ensure that the working conditions are suitable for all employees regardless of sex, ethnicity, religion or other belief, (see above f)

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. It is a state authority and its task is to develop national guidelines for the use of Braille in Sweden.¹¹⁹ It is a part of the Authority of Accessible Medias. According to an ordinance from 2010¹²⁰ it shall among other things translate literature, newspapers and societal information to sound 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 can not say that there is a general practice with regard to Braille. The Tax Authority has information in sign language, as well as some foreign languages, but not in Braille. The National Social Insurance Board has information in Braille.¹²¹ Each authority is required to translate information in Braille even if it is only one person that needs the information.¹²² 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.

¹¹⁹ <http://www.mtm.se/punktskriftsnamnden>.

¹²⁰ Ordinance 2010:769 with instructions for the Authority for Accessible Media.

¹²¹ <http://www.mtm.se/punktskriftsnamnden/namnden/>.

¹²² 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 Protection against discrimination (Recital 16 Directive 2000/43)

a) Natural and legal persons

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 have a wording like "the job seeker", "the child, pupil or student" and so on, where it is obvious that a legal person can not 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.¹²³

The Discrimination Act thus generally protects natural persons.¹²⁴ Nevertheless, as regards the act's applicability to working life, there is in the background the general "concept of employee", a compulsory concept not for the parties concerned to decide upon. Within this concept it is perfectly possible for the Labour Court, in the last instance, to "look through" and thus 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 is according to them required by the directive.¹²⁵ The Discrimination Inquiry Commission proposed in 2006 a protection also for legal persons in a number (but not all) areas covered by non-discrimination legislation.¹²⁶ But legal persons still have no explicit protection – which is a problem in relation to the directive.

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 speak of the "employer", the "service provider" and so on. It is clear from the wording that both natural and legal persons are covered.

b) Private and public sector including public bodies

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.

¹²³ Government bill 2007/08:95, p. 91.

¹²⁴ Government bill 2007/08:95, p. 90.

¹²⁵ 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) 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.'

¹²⁶ SOU 2006 :22 pp. 332 and following.

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.

The prohibition in the Discrimination Act is applicable to both private and public sector including public bodies. The limitation to the applicability of the Discrimination Act relates to activity areas and not to public or private sector or to who is responsible for the activity.

A police officer arresting a criminal is an area where the Discrimination Act do not apply. However, if the same police officer an hour later gives advice to a ordinary citizen, and treats this citizen disfavourable for a reason connected to a ground of discrimination, this activity will fall under the Discrimination Act. If so 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 neither if it is a natural or legal person nor if 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), 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 another employee *and* the latter is subordinated to or dependent upon the former.¹²⁷
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).¹²⁸
4. Discrimination against legal persons is not prohibited in working life

¹²⁷ 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 are two examples of this general thinking. Compare Labour Court 2007 nr 45 and 2011 nr 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.

¹²⁸ This follows from a lacuna. Chapter 2 Section 10 and 11 applies 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 is applicable between two self employed business partners.

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 does not fully include conditions for access to employment, to self-employment or to occupation, including selection criteria, recruitment conditions and promotion, whatever the branch of activity and at all levels of the professional hierarchy for the five grounds in both private and public sectors as described in the directives.

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 to discriminate 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 as well as to employed persons and offer both groups the same protection. A self employed person can also be discriminated against by the service provider if he or she need a service as a customer or a client (Ch. 2 Sec 12) for instance if a painter buys a car to 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 have 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, no specific prohibition covers this situation.

In his Sexual Orientation report of the 28 July 2004 the Ombudsman Against Discrimination on the Ground of Sexual Orientation 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 art. 2(3) and 3 of the directive). It is also a situation which has appeared in the requests for advice and support that the Ombudsman’s office has come across since the entering into force of the Act.”

This critical remark can be directed at the new Discrimination Act as well.¹²⁹

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

In Sweden, national legislation includes conditions for 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 of a worker, job seeker etc and therefore applies to all forms of working conditions including pay and dismissals. As regard occupational pensions these are, in parallel with the jurisprudence

¹²⁹ 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.

of the ECJ, considered as a sort of pay and are thus covered by the ban on discrimination.¹³⁰

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 applies to vocational training outside the employment relationship, such as that provided by technical schools or universities, or such as adult lifelong learning courses.

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 also applies to all forms of education including vocational training. In Sweden the word 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 prohibit discrimination when a person apply for - or participate 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 includes 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.

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

In Sweden, national legislation includes 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 there is a general possibility to justify direct age discrimination subject to a proportionality test in most areas.

¹³⁰ Se for instance Labour Court 2009 nr 15, Equality Ombudsman v. Stryker AB (judgement 2009-01-28).

- Article 3.3 exception

As the Swedish Discrimination Act covers both social insurance and social service, 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 de facto includes 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 Art. 3(1)(f) in the 2000/43/EC Directive. Discounts on services like 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 comprised in the Swedish Penal Code contains some provisions making it a criminal offence for anyone running a private business to treat customers unfavourably because of their sexual orientation, religion or ethnicity. The provision covers also anyone employed in such a private enterprise or acting on behalf of it, as well as anyone acting in their capacity of employee within the public administration, when dealing with the public. This means that discriminatory treatment in areas like health care, education and social security under certain circumstances can be considered a criminal offence.

The author can not 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)

In Sweden, national legislation includes education as formulated in the Racial Equality Directive in Chapter 2 Sections 5-8 of the Discrimination Act. The prohibition of discrimination applies to all grounds and the discrimination forms are described in Chapter 1 Section 4 of the Discrimination Act.

- Pupils with disabilities

In Sweden the general approach to education for pupils with disabilities does not raise problems. If discrimination occurs the new form of discrimination, lack of accessibility will most likely be effectively applied together with the education legislation.

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 normal school is preferable to going to a special school.

The new (2015) discrimination form of lack of accessibility, Chapter 1 Section 4 point 3 of the Discrimination Act relies on other legislation to formulate the demands which are

reasonable like 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.¹³¹ 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 is that conflicts when the child (through its parents) want to enter a ordinary class and get support to be able to stay in this class, and the local authority want to place the child in a special class for children disabilities, the local authority shall win. 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 made for improper reasons.

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

- Trends and patterns regarding Roma pupils

In Sweden Roma pupils meet 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 Romany chib 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 Romanies 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, Romanies in School. (*Romer i skolan*).¹³² Actual complaints of discrimination were few¹³³ and it is still so.

It is said to be hard for Romany youths to benefit of their rights to education on equal terms due to structural obstacles. In 2008 DO made a report on 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 the school managers said that the conditions necessary to provide language education did not exist.¹³⁴ As a part of the National Roma Strategy five municipalities have become test places and received state funding for inter alia improving education. In these municipalities, Roma pupils were seldom encouraged to take the minority language classes, the problems of finding qualified teachers sometimes made the municipalities wish for a low attendance.¹³⁵

¹³¹ School Act (2010:800) Ch. 10. Sec. 30.

¹³² Swedish National Agency for Education. Report 2007 nr 292.

¹³³ DO reveals only four such complaints made – case no. 897-2003, 526-1004, 290:1997 and 897-1999. See also Equality Ombudsman 2011, Roma rights (Romers rättigheter), p. 51.

¹³⁴ Swedish National Agency for Education (Skolverket) Report on Governmental Assignment, 2013-11-28 Dnr 2012:518 p. 3. More than 50 school managers gave this answer out of 886.

¹³⁵ See above, p 3.

An important legal background to this discussion is a case the Equality Ombudsman has taken to court claiming that the failure to provide language education in Romany 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 comparable situation.¹³⁶ If they for instance would actively seek such a teacher on the national labour market, they must be equally active in finding a teacher in Romany Chib.

The Ombudsman lost.¹³⁷ The District Court stated that the relevant measurement of comparable situation was other minorities. The municipality had not worked less hard to find teachers of Romany Chib compared to other minorities mother tongues for instance refugees. The judgement was appealed but Göta Court of Appeal decided not to take it up.¹³⁸ From this case it follows that even though it is a duty for the municipalities to provide minority language, there is no effective legal remedy if this do not happen. There is no corresponding right for the pupil for this education.

The author does not think that the new discrimination form 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 judgement 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 Romany Chib as well. The case law still says that national ethnic minorities can not be compared to the national ethnic majority.

In the 2013 report a majority of the school managers reported that their schools did not teach on the Swedish Roma perspective with regard to Roma culture, language, history or religion.¹³⁹ In 2014 detailed information on how a Roma perspective could be introduced in Swedish, history, societal knowledge and so on was produced to aid the schools.¹⁴⁰

The author thinks that it is fair to say that the authorities works seriously with 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 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 the discrimination forms are described in Chapter 1 Section 4 of the Discrimination Act.

When age in 2013 was included in the prohibition on discrimination in goods, services and housing in Ch. 2 Sec. 12 of the Discrimination Act, a set of special exemptions were needed. These are in the 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 wage to drink, above the national

¹³⁶ Equality Ombudsman, 2010-11-11 OMED 2007/1109 Act 116, p. 4.

¹³⁷ Equality Ombudsman against Vetlanda Municipality, Eksjö District Court, Case T 1395-09, judgement 2010-10-21.

¹³⁸ Göta Court of Appeal, case T 3264-10.

¹³⁹ Swedish National Agency for Education (Skolverket) Report on Governmental Assignment, 2013-11-28 Dnr 2012:518 p. 3.

¹⁴⁰ 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).

mandatory minimum age of 18 years and there is a general possibility to defend all other rules on age subject to a proportionality test.

The prohibition on discrimination in goods, services and housing applies without exemptions on disability. This has been so 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. Stockholm District Court in 2011 said that:¹⁴¹

“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 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 present they could not design an individualised contract with higher fees or exemptions. Since this was impossible, it was not discriminatory to deny insurance all together. 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 statistic 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 is accurate enough with regard to the individual, statistical discrimination is not considered to be a form a direct discrimination with regard to insurances and disability.¹⁴²

All of this leads up 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 to the directive within those areas.¹⁴³

¹⁴¹ Stockholm District Court, case T20377-09, The Equality Ombudsman against Trygg Hansa (judgement 2011-03-08), p. 11.

¹⁴² Svea Court of Appeal, Equality Ombudsman v. If Insurances, case T 1912-13 (judgement 2013-10-08.

¹⁴³ The European Court of Justice regards statistical discrimination as a form of direct discrimination. Case C-236/09 (Test Achats) where the insurance providers was not allowed to use the sex of the costumer 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 the sex to determine the insurance fees for cars. However, with regard to disability and insurances statistical differences between persons with a disability and healthy persons makes them not comparable and thus a presumption of discrimination can not 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 like in Directive 2004/113. But extending the protection for disability to the insurance sector and then defining comparable situation as statistical discrimination is not a form of direct discrimination can not be right. If an EU-concept like direct discrimination is used then it must (according to the author) be used correctly.

- Distinction between goods and services available publicly or privately

In Sweden national law distinguishes goods and services available to the public (e.g. in shops, restaurants, banks) and those only available privately (e.g. limited to members of a private association).

The Discrimination Act applies to:

“persons who *outside private or family sphere* are offering goods services or housing to the public.”¹⁴⁴

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

The Penal Code contains a ban on unlawful discrimination which concerned both those who supplies goods and services for professional purposes as well as employees at the state and local authorities. It is prohibited for them to discriminate in the line of their work on the ground of race, religion and sexual orientation.

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

In Sweden, national legislation includes housing as formulated in the Racial Equality Directive. The prohibition covers all grounds but does not apply to private persons who sells or rent out their property on sporadic occasions.

Housing falls under Chapter 2 Section 12-12 c of the Discrimination Act. The Government bill¹⁴⁵ to the Discrimination Act states that *sporadic occasions*¹⁴⁶ (*enstaka*) of selling or renting out a dwelling should be regarded as within the private/family sphere. Selling an apartment or a house will thus often be exempted from the law.¹⁴⁷ A realistic scenario is that a real estate agent presents two possible buyers to the seller and the seller chose the lower bid for ethnic reasons. As long as it is the seller’s decision and the real estate agent treats both buyers equally, there is no unlawful discrimination under the act.

Situation testing in different forms have been undertaken by among others the Tenants Association and by researchers at Linneaus University.¹⁴⁸ 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.¹⁴⁹ 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.

¹⁴⁴ Discrimination (2008:567) law, 2 Ch., Sec.12. point1.

¹⁴⁵ 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 of the Discrimination Act – this bill becomes the most important source for interpreting the wording of new Act at least before there is any case law. See Section 0.1.

¹⁴⁶ Sporadic occasions may be more than one occasion. A person may for instance sell their apartment and by 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 selling are sporadic occasions.

¹⁴⁷ Prop. 2007/08:95: p. 244.

¹⁴⁸ The Ombudsman Against Ethnic Discrimination, Discrimination on the Swedish Housing Market 2008:3.

¹⁴⁹ Ahmed A and Hammarstedt M. Discrimination on the housing market – a field experiment on the internet, Växjö 2007.

- Trends and patterns regarding housing segregation for Roma

In Sweden there are patterns of housing segregation and 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 Romany population live. When segregation is studied in statistic material a proxy such as the birthplace of the individual or the parents is used. National ethnic minorities are missed out.

The Swedish housing market is very 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 public housing companies are the predominant landlord. The average Romany would live in such a neighbourhood. There have been some cases where local politicians have made discriminatory statements like "Vänersborg cannot absorb more gypsies".¹⁵⁰ Such comments have been made by representatives of public housing companies as well.¹⁵¹

The old Ombudsman Against Ethnic Discrimination had about 50 housing cases each year.¹⁵² Many landlords have no formal queue where prospective tenants can register their interest in renting an apartment.¹⁵³ 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, refusals to barter¹⁵⁴ the apartment or denied membership in a housing co-operative are also common complaints.¹⁵⁵

Romanies bring many housing cases to the ombudsman. One case from Lidköping District Court concerned a landlord that changed the lock in order to evict a Romany family. When the lease on the apartment was signed the landlord mistook the ethnicity of the family. He thought they were from Thailand.¹⁵⁶ There are other cases in which landlords specifically refuse to let Romanies rent apartments.¹⁵⁷

- disability

General disability accessibility is in Sweden primarily dealt with under property law. The new discrimination form of 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) deciding 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

¹⁵⁰ Ombudsman Against Ethnic Discrimination, Discrimination Against Romanies in Sweden, Report on DO project 2002 and 2003. p. 16.

¹⁵¹ See above p. 18.

¹⁵² 55 cases in 2008. Ombudsman Against Ethnic Discrimination, Yearly report 2008, p. 18.

¹⁵³ Equality Ombudsman (2011) Roma rights (Romers rättigheter) p. 44. This is presented as a factor making discrimination harder to address.

¹⁵⁴ The possibility to barter a contract for an apartment is a valuable right within the Swedish rent law system.

¹⁵⁵ The Ombudsman Against Discrimination, Ethnical Discrimination in the Housing Area (Etnisk diskriminering på bostadsmarknaden PM 2006-01-01).

¹⁵⁶ Lidköping District Court (dnr 1209-2005) case T-nr 1596-06, judgement 2008-05-20. The tenant was awarded 50.000 SEK approximately 5.600 Euros.

¹⁵⁷ The Ombudsman Against Discrimination case nr 331-2006.

buildings are thus good from a general accessibility point of view. But a property owner comes in contact with these regulations only when applying for a building permit.

The National Board of Housing, Building and Planning (Boverket) have issued a regulation regarding easily removable obstacles.¹⁵⁸ This rule applies to public spaces, social security, the health care sector, infrastructure¹⁵⁹ 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 with only dwellings cannot be ordered to improve accessibility under the threat of a conditional penalty. They can only be made to do such things when they need a building permit.

If a person with a disability needs an adaptation of their home, the person asks the municipality for a housing adaptation grant. This applies to rented property as well as property owned by the person with a disability.¹⁶⁰ The tenant cannot do such alterations to the apartment without the landlord's permission. The municipality checks that permission is 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 the Discrimination form lack of accessibility does not apply to housing a landlord is free to say No to any adaptation that falls outside what a non-disabled tenant are allowed to do according to the Tenancy Act even if all the costs are covered by grants or the tenant him or herself.

¹⁵⁸ The current regulation is BFS 2003:19.

¹⁵⁹ 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.

¹⁶⁰ Section 4 Law on Housing Adaptation Allowance.

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 Muslim faith, that an organisation for equal rights for gays and lesbians or an interest organisation, which caters for a certain immigrant group may have the right to require¹⁶¹ 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.¹⁶² In an organisation only the positions "visible" to the public can come into question, not an entire organisation per se and automatically. The employer, must, furthermore, have a strong motive for applying the exemption; the position must clearly have demanded that the discrimination takes place. Religious communities do not have any favourable status here, but they are explicitly mentioned in the preparatory work, along with other examples.

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

- Exception for employers with an ethos based on religion or belief

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.

¹⁶¹ 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 regards employers asking applicants for their medical history. The applicant has a right to privacy and cannot for instance be forced to turn over the statistics from the National Insurance Board regarding sickness benefits in the past. But if the applicant uses this right the employer is free to deduce that these statistics probably was 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 hers own deductions from this denial. If for instance an organisation representing homosexuals wish to employ a new president and ask applicants about their sexual orientation, Swedish law on privacy only protect the right of the individual applicant not to answer the question. If the employers interprets the refusal to answer as the applicant being heterosexual and therefore does not hire the applicant there is no problem with privacy law.

¹⁶² Government bill 2002/03:65, p. 185-187. Government bill 2007/08:95 p. 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 covers enrolment inspection, admission tests and other examination 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. Should Sweden be attacked the possibility to do so still exist and these sections of the Discrimination Act would then protect the conscripts.

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 other aspects of nationality than citizenship.

According to Chapter 11 Sec. 11. of the Instrument of Government Swedish citizenship is required for judges, Chapter 6 Sec. 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 when Swedish Nationality is required by the Instrument of Government.¹⁶³

Positions where the person is elected by the Parliament requires Swedish citizenship according to the Parliament Act (1974:153) Ch. 7 Sec. 11. This Act has a semi constitutional status. As regard to other legislation there are some (but rare) occasions where Swedish citizenship is required.¹⁶⁴

In Sweden national origin is explicitly mentioned as a part of the protected ground ethnicity in national anti-discrimination law. According to Chapter 1 article 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 wording of definition of ethnicity, "national origin or other similar circumstances".

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

Within Swedish non-discrimination legislation there are no exceptions related to nationality (apart from rules requiring Swedish citizenship). National origin is an aspect¹⁶⁵ of ethnicity. The overlap is thus recognised by the law and no person can be left unprotected. A stateless person will always have an ethnic origin.

¹⁶³ Government bill 2009/10:80 p. 333.

¹⁶⁴ See further, SOU 2000:106, Medborgarskapskrav i svensk lagstiftning, where an inventory is made.

¹⁶⁵ According to Chapter 1 article 5 point 3 of the Discrimination Act ethnic origin is defined as "national or ethnic origin, skin colour or other similar circumstance".

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

a) Benefits for married employees

In Sweden it would not constitute unlawful discrimination in national law if an employer only provides benefits 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 spouses of different sex.

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

b) Benefits for employees with opposite-sex partners

In Sweden it would constitute unlawful discrimination in national law if an employer only provides benefits 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 this Sexual orientation report of 28 July 2004 “the whole *raison d’être* of the Swedish Registered Partnership Act¹⁶⁶ was to create a legal frame-work for homosexual couples, which corresponds to that of civil marriage for heterosexuals.”

On the first of 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)

a) Exceptions in relation to disability and health/safety

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.

Regarding the persons with disabilities, it is relevant for the employer to take into consideration not only security issues/the health and safety of others at the workplace, but also a person with a disability’s own health or safety. However, the burden of proof can sometimes be shifted to the employer. In the Labour Court case 2003 No. 47¹⁶⁷ the

¹⁶⁶ Lag (1994:1117) om registrerat partnerskap [Act (1994:1117) on Registered Partnership]; original *travaux préparatoires*: bet. 1993/94:LU28. Now repealed.

¹⁶⁷ Labour Court 2003 no 47 Swedish Metal Worker’s Union v. Scandinavian Refinery Ltd (Scanraff) and Co-operative Employers Organisation (judgement 2003-06-04).

risks of shift work for an employee with diabetes were not proven and the denial 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 it 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.

- Justification of direct discrimination on the ground of age

In Sweden it is possible, generally 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 pension, 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 work well according to the Government. Therefore the courts are encouraged to look at a collective agreement in a holistic way, including its relation with relevant social security provisions and not single out individual clauses in a collective agreement for scrutiny in isolation.¹⁶⁸ But at the same time the Government rejected demands for a presumption of collective agreements being compatible with directive 2000/78.¹⁶⁹ Any benefit in a collective agreement can be seen as "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:¹⁷⁰

- 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 2011 No. 37¹⁷¹ 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

¹⁶⁸ Government bill 2007/08:95, p. 177.

¹⁶⁹ Government bill 2007/08:95, p. 177.

¹⁷⁰ Government bill 2007/08:95, p. 179.

¹⁷¹ Labour Court 2011 no 37, Equality Ombudsman v. Aviation Employers (Flygarbetsgivarna) and Scandinavian Airlines System (judgement 2011-05-04).

shall apply. The persons who have been employed for the longest time shall keep their job. This rule is however semi-mandatory 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 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 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 within Chapter 2 Section 2 Point 4 of the Discrimination Act. Voluntary retirement schemes could thus be acceptable. However, it was not proportionate 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 125 000 SEK (13 800 Euros) in a combination of a discrimination award and non pecuniary damages according to the Employment Protection Act.¹⁷²

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

a) 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.

b) Occupational pension schemes' fixed ages for admission or entitlements

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.¹⁷³

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.

¹⁷² The reform of 2013 extending the protection for age discrimination did not affect the prohibition of discrimination in the labour market.

¹⁷³ Discrimination Act Ch. 2 Sec. 2 Point 3.

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. The government is currently asking the National Employment Agency to prepare for a 90 days guarantee for young people. No young person shall wait more than 90 days for a traineeship or a vocational training or some other labour market activity.¹⁷⁴

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

4.7.3 Minimum and maximum age requirements

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 pensions.

According to the Swedish statutory pension scheme introduced in 1998¹⁷⁵ there is no fixed retirement age. The income-related public pension scheme opens up for part-time or full-time retirement from the age of 61.

You can also postpone your retirement, continue to work for as long as you like and continue to add to your pension benefits, the scheme being construed on a principle of life-long earnings and actuarially correct calculations on expected life when you retire. Postponing retirement one month raises the pension with approximately 0.6 %. It is OK to collect a pension and still work – both the pension and the income are taxable.

However, the right to the basic pension scheme – “guaranteed pension” – requires the beneficiary to be 65 years of age. Even this pension can be postponed and thus increased.

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.

All occupational pension schemes contain – mostly flexible – rules on pensionable age. They can thus normally be deferred if an individual wishes to work for longer. You can also collect a pension and still work. The age of 55 is the earliest age at which a pension fund can allow a person to start withdrawing pension.¹⁷⁶ Many occupational pension schemes thus has this age limit.

c) State imposed mandatory retirement ages

¹⁷⁴ As the guarantee is to be introduced gradually the exact age limits are not yet set.

¹⁷⁵ Act (1998:674) on income related old age pension and Act (1998:702 on guarantee pension.

¹⁷⁶ Act (1999:1229) on Income Taxation Chapter 58 Section 8 sets this age at the lowest possible for favourable tax treatment.

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

d) Retirement ages imposed by employers

In Sweden national law permits employers to set retirement age at 67 years or higher 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.¹⁷⁷ At this point it is possible for the employer to unilaterally terminate the employment with one month notice.

e) Employment rights applicable to all workers irrespective of 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 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.

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 notice at this age. Should the employer not do this the old employee can not 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. Employer normally dismiss workers who reach 67 years. If they want to keep the worker, they give the worker a fixed-time 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.

f) Compliance of national law with CJEU case law

In Sweden national legislation is in line with the 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.

¹⁷⁷ 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.

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. This, arguably, may be regarded as amounting to indirect age discrimination. Moreover, in the event of equal periods of employment senior age priority applies directly. There is also special protection for the persons with disabilities (preference, i.e. the seniority rule does not necessarily apply).

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.

b) Age taken into account for redundancy compensation

In Sweden national law does not provide compensation for redundancy.

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.
- 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 health care and social services are also permitted according to Chapter 2 Section 13 b point 1 of the Discrimination Act.
- The Discrimination ground lack of accessibility does not apply to housing according to Chapter 2 Section 12 c point 1 of the Discrimination Act.
- The Discrimination form lack of accessibility does not apply to private persons according to Chapter 2 Section 12 c point 2 of the Discrimination Act.
- The Discrimination ground 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 was build can not be asked to do any more adaptation. The Discrimination ground 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 programs 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 there is a number of special measures available in relation to persons with disabilities in regard to working life. Their purpose is to directly or indirectly compensate for disadvantages linked to disability. In some cases, for example, wage subsidies are available. An individual may also have a right to certain support measures in order to regain or retain his/her work capacity. These measures are regulated in the 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 as well. This also means that certain types of accommodations should be made in regard to employees with disabilities. This can also relate to the physical accessibility of the workplace. These issues are regulated in the Work Environment Act (Arbetsmiljölagen (1977:1160) and the Work Environment Decree Arbetsmiljöförordningen (1977:1166) as well as by the 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 in such a test.

Ethnicity and religion have an exemption from the prohibition of discrimination regarding labour market policy activities and for the 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 the employers carry out a goal-oriented work to actively promote ethnic diversity in working life.¹⁷⁸

The universities are required to do goal-orientated work with regard to all grounds except age and transgender identity and expressions. There is a requirement on the universities to adopt plans to this end on a yearly basis (Ch 3. Sec. 16.). They are also required to take measures to prevent and preclude conduct that violates a person's integrity if the conduct is related to any ground but age and transgender identity and expressions (Ch. 3 Sec. 15).¹⁷⁹

¹⁷⁸ Chapter 3 Section 3 of the Discrimination Act.

¹⁷⁹ 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 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 according to Ch. 4 Sec. 5 of the Discrimination Act. The financial penalty will gain legal force only after a district court has ordered the payment and the legality of the order itself – as well as the reasonableness of the amount – can be decided upon by the district court.

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 to pass 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.¹⁸⁰ 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, narrowly tailored or 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 long-term unable to hold a normal job can qualify a person for these measures.

The inquiry into the rights of Roma people proposes state funding for locally decided labour market activities designed to meet the needs of this group.¹⁸¹ The inquiry estimates that only 10 % of the Roma people in Malmö have a normal job on the open labour market.¹⁸² As a part of the National Roma Strategy five municipalities have become test places and received state funding for inter alia making sure that the National Employment Agency assists Roma persons in a better way.¹⁸³ This has led to broad based activities in the five municipalities. They have for instance created positions called - costumer resource officials with minority focus - which assists all minorities. However all of them must either speak Romany or have good knowledge of Roma culture.¹⁸⁴ They also present figures like 20 Roma persons received employment or 10 Roma persons received training places, but no one knows how many would have received jobs or training places anyway.¹⁸⁵ No municipality report 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 it was implemented in a way that benefited all minorities - but with special focus on Roma.

There is a special labour market program for newly arrived immigrants based on a law (2010:197). It consists of a right to education on the Swedish language and on the Swedish society and activities to facilitate the immigrant 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 meet the problems of new immigrants.

With regard to dismissals on grounds of redundancy there is also the provision in Sec. 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

¹⁸⁰ The Government do such positive measures as well, for instance with regard to employment decisions and selection of persons to lead governmental authorities.

¹⁸¹ Government White Paper 2010:55 p. 363.

¹⁸² 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.

¹⁸³ <http://www.regeringen.se/>.

¹⁸⁴ National Employment Agency, Report on Pilot Activities for Roma Inclusion 2015, p. 10.

¹⁸⁵ National Employment Agency, Report on Pilot Activities for Roma Inclusion 2015, p. 15, that example is from Malmö.

and supportive measures as regard the use of their native language as well as access to media¹⁸⁶ and as regards the Sami also on land rights and reindeer management. From 2011 the Sami people have their reindeer management rights recognised in the constitution.¹⁸⁷ 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 that have little or no academic background. People's universities are free to design their own courses and programs. They are not bound by the normal educational hierarchy. Some programs result in professional qualifications (for instance journalist and drama teacher). Admittance to such programs often requires the same level of secondary education as universities do.

Some people's universities co-operate with normal universities and let the normal university do part of the examination and part of the program can then be counted as an ordinary academic course giving the student ordinary academic points. Other programs are directed at people with very little educational background and when admitting students to the basic general course elder 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 Romany population. Creating educational programs reserved for special groups like immigrants, persons with disabilities or women is considered normal in this form of education.

The distinction between narrowly tailored measures and quotas may be debatable. A Sami with a reindeer right can not 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 to admit a non Sami as a member and since a non Roma person with a deep interest in Roma culture would have a good chance to be admitted to the Roma People's University or a Roma class at another people's university, the author has regarded these form of positive action as narrowly tailored measures rather than quotas.

¹⁸⁶ Compare the Government bill 2005/06:112 on public television and radio.

¹⁸⁷ Instrument of Government Ch. 2 Sec. 17.

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:

1. Judicial proceedings in The Labour Court (starting in the civil court if the worker is represented by someone else than a trade union with a collective agreement or the Equality Ombudsman).
2. Judicial Proceedings in the Civil Court system.
3. If a trade union with a collective agreement represent a member, there must be negotiations with a view to settle the conflict 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.
4. The Equality Ombudsman also negotiates with the employer before going to the Labour Court.¹⁸⁸ There are more settlements than cases.

It is as a general rule not possible 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 get a decision from the School Appeal Board that the adaptation cost necessary for accepting their child to a school are not substantial¹⁸⁹ and that the school thus have to take the cost, the discrimination is averted, but there will be no discrimination award. Some state employment decisions can be appealed as well and the plaintiff 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 aided by the trade union or the Equality Ombudsman and in the Civil Court the Equality Ombudsman may assist the plaintiff.

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

Civil processes regarding working life under the Discrimination Acts are to be dealt with in accordance with the Labour Disputes Act.¹⁹⁰ Depending on whether the employer is bound by a collective agreement, the person who alleges discrimination is or is not a member of the trade union having 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*) with a special composition comprising both judges with judicial background and members from both sides of the labour court.¹⁹¹ Whereas it is the

¹⁸⁸ 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 a possibility to decide on a financial penalty (which can be appealed to the administrative court) if the employer does not show up.

¹⁸⁹ Chapter 9 Section 15 of the School Act in conjunction with Chapter 28 Section 12 point 6.

¹⁹⁰ Act (1974:371) on Labour Law Procedure.

¹⁹¹ As regards the Swedish Labour Court, see, for instance, the European Court of Human Rights judgment of 26 October 2004 in the case of AB Kurt Kellermann v. Sweden.

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

However, as regard State employees there are the constitutional rules regarding objective grounds on hiring. If the plaintiff is better qualified he or she is entitled to get the employment (which they cannot get under the Discrimination Act, they could only get 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 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.¹⁹²

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

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 the alleged discriminatory act took place.¹⁹³ Individuals can (but must not), 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 plaintiff ask for less than 22 000 SEK (2 400 Euro) a simplified procedure may be used. This procedure is tailored so that a normal person shall not need an attorney. The right of the winning party to recover legal costs is limited.¹⁹⁴ 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 victims is important for persons with limited means.

A more complicated system of rather short time limits applies in working life.¹⁹⁵ Dismissal claims are regulated by the 1982 Employment Protection Act and time limits are complicated and rather short. If the claim consists in declaring a dismissal null and void we are talking about weeks from the occurrence of the act or – in certain cases - 1

¹⁹² Some university or higher education cases may also be brought before the Board of Appeal for Higher Education.

¹⁹³ Chapter 6 Section 6 of the Discrimination Act.

¹⁹⁴ There is a list of allowed expenses, one hour of legal aid (1242 SEK) claim fee (450 SEK), travelling costs, cost for witnesses, translation costs.

¹⁹⁵ Chapter 6 Sections 4 and 5 of the Discrimination Act.

month after the expiry of the employment. If the claim regards only indemnification we are talking about four months. Are we talking about wage compensation the 1976 Co-Determination Act applies. Here the general time limit is four months from knowledge of the act within a maximum of two years from its occurrence.¹⁹⁶ 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 with regard to access of justice.

As regard the costs of litigation, etc., both in the case 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, something which is, of course, very convenient for the individual concerned. If the individual him- or herself brings a claim to court he or she risks to have to pay the costs of the trial should the case be lost.

If a person is poor and is not represented by the Equality Ombudsman or a trade union, there is a possibility 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) there is a possibility for the court to rule that both parties shall bear their own costs if the plaintiff loses but had good reasons (*skälig anledning*) to go to court according to Ch 6 Sec. 7 of the Discrimination Act.¹⁹⁷

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.

¹⁹⁶ If someone brings an action as a result of *notice of termination or summarily dismissal* the rules in the 1982 Employment Protection Act (LAS) apply. To have a dismissal declared null and void the employer shall be notified about the claim within two weeks of the dismissal. A law-suit shall be presented within two weeks thereafter, or, should conciliations negotiations have taken place, within two weeks from terminating such negotiations (Sec. 40 LAS). As regard damage claims, the employer shall be notified about the claim within four months after the damaging activity occurred and a law-suit shall be presented within four months after that, or, should conciliations negotiations have taken place within four months from terminating such negotiations (Sec. 41 LAS). – With regard to *any other action* the rules in the Co-Determination Act (MBL) apply. Conciliations negotiations must be required by the relevant trade union within four months from knowledge of the damaging act and within two years from the act itself (Sec. 64 MBL). A law-suit shall be presented within three months after terminating such negotiations (Sec. 65). If an employee cannot be represented by a trade union he or she must present the claim to the court within four months from knowledge of the damaging act and within two years from the act itself (Sec. 66 MBL).

¹⁹⁷ The Equality Ombudsman cannot use this rule. It only applies to private persons. An Anti Discrimination Bureau would as a private law legal person 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 (judgement 2013-03-18). An Anti-Discrimination Bureau helped a mother to sue IKEA for not letting her disabled daughter play in the playroom. She demanded 20 000 SEK (2 200 Euros) in discrimination award. IKEA admitted that they had treated the daughter badly. They accepted 20 000 SEK 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) Standing to act 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 plaintiff. 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 it is to look after its members, the right to bring actions in their own name as a party representing a individual person. The association must have the consent of the individual and be suited to represent 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 their right is secondary to that of a trade union in the employment field. Anti-discrimination bureaux¹⁹⁸ have been allowed to do it also, though it is not entirely certain that the Discrimination Act gives them this right (they are not created for the benefit of their members but for everybody who suffers discrimination).¹⁹⁹

b) Standing to act in support of victims of discrimination

In Sweden any organisation are 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 proceeding or support a complaint according to 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 an Process Aid (rättegångsbiträde). If the person is law abiding, and do not risk becoming involved in the process as a witness or something similar, there is no problem. A Process Aid (rättegångsbiträde) may speak on behalf of the plaintiff and the plaintiff is bound by what he or she says or does, unless the plaintiff immediately declare 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**).

¹⁹⁸ Local anti discrimination bureaux are idealistic organisations whose members are other organisations and sometimes individuals. They are created to combat discrimination on all the grounds of discrimination. They typically provide free legal advice to persons suffering from discrimination and also to take part in the public debate, arrange seminars to the general public and so on.

¹⁹⁹ See Göta Court of Appeal, Judgment 2011-09-30, Örebro Rättighetscenter against Götavi Invest AB, Case No FT 198-11.

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

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?

Class action is not possible in Sweden. There is – however, only outside employment law²⁰⁰ - a possibility in Swedish Law to make a group petition (*the Act on Group Petitions, Lag [2002:599] om grupprättegång*). This means that a person can make a lawsuit on behalf on her- or himself but with legal consequences for other persons, even though they are not parties to the case.²⁰¹ This kind of lawsuit can be made also by organisations.²⁰² However, this Act does not make it possible for organisations to act as a representative or agent for an individual.²⁰³ 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 a ethnicity. If a restaurant is inaccessible for persons in a wheelchair, the court would have the victims consisting of every disabled person who have 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.²⁰⁴

But if many disabled persons 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 organization.²⁰⁵

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

In Sweden national law requires a shift of the burden of proof from the complainant to the respondent?

A shift of the burden of proof is required in Ch. 6 Sec. 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 discrimination form of 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 disfavourable treatment). Thereafter the burden of proof is shifted to the

²⁰⁰ 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.

²⁰¹ If a group is created the court need not treat each member of the group as a party all the times. The court must know all the members of the group. The judgement 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.

²⁰² Petitions by organisations are regulated by section 5 of the law, but I am not aware of any case law on this paragraph.

²⁰³ See, for instance, prop. 2002/2003:65 p. 167.

²⁰⁴ See Section 8.

²⁰⁵ To the author’s knowledge this has never happened.

other party who must show that one of the requirements is not fulfilled or that the disfavourable treatment was not associated with the ground in question. No intent to discriminate is required.

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)²⁰⁶ 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 %.²⁰⁷

In their book explaining the new Discrimination Act Fransson and Stüber point out a possible difference in the handling of the burden of proof.²⁰⁸ 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 plaintiff proves similar situation and the less favourable treatment. The Labour Court applies the presumption more narrowly. The plaintiff 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.²⁰⁹

The difference between the civil courts and the Labour Court is to be analysed in a government white paper and this inquiry may produce a proposal for modification of the legal rule.²¹⁰ It has got extended time and will report to the government in December 2015.²¹¹

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

In Sweden there are legal measures of protection against victimisation.

Victimization is forbidden in Ch.2 Sec. 18 and 19 of the Discrimination Act.

It is defined in the preparatory work as acts, statements and omission to act which leads to a damage or a sense of discomfort for the individual.²¹²

The prohibition protects all persons involved in an investigation including witnesses and persons reporting discrimination or in other ways help the victim. According to Ch. 6 Sec. 3 the reversed burden of proof applies in victimisation cases.

²⁰⁶ The replacement of the former Ombudsman Katri Linna took place in February of 2011. Agneta Broberg started at the first of October 2011. Sandesjö was not involved with the Equality Ombudsman when the report was made in 2010.

²⁰⁷ Sandesjö 2010 (Jurcom AB), *Domar i diskrimineringsmål 1999-2009*, p.11.

²⁰⁸ Fransson–Stüber, *The Discrimination Act Commented*, Chapter 6 Section 3. Compare Sandesjö 2010, p. 14. In cases where the rule on burden of proof has been decisive the success rate in the general court system is 90 % against 19 % in the Labour Court.

²⁰⁹ There are other possible explanations for the difference in the plaintiffs' success rates. One possible explanation is that obvious cases of discrimination often are settled in the negotiations between the employer and the trade union on local or central level, which must take place before going to the Labour Court, if a trade union is representing its member. But there is also an ongoing discussion 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. Compare Sandesjö 2010, p. 18.

²¹⁰ Committee directive 2014 nr 10, p. 6.

²¹¹ Committee supplementary directive 2014 nr 79.

²¹² 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. It is complemented by a 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.²¹³

The concept discrimination award is 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 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.²¹⁴ 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 contracts and in individual contracts is possible in all areas of the law according to Ch. 5 Sec 3.

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

Violations of the penal provision on unlawful discrimination are punished by a fine or imprisonment for a time not exceeding one year and can also result in the obligation to pay financial compensation according to Chapter 16 Section 9 of the Penal Code. The maximum prison sentence for hate speech in Chapter 16 Section 8 is two years.

Sanctions are normally applied to e.g. the employer, university, labour union or employers' association as such. This follows from expressions such as "employer" or "university" in the provisions on financial compensation. Harassment by fellow workers or students may, however, also come under general criminal law provisions on such behaviour, e.g. as harassment, verbal abuse, threats or assault.

In such cases, a complaint may result in sanctions also against the individual directly responsible for the actions.

b) Ceiling and amount of compensation

There is no formal ceiling on the compensation.

The record amount was set 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

²¹³ With regard to breaches of active duties a court order subjected to a financial penalty can be meted out.

²¹⁴ In the state sector, however, the Public Law character of the constitutional provisions as regard objective grounds on hiring has as the consequence that a discriminatory decision may be appealed through administrative procedures and the discriminated be installed in the position in question.

and therefore the Discrimination award was set at 150 000 SEK (16 500 Euros for each of the involved parties (both parents and the child)).²¹⁵

There is 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) raise of the amount awarded.²¹⁶

The Equality Ombudsman has so far decided to proceed on a number of cases regarding the labour market, asking for 75 000 to 400 000 SEK (8 300 to 44 000 Euros). The Labour Court has previously awarded between 30 000 and 50 000 SEK (3300 to 5600 Euros) in similar cases. The Ombudsman has further settled several cases at the level of 100 000 SEK (11 000 Euros) and one record breaking case of 200 000 SEK (22 000 Euros).²¹⁷ This settlement is impressive in relation to the discrimination awards in AD 2010 No. 91²¹⁸ (75 000 SEK approximately 8 300 Euros) AD 2011 No. 37²¹⁹ 125 000 (13 800 Euros). In the former case the Equality Ombudsman asked for 300 000 (33 000 Euros) in the latter case the ombudsman asked for 400 000 SEK (44 000 Euros) in discrimination award and 100 000 SEK (11 000 Euros) for the violation of the Employment Protection Act. The amount of 125 000 SEK (approximately 13 800 Euro) was awarded in a one for all compensation for the violation of both acts.

But 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. The Supreme Court has decided two cases on the same day.²²⁰ 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 20.000 SEK (2 200 Euros) each.²²¹ The Supreme Court decided that the violation was severe - as severe as violation by word without threats can possibly be. The violation was worth 15 000 SEK (1 650 Euro) each. Furthermore a 20 000 SEK (2 200 Euro) should be added as a prevention supplement. Normally a prevention supplement should be the same amount as the violation.

²¹⁵ Svea Court of Appeal case T 5096, The equality Ombudsman v. Sigtuna Municipality (judgement 2014-04-11).

²¹⁶ Equality Ombudsman, Yearly Report 2012, p. 24.

²¹⁷ 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.

²¹⁸ Equality Ombudsman v. Swedish Agency for Government Employers (judgement 2010-12-15), 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 to 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 to a man who got an interview and therefore a presumption of sex discrimination arose as well.

²¹⁹ Collective agreement permitting the employer to dismiss all employees above the age of 60 in a redundancy case (described in section 4.7.1).

²²⁰ Supreme Court case T 3592-13, Equality Ombudsman v. Veolia (judgement 2014-06-26). The Second case was Supreme Court case T 5507-12, Equality Ombudsman v. Stockholm County (judgement 2014-06-26) Nja 2014 p. 499.

²²¹ In Sweden the ground of ethnicity covers race as well.

Had one person been discriminated against that person would thus have received 15.000 plus the full prevention fee (15.000 plus 15.000 SEK).²²² Since two persons would share the prevention fee it was set at 20.000 as 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 being refused to eat at a restaurant result in a damage of 15 000 SEK (1700 Euro) 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 persons in. The prevention fee could therefore be much higher compared to 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 (approx. 8 900 Euro) will hardly deter a larger employer. For large employers or businesses the threat of publicity is real and much more important.²²³ For small employers or small businesses the sanctions may be said to be a deterrent.

c) Assessment of the sanctions

Nobody has tried to answer the question of effectiveness in a scientific way.

As regards *the principle of effectiveness* it is the opinion of the author that Swedish regulations in this area on an overall basis do meet the standards of Community Law.

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 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.²²⁴

Outside the labour market, the sharply reduced civil damage, when discrimination is proved by situation testing is according to the author probably against the principle of effectiveness at least with regard to night clubs.²²⁵ 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

²²² For those who read Swedish and have access to this fee-based data base an interesting article by Håkan Andersson a professor who specializes 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%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>.

²²³ See for instance Court of Appeal over Scania and Blekinge case FT 1948-12, Forum for Equal Rights v. IKEA (judgement 2013-03-18). An Anti-Discrimination Bureau helped a mother to sue IKEA for not letting her disabled daughter play in the playroom. She demanded 20 000 SEK (2 200 Euros) in discrimination award. IKEA admitted that they had treated the daughter badly. They accepted 20 000 SEK 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.

²²⁴ Compare SOU 2004:55 p. 313.

²²⁵ The Supreme Court, Escape Bar and Restaurant v. The Ombudsman Against Ethnic Discrimination (case T-2224-07 judgement 2008-10-01). Night clubs 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 mean to prove such discrimination will probably lead to continued discrimination based on a cost-benefit analysis by the night clubs owner.

the new Supreme Court case from 2014²²⁶ is well reasoned and it makes it possible to state that the damage to the individual in a case the individual willingly participates in situation testing is small, but the importance to stop a 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 for persons suffering from discrimination with regard to goods and services is a real problem (20 000 SEK 2.400 Euro being a normal award).²²⁷ The author, however, believe that the new Supreme Court case may improve the situation. The clear concept of small loss to the individual (the product may be bought elsewhere) and a situation were many people refuse Roma persons because they are believed to be stealing should result in a high prevention supplement. The situation of the Roma being refused repeatedly regarding various services and the homosexual occasionally meeting somebody with severe prejudice does not (according to the author) merit the same amount in prevention supplement.²²⁸

The fact that harassment between fellow workers does not amount to discrimination and cannot lead to any compensation,²²⁹ unless the employer has been negligent in dealing with the problem, is another example of when 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.

Concerning the principle of equivalence, the Labour Court regularly make reference to the level of damages paid in labour law disputes generally and the ordinary courts relate to normal level of damages in other areas.²³⁰ To the author's opinion, there is no doubt that the principle of equivalence is met.²³¹

²²⁶ Supreme Court case T 3592-13, Equality Ombudsman v. Veolia (judgement 2014-06-26). The Second case was Supreme Court case T 5507-12, Equality Ombudsman v. Stockholm County (judgement 2014-06-26) together known as Nja 2014 p. 499. See above (b).
Nja 2014 p. 499.

²²⁷ Equality Ombudsman Yearly Report 2014, p. 54.

²²⁸ 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 shop keeper may encourage the staff to behave differently when doing business with Roma persons, something that ought to raise the prevention supplement.

²²⁹ The only option for the employee is penal law provisions outside the discrimination field (for instance rules on insult).

²³⁰ Compare, for instance, the Labour Court in case 2002 No. 45 and 2002 No. 102, respectively.

²³¹ 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).²³²

The trade unions and the Equality Ombudsman are the main organisations that today support victims in bringing their complaints.

There are a number of local anti-discrimination bureaus that provide advice to victims of discrimination and sometimes represent them in court. So far they have limited the risks by taking cases regarding smaller amounts and thus not taking the risk to pay the opposite parties full legal expenses.²³³ Normally a local anti discrimination bureau, asks the client to contact the Equality Ombudsman if the client need help to afford to go to court. Local anti discrimination bureaus are idealistic organisations²³⁴ working to combat discrimination on all the grounds of discrimination. Ordinance (2002:989) on state support for activities to counter act discrimination gives the organisations a possibility 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, arrange seminars to the general public and so on. Each local anti discrimination bureau apply for new funding each year and new bureaus can always be made and start to compete for the funds. If the money allocated to this particular support is used up the funding stops. New bureaus will then not be able to get any funding. In 2015 12 millions SEK (1 320 000 Euro) was earmarked for anti-discrimination bureaus in this way.²³⁵

They use the money for information and public opinion work as well as to help individuals. The 13 anti-discriminations bureaus existing in the beginning of 2013²³⁶ had 652 cases in 2012²³⁷ nearly half (308) were about ethnic discrimination. They had 202 settlements or other local solutions (an apology can count as a local solution if the victim is satisfied) If a settlement cannot be reached and the anti discrimination bureau strongly suspects discrimination they normally refer the case to another institution like the Equality Ombudsman (47 cases)²³⁸ School Inspectorate and the Child and Pupil Ombudsman (15 each) and 24 to other state authorities.²³⁹

²³² These acts were decided at the same time by the parliament. Chapter 4 Sections 1-6 of the Discrimination Act together with the Equality Ombudsman Act gives the complete instruction in law with regard to the authority.

²³³ Code of Legal Procedure (1942:740) 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 2.400 Euros (a half basic price amount) the right of the winning party to have legal costs reimbursed by the loser is limited in a quite narrow way.

²³⁴ Foundations are allowed to apply for the financial support as well but the author does not know about any existing anti discrimination bureau created this way.

²³⁵ Regulation letter for 2015 to the State Youth Board, 3.1. Of this 500 000 SEK (55 000 Euro) may be used for the administrative costs of the Youth Board monitoring the use of this money.

²³⁶ 15 bureaus received state support in 2012. Three closed at the onset of 2013 and one survived despite loosing its state support, Swedish Anti-discrimination Bureaus Yearly Report 2012 (latest available) p.1-2.

²³⁷ The national office of the local Anti Discriminations Bureau is reorganizing itself. Therefore the yearly reports stops at 2012. Once it is taken up again the author will update these figures.

²³⁸ Statistics are not comparable. According to the Equality Ombudsman they received 8 cases from anti-discrimination bureaus regarding individuals in 2012. Equality Ombudsman Yearly Report 2013, p. 11.

²³⁹ Swedish Anti-discrimination Bureaus Yearly Report 2012 (latest available) p. 2-6.

The chance of a positive outcome for the plaintiff (settlement or other local solution) is thus high in relation to the number of cases. The focus on such settlement clearly differentiates the local antidiscrimination bureaus from the Equality Ombudsman.

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

The Equality Ombudsman works under the Government. It is a governmental authority. In Sweden all governmental authorities are independent when deciding individual cases according to the Instrument of Government Ch. 12 Sec. 2. Trying to influence any governmental authority on the handling of a 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 who issue 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 made 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 new 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 base for JK or JO to intervene. JO and JK are the two most important supervising authorities in Sweden.

The independence of the Equality Ombudsman is enhanced in many ways. But the most important is the fact 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 nature. The general nature of the instructions protects the Equality Ombudsman from interference from JK or JO. The Government is not allowed to use the normal tools to give general instructions to independent agencies, like 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 in Section 5 of the decree (2008:1401) with Instructions for the Equality Ombudsman. This board is chaired by the Ombudsman and has up to ten members appointed by the Ombudsman for two years at a time.²⁴⁰

The Equality Ombudsman must be considered to be independent.

c) Grounds covered by the designated body/bodies

²⁴⁰ This board first met on the 9 of February 2010.²⁴⁰ 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.

The Equality Ombudsman covers all seven grounds of discrimination, sex, sexual orientation, ethnicity, religion and belief, disability, age and transgender identity or expression.

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”.²⁴¹ 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 has not the resources to go to court him or herself will find it hard to get priority with the Equality Ombudsman. Currently it is focusing on cases of principal importance. Effectively protecting victims of discrimination is the focus of a governmental inquiry.²⁴²

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 the tasks of the Equality ombudsman and Section 2 refers to its right in Chapter 6 section 2 to go to court on the behalf of an individual who has suffered Discrimination.

f) Quasi-judicial competences

In Sweden the Equality Ombudsman sometimes function in a quasi-judicial way.

When dealing with the prohibition of discrimination the Equality Ombudsman is in principle neutral when a plaintiff initiates a case. After hearing both sides the Ombudsman evaluates the evidence. On basis of this evaluation the Ombudsman may decide to go to court as a party on behalf of the plaintiff. At this point the role of the Ombudsman changes. If the Ombudsman thinks more evidence is needed for a conviction the Ombudsman can actively help the plaintiff in obtaining it.

Here the Ombudsman is at an advantage compared to 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 with the Ombudsman and such an order can be subjected to a financial penalty.²⁴³ The financial penalty will gain legal force only after a district court has ordered the payment and 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.

²⁴¹ Section 2.

²⁴² Se Committee directives 2014:10 and 2014:79.

²⁴³ Ch. 4 Sec. 4. One difference compared to the previous legal situation is that the ombudsman can issue these orders without going through a discrimination board.

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 Discrimination²⁴⁴ 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 according to Ch. 4 Sec. 5 of the Discrimination Act. The financial penalty will gain legal force only after a district court has ordered the payment and 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 register 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 and received 1949 new cases in 2014, 1611 of them related to the Discrimination Act or the Parental Leave Act.²⁴⁵ Of this 239 cases were carefully investigated and 25 were considered suitable to take to court. The rest (1660 cases) were closed at an early stage.²⁴⁶ Court proceedings were started in 14 cases in 2014 and 21 settlements were reached.²⁴⁷

There were 461 disability cases, 601 cases regarding ethnic origin,²⁴⁸ 250 cases regarding sex,²⁴⁹ 269 cases of alleged age discrimination, 119 cases relating to the religion ground, 32 cases regarding sexual orientation and 26 cases regarding transgender identity or expressions. Protection during parental leave had 52 cases and 248 cases where there is no discrimination ground. The total number of grounds referred to in all cases is 1810 and the total number of cases is 1609. It is thus only in a minority of the cases that more than one discrimination ground is involved.²⁵⁰

The numbers for each ground and each field is available in the yearly report. Decisions are described in the yearly report but the largest category, more than half, is that the Equality Ombudsman decided not to start an investigation.²⁵¹ A government white paper will look into this category.²⁵² The government is worried that persons suffering from discrimination do not get a proper hearing. If asked the Equality Ombudsman will provide numbers on direct discrimination, indirect discrimination, sexual²⁵³ harassments other harassment, instructions to discriminate and victimisation.

²⁴⁴ The board is an administrative authority. It consists of a chairman and a vice chairman who must be judges. There are eleven 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 Co-operation Organization, and one is appointed on the suggestion of the Swedish Federation for Lesbian, Gay, Bisexual and Transgender Rights.

²⁴⁵ Equality Ombudsman Yearly Report 2014 p. 46. The Equality Ombudsman can investigate discrimination in areas not covered by the Discrimination Act, for instance police work. This is called Equality Ombudsman Act cases and 338 cases handled as possible such cases (p. 49).

²⁴⁶ Equality Ombudsman Yearly Report 2014 p. 48. 365 cases were closed because the Discrimination Act was not applicable and 158 cases was referred to the trade union as the Ombudsman can not act in the labour market unless the trade union has decided not to support it's member.

²⁴⁷ Equality Ombudsman Yearly Report 2014, p. 47 and 61.

²⁴⁸ Equality Ombudsman Yearly Report 2014, p. 52.

²⁴⁹ Equality Ombudsman Yearly Report 2014, p. 47.

²⁵⁰ Equality Ombudsman, Yearly Report 2014, p. 46. I have counted the case with 109 persons as one case with two grounds involved. Formally it gave rise to 436 grounds.

²⁵¹ Equality Ombudsman Yearly Report 2013, p. 16.

²⁵² Committee directive 2014. p. 4.

²⁵³ The Swedish word *sexuell* has a much more narrow meaning compared to the English word *sexual*. This category is only about harassment connected to sexual attraction.

h) Roma and Travellers

There were at least 54 new cases at the Equality Ombudsman of Roma discrimination three settlements.²⁵⁴ The Ombudsman Against Ethnic Discrimination had a special obligation to assist the Romany population. It was instructed to give extra priority to this ethnicity in the "regulation letters" it received from the Government.²⁵⁵ The main goal behind its policy towards the priority groups²⁵⁶ was to make them able to fend for themselves, i.e being 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 parts.

Reference groups consisting of representatives of the priority group and the DO is one way of performing these functions and at the same time build networks which may continue when DO eventually steps back. In 2013 The Equality Ombudsman started a work on discrimination of Roma within the field of housing and social services.²⁵⁷

As the new Equality Ombudsman gets its instructions from the Parliament by law, its regulation letter is empty 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.²⁵⁸ A report evaluating the work on the Roma situation and following up the report "Discrimination against Romanies in Sweden" from 2004 was published in the 2011.²⁵⁹ There have been many cases involving Roma and the Ombudsman will analyse these cases and give guidelines on how to work with 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 the Roma is harder than for other groups, having a lot of cases from this ethnic group is likely in the future as well.²⁶⁰

²⁵⁴ Mail Mattias Falk Equality Ombudsman 2015-04-30.

²⁵⁵ 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 Romany population - are normal and are not considered to affect the authority's independence.

²⁵⁶ National ethnic minorities including Roma, persons originating from the middle east, Muslims, persons originating from Africa, women with non-European origin.

²⁵⁷ Equality Ombudsman, Yearly Report 2013, p-8.

²⁵⁸ Government bill 2007/08:95 p. 378 f.

²⁵⁹ Equality Ombudsman 2011, Romers rättigheter (Roma Rights).

²⁶⁰ Equality Ombudsman Yearly Report 2014, p 53f. The discrimination of the Roma people with regard to goods services and housing is a priority area. The Ombudsman strive 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).

8 IMPLEMENTATION ISSUES

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

The Equality Ombudsman develops a considerable amount of activities throughout society in the fields covered by non-discrimination legislation, for instance in the form of special projects, supervision of individual institutions, informative brochures and other publications, etc. The Ombudsman Co-operates with other state agencies and NGO.s in these endeavours.

Dissemination of information

One example is that the Equality Ombudsman participates in the training programmes of the Prosecutor General, 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, harassments and other degrading treatment of children in school.

The Ombudsman further participates as expert or member of different official inquiries.

In 2014 a white book documenting suppression²⁶¹ and discrimination of Roma people in Sweden before the year of 2000 was presented.²⁶² The aim is to make the history known and to combat the idea that it was the Roma themselves who chose not to integrate in the Swedish society. The Equality Ombudsman co-operated with the Commission Against Anti-Gypsieism²⁶³ to present a material for schools based on this white book.²⁶⁴

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

Dialogue with NGOs outside the labour market

As was already indicated there is in Sweden a fairly weak role played by NGOs other than trade unions and employer organisations, may be with the exception of the different organisations within the movement of people with disabilities. To the extent there are NGO's the Ombudsman have an on-going dialogue.

With regard to the Police registration of Roma people scandal,²⁶⁵ the Equality Ombudsman has on it's own initiative²⁶⁶ investigated whether or not the Police had practiced ethnic profiling. It's conclusion was that conscious ethnic profiling could not be proved but could not be ruled out either.²⁶⁷

²⁶¹ One example is that Roma persons could not stay more than three days in a municipality. It was not until 1959 when they got a right to choose to live in a municipality instead of travelling.

²⁶² DS 2014:8.

²⁶³ We have a Swedish word (antiziganism) that is newly invented and used when describing racism against Roma as something to be combated and is based on the word gypsy.

²⁶⁴ Equality Ombudsman, Yearly Report 2014, p. 22.

²⁶⁵ For a description of the case see Section 12.2 of this report.

²⁶⁶ As policing is an area outside the scope of the Discrimination Act it was not self evident that the Ombudsman should investigate the issue.

²⁶⁷ Equality Ombudsman Decision 2014-02-20 case GRA 2013/617.

NGO:s working with discrimination are encouraged to be members of and form local anti-discrimination bureaus. The Equality Ombudsman co-operates both with the national organisation and the individual bureaus.

Co-operation with the social partners

As was already indicated, the social partners traditionally play a key role on Swedish labour-market and a variety of issues are collectively bargained and regulated by means of collective agreements. This is also true with regard to non-discrimination issues, albeit to a lesser extent than as regard other working conditions. A characteristic feature of the Swedish law on sex discrimination – Ch. 3 Sec 13 of the Discrimination Act – is the requirement on employers (with 25 or more employees) to have equality plans. Such a requirement is also present in Ch. 3 Sec. 16 requiring universities to have plans regarding all the grounds covered except age and transgender identity and expression. Moreover, the Ombudsman is involved in an ongoing dialogue with both employers' and employees' organisations concerning the promotion of diversity and counteracting discrimination.

Dialogue concerning the minorities

Stockholm County Administrative Board has been given special responsibility for all five national minorities. It does so in co-operation with the Sami Parliament. The four other national minorities are not represented by an organisation which can be described as "theirs". Thus it no longer exist an organisation specifically addressing all sorts 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 inclusion in the society, covering the years 2012-2032. The goal is that at the end of the period, the Roma population shall have the same living standard with regard to housing, unemployment, education and so on, as the majority has. Creating a 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. They are disseminating information and creating a dialogue with the society at large on inter alia the situation of the Roma people.

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

a) Mechanisms

The relevant mechanisms are precisely the Ombudsman supervising the Discrimination Act in its entirety and the possibilities this provide for individual claimants. In addition the role played by the trade unions to support their members must also be mentioned and 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 like good faith, good practice on the labour market and so on may be said to assist in the combat of 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 2002.²⁶⁸ However, the investigator did not, as required by art. 16(a) of the directive, carry out any general screening of laws and administrative provisions for incompatibilities with the requirements of the directive (at least not in any comprehensive way).²⁶⁹

This is probably more problematic in the area of ethnic discrimination, particularly with respect to indirect discrimination. Obvious examples of problematic provisions would include requirements regarding Swedish citizenship or to have a degree or diploma from a Swedish educational institution to be able to exercise certain professions. - According to Ytterberg (the former Homo), there are no discriminatory laws and provisions with respect to sexual orientation discrimination in employment or occupation still in force.²⁷⁰ However, according to Lappalainen the measures undertaken thus far seem to have been insufficiently thorough, at least in terms of examining regulations or administrative provisions. The Government enquiry basically asserted that this was not needed, without making more than a cursory analysis.

²⁶⁸ Government White Paper 2002:43: *An Extended Protection against Discrimination* [Ett utvidgat skydd mot diskriminering, bet. SOU 2002:43].

²⁶⁹ Idem, page 143.

²⁷⁰ Ytterberg, Sexual Orientation report of 28 July 2004. This report still holds in the sense that there is no newer report that has investigated the issue. The general opinion seems to be that there is no need to investigate again. Lappalainen disagrees with this general opinion.

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 program from the third of October 2014 (regeringssförklaringen) the following is said:

“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 co-ordination 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. The Discrimination unit and 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 Kuhnkes responsibility, but the planning of housing or other active measures to avoid segregation will be the responsibility of the housing minister.

There is no current National Action Plan.²⁷¹ There was a National Action Plan for 2006-2009 regarding human rights. Anti-discrimination was an important part of that plan. There is a Government White Paper from the Delegation for Human Rights suggesting inter alia the creation of a national institute for human rights.²⁷² The 2006-2009 National Action Plan has been evaluated in Government White Paper 2011:29. The evaluation is positive towards creating new such plans²⁷³ and it also advises the government to go ahead and create a national institute for human rights. The UN Council on Human Rights has criticised Sweden for not creating such an institute and Sweden plans to give an answer in June 2015. The author does not know what the answer will be.

The evaluation of the second plan will not be finished until 2017²⁷⁴ and the government takes the recommendations from both Government White Papers and the UN Council on Human Rights seriously. The government intend to create a new general strategy for the systematic work for human rights and anti-discrimination.²⁷⁵

²⁷¹ There is a national action plan against violent extremism for the years 2012-2014. But there is no national action plan against other forms of discrimination.

²⁷² SOU 2010:70.

²⁷³ There is a fact sheet in English on the government's current work to combat intolerance, but there is no plan. <http://www.government.se/sb/d/574/a/195525>.

²⁷⁴ Government bill 2014/15:1, Expense Area 1 p. 71.

²⁷⁵ Government bill 2014/15:1 Expense area 1, p. 81.

10 CURRENT BEST PRACTICES

1. The 2014 white book documenting Roma suppression.²⁷⁶ In 2011 the work started in the government office on a white book on suppression of the rights of Roma people the years 1900 to 1999. The purpose was to make the history of oppression known more generally. Today's discrimination problems have their roots in yesterdays open racism (before 1960) and later days paternalistic ways of helping Roma persons but without letting them actively participate in their integration. The focus was on material found in state and municipal archives regarding official inquiries into real or perceived problems. Another important purpose was to apologise to the victims for past mistreatment. The end result governmental inquiry 2014:8 is published as a book with the title "the Dark and unknown history – A white book documenting violations of Roma peoples rights in the 20th century."²⁷⁷
2. The work of the Equality Ombudsman to analyse 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 can not be proved). It is however very important to see the weaknesses of our society through the eyes of those affected by discrimination. Active measures (and may be legal changes) may be the long-term result of this work. In 2014 the report Parts of Patterns (Delar av mönster 2014:1) was published and is built on all cases (812) reported in the first half of 2012.²⁷⁸ The general result is that the vast majority of the plaintiffs did not go to the Equality Ombudsman because they had suffered discrimination in a particular situation, like an ordinary person would report a crime to the Police. Most of the times they described many instances of discrimination (affecting both themselves and others) and they had decided to take one of them to the Equality Ombudsman. This result is important because if a person meets one bad representative of the society a individual case is effective, but if a persons feel mistreated all the times than their trust in the Society suffers and they may feel excluded or even worse decide to have as little contact as possible with the Society. Another example of the same kind of analysis (all 485 disability cases reported 2012) was done for the Equality Ombudsman by an associate professor regarding disability and published in 2014 - Meeting Obstacles (Mötas av hinder 2014:2).²⁷⁹
3. The work on right based education of Sami and Roma persons. The Equality Ombudsman started a right based education program with regard to both the Sami and the Roma people. With regard to the Sami people the Ombudsman works towards persuading the government to sign ILO-convention 169 on indigenous people in order to give them better rights with regard to conflicts between reindeer management and other societal interests like mining.²⁸⁰

Common to both groups are:

1. Having a dialogue with Roma and Sami people and organisations regarding obstacles to equal access to rights and opportunities.
2. Giving right based education to increase Roma and Sami awareness of their rights and their possibilities to counteract discrimination

²⁷⁶ One example is that Roma persons could not stay more than three days in a municipality. It was not until 1959 when they got a right to choose to live in a municipality instead of travelling.

²⁷⁷ <http://www.regeringen.se/contentassets/ea9e9da200174a5faab2c8cd797936f1/den-morka-och-okanda-historien---vitbok-om-overgrepp-och-krankningar-av-romer-under-1900-talet-ds-20148>.

²⁷⁸ <http://www.do.se/Documents/rapporter/Delar-av-monster-tillganglig.pdf>.

²⁷⁹ <http://www.do.se/Documents/rapporter/motas-av-hinder-rapport.pdf>.

²⁸⁰ <http://www.do.se/sv/Press/Debattartiklar/Debattartikel-Sverige-behover-en-urfolkspolitik/>.

3. Documenting knowledge in dialogue with Roma and Sami regarding identified obstacles, rights and legislation through inter alia research surveys, analysing cases at the Equality Ombudsman (see above point 2).
- 4 Strategic choices of cases taken to court.

After having lost an important case in 2011 and settled another good case in 2012, the Equality Ombudsman managed to bring a carefully selected case against a large insurance company for having denied a disabled child insurance without conducting an individual risk assessment. After losing in first instance, the action was eventually successful on appeal in 2013,²⁸¹ creating an important precedent, demonstrating that the specificities of the insurance market and the laws governing it do not justify or motivate any exemptions from the prohibition of discrimination under Swedish law.

The Equality Ombudsman then in 2014 decided to file suit against another insurance company who had denied a young woman insurance on the basis of her diagnosis (Tourettes). The ombudsman claimed that the risk assessment conducted was based on too general data to support the negative decision. After being notified of the pending action, the insurance company admitted the discrimination and paid compensation to the woman.²⁸²

As a result of the cases, the insurance companies in question have changed their routines. The cases have also highlighted more problems regarding the insurance companies' wide ranging possibilities to deny coverage. A public inquiry has recently been initiated to oversee and eventually propose changes to the relevant legislation, inter alia to prevent discrimination in the area.²⁸³

The example shows the importance of careful case selection involving conscious choices of what problem is targeted. The example also shows the potential of strategic litigation as a tool for equality bodies. On a more general note, the project highlights conflicts between authorizations under specific legislation (in this case insurance law) and prohibitions under discrimination law, likely to be found in other areas.

Another example of strategic processing was the school boy who was denied a training place because he was born in Iraq. The employer co-operated with American companies and American law required that no person born in Iraq should be at the premises where sensitive military information could be obtained. Following American law was not a valid defence for direct discrimination.²⁸⁴ This case was debated in media and showed that employer must sometimes be willing to take substantial costs to avoid discrimination.

²⁸¹ Svea Court of Appeal, Equality Ombudsman v. If Insurances, case T 1912-13 (judgement 2013-10-08).

²⁸² Equality Ombudsman, ANM 2014/170.

²⁸³ http://www.riksdagen.se/sv/Dokument-Lagar/Utdredningar/Kommittedirektiv/Ratten-till-en-personforsakrin_H2B180/.

²⁸⁴ ANM 2014/845, There was a settlement giving the boy 80.000 SEK (8 800 Euro) in discrimination award.

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 another employee *and* the latter is subordinated to or dependent upon the former (section 2.4.b).²⁸⁵
- The definition of discrimination requires that a person has suffered disfavour – a 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).
- It seems to be easier to establish a prima facie case and to win discrimination cases in the ordinary court system compared to 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).²⁸⁶

11.2 Other issues of concern

The Equality Ombudsman is truly independent. The main areas of concern are:

- There sparse of case law on indirect discrimination;

²⁸⁵ 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 are two examples of this general thinking. Compare Labour Court 2007 nr 45 and 2011 nr 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.

²⁸⁶ The European Court of Justice regards statistical discrimination as a form of direct discrimination. Case C-236/09 (Test Achats) where the insurance providers was not allowed to use the sex of the costumer 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 the sex to determine the insurance fees for cars. However, with regard to disability and insurances statistical differences between persons with a disability and healthy persons makes them not comparable and thus a presumption of discrimination can not 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 like in Directive 2004/113. But extending the protection for disability to the insurance sector and then defining comparable situation as if statistical discrimination is not a form of direct discrimination can not be right. If an EU-concept like direct discrimination is used then it must (according to the author) be used correctly.

- Cost of going to court.

The vast majority of the case law in Sweden regards direct discrimination. The sparse case law on indirect discrimination is 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 in a middle class perspective, it is clear that many of the persons who suffer the worst discrimination can not afford to claim their rights. The risk of ending up in court for a person who discriminates against for instance Roma or persons with African ethnic origin is small. There is a government inquiry looking into this issue.²⁸⁷ 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) a task to monitor discrimination within the county. For poor people suffering from discrimination access to justice is according to the author the most pressing problem.

²⁸⁷ Committee directive 2014:10.

12 LATEST DEVELOPMENTS

12.1 Legislative amendments

Legislative change of the 1 of January 2015 when lack of accessibility became a new form of discrimination.²⁸⁸ As the new ground relies heavily on the adaptation measures already required by laws and other forms of legislation, no new duties are imposed on employers, service providers and other persons to which the Discrimination Act applies. The biggest change is that discrimination award as a remedy becomes possible, which of course is valuable for the plaintiff, especially if civil damages was not possible before, many public law regulations have conditional fines as the main sanction – i.e. a court order linked to a financial penalty – a conditional fine. This change has affected many sections of this report.

12.2 Case law

I have previously not reported on cases in the first instance. There is one on an engine driver with Asberger's syndrome who on medical grounds was prohibited from driving trains. The administrative courts decided that this disability did not affect his capacity to drive trains and that he should have passed his medical check. He received 100 000 SEK (11 000 Euros) in Discrimination Award. With regard to disability a error by an authority amounts to a disfavour connected to disability and the idea that involuntary discrimination is still discrimination is upheld.²⁸⁹ The right to a proper individual assessment is judged by the administrative court system (and is hard to win) but if successful there, a discrimination award in the civil court system seems reasonable easy to get for the claimant.

Name of the court: Supreme Court

Date of decision: 26 June 2014

Name of the parties: Equality Ombudsman v. Veolia

Reference number: Case T 3592-13 NJA 2014 p. 499

Adress of the webpage:

[http://www.hogstadamstolen.se/Domstolar/hogstadamstolen/Avgoranden/2014-06-26%20T%203592-13%20Dom.pdf](http://www.hogstadamstolen.se/Domstolar/hogstadamstolen/Avgoranden/2014/2014-06-26%20T%203592-13%20Dom.pdf)

Brief summary: Two immigrants were sitting together on a bus, 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 20.000 SEK (2 200 Euros) each.²⁹⁰ The Supreme Court decided that the violation was severe - as severe as violation by word without threats and without lasting damage can possibly be. The violation was worth 15 000 SEK (1 650 Euro) each. Furthermore a 20 000 SEK (2 200 Euro) should be added as a prevention supplement. The two persons got 15000 SEK plus 10.000 SEK each (half the prevention supplement). Normally a prevention supplement should be the same amount as the violation. Had one person been discriminated against that person would thus have received 15.000 plus the full prevention fee (15.000 plus 15.000 SEK). Since two persons would share the prevention fee it was set at 20.000 as 30.000 would have been too hard on the perpetrator.

²⁸⁸ Act (2014:958) changing the Discrimination Act (2008:567).

²⁸⁹ Norrköping District Court, case T 1003-13, Torolf Jansson v State Transportation Board (judgement 2014-04-09).

²⁹⁰ In Sweden the ground of ethnicity covers race as well.

Name of the court: Supreme Court

Date of decision: 26 June 2014

Name of the parties: Equality Ombudsman v. Stockholm County

Reference number: Case T 5507-12 NJA 2014 p. 499

Address of the webpage:

<http://www.hogstodomstolen.se/Domstolar/hogstodomstolen/Avgoranden/2014/2014-06-26%20T%205507-12%20Dom%20skiljaktig.pdf>

Brief summary: A woman who could not receive IVF treatment at her local clinic because they wanted her to go to a unit specialising in treating homosexual persons. The woman received 30 000 SEK (approximately 3 300 Euros) in the appeal court. Svea Court of Appeal reduced the amount from 40 000 SEK (its valuation of the infringement itself) to 30 000 SEK because the discrimination was involuntary. The regional municipality did not understand that being referred to a special unit for homosexuals was discriminatory.

The Equality Ombudsman argued that they should have understood this and that the court therefore lacked a proper ground to reduce the damages (special reasons is required by the law). Furthermore the Equality Ombudsman argued that big organisations should pay higher discrimination awards if the prevention effects should be upheld.

The Supreme Court disagreed with the Appeal Court. They regarded the discrimination as real but minimal²⁹¹ and stated that 10.000 SEK (1.100 Euros) is the minimum discrimination award and had the county asked for a reduction of the discrimination award set by the appeal court they would have got it.

Name of the court: Svea Court of Appeal

Date of decision: 4 November 2014

Name of the parties: Equality Ombudsman v. Sigtuna Municipality

Reference number: Case T 5095-13

Address of the webpage: <https://www.notisum.se/rnp/domar/rh/RH014020.htm>

Brief summary: A pair living together since 2006 had a child in 2010. The mother had a cognitive disability and the child was taken into custody one week after the birth. The Municipality won both in the first administrative court and in the administrative appeal court, however the Supreme Administrative Court changed that and said that there was no proof that warranted the child being taken into custody. The municipality should have tried to let the parents keep the child with support.

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 150 000 SEK (16 500 Euros) for each of the involved parties (both parents and the child).

In this case the municipality did wrong but its mistake was such that neither the first administrative court nor the appeal administrative court disagreed with it (it concerned the weighing of evidence). The good faith of the municipality was of minor importance with regard to the severity of the injury.

Please describe trends and patterns in 2014 in cases brought by Roma and Travellers, and provide figures – if available.

There were 601 cases initiated relating to ethnic origin at the Equality Ombudsman in 2014²⁹² and of those at least 54 cases were initiated by Roma persons.²⁹³ This can be

²⁹¹ Two judges found no discrimination at all.

²⁹² Mail Mattias Falk 2015-04-30.

²⁹³ There are no statistics but Martin Mörk manager of the judicial unit made a manual count.

compared to about 30 cases in 2011 40 cases in 2010,²⁹⁴ 30 cases in 2009 and 50 cases registered in 2008 at the former Ombudsman Against Ethnic Discrimination. Fifty-four is a reasonably high figure.²⁹⁵ Furthermore the Equality Ombudsman gives priority to Roma cases.²⁹⁶ The chance of getting some sort of remedy is thus better for Roma complainants compared to the average complainant.²⁹⁷ Three Roma settlements have been done 2014.

The cases mainly regard normal daily activities. Many cases concern shops, for instance denying entrance or suspecting the customer of theft. Another large group of cases regards housing for instance refusals to be accepted as tenants or refusals of requests to barter²⁹⁸ an apartment.²⁹⁹ A growing group of cases in 2009 and 2010 relates to different forms of "social services" (socialtjänst), such as denial or withdrawal of financial support and taking children into state care.³⁰⁰

The Roma Registration scandal

The famous Roma registration case was probably ended this year (2015). In September 2013 it was revealed that the police had been registering more than 4000 Roma persons or persons having a relationship with a Roma person.

The majority of those persons have been awarded 5000 SEK (550 Euros each) by the Chancellor of Justice as compensation for the police violation of Section 48 of the Data Protection Act.

In Sweden a violation that is regarded as less severe results in normal damages of 3000 SEK. The information in the register was not dispersed 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 worth 5000 SEK.³⁰¹ This decision came in March 2015.

²⁹⁴ Equality Ombudsman, mail Heidi Pikkarainen.

²⁹⁵ Compare, The Ombudsman Against Ethnic Discrimination, Yearly Report 2007 p. 29. 31 cases in 2005, 26 cases in 2006 and 33 cases in 2007.

²⁹⁶ See also this report Section 7 (h). The Equality Ombudsman is not required by law to give priority to Roma cases, but it has chosen to do so and will probably continue do so in the near future as well.

²⁹⁷ Equality Ombudsman, Yearly Report 2010, p. 5. In 2010 the Equality Ombudsman initiated 19 court cases and made 38 settlements. If these numbers are compared to a total number of 2614 cases on all grounds, the chance of a successful outcome in an average case is around 2 %. For Roma cases the success rate in 2010 was 27,5 %. This is only rough calculations as settlements and judgements often relates to cases started in earlier years. Looking at the years 2004-2010 there was 25 successful outcomes in relation to 230 Roma cases initiated in the period, a success rate of 11 % (p.61 f). The term success rate is not wholly appropriate as the Equality Ombudsman has not been victorious in all judgements. But according to the Ombudsman almost all judgments in Roma cases were successful (p.62). The term success rate is problematic in another term as well. In the 2011 report on Roma Rights the number of successful outcomes for the same 230 cases are 50. Sometimes the case can be solved in a way that makes the Roma person feel that he or she has got redress without a judgment or a settlement, for instance if the Roma person feel that the perpetrator is genuinely sorry and ask for forgiveness (p. 63).

²⁹⁸ A lease for a dwelling cannot be terminated by the landlord without just cause. The tenant can thus keep renting their apartment for life. There is a rent control and some contracts have a high value on the black market. The tenant cannot sell his or her contract but can under some circumstances barter the contract for another contract with a high value on the black market. If a landlord gives some tenants a wider right to barter their contracts, compared to what the law requires, they receive a valuable favour. The landlord can further always refuse a request to barter, and the tenant will then have to ask a Rental Board for permission instead. Exercising the right to say No can be a costly disfavour to the tenant, as the legal process may make the other party to the barter withdraw. He or she may be offered an apartment with another landlord not fighting the barter in the Rental Board.

²⁹⁹ The Ombudsman Against Ethnic Discrimination, Yearly Report 2008 p. 27.

³⁰⁰ Equality Ombudsman Yearly Report 2009, p. 17. The author notices that reported perceived discrimination from Roma persons to the Equality Ombudsman regarding investigations or decisions about taking children into state custody care has so far not resulted in any settlements or judgements.

³⁰¹ <http://www.jk.se/sv-SE/Beslut/Skadestandsarenden/1441-14-47.aspx>.

Throughout this process the Police statement that it never had done any ethnic registration has been accepted – or at least not proven wrong – by all the involved authorities, most of them making their final decisions in 2013-2015.³⁰² All of them has viewed it has a register practise in violation of the Data Protection Act, but nothing more.

The damage was set at the same level that a Swedish Non-Roma person would have received in the same situation.

³⁰² Commission on Security and Integrity Protection (decision in 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/Documents/granskningar/Beslut%20GRA%202013-617.pdf>. Public prosecutor (decision in December 2013). <http://www.aklagare.se/Upload/Media/Nyheter/131220%20Beslut%20AM%20139971%2013.pdf>. The Parliamentary Ombudsman (decision in March 2015) <http://www.io.se/PageFiles/6353/5205-2013.pdf>.

ANNEX 1: TABLE OF KEY NATIONAL ANTI-DISCRIMINATION LEGISLATION

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

Country: Sweden

Date: 1 January 2015

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 (2014:958) changing the Discrimination Act Date of adoption: 25.06.2014 Entering into force 01.01.2015 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: A detailed description of the tasks of the Equality Ombudsman</p>
Title of legislation (including amending legislation)	<p>The (1962:700) Penal Code Abbreviation BrB Date of adoption: 21.12.1962 Entering into force: 01.01.1965 Latest relevant amendment: Act (2008569) changing the Penal Code</p>

	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 2015

Instrument	Date of signature (if not signed please indicate) Dd.mm.YYYY	Date of ratification (if not ratified please indicate) Dd.mm.YYYY	Derogations/ reservations relevant to equality and non- discrimination	Right of individual petition accepted ?	Can this instrument be directly relied upon in domestic courts by individuals ?
European Convention on Human Rights (ECHR)	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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