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Country report

Non-discrimination

Sweden

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Country report

Non-discrimination

Sweden

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Directorate-General for Justice and Consumers

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EXECUTIVE SUMMARY

1. Introduction

Sweden has long had various minorities such as the Roma, the Finns and the Jewish community. The Sami have always constituted an indigenous population. Nevertheless, Sweden has long viewed itself, and has been viewed until fairly recently, as a homogenous country. In 2017 its population reached 10.1 million. The proportion of foreign-born inhabitants has increased from 6.7 % in 1970 to 18.5 % in 2017 and continues to rise.¹ Sweden is considered to be a strongly secular country although, at the same time, most people still belong to the Lutheran church, formerly the state church. There is no tradition of monitoring ethnicity within society and no long-established tradition as regards anti-discrimination legislation either.

In order to understand discrimination legislation and its enforcement in Sweden, it is imperative to understand the functioning of Swedish labour law, and the special and dominant role designated to the social partners. The labour market is characterised by a high degree of organisational density among the unions as well as the employers' organisations – at roughly 70 %. This applies to both the private and public sectors. This organisational structure is reflected in collective bargaining and in the fact that some important issues, for instance wages, still lie outside the scope of the law. As a general rule, work as a civil servant is controlled by contracts and collective agreements, largely in the same way as private employment. With some exceptions, the same rules apply.

Sweden, which has had predominantly Social Democratic Governments during the past century, has developed a fairly comprehensive welfare state. Social and economic benefits have been formulated only to a limited extent in terms of rights giving rise to legal claims. At the same time, the constitutional tradition in regard to fundamental rights has been weak. This has started to change, however, due to the increasingly important role played by the European Convention on Human Rights, EU law and the Swedish constitution.

Because of their special role, the unions and the employers' associations, the social partners, were influential in at least initially hindering the development of discrimination law, and thereafter in its formulation and enforcement. Other NGOs, such as those representing discriminated-against groups, have thus far had a very limited role in relation to the development and particularly the enforcement of laws against discrimination.

Up to the 1990s, there was little in the form of discrimination law covering grounds or fields other than sex discrimination in employment. However, from 1999, the Swedish Government has been active regarding the introduction of relatively modern anti-discrimination legislation. This was due to domestic needs in addition to anticipating and transposing EU law. In 2009, seven civil laws covering various grounds and fields such as education and working life were basically merged into a single Discrimination Act, covering all grounds and much of society. One step further on this road was taken on 1 January 2015,² when a new form of discrimination – inadequate accessibility – was established. This extended the ability of persons with disabilities to obtain discrimination compensation awards for failures to adopt reasonable accommodation measures to provide access to areas of society not covered by the framework directive for equal treatment in employment and occupation (2000/78).

¹ Statistics Sweden, Summary of Population Statistics 1960–2017, accessed 2018-05-10, <https://www.scb.se/en/finding-statistics/statistics-by-subject-area/population/population-composition/population-statistics/pong/tables-and-graphs/yearly-statistics--the-whole-country/summary-of-population-statistics/>.

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

The Roma have been the focus of both official and unofficial racism and discrimination. It was not until the late 1950s that there was some focus on recognising their right to reside in a municipality. Up until that time, many municipalities had adopted various means to discourage or prevent their settlement. Regulations limiting the rights of Roma to stay for more than a few days were common. In this way, local authorities avoided responsibility for the schooling of children and various welfare rights. The Roma still face a more open racism and discrimination compared with various other ethnic groups, but the Government now seems somewhat more aware and active.³

2. Main legislation

There are constitutional provisions with respect to discrimination in the Swedish Instrument of Government (part of Sweden's constitution). According to the first chapter, which cannot be cited as a basis for a legal claim, the public institutions shall combat discrimination against persons on grounds of gender, colour, national or ethnic origin, linguistic or religious affiliation, functional disability, sexual orientation, age or other circumstances affecting the individual. This principle does not grant any legally enforceable rights. There are two articles in Chapter 2 that can form the basis of a legal claim: Article 12, which provides protection against laws and regulations that discriminate on the basis of ethnic origin, colour, or other similar circumstances, or on account of sexual orientation. Article 13 prohibits laws and regulations that discriminate on the basis of sex. The relationship to the European Union and EU law is regulated through the Instrument of Government (1:10 and 10:6) and through other laws.

The European Convention on Human Rights (ECHR) was incorporated into national legislation in 1995 under the requirement of dualism, and was given quasi-constitutional status through Chapter 2 § 19 of the Instrument of Government. Basically, any law that contradicts the rights set forth in the Convention is void and may not be applied. Sweden has also signed and ratified various other human rights instruments such as 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, the Convention on the Elimination of Discrimination against Women, the Convention on the Rights of Persons with Disabilities, and a number of relevant ILO conventions. Under the requirement of dualism, if an international instrument has not been incorporated into Swedish law, such international agreements are not part of the internal Swedish hierarchy of laws as such, and these instruments thus cannot be directly relied upon in the courts. However, Swedish laws are to be interpreted by the courts as being in conformity with such international agreements.

Sweden was a late starter in the field of anti-discrimination legislation (despite its reputation concerning human rights). However, by 2008 Swedish domestic civil law contained the discrimination protections, with the exception of age, that were required by EU law, as found in seven specific acts.⁴ Concerning working life, these were grounds-based. In other fields of society such as goods and services and education, they covered multiple grounds. There were also four independent grounds-based anti-discrimination

³ See e.g. Den mörka och okända historien: VITBOK OM ÖVERGREPP OCH KRÄNKNINGAR AV ROMER UNDER 1900-TALET (The Dark, Unknown History – a White Paper on Abuses and Rights Violations against Roma in the 20th Century) Ds 2014:8.

⁴ The Equal Opportunities Act (1991:433, sex discrimination in employment/jämställdhetslagen); the Act (1999:130) on Measures against Discrimination in Working Life on grounds of Ethnicity, Religion or other Belief (lagen om åtgärder mot etnisk diskriminering i arbetslivet); the Act (1999:132) Prohibiting Discrimination in Working Life due to Disability (lagen om förbud mot diskriminering i arbetslivet av personer med funktionshinder); the Act (1999:133) Prohibiting Discrimination in Working Life due to Sexual Orientation (lagen om förbud mot diskriminering i arbetslivet på grund av sexuell läggning); the Act (2001:1286) on Equal Treatment of Students at Universities (lagen om likabehandling av studenter i högskolan); the Act (2003:307) Prohibiting Discrimination (outside of working life and education)/lagen om förbud mot diskriminering; and the Act (2006:67) Prohibiting Discrimination against Pupils (lag om förbud mot diskriminering och annan kränkande behandling av barn och elever).

ombudsmen. On 1 January 2009, the seven acts were repealed and replaced with the Discrimination Act (2008:567).⁵ Age and transgender identity/expression were added as grounds. The four ombudsmen were merged in the new office of the Equality Ombudsman. Among other things, a new form of discrimination, inadequate accessibility (outside of employment) was added in 2015⁶ and, in 2016, the act was amended with regard to active duties. Today, the general active duties apply to all grounds, while certain specific duties still only apply to sex/gender.⁷ The Discrimination Act goes beyond the minimum requirements established by EU law in various ways.

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

Generally speaking, Swedish law can be said to be in conformity with the minimum requirements of the Article 13 Directives. Furthermore, especially as regards religion and other beliefs, sexual orientation, age⁸ and disability, domestic law goes beyond the requirements of EU law in that certain additional grounds are covered (transgender identity and expression), along with the material scope that applies to all grounds.

Nevertheless, there are some remaining questions concerning full implementation of the directives in the 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 by fellow workers or third parties is not prohibited as such.

The unwillingness to prohibit harassment by fellow workers as such is connected to a more general restriction of the vicarious liability of employers, at least as applied by the Labour Court. This can be illustrated with Labour Court case 2007 number 45.⁹ All parties accepted the fact that the Iranian job applicant had been discriminated against, but no person, according to the court, could be held responsible, since the employee at fault did not have the authority to reject his application for the job. In such cases we have a person being discriminated against by an employee who is not liable under civil discrimination law. The claimant, according to the court, must be able to assert that the employer is liable for the employee's actions, and the employer can only be liable if he or she has been negligent by, for instance, not reacting promptly on being informed of an instance of harassment or by giving authority to represent them to an employee with poor judgment. The limited application of vicarious liability concerning discrimination law limits the liability of employers when employees act outside their authority. This is problematic in relation to effective implementation of the law.

⁵ Part-time work and parental leave protections are contained in separate legislation.

⁶ Act (2014:958) on changing the Discrimination Act (2008:567).

⁷ Act (2016:828) on changing the Discrimination Act (2008:567), adopted on 12.07.2016. The new rules on active measures are process oriented and cover all seven grounds. However, certain special rules concerning gender were retained. Employers and education providers are to document their work with active measures, but they are not required to make annual plans. Apart from having a system for reporting and dealing with harassment cases, there are no specific requirements with regard to the grounds covered by this report. Furthermore, no improvements concerning enforcement or supervision were included.

⁸ The protection of age was extended to many new areas on 01.01.2013. See Act 2012:673 on changing the Discrimination Act, and Government bill 2011/12:159.

⁹ Labour Court 2007 no. 45, *The Ombudsman Against Ethnic Discrimination v. Laika film & amp* (Judgment of 16.05.2007).

3. Main principles and definitions

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

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

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

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

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

The definition of indirect discrimination in the new Discrimination Act is in close adherence to the Article 13 Directives. At the same time, as there is relatively limited case law regarding the old acts and the 2009 Discrimination Act, it is too early to tell what 'the test to be satisfied' in these situations really is.

The Discrimination Act defines harassment and instructions to discriminate as forms of prohibited discrimination. Furthermore, the legislation obliges an employer or educational institution that is aware of the fact that an employee/student feels that she or he has suffered harassment related to any protected ground to investigate the matter and, when appropriate, to take action to prevent such harassment from continuing. Victimization is also forbidden.

Inadequate accessibility has been a new form of discrimination since 2015.¹⁰ It applies when an employer, education provider or merchant fails to provide support and accommodation measures that would create a situation for a person with a disability that is similar to that for persons without such a disability, and the employer/education provider/merchant may reasonably be required to implement such measures. The main legal change was the extension of the possibility of obtaining discrimination awards for lack of reasonable accommodation in areas beyond education and employment, such as the provision of goods and services.

In Sweden, there is no specific prohibition of multiple discrimination in the law. However, many cases can be said to involve multiple discrimination. The issue of multiple discrimination was to some extent dealt with in the case of Labour Court 2010 No 91.¹¹ Several grounds were involved, and thus multiple discrimination. The court determined that if the same act can be presumed to be discriminatory in 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. At the same time, in the author's opinion, even though the court did not refer to them, the results indicate that some form

¹⁰ Act (2014:958) changing the Discrimination Act (2008:567).

¹¹ Labour Court 2010 No 91, *The Equality Ombudsman v. State Employment Board* (Statens arbetsgivarverk) (judgment of 15.12.2010).

of multiple discrimination or intersectionality analysis was used. This case and others have led to various discussions in Sweden about the role of intersectionality and multiple discrimination.¹²

4. Material scope

The material scope of the Discrimination Act fulfils the minimum standards established by EU law and in various ways extends beyond the material scope required by EU law.¹³

The Discrimination Act enumerates the material scope by specifying the following headings: 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, services and housing etc.; Health and medical care and social services etc.; Social insurance system, unemployment insurance and financial aid for studies; National military service and civilian service; and Public employment.

The Discrimination Act applies to all aspects of the employer-employee relationship in both the public and private sectors. However, self-employed people are not covered by the prohibition of discrimination in working life, which may indicate a problem with the scope of the act. Self-employed persons can, however, be protected as natural persons, for example in starting or running a business and as regards professional recognition (Chapter 2, Section 10). Professional organisations are prohibited from discriminating against the self-employed as well as the employed (Chapter 2 Section 11). Another potentially relevant issue is that the Discrimination Act does not, as a general rule, protect legal persons.

5. Enforcing the law

Civil proceedings regarding working life under the Discrimination Act are to be dealt with in accordance with the Labour Disputes Act, assuming that the claimant is represented by a union or the equality Ombudsman (DO, the equality body in Sweden).¹⁴ If the individual concerned is a member of a trade union, the DO's right to represent the victim (see also section 6 below) is subsidiary to the right of a trade union to represent its member. The procedures are the same regardless of whether the case concerns a private sector or public sector employee. However, with regard to state employees, due to the constitutional rules on objective grounds in hiring, there is sometimes also the complementary route of appealing against a decision through administrative procedures. If an individual brings an employment case without the support of the DO or a union, the case is first filed with and heard by a district court, with the Labour Court functioning as a court of appeal. The Labour Court is a special court and its decisions are final.

Cases outside working life are dealt with in the ordinary court system, i.e. the relevant district court in the first instance, with appeals then going to the appeal court and the Supreme Court. 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 procedure apply.¹⁵

¹² See for example Schömer, E. (2012) *Multiple discrimination: A smokescreen over differences*, RETFÆRD ARGANG 35 2012 NR. 3/138, available at: http://retfaerd.org/wp-content/uploads/2014/08/Retfaerd_3_2012_3.pdf.

¹³ For example, the Discrimination Act essentially already fulfils the minimum standard that would apply if and when the Proposal (COM (2008) 426 final) for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation is adopted.

¹⁴ Act (1974:371) on Labour Law Procedure.

¹⁵ Some higher education cases may also be brought before the Board of Appeal for Higher Education.

In addition to the right of the DO and the unions to bring actions, the Discrimination Act also gives non-profit organisations whose statutes state that they are to look after their members' interests the right to bring actions in their own name as a party. However, for most NGOs that represent groups suffering discrimination, taking legal actions such as going to court is not part of their advocacy culture – although there are some indications that this is changing.

There seems to be an increasing interest among NGOs in the possibility of bringing actions on behalf of their members. Both the 'Law as a tool for social change' project and the 'From talk to action' project are examples of this tendency, at least in the field of disability discrimination.¹⁶ After concluding that the current enforcement system is insufficient, the supporting NGOs have decided that discriminated-against groups need to take on the issue of more effective enforcement themselves. They have also realised that this is an important form of advocacy.¹⁷ Their goal is not to replace the local anti-discrimination bureaux discussed below; they seek to complement each other's work.

The general rule in Sweden is that the loser pays the winning party's legal costs. One advantage of representation by the DO or a union is that the DO or the union then takes on the economic risk in cases that are lost. An individual can hire their own lawyer, but they then run the risk of being required to pay not only their own lawyer's fees but also the winning party's legal costs. This economic risk is often prohibitive for most victims of discrimination.

Relevant criminal proceedings may be initiated by a public prosecutor (or in rare cases by the private party on their own). The DO and non-profit organisations do not have legal standing before the courts in criminal procedures.

A shifted burden of proof of discrimination had already been introduced under the old acts and is specified in the 2009 Act. Nevertheless, very few cases of discrimination have been won so far. There are some indications that a key problem lies in how the Labour Court applies the burden of proof.¹⁸ At the same time, statistics from the DO indicate that a number of cases are being settled out of court. The same is probably true for the trade unions.

It is also worth pointing out that it seems to be easier to establish a *prima facie* case and to win discrimination cases in the ordinary court system compared with the Labour Court. It seems to be particularly hard to bring successful cases on ethnic discrimination in the Labour Court. One possible reason is that the Labour Court applies the rules on shifting the burden of proof under the Swedish Discrimination Act and EU legislation in a more restrictive manner compared with the ordinary courts. One case in 2016 in Stockholm District Court¹⁹ and a very similar case in the Labour Court in 2017²⁰ concerning religion and discrimination illustrate this. The circumstances of the two cases were basically identical, as was the evaluation of the proof. Both courts agreed on the facts that remained uncertain, however they differed as to who should bear the burden of proof concerning that uncertainty. The discriminated-against party won in the District Court, since the alleged discriminator failed to carry their burden of proof. The Labour Court instead found that the discriminated-against party had failed to carry their burden of proof.

¹⁶ Lagen som verktyg (The law as a tool for social change), available at: <https://lagensomverktyg.se>, and Från snack till verkstad (From talk to action), available at: <https://funktionsrattskonventionen.se/om-projektet/>.

¹⁷ One example of inspiration is Disability Rights Advocates, whose offices are in New York and California. See their website at: <https://dralegal.org>.

¹⁸ Farkas, L. and O'Farrell, O. (2014), *Reversing the burden of proof: Practical dilemmas at the European and national level*, p. 76.

¹⁹ Stockholm District Court, case T 3905-15, *Equality Ombudsman v. The Swedish State through Karolinska institutet* (judgment of 16.11.2016).

²⁰ Labour Court 2017 no. 65, *Equality Ombudsman v. Public Dentists of Stockholm County* (judgment of 20.12.2017)).

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 compensation for the violation caused by the discrimination and – in employment cases not related to hiring or promotion – for the economic loss that arises. Damages are known to be low in Sweden. The 2009 Discrimination Act introduced a new form of civil damages: discrimination compensation. Beyond providing compensation to the victim, the courts have been instructed by law to give particular attention to the aim of discouraging infringements of the law. The level of compensation awards was therefore expected to be higher in the future as compared to the amounts awarded prior to 2009 in the form of damages.

Generally speaking, the sanctions are supposed to be proportionate, effective and dissuasive.

Nevertheless, with the limited case law that exists there seems to be little difference between discrimination compensation awards and the awards of damages granted under the old acts by the general courts or the Labour Court. There has been some hope that this might change, at least in the general courts, due to two Supreme Court decisions from June 2014, clarifying the court's reasoning concerning discrimination compensation related to goods and services.²¹ The focus here was on the dual purpose of compensation for the victim as well as effective prevention. The court seems to have come to the conclusion that, in a relatively normal case, a basic compensation of SEK 15 000 was reasonable. It also found that the preventive award in an individual case could be set at a level equivalent to the compensation amount, i.e. an additional SEK 15 000 or a total of SEK 30 000 (EUR 3 300). This seems to mainly relate to cases where the service provider has never wanted the discrimination to take place, acts diligently, cautions the employee at fault and apologises to the victims. In the author's view, these cases basically establish some guidelines concerning awards. This is positive, but the reasoning of the case still maintains a focus on compensation (or damages) rather than on the issue of prevention (or dissuasion). Such cases seem to provide greater potential to focus on increasing the prevention element of discrimination compensation in situations where the discrimination is more purposeful. However, given the limited number of cases, as well as their variety in the ordinary court system, it is difficult to point to any specific tendency.

A recent study has examined the awards granted by the Labour Court over a long period of time. According to Laura Carlson's analysis, the amounts awarded in discrimination cases are about 4.5 % higher today than they were in 1980, adjusting for inflation. Her conclusion is that this does not appear to reach the threshold of enhanced compensation, as was envisaged by the change in terminology that came with the Discrimination Act in 2009. She also points out that this modest increase in compensation can be compared with the 170 % increase in trial costs and fees since the 1980s. She concludes that the trends concerning compensation awarded and increasing lawyers' costs and fees, combined with low success rates, 'create a significant deterrent for plaintiffs bringing discrimination claims.'²² Her conclusion is that more effective enforcement and sanctions are needed.

Compared with the ordinary court system, the Labour Court seems to pay much less attention to the prevention issue. In future, this may cause some confusion, as some employment discrimination cases start in the district courts and can then be appealed to the Labour Court.

²¹ Supreme Court case T 3592-13, *Equality Ombudsman v. Veolia* (judgment of 26.06.2014). The second case was Supreme Court case T 5507-12, *Equality Ombudsman v. Stockholm County* (judgment of 26.06.2014) NJA 2014 p. 499.

²² Carlson, L. (2017), *Comparative Discrimination Law: Historical and Theoretical Frameworks*, Brill, pp. 79-80.

One potential complementary tool in Sweden for increasing the cost risks of discrimination for those with the power to discriminate, which in turn would lead to more effective implementation of the Discrimination Act, can be found in Regulation (2006:260) On Anti-Discrimination Conditions In Contracts.²³ For Sweden's 28 largest national government agencies, this regulation requires the inclusion of an anti-discrimination condition in all of their larger public building and services contracts. In a normal discrimination case, even if the discriminated-against party overcomes all of the obstacles in getting their case to court and actually wins, the risk for the discriminator is a compensation award of probably EUR 14 000 (SEK 150 000) at most. In the author's view, assuming that such a condition is properly formulated and that there is a reasonable possibility of follow-up, for example if the government agency reserves the right to cancel the entire contract if there is a violation of the Discrimination Act, it is reasonable to assume that businesses with such contracts will pay greater attention to compliance with the Discrimination Act, both as a preventive measure involving active measures and when they are accused of discrimination. The cost risk of losing a case worth EUR 14 000 is one thing; the risk of losing a contract worth EUR 140 000 or EUR 1 400 000 is quite another. Such violations could also cause problems concerning the ability to compete for future public contracts.²⁴ The total value of all public sector contracts in Sweden is over EUR 56 billion (SEK 600 billion) annually.²⁵

6. Equality bodies

The DO is the key public institution for counteracting discrimination and promoting equal rights. The DO has the right to investigate complaints concerning discrimination in relation to all grounds. The DO also has the right to take cases to court on behalf of an individual.

Furthermore, the DO can provide advice, independent assistance and support to individuals and institutions more generally; it can engage in educational, informative and opinion-shaping work to combat discrimination; it can propose legal and other measures to the Government that may be of use in combating discrimination; it can monitor international developments; and it can undertake other suitable measures to promote equality and counteract discrimination. Independent surveys and reports are important parts of this work. The DO is appointed by the Government, like other heads of government agencies. Also like other agencies, the DO has an independent status in matters concerning individual cases. The DO is state-funded, with decisions on funding being taken annually by the Swedish Parliament, based on Government recommendations. The DO is funded out of the general state budget.

As has already been indicated, the role played by NGOs other than trade unions and employer organisations in Sweden is known to be fairly weak. To the extent that there are NGOs, the DO has an ongoing dialogue with them. In particular, the local NGOs known as anti-discrimination bureaus should be mentioned here. They are beginning to take cases to court. So far, they have limited their risks mainly by taking cases to court as small claims cases, thus avoiding the risk of being required to pay the opposing parties' full legal expenses if they lose. At the same time, as the DO has given less priority to individual cases, there is mounting pressure on the bureaus to step in to provide additional assistance, including by taking cases to court.

²³ Regulation (2006:260) On Anti-Discrimination Conditions In Contracts (Förordning (2006:260) om antidiskrimineringsvillkor i upphandlingskontrakt), available at: <http://rkrattsbaser.gov.se/sfst?bet=2006:260>.

²⁴ Although it was changed to a large extent, the original proposal for the regulation as a complementary tool to the laws against discrimination and its potential effects can be seen in Government White Paper 2005:56, *The Blue and Yellow Glass House: Structural Discrimination in Sweden*, pp. 579-584.

²⁵ Swedish Government (2016), *Varför behövs en nationell upphandlingsstrategi?* (Why is a national public procurement strategy needed?) p. 4.

7. Key issues

The Equality Ombudsman is changing its priorities. There is a decreased focus on investigating complaints and taking cases to court or engaging in settlements. Instead, more priority has been given to issuing assessments of discrimination that are not legally binding and cannot be appealed. Individual complaints are at times transformed into more general supervisory inquiries or a follow-up of active duties. In the author's opinion, the focus is thus on information as a means of improving attitudes and hopefully future behaviour, rather than more effective enforcement of the law as a more direct means of affecting behaviour, and thus deeper underlying attitudes. The DO also has some focus on monitoring the duty to carry out active measures, which include carrying out wage surveys as well as various promotional activities. In the author's view, these actions carry with them the risk of a similarly ineffective focus, with the idea that information – as opposed to implementation of the law – is the key to social change.

The victims of discrimination, in the author's view, need improved means of ensuring that their cases are heard. Otherwise, only those who have sufficient financial resources to go to court can hope to get justice. For a person who discriminates against Roma or people of African ethnic origin, for example, the risk of ending up in court is extremely small, especially given the decreasing number of investigations by the DO and the limited mandate of the unions. There was a Government inquiry on the issue, which presented its results in 2016.²⁶ The only relatively concrete measure proposed was increased funding for the NGO-run anti-discrimination bureaus.

Given the decreased focus on access to justice, the prospects for the development of case law concerning the effective prevention portion of discrimination compensation are becoming correspondingly limited.

In addition to the lack of access to justice issue, the burden of proof problem is probably the most important principle-based legal issue. In the long run, a system where it is easier to prove discrimination in the general or ordinary courts, rather than in the Labour Court, is not sustainable. The same inquiry has suggested a new wording for the rules on the burden of proof, although it found no problem in the application of the current rule in the Labour Court.

In the view of the author, a slightly different wording is probably not an effective solution unless the problem at issue becomes clearer. This is why more attention needs to be paid to the access to justice issue. This is not just a question of processing more cases on behalf of individuals. Although that is important, what is more important is the development of case law through sustained and engaged advocacy. Just as those with the power to discriminate need to be challenged regarding their actions, those with the power to decide discrimination cases also need to be challenged, so that they can learn to understand and recognise discrimination.

In the author's opinion, it is not the law itself that changes norms, but implementation of the law, including through case law. Moreover, it is not just case law that is required, but a critical mass of cases that reflect a deeper understanding of the words used in the legislation, which in turn increases the cost risks of discrimination, leading to actual changes in behaviour and norms, particularly among those with the power to discriminate. This should lead to the main goal of anti-discrimination law, which is not that victims can get some kind of redress, but that they are not subjected to discrimination in the first place.

²⁶ Government White Paper 2016:87.

RÉSUMÉ

1. Introduction

La Suède compte de longue date diverses minorités parmi lesquelles les Roms, les Finlandais et la communauté juive. Le peuple Sami est autochtone depuis toujours. La Suède s'est pourtant considérée longtemps, et a été considérée jusqu'à récemment, comme un pays homogène. En 2017 toutefois, sa population, qui atteignait 10,1 millions d'habitants, comprenait 18,5 % de résidents nés à l'étranger contre 6,7 % en 1970, et cette proportion continue d'augmenter.²⁷ La Suède est considérée comme un pays fortement laïc même si la majeure partie de sa population continue d'appartenir à l'Église luthérienne, qui a eu le statut d'Église d'État. Il n'existe pas de tradition de suivi de l'appartenance ethnique au sein de la société, ni de tradition établie de longue date en matière de législation antidiscrimination.

Il est impératif, pour bien comprendre la législation relative à la discrimination et son application en Suède, de bien saisir le fonctionnement du droit du travail suédois ainsi que le rôle particulier et prédominant assigné aux partenaires sociaux. Le marché national du travail se caractérise par une densité organisationnelle extrêmement élevée – tant du côté des syndicats que du côté des associations patronales – puisqu'elle atteint 70 % environ. Il en va ainsi dans le secteur privé comme dans le secteur public. Cette structure organisationnelle se reflète dans les négociations collectives et dans le fait que certaines questions importantes (les salaires, par exemple) échappent encore au champ d'application de la loi. Le travail des fonctionnaires est régi de manière générale par des contrats et des conventions collectives selon des modalités qui sont très similaires à celles du secteur privé et qui appliquent, moyennant quelques exceptions, les mêmes règles.

La Suède, essentiellement dirigée par des gouvernements sociaux-démocrates durant le dernier siècle, a développé un État-providence assez complet. La formulation des avantages sociaux et économiques en tant que droits – pouvant dès lors donner lieu à un recours en justice – est restée limitée. La tradition constitutionnelle en matière de droits fondamentaux demeure, elle aussi, assez faible. On commence néanmoins à observer une évolution à cet égard, impulsée par l'importance croissante que revêtent la Convention européenne des droits de l'homme, la législation de l'UE et la constitution suédoise.

Leur rôle particulier fait que l'influence des syndicats de travailleurs et des associations d'employeurs, autrement dit des partenaires sociaux, a consisté, dans un premier temps du moins, à freiner l'élaboration d'une législation antidiscrimination avant de participer à sa formulation et à sa mise en œuvre. D'autres ONG, et notamment celles qui représentent des groupes visés par les discriminations, n'ont joué à ce jour qu'un rôle très limité dans le développement et surtout dans la mise en application des dispositions législatives visant à lutter contre le phénomène.

La législation antidiscrimination couvrant d'autres motifs ou domaines que la discrimination fondée sur le sexe en matière d'emploi est restée très embryonnaire jusqu'aux années 1990. À partir de 1999 toutefois, le gouvernement suédois s'est efforcé d'introduire une législation antidiscrimination relativement moderne pour anticiper et transposer le droit de l'UE mais aussi pour répondre à des besoins nationaux. En 2009, sept lois civiles couvrant divers motifs et domaines tels que l'éducation et la vie professionnelle ont été fondamentalement fusionnées en une seule et même loi antidiscrimination englobant l'ensemble des motifs et une large part de la société. Une

²⁷ Statistics Sweden, *Summary of Population Statistics 1960–2017*, consulté le 10 mai 2018, <https://www.scb.se/en/finding-statistics/statistics-by-subject-area/population/population-composition/population-statistics/pong/tables-and-graphs/yearly-statistics--the-whole-country/summary-of-population-statistics/>.

étape supplémentaire a été franchie dans cette voie le 1^{er} janvier 2015²⁸ avec l'instauration d'une nouvelle forme de discrimination: l'accessibilité insuffisante. Les personnes handicapées sont désormais mieux en mesure d'obtenir une indemnisation pour discrimination lorsque des mesures d'aménagement raisonnable ne sont pas adoptées pour leur permettre d'accéder à des sphères de la société non visées par la directive-cadre relative à l'égalité de traitement en matière d'emploi et de travail (2000/78/CE).

La population rom a longtemps fait l'objet d'un racisme et d'une discrimination au plan officiel comme au plan non officiel. Ce n'est qu'à la fin des années 1950 qu'une certaine attention a été portée à la reconnaissance de leur droit de résider dans une municipalité. Nombreuses étaient en effet les municipalités qui avaient mis en place jusque-là différents moyens de dissuader ou d'empêcher leur établissement. Il était courant que des règlements limitent le droit des Roms de séjourner pendant plus de quelques jours. Les autorités locales éludaient ainsi leurs responsabilités concernant la scolarisation des enfants et divers droits relevant de la protection sociale. Les Roms restent plus ouvertement confrontés que d'autres groupes ethniques au racisme et à la discrimination, mais il semble que le gouvernement soit désormais davantage sensibilisé et proactif face à leur situation.²⁹

2. Législation principale

Des dispositions constitutionnelles concernant la discrimination figurent dans l'Instrument de gouvernement, qui fait partie de la constitution suédoise. Son premier chapitre, qui ne peut être invoqué en tant que fondement d'un recours en justice, dispose que les institutions publiques doivent lutter contre la discrimination envers des personnes en raison de leur genre, de leur couleur, de leur origine nationale ou ethnique, de leur appartenance linguistique ou religieuse, d'une déficience fonctionnelle, de leur orientation sexuelle, de leur âge ou de toute autre situation les affectant. Ce principe ne confère cependant aucun droit juridiquement exécutoire. Le chapitre 2 contient deux articles susceptibles d'être invoqués en justice: l'article 12, qui prévoit une protection contre les lois et règlements donnant lieu à une discrimination fondée sur l'origine ethnique, la couleur ou autres caractéristiques similaires, ou en raison de l'orientation sexuelle; et l'article 13, qui interdit les lois et règlements qui génèrent une discrimination fondée sur le sexe. Le lien avec l'Union européenne et le droit de l'UE est régi au moyen de l'Instrument de gouvernement (1:10 et 10:6) et d'autres lois.

La Convention européenne des droits de l'homme (CEDH) a été intégrée dans la législation nationale en 1995 avec une exigence de dualisme, et un statut quasi-constitutionnel lui a été conféré au chapitre 2, article 19, de l'Instrument de gouvernement. Fondamentalement, toute loi qui contredit les droits inscrits dans la Convention est nulle et non avenue, et ne peut être appliquée. La Suède a également signé et ratifié divers autres instruments en matière de droits de l'homme parmi lesquels 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, la Convention sur l'élimination de toutes les formes de discrimination à l'égard des femmes, la Convention relative aux droits des personnes handicapées et un certain nombre de conventions pertinentes de l'OIT. En raison de l'exigence de dualisme, lorsqu'un instrument international n'a pas été incorporé dans la législation suédoise, il ne fait pas partie de la hiérarchie interne des lois suédoises et ne peut donc être directement invoqué devant les juridictions nationales. Les cours et tribunaux sont néanmoins tenus d'interpréter les lois suédoises comme étant conformes à ces accords internationaux.

²⁸ Loi 2014:958 portant modification de la loi antidiscrimination.

²⁹ Voir par exemple «*Den mörka och okända historien: VITBOK OM ÖVERGREPP OCH KRÄNKNINGAR AV ROMER UNDER 1900-TALET*» (L'histoire sombre et méconnue – Livre blanc sur les abus et les violations des droits commis envers les Roms au 20^e siècle), Ds 2014:8.

Si la Suède a connu un démarrage tardif dans le domaine de la législation anti-discrimination (en dépit de sa réputation en matière de droits de l'homme), son droit civil n'en contenait pas moins dès 2008 les protections contre la discrimination (exception faite de celle fondée sur l'âge) exigées par le droit de l'UE et énoncées dans sept lois spécifiques.³⁰ Ces lois étaient fondées sur des motifs particuliers dans le cas de la vie professionnelle et elles couvraient des motifs multiples dans les autres sphères de la société (biens et services et éducation notamment). La Suède comptait également quatre médiateurs indépendants en charge de motifs particuliers. Les sept lois ont été abrogées le 1^{er} janvier 2009 et remplacées par la loi antidiscrimination (2008:567).³¹ Les motifs de l'âge et de l'identité/expression transgenre ont été ajoutés. Les quatre médiateurs ont été regroupés au sein d'un nouveau Bureau du Médiateur pour l'égalité. Une nouvelle forme de discrimination, à savoir l'accessibilité insuffisante (en dehors de l'emploi) a été ajoutée entre autres en 2015³² et la loi a été modifiée en 2016 pour ce qui concerne les obligations actives. Des obligations actives générales s'appliquent désormais à tous les motifs tandis que certaines obligations plus spécifiques s'appliquent uniquement au sexe/genre.³³ La loi antidiscrimination va à divers égards au-delà des exigences minimales définies en droit de l'UE.

Il existe des *dispositions de droit pénal*, et notamment celle qui interdit la discrimination illégale pratiquée par des commerçants et fondée sur l'origine ethnique, la religion et l'orientation sexuelle en ce qui concerne la fourniture de biens et de services. Les recours invoquant ces dispositions sont rares. Il existe aussi une disposition visant le discours haineux, qui pénalise la diffusion d'un discours menaçant ou dégradant vis-à-vis d'un groupe de personnes.

La législation suédoise peut être considérée, de façon générale, comme conforme aux exigences minimales des directives «article 13». De surcroît, en ce qui concerne plus particulièrement la religion et autres convictions, l'orientation sexuelle, l'âge³⁴ et le handicap, le droit national va au-delà des exigences du droit de l'UE dans la mesure où il couvre des motifs supplémentaires (identité/expression transgenre) parallèlement au champ matériel qui s'applique à tous les motifs.

Un certain nombre de questions subsistent néanmoins en ce qui concerne la pleine transposition des directives dans la loi antidiscrimination:

³⁰ La loi 1991:433 sur l'égalité des chances, discrimination fondée sur le sexe dans le domaine de l'emploi/*jämställdhetslagen*); la loi 1999:130 sur les mesures de lutte contre la discrimination dans la vie professionnelle fondée sur l'origine ethnique, la religion ou d'autres convictions (*lagen om åtgärder mot etnisk diskriminering i arbetslivet*); la loi 1999:132 portant interdiction de discrimination dans la vie professionnelle à l'égard des personnes handicapées (*lagen om förbud mot diskriminering i arbetslivet av personer med funktionshinder*); la loi 1999:133 portant interdiction de discrimination dans la vie professionnelle 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 (*lagen om likabehandling av studenter i högskolan*); la loi 2003:307 sur l'interdiction de la discrimination (en dehors de la vie professionnelle et de l'éducation) (*lagen om förbud mot diskriminering*); et la loi 2006:67 portant interdiction de discrimination envers les élèves (*lag om förbud mot diskriminering och annan kränkande behandling av barn och elever*).

³¹ Les protections relatives au travail à temps partiel et au congé parental figurent dans une législation distincte.

³² Loi 2014:958 portant modification de la loi antidiscrimination 2008:567.

³³ Loi 2016:828 portant modification de la loi antidiscrimination 2008:567, adoptée le 12 juillet 2016. Les nouvelles règles en matière de mesures actives sont axées sur des processus et couvrent l'ensemble des sept motifs. Certaines règles spéciales concernant le genre ont toutefois été maintenues. Les employeurs et les prestataires d'enseignement sont tenus de documenter leur travail en matière de mesures actives, mais ne sont pas tenus de faire des plans annuels. En dehors de l'existence d'un système d'établissement de rapports et de gestion des cas de harcèlement, aucune exigence spécifique n'est stipulée en rapport avec les motifs couverts par le présent rapport. Aucune amélioration n'a par ailleurs été prévue en ce qui concerne la mise en application ou la supervision.

³⁴ La protection de l'âge a été étendue à de nombreux nouveaux domaines au 1^{er} janvier 2013. Voir la loi 2012:673 portant modification de la loi antidiscrimination et le projet de loi gouvernemental 2011/12:159.

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

Les réticences vis-à-vis de 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, du moins de la façon dont elle est appliquée par le Tribunal du travail – dont l'arrêt n° 45 prononcé en 2007 offre une bonne illustration.³⁵ Tous les intervenants avaient admis en l'espèce le fait que le candidat iranien à l'emploi avait été victime de discrimination mais personne ne pouvait, selon le Tribunal, en être tenu pour responsable dans la mesure où l'employé fautif n'était pas habilité à rejeter la candidature du plaignant. Nous sommes donc en l'espèce en présence d'une personne faisant l'objet d'une discrimination de la part d'un salarié qui ne peut être tenu pour responsable en vertu du droit civil antidiscrimination. Selon le Tribunal, la partie requérante doit être capable de faire valoir que l'employeur est responsable des actions du salarié, et l'employeur ne peut être tenu pour responsable que s'il/si elle s'est montré(e) négligent(e): s'il/si elle ne réagit pas immédiatement en apprenant des faits de harcèlement ou s'il/si elle habilite pour le/la représenter un salarié manquant de jugement, par exemple. L'application restreinte de la responsabilité du fait d'autrui en droit antidiscrimination limite la responsabilité des employeurs lorsque des salariés agissent en dehors de leur autorité, et cette situation pose problème pour l'application effective de la loi.

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 associé au motif protégé. La protection couvre donc les cas de discrimination par association.

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

³⁵ Tribunal du travail, arrêt n° 45 du 16 mai 2007, *Médiateur chargé de la lutte contre la discrimination ethnique c. Laika film & amp.*

La définition de la discrimination indirecte contenue dans la nouvelle loi antidiscrimination est largement conforme aux directives «article 13» de l'UE. Ceci dit, étant donné la jurisprudence peu abondante découlant des lois précédentes et de la loi antidiscrimination de 2009, il est trop tôt pour dire en quoi consiste réellement «le critère à satisfaire» dans ces situations.

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

L'accessibilité inadéquate constitue une nouvelle forme de discrimination depuis 2015.³⁶ Elle s'applique lorsqu'un employeur, un prestataire d'enseignement ou un commerçant ne prévoit pas les mesures d'aide et d'adaptation permettant à une personne handicapée de se trouver dans une situation analogue à celle d'une personne ne souffrant pas du même handicap; il est également prévu que l'employeur/le prestataire d'enseignement/le commerçant puisse être raisonnablement invité à implémenter ces mesures. Le grand changement sur le plan juridique est la possibilité accrue d'obtenir une indemnisation pour discrimination fondée sur l'absence d'aménagement raisonnable dans d'autres domaines que l'enseignement et l'emploi, tel celui de la fourniture de biens et de services.

La loi suédoise n'interdit pas spécifiquement la discrimination multiple, alors que l'on peut considérer qu'elle existe dans un grand nombre d'affaires. La question de la discrimination multiple a été abordée dans une certaine mesure par le Tribunal du travail dans son arrêt n° 91 de 2010.³⁷ Plusieurs motifs étaient en cause, et il s'agissait donc de discrimination multiple. Le Tribunal a dit pour droit que lorsqu'un même acte peut être présumé discriminatoire par rapport à plusieurs motifs, il reste considéré comme un fait unique de discrimination, et que le montant de l'indemnité n'est pas affecté par le nombre de motifs invoqués. Ceci dit, et même si le Tribunal n'y a pas fait référence, les conclusions indiquent selon l'auteur qu'il a fait appel à une certaine forme d'analyse de discrimination multiple ou croisée. Cette affaire et d'autres ont donné lieu en Suède à divers débats concernant le rôle de l'intersectionnalité et de la discrimination multiple.³⁸

4. Champ d'application matériel

Le champ d'application matériel de la loi antidiscrimination répond aux normes minimales instaurées par le droit de l'UE et va même à plusieurs égards au-delà des exigences qu'il contient.³⁹

La loi antidiscrimination définit le champ d'application matériel en énumérant les rubriques suivantes: vie professionnelle et enseignement; activités relatives au marché du travail et services de l'emploi ne relevant pas d'un contrat public; démarrage ou exploitation d'une entreprise et reconnaissance professionnelle; affiliation à certaines organisations; biens, services et logement, etc.; soins médicaux et de santé, services

³⁶ Loi 2014:958 portant modification de la loi antidiscrimination 2008:567.

³⁷ Tribunal du travail, arrêt n° 91 du 15 décembre 2010, *Médiateur pour l'égalité contre Direction des services employeurs de l'administration de l'État* (Statens arbetsgivarverk).

³⁸ Voir notamment Schömer, E. (2012) *Multiple discrimination: A smokescreen over differences*, RETFÆRD ARGANG 35 2012 n° 3/138, disponible sur: http://retfaerd.org/wp-content/uploads/2014/08/Retfaerd_3_2012_3.pdf.

³⁹ Ainsi par exemple, la loi antidiscrimination satisfait déjà essentiellement à la norme minimale qui serait d'application dans l'éventualité et au moment de l'adoption de la proposition de directive du Conseil relative à la mise en œuvre du principe de l'égalité de traitement entre les personnes sans distinction de religion ou de convictions, de handicap, d'âge ou d'orientation sexuelle [COM (2008) 426 final].

sociaux, etc.; système d'assurances sociales, assurance-chômage et aide financière aux études; service militaire et service civil nationaux; et fonction publique.

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, ce qui pourrait poser problème quant au champ d'application de la loi. Les travailleurs indépendants peuvent néanmoins jouir d'une protection en tant que personnes physiques, par exemple pour la création ou la gestion d'une entreprise, et pour ce qui concerne la reconnaissance professionnelle (chapitre 2, article 10). Les organisations professionnelles ne peuvent pratiquer de discrimination à l'encontre des travailleurs indépendants, ni à l'encontre des salariés (chapitre 2, article 11). Un autre point pertinent pourrait être soulevé, à savoir que la loi antidiscrimination ne protège pas, en règle générale, les personnes morales.

5. Mise en application de la loi

Les procédures civiles engagées en matière de vie professionnelle en vertu de la loi antidiscrimination doivent se dérouler conformément à la loi sur les conflits du travail, supposant que la partie requérante est représentée par un syndicat ou par le médiateur pour l'égalité (le DO – organisme chargé des questions d'égalité en Suède).⁴⁰ Si la personne concernée est affiliée à un syndicat, le droit de ce dernier de représenter la victime (voir également le point 6 ci-après) est subordonné à celui d'un syndicat de représenter l'un de ses membres. Que l'affaire concerne un travailleur du secteur privé ou du secteur public, les procédures sont les mêmes. Il peut néanmoins exister pour les fonctionnaires, en raison de règles constitutionnelles en matière de motifs objectifs d'embauche, une voie complémentaire permettant de faire appel d'une décision via des procédures administratives. Lorsqu'une personne engage individuellement une action en matière d'emploi sans le soutien du DO ou d'un syndicat, le dossier est d'abord introduit auprès d'un tribunal de district de première instance, le Tribunal du travail fonctionnant comme une juridiction d'appel. Le Tribunal du travail est une juridiction spéciale et ses arrêts sont définitifs.

Les affaires qui n'ont pas trait à la vie professionnelle relèvent du système judiciaire ordinaire, à savoir le tribunal de première instance compétent – les appels étant interjetés ensuite auprès d'une cour d'appel et de la Cour suprême. 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'y appliquent.⁴¹

Outre le droit du DO et des syndicats d'engager des actions, la loi antidiscrimination confère 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. Il apparaît toutefois que l'engagement de poursuites, judiciaires notamment, ne fait pas partie de la culture de défense des intérêts telle que pratiquée par la plupart des ONG qui représentent des groupes victimes de discrimination – bien que certains signes donnent à penser que la situation connaît une évolution à cet égard.

Un intérêt croissant semble se manifester parmi les ONG quant à la possibilité d'engager des actions au nom de leurs membres. Les projets «La loi comme instrument de changement social» et «De la parole à l'action» offrent deux exemples de cette tendance,

⁴⁰ Loi 1974:371 sur les contentieux du travail (procédures judiciaires).

⁴¹ Certaines affaires relatives à l'enseignement universitaire ou supérieur peuvent également être portées devant la Commission d'appel de l'enseignement supérieur.

à tout le moins dans le domaine de la discrimination fondée sur le handicap.⁴² Après avoir conclu à la défaillance du régime actuel de mise en application, les ONG concernées ont décidé que les groupes visés par des discriminations devaient se charger eux-mêmes de la question du renforcement de son efficacité. Elles ont également pris conscience de la forme majeure de défense des intérêts que cette problématique peut constituer.⁴³ Ces ONG n'ont pas pour objectif de remplacer les bureaux anti-discrimination décrits ci-après: elles visent à ce que leurs actions respectives soient complémentaires.

La règle générale veut que ce soit, en Suède, la partie perdante qui assume les frais de justice de la partie gagnante. L'un des avantages de la représentation par le DO ou par un syndicat est donc le fait que ce soit lui qui prenne le risque économique si l'affaire devait être perdue. Une personne individuelle peut engager son propre avocat, mais elle prend alors le risque de devoir payer non seulement les honoraires de celui-ci, mais également les frais de procédure de la partie adverse lorsque celle-ci obtient gain de cause. Ce risque économique s'avère souvent prohibitif pour la plupart des victimes de discrimination.

Des procédures pénales peuvent également être engagées par le procureur général (ou, beaucoup plus rarement, la partie privée elle-même). Le DO 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 un renversement de la charge de la preuve de discrimination, lequel est précisé dans la loi de 2009. Très peu de plaignants invoquant une discrimination ont cependant eu gain de cause à ce jour, et il semblerait que l'un des problèmes soit la manière dont le Tribunal du travail applique la charge de la preuve.⁴⁴ Les statistiques publiées par le DO montrent dans le même temps qu'un nombre considérable de litiges font l'objet d'un règlement extrajudiciaire. Il en va sans doute de même pour les syndicats.

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. Et qu'il semble particulièrement difficile de remporter une affaire devant ce Tribunal lorsqu'il s'agit de discrimination ethnique. L'une des explications serait que le Tribunal du travail 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. Cette situation est illustrée par une affaire dont le tribunal de district de Stockholm a été saisi en 2016⁴⁵ et par une affaire très similaire dans laquelle le Tribunal du travail a statué en 2017⁴⁶ en matière de religion et de discrimination. Les circonstances étaient fondamentalement identiques dans les deux cas, tout comme l'appréciation de la preuve. Les deux juridictions étaient d'accord pour affirmer que les faits demeuraient incertains, mais leurs points de vue ont divergé quant à savoir qui devait assumer la charge de la preuve face à cette incertitude. La partie visée par la discrimination a eu gain de cause devant le tribunal de district, étant donné que l'auteur présumé de la discrimination n'a pu assumer la charge de la preuve qui lui incombait. Le Tribunal du travail a estimé pour sa part que

⁴² *Lagen som verktyg* (La loi comme instrument de changement social), disponible sur: <https://lagensomverktyg.se/>; et *Från snack till verkstad* (De la parole à l'action), disponible sur: <https://funktionsrattskonventionen.se/om-projektet/>.

⁴³ Un exemple à suivre serait celui des Défenseurs des droits des personnes handicapées (*Disability Rights Advocates*), dont les bureaux sont situés à New York et en Californie. Voir leur site web sur: <https://dralegal.org>.

⁴⁴ Farkas, L. & O'Farrell, O. (2014), *Reversing the burden of proof: Practical dilemmas at the European and national level*, p. 76.

⁴⁵ Tribunal de district de Stockholm, arrêt du 16 novembre 2016 dans l'affaire T 3905-15, *Médiateur pour l'égalité c. État suédois via le Karolinska institutet*.

⁴⁶ Tribunal du travail, arrêt n° 65 du 20 décembre 2017 dans l'affaire *Médiateur pour l'égalité c. dentistes du secteur public du comté de Stockholm*.

la partie visée par la discrimination n'était pas parvenue à assumer la charge de la preuve qui lui incombait.

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 loi antidiscrimination de 2009 introduit une nouvelle forme de réparation civile, à savoir l'indemnité pour discrimination. Outre leur obligation d'indemniser les victimes, les juridictions sont désormais tenues par la loi d'accorder une attention toute particulière à l'objectif de dissuasion des infractions. On pouvait s'attendre dès lors à ce que le niveau des réparations allouées augmente par rapport à ce qui était alloué au titre d'indemnités avant 2009.

De manière générale, les sanctions sont censées être proportionnées, effectives et dissuasives.

Il ressort toutefois de la jurisprudence limitée existante que l'indemnisation pour discrimination ne soit pas très différente des réparations allouées par les juridictions ordinaires ou le Tribunal du travail en vertu des anciennes lois. Un espoir de changement à cet égard, du moins au niveau des juridictions ordinaires, était né lorsque la Cour suprême a clarifié dans deux arrêts prononcés en juin 2014 son raisonnement concernant l'indemnisation pour discrimination en rapport avec des biens et services.⁴⁷ Elle y insistait sur le double but de l'indemnisation, à savoir la réparation allouée à la victime et une prévention efficace. La Cour semble avoir conclu que, dans un cas relativement normal, une indemnisation de base de 15 000 SEK constitue un montant raisonnable. Elle a également déclaré que le montant à vocation préventive pouvait, dans un cas individuel, être fixé à un niveau équivalent à celui de la réparation, soit 15 000 SEK supplémentaires ou un montant total de 30 000 SEK (3 300 EUR). Ceci semble principalement concerner des affaires dans lesquelles le prestataire de service n'a jamais eu l'intention d'une discrimination, agit avec diligence, donne un avertissement au salarié fautif et présente ses excuses aux victimes. L'auteur estime que ces affaires définissent des orientations de base en matière d'indemnisation. Il s'agit d'une évolution positive, mais l'argumentation de la décision reste davantage focalisée sur l'indemnité (ou réparation) plutôt que sur la question de la prévention (ou dissuasion). Il semblerait que les affaires de discrimination offrent une plus grande possibilité de mettre l'accent sur l'élément «prévention» de l'indemnisation lorsque les faits discriminatoires revêtent un caractère davantage délibéré. Il s'avère néanmoins difficile, étant donné le faible nombre d'affaires et leur diversité dans le cadre du système judiciaire ordinaire, de cerner une tendance plus particulière.

Une récente étude s'est récemment penchée sur les indemnités allouées sur une longue période par le Tribunal du travail. Il ressort de l'analyse de Laura Carlson que les montants octroyés dans les affaires de discrimination sont actuellement supérieurs de 4,5 % environ à ce qu'ils étaient en 1980, après correction pour l'inflation. Elle en conclut que cette évolution n'a apparemment pas suffi à atteindre le seuil d'indemnisation renforcée qui avait été envisagé avec le changement de terminologie accompagnant la loi antidiscrimination de 2009. Laura Carlson souligne également que cette hausse modeste de l'indemnisation doit être comparée à l'augmentation de 170 % des frais et honoraires de justice depuis les années 1980. Et elle conclut que les tendances au niveau des

⁴⁷ Cour suprême, arrêt du 26 juin 2014 dans l'affaire T 3592-13 *Médiateur pour l'égalité c. Veolia*; et Cour suprême, arrêt du 26 juin 2014 dans l'affaire T 5507-12 *Médiateur pour l'égalité c. Comté de Stockholm*, NJA 2014, p. 499.

indemnités allouées et au niveau des frais et honoraires d'avocats, conjuguées aux faibles taux de réussite, dissuadent fortement les plaignants d'engager des poursuites pour discrimination.⁴⁸ Elle fait donc valoir en conclusion la nécessité d'une plus grande efficacité en termes d'application comme en termes de sanctions.

Le Tribunal du travail semble accorder beaucoup moins d'attention que les juridictions ordinaires à la question de la prévention – ce qui pourrait être source de confusion à l'avenir, étant donné que certaines affaires de discrimination débutent devant des tribunaux de district avant un éventuel appel auprès du Tribunal du travail.

Un outil complémentaire pourrait permettre d'augmenter en Suède les coûts que peut engendrer une discrimination dans le chef de ceux qui sont en position de la pratiquer, et pourrait conduire à son tour à une mise en œuvre plus efficace de la loi antidiscrimination: on le trouve dans le règlement 2006:260 relatif aux conditions antidiscrimination dans les contrats,⁴⁹ lequel exige des 28 principaux organismes officiels suédois d'inclure une condition antidiscrimination dans tous leurs grands marchés publics de construction et de services. Dans un cas ordinaire de discrimination, même si la partie visée par la discrimination surmonte tous les obstacles pour saisir la justice et obtient effectivement gain de cause, le risque encouru par l'auteur des faits discriminatoires est le versement d'une indemnisation représentant probablement un maximum de 14 000 EUR (150 000 SEK). De l'avis de l'auteur, en supposant que la condition en question soit formulée de manière adéquate et qu'il existe une possibilité raisonnable de suivi – si par exemple l'organisme officiel se réserve le droit d'annuler la totalité du contrat en cas de non-respect de la loi antidiscrimination – on peut raisonnablement supposer que les entreprises obtenant ce type de marchés veilleront davantage à respecter la loi antidiscrimination, à la fois au titre de mesure préventive impliquant des mesures actives et au cas où elles sont accusées discrimination. En termes de coûts, perdre une affaire valant 14 000 euros est une chose; perdre un contrat d'une valeur de 140 000, voire de 1 400 000 euros en est une autre. Les infractions de ce type peuvent en outre compromettre l'autorisation de soumissionner en vue d'obtenir de futurs marchés publics.⁵⁰ Or l'ensemble des marchés passés chaque année par le secteur public en Suède représente une valeur supérieure à 56 milliards d'euros (600 milliards SEK).⁵¹

6. Organismes de promotion de l'égalité de traitement

Le Médiateur pour l'égalité (DO) est la principale institution publique en charge de la lutte contre la discrimination et de la promotion de l'égalité des droits. Il est habilité à enquêter sur des plaintes pour des faits discriminatoires fondés sur tous les motifs ainsi qu'à engager une action en justice au nom d'une personne individuelle.

Le DO peut en outre fournir des conseils, une assistance indépendante et un soutien aux particuliers et aux institutions de façon plus générale; il peut mener des actions d'éducation, d'information et de formation d'opinion en vue de combattre la discrimination; il peut proposer au gouvernement des mesures juridiques et autres pouvant servir à lutter contre la discrimination; il peut suivre les développements au plan international; et il peut s'engager dans d'autres mesures adéquates en vue de promouvoir l'égalité et de lutter contre la discrimination. Les études et rapports indépendants constituent des volets importants de sa mission. Le DO est désigné par le

⁴⁸ Carlson, L. (2017), *Comparative Discrimination Law: Historical and Theoretical Frameworks*, Brill, p. 79-80.

⁴⁹ Règlement 2006:260 relatif aux conditions antidiscrimination dans les contrats (*Förordning (2006:260) om antidiskrimineringsvillkor i upphandlingskontrakt*), disponible sur: <http://rkrattsbaser.gov.se/sfst?bet=2006:260>.

⁵⁰ Bien qu'elle ait subi d'importantes modifications, la proposition initiale de règlement en tant qu'outil complémentaire aux lois antidiscrimination et ses effets potentiels peut être consultée dans le livre blanc 2005:56 du gouvernement intitulé *The Blue and Yellow Glass House: Structural Discrimination in Sweden*, p. 579-584.

⁵¹ Gouvernement suédois (2016), *Varför behövs en nationell upphandlingsstrategi?* (Pourquoi une stratégie nationale est-elle nécessaire en matière de marchés publics?), p. 4.

gouvernement, comme d'autres responsables d'organismes officiels. Comme d'autres organismes officiels également, le DO a un statut indépendant pour les questions relatives à des cas individuels. Le DO est financé par l'État, les décisions relatives à son financement étant prises annuellement par le Parlement suédois sur la base des recommandations du gouvernement. Le financement du DO émerge au budget général de l'État.

Comme déjà indiqué, le rôle joué par les ONG en dehors des organisations syndicales et patronales est notoirement assez peu développé en Suède. Le DO entretient un dialogue permanent avec les ONG lorsqu'elles existent. Il convient de citer plus particulièrement à cet égard les bureaux locaux d'action contre la discrimination, qui commencent à intenter des actions en justice. Ils ont principalement limité leurs risques jusqu'ici en se chargeant d'affaires portant sur des revendications modestes, ce qui leur évite d'être éventuellement appelés à prendre en charge l'intégralité des frais judiciaires s'ils perdent. Ceci dit, étant donné qu'une moindre priorité a été donnée par le DO à des cas individuels, une pression croissante s'exerce sur les bureaux pour qu'ils interviennent en fournissant davantage d'assistance, y compris l'engagement d'actions en justice.

7. Points essentiels

Le Médiateur pour l'égalité (DO) réoriente ses priorités. On observe une moindre focalisation sur l'examen des plaintes et l'engagement de poursuites en justice ou les règlements à l'amiable au profit d'un accent plus marqué sur la publication d'évaluations de faits discriminatoires, lesquelles ne sont pas juridiquement contraignantes et dont il ne peut être fait appel. Il arrive que des plaintes individuelles soient mutées en enquêtes de surveillance à caractère plus général ou en suivi d'obligations actives. De l'avis de l'auteur, la priorité va donc davantage à l'information en tant que moyen d'améliorer les mentalités et, peut-on espérer, les comportements futurs, plutôt qu'à une mise en application efficace de la loi en tant que moyen plus direct de modifier les comportements et, partant, les mentalités sous-jacentes. Le DO s'attache également à suivre l'obligation de procéder à des mesures actives telles que l'exécution d'enquêtes salariales et de diverses activités de promotion. De l'avis de l'auteur, ces actions comportent le risque d'une focalisation tout aussi inefficace car elles se fondent sur l'idée que l'information – par opposition à la mise en œuvre de la loi – est la clé du changement social.

Les victimes de discrimination ont besoin, selon l'auteur, de meilleurs moyens de faire valoir leurs cas – faute de quoi, seules celles qui disposent de ressources financières suffisantes pour saisir les tribunaux peuvent espérer que justice leur soit rendue. Une personne pratiquant une discrimination envers des Roms ou envers des personnes d'origine ethnique africaine, par exemple, ne court pratiquement aucun risque de poursuites judiciaires, à plus forte raison au vu du nombre décroissant d'enquêtes menées par le DO et du mandat limité des organisations syndicales. Une étude officielle a été réalisée sur cette question, et les résultats ont été présentés en 2016.⁵² La seule mesure relativement concrète proposée a été l'augmentation du financement des bureaux de lutte contre la discrimination gérés par des ONG.

Étant donné la moindre priorité conférée à l'accès à la justice, les perspectives de développement d'une jurisprudence relative au volet «prévention efficace» de l'indemnisation pour discrimination tendent, elles aussi, à se restreindre.

Outre le manque d'accès à la justice, c'est sans doute la question de la charge de la preuve qui constitue le principal problème juridique sur le plan du principe. Un système dans lequel il est plus facile de prouver une discrimination devant des juridictions ordinaires que devant le Tribunal du travail n'est pas viable à long terme. L'étude

⁵² Livre blanc 2016:87 du gouvernement.

susmentionnée a suggéré un nouveau libellé pour les règles relatives à la charge de la preuve, bien qu'elle n'ait constaté aucun problème d'application de la règle actuelle au Tribunal du travail.

L'auteur estime pour sa part que le libellé légèrement différent n'offre probablement pas une bonne solution à moins que le problème en cause soit éclairci. Telle est la raison pour laquelle il convient d'accorder davantage d'attention à la question de l'accès à la justice. Il ne s'agit pas simplement de pouvoir traiter un plus grand nombre d'affaires au nom de particuliers. Ce point est important, mais il est plus important encore de développer la jurisprudence en menant une action de plaidoyer à la fois soutenue et engagée. Tout comme ceux qui sont en position de pratiquer une discrimination doivent voir leurs actions mises en cause, ceux qui sont en position de statuer dans des affaires de discrimination doivent pouvoir être eux aussi contestés afin qu'ils apprennent à comprendre et à reconnaître la discrimination.

L'auteur considère que ce n'est pas la loi elle-même qui modifie les normes, mais sa mise en œuvre, y compris au travers de la jurisprudence. Il faut d'ailleurs davantage qu'une jurisprudence: il faut une masse critique de cas qui traduisent une meilleure compréhension des mots utilisés dans la législation (ce qui augmente à son tour les coûts susceptibles d'être engendrés par une discrimination) et qui conduisent à un véritable changement au niveau des comportements et des normes, en particulier parmi ceux qui sont en position de pratiquer une discrimination. Une telle évolution contribuerait à réaliser l'objectif principal de la législation antidiscrimination, qui n'est pas d'obtenir une forme ou une autre de réparation pour les victimes, mais de faire en sorte qu'il n'y ait plus de discrimination à leur égard pour commencer.

ZUSAMMENFASSUNG

1. Einleitung

Schweden hat seit langem verschiedene Minderheiten, darunter die Roma, die Finnen und die jüdische Gemeinschaft. Die Samen waren schon immer eine indigene Bevölkerungsgruppe. Dennoch wurde Schweden bis vor kurzem als homogenes Land gesehen und hat sich lange Zeit auch selbst so gesehen. 2017 hatte das Land 10,1 Millionen Einwohner. Der Anteil der im Ausland geborenen Einwohner ist von 6,7 % im Jahr 1970 auf 18,5 % im Jahr 2017 gestiegen und nimmt weiter zu.⁵³ Schweden gilt als ausgeprägt säkulares Land; gleichzeitig gehört jedoch die Mehrheit der Bevölkerung nach wie vor der evangelisch-lutherischen Kirche, der ehemaligen Staatskirche, an. Es gibt traditionell kein Monitoring der ethnischen Zugehörigkeit innerhalb der Gesellschaft und auch keine lange Tradition der Antidiskriminierungsgesetzgebung.

Um das Antidiskriminierungsrecht und seine Durchsetzung in Schweden zu verstehen, ist es unerlässlich, die Funktionsweise des schwedischen Arbeitsrechts und die besondere, dominierende Rolle der Sozialpartner zu begreifen. Der Arbeitsmarkt ist durch einen hohen Organisationsgrad – sowohl auf Seiten der Gewerkschaften als auch auf Seiten der Arbeitgeberverbände – gekennzeichnet, der rund 70 % beträgt, und zwar sowohl im privaten als auch im öffentlichen Sektor. Diese organisatorische Struktur spiegelt sich in den Tarifverhandlungen wider und in der Tatsache, dass sich einige wichtige Themen, z.B. Löhne und Gehälter, nach wie vor im rechtsfreien Raum befinden. Die Arbeit der Staatsbediensteten wird im Allgemeinen durch Verträge und Kollektivvereinbarungen geregelt, weitgehend ebenso wie die Arbeit im Privatsektor. Bis auf wenige Ausnahmen gelten dieselben Regeln.

Schweden, das im vergangenen Jahrhundert überwiegend sozialdemokratisch regiert wurde, hat einen recht umfassenden Wohlfahrtsstaat entwickelt. Soziale und wirtschaftliche Vergünstigungen wurden nur in begrenztem Umfang als Rechte formuliert, die gesetzliche Ansprüche begründen. Auch die verfassungsmäßige Tradition der Grundrechte ist eher schwach entwickelt. Dank der wachsenden Bedeutung der Europäischen Menschenrechtskonvention, des Unionsrechts und der schwedischen Verfassung hat sich dies jedoch zu ändern begonnen.

Aufgrund ihrer besonderen Rolle hatten die Gewerkschaften und Arbeitgeberverbände, kurz: die Sozialpartner, Einfluss auf die Entwicklung des Antidiskriminierungsrechts, die sie zumindest anfänglich behinderten, und danach auf seine Formulierung und Durchsetzung. Andere Akteure, z.B. NROs, die diskriminierte Gruppen vertreten, haben bei der Entwicklung und insbesondere der Durchsetzung der Antidiskriminierungsgesetze bislang eine sehr begrenzte Rolle gespielt.

Bis in die 1990er Jahre gab es kaum antidiskriminierungsrechtliche Bestimmungen, die andere Gründe oder Bereiche als geschlechtsspezifische Diskriminierung am Arbeitsplatz regelten. Seit 1999 setzt sich die schwedische Regierung jedoch aktiv für die Einführung relativ moderner Antidiskriminierungsvorschriften ein. Dies war sowohl auf nationale Erfordernisse als auch auf die Antizipation und Umsetzung des Unionsrechts zurückzuführen. 2009 wurden sieben Zivilgesetze, die unterschiedliche Diskriminierungsgründe und Bereiche (Bildung, Erwerbsleben usw.) abdeckten, in einem einzigen Antidiskriminierungsgesetz zusammengefasst, das sämtliche Diskriminierungsgründe und einen Großteil der Gesellschaft abdeckt. Ein weiterer Schritt auf diesem Weg wurde am 1. Januar 2015 vollzogen,⁵⁴ als eine neue Form von

⁵³ Statistisches Zentralbüro, Zusammenfassung der Bevölkerungsstatistik 1960–2017, <https://www.scb.se/en/finding-statistics/statistics-by-subject-area/population/population-composition/population-statistics/pong/tables-and-graphs/yearly-statistics--the-whole-country/summary-of-population-statistics/> (letzter Zugriff am 10.05.2018).

⁵⁴ Gesetz (2014:958) zur Änderung des Antidiskriminierungsgesetzes.

Diskriminierung eingeführt wurde: unzureichende Zugänglichkeit. Für Menschen mit Behinderungen war es nun einfacher, eine Diskriminierungsentschädigung zu erhalten, wenn keine angemessenen Vorkehrungen getroffen wurden, um ihnen den Zugang zu Bereichen der Gesellschaft zu ermöglichen, die von der Rahmenrichtlinie Beschäftigung und Beruf (2000/78/EG) nicht erfasst wurden.

Die Roma-Bevölkerung ist, sowohl auf offizieller als auch auf inoffizieller Ebene, Rassismus und Diskriminierung ausgesetzt. Erst Ende der 1950er Jahre wurde der Anerkennung ihres Rechts auf Aufenthalt in einer Gemeinde eine gewisse Aufmerksamkeit zuteil. Bis zu diesem Zeitpunkt hatten viele Gemeinden unterschiedliche Mittel eingesetzt, um die Roma von einer Ansiedlung abzuhalten oder sie an einer Ansiedlung zu hindern. Vorschriften, die das Recht der Roma, sich länger als ein paar Tage aufzuhalten, einschränkten, waren üblich. Auf diese Weise entzogen sich die lokalen Behörden der Verantwortung für die schulische Betreuung der Kinder und diverse soziale Rechte. Im Vergleich zu anderen ethnischen Gruppen sind die Roma immer noch offeneren Formen von Rassismus und Diskriminierung ausgesetzt; die Regierung scheint im Umgang mit dieser Situation inzwischen jedoch etwas sensibler und proaktiver zu sein.⁵⁵

2. Wichtigste Rechtsvorschriften

Im „Instrument der Regierung“ (Teil der schwedischen Verfassung) sind Verfassungsbestimmungen zum Thema Diskriminierung enthalten. Nach Kapitel 1, das nicht als Grundlage für einen Rechtsanspruch herangezogen werden kann, sind die staatlichen Einrichtungen verpflichtet, jeglicher Diskriminierung von Menschen aufgrund von Geschlecht, Hautfarbe, nationaler oder ethnischer Herkunft, sprachlicher oder religiöser Zugehörigkeit, Behinderung, sexueller Orientierung, Alter oder anderen individuellen Umständen entgegenzutreten. Mit diesem Grundsatz sind keinerlei einklagbare Rechte verbunden. Kapitel 2 enthält zwei Artikel, die Grundlage für einen Rechtsanspruch sein können: Artikel 12 regelt den Schutz vor Gesetzen und Vorschriften, die aufgrund der ethnischen Herkunft, der Hautfarbe oder ähnlicher Merkmale bzw. aufgrund der sexuellen Orientierung diskriminieren. Artikel 13 verbietet Gesetze und Vorschriften, die eine Diskriminierung aufgrund des Geschlechts beinhalten. Das Verhältnis zur Europäischen Union und zum Unionsrecht wird im Instrument der Regierung (1:10 und 10:6) und in anderen Gesetzen geregelt.

Die Europäische Menschenrechtskonvention (EMRK) wurde 1995 nach dem Erfordernis des Dualismus in die nationale Gesetzgebung aufgenommen und erhielt im Zuge von Kapitel 2 § 19 des Instruments der Regierung einen verfassungsähnlichen Status. Grundsätzlich ist jedes Gesetz, das den in der Konvention festgeschriebenen Rechten widerspricht, nichtig und darf nicht angewendet werden. Schweden hat auch verschiedene andere Menschenrechtsinstrumente unterzeichnet und ratifiziert, darunter den Internationalen Pakt über bürgerliche und politische Rechte, den Internationalen Pakt über wirtschaftliche, soziale und kulturelle Rechte, das Übereinkommen zur Beseitigung jeder Form von Rassendiskriminierung, das Übereinkommen zur Beseitigung jeder Form von Diskriminierung der Frau, das Übereinkommen über die Rechte von Menschen mit Behinderungen und eine Reihe einschlägiger Übereinkommen der IAO. Nach dem Erfordernis des Dualismus sind internationale Abkommen, die nicht in schwedisches Recht übernommen wurden, nicht Teil der innerstaatlichen schwedischen Gesetzeshierarchie im eigentlichen Sinne und können daher vor Gericht nicht unmittelbar geltend gemacht werden. Die innerstaatlichen Gesetze sind von den Gerichten jedoch so auszulegen, dass sie mit diesen internationalen Vereinbarungen übereinstimmen.

⁵⁵ Vgl. z.B. *Den mörka och okända historien: VITBOK OM ÖVERGREPP OCH KRÄNKNINGAR AV ROMER UNDER 1900-TALET* (Die dunkle, unbekannte Geschichte – Weißbuch über Missbräuche und Verstöße gegen die Rechte von Roma im 20. Jahrhundert), Ds 2014:8.

Schweden war auf dem Gebiet des Antidiskriminierungsrechts ein Spätstarter (trotz seines Renommées in puncto Menschenrechte). Bis 2008 wurden jedoch die nach Unionsrecht erforderlichen Vorkehrungen zum Schutz vor Diskriminierung, mit Ausnahme des Diskriminierungsgrunds Alter, im schwedischen Zivilrecht verankert, und zwar in sieben Einzelgesetzen.⁵⁶ Im Bereich des Berufslebens bezogen sich diese auf einzelne Diskriminierungsgründe. In anderen Bereichen der Gesellschaft (z.B. Güter und Dienstleistungen bzw. Bildung) deckten sie mehrere Diskriminierungsgründe gleichzeitig ab. Es gab auch vier unabhängige Ombudspersonen für Antidiskriminierung, die für unterschiedliche Merkmale zuständig waren. Am 1. Januar 2009 wurden die sieben Gesetze aufgehoben und durch das Antidiskriminierungsgesetz Nr. 2008:567 ersetzt⁵⁷. Alter sowie Transgender-Identität und -Ausdruck wurden der Liste der Diskriminierungsgründe hinzugefügt. Die vier Ombudspersonen wurden im neu geschaffenen Amt der Ombudsperson für Diskriminierungsfragen zusammengeführt. 2015 wurde unter anderem eine neue Form von Diskriminierung, nämlich unzureichende Zugänglichkeit (außerhalb des Bereichs der Beschäftigung), aufgenommen,⁵⁸ und 2016 wurde das Gesetz in Bezug auf aktive Pflichten geändert. Die allgemeinen aktiven Pflichten gelten heute für alle Diskriminierungsgründe, wohingegen bestimmte spezifischere Pflichten nach wie vor nur für Geschlecht gelten.⁵⁹ Das Antidiskriminierungsgesetz geht in verschiedener Hinsicht über die im Unionsrecht festgelegten Mindestanforderungen hinaus.

Es gibt *strafrechtliche Bestimmungen*, darunter auch eine Bestimmung, die rechtswidrige Diskriminierung durch Gewerbetreibende aufgrund von ethnischer Zugehörigkeit, Religion und sexueller Orientierung bei der Bereitstellung von Waren und Dienstleistungen verbietet. Strafverfahren auf der Grundlage dieser Bestimmungen sind selten. Es gibt außerdem eine Bestimmung über Hassrede, die die Verbreitung von Äußerungen, die für eine Gruppe von Personen bedrohlich oder erniedrigend sind, unter Strafe stellt.

Im Großen und Ganzen entspricht das schwedische Recht den Mindestanforderungen der Artikel-13-Richtlinien. Außerdem geht es, insbesondere in Bezug auf Religion und Weltanschauung, sexuelle Orientierung, Alter⁶⁰ und Behinderung, insofern über die Anforderungen des Unionsrechts hinaus, als es – neben dem sachlichen Anwendungsbereich, der sich auf sämtliche Diskriminierungsgründe erstreckt – bestimmte zusätzliche Gründe (Transgender-Identität und -Ausdruck) abdeckt.

⁵⁶ Gesetz Nr. 1991:433 über die Chancengleichheit, Diskriminierung wegen des Geschlechts am Arbeitsplatz (*jämställdhetslagen*); Gesetz Nr. 1999:130 über Maßnahmen gegen Diskriminierung im Erwerbsleben aufgrund der ethnischen Herkunft, der Religion oder der Weltanschauung (*lagen om åtgärder mot etnisk diskriminering i arbetslivet*); Gesetz Nr. 1999:132 über das Verbot von Diskriminierung im Erwerbsleben aufgrund von Behinderung (*lagen om förbud mot diskriminering i arbetslivet av personer med funktionshinder*); Gesetz Nr. 1999:133 über das Verbot von Diskriminierung im Erwerbsleben aufgrund der sexuellen Orientierung (*lagen om förbud mot diskriminering i arbetslivet på grund av sexuell läggning*); Gesetz Nr. 2001:1286 über die Gleichbehandlung von Studierenden an Universitäten (*lagen om likabehandling av studenter i högskolan*); Gesetz Nr. 2003:307 über das Verbot von Diskriminierung (außerhalb des Erwerbslebens und des Bildungsbereichs) (*lagen om förbud mot diskriminering*); Gesetz Nr. 2006:67 über das Verbot von Diskriminierung von Schülerinnen und Schülern (*lag om förbud mot diskriminering och annan kränkande behandling av barn och elever*).

⁵⁷ Schutzvorschriften für Teilzeitarbeit und Elternurlaub sind in separaten Rechtsvorschriften enthalten.

⁵⁸ Gesetz Nr. 2014:958 zur Änderung des Antidiskriminierungsgesetzes Nr. 2008:567.

⁵⁹ Gesetz Nr. 2016:828 zur Änderung des Antidiskriminierungsgesetzes Nr. 2008:567, verabschiedet am 12.07.2016. Die neuen Vorschriften über aktive Maßnahmen sind prozessorientiert und decken alle sieben Diskriminierungsgründe ab. Bestimmte Sonderregelungen in Bezug auf Geschlecht wurden jedoch beibehalten. Arbeitgeber und Bildungsträger müssen ihre Arbeit mit aktiven Maßnahmen dokumentieren, sind jedoch nicht verpflichtet, jährliche Pläne zu erstellen. Abgesehen davon, dass ein System für die Meldung und Bearbeitung von Belästigungsbeschwerden vorhanden sein muss, gibt es bezüglich der im vorliegenden Bericht behandelten Diskriminierungsgründe keine speziellen Anforderungen. Darüber hinaus wurden keine Verbesserungen in Bezug auf Durchsetzung oder Überwachung vorgenommen.

⁶⁰ Der Schutz vor Altersdiskriminierung wurde zum 01.01.2013 auf viele neue Bereiche ausgedehnt; siehe das Gesetz Nr. 2012:673 zur Änderung des Antidiskriminierungsgesetzes sowie den Regierungsentwurf 2011/12:159.

Was die vollständige Umsetzung der Richtlinien im Antidiskriminierungsgesetz betrifft, gibt es jedoch noch einige Fragen:

1. Der Schutz vor Diskriminierung bzw. Viktimisierung erfasst selbständig Erwerbstätige nicht vollständig;
2. die Diskriminierung juristischer Personen ist nicht verboten;
3. Diskriminierung und Belästigung durch Kolleginnen oder Kollegen bzw. durch Dritte ist als solche nicht verboten.

Der mangelnde Wille, Belästigungen durch Kolleginnen oder Kollegen als solche zu verbieten, hängt damit zusammen, dass die Haftung des Arbeitgebers für fremdes Verschulden generell eher restriktiv gehandhabt wird, zumindest seitens des Arbeitsgerichts. Dies lässt sich an der Arbeitsgerichtssache 2007 Nr. 45 veranschaulichen.⁶¹ Alle Parteien akzeptierten die Tatsache, dass der iranische Stellenbewerber diskriminiert worden war, allerdings konnte nach Ansicht des Gerichts niemand zur Verantwortung gezogen werden, da der verantwortliche Mitarbeiter nicht befugt war, die Bewerbung abzulehnen. Es handelt sich also um einen Fall, in dem jemand von einem Arbeitnehmer diskriminiert wird, der nach dem Antidiskriminierungsgesetz nicht haftbar ist. Die beschwerdeführende Partei muss, so das Gericht, nachweisen können, dass der Arbeitgeber für das Handeln des Arbeitnehmers haftbar ist, und der Arbeitgeber kann nur dann haftbar gemacht werden, wenn er fahrlässig handelt, indem er zum Beispiel bei Kenntnis eines Falls von Belästigung nicht sofort reagiert oder indem er einen Mitarbeiter mit schlechtem Urteilsvermögen beauftragt, ihn zu vertreten. Die beschränkte Anwendung der Haftung für fremdes Verschulden im Antidiskriminierungsrecht beschränkt die Haftung des Arbeitgebers, wenn Arbeitnehmer außerhalb ihrer Befugnisse handeln. Im Hinblick auf eine wirksame Umsetzung der Rechtsvorschriften ist dies problematisch.

3. Wichtigste Grundsätze und Begriffe

Der Begriff „unmittelbare Diskriminierung“ wird in Kapitel 1 Artikel 4 Absatz 1 Antidiskriminierungsgesetz wie folgt definiert:

Unmittelbare Diskriminierung: Wenn eine Person benachteiligt wird, indem sie eine weniger günstige Behandlung erfährt, als eine andere Person in einer vergleichbaren Situation erfährt, erfahren hat oder erfahren würde, und diese Benachteiligung mit Geschlecht, Transgender-Identität oder -Ausdruck, ethnischer Zugehörigkeit, Religion oder Weltanschauung, Behinderung, sexueller Orientierung oder Alter in Verbindung steht.

Nach dieser Definition ist es erforderlich, dass eine Person benachteiligt wird. Eine diskriminierende Äußerung gegenüber der Öffentlichkeit stellt somit keine unmittelbare Diskriminierung dar.

Arbeitgeber, Bildungseinrichtungen oder Anbieter von Waren und Dienstleistungen usw. dürfen eine Person, die zu einer der geschützten Gruppen gehört, nicht benachteiligen, indem sie sie schlechter behandeln, als sie eine andere Person in einer vergleichbaren Situation behandeln, behandelt haben oder behandeln würden, wenn die Benachteiligung mit dem geschützten Grund *in Verbindung steht*. Der Schutz bezieht sich somit auch auf Diskriminierung durch Assoziierung.

Das Verbot der unmittelbaren Diskriminierung wird durch die Möglichkeit einer Rechtfertigung eingeschränkt. Das neue Antidiskriminierungsgesetz sieht im Vergleich zu

⁶¹ Arbeitsgericht, 2007, Urteil Nr. 45 vom 16.05.2007, *Die schwedische Ombudsperson gegen ethnische Diskriminierung gg. Laika film & amp.*

den alten Gesetzen jedoch weniger Möglichkeiten vor, unmittelbare Diskriminierung zu rechtfertigen. Abgesehen von Altersdiskriminierung gibt es im schwedischen Recht keine Beispiele mehr für Rechtfertigungen, die zu großzügig sein könnten, um nach Maßgabe des Unionsrechts zulässig zu sein.

Die Definition von „mittelbarer Diskriminierung“ im neuen Antidiskriminierungsgesetz orientiert sich streng an den Artikel-13-Richtlinien. Da zu den alten Gesetzen und zum Antidiskriminierungsgesetz von 2009 relativ wenig Rechtsprechung existiert, ist es jedoch noch zu früh, um sagen zu können, was in diesen Situationen wirklich das entscheidende Kriterium ist.

Das Antidiskriminierungsgesetz betrachtet Belästigung und Anweisung zur Diskriminierung als Formen rechtswidriger Diskriminierung. Nach dem Gesetz sind Arbeitgeber und Bildungseinrichtungen, denen bekannt ist, dass Mitarbeiter oder Schüler sich im Zusammenhang mit einem geschützten Merkmal für belästigt halten, außerdem verpflichtet, die Angelegenheit zu untersuchen und gegebenenfalls Maßnahmen zu ergreifen, um derartige Belästigungen zu unterbinden. Viktimisierung ist ebenfalls verboten.

Unzureichende Zugänglichkeit gilt seit 2015 ebenfalls als eine Form von Diskriminierung.⁶² Sie liegt vor, wenn ein Arbeitgeber, Bildungsträger oder Gewerbetreibender es unterlässt, Hilfsmaßnahmen oder Vorkehrungen zu treffen, die für eine Person mit Behinderung eine Situation schaffen, die mit der Situation von Personen ohne Behinderung vergleichbar ist, und wenn von dem Arbeitgeber/Bildungsträger/Gewerbetreibenden vernünftigerweise verlangt werden kann, solche Maßnahmen und Vorkehrungen zu treffen. Die wichtigste rechtliche Änderung bestand in der Ausweitung der Möglichkeit, in Bereichen außerhalb von Bildung und Beschäftigung – etwa bei der Bereitstellung von Gütern und Dienstleistungen – eine Entschädigung wegen Diskriminierung aufgrund mangelnder angemessener Vorkehrungen zu erhalten.

Das schwedische Recht enthält kein spezifisches Verbot von Mehrfachdiskriminierung. Trotzdem kann in vielen Fällen davon ausgegangen werden, dass es sich um Mehrfachdiskriminierung handelt. Bis zu einem gewissen Grad wurde in der Arbeitsgerichtssache 2010 Nr. 91 auf das Thema Mehrfachdiskriminierung eingegangen.⁶³ Es waren mehrere Diskriminierungsgründe involviert und somit lag Mehrfachdiskriminierung vor. Das Gericht kam zu dem Ergebnis, dass, wenn ein und dieselbe Handlung in Bezug auf mehrere Gründe als diskriminierend angesehen werden kann, sie dennoch als ein einziger Fall von Diskriminierung gilt und die Höhe der Entschädigung von der Anzahl der involvierten Diskriminierungsgründe nicht beeinflusst wird. Nach Meinung des Verfassers deuten die Schlussfolgerungen gleichwohl darauf hin, dass in gewisser Weise auf Mehrfachdiskriminierung bzw. Intersektionalität hin analysiert wurde, und auch wenn das Gericht dies nicht erwähnte. Dieser und andere Fälle haben in Schweden diverse Diskussionen über die Rolle von Intersektionalität und Mehrfachdiskriminierung ausgelöst.⁶⁴

⁶² Gesetz Nr. 2014:958 zur Änderung des Antidiskriminierungsgesetzes Nr. 2008:567.

⁶³ Arbeitsgericht, Urteil Nr. 91 vom 15.12.2010, *Die Ombudsperson für Diskriminierungsfragen / Statens arbetsgivarverk*.

⁶⁴ Siehe z.B. Schömer, E. (2012) *Multiple discrimination: A smokescreen over differences*, RETFÆRD ARGANG 35 2012 Nr. 3/138, abrufbar unter: http://retfaerd.org/wp-content/uploads/2014/08/Retfaerd_3_2012_3.pdf.

4. Sachlicher Geltungsbereich

Der sachliche Geltungsbereich des Antidiskriminierungsgesetzes erfüllt die Mindeststandards des Unionsrechts und geht in mancherlei Hinsicht über den vom Unionsrecht verlangten sachlichen Geltungsbereich hinaus.⁶⁵

Das Antidiskriminierungsgesetz definiert den sachlichen Geltungsbereich durch Aufzählung folgender Rubriken: Berufsleben und Bildung; arbeitsmarktpolitische Aktivitäten und Arbeitsvermittlungsdienste, die nicht im Rahmen eines öffentlichen Vertrags geleistet werden; Gründung oder Führung eines Unternehmens und berufliche Anerkennung; Mitgliedschaft in bestimmten Organisationen; Güter, Dienstleistungen, Wohnraumversorgung usw.; gesundheitliche und medizinische Versorgung, soziale Dienste usw.; Sozialversicherungssystem, Arbeitslosenversicherung und Studienbeihilfen; Wehr- und Zivildienst; öffentlicher Dienst.

Das Antidiskriminierungsgesetz gilt für alle Aspekte des Arbeitgeber-Arbeitnehmer-Verhältnisses, sowohl im öffentlichen als auch im privaten Sektor. Selbständig Erwerbstätige fallen jedoch nicht unter das Verbot der Diskriminierung im Erwerbsleben, was bedeuten kann, dass ein Problem mit dem Geltungsbereich des Gesetzes besteht. Selbständig Erwerbstätige können jedoch als natürliche Personen Schutz genießen, beispielsweise bei der Gründung oder Führung eines Unternehmens oder bezüglich der beruflichen Anerkennung (Kap. 2 Art. 10). Berufsverbände dürfen weder selbständig Erwerbstätige noch abhängig Beschäftigte diskriminieren (Kap. 2 Art. 11). Ein weiterer, potenziell wichtiger Punkt ist, dass das Antidiskriminierungsgesetz juristische Personen grundsätzlich nicht schützt.

5. Rechtsdurchsetzung

Zivilverfahren in Beschäftigungsfragen nach dem Antidiskriminierungsgesetz sind im Einklang mit dem Gesetz über Arbeitsstreitigkeiten zu behandeln, sofern die beschwerdeführende Person durch eine Gewerkschaft oder durch die Ombudsperson für Diskriminierungsfragen (die DO, die schwedische Gleichbehandlungsstelle) vertreten wird.⁶⁶ Ist die betroffene Person Mitglied in einer Gewerkschaft, so ist das Recht der DO, die Person zu vertreten (siehe auch Abschnitt 6 weiter unten), subsidiär zu dem Recht der Gewerkschaft, ihr Mitglied zu vertreten. Die Verfahren sind dieselben, unabhängig davon, ob die betroffene Person im privaten oder im öffentlichen Sektor beschäftigt ist. Für Staatsbedienstete kann es, aufgrund der verfassungsrechtlichen Bestimmungen über objektive Einstellungsgründe, manchmal jedoch auch den zusätzlichen Weg geben, Entscheidungen im Zuge von Verwaltungsverfahren anzufechten. Klagt eine Person in einer Sache, die Beschäftigung betrifft, ohne Unterstützung der DO oder einer Gewerkschaft, so wird die Klage zuerst bei einem Amtsgericht eingereicht und verhandelt; das Arbeitsgericht fungiert als Berufungsinstanz. Das Arbeitsgericht ist ein Sondergericht und seine Entscheidungen sind endgültig.

Fälle außerhalb des Erwerbslebens werden vor den ordentlichen Gerichten verhandelt. In erster Instanz ist das Amtsgericht zuständig, Berufungen gehen danach zum Berufungsgericht und zum Obersten Gerichtshof. Diskriminierung beispielsweise im Bereich der sozialen Sicherheit (ein Bereich, der normalerweise unter das Verwaltungsrecht fällt) wird entsprechend vor den ordentlichen Zivilgerichten verhandelt, und es kommen die normalen Vorschriften des Zivilprozessrechts zur Anwendung.⁶⁷

⁶⁵ Beispielsweise erfüllt das Antidiskriminierungsgesetz im Wesentlichen bereits den Mindeststandard, der gelten würde, falls der Vorschlag (KOM(2008) 426 endg.) für eine Richtlinie des Rates zur Anwendung des Grundsatzes der Gleichbehandlung ungeachtet der Religion oder der Weltanschauung, einer Behinderung, des Alters oder der sexuellen Orientierung angenommen wird.

⁶⁶ Gesetz Nr. 1974:371 über Gerichtsverfahren in Arbeitsstreitigkeiten.

⁶⁷ Bestimmte Fälle, die sich auf Hochschulbildung beziehen, können auch vor die Beschwerdekammer für Hochschulbildung gebracht werden.

Abgesehen vom Klagerecht der DO und der Gewerkschaften räumt das Antidiskriminierungsgesetz auch gemeinnützigen Organisationen, die aufgrund ihrer Satzung zur Wahrnehmung der Interessen ihrer Mitglieder verpflichtet sind, das Recht ein, im eigenen Namen als Prozesspartei zu klagen. Für die meisten NROs, die diskriminierte Gruppen vertreten, gehört es jedoch nicht zu ihrer Lobbykultur, rechtliche Schritte zu unternehmen, etwa vor Gericht zu ziehen – es gibt jedoch Anzeichen dafür, dass sich dies ändert.

NROs scheinen sich zunehmend für die Möglichkeit zu interessieren, im Namen ihrer Mitglieder zu klagen. Die Projekte „Das Recht als Instrument für sozialen Wandel“ und „Vom Reden zum Handeln“ stehen beispielhaft für diese Entwicklung, zumindest im Bereich der Diskriminierung aufgrund von Behinderung.⁶⁸ Nachdem sie zu dem Schluss gekommen waren, dass das derzeitige Durchsetzungssystem unbefriedigend ist, beschlossen die projekttragenden NROs, dass diskriminierte Gruppen sich selbst um eine wirksamere Durchsetzung kümmern mussten. Sie wurden sich auch bewusst, dass dies eine wichtige Form der Interessenvertretung ist.⁶⁹ Ihr Ziel ist es nicht, die lokalen Antidiskriminierungsbüros zu ersetzen, auf die weiter unten eingegangen wird; es geht ihnen darum sicherzustellen, dass sich ihre jeweilige Arbeit ergänzt.

In Schweden gilt allgemein, dass die unterlegene Partei die Prozesskosten der obsiegenden Partei trägt. Ein Vorteil der Vertretung durch die DO oder eine Gewerkschaft besteht darin, dass diese das finanzielle Risiko übernehmen, falls der Prozess verloren wird. Betroffene können einen eigenen Anwalt beauftragen, laufen dann aber Gefahr, nicht nur die eigenen Anwaltskosten, sondern auch die Prozesskosten der obsiegenden Partei tragen zu müssen. Dieses finanzielle Risiko ist für die meisten Diskriminierungsoffer oft nicht tragbar.

Strafverfahren können von der Staatsanwaltschaft (in seltenen Fällen auch von der privaten Partei selbst) angestrengt werden. Weder die DO noch gemeinnützige Organisationen sind in Strafverfahren vor Gerichten nicht klagebefugt.

Eine verlagerte Beweislast in Diskriminierungsfällen existierte bereits nach den alten Gesetzen und ist im Gesetz von 2009 festgeschrieben. Trotzdem wurden bisher nur sehr wenige Diskriminierungsverfahren gewonnen. Ein Hauptproblem scheint darin zu liegen, wie das Arbeitsgericht die Beweislast anwendet.⁷⁰ Aus Statistiken der DO geht andererseits hervor, dass einige Fälle außergerichtlich beigelegt werden. Das Gleiche gilt wahrscheinlich auch für die Gewerkschaften.

Erwähnenswert ist auch, dass es einfacher zu sein scheint, vor den ordentlichen Gerichten eine Diskriminierung glaubhaft zu machen und Diskriminierungsverfahren zu gewinnen als vor dem Arbeitsgericht. Besonders schwierig scheint es zu sein, Verfahren vor dem Arbeitsgericht zu gewinnen, in denen es um ethnische Diskriminierung geht. Ein möglicher Grund ist, dass das Arbeitsgericht die im schwedischen Antidiskriminierungsgesetz und im Unionsrecht vorgegebenen Regeln zur Verlagerung der Beweislast restriktiver anwendet als die ordentlichen Gerichte. Zwei Fälle, in denen es um Religion und Diskriminierung ging – einer aus dem Jahr 2016 vor dem Amtsgericht Stockholm⁷¹ und ein zweiter, sehr ähnlicher, aus dem Jahr 2017 vor dem

⁶⁸ *Lagen som verktyg* (Das Recht als Instrument für sozialen Wandel), abrufbar unter: <https://lagensomverktyg.se>, und *Från snack till verkstad* (Vom Reden zum Handeln), abrufbar unter: <https://funktionsrattskonventionen.se/om-projektet/>.

⁶⁹ Ein inspirierendes Beispiel ist das der *Disability Rights Advocates* (Verteidiger der Rechte von Menschen mit Behinderungen), deren Büros sich in New York und Kalifornien befinden. Siehe die Webseite der Organisation unter: <https://dralegal.org>.

⁷⁰ Farkas, L. und O'Farrell, O. (2014), *Reversing the burden of proof: Practical dilemmas at the European and national level*, S. 76.

⁷¹ Amtsgericht Stockholm, Urteil vom 16.11.2016 in der Rechtssache T 3905-15, *Ombudsperson für Diskriminierungsfragen gg. den schwedischen Staat, vertreten durch Karolinska institutet*.

Arbeitsgericht⁷² – veranschaulichen dies. In beiden Fällen waren die Umstände im Wesentlichen identisch, ebenso die Bewertung der Beweise. Beide Gerichte waren sich hinsichtlich der noch zweifelhaften Sachverhalte einig, unterschieden sich jedoch in der Frage, wer die Beweislast für die Beseitigung dieser Zweifel tragen sollte. Die diskriminierte Partei gewann vor dem Amtsgericht, da die mutmaßlich diskriminierende Partei der ihr obliegenden Beweispflicht nicht nachkam. Das Arbeitsgericht hingegen befand, dass die diskriminierte Partei der ihr obliegenden Beweispflicht nicht nachgekommen war.

Ein Vertrag (ob kollektiv oder individuell) ist ungültig, wenn er Diskriminierung vorschreibt oder zulässt; eine diskriminierende Bestimmung oder ein diskriminierender Rechtsakt kann auf Antrag für ungültig erklärt werden.

Es gibt auch ein Recht auf Wiedergutmachung für diskriminierende Verstöße und – in Beschäftigungssachen, die nichts mit Einstellung oder Beförderung zu tun haben – für den erlittenen Vermögensschaden. Entschädigungen fallen in Schweden bekanntermaßen gering aus. Mit dem Antidiskriminierungsgesetz von 2009 wurde eine neue Form der zivilrechtlichen Entschädigung eingeführt: die Diskriminierungsentschädigung. Über ihre Pflicht, dem Opfer eine Wiedergutmachung zu verschaffen, hinaus sind die Gerichte seitdem gesetzlich angehalten, dem Ziel der Abschreckung von Verstößen besondere Aufmerksamkeit zu widmen. Es war daher zu erwarten, dass die zugesprochenen Beträge im Vergleich zu dem, was vor 2009 als Entschädigung gewährt wurde, künftig höher ausfallen würden.

Generell sollen die Sanktionen verhältnismäßig, wirksam und abschreckend sein.

Die vorhandene, beschränkte Rechtsprechung deutet jedoch darauf hin, dass der Unterschied zwischen den zugesprochenen Diskriminierungsentschädigungen und den Entschädigungen, die nach den alten Gesetzen von den ordentlichen Gerichten bzw. vom Arbeitsgericht gewährt wurden, gering ist. Es besteht die Hoffnung, dass sich dies, zumindest bei den ordentlichen Gerichten, ändern könnte, nachdem der Oberste Gerichtshof in zwei Entscheidungen vom Juni 2014 seine Erwägungen betreffend Diskriminierungsentschädigungen im Bereich Güter und Dienstleistungen darlegte.⁷³ Der Fokus lag dabei auf dem doppelten Zweck der Entschädigung als Wiedergutmachung für das Opfer einerseits und als wirksame Prävention andererseits. Der Gerichtshof scheint zu dem Schluss gekommen zu sein, dass, in einem relativ normal gelagerten Fall, eine Grundentschädigung von 15 000 SEK angemessen ist. Er stellte des Weiteren fest, dass der Betrag, der präventiv zugesprochen wird, im Einzelfall auf eine Höhe festgesetzt werden könnte, die dem Betrag der Grundentschädigung entspricht – was bedeutet: zusätzliche 15 000 SEK, insgesamt also 30 000 SEK (3300 Euro). In erster Linie scheint sich dies auf Fälle zu beziehen, in denen der Dienstleistende nie eine Diskriminierung beabsichtigt hat, umsichtig handelt, den verantwortlichen Mitarbeiter abmahnt und sich bei den Opfern entschuldigt. Nach Ansicht des Verfassers definieren diese Fälle im Grunde gewisse Leitlinien für Entschädigungen. Das ist positiv; die Begründung der Entscheidung legt den Schwerpunkt jedoch immer noch mehr auf Entschädigung (im Sinne von Wiedergutmachung) als auf Prävention (im Sinne von Abschreckung). Das Potenzial solcher Fälle, den präventiven Aspekt der Diskriminierungsentschädigung stärker zu betonen, scheint größer zu sein, wenn die diskriminierende Handlung einen vorsätzlicheren Charakter hat. Angesichts der geringen Zahl und der Verschiedenheit der Fälle, die von ordentlichen Gerichten entschieden werden, ist es jedoch schwierig, eine bestimmte Tendenz zu benennen.

⁷² Arbeitsgericht, Urteil Nr. 65 vom 20.12.2017, *Ombudsperson für Diskriminierungsfragen gg. staatliche Zahnärzte der Provinz Stockholm*.

⁷³ Oberster Gerichtshof, Urteil vom 26.06.2014 in der Rechtssache T 3592-13, *Ombudsperson für Diskriminierungsfragen gg. Veolia*; Oberster Gerichtshof, Urteil vom 26.06.2014 in der Rechtssache T 5507-12, *Ombudsperson für Diskriminierungsfragen gg. Provinz Stockholm*, NJA 2014, S. 499.

Eine aktuelle Studie hat die vom Arbeitsgericht gewährten Entschädigungen über einen langen Zeitraum hinweg untersucht. Aus der von Laura Carlson durchgeführten Analyse geht hervor, dass die in Diskriminierungsfällen zugesprochenen Beträge heute – inflationsbereinigt – etwa 4,5 % höher sind als 1980. Nach Meinung der Wissenschaftlerin wird die Schwelle der erweiterten Entschädigung, wie sie mit der im Zuge des Antidiskriminierungsgesetzes von 2009 geänderten Terminologie angestrebt wurde, damit nicht erreicht. Der moderate Zuwachs bei den Entschädigungen müsse außerdem mit dem Anstieg der Gerichtskosten und -gebühren um 170 % seit den 80er Jahren ins Verhältnis gesetzt werden. Die Wissenschaftlerin kommt zu dem Ergebnis, dass die Entwicklung der zugesprochenen Entschädigungen und der Anstieg der Anwaltskosten und Gebühren, kombiniert mit niedrigen Erfolgsraten, auf Betroffene, die wegen Diskriminierung vor Gericht ziehen wollen, eine sehr abschreckende Wirkung hat.⁷⁴ Sie zieht daraus die Schlussfolgerung, dass es einer wirksameren Durchsetzung und wirkungsvollerer Sanktionen bedarf.

Das Arbeitsgericht scheint dem Thema Prävention viel weniger Beachtung zu schenken als die ordentlichen Gerichte. Dies könnte in der Zukunft zu einer gewissen Verwirrung führen, da manche Verfahren wegen Diskriminierung am Arbeitsplatz vor den Amtsgerichten beginnen und dann beim Arbeitsgericht gegebenenfalls in die Berufungsinstanz gehen.

Schweden verfügt über ein weiteres Instrument, das potenziell in der Lage ist, die mit Diskriminierung verbundenen Kostenrisiken für diejenigen, die die Macht haben zu diskriminieren, zu erhöhen, was wiederum zu einer wirksameren Umsetzung des Antidiskriminierungsgesetzes führen würde: Es ist in der Verordnung Nr. 2006:260 über Antidiskriminierungsbedingungen in Verträgen zu finden,⁷⁵ die von den 28 wichtigsten schwedischen Regierungsbehörden verlangt, eine Nichtdiskriminierungsbedingung in ihre großen öffentlichen Bau- und Dienstleistungsaufträge aufzunehmen. In einem normalen Diskriminierungsfall – selbst wenn die diskriminierte Partei alle Hindernisse, ihren Fall vor Gericht zu bringen, überwindet und tatsächlich gewinnt – besteht das Risiko für die diskriminierende Partei darin, eine Entschädigung von wahrscheinlich höchstens 14 000 Euro (150 000 SEK) zu bezahlen. Wenn die fragliche Bedingung richtig formuliert ist und eine vernünftige Möglichkeit des Follow-ups besteht – indem sich die Behörde beispielsweise das Recht vorbehält, bei einem Verstoß gegen das Antidiskriminierungsgesetz den gesamten Vertrag zu kündigen – kann nach Ansicht des Verfassers vernünftigerweise davon ausgegangen werden, dass Unternehmen, die einen solchen Vertrag abschließen, der Einhaltung des Antidiskriminierungsgesetzes größere Aufmerksamkeit schenken werden, sowohl präventiv durch aktive Maßnahmen als auch dann, wenn sie der Diskriminierung beschuldigt werden. Das finanzielle Risiko, ein Verfahren im Wert von 14 000 Euro zu verlieren, ist eine Sache, das Risiko, einen Auftrag im Wert von 140 000 Euro oder sogar 1 400 000 Euro zu verlieren, eine ganz andere. Verstöße dieser Art könnten auch zu Problemen hinsichtlich der Berechtigung führen, sich künftig um öffentliche Aufträge zu bewerben.⁷⁶ Der Gesamtwert aller öffentlichen Aufträge, die jährlich in Schweden vergeben werden, beläuft sich auf über 56 Milliarden Euro (600 Mrd. SEK).⁷⁷

⁷⁴ Carlson, L. (2017), *Comparative Discrimination Law: Historical and Theoretical Frameworks*, Brill, S. 79-80.

⁷⁵ Verordnung Nr. 2006:260 über Antidiskriminierungsbedingungen in Verträgen (*Förordning (2006:260) om antidiskrimineringsvillkor i upphandlingskontrakt*), abrufbar unter: <http://rkrattsbaser.gov.se/sfst?bet=2006:260>.

⁷⁶ Der ursprüngliche – inzwischen allerdings stark abgeänderte – Vorschlag für eine Verordnung als ergänzendes Instrument zu den Antidiskriminierungsgesetzen und ihre möglichen Auswirkungen ist im Weißbuch 2005:56 der Regierung *The Blue and Yellow Glass House: Structural Discrimination in Sweden*, S. 579-584, zu finden.

⁷⁷ Schwedische Regierung (2016), *Varför behövs en nationell upphandlingsstrategi?* (Warum braucht es eine nationale Vergabestrategie für öffentliche Aufträge?), S. 4.

6. Gleichbehandlungsstellen

Die Ombudsperson für Diskriminierungsfragen (DO) ist die wichtigste staatliche Institution zur Bekämpfung von Diskriminierung und Förderung von Gleichberechtigung. Sie ist befugt, Beschwerden über Diskriminierung im Zusammenhang mit allen Merkmalen zu untersuchen. Sie ist auch befugt, im Namen von Betroffenen vor Gericht zu ziehen.

Darüber hinaus kann die DO generell Personen und Institutionen unabhängig beraten und unterstützen, sie kann Bildungs-, Aufklärungs- und Meinungsbildungsarbeit zur Bekämpfung von Diskriminierung leisten, sie kann der Regierung rechtliche und andere Maßnahmen vorschlagen, die bei der Bekämpfung von Diskriminierung von Nutzen sein können, sie kann internationale Entwicklungen kontrollierend begleiten und sie kann andere geeignete Maßnahmen zur Förderung von Gleichstellung und Bekämpfung von Diskriminierung ergreifen. Unabhängige Umfragen und Berichte sind wichtige Bestandteile dieser Arbeit. Die DO wird, wie die Spitzen anderer Regierungsbehörden auch, von der Regierung ernannt. Ebenfalls wie andere Regierungsbehörden auch hat die DO in Fragen, die Einzelfälle betreffen, einen unabhängigen Status. Die DO wird vom Staat finanziert, wobei die Finanzierungsentscheidungen jährlich vom schwedischen Parlament aufgrund von Empfehlungen der Regierung getroffen werden. Die Finanzierung der DO erfolgt aus dem allgemeinen Staatshaushalt.

Wie bereits erwähnt, spielen NROs, anders als Gewerkschaften und Arbeitgeberverbände, in Schweden eine ziemlich untergeordnete Rolle. Soweit NROs existieren, führt die DO einen kontinuierlichen Dialog mit ihnen. Besonders hervorzuheben sind in diesem Zusammenhang die lokalen NROs, die als Antidiskriminierungsbüros bekannt sind und begonnen haben, Fälle vor Gericht zu bringen. Bislang haben sie ihr Risiko vor allem dadurch begrenzt, dass sie Bagatellsachen vor Gericht gebracht haben und so der Gefahr aus dem Weg gegangen sind, im Falle eines Unterliegens die vollen Rechtskosten der gegnerischen Parteien tragen zu müssen. Da die DO Einzelfällen jedoch eine geringere Priorität einräumt, steigt der Druck auf die Büros, einzugreifen und zusätzliche Unterstützung zu leisten, auch durch Anrufung der Gerichte.

7. Zentrale Punkte

Die Ombudsperson für Diskriminierungsfragen ändert ihre Prioritäten. Sie konzentriert sich weniger darauf, Beschwerden zu untersuchen, vor Gericht zu ziehen oder außergerichtliche Einigungen auszuhandeln; mehr Gewicht wird stattdessen darauf gelegt, Gutachten über Diskriminierung zu erstellen, die nicht rechtsverbindlich sind und nicht angefochten werden können. Einzelbeschwerden werden bisweilen in allgemeinere Aufsichtsuntersuchungen oder ein Follow-up aktiver Pflichten umgewandelt. Nach Einschätzung des Verfassers liegt der Schwerpunkt somit mehr auf Information als Mittel zur Verbesserung von Einstellungen und – hoffentlich – künftigem Verhalten als auf einer wirksameren Durchsetzung der Rechtsvorschriften als direkterem Mittel zur Beeinflussung von Verhaltensweisen und der zugrunde liegenden Einstellungen. Die DO widmet sich auch der Aufgabe, die Pflicht zur Umsetzung aktiver Maßnahmen zu überwachen, was die Durchführung von Lohn- und Gehaltsumfragen und diversen unterstützenden Aktionen beinhaltet. Nach Ansicht des Verfassers bergen diese Aktivitäten die Gefahr eines ähnlich wirkungslosen Fokus, mit der Vorstellung, dass Informationen – im Gegensatz zur Durchsetzung von Rechtsvorschriften – der Schlüssel zum sozialen Wandel sind.

Die Opfer von Diskriminierung brauchen nach Meinung des Verfassers bessere Mittel, um sicherzustellen, dass ihre Fälle vor Gericht kommen. Andernfalls können nur diejenigen, die über ausreichende finanzielle Mittel verfügen, um vor Gericht zu ziehen, darauf hoffen, Gerechtigkeit zu erlangen. Für eine Person, die beispielsweise Roma oder Menschen afrikanischer Herkunft diskriminiert, ist das Risiko, vor Gericht gestellt zu

werden, äußerst gering, vor allem angesichts der sinkenden Zahl der von der DO durchgeführten Untersuchungen und des begrenzten Mandats der Gewerkschaften. Dieses Thema war Gegenstand einer offiziellen Studie, deren Ergebnisse 2016 vorgestellt wurden.⁷⁸ Die einzige relativ konkrete Maßnahme, die vorgeschlagen wurde, war eine Aufstockung der Mittel für die von NROs geführten Antidiskriminierungsbüros.

Angesichts der geringeren Priorität, die dem Zugang zur Justiz eingeräumt wird, verringern sich auch die Aussichten für die Entwicklung von Rechtsprechung zu dem Teil der Diskriminierungsentschädigung, der auf wirksame Abschreckung abzielt.

Neben dem mangelnden Zugang zur Justiz ist die Frage der Beweislast wohl das wichtigste grundsätzliche Rechtsproblem. Langfristig ist ein System, in dem es einfacher ist, Diskriminierung vor den allgemeinen oder ordentlichen Gerichten nachzuweisen als vor dem Arbeitsgericht, nicht tragfähig. Die oben erwähnte Studie schlug eine Neuformulierung der Beweislastregeln vor, stellte bei der Anwendung der derzeitigen Regel seitens des Arbeitsgerichts jedoch kein Problem fest.

Nach Ansicht des Verfassers ist ein leicht veränderter Wortlaut vermutlich keine wirksame Lösung, solange das eigentliche Problem nicht geklärt wird. Aus diesem Grund muss der Frage des Zugangs zur Justiz mehr Aufmerksamkeit gewidmet werden. Dabei geht es nicht einfach darum, mehr Einzelfälle zu bearbeiten. Dies ist zwar ein wichtiger Punkt, noch wichtiger aber ist es, durch kontinuierliche und engagierte Interessenvertretung Rechtsprechung zu entwickeln. So wie jene, die die Macht haben zu diskriminieren, für ihr Handeln zur Rechenschaft gezogen werden müssen, so müssen auch diejenigen, die die Macht haben, über Diskriminierungsfälle zu entscheiden, gefordert werden, damit sie lernen können, Diskriminierung zu verstehen und zu erkennen.

Nach Meinung des Verfassers ist es nicht das Recht an sich, das Normen verändert, sondern die Umsetzung des Rechts, auch im Zuge der Rechtsprechung. Es bedarf aber mehr als nur Rechtsprechung: Es bedarf einer kritischen Masse von Fällen, die ein tieferes Verständnis der in der Gesetzgebung verwendeten Worte widerspiegeln, was wiederum die Kostenrisiken von Diskriminierung erhöht und zu tatsächlichen Änderungen des Verhaltens und der Normen führt, insbesondere bei denen, die die Macht haben zu diskriminieren. Dies würde dazu beitragen, das Hauptziel des Antidiskriminierungsrechts zu erreichen, das nicht darin besteht, Diskriminierungsopfern irgendeine Art von Wiedergutmachung zukommen zu lassen, sondern darin, dass erst gar niemand Opfer von Diskriminierung wird.

⁷⁸ Regierungsweißbuch 2016:87.

INTRODUCTION

The national legal system

The power to enact laws is vested in the Swedish Parliament (the Riksdag). Authorities at the regional and local levels have no competence to enact legislation and do not issue local ordinances with regard to the two directives. However, they can undertake actions that promote equality and counteract discrimination within the framework of their mandates.

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

In practice, the right to initiate legislation lies predominantly with the Government. Its right to make legislative proposals to Parliament is guaranteed by the Constitution.⁷⁹ The process starts with a legal inquiry, and the results are sent out to interested parties including relevant NGOs with an invitation to comment on the proposed legislation. The Government gives answers to the comments regarding its bill and explains the proposed new legislation, and the report from the Parliament's standing committee is debated in the Parliament. If there are political differences, the two sides normally suggest different wordings concerning the proposed legislation. Formally, there is the main proposal in the standing committee and a reservation or reservations by the minority in the committee. The various formulations are put to a vote. The majority side's arguments in the standing committee and the Government bill (if the Government wins the vote) are thus regarded as 'approved'⁸⁰ 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 general court system (district courts, courts of appeal and the Supreme Court). The Labour Court deals with all aspects of the employer-employee relationship. It is a single-instance system in cases where the worker is supported by his or her trade union and the employer has a collective agreement with that union or, in certain cases, where the Equality Ombudsman (DO) brings the case in accordance with Chapter 6, Sections 1-2 of the Discrimination Act. Otherwise, it is a two-instance system, with the district courts constituting the first instance with a right of appeal to the Labour Court.

Collective agreements cover 90 % of workers on the Swedish labour market and are very important in setting the rules.⁸¹ There is no national minimum wage. Generally, work as a civil servant is governed by contracts and collective agreements in largely the same way as applies regarding private employment. Certain special rules apply to public employment, especially in the state sector. These mainly concern the recruitment process, where some constitutional rules on objectivity apply.

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

⁷⁹ Chapter 4, Article 4 of the Swedish Instrument of Government (Regeringsformen 1974:152), adopted 28.02.1975. Sometimes the opposition parties agree on a piece of legislation that the Government does not want.

⁸⁰ Formally, it is only the report of the 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.

⁸¹ See Eurofound, *Living and working in Sweden*, 18.10.2017, available at: <https://www.eurofound.europa.eu/country/sweden#collective-bargaining>.

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 expression. The most recent amendment, enacted on 23 November 2017,⁸² concerned some details that are not relevant to this report.

Two other minor changes occurred in 2017. Firstly, the exemption of businesses with less than 10 employees from the rules on inadequate accessibility (which is linked to the duty of reasonable accommodation) was repealed.⁸³ Secondly, it is now possible to appeal certain decisions by a university to the Higher Education Appeals Board, based on an assertion that they are a violation of the Discrimination Act. The board can declare the university's decision void, send it back and request a new decision. However, this does not include any possibility of getting a discrimination compensation award; the new arrangements only create the possibility of correcting a discriminatory act or omission.⁸⁴

The Discrimination Act is comprehensive. It covers all the grounds of the two directives as well as discrimination due to sex or transgender identity and expression. The areas covered by the act are:

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

The main idea with the 2009 Act was to replace the seven previous acts with one comprehensive act regulating all aspects of discrimination falling under civil law as well as full compliance with the EU anti-discrimination directives. Much of its content is based on the seven older discrimination acts,⁸⁵ which were limited to certain grounds and certain areas. Case law regarding these previous acts, and the relevant legislative materials, particularly the Government bills and the standing committee reports referring to these older acts, are thus still important tools for understanding the law.

The Penal Code has two sections of relevance.⁸⁶ The crime of unlawful discrimination by merchants concerning the provision of goods and services covers race, skin colour,

⁸² Act 2017:1128 Changing the Discrimination Act, adopted 23.11.2017.

⁸³ Act 2017:1081 Changing the Discrimination Act, adopted 16.11.2017. This act comes into effect on 01.05.2018.

⁸⁴ Act 2017:282 Changing the Discrimination Act, adopted 13.04.2017.

⁸⁵ The Equal Opportunities Act (jämställdhetslagen 1991:433), adopted on 30.03.1991.

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

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

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

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

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

⁸⁶ The Penal Code (1962:700) – the Swedish abbreviation is BrB. The two relevant sections are Chapter 16 Sections 8 (hate speech) and 9 (unlawful discrimination). The latest important change of the relevant

national or ethnic origin, religious belief and sexual orientation. It is seldom used today. One reason for this is that it may be preferable, due to the burden of proof rules and the issue of discrimination compensation, for victims to use the Discrimination Act as opposed to Penal Code 16:9. However, the crime of unlawful agitation or hate-speech under Penal Code 16:8 (which basically covers the same grounds) can still have an important function in that it covers matters that do not fall under the Discrimination Act.

sections was adopted on 25.06.2008 and entered into force on 01.01.2008. The term 'sexual orientation' was then added to replace 'homosexual orientation' 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 constitution of Sweden includes the following articles dealing with non-discrimination: the 1975 Instrument of Government, Chapter 1 Section 2, Chapter 2 Sections 12-13 and Chapter 12 Section 5. Chapter 2 Section 19 should also be mentioned, as it incorporates the European Convention on Human Rights (ECHR) and its discrimination rules.

Chapter 1 Section 2 of the Instrument of Government contains generally formulated goals concerning equal opportunity and non-discrimination.⁸⁷ All the grounds of the directives are covered, but as these are only policy goals they are not considered to be directly applicable in any sense.

Instrument of Government Chapter 2 Section 12 prohibits laws or other provisions that entail discrimination in relation to those who belong to a minority group due to ethnicity, colour or other similar circumstances or due to sexual orientation. Section 13 prohibits laws or other provisions that entail discrimination due to sex, while at the same time creating an exception for positive action and for military service. It is not possible to obtain damages based on a violation of these two articles alone. Their importance lies in the fact that any form of legislation that is discriminatory could be set aside by the courts.

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

Questions of direct applicability are hard to answer, but if an answer must be given the author would say that there is potential for the Constitution to be considered as being directly applicable. The traditional answer within Swedish legal culture has been that the Constitution is unimportant and not directly applicable. In 1974 a new Constitution replaced the Constitution of 1809. However, judicial review by the courts of acts of Parliament was extremely limited. Only if an act of Parliament was manifestly contrary to the Constitution could it be set aside. Gradually, the Constitution has become more important. The most important changes are the rule (created in 1994) in Chapter 2 Section 19 that courts should set aside parliamentary acts that violate the ECHR, and the reform in 2010 that abolished the restriction to set aside acts of Parliament only if the violation of the Constitution was manifest. Thus far, it is hard to say that the 2010 changes have made a major difference in how the courts apply the Constitution.

The protection from discrimination that stems from the Instrument of Government alone is clearly not sufficient for fulfilling the requirements of the directives – regarding either the areas covered or the grounds protected. In relation to the implementation of the directives, it is the Discrimination Act that is important.

⁸⁷ Paragraph 5 sentence 2 states: 'The public institutions shall combat discrimination of persons on grounds of gender, colour, national or ethnic origin, linguistic or religious affiliation, functional disability, sexual orientation, age or other circumstance affecting the individual'.

2 THE DEFINITION OF DISCRIMINATION

2.1 Grounds of unlawful discrimination explicitly covered

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

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

Within special labour market legislation the following categories of workers are protected:⁸⁸

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

The rules in the Constitution are not currently important in reaching the protection level required by the directives – mainly due to their limited applicability.⁸⁹

2.1.1 Definition of the grounds of unlawful discrimination within the directives

a) Racial or ethnic origin

In the 2009 Discrimination Act, the concept of ethnicity is defined as 'national or ethnic origin, skin colour or other similar circumstance' (Chapter 1 Section 5, p. 3).

Although, the word 'race' was removed in the 2009 Act, the definition in the law is nevertheless supposed to cover the term 'race'. Discrimination due to ethnicity and religion were considered fairly interchangeable until the 1999 Act on Measures against Discrimination in Working Life on Grounds of Ethnicity, Religion or other Belief (Lag om åtgärder mot etnisk diskriminering i arbetslivet 1999:130). At the same time, the delineation between discriminatory acts related to ethnicity as opposed to religion (or being a combination of both) is often unclear – both for those who discriminate and for those who are the victims.⁹⁰

There is case law that provides some clarity concerning the concepts of race or ethnic origin. One case in this area involved a landlord taking higher rent from refugees. The trial court, based on a restrictive view of the term 'ethnic origin', determined that refugees were not protected by the prohibition against ethnic discrimination – refugees were not an ethnicity. In 2010, the court of appeal reversed the judgment of the trial court. The court held that the term ethnic origin had to be interpreted more broadly, given the intent of the act. This meant that refugees fell within the protection of the law, which also meant that the landlord's actions violated the law.⁹¹ Discrimination against

⁸⁸ The author believes that this protection is somewhat related to the directives; other protected groups exist, for example trade union representatives.

⁸⁹ There is a legal development towards the possibility of increased direct applicability. See Section 1 of this report.

¹³ See: Equality Ombudsman, *Chains of Events (Kedjor av Händelser)* Report 2016:2. The majority of the 217 complaints from Muslims in 2014 came from persons who could not distinguish whether the treatment was related to their religion or to their ethnicity, and invoked both grounds.

⁹¹ Göta Court of Appeal, case T 1666-09, *Equality Ombudsman v. Skärets fastigheter AB*, (Judgment of 25.02.2010). <http://www.do.se/globalassets/diskrimineringsarenen/hovratt/dom-hovratt-skaret-fastighetsbolag-omed-20068982.pdf>.

refugees, foreigners, immigrants or any other mixed group defined as being 'non-Swedish' in the eyes of the discriminator can generally be regarded as ethnic discrimination. Since the concept of discrimination relates to the ground and not to the person, it is not necessary to determine whether or not the victim of discrimination actually belongs to a specific ethnic group.

Sweden has for a number of years been working towards the elimination of the word 'race' from Swedish law. According to the Government's assessment, neither Directive 2000/43 nor Directive 2000/78 requires the word 'race' to be used. Directive 2000/43 requires effective protection against race discrimination, which, according to the Government, is achieved under the Discrimination Act as currently written.⁹² The author of this report contends that this assessment is correct, in that it is likely that the Court of Justice of the European Union (CJEU) would come to the same conclusion. The directives require the establishment of certain minimum standards, but implementation differs according to national traditions and allows for some flexibility. The directives do not necessarily require specific words to be used in achieving those goals. However, in the author's opinion, there are certain policy and implementation risks involved, even if removing the word 'race' would not necessarily violate the directives. Due to a denial of race discrimination as a problem in Sweden, Swedish policymakers were slow in adopting modern legislation in this regard. Symbolic laws – at best – were adopted to change attitudes rather than behaviour. Removal of the word 'race' may in turn feed into the more general denial of racism as a Swedish problem and thus confuse judges, lawyers and others in implementing the Discrimination Act. As far as terminology related to discrimination is concerned, policymakers tend to be sensitive to the interests of discriminated-against groups. This relates to empowerment. However, there seems to have been little interest in the opinions of those affected by the term 'race', particularly Swedes with an African heritage.⁹³ Furthermore, since policymakers seem to believe that such changes are an important step in effective implementation of the Discrimination Act, this may in turn be a hindrance to the development of actual improvements in the law.

b) Religion or belief

There is no definition of religion in the Discrimination Act itself. However, the preparatory works regarding the current act and the older acts provide some guidance. This ground covers beliefs that emanate from or are connected to religious beliefs.⁹⁴ Atheism and agnosticism are related to the existence or non-existence of a God and are thus counted as beliefs sufficiently connected to religion to be protected by the Discrimination Act.

There is no case law where it has been necessary to define religion or belief more deeply. In the case of a woman wearing a burqa or a niqab, it is probable that the court would say that it is not important to investigate whether this practice in a particular case is rooted in religion or ethnicity, as it can obviously be rooted in either or both, and because both ethnic and religious discrimination are prohibited.

There are situations where the question of definition may be important. If the members of a small group such as the Jehovah's Witnesses hold a moral conviction (for example, that gambling is a sin), then it is connected to religion, even if most Christians believe otherwise.⁹⁵ When protection for a practice is upheld only by a minority within a congregation, the delimitation with individual philosophical and moral choices can be

⁹² Government bill 2007/08:95, pp. 118-120.

⁹³ See e.g. 'Race to be scrapped from Swedish legislation', *The Local*, 31.07.2014.

⁹⁴ Government bill 2002/03:65, p. 82.

⁹⁵ Stockholm District Court, case T-10264-14, *Equality Ombudsman v. Swedish State through the National Employment Agency* (judgment of 28.12.2015). Svea Court of Appeal upheld the decision of the district court. Svea Court of Appeal, case T 777-16, *Swedish State through the National Employment Agency v. Equality Ombudsman* (judgment of 22.03.2017) <http://www.do.se/globalassets/diskrimineringsanden/hovratt/dom-hovratt-arbetsformedlingen-anm-2014-1037.pdf>.

problematic. Nevertheless, it seems that courts will typically accept the claimant's statement that their religious belief is important to him or her in adopting the practice in question.⁹⁶

c) Disability

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

'Permanent⁹⁷ 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, one 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 temporary nature. There is no threshold of 'severity', nor is there any reference to the ability to engage in 'normal life activities' or 'professional life', for that matter. The latter forms part of the assessment as regards a 'similar situation'.⁹⁸ However, until there is clear case law on the point, it will be difficult to define the issues more closely.

The law covers illnesses that can be expected to limit functional capacity in the future. This includes HIV, cancer and multiple sclerosis (MS). It is notable that Swedish law does not require an impairment that actually hinders the participation of the person concerned in professional life. In Labour Court case 2005 No. 32, a person diagnosed with MS but not suffering any symptoms was awarded damages for disability discrimination.⁹⁹ In Labour Court case 2003 No. 42, a person applying for a post as a systems operator at an oil refinery was denied employment with reference to his diabetes.¹⁰⁰ The employer believed him to be a security risk. This was disability discrimination. The diabetes was real, but the employer failed to show that it was a security risk.

No Swedish claimant has, to the author's knowledge, lost a case because his or her disability issues/medical problems were not regarded as a disability. The focus on the perception of the discriminator makes it quite immaterial whether or not the disability is as severe as the discriminator believes. In 2009, a mistaken assumption regarding someone's behaviour being caused by their alcohol consumption was regarded as a valid defence for a restaurant that had refused entry to a person with a disability.¹⁰¹ The focus in Sweden is thus on what the discriminator knows, believes or mistakenly assumes about the claimant's abilities, not the abilities themselves. An appeal court decision from

⁹⁶ See for example Appeal Court for Skåne and Blekinge (as well as the trial court decision) case T 1157-15, *Equality Ombudsman v. Polop AB*, judgment of 14.04.2016. <http://www.do.se/globalassets/diskrimineringsarenden/hovratt/dom-hovratt-sjukvard-anm-20131805-tillganglig.pdf>.

⁹⁷ The Swedish term *varaktig* has been translated in the Government's unofficial translation as 'permanent'. The term 'permanent' should here be considered as meaning long-term or durable.

⁹⁸ There is no case law in Sweden where the defendant has argued that the claimant is not disabled. The legal question has always been whether the claimant would have been productive enough to be in a similar situation as a person without disability if accommodation measure X had been adopted, or how much this accommodation measure would have cost.

⁹⁹ Labour Court, case 2005 No. 32 *Sveriges Civilingenjörsförbund and MK v. T&N Management Aktiebolag* (judgment of 30.03.2005). See also Section 2.1.3. <http://www.arbetsdomstolen.se/upload/pdf/32-05.pdf>.

¹⁰⁰ Labour Court Case 2003 No. 47, *Svenska Metallindustriarbetarförbundet v. Skandinaviska Raffinaderi Aktiebolag Scanraff and Kooperationens Förhandlingsorganisation* (judgment of 04.06.2003). <http://www.arbetsdomstolen.se/upload/pdf/47-03.pdf>.

¹⁰¹ Svea Court of Appeal, case T 7752-08, *Equality Ombudsman v. Sturehof AB* (judgment of 02.06.2009). The appeal court went as far as to state that, if it is proven that the defendant did not know about the disability, it does not matter if the defendant ought to have done so (*obiter dicta*). This case is also problematic with regard to the principle that discrimination may be involuntary. The appeal court points out that the material of the case shows that persons with this particular disability are sometimes wrongly perceived as drunk. The fact that the mistake is easy to make seems to rule out discrimination. <http://www.do.se/globalassets/diskrimineringsarenden/hovratt/dom-hovratt-sturehof-ho-201318302.pdf>.

2014 can be given as an additional example.¹⁰² It concerns a child custody case where the municipality mistakenly believed that the two parents were unable to take care of their child. The discrimination arose because the municipality took the child into custody without objective justification and for a reason connected to the alleged disability of the parents. Irrespective of whether the parents had a small cognitive disability (as the mother had) or not (as in the case of the father), both the parents and the child received discrimination awards of SEK 150 000 (EUR 14 000) each. Here, the key was the reliance on perceived norms concerning cognitive disabilities, instead of examining the persons involved as individuals.¹⁰³

The area of CJEU case law dealing with the interaction between a person's limitation and barriers at the workplace is not a part of the definition above. In Sweden, barriers in the workplace become important when the employee requests reasonable accommodation measures on the part of the employer. According to the author, the threshold for proving a disability must be considered slightly lower in Sweden compared with the case law of the CJEU, since neither a connection to barriers in private life nor one to barriers in professional life needs to be shown. In Swedish case law, the question of whether the claimant actually has a disability is less important than the focus on the perceptions and actions of the discriminator. Sweden has moved away from the medical model of disability to a social or human rights model, where the focus is on disability being caused by the way society is organised, rather than by a person's impairment or difference. Thus, the focus is not on the medical condition of the claimant.¹⁰⁴

The Swedish definition is therefore in accordance with the decision by the CJEU in joined cases *Ring and Skouboe Werge* (335/11 and 337/11). The claimant is normally¹⁰⁵ not worse off, because the Swedish definition focuses on the discriminator's perception of functional limitations.¹⁰⁶

d) Age

Under Chapter 1 Section 5 point 6 of the Discrimination Act, age is defined as 'length of life to date'. This definition includes all ages and makes it clear that the young as well as the old are protected. There is no case law on the definition itself. All case law deals either with justifications provided by the discriminator¹⁰⁷ or with whether or not two persons are in a similar situation.¹⁰⁸ In the author's opinion, Sweden is slowly coming to grips with the issue of age discrimination. This is a complex process, since age discrimination has long been such an accepted part of society in terms of laws, collective agreements and patterns of behaviour. In turn, this is the reason for the broader

¹⁰² Svea Court of Appeal case T 5095-13, *Equality Ombudsman v. Sigtuna Municipality* (judgment of 11.04.2014). <http://www.do.se/globalassets/diskrimineringsanden/hovratt/dom-hovratt-sigtuna-kommun-anm-2011274.pdf>.

¹⁰³ The appeal court decision is very short. A comparison may be made with the extensive reasoning in Attunda District Court case T5508-12, *Equality Ombudsman v. Sigtuna Municipality* (judgment of 24.04.2013). <http://www.do.se/globalassets/diskrimineringsanden/tingsratt/dom-tingsratt-sigtuna-kommun-anm-211274.pdf>.

¹⁰⁴ Government bill 2007/08:95, p. 123.

¹⁰⁵ The Svea Court of Appeal, case T 7752-08, *Equality Ombudsman v. Sturehof AB* (judgment of 02.06.2009) leads to the following problem. The appeal court went as far as to state that, if it is proven that the defendant did not know about the disability, it does not matter whether the defendant should have known. The appeal court points out that the material of the case shows that persons with this particular disability are sometimes wrongly perceived as drunk. The fact that the mistake is easy to make seems to rule out discrimination. <http://www.do.se/globalassets/diskrimineringsanden/hovratt/dom-hovratt-sturehof-ho-201318302.pdf>.

¹⁰⁶ Furthermore, there is a long tradition of interpreting the concept of disability in an extensive way so as not to exclude any persons. See Fransson-Stüder (2015), *Diskrimineringslagen: en kommentar* (*The Discrimination Act: A Commentary*), Second edition, p. 111.

¹⁰⁷ See for instance Labour Court 2011 No. 37, *Equality Ombudsman v. Aviation Employers (Flygarbetsgivarna) and Scandinavian Airlines System* (judgment of 04.05.2011).

¹⁰⁸ See for instance Labour Court 2010 No. 91, *Equality Ombudsman v. Swedish Agency for Government Employers* (judgment of 15.12.2010). <http://www.arbetsdomstolen.se/upload/pdf/2010/91-10.pdf>.

exceptions allowed by Swedish and EU law. However, one clear change seems to be that age discrimination is no longer a generally accepted defence to assertions of sex or ethnic discrimination. Prior to the adoption of the 2009 Act, it was difficult to overcome an employer's assertion that an applicant was rejected because of their age (which was legal), and thus not their sex or ethnicity (which was illegal).

e) Sexual orientation

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

The dividing line between sexual orientation, which is protected by the law, and sexual behaviour, which is not protected, is made in the preparatory works to the older act. In its bill to Parliament proposing the 1999 Sexual Orientation Discrimination in Working Life Act, the Government clarified that various types of sexual conduct can involve individuals regardless of whether they are homosexual, bisexual or heterosexual – and these types of conduct are not protected by the discrimination prohibition.¹⁰⁹ These earlier preparatory works are extensively referred to in the Government bill for the 2009 Discrimination Act.¹¹⁰

In 2006 the Supreme Court¹¹¹ decided a case where a lesbian woman, her girlfriend and some other friends from work had been asked to leave a restaurant because the lesbian pair were kissing and hugging each other. It was a 'he-said, she-said' case, with the restaurant manager claiming that they did not merely kiss and hug but were also involved in heavy petting (*hångla*). The appeal court and the Supreme Court placed the burden of proof upon the restaurant and they failed to prove anything more than kissing and hugging, which was permitted according to the restaurant. This case is considered to have provided important rules for all grounds of discrimination with regard to the distribution of the burden of proof. At the same time, the concept of discrimination on the ground of sexual orientation has not been perceived as being particularly problematic in Sweden.

2.1.2 Multiple discrimination

In Sweden, there is no specific prohibition of multiple discrimination included in the law.

However, many cases can be said to involve multiple discrimination. There are two basic types of cases. One type can be exemplified by Labour Court case 2010 No 91.¹¹² The employer in this case was held to be liable for both age and sex discrimination. The discrimination was based on the failure to call a 62-year-old woman to a job interview, and the failure to hire her. Two younger, less qualified women were given the jobs. The employer claimed, among other things, that the woman was not suitable for the job, but failed to demonstrate this and thus failed to overcome a presumption of both age discrimination and sex discrimination. The Labour Court stated that the practising of two types of discrimination committed by the same failure to act was *not* a reason to increase the level of the discrimination award. It was treated as a single infringement. At the same time, in the author's opinion, it is interesting that the compensation awarded was a relatively full amount of compensation, based on the idea that the woman should have been given the job – although this is not so easy to determine, as she was never

¹⁰⁹ Government bill 1997/98:180, p. 22.

¹¹⁰ Government bill 2007/08:95.

¹¹¹ The Supreme Court (NJA 2006 p. 170): *Ombudsman Against Discrimination due to Sexual Orientation v. Restaurang Fridhem Handelsbolag* (judgment of 28.03.2006).

¹¹² Labour Court 2010 No. 91, *Equality Ombudsman v. State Employment Board (Statens arbetsgivarverk)* (judgment of 15.12.2010). <http://www.arbetsdomstolen.se/upload/pdf/2010/91-10.pdf>.

interviewed for the position. Even though the issue was not discussed by the court, the final result seems to have required an intersectionality analysis.

The Equality Ombudsman receives several hundred complaints per year that potentially cover more than one ground.¹¹³ Most of them are of the type where the complaint concerning discriminatory treatment is asserted to involve, or can be seen as referring to, two or more grounds of discrimination.¹¹⁴

The other type of multiple discrimination can be exemplified with Labour Court case 2011 No. 13.¹¹⁵ The case regarded two different alleged instances of harassment, one involving ethnicity and the other involving sex. The rules on the burden of proof were applied to each of these two offences separately, and the claimant won. The compensation is higher when there are separate offences concerning the same individual, but the fact that one offence concerned ethnicity and the other concerned sex does not seem to have affected the combined level awarded in Labour Court case 2011 No. 13. The claimant would probably have received the same amount even if both offences had related to the same discrimination ground.

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

There is no legislation directly covering multiple discrimination and there is no such legislation being planned, nor is there any case law where the issue has been directly addressed by the courts. Nevertheless, current case law is being used, by academics among others, as the basis for analysing the role of multiple discrimination and intersectionality.¹¹⁶ In the author's opinion, these analyses may lead to improved arguments in the courts in this field, which in turn could lead to pressure to establish case law or relevant legislation. This seems to have been part of the pattern developed in the US and Canada, where the issue of intersectionality was initially brought into focus by academics and in case law.¹¹⁷

¹¹³ See Equality Ombudsman, *Annual Report 2012*, pp. 13 and 15. The total number of grounds is 1 835 and the total number of cases is 1 559. The number of grounds is thus 276 more than the number of cases. However, there may be three grounds in some cases, and parental leave is a ground, so a case concerning both sex discrimination and parental leave discrimination will show up as concerning two grounds. In 2014, 1 611 cases were considered in relation to the Discrimination Act, and 1 810 grounds were involved. Equality Ombudsman, *Annual Report 2014*, pp. 45f and 49. In 2016, the way in which the Equality Ombudsman handles statistics was changed so that the number of cases and the number of grounds match.

¹¹⁴ Based on the author's experience, it is not uncommon for the claimant to refer to a particular discrimination ground while the facts indicate that there may also be other grounds involved in the case.

¹¹⁵ Labour Court 2011 No. 13. *Equality Ombudsman v. Municipality of Helsingborg*, (Judgment of 16.02.2011). <http://www.arbetsdomstolen.se/upload/pdf/2011/13-11.pdf>.

¹¹⁶ See for example Schömer, E. (2012), 'Multiple discrimination: A smokescreen over differences', *RETFÆRD ARGANG* 35 2012 NR. 3/138, available at: http://retfaerd.org/wp-content/uploads/2014/08/Retfaerd_3_2012_3.pdf.

¹¹⁷ See for example Crenshaw, K. (1991), 'Mapping the margins: intersectionality, identity politics, and violence against women of color', *Stanford Law Review* 43, No. 6, pp. 1241-1299; Crenshaw, K. (1989), 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Theory and Antiracist Politics', *The University of Chicago Legal Forum*, from p. 139; *DeGraffenreid v GM*, 558 F.2d. 480 (8th Cir. 1977); and Ontario Human Rights Commission (2001), *An Intersectional approach to discrimination: Addressing multiple grounds in Human Rights Claims* – Discussion Paper, available at: http://www.ohrc.on.ca/sites/default/files/attachments/An_intersectional_approach_to_discrimination%3A_Addressing_multiple_grounds_in_human_rights_claims.pdf.

2.1.3 Assumed and associated discrimination

a) Discrimination by assumption

In Sweden, the Discrimination Act (including case law) prohibits discrimination based on perception or assumption of what a person is.

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

The principles on mistaken assumption can cut both ways in Sweden. A mistaken assumption regarding a behaviour being caused by alcohol intoxication was a valid defence for a restaurant that had rejected a person with a disability.¹¹⁸ 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, Discrimination Act Chapter 1 Section 4 point 1 (as well as case law) prohibits discrimination based on association with persons with particular characteristics.

Since the definition of (direct) discrimination is related to the ground and not to the person, the prohibition applies. Treating an ethnic Swede unfavourably because he or she has a lot of Muslim friends may be associated with the ground of religion. This applies to disability as well. If a person is treated less favourably because he or she is the primary carer of a child with a disability, this treatment would be regarded as associated with the disability ground. Swedish law is thus in line with the reasoning established in *Coleman v. Attridge Law and Steve Law*.¹¹⁹

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

a) Prohibition and definition of direct discrimination

In Sweden, direct discrimination is prohibited through the Discrimination Act, Chapter 1 Section 4 point 1, which reads as follows:

'Direct Discrimination: that someone¹²⁰ is disfavoured by being treated less favourably than someone else is treated, has been treated or would have been treated in a

¹¹⁸ Svea Court of Appeal, case T 7752-08, *Equality Ombudsman v. Sturehof AB* (judgment of 02.06.2009). The appeal court went as far as to state that, if it is proven that the defendant did not know about the disability, it does not matter whether the defendant ought to have known (*obiter dicta*). This case is also problematic with regard to the principle that discrimination may be involuntary. The appeal court points out that the material of the case shows that persons with this particular disability are sometimes wrongly perceived as drunk. The fact that the mistake is easy to make seems to rule out discrimination.
<http://www.do.se/globalassets/diskrimineringsarenden/hovratt/dom-hovratt-sturehof-ho-201318302.pdf>.

¹¹⁹ The Svea Court of Appeal case T 1912-13, seems to confirm this. A mother was refused child insurance for a child because the child's hearing impairment was severe enough to entitle the mother to a care benefit for her. This was unlawful discrimination not only against the child but against the mother as well. Both received a discrimination compensation award.

¹²⁰ If a group has been discriminated against, each person goes to court as an individual or makes an individual complaint with the Equality Ombudsman. It is easy to deal with many such cases together in a single process if many persons have been discriminated against in the same way by the same discriminator. A group of persons cannot be a discriminator. It is only the person (actual or legal) who is legally responsible for the activity that is regarded as a discriminator.

comparable situation, if this disadvantaging is associated with sex, transgender identity or expression, ethnicity, religion or other belief, disability, sexual orientation or age’.

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

A discriminatory job advertisement does not by itself constitute less favourable treatment under the Discrimination Act.¹²¹ Some experts in the field assert that Swedish law is potentially not in line with the decision made in the *Firma Feryn* case, where it was held that national law, against the background of the EU anti-discrimination directives, did not have to have an identifiable victim for a discrimination claim to be brought against the discriminator.¹²² Others go even further, asserting that Member States must institute discrimination laws that provide sanctions even when there is no identifiable victim.¹²³ However, notice needs to be taken of the following from *Firma Feryn*: ‘Consequently, Article 7 of Directive 2000/43 does not preclude Member States from laying down, in their national legislation, the right for associations with a legitimate interest in ensuring compliance with that directive, or for the body or bodies designated pursuant to Article 13 thereof, to bring legal or administrative proceedings to enforce the obligations resulting therefrom without acting in the name of a specific complainant or in the absence of an identifiable complainant. It is, however, solely for the national court to assess whether national legislation allows such a possibility’.¹²⁴ According to the author's interpretation of the case, the court seems to be clearly saying that such a national law would be in line with the EU directive, but not that the EU directive requires it. It is even possible that such a law is desirable, but it is not required by EU law.

Nevertheless, it is important to note that a job advertisement deemed to be discriminatory because of ethnicity, for example, could in theory be dealt with under the rules on active measures in the Discrimination Act. Under Chapter 3 Section 5 point 3, the employer shall take active measures with regard to employment and also promotion. If the employer is insufficiently active in ensuring that people have the opportunity to apply for jobs without regard to sex, ethnicity, religion or other belief, or one of the other grounds, the Equality Ombudsman may, in accordance with Chapter 4 Section 5, ask the Board Against Discrimination¹²⁵ to order the employer to fulfil his or her duty *in the future* subject to a financial penalty (*vite*). Central employees’ organisations (labour unions) with a collective agreement can ask for such an order if the Ombudsman declines to do so. The financial penalty will gain legal force only after a district court has ordered the payment. The legality of the order itself, as well as the reasonableness of the amount, can be decided upon by the district court. The individual who may have abstained from seeking a job cannot initiate such a proceeding at the Board Against Discrimination on her or his own. In spite of its relatively long history, this type of financial penalty has never actually been imposed.

Another illustrative example where discriminatory actions fall outside the scope of the Discrimination Act, in particular Chapters 2 (prohibition of discrimination) and 3 (active measures) is the *Bergsjön* case. A major landlord required applicants to state their

¹²¹ This is given as an explicit example of things falling outside the prohibition of direct discrimination, Government bill 2007/08:95, p. 499.

¹²² See Gambinius Göransson et al (2011), *The Discrimination Law 2d ed. (Diskrimineringslagen 2:a upplagan)*, pp. 43-44.

¹²³ Fransson-Stüber (2015), *The Discrimination Law, A Commentary (Diskrimineringslagen, En kommentar)*, pp. 65 and 131.

¹²⁴ European Court of Justice, case C-54/07, *Centrum voor gelijkheid van kansen en voor racismebestrijding v. Firma Feryn NV* (judgment of 10.07.2008), paragraph 27.

¹²⁵ The board is an administrative authority. It consists of a chairman and a vice-chairman, who must be judges. There are 11 other members. Two are appointed by the Government as neutral members. Six members are appointed by the Government on the suggestion of trade unions and employer organisations, one member is appointed by the Government as representing ethnic or religious minorities in Sweden, one is appointed on the suggestion of the Disabled Associations Cooperation Organisation, and one is appointed on the suggestion of the Swedish Federation for Lesbian, Gay, Bisexual and Transgender Rights.

citizenship and length of residence in Sweden in their application form, and reportedly used the information to avoid renting out to certain groups. The Tenant Union reported the issue to the Equality Ombudsman. This led to an inquiry by the Ombudsman as to the landlord's information requirements and their purpose. The case resulted in substantial media coverage, and the landlord changed its practices. The high visibility of the case, together with the fact that a landlord with almost 400 apartments needed to find new tenants regularly, indicated that it was risky to ignore the Equality Ombudsman and the Tenant Union.¹²⁶ It is likely that a prospective tenant would have eventually filed a discrimination complaint.¹²⁷

It should be pointed out that no individual victim had submitted a complaint, which meant that the prohibition of discrimination in Chapter 2 did not apply. Furthermore, the rules in Chapter 3 on the duty to undertake active measures to prevent discrimination apply only to employers. They were therefore not relevant in this case. Nevertheless, the Ombudsman had sufficient powers through the Equality Ombudsman Act to initiate a supervisory investigation. Combined with the media attention, this was enough to lead to positive results.

The results of this type of case may be given publicity, for example, through publication on the Equality Ombudsman's home page under the heading 'Supervision and decisions' (*Tillsyn och beslut*). This is not necessarily effective on its own, however, since the page is not particularly visible to potential discriminators or discrimination victims. Furthermore, this section of the home page is not designed to name and shame – it is designed to clarify legal positions taken by the Equality Ombudsman.¹²⁸

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 main justification relevant to this report is found in Chapter 2 Section 2 point 1. It concerns differential treatment due to the nature of the work or the context in which the work is carried out if the characteristic constitutes a genuine and determining occupational requirement that has a legitimate purpose and the requirement is appropriate and necessary to achieve that purpose.

Another important justification is found in Chapter 2 Section 2 point 4, which states that differential treatment on the ground of age is not prohibited if there is a legitimate purpose and the means that are used are appropriate and necessary to achieve that purpose.

Strong positive action for one group normally means direct discrimination against another group. There is no general provision concerning working life (recruitment etc.) in the act that allows for positive action concerning grounds other than sex.

¹²⁶ See e.g. 'Hyresvärderna ändrar sig efter SVT:s granskning' (Landlord changes practices after SVT's reporting) 26.04.2016, SVT. Available at: <https://www.svt.se/nyheter/lokalt/vast/hyresvarden-andrar-sig-efter-svt-s-granskning>.

¹²⁷ The Swedish Tenant Union has for many years worked against discrimination in the housing market. With around a third of Swedish tenants as members (calculated on a household basis), it is natural that some of their members were discriminated against, and thus the organisation decided to take action.

¹²⁸ The decisions on this page range from Roma police registration (possible ethnic profiling, but falling outside the Discrimination Act) to employers possibly going too far in their positive actions concerning discriminated-against groups.

2.2.1 Situation testing

a) Legal framework

In Sweden, situation testing is accepted by the courts as evidence.

The principle of freedom of evidence as a general rule is stated in Chapter 35 Section 1 of the Swedish Code of Judicial Procedure (1942:740).¹²⁹ Evidence must be assessed in accordance with the circumstances at issue. As a general rule, evidence that is relevant shall be allowed. This principle applies also to illegally obtained evidence.¹³⁰ The fact that the law is silent on situation testing must, against this background, be interpreted as meaning that situation testing is clearly permitted, especially given the cases below.

b) Practice

In Sweden, situation testing is used in practice.

The former DO (the former Ombudsman against Discrimination due to Ethnicity or Religion) was involved in several cases where situation testing was used by potential victims as a method to counteract discrimination and to contribute to the evidence. Situation testing was also recommended to the DO and civil society as a tool following the Government inquiry into structural discrimination.¹³¹

Situation testing has been accepted by the courts as evidence of discrimination, and the authorities can use public money to act as legal representatives¹³² of claimants relying on evidence obtained by situation testing in the courts.¹³³ However, the authorities are reluctant to get involved in carrying out situation testing themselves as a means of obtaining evidence in individual cases. It is not forbidden, however, and authorities have not been required to refrain from doing this – at least thus far – but the instance of outspoken encouragement through the Government inquiry on structural discrimination (see above) seems to be an exception.

Situation testing is close to the idea of crime provocation, which is generally not allowed in Sweden. Authorities cannot ask a citizen to commit a crime they would otherwise not have committed. In the discrimination field, however, the discriminator is asked to do something legal – for instance allowing a person to eat at a restaurant. The documentation of the refusal creates evidence of discrimination. This is more in the realm of evidence provocation, which is accepted, although limitations may apply to authorities that do not apply to private persons.¹³⁴ The unclear legal situation regarding these limitations led the DO to argue that explicit permission for the DO to carry out situation

¹²⁹ The rules on evidence are also based on the 'principle of best possible evidence'. For instance, an affidavit is not allowed if the person could have been heard as a witness.

¹³⁰ In other words, it is possible for a criminal to be sent to prison on the basis of that illegally obtained evidence, while at the same time a police officer can be convicted for collecting evidence in an illegal manner.

¹³¹ Lappalainen, P., Government White Paper SOU 2005:56, *Det blågula glashuset – strukturell diskriminering i Sverige*, (*The Blue and Yellow Glass House – Structural Discrimination in Sweden* – English summary p. 41) p. 590. It should be pointed out that Paul Lappalainen is also the expert preparing the present report on Sweden. See Government website: <https://www.regeringen.se/rattsliga-dokument/statens-offentliga-utredningar/2005/06/sou-200556/>.

¹³² Swedish law allows the Equality Ombudsman (DO) to act as the formal claimant or party in civil cases. Among other things, this means that the DO takes on the risk of paying the winning party's legal costs if the case is lost.

¹³³ The Ombudsman Against Ethnic Discrimination represented the four claimants in the Escape case. Malmö District Court, judgment 03.05.2006, case T 3562-05. The Appeal Court for Skåne and Blekinge, judgment of 24.04.2007, case T 1358-06. The Supreme Court, *Escape Bar and Restaurant v. The Ombudsman Against Ethnic Discrimination* (case T-2224-07 judgment of 01.10.2008).

¹³⁴ See Ombudsman Against Ethnic Discrimination Dnr 419-2005, *Discrimination Tests as Evidence*, p. 2.

testing under the Discrimination Act is necessary if the authorities are to apply situation testing as a method of gathering evidence themselves.¹³⁵

There is nothing stated on situation testing in the Discrimination Act.

It should be noted that, until 2005, when the above-mentioned inquiry was carried out, situation testing had for many years been banned as a research method for demonstrating the occurrence of discrimination – at least in practice.¹³⁶ However, situation testing is now accepted not just as a legal tool for proving discrimination in the courts but also as a research tool that clearly demonstrates the occurrence of discrimination.¹³⁷ Situation testing has been used in particular by researchers on ethnic discrimination in both the housing market and the labour market. However, it is not uncontroversial. In a survey commissioned by the Equality Ombudsman, it is stated that there has been so much research based on ‘applications from fictive applicants’ that there is question of whether it is ethically acceptable to subject employers to more such research. Indeed, it is claimed that this has led to increased difficulties in obtaining funding for such research.¹³⁸

At the same time, it is the author’s assessment that the interest of funders and others may also reflect an interest in returning to a period when research using situation testing was in practice banned by the Government, or at least government funders of research. Situation testing is effective, yet it was described as unethical for long periods as a research method in Sweden – at the same time that it was a tool used in research in much of Europe and North America, as well as by the ILO, to demonstrate the occurrence of discrimination. Other research methods made it easier to deny that this research actually showed the existence of discrimination (for example, the statistical differences in employment rates between ‘Swedes’ and ‘immigrants’ could be attributed to other non-discrimination factors, and interviews with immigrants concerning their experiences of discrimination related to ‘their’ feelings, rather than actual discrimination).¹³⁹

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

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

¹³⁵ The Ombudsman Against Ethnic Discrimination, *Diskriminerings tester som bevismedel (Discrimination Tests as Means of Evidence)*, Dnr. 419-2005.

¹³⁶ Lappalainen, P. SOU 2005:56, *Det blågula glashuset – strukturell diskriminering i Sverige, (The Blue and Yellow Glass House – Structural Discrimination in Sweden)*, pp. 466-468.

¹³⁷ See for example Skedinger, P. and Carlsson, M. (2011), ‘Reglering eller diskriminering – vad hindrar etablering?’, *FORES Studie* 2011:4. Here it is pointed out that new research using situation testing in the recent past has clearly demonstrated that discrimination contributes to the employment gap between ‘Swedes’ and ‘immigrants’: <http://lnu.diva-portal.org/smash/get/diva2:801233/FULLTEXT01.pdf>, accessed 2 May 2018.

¹³⁸ See, for example, Oxford Research (2013), *Forskningsöversikt om rekrytering i arbetslivet (Overview of Research on Recruitment in Working Life)*, p. 38.

¹³⁹ See e.g. Banton, M. (1997), ‘The ethics of practice-testing’, *New Community* 23(3): pp. 413-420, July 1997; Knocke, W. (2000), ‘Integration or Segregation? Immigrant Populations Facing the Labour Market in Sweden’, *Economic and Industrial Democracy*, 1 August 2000, Volume 21, issue 3, pp. 361-380, 372-373; Rapport från Integrationsverkets workshop den 14-15 oktober 2004, *Tillämpningen av Situation testing – metodologi i analysen av arbetsmarknadsdiskriminering*, available at: <http://integrationsrapporter.mkcentrum.se/wp-admin/wp-content/uploads/Situation-Testing.pdf>; Lappalainen, P. Government White Paper SOU 2005:56, *Det blågula glashuset: strukturell diskriminering i Sverige (The Blue and Yellow Glass House: Structural Discrimination in Sweden)*, from p. 577.

ground to suspect discrimination. The Equality Ombudsman has won a case based on discrimination testing'.¹⁴⁰

In 2014 the Equality Ombudsman reached a settlement with a petrol station that refused to rent out cars to three Roma persons. The state television company had set up the situation testing scenario as part of a programme on ethnic discrimination.¹⁴¹

Thus, in the author's opinion, while situation testing is controversial both as a legal tool for proving discrimination and as a research method, if it is carried out properly it can be quite effective.

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

a) Prohibition and definition of indirect discrimination

In Sweden, indirect discrimination is prohibited in national law. It is defined.

The definition of indirect discrimination in the Discrimination Act in Chapter 1 Section 4 point 2 reads as follows:

'Indirect Discrimination: whereby someone¹⁴² is disadvantaged by the application of a provision, a criterion or a procedure that appears neutral but that may put people of a certain sex, a certain transgender identity or expression, a certain ethnicity, a certain religion or other belief, a certain disability, a certain sexual orientation or a certain age at a particular disadvantage, unless the provision, criterion or procedure has a legitimate purpose and the means that are used are appropriate and necessary to achieve that purpose'.

b) Justification test for indirect discrimination

Guidance is given in the preparatory works to both the Discrimination Act and the previous acts. For instance, as regards the 1999 Act Prohibiting Discrimination in Working Life due to Sexual Orientation, the example given of presumed unlawful indirect discrimination is that of a childcare centre requiring prospective employees to have experience of raising biological children of their own. As regards disability, according to the former Disability Ombudsman, for example, requiring a driver's licence can be a form of indirect discrimination. A licence is a necessary requirement for a job as a taxi driver, but does not have to be essential, for example, for a job as a journalist. The Government bill for the Discrimination Act uses language skills as an example when discussing the idea of a legitimate purpose and under what circumstances a criterion can be appropriate and necessary in order to achieve such a purpose.¹⁴³

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, much of the case law on the Discrimination Act relates to direct discrimination. There are also a number of cases relating to indirect discrimination.

¹⁴⁰ Equality Ombudsman (2011), *Roads to Rights*, p. 34.

¹⁴¹ Equality Ombudsman, ANM 2013/828-30 (Statoil AB).

¹⁴² If a group has been discriminated against, each person goes to court as an individual or makes an individual complaint with the Equality Ombudsman. It is easy to deal with many such cases together in a single process if many persons have been discriminated against in the same way by the same discriminator. A group of persons cannot be a discriminator. It is only the person (actual or legal) who is legally responsible for the activity that is regarded as a discriminator.

¹⁴³ Government bill 2007/08:95, p. 491.

Chapter 6.3 contains two examples concerning religion and the burden of proof. A further example illustrates the influence of relevant evidence from other countries.

One individual case showing a clear influence from another country is that of the Karolinska institutet.¹⁴⁴ A Muslim dental student was required to work with bare forearms due to a national regulation on hygiene. The court gave equal credibility to a British expert's opinion as to the hygienic acceptability of disposable forearm protection in the UK and the Swedish experts' opinion as to why there was a genuine hygienic concern and regulation in Sweden. While the state established legitimate concerns, the state's expert also admitted that the British example showed that similar disposable protection had been used there, and no one had been able to show a relevant statistical increase in infection risk. Thus it was determined that the education provider had not overcome the shifted burden of proof, leading to a decision on indirect discrimination. It may be assumed that the case would have been lost without the testimony of the British expert.

A similar situation arose a year later, this time involving a Muslim dentist. Based on essentially the same evidence, and with a determination of equal credibility, the Labour Court shifted the burden of proof back to the complainant as the state had a wide margin of appreciation in such cases, leading to a determination that there was no indirect discrimination.¹⁴⁵

c) Comparison in relation to age discrimination

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

2.3.1 Statistical evidence

a) Legal framework

In Sweden, there are national rules permitting data collection.

These rules are not connected to the Discrimination Act and there is no special legislation that is intended to provide statistical data for discrimination cases.

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

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

¹⁴⁴ Stockholm District Court, case T 3905-15, *Equality Ombudsman v. Swedish State through Karolinska institutet* (judgment of 16.11.2016).

¹⁴⁵ Labour Court 2017 case 65, *Equality Ombudsman v. The People's Dentists of Stockholm County* (judgment 20.12.2017).

rule on secrecy (Section 18). In Section 16 there is also a general exception whenever legal claims make it necessary to keep a record of sensitive information for an individual case, and this is also the case when the person registered has explicitly agreed to the registration (Section 15).

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

It should also be noted that the EU's General Data Protection Regulation, replacing the Act on Personal Information (Personuppgiftslagen), will have full effect as from 25 May 2018.

For general statistics purposes there is the population register (*folkbokföringsregistret*), which is maintained by the tax authorities. This register contains information, *inter alia*, on the place of birth and nationality of a person as well as the place of birth of their parents and the date of their taking up residence in Sweden. Religion and belief are not registered as such, but church membership may be registered with the tax authorities so that they can provide assistance in collecting church membership fees.¹⁴⁶

No information on disability or sexual orientation is included in the population register.

The general inquiry into living conditions undertaken by Sweden Statistics includes health information on impaired vision, hearing or mobility and severe mental psychical problems. This information is relevant to the discrimination ground of disability.¹⁴⁷ Disability is linked to a person's health and is therefore considered to be sensitive information. The views of the courts on statistics can be somewhat unclear, nevertheless there seems to be some basic expectation concerning the production of statistics or at least some statistical analysis.¹⁴⁸

In November 2012 the Equality Ombudsman reported back its observations to the Government.¹⁴⁹ The Ombudsman's report contained various important principles for going forward. One was that nobody should be forced to provide sensitive information

¹⁴⁶ The Swedish State provides assistance to some churches by having the tax authorities assist them by collecting 'church fees'. Today, this is not a church tax as it was prior to the separation between the Swedish state and the Swedish church, but an income-related membership fee. If a church wants this assistance, its members must be registered with the tax authority. Currently there are 18 churches that receive this assistance, of which the largest is the former Swedish state church. The list of other churches can be seen at: <https://www.skatteverket.se/privat/skatter/arbeteochinkomst/skattetabeller/avgifttillandratrossamfund.4.18e1b10334ebe8bc80005629.html>.

¹⁴⁷ Equality Ombudsman (2012), *Statistikens roll i arbetet mot diskriminering – En fråga om strategi och trovärdighet* (The role of statistics in the work against discrimination – A question of strategy and credibility), p. 9, available at: <https://www.do.se/globalassets/publikationer/rapport-statistikens-roll-arbetet-mot-diskriminering2.pdf>.

¹⁴⁸ See, for example, Stockholm District Court judgment 28/01-2013, *Equality Ombudsman v. If Insurances*. The company refused to insure children if the parent received a form of child care benefit reserved for disabled or long-term sick children. This could not be direct discrimination, as the group of children consisted of sick but not necessarily disabled children. It was not indirect discrimination either, as the Ombudsman had not shown what proportion of children receiving the benefit were disabled; simply asserting that disabled children were typically disadvantaged by the rule that was applied was not enough. It is important to note that the appeal court held that there was direct discrimination based on the idea that it was enough to show that there was a direct connection (*samband med*) to two different groups of children – those with disabilities and those with illnesses. This was enough to constitute direct discrimination, since an individual analysis had not been made concerning access to insurance. See Svea Appeal Court 08.10.2013 case T 1912-13, at: <http://www.do.se/lag-och-ratt/diskrimineringsarenden/if-skadeforsakring-ab/>.

¹⁴⁹ Equality Ombudsman (2012), *Statistikens roll i arbetet mot diskriminering – En fråga om strategi och trovärdighet* (The role of statistics in the work against discrimination – A question of strategy and credibility).

regarding themselves. Nobody should thus be forced to reveal their sexual orientation, religion etc. If they do choose to reveal it, anonymity must be granted. A second important principle is that of self-categorisation. A person must be allowed to belong to the ethnicity, religion, sexual orientation etc. that he or she feels part of. There cannot be a state classification. A third principle is that the views of groups who distrust society¹⁵⁰ must be taken into account in such a manner as to build up trust in the research. One approach can be to make sure the research is done by people they can trust.

The current constraints affect the potential of various programmes that could be considered positive actions. However, it should be noted that 'positive actions' generally means something other than positive treatment, which may often violate the Discrimination Act. Age and nationality are two discrimination grounds covered by this report where the author can imagine that it would be possible to use statistical data directly to help construct positive measures. Statistics can provide reasons for adopting certain measures or for ceasing to apply them.

In Sweden, statistical evidence is permitted by national law (given the freedom of evidence principle) and has been used in order to establish indirect sex discrimination.¹⁵¹

b) Practice

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

2.4 Harassment (Article 2(3))

a) Prohibition and definition of harassment

In Sweden, harassment is prohibited by national law. It is defined.

In Sweden, harassment explicitly constitutes a form of discrimination.

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

*'Harassment:*¹⁵² conduct that violates a person's¹⁵³ 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'.

¹⁵⁰ Representatives of some groups, including the Roma, are worried that research may be used to stigmatise the group further. For historical reasons, even in the recent past, these groups have been highly suspicious of the uses that such statistics can or will be put to. There are big differences regarding the level of trust between the groups and the authorities, which may be relevant. See Equality Ombudsman (2012), *Statistikens roll i arbetet mot diskriminering*, from p. 93. Trust is at the centre of the Equality Ombudsman's preliminary report.

¹⁵¹ For example, statistics formed an important part of the Labour Court case, Dom nr 87/05 Mål nr A 192/03. The court determined that a car manufacturer had violated the prohibition against indirect discrimination by imposing certain height requirements for the job, which meant that, statistically, a large number of women would be automatically ineligible for the job.

¹⁵² Sexual harassment is an additional form of harassment.

¹⁵³ If a group has been discriminated against, each person goes to court as an individual or makes an individual complaint with the Equality Ombudsman. It is easy to deal with many such cases together in a single process if many persons have been discriminated against (harassed) in the same way by the same discriminator. A group of persons cannot be a discriminator. It is only the person (actual or legal) who is legally responsible for the activity that is regarded as a discriminator.

The material scope is thus wide. In general, all six forms of discrimination apply in all areas. There is no area where harassment is exempted, which is the case with regard to inadequate accessibility.

b) Scope of liability for harassment

In Sweden, where harassment is perpetrated by an employee, the employee is almost never¹⁵⁴ liable and the employer is not always liable. Sometimes, no one can be held responsible.

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

In one interesting example, the employee who sent a discriminatory email to a job applicant in Labour Court case 2007 No. 45¹⁵⁵ was not authorised to make decisions regarding the job application of the Iranian job applicant concerned. The employee did not represent the employer on this issue, thus the email that was sent was outside the scope of their employment. The court therefore held that there was no violation of the Discrimination Act that the employer was liable for. It should be pointed out that the employer never argued or demonstrated that the lack of authorisation was known about or should have been known about by the Iranian applicant. This restriction on the vicarious liability of employers limits the scope of the prohibition on discrimination in a way that could be problematic in relation to EU law. In this case, in the author's opinion, there is a question of whether even Swedish law was applied properly.

Labour Court case 2011 No. 19¹⁵⁶ is another example of a case where there was a question as to the extent of an employer's liability for employees or others who are said to be acting on behalf of their employer. Here, a trainee applicant participated in an interview with S.F., an independent contractor in a hair salon. The issue was whether S.F. represented herself or C.N., the beauty salon employer. The interview by S.F. and C.N.'s subsequent refusal to offer a trainee position were asserted to be discriminatory due to, among other things, comments about the applicant's headscarf during the interview. The court did not find that the applicant, acting through the DO, had shown that S.F. was acting on behalf of C.N. as the potential employer of the trainee. Thus, the applicant lost the case based on legal reasoning regarding which employees or other persons an employer is responsible for.

Concerning harassment, an employer also has an obligation to investigate and implement measures against harassment between employees. Harassment between employees does not, according to Swedish domestic law, amount to discrimination *per se*, therefore the employer cannot be held responsible as such. However, an employer who becomes aware that an employee considers himself or herself to have been exposed to harassment has a duty to investigate the circumstances surrounding the harassment and, in relevant cases, implement measures that may reasonably be required to prevent continuance of the

¹⁵⁴ Harassment might under some circumstances fall under a section in Chapter 5 of the Penal Code (defamation etc.).

¹⁵⁵ Labour Court 2007 No. 45 *Ombudsman Against Ethnic Discrimination v. Laika film & amp* (Judgment of 16.05.2007) <http://www.arbetsdomstolen.se/upload/pdf/45-07.pdf>.

¹⁵⁶ Labour Court 2011 No. 19, *Equality Ombudsman v. C.N. and her private business (enskild firma) Bright Hair and Beauty Salon and Café Next Door Unlimited Partnership*, (judgment of 23.03.2011) <http://www.arbetsdomstolen.se/upload/pdf/2011/19-11.pdf>.

harassment. An employer will thus become liable for the damages that result due to the employer's failure to investigate and implement reasonable measures to prevent harassment by another employee. The latter indicates that this law does not apply to harassment by clients. However, it is possible that this situation will be covered by the various rules related to an employer's responsibility for the work environment, which includes responsibility for the psycho-social work environment (1977 Work Environment Act).

2.5 Instructions to discriminate (Article 2(4))

a) Prohibition of instructions to discriminate

In Sweden, instructions to discriminate are prohibited in national law. The prohibition of instructions to discriminate is defined.

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

'Instructions to discriminate: orders or instructions to discriminate against someone¹⁵⁷ in a manner referred to in points 1–5 that are given to someone who is in a subordinate or dependent position relative to the person who gives the orders or instructions or to someone who has committed herself or himself to performing an assignment for that person'.

The material scope is thus wide. There is no area where instructions to discriminate are exempted.

b) Scope of liability for instructions to discriminate

In Sweden, the person giving the instructions is liable for issuing the instruction to discriminate if, in addition to there being a subordinate, a dependency or an assignment relationship, a disadvantageous effect has occurred in regard to one or more persons. If such an effect does not occur, then the instruction does not violate the Discrimination Act. Basically, this means that the person receiving the instruction must have acted in accordance with the instruction. There is one exception indicated in the legislative materials. If the instruction points out a specific person (or several specific persons) as the target of discrimination, that person has had his rights violated (*blivit kränkt*), and there is thus a violation of the prohibition against discrimination. This can occur if, for example, gossip develops due to the instruction, even if the instruction was never carried out.¹⁵⁸

If an employer instructs an employment agency to discriminate, both will be liable for a violation of the law – the employer for the instruction and the employment agency for the discrimination. However, if the instruction is not carried out there will be no violation of the law.

On the other hand, if such an instruction is given to an employee and the employee discriminates, the employer will be responsible for both violations. First, there is liability for the instruction; secondly, there is liability for the actions of employees (*principalsvar*).

¹⁵⁷ If a group has been discriminated against, each person goes to court as an individual or makes an individual complaint with the Equality Ombudsman. It is easy to deal with many such cases together in a single process if many persons have been discriminated against in the same way by the same discriminator. A group of persons cannot be a discriminator. It is only the person (actual or legal) who is legally responsible for the activity that is regarded as a discriminator.

¹⁵⁸ Government bill 2007/08, pp. 494-495.

Regarding health, social security, goods and services and most other areas, the service provider is responsible for the actions that an employee takes in relation to a customer or a client.

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

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

In Sweden, the duty on employers to provide reasonable accommodation for people with disabilities is included in the law. It is defined as the concept of inadequate accessibility.¹⁵⁹

Inadequate accessibility has, from 1 January 2015, become a form of discrimination in the Discrimination Act Chapter 1 Section 4 point 3, and it applies in most of the areas covered by the act.¹⁶⁰ Before 2015 – when ‘reasonable accommodation’ was the term – a lack of reasonable accommodation could result in direct discrimination, because the comparable situation should be assessed as if the worker or student had been accommodated.

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

It is defined as follows:

‘Inadequate accessibility’:¹⁶¹ that a person with disability is disadvantaged through a failure to take measures for accessibility to enable the person to come into a situation comparable with that of persons without this disability where such measures are reasonable on the basis of accessibility requirements in laws and other statutes, and with consideration to

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

This change is of no practical importance in the field of employment as – according to the preparatory works – the old legal praxis shall remain unchanged with regard to accommodation measures in employment. The protection is, however, extended to cover trainees in basic and secondary education.¹⁶²

- b) Practice

It is not really possible to specify what accommodations are to be classified as ‘reasonable support and accommodation measures’ in accordance with Swedish law,

¹⁵⁹ ‘Inadequate accessibility’ is the term used in the unofficial translation of the Discrimination Act. See: <http://www.government.se/information-material/2015/09/discrimination-act-2008567/>, accessed 9 May 2018.

¹⁶⁰ Act (2014:958) on changing the Discrimination Act (2008:567), adopted on 08.07.2014. Government bill 2013/14:198. Even prior to 2015, a failure by an employer (and in limited cases education providers) to provide a reasonable accommodation could lead to a finding of discrimination. The main purpose of the inadequate accessibility concept was to expand the duty of reasonable accommodation to others with the power to prevent disability discrimination, such as providers of goods and services.

¹⁶¹ The author refers to the Government’s unofficial translation of the Discrimination Act, available at: https://www.government.se/4a788f/contentassets/6732121a2cb54ee3b21da9c628b6bdc7/oversattning-diskrimineringslagen_eng.pdf.

¹⁶² Government bill 2013/14:198, pp. 74 and 115.

since the case law is limited. 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.¹⁶³ The following accommodation measures were mentioned in the legislative materials accompanying the Discrimination Act as examples of requirements that could be made concerning an employer: improvements related to physical accessibility, the acquisition of technical support, and changes in work tasks, time schedules or working methods.¹⁶⁴ The reasonableness of requiring measures to be undertaken can vary depending on the employer.

This determination must be made from case to case, depending on such factors as the company's ability to bear the costs, the ability to undertake a measure, the problems caused for the employer by the measure and the expected length of the employment. According to the former Disability Ombudsman, the mere possibility of obtaining a subsidy will not be taken into account in assessing reasonableness. This can be taken into account, however, if it becomes apparent during the recruitment process that a subsidy will be received.¹⁶⁵

General legislation applying outside the field of discrimination is important here, especially the 1977 Working Environment Act and the employer's duty of undertaking 'rehabilitation measures'¹⁶⁶ regarding the already employed, in combination with the 1982 Employment Protection Act, which imposes a duty of fairly far-reaching accommodation.¹⁶⁷ These duties are sometimes more far reaching compared with the Discrimination Act. However, these far-reaching obligations apply only if the worker has a good chance of returning to work for the employer in question.

One may conclude from case 2013 No. 78 that the Labour Court is reluctant to ask the employer to permanently¹⁶⁸ change a fellow worker's tasks in way that makes his or her work worse in order to provide an accommodation for the sake of the work of a person with a disability. The case concerned a bus driver who – due to a stroke – could not drive during peak hours, early mornings and late evenings. Allowing him to work during the daytime at off-peak hours would have required someone else to work the morning and afternoon peak hours with a long break in between. Creating such a schedule could not be required of the employer, and the disabled worker was dismissed.¹⁶⁹ With regard to dismissals due to sickness leading to disability resulting in an inability to work, the Discrimination Act offers no added protection in comparison with the ordinary labour law rules on reasonable accommodation.

In a case from 2017, the Labour Court found that there was no discrimination when a university refused to hire a lecturer who was deaf. The Equality Ombudsman and the university agreed that an interpreter between sign-language and spoken language was needed. The cost to the employer was disputed with regard to, *inter alia*, how much could be financed with employment policy allowances. The Labour Court started by assessing the case as if the Equality Ombudsman had done the correct cost assessment

¹⁶³ A departmental inquiry (DS 2010:20) which suggested changing the wording of Chapter 1 Section 4 of the Discrimination Act and creating a non-exhaustive list of six factors that are relevant when assessing the concept of reasonable accommodation (p. 27).

¹⁶⁴ Government bill 2007/08:95 p. 148.

¹⁶⁵ Swedish employers have extensive managerial rights and cannot be forced to seek subsidies.

¹⁶⁶ The goal of rehabilitation is the employee's return to the workplace or the provision of support for an individual in maintaining his position in the workplace. Rehabilitation in relation to working life is further regulated by the Social Security Code (Socialförsäkringsbalk 2010:110), adopted on 04.03.2010.

¹⁶⁷ See also, for instance, Inghammar (2001), '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.

¹⁶⁸ During the period when it was uncertain whether or not the bus driver would become healthy enough to drive at peak hours, the employer worked hard to help the driver with job training, for instance allowing him to drive buses with a reserve driver present in the bus.

¹⁶⁹ Labour Court 2013 No. 78, *Equality Ombudsman v. Veolia and the Swedish Bus and Coach Federation* (judgment of 23.10.2013). See: <http://www.arbetsdomstolen.se/upload/pdf/2013/78-13.pdf>.

of SEK 520 000 (approximately EUR 49 000) per year as a net cost for the education provider. That cost was considered excessive (unreasonable), however, and the Ombudsman lost the case.¹⁷⁰

c) Definition of disability and non-discrimination protection

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

‘Permanent¹⁷¹ 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 ‘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 a ‘similar situation’. However, until there is clear case law on the point it will be difficult to define the issues more closely.

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

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

There has been a duty, since 2015, to provide reasonable accommodation for people with disabilities in most of the areas where the Discrimination Act applies. This duty is related to the discrimination form known as inadequate accessibility.¹⁷² The areas covered are working life, education, labour market policy activities and employment services not under public contract, starting or running a business and professional recognition, membership of certain organisations, services, meetings or public events, health and medical care and social services, the social insurance system, unemployment insurance and financial aid for studies, national military service and civilian service, public employment.

Before 2015 the prohibition of discrimination by education providers applied when, by taking ‘reasonable measures regarding the accessibility and usability of the premises, they can see to it that a person with a disability’ is put in a comparable situation to people without such a disability.¹⁷³ This duty applied to higher education only. Today’s rules on inadequate accessibility apply throughout the education sector.

¹⁷⁰ Labour Court 2017 No. 51, *Equality Ombudsman v. Södertörn University* (judgment 11.10.2017). There was thus no need for the Labour Court to assess whether or not the true cost was higher, as the university claimed.

¹⁷¹ The Swedish term *varaktig* has been translated in the Government’s unofficial translation as ‘permanent’. The term ‘permanent’ should be considered here as meaning ‘long-term’ or ‘durable’.

¹⁷² Act 2014 (958) on changing the Discrimination Act (2008:567), adopted on 08.07.2014; Government bill 2013/14:198. According to Chapter 2 Section 12 c, the prohibition of discrimination in the form of a lack of reasonable accommodation (inadequate accessibility) does not apply to housing, private persons offering services or goods to the general population or services and goods sold by companies with less than 10 employees (the same exception applies in the healthcare area too, according to Section 13 c) – and if the measure in question concerns goods and services and the buildings where they are offered and the claimant seeks actions that go beyond what was required when the building was made. The exception for employers with less than 10 employees no longer applies as of 1 May 2018, Government bill 2016/17:220, an expanded protection against discrimination in the form of inadequate accessibility.

¹⁷³ Chapter 2 Section 5 of the Discrimination Act (Diskrimineringslagen 2008:567, adopted on 05.06.2008).

The School Act (2010:800) contains a duty to accept pupils at the school of their choice unless the financial burden required is substantial according to Chapter 9 Section 15. With the new rules from 2015, a violation of the School Act can also result in discrimination according to the rules on inadequate accessibility in the Discrimination Act.

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

There is still little case law on the new rules on inadequate accessibility. However, as they rely heavily on laws and other forms of legislation to provide the accommodation level that can be required,¹⁷⁴ the biggest change is probably that a discrimination award as a remedy becomes possible, which is valuable for the claimant, especially if civil damages were not possible before. Many public law regulations have conditional fines that are payable to the state as the main sanction – i.e. a court order linked to a financial penalty if not followed.

In the Discrimination Act, the term ‘inadequate accessibility’ basically assumes that the accessibility standards already set in other laws and statutes are reasonable. For instance, the School Act and the Employment Protection Act already create a minimum standard of reasonable accommodation and a reasonable accommodation duty. If that standard is fulfilled, there will be no examination of inadequate accessibility based on the Discrimination Act. Thus, the introduction of this new form of discrimination in the Discrimination Act does not create any new duties in regard to the accessibility standards already established in other laws and regulations.

In a situation such as that of schools, where there is a clear legal duty to provide accommodation through administrative law, the Discrimination Act still helps by providing potential sanctions (discrimination compensation) that may be more effective than those in other laws and regulations which often only provide for the imposition of conditional fines by a government authority.¹⁷⁵ The concept of inadequate accessibility is – in those situations – related to accommodations required by other legislation.¹⁷⁶

Inadequate accessibility outside of working life, and its interplay with other regulations, was essentially examined for the first time in a 2017 case concerning a pupil who used a wheelchair and who had for three years attended a school with inadequate access ramps. In particular, he was required to use ramps that were steep or without railings. On two occasions, his wheelchair tipped over as a consequence. The school and the municipality

¹⁷⁴ With regard to costs within the different sectors, the Government repeatedly states that the costs are small because new requirements are not being introduced. See Government bill 2013/14:198, Chapter 13.

¹⁷⁵ In December 2017 the Equality Ombudsman filed a lawsuit against a school for trying to convince the parents of an autistic child that he would be better off in a special school. The question of whether or not he would be better off depended partly on what accommodations could be provided by the ordinary school. In the view of the Equality Ombudsman, not providing a clear promise of necessary support amounts to discrimination in the form of a lack of reasonable accommodation. The Equality Ombudsman asked for a discrimination award of SEK 150 000 (approximately EUR 16 500) for the child, and SEK 50 000 (approximately EUR 5 500) for each parent. A large part of this case is about the school’s duties under the School Act. Equality Ombudsman case ANM 2017/1261.

¹⁷⁶ For more information, see Skaraborg County District Court, 2017-05-24, *Equality Ombudsman v. Vara Municipality*, available on the Ombudsman’s website at: <http://www.do.se/globalassets/diskrimineringsrenden/tingsratt/dom-tingratten-skola-anm-2016-9402.pdf>.

were aware of these issues but failed to act appropriately. The district court held that this was discrimination in the form of inadequate accessibility, resulting in an award to the pupil of SEK 30 000 (approximately EUR 2 800) from the municipality. Due to the gravity of the circumstances, the Equality Ombudsman has appealed the case in order to obtain a higher discrimination compensation award.¹⁷⁷

It should be pointed out that the idea was never to create a definition of inadequate accessibility that could be used to impose high costs on service providers when accommodation is not required by other legislation. This can be seen in the wording of the act as well as in the preparatory works.¹⁷⁸

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

In Sweden, failure to meet the duty of reasonable accommodation for people with disabilities does count as discrimination, because it amounts to inadequate accessibility for an individual, which is a separate form of discrimination – and the third in a list of six forms of discrimination under the Discrimination Act.

The key issue is whether the individual involved can be placed in a similar situation to a non-disabled person. In most cases, the required standard is set by laws and other regulations. Within the labour market, the Discrimination Act itself sometimes sets out the standard required, for instance with regard to the hiring of labour. This case law is unaffected by the introduction of the new form of discrimination.

In dismissal cases and in cases outside the labour market, the new form of discrimination is not perceived as introducing any major new requirements compared with other legislation. The minor changes, introducing new legal demands exemplified in the preparatory works,¹⁷⁹ are such that the relevant actions were probably undertaken even where there was no legal duty to do so. Before 2015 a restaurant could refuse to have a member of staff read the menu to a blind guest because a fully sighted guest did not have this right. However, in acting this way, the management would have been likely to offend not only the blind guest but also the majority of sighted people witnessing this refusal. The new duties created can thus seem relatively minor.

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

¹⁷⁷ Skaraborg County District Court, 24.05.2017, *Equality Ombudsman v. Vara Municipality*, Case T 2447/16 <http://www.do.se/globalassets/diskrimineringsarenanden/tingsratt/dom-tingratten-skola-anm-2016-9402.pdf>.

¹⁷⁸ This follows from a literal interpretation of the definition in Chapter 1 Section 4 point 3 of the Discrimination Act (Diskrimineringslagen 2008:567, adopted on 05.06.2008). If there is no legislation stipulating a duty to take on a certain cost, this weighs heavily in favour of the service provider. On the Equality Ombudsman home page, many examples are given where there is no express legal duty elsewhere, but where an obligation nevertheless may exist under the new rules of inadequate accessibility under the Discrimination Act (<http://www.do.se/om-diskriminering/vad-ar-diskriminering/bristande-tillganglighet/#1>). The first of these is that a customer may ask to have the menu read to him or her at a restaurant. The second concerns assistance in picking and packing groceries in a grocery store. The Equality Ombudsman has taken these two examples from Government bill 2013/14:198, p. 65.

¹⁷⁹ On the Equality Ombudsman home page, many examples are given where there is no express legal duty elsewhere, but where an obligation nevertheless may exist under the new rules of inadequate accessibility under the Discrimination Act (<http://www.do.se/om-diskriminering/vad-ar-diskriminering/bristande-tillganglighet/#1>). The first of these examples is that a customer may ask to have the menu read to him or her at a restaurant. The second concerns assistance in picking and packing groceries in a grocery store. The Equality Ombudsman has taken these two examples from Government bill 2013/14:198, p. 65.

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

The principal sanctions are the discrimination compensation award and the ability of the court to declare contract clauses and certain actions such as dismissals null and void in certain situations.

With regard to direct discrimination, the claimant must show unfavourable treatment and demonstrate a similar situation before the burden of proof shifts. In the author's opinion there is some confusion here in that, while the 'normal' rules on shifting the burden of proof should apply in principle to inadequate accessibility, the burden of proof concerning the reasonableness of an accommodation is somewhat unclear. At least in practice, until some case law is established, the burden of proof seems to rest with the employee or the person who is asserting that a reasonable accommodation should have been in place. The preparatory works concerning the introduction of the new discrimination form of inadequate accessibility are silent on the issue of burden of proof. The legal situation is thus the same as it was before. The Labour Court seems to be experiencing greater difficulties in shifting the burden of proof in reasonable accommodation cases.¹⁸⁰ In the author's opinion, the Labour Court has in general, at least historically, had a harder time with the concept of shifting the burden of proof compared with the ordinary courts.¹⁸¹ This is discussed in more detail in Chapter 6.3.

The 2009 Discrimination Act – although an improvement on the previous acts – is not very clear on shifting the burden of proof in cases concerning reasonable accommodations. Presumably this will be cleared up as case law develops.

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

There is no requirement in the Discrimination Act to provide reasonable accommodation in relation to grounds of discrimination other than disability in dealing with individual cases.

The Discrimination Act contains provisions in Chapter 3 Sections 1-7 requiring employers to undertake active measures to counteract discrimination and promote equal rights and opportunities in relation to the seven grounds protected under anti-discrimination law. This active duty has a public law character.

The new rules in Chapter 3 of the Discrimination Act, which entered into force in 2017, contain few material requirements, and no material requirement that can be said to have a reasonable accommodation character.¹⁸²

It may be asserted that there is an underlying reasonable accommodation issue concerning proportionality related to indirect discrimination, but the indirect discrimination cases need to be examined separately.

¹⁸⁰ The wording of Chapter 6 Section 3 of the 2009 Discrimination Act (Diskrimineringslagen 2008:567, adopted on 05.06.2008) should, however, clearly indicate to the Labour Court the importance of the rules on shifting the burden of proof. So does the reasoning behind the new formulation – see Government bill 2007/2008:95, p. 444. The burden was shifted, for example, in Labour Court case 2003 No. 47.

¹⁸¹ See e.g. the reference in SOU 2016:87 Betänkande av Utredningen om bättre möjligheter att motverka diskriminering, *Bättre skydd mot diskriminering*, pp. 441-442; Sandesjö, H. (2010), *DOMAR I DISKRIMINERINGSMÅL 1999 – 2009: En förstudie* (dnr A2011/188/DISK).

¹⁸² The new rules emphasise the work process and give considerable freedom to employers to choose which areas shall be given priority. Therefore, the rules in this chapter are not relevant with regard to reasonable accommodation.

The new discrimination form of inadequate accessibility does not apply to any ground other than disability. With regard to other grounds, the only viable option in the Discrimination Act perhaps involves relying on the concept of indirect discrimination.

With regard to religion, it is possible to assert that there is an underlying element of reasonable accommodation in relation to indirect discrimination in examining exceptions for a legitimate purpose where the means that are used are appropriate and necessary to achieve that purpose.

It could be said that the wearing of the niqab in schools raises the issue of a form of reasonable accommodation.¹⁸³ In some cases, schools have asked a person to remove their niqab. Such demands (not allowing a partial or full face covering in class) formally apply to everyone, but particularly affect certain Muslims. This may involve indirect discrimination, depending on the proportionality or 'appropriate and necessary' test. A relevant question is whether the legitimate purpose could have been solved by other means. Potentially, reasonable accommodation is an underlying element in assessing various cases of indirect discrimination.¹⁸⁴

In the 2017 midwife case decided by the Labour Court,¹⁸⁵ the applicant was essentially seeking a reasonable accommodation from the employer, meaning that she would not have to take part in abortions due to her religious beliefs. Applying a proportionality test, the court found that the demands made by the employer were appropriate and necessary. Thus, there was no indirect discrimination.

A somewhat different situation was featured in a 2017 appeal court case,¹⁸⁶ where a Jehovah's witness in a public unemployment programme who was receiving an activity grant was asked to apply for a job at the Swedish National Lottery and Gambling Monopoly. His job would have involved selling companies packages of lottery tickets with the customer's logo on so that they could give them out to employees or customers or use them for other promotional purposes. His job would thus not involve selling tickets to individuals. Given his religious convictions against gambling, he refused to go to the interview. He thus lost his place in the programme, including the activity grant. The court concluded that elements of indirect discrimination were present, but that the actions of the Government were disproportionate in relation to the negative consequences for the complainant. The state, given its evidence, failed to overcome the presumption of indirect discrimination.

In the author's opinion, while these cases do not necessarily clearly establish the idea of a reasonable accommodation duty outside the field of disability, the idea can be said to form part of the proportionality test that is to be applied in various indirect discrimination cases. These cases involved religion, which may be somewhat special due to its connection to freedom of religion. Nevertheless, it can also be asserted that, given the right cases, the idea could arguably apply to other grounds as well.

¹⁸³ Equality Ombudsman, Case 2009/103.

¹⁸⁴ Equality Ombudsman Case 2009/103 involved a school where these circumstances applied. In the end, the Ombudsman decided not to pursue the case because the school found alternative solutions, and allowed the woman to wear her niqab if such a solution did not work, for instance if the men could not be seated behind her.

¹⁸⁵ See Chapter 12.2. Labour Court, 12.04.2017, *E.G. v. Jönköping County*, Case 23/2017, available at: <http://www.arbetsdomstolen.se/upload/pdf/2017/23-17.pdf>.

¹⁸⁶ See Chapter 12.2. Svea Court of Appeal, 22.03.2017, *Swedish State Through the National Employment Agency v. Equality Ombudsman*, Case T 777-16, available at: <http://www.do.se/globalassets/diskrimineringsarenden/hovratt/dom-hovratt-arbetsformedlingen-anm-2014-1037.pdf>.

g) Accessibility of services, buildings and infrastructure

In Sweden, national law requires accessibility of services available to the public, and also requires buildings and infrastructure to be designed and built in a disability-accessible way.¹⁸⁷ As regards public authorities, there is a general duty to assess accessibility in all their activities and to develop accessibility plans to this end.¹⁸⁸ The new discrimination ground of inadequate accessibility, which has applied from 2015, does not apply to homes, nor to buildings where goods are sold or services provided. This is one of the areas in which case law must be developed, as there is a lack of clarity, or at least a gap in the law, concerning the common situation where a merchant of goods and services is renting premises from a building owner and the building itself is inaccessible.

As far as the author knows, there is no case law on this issue – nor is there on a number of others.

In Sweden, national law does not contain a general duty to provide accessibility by anticipation¹⁸⁹ for people with disabilities.

h) Accessibility of public documents

There are no rules requiring certain specific documents to be translated unless this is necessary for the individual.

There is a Braille Board. This is a state authority, and its task is to develop national guidelines for the use of Braille in Sweden.¹⁹⁰ It is a part of the Authority of Accessible Medias. According to an ordinance from 2010¹⁹¹ it shall, among other things, translate literature, newspapers and societal information into audio books and Braille. This service concerns the individual sphere. A person may ask for a private letter, a book, study material or anything else to be translated. If, for instance, a student needs his or her literature translated, this is the proper authority to turn to.

Since 2012, the board has also been assisting persons with problems holding a book or who have dyslexia.

One cannot say that there is a general practice with regard to Braille. The Tax Authority has information in sign language, as well as in some foreign languages, but not in Braille. The National Social Insurance Board has information in Braille.¹⁹² Each authority is required to translate information into Braille even if it is only one person that needs the information.¹⁹³ The authorities are free to choose which information is to be translated 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.

¹⁸⁷ The Planning and Building Act (Plan- och bygglagen 2010:900), adopted on 01.07.2010.

¹⁸⁸ Regulation on State Authorities' Responsibilities Regarding Implementation of the Policies on Disabilities (Förordning om de statliga myndigheternas ansvar för genomförande av funktionshinderspolitiken 2001:526), adopted on 26.06.2001.

¹⁸⁹ If the building permit has been adhered to and a healthcare provider cannot accept a patient with a disability, the discrimination ground of inadequate accessibility applies. Adherence to the building permit is to the healthcare provider's benefit. The most important factor will be the assessment of economic and practical difficulties. If this is too costly, the patient can be asked to turn to another provider. The fact that a cheap solution was missed when the building was constructed will not be taken into account. There is no duty of anticipation outside the normal building regulations.

¹⁹⁰ The Braille Board – see: <http://www.mtm.se/punktskriftsnamnden>.

¹⁹¹ Ordinance with Instructions for the Authority for Accessible Media (Förordning med instruktion för Myndigheten för tillgängliga medier 2010:769), adopted on 23.06.2010.

¹⁹² See: <http://www.mtm.se/punktskriftsnamnden/namnden/>.

¹⁹³ 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 these. During this discussion, it might become clear that a certain document is not needed.

3 PERSONAL AND MATERIAL SCOPE

3.1 Personal scope

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

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

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

a) Protection against discrimination

In Sweden, the personal scope of anti-discrimination covers all natural persons but in general does not cover legal persons for the purpose of protection against discrimination. This does not follow from a specific article. Some Sections of Chapter 2 of the Discrimination Act contain wording such as 'the job seeker', 'the child, pupil or student' and so on, where it is obvious that a legal person cannot fall under the protected category. In other cases where the wording is unclear there is a general statement in the preparatory works that legal persons are not protected.¹⁹⁴

The Discrimination Act thus generally protects natural persons.¹⁹⁵ Nevertheless, as regards the act's applicability to working life, the general 'concept of employee' is in the background – a compulsory concept, which is not for the parties concerned to decide upon. Within this concept it is perfectly possible for the Labour Court, in the last instance, to look beyond or ignore the fact that a contract may be agreed between the employer and a legal entity run by the 'employee' alone.

The former four Ombudsmen against discrimination have unanimously criticised the fact that no explicit protection against discrimination is provided for legal persons, something that they concluded is required by the directive.¹⁹⁶ In 2006, the Discrimination Inquiry Commission proposed a protection also for legal persons in a number of (but not all) areas covered by non-discrimination legislation.¹⁹⁷ However, legal persons still have no explicit protection – which is potentially a problem in relation to the directive.

b) Liability for discrimination

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

¹⁹⁴ Government bill 2007/08:95, p. 91.

¹⁹⁵ Government bill 2007/08:95, p. 90.

¹⁹⁶ The Ombudsman against discrimination due to sexual orientation, Hans Ytterberg, argues in the following way: 'First of all, we have pointed to the fact that Art. 3(1) of the Directive provides that the Directive shall apply to *all* persons and that recital 12 states that *any* direct or indirect discrimination as regards the areas covered by the Directive should be prohibited throughout the Community. Furthermore, membership in employers' associations (which is one area explicitly covered by the Directive) is almost exclusively relevant to 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'.

¹⁹⁷ SOU 2006:22, from p. 332.

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

a) Protection against discrimination

In Sweden, the Discrimination Act does not cover legal persons in relation to the protection against discrimination. Only natural persons are covered. However, in the author's opinion, if the matter is tested, it is not impossible that a court might find a sufficient nexus between a natural person and a legal person, given the right circumstances. This could be done by interpreting Swedish law in conformity with the directive so that some protection is provided in the private sector.

b) Liability for discrimination

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

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

A police officer arresting a criminal is a situation where the Discrimination Act does not apply. However, if the same police officer gives advice to an ordinary citizen an hour later and treats this citizen unfavourably for a reason connected to a ground of discrimination, this activity may fall under the Discrimination Act (Chapter 2, Section 17). In such a case, it will be the Police Authority (at the appropriate level) that will be held responsible under the Discrimination Act. It is the employer, the service provider etc. that are held responsible under Chapter 2 of the Discrimination Act: it does not matter whether it is a natural or legal person, nor whether it is a public or a private body.

3.2 Material scope

3.2.1 Employment, self-employment and occupation

In Sweden, the Discrimination Act applies to all sectors of private and public employment, self-employment and occupation, including contract work, self-employment, military service (not age) and holding statutory office. 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 by case law when employees act outside their authority to an extent that is problematic. Furthermore, the legal concept of employer may be too narrow, as the employer is regarded as the legal person itself or the natural person who as a representative of this legal person makes decisions regarding the employees. The employer is thus directly responsible only when an employee discriminates against another employee *and* the latter is subordinated to or dependent upon the former.¹⁹⁸

¹⁹⁸ There is a general line of thinking on vicarious liability that is problematic, and Chapter 1 Section 4 point 5 and Chapter 2 Section 1 of the Discrimination Act (Diskrimineringslagen 2008:567, adopted on 05.06.2008) provide two examples of this general thinking. See Labour Court 2007 No. 45 and 2011 No. 19. In these two cases, it is obvious that the applicant/trainee had reason to believe that the person who was allegedly behaving in a discriminatory manner was acting on behalf of the employer, but there was no protection for persons acting under such a belief, however well founded that belief may have been.

2. Discrimination and harassment by fellow workers or third parties is not directly prohibited.
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 by the other).¹⁹⁹
4. Discrimination against legal persons is not prohibited in working life.

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

In Sweden, national legislation prohibits discrimination in the following areas: access to employment, to self-employment or to occupation, including selection criteria, recruitment conditions and promotion, whatever the branch of activity and at all levels of the professional hierarchy, 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 (Chapter 2, Section 10). Professional organisations are prohibited from discriminating against the self-employed as well as the employed (Chapter 2, Section 11). Permits, certification and financial support are examples of areas covered by these two provisions. There are other provisions in the Discrimination Act which apply to self-employed persons as well as to employed persons and that offer both groups the same protection. A self-employed person can also be discriminated against by a service provider if he or she needs a service as a customer or client (Chapter 2 Section 12), for instance if a painter buys a car for his firm.

However, no prohibition in the Discrimination Act is applicable between two or more self-employed business partners. Suppose that a private company needs a big paint job done. They want to hire four different persons. Three of them raise objections against the fourth because of her religion or sex. They convince the company not to give her a contract and to give the job to someone else – or, if she gets the contract, they harass her. There is no specific prohibition that covers this scenario. In his Sexual Orientation report of 28 July 2004, the Ombudsman Against Discrimination on the Ground of Sexual Orientation, Hans Ytterberg, made the following remark:

‘With respect to self-employment, the [now repealed 1999 Sexual Orientation Discrimination Act] does not seem to fully implement the directive. Self-employed business partners, for example, apparently are not protected against harassment or other forms of discrimination from one another, a situation which to me clearly seems to be covered by the directive (see Arts. 2(3) and 3 of the directive). It is also a situation which has appeared in the requests for advice and support that the Ombudsman’s office has come across since the entering into force of the Act.’²⁰⁰

This critical remark can be directed at the 2009 Discrimination Act as well.²⁰¹

¹⁹⁹ Chapter 2 Sections 10 and 11 apply to the legal person that distributes financial support, decides on qualifications, issues authorisations or provides other benefits to members or the general public. No prohibition in the Discrimination Act (Diskrimineringslagen 2008:567), adopted on 05.06.2008, is applicable between two self-employed business partners.

²⁰⁰ See the quote in *REPORT ON MEASURES TO COMBAT DISCRIMINATION*, Directives 2000/43/EC and 2000/78/EC, Numhauser-Henning, A., *COUNTRY REPORT Sweden 2005*, p. 35.

²⁰¹ The reader is invited to reflect on whether or not self-employed persons should be protected against discrimination by each other according to the directive. It depends on the interpretation of Articles 3.1(a) and 2.3.

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

In Sweden, national legislation prohibits discrimination in the following areas: access to employment, including selection criteria, recruitment conditions and promotion, whatever the branch of activity and at all levels of the professional hierarchy for the five grounds in both private and public sectors as described in the directives.

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

3.2.3.1 Occupational pensions constituting part of pay

Occupational pensions are, in parallel with the jurisprudence of the CJEU, considered to be a form of pay, and are thus covered by the ban on discrimination.²⁰²

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

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

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

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

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

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

²⁰² See, for instance, Labour Court 2009 No. 15, *Equality Ombudsman v. Stryker AB* (judgment of 28.01.2009) <http://www.arbetsdomstolen.se/upload/pdf/2009/15-09.pdf>.

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

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

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

3.2.6.1 Article 3.3 exception (Directive 2000/78)

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

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

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

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

The Discrimination Act should meet the requirement of Article 3(1)(f) of Directive 2000/43/EC. Discounts on services such as trains and municipal leisure facilities fall under the provision on goods, services and housing (Chapter 2, Section 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 on the basis of 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 crime of unlawful discrimination set out in the Swedish Penal Code (16:9) contains some provisions making it a criminal offence for anyone running a private business to treat customers unfavourably in the provision of goods and services because of their sexual orientation, religion or ethnicity. The provision also covers anyone employed in such a private enterprise or acting on behalf of it, as well as anyone acting in their capacity of employee within the public administration, when dealing with the public. This means that discriminatory treatment in areas such as healthcare, education and social security can be considered a criminal offence under certain circumstances.

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

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

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

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

Migrants are treated in the same way as Swedish citizens, provided that they have a right to live in Sweden. An EU citizen who has no money to live on and no reasonable chance of finding a job, has a right as an EU citizen to visit Sweden for three months but no right to settle and to rely on public services there.²⁰³

An asylum seeker, on registering with the Migration Board, may, upon request,²⁰⁴ obtain education for his or her children. For parents with a permanent or time-limited residence permit, there is a duty to send their children to school between the ages of 6 and 16, just like for Swedish parents. The Discrimination Act provides protection for all of these groups.

Today, Sweden has a relatively restrictive refugee policy. Only refugees (those subjected to oppression directed at a specific person) have a right to family reunification. Alternative protection grounds (*alternativt skyddsbehov*) such as the war in Syria give rise to a time-limited right of residence (in that the war may end and the country may become safe – or at least safer).

In 2017, 25 666 persons applied for asylum in Sweden. Of these, 8 507 were children, including 1 336 unaccompanied minors.²⁰⁵ The Child Ombudsman Report of 2017 describes problems with entering education. Once those problems are solved the main obstacles lie within the asylum process. It can take a long time, and the child may have to stay at an asylum centre. Uncertainty about their future will affect their studies, and this may lead in turn to a decision to reject their application and to their expulsion from Sweden.

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

The Swedish Child Ombudsman is critical towards Sweden for not addressing the criticism from the UN Committee on the Rights of the Child. The Ombudsman does not think that Sweden is directly violating the UN Convention on the Rights of the Child, but does think that Sweden has serious shortcomings with respect to the convention.²⁰⁶

The debate in Sweden is a children's rights debate rather than a discrimination debate, and the national right to decide who stays in Sweden and who is expelled is at the centre

²⁰³ In the public debate in Sweden, they are often called EU migrants.

²⁰⁴ The child of an asylum seeker has a right, but not a duty, to attend school. The Child Ombudsman has issued a critical report concluding that there should be a duty to attend school for these children and a time limit of one month from arrival to the start of their education. See: <https://www.barnombudsmannen.se/barnombudsmannen/vart-arbete/arsrapporteringar/vi-lamnade-allting-och-kom-hit-2017/>.

²⁰⁵ Swedish Migration Authority (Migrationsverket) (2017), 'Inkomna ansökningar om asyl' (Asylum applications 2017), available at: <https://www.migrationsverket.se/download/18.4100dc0b159d67dc6146d7/1514898751102/Inkomna%20ansökningar%20om%20asyl%202017%20-%20Applications%20for%20asylum%20received%202017.pdf>.

²⁰⁶ Child Ombudsman (2017), *Barn på flykt: Barns och ungas röster om mottagandet av ensamkommande* (Children on the run: Voices of children and young people concerning the reception of unaccompanied minors), p. 16, available at: https://www.barnombudsmannen.se/globalassets/dokument-for-nedladdning/publikationer/barn_pa_flykt_webb.pdf.

of it. The question is to what degree a child of an illegal immigrant has rights independent of the asylum grounds invoked by their parents.

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

a) 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 as of 2015, inadequate accessibility, will most likely be effectively applied together with the education legislation. If, for instance, a municipality does not fulfil its duties under the School Act, the extra sanction of a discrimination compensation award may apply.

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 provide a child with a disability with as normal a life as is possible. This means that staying with the parents is preferable to living in an institution, and that going to a mainstream school is preferable to going to a special school.

For the new form of discrimination (from 2015), inadequate accessibility, Chapter 1 Section 4 point 3 of the Discrimination Act relies on other legislation, for example the School Act (2010:800), to formulate the demands that are reasonable. 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.²⁰⁷ This provision applies to all pupils, but pupils with disabilities are more likely than other groups to be denied a place at their school of choice for this reason.

When it comes to reasonable accommodation in pedagogical circumstances, the starting point consists of conflicts when the child (through its parents) wants to enter an ordinary class and get support to be able to stay in this class, but the local authority wants to place the child in a special class for children with disabilities, and the local authority wins. The motive is that a local authority has a duty under the School Act to provide an education according to every child's needs.

If the child (through its parents) asks to be placed in a special class and this request is denied, the new form of discrimination, inadequate accessibility, may apply. Failure to fulfil the requirements of the School Act may, since 1 January 2015, result in a discrimination compensation award.²⁰⁸

b) Trends and patterns regarding Roma pupils

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

²⁰⁷ School Act (Skollag 2010:800), adopted on 23.06.2010, Chapter 10, Section 30.

²⁰⁸ The importance of the discrimination award is that it raises the victim's potential level of compensation. This can be illustrated by Appeal Court for Western Sweden case T-2957-15, *School Inspectorate v. Municipality of Marks* (judgment 15-12-22). In this case, a teacher had put Scotch tape over the mouth of a three-year-old pupil for a short time. This treatment was degrading (but not connected to any discrimination ground). The School Inspectorate wanted damages under the School Act at the same level as the discrimination awards under the Discrimination Act (Diskrimineringslagen 2008:567, adopted on 05.06.2008). The court of appeal disagreed and allowed only the lower level of damages in accordance with normal civil law principles. In Sweden, damages of this type are not meant to achieve a preventive effect.

In Sweden, Roma pupils encounter severe obstacles in the education system. To a large extent, however, intentional segregation is not currently the cause of this. Roma people often live in relatively acceptable housing conditions and go to the same schools as the children of the majority 'ethnic Swedes'. If they want to learn Romani Chib (the Romani language) they are supposed to get extra lessons, like the children of other national minorities.

The specific situation of Roma in the Swedish schooling system with regard to discrimination is described in the former (ethnic) Discrimination Ombudsman's report 'Discrimination against Roma in Sweden' from 2004, which was followed up in the 2012 report by the Equality Ombudsman, 'Roma rights' (*Romers rättigheter*). The work carried out on discrimination complaints concerning Roma can be seen in the reports above. The subjects of these complaints cover public services, housing and employment. A general overview can be found in a Report from the Swedish National Agency for Education, 'Roma in School'. (*Romer i skolan*).²⁰⁹

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

Municipalities have a duty to arrange minority language education, although it is difficult to assert that people have the right to demand it. One pupil is enough to activate this duty. However, when the Swedish National Agency for Education reported back to the Government in November 2013, 6 % of school heads said that the conditions necessary to provide language education did not exist.²¹⁰ As a part of the National Roma Strategy, five municipalities have become pilot areas and received state funding for, *inter alia*, improving education. In these municipalities, Roma pupils were seldom encouraged to take the minority language classes, and the problems of finding qualified teachers sometimes led the municipalities to hope for low attendance.²¹¹

Some important legal background to this discussion is provided by a case that the Equality Ombudsman took to court, claiming that the failure to provide language education in Romani Chib violates the now repealed 2006 Act on a Ban Against Discrimination and Other Degrading Treatment of Children and Pupils. The Equality Ombudsman argued that, with regard to national minorities, the treatment of children with Swedish as their mother tongue is the relevant measurement of a comparable situation.²¹² If they actively seek such a teacher on the national labour market, for instance, they should be equally active in finding a teacher in Romani Chib.

The Ombudsman lost the case.²¹³ The district court stated that the relevant measurement of a comparable situation lay with other minorities. The municipality had not worked less hard to find teachers of Romani Chib compared with the mother tongues of other minorities, including refugees. The judgment was appealed, but Göta Court of Appeal decided not to grant the appeals request.²¹⁴ From this case it follows that, even though there is a duty for the municipalities to provide minority language education, there is no effective legal remedy if this does not happen. There is no corresponding right on the part of the pupil to require this education.

²⁰⁹ Swedish National Agency for Education. Report 2007 No. 292.

²¹⁰ Swedish National Agency for Education (Skolverket) (2013), *Report on Governmental Assignment*, 28.11.2013 Dnr 2012:518, p. 3. More than 50 school heads out of 886 gave this answer.

²¹¹ Swedish National Agency for Education (Skolverket) (2013), *Report on Governmental Assignment*, 28.11.2013 Dnr 2012:518, p. 3.

²¹² Equality Ombudsman, 11.11.2010 OMED 2007/1109 Act 116, p. 4.

²¹³ Eksjö District Court, Case T 1395-09, *Equality Ombudsman v. Vetlanda Municipality*, judgment of 21.10.2010. <http://www.do.se/globalassets/diskrimineringsarenden/tingsratt/dom-tingsratt-vetlanda-kommun-omed-20071109.pdf>.

²¹⁴ Göta Court of Appeal, case T 3264-10.

In the 2013 report, a majority of school heads reported that their schools did not teach from a Swedish Roma perspective with regard to Roma culture, language, history or religion.²¹⁵ In 2014, detailed information was produced in order to assist schools regarding how a Roma perspective could be introduced concerning Swedish history, societal knowledge and so on.²¹⁶ Each school has been given both materials for pupils and guidance for teachers.²¹⁷

The author thinks it is fair to say that the authorities are paying some attention to the Roma situation. However, the individual rights approach of the Discrimination Act is largely absent from this work with regard to education. Furthermore, despite the ongoing government activities, the activities being carried out lack a sufficiently meaningful empowerment perspective in the author's opinion.

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 concerning goods, services and housing in Chapter 2 Section 12 of the Discrimination Act applies to all grounds, and to all forms of discrimination as described in Chapter 1 Section 4 of the Discrimination Act.

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

The prohibition of all forms of discrimination applies to the disability ground with regard to goods, services and housing (although inadequate accessibility is sometimes exempted).²¹⁸ This has been the case since the 2003 Act on Goods and Services. Insurance companies frequently use medical conditions for risk assessments, and there is no need for a legal exemption. In 2011 Stockholm District Court stated:²¹⁹

'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

²¹⁵ Swedish National Agency for Education (Skolverket) (2013), *Report on Governmental Assignment*, 28.11.2013 Dnr 2012:518 p. 3.

²¹⁶ The material can be found at: <https://www.skolverket.se/skolutveckling/inspiration-och-stod-i-arbetet/stod-i-arbetet/kampanj-stodpaket-undervisa-om-romer> and <https://www.skolverket.se/skolutveckling/inspiration-och-stod-i-arbetet/stod-i-arbetet/material-for-att-undervisa-om-nationella-minoriteter/undervisa-om-den-nationella-minoriteten-romer>. The Equality Ombudsman has a role in promoting the use of this material. Equality Ombudsman Annual Report 2015, p. 22 (Ds 2014:8).

²¹⁷ Government White Paper 2016:44, from p. 66.

²¹⁸ See Discrimination Act Chapter 2 Section 12 c. Exemptions apply to housing (for private persons) and to requirements to adapt buildings unless the requirements are specified either in the building permit or in the formal notice permitting the building work to start. As of 01.05.2018, the exemption for companies with less than 10 employees will no longer be in force.

²¹⁹ Stockholm District Court, case T 20377-09, *Equality Ombudsman v. Trygg Hansa* (judgment of 08.03.2011), p. 11, available at: www.do.se/globalassets/diskrimineringsarenen/tingsratt/dom-tingsratt-trygg-hansa-ho-2007371.pdf.

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

According to the author, the situation with regard to disability is problematic. An exemption is necessary with regard to age and the insurance sector, because actuarially correct assessments would, if applied, amount to statistical discrimination if age was a covered area. 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 potentially have been decided differently.

In 2013 another case following the same line of reasoning was decided. Svea Court of Appeal found discrimination because the insurance company had denied insurance without assessing a child with a hearing impairment with enough consideration to the medical condition of this particular child. If the statistics are accurate enough with regard to the individual, statistical discrimination is not considered to be a form of direct discrimination with regard to insurance and disability.²²⁰

All of this leads to the question of whether or not a country that extends the prohibition of discrimination to areas outside the directives is free to define the concept of direct discrimination more narrowly compared with the directive within those areas.²²¹

3.2.9.1 Distinction between goods and services available publicly or privately

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

The Discrimination Act applies to:

'persons who *outside the private or family sphere* are offering goods, services or housing to the public'.²²²

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

If an item is offered to the general public through a newspaper advertisement or on a sales website, it may be regarded as being outside of the private or family sphere. Selling a car or renting out a room can fall within the family sphere if it happens only occasionally. However, if someone rents out a room regularly and advertises it as soon

²²⁰ Svea Court of Appeal, *Equality Ombudsman v. If Insurances*, case T 1912-13 (judgment of 08.10.2013), at: <http://www.do.se/globalassets/diskrimineringsarenen/hovratt/dom-hovratt-if-skadeforsakring-anm-20111922.pdf>.

²²¹ The European Court of Justice regards statistical discrimination as a form of direct discrimination. Case C-236/09 (*Test Achats*), where the insurance providers were not allowed to use the sex of the customer in order to determine insurance fees, is a prime example of that. The fact that men statistically have more accidents than women is not a valid defence for directly using a person's sex to determine the insurance fees for cars. However, with regard to disability and insurance, statistical differences between persons with a disability and persons without makes them not comparable, and thus a presumption of discrimination cannot arise. 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 CJEU. The Swedish Discrimination Act could have extended the protection for disability to services and then exempted the insurance sector, as in Directive 2004/113. However, extending the protection for disability to the insurance sector and then defining a comparable situation as if statistical discrimination is not a form of direct discrimination would have been confusing. If an EU concept such as direct discrimination is used, then it should (according to the author) be used correctly.

²²² Discrimination Act (*Diskrimineringslagen* 2008:567 adopted on 05.06.2008), Chapter 2, Section 12, point 1.

as it is free, that may be regarded as falling within the public sphere. A private person's pursuit of an extra income may be considered to be within the public sphere.²²³

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

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

Migrants are treated like everybody else, provided that they have a right to take up residence in Sweden. A landlord taking higher rent from refugees due to their refugee status violated the prohibition concerning ethnic discrimination in 2010.²²⁴

An asylum seeker is the responsibility of the Migration Board. If they receive a temporary residence permit and are registered in the Population Register (*Folkbokföringsregistret*)²²⁵ or if they receive a permanent residence permit, responsibility is transferred to a municipality and they are then treated in the same way as other residents.

When a refugee family applies for a normal municipal apartment, they shall have the same social priority as Swedish families in similar situations – i.e. the worse their current housing situation is, the higher the social priority. Sweden has a severe housing shortage, and young Swedes with moderate incomes have problems entering the housing market. The same applies to adult migrants. They have to remain with their parents, sleep on friends' couches or share small apartments with others in order to be able to pay high black-market rents. The municipalities have thus been forced to think outside the box to accommodate newly-arrived immigrants.²²⁶

A migrant thus has the same right as anyone else to move, to apply for rental contracts or to buy housing on the open market. If they are not wealthy or well-connected,²²⁷ the only realistic option is to stay in their municipality. There, they can be on the waiting list²²⁸ for municipal housing, and they should at least be able to get temporary housing there.

The Discrimination Act prohibits preferential treatment and discrimination concerning housing, regardless of which group gets the preferential treatment. Newly constructed municipal houses and apartments for families to rent are by and large distributed on a needs basis, and migrants' needs are regarded equally alongside those of 'ethnic Swedes'. Temporary housing has so far been of such a low standard and has attracted such a high level of stigma (in particular, it is a prime target for racist violence) that young Swedish people have not applied for it.

²²³ Compare Government bill 2007/08:95, p. 247 and Fransson-Stüber (2015), *Diskrimineringslagen: en kommentar* (The Discrimination Act: A Commentary), p. 314.

²²⁴ Göta Court of Appeal, case T 1666-09, *Equality Ombudsman v. Skärets fastigheter AB*, (Judgment of 25.02.2010), available at: <http://www.do.se/globalassets/diskrimineringsarenden/hovratt/dom-hovratt-skaret-fastighetsbolag-omed-20068982.pdf>.

²²⁵ Some persons with a temporary residence permit may remain the responsibility of the Migration Board if they are not registered in the population register. If so, they have no right to demand housing or housing benefits from the municipality (a change in 2017). The issuance of a temporary residence permit thus does not automatically give a person a right to enter the housing market with the same support as nationals.

²²⁶ See: <https://www.hemhyra.se/nyheter/desperat-jakt-pa-flyktingbostader/>. This is a link to the Tenant Unions members' paper, which gives a reliable overview of the temporary solutions currently used by the municipalities. Some are similar to what ethnic Swedes must do; others, such as temporary housing, are immigrant specific. Many immigrants enter the black market and end up in overcrowded conditions.

²²⁷ It is not uncommon to have friends or family who arrived in Sweden earlier, who have a dwelling and who are willing to live in overcrowded conditions rather than forcing others to live alone in temporary housing conditions.

²²⁸ Many municipalities own larger housing companies, and these companies provide a great deal of the rental housing on the market. There is no rule requiring municipal housing companies to having a waiting list, but most do and complement it with social priority rules.

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

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

Housing falls under Chapter 2 Sections 12-12 c of the Discrimination Act. The Government bill²²⁹ to the Discrimination Act states that 'occasional instances'²³⁰ (*enstaka*) of selling or renting out a dwelling should be regarded as being within the private/family sphere. Selling an apartment or a house will thus often be exempted from the law.²³¹ A realistic scenario is that an estate agent presents two possible buyers to the seller and the seller chooses the lower bid due to ethnic reasons. As long as it is the seller's decision and the estate agent treats both buyers equally, there is no unlawful discrimination under the act.

Situation testing in different forms has been undertaken by, among others, the Tenants Association and researchers at Linnaeus University.²³² When the researchers sent out 500 identical applications signed with a name indicating 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 led to him being shown the apartment.²³³ Neither example could lead to a discrimination case, since no physical person had suffered less favourable treatment (*missgynnande*). There was no one who could go to court or to the Ombudsman, and the researchers themselves had not been discriminated against.

3.2.10.1 Trends and patterns regarding housing segregation for Roma

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

In Sweden, there is no registration of people according to their ethnicity, which means that it is not necessarily easy to determine how the Roma population lives. When segregation is studied in statistical materials, a proxy such as the birthplace of the individual or the parents can be used under certain circumstances. At the same time, this type of proxy provides no information concerning national ethnic minorities such as the Roma.

In principle, most Roma persons who have housing live in relatively good housing conditions in Sweden. However, a significant number of them are poor and require housing allowances, and they live in accommodation owned by municipal housing companies. They encounter considerable housing discrimination when they seek to buy apartments or houses or try to rent on the private or public market.²³⁴ Therefore, they

²²⁹ The Government bill is the document where the Government describes the new Act to the Parliament. If the Act is adopted in accordance with the proposal of the Government – as was the case with the Discrimination Act – this bill becomes the most important source for interpreting the wording of the new Act, at least before there is any case law. See Section 0.1.

²³⁰ 'Sporadic occasions' may be more than one occasion. A person may, for instance, sell their apartment and buy a new one with a new partner, separate, sell the apartment and buy another apartment. As long as the apartments are bought and sold for housing reasons, as opposed to financial reasons, the sales are sporadic occasions.

²³¹ Government bill 2007/08:95, p. 244.

²³² The Ombudsman Against Ethnic Discrimination, *Discrimination on the Swedish Housing Market* 2008:3.

²³³ Ahmed, A. and Hammarstedt M. (2007), *Discrimination on the housing market – a field experiment on the internet*, Växjö.

²³⁴ There are several studies using situation testing that indicate this, for instance the Ombudsman Against Ethnic Discrimination, *Discrimination on the Swedish Housing Market* 2008:3 and Ahmed, A. and

often end up living in municipal housing company accommodation, where waiting lists and certain selection criteria can be more objective. It should be pointed out that these apartments are generally of a good standard.

The Swedish housing market is highly segregated in the three biggest cities. This segregation is mostly two-dimensional. Some areas are 'Swedish-dense'. In those areas, the Swedish ethnic majority is predominant. Other areas are 'Swedish-sparse'. The typical ethnic neighbourhood in Sweden has no dominant group. The municipal housing companies are often the largest or at least among the largest landlords in many areas. It may be assumed that the average Roma lives in such a neighbourhood. There have been some cases where local politicians have made discriminatory statements like 'Vänersborg cannot absorb more gypsies'.²³⁵ Such comments have been made by representatives of public housing companies as well.²³⁶

The previous Ombudsman Against Ethnic Discrimination had about 50 housing cases each year.²³⁷ Many landlords have no formal waiting list system where prospective tenants can register their interest in renting an apartment.²³⁸ Minorities suspect discrimination when a landlord prefers to let an apartment remain empty instead of accepting them as tenants. Harassment by neighbours or the landlord is another common complaint. Termination of the rental contract, refusal to allow a trade²³⁹ of the apartment or denial of membership in a housing cooperative are also common complaints.²⁴⁰

Roma people have brought many housing cases to the Ombudsman over the years. One case from Lidköping District Court concerned a landlord who changed the lock in order to evict a Roma family. When the lease on the apartment was signed, the landlord mistook the ethnicity of the family. He thought they were from Thailand.²⁴¹ There are other cases in which landlords specifically refuse to let Roma rent apartments.²⁴²

Disability

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

When a building permit is issued, the municipality must be satisfied that the building conforms to the required accessibility standards for persons with disabilities. New buildings should thus have relatively good accessibility. However, a property owner

Hammarstedt, M. (2007), *Discrimination on the housing market – a field experiment on the internet*, Växjö.

²³⁵ Ombudsman Against Ethnic Discrimination, *Discrimination Against Romanies in Sweden*, Report on DO project 2002 and 2003, p. 16.

²³⁶ Ombudsman Against Ethnic Discrimination, *Discrimination Against Romanies in Sweden*, Report on DO project 2002 and 2003, p. 18.

²³⁷ There were 55 complaints submitted in 2008. Ombudsman Against Ethnic Discrimination, Annual Report 2008, p. 18.

²³⁸ Equality Ombudsman (2011), *Roma rights* (Romers rättigheter), p. 44. This is presented as a factor making discrimination harder to address.

²³⁹ The possibility of trading a first-hand contract for an apartment with another person under certain circumstances is a valuable legal right in the Swedish rental housing system.

²⁴⁰ The Ombudsman Against Discrimination, *Ethnic Discrimination on the Housing Market (Etnisk diskriminering på bostadsmarknaden* PM 2006-01-01).

²⁴¹ Lidköping District Court, case T-1596-06, *Ombudsman Against Ethnic Discrimination v. Jonslundstvädden* (judgment of 20.05.2008). The tenant was awarded SEK 50 000 (approximately EUR 5 600). Judgment not available on the internet.

²⁴² The Ombudsman Against Discrimination case No. 331-2006.

generally only comes in contact with these regulations when applying for a building permit.

The National Board of Housing, Building and Planning (*Boverket*) has issued rules (*föreskrifter*) regarding easily removable obstacles (*enkelt avhjälpta hinder*).²⁴³ These rules apply to public spaces, social security offices, the healthcare sector, infrastructure²⁴⁴ and services made available to the general public. A house, however, is not an area open to the general public, so a landlord owning a house consisting only of residential apartments cannot be ordered to improve accessibility under the threat of a conditional penalty.²⁴⁵ They can only be made to do such things when they need a building permit.

If a person with a disability needs an adaptation to their home, the person can apply to the municipality for a housing adaptation grant. This applies to rental property as well as to property owned by the person with a disability.²⁴⁶ A tenant cannot make such alterations to the apartment without the landlord's permission. The municipality checks that permission has been given and that the landlord does not require the adaptations to be removed if the tenant leaves the apartment. The most likely reason for a landlord to refuse is the cost of removing adaptations, which can be a nuisance for persons without a disability. There is also a removal allowance that can be applied for.

As inadequate accessibility does not apply to housing as a form of discrimination, a landlord is free to say no to any accommodation that falls outside what a non-disabled tenant is allowed to do under the Tenancy Act, even if all the costs are covered by grants or by the tenant on their own.

The freedom to continue to apply norms for people without disabilities, and hence without accommodations, to persons with disabilities (apart from instances where the Discrimination Act or some other statute clearly prohibits it) is a problematic area in Sweden. In a case where a building permit was denied to a person with a disability who needed a pool for medical reasons, this appeared to be viewed as discrimination in the form of failure to make a reasonable accommodation²⁴⁷ by the CRPD monitoring committee.²⁴⁸

²⁴³ The details are published in a book from 2005 by the National Housing and Planning Authority called *Enklare utan hinder* ('Easier without obstacles').

²⁴⁴ The legislation applies to airports, bus stations and so on. There is special legislation on accessibility concerning public transportation that does not involve the use of land or buildings.

²⁴⁵ Government White Paper SOU 2015:85 has proposed new legislation extending this duty to the commonly shared areas of a multi-apartment housing unit, but not to the apartments themselves. No legal changes have been adopted yet.

²⁴⁶ Section 4, Law on Housing Adaptation Allowances.

²⁴⁷ Sweden was found to have violated many articles, one of them being on discrimination. The decision does not specify that the discrimination was indirect. Other articles concerned matters such as the duty to provide medical services, which has some similarities with the discrimination form of inadequate accessibility. The decision focuses more on active duties to provide for necessary goods and services, rather than passive duties such as abstaining from discrimination.

²⁴⁸ CRPD/C/7/D/3/2011, *H.M v. Sweden*.

4 EXCEPTIONS

4.1 Genuine and determining occupational requirements (Article 4)

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

Chapter 2 Section 2 of the Discrimination Act is formulated 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 typical examples concerning this clause include those where a Muslim organisation has the right to demand that an imam be of the Muslim faith, or an organisation campaigning for equal rights for gays and lesbians or an interest organisation serving a certain immigrant group may have a right to require that, for some 'core' positions, the employees themselves should be homosexuals or should have the relevant immigrant background. At the same time, it is emphasised that exceptions from the prohibition of discrimination must be given a narrow interpretation.²⁴⁹ Concerning an organisation, only the positions that are 'visible' to the public or of particular relevance can come into question, not an entire organisation per se, and not automatically. The employer must, furthermore, have a strong motive for applying the exemption, and the position must clearly have required the qualification concerned. Religious communities do not have a special status under the Discrimination Act, but they are explicitly mentioned in the preparatory work, along with other examples.

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

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

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

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 under 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 exceptions.

Chapter 2, Sections 15-16, also covers enrolment procedures, admission tests and other examinations of personal circumstances under the National Total Defence Service Act

²⁴⁹ Government bill 2002/03:65, pp. 185-187. Government bill 2007/08:95, pp. 155-157.

(1994:1809). The act still applies, but nowadays the state does not force any person to do military service against their wishes. Conscription will be reintroduced in 2018.²⁵⁰

4.4 Nationality discrimination (Article 3(2))

a) Discrimination on the ground of nationality

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

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

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

Under Chapter 11 Section 11 of the Instrument of Government, Swedish citizenship is required for judges. Chapter 6 Section 2 says that Government ministers must have Swedish citizenship. The Chancellor of Justice, the Parliamentary Ombudsman and the three Auditors General are the other examples where Swedish Nationality is required by Instrument of Government.²⁵¹

Positions to which the person is elected by the Parliament require Swedish citizenship, in accordance with the Parliament Act (1974:153) Chapter 7 Section 11. This act has a semi-constitutional status. As regards other legislation, there are some (rare) occasions where Swedish citizenship is required.²⁵²

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

National origin and citizenship are two of many factors that can lie at the heart of ethnicity.²⁵³ The overlap is thus recognised by the law, and no person can be left unprotected. A stateless person will always have an ethnic/national origin. The word 'race' has been deliberately omitted. In Sweden, discrimination on this basis will be regarded as ethnic discrimination, being a ground similar to that of skin colour.²⁵⁴

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

a) Benefits for married employees

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

²⁵⁰ In March 2017 the Government decided to reintroduce conscription, starting in 2018. As only 4 000 out of a yearly cohort of 100 000 persons shall serve and as their willingness to serve shall be a selection criterion, there is a strong possibility of it becoming a reality only for those who want to serve.

²⁵¹ Government bill 2009/10:80, p. 333.

²⁵² See also SOU 2000:106, *Medborgarskapskrav i svensk lagstiftning*, where an inventory is made of the areas where citizenship requirements exist.

²⁵³ According to Chapter 1 Article 5 point 3 of the Discrimination Act (Diskrimineringslagen 2008:567, adopted on 05.06.2008), ethnic origin is defined as 'national or ethnic origin, skin colour or other similar circumstance'.

²⁵⁴ The reasons for omitting the word 'race' are discussed in Section 2.1.1 of this report. Although the author believes removal of the word 'race' does not violate EU law, this is not necessarily a positive development with regard to Directive 2000/43.

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

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

b) Benefits for employees with opposite-sex partners

In Sweden, it would constitute unlawful discrimination under national law if an employer provided benefits only to employees with opposite-sex partners.

When it comes to discrimination between married spouses and registered partners, as was pointed out by Hans Ytterberg in the Sexual Orientation Report of 28 July 2004, 'the whole *raison d'être* of the Swedish Registered Partnership Act²⁵⁵ was to create a legal framework for homosexual couples, which corresponds to that of civil marriage for heterosexuals'.

On 1 April 2009 the Swedish Parliament went one step further and decided to amend the Marriage Code to allow two persons to marry regardless of whether they are of the opposite sex or not. This modification entered into force in May 2009. At the same time, the Registered Partnership Act was repealed and registered partnerships were converted into marriages. This was done in order to emphasise that a homosexual family of parents and children is 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 under Chapter 1 Section 4 point 1 of the Discrimination Act.

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

In Sweden, there are no exceptions in relation to disability and health and safety, as permitted under Article 7(2) of the Employment Equality Directive.

The ordinary exception in Chapter 2 Section 2 of the Discrimination Act (genuine and determining occupational requirement) applies to the employer. Regarding persons with disabilities, it is relevant for the employer to take into consideration not only security issues and the health and safety of others at the workplace, but also the health and safety of the person with a disability. However, the burden of proof can sometimes be shifted to the employer, who then has to prove that the contested measure is necessary to protect health and safety.²⁵⁶ In Labour Court case 2003 No. 47,²⁵⁷ the risks of shift work for an employee with diabetes were not proven and the refusal to employ him was deemed to constitute direct discrimination.

²⁵⁵ Act on Registered Partnership (Lag om registrerat partnerskap 1994:1117), adopted on 23.06.1994; original preparatory work: bet. 1993/94:LU28. Now repealed.

²⁵⁶ Formally, Chapter 6 Section 3 of the Discrimination Act (Diskrimineringslagen 2008:567 adopted on 05.06.2008) applies to all forms of discrimination. In practice, a shift of the burden of proof has only happened in situations which could easily have occurred regarding other grounds such as sex or ethnicity (see for instance footnote below). The author knows of no case where the shift of burden of proof has been decisive in a reasonable accommodation case.

²⁵⁷ Labour Court 2003 No. 47, *Swedish Metal Workers Union v. Scandinavian Refinery Ltd (Scanraff) and Cooperative Employers Organisation* (judgment of 04.06.2003).

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 to direct discrimination in relation to age in Chapter 2 Section 2 points 3 and 4 of the Discrimination Act.

a) Justification of direct discrimination on the ground of age

In Sweden, it is generally possible to justify direct discrimination on the ground of age. Chapter 2 Section 2 point 3 of the Discrimination Act allows age limits without the need to justify them with regard to the right to a pension or to survivor's or invalidity benefits in individual contracts or collective agreements. The next point (point 4) 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 with 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 broad. Age limits are common in collective agreements, and the system as such works well according to the Government. Therefore, the courts are encouraged to look at a collective agreement in a holistic way, including its relationship to the relevant social security provisions, rather than singling out individual clauses in a collective agreement for scrutiny.²⁵⁸ At the same time, the Government rejected demands for a presumption of collective agreements being compatible with Directive 2000/78.²⁵⁹ Any benefit in a collective agreement can be seen as a 'certain advantage linked to employment' within the meaning of Article 6.1.b. In the author's opinion, the scope for justification is likely to become too broad unless the Labour Court makes a narrow interpretation of the law. Two examples from the preparatory work concerning conditions fulfilling a legitimate aim and normally being both appropriate and necessary are that:²⁶⁰

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

In Labour Court case 2011 No. 37,²⁶¹ the Labour Court made a narrow interpretation of the scope for different treatment with regard to age. The case concerned a redundancy situation regarding an airline's cabin crew personnel. According to the Employment Protection Act, the principle of seniority was to apply. Those persons who had been employed for the longest time were to have the highest level of job security. This rule is only semi-mandatory, however, and can thus be modified by collective agreements. A collective agreement in this case permitted the employer to dismiss all persons above the age of 60, as they were entitled to a full pension (roughly 70 % of previous pay) under the employer's pension scheme. The case concerned 25 persons.

²⁵⁸ Government bill 2007/08:95, p. 177.

²⁵⁹ Government bill 2007/08:95, p. 177.

²⁶⁰ Government bill 2007/08:95, p. 179.

²⁶¹ Labour Court 2011 No. 37, *Equality Ombudsman v. Aviation Employers (Flygarbetsgivarna) and Scandinavian Airlines System* (judgment of 04.05.2011) at <http://www.arbetsdomstolen.se/upload/pdf/2011/37-11.pdf>.

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

The Labour Court decided that there was direct discrimination because age and the pension rights were directly linked to each other. The Labour Court said that both the desire to distribute employment fairly between generations and the desire to ensure that the remaining employees were not all close to pension age were arguments that could be valid in defending different treatment according to age under Chapter 2 Section 2 point 4 of the Discrimination Act. Voluntary retirement schemes could thus be acceptable. However, it was not deemed 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 SEK 125 000 (EUR 11 700) in a combination of a discrimination compensation award and non-pecuniary damages under the Employment Protection Act (Lagen om Anställningsskydd).²⁶²

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

b) Permitted differences of treatment based on age

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

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

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

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

There is a specific exception in the Discrimination Act for age limits concerning pensions, survivor's benefits and disability benefits, in individual contracts and collective agreements.²⁶³

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

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

Within labour market policy regulations there are a number of rules which expressly refer to age, aimed at promoting the vocational integration of young and old people, respectively. Age limits are often uncontroversial. There is, for instance, a 'work guarantee' for people younger than 25. It was introduced as an amendment to the Regulation on a Work Guarantee for Young Persons, and has the aim of ensuring that a

²⁶² The reform of 2013 extending the protection for age discrimination did not affect the prohibition of discrimination in the labour market.

²⁶³ Discrimination Act (Diskrimineringslagen 2008:567 adopted on 05.06.2008) Chapter 2, Section 2 point 3.

young person gets a suitable place in an education programme or traineeship within three months of registering with the National Employment Agency.²⁶⁴

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

4.7.3 Minimum and maximum age requirements

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

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

4.7.4 Retirement

a) State pension age

In Sweden, there is no state pension age at which individuals must begin to collect their state pension. If an individual wishes to work up to a very old age or live on their savings, the pension can be postponed without any upper limit, with each month of postponement resulting in an actuarial increase of the pension level.

An individual can collect a pension and still work.

According to the Swedish statutory pension scheme introduced in 1998²⁶⁵ there is no fixed upper pension age. The income-related public pension scheme opens up for part-time or full-time pensions from the age of 61.²⁶⁶

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

However, the right to the basic pension scheme – the ‘guaranteed pension’ – requires the beneficiary to be 65²⁶⁷ years of age. Even this pension can be postponed and thus increased in accordance with actuarial principles.

b) Occupational pension schemes

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

²⁶⁴ Regulation (2007:813) on a work guarantee for young persons, (updated by SFS 2017:1165). The words ‘work guarantee’ have been put inside quotation marks because the act contains goals and not a legally enforceable guarantee.

²⁶⁵ Chapters 62-67 of the Social Security Code (Socialförsäkringsbalk 2010:110), adopted on 04.03.2010.

²⁶⁶ There is a political compromise backed by most of the political parties in the Parliament to raise this age to 62 in 2020 and to 63 and 64 with three-year intervals, but there is no legislation yet. See: <http://www.regeringen.se/pressmeddelanden/2017/12/blockoverskridande-overenskommelse-for-langsiktigt-hojda-och-trygga-pensioner/>.

²⁶⁷ There is a political compromise backed by most of the political parties in the Parliament to raise this age to 66 in 2023 and to 67 in 2026, however a person who has worked for 44 years shall still have a right to take it at 65. There is no legislation yet. See: <http://www.regeringen.se/pressmeddelanden/2017/12/blockoverskridande-overenskommelse-for-langsiktigt-hojda-och-trygga-pensioner/>.

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

An individual cannot, in many cases, collect an occupational pension and still work full-time with their employer.

There are over 300 occupational pension schemes in Sweden.

Generally speaking, occupational pension schemes contain (mostly flexible) rules on pensionable age. Pensions can thus normally be deferred if an individual wishes to work for longer, and they will provide more income in such cases.²⁶⁸ It is possible to collect a pension and still work. The age of 55 is the earliest age at which a pension fund can allow a person to start withdrawing their pension.²⁶⁹ Many occupational pension schemes thus have this age limit; 60 and 65 are other common age limits.

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

c) State imposed mandatory retirement ages

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

d) Retirement ages imposed by employers

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

Within employment law there is a right for the employee to stay on until he or she reaches the age of 67, despite what may have been agreed between the parties.²⁷⁰ At this point it is possible for the employer to unilaterally terminate the employment with one month's notice. This was accepted by the CJEU in the Hörnfeldt case.²⁷¹ On a general level, most Swedes accumulate a viable pension by the age of 67. This age limit is therefore proportional and can be defended as an integral part of the general labour market system.

However, in the Keolis case,²⁷² the employer legally dismissed bus drivers at the age of 67. The employer then offered to re-hire the staff on a fixed short-term hourly basis (for instance filling in at short notice for permanently employed drivers calling in sick). When they reached the age of 70, their employment was not renewed. This was considered to be direct age discrimination. The Labour Court stated that the permission to dismiss with regard to the Discrimination Act (or to refuse to prolong temporary employment) without an individual assessment exists only at the age of 67. Only at this age is there explicit permission in the Employment Protection Act for dismissals without just cause.²⁷³

²⁶⁸ Collective agreements on pensions are very diverse. The normal practice today is that a young person belongs to a prefunded system based on actuarial principles. Elderly workers quite often belong to a defined benefits system, and some systems have a combination of a defined contribution with guaranteed defined benefits for those with many years of participation. Such systems do not always work on actuarial principles (with regard to the defined benefit part) if the worker decides to postpone their retirement.

²⁶⁹ Act on Income Taxation (Inkomstskattelag 1999:1229 adopted on 16.12.1999) Chapter 58 Section 8 sets this age as the lowest possible for favourable tax treatment.

²⁷⁰ The rule also outlaws 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 (Section 32 a of the 1982 Employment Protection Act) has not yet been revised.

²⁷¹ European Court of Justice, Case 141/11, *Torsten Hörnfeldt v. Posten AB*, (judgment of 05.07.2012).

²⁷² Labour Court, Case 2015 No. 51, *Equality Ombudsman v. Keolis AB* (judgment of 16.09.2015).

²⁷³ In the Employment Protection Act, there is a free choice on fixed-term contracts once the worker is 67 or older. However, the Discrimination Act still applies to any refusal to prolong employment that may involve discrimination. This is problematic, as a fixed-term contract that expires when the person reaches the age of

e) Employment rights applicable to all workers irrespective of age

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

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

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

Regardless of the reason for the dismissal, the notice period (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 under Section 33 of the Employment Protection Act, and can thus be dismissed in a redundancy case. The same section also gives the employer the right to dismiss the worker with one month's notice at this age. Should the employer not do this, the old employee cannot be dismissed for personal reasons without just cause any more, but presumably the protection will be much weaker. There is no case law on this. Employers normally dismiss workers who reach 67 years. If they want to keep the worker, they give the worker a fixed-term contract - on which there is no restriction if the worker is 67 years or older, in accordance with Section 5 point 4 of the Employment Protection Act.²⁷⁴ The fact that the Discrimination Act could be applicable to the refusal to renew such a contract at an age significantly above 67 - as was decided in the Keolis case²⁷⁵ - was a surprise to many people.

Redundancies and collective agreements are problematic in Sweden. It is not unusual for central collective agreements to give people over the age of 60 access to early retirement if there is a redundancy situation.²⁷⁶ Such arrangements encourage the local trade union to agree to local collective agreements allowing elderly workers to be dismissed in redundancy situations instead of applying the last-in, first-out principle. If all those over the age of 60 are dismissed, it becomes a case of direct discrimination, which is prohibited.²⁷⁷ However, if 50 % of the employees over 60 whose preference was to work until early retirement are dismissed and 25 % of the younger workers are dismissed, it would become a case of possible indirect discrimination and, since collective agreements have strong standing in the Swedish labour market model, they are almost certain to survive a proportionality test. Facilitating the dismissals of elderly persons through local collective agreements is an important reason for employers to want central collective agreements providing early retirement for workers over 60 who are made redundant.

f) Compliance of national law with CJEU case law

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

67 can be a valid termination without the need to apply the special exemption for dismissals at 67.

²⁷⁴ See the Keolis case above (e).

²⁷⁵ Labour Court, Case 2015 No. 51, *Equality Ombudsman v. Keolis AB* (judgment of 16.09.2015).

²⁷⁶ See further discussions in Government White Paper 2012:28, pp. 316-320. The Government inquiry has found these collective agreements to be problematic because they encourage early retirement, something that the state pension system discourages.

²⁷⁷ See Labour Court 2011 No. 37, *Equality Ombudsman v. Aviation Employers (Flygarbetsgivarna) and Scandinavian Airlines System* (judgment of 04.05.2011). The case is described in Section 3.9.1.

4.7.5 Redundancy

a) Age and seniority are 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 due to a shortage of work.

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 under Section 22.

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

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

b) Age taken into account for redundancy compensation

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

Collective agreements for white-collar workers and for workers in the public/state sector sometimes provide packages including extra unemployment benefits, re-training on favourable terms and even early retirement if the worker being made redundant is over 60.²⁷⁸

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 by law are accepted within the social security field under Chapter 2 Section 14 b point 1 of the Discrimination Act.
- Age limits set in laws for goods and services are permitted under Chapter 2 Section 12 b point 1 of the Discrimination Act.
- Age limits in the insurance sector are permitted under Chapter 2 Section 12 b point 2 of the Discrimination Act.
- Minimum age limits for places that are allowed to serve alcohol is permitted under Chapter 2 Section 12 b point 3 of the Discrimination Act.
- Age limits set in laws governing healthcare and social services are also permitted under Chapter 2 Section 13 b point 1 of the Discrimination Act.
- The discrimination form of inadequate accessibility does not apply to housing under Chapter 2 Section 12 c point 1 of the Discrimination Act.

²⁷⁸ See further descriptions and discussions of such collective agreements in relation to the sustainability of the Swedish pension system in Government White Paper 2012:28, pp. 316-320.

- Inadequate accessibility as a form of discrimination does not apply to private persons under Chapter 2 Section 12 c point 2 of the Discrimination Act.
- A seller of goods or provider of services who has fulfilled the accessibility requirements in the building regulations at the time the premises were built cannot be required to undertake any further accessibility measures. This is stated in Chapter 2 Section 12 c point 4 of the Discrimination Act.
- Harassment with regard to age need not be investigated with regard to conscripts and persons in military education programmes under 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, the extent to which positive action is allowed depends on the ground (racial or ethnic origin, religion or belief, disability, age or sexual orientation) and the area of prohibition. There is no general clause allowing positive action. Concerning working life, there is a clause that allows positive action concerning sex.

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 protection provided for disability is 'asymmetric' as compared with, for example, the protection for ethnicity, which protects 'Swedes' and 'non-Swedes', the protection for the ground of sex, which protects men and women, and the protection for sexual orientation, which protects heterosexuals, homosexuals and bisexuals.

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

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

Ethnicity has an exception from the prohibition of discrimination regarding labour market policy activities and for starting or running a business (Chapter 2, Sections 39 and 10). Ethnicity and religion or other belief have an exception in the context of folk high schools and study associations (Chapter 2 Section 6). A right for members of certain religions to refuse military service is also specified (Chapter 2, Section 15).

There are no exceptions in the act concerning sexual orientation.

The Discrimination Act also contains rules on 'active measures'. From an EU law perspective, such measures are within the realm of positive action in a more general meaning. The act requires that employers continuously carry out goal-oriented work concerning all discrimination grounds so as to actively promote equality in working life.²⁷⁹ Education providers are also required to undertake continuous goal-oriented work with regard to all grounds (Chapter 3 Sections 1-3).

Both employers and education providers need to have a ready-made procedure in place to handle instances of sexual²⁸⁰ harassment and other harassment on any ground that may be reported by students/pupils/employees (Chapter 3 Sections 6 and 18).²⁸¹

²⁷⁹ Chapter 3 Sections 1-3 of the Discrimination Act (Diskrimineringslagen 2008:567), adopted on 05.06.2008.

²⁸⁰ Sexual harassment is harassment connected to sexual desire, and can happen between persons of the same sex as well as between persons of the opposite sex. In Sweden this is so uncontroversial that it would have been very strange to mention it in the law. There is at least one same-sex harassment case in the courts

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

b) Main positive action measures in place at the 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.²⁸² A list of the most commonly used positive action measures would thus require extensive research, especially if they are to be used as a basis for classifying Swedish positive action measures as mostly broad, social policy based or narrowly tailored, or as being quotas. The classifications in this report should therefore be considered preliminary. From the text below the reader can safely assume that quotas are very rare.

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

The inquiry into the rights of Roma people proposes state funding for locally determined labour-market activities designed to meet the needs of this group.²⁸³ The inquiry estimates that only 10 % of the Roma people in Malmö have a normal job on the open labour market.²⁸⁴ As a part of the National Roma Strategy, five municipalities have become test places and have received state funding for, *inter alia*, making sure that the National Employment Agency assists Roma persons in a better way. This has led to broad-based activities in the five municipalities. These initiatives have created positions called 'customer resource officials with a minority focus, who assist all minorities. However, all of them must either speak Romani or have a good knowledge of Roma culture.²⁸⁵ The municipalities have presented figures, for example, that 20 Roma persons received employment or 10 Roma persons received training places, but no one knows how many of them would have received jobs or training places anyway.²⁸⁶ No municipality reported training places reserved for Roma persons (which would be legal, as opposed to jobs reserved for Roma persons). The author would classify these measures as broad because they were implemented in a way that benefited all minorities – but with a special focus on Roma.

There is no longer a special labour market programme for newly arrived immigrants. Instead, they shall receive labour-market-based programme activities on terms as similar as possible to those of other people who are finding it hard to establish themselves on

that the author knows of. For reasons of anonymity the author refers here only to the Equality Ombudsman's case number ANM 2015/2431.

²⁸¹ With regard to employers, this duty includes victimisation too. As regards active measures, the Ombudsman works as a regulatory authority, visiting employers and universities, checking their equality plans and so on. If somebody fails to fulfil their duties, the Board Against Discrimination may – on the Ombudsman's application – issue an order to comply with a specific request before a certain date (or for the future), subject to a financial penalty under Chapter 4, Section 5 of the Discrimination Act. The financial penalty will gain legal force only after a district court has ordered the payment. The legality of the order itself – as well as the reasonableness of the amount – can be decided upon by the district court. As far as the author knows, a district court has never ordered such a payment, and applications to the Board Against Discrimination have been extremely rare.

²⁸² The Government takes such positive measures as well, for instance with regard to employment decisions and the selection of persons to lead government authorities.

²⁸³ Government White Paper 2010:55, p. 363.

²⁸⁴ Government White Paper 2010:55, p. 367. The estimate 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.

²⁸⁵ National Employment Agency, Report on Pilot Activities for Roma Inclusion 2015, p. 10.

²⁸⁶ National Employment Agency, Report on Pilot Activities for Roma Inclusion 2015, p. 15; example from Malmö.

the labour market. The new basic legislation is Act (2017:584) on Responsibility for Employment Promotion for Certain Newly Arrived Immigrants.²⁸⁷ Under this legislation, certain categories of persons such as immigrants, like all other persons seeking employment, must accept changes in their individual activity plans. They must further accept that, if they do not follow the plan, they shall be subjected to the same consequences as other job seekers. Where the old legislation described a right to Swedish language education, the new act emphasises the duty to do what the Employment Agency believes would facilitate the individual's potential to enter the labour market, for instance learning Swedish. If such duties are not fulfilled, financial support in the form of an activity grant may be reduced – or, if offences are repeated many times, they may be revoked altogether.

The Entry Recruitment Incentive (*instegsjob*) is a narrowly tailored programme, which supports newly arrived immigrants by providing a wage subsidy of up to 80 % to an employer who employs an immigrant who is learning Swedish and has received a residence permit within the previous 36 months.²⁸⁸

With regard to dismissals on grounds of redundancy, there is a provision in Section 23 of the 1982 Employment Protection Act that a person with a disability, having been accommodated at the workplace, may stay on despite the last-in, first-out principle, if this can be done without serious inconvenience to the employer.

As regards national minorities²⁸⁹ such as the Sami and the Roma, there are special rights and supportive measures regarding the use of their native languages as well as access to media²⁹⁰ – and, as regards the Sami, measures on land rights and reindeer management. From 2011 the Sami people have had their reindeer management rights recognised in the Constitution.²⁹¹ These are also examples of narrowly tailored positive action measures.

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

Some folk high schools cooperate with normal universities and let the university do part of the examination, and part of the programme can then be counted as an ordinary academic course, giving the student ordinary academic points. Other programmes are directed at people with very little educational background and, when admitting students to basic general courses, older students are often given preferential treatment by the folk high schools. The majority of folk high schools (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 Folk High School, and other folk high schools that can (and sometimes do) give courses aimed at and reserved for the Roma population. Creating educational programmes reserved for special groups such as immigrants, persons with disabilities or women is considered normal in this form of education.

²⁸⁷ Passed by the Parliament on 22.06.2017, entering into force on 01.01.2018.

²⁸⁸ Regulation (2015:503) on Special Employment Promotion. Passed on 25.06.2015, entering into force on 03.08.2015.

²⁸⁹ Sweden has five national minorities: the Sami, Swedish Finns, Tornedalians, Roma and Jews. See the Act on National Minorities and National Minority Languages, which entered into force in 2010.

²⁹⁰ See Government bill 2005/06:112 on public television and radio.

²⁹¹ Swedish Instrument of Government (Regeringsformen 1974:152), adopted on 28.02.1975, Chapter 2, Section 17.

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

There is no new latest form of positive action. Politically, the work guarantee for young people is important to the Government. So far, it has only resulted in regulations making adjustments to complement the original 10-year-old regulation.²⁹² The changes come from a Government bill on better adapting employment support to individual needs, with immigrants as the target group.²⁹³ The question that arises when helping immigrants is thus which adjustments need to be made through ordinary legislative acts (including the work guarantee for young persons), while not creating a new form of positive action for this group alone. The adjustments take the form of additions allowing extra time or consideration of the activities that newly arrived immigrants need to engage in as falling within their work requirement under the regulation.

One of the main goals of the educational changes was to make courses in Swedish a form of municipal adult education (*kommunal vuxenutbildning*). An immigrant learning Swedish should thus be in the same school class as a young native Swede catching up in any subject that he or she missed during secondary education. The present Government is in theory striving to make the ordinary wage guarantee system and the ordinary municipal adult education system – as well as all other general systems – work for immigrants as well.

²⁹² Regulations 2015:148 and 2015:512.

²⁹³ Regulation 2016:819 and 2017:108 changing Regulation 2007:813 on the Work Guarantee for Young Persons (*Förordning om jobbgaranti för ungdomar*); Government bill 2014/15:85 on Increased Individual Adaptation – More Effective Education in Swedish for Immigrants and Adult Education (*Ökad individanpassning – en effektivare sfi och vuxenutbildning*).

6 REMEDIES AND ENFORCEMENT

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

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

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

- a. Judicial proceedings in the Labour Court (starting in the civil court if the worker is represented by someone other than a trade union with a collective agreement or by the Equality Ombudsman).
- b. Judicial proceedings in the general court system.
- c. If a trade union with a collective agreement represents a member, there must be negotiations with a view to settling the conflict, which must take place before going to the Labour Court, according to Section 11 of the Co-Determination Act in conjunction with Chapter 4 Section 7 of the Labour Procedure Act (1974:371). Cases are often settled at this stage.
- d. The Equality Ombudsman negotiates with the employer before going to the Labour Court.²⁹⁴ There are more settlements than cases that go to court.

It is not possible, as a general rule, to use the administrative courts or procedures to address discrimination under the Discrimination Act. No administrative body can apply the Discrimination Act directly. However, there are examples where a discriminatory situation can be resolved by an administrative body and through the application of other laws and regulations. If, for instance, a parent gets a decision from the School Appeal Board concluding that the accommodation costs necessary for accepting their child to a school are not substantial,²⁹⁵ the school must take on those costs. This means that the discrimination issue has been resolved, but at the same time the decision does not lead to an award of discrimination compensation. Some state employment decisions can be appealed as well, and the claimant may obtain the job if they prove that they are better qualified. This means that the discrimination issue can be dealt with in this framework as well, although this type of proceeding cannot lead to a discrimination compensation award.

Along the same lines, on 1 July 2017 a mechanism was introduced in the education sector to bring an alleged violation of the Discrimination Act to the Higher Education Appeals Board in some situations. However, this does not include any possibility of obtaining a discrimination award; it is possible only to correct the discriminatory act or omission, for instance by replacing a tutor who has discriminated against a student.²⁹⁶

In the Labour Court, a trade union or the Equality Ombudsman can act on behalf of the worker; in the general court system, the Equality Ombudsman can act on behalf the claimant.

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

²⁹⁴ The law does not order this, but having the Labour Court as the only instance presupposes well-prepared cases, and that includes these negotiations. Chapter 4 Section 3 of the Discrimination Act gives the Equality Ombudsman the ability to decide on a financial penalty (which can be appealed to the administrative court) if the employer does not show up.

²⁹⁵ Chapter 9 Section 15 of the School Act (Skollag 2010:800 adopted on 23.06.2010), in conjunction with Chapter 28 Section 12 point 6.

²⁹⁶ Act 2017:282 Changing the Discrimination Act, adopted 13.04.2017.

Civil proceedings regarding working life under the Discrimination Act are to be dealt with in accordance with the Labour Disputes Act.²⁹⁷ Depending on whether the employer is bound by a collective agreement, whether the person who alleges discrimination is or is not a member of the trade union with the collective agreement, and whether the trade union is willing to take up the claim, the case may be heard in the first instance either by the district court (*tingsrätt*) with ordinary judges as in other civil cases, or the Labour Court (*Arbetsdomstolen*), in a special composition comprised of a majority of judges with a judicial background and a minority of members with a background in labour market organisations.²⁹⁸ Whereas it is the injured individual who has standing (*locus standi*) as the claimant at the district court, it is the trade union which has that position when claims are dealt with at the Labour Court at first (and last) instance. A lawsuit taken to the district court in accordance with the described rules may always be appealed to the Labour Court, whereas a decision of the Labour Court – whether at first or second instance – is not subject to further appeal. As has already been indicated, the Ombudsman can also bring a case directly to the Labour Court, with the individual's consent, if the Ombudsman considers that the case is important in relation to case law or for other reasons. When the DO takes on a claimant's case, the DO becomes the party to the case, assuming the claimant has provided a power of attorney.

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

The Equality Ombudsman may represent victims of discrimination in all areas covered by the Discrimination Act. Cases outside working life will be dealt with by the ordinary court system, i.e. the relevant district court in the first instance. Discrimination in connection with social security, for instance, (an example of an area that normally falls under administrative law) is thus dealt with under the general court system, and the ordinary rules on civil procedure apply.²⁹⁹

The relatively few cases that end up in the court system should not be taken as proof that action is not taken in cases of discrimination. A number of cases are settled out of court. The same is probably true concerning the trade unions. Most complaints are settled during the mandatory negotiations prior to a claim being presented to the Labour Court. In cases that are settled, the remedies are pretty much the same as those that apply in the case law of the Labour Court – or even better, since the parties concerned will lower their costs through an early settlement. It is also worth noting that settlements in discrimination cases can lead to other remedies beyond economic compensation. For example, compensation can be combined with employment, which is something a court could not order.

b) Barriers and other deterrents faced by litigants seeking redress

With regard to discrimination cases, inside but particularly outside the labour market, there are various obstacles for potential discrimination litigants, such as low levels of rights awareness, low levels of trust in the legal system, and the substantial economic risks related to litigation. As regards the general time limit under the Discrimination Act, a claim must be presented within two years of when the alleged discriminatory act took

²⁹⁷ Act (1974:371) on Labour Law Procedure.

²⁹⁸ As regards the Swedish Labour Court, see, for instance, the European Court of Human Rights judgment of 26.10.2004 in the case of *AB Kurt Kellermann v. Sweden*.

²⁹⁹ Some university or higher education cases may also be brought before the Board of Appeal for Higher Education.

place.³⁰⁰ Individuals can (but do not have to) rely on private attorneys, but this means an increase in the cost risks should the case be lost. The procedures are the same regardless of whether the case concerns a private sector or public sector employee. If the claimant asks for less than SEK 22 000 (EUR 2 060), a simplified small claims procedure may be used. This procedure is tailored so that a normal person in theory does not need an attorney. The right of the winning party to recover legal costs is limited in small claims cases.³⁰¹ For many people, the cost of going to court is a major hurdle, especially considering the cost risks of losing. Sweden has a loser pays system, meaning that, if the claimant loses they will be liable not only for their own lawyer's fees, but also for the winning party's lawyer's fees. There is no situation in which an enforceable decision can be made free of charge. Therefore, the ability of the Ombudsman or the trade unions to go to court on behalf of victims is very important for persons with limited means. When the Ombudsman or a trade union take on a case, it is as the named party, which also means that they are taking on the economic risk of losing the case.

A complex system of rather short time limits applies in working life.³⁰² Dismissal claims are regulated by the 1982 Employment Protection Act, which also sets out the applicable time limits. If the claim seeks to declare a dismissal null and void, the procedure could take place weeks from the occurrence of the act or – in certain cases – one month after the end of the employment. If the claim concerns only indemnification, it can take about four months. The 1976 Co-Determination Act applies to cases concerning wage compensation. Here, the general time limit is four months from gaining knowledge of the act, with a maximum of two years from its occurrence.³⁰³ Within these time limits, it is possible to bring a discrimination suit after the employment relationship has ended.

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

As regards the costs of litigation etc., both when the trade union takes on a claim and when this is done by the Ombudsman, they will cover the costs if the case is lost. This can be very important for the individual concerned. If the individual brings a claim to the court on their own, he or she risks having to pay the costs of the trial, including the winning party's lawyer's fees, should the case be lost.

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

³⁰⁰ Chapter 6 Section 6 of the Discrimination Act (Diskrimineringslagen 2008:567), adopted on 05.06.2008.

³⁰¹ There is a list of permitted expenses: one hour of legal aid at the current rate, a small claims fee, travel costs, costs for witnesses and translation costs.

³⁰² Chapter 6 Sections 4 and 5 of the Discrimination Act (Diskrimineringslagen 2008:567), adopted on 05.06.2008.

³⁰³ If someone brings an action as a result of a *notice of termination or summary dismissal*, the rules in the 1982 Employment Protection Act (LAS) apply. To have a dismissal declared null and void, the employer shall be notified about the claim within two weeks of the dismissal. A lawsuit shall be presented within two weeks thereafter or, if conciliation negotiations have taken place, within two weeks of the termination of such negotiations (Section 40 LAS). As regards damage claims, the employer shall be notified about the claim within four months after the damaging activity occurred, and a lawsuit shall be presented within four months after that or, should conciliation negotiations have taken place, within four months of terminating such negotiations (Section 41 LAS). With regard to *any other action*, the rules in the Co-Determination Act (MBL) apply. Conciliation negotiations must be demanded by the relevant trade union within four months of becoming aware of the damaging act and within two years of the act itself (Section 64 MBL). A lawsuit shall be presented within three months after terminating such negotiations (Section 65). If an employee cannot be represented by a trade union, he or she must present the claim to the court within four months of becoming aware of the damaging act and within two years of the act itself (Section 66 MBL).

7 of the Discrimination Act.³⁰⁴ In the author's opinion, this possibility is seldom used, as there is little clarity about how the courts will apply this exception to the loser pays rule. Rather than addressing what is an important issue concerning access to justice, the courts seem to be more concerned about ensuring a restrictive application of this exception to the general rule, particularly the Labour Court.³⁰⁵

Relevant criminal procedures may be initiated by a public prosecutor (or in very rare cases by 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.

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

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

In Sweden, the 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, in accordance with Chapter 4 Section 5 of the Labour Procedure Act. The Equality Ombudsman can also act on behalf of a claimant. The right of the Equality Ombudsman to represent a victim is subsidiary to a labour organisation's right to represent its members under Chapter 6 Section 2 point 3 of the Discrimination Act.

Chapter 6 Section 2 of the Discrimination Act gives non-profit organisations whose statutes state that they are to protect their members' interests the right to bring actions in their own name as a party representing an individual person. The association must have the consent of the individual and be suited to representing the individual in the case, taking account of its activities and its interest in the matter, its financial ability to bring an action and other circumstances. This right is subsidiary to that of a trade union in the employment field.

This provision on NGOs acting as parties was added to the law because of an interpretation of the minimum requirements of the EU anti-discrimination directives.³⁰⁶ At

³⁰⁴ The Equality Ombudsman cannot use this rule. It only applies to private persons. An anti-discrimination bureau, as a legal person under private law, would be able to use it. See, for instance, Court of Appeal over Scania and Blekinge case FT 1948-12, *Forum for Equal Rights v. IKEA* (judgment of 18.03.2013). An anti-discrimination bureau helped a mother to sue IKEA for not letting her disabled daughter play in the playroom. She demanded SEK 20 000 (EUR 2 200) as a discrimination award. IKEA admitted that it had treated her daughter badly. IKEA accepted SEK 20 000 as fair compensation but did not admit to discrimination. The case was tried by both the district court and the appeal court because the classification of the decision as discrimination or otherwise was important to both parties.

³⁰⁵ One significant example can be seen in Labour Court 2015 No. 57 from 2015 (30.09.2015). The claimant brought a disability discrimination case before a district court. He lost the case, but the court determined that the parties should be liable for their own costs, as the claimant had sufficient reason for at least taking the case to court. He appealed the case to the Labour Court, which came to the same judgment as the district court: there had been no discrimination. However, the Labour Court ordered the claimant to pay SEK 1 663 400 (EUR 156 322) as compensation for the winning party's legal costs.

³⁰⁶ See, for example, the reference in the Government bill referring to Article 7.2 in the Race Directive and Article 9.2 in the Equal Treatment in Working Life Directive.

the same time, prior to the change in the law, NGOs always had the possibility of providing assistance in the form of covering a victim's potential legal costs. However, this type of action was for many years outside of Sweden's legal and political culture, at least if the NGOs did not represent stronger interests in society (such as unions or employers' organisations).

Anti-discrimination bureaus³⁰⁷ in particular have been allowed to enter into cases as parties. Some have questioned whether the Discrimination Act gives them this right, but it now seems clear that they do have it.³⁰⁸

The reduction in the number of complaints dealt with by the Equality Ombudsman has led to increasing reliance by victims on the bureaus in particular, since the Ombudsman refers them to the bureaus as a potential source of advice and support. In this regard, it may be noted that the 2016 Government White Paper 2016:87, on measures to improve the implementation of the anti-discrimination principle, proposed a substantial increase in funding to the local anti-discrimination bureaus, given their increasing workloads.

Even beyond the work of the local anti-discrimination bureaus, civil society has been developing an increased awareness of the importance of being more proactive concerning the development of case law related to discrimination. The main LGBT organisation in Sweden, RFSL, has brought a number of cases in the administrative courts that involve discriminatory treatment (but not the Discrimination Act), partly with the help of local anti-discrimination bureaus. In addition, two disability organisations have received funding for projects to raise awareness of the law and to increase the potential for civil society to take cases to court.³⁰⁹ This is mentioned here since it is only in recent years that civil society organisations representing discriminated-against groups have seen the advocacy potential in taking on an enforcement role concerning the law.

Even if civil society is increasingly realising the need to get cases to court, they seldom have the economic resources that may be needed for effective representation. Thus, another idea that is developing involves the Fund for Discrimination Cases (Talerättsfonden),³¹⁰ which was established in 2017 by a number of equality and discrimination experts. The organisation is still in its initial stages, and its purpose is to raise money for a fund that can provide economic support at least for some strategic discrimination cases. It is thought that this could help encourage more private cases, thus providing a healthy 'competition' or complement to the work done by the unions and the Ombudsman.

It bears repeating that one key issue about the identity of the named party is that, other than in small claims cases, they risk being ordered to pay the winning party's legal costs – which can be substantial.

³⁰⁷ Local anti-discrimination bureaus are non-governmental organisations whose members are other organisations and sometimes individuals. The bureaus were created in order to combat discrimination on all grounds. They typically provide free legal advice to persons suffering from discrimination. The demands on their offices have increased substantially as the DO has increasingly concentrated on 'strategic' complaints and other means of dealing with discrimination other than through individual complaints, creating an increased inflow to the bureaus. They are increasingly looking at ways of taking cases to court. Among other things, they take part in public debate, arrange seminars for the general public and provide anti-discrimination training for the private and public sectors. The inspiration for their work came from similar bureaus in the Netherlands and the UK, and more indirectly from public interest law firms in the United States.

³⁰⁸ See, for example, Göta Court of Appeal, Judgment of 30.09.2011, *Örebro Rättighetscenter v. Götavi Invest AB*, Case No. FT 198-11, and *Malmö mot diskriminering*, the bureau that has been the most active in actually taking cases to court. Available at: <https://malmomotdiskriminering.se>, accessed 2 May 2018.

³⁰⁹ For information on the 'Law as a tool for social change' project, run by the Independent Living Institute, see: <https://lagensomverktvg.se>; for information on the 'From talk to action' project, run by Funktionsrätt Sverige (Disability Rights Federation), see: <http://funktionsratt.se/projekt/fran-snack-till-verkstad/>.

³¹⁰ Fund for Discrimination Cases – Talerättsfonden. See: <http://talerattsfonden.se>.

b) Engaging in support of victims of discrimination

In Sweden, any organisation is entitled to act in support of victims of discrimination. Assuming the victim has agreed, organisations (or at least individuals from such organisations) can provide support concerning complaints. According to Swedish procedural law, anyone can in theory engage in proceedings or support a complaint as a legal representative, in accordance with the Swedish Code on Judicial Procedure (1942:740) Chapter 12 Section 22. The person is presented to the court and the court makes a formal decision as to accepting that person as a legal representative (*rättegångsbiträde*). If the person is law abiding and does not risk becoming involved in the proceedings as a witness or something similar, there is usually no problem. A legal representative (*rättegångsbiträde*) may speak on behalf of the claimant and the claimant is bound by what he or she says or does, unless the claimant immediately declares a different opinion. However, most legal representatives are jurists with a law degree. They will often be members of the Swedish Bar Association (Advokatsamfundet), and the title of Advokat (lawyer) is reserved to members of the Bar. Unlike in some other countries, however, lawyers in Sweden, as members of the Bar, do not have a monopoly on the right of representation in civil law cases.

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

c) Actio popularis

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

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

d) Class action

There is a facility under Swedish law – outside of labour law – to submit a class action (or group proceeding) to a district court for claims arising from the same issue.³¹¹ Such cases are to be dealt with according to the rules on civil disputes. However, class actions are not allowed if the case can be appealed to, for example, the Labour Court. Thus, labour law cases fall outside the scope of the act, but discrimination in other fields can result in class actions.³¹²

This means that a person can pursue a lawsuit on their own behalf, but with legal consequences for other persons, even though they are not parties to the case.³¹³

There are various types of difficulties related to the use of class actions, which is probably why there have been so few since the law came into effect in 2003.

Nevertheless, there is one class action that the author knows of that concerned sex discrimination. In this case, R brought a class action on behalf of 44 women who asserted that they had been passed over in favour of less qualified men in the admissions process at a university for veterinarians. The appeal court, in agreeing with the district

³¹¹ Group Proceedings Act (Lag [2002:599] om grupprättegång).

³¹² Government bill 2001/02:107, p. 139.

³¹³ Even if each member of the group must be treated as a party by the court, the court must know all the members of the group. The judgment will be legally binding on all the members of the group. However, important developments in the case need to be communicated by the court to all of the group members.

court, concluded that the admissions system was disproportionate with regard to its goals, and that this constituted discrimination.³¹⁴

This case shows that, under the right circumstances, it is possible to bring an action for discrimination in fields other than working life. Even though there are various questions and difficulties related to the use of class actions, they can have significant potential in the right circumstances. They also provide NGOs in particular with the potential to combine situation testing with a class action, for example in the case of inadequate accessibility.

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

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

This is stated in Chapter 6 Section 3 of the Discrimination Act:

'If a person ... demonstrates reason to presume that he or she has been discriminated against ... the defendant is required to show that discrimination or reprisals have not occurred'.

This section applies to all six forms of discrimination including harassment and the new form of discrimination, inadequate accessibility. The victim of discrimination must be able to present facts that make it possible to presume that discrimination has occurred (a similar situation and unfavourable treatment). Thereafter the burden of proof is shifted to the other party who must show that one of the requirements is not fulfilled or that the unfavourable treatment was not associated with the ground in question. No intent to discriminate is required.

It could be asserted that it is hard to prove a *prima facie* case of discrimination in the Labour Court. At the same time, the problem may simply lie with the Labour Court's difficulties in properly applying the rules on shifting the burden of proof. It does not seem to be as difficult to establish a *prima facie* case in the general court system. Håkan Sandesjö (the temporary Equality Ombudsman for most of 2011)³¹⁵ 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 was 70.8 %. In the Labour Court, the rate was 19.5 % and, if the discrimination was on the ground of ethnicity, the rate of success dropped to 4.3 %.³¹⁶

In their commentary explaining the 2009 Discrimination Act, Fransson and Stüber point out a possible difference in the handling of the burden of proof.³¹⁷ The Supreme Court treats the less favourable treatment in a similar situation as the fact that makes the presumption apply. The eased level of proof thus sometimes applies when the claimant proves a similar situation and the less favourable treatment.³¹⁸ The Labour Court applies

³¹⁴ Svea Court of Appeal, dom 21.12.2009, T-3552-09. At: <http://centrumforrattvisa.se/wp-content/uploads/2010/10/Svea-hovratts-dom.pdf>.

³¹⁵ The removal of the former Ombudsman Katri Linna took place in February 2011. Agneta Broberg started on 1 October 2011. Sandesjö was not involved with the Equality Ombudsman when the report was made in 2010.

³¹⁶ Sandesjö 2010 (Jurcom AB), *Domar i diskrimineringsmål 1999-2009*, p. 11.

³¹⁷ Fransson-Stüber (2015), *Diskrimineringslagen: en kommentar* (The Discrimination Act: A Commentary), second edition, Chapter 6 Section 3. See Sandesjö (2010), p. 14. In cases where the rule on the burden of proof has been decisive, the success rate in the general court system was 90 % against 19 % in the Labour Court.

³¹⁸ See Supreme Court (NJA 2006 p. 170): *Ombudsman Against Discrimination due to Sexual Orientation v. Restaurang Fridhem Handelsbolag* (judgment of 28.03.2006). The main question was whether the same-sex couple had engaged in heavy petting or merely shown affection, which was allowed in the restaurant. The restaurant owner failed to prove they had engaged in anything beyond the normal kissing and hugging that

the presumption more narrowly. The claimant must always prove the similar situation and the less favourable treatment according to normal standards of proof. The presumption applies only to the causal link between these two facts and the discrimination ground. That being so, the Labour Court perhaps applies the rules on a shifted burden of proof in a manner that is too restrictive, especially with regard to ethnicity.³¹⁹

The difference between the general courts and the Labour Court was also taken up in a Government White Paper. The inquiry report stated that it seemed to be accepted by the Labour Court and the general courts that the rule now involves a presumption (*en presumptionsregel*) and is not a shared burden of proof rule. At the same time, the report seemed to be asserting that the big difference was that the general courts used the rule, while the Labour Court tended not to. The inquiry thus appeared to conclude that an even clearer wording of the rule in the act would help.³²⁰ However, no change in the law has yet been proposed.

In 2017, the Labour Court dealt for the first time with a case that was fairly similar to a case that had been dealt with in the general court system one year earlier. In both cases, the focus was on implementation of the burden of proof.

These cases turned on whether there is an alternative to bare lower arms for a Muslim dental student (district court) or a Muslim dentist (Labour Court). The focus was on the application of health and safety regulations, the desire of those involved not to work with their lower arms exposed due to religious reasons and whether or not an application of this rule constituted indirect discrimination.

The 2016 district court case involved a female Muslim dental student at Karolinska institutet.³²¹ In accordance with the dental programme, she was required to perform clinical tasks with bare forearms. She asked if she could wear special disposable forearm protection instead of having bare forearms, because she did not want to show this part of her body to strangers.

The institute, drawing on National Health and Welfare Board Regulation (2007:19),³²² made a formal decision denying this request. The state, in defending the content of the rules, said that simple rules such as having bare forearms were easier to follow in everyday situations than complex rules with alternatives, and that simplicity was important for rules that need to be followed every day and for every patient. It also said that, as the arms are harder to clean if they are covered, a disposable forearm protection could contaminate the person's work clothes when taken off, as well as increasing the amount of waste produced. The state had experts from the institute itself and from the Public Health Authority testifying that having bare arms was necessary to achieve the hygienic standards required by the regulation.

The Equality Ombudsman brought in a British expert describing the reasons why British authorities believe that there is no hygienic problem with disposable forearm protection.

was allowed.

³¹⁹ There are other possible explanations for the difference in the claimants' success rates. One possible explanation is that obvious cases of discrimination are often settled in the negotiations between the employer and the trade union at a local or central level, which must take place before going to the Labour Court if a trade union is representing one of its members. There is also an ongoing discussion, however, on whether judges appointed by trade unions and employer organisations are neutral, if important parts of the collective bargaining system are affected by the outcome. See Sandesjö (2010), p. 18.

³²⁰ Government White Paper 2016:87, pp. 462-463.

³²¹ Stockholms tingsrätt (Stockholm District Court), judgment 2016-11-16, case number T 3905-15, available at: <http://www.do.se/globalassets/diskrimineringsarenden/tingsratt/dom-tingsratt-karolniska-2014-1987.pdf>.

³²² Now Regulation (2015:10).

The court decided that both the British expert's reason as to why disposable forearm protection was acceptable and the Swedish experts' statements on why there were genuine hygienic reasons against their use seemed scientific and credible, and that it was not possible to believe one more than the other. However, it was the education provider (as the alleged discriminator), which bore the burden of proof with regard to the justification of possible indirect discrimination once the *prima facie* case was established. The district court applied the rules of burden of proof in accordance with the established practice in the general courts. Therefore, the state lost the case. The state had legitimate concerns, but even the state's expert admitted that the British example showed that such disposable protection had been used in the UK, and no one had been able to demonstrate a relevant increase of infection risk there.

The woman was awarded SEK 5 000 (EUR 468) as a discrimination award. Normally, SEK 10 000 (EUR 936) is a minimum award (SEK 5 000 for the injury and SEK 5 000 as a prevention award). In this case, the injury was small (*måttlig*). The denial of the woman's demand was based on a serious evaluation of the situation and was addressed in a formal decision – that is, it was not arbitrary. In future, every Muslim will presumably be correctly treated by this education provider in such situations. A prevention award was therefore deemed unnecessary.

The state did not appeal the decision. It accepted the district court's decision that the rule in the regulation was disproportionate.

The Karolinska case was followed by one in the Labour Court in 2017, in which the court came to the opposite conclusion, even though it was deciding a case based on the essentially the same evidence.³²³ The Labour Court case arose in an employment setting during the claimant's clinical work as a dentist. The hygiene standards were thus the same in both cases, as they stemmed from the same National Health and Welfare regulation.

The reasoning of the Labour Court was very similar to that of the district court up to the point when the employer presented the objective justification. Like the district court in the previous case, it considered that the experts on both sides were credible. The employer showed reasons why it was genuinely (albeit theoretically) possible that there could be a hygienic problem. The expert for the Equality Ombudsman showed that it was not possible to detect increased infections in Britain connected to permitting the use of disposable lower arm protection there.

The case was thus decided on the basis of how the rules on the burden of proof were to be applied, just like in the district court. However, while the district court placed the burden of proof on the discriminator, because it is the discriminator who shall be responsible for proving an objective justification, the Labour Court did the opposite.

The Labour Court said that, when the employer presented the genuinely objective theoretical hygienic reasons, the burden of proof shifted back to the claimant. Since the Equality Ombudsman failed to disprove the assertions of the employer's expert, the Equality Ombudsman lost the case. The main argument for this outcome was that, when patient safety is at risk, the employer must be allowed a wide margin of appreciation when setting hygienic rules (*försiktighetsprincipen* – the duty-of-care principle) and thus any remaining doubt must fall on the claimant.

To the author it seems as if, in this case, the Labour Court chose to add a footnote to the burden of proof rules, a footnote that is not easy to find in the directives, the Discrimination Act or the preparatory works. The case illustrates the disparity between

³²³ Labour Court 2017 case 65, *Equality Ombudsman v. The People's Dentists of Stockholm County* (Judgment 20.12.2017).

two court systems when they have a different approach to the EU rules on the burden of proof and where no one can demand that the Labour Court ask for a preliminary ruling from the CJEU, even when there is an obvious need for one.³²⁴ At the same time, the Swedish Supreme Court was reluctant to send questions to the CJEU in previous years. This in turn resulted in the so-called revolt of the lower courts, which ended up bypassing the Swedish Supreme Court by sending questions directly to the CJEU.³²⁵

The two cases discussed above are quite controversial. Many people are against any 'concessions' at all concerning Muslims, and thus applaud the Labour Court for its application on the rules of burden of proof.

Today, Karolinska Institutet applies the ruling from the district court by allowing disposable lower-arm protection, while dental clinics do not need to do so with regard to employees.³²⁶ At some point or another, an education provider is likely to follow the practice of the Labour Court and, when that happens, the general court system will presumably have to decide whether or not to ask for a preliminary ruling from the CJEU.

In the author's opinion, one of the difficulties for the Labour Court in applying the burden of proof may relate to certain broader legal and cultural factors concerning the court. The Labour Court was created mainly as a special arena where the unions and employers' organisations could settle disputes concerning rights and duties under collective bargaining agreements. They still appoint the majority of the judges. It is only in discrimination cases that the majority of judges are made up of the 'law' judges. The main original issue was – and still is – collective rights. At the same time, individual rights have increasingly become part of Swedish law, including labour law, particularly since the country joined the EU. To a large extent, discrimination law concerns individual rights. For a long time, the social partners jointly opposed the adoption of such laws. This history forms part of the environment within which the Labour Court functions even today, i.e. the world of the social partners, rather than the world of the individual. The general courts perhaps find themselves a little closer to the idea of individual rights. This background provides at least some additional explanation of how two court systems can seemingly implement the same rule in very different ways.

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

In Sweden, there are legal measures that provide protection against victimisation. Victimisation is forbidden in Chapter 2 Sections 18 and 19 of the Discrimination Act.

³²⁴ If both Sweden and Britain take patient security seriously and still decide on different policies with regard to disposable lower arm protection, it is perfectly possible that the CJEU would have decided to allow the Member States a wide margin of appreciation and that the Labour Court would have been allowed to decide the case as it did. It is also possible, however, that the CJEU would have said that, if the claimant showed that an alternative solution had been applied in another country without any indications of increased infections, then any remaining uncertainty should fall on the employer, as they bore the burden of proof for the objective justification in an indirect discrimination case as a matter of principle. In the author's view, the latter reasoning seems to be the most rational. This was possibly a reason for the Labour Court not to send the issue to the CJEU – or at least they did not want to take that chance.

³²⁵ The key issue was that of *ne bis idem* (no one shall be tried twice for the same offence) in relation to EU law. The lower court's action led to a judgment in the Åkerberg Fransson case (Case C-617/10 *Fransson* [2013]), which forced the Supreme Court to change its recently established case law. This also led to the re-examination of a large number of cases. See, for example, Fast, Katarina, *Juridisk Tidskrift* 2013-14 nr 1, s. 24-44, *Tusen skäl att förekomma istället för att förekommas – en kommentar till dubbelbesträffningsfallen i EU-domstolen och Högsta domstolen 2013 (A thousand reasons to act rather than being required to react – a commentary on the double jeopardy cases in the CJEU and the Swedish Supreme Court)*.

³²⁶ Radio interview on 8 December 2016 with Mats Trulsson, Head of Odontology Department, Karolinska Institutet, available at: <http://sverigesradio.se/sida/artikel.aspx?programid=128&artikel=6582632>.

Victimisation (*repressalier*) is defined in the preparatory work as acts, statements and omissions to act which lead to a disadvantage or a sense of discomfort for the individual.³²⁷

The prohibition protects all persons involved in an investigation, including witnesses and persons reporting discrimination or those who have helped the victim in other ways. According to Chapter 6 Section 3, the shifted burden of proof applies in victimisation cases.

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 compensation award, which is regulated in Chapter 5 Section 1. This is complemented by the possibility to declare certain acts like termination of contracts or discriminatory contract clauses void, which is regulated in Chapter 5 Section 3. There are no other remedies open to the individual who has been the target of discrimination.³²⁸

The concept of discrimination compensation (*diskrimineringsersättning*) was created, at least in theory, in order to make it easier for the courts to provide higher amounts of compensation than was previously the case in relation to damages. Discrimination compensation 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 *compensation or damages for the violation* caused by the discrimination. Chapter 5 Section 1 also requires the courts to give *particular attention to the purpose of discouraging future infringements*. There is a compensatory goal as well as a preventive goal.

In working life there is also 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.³²⁹ 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 removed completely. Depending on the discriminatory act, other labour law provisions may apply in parallel, such as the rules of the Employment Protection Act in cases of dismissal or those of the Co-Determination Act in cases where a collective agreement is violated.

Invalidity of provisions in collective agreements and in individual contracts is possible in all areas of the law under Chapter 5 Section 3.

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

Violations of the penal provision on unlawful discrimination are punished by a fine or imprisonment for a period not exceeding one year and can result in an obligation to pay financial compensation in accordance with Chapter 16 Section 9 of the Penal Code.³³⁰ The

³²⁷ Government bill 2007/08 p. 531-532.

³²⁸ With regard to breaches of active duties, a court order involving a financial penalty can in theory be issued.

³²⁹ In the state sector, however, a consequence of the public law character of the constitutional provisions as regards objective grounds on hiring is that a discriminatory decision may be appealed through administrative procedures, with the discriminated-against person actually being given the position in question.

³³⁰ See Stockholm District Court, case B-16349-13, *Public Prosecutor v. Jonas Taipani Thesén* (judgment of 18.02.2015). The three victims were each awarded SEK 5 000 (EUR 550) in a case of refused admittance to a shop. The owner was fined the same amount (100 income-related units). If the case had been considered under the Discrimination Act, the discrimination award could possibly have been higher, and the rules on a

maximum prison sentence for hate speech, as set out in Chapter 16 Section 8, is two years.

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

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

With regard to the sanctions under the Discrimination Act, there is no differentiation between the public sector and the private sector.³³¹

b) Ceiling and amount of compensation

Swedish law currently provides no ceiling on compensation in discrimination cases. Nevertheless, compensation levels are low. The record for the amount awarded was set in 2014 by Svea Court of Appeal in a child custody case. Having a child taken away from its parents was seen as the worst injury that could be suffered, and therefore the discrimination award was set at SEK 150 000 (EUR 14 040) for each of the parties involved (both parents and the child).³³²

There are no statistics on the average amount of compensation to victims.

In 2012, the Equality Ombudsman pointed out that, although it was too early to make definitive conclusions, the introduction of the term 'discrimination compensation' (*diskrimineringsersättning*) in 2009 to replace the term 'damages' (*skadestånd*) had not thus far resulted in any significant (*nämnvärd*) increase in the amounts awarded.³³³ In 2014, the Equality Ombudsman concluded that various judgments indicated that the compensation levels for less severe violation would in many cases be too low to have a dissuasive effect. This was considered by the DO to be a problem in relation to the EU requirement concerning dissuasive sanctions: 'Ineffective sanctions actually means the anti-discrimination legislation will not live up to the goal of protecting those who most need it'.³³⁴ In its 2017 Annual Report, the DO highlighted the need for more effective sanctions for counteracting discrimination, particularly concerning violations of the Discrimination Act.³³⁵

The need for more effective sanctions seems to be in line with the conclusions drawn by Laura Carlson in her analysis of compensation paid in employment discrimination cases. According to her calculations, the amounts that are currently being awarded by the Labour Court, adjusting for inflation, are about 4.5 % higher than they were in 1980. She points out that this does not appear to reach the threshold of enhanced compensation, as was envisaged by the change in terminology that came with the Discrimination Act in 2009. She also points out that this modest increase in compensation should be compared with the 170 % increase in trial costs and fees since the 1980s. She concludes that the trends concerning compensation awarded and increasing legal costs and fees, combined

shifted burden of proof would have applied.

³³¹ With regard to alternative procedures for public employees, see Section 6.1(a) above.

³³² Svea Court of Appeal case T 5096, *Equality Ombudsman v. Sigtuna Municipality* (judgment of 11.04.2014). Available at: <http://www.do.se/globalassets/diskrimineringsarenden/hovratt/dom-hovratt-sigtuna-kommun-anm-2011274.pdf>.

³³³ Equality Ombudsman, Annual Report 2012, p. 24.

³³⁴ Equality Ombudsman, Annual Report 2014, p. 60.

³³⁵ Equality Ombudsman, Annual Report 2017, pp. 2, 34 and 35.

with low success rates, 'create a significant deterrent for claimants bringing discrimination claims'.³³⁶

The Equality Ombudsman previously decided to proceed with a number of cases regarding the labour market, asking for SEK 75 000 to SEK 400 000 (EUR 7 021 to EUR 37 500). The Labour Court has previously awarded between SEK 30 000 and SEK 50 000 (EUR 2800 to EUR 4 700) in similar cases. The Ombudsman has further settled several cases at the level of SEK 100 000 (EUR 9 362), with one record-breaking case of SEK 200 000 (EUR 18 724).³³⁷ This settlement is impressive in relation to the discrimination awards in AD 2010 No. 91³³⁸ (SEK 75 000 or approximately EUR 7 021); AD 2011 No. 37³³⁹ (SEK 125 000 or EUR 11 700). In the former case, the Equality Ombudsman asked for SEK 300 000 (EUR 28 100); in the latter case the Ombudsman asked for SEK 400 000 (EUR 37 440) as a discrimination award and SEK 100 000 (EUR 9 360) for the violation of the Employment Protection Act. An amount of SEK 125 000 (approximately EUR 11 700) was awarded in a one-for-all compensation for the violation of both acts.

However, since the preparatory work on which the Discrimination Act is based is vague regarding the expected new levels of compensation, there is a large amount of legal uncertainty on the matter. The Supreme Court helped clarify some of the uncertainty in two cases decided on the same day in 2014.³⁴⁰ In the Veolia case, a bus driver had problems closing the doors of the bus. Two immigrants were sitting together, and one of them had her knee close to the stop request button. The bus driver walked over to them and removed her knee from the vicinity of the button (in a non-discriminatory way according to the courts). He also said that they should return to Taliban country and made a rude gesture. The discrimination award was set by the appeal court at SEK 20 000 (EUR 1 870) each.³⁴¹ The Supreme Court increased the amount to SEK 25 000 (EUR 2 340) on the basis that this violation was as severe as a violation through words without threats can be. The violation award was set at SEK 15 000 (EUR 1 400) each. Furthermore, SEK 20 000 (EUR 1 870) was to be added as a prevention award. Normally a prevention award is the same amount as the award for the violation.

If only one person had been discriminated against, that person would have received SEK 15 000 plus the full prevention award (SEK 15 000 plus SEK 15 000). Since two persons were to share the prevention amount, the court set the amount at a total of SEK 20 000, to be divided between the two persons involved, as the court concluded that SEK 30 000 (EUR 2 800) would have been too harsh for the perpetrator.

There are some situations where one may be able to identify a standard level of compensation, for instance in the case of a person not being allowed to eat at a restaurant, resulting in damages of SEK 15 000 (EUR 1 400) under normal circumstances. It is unclear what will happen to these levels. The author believes that violations concerning a restaurant or nightclub are probably less severe compared with

³³⁶ Carlson, L. (2017), *Comparative Discrimination Law: Historical and Theoretical Frameworks*, Brill, pp. 79-80.

³³⁷ Case 2009/1640 (Telenor). The case concerned parental leave but, as it is a record sum, it should be reported even if it involves discrimination outside the grounds covered by this report.

³³⁸ *Equality Ombudsman v. Swedish Agency for Government Employers* (judgment of 15.12.2010). A.H., a 62-year-old woman, applied for a position as a job coach with the Public Employment Service. She was not called to an interview, and two women aged 27 and 36 were hired. A.H. was at least as qualified as one of the persons hired and was better qualified than the other. Thus, a presumption of age discrimination arose. She was also better qualified compared with a man who got an interview, and therefore a presumption of sex discrimination arose as well.

³³⁹ Collective agreement permitting the employer to dismiss all employees above the age of 60 in a redundancy case (described in Section 4.7.1).

³⁴⁰ Supreme Court case T 3592-13, *Equality Ombudsman v. Veolia* (judgment of 26.06.2014). The second case was Supreme Court case T 5507-12, *Equality Ombudsman v. Stockholm County* (judgment of 26.06.2014), NJA 2014, p. 499.

³⁴¹ In Sweden, the ground of ethnicity also covers race.

the bus case. At the same time, some restaurants seem to encourage discrimination if for no other reason than that they think it will be more lucrative for them. Potentially, the prevention award should be much higher here compared with the bus case, where the employer presumably had a substantial interest in their bus driver behaving properly.

As to sanctions, Swedish law generally provides for low levels of compensation or damages. For example, a discrimination compensation award of even SEK 80 000 (EUR 7 487) will hardly deter a larger employer. For large employers or businesses, the threat of publicity is real and probably much more significant.³⁴² For small employers or small businesses, the sanctions may be said to be a deterrent.

There is an important potential sanction that, even though there seems to be little follow-up concerning implementation, has substantial potential as a complementary tool in relation to the Discrimination Act. Under Regulation (2006:260) on Anti-Discrimination Conditions in Contracts, Sweden's 28 largest national government agencies shall include an anti-discrimination condition in their larger public procurement service and building contracts. The purpose of the regulation is to increase awareness of and compliance with the Discrimination Act (2008:567).³⁴³

It is hard to say very much about the effects of this regulation or those used by some local authorities (e.g. Stockholm, Malmö and Botkyrka). The total value of all public sector contracts in Sweden is over SEK 600 billion (EUR 56.1 billion) annually.³⁴⁴ The national Government's contracts are valued at about SEK 200 billion (EUR 18.7 billion). There have been no evaluations or follow-up of the clauses used by the different agencies. Nevertheless, in the author's opinion, if the anti-discrimination conditions have been formulated in such a manner that serious potential sanctions such as cancellation are included as a part of the contract, their preventive potential is substantial. There is currently little risk in violations of the Discrimination Act, given the limited risks around detection, enforcement and economic sanctions, and particularly in relation to active measures. Even if the detection risks are minimal, however, if a business risks losing a contract worth SEK 50 million (EUR 4.7 million), for instance, due to a violation of the Discrimination Act, this probably means that the company has a much greater incentive to deal with active measures in a more serious manner than has been the case hitherto. This would also be an important factor concerning individual complaints.

c) Assessment of the sanctions

An economic efficiency analysis of discrimination awards has been undertaken by a professor of national economics, paid for by the Equality Ombudsman.³⁴⁵ From an economic standpoint, there are clear deficiencies. Discrimination awards are divided into

³⁴² See, for instance, Court of Appeal on Scania and Blekinge case FT 1948-12, *Forum for Equal Rights v. IKEA* (judgment of 18.03.2013). An anti-discrimination bureau helped a mother to sue IKEA for not letting her disabled daughter play in the playroom. She demanded SEK 20 000 (EUR 2 200) as a discrimination award. IKEA admitted that it had treated her daughter badly. IKEA accepted SEK 20 000 as fair compensation but would not admit to discrimination. The case was tried by both the district court and the appeal court because the classification of the decision as discrimination or otherwise was important to both parties. The author knows of an employment case regarding promotion, where an anti-discrimination bureau sued for SEK 20 000 and settled for SEK 70 000. The settlement included a secrecy clause of high value to the discriminator.

³⁴³ Regulation (2006:260) On Anti-Discrimination Conditions In Contracts (Förordning (2006:260) om antidiskrimineringsvillkor i upphandlingskontrakt), available at: <http://rkrattsbaser.gov.se/sfst?bet=2006:260>. There is an unofficial translation at: <https://www.global-regulation.com/translation/sweden/2988722/ordinance-%25282006%253a-260%2529-on-anti-discrimination-clauses-in-procurement-contracts.html>.

³⁴⁴ 'Varför behövs en nationell upphandlingsstrategi?' (Why is a national public procurement strategy needed?) p. 4. <http://www.regeringen.se/49eaf7/globalassets/regeringen/dokument/finansdepartementet/pdf/2016/upphandlingsstrategin/nationella-upphandlingsstrategin.pdf>.

³⁴⁵ Stenek, J. (2015), *En Samhällsekonomisk analys av diskrimineringsersättningen* (17.12.2015), available from the Equality Ombudsman – document LED 2015/299 17.

two parts. One portion is intended to compensate the victim for the violation of his or her integrity. The other portion, the prevention portion, is intended to dissuade the discriminator in relation to future violations. The most basic deficiency according to the report is that the prevention portions of discrimination awards seem to be too low to prevent future infringements. From an econometric efficiency standpoint, the discrimination award would need to be extremely high on some occasions if the low detection risk in many areas is to be properly taken into account.

In the author's opinion, it should be obvious that it is highly doubtful that Sweden, due to its legal, social and political culture, will ever develop extremely high discrimination compensation awards. This issue was also discussed by the writer of the report for the Equality Ombudsman.³⁴⁶ It should nevertheless be obvious that higher awards are necessary if the law is to become more effective. Greater justification for this could come from understanding the substantial damage arising in various situations, as well as the damage caused to third parties, as was pointed out in the above-mentioned report. These issues have been missing from the discussion of the preventive potential of discrimination awards, just as a serious discussion, in the author's opinion, has been missing concerning the sanctioning and remedies system under the Discrimination Act, as well as other potential sanctioning or support measures in the public sector with regard to counteracting discrimination.

Concerning the labour market, in the author's opinion, the sanctions would be more effective if there was a right to damages for economic loss in cases of recruitment and promotions, at least in regard to the most qualified applicant. The most qualified applicant, if he or she can prove that discrimination occurred, would not have a right to the job, but the right to damages as if they had been hired and fired. This type of change would raise the cost risks associated with discrimination without radically changing the system of damages in Sweden.

Outside the labour market, the sharply reduced level of civil damages in cases where discrimination is proved by situation testing may violate the principle of effectiveness, according to the author, at least with regard to night clubs.³⁴⁷ But this legal situation may change with the Discrimination Act, when the Supreme Court by law will have to give particular attention to the purpose of discouraging future infringements. The author believes that the Supreme Court case from 2014³⁴⁸ is well reasoned, which makes it possible to state that the damage to the individual in a case where the individual willingly participates in situation testing is small, although the importance of stopping an economically profitable discriminatory behaviour by a club owner should lead to a high prevention award as a part of the discrimination award.

The Equality Ombudsman is of the opinion that the low level of awards made to persons suffering from discrimination with regard to goods and services is a real problem (SEK 20 000 or EUR 1 872 being a typical award).³⁴⁹

As to the overall question of whether the available sanctions are, or are likely to be,

³⁴⁶ See Stenek, J. (above) p. 21. He cites an example of employment discrimination where the detection risk is probably below 0.1 % and where a EUR 2 000 evaluation of the damage to the individual would result in a EUR 2 million prevention award. He concludes that such high sums would be seen as unfair lottery winnings for the individuals receiving them, and that such a system would lose public support in the long run.

³⁴⁷ The Supreme Court, *Escape Bar and Restaurant v. Ombudsman Against Ethnic Discrimination* (case T-2224-07 judgment of 01.10.2008). Nightclubs have strong economic incentives to give preference to high-status persons and exclude low-status persons when admitting guests. Sharply reducing the civil damages for the only effective and available means to prove such discrimination will probably lead to continued discrimination based on a cost-benefit analysis by the nightclub owner.

³⁴⁸ Supreme Court case T 3592-13, *Equality Ombudsman v. Veolia* (judgment of 26.06.2014). The second case was Supreme Court case T 5507-12, *Equality Ombudsman v. Stockholm County* (judgment of 26.06.2014), together known as NJA 2014 – p. 499. See above (b).

³⁴⁹ Equality Ombudsman Annual Report 2014, p. 54.

effective, proportionate and dissuasive, there are two basic issues.

The first issue would arise if Sweden were to be found to be non-compliant with the directives regarding the sanctions available in Sweden. In the author's opinion this is unlikely, since Sweden can be considered as more effective than many other countries in this regard.

However, the more important issue is whether the current system for sanctions is sufficiently effective, proportionate and dissuasive to bring about the goals of the directives and thus the goals of the Discrimination Act. In the author's opinion, given the current state of the legislation and the case law, this is doubtful. The potential sanctions are not the only issue, but they are an important one.

As was pointed out in the 2005 inquiry into structural discrimination, the overall system for promoting equality and counteracting discrimination needs to concentrate on the idea that if discrimination costs, or carries with it substantial cost risks, most people with the power to discriminate can refrain from their discriminatory tendencies. The key is not necessarily sanctions, but convincing those with the power to discriminate to work seriously on preventing discrimination. The end goal is not compensation for victims, but rather that potential victims are not subjected to discrimination in the first place.

Some changes in the law could and should be made, including in regard to economic damages relating to recruitment and promotion.

At the same time, policymakers need to take a more holistic view, by examining other legal tools that can help to ensure the effectiveness of the principle of equality.

One idea is a review of the rules on class actions, so that they become more effective, especially in discrimination cases. This should also mean that class actions are available in labour law as well.

Concerning restaurant and nightclub discrimination, almost all such establishments have liquor service licences, granted by their local authority. These licences are a privilege and not a right. The licences may be tied, through the Alcohol Act, to the idea that the licence holder is put on notice that discrimination is a violation of the trust granted to them by the public, and that discrimination can lead to revocation of the licence.

Another idea takes the form of a revised regulation on anti-discrimination conditions in public contracts, which clearly indicates that the contractor shall agree to abide by the Discrimination Act, as well as making a written report about the fulfilment of their duties under the Discrimination Act at the request of the contracting entity, and that the contracting entity retains the right to cancel the contract if these conditions are violated.

In the author's opinion, this type of broader approach to the issue of what policymakers can do concerning sanctions in a broad sense can help to ensure that they actually become effective, proportionate and dissuasive.

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

Sweden has a specialised body designated for the promotion of equal treatment irrespective of racial/ethnic origin, in accordance with Article 13 of the Racial Equality Directive: the Equality Ombudsman (DO). The DO has a broad anti-discrimination and equality promotion mandate established by law (the Equality Ombudsman Act). The grounds covered by the DO's mandate are sex, transgender identity or expression, ethnicity, religion and other belief, disability, sexual orientation, and age. The DO's scope of action includes but is not limited to working life, education, labour market policy activities and employment services, starting or running a business and professional recognition, membership of certain organisations, goods, services and housing, health and medical care and social services, national military service and civilian service and, to a limited extent, public sector employment.

The head of the DO is appointed by the Government. It is the type of government agency where all responsibility for the agency lies with the head of the agency. There is no governing board or anything similar.

- b) Political, economic and social context for the designated body

In 2009 and 2010, there was extensive public criticism of the Equality Ombudsman (DO). Much of this had its beginnings in a case taken to court concerning discrimination against a Muslim man. His labour market subsidy was withdrawn for failing to shake hands in an interview for an apprentice position with a potential employer who was a woman. The DO won the case in February 2010 (Mål nr: T 7324-08). This resulted in massive and almost unanimous criticism of the DO in editorials. Feminists and politicians were especially critical. Few seemed to have read the actual judgment, and it was the DO that was criticised, but in general there was essentially no criticism of the court. On top of the media criticism of the DO, there were also problems concerning the administrative management of the DO. In February 2011, the head of the office was removed. News reports at the time stated that the Government acted, among other things, due to a slowness of decision-making.³⁵⁰

While it may be asserted that there is broad political support for the Equality Ombudsman, this seems to be dependent on the DO being relatively uncontroversial and unchallenging. It seems to the author that the victims of discrimination have been having less and less trust in the DO, at least since 2011. The DO asserts that it has become more strategic. According to a former gender equality ombudsman, the DO has moved from a situation of trying to use the law to promote equality through taking on cases and assisting victims to a position of merely providing information concerning discrimination.³⁵¹ Among NGOs and various experts in the field outside of the DO, support can be found for this criticism.

This development is taking place in an environment where, even though there has been increased funding for certain equality issues (including for the DO and the new Gender Equality Agency), the political debate is becoming increasingly focused on law and order issues – largely in response to fears of increasing support for Sweden's far-right-wing party. There are elections coming up in September 2018, and the only party that seems

³⁵⁰ See, for example, 'Regeringen sparkar DO Katri Linna' (The government fires DO Katri Linna), *Expressen*, 1 February 2011, available at: <https://www.expressen.se/nyheter/regeringen-sparkar-do-katri-linna/>.

³⁵¹ Lena Svenaeus, 'Amnesti råder för brott mot diskrimineringslagen' (There is an ongoing amnesty for violations of the Discrimination Act) 30.02.2018, available at: <https://www.svd.se/amnesti-rader-for-brott-mot-diskrimineringslagen>.

poised for substantial gains compared with the last election in 2014 is the far-right-wing party.

Discussion is ongoing in Sweden concerning the creation of a National Human Rights Institute (NHRI). Although there is broad support for such a body, it seems thin. The issue has been on the table since at least 2010. Recently, a new inquiry was started concerning the potential placement of such an institution under the Government, since the Parliament decided that it does not want an NHRI established as a parliamentary agency, even though the Parliament has agreed to its establishment.

The Swedish Gender Equality Agency³⁵² was opened on 1 January 2018. The task of the agency is to coordinate, follow up and in different ways support the effective implementation of the Government's gender equality policy. This is to be done in cooperation with other government authorities, as well as municipalities, county councils, regions, civil society and industry. There may potentially be some overlap with the work of the Equality Ombudsman, but this is not yet clear.

The income and expenses for the Equality Ombudsman were about SEK 103 million (approximately EUR 9 640 000) during each year from 2014 to 2016. There have been no dramatic increases or reductions since the Equality Ombudsman was created in 2009. In 2017, the budget was SEK 112 million (approximately EUR 10 482 000) and in 2018 it is SEK 124 million (approximately EUR 11 605 000). The latest increase consists of compensation for inflation of SEK 2 million and a further SEK 10 million for various activities. The budget has thus increased over the last two years.³⁵³ The funding for equality promotion other than through the Equality Ombudsman increased from SEK 62 million (approximately EUR 5.8 million) to SEK 79 million (approximately EUR 7.4 million) in 2018.

It is not easy to assess the balance between supportive and hostile news coverage in the popular press. However, in the view of the author, the press coverage of the Equality Ombudsman seems to be decreasing in general. The only party that seems interested in a debate concerning the Equality Ombudsman is the far-right-wing party – which wants the DO to be defunded. Some topics such as the matter of the handshake and other issues related to Muslims give rise to debate, sometimes heated. Although there is no active political campaign against the Equality Ombudsman except from the extreme right, there is no active support either. Various civil society organisations seem to have realised that they themselves must become more active in taking cases to court. At the same time, the former gender equality ombudsman has severely criticised the Equality Ombudsman's strategy and current approach to handling complaints. She points out that the Ombudsman is moving its focus from legal strategy and the tools provided by law to an information strategy that will convince those with the power to discriminate to voluntarily refrain from discrimination. Her criticism relates to all discrimination grounds, and not just gender.³⁵⁴

³⁵² See Government information available at: <http://www.government.se/articles/2018/01/the-new-swedish-gender-equality-agency-inaugurated-in-gothenburg/> and the agency's website at: <https://www.jamstalldohetsmyndigheten.se/en/>.

³⁵³ Government bill 2017/18:1, Expenditure Area 13, p. 45. Of that amount, SEK 0.7 million is for the Board Against Discrimination, Regulation letter for the Equality Ombudsman 2018. Ku2017/02634/DISK.

³⁵⁴ Some examples where the author of this report has translated the headlines into English: Lena Svenaeus, 'There is an amnesty today for violations of the Discrimination Act', 30.02.2018, available at: <https://www.svd.se/amnesti-rader-for-brott-mot-diskrimineringslagen>; 'Procedural circus when the OD handles cases on sexual harassment', available at: <http://www.dagensjuridik.se/2017/11/processrattsliq-cirkus-nar-do-hanterar-mal-om-sexuella-trakasserier-2>; Response by the DO, 'Attempting to get an admission of sexual harassment is not a circus. Your criticism is not serious', available at: <http://www.dagensjuridik.se/2017/11/inte-cirkus-att-forsoka-fa-sexuella-trakasserier-konstaterade-din-kritik-ar-oserios-lena-sve>; Counter-response by Lena Svenaeus, '135 sexual harassment complaints to the DO, but few lead to investigations or attempts to find a solution', at: <http://www.dagensjuridik.se/2017/11/135-anmalningar-om-sexuella-trakasserier-till-do-men-fa-utredningar-eller-forsok-till-uppgor>.

While it is true that economic actors fear losing a discrimination case mainly because of the public stigma it entails, it is hard to say how important this fear is. If there is little or no risk of cases being brought against them, they are not in a difficult position regarding discrimination, in particular concerning active measures. In the author's opinion, even among those victims who are aware of their rights on paper, many seem to conclude that there is little point in pursuing such cases, since the help they can get is limited. In spite of receiving increased funding, the Equality Ombudsman is not dedicating these resources to increased investigation of complaints or the pursuit of cases in court.

As regards another important actor, the unions, there is no overview of the discrimination cases they are taking on, so it is hard to know how they are dealing with such cases.

Very few cases are brought by individual complainants – the cost risks related to losing are too high for most people, perhaps especially for those who are most likely to be victims. Some of the cases taken on by the local anti-discrimination bureaux lead to settlements. If and when a bureau brings a case to court, it will generally be a small claims matter, which avoids the risk of being required to pay the winning party's legal costs.

c) Institutional architecture

The Equality Ombudsman does not have a mandate as a general human rights institution, in that its mandate is limited to the fundamental human right of equality and non-discrimination.³⁵⁵ In theory it cannot deal with an infringement of a human right that is totally unconnected to a discrimination ground. However, the Equality Ombudsman has a wide scope of appreciation when it decides which areas to give priority to and how to interpret those areas. With regard to the Sami people, their rights as an indigenous people are not a part of the Ombudsman's official mandate, but their rights are so interlinked with their ethnic background that the Ombudsman can work on that basis anyway with regard to the Sami.

The mandate of the Ombudsman is set out in the Equality Ombudsman Act. The annual regulation letter,³⁵⁶ which requires the Ombudsman to report back to the Government regarding specific tasks, can have some effect on the agency's priorities. The DO's mandate covers equality and non-discrimination, thus all of its resources are dedicated to the equality mandate.

The author has some questions about the effectiveness of the nature and level of attention accorded to the equality/anti-discrimination mandate. The author is unsure about the DO's understanding of how equality and non-discrimination can be achieved, especially in connection with the idea of promoting social and political change concerning equal rights and opportunities. Among various other factors, in the author's opinion, the DO seems to lack an understanding of the idea that an essential key to effective work in this field is an understanding of and cooperation with the victims of discrimination. Without this understanding, much of the work being done, while well-intentioned, risks becoming one more means of maintaining rather than changing the status quo.

³⁵⁵ The Equality Ombudsman (DO) applied to the UN a number of years ago as an 'A' status national human rights institution. The UN determined that the DO did not fulfil the requirement of independence (given the background of how the head of the agency was removed by the Government) and has a mandate that was too limited, as it related only to equality and non-discrimination.

³⁵⁶ Every year, the Equality Ombudsman receives a regulation letter from the Government setting out tasks on which the DO shall report back to the Government, usually in its annual report. Occasionally the DO can be assigned special tasks that are to be reported back to the Government in some other manner. Regulation letters are given to all government agencies. From 2009 to 2012, the DO would get a 'blank' regulation letter to ensure its independence. Since 2013 these letters have included various tasks to be reported back to the Government.

The author's professional assessment concerning the level of visibility of the equality mandate and the DO is that, in spite of its broad mandate and increasing resources, its level of visibility has been fading for a number of years, particularly concerning discriminated-against groups.

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

i) Status of the body

The Equality Ombudsman is a government authority and is thus a separate legal person.

The DO is currently placed under the Government's Ministry for Culture and Democracy, and is appointed by the Government. The person appointed as the DO is responsible for the actions of the agency (*en enrådighetsmyndighet*).

There is no governing body. Such a body would have made the Equality Ombudsman less independent. Neither the Government nor any other organisation has a formal influence on the DO's decision-making. Instead, there is an advisory board regulated under Section 5 of Regulation (2008:1401) with Instructions for the Equality Ombudsman. This board is chaired by the Ombudsman and has up to 10 members appointed by the Ombudsman for a term of two years.³⁵⁷

The Equality Ombudsman gets its annual funding from the Government, based on a budget approved by the Parliament.

The Equality Ombudsman recruits and manages its own staff.

In Sweden, all governmental authorities are independent when deciding individual cases, in accordance with the Instrument of Government Chapter 12 Section 2. Trying to influence any governmental authority on the handling of an individual case is one of the worst things a minister can do. Not even the Parliament is allowed to do that. Instructions, whether issued by the Government or the Parliament, must consist of general principles on how to act. This applies to staffing decisions as well. A general instruction may be given, for instance on trying to provide apprenticeships for newly arrived immigrants with little education. However, the Government cannot instruct any authority to hire a particular individual.

Instructions can be given by the Government to the Equality Ombudsman by regulation letter. So far, this has been used for specialised requests such as surveys on different topics or reporting on certain issues. When the Equality Ombudsman was created in 2009, there was an understanding that the Ombudsman would receive only a blank regulation letter. This was one way of indicating the particular independence of the Ombudsman, with reference, *inter alia*, to the Paris Principles. This was adhered to through 2012. Since then, the regulation letters have included various reporting demands. Based on the regulation letter currently in force, the Ombudsman has a special duty,

³⁵⁷ This board first met on 09.02.2010. Its members are highly qualified and have a range of academic and professional experience. The composition of the board is diverse with regard to sex and ethnic background, and its members are paid. There is absolutely no other rule regarding the board's composition than the rule stating that the number of members shall not exceed 10. No NGO can claim a right to a seat, nor can the DO be required to appoint a certain number of members representing NGOs, employers, trade unions or any other group. However, there are usually NGOs and academics and others appointed to the board, who presumably have a considerable amount of expertise in the field.

among other things, to report its work on wage surveys to the Government.³⁵⁸ The regulation letter has now clearly become a means of influencing the work of the Equality Ombudsman.

All governmental authorities (including the Equality Ombudsman) report back to the Government on the basis of their regulation letter. Even though the regulation letter for the Equality Ombudsman contains fewer detailed requests compared with the regulation letters of other government authorities, the requests necessarily affect the independence of the office.

The Equality Ombudsman is accountable to the Government. Usually, this takes the form of annual reports, in addition to separate special reporting that may be required in accordance with the regulation letter.

ii) Independence of the Body

The word 'independent' is not stipulated in the Equality Ombudsman Act, but the body is nevertheless independent. At least initially, based on the legislative materials and their references to the Paris Principles, certain special measures were taken to underline the DO's independence. In addition, Sweden has a long theoretical tradition of a wall of separation between the Government and all governmental authorities. The Instrument of Government Chapter 12 Section 2 (which is part of the Swedish Constitution) prohibits the Government (and all other public actors including the Parliament) from interfering in any individual case of any governmental authority. It would thus not be possible for the Government to interfere in an individual case without a change in the Constitution.

However, if the issue of actions in individual cases is disregarded, it is obvious that the Government can control the actions of an independent government authority in other ways. This can include removal of the head of the authority, as well as the use of a regulation letter or possibly changing the mandate if the authority was established by Government regulation. One of the reasons for establishing the Equality Ombudsman through the Equality Ombudsman Act was that a change in the law, and thus the DO's mandate, would require approval by Parliament. Several of the previous anti-discrimination ombudsmen were created on the basis of a Government regulation, not an act. The act thus added an extra measure of independence.

Normally, if a governmental authority is to have a supervisory board, the Government appoints the board. The rule laid down in Section 5 of the Equality Ombudsman regulation (2008:1401) clearly states that the Equality Ombudsman selects her own advisory board. This is an example of the high degree of independence given to the Equality Ombudsman. Even this measure was adopted, at least in part, with reference to the Paris Principles. It should be noted, though, that the Government can basically revoke a regulation at any time.

The Equality Ombudsman has independence mainly based on the general and constitutionally protected tradition of independent authorities in Sweden, as well as being established by law. Initially, this independence was complemented by some special independence-enhancing measures. However, in practice, it should be pointed out that one of the major reasons why the Equality Ombudsman's application to the UN for status as a national human

³⁵⁸ Equality Ombudsman, 2018 regulation letter, available at: <https://www.esv.se/statsliggaren/regleringsbrev/?RBID=18906>.

rights institution was rejected was the lack of independence demonstrated by the manner in which the Swedish Government was able to remove the head of the Equality Ombudsman so easily in 2011.

Even though the DO is established by law, and even though the legislative materials for that law refer, *inter alia*, to the Paris Principles, the removal of the agency head in 2011 and the increasingly detailed regulation letters clearly indicate that the DO is accountable to the Government.

e) Grounds covered by the designated body/bodies

The Equality Ombudsman covers seven grounds of discrimination: sex, sexual orientation, ethnicity, religion and belief, disability, age and transgender identity or expression. In addition, the DO, in accordance with the Parental Leave Act (1995:584) has the right to bring cases on behalf of individuals regarding the prohibition against unfavourable treatment related to parental leave.

The Swedish Discrimination Act is to a large extent built upon the idea that all seven grounds are equal. Therefore, none of its staff only deal with a single ground, and there is no specified budget for specific grounds. When a priority is decided on, for example the issue of harassment, it can often transcend the various grounds, or it can be only a part of a ground, for instance Islamophobia or Afrophobia. The priorities are not based on the grounds, but rather on a determination of which issues need an increased focus.

In Sweden, intersectional cases can be a problem. One benefit of the Equality Ombudsman's mandate concerning all grounds has been the increased understanding that quite a few complaints can involve multiple grounds, even if the individual did not realise this in the beginning. If they had approached a single-ground authority, the other ground or grounds might have been missed.

Migrants are protected by the prohibition against ethnic discrimination in the Discrimination Act. Basically, such cases are dealt with like all other cases, and they are not a special priority for the DO. There is presumably a high level of discrimination against undocumented migrants or those who are to be expelled, but complaints will probably not be made to the DO very often, since such complaints are generally publicly accessible documents. Persons living under the threat of expulsion often avoid contacts that they believe might make the police aware of their whereabouts. It may be noted that the Equality Ombudsman was highly critical of Sweden's reform of its asylum rules, which sought to move towards the lowest level permitted by international rules.³⁵⁹

The level of attention given to the various grounds seems unsatisfactory – or at least there is an increasing lack of clarity as to the attention given to any ground. On the one hand, there are short-term political issues receiving attention, ranging from gender equality and active measures to gender mainstreaming (not equality mainstreaming) in government agencies to sexual harassment, and others concerning LGBT issues, disability issues, anti-Roma issues, Islamophobia and Afrophobia. On the other hand, there seems to be a shifting away from using the law as a tool for change to using the law as an informational tool.³⁶⁰

The level of attention given to the various grounds could equally be described as unsatisfactory in that the NGOs related to these different grounds seem to be equally dissatisfied with the work of the DO on 'their' ground, particularly concerning complaints.

³⁵⁹ DO Begränsningar av möjligheten att få uppehållstillstånd i Sverige (Limitations on the possibility to receive a residence permit in Sweden), Diarienummer LED 2016/57, Remissvar på Lagrådsremiss Ju2016/01307/L7, 10.03.2016, available at: <http://www.do.se/om-do/vad-gor-do/remissvar/remissvar-under-2016/begransningar-av-mojligheten-att-fa-uppehallstillstand-i-sverige/>.

³⁶⁰ DO Annual Report 2017, p. 15.

The author tends to agree with the NGOs in that there has been a pullback from the use of complaints, but this does not seem to be aimed at favouring some other ground; rather, all grounds are disfavoured, which is connected with the implementation of the DO's strategy in general.

To the extent that there is a focus on enforcement of the Discrimination Act, the DO's strategy is to concentrate to a large extent on the development of case law and other tools that benefit all grounds. This approach makes sense if it is actually put into practice as well as being effectively communicated to discriminated-against groups. If a higher court applies the burden of proof rules or increases the general level of compensation in an advantageous manner in a sex or ethnic discrimination case, for instance, this will usually be of benefit for all grounds. However, to find these types of strategic cases, it is presumably important for the Ombudsman to have a reserve of trust and respect from the relevant NGOs. Those most likely to first hear of cases are probably NGOs. If they have trust in and respect the DO, they will see to it that such cases are sent to the DO. They may even go further and actively look for or even generate cases, if they think that their efforts can lead to concrete results. The opposite is also true. Without some level of trust and respect, they may even actively discourage people from relying on the DO. Thus, the bigger issue is probably the effectiveness of the level of attention that is paid, and not the level of attention itself.

One of the problems in Sweden, in the author's opinion, is that there are insufficient resources dedicated to the reported complaints, and not much of a Government strategy in this regard beyond the establishment of the DO (and some support to local anti-discrimination bureaux). Thus, there is little risk that a discriminator will end up in court. This is particularly true if an individual attempts to go to court without the assistance of the DO or a union. Given Sweden's loser pays system, there are not many individuals who want to take on the risks involved. Also, although the law in theory allows a court to say that a losing party shall pay only their own costs, if they brought the claim in good faith, the courts seem to be reluctant in applying this exception. Thus, there seems to be a decreasing number of effective investigations and court cases being brought by the DO, an unclear number of cases brought by the unions and only a handful of individual cases, where the economic odds, if not the legal odds, are skewed from the beginning.

At the same time, in the author's opinion, if the available funds were actually used in a more strategic manner by the Equality Ombudsman (and the unions), the lack of funding would probably be less of a problem.

f) Competences of the designated body/bodies – and their independent and effective exercise

i) Independent assistance to victims

In Sweden, the designated body has the competence to provide independent assistance to victims. 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.³⁶¹

- *Independence*

The competences are exercised independently. Once the decision has been made to take on a case, including the willingness to take it to court, one indication of independence is the willingness to take on cases of a controversial nature, such as the handshake or headscarf cases.

³⁶¹ Equality Ombudsman Act Section 2 and Discrimination Act Chapter 6 Section 2.

Such cases are still, on occasion, taken to court by the Equality Ombudsman.

- *Effectiveness*

Concerning the cases that are actually taken to court, the DO seems to be committing the personnel and other resources that are needed in order to be effective, and it appears that a high level of courtroom advocacy is being provided.

As for the cases that are settled, the DO has a basic policy against settlements unless the opposing party admits to discrimination as part of the settlement. While the author understands the thinking here concerning an admission of wrongdoing, this approach is not as effective as it could be, in the author's view. One reason is that, given such an admission, the settlement will presumably focus on the compensation paid. This potentially limits the possibilities with regard to more far-reaching settlements. For example, if someone applies for a job with a large employer, a settlement including a different but similar job, some compensation, and possibly a requirement of equality training for the employer's upper level management could be more attractive, both for society and for the individual involved. This could be particularly true if the individual is unemployed and is offered a job that fits their educational background and experience. The Government inquiry tasked with investigating how more people can receive help in pursuing discrimination complaints recommended that the DO develop a broader policy on potentially adopting a more creative approach to settlements. The inquiry report stated that 'The Equality Ombudsman's primary task, also in the future, should be to help the parties reach agreement. However, in our opinion the Equality Ombudsman should broaden its work involving consensual solutions, and examine the possibility for parties to reach agreement in more cases'.³⁶²

It is interesting to note the inquiry's reference to the DO's expressed views on settlements: 'Due to the imbalance in the power relations between the DO and the party accused of discrimination, it is also problematical that the DO works towards a settlement in cases where the legal situation is unclear or there is a dispute on the issue of guilt'.³⁶³ Naturally, it is important to be concerned that this imbalance in power is not used improperly. It would probably be equally or more important if there was also an understanding of the substantial imbalance of power between those who have the power to discriminate and the victims of discrimination.

In the author's view, providing a counterweight to those with the power to discriminate was the primary reason for the development and establishment of equality bodies in the first place. Policymakers and civil society organisations recognised that, otherwise, little would change, regardless of what the law said. This is of particular relevance when civil laws are used by the state to contribute to substantive change; civil laws here have a twofold purpose: redress for the victims and social change so that there is less need for redress.

³⁶² Government White Paper 2016:87, p. 34.

³⁶³ Government White Paper 2016:87, p. 160.

It is difficult to say much about the effectiveness of those cases that are investigated. During 2017, 204 decisions to investigate (*tillsynsbeslut*) were taken. The complaints that are to be investigated are those that the DO has in theory determined can have a great impact, can affect societal development and can promote equal rights and opportunities.³⁶⁴ These investigations are said to be neutral up until the time that the DO expresses a willingness to take them to court. Some then lead to settlements, some to court cases and some to other measures. The inquiry nevertheless recommended that the DO look for alternative resolution measures, even if going to court is not possible or is undesirable. The inquiry also recommended improvements to communications with the person submitting the complaint as well as with the person complained against. As one alternative, the inquiry recommended that the DO should provide clearer motivations when it decides not to take particular cases to court.

There were 2 475 complaints submitted in 2017.³⁶⁵ According to the Government inquiry, only a small number of these complaints are investigated. Although it may vary from year to year, the percentage of complaints that are investigated is about 15-20 %, according to the inquiry report. In other words, most complaints are not investigated.³⁶⁶ Although the inquiry pointed out that it is not reasonable to require the DO to investigate all complaints, it recommended that more of them should be investigated.³⁶⁷ It is hard to conclude that the DO is being particularly effective with regard to complaints in cases where the decision to send a form letter in response is based solely on the complaint. It is certainly possible that a number of complaints may be rejected on the basis of the complaint itself, especially if the person reading the complaint has substantial experience in dealing with discrimination and discrimination law – but presumably the most skilled and experienced are not involved at this stage. It is also obvious that, if 80-85 % of the complaints are rejected, some of them will involve cases that fit the categories given priority by the DO.

One problem concerning effectiveness is the decreasing number of cases taken on by the Ombudsman that lead to settlements or a decision by the courts. Individuals who have a case run substantial economic risks if they go to court without the support of the Equality Ombudsman (or their union). For a number of years, individual complainants seem to have found it increasingly hard to get their cases investigated by the Equality Ombudsman, with even less chance of obtaining support in taking a case to court, particularly given the Ombudsman's purported focus on cases of principal importance. Effectively protecting victims of discrimination was the focus of a Government inquiry, which recommended that the Ombudsman investigate more cases.³⁶⁸ Since the proposals were merely recommendations, however, they will be given little weight by the DO, as is indicated by the DO's response to the inquiry, in which the DO basically rejected the recommendations for it to investigate more cases and pursue more settlements.³⁶⁹

³⁶⁴ Government White Paper 2016:87, p. 164.

³⁶⁵ Equality Ombudsman 2017 Annual Report, p. 57.

³⁶⁶ Government White Paper 2016:87, p. 186.

³⁶⁷ Government White Paper 2016:87, p. 33-34 (in English).

³⁶⁸ See Committee Directives 2014:10 and 2014:79 and Government White Paper 2016:87, p. 25. A case taken to the point where the alleged discriminator is asked to reply creates a basic investigation even if the Ombudsman decides not to go to court. This may cause the alleged discriminator to change their practice, and it may be helpful should the individual decide to go to court.

³⁶⁹ See the DO response at: <http://www.do.se/om-do/vad-gor-do/remissvar/remissvar-under-2017/battre->

In the assessment of the author, the factors in the next section concerning the *resources* of the DO for providing independent assistance to victims, particularly concerning the level and quality of the staff, are relevant. The limited experience of the senior staff in understanding law, social change, those with the power to discriminate and the state seems to have led to a strategy that places a greater emphasis on information and to a focus on changing attitudes, presumably hoping that changed attitudes lead to behavioural change. There is thus less focus on legal tools, other than as a persuasive measure in relation to attitudes (and hopefully behaviour). At the same time that the DO is in theory asking for additional remedies or sanctions that will hopefully be more effective, the DO does not seem to be choosing to use the tools it already has concerning legal proceedings and case law. This applies both to independent assistance to victims and to active measures. There seems to be a lack of understanding of how individual complaints and case law need to provide a key basis for equality promotion information, and how equality promotion information (reports etc.) can be used to inform the handling of individual complaints and cases. One of the problems with this type of strategy is that, in Sweden, people in general and particularly those with the power to discriminate already tend to have good attitudes – the problem is behaviour.

According to the DO's annual reports, about 7 800 discrimination complaints were submitted to the DO during the years 2013-2016. Of these, according to the Government inquiry, between 15-20 % became the subject of an investigation. Most persons submitting a complaint received a form letter stating that the DO itself determined which complaints would lead to an investigation. A relatively small number of the cases investigated led to a lawsuit or a settlement.

In the author's opinion, it would be difficult to conclude that Sweden is not in formal compliance with Article 13 RED, particularly in comparison with other countries. However, it is also apparent that Sweden has a long way to go before it can be concluded that the country is in compliance with Article 13 RED on providing independent assistance to victims.

- *Resources*

While the provision of independent assistance to victims falls within the mandate of the DO, there is no specific staff or budget dedicated to independent assistance to victims.

The general level and quality of funding has stayed fairly steady since 2009, and has been increasing somewhat in 2017 and 2018. The amount of funding makes the office one of the best-financed equality bodies in Europe. The level of funding is relatively adequate, although more funding is always needed – or at least could always be used.

Issues with the level and quality of the staff are harder to assess. Of the 100 or so employees in 2009, most came from the previous four anti-discrimination ombudsmen. At the end of 2017 there were 95 employees. Of these 95, perhaps six had experience with the DO at its inception, together with experience from working for the previous ombudsmen. This means that there are very few staff members who

have more than 10 years' experience. The head of the office recruited in 2011 came from another state agency. She had no knowledge of discrimination or discrimination law, and this was not considered a requirement. All the heads of units have been external recruitments since her recruitment in 2011. Except for the head of the litigation unit, who had previously worked on some cases as outside counsel for the Equality Ombudsman, the rest of the senior staff in place today have come from other state agencies – with basically no knowledge of the field of discrimination/equality or discrimination law. Thus, while the level of staffing has stayed relatively stable, questions may be asked about the quality. In the author's opinion, the reason for this is that the denial of discrimination as a key socio-political issue in Sweden is still a dominant one. The international reputation of Sweden is as a champion of human rights. This applies to the internal view of Sweden as well. This means that, without at least some institutional history concerning discrimination or some other assistance in developing a deeper understanding of the issues, state employees, especially at management level – and for the most part based on good intentions – will have a hard time dealing with issues of discrimination and equality and understanding that those with power in Sweden need to change their behaviour. Since the senior staff basically lacked experience in the field of discrimination or equality law, and as much of the rest of the staff has been recruited since 2011, the entire staff is basically on a steep learning curve in the field of discrimination law – which is presumably meant to change the status quo in society. This in turn requires a willingness to challenge those with the power to discriminate – e.g. business owners, unions, government agencies, politicians and fellow civil servants. This is not an easy task for civil servants, particularly when there is little in the way of effective pressure emanating from civil society and thus from policymakers, including politicians.

ii) Independent surveys and reports

- Independence

In Sweden, the Equality Ombudsman has the competence to conduct independent surveys and publish independent reports.

One or two reports will be produced during a typical year, although there may be anything between no reports and five reports published in individual years. The reports are generally of a high quality, in that they are produced by professionals in the field, quite often external experts. Normally, these reports describe the facts, and they are not designed to advocate a change to legal rules and so on.

- Effectiveness

The effectiveness with which the DO exercises its competence to conduct reports and surveys is hard to assess, since it is hard to understand the strategy behind them. They mainly seem to be informational tools that could just as well be produced by other authorities, research institutes or NGOs.

- Resources

The mandate of the DO includes conducting inquiries and publishing independent reports. However, there is no specific staff or budget

dedicated to independent assistance to victims, and the extent of this work varies, based at least to some extent on the DO's own priorities.

iii) Independent recommendations

- Independence

In Sweden, the Equality Ombudsman has the competence to issue independent recommendations on discrimination issues.

In the legislative process, the Equality Ombudsman always gives an opinion on new legislation that is relevant to the equality field. The adoption of the new and very restrictive asylum legislation and the Roma registration scandal are both examples of the Equality Ombudsman taking positions on issues that fall outside the Discrimination Act but that are still of relevance to the field of discrimination.

The collaboration between the School Inspectorate and the Equality Ombudsman on the guiding principles for schools regarding the wearing of headscarves and burkas/niqabs is another example of the Equality Ombudsman acting independently but together with another governmental authority.

The Equality Ombudsman is regarded as an expert in its field when dealing with other governmental authorities or commenting on proposed legislation.

- Effectiveness

Even though the Equality Ombudsman is considered to be an expert, in the author's opinion it is difficult to conclude that the independent recommendations are particularly effective. In general, they do not seem to be particularly challenging. And even when they are, as long as the trust from the victims of discrimination is weak or is lacking, the recommendations will not be as influential as they otherwise could be.

- Resources

The mandate of the DO includes the issuance of independent recommendations. However, there is no specific staff or budget dedicated to this area, and the staff and budget vary, at least to some extent, on the basis of the DO's own priorities.

iv) Other competences

Under Section 1 of the Equality Ombudsman Act (2008:568), in addition to the duties described in the Discrimination Act (2008:567), the DO shall work to counteract discrimination and promote equality concerning sex, transgender identity or expression, ethnicity, religion or other belief, disability, sexual orientation or age. Section 3 exemplifies the broad mandate by specifying that, within her or his sphere of activities, the Equality Ombudsman shall inform, educate, discuss and have other contacts with government agencies, enterprises, individuals and organisations; it shall follow international developments and have contacts with international organisations; it shall follow research and development work; it shall propose legislative amendments or other anti-discrimination measures to the

Government; and it shall initiate other appropriate measures. This last phrase was put in to indicate that the DO has a broad and independent mandate that is clearly not limited to the issues set out in the rest of Section 3. These are examples of, but not limits on, what the DO may choose to do to counteract discrimination and promote equality. Thus, in the author's opinion, the Ombudsman has substantial freedom within its budgetary constraints to determine other potential competences that may be needed beyond those enumerated in the act. Exactly what those other competencies are or could be will be unclear until the Ombudsman decides to actually test the limits of its mandate.

v) Positive duties

Chapter 3 of the Discrimination Act imposes positive duties called active measures on employers and education providers. Active measures are defined more generally as the preventive and promotional work carried out within an organisation to counteract discrimination and in other ways work for the realisation of equal rights and opportunities regardless of sex, gender identity or expression, ethnicity, religion or other belief, disability, sexual orientation or age.

Certain more specific active measures in Chapter 3 relate only to sex/gender. Section 7 requires the promotion of 'an even gender balance in different types of jobs, in different categories of workers and in senior positions'. Sections 8 to 10 require employers to carry out compensation or pay gap surveys in order to detect, remedy and prevent unreasonable differences in pay and other terms of employment between men and women.

The active measures undertaken by larger employers require to be documented in writing annually.

According to Chapter 4 of the Discrimination Act, the DO is to supervise compliance with the act, including concerning active measures. Under Chapter 4, Section 5, a 'person who does not fulfil his or her obligations concerning active measures, or to provide information under Chapter 3, Section 12 or document the work with active measures' can be ordered to fulfil those obligations. 'Such orders shall be issued under penalty of a fine by the Board against Discrimination after an application by the Equality Ombudsman. Such orders can also be directed towards the State as an employer or as the entity responsible for the educational activities'. If the Ombudsman decides against applying to the board for a financial penalty order, a central employees' organisation to which the employer is bound by a collective agreement may make an application concerning active measures in working life.

The application submitted to the board states the measures that should be required of the party that the application concerns, the grounds referred to in support of the application and the contents of the investigation of the matter.

According to the website of the Board against Discrimination (<https://namndenmotdiskriminering.se>), only two decisions have been issued since 2009, one in 2010 brought by the DO and one in 2015 brought by a union. The board denied the DO's application.

Thus, while the work of the DO concerning active measures is often discussed, enforcement work does not seem to be very apparent. This could be, as the DO asserts, because increased sanctioning powers need to be added to the

act.³⁷⁰ At the same time, given the low level of activity at the Board against Discrimination, it is difficult to assert that the limits of the current law have even been tested.

g) Legal standing of the designated body/bodies

In Sweden, the Equality Ombudsman has legal standing to bring discrimination complaints on behalf of identified victims who provide a power of attorney to the DO. The DO then becomes the party in the case, which means that the DO will pay the other party's legal costs if the case is lost.

Chapter 4 of the Discrimination Act sets out the tasks of the Equality Ombudsman under the act, and Section 2 refers to its right under Chapter 6 Section 2 to go to court on behalf of an individual who has suffered discrimination. The Equality Ombudsman needs the permission of the victim if a case is taken to court - but no other permission.

The Equality Ombudsman cannot act as *amicus curiae*.

The Equality Ombudsman cannot bring discrimination complaints on behalf of non-identified victims to court. Some would assert that the limitation of the DO's mandate to identified victims is problematic, and that Swedish law is not in line with the first point of the operative part of the *Firma Feryn* case.^{371 372} On the other hand, in the author's opinion the CJEU was quite clear in stating: 'Consequently, Article 7 of Directive 2000/43 does not preclude Member States from laying down, in their national legislation, the right for associations with a legitimate interest in ensuring compliance with that directive, or for the body or bodies designated pursuant to Article 13 thereof, to bring legal or administrative proceedings to enforce the obligations resulting therefrom without acting in the name of a specific complainant or in the absence of an identifiable complainant. It is, however, solely for the national court to assess whether national legislation allows such a possibility'. While national legislation can allow for such a power when the Court states that the directive *does not preclude* Member States, the Court did not say that the directive requires it. It can also be pointed out that, if *Feryn* was to be interpreted in such a way as to indicate that the directive requires national legislation that allows court proceedings on behalf of unidentified victims, the laws of many Member States would be in violation of the minimum standards set by the directive.

h) Quasi-judicial competences

Generally speaking, the Swedish Equality Ombudsman is not a quasi-judicial institution. It is more of an equality promotion body that can, among other things, take cases to court. However, it does have some formal quasi-judicial aspects.

In certain situations the Ombudsman may, under Chapter 4 Section 3 of the Discrimination Act, order the suspected discriminator to provide information, allow access to the workplace and enter into discussions. Such an order can be subject to a financial penalty.³⁷³ The financial penalty will gain legal force only after a district court has ordered the payment. The legality of the order itself, as well as the reasonableness of the

³⁷⁰ See DO consultation response to Government White Paper SOU 2016:87, 15.09.2017, at: <http://www.do.se/om-do/vad-gor-do/remissvar/remissvar-under-2017/battre-skydd-mot-diskriminering/> and DO press release of 14.02.2018, 'Is an expansion of the sanctions in the Discrimination Act needed?' at: <http://www.do.se/om-do/pressrum/aktuellt/aktuellt-under-2018/behovs-utokade-sanktionsmojligheter-i-diskrimineringslagen/>.

³⁷¹ European Court of Justice, case C-54/07, *Centrum voor gelijkheid van kansen en voor racismebestrijding v. Firma Feryn NV* (judgment of 10.07.2008).

³⁷² See Gambinius Göransson et al, *The Discrimination Law* 2d ed. (Diskrimineringslagen 2:a upplagan), 2011, pp. 43-44.

³⁷³ Chapter 4, Section 4. One difference compared with the previous legal situation is that the Ombudsman can issue these orders without going through a discrimination board.

amount, can only be decided upon by the district court. The Equality Ombudsman cannot impose other sanctions on the discriminator.

As regards active measures, the Ombudsman works in the same way 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 Discrimination³⁷⁴ may – on the Ombudsman's application – issue an order to comply with a specific request before a certain date (or in the future), subject to a financial penalty in accordance with Chapter 4 Section 5 of the Discrimination Act. The financial penalty will gain legal force only after a district court has ordered the payment. The legality of the order itself, as well as the reasonableness of the amount, can be decided upon by the district court.

Finally, to the extent that there are quasi-judicial powers or aspects within the mandate of the Equality Ombudsman, they have been rarely exercised, at least in formal terms.

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

The Equality Ombudsman registers the number of inquiries, complaints and decisions (by ground, field, type of discrimination, etc.). These data are available to the public and are presented in the Annual Report. The statistics for the previous year are made available around the end of February. Thus, the figures for 2017 are now official. Each Annual Report from 2009 onwards can easily be downloaded from the Equality Ombudsman's home page.

In total, 2 745 telephone inquiries and 1 853 written inquiries were received in 2017. These mainly involved the areas of working life and education. Ethnicity and disability issues tend to dominate. The numbers have been relatively similar for the years 2016 and 2015.

As to the complaints received by the Equality Ombudsman, 2 475 were submitted during 2017 (as compared with 2 276 in 2016, 2 382 in 2015 and 1 981 in 2014) in relation to the Discrimination Act or the Parental Leave Act.³⁷⁵ In 2017, 204 investigation decisions were made. Even in 2016, 204 decisions to investigate were made. In 13 of them, the Ombudsman initiated court proceedings³⁷⁶ (compared with 16 initiations of court proceedings in 2015 and 25 in 2014).³⁷⁷

In 2017 there were 749 disability complaints, 710 regarding ethnic origin, 350 regarding sex, 274 regarding age, 218 regarding religion, 67 regarding sexual orientation, 59 regarding transgender identity or expression and 83 regarding parental leave.³⁷⁸

In 2016 there were 674 disability complaints, 695 regarding ethnic origin, 316 regarding sex, 238 regarding age, 152 regarding religion, 55 regarding sexual orientation, 54 regarding transgender identity or expression and 76 regarding parental leave.³⁷⁹

³⁷⁴ The board is an administrative authority. It consists of a chairman and a vice-chairman, who must be judges. There are 11 other members. Two are appointed by the Government as neutral members. Six members are appointed by the Government on the suggestion of trade unions and employer organisations, one member is appointed by the Government as representing ethnic or religious minorities in Sweden, one is appointed on the suggestion of the Disabled Associations Cooperation Organisation, and one is appointed on the suggestion of the Swedish Federation for Lesbian, Gay, Bisexual and Transgender Rights.

³⁷⁵ Equality Ombudsman Annual Report 2016, pp. 40 and 42. There were a further 369 cases. In the 2015 Annual Report, the figure is on p. 43; in the Annual Report for 2014, it is at p. 46.

³⁷⁶ Equality Ombudsman, Annual Report 2016, p. 42. Four of those cases were related to the ground of sex (counting a pregnant transgender man as a sex case like other pregnancy cases). Three cases were ethnic cases, and one concerned religion. In the Annual Report for 2015, the figure is on p. 44; in the Annual Report for 2014, it is at p. 47.

³⁷⁷ Equality Ombudsman Annual Report 2015, at: <http://www.do.se/globalassets/om-do/diskrimineringsombudsmannen-arsredovisning-2015.pdf>.

³⁷⁸ Equality Ombudsman, Annual Report 2017, p. 58.

³⁷⁹ Equality Ombudsman, Annual Report 2017, p. 58.

In 2015 there were 749³⁸⁰ disability complaints, 763 regarding ethnic origin, 327 regarding sex, 319 regarding age discrimination, 179 regarding religion, 78 regarding sexual orientation, 62 regarding transgender identity or expression and 58 regarding parental leave.³⁸¹

j) Planning

The Equality Ombudsman works according to a three-year strategic plan called *Verksamhetsplan 2017-2019* (literally 'Activity Plan').³⁸² The plan is followed up every three months and revised every year. After the revision of 2018, it will thus be the plan for 2018-2020.

The revisions that are made annually to the three-year strategic plan as described above can be considered as an annual work plan.

The Equality Ombudsman produces an annual report, usually in the last week of February. A general duty to report the qualitative aspects of its work stems, *inter alia*, from the regulation letter.³⁸³ The Parliament does not take a formal position on the annual report.

There has been no recent evaluation of the implementation of the DO's strategic plan since it was just put into place. The new strategic plan seems to be the result of the DO's internal evaluation of its strategic goals from 2012 to 2016. The internal results were basically in agreement with the two reports from 2011 and 2012, which are discussed below.³⁸⁴

In 2011, the Swedish Agency for Public Management (Statskontoret), carried out an evaluation of the Equality Ombudsman at the request of the Government, partly because of widespread criticism of its handling of individual cases.³⁸⁵ The key finding was that the Ombudsman had done much to address the problems, but that some further steps needed to be taken. In 2012 the Swedish National Audit Office finalised a similar evaluation, giving recommendations to both the Equality Ombudsman and the Government concerning the Equality Ombudsman's work.³⁸⁶

The key findings in both of the above reports was that the Equality Ombudsman needed to develop its strategic work with individual cases, and that this work had been driven too much by individual cases, without sufficient attention to other strategic issues such as equality promotion.

In addition, it may be noted that effectively protecting victims of discrimination was the focus of a governmental inquiry that was completed in 2016. Among other things, the inquiry recommended that the Ombudsman investigate more cases.³⁸⁷ At the same time, the inquiry report stated that, in general, the Ombudsman should continue working in its current manner. Aside from making some recommendations, the report contained few concrete measures or requirements for the Ombudsman to actually take action.

³⁸⁰ 297 of these complaints concern the new discrimination form of lack of accessibility – Equality Ombudsman, Annual Report 2015, p. 52.

³⁸¹ Equality Ombudsman, Annual Report 2017, p. 58.

³⁸² DO:s Verksamhetsplan 2017-2019. LED 2017/80 decided 2017-03-22.

³⁸³ Regulation letter for the Equality Ombudsman 2018. Ku2017/02634/DISK.

³⁸⁴ Equality Ombudsman, Annual Report 2016, pp. 7-8.

³⁸⁵ Statskontoret, Rapport 2011:26, En myndighetsanalys av Diskrimineringsombudsmannen.

³⁸⁶ Riksrevisionsverket, Rapport 2012:3, available at:

<https://www.riksrevisionen.se/rapporter/granskningsrapporter/2012/do-och-diskrimineringsfragorna.html>.

³⁸⁷ See Committee Directives 2014:10 and 2014:79 and Government White Paper 2016:87, p. 25. A case taken to the point where the alleged discriminator is asked to reply creates a basic investigation even if the Ombudsman decides not to go to court. This may cause the alleged discriminator to change their practice, and it may be helpful should the individual decide to go to court.

k) Stakeholder engagement

Section 3 of the Equality Ombudsman Act indicates that the Ombudsman shall have various types of contacts with stakeholders. However, these are mentioned only in general. This means it is basically up to the Ombudsman to determine its priorities even here in regard to the various stakeholders.

In its annual reports, the DO brings up the importance of a continuous exchange of knowledge with civil society so that the DO can identify problems in society relating to the risk of discrimination. 'Which actors the DO cooperates with, the purpose and the form of the cooperation, depends on which changes the DO wants to contribute to and how the cooperation can contribute to the work for change. In addition, the DO has a continuous exchange of knowledge that is connected to each respective discrimination ground'.³⁸⁸

As regards civil society and discriminated-against groups, the Ombudsman seems to have at least annual information meetings with NGOs representing, for example, women, immigrants, persons with disabilities and the LGBT community. These tend to be grounds-based meetings. However, on specific issues, the meetings can be mixed.

Other meetings can occur related to specific issues such as discrimination against Muslims, or Afro-Swedes or the Sami.

Concerning Afro-Swedes, for example, as a consequence of the Government's special task on knowledge-increasing measures on Afrophobia, the DO has taken several actions on the basis of various meetings with the Afro-Swedish community. One of these actions involved giving an assignment to the Institute for Future Studies concerning a pilot project to develop one or more methods to illustrate how discrimination affects the access of Afro-Swedes to equal rights and opportunities. According to the DO, all of the work has been carried out in close cooperation with Afro-Swedes.³⁸⁹

Some other special government tasks in 2017 involved cooperation with civil society organisations and other government agencies concerning LGBT issues, disability and racism and xenophobia.³⁹⁰

Concerning more broad-based civil society associations, there are local anti-discrimination bureaus run by NGOs in various parts of Sweden. One form of co-operation involves the Equality Ombudsman being present at local educational events on non-discrimination arranged by the local anti-discrimination bureau. The bureaus, in providing advice and assistance, refer suitable complaints to the DO.

The DO also takes part in meetings and projects with employers' associations and unions, and is involved in discussions with them on the development of an e-education project concerning active measures focusing on the same target groups. The DO is also engaged in a Scandinavian project to counteract sexual harassment in the restaurant and hotel industry. This, too, involves discussions with employers' associations and unions.³⁹¹

The DO cooperates with other state agencies, depending on the specific issues involved. One example of this is its cooperation with bodies such as the Authority for Participation (*Myndigheten för delaktighet*) concerning the changes in the law on inaccessibility as a new form of discrimination. The Ombudsman further cooperates with other authorities as an expert or as a member of different official inquiry teams.

³⁸⁸ Equality Ombudsman, Annual Report 2016, p. 18.

³⁸⁹ Equality Ombudsman, Annual Report 2017, p. 41.

³⁹⁰ Equality Ombudsman, Annual Report 2017, from p. 41.

³⁹¹ Equality Ombudsman, Annual Report 2017, pp. 21-22.

As regards local government, the DO will be reporting to the Government on work being done by local authorities to counteract racism, including success factors and challenges, as a part of its task of examining the situation of racism in Sweden.³⁹² This work is obviously based on cooperation with local authorities.

Cooperation with the unions has been of particular importance in 2017 in relation to work on the changes in the law regarding active measures (see above concerning an e-education project on active measures).

Overall, it can be said that the DO engages with a broad variety of stakeholders based on its understanding of its own priorities – or the Government's priorities. (It may be pointed out that the Government, in allocating certain special tasks, adds a budget related to those tasks. One example is the Afrophobia project, mentioned above).

As to the quality of engagement, stakeholders with the power to discriminate or prevent discrimination (businesses, unions, local and state agencies, etc.) should be separated from those who represent discriminated-against groups. Concerning the first group, the level and nature of engagement is satisfactory, in the opinion of the author, in that the DO is expected to be and is treated as an expert as well as a normal government agency. Referring to the increasingly positive media view concerning the DO, as reflected in an external report, the DO published the following quote: 'The DO feels serious. It feels like they are balancing on some kind of line where you could be either really racist or really like the politically correct left. But the DO feels steady and stable in the middle'.³⁹³ Presumably this reflects not just the view of journalists but also certain stakeholders, particularly those with power.

At the same time, the picture the author has gathered from discriminated-against groups (both individuals and NGOs) is that they are increasingly dissatisfied and less trustful of the DO, that their issues are not particularly relevant to the DO's priorities, that they get information at best rather than an exchange concerning priorities, and that the DO is not particularly interested in taking on cases involving 'their' ground. While the DO is not there just to represent discriminated-against groups, if the DO loses the trust of discriminated-against groups as stakeholders, one might question the actual value and level of engagement with other stakeholders.

There is a risk that it could simply be more comfortable to deal with those who have power rather than those who want the Equality Ombudsman to use its power.

l) Accessibility

A few years ago, the Equality Ombudsman moved out of a very centrally located office (near the central train station, subway and buses) to a less accessible office in a suburb on the edge of Stockholm. This was basically a move that the Government decided the DO should make. Despite the less central location, the new office is relatively accessible.

The Equality Ombudsman does not have local or regional offices. There is some hope that the NGOs that run local anti-discrimination bureaus can fulfil some of the demand.

The Equality Ombudsman conducts outreach actions to local areas and regions, often in co-operation with local antidiscrimination bureaus or at public events such as Sweden's Human Rights Days.

The Equality Ombudsman has procedures in place to identify and respond to the access needs of specific complainants such as people with disabilities, people with caring

³⁹² Equality Ombudsman, Annual Report 2017, p. 41.

³⁹³ Equality Ombudsman, Annual Report 2017, p. 45.

responsibilities and people speaking or using languages other than Swedish. Complaints can be submitted in any language. The office is accessible, and interpreters can be brought in.

The web page complies with the highest international standard for accessibility (WCAG 2.0).³⁹⁴

The Equality Ombudsman works with accessibility in an adequate manner.

m) Roma and Travellers

There have been many cases involving Roma, and the Ombudsman will analyse these cases and issue guidelines on how to address Roma issues in the future. Although the Roma were a special focus for a number of years, in particular as one of the five national minorities, this is no longer the case. However, since one of the Equality Ombudsman's main tasks is to combat discrimination in individual cases, and it is likely that there will continue to be a high number of cases from this ethnic group in the future due to their risk of discrimination, it is likely that the DO will continue some of this work as a practical matter.³⁹⁵

An important settlement reached in 2017 concerned a Roma woman whose child had been taken into custody and placed with a non-Roma family. The mother was denied visiting rights. The municipality admitted that this decision had been based on stereotypical perceptions of Roma culture and that a further factor in the mistake was the fact that the woman was not allowed to communicate in her own language. The municipality agreed to pay compensation.³⁹⁶

Cases that were investigated but not taken to court in 2016 include those of several shops and restaurants that denied Roma customers service.³⁹⁷ Such cases are hard to prove.

As a practical matter, it seems that Roma will continue at least to be a de facto priority group.

³⁹⁴ Equality Ombudsman, Annual Report 2016, p. 27.

³⁹⁵ Equality Ombudsman Annual Report 2014, from p. 53. Discrimination against the Roma people with regard to goods, services and housing is a priority area. The Ombudsman strives to take up some such cases each year in order to keep the public aware of the risk of being taken to court. However, the Ombudsman is doubtful regarding the effectiveness of this strategy (low amounts of discrimination awards being one problem). Compare Equality Ombudsman Annual Report 2016, pp. 9 and 35.

³⁹⁶ Equality Ombudsman case 2016/1971. This case, settled in March 2017, was highly sensitive. The custody decision itself was not discriminatory (the mother could not take care of the child); it was only the decision on visitation rights that was discriminatory. Therefore, no further details are given. There are two types of settlements. One type is where the perpetrator denies discrimination but accepts that a mistake has been made and offers compensation. This settlement was of the other type, whereby the municipality accepted that its mistake amounted to discrimination.

³⁹⁷ Equality Ombudsman Annual Report 2016, p. 35.

8 IMPLEMENTATION ISSUES

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

- a) Dissemination of information about legal protection against discrimination (Article 10 Directive 2000/43 and Article 12 Directive 2000/78)

Beyond the activities of the Equality Ombudsman involving reports, training programmes and dialogue with NGOs and social partners, which are discussed above, further national and local activities are mentioned below. Some of them are connected with the DO's activities already mentioned above.

The Government has undertaken various initiatives that are worth noting:

- The DO's task on increasing awareness about Afrophobia.
- The national strategy for equal rights and opportunities concerning sexual orientation and gender identity and expression (the DO is specified as one of five strategic government agencies involved).
- A budget increase of SEK 10 million (EUR 936 000) in 2018 for the DO and essentially a doubling of the funding for local anti-discrimination bureaus.³⁹⁸
- A special task was allocated to the Agency for Participation and the DO to raise awareness about the UN Convention on the Rights of Persons with Disabilities (CRPD) and the changes in the law concerning inadequate accessibility.³⁹⁹

The Swedish Inheritance Fund provided support to two projects ('Law as a tool for social change'⁴⁰⁰ and 'From talk to action')⁴⁰¹ run by different disability organisations aimed at spreading information about implementation of the Discrimination Act and counteracting discrimination in other ways, especially by raising awareness about the need to take cases to court and the process for doing so.

The work of the Swedish network of cities against racism and discrimination continues to be of interest.⁴⁰² Their work to some extent involves dissemination information about the directives and the national laws that stem from them. In this connection, it is worth mentioning the work of UNESCO LUCS – a UNESCO regional initiative intended to bring together the initiatives undertaken by local authorities along with researchers and civil society, for example on integration and anti-discrimination. One effort by UNESCO LUCS and the Mångkulturellt Centrum in this regard was the 2016 publication *Equality - Local demands you can make! Tools for those who want to counteract discrimination and promote human rights*.⁴⁰³ Among other things, the book takes up the issue of what cities can do to promote equality as employers, service providers, public contractors and rule-makers. In practical terms, this deals with implementation of the principles of the EU anti-discrimination directives.

³⁹⁸ Government press release, 'Increased support to the work against discrimination', 20 September 2017, available at: <http://www.regeringen.se/artiklar/2017/09/regeringen-foreslar-forstarkt-satsning-mot-diskriminering/>.

³⁹⁹ Government press release, 'Communication campaign to counteract disability discrimination', 1 April 2015, available at: <http://www.regeringen.se/pressmeddelanden/2015/04/ny-kommunikationssatsning-for-att-forebygga-diskriminering-av-personer-med-funktionsnedsattning/>.

⁴⁰⁰ 'Law as a tool for social change' – see: <https://lagensomverktyg.se>.

⁴⁰¹ 'From talk to action' – see: <http://funktionsratt.se/projekt/fran-snack-till-verkstad/>.

⁴⁰² See the website of Sweden's Association of Local and Regional Governments, at: <https://skl.se/demokratiledningstyrning/manskligarattigheterjamstalldhet/rasismdiskriminering/natverkmotr-asmochdiskriminering.699.html>.

⁴⁰³ UNESCO LUCS, available at: <http://unescolucs.se>. Mångkulturellt centrum, *Lika rätt! Ställ krav på kommunen*, available at: https://mkc.nordicshops.com/index.html?submenu_id=-1.

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

As has already been indicated, a fairly weak role is played by the discrimination ground-specific NGOs in Sweden, with the possible exception of certain organisations within the disability movement and the main LGBT organisation (RFSL). Concerning the DO's dialogue with NGOs related to the grounds, see in particular Chapter 7(k), 'Stakeholder Engagement'.

NGOs dealing with discrimination are encouraged to be members of and to form local anti-discrimination bureaus. Some bureaus, like the one in Malmö, seem to have become fairly important voices in counteracting discrimination in their regions, which gives them an interesting platform from which to engage with others in dialogue.

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

As has already been indicated, the social partners traditionally play a key role in the Swedish labour market, and a variety of issues are collectively bargained and regulated by means of collective agreements. The new rules on active duties that entered into force at the start of 2017 have made it necessary for the Ombudsman to have contacts with the Confederation of Swedish Enterprise.⁴⁰⁴ In the regulation letter for 2018 there is a special duty to report back to the Government on these activities.⁴⁰⁵ These new rules expand the role of the trade unions with regard to active duties.

- d) Addressing the situation of Roma and Travellers

In 2016 to 2018, as part of the Government's strategy for Roma inclusion, the National Board of Housing, Building and Planning (Boverket) was given the task of raising awareness about the situation of Roma and counteracting discrimination against them on the housing market.⁴⁰⁶

The Roma are one of five national minorities in Sweden. The Stockholm County Administrative Board has been given special responsibility for all five national minorities. It does so in cooperation with the Sami Parliament. The four other national minorities are not represented by an organisation that can be described as 'theirs'. Thus, there is no longer an organisation specifically addressing all types of problems affecting Roma and Travellers. There is, however, a continuing duty for the Administrative Board to continue its coordination and follow-up work related to how Sweden's minority policy is implemented throughout the country.⁴⁰⁷

Furthermore, the Government is continuing to work on its National Strategy for Roma Inclusion covering the years 2012-2032. The goal is that, at the end of the period, the Roma population shall have the same living standards with regard to housing, employment, education and so on, as the majority. One element of this plan involves compiling documentation of violations committed by the state in the last 100 years and correcting the effects of those violations where possible.⁴⁰⁸

⁴⁰⁴ Equality Ombudsman Annual Report 2016, p. 1.

⁴⁰⁵ Regleringsbrev för budgetåret 2018 avseende DO, available at: <https://www.esv.se/statsliggaren/regleringsbrev/?RBID=18906>.

⁴⁰⁶ See the minister's press release at: <http://www.regeringen.se/pressmeddelanden/2016/05/boverket-ska-motverka-diskriminering-av-romer-pa-bostadsmarknaden/>.

⁴⁰⁷ Stockholm Administrative County Board and national minorities, available at: <http://www.minoritet.se/romsk-inkludering>.

⁴⁰⁸ For more information concerning the Government's strategy for Roma inclusion, see: <http://www.regeringen.se/regeringens-politik/regeringens-strategi-for-romsk-inkludering/>.

The Living History Forum is a Government agency that has been commissioned with the task of promoting issues relating to tolerance, democracy and human rights – with the Holocaust as its point of reference. It disseminates information, creating a dialogue with society at large on, *inter alia*, the situation of the Roma people.

In 2016 the Equality Ombudsman shifted the focus towards the Sami people and held roundtable discussions regarding possible future 'truth commissions'. One aim was to integrate a historical perspective into the Ombudsman's current work on discrimination.⁴⁰⁹ Another important principle is that the Sami's status as an indigenous minority should affect what should be regarded as discrimination.⁴¹⁰

Even if there is no specialised work by the DO aimed specifically at the Roma, some activities like the 2016 investigation into discriminatory practices within social services originate from complaints and are of great relevance to the Roma people.⁴¹¹

The Commission on Antiziganism presented Government White Paper 2016:44. The majority of the members of the commission are Roma. Among the recommendations made to the Government is the creation of a National Roma Centre. It is suggested that this should be a governmental board, with a high proportion of Roma members.

Two Government White Papers (SOU 2017:60 and 2017:88) deal, *inter alia*, with improved status for all five national minorities. Various proposals concerning different legislative details have been made where the intention is to improve the situation for all five national minority languages, even if it seems clear that Yiddish and Romani are less of a priority compared with Sami and the two Finnish languages. One proposal of interest concerning discrimination is the addition of language as a protected ground in the Discrimination Act.

At the same time, it is important to note that these white papers do not propose anything concerning the lack of enforcement mechanisms in Law (2009:724) on national minorities and minority languages (the Minorities Act). There is no right of appeal for individuals, and there is no government body designated as a supervisory authority. This criticism was underlined by Civil Rights Defenders and the DO in their responses.⁴¹² This issue is of particular interest since the Government inquiry itself, in White Paper SOU 2017:60, concludes: 'it must unfortunately be noted that minorities policy has almost completely failed in terms of guaranteeing the fundamental rights that all five national minorities should enjoy in all municipalities in this country. More than seven years after the entry into force of the Minorities Act, it remains the case that a large majority of this country's municipalities are barely or not at all affected by the Act's requirements concerning support to the five national minorities and their rights'.⁴¹³

Quite simply, the law provides rights, but no remedies – which, in the author's opinion, reflects a legislative technique that needs to be questioned.

⁴⁰⁹ Equality Ombudsman Annual Report 2016, p. 3.

⁴¹⁰ Equality Ombudsman Annual Report 2016, p. 16.

⁴¹¹ Equality Ombudsman Annual Report 2016, p. 50.

⁴¹² Civil Rights Defenders, Responses of 5 October 2017 to SOU 2017:60, available at: <https://www.regeringen.se/4a9135/contentassets/02f13dc4b7401eba0bd2ebc31c406e/civil-right-defendes.pdf> and of 6 March 2018 to SOU 2017:88, available at: <https://www.regeringen.se/496dd7/contentassets/9d6ff20902c34927b3d9d4cdf2cf3862/civil-rights-defenders.pdf>. DO, Responses of 2 October 2017 to SOU 2017:60, available at: <https://www.regeringen.se/4a9136/contentassets/02f13dc4b7401eba0bd2ebc31c406e/diskrimineringsombudsmannen.pdf> and of 19 March 2018 to SOU 2017:88, available at: <https://www.regeringen.se/496594/contentassets/9d6ff20902c34927b3d9d4cdf2cf3862/diskrimineringsombudsmannen.pdf>.

⁴¹³ Government White Paper 2017:60 – Summary in English and the National Minority Languages, p. 11, available at: <https://www.regeringen.se/4a8d12/contentassets/f869b8aae642474db1528c4da4d2b19a/sammanfattninge-n-pa-engelska-och-de-nationella-minoritetspraken>.

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

a) Mechanisms

The relevant mechanisms involve the Ombudsman supervising the Discrimination Act in its entirety, taking into account the possibilities that this provides to individual claimants. In addition, the role played by the trade unions to support their members must also be mentioned, as well as the work done by the anti-discrimination bureaus. No Swedish act allows direct discrimination in areas where the Discrimination Act prohibits it. The author has not heard of a conflict of laws with regard to this. Generally, legal principles such as good faith and good practice on the labour market can hopefully be said to assist in combating discrimination.

b) Rules contrary to the principle of equality

The task of proposing legislation in order to implement the directive into Swedish national law was given to a special investigator, who presented her report in the spring of 2002.⁴¹⁴ However, the investigator did not, as required by Article 16(a) of the directive, carry out any general screening of laws and administrative provisions for incompatibilities with the requirements of the directive (at least not in any comprehensive way).⁴¹⁵

According to Hans Ytterberg (the former Ombudsman Against Discrimination on the Ground of Sexual Orientation), there are no discriminatory laws and provisions with respect to sexual orientation discrimination in employment or occupation still in force.⁴¹⁶

This is more problematic in the area of differential treatment due to ethnicity, particularly with respect to indirect discrimination. Obvious examples of problematic provisions would include requirements regarding Swedish citizenship or the need to hold a degree or diploma from a Swedish educational institution in order to be able to exercise certain professions. These requirements have to a large extent been removed. 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 in relation to ethnic origin. One of the examples pointed out by Lappalainen relates more to European Union citizenship, as opposed to non-European citizenship, concerning voting in local elections. In the 1970s, Sweden granted the right to vote in local elections to immigrants who had been residents for at least three years. In the late 1990s, the law was changed so that immigrants who were EU citizens as well as those from Norway and Iceland were given the right to vote locally as soon as they crossed the border, whereas the three-year rule was retained for all other immigrants. Apparently, non-European immigrants still needed to develop an understanding of local conditions. The practical result is that some new immigrants are allowed to vote immediately, while a large number must wait. Although this is not a violation of the directives, it makes for an odd example of the official acceptance of unequal treatment on a key democratic issue, essentially between European immigrants as opposed to non-European immigrants.⁴¹⁷ The law on local voting rights remains the same as the 2018 election approaches.

⁴¹⁴ Government White Paper, 2002:43: *An Extended Protection against Discrimination (Ett utvidgat skydd mot diskriminering*, bet. SOU 2002:43).

⁴¹⁵ Government White Paper, 2002:43: *An Extended Protection against Discrimination (Ett utvidgat skydd mot diskriminering*, bet. SOU 2002:43), p. 143.

⁴¹⁶ Ytterberg, H. (2004), Sexual Orientation report of 28 July 2004. This report still holds, in the sense that there is no more recent report that has investigated the issue.

⁴¹⁷ Lappalainen, P. (2005), Government White Paper SOU 2005:56, *Det blågula glashuset – strukturell diskriminering i Sverige*, (*The Blue and Yellow Glass House – Structural Discrimination in Sweden*), pp. 448, 471, 597-600.

A similar situation prevailed regarding the testing of language skills required of doctors and nurses trained in the EU as opposed to elsewhere. Much harder language tests were given to those who were not from the EU.⁴¹⁸

⁴¹⁸ Lappalainen, P. (2005), Government White Paper SOU 2005:56, *Det blågula glashuset: strukturell diskriminering i Sverige (The Blue and Yellow Glass House: Structural Discrimination in Sweden)*, p. 559.

9 COORDINATION AT NATIONAL LEVEL

A new Government was formed in Sweden following the 2014 elections. The following statement is contained in the Government's principal programme from 3 October 2014 (*regeringsförklaringen*):

'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'.

Thus, there is longer an integration minister. The labour market minister Ylva Johansson is responsible for the coordination of integration and diversity issues and heads this work unit. The minister for culture and democracy Alice Bah Kuhnke is responsible for the work against discrimination and is the head of the discrimination unit. In theory, 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, this will be within her mandate rather than Ylva Johansson's mandate, even if the problem concerns labour market discrimination. Active measures to promote integration in the labour market fall within the mandate of Ylva Johansson. The same is true of almost any area. Discrimination on the housing market comes under Alice Bah Kuhnke's mandate, but the planning of housing or other active measures to avoid segregation falls within the mandate of the housing minister.

The current national strategy for human rights takes effect from October 2016.⁴¹⁹ It is not a plan with a beginning and an end, and it may be changed continuously. The ideology is the same here as for integration policy. The strategy emphasises that it is for individual ministries to deal with the particularities.⁴²⁰ Therefore, the strategy is devoid of concrete measurable goals like promoting employment for group Y to level X.

The Government's national strategy has long included the establishment of a national institution for human rights under the aegis of the Parliament.⁴²¹ Apparently, however, this idea has been rejected by the constitutional committee of the Parliament, which sent the issue back to the Government. The committee said that an institution should not be created under the aegis of the Parliament, and that other alternatives needed further inquiry.⁴²² The Government has authorised a new inquiry to see if the investigator can come up with a quick alternative by 31 July 2018 that, among other things,

- proposes the formation of an NHRI that can fulfil the Paris Principles, within the framework of e.g. the Instrument of Government (constitution) and the Budget Act (2011:203);
- proposes placement of the NHRI within an existing institution; and
- calculates the costs for the proposals provided and a proposal on financing.⁴²³

A Swedish NHRI could potentially play an important role in the field of equality and non-discrimination. However, in the author's opinion, policymakers seem quite confused as to the purpose of having an NHRI. The main stimulus for policymakers seems to be the

⁴¹⁹ Skr 2016/17:29. Strategy for the National Work on Human Rights.

⁴²⁰ Skr 2016/17:29. Strategy for the National Work on Human Rights, p. 13.

⁴²¹ The Government's power to dismiss and replace the Equality Ombudsman has resulted in it being downgraded from A-status according to the Paris Principles. The new institute could avoid this fate by operating under the aegis of the Parliament (and having a framework describing the conditions under which such dismissals may occur).

⁴²² Swedish parliamentary committee on the constitution, 'The issue of a national human rights institution needs to be investigated further,' 30 November 2017, available at: <http://www.riksdagen.se/sv/aktuellt/2017/nov/30/fragan-om-en-nationell-institution-for-manskliga-rattigheter-bor-utredas-mer/>.

⁴²³ 'Government inquiry appointed to further investigate the establishment of a Swedish NHRI', 19.03.2018, available at: <http://www.regeringen.se/pressmeddelanden/2018/03/lise-bergh-ska-utreda-hur-en-institution-for-manskliga-rattigheter-ska-inrattas-i-sverige/>.

international criticism directed towards Sweden for failure to have an NHRI. At the same time, civil society organisations representing, among others, discriminated-against groups and others are hoping for an institution that is relevant to the development and analysis of human rights in Sweden. Since 2010, when the issue became more relevant, the author has been asking both policymakers and NGOs whether they have seen any models of an effective NHRI, and whether any of them do not have an equality mandate as well. The answers have thus far been extremely limited. Hence, the author has concluded that the discussions concerning the establishment of a Swedish NHRI will continue for a long while – in spite of the apparently broad, albeit thin, support by policymakers.

10 CURRENT BEST PRACTICES

1. ESF report concerning discrimination in working life

The Swedish European Social Fund Council (ESF) commissioned a report in 2017 on *Discrimination in Working Life – Where is it and how do we know?* (*Diskriminering i arbetslivet: Var den finns – och hur vi vet*).⁴²⁴ This constitutes best practice in that it has brought together important knowledge that cuts across discrimination grounds. The report underlines the cross-cutting nature of discrimination, the need for improved statistics, and the consequences of discrimination for society as well as individuals. In the final comments concerning moving forward, the report points out that ensuring equality on the labour market requires a focus on structural changes, and thus a focus on the institutions and organisations that have the power to contribute to change. 'In order for this type of shift in perspective to be possible, a redistribution of power and room for manoeuvre is necessary – a redistribution that is seldom friction free'. (Author's translation).

The report, together with its follow-up, could become particularly important if it has a major effect on the manner in which the Swedish ESF Council carries out its work administering the European Social Fund in Sweden. The fund is relevant to many major structures and institutions. In the author's opinion, much of the work done in Sweden in relation to ESF on discrimination has focused on 'improving' the individual, with little focus on those with the power to discriminate. If greater focus is placed on institutions and structures, this can lead to the substantive changes that are needed to move closer to the goal of a labour market that is accessible to everyone on equal terms.

2. Analysis of discrimination complaints

The DO publication from 2016, *Chains of Events (Kedjor av händelser)*, is based on 217 complaints made by Muslims in 2014.⁴²⁵ Here, the analysis is focused on the victims' perception of being discriminated against – not on whether discrimination could be proved in a formal legal sense in the cases concerned. One of the situations described in this report concerns clothing used in the healthcare sector (p. 41). Muslim women believed that they were being forced to show bare skin for no good reason. The institutions believed that the clothing rules were motivated by objective hygienic reasons. The report constituted a good example in itself, but also helped to focus on bringing such cases to court, as indicated in the next example of best practice.

3. Testing the burden of proof rules

The extent to which health regulations concerning clothing requirements can be considered to be discriminatory with regard to religion ended up being tested in the general courts in 2016 and in the Labour Court in 2017.⁴²⁶ Taking these very similar cases into the different Swedish court systems clearly exposed a difference in the implementation of the burden of proof rules. By testing the issue of clothing and regulations, as well as exposing the difference in implementation, they constitute best practice. These cases are discussed in more detail in Chapter 6.3 above.

⁴²⁴ Swedish ESF Council (2017), *Discrimination in Working Life – Where is it and how do we know* (*Diskriminering i arbetslivet: Var den finns – och hur vi vet*), available at: <https://www.esf.se/Documents/Våra%20program/Socialfonden%202014-2020/Programinformation/Diskriminering%20i%20arbetslivet%20version%202.pdf>.

⁴²⁵ Equality Ombudsman, *Kedjor av händelser*, Report 2016:2, p. 25. These are all complaints submitted in 2014 by persons who believed that the alleged discriminator perceived them as Muslims or who were Muslims and thought that the treatment could equally well be directed at their religion or ethnic background.

⁴²⁶ Stockholm District Court, case T 3905-15, *Equality Ombudsman v. Swedish State through Karolinska institutet* (judgment of 16.11.2016); Labour Court 2017, case 65, *Equality Ombudsman v. The People's Dentists of Stockholm County* (judgment of 20.12.2017).

The Karolinska institute case involved a Muslim dental student who wanted to use disposable forearm protection instead of having bare forearms, because she did not want to show this part of her body to strangers. The state refused, referring to a National Health and Welfare Board Regulation (2007:19),⁴²⁷ which allowed for covered forearms only in special situations. The state's experts underlined the need for such rules due to hygienic considerations. The Equality Ombudsman's British expert testified as to the reasons why British authorities believe that there is no hygienic problem with disposable forearm protection. The court considered the experts on both sides to be scientific and equally credible. However, in applying the burden of proof rules in the general courts, it was the education provider (the alleged discriminator) who bore the burden of proof with regard to the justification of possible indirect discrimination once the *prima facie* case was established. Therefore, the state lost the case.

This case was followed by a similar case in 2017 in the Labour Court, but this time the issue involved not a student but a Muslim dentist working for a county dental surgery. The demands on hygienic standards stemmed from the same regulation. Essentially, the same evidence was presented. However, even though the Labour Court gave equal weight to the experts on both sides, the court determined that the DO had not fulfilled its burden of proof. The court stated that, as far as patient health was concerned, the employer must be allowed a wide margin of appreciation in accordance with the duty of care principle (*försiktighetsprincipen*); thus, any remaining doubt must fall on the claimant.

In the author's opinion, exposing the different ways in which the burden of proof rules are being implemented clearly constitutes good practice. This demonstrates the need to ensure that the rules are implemented in a manner that is consistent with EU law and the intentions of the Swedish Parliament. While the Labour Court put the burden on proof on the claimant and refused to ask the CJEU for a preliminary ruling, the district court placed the burden on the discriminator. These cases are a problem for those who argue that the difference in success rates in discrimination cases in the general courts as opposed to the Labour Court is entirely caused by factors other than the Labour Court's more restrictive application of the rules on the burden of proof.⁴²⁸

4. *Awareness raising campaign concerning disability discrimination*

The Swedish Agency for Participation (Myndigheten för delaktighet), together with the Equality Ombudsman and the Child Ombudsman, has conducted an information campaign regarding the new (2015) discrimination form of inadequate accessibility and the UN convention on the Rights of Persons with disabilities. Seminars, an ad-campaign and digital information are all important parts of this campaign.⁴²⁹

5. *Civil society raising awareness about enforcement*

The projects given support by the National Inheritance Fund could mark an important step forward concerning the empowerment of discriminated-against groups. The 'Law as a tool for social change' project and the 'From talk to action' project both concern disability, equality and non-discrimination.⁴³⁰ Even though the funding is basically just for various types of awareness raising, this is focused on encouraging the targets of discrimination to realise that, if they want the Discrimination Act to be applied in practice, they have to part of the process. This means a willingness to actually take cases

⁴²⁷ Now Regulation (2015:10).

⁴²⁸ Stockholm District Court, case T 3905-15, *Equality Ombudsman v. Swedish State through Karolinska institutet* (judgment of 16.11.2016); Labour Court 2017, case 65, *Equality Ombudsman v. The People's Dentists of Stockholm County* (judgment 20.12.2017).

⁴²⁹ DO Annual Report 2017, pp. 7 and 42.

⁴³⁰ Lagen som verktyg ('Law as a tool for social change') – see <https://lagensomverktyg.se>; Från snack till verkstad ('From talk to action') – see: <https://funktionsrattskonventionen.se/om-projektet/>.

to court – a willingness to test the law. If the disability movement as well as other parts of society move in this direction, this will provide a healthy 'competition' or complement to the Equality Ombudsman. This is the type of action that, in the long run, the author expects will help to transform the law already set out in statute into law in action.

11 SENSITIVE OR CONTROVERSIAL ISSUES

11.1 Potential breaches of the directives (if any)

Generally, Sweden fulfils the requirements set by the directives. The following points are problematic in the opinion of the author:

- Discrimination against legal persons is not prohibited in working life (3.1.2.a).
- The principle of vicarious liability in relation to discrimination law is restricted when employees act outside their authority to an extent that is problematic. Furthermore, the legal concept of 'employer' may be too narrow, as the employer is regarded as the legal person itself or the natural person who, as a representative of this legal person, makes decisions regarding the employees. The employer is thus directly responsible only when an employee discriminates against another employee *and* the latter is subordinated to or dependent upon the former (Section 2.4.b).⁴³¹
- Compared with the general court system, the Labour Court seems to apply the rules on burden of proof more restrictively towards the claimant. The 2017 dentist case is the first essentially similar case that has been tried in both systems and clearly demonstrates this difference. The Labour Court's practice does not seem to be in compliance with the directives, while the practice of the civil courts seems to be compliant. Furthermore, it seems to be very hard to win cases of ethnic discrimination in the Labour Court (Section 6.3).
- In cases concerning recruitment, including promotion cases, there is no right to economic compensation (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).⁴³²
- The Equality Ombudsman is currently working on harassment cases and is trying to get a preliminary ruling from the CJEU. In Sweden, the claimant must show either that the offending employee has a managerial position or that the employer knows about the harassment but has not taken action. The Equality Ombudsman wants an answer to the following questions:⁴³³

1. Is the limitation of responsibility to employees with managerial positions in accordance with the directives?

⁴³¹ The general thinking is that vicarious liability is problematic, and Chapter 1 Section 4 point 5 and Chapter 2 Section 1 of the Discrimination Act (Diskrimineringslagen 2008:567), adopted on 05.06.2008, are two examples of this general thinking. See Labour Court 2007 No. 45 and 2011 No. 19. In these two cases it is obvious that the worker/trainee had every reason to believe that the person with the alleged discriminatory behaviour was acting on behalf of the employer, but there is no protection for persons acting under such a belief, however well founded that belief may have been.

⁴³² The Court of Justice of the European Union regards statistical discrimination as a form of direct discrimination. Case C-236/09 (Test Achats), where the insurance providers were not allowed to use the sex of the customer in order to determine insurance fees, is a prime example of this. The fact that men statistically have more accidents than women is not a valid defence for directly using a person's sex to determine the insurance fees for cars. However, with regard to disability and insurance, statistical differences between persons with a disability and healthy persons makes them non-comparable, and thus a presumption of discrimination cannot arise. Please note that the fact that the concept of direct discrimination covers statistical discrimination is so strong that the directive in question (2004/113) contained a clause exempting the insurance sector, and it was this clause that got struck down by the CJEU. The Swedish Discrimination Act could have extended the protection for disability to services and then exempted the insurance sector, as per Directive 2004/113. However, extending the protection for disability to the insurance sector and then defining a comparable situation as if statistical discrimination is not a form of direct discrimination cannot be right. If an EU concept such as direct discrimination is used, then, in the view of the author, it must be used correctly.

⁴³³ Two cases regarding sex (therefore not reported here) have been heard by the Labour Court this year (2016 No. 56 and 2016 No. 38). The Ombudsman won the cases, but failed to get the legal answers (the discriminators were found to have managerial positions). There is one pending case in a district court on alleged harassment due to sexual orientation by a university teacher towards a student, where the second question is asked.

2. If it is in accordance with the directives, what is the subjective requirement concerning the knowledge of the employer: should they know, or is a higher barrier for the claimant allowed according to EU law?

11.2 Other issues of concern

The independence of the Equality Ombudsman is a concern. In the author's opinion, an equality body necessarily needs to be willing to at least occasionally confront those with power in society, not just in court but in other forums as well. This applies to employers, business owners, unions, civil servants, researchers, politicians and others. This creates an uncomfortable situation for civil servants. This is especially true in a country that has an international reputation as a champion of human rights, a reputation that is also believed in by much of the Swedish population, including civil servants themselves. This makes it hard to understand the underlying issues related to discrimination, especially in relation to the use of law for social change. Regarding those who are less powerful in Sweden, there is a legal tradition of adopting laws that state principles but lack remedies. Basically, all of the key elements of Swedish discrimination law have been inspired by or transplanted from the EU or other countries. This applies to a civil law ban on discrimination, an equality body, a shifted burden of proof, indirect discrimination, sexual harassment and active measures.

However, in the author's opinion, moving from law on paper to law in action requires an understanding of the current legal and political environment, as well as the direction in which it needs to go. This means understanding that case law must now be developed, even with regard to less powerful interests. This is a disruptive change as regards the Swedish model, where collective thinking has reigned and individual rights were not particularly significant, at least not in regard to the less powerful. As a rule, 'they' have been expected to accept the consensus of those with power. This is one reason why a key factor going forward is empowerment. One key test, when it comes to empowerment, is to see if the law means what it says.

This is why the following are key concerns and/or needs:

- The lack of case law in regard to the Discrimination Act and related fields. Indirect discrimination is one of several areas.
- The DO needs to be investigating more complaints more effectively. This is needed for building up the knowledge of DO staff concerning discrimination as well as the trust of the victims and groups representing victims. Even from a strategic litigation viewpoint, development of this knowledge and trust is key.
- The slow development of public interest law firms that serve discriminated-against groups.
- Amendment of the Discrimination Act in a way that can lead to larger and more substantive awards, including those issued by courts, in prohibition of discrimination cases, with forward-looking orders on reporting back to the courts on the implementation of active measures.
- Reducing the cost risks placed on victims of discrimination who take cases to court on their own.
- A test case fund, controlled mainly by NGOs, which can provide support in potentially strategic cases.
- On discrimination awards, the possibilities concerning the prevention portion should be considered as a potential source of financing for the fund above. For example, if 50 % of the preventive (or dissuasive) portion is to be paid into a test case fund, the courts might be more easily convinced that they should make awards that are both compensatory and dissuasive. The author believes that one hindrance to more dissuasive awards being made is the fear of unjust enrichment of the victim. This type of idea could help remove that obstacle.

Even though the cost of going to court is not terribly expensive from a middle-class perspective, it is clear that many of the persons who suffer the worst discrimination cannot afford to defend their rights. For a person who discriminates against Roma or persons of African ethnic origin, for instance, the risk of ending up in court is small. The risks for the discriminator are generally minor, except in extreme situations.

One alternative is to support the anti-discrimination bureaus so that they can take more cases to court. It is important that they learn to think in terms of legal activism. To the extent that there are role models in Sweden, the Civil Rights Defenders organisation is one, and another is the Centre for Justice. Long-term strategic thinking is important, along with understanding the idea that it is necessary to risk losing in order to win, that today's losses may be necessary for tomorrow's successful cases, that settlements can provide a basis for moving forward, that the trust of the client is key, and that the courtroom, while important, is just one part of the arena. Winning in court but not being heard elsewhere is not really winning.

The Government White Paper 2016:87, on measures to improve the implementation of the anti-discrimination principle provided some arguments for the creation of a new Anti-Discrimination Board. In the author's opinion, however, the suggested general framework, along with the need for an additional inquiry, meant that the idea had little chance of gaining serious support. The inquiry treated the issue of discrimination as if it was a simple consumer case that could be resolved on the basis of written submissions. The critical comments by various actors in the field will probably mean that this idea will be disregarded.

Unfortunately, other than proposing increased funding for the anti-discrimination bureaus and suggesting that the DO should voluntarily investigate and act on more individual complaints, the board's suggestion was about the only concrete proposal that was relevant to implementation of the anti-discrimination principle. In particular, nothing was suggested that would lessen the cost risks for an individual who wants to take a case to court. Nor was anything suggested that would increase the cost risks of those with the power to discriminate.

12 LATEST DEVELOPMENTS IN 2017

12.1 Legislative amendments

Two minor changes were made to the Discrimination Act in 2017 that are relevant to this report.

- The repeal of the exemption of businesses with less than 10 employees from the rules on inadequate accessibility.⁴³⁴
- The introduction of a possibility, in certain situations, to appeal a decision by a university to the Higher Education Appeals Board as a violation of the Discrimination Act. However, this only means that the decision is nullified and sent back to the university for a new decision. It does not include the possibility of receiving a discrimination award or injunctive relief.⁴³⁵

12.2 Case law

Labour Court

2017-12-20

Equality Ombudsman v. People's Dentists of Stockholm County

Case 65/2017

<http://www.arbetsdomstolen.se/upload/pdf/2017/65-17.pdf>

Brief summary: The People's Dentists of Stockholm County (Folktandvården) is a very important dental care provider owned by the Region of Stockholm. It required all dentists to work with bare lower arms regardless of the outcome in the district court in the *Karolinska Institutet* Case. A Muslim dentist was thus disfavoured, and the Equality Ombudsman took the case to the Labour Court.

The employer set out reasons why it was genuinely (albeit theoretically) possible that there could be a problem with hygiene. The expert for the Equality Ombudsman showed that it was not possible to detect increased infections in Britain connected to permitting disposable lower arm protection in that country.

The Labour Court said that, since the employer had presented genuinely objective theoretical hygienic reasons, the burden of proof had shifted back to the claimant. Since the Equality Ombudsman failed to disprove the employer's expert, the Equality Ombudsman lost the case. The main argument for this outcome was that, when patient security is at risk the employer must be allowed a wide margin of appreciation when setting hygiene rules (*försiktighetsprincipen* – the duty-of-care principle), and thus any remaining doubt must fall on the claimant.

Labour Court

2017-10-11

Equality Ombudsman v. Södertörn University

Case 51/2017

<http://www.arbetsdomstolen.se/upload/pdf/2017/51-17.pdf>

Brief summary: A university refused to hire a lecturer who was deaf. The Equality Ombudsman and the education provider agreed that an interpreter between sign-language and spoken language was needed. The cost to the employer was disputed with regard to how much could be financed with employment policy allowances, among other factors. The Labour Court started by assessing the case as if the Equality Ombudsman had made a correct cost assessment of SEK 520 000 (approximately EUR 48 660) per year as a net cost for the education provider (the lowest cost assessment). Considering all of the facts, that cost was considered excessive and the Ombudsman lost the case.

⁴³⁴ Act 2017:1081 Changing the Discrimination Act, adopted 16.11.2017.

⁴³⁵ Act 2017:282 Changing the Discrimination Act, adopted 13.04.2017.

There was thus no need for the Labour Court to assess whether the correct cost was higher than SEK 520 000 as the university claimed.

Labour Court

2017-04-12

E.G. v. Jönköping County

Case 23/2017

<http://www.arbetsdomstolen.se/upload/pdf/2017/23-17.pdf>

Brief summary: A woman was employed as a nurse but applied several times for a job as a midwife. However, because of her Christian faith, she refused to perform some of the duties regarding abortions or contraceptives. Her employer refused to adapt the midwife's job so that it corresponded to her faith. Her employer also refused to allow her an 'education wage' for the last two terms of the midwife specialist education, because they believed that she would not use the education for them by working as a midwife. She believed that the employer had thus violated both the Swedish Discrimination Act and ECHR Articles 9, 10 and 14.

The Labour Court found that this could not be a case of direct discrimination since all job seekers who refused to do some of the required tasks would not have been hired.

The Labour Court found that the requirement that midwives must do some tasks regarding abortions was a potential source of indirect discrimination, because it affected persons of certain Christian beliefs more than others.

In Sweden, a woman has a right to abortion during the first 18 weeks of the pregnancy. There is a general instruction to respect the woman's decision and proceed with no delay if an abortion is requested. Therefore, the Government bill for the Abortion Act says that counties shall avoid hiring midwives or other staff who, for religious reasons, are against abortions in clinics where this question may arise. One cannot know in advance if a particular woman will wish to discuss abortion when she meets the midwife.

Abortions are an integrated part of the work performed in a women's clinic. It would cause delays and other problems if the midwife in charge of the patient refused to perform her tasks. The societal interest of having a high standard of healthcare was thus given preference and was regarded as a valid justification for the negative impact.

Svea Court of Appeal

2017-03-22

Swedish State Through the National Employment Agency v. Equality Ombudsman

Case T 777-16

<http://www.do.se/globalassets/diskrimineringsarenden/hovratt/dom-hovratt-arbetsformedlingen-anm-2014-1037.pdf>

Brief summary: A Jehovah's Witness who was in an employment programme and was receiving an activity grant was asked to apply for a job at the Swedish National Lottery and Gambling Monopoly. His job would have involved selling companies packages of lottery tickets with the customer's logo, so that they could give them to employees or customers or use them for other promotional purposes. His job would thus not involve selling tickets to individuals.

Nevertheless, in accordance with his faith as a Jehovah's witness, he believed that gambling is sin and thus refused to go to the job interview and therefore lost his place in the programme, and thus also his right to the activity grant.

This was regarded as indirect discrimination. The criterion of seeking all employment including jobs promoting gambling was considered to be a disproportionate burden on Jehovah's Witnesses compared with average Swedes, and the National Employment

Agency could not present a valid justification. There were many potential employers for this person whose main activity was not gambling, and it should therefore have been possible to let him refuse this job. He was awarded SEK 60 000 (approximately EUR 5 614).

Lund Municipal Court

2017-04-10

Malmö Against Discrimination v. Helsingborg Municipality

Case FT 3174/16

Not available on line on a site free of charge

Brief summary: A Muslim man was not allowed to continue as a temporary employed substitute at a centre for persons with social problems. He and Malmö Against Discrimination (a local anti-discrimination bureau) believed that it was because he refused to shake hands with women.

The employer said that he had a problem in his attitude towards female co-workers and residents. The employer also claimed that he sometimes did not fulfil certain duties such as cleaning up. The district court emphasised the fact that an employer under the circumstances of the case can refuse to renew someone's temporary employment for any reason. Therefore, even a description of relatively minor problems at the workplace may give rise to legitimate and proportionate action in an indirect discrimination case, as the same issues could have prevented an ethnic Swede from being offered continued temporary employment.

Skaraborg County District Court

2017-05-24

Equality Ombudsman v. Vara Municipality

Case T 2447/16

<http://www.do.se/globalassets/diskrimineringsarenden/tingsratt/dom-tingratten-skola-anm-2016-9402.pdf>

Brief summary: For three years, a pupil who used a wheelchair had attended a school with inadequate access ramps. In particular, he was required to use ramps that were steep or without railings. On two occasions, his wheelchair tipped over as a consequence. The Equality Ombudsman asked for SEK 75 000 (approximately EUR 7 018). The district court determined that this was discrimination in the form of inadequate accessibility and awarded the pupil SEK 30 000 (approximately EUR 2 800).

The Equality Ombudsman has appealed the case (seeking a higher award), and the Appeal Court for Western Sweden has decided to take the case on.

Stockholm District Court

2017-10-17

Equality Ombudsman v. Braathens Regional Aviation (BRA)

Case FT 8882/17

<http://www.do.se/globalassets/diskrimineringsarenden/tingsratt/dom-tingratt-flytbolag-anm2017-1260-ft888217.pdf>

Brief summary: A male passenger, AA, who was sitting in a plane preparing to fly to Stockholm, was removed by two guards and forced to undergo a further and more extensive security check than had already taken place in the airport. The man was subsequently denied the opportunity to re-board the plane. After investigating the issue, the DO determined that these actions were based on AA's ethnicity and thus demanded SEK 10 000 (EUR 940) as a discrimination compensation award via a lawsuit. BRA consented to payment of the amount demanded, while at the same time stating that this was not an admission that discrimination had occurred. In accordance with the rules of procedure for this type of dispositive case, the district court issued a judgment for the amount requested without an examination of the facts in the case. The court also denied

the DO's request for a finding that discrimination had taken place, as well as a request for a referral to the CJEU for a preliminary ruling.

The DO appealed the case, and the appeal court agreed to take the case on.

Stockholm District Court

2017-10-05

Equality Ombudsman v. The State through the Chancellor of Justice

Case T 16908/15

<http://www.do.se/globalassets/diskrimineringsarenanden/tingsratt/dom-tingratten-trakasserier-universitet-20152431.pdf>

Brief summary: AA contacted the DO concerning a claim of sexual harassment and harassment with a connection to sexual orientation. AA was a university student and was subjected to the harassment by a teacher. The DO investigated and, finding the claims to be credible, filed a lawsuit requesting the payment of a discrimination compensation award to AA of SEK 100 000 (EUR 9 400). The State / university consented to pay the amount requested while still denying that discrimination had occurred. In accordance with the rules of procedure for this type of dispositive case, the district court issued a judgment for the amount requested without an examination of the facts in the case. The court also denied the DO's request for a hearing and a finding that discrimination had taken place.

The Roma Registration scandal

The Chancellor of Justice completed consideration of the first phase of the Roma registration scandal in 2015.

In Sweden, a violation that is regarded as less severe results in a normal level of damages of SEK 3 000 (EUR 280). The information in the register was not disseminated outside the police, and no person suffered a loss due to that information, therefore the violation was considered to be marginally more than 'less severe', and was worth SEK 5 000 (EUR 468).⁴³⁶ This decision was given in May 2014.

Throughout this process, the police assertion that the case did not involve ethnic registration has been accepted – or at least not proven wrong – by all of the authorities involved, most of them making their final decisions in 2013-2015.⁴³⁷ All of them have viewed this registration practice as being in violation of the Data Protection Act, but nothing more. The damages were set at the same level that a non-Roma Swedish person would have received in the same situation.

In a second phase, 11 persons were helped by the Civil Rights Defenders⁴³⁸ to bring a case before the Stockholm District Court. The decision of the court was delivered on 10 June 2016.⁴³⁹

⁴³⁶ Decision of the Chancellor of Justice of 7 May 2014 concerning the police travellers' registry, available at: <http://www.jk.se/beslut-och-yttranden/2014/05/1441-14-47/>.

⁴³⁷ Commission on Security and Integrity Protection (decision from December 2014), available at: <http://www.sakint.se/dokument/rapporter-och-uttalanden/Uttalande-PM-Skaane-Uppfoeljning-Kringresande.pdf>; Equality Ombudsman (decision from February 2014), available at: <http://www.do.se/globalassets/stallningstaganden/ovriga/stallningstagande-beslut-med-rekommendationer-till-polismyndigheten-gra-2013617.pdf>; Public prosecutor (decision from December 2013); The Parliamentary Ombudsman (decision from March 2015), available at: <http://www.jo.se/PageFiles/6353/5205-2013.pdf>.

⁴³⁸ More information about Civil Rights Defenders, a Swedish NGO that defends people's civil and political rights internationally as well as in Sweden, can be found at: <https://crd.org>.

⁴³⁹ Stockholm District Court, Case T 2978-15 (and 10 more cases), *Fred Taikon (and 10 more claimants) v. Swedish State through the Chancellor of Justice* (judgment of 10.06.2016).

The claimants were awarded SEK 30 000 (EUR 2 807) in addition to the damages already awarded by the Chancellor of Justice. The important difference is that, while the Chancellor of Justice found only a violation of the Data Protection Act not connected to the ethnic background of the individuals, the Stockholm District Court found that the only reason for the registration was their ethnicity.

The court applied a shifted burden of proof. Given that the 11 claimants had proved the existence of the register and that people were registered because they were friends or relatives of three criminal Roma families or friends of friends, there was an assumption that these 11 persons were registered because they were Roma (in the case of 10 persons) or married to a Roma (in the case of one person). It was then up to the state to prove that there was another valid reason to register the persons that was not connected to ethnicity. Nobody could remember why these 11 persons had been registered in 2011, and thus the state failed to prove a valid reason that was not connected to ethnicity.

The amount of SEK 30 000 (EUR 2 807) was set for a violation of Article 14 of the European Convention on Human Rights. The district court considered the violations to be particularly egregious because of the long historical discrimination against Roma, among other reasons. This in turn was a reason to set the amount at a higher level compared with what might have applied in other more 'normal' cases.

In the Court of Appeal in 2017, the Swedish state admitted for the first time that the registration amounted to discrimination in that it constituted a violation of Articles 8 and 14 of the ECHR. The registration was at least partly connected with the claimants' Roma ethnicity. If ethnicity is a contributing causal factor, it is sufficient to make it ethnic discrimination under Article 14 of the ECHR in conjunction with Article 8. Like the district court had done in 2016, the Svea Court of Appeal in 2017⁴⁴⁰ found that the sole reason for the registration was indeed ethnicity, and thus found that there had been a breach of the Police Data Act as well as discrimination. The award of SEK 30 000 was not changed. The state did not appeal this verdict and has paid out the compensation to all registered persons (not only the 11 persons for whom the Civil Rights Defenders took the case to court).

⁴⁴⁰ Svea Court of Appeal, Case T 6161-16, *Fred Taikon (and ten more claimants) v. Swedish State through the Chancellor of Justice* (judgment of 28.04.2017).

ANNEX 1: TABLE OF KEY NATIONAL ANTI-DISCRIMINATION LEGISLATION

The **main transposition and anti-discrimination legislation** at both federal and federated/provincial level.

Country: Sweden
Date: 1 January 2018

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 (2017:1128) changing the Discrimination Act Date of adoption: 23.11.2017 Entering into force: 01.01.2018 Web link: https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/diskrimineringslag-2008567_sfs-2008-567 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, inadequate 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.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/lag-2008568-om-diskrimineringsombudsmannen_sfs-2008-568 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>

	Principal content: A detailed description of the tasks of the Equality Ombudsman
Title of legislation (including amending legislation)	<p>The (1962:700) Penal Code</p> <p>Abbreviation BrB</p> <p>Date of adoption: 21.12.1962</p> <p>Entering into force: 01.01.1965</p> <p>Latest relevant amendment: Act (2008:569) changing the Penal Code</p> <p>Entering into force 01.01.2009</p> <p>Web link: https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/brottsbalk-1962700_sfs-1962-700</p> <p>Grounds covered: Ethnicity, religion and other belief, sexual orientation</p> <p>Civil/administrative/criminal law: Criminal law</p> <p>Material scope: Access to goods and services, protection against hatred</p> <p>Principal content: The crimes of unlawful discrimination and hate speech.</p>

ANNEX 2: TABLE OF INTERNATIONAL INSTRUMENTS

Country: Sweden
Date: 1 January 2018

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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