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

COUNTRY REPORT 2012

SWEDEN

PER NORBERG

State of affairs up to 2 January 2013

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INTRODUCTION

0.1 The national legal system

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

Swedish legislation is based on a strong domestic tradition of Germanic law, but it has also been influenced by foreign law. An important difference in relation to the majority of continental legal systems is that Sweden has abstained from large-scale codifications along the lines of the Bürgerliches Gesetzbuch in Germany. In comparison with Anglo-American law, a major difference is that Swedish law is based to a considerably greater extent on written law, while case law plays a smaller, though important role. Thus the Swedish legal system, both by virtue of its systematic structure and its contents, may be said to be somewhere between the Continental European and Anglo-American systems.

Power to enact laws is vested in the Swedish Parliament (the Riksdag), which consists of a single chamber with 349 members. The Government, however, has the power to issue decrees concerning less important matters. To some extent this power stems directly from the Instrument of Government (one out of four Swedish constitutional laws, see further Sec. 1 below). But the Government can also be granted power to issue decrees by means of acts of law passed by the Riksdag. These decrees are normally given in the form of regulations. Legal instruments relating to the personal status of private subjects or the personal and economic relations between private subjects – that is matters of civil law – fall under the exclusive competence of the Parliament and must thus be regulated by law.[1] Employment legislation falls under this category. Neither local nor regional authorities have any legislative powers in this field.

As regards employment/labour law, legislation is scattered over a number of different acts, the two most important being the 1982 Employment Protection Act[2] and the 1976 Codetermination at the Workplace Act.[3] The former contains rules on the hiring of employees, including modes-of-employment, as well as rules regarding dismissals. The latter includes the central rules on collective labour law.

[1] Art. 2 of Ch. 8, Instrument of Government.
[2] Lag (1982:80) om anställningsskydd.
[3] Lag (1976:580) om medbestämmande i arbetslivet.

Other important laws are the Trade Union Representatives Act,[4] the Working Hours Act,[5] the Working Environment Act,[6] the Annual Leave Act[7] and the Parental Leave Act.[8] The non-discrimination legislation consists of the Discrimination Act (2008:567) and some rules in the Penal Code (1962:700).

These acts apply both to the private and the public sector. Generally, work as a civil servant is ruled by contracts and collective agreements largely the same way as regarding private employment and the same rules apply. However, some special rules for the public, and especially the State sector, still apply. These regard mainly the hiring process, where some constitutional rules on objectivity apply.

As regards the lawmaking process, in Sweden the groundwork in the preparation of bills is laid by commissions of inquiry, legal experts in the ministries, and Riksdag standing committees. Legislative initiative lies predominantly with the Government. Its right to make legislative proposals to Parliament is guaranteed by the Constitution.[9] Another alternative is that the Riksdag, on the basis of bills introduced by individual members, requests that an inquiry be made concerning legislation on a certain issue.

Swedish legislative commissions, likely to prepare any bill of importance, are noted for carrying out detailed inquiries published in a special series known as Swedish Government Reports (Statens offentliga utredningar, SOU). The results of their work are generally presented in a report that reviews the field concerned (often with references to legal systems in other countries), a general justification of the changes proposed, and detailed draft proposals with commentaries on each clause. To a certain extent, inquiries into matters of legislation are carried out in the ministry principally concerned, with the assistance of the ministry's own officials.

When a commission has finished its work, its recommendations are examined by the legislation department of the ministry concerned. The commission's report is then sent out for written comment by interested authorities and organisations.[10] On the basis of the report and the invited comments, the matter is analysed by experts within the ministry. The minister concerned and the Government then adopt a position on the issue. If a decision is made to proceed with the matter, the ministry will prepare a bill which is presented to the Riksdag.

[4] Lag (1974:358) om facklig förtroendemans ställning på arbetsplatsen.
[5] Arbetstidslag (1982:673).
[6] Arbetsmiljölag (1977:1160).
[7] Semesterlagen (1977:480).
[8] Föräldraledighetslagen (1995:584).
[9] Ch. 4 Art. 4 of the Instrument of Government.
[10] This is done at the choice of the Government. Since such reports are public documents any organisation, etc., may send in their comments, though.

The most important part of the Riksdag's legislative work is performed within standing committees. The committee deals with the Government's bills and with members' bills containing various amendments. This results in a committee report. The bill and the report are subsequently dealt with at a plenary session of the Riksdag which, after a debate, votes on the bill. The Swedish lawmaking process thus generates a voluminous body of printed matter which is important in applying the legislation. Given the care taken in these materials to formulate the reasons and intent of the law, it becomes natural for courts, authorities and individual lawyers to rely on them as important sources of interpretation.

Primary responsibility for the enforcement of legal rules devolves upon the courts and the various administrative authorities. As in other European countries, the court system occupies a special position. The difference between adjudicative and administrative authorities is less in Sweden than in most European countries, although there is a clear borderline between the courts and the administrative agencies.

As for the *general courts,* Sweden has a three-tier hierarchy: the district courts (tingsrätt), the courts of appeal (hovrätt), and the Supreme Court (Högsta domstolen). As a general principle it may be said that the general courts enforce civil law and criminal law legislation.

The task of *the administrative courts* may be described as one of maintaining due observance of the law within the public administration—at central, regional and local level. They deal with decisions by public authorities such as for instance tax regulations and the social security system. The proceedings take a form corresponding quite closely to the proceedings at the courts of general jurisdiction. However, in contrast to general courts, proceedings in writing are predominant. Thus appeals concerning assessment for taxation as well as appeals against certain decisions of administrative authorities and against decisions of local authorities are dealt with by administrative courts (förvaltningsrätter). Appeals against judgements of these administrative courts are made to the administrative courts of appeal (kammarrätter). The highest administrative tribunal is the Supreme Administrative Court (Högsta Förvaltningsdomstolen).

The Labour Court is a special court with the task of trying labour disputes. Certain cases can be brought directly before the Labour Court, while other cases (presented by individuals *not* supported by their professional organisation[11] or – in matters of discrimination – by an Ombudsman) are to first be brought before a district court. Thereafter they can be appealed to the Labour Court. The decisions of the Labour Court are final and cannot be appealed. Workplace discrimination cases are thus ultimately to be tried before the Labour Court, either as the court of first instance or as an appeals court.

The national administration is conducted by the Government and the various ministries and is organized in a well-developed network of administrative authorities. The central administrative agencies have a relatively independent position regulated in general by instructions laid down by the Government.

There are also the special institutions of control called the Ombudsmen. Outside Sweden, the best known of these institutions is probably the Office of the Parliamentary Ombudsmen (Riksdagens Ombudsmän or Justitieombudsmännen, JO), the first of whom was appointed in 1809.

In order to understand the functioning of Swedish labour law, and thus important parts of the non-discrimination legislation, it is crucial to have in mind the special role designated to the social partners. Swedish labour market is characterised by a high degree of organisation density; this is true of employees and employers alike. It is difficult to obtain exact figures on the degree of affiliation, but it is roughly 70 percent among workers as well as among salaried employees.[12] Furthermore, the organisation pattern is firmly established, and there is relatively little inter-trade-union rivalry. This organisational structure is reflected in collective bargaining. There are collective agreements at three levels: national, industry-wide and local. In most instances, the relationship between an employer/employers' organisation and the union is firm and long-standing. Orderly and peaceful ways for the parties to meet, to bargain and to settle disputes still can be said to characterise "the Swedish model" for industrial relations.

[11] According to Chapter 2 Section 1 Act (1974:371) on Court Procedures in Labour Cases, a case can be brought directly to the Labour Court if the plaintiff is a worker who is supported by his or her trade union and the trade union has a collective agreement which binds the employer. It can also be brought directly to the Labour Court if the plaintiff is an employer, is supported by his or her employer organisation and there is a collective agreement between the employer organisation and the trade union or if the employer has signed the collective agreement (as opposed to being bound by membership of the employer organisation that have signed it). Using the word professional organisations is a way to include employers and employer organisations and the two first ways to go directly to the Labour Court are the most common. The third way is not covered by the sentence above.

[12] Kjellberg A, Kollektivavtalens täckningsgrad samt organisationsgraden hos arbetsgivarförbund och fackförbund, Department of sociology, Lund University Studies in Social Policy, Industrial Relations, working Life and Mobility, Research Reports 2010:1, p. 12.

Labour Law generally assigns to established unions – i.e. unions that uphold a collective agreement with the employer in question – a privileged position. Though Swedish law does not provide for exclusive representation, established unions de facto often speak for the entire employee community. The role of the social partners is also reflected in the fact that important issues are still outside the scope of law, for instance wages.[13] Another important feature, due to the crucial role played by the social partners and collective bargaining, are the frequent use of what is generally referred to as "semi-mandatory rules". Even important rules may be overridden by collective agreements.

Non-discrimination legislation is always mandatory. Nevertheless, the industrial relations structure and the role played by the social partners are crucial also to non-discrimination law as regards employment. Thus, both the individual claiming having been discriminated against and the one who got the job, the comparator as regards equal pay, etc., are likely to be members of the same union. Different wage-levels as regards work of equal value are regularly the outcome of collective bargaining, etc. Moreover, at the Labour Court there is a strong representation of the social partners. There has been intense discussion on pay issues as being best kept outside the court system, and also .on the Swedish Labour Court as not the appropriate forum to deal with such claims.[14]

0.2 Overview/State of implementation

List below the points where national law is in breach of the Directives. This paragraph should provide a concise summary, which may take the form of a bullet point list. Further explanation of the reasons supporting your analysis can be provided later in the report.

This section is also an opportunity to raise any important considerations regarding the implementation and enforcement of the Directives that have not been mentioned elsewhere in the report.
This could also be used to give an overview on the way (if at all) national law has given rise to complaints or changes, including possibly a reference to the number of complaints, whether instances of indirect discrimination have been found by judges, and if so, for which grounds, etc.

Please bear in mind that this report is focused on issues closely related to the implementation of the Directives. General information on discrimination in the domestic society (such as immigration law issues) are not appropriate for inclusion in this report.

[13] There is thus no legislation on minimum wages, for instance.
[14] For an English version of this debate, see *Legal Procedure in Discrimination Cases, etc*., Lag & Avtal, Stockholm 2002. This discussion has led to a reform and the social partners are no longer in a majority in the Labour Court, when a case involves the new Discrimination Act. SFS 2008:932.

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

Swedish domestic law today contains a considerable number of explicit bans on discrimination. These non-discrimination provisions have until the end of 2008 been found in seven specific laws. Thus, in the area of employment law there were four laws that banned discrimination on the grounds of sex,[15] ethnicity and religion and other belief,[16] disability[17] and sexual orientation,[18] respectively.

Furthermore, there was a law from 2001 which applied to discrimination in higher education on grounds of sex, ethnicity and religion and other belief, disability or sexual orientation.[19]

Since 2003 there was also the Prohibition of Discrimination Act (2003:307) banning discrimination on the grounds of ethnicity, religion and other belief, sexual orientation, disability and after an amendment also sex in other areas of society than working life, such as goods and services (including housing) and social security and related benefits systems.

Since 1 April 2006 there was also the Act on a ban against discrimination and other degrading treatment of children and pupils.[20] This Act applied to pre-school facilities, school-age childcare, primary and secondary school and municipal adult education. It was intended to promote equal rights for children and pupils and to combat discrimination on grounds of sex, ethnic origin, religion or other belief, sexual orientation and disability.

These seven acts are from the 1 of January 2009 repealed and replaced with the 2008 Discrimination Act (2008:567).[21] Chapter one of the new Discrimination Act contains the purpose and the content of the act. Definitions of the following central concepts are given in Section 4, direct and indirect discrimination, harassment, sexual harassment and instructions to discriminate. The seven grounds of

[15] The (1991:433) Equal Opportunities Act (jämställdhetslagen).
[16] The (1999:130) Act on Measures against Discrimination in Working Life on grounds of Ethnicity, Religion or other Belief (the Ethnic Discrimination Act, lagen om åtgärder mot etnisk diskriminering i arbetslivet).
[17] The (1999:132) Prohibition of Discrimination in Working Life of People with Disability Act (the Disability Discrimination Act, lagen om förbud mot diskriminering i arbetslivet av personer med funkionshinder).
[18] The (1999:133) Act on a Ban against Discrimination in Working Life on grounds of Sexual Orientation (the Sexual Orientation Discrimination Act, lagen om förbud mot diskriminering i arbetslivet på grund av sexuell läggning).
[19] The (2001:1286) Equal Treatment of Students at Universities Act (the Students at Universities Discrimination Act, lagen om likabehandling av studenter i högskolan).
[20] Lag (2006:67) om förbud mot diskriminering och annan kränkande behandling av barn och elever (the Pupils Discrimination Act). Prop. 2005/06:38.
[21] For short information see Government Offices Fact Sheet, January 2009 at http://www.sweden.gov.se/content/1/c6/11/80/10/4bb17aff.pdf.

discrimination are enumerated and defined in Section 5. They are, sex, transgender identity or expression, ethnicity, religion and other belief, disability, sexual orientation and age.

Chapter two describes the prohibition of discrimination in the areas the Act applies to. The duties on reasonable accommodation are regulated here as it is regarded as special applications of the prohibition on discrimination in the areas of working life and education. The areas covered by the Act are:

1. Working life, Sections 1-4;
2. Education, Sections 5-8;
3. Labour market policy activities and employment services not under public contract, Section 9;
4. Starting or running a business and professional recognition, Section 10;
5. Membership of certain organisations, Section 11;
6. Goods services housing and meetings or public events, Section 12;
7. Health and medical care and social services, Section 13;
8. Social insurance system, unemployment insurance and financial aid for studies, Section 14;
9. National military service and civilian service, Sections 15-16;
10. Public employment, Section 17.

Chapter two also includes a general prohibition of discrimination directed at all public employees when they assist the public by providing information, guidance, advice or other such help or have other types of contacts with the public in the course of their employment and rules on prohibition of reprisals.

Chapter three contains rules on the requirement of employers and education providers to actively promote[22] equality, so called active measures.

Sections 1-13 cover working life and are organized into the following categories, co-operation between employer and employees, goal-orientated work, working conditions, recruitment, matters of pay and gender equality plan. Sections 14-16 covers education and deals with goal-orientated work, preventing and hindering harassment and equal treatment plans.

Chapter four deals with supervision. The previous four ombudsmen are now merged into one Equality Ombudsman having the responsibility of supervising all grounds. Sections 1-6 together with The Equality Ombudsman Act (2008:568) give the basic rights and duties of the new Ombudsman. Sections 7-17 regulate the activities of the Board against Discrimination and Section 18 regulates discrimination claims brought to the Board of Appeal for Higher Education.

[22] These rules do not require positive action if it is defined as eliminating or reducing a certain barrier for a certain protected group or to compensate that group for its disadvantaged position.

Chapter five contains rules on compensation and invalidity of contractual obligations. A new form of economic compensation, the discrimination award (diskrimineringsersättning) is introduced. Discrimination awards are not supposed to be in line with the low general levels of civil damages in other legal areas. The award includes a right to *damages for the violation* caused by the discrimination. This is in line with the way economic damages are used in other legal areas. Chapter 5 Section 1 also requires the courts to pay *particular attention to the purpose of discouraging future infringements*. Discrimination law is one of the very few[23] areas where pecuniary damages explicitly are used as means of general deterrence.

Chapter six have rules on the legal proceedings such as which courts deal with different claims, the right to bring action, burden of proof, statute of limitations, litigation costs and so on.

The main ideological motive behind the last Act is that anti discrimination law is based on human rights and all violations of human rights are wrong. A comprehensive Discrimination Act based – as far as possible – on equal treatments of all grounds emphasises the non hierarchical relation between the different discrimination grounds. It also facilitates legal developments to spread more rapidly from one discrimination ground to the others. New discrimination grounds can be adopted based on common concepts and without the need to create a completely new act and a new authority.

Several practical motives have been important as well. One law and one authority make it easier for laymen to find and understand the relevant legal provisions. Unnecessary duplication of work is avoided as companies and other actors need only to deal with one authority concerning for instance active measures.

Beside the new Discrimination Act, there is also a law prohibiting discrimination against part-time and fixed-term workers, implementing the European Council's Directives 1997/81/EC and 99/70/EC.[24]

Ethnicity, Religion and sexual orientation have also criminal law provisions such as the provision that bans unlawful discrimination by businessmen[25] in regard to the provision of goods and services[26] and the "hate speech" provision, which makes it a criminal offence to spread a message which is threatening or degrading to a group of persons.[27]

[23] Labour law and intellectual property rights are two other examples of legal areas where pecuniary damages are used in this way.
[24] The 2002 Act on a Ban against Discrimination in Working Life of Part-time and Fixed-term Workers.
[25] Later extended to public employees and public elected representatives.
[26] Chapter 16 Sec. 9 in the Penal Code.
[27] Chapter 16 Sec. 8 in the Penal Code. The provision has its counterpart also in the Freedom of the Press Act and the Fundamental Law on Freedom of Expression. Individual persons are not protected by these provisions but can instead rely on the slander or verbal abuse provisions of the Penal Code.

Directive 2000/43/EC and 2000/78/EC are now implemented mainly by the new Discrimination Act. To a large extent, Swedish law is in conformity with the Directives and, especially as regards disability, religion and other belief , sexual orientation, and from the 1 of January 2013 age[28], domestic law goes beyond the requirements of the Directives. The government is of the opinion that protection against discrimination, in principle, should be as harmonised as possible regardless of the protected group. This harmonisation means that Sweden in several ways goes beyond the requirements of the directives. However, the following three problems remain unsolved:

- The protection against discrimination or victimisation does not fully cover self-employed persons;
- Discrimination and harassment from fellow workers or third parties are not prohibited directly;
- Discrimination against legal persons is not prohibited in working life.

Four other problematic issues are that:

- The principle of vicarious liability in relation to discrimination law is restricted when employees act outside their authority to an extent that is problematic. Furthermore the legal concept of employer may be too narrow as the employer is regarded as the legal person itself or the natural person who as a representative of this legal person makes decisions regarding the employees. The employer is thus directly responsible only when an employee discriminates another employee *and* the latter is subordinated to or dependent upon the former.[29]
- The definition of discrimination requires that a person has suffered disfavour – a less favourable treatment. A discriminatory statement directed at the general public does not fulfil this definition. A discriminatory advertisement will instead fall under Chapter 3 of the Discrimination Act and the possible sanctions for infringements of that chapter are clearly inadequate.
- It seems to be easier to establish a prima facie case and to win discrimination cases in the ordinary court system compared to the Labour Court. It further seems to be very hard to win cases of ethnic discrimination in the Labour Court (see below Section 6.3).
- In cases concerning employment, including promotional cases, there is no right to economic compensation based on lost pay.

[28] Act 2012:673 on changing the Discrimination Act, government bill 2011/12:159.
[29] There is a general thinking on vicarious liability which is problematic and Chapter 1 Section 4 point 5 and Chapter 2 Section 1 of the Discrimination Act are two examples of this general thinking. Compare Labour Court 2007 nr 45 and 2011 nr 19. In these two cases it is obvious that the worker/trainee had every reason to believe that the person with the alleged discriminatory behaviour was acting on behalf of the employer, but there is no protection for persons acting under such a belief however well founded that belief is.

0.3 Case-law

*Provide a list of any important case-law in **2012** within the national legal system relating to the application and interpretation of the Directives. (The **older case-law mentioned in the previous report should be moved to Annex 3)**. This should take the following format:*

Name of the court:
Date of decision:
Name of the parties:
Reference number: (or place where the case is reported).
Address of the webpage: (if the decision is available electronically)

Brief summary: of the key points of law and of the actual facts (no more than several sentences).
➔Please use this section not only to update, complete or develop last year's report, but also to include information on important and relevant case law falling under both anti-discrimination Directives (Please note that you may include case-law going beyond discrimination in the employment field for grounds other than racial and ethnic origin)

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

Name of the court: Court of Appeal for Western Sweden
Date of decision: 25 October 2012
Name of the parties: Child and Pupil Representative of the School Inspectorate v. Municipality of Gothenburg
Reference number: case T 3021-11
Webpage: https://lagen.nu/dom/rh/2013:6
Brief summary: A pupil had been bullied[30] at school. The bullying started in the beginning of 2007 and ended in the beginning of 2008. The court found that the school did not tackle the issue properly during the year of 2007. For instance when the parent reported the bullying and the pupil said it was not so bad, the school believed the pupil instead of investigating the background to the different accounts given by the parent and the pupil. For the inactivity in the year of 2007 the municipality was ordered to pay damages of 50 000 SEK (5 600 Euros) according to the 2006 Pupils Discrimination Act which is now replaced by the Discrimination Act.

[30] The judgement is careful not to give more than the absolute minimum of details regarding the bullying. There was made a song about her with a very degrading text, she was frequently subjected to insulting comments and somebody had written tart (slampa) over her locker. According to Section 2 of the 2006 Pupils Discrimination Act the prohibition covered not only discrimination but other degrading behaviour as well. Therefore the discrimination ground was not important in this case. The damages were the same for discrimination with regard to a discrimination ground and other degrading treatment not connected to a discrimination ground.

Name of the court: Svea Court of Appeal
Date of decision: 12 November 2012
Name of the parties: Stockholm County Council v. The Equality Ombudsman
Reference number: case T 9222-11
Webpage: http://www.do.se/Documents/forlikningar-domstolsarenden/dom_2012-11-12.pdf
Brief summary: A women in a same sex relationship made a phone call to her local medical center, with the aim of making an appointment for medical evaluation, necessary with regard to IVF-treatment. The person receiving the call denied her treatment at her local medical center and asked her to contact a specialist unit. She felt discriminated against since heterosexual couples could get a evaluation at their local medical center. The District Court allowed her 15 000 SEK (approximately 1650 Euro) in discrimination award. The need to make the evaluation at a special unit with times reserved for homosexual couples was degrading in a way that caused disfavour to her and it was directly linked to her sexual orientation. The County Council appealed and so did the Ombudsman in order to raise the discrimination award.

The Appeal Court found discrimination. It also found that the preparatory works to the new Discrimination Act should point toward 40 000 SEK (approximately 4 400 Euro) as a normal compensation in this kind of case. However, because the local medical center realised its mistake and offered her treatment in the local medical center as soon as they realised that she felt discriminated against, the discrimination award was reduced to 30 000 SEK (approximately 3 300 Euro).

The Equality Ombudsman has appealed to the Supreme Court in order to raise the level of the award to 100 000 SEK (approximately 11 100 Euro). The Supreme Court will take the case.

Name of the court: Labour Court
Date of decision: 18 April 2012
Name of the parties: The Building Workers Union v. VVS-Companies and IPL.
Reference number: 2012 nr 51
Webpage: http://www.do.se/Documents/forlikningar-domstolsarenden/dom_2012-11-12.pdf
Brief summary: IPL employed a Nigerian welder who felt harassed in many different ways. The Building Workers Union failed to prove that management was aware that he was called things like Tony Mogadishu or Koko Stupid by fellow workers. In one case he had recorded a conversation with a superior who said, “you look like a slow motion movie – I think it depends on a cultural thing…not because of your colour”. According to the Labour Court the first part of the statement was a critical remark on speed, but not discriminatory in itself. The second part linking speed to cultural differences was inappropriate but as the recording ended with a third statement from the superior that skin colour was not relevant, the tape could not prove harassment.

The Labour Court found no discrimination.

Name of the court: Labour Court
Date of decision: 11 July 2012
Name of the parties: The Retail Worker's Union v. Coop.
Reference number: 2012 nr 51
Webpage: http://www.do.se/Documents/forlikningar-domstolsarenden/dom_2012-11-12.pdf
Brief summary: A food store wanted to reduce their workforce by one person to lower the wage cost. They choose to dismiss the person with the highest seniority, who held a job specially adapted to her disability. The employer decided to abolish that particular job and decided that all remaining jobs should be part of a scheme were each employee should rotate between all the tasks. The disabled worker could not do all those tasks because she was weak in one of her hands and could not grip heavy objects. She could for instance not put heavy items on the shelves. Because all remaining positions required the worker to do all tasks, there was no job left in the store that she could do, therefore she was dismissed.

The core of the case regarded the rules on reasonable accommodation both in the Work Environment Act and the Discrimination Act. The Labour Court said that an employer is not under an obligation to create (or keep) a position that is well suited to the disability of an employee. Only if this can be achieved with a small adaptation of an existing post can the employer have a duty to this under the Work Environment Act to do such adaptations. Basically, the duty of reasonable accommodation is the duty to take costs to adapt the work positions the employer has already decided to have, to a workers disability.

In this case there were no technical adaptations which (at a reasonable cost) would have made the woman able to for instance put food on the shelf. It was therefore not possible to employ her.

The Labour Court also stated that the Discrimination Act did not require more of the employer compared to the Work Environment Act.

Describe trends and patterns in cases brought by Roma and Travellers and provide figures if available?

There were 514 cases initiated relating to ethnic origin at the Equality Ombudsman in 2012[31] and of those about 50 cases were initiated by Roma persons.[32] This can be compared to about 30 cases in 2011 and 40 cases in 2010[33], 30 cases in 2009 and 50 cases registered in 2008 at the former Ombudsman Against Ethnic Discrimination. Fifty is a high figure, it is almost a tenth of the ethnicity cases.[34] Furthermore the

[31] Equality Ombudsman, Yearly Report 2012, p. 13 and 15.
[32] Equality Ombudsman, phone call 2013-03-18 Lars Lindgren and mail correspondence with him.
[33] Equality Ombudsman, mail Heidi Pikkarainen.
[34] Compare, The Ombudsman Against Ethnic Discrimination, Yearly Report 2007 p. 29. 31 cases in 2005, 26 cases in 2006 and 33 cases in 2007.

Equality Ombudsman gives priority to Roma cases.[35] The chance of getting some sort of remedy is thus better for Roma complainants compared to the average complainant.[36] In 2012 there were 3 settlements and one case is taken to court but the court has not decided on it yet.

The cases mainly regard normal daily activities. Many cases concern shops, for instance denying entrance or suspecting the customer of theft. Another large group of cases regards housing for instance refusals to be accepted as tenants or refusals of requests to barter[37] an apartment.[38] Social services"(socialtjänst) – especially child custody cases – is a quite new type of cases that started to grow some years ago.[39]

Other

Prior or to November 2010, schools had quite extensive right to decide not to allow niqab or burkas in the classroom, if they explained themselves to the pupils concerned and had a legitimate reason referring to pedagogical needs.

The Swedish National Board of Education made a guideline of 15 pages in 2003 on burka and niqab. It emphasised that decisions must be made locally by the individual school. A general prohibition of burka or niqab was not permissible relying on the School Act. Decisions must be made case by case.

[35] See also this report Section 7 (h). The Equality Ombudsman is not required by law to give priority to Roma cases, but it has chosen to do so and will probably continue do so in the near future as well.
[36] Equality Ombudsman, Yearly Report 2010, p. 5. In 2010 the Equality Ombudsman initiated 19 court cases and made 38 settlements. If these numbers are compared to a total number of 2614 cases on all grounds, the chance of a successful outcome in an average case is around 2 %. For Roma cases the success rate in 2010 was 27,5 %. This is only rough calculations as settlements and judgements often relates to cases started in earlier years. Looking at the years 2004-2010 there was 25 successful outcomes in relation to 230 Roma cases initiated in the period, a success rate of 11 % (p.61 f). The term success rate is not wholly appropriate as the Equality Ombudsman has not been victorious in all judgements. But according to the Ombudsman almost all judgments in Roma cases were successful (p.62). The term success rate is problematic in another term as well. In the 2011 report on Roma Rights the number of successful outcomes for the same 230 cases are 50. Sometimes the case can be solved in a way that makes the Roma person feel that he or she has got redress without a judgment or a settlement, for instance if the Roma person feel that the perpetrator is genuinely sorry and ask for forgiveness (p. 63).
[37] A lease for a dwelling cannot be terminated by the landlord without just cause. The tenant can thus keep renting their apartment for life. There is a rent control and some contracts have a high value on the black market. The tenant cannot sell his or her contract but can under some circumstances barter the contract for another contract with a high value on the black market. If a landlord gives some tenants a wider right to barter their contracts, compared to what the law requires, they receive a valuable favour. The landlord can further always refuse a request to barter, and the tenant will then have to ask a Rental Board for permission instead. Exercising the right to say No can be a costly disfavour to the tenant, as the legal process may make the other party to the barter withdraw. He or she may be offered an apartment with another landlord not fighting the barter in the Rental Board.
[38] The Ombudsman Against Ethnic Discrimination, Yearly Report 2008 p. 27.
[39] Equality Ombudsman 2011 Roma Rights (Romers rättigheter), p. 46.

The central requirement was to have a dialogue with each woman who may have to remove her burka or niqab. The dialogue concerned common values for instance, equality between gender and other democratic values upon which the Swedish educational system relies. After such a dialogue, the Board was generally positive towards a local ban during class hours.

On the 30 of November 2010, the Equality Ombudsman decided on an important and widely debated niqab case.[40] A 24 year old ethnic Swede who converted to Islam and decided to wear a niqab for religious reasons was not allowed to follow an educational program training persons to become pre-school teachers (barnskötare).[41] The school claimed that a niqab made it harder to teach since the teacher could not read the face of the student if it was covered.

The School was not sanctioned. The Equality Ombudsman dropped the case, but only because the school found alternative solutions, and allowed the woman to wear her niqab if such solution did not work, if for instance the men could not be seated behind her.[42] This case was widely discussed in media and the discussion made it clear that schools following the old guidelines on Niqab and burkas risked violating the Discrimination Act, at least according to the Equality Ombudsman.

The School Inspectorate (created in 2008) issued new guidelines on 11 of January 2012.[43] The guidelines states that a prohibition of niqab or burkas can be acceptable for health and safety reasons and the examples provided in the guidelines are such as hygienic reasons in restaurants and food industry and health care and safety reasons in laboratories.

The new guidelines also recognise that niqab or burkas can create obstacles in the teaching situation and thus can be forbidden if the obstacle is manifest. There are no examples of manifest obstacles in the teaching meriting a prohibition.

Instead, the guidelines emphasise that such obstacles can in most cases be overcome by other means than to ask the pupil to remove her burka or niqab and that it is only in the few cases that such solutions are impossible that a prohibition is

[40] Case 2009/103.
[41] Please note that it was irrelevant to the case, whether or not here future employers would have the right to require that she does not wear a niqab. From the view of the employment sections of the Discrimination Act, the important question is whether or not she becomes a less good teacher if the children cannot read her facial expressions. The negative consequences of wearing a niqab are thus put on the pupils. There are no niqab cases in the employment sector and this case is certainly not a legal precedent case. Firstly, the case was never tried by the courts, and secondly, if she is allowed to follow the education and get her degree, she is able to make a new decision on whether or not to wear a niqab when she starts working. But if she is excluded from the education, she may have problems finding employment for life.
[42] If for instance a group of pupils made a presentation for the class and that group included male members, these men needed to be in front of her during the presentation.
[43] Outside the time frame but as the old text is not relevant more it is better to put it in.

allowed. The examples given are examples where the teacher normally can solve the situation through less severe means. For instance that it is acceptable to require seeing the face only for the few second it takes to indentify a pupil taking a test. If the teacher cannot read facial expressions it is harder to make sure that the pupil understands, but such a problem could be overcome with questions to the pupil.

The Equality Ombudsman supports the new guidelines.

http://www.skolverket.se/polopoly_fs/1.165937!/Menu/article/attachment/Mer%20om%20Elever%20med%20helt%C3%A4ckande%20sl%C3%B6ja.pdf
http://www.do.se/sv/Press/Pressmeddelanden-och-aktuellt/2012/DO-valkomnar-Skolverkets-vagledning-om-religios-kladsel-i-skolan

1 GENERAL LEGAL FRAMEWORK

Constitutional provisions on protection against discrimination and the promotion of equality

a) Briefly specify the grounds covered (explicitly and implicitly) and the material scope of the relevant provisions. Do they apply to all areas covered by the Directives? Are they broader than the material scope of the Directives?

Swedish constitutional law is comprised by four different statutes, i.e. the Instrument of Government, the Act of Succession to the Throne, the Freedom of the Press Act and the Fundamental Law on Freedom of Expression (Regeringsformen, Successionsordningen, Tryckfrihetsförordningen and Yttrandefrihetsgrundlagen, respectively). The one of interest to this report is the 1975 Instrument of Government. Basically, it contains provisions regarding the fundamental principles of Government, fundamental rights and freedoms, the role of the Head of State, the Parliament, the Government, courts of law and other bodies of public administration as well as basic rules for legislation, financial powers, the State's relations to other states, Parliamentary control and situations of war or danger of war.

The 1975 Instrument of Government replaced the first one stemming from 1809. The original one showed rather little influence from the European enlightenment movement and did not pay much attention to individual rights. The current Instrument of Government is somewhat different in this respect. Amendments relating particularly to fundamental rights and freedoms were also made throughout the years following 1975.

Art. 2 (the first two paragraphs) in the first chapter of the Instrument of Government states:

"Public power shall be exercised with respect for the equal worth of all and for the freedom and dignity of the individual. The personal, economic and cultural welfare of the individual shall be fundamental aims of public activity. In particular, it shall be incumbent upon the public administration so secure the right to work, housing and education, and to promote social care and social security and a good living environment."

In addition paragraph 5 of Article 2 declares:

"Public institutions shall work to ensure that all persons shall be able to achieve participation and equality in society and that children's rights are respected. The public institutions shall counteract discrimination against persons on the grounds of sex, skin colour, national or ethnic origin, language or religious affiliation, disability, sexual orientation, age or other circumstance that relates to the individual as a person."

Chapter 2 of the Instrument of Government contains an enumeration of the protected fundamental individual rights. - In Article 12 we find a rule that states that legislation entailing discrimination of individuals belonging to minorities as to ethnic origin skin colour or other similar circumstances and sexual orientation is prohibited. Apparently, this provision does not entail religion, but insofar ethnicity involves worship it is probably also included in the prohibition against discrimination. The prohibition is also valid for non-citizens according to Chapter 2 Section 25 where the exceptions where restrictions can be made for non citizens are listed.[44]

In Article 13 we find a similar rule banning legislation entailing sex discrimination including a permissive rule on positive action to promote the underrepresented sex. - Also worth mentioning in this context is the constitutional freedom of religion, which is one of the few absolute rights among the rights set forth in the constitution. These rules, too, do not support individual claims. This is true both with regard to the State and to private actors. Their implication is that all Acts of Parliament and other legal regulations must satisfy these basic requirements of non-discrimination.

According to Article 14 of Chapter 11 of the Instrument of Government Courts can disregard laws that are in violation of the constitution.

In regard to employment in the public sector by authorities under the national Government there is a constitutional requirement (Instrument of Government Chapter 12, Article 5) that decisions regarding an offer of employment shall be based solely on objective grounds, such as skills and merits, and it is therefore never justifiable to treat any job applicant unfavourably on the basis of irrelevant factors. Strictly speaking, this does not apply to local government employees.

However, in practice this applies because of the constitutional rule in Chapter 1, Article 9 of the Instrument of Government, which states that all exercise of public authority, shall be grounded on an objective basis. These rules, too, are not the basis for individual claims on damages, etc, but hiring decisions within the Civil Service can to some extent be subject to administrative appeal, e.g. on the grounds that undue consideration has been given to other factors than those allowed by the Constitution. It should also be noted that The European Convention on Human Rights has been incorporated into national legislation.[45] Moreover, Article 19 of Chapter 2 of the Instrument of Government prescribes that:

“No act of law or other provision may be adopted which contravenes Sweden's undertakings under the European Convention for the Protection of Human Rights and Fundamental Freedoms”.

[44] Restrictions on freedom of religion can be restricted for non citizens Chapter 2 Section 25 point 1.
[45] Convention for the Protection of Human Rights and Fundamental Freedoms, Adopted in Rome on 4 November 1950. Entered into force on 3 September 1953, Lag (1994:1219) om den europeiska konventionen angående skydd för de mänskliga rättigheterna och de grundläggande friheterna.

The European Convention on Human Rights has thus received a semi-constitutional status. This means that any law that contradicts the rights set forth in the Convention is void and must not be applied. Thus the Government has an obligation not only not to violate the Convention but also to uphold the respect and protection for the rights established in it.

b) Are constitutional anti-discrimination provisions directly applicable?

Article 2 of the first chapter of the Instrument of Government is mainly a declaration of the political programme of the welfare state. It does not grant any legally enforceable right to anybody. Paragraph 5 is expected to play the role of a guiding principle for public authorities rather than being a statement of law that will be implemented by the courts. The term "counteract" [motverka] would seem to include an obligation to abolish any remaining discriminatory legislation as well as an obligation on all public bodies themselves to refrain from discriminating acts. Since this amendment is also not legally binding, the only kind of control is political. As regards the enumeration of protected individual rights in Chapter 2 of the Instrument of Government, these rules, too, do not support individual claims. This is true both with regard to the State and to private actors. Their implication is that all Acts of Parliament and other legal regulations must satisfy these basic requirements of non-discrimination.

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

No it cannot.

2 THE DEFINITION OF DISCRIMINATION

2.1 Grounds of unlawful discrimination

Which grounds of discrimination are explicitly prohibited in national law? All grounds covered by national law should be listed, including those not covered by the Directives.

The Discrimination Act covers sex, transgender identity or expression, ethnicity, religion and belief, disability, sexual orientation and age. Part-time workers, fixed-term workers, and workers taking parental leave are protected by special laws.

2.1.1 Definition of the grounds of unlawful discrimination within the Directives

a) How does national law on discrimination define the following terms: (the expert can provide first a general explanation under a) and then has to provide an answer for each ground)

The definition of these concepts in the new Discrimination Act is based on the definitions made in the old acts.[46]

i) racial or ethnic origin,

The concept of ethnicity in the new Discrimination Act is defined as "national or ethnic origin, skin colour or similar circumstance" (Ch. 1 Sec. 5 p. 3) "Race" and "religion" have previously been subsumed as similar circumstances under "ethnicity". The reason for this is that the delimitation between acts that are an expression of ethnic belonging and acts that are an expression of religious belief is often unclear. Creating one ground covering both situations eliminates the need to make that particular distinction. Nowadays the most correct way is to regard religion and ethnicity as separate grounds. The overlapping area between these two grounds is however still used as an argument for not making a legal definition of religion.[47]

ii) religion or belief,

Thus, there is no definition of religion in the Discrimination Act itself. However, the preparatory works regarding the old acts can give some guidance. This ground covers beliefs which emanates from or are connected to religious beliefs.[48] 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

[46] Government bill 2007/08:95 p. 117-122, 123, 125.
[47] Government bill 2007/08:95 p. 122. This is not a good argument for not mentioning religion or belief when the grounds are defined. Claiming that there are seven grounds and defining only six is confusing. Especially when overlap is an important argument not to define the last ground.
[48] Government bill 2002/03:65 p. 82.

Discrimination Act. A pure ethical belief, for instance veganism related to the belief that animal suffer and have feelings like humans and should not be killed, does not count as a religious belief.

iii) disability. Is there a definition of disability at the national level and how does it compare with the concept adopted by the Court of Justice of the European Union in Case C-13/05, Chacón Navas, Paragraph 43, according to which "the concept of 'disability' must be understood as referring to a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life"?

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

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

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

Illnesses that can be expected to limit functional capacity in the future are covered by the law. Among others this includes HIV, cancer and multiple sclerosis (MS). According to the authors opinion, the definition of disability within national law meets the requirements of Community law as stated in C-13/05, Chacón Navas (compare pp. 43 and 45 the judgment). It is notable, that Swedish law does not require an impairment which actually hinders the participation of the person concerned in professional life. However, this should be no problem since the Directive is of a minimum character.

iv) age,

According to Ch 1 Sec. 5 p. 6 of the Discrimination Act, age is defined as "length of life to date". This definition includes all ages and makes it clear that the young as well as the old are protected.

v) sexual orientation?

According to Ch. 1 Sec. 5 p. 5 of the Discrimination Act, sexual orientation is defined as "homosexual, bisexual or heterosexual orientation". In the preparatory works, the

Government indicates that the intention is to create a legal protection that covers the whole population as all individuals in principle belong to one of these three categories.

The dividing line between sexual orientation which is protected by the law, and sexual behaviour which is not protected, is made in the preparatory works to the old Act. In its bill to Parliament proposing the 1999 Sexual Orientation Discrimination Act, the Government seeks to clarify that a variety of sexual conducts that may be found in individuals regardless of whether they are homosexual, bisexual or heterosexual are not protected by the discrimination prohibition.[49] The remarks in the bill run the risk of leading to the erroneous conclusion that the anti-discrimination provisions would only cover differences in treatment related to the orientation or preference itself and never on grounds of sexual behaviour. This, however, is not the case.

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

The fact that a person is living together with someone of her own sex in an intimate relationship, whether in a registered partnership[50] or not, or the fact that she is *at all* having sexual relations with someone of her own sex, must be considered as a natural expression of the sexual orientation itself, the same way that this is the case for heterosexuals.

Therefore, an employer may not take into account any behaviour that has such a natural link to the sexual orientation itself, whichever orientation that may be; unless he can prove that the behaviour has a definite relevance for the aptitude of the employee to perform her duties on the job. This clarification will have a strong effect on the interpretation by the courts since its wording is clear and it is included in the Parliament Standing Committee report, which led to the adoption of the Act."[51] This part of the report is also recited in the Government bill to the new Discrimination Act.[52]

b) Where national law on discrimination does not define these grounds, how far have equivalent terms been used and interpreted elsewhere in national law? Is recital 17 of Directive 2000/78/EC reflected in the national anti-discrimination legislation?

[49] Government bill 1997/98:180, p 22.
[50] Registered partnerships do not exist since May 2009. Nowadays the institution of marriage is open to same-sex couples.
[51] Ytterberg, Sexual Orientation Report of 28 July 2004.
[52] Government bill 2007/08:95, p 125.

i) racial or ethnic origin

Ethnicity and nationality need not refer to a specific origin. A landlord taking higher rent from refugees was in 2010 convicted of ethnic discrimination.[53] Discrimination of refugees, foreigners, immigrants or any other mixed group defined by being "non-Swedish" is regarded as ethnic discrimination.

ii) religion or belief (e.g. the interpretation of what is a 'religion' for the purposes of freedom of religion, or what is a "disability" sometimes defined only in social security legislation)?

During the drafting of the now repealed 2003 Prohibition of Discrimination Act, a legislative and several Government authorities and other parties discussed the concept of belief. The problem addressed was how to find an adequate translation for "belief". In those cases this notion already occurs in legislation it is almost consequently referred to as "worship" (*religion*) or "religious faith" (*trosuppfattning*), i.e. with a meaning very close to the concept of religion. The Government Commission in its report suggests a word similar to conviction (*övertygelse*). Most parties who were involved in the discussion on this report agreed upon the ambiguity of using conviction since it entails also political or cultural conviction.

The Government finds in its proposal, that the word faith is the most adequate in this context due to its close relation to "religion".[54] Faith also comprises atheism and agnosticism, which religion does not.

Besides this debate on the translation of the Directive requisites there has been a discussion on whether or not the Act should contain a legal definition of religion and belief. The Government Commission did in its report suggest that there should be a legal definition and that belief be understood as "basic values concerning ideology or other issues of ethic character".[55] This definition was criticised by the Legislative Council in its preview of the draft legislation for being unclear and ambiguous. Instead it suggested that religion and belief is defined as "a religious, philosophical or another such ideology".[56]

The Government argued that both this definition and that made by the Commission were too extensive and would lead to problems of application and interpretation. Moreover, the currently used requisites, faith and worship, are not defined in the legal texts themselves, but through case law. Since this seems to be unproblematic the Government left the definition out of the 2003 Act (as well as the other laws on discrimination). Any eventual issue of interpretation is left to the authorities and the

[53] Göta Court of Appeal, Judgment 2010-02-25, case T 1666-09, Equality Ombudsman v. Skärets fastigheter AB.
[54] Proposition 2002/03:65, pp. 81-82.
[55] SOU 2000:43, p. 155.
[56] The Legislative Council's official statement 2003-03-06, in proposition 2002/03:65, p. 344.

courts to take upon them.[57] This was also the view of the Discrimination Committee (2006) and their proposal did not contain a definition as regard religion and other belief nor does the Government bill to the new Discrimination Act contain any definition.[58]

As regards recital 17 of the Employment Framework Directive most plaintiffs lose discrimination cases because they fail to make a prima facie case. Proving that they are in a "similar situation" is the main hurdle. Recital 17 is embedded in the concept of 'similar situation'.

iii) disability
iv) age
v) sexual orientation

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

The prohibition on age discrimination in the Discrimination Act covers all ages without restrictions.[59]

2.1.2 Multiple discrimination

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

The Equality Ombudsman receives between 200 and 400 cases, attributed to more than one ground. There are no special rules which deal with multiple discrimination.[60]

Apart from stating the obvious advantage of having one authority regardless of ground and one law placing the events under the same Sections and requiring the

[57] Proposition 2002/03:65, p. 82.
[58] SOU 2006:22 p. 311. Government bill 2007/08:95 p. 120. Since the Discrimination Act does not have any definition of religion or belief, this discussion is the best legal guidance there is.
[59] Government bill 2007/08:95 p. 120.
[60] Compare, Equality Ombudsman, Yearly Report 2012, p. 13 and 15. Total number of grounds is 1835 and the total number of cases is 1559. The number of grounds is thus 276 more than the number of cases. However, there may be three grounds in some cases and parental leave is a ground so a case concerning both sex discrimination and parental leave discrimination will show up as concerning two grounds.

same conditions to be fulfilled,[61] there is nothing in the Government bill to the new Discrimination Act either.[62]

Multiple discrimination seems to be non problematic in Sweden.[63]

b) How have multiple discrimination cases involving one of Art. 19 TFEU grounds and gender been adjudicated by the courts (regarding the burden of proof and the award of potential higher damages)? Have these cases been treated under one single ground or as multiple discrimination cases?

In AD case 2010 No 91 the employer was convicted of both age and sex discrimination. The omission was not to hire and not to call an elderly woman to a job interview. The employer claimed that the women was not suitable for the job but failed to demonstrate this and thus failed to break both a presumption of age discrimination and sex discrimination. The Labour Court stated that two discriminations, committed by the same omission, was *not* a reason to raise the level of the discrimination award. It was treated as one single offense.

When there are two offences, the rules on burden of proof apply to each of these two offences separately and the compensation is higher the more offences there are. But the fact that one offence regarded ethnicity and the other sex appears not to have affected the combined level in AD 2011 No 13.[64] A.K. would probably have got the same amount had both offences related to the same ground.

Multiple discrimination is not a concept used by the courts in Sweden.

2.1.3 Assumed and associated discrimination

a) Does national law (including case law) prohibit discrimination based on perception or assumption of what a person is? (e.g. where a person is discriminated against because another person assumes that he/she is a Muslim

[61] This advantage should not be overestimated. In the case AD 2011 No 13 it would have been quite easy to see that the case concerned sex more than ethnicity. When there were four ombudsmen, each one could take up an intersectional case and take it to court on all ground involved. They were supposed to co-operate and give it to the one most concerned. The Courts were asked to accept the case unless the particular ombudsman had made a manifest mistake in taking it up. The author does not think that it would have been regarded as a manifest mistake had the old Ombudsman Against Ethnic Discrimination taken AD 2011 no13 to Court. No person has in Sweden lost a legal right because the wrong ombudsman has been involved in it.

[62] Prop 2007/2008, p. 85. The government bill is the natural place to look for such information see Section 0.1. It is a really important tool in interpreting the Act.

[63] I agree with the reasoning in AD 2010 No 91 (see below e) in so far as when multiple discrimination is created through one single omission that can be presumed to have a causal link with many grounds, the number of grounds should not affect damages. The Equality Ombudsman disagrees with me on this but there is not much debate on this particular issue in Sweden.

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

or has a certain sexual orientation, even though that turns out to be an incorrect perception or assumption).

The definition of (direct) discrimination is related to the ground and not to the person (see Sec 2.2). The wording of the prohibition in Ch. 1 Sec. 4 p. 1 of the Discrimination Act, state that it applies "if this disadvantaging is *associated* with sex, transgender identity or expression, ethnicity, religion, disability, sexual orientation and age". Any discrimination which relates to the protected grounds is prohibited. A mistaken assumption regarding a person's religion is clearly associated to the religion ground.

The principles on mistaken assumption may in Sweden cut both ways. A mistaken assumption regarding a behaviour being caused by alcoholic intoxication was a valid defence for a restaurant which had rejected a person with a disability.[65] The appeal court quoted the preparatory works on mistaken assumptions and did its best to apply the same principle both ways.

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

Since the definition of (direct) discrimination is related to the ground and not to the person the prohibition applies. Treating an ethnic Swede unfavourably because he or she has a lot of Muslim friends is a treatment associated to the ground of religion. This applies to disability as well. If a person is less favourably treated because he or she is the primary carer of a child with a disability, this treatment would most likely be regarded as associated to the disability ground. Swedish law is in line with the requirement set out in Coleman v Attridge Law and Steve Law, though there is no case law to confirm it.

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

a) How is direct discrimination defined in national law? Please indicate whether the definition complies with those given in the directives.

The definition of direct discrimination in the new Discrimination Act in Ch. 1 Sec. 4 first point, reads as follows:

[65] Svea Court of Appeal 2009-06-02, case T 7752-08. The Appeal Court went as far as to state that if it is proven that the defendant did not know about the disability it does not matter if the defendant ought to have done so (obiter dicta). This case is also problematic with regard to the principle that discrimination may be involuntary. The Appeal Court points out that the material of the case shows that persons with this particular disability sometimes wrongly are perceived as drunk. The fact that the mistake is easy to make, seems to rule out discrimination.

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

This definition is in compliance with the directive.

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

The definition of discrimination requires that a person has suffered a less favourable treatment[66] (missgynnande).

A discriminatory job vacancy announcement is not a less favourable treatment.[67] A discriminatory statement directed at an individual amounts to less favourable treatment, but a discriminatory statement directed at the general public does not. Swedish law is clearly not in line with the first point of the operative part of Firma Feryn.

A discriminatory job announcement regarding ethnicity will in Sweden be dealt with under active measures in Ch. 3 Sec. 7 of the Discrimination Act. If the employer is insufficiently active in ensuring that people of different sex, ethnicity, religion or other belief have the opportunity to apply to vacant jobs the Equality Ombudsman may according to Ch. 4 Sec. 5 ask the Board Against Discrimination to order the employer to fulfil his or her duty *in the future* subject to a financial penalty (vite).[68] Central employees' organisations having a collective agreement can ask for such an order, if the Ombudsman declines to do so. The economic penalty will gain legal force only after a district court has ordered the payment. The legality of the order itself, as well as the reasonableness of the amount, can be decided upon by the district court. The individual person who may have abstained from seeking a job cannot by him- or herself initiate such a process at the Board Against Discrimination.

To summarize the legal situation a financial penalty can only be given for continued violations, not for the first offence. This is probably not in accordance with the third point of the operative part of Firma Feryn and Article 15 of Directive 2000/43.[69]

[66] Disfavour is the word used in the translation made on the Parliaments home page. It is literally close to the term (missgynnande). This term should however be constructed extensively. Therefore concept of disfavour in reality means less favourable treatment.
[67] It is given as an explicit example of things falling outside the prohibition of direct discrimination, Government bill 2007/08:95, p. 499.
[68] This applies only to the grounds mentioned in the text.
[69] See Gambinius Göransson et al, The Discrimination Law p. 37.

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

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

The first justification regards differential treatment made for reasons of the nature of the work or the context in which the work is carried out if the characteristic constitutes a genuine and determining occupational requirement that has a legitimate purpose and the requirement is appropriate and necessary to achieve that purpose. The second justification regards measures to promote equality between the sexes concerning matters other than pay or terms of employment.

The third justification concern age limits with regard to pension, survivors or invalidity benefits in individual or collective contracts and the last is a general possibility to justify differential treatment based on age subject to a normal proportionality test.[70] This general possibility to justify age discrimination applies to the areas where the prohibition applies to age.[71]

For the educational sector the justifications are enumerated in Chapter 2 Section 6. Measures that contribute to promote equality between men and women can be justified in higher education. Application of provisions taking account of age and for special needs of persons with disabilities is also permitted. There is further a general possibility to justify differential treatment based on age subject to a normal proportionality test. For the people's universities[72] and study associations there is an exception allowing efforts to promote equal rights based on ethnicity and religion. This provision stands out as the scope to justify direct discrimination with regard to ethnicity and religion are rare elsewhere in the legislation. Labour market policy activities, is the other example where it is allowed.[73] The test required to justify direct discrimination are not written into the law. The main requirement according to the Government bill to the new Discrimination Act is that the activities shall be "planned" i.e. is a part of a conscious effort to promote the wellbeing of a certain group.[74]

The scope to justify direct discrimination with regard to unlawful discrimination under Ch. 16 Sec. 9 of the Penal Code is somewhat wider.

[70] This test requires a legitimate purpose and means which are appropriate and necessary to achieve this purpose.
[71] See for instance Ch. 2 Sec. 6, 9 and 10.
[72] People's universities is a form of education designed to admit students that have little or no academic background.
[73] Ch. 2 Sec. 9.
[74] Government bill 2007/08:95, p. 207 (study associations and people's universities) and 220 (labour market policy activities).

A shop keeper of a minority ethnicity giving discounts to members of that particular ethnic group is given as an example of a situation where intent in penal law to discriminate is lacking, and intent is a necessary requirement in this provision.[75] Thus, under some circumstances good intentions are accepted as a defence in penal law.[76]

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

No.

2.2.1 Situation Testing

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

Swedish procedural rules are based on the principle of freedom of evidence. Evidence must be assessed in accordance with the circumstances at issue. Courts cannot declare evidence inadmissible for formal reasons. This principle applies also to illegally obtained evidence.[77] The fact that the law is silent on situation testing must against this background be interpreted as situation testing being clearly permitted.

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

The former Swedish Integration Board (Integrationsverket)[78] a national authority under the Government, has since 2004 been involved in a project on situation testing together with the ILO. A workshop in October 2004 resulted in a report covering, among other things, hitherto experiences of situation testing in Sweden.[79] These were regarded as, hitherto, hardly non-existent in the area of employment. As part of the project the ILO has now carried out a study based on situations testing of pairs of job applicants with a Middle East and Swedish background, respectively, applying for

[75] Holmqvist et al, Brottsbalken - En kommentar (The Penal Code – With Commentary) 6 uppl, 16:49.
[76] A housing company wanting a proper ethnic mix is an example where a good intention was not accepted as a defence.
[77] It is perfectly possible that a police officer is convicted for collecting evidence in an illegal way and for a criminal to be sent to prison on the basis of that same evidence.
[78] This authority was closed down 30 of June 2007.
[79] Tillämpningen av Situation testing – metodologi i analysen av arbetsmarknadsdiskriminering (The Application of Situation Testing – Methodology in Analysing Labour Market Discrimination). This report gives an account of a 2 day workshop and has a summary in English. www.integrationsverket.se/templates/ivPublication_6720.aspx .

1 431 jobs in Sweden. It was three times as hard for individuals of Middle East origin as compared to the Swedes to even be taken in consideration for a job.[80]

Also DO, the old Ethnicity Ombudsman, was involved with an investigation on situation testing as a method against discrimination and situation testing was also recommended to DO as a tool by the structural discrimination inquiry commission.[81]

No action has been taken and the method is not yet in use in the employment area, though. However, as mentioned below, a number of cases of alleged illegal discrimination on the grounds of ethnicity based on the Penal Code, on the one hand, and on the 2003 Act on the other was brought to different district courts in 2005. The background situation was groups of law students (of Swedish origin and immigrants, respectively) "testing" equal treatment practices of restaurants and night-clubs. In some of these cases discrimination was found to have been proven by the respective District Court. However, in the first Appeal Court judgment Hovrätten over Skåne och Blekinge (case B 3145-05, judgment 22 December 2006) found no criminal offense proven on the basis of the evidence presented (video-clips). The Court stated that it was not proven by the video-clip (or by the rest of the investigation) what were the motives behind the actions of a colleague of the prosecuted guard, or what insights the guard himself might have had on these motives.

Situation testing thus is uncontroversial as a mean of evidence and the authorities can use public money to act as legal representatives[82] of plaintiffs relying on evidence obtained by situation testing in courts.[83] But the authorities are reluctant to be involved themselves in situation testing as a way of obtaining evidence in individual cases. They are not forbidden to do so or even asked to abstain from situation testing. But the instance of outspoken encouragement in footnote 95 is a rare exception.

Situation testing is close to crime provocation. Crime provocation is generally not allowed in Sweden. Authorities cannot ask a citizen to commit a crime they would otherwise not have committed. But in the discrimination field the discriminator is asked to do something legal – for instance allowing a person to eat at a restaurant. The documentation of the refusal creates an evidence of discrimination. Evidence provocation is clearly more acceptable but there is limitations applying to authorities

[80] A synthesis report 'Discrimination against native Swedes of immigrant origin in access to employment' can be found on the following webpage, http://www.integrationsverket.se/tpl/NewsPage_4067.aspx.

[81] SOU 2005:56, Det blågula glashuset – strukturell diskriminering I Sverige, p. 590. See Flash report P137.

[82] Swedish procedural rules make the discrimination authorities the formal plaintiff in civil cases.

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

but not to private persons.[84] The unclear[85] legal situation regarding these limitations made DO argue that an explicit permission to do situation testing in the Act is necessary if they are to apply situation testing as a method of gaining evidence themselves.[86] There is nothing on situation testing in the new Discrimination Act.

Another reason for explicitly regulating the issue in the anti discrimination law is that the Ombudsman is in principle neutral when a plaintiff initiates a case. After hearing both sides the Ombudsman evaluates the evidence. On basis of this evaluation the Ombudsman may decide to go to court on behalf of the plaintiff. Collecting additional evidence for the plaintiff – by any mean – before this point is problematic.[87]

The Swedish Parliament decided on the 15 of October 2009 to request a survey from the Equality Ombudsman on discrimination in the housing market and to give the Ombudsman 1, 1 million crowns (approximately 120 000 Euro) to this end.

The Ombudsman shall consider practical testing[88] as a method to investigate the extent of discrimination. The testing that the Parliament has in mind is for instance to send out applications from fictive applicants with texts relating the applicants to different grounds[89] of discrimination. The focus is on proving discrimination on aggregate level not on obtaining evidence in individual cases. The work has been carried out by the Institute for Housing and Urban Development, and the report has been presented to the government.[90]

Situation testing in the form of practical testing is an accepted scientific method. It has been used by scientists both with regard to ethnic discrimination both in the housing market and the labour market. However – it is not totally uncontroversial - sometimes funding is denied because of ethical concerns. The persons subjected to the testing have not consented to it.

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[84] Compare, The Ombudsman Against Ethnic Discrimination Dnr 419-2005, Discrimination Tests as Evidence, p. 2.
[85] The legal situation is truly unclear. It is based on case law concerning the Police. The degree to which it applies to discrimination authorities and to civil law is unknown.
[86] The Ombudsman Against Ethnic Discrimination, Diskimineringstester som bevismedel (Discrimination Tests as Means of Evidence), Dnr. 419-2005.
[87] Compare Göta Court of Appeal, Judgment 2011-09-30, Örebro Rättighetscenter against Götavi Invest AB, Case No FT 198-11. In this case the NGO was free to do a situation test, sending its members to fill up their car at the petrol station in question, to see if they were treated differently compared to the Roma woman.
[88] Praktikprövning.
[89] If possible the Government wants the Survey to cover all grounds, ethnicity, sex, sexual orientation and disability will definitely be covered.
[90] Diskriminering på bostadsmarknaden, The Equality Ombudsman 2010-07-26. The study showed that there is more discrimination in the rental market compared to the owner-tenant market. There is more discrimination with regard to ethnicity compared to other grounds. Foreigners were especially discriminated against in the rental sector, Finnish Roma and Muslims were especially discriminated against by real estate agents. There were accessibility problems for disabled persons when properties were shown.

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

"If the landlord does not answer your questions or if you suspect that you do not receive a correct treatment when seeking a rental apartment and that this is connected to a discrimination ground, you may ask one or more of your friends to apply for the same apartment. If the other person is offered a contract for the apartment and if you are in a similar situation to that person, there is reasonable ground to suspect discrimination. The Equality Ombudsman has won a case based on discrimination testing."[91]

c) *Is there any reluctance to use situation testing as evidence in court (e.g. ethical or methodology issues)? In this respect, does evolution in other countries influence your national law (European strategic litigation issue)?*

There is no such reluctance with regard to courts, to the author's knowledge.[92] On the contrary, situation testing has helped to prove discrimination in a number of successful discrimination cases.[93] The Appeal Court for Skåne and Blekinge has upheld a decision by Malmö District Court where it is explicitly stated that even if the purpose of the visit to the night club was a part of an investigation into restaurant discrimination, the four persons had still been discriminated against under the civil law.[94]

The Supreme Court agreed (see below d). In another case a situation test contributed to proving a prima facie case regarding circumstances taking place some weeks earlier. This case was appealed by the discriminator but only regarding the level of the damages.[95]

There is no case in which the value of a situation test as a proof of discrimination has been reduced because of the manner in which the evidence was obtained. There is not any visible direct influence on national law from other countries.

d) *Outline <u>important</u> case law within the national legal system on this issue.*

[91] Equality Ombudsman 2011, Roads to Rights, p. 34.
[92] With the possible exception of Nja 1996 p. 768 (see Sec 0.3.5).
[93] Lappalainen gives an overview of some of the cases in Centre for Equal Rights and MPG (eds) Proving Discrimination Cases – the Role of Situation Testing (2009), p. 80-88 .For an example of a recent case see Göta Court of Appeal, Judgment 2011-09-30, Örebro Rättighetscenter against Götavi Invest AB, Case No FT 198-11.
[94] Malmö District Court, judgement 3 of may 2006. case T 3562-05, p. 8. The Appeal Court for Skåne and Blekinge, judgement 2007-04-24, case T1358-06.
[95] Gothenburg District Court, Judgment 2006-05-17 case T 9717-05. The Appeal Court for Western Sweden, Judgement 2007-01-18, case nr T 2950-06.

The Supreme Court made one important decision on situation testing in 2008.[96] A group of law students was testing a number of restaurants and night-clubs from an ethnic discrimination point of view. The appeal court awarded the four students each 15.000 crowns (approximately 1700 Euro) in civil damages. This is considered to be the normal level of damages for the offence of denied entrance. The Supreme Court allowed an appeal on legal grounds only.

The investigation purpose and the absence of a genuine desire to be let into the establishment meant that the four students had not been denied anything they tried to obtain. It was for this reason equitable to lower the civil damages and the Supreme Court awarded each of the four students 5000 crowns (approximately 560 Euro) in damages. Two of the five judges wrote a dissenting opinion arguing that each student should be awarded the normal level of civil damages.

Constructing the aim of the civil damages to be mainly about compensation for a non economic injury to the individual – as opposed to a deterrence for the perpetrator – may result in that discrimination proved through situation testing will in the future lead to only lower levels of damages. However, the new Discrimination Act requires the courts to give particular attention to the interest of preventing future infringements (See below Sec. 6.5 and the principle of effectiveness).

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

a) How is indirect discrimination defined in national law? Please indicate whether the definition complies with those given in the directives.

The definition of indirect discrimination in the new Discrimination Act in Ch. 1. Sec. 4 second point, reads as follows:

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

b) What test must be satisfied to justify indirect discrimination? What are the legitimate aims that can be accepted by courts? Do the legitimate aims as accepted by courts have the same value as the general principle of equality, from a human rights perspective as prescribed in domestic law? What is

[96] The Supreme Court, Escape Bar and Restaurant v. The Ombudsman Against ethnic Discrimination (case T-2224-07 judgement 2008-10-01)

considered as an appropriate and necessary measure to pursue a legitimate aim?

Some guidance are given in the preparatory works to both the new Discrimination Act and the previous acts. For instance, as regards the 1999 Sexual Orientation Discrimination Act, the example of presumably unlawful indirect discrimination given is that of a childcare centre requiring prospective employees to have experience of raising biological children of their own. Another example could be if a requirement is made that a person be married to qualify for a job. As regards disability, according to the old Disability Ombudsman, for example, requiring a driver's license can be a form of indirect discrimination. A license is a necessary requirement for a job as a taxi driver, but does not have to be essential, for example, in regard to a job as a journalist. The government bill to the Discrimination Act uses language skill as an example when discussing legitimate purpose and under what circumstances a criterion can be appropriate and necessary in order to achieve such a purpose.[97]

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.

c) *Is this compatible with the Directives?*

Yes.

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

The rules on the legal proceedings are the same for all grounds in the new Discrimination Act.

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

Difference in treatment based on language is one of the most commonly used examples of potential indirect ethnic discrimination in the preparatory works and in academic literature.[98] See also Labour Court cases 2005 no. 98 (above sec. 0.3.1). In this case the municipality claimed that the Ombudsman Against Ethnic Discrimination had failed to prove that the required level of language skills had an adverse effect on persons from former Yugoslavia. The Labour Court said that ethnic origin in relation to Swedish language skills should be perceived as concerning

[97] Government bill 2007/08:95, p. 491.
[98] See for instance Government bill 2007/08:95, p. 491, government bill 2002/2003:65, p. 94f and Källström–Malmberg, The Employment Relationship (Anställningsförhållandet, second edition 2009) p. 89f.

people with Swedish as their native tongue and people with other native tongues. It thus became unnecessary to prove any adverse effect on a particular ethnic group.[99]

2.3.1 Statistical Evidence

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

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

b) Is the use of such evidence widespread? Is there any reluctance to use statistical data as evidence in court (e.g. ethical or methodology issues)? In this respect, does evolution in other countries influence your national law (European strategic litigation issue)?

In areas outside sex-discrimination statistical evidence is, to the knowledge of the author, not frequently used. However, such evidence is not viewed upon with reluctance either. Due to the situation – scarce case law – it is impossible to say whether judges are influenced by the evolution in other countries.

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

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

d) Are there national rules which permit data collection? Please answer in respect to all five grounds. The aim of this question is to find out whether or not data collection is allowed for the purposes of litigation and positive action measures. Specifically, are statistical data used to design positive action measures? How are these data collected/ generated?

[99] This can be compared to Stockholm district court judgement 28/01-2013, Equality Ombudsman v. If Insurances. The company refused to insure children if the parent received a form of child care benefit reserved for disabled or long term sick children. It could not be direct discrimination as the group of children consisted of sick but not disabled and disabled children and the Ombudsman had not proved what proportion of children receiving the benefit were disabled. Therefore adverse effect upon disabled children was not proven.

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

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

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

For general statistics purposes there is, however, the population register (folkbokföringsregistret) managed by the tax authorities. This register contains information (among other things) on the place of birth and nationality of a person as well as the place of birth of his/her parents and the date of taking up residence in Sweden. Religion and belief as such are not registered but the membership of a church may be registered.[100] Information on disability or sexual orientation is not included in the population register

It would not be permissible to register ethnicity, religion and sexual orientation in order to prove that a certain criterion have adverse impact on a certain group. The general inquiry into living conditions made by Sweden Statistics includes health information on impaired vision, hearing or mobility, and severe mental psychical problems. This information is relevant to the discrimination ground of disability.[101] Disability is linked to a person's health and is therefore sensitive and a private person

[100] The Swedish state supports some churches by helping them to collect "taxes". Today it is not a tax but a membership fee. If a church want this help, their members must be registered with the tax authority. A list of these churches can be found on http://www.skatteverket.se/privat/skatter/arbeteinkomst/vadblirskatten/avgifttillandratrossamfund.4.18e1b10334ebe8bc80005629.html.

[101] The Equality Ombudsman 2012, Statistikens roll i arbetet mot diskriminering, p. 9.

is unlikely to be allowed to register such things. The courts haves sometimes accepted common sense reasoning were statistics cannot be produced.[102]

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

In November 2012 the Equality Ombudsman reported back its preliminary observations to the government.[103] The Ombudsman stated some important principles. One is that nobody shall be forced to give sensitive information regarding themselves. Nobody shall thus be forced to reveal their sexual orientation, religion etc. If they chose to reveal it anonymity must be granted. A second important principle is self categorisation. A person must be allowed to belong to the ethnicity, religion, sexual orientation etc he or she feels to be a part of. There cannot be a state classification. A third principle is that groups who distrust the society[104] must be treated in a way that makes them trust the research. One way can be to make sure the research is done by persons they trust.

The current constraints affect positive action. Age and nationality are two discrimination grounds covered by this report were the author can imagine that it would be possible to use statistical data directly to construct positive measures. But

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

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

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

the author does not know of any such cases. In most cases, to the degree that positive action is allowed, it is up to the person wanting to promote the interests of for instance an ethnic minority to find a permitted proxy for ethnicity which can be used for statistical purposes.

2.4 Harassment (Article 2(3))

a) How is harassment defined in national law? Does this definition comply with those of the directives? Include reference to criminal offences of harassment insofar as these could be used to tackle discrimination falling within the scope of the Directives.

The Discrimination Act defines five forms of discrimination in Ch. 1. Sec. 4, each having its own point. The third point reads as follows:

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

This definition is somewhat broader than the one found in the Directive, in that it does not require that the behaviour also creates an intimidating, hostile, degrading, humiliating or offensive environment, but only that it violates the dignity of a person. The provision omits the qualification of "unwanted", a criterion which is understood to be an integral part of the term "harassment" in Swedish (trakasserier).

The concept of unlawful discrimination in Ch. 16 Sec. 9 of the Penal Code applies to harassment as well. Employers are however not covered by this provision and an intention to discriminate must be shown.

b) Is harassment prohibited as a form of discrimination?

Yes, see above.

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

According to Ch. 2 Sec. 3 and Sec 7 of the Discrimination Act an employer or an education provider who becomes aware that a worker or pupil or student has been subjected to harassments have a duty to investigate the circumstances and to take appropriate actions to avoid harassment in the future.[105]

[105] Such a duty is placed on the national military and civil service as well, according to Chapter 2 Section 16 of the Discrimination Act.

Chapter 3 contain rules on active measures involving the duty of establishing equal treatment plans[106] and perform preventive work as regards harassment. It is thus fairly common that individual employers have elaborated codes of conduct applicable at the workplace.

Furthermore, the Equality Ombudsman has a duty to follow up the application of the Discrimination Act. There are publications giving guidance as regards how to deal with harassment. Such material has no real legal standing, though, but is only of an informative character.

However, there are also the rules stipulated by the Swedish Work Environment Authority (Arbetsmiljöverket) under the 1977 Work Environment Act. Here we find regulation AFS 1993:17 on Harassing Differential Treatment in Working Life. These rules cover any type of harassment at the work-place; including harassment covered by non-discrimination legislation, and are complemented by general guidelines. The rules and guidelines are of a procedural character and do not contain any definitions, etc., of interest.

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

In working life the prohibition applies to the employer. The employer may be a natural or a legal person. According to Ch. 2 Sec. 1 of the Discrimination Act a person who has the right to make decisions on the employer's behalf in matters concerning the employee shall be equated with the employer. An employer can thus only be made responsible for employees who are given the authority to represent the employer towards other employees i.e. management on different levels.[107] A fellow worker lacks such an authorisation towards another fellow worker, thus an individual employee cannot sue a fellow worker under the Discrimination Act.

The employee sending the discriminatory email in Labour Court case 2007 No 45 (see annex 3), was not in a position to make decisions regarding the Iranian's job application and did thus not represent the employer. There could therefore be no discrimination even though the employer never argued that the lack of authorisation was visible to the Iranian job applicant. This restriction on the vicarious liability of employers reduces the scope of the prohibition on discrimination in a way which might be problematic in relation to EU law. Labour Court case 2011 No 19 is another

[106] Section 16 requires a yearly plan from education providers. Section 3 requires "goal oriented work" from the employers. Such work needs to follow some sort of plan but it must not be a yearly plan.
[107] See Labour Court Case 2007 no 45 (Sec. 0.3.1).

example where both the applicant, the municipal co-ordinator of summer training posts for pupils and S.F. herself thought that S.F. was representing the employer. The employer was at least equally to blame for this misunderstanding between her and S.F. Yet the applicant lost the case based on a legal formalistic reasoning, with regard to whom the employer is responsible for.

An employment agency or a head hunting firm, are two examples of legal persons whose actions will make the employer liable if they are given the authority to represent the employer. As regards sub-contractors, assuming that they are completely independent, employers can be assumed to have no liability for the acts of sub-contractors.

Concerning harassment, an employer has an obligation to investigate and implement measures against harassment also between employees. An employer who becomes aware that an employee considers her or himself to have been exposed to harassment shall investigate the circumstances surrounding the reported harassment and in relevant cases implement the measures that may reasonably be required to prevent its continuance.

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

In Section 0.2 the fact that discrimination and harassment from fellow workers or third parties are not as such prohibited is listed as a potential problem and so is the limitation on the employer's vicarious liability.[108]

In education the prohibition in Ch. 2 Sec. 5 applies to education providers for instance schools and universities. Employees and contractors engaged in the activities shall be equated with the education provider when they are acting within the context of their employment or contract. A person can act in context of their employment but outside the authorisation given to them. Education providers thus are more widely responsible for their employees in relation to for instance students, compared to when the same employees harass fellow employees. As with employment, becoming aware that a child, pupil or student considers that he or she has been harassed is enough to give rise to the duty to investigate and to and implement reasonable measures to prevent harassment in the future.

[108] The crime of unlawful discrimination is unlikely to apply on the labour market and between employees. When the relationship between employees is not covered specifically by any other rules either, a problematic situation might arise.

The Discrimination Act is directed towards the person responsible for the activity in question. When it is a legal person this person necessary must act through its employees or through contractors. Generally, this is not explicitly regulated in the Discrimination Act.[109] Other sources such as case law and the preparatory works are important instead. When it comes to goods services and housing all persons who represent the legal person shall be equated with it. In this area it is not possible to argue that the employee of the landlord, or the controller of the security firm engaged to stop shoplifting by the store, did not have the authority to act as they did. The landlord and the store are liable for their actions under the Discrimination Act towards the tenant and the customer.

A landlord cannot be held liable for tenants' actions towards each other and a trade union or a trade association cannot be liable for what their members do. Harassment, for instance, may however on occasion amount to a criminal offence. Labour Law contains disciplinary sanctions, also. A tenant harassing another tenant is in breach of the rent law and may lose his contract. The landlord has a duty under this law to prevent disturbances (störningar). Disturbances can be noise from a heavily trafficked road and this noise can lead to reduced rent and an order subject to a pecuniary fine to improve the sound isolation of the building. Disturbances can also be a hostile neighbour. In such a case the landlord have a duty to contact the Social Board (socialnämnden). In extreme cases the Rental Board may award the tenant reduced rent and can also order the landlord to evict the disturbing neighbour subject to a pecuniary fine. The hostile neighbour is thus treated as a sort of "environmental" problem.

2.5 Instructions to discriminate (Article 2(4))

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

The Discrimination Act defines five forms of discrimination in Ch. 1. Sec. 4, each having its own point. The fifth point deals with instructions to discriminate and covers someone who is in a subordinated or dependent position relative to the person who gives the order or someone who has committed herself or himself to performing an assignment for that person.

There are no special rules on liability for legal persons. The general rule applies (see Chapter 3 Sections 1 and 2). The employer is according to Chapter 2 Sec. 1 of the Discrimination Act responsible for the instruction to discriminate, whether the instruction is given by a legal person or a natural person who has the authority to take decisions on behalf of the employer with regard to the person receiving the

[109] The employment area and education areas are exceptions.

instruction. However, only natural persons are protected as receivers of such instructions.

b) Does national law go beyond the Directives' requirement? (e.g. including incitement)

Swedish law does not go beyond the directive. Chapter 1 Section 4 point 5 defines the prohibited act as "giving an order or an instruction" to a subordinate.

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

In Section 0.2 the fact that discrimination and harassment from fellow workers or third parties are not as such explicitly prohibited is listed as a potential problem and so is the limitation on the employer's vicarious liability.[110] This is elaborated upon in in Section 2.4 (d). The same legal questions arise with regard to instructions to discriminate. The cases presented in Section 2.4 (d) are relevant to all five forms of discrimination.

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

a) How does national law implement the duty to provide reasonable accommodation for people with disabilities? In particular, specify when the duty applies, the criteria for assessing the extent of the duty and any definition of 'reasonable'. For example, does national law define what would be a "disproportionate burden" for employers or is the availability of financial assistance from the State taken into account in assessing whether there is a disproportionate burden?

The Discrimination Act specifies the concept of reasonable accommodation in Ch. 2 Sec. 1 passage 2:

"The prohibition of discrimination also applies in cases where the employer by taking reasonable support and adaptation measures, can see to it that an employee, a job applicant or a trainee with disability is put in a comparable situation to people without such a disability."

[110] The crime of unlawful discrimination is unlikely to apply on the labour market and between employees. When the relationship between employees is not covered specifically by any other rules either, a problematic situation might arise.

In a discrimination case the concept of comparable situation is to be assessed as the situation would have been, had the employer fulfilled its duty to adopt reasonable adaptation measures. If the other requirements are fulfilled, there may be a case of direct discrimination.

It is not really possible to specify what accommodations are to be classified as "reasonable support and adaptation measures" according to Swedish law, since case law so far is scarce, nor is it possible to specify what would be recognised as a disproportionate burden and thus be seen as going beyond what is reasonable with regard to support and adaptation measures.[111] The following adaptation measures were mentioned in the legislative materials accompanying the Discrimination Act as examples that could be required of an employer: improvements related to physical accessibility, the acquisition of technical support, and changes in work tasks, time schedules or work methods.[112] The reasonableness of requiring measures to be undertaken can vary depending on the employer.

This determination must be made from case to case depending on such factors as, for example, the company's ability to bear the costs, the ability to undertake a measure, the problems caused for the employer by the measure and the expected length of the employment. According to the old Disability Ombudsman, the mere possibility of obtaining a subsidy will not be taken into account in assessing reasonableness. This can however be taken into account if it becomes apparent during the recruitment process that a subsidy will be received.[113]

The scope of the duty is based on a reasonable balancing of interests. In the case of a large employer with substantial resources the duty to provide a "reasonable accommodation" will presumably go substantially beyond the essential functions of the job.

General legislation applying outside the field of discrimination is important here, especially the 1977 Working Environment Act and the employer's duty of "rehabilitation measures"[114] as regard the already employed in combination with the 1982 Employment Protection Act, which impose a duty of fairly far-reaching accommodation.[115] These duties are sometimes more far reaching compared to the

[111] There is a government inquiry DS 2010:20 which has suggested changing the wording of Ch. 1 Section 4 of the discrimination act and creating a non exhaustive list of 6 factors relevant when assessing the concept of reasonable accommodation (p. 27).
[112] Government bill 2007/08:95 p. 148.
[113] Swedish employers have extensive managerial rights and cannot be made to seek subsidies.
[114] The goal of rehabilitation is the employee's return to the workplace or to provide support for an individual in maintaining his position in the workplace. Rehabilitation in relation to working life is additionally regulated in the General Social Insurance Act (lag om allmän försäkring (1962:381)).
[115] See further, for instance, Inghammar, Discrimination of People with Disabilities. Normative Aspects of Disability and Work in a Swedish, English and EC Context, in: Numhauser-Henning (ed.), *Legal Perspectives on Equal Treatment and Non-Discrimination,* Kluwer Law International, The Hague 2001.

Discrimination Act. As regards indirect discrimination accommodation concerns will be taken into account within the assessment of justification process.

Described above are the rules on what an employer must do to make reasonable adaptations for the disabled. There is no rule preventing an employer to go further. Favouring persons with disabilities means disfavouring able bodied persons and since able bodied persons are not a protected group within the Discrimination Act, no exemption is needed.

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

The concept of disability is the same in all areas regulated by the Discrimination Act.[116]

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

The prohibition of discrimination for education providers applies 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.[117] This duty applies to higher education.

In a discrimination case the concept of comparable situation is to be assessed as the situation would have been, had the education provider fulfilled its duty to adopt reasonable adaptation measures. If the other requirements are fulfilled there may be a case of direct discrimination.

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

[116] However, public law can be based on different concepts of disability. For instance, Section 7 of the Transportation Service Act (1997:736), which provides subsidized travel, defines disability as an impairment which is not temporary (inte endast tillfällig) while the Discrimination Act defines disability as an impairment which is permanent (varaktig). This may not be an example of reasonable accommodation as the measure is not individualised enough but it is an example of a clearly different concept of disability in public law.
The examples of reasonable accommodation from public law in section b, below may have a definition of disability that is slightly different from that in the Discrimination Act. The author believes that there is no important difference but will not go as far as stating that the concept is the same.

[117] Chapter 2 Section 5 of the Discrimination Act.

But since this duty is not regulated by the Discrimination Act, a breach does not amount to direct discrimination.

The individual with a disability must often be the principal actor, making the reasonable accommodation happen. The state and the municipality offer assistance directed at the individual. Abstaining from taking positive measures does not in itself amount to discrimination outside the areas of employment and higher education.

I can make an example with a landlord having a tenant who becomes disabled due to an illness. The landlord might then prohibit installations necessary for the tenant to remain in the apartment. The fact that the municipality would have been obliged to grant an allowance for the installation as well as to pay for the future removal does not include a duty for the landlord to permit them. Discrimination law is based on comparisons between persons with disabilities and persons without disabilities and persons without disabilities have very limited rights to make installations, in rented apartments.

The scope to demand reasonable adaptations to accommodate a disability is limited unless the law clearly states that a refusal to do a reasonable adaptation amounts to direct discrimination. This is so only for employers and for providers of higher education.

Failure to provide reasonable accommodation today amounts to direct discrimination in the labour market and in higher education. A goverment enquiry – DS 2010:20 – suggested legislative changes and one is to amend chapter 1 Sec. 4 of the Discrimination Act and define restricted accessibility as a form of direct discrimination in all areas. Nothing has happened since.[118]

In areas outside the labour market and higher education one has today to look at other legal concepts such as indirect discrimination. One could argue that failure to fullfill accommodation duties could under some circumstances amount to indirect discrimination (compare the 2010 niqab case described below (d) and also in the annex 3).

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

The duty of reasonable accommodation is made an integrated part of the concept of direct discrimination itself. “Reasonable accommodation” is required in determining whether or not a similar situation exists, and thus for determining whether or not discrimination has occurred. The key issue is if the individual involved can be placed

[118] The Equality Ombudsman has publicly criticsed the government for not moving forward with this proposed legislation. Helsingborgs Dagblad 2013-01-02.

in a similar situation. If this can be achieved through reasonable adaptation of the workplace, the employer cannot take the disability into account and doing so amounts to direct discrimination.

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

There is no specific requirement to provide reasonable accommodation in relation to other grounds of discrimination. No law for instance requires a school to accomodate a group of Muslims who ask for a place to pray in that school.

The author does not regard the niqab case described in the annex 3 as a case of reasonable accommodation. That case started with the school making demands on the pupil to remove her niqab. Whenever someone makes a demand on a person (like not having the face almost totally covered) which is formally applying to all groups but affects a particular group more than others, indirect discrimination may or may not occur depending on the proportionality test. An important part of this test would have been if the educational needs could have been solved by another mean, for instance by the teacher asking the student more questions to compensate for the fact that the teacher cannot read the facial expressions of the pupil. Thus, for all pratical purposes, reasonable accommodation is an essential element in assessing almost all cases of indirect discrimination.

The author uses the term indirect discrimination when the alleged discriminator sets a provision, a criterion or a procedure that appears neutral but puts a special burden on individuals in a specific group, like the provision of the school that pupils should not cover their heads. The term reasonable accommodation is used for situations which arise without any connection to a provision, a criterion or a procedure created by the alleged discriminator. For instance if it is important for a person to pray with persons of the same religion and they need the school to provide a room for it. The distinction between indirect discrimination and a failiure to provide reasonable accommodation is sometimes very hard to make[119] but one should try to make it.[120]

However, it is possible that the law concerning ethnic discrimination will in the future be interpreted in a manner which requires some form of reasonable accommodation in relation to, for example, religious minorities.[121] Employers have a duty to undertake

[119] The decisive thing is whether or not the discriminator could have chosen not to put up the hindrance. An employer asking the employee to do a certain task is indeed a hard question.
[120] Whether or not the reader agrees or disagrees with the author on the distinction between reasonable accommodation and indirect discrimination, it is still a clear fact that the Swedish Equality Ombudsman did not treat the niqab case as a case of reasonable accommodation. It was treated as a case of possible direct or indirect discrimination before it was closed.
[121] To the knowledge of the author there has been no discussion on 'language accommodation measures'. However, there is a right to time-off during language studies (in Swedish) according to the (1986:163) Act on a right to leave for studies in Swedish for immigrants.

active measures to ensure that the workplace is more inclusive in terms of persons with different ethnic and religious backgrounds.

The Discrimination Act contains a provision Ch. 3 Sec. 4 requiring employers to implement such measures as can be required in view of their resources and other circumstances to ensure that the working conditions are suitable for all employees regardless of sex, ethnicity, religion or other belief. The active measures have a public law character and this is an example when a failure to do so might lead to indirect discrimination. Another example could be Chapter 1, Section 8 of the School Act (2010:800). It requires the municipality to give equal access to basic compulsory and secondary education to all children regardless of social or economic background. If a child has problem attending school because the school will not accommodate a religious belief of the child or its parents, the failure to accommodate may be regarded as indirect discrimination connected to religion and the duty in the School Act to provide equal access to education (regarding all forms of social background including religious background) may be a important factor in the proportionality test. The same may apply to the employer active duties with regard to Ch. 3 Sec. 4 of the Discrimination Act.

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

i) race or ethnic origin

There is no direct duty to apply reasonable accommodation. However Chapter 3 Section 4 of the Discrimination Act and Chapter 1 Section 8 of the School Act may be used to achieve such a duty indirectly. See general remarks above.

ii) religion or belief

There is no direct duty to apply reasonable accommodation. However Chapter 3 Section 4 of the Discrimination Act and Chapter 1 Section 8 of the School Act may be used to achieve such a duty indirectly. See general remarks above.

iii) Age

No direct duty

iv) sexual orientation

No direct duty. For instance the School Act may in some situations be used to achieve such a duty indirectly.

f) Please specify whether this is within the employment field or in areas outside employment

There is no duty modelled on the duty to provide reasonable adaptation for persons with disabilities in the Discrimination Act applying to other groups. There are however other duties with regard to all grounds but age. The areas most affected by such other duties are employment and education.

i) race or ethnic origin

There is no direct duty to apply reasonable accommodation. However Chapter 3 Section 4 (labour market) of the Discrimination Act and Chapter 1 Section 8 of the School Act (education) may be used to achieve such a duty indirectly. See general remarks above.

ii) religion or belief

There is no direct duty to apply reasonable accommodation. However Chapter 3 Section 4 (labour market) of the Discrimination Act and Chapter 1 Section 8 of the School Act (education) may be used to achieve such a duty indirectly. See general remarks above.

iii) Age

No direct duty

iv) sexual orientation

No direct duty. For instance the School Act (education) may in some situations be used to achieve such a duty indirectly.

g) Is it common practice to provide for reasonable accommodation for other grounds than disability in the public or private sector?

No it is not.

h) Does national law clearly provide for the shift of the burden of proof, when claiming the right to reasonable accommodation?

Chapter 2 Section 1 of the new Discrimination Act states that a person is in a comparable situation if the employer by reasonable accommodation can place him or her in a comparable situation. Reasonable accommodation is thus an integral part of the making of a prima facie case. In principal, the burden of proof rests with the

employee at this stage. The author finds it unlikely that the Labour Court would shift the burden of proof.[122]

The Supreme Court has - however - criticised the old wording of the law. The law should not be understood as split between two points, where one party has the burden of proof for certain facts before the specific point and the other party for other facts after this point. The Supreme Court sees the provisions on burden of proof as a presumption rule, and the fact that must be proved for the presumption to apply must be assessed in the individual case.[123] It is thus possible that the Supreme Court would shift the burden of proof.

The new Discrimination Act – though better than the previous acts – does not clearly provide for the shifting of the burden of proof.

i) Does national law require services available to the public, buildings and infrastructure to be designed and built in a disability-accessible way? If so, could and has a failure to comply with such legislation be relied upon in a discrimination case based on the legislation transposing Directive 2000/78?

Yes, building regulations include rules on accommodation/accessibility. As regards public authorities there is a general duty to assess accessibility in all their activities and to develop accessibility plans to this end.[124] Such rules may be relied upon, for instance, in an argument on "reasonable" accommodation and in connection to the proportionality test in cases of indirect discrimination.

To my knowledge, though, there is no case law to reflect this and there are only indirect links between violations of such law and the discrimination act.

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

There is no general duty with regard to disability. The Discrimination Act contains a provision Ch. 3 Sec. 4 requiring employers to implement such measures as can be required in view of their resources and other circumstances to ensure that the

[122] The wording of Chapter 6 Section 3 of the new Discrimination Act ought however to nudge the Labour Court towards shifting the burden proof. So does the reasoning behind the new formulation, Government bill 2007/2008:95 p. 444.
[123] The Supreme Court, case T 2100-05 (judgment March 28 2006). This critic is addressed by the new wording on the shifting of burden of proof in the Discrimination Act, Government bill 2007/2008:95 p. 444.
HomO v. Restaurang Fridhem Handelsbolag.
[124] Ordinance (2001:526).

working conditions are suitable for all employees regardless of sex, ethnicity, religion or other belief, (see above e).

k) Please explain briefly the existing national legislation concerning people with disabilities (beyond the simple prohibition of discrimination). Does national law provide for special rights for people with disabilities?

The Swedish social tradition is not based on individual rights. The Swedish system of positive action is based on the state giving subsidies to employers (private as well as public employers) as the first option. These subsidies are regulated in Ordinance (2000:630) on special measures for persons with an employment handicap. The wage subsidy is based on the person's reduced working capacities. The part of the wage that exceeds 16 700 SEK (approximately 1900 Euro) per month for full time work is not subsidised.[125]

If that does not work the second option is sheltered employment at Samhall (see below Sec. 2.7).

There is also special protection for the persons with disabilities in the Employment Protection Act (1982:80). In the redundancy situation the seniority rule normally applies. An employee has the right to be transferred a position for which he or she has sufficient qualifications and better seniority than the employee holding that position. According to Section 23 a person who have reduced working capacities, and therefore have been given special duties by the employer, shall be given priority for continued work, regardless of his seniority, if it can be accomplished without serious inconvenience to the employer. This is a clear preferential treatment in relation to other employees. However, this section does not include any right to preferential treatment when the employer decides which positions are to be made redundant.[126]

Another ordinance providing group rights is (2001:526) which gives governmental authorities special duties to work toward reaching the goals of integrating persons with disabilities.

2.7 Sheltered or semi-sheltered accommodation/employment

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

Open-labour-market integration for the workers with disabilities is the main policy in Sweden. However, sheltered employment is also a possibility (but no individual right) for those with too serious disabilities to obtain other employment and whose needs

[125] Section 28.
[126] See Labour Court 2012 nr 51.

cannot be met in any other way, according to the Ordinance (2000:630) on special measures for persons with an employment handicap. Sheltered employment is offered by a public company, Samhall AB, and employs about 20 000 workers with disabilities.[127]

There is also "sheltered employment in the public sector" targeting especially persons who are psycho-socially and intellectually disabled[128] and covering about 4000 persons.

b) Would such activities be considered to constitute employment under national law- including for the purposes of application of the anti-discrimination law?

Sheltered work is regarded as employment but is, however, not covered by the Employment Protection Act.

Some employment protection is, nevertheless, offered through collective agreements in the area, though. The laws against discrimination make no exception for employees in sheltered employment.

[127] http://www.samhall.se/om-samhall/.

[128] The essential requirement is a functional impairment that is permanent or long-term. Such an impairment may arise for instance from a intellectual impairment, a mental health problem, a physical health problem or a social problem. The group covered is quite wide but the socially and mentally disabled are the most important group within the persons offered positions. For more information see http://www.arbetsformedlingen.se/download/18.46ccfec5127ddccec778000485/osa_as.pdf .

3 PERSONAL AND MATERIAL SCOPE

3.1 Personal scope

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

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

There are no explicit references to nationality or residence made in the Discrimination Act. An employer cannot be considered to be under the obligation to, for instance, employ a person not holding a necessary residence or work permit – on the contrary, this is regarded as a criminal offence. Furthermore, the Discrimination Act covers a number of areas, such as the application of social security regulations, where at least residence requirements are plenty.

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

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

The Discrimination Act protects only natural persons.[129] Nevertheless, as regards the act's applicable to working life, there is in the back-ground the general "concept of employee", a compulsory concept not for the parties concerned to decide upon. Within this concept it is perfectly possible for the Labour Court, in the last instance, to "look through" and thus ignore the fact that a contract may be agreed between the employer and a legal entity run by the "employee" alone.

The former four Ombudsmen against discrimination have unanimously criticised the fact that no explicit protection against discrimination is provided for legal persons, something which is according to them required by the Directive.[130] The Discrimination Inquiry Commission proposed in 2006 a protection also for legal persons in a number (but not all) areas covered by non-discrimination legislation.[131] But legal person still have no explicit protection.

[129] Government bill 2007/08:95, p. 90.
[130] The Ombudsman against discrimination due to sexual orientation, Hans Ytterberg, agues in the following way: 'First of all, we have pointed to the fact that art. 3(1) Directive provides that the Directive shall apply to *all* persons and that recital 12 states that *any* direct or indirect discrimination as regards the areas covered by the Directive should be prohibited throughout the Community. Furthermore, membership of employers' associations (which is one area explicitly covered by the Directive) is almost exclusively relevant for legal persons, at least in Sweden. It would therefore make little sense to prohibit discrimination with respect to such membership but at the same time exclude legal persons from that protection.'
[131] SOU 2006 :22 pp. 332 and following.

b) Is national law applicable to both private and public sector including public bodies?

The Discrimination Act is applicable to both private and public sector including public bodies. The limitation to the applicability of the Discrimination Act relates to activity areas and not to public or private sector. A police officer arresting a criminal is an area where the Discrimination Act do not apply. However, if the same police officer an hour later gives advice to a ordinary citizen, and treats this citizen disfavourable for a reason connected to a ground of discrimination, this activity will fall under the Discrimination Act.

3.1.3 Scope of liability

Are there any liability provisions than those mentioned under harassment and instruction to discriminate? (e.g. employers, landlords, tenants, clients, customers, trade unions)

In working life the prohibition applies to the employer. The employer may be a natural or a legal person. According to Ch. 2 Sec. 1 of the Discrimination Act a person who has the right to make decisions on the employer's behalf in matters concerning the employee shall be equated with the employer. An employer can thus only be made responsible for employees who are given the authority to represent the employer towards other employees i.e. management on different levels.[132] A fellow worker lacks such an authorisation towards another fellow worker, thus an individual employee cannot sue a fellow worker under the Discrimination Act.

The employee sending the discriminatory email in Labour Court case 2007 No 45 (see annex 3), was not in a position to make decisions regarding the Iranian's job application and did thus not represent the employer. There could therefore be no discrimination even though the employer never argued that the lack of authorisation was visible to the Iranian job applicant. This restriction on the vicarious liability of employers reduces the scope of the prohibition on discrimination in a way which might be problematic in relation to EU law. Labour Court case 2011 No 19 is another example where both the applicant, the municipal co-ordinator of summer training posts for pupils and S.F. herself thought that S.F. was representing the employer. The employer was at least equally to blame for this misunderstanding between her and S.F. Yet the applicant lost the case based on a legal formalistic reasoning, with regard to whom the employer is responsible for.

An employment agency or a head hunting firm, are two examples of legal persons whose actions will make the employer liable if they are given the authority to represent the employer. As regards sub-contractors, assuming that they are

[132] See Labour Court Case 2007 no 45 (Sec. 0.3.1).

completely independent, employers can be assumed to have no liability for the acts of sub-contractors.

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

In education the prohibition in Ch. 2 Sec. 5 applies to education providers for instance schools and universities. Employees and contractors engaged in the activities shall be equated with the education provider when they are acting within the context of their employment or contract. A person can act in context of their employment but outside the authorisation given to them. Education providers thus are more widely responsible for their employees in relation to for instance students, compared to when the same employees harass fellow employees. As with employment, becoming aware that a child, pupil or student considers that he or she has been harassed is enough to give rise to the duty to investigate and to and implement reasonable measures to prevent harassment in the future.

The Discrimination Act is directed towards the person responsible for the activity in question. When it is a legal person this person necessary must act through its employees or through contractors. Generally, this is not explicitly regulated in the Discrimination Act.[133] Other sources such as case law and the preparatory works are important instead. When it comes to goods services and housing all persons who represent the legal person shall be equated with it. In this area it is not possible to argue that the employee of the landlord, or the controller of the security firm engaged to stop shoplifting by the store, did not have the authority to act as they did. The landlord and the store are liable for their actions under the Discrimination Act towards the tenant and the customer.

A landlord cannot be held liable for tenants' actions towards each other and a trade union or a trade association cannot be liable for what their members do. Harassment,

[133] The employment area and education areas are exceptions.

for instance, may however on occasion amount to a criminal offence. Labour Law contains disciplinary sanctions, also. A tenant harassing another tenant is in breach of the rent law and may lose his contract. The landlord has a duty under this law to prevent disturbances (störningar). Disturbances can be noise from a heavily trafficked road and this noise can lead to reduced rent and an order subject to a pecuniary fine to improve the sound isolation of the building. Disturbances can also be a hostile neighbour. In such a case the landlord have a duty to contact the Social Board (socialnämnden). In extreme cases the Rental Board may award the tenant reduced rent and can also order the landlord to evict the disturbing neighbour subject to a pecuniary fine. The hostile neighbour is thus treated as a sort of "environmental" problem.

3.2 Material Scope

As a general rule the material scope is the same for all the protected grounds in Sweden. From the 1 of January 2013 age is a protected ground in almost all areas.[134] However, with regard to age, direct discrimination can as a general rule be justified by a proportionality test. In sensitive areas like health care and social insurances (including student benefits), age limits set in laws are exempted from the prohibition of discrimination.[135]

3.2.1 Employment, self-employment and occupation

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

The Discrimination Act applies to both private and public employers, regardless of the number of employees. Workers hired from a temporary work agency or borrowed from other employers are protected as well. As regards the self-employed, these are not covered by the sections of the Discrimination Act dealing with working life. Recall, however, what was earlier said about the compulsory "concept of an employee" in the Swedish context.

Ytterberg in his Sexual Orientation report of the 28 July 2004 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

[134] The prohibition on age discrimination does not apply to the area of conscription and similar military education, Ch. 2 Secs 15 and 16 in the Discrimination Act. Neither does it apply in the insurance sector according to Ch. 2 Sec. 12 b point 2.
[135] Chapter 2 Section 13 b and Section 14 b of the Discrimination Act.

to be covered by the Directive (see art. 2(3) and 3 of the Directive). It is also a situation which has appeared in the requests for advice and support that the Ombudsman's office has come across since the entering into force of the Act."

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

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

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

The old acts contained an enumeration of the situations where the prohibition of discrimination applied. This enumeration was abolished with the new Discrimination Act. It covers all aspects of the employer-employee relationship and all aspects of the recruiting process, including inquiries from a potential work seeker about a job.

The Discrimination Act covers the self-employed with regard to starting or running a business and professional recognition (Ch. 2 Sec. 10). Professional organisations are prohibited to discriminate the self employed as well as the employed (Ch. 2 Sec. 11) Permits, approvals certification and financial support, are examples of areas covered by these two provisions. There are other provisions in the Discrimination Act which apply to self-employed as well as to employed persons and offer both groups the same protection.

There are no special rules for the public sector.

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

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

Note that this can include contractual conditions of employment as well as the conditions in which work is, or is expected to be, carried out.

As regard occupational pensions these are, in parallel with the jurisprudence of the ECJ, considered as a sort of pay and are thus covered by the ban on discrimination.

3.2.4 Access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience (Article 3(1)(b))

Note that there is an overlap between 'vocational training' and 'education'. For example, university courses have been treated as vocational training in the past by the Court of Justice. Other courses, especially those taken after leaving school, may fall into this category. Does the national anti-discrimination law apply to vocational training outside the employment relationship, such as that provided by technical schools or universities, or such as adult lifelong learning courses?

The prohibition of discrimination in the education sector applies to all sorts of education providers from those teaching small children to those teaching university students. It also applies to all forms of education including vocational training. In Sweden the word vocational training is not used as an official category when we distinguish between different forms of education. Chapter 2 Section 1 point 3 of the Discrimination Act clearly prohibit discrimination when a person apply for - or participate in - training with an employer and sections 5-8 will apply to the education provider if responsibility for the training is shared between the employer and for instance a school.

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

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. This implementation measure seems to me to meet the requirement of both the Article 13 Directives.

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

In relation to religion or belief, age, disability and sexual orientation, does national law seek to rely on the exception in Article 3(3), Directive 2000/78?

Health and medical care, social services, state financial aid for studies, social insurance and related benefit systems are included in the Discrimination Act in Chapter 2 Sections 13- 14. All grounds are covered. With regard to age there is an

exemption for age limits set down in law with regard to health and social insurances (including student benefits) and there is a general possibility to justify direct age discrimination subject to a proportionality test in most areas.

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

This covers a broad category of benefits that may be provided by either public or private actors to people because of their employment or residence status, for example reduced rate train travel for large families, child birth grants, funeral grants and discounts on access to municipal leisure facilities. It may be difficult to give an exhaustive analysis of whether this category is fully covered in national law, but you should indicate whether national law explicitly addresses the category of 'social advantages' or if discrimination in this area is likely to be unlawful.

The Discrimination Act should meet the requirement of Art. 3(1)(f) in the 2000/43/EC Directive. Discounts on services like trains and municipal leisure facilities fall under the provision on goods services and housing (Ch. 2 Sec. 12). Discounts will thus in principle fall under the prohibition. Discounts for persons with disabilities will always be allowed as the disadvantaged group (persons without disabilities) is not protected by the Discrimination Act. Discounts based on age can be justified in a proportionality test depending on the circumstances according to Chapter 2 Section 12 b point 4 of the Discrimination Act. The rest of the examples would either fall under the provisions on social services (Ch. 2 Sec. 13) or social security (Ch. 2 Sec. 14).

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

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

This covers all aspects of education, including all types of schools. Please also consider cases and/ or patterns of segregation and discrimination in schools, affecting notably the Roma community and people with disabilities. If these cases and/ or patterns exist, please refer also to relevant legal/political discussions that may exist in your country on the issue.
Please briefly describe the general approach to education for children with disabilities in your country, and the extent to which mainstream education and segregated "special" education are favoured and supported.

The Discrimination Act applies to all education providers and to all forms of education from day-care for small children to university students. The official policy is to give a

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

Chapter 2 Section 5 of the Discrimination Act does not apply to education under the School Act (2010:800). Failure to provide reasonable accommodation thus cannot constitute direct discrimination of a child or a pupil. However, 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.[136] This provision applies to all pupils but pupils with disabilities are a group that is more likely than other groups to be denied a place at their school of choice for this reason.

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

If the child (through its parents) ask to be placed in a special class and this request is denied it may however be discrimination according to the preparatory works to the 2006 Pupils Discrimination Act.[137] This Act is repealed but the question of when a failure to take reasonable accommodation measures may amount to indirect discrimination is alive.

The specific situation of Roma in the Swedish schooling system with regard to discrimination is described in the old Discrimination Ombudsman's (DO) report "Discrimination against Romanies in Sweden" from 2004 and has been followed up in the 2012 report by the Equality Ombudsman, Roma rights (Romers rättigheter). A general overview can be found in a Report from the Swedish National Agency for Education, Romanies in School. (*Romer i skolan)*.[138]

[136] School Act (2010:800) Ch. 10. Sec. 30.
[137] Government bill 2005/2006:38 p. 94.
[138] Swedish National Agency for Education. Report 2007 nr 292.

Actual complaints of discrimination were few[139] at this time but the general problem of discrimination in education as an obstacle to Romanies is now attracting attention and is likely to be addressed on a broader scale of active measures in the near future.[140]

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

There is no right to minority language education. There is only a duty for the municipalities to arrange it. One pupil is enough to activate this duty.

But the duty hinges on the condition is that a suitable teacher can be found and it has sometimes been interpreted as a certified teacher, which is problematic when there is no university education in a language.[141] There are only 15 certified teachers of Romany Chib. The number of students entitled to education in this language in 2008 was 1208. The Equality Ombudsman has taken a case to court claiming that the failure to provide language education in Romany violates the now repealed 2006 Act on a Ban Against Discrimination and Other Degrading Treatment of Children and Pupils. The Equality Ombudsman argues that with regard to national minorities, the treatment of children with Swedish as their mother tongue, is the relevant measurement of comparable situation.[142] If they for instance would actively seek such a teacher on the national labour market, they must be equally active in finding a teacher in Romany Chib.

The Ombudsman lost.[143] The District Court stated that the relevant measurement of comparable situation was other minorities. The municipality had not worked less hard to find teachers of Romany Chib compared to other minorities mother tongues. The

[139] DO reveals only four such complaints made – case no. 897-2003, 526-1004, 290:1997 and 897-1999. See also Equality Ombudsman 2011, Roma rights (Romers rättigheter), p. 51.
[140] So far examples of active measures are things like the school fetching the child at the parent's home, Swedish National Agency for Education. Report 2007 nr 292, p. 26. When the Roma delegation lists positive examples from local municipalities they chose examples like employing Roma persons as teaching assistants who can act as "cultural translators". Malmö, Norrköping and Stockholm have had good results from this active measure. Roma Delegation Report 5/2007 Ju 2006:10, p. 20. The author is not aware of any example where a Roma have got a preferential treatment resulting in a loss to a person of another ethnicity. Such preferential treatment would be illegal under the Discrimination Act.
[141] DO (2008) Discrimination of National Minorities in the Education System, p. 38. The lack of university education is being addressed by funds for a three year period for teaching Romany Chib at Linköping University, Council of Europe, Application of the Charter in Sweden, Third monitoring cycle, p. 45 (2009-05-06).
[142] Equality Ombudsman, 2010-11-11 OMED 2007/1109 Act 116, p. 4.
[143] Equality Ombudsman against Vetlanda Municipality, Eksjö District Court, Case T 1395-09, judgement 2010-10-21.

judgement has been appealed but Göta Court of Appeal has decided not to take up the case.[144]

Government inquiry SOU 2010:55 describes the situation of Roma people. It suggests that providing language education may have to be done in many varieties of Romany Chib and other Roma languages because the Roma people will not want language education unless they recognise the language taught as sufficiently close to their mother tongue.[145]

In a study commissioned by DO 40 % of Roma children indicated that they were not open about their Roma identity in school.[146] Some of them claimed that they were from Poland.[147] Many Romanies expect discrimination at school from teachers, children and parents. Harassment and other forms of discrimination contribute to a high rate of absence from school. In a study interviewing Roma persons about their experiences in the school system, many reported that workers in the school system perceived Roma culture as a factor discouraging children to complete their education and that such racist sentiments contributed to their misgivings in the school system.[148]

The National Board of Education have in a report from 2007 Romanies in School a Deepened Study *(Romer i skolan en fördjupad studie)* addressed the problem that some schools are more tolerant of Romany children not coming to school and identified it as a form of structural discrimination. This report also contains a lot of good local examples addressing this complex problem.

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

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

The Discrimination Act applies to "persons who *outside private or family sphere* are offering goods services or housing to the public."[149] Directing the offer to the general public is a necessary requirement for the discrimination law to apply. A private

[144] Göta Court of Appeal, case T 3264-10.
[145] Page 324-325 with reference to Lindberg/Liedholm (2010).
[146] DO (2003) Discrimination of Romanies in Sweden, p. 15.
[147] Roma is the group facing the most severe negative opinions in the general populations. See for instance Forum for Living History (2010), The Ambivalent Intolerance (Den mångtydiga intoleransen), p. 7.
[148] Equality Ombudsman 2011, Roma rights (Romers rättigheter), p. 51f with reference to research from 2005 by Christina Rodell Olgac.
[149] Discrimination (2008:567) law, 2 Ch., Sec.12. point1.

person can sell or rent out anything, without regard for the discrimination law, as long as the offer stays within a small group of people.

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

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

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

The prohibition on discrimination in goods, services and housing applies without exemptions on disability. This has been so since the 2003 Act on Goods and Services. The insurance companies frequently use medical conditions for risk assessments. There is no need to have a legal exemption. Stockholm District Court in 2011 said that:[150]

"Discrimination is when a person has had a disfavoured treatment compared to other persons in the same risk group. The equal treatment requirement shall thus not be interpreted as meaning that persons with different risks of for instance developing a medical problem shall be granted insurance on the same terms".

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

According to the author, the situation with regard to disability is problematic. An exemption is necessary with regard to age and the insurance sector because actuarially correct assessments amount to statistic discrimination which would have

[150] Stockholm District Court, case T20377-09, The Equality Ombudsman against Trygg Hansa, p. 11.

been prohibited had age been a area in which the prohibition on discrimination applied. With regard to disability the concept of statistical discrimination as a form of direct discrimination does not seem to apply. Had it done so, the Trygg Hansa case would have been decided differently.

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

To which aspects of housing does the law apply? Are there any exceptions? Please also consider cases and patterns of housing segregation and discrimination against the Roma and other minorities or groups, and the extent to which the law requires or promotes the availability of housing which is accessible to people with disabilities and older people.

The Government bill[151] to the new Discrimination Act states that *sporadic occasions*[152] *(enstaka)* of selling or renting out a dwelling should be regarded as within the private/family sphere. Selling an apartment or a house will thus often be exempted from the law.[153] A realistic scenario is that a real estate agent presents two possible buyers to the seller and the seller chose the lower bid for ethnic reasons. As long as it is the seller's decision and the real estate agent treats both buyers equally, there is no unlawful discrimination under the act.

Situation testing in different forms have been undertaken by among others the Tenants Association and by researchers at Linneaus University.[154] When the researchers sent out 500 identical applications signed with a name signalling a Swedish female she got to see the apartment in 20 % of the cases. When the name signalled a Muslim man only 4 % of the applications lead to him being shown the apartment.[155] In both cases the result could not lead to discrimination cases. No physical person had suffered a less favourable treatment (missgynnande). The invented applicants could not go to court or to the Ombudsman and the researchers themselves had not been discriminated against.

In Sweden we do not register ethnicity (see above sec. 2.3.1.d) so we cannot easily see how the Romany population live. When segregation is studied in statistic material

[151] The government bill is the document where the government describes the new Act to the Parliament. If the Act is adopted according to the proposal of the government – as was the case of the Discrimination Act – this bill becomes the most important source for interpreting the wording of new Act at least before there is any case law. See Section 0.1.
[152] Sporadic occasions may be more than one occasion. A person may for instance sell their apartment and by a new one with a new partner, separate, sell the apartment and buy another apartment. As long as the apartments are bought and sold for housing reasons, as opposed to financial reasons, the selling are sporadic occasions.
[153] Prop. 2007/08:95: p. 244.
[154] The Ombudsman Against Ethnic Discrimination, Discrimination on the Swedish Housing Market 2008:3.
[155] Ahmed A and Hammarstedt M. Discrimination on the housing market – a field experiment on the internet, Växjö 2007.

a proxy such as the birthplace of the individual or the parents is used. National ethnic minorities are missed out.

The Swedish housing market is very segregated in the three biggest cities. This segregation is mostly two-dimensional. Some areas are “Swedish-dense”. In those areas the Swedish ethnic majority is predominant. Other areas are “Swedish-sparse”. The typical ethnic neighbourhood in Sweden has no dominant group. The public housing companies are the predominant landlord. The average Romany would live in such a neighbourhood. There have been some cases were local politicians have made discriminatory statements like “Vänersborg cannot absorb more gypsies”.[156] Such comments have been made by representatives of public housing companies as well.[157]

The old Ombudsman Against Ethnic Discrimination had about 50 housing cases each year.[158] Many landlords have no formal queue were prospective tenants can register their interest in renting an apartment.[159] Minorities suspect discrimination when a landlord prefers to let an apartment remain empty instead of accepting them as tenants. Harassments from neighbours or the landlord is another common complaint. Termination of the contract for the apartment, refusals to barter[160] the apartment or denied membership in a housing co-operative are also common complaints.[161]

Romanies bring many housing cases to the ombudsman. One case from Lidköping District Court concerned a landlord that changed the lock in order to evict a Romany family. When the lease on the apartment was signed the landlord mistook the ethnicity of the family. He thought they were from Thailand.[162] There are other cases in which landlords specifically refuse to let Romanies rent apartments.[163]

General disability accessibility is in Sweden primary dealt with under property law. Every alteration to land or a building requires a building permit unless it is a minor change. The municipality makes a general plan (översiktsplan) deciding which areas shall be used for which purposes. Based on that plan detailed plans covering smaller

[156] Ombudsman Against Ethnic Discrimination, Discrimination Against Romanies in Sweden, Report on DO project 2002 and 2003. p. 16.
[157] See above p. 18.
[158] 55 cases in 2008. Ombudsman Against Ethnic Discrimination, Yearly report 2008, p. 18.
[159] Equality Ombudsman (2011) Roma rights (Romers rättigheter) p. 44. This is presented as a factor making discrimination harder to address.
[160] The possibility to barter a contract for an apartment is a valuable right within the Swedish rent law system. See footnote 38.
[161] The Ombudsman Against Discrimination, Ethnical Discrimination in the Housing Area (Etnisk diskriminering på bostadsmarknaden PM 2006-01-01).
[162] Lidköping Municipal Court (dnr 1209-2005) case T-nr 1596-06, judgement 2008-05-20. The tenant was awarded 50.000 SEK approximately 5.600 Euros.
[163] The Ombudsman Against Discrimination case nr 331-2006.

areas are made. These plans are used as a point of reference when individuals apply for building permits.

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

The National Board of Housing, Building and Planning (Boverket) have issued a regulation regarding easily removable obstacles.[164] This rule applies to public spaces, social security, the health care sector, infrastructure[165] and services made available to the general public. A house, however, is not an area open to the general public so a landlord owning a house with only dwellings cannot be ordered to improve accessibility under the threat of a penalty. They can only be made to do such things when they need a building permit.

If a person with a disability needs an adaptation of their home, the person asks the municipality for a housing adaptation grant. This applies to rented property as well as property owned by the person with a disability.[166] The tenant cannot do such alterations to the apartment without the landlord's permission. The municipality checks that permission is given and that the landlord does not require the adaptations to be removed if the tenant leaves the apartment. The most likely reason for a landlord to refuse is the costs of removing adaptations which are a nuisance to persons with no disabilities. There is therefore a removing allowance that can be applied for.

[164] The current regulation is BFS 2003:19.
[165] The legislation applies to airports, bus stations and so on. There is special legislation on accessibility of the part of public transportation that does not involve the use of land or buildings.
[166] Section 4 Law on Housing Adaptation Allowance.

4 EXCEPTIONS

4.1 Genuine and determining occupational requirements (Article 4)

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

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

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

In the preparatory works, it is made clear that the typical examples born in mind for the use of this exceptional clause are that a Muslim organisation has the right to demand that an imam be of Muslim faith, that an organisation for equal rights for gays and lesbians or an interest organisation, which caters for a certain immigrant group may have the right to require[167] that for some “core” positions the employees themselves be homosexual or have that same immigrant background. At the same time it is underlined that the exception from the prohibition of discrimination must always be given a very narrow interpretation.[168] In an organisation only the positions “visible” to the public can come into question, not an entire organisation per se and automatically. The employer, must, furthermore, have a strong motive for applying the exemption; the position must clearly have demanded that the discrimination takes place. Religious communities do not have any favourable status here, but they are explicitly mentioned in the preparatory work, along with other examples.

Swedish law is now in conformity with the directives and the wording is clear.

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

[168] Government bill 2002/03:65, p. 185-187. Government bill 2007/08:95 p. 155-157.

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

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

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

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

As for case law, the Supreme Court's case on balancing freedom of speech and religion against the rights of homosexuals could be mentioned, though.[169] A pastor held a long sermon entitled "Is homosexuality congenital or the powers of evil meddling with people" where he developed his religious beliefs with regard to homosexuality, blaming homosexuals for AIDS, linking them to the sexual abuse of children and characterising them as "a serious cancerous growth on the body of society". The Supreme Court ruled that under Swedish law the pastor should be convicted according to Ch. 16 Sec. 8 of the Penal Code. The Supreme Court however believed that the European Court of Human Rights, probably would have ruled this restriction on the pastor's right to free speech not to be proportionate to the aim of protecting homosexuals and therefore acquitted him.

c) Are there cases where religious institutions are permitted to select people (on the basis of their religion) to hire or to dismiss from a job when that job is in a state entity, or in an entity financed by the State (e.g. the Catholic church in Italy or Spain can select religious teachers in state schools)? What are the conditions for such selection? Is this possibility provided for by national law only, or international agreements with the Holy See, or a combination of both?

There are no such cases in Sweden. A religious group can open a school financed with public money. But this school will operate under normal laws. They will have to admit students of other religions on equal terms as long as these students show respect for the religion of the school. The Discrimination Act allows for instance a church to require a priest to have the same faith as the church, because the priest performs religious functions. But giving preference for a Christian when selecting a janitor will not be allowed and can amount to discrimination as the janitor do not perform religious services. Teachers at a religious school teach under the School Act as other teachers do. Like a janitor they do not practise their religion in their job.

[169] Judgment 29 November 2005 in case B 1050-05, see Sec. 0.3.4 above.

Therefore a religious school will discriminate if they make religion a criterion when hiring a teacher (compare above Sec. 4.2.a.).

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

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

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

Chapter 2 Sections 15-16 also covers enrolment inspection, admission tests and other examination of personal circumstances under the National Total Defence Service Act (1994:1809). The Act still applies but nowadays the state does not force any person to do military service against their wishes. Should Sweden be attacked the possibility to do so still exist and these sections of the discrimination act would then protect the conscripts.

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

There are no exceptions for the police, prison or emergency services. Any special interest will have to be taken into account within the application of the general exception, see Sec. 4.1 above. There is, so far, no case law of relevance.

4.4 Nationality discrimination (Art. 3(2)

Both the Racial Equality Directive and the Employment Equality Directive include exceptions relating to difference of treatment based on nationality (Article 3(2) in both Directives).

a) How does national law treat nationality discrimination? Does this include stateless status?
What is the relationship between 'nationality' and 'race or ethnic origin', in particular in the context of indirect discrimination?
Is there overlap in case law between discrimination on grounds of nationality and ethnicity (i.e. where nationality discrimination may constitute ethnic discrimination as well?

Within Swedish non-discrimination legislation there are no exceptions related to nationality, whatsoever. Nationality is an aspect of ethnicity so there can be no overlap. A stateless person will always have an ethnic origin.

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

According to Chapter 11 Sec. 11. of the Instrument of Government Swedish citizenship is required for judges, Chapter 6 Sec. 2 says that government ministers must have Swedish Citizenship, the Chancellor of Justice, the Parliamentary Ombudsman and the three Auditors General are the other examples when Swedish Nationality is required by the Instrument of Government.[170]

Positions were the person is elected by the Parliament requires Swedish citizenship according to the Riksdag Act (1974:153) Ch. 7 Sec. 11. This Act has a semi constitutional status. As regard other legislation there are some (but rare) occasions where Swedish nationality is required, though.[171]

With regard to immigration, visas and residence permits are issued by the Migration Board (Migrationsverket). This Board assesses the level of political oppression in non EU countries. Sometimes the oppression is different in different parts of a country, so the situation in a part of a country can be assessed as well. It is naturally much easier to be recognised as a refugee if the person comes from a high-risk country. But these assessments do not rely on article 3 (2) and are changed and updated continuously and can therefore not be put down in law. Ethnicity, race and nationality can be important for instance if there is oppression in a country directed mainly at persons perceived to belong to a certain race or ethnicity. But its importance is determined by the need for protection this oppression creates for the individual person seeking asylum in Sweden.

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

Some employers, both public and private, provide benefits to employees in respect of their partners. For example, an employer might provide employees with free or subsidised private health insurance, covering both the employees and their partners. Certain employers limit these benefits to the married partners (e.g. Case C-267/06 Maruko) or unmarried opposite-sex partners of employees. This question aims to establish how national law treats such practices. Please note: this question is focused on benefits provided by the employer. We are not looking for information on state social security arrangements.

a) Would it constitute unlawful discrimination in national law if an employer provides benefits that are limited to those employees who are married?

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

[170] Government bill 2009/10:80 p. 333
[171] See further, SOU 2000:106, Medborgarskapskrav i svensk lagstiftning, where an inventory is made.

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

b) Would it constitute unlawful discrimination in national law if an employer provides benefits that are limited to those employees with opposite-sex partners?

When it comes to discrimination between married spouses and registered partners, as was pointed out by Hans Ytterberg in this Sexual orientation report of 28 July 2004 "the whole *raison d'être* of the Swedish Registered Partnership Act[172] was to create a legal frame-work for homosexual couples, which corresponds to that of civil marriage for heterosexuals."

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

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

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

The Discrimination Act applies in the area of health to all grounds. Regarding the persons with disabilities, it is relevant for the employer to take into consideration not only security issues/the health and safety of others at the workplace, but also a person with a disability's own health or safety. However, when the risk involved is not absolutely clear the desire of the individual protected by discrimination law him or herself is decisive. In the Labour Court case 2003 No. 47 the risks of shift work for an employee with diabetes were not proven and the denial to employ him was deemed to constitute direct discrimination.

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

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

There are no exceptions. If - for instance - a turban is prohibited by a work environment rule, it will become a case of possible indirect discrimination and it will be resolved by a proportionality test according to the rules of the Discrimination Act.

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

4.7.1 Direct discrimination

Is it possible, generally, or in specified circumstances, to justify direct discrimination on the ground of age? If so, is the test compliant with the test in Article 6, Directive 2000/78, account being taken of the Court of Justice of the European Union in the Case C-144/04, Mangold and Case C-555/07 *Kucukdeveci?*

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

Chapter 2 Section 2 Point 3 of the Discrimination Act allows age limits with regard to the right to pension, survivor's or invalidity benefits in individual contracts or collective agreements. The next point allows,

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

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

There is a general possibility to justify age discrimination by a legitimate aim if the means are appropriate and necessary in pursuit of this aim. The preparatory works for the Discrimination Act describe the scope for justification as being quite wide. Age limits are common in collective agreements and the system as such work well according to the Government. Therefore the courts are encouraged to look at the system of a collective agreement including its relation in context with social security and not single out individual clauses in a collective agreement for scrutiny.[173] But at the same time the Government rejected demands for a presumption of collective agreements being compatible with directive 2000/78.[174] Any benefit in a collective agreement can be seen as "certain advantage linked to employment" within the meaning of article 6.1.b. It is in my opinion likely that the scope for justification becomes too wide unless the Labour Court makes a narrow interpretation of the law.

[173] Government bill 2007/08:95, p. 177.
[174] Government bill 2007/08:95, p. 177.

Two examples from the *travaux préparatoires* of conditions fulfilling a legitimate aim and normally being both appropriate and necessary are:[175]

- 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 AD 2011 No. 37 (see annex 3) the Labour Court made a narrow interpretation of the scope for different treatment with regard to age. So far the interpretation seems to be in conformity with the directive as far as discrimination against the elderly is concerned.

b) Does national legislation allow 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 for age limits in pensions, survivor's benefits and disability benefits, in individual contracts and collective agreements.[176]

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

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

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

4.7.3 Minimum and maximum age requirements

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

Minimum or maximum age requirements will be dealt with under the proportionality test (See Sec. 4.7.1. (a))

[175] Government bill 2007/08:95, p. 179.
[176] Ch. 2 Sec. 2 Point 3.

4.7.4 Retirement

In this question it is important to distinguish between pensionable age (the age set by the state, or by employers or by collective agreements, at which individuals become entitled to a state pension, as distinct from the age at which individuals actually retire from work), and mandatory retirement ages (which can be state-imposed, employer-imposed, imposed by an employee's employment contract or imposed by a collective agreement).

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

All legal provisions are the same for women and men.

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

According to the new Swedish statutory pension scheme introduced in 1998 there is no fixed retirement age. The income-related public pension scheme opens up for part-time or full-time retirement from the age of 61.

You can also postpone your retirement, continue to work for as long as you like and continue to add to your pension benefits, the scheme being construed on a principle of life-long earnings. However, the right to the basic pension scheme – "guaranteed pension" – requires the beneficiary to be 65 years of age. - It is OK to collect a pension and still work – both the pension and the income are taxable.

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

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

c) *Is there a state-imposed mandatory retirement age(s)? Please state whether this is generally applicable or only in respect of certain sectors, and if so please state which. Have there been recent changes in this respect or are any planned in the near future?*

National law does not require an employee to retire at any special age.

d) Does national law permit employers to set retirement ages (or ages at which the termination of an employment contract is possible) by contract, collective bargaining or unilaterally?

Within employment law there is a right for the employee to stay on until he or she reaches the age of 67 despite what may have been agreed between the parties.[177]

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

According to the 1982 Employment Protection Act there is at that age (67) a right for the employer to terminate the employment without showing just cause (something which is normally required for dismissal).[178] If the employer does not make use of this right at this precise moment, just cause for dismissal is still needed but the employee is only given a one month notice period and there is no right to re-employment.

f) Is your national legislation in line with the CJEU case law on age (in particular Cases C-229/08 Wolf, C-499/08 Andersen, C-144/04 Mangold and C-555/07 Kücüdevici C-87/06 Pascual García [2006], and cases C-411/05 Palacios de la Villa [2007], C-488/05 The Incorporated Trustees of the National Council on Ageing (Age Concern England) v. Secretary of State for Business, Enterprise and Regulatory Reform [2009], C-45/09, Rosenbladt [2010], C-250/09 Georgiev, C-159/10 Fuchs, C-447/09, Prigge [2011] regarding compulsory retirement.

Yes it is.[179]

4.7.5 Redundancy

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

[177] The rule outlaws also collective agreements stipulating a lower retirement age, something which has been criticised by the ILO, Case No. 2171, GB 286/11 (part II) March 2003. The law (Sec. 32 a the 1982 Employment Protection Act) has not yet been revised, though.
[178] See The Equality Ombudsman, Yearly Report 2009, p. 20. There were some cases taken to the Ombudsman in 2009 regarding this legal provision. The Ombudsman dismissed these cases, and stated that the case law of the European Court of Justice permitted this treatment of persons at the age of 67 (Palacio Villa is not mentioned directly nor is any other case).
[179] As the author understands the legal situation a national retirement age is allowed if pensions are typically provided at a reasonable level at that age. This applies to the Swedish national age limit of 67. Special rules for certain groups are subjected to a much stricter proportionality test. Especially if created by the social partners or some other actor not representing the state. So far the Swedish Labour Court has applied this strict test for instance in AD 2011 nr 37.

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

In the latter case, just cause is regarded to exist (the decision as to whether there is a shortage of work rests entirely with the employer) but lay-offs have to be carried out in accordance with the "last-in-first-out" principle. This, arguably, may be regarded as amounting to indirect age discrimination. Moreover, in the event of equal periods of employment senior age priority applies directly. There is also special protection for the persons with disabilities (preference, i.e. the seniority rule does not necessarily apply).

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

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

There are no legal provisions on redundancy payment in Sweden. But central collective agreements often provide structures to support persons dismissed for redundancy reasons and redundancy payment can be a part of such central systems. These central systems can also be topped up by the employer for instance as a part of a local collective agreement with the trade unions on derogations from the seniority principle.

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

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

In Swedish non-discrimination legislation there are no such exceptions.

4.9 Any other exceptions

When the protection against age discrimination was extended to almost all areas of the Discrimination Act in 2013, a set of new special exemptions were needed (see table Section 4.7 above). For example, the prohibition of age discrimination does not apply in the insurance sector, establishments serving alcoholic drinks may freely set a minimum wage to drink, above the national mandatory minimum age of 18 years. Any age limit set by law is exempted in the areas of goods services and housing, social insurances (including student benefits) and the health care sector.

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

a) What scope does national law provide for taking positive action in respect of racial or ethnic origin, religion or belief, disability, age or sexual orientation? Please refer to any important case law or relevant legal/political discussions on this topic.

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

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

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

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

However, the Discrimination Act also contains rules on "active measures". From an EU-law perspective such measures are within the realm of positive action in a more general meaning. The Act requires that the employers carry out a goal-oriented work to actively promote ethnic diversity in working life.[180]

The universities are required to do goal-orientated work with regard to all grounds except age and transgender identity and expressions. There is a requirement on the universities to adopt plans to this end on a yearly basis (Ch 3. Sec. 16.).

[180] Chapter 3 Section 3 of the Discrimination Act.

They are also required to take measures to prevent and preclude conduct that violates a person's integrity if the conduct is related to any ground but age and transgender identity and expressions (Ch. 3 Sec. 15).[181]

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

b) *Do measures for positive action exist in your country? Which are the most important? Please provide a list and short description of the measures adopted, classifying them into broad social policy measures, quotas, or preferential treatment narrowly tailored. Refer to measures taken in respect of all five grounds, and in particular refer to the measures related to disability and any quotas for access of people with disabilities to the labour market, any related to Roma and regarding minority rights-based measures.*

Positive actions are mostly decided upon locally, i.e. by an individual employer or a university, and frequently concern advertising practices and the like.[182] National law does not prescribe a quota system for persons with disabilities. There are, however, a number of labour-market policy measures such as subsidised wage schemes and sheltered employment targeting people with disabilities. The inquiry into the rights of Roma people proposes state funding for locally decided labour market activities designed to meet the needs of this group.[183] As a part of the National Roma Strategy five municipalities have become test places and received state funding for inter alia making sure that the National Employment Agency assists Roma persons in a better way.[184] There is a possibility that this may involve some locally decided preferential treatment. The inquiry estimates that only 10 % of the Roma people in Malmö have a normal job on the open labour market.[185]

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

[181] As regards active measures the Ombudsman works as a normal authority, visiting employers and universities, checking their equality plans and so on. If somebody fails to fulfil their duties the Board Against Discrimination may – on the Ombudsman's application – issue an order to comply with a specific request before a certain date (or for the future) subject to an financial penalty according to Ch. 4 Sec. 5 of the Discrimination Act. The financial penalty will gain legal force only after a district court has ordered the payment and the legality of the order itself – as well as the reasonableness of the amount – can be decided upon by the district court.
[182] The Government do such positive measures as well, for instance with regard to employment decisions and selection of persons to lead governmental authorities.
[183] Government White Paper 2010:55 p. 363.
[184] http://www.regeringen.se/sb/d/17342/a/186322.
[185] See above p. 367. The estimation is based on a local report from 2008, which in turn is based on interviews with Roma representatives. Ethnicity is not registered in Sweden so all figures for ethnic groups need to be based on some other method of assessing the situation.

market. Validation of the immigrants education in the home country is one such activity.

With regard to dismissals on grounds of redundancy there is also the provision in Sec. 23 of the 1982 Employment Protection Act that a person with a disability having being accommodated at the workplace may stay on despite the last in-first out principle. As regards indigenous minorities such as the Sami and the Roma, there are special rights and supportive measures as regard the use of their native language as well as access to media[186] and as regards the Sami also on land rights and reindeer management. From 2011 the Sami people have their reindeer management rights recognised in the constitution.[187]

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

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

[186] Compare the Government bill 2005/06:112 on public television and radio.
[187] Instrument of Government Ch. 2 Sec. 17.

6 REMEDIES AND ENFORCEMENT

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

In relation to each of the following questions please note whether there are different procedures for employment in the private and public sectors.

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

As will be described further below (see Sec. 7) there were special bodies introduced in the form of four Ombudsmen to make the enforcement of non-discrimination legislation efficient. From the 1 of January 2009 there is only one Equality Ombudsman. It's the task of the Ombudsman to investigate any complaints of discrimination. This include provision of advice but also the task – at the Ombudsman's discretion - to represent the victim of discrimination in settlement proceedings or, ultimately, in a court of law. Should the individual concerned be a member of a trade union this privilege of the Ombudsman is subsidiary to the right of the trade union to represent its member.

Civil processes regarding working life under the Discrimination Acts are to be dealt with in accordance with the Labour Disputes Act.[188] Depending on whether the person who alleges discrimination is or is not a member of a trade union, and in the former case whether the trade union is willing to take up the claim, the case may be heard in the first instance either by the District Court (*tingsrätt*) with ordinary judges as in other civil cases or the Labour Court (*Arbetsdomstolen*) with a special composition comprising both judges with judicial background and members from both sides of the labour court.[189] Whereas it is the injured individual who has *locus standi* as the plaintiff at the District Court, it is the trade union which has that position when claims are dealt with at the Labour Court in the first (and last) instance. A law-suit taken to the District Court in accordance with the described rules may always be appealed to the Labour Court, whereas a decision of the Labour Court – whether in first or second instance – is not subject to further appeal. As was already indicated, also the Ombudsman can bring a case directly to the Labour Court with the individual's consent, if the Ombudsman considers that the case is of importance for legal practice or for other reasons.

Individuals can (but must not), when not represented by their union or an Ombudsman, rely on private attorneys, but this means a risk of greater costs if the case is lost. Procedures are the same regardless of whether the case concerns a private or a public employee.

[188] Lagen (1974:371) om rättegången i arbetstvister.
[189] As regards the Swedish Labour Court, see, for instance, the European Court of Human Rights judgment of 26 October 2004 in the case of AB Kurt Kellermann v. Sweden.

However, as regard State employees there are the constitutional rules regarding objective grounds on hiring. If the plaintiff is better qualified he or she is entitled to get the employment (which they cannot get under the Discrimination Act, they could only get a discrimination award). Using the administrative procedures relating to these rules is sometimes an alternative/or complementary way to appeal against a discriminatory decision.

The Equality Ombudsman may represent victims of discrimination in all areas covered by the Discrimination Act. Cases outside working life will be dealt with by the ordinary court system, i.e. the relevant district court in the first instance. Discrimination in connection with for instance social security (an example of an area normally falling under administrative law) is thus dealt with by the ordinary civil court system and the ordinary rules on civil process apply.[190]

The general time limit in the Discrimination Act is that a claim must be presented within two years from the alleged discriminatory act took place.[191] A more complicated system of rather short time limits applies in working life (see belove c).[192]

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

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

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

b) Are these binding or non-binding?

In the area of employment, both in cases of discrimination taken on by the Ombudsman and those where a member is represented by his or her trade union the procedure is first to try to settle the case outside court. In the case of a trade union

[190] Some university or higher education cases may also be brought before the Board of Appeal for Higher Education.
[191] Chapter 6 Section 6 of the Discrimination Act.
[192] Chapter 6 Sections 4 and 5 of the Discrimination Act.

such reconciliation settlements are mandatory. The Ombudsman is supposed to try and settle the case outside court, if possible, but there is no formal requirement on settlement proceedings.

c) What is the time limit within which a procedure must be initiated?

Dismissal claims are regulated by the 1982 Employment Protection Act and time limits are complicated and rather short. If the claim consists in declaring a dismissal null and void we are talking about weeks from the occurrence of the act or – in certain cases - 1 month after the expiry of the employment. If the claim regards only indemnification we are talking about four months. Are we talking about wage compensation the 1976 Co-Determination Act applies. Here the general time limit is four months from knowledge of the act within a maximum of two years from its occurrence.[193]

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

Yes, as long as it is within the time limits for the claim at issue.[194]

e) In relation to the procedures described, please indicate any costs or other barriers litigants will face (e.g. necessity to instruct a lawyer?) and any other factors that may act as deterrents to seeking redress (e.g. strict time limits, complex procedures, location of court or other relevant body).

The author cannot think of any such barrier beside the strict time limits described above. There are 48 district courts so most people have access to one without travelling too long. If a person is poor and is not represented by the Equality Ombudsman or a trade union, there is a possibility to ask for legal aid in employment cases to help with the costs of going to court. There is no requirement to be represented by a lawyer in Sweden. In cases going to the civil courts (non employment cases) there is a possibility for the court to rule that both parties shall

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

[194] See above.

bear their own costs if the plaintiff looses but had good reasons (skälig anledning) to go to court according to Ch 6 Sec. 7 of the Discrimination Act.[195]

f) Are there available statistics on the number of cases related to discrimination brought to justice? If so, please provide recent data.

There is no statistic on cases brought to justice. A researcher has to look into databases him or herself. In 2012 there were the two cases from the appeal courts described in section 0.3. A local antidiscrimination bureau lost a case in a District Court as well. Apart from the two Labour Court cases in Sec 0.3 there is a case in the Labour Court when a woman claimed unfair dismissal and that her small size was connected both to her sex and her ethnicity. She won her case, but solely with reference to rules in the Employment Protection Act. The Labour Court has also declined to overrule a decision from a district court making a request for preliminary ruling on age discrimination from the ECJ. Furthermore there is a district court case on unlawful discrimination taken to court by the public prosecutor and where the landlord admitted to the police that the woman's Roma origin was partly the reason for not renting to her.

There is statistics on hate crime. A hate crime is any crime, theft, robbery, abuse and so on where hatred towards the victim's ethnicity, sexual orientation, religion or some similar ground can be suspected to be a part of the reason for the crime. We have around 5.000 reported hate crimes a year in Sweden.[196]

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

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

a) What types of entities are entitled under national law to act on behalf or in support of victims of discrimination? (please note that these may be any association, organisation, trade union, etc.).

The trade unions and the Equality Ombudsman are the main organisations that today support victims in bringing their complaints. However, there are a number of local anti-discrimination bureaus that provide advice to victims of discrimination and

[195] The Equality Ombudsman cannot use this rule. It only applies to private persons. An Anti Discrimination Bureau would as a private law legal person be able to use it.
[196] The Swedish National Council for Crime Prevention (Brå) has a homepage were it is possible to find out information in great detail in 2011 there were 184 crimes with a suspected anti-Roma motive, 651 with a suspected antireligious motive, 854 with a suspected, homophobic biphobic or heterophobic and so on. http://www.bra.se/bra/statistik/hatbrott/2011/anmalda-hatbrott/anmalningar-med-homofobiska-bifobiska-och-heterofobiska-motiv-efter-huvudbrott.html.
Updated after this report was published, http://www.bra.se/download/18.1ff479c3135e8540b29800016186/1350388772733/2012_07_Hatbrott_2011_webb.pdf

sometimes represent them in court. So far they have limited the risks by taking cases regarding smaller amounts and thus not taking the risk to pay the opposite parties full legal expenses.[197] One of them (Örebro rättighetscenter) has successfully acted on behalf of a private person in Göta Court of Appeal.[198] However, normally a local anti discrimination bureau, ask the client to contact the Equality Ombudsman if the client need help to afford to go to court.

Assuming the victim has agreed, organisations (or at least individuals from such organisations) can support such complaints and act on behalf of the victim. According to Swedish procedural law, anyone can engage in proceeding or support a complaint, and that is valid also for the religious communities. There are, thus, no special regulations on the rights of the churches in this matter. Nonetheless, some religious communities engage themselves in the work of the private anti-discrimination agencies in the country, along with other NGOs such as the Swedish Red Cross and Save the Children.

Labour unions have legal standing to litigate discrimination cases where one of their members is involved. (As a matter of fact, the right of the Ombudsman to represent a victim is secondary to this right of the organisation.) Chapter 6 Section 2 of the Discrimination Act gives non-profit organisations whose statutes state that it is to look after its members, the right to bring actions in their own name as a party. The association must have the consent of the individual and be suited to represent the individual in the case, taking account of its activities and its interest in the matter, its financial ability to bring an action and other circumstances and their right is secondary to that of a trade union in the employment field.

b) *What are the respective terms and conditions under national law for associations to engage in proceedings on behalf and in support of complainants? Please explain any difference in the way those two types of standing (on behalf/in support) are governed. In particular, is it necessary for these associations to be incorporated /registered? Are there any specific chartered aims an entity needs to have; are there any membership or permanency requirements (a set number of members or years of existence), or any other requirement (please specify)? If the law requires entities to prove "legitimate interest", what types of proof are needed? Are there legal presumptions of "legitimate interest"?*

[197] Code of Legal Procedure (1942:740) Ch. 1 Sec. 3 d in conjunction with Ch. 17 Sec. 8 a says that if the procedure is about something worth less than approximately 2.400 Euros (a half basic price amount) the right of the winning party to have legal costs re-imbursed by the loser is limited in a quite narrow way. Chapter 6 Section 7 is not often used in Sweden and it is only after the case is lost, the the court would decide on whether or not the plaintiff had good enough reasons to go to court to be allowed not to pay the legal cost of the defendant. Asking for more than 2.400 Euros in compensation is thus risky.

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

According to Swedish procedural law, anyone can engage in proceeding or support a complaint. If the complainant agrees and the support is in some way relevant to the case there is no problem.

The general right to act on behalf of complainants are restricted to non-profit organisations according to Ch. 6 Sec. 2 of the Discrimination Act. It is really easy to set up a non-profit organisation in Sweden. Three persons agreeing on statutes and creating a board can do it. There are no formal requirements on non-profit organisations. It is only the non-profit organisations that engage in commercial activities that must register themselves.

It is this background that necessitates the requirement in Ch. 6 Sec. 2 of the Discrimination Act, that the court must satisfy itself that the non-profit organisation is capable of properly representing the individual and that it has a legitimate interest.

Which types of non-profit organisations that has the right to act on behalf of victims according to Chapter 6 Section 2 is very hard to assess. The requirement of a statutory duty to look after its members' interests could for instance rule out organisations like the Red Cross who look after non-members interest and churches which focuses on religion and not on the material interests of its members. On the other hand, the Government bill says almost nothing on the requirement to look after the members interests. It is the financial ability to take a case to court that seems to be the major obstacle for non-profit organisations.[199] It could be that a church has an interest in combating religious discrimination and be allowed to take such a case to court even though they do not generally look after their members' interests. The author however thinks that a church would be prohibited to take a case of age discrimination or disability discrimination to court. The church would probably lack a legitimate interest regarding any other ground than religion. There is a lot of uncertainty here. In Göta Court of Appeal case FT 198-11 a local anti-discrimination bureau was permitted to act on behalf of a plaintiff. The perpetrator did not question the right of the local anti-discrimination bureau to act on behalf of the plaintiff, therefore the court had no reason to investigate the issue, and the same thing would be likely to happen should a church try to act on behalf of a member in a disability case.

c) *Where entities act on behalf or in support of victims, what form of authorization by a victim do they need? Are there any special provisions on victim consent in cases, where obtaining formal authorization is problematic, e.g. of minors or of persons under guardianship?*

There is no special legislation. A court normally asks for proof that the lawyer represents the party. The parents or legal guardians are the persons who can provide a valid instruction to represent a minor or a person under guardianship.

[199] Government Bill 2007/08:95 p. 433-441.

d) Is action by all associations discretionary or some have legal duty to act under certain circumstances? Please describe.

There is no organisation that has a legal duty to go to court. The Equality Ombudsman has a legal duty to hear complaints, but can decide not to go to court.

e) What types of proceedings (civil, administrative, criminal, etc.) may associations engage in? If there are any differences in associations' standing in different types of proceedings, please specify.

Ch. 6 Sec. 2 of the Discrimination Act regulates civil law discrimination cases. The Act on Group Petitions (see below i) applies to conflicts between for instance several house buyers and one house producer and is only of limited interest in discrimination cases.

Normal penal law principles apply to the crimes of incitement of hatred and unlawful discrimination, Ch. 16 Secs. 8 and 9 of the Penal Code.
The central principle is stated in Chapter 20 Section 8 of the Procedural Code. If the victim has reported a crime to the Public Prosecutor and it decides not to proceed, the victim can bring criminal charges to court him- or herself. If they do so anyone can engage in the proceeding to support them.

f) What type of remedies may associations seek and obtain? If there are any differences in associations' standing in terms of remedies compared to actual victims, please specify.

The involvement of an association makes no difference with regard to remedies.

g) Are there any special rules on the shifting burden of proof where associations are engaged in proceedings?

No, the same rules apply.

*h) Does national law allow associations to act in the public interest on their own behalf, without a specific victim to support or represent (**actio popularis**)? Please describe in detail the applicable rules, including the types of associations having such standing, the conditions for them to meet, the types of proceedings they may use, the types of remedies they may seek, and any special rules concerning the shifting burden of proof.*

There is no such possibility in Sweden.

*i) Does national law allow associations to act in the interest of more than one individual victim (**class action**) for claims arising from the same event? Please describe in detail the applicable rules, including the types of associations having such standing, the conditions for them to meet, the types of proceedings they*

may use, the types of remedies they may seek, and any special rules concerning the shifting burden of proof.

Class action is not possible in Sweden. There is – however, only outside employment law[200] - a possibility in Swedish Law to make a group petition (*the Act on Group Petitions, Lag [2002:599] om grupprättegång*). This means that a person can make a lawsuit on behalf on her- or himself but with legal consequences for other persons, even though they are not parties to the case. This kind of lawsuit can be made also by organisations.[201] However, this Act does not make it possible for organisations to act as a representative or agent for an individual.[202] Only organisations fulfilling the demands required by the Discrimination Act can do that (see above 6.2 (a)).

Only groups representing either economic operators (näringsidkare) or consumers can use the Act on Group Petitions. The group cannot be constituted by persons sharing for instance a disability or a ethnicity. But if many disabled persons buy a product suitable for their medical problems and it does not function properly, they may as consumers start a group petition case and be represented by a disability organization.[203]

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

Does national law require or permit a shift of the burden of proof from the complainant to the respondent? Identify the criteria applicable in the full range of existing procedures and concerning the different types of discrimination, as defined by the Directives (including harassment).

A shift of the burden of proof is required in Ch. 6 sec. 3 of the Discrimination Act.

"If a person….demonstrates reason to presume that he or she has been discriminated against… the defendant is required to show that discrimination or reprisals have not occurred."

The victim of discrimination must be able to present facts that make it possible to presume that discrimination has occurred (a similar situation and disfavourable treatment). Thereafter the burden of proof is shifted to the other party who must show that one of the requirements is not fulfilled or that the disfavourable treatment was not associated with the ground in question. No intent to discriminate is required.

[200] Swedish labour law is built on the single channel model. The "workers" influence shall be channelled *only* through the trade unions. Allowing the "workers" to create groups and to go to court in another way would not be consistent with this model.
[201] Petitions by organisations are regulated by section 5 of the law, but I am not aware of any case law on this paragraph.
[202] See, for instance, prop. 2002/2003:65 p. 167.
[203] To the author's knowledge this has never happened.

As can be concluded from the case law presentation in Sec. 0.3 above, very few cases on alleged discrimination have been won. In most cases this is due to the plaintiff's failure to prove a prima facie case of discrimination in the Labour Court. It seems to be less difficult to prove a prima facie case in the ordinary court system. Håkan Sandesjö (the temporary Equality Ombudsman for most of 2011)[204] made a preliminary study for the Ministry of Integration and Equality on Judgments in Discrimination cases between 1999 and 2009 involving the four former discrimination Ombudsmen. The success rate in the general Court system is 70,8%. In the Labour Court the rate is 19,5% and if the discrimination is on the ground of ethnicity the rate of success drops to 4,3%.[205]

In their book explaining the new Discrimination Act Fransson and Stüber point out a possible difference in the handling of the burden of proof.[206] The Supreme Court treats the less favourable treatment in a similar situation as the fact that makes the presumption apply. The eased level of proof thus sometimes applies when the plaintiff proves similar situation and the less favourable treatment. The Labour Court applies the presumption more narrowly. The plaintiff must always prove the similar situation and the less favourable treatment according to normal standards of proof. The presumption applies only to the causal link between these two facts and the discrimination ground. If that is so, the Labour Court may apply the rules on shared burden of proof in a too restricted way, especially with regard to ethnicity.[207]

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

What protection exists against victimisation? Does the protection against victimisation extend to people other than the complainant? (e.g. witnesses, or someone who helps the victim of discrimination to bring a complaint).

Victimization is forbidden in Ch.2 Sec. 18 and 19 of the Discrimination Act.
It is defined in the preparatory work as acts, statements and omission to act which leads to a damage or a sense of discomfort for the individual.[208]

[204] The replacement of the former Ombudsman Katri Linna took place in February of 2011. Agneta Broberg started at the first of October 2011. Sandesjö was not involved with the Equality Ombudsman when the report was made in 2010.
[205] Sandesjö 2010 (Jurcom AB), Domar i diskrimineringsmål 1999-2009, p.11.
[206] Fransson–Stüber, The Discrimination Act Commented, Chapter 6 Section 3. Compare Sandesjö 2010, p. 14. In cases where the rule on burden of proof has been decisive the success rate in the general court system is 90 % against 19 % in the Labour Court.
[207] There are other possible explanations for the difference in the plaintiffs' success rates. One possible explanation is that obvious cases of discrimination often are settled in the negotiations between the employer and the trade union on local or central level, which must take place before going to the Labour Court, if a trade union is representing its member. But there is also an ongoing discussion on whether judges appointed by trade unions and employer organisations are neutral if important parts of the collective bargaining system are affected by the outcome. Compare Sandesjö 2010, p. 18.
[208] Government bill 2007/08 p. 531-532.

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

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

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

The basic sanction in the Discrimination Act is the discrimination award. The concept discrimination award is created to make it easier for the courts to allow higher damages. Discrimination awards are not supposed to be in line with the low general levels of civil damages in other legal areas. The award includes a right to *damages for the violation* caused by the discrimination. Chapter 5 Section 1 also requires the courts to give *particular attention the purpose of discouraging future infringements*.

In working life there is a basic right to *economic damages*. However, in recruitment and promotion cases, the individual is not considered to have a right to obtain the employment or promotion in question.[209] Economic injuries are thus not compensated for. The violation still leads to a non-economic injury which is compensated. As is usually the case in Swedish labour law, if it is reasonable, damages can occasionally be reduced or lapse completely. Depending on the discriminatory act other labour law provisions may apply in parallel, such as the rules of the LAS in cases of dismissal or those of the MBL in cases where a collective agreement is violated.

Invalidity of provisions in collective contracts and in individual contracts is possible in all areas of the law according to Ch. 5 Sec 3.

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

Violations of the penal provision on unlawful discrimination are punished by a fine or imprisonment for a time not exceeding one year and can also result in the obligation to pay financial compensation.

Sanctions are normally applied to e.g. the employer, university, labour union or employers' association as such. This follows from expressions such as "employer" or "university" in the provisions on financial compensation. Harassment by fellow

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

workers or students may, however, also come under general criminal law provisions on such behaviour, e.g. as harassment, verbal abuse, threats or assault.
In such cases, a complaint may result in sanctions also against the individual directly responsible for the actions.

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

There is no formal limit.

c) Is there any information available concerning:

i) the average amount of compensation available to victims?

The statistics on the average amount of compensation to victims is not available. There are some cases from the Labour Court where the plaintiff has been awarded discrimination award. So far there is no case from the Supreme Court but district courts and courts of appeal have awarded discrimination awards. It is still too early to make definitive conclusions, but so far - according to the Equality Ombudsman the introduction of discrimination awards have not (SIC) resulted in any significant (nämnvärd) raise of the amount.[210]

The Equality Ombudsman has so far decided to proceed on a number of cases regarding the labour market, asking for 75 000 to 400 000 SEK (8 300 to 44 000 Euros). The Labour Court has previously awarded between 30 000 and 50 000 SEK (3300 to 5600 Euros) in similar cases. The Ombudsman has further settled several cases at the level of 100 000 SEK (11 000 Euros) and one record breaking case of 200 000 SEK (22 000 Euros).[211] This settlement is impressive in relation to the discrimination awards in AD 2010 No 91 (75 000 SEK approximately 8 300 Euros) AD 2011 No 37 125 000 (13 800 Euros). In the former case the Equality Ombudsman asked for 300 000 (33 000 Euros) in the latter case the ombudsman asked for 400 000 SEK (44 000 Euros) in discrimination award and 100 000 SEK (11 000 Euros) for the violation of the Employment Protection Act. The amount of 125 000 SEK (approximately 13 800 Euro) was awarded in a one for all compensation for the violation of both acts.

But since the preparatory work on which the new Discrimination Act is based, is vague regarding the expected new levels of compensation there is a large amount of legal uncertainty. This uncertainty will remain until the Supreme Court clarifies it.

These figures below are based on case law from the seven repealed acts. From the case-law presented above one can conclude that the damages for the violation

[210] Equality Ombudsman, Yearly Report 2012, p. 24.
[211] Case 2009/1640 (Telenor). The case regarded parental leave but as it is the record sum it should be reported even if it is discrimination outside the grounds covered by this report.

caused by the discrimination have fluctuated between 15 000 and 100 000 SEK (1700 and 11 000 Euro) depending on the situation, if there are no mitigating circumstances.

There are some situations where one could identify a normal level of compensation, for instance being refused to eat at a restaurant result in a damage of 15 000 SEK (1700 Euro) under normal circumstances.

As to sanctions, Swedish law generally provides for very low levels of damages. Damages of for example even SEK 80 000 (approx. 8 900 Euro) will hardly deter a larger employer. For large employers or businesses the threat of publicity is more important. For small employers or small businesses the sanctions may be said to be a deterrent.

ii) the extent to which the available sanctions have been shown to be - or are likely to be - effective, proportionate and dissuasive, as required by the Directives?

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

As regards *the principle of effectiveness* it is the opinion of the author that Swedish regulations in this area on an overall basis do meet the standards of Community Law. The Equality Ombudsman has appealed the case of the women who could not receive IVF treatment at her local clinic because they wanted her to go to a unit specialising in treating homosexual persons (see Sec. 0.3) The woman received 30 000 SEK (approximately 3 300 Euros). The Supreme Court is invited to discuss the new principles behind the discrimination award. What sums are necessary to deter a county with a very big budget from future infringements? Svea Court of Appeal reduced the amount from 40 000 SEK (its valuation of the infringement itself) to 30 000 SEK because the discrimination was involuntary. The regional municipality did not understand that being referred to a special unit for homosexuals was discriminatory. The Equality Ombudsman argues that they should have understood this and that that the court therefore lacked a proper ground to reduce the damages (special reasons is required by the law). The Equality Ombudsman asks for 100 000 SEK (approximately 11 100 Euro).[212] The Supreme Court has now decided to take the case.

In the labour market the high rates of trade union affiliation normally imply that the individual employee can turn to his or her union for support in cases of discrimination, and in cases the individual is not organised or the union fails to support him or her there is always the Ombudsman. One could however call into question the absence of a right to damages for economic loss in cases of recruitment and promotions.[213]

[212] Appeal 2012-12-04 – ANM 2009/321.
[213] Compare SOU 2004:55 p. 313.

Outside the labour market, the sharply reduced civil damage, when discrimination is proved by situation testing is according to the author probably against the principle of effectiveness at least with regard to night clubs.[214] 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 fact that harassment between fellow workers does not amount to discrimination and cannot lead to any compensation,[215] unless the employer has been negligent in dealing with the problem, is another example of when the effectiveness of the legal sanctions may be questioned. The employer can only be held responsible for the additional damage resulting from his or her negligence.

Concerning the principle of equivalence, the Labour Court regularly make reference to the level of damages paid in labour law disputes generally and the ordinary courts relate to normal level of damages in other areas.[216] To the author's opinion, there is no doubt that the principle of equivalence is met.[217]

[214] The Supreme Court, Escape Bar and Restaurant v. The Ombudsman Against Ethnic Discrimination (case T-2224-07 judgement 2008-10-01). Night clubs have strong economic incentives to give preference to high status persons and exclude low status persons when admitting guest. Reducing the civil damages sharply for the only effective and available mean to prove such discrimination will probably lead to continued discrimination based on a cost-benefit analysis by the night clubs owner.
[215] The only option for the employee is penal law provisions outside the discrimination field (for instance rules on insult).
[216] Compare, for instance, the Labour Court in case 2002 No. 45 and 2002 No. 102, respectively.
[217] Same opinion, SOU 2004:55 pp. 309 ff.

7 SPECIALISED BODIES, Body for the promotion of equal treatment (Article 13 Directive 2000/43)

When answering this question, if there is any data regarding the activities of the body (or bodies) for the promotion of equal treatment, include reference to this (keeping in mind the need to examine whether the race equality body is functioning properly). For example, annual reports, statistics on the number of complaints received in each year or the number of complainants assisted in bringing legal proceedings.

a) *Does a 'specialised body' or 'bodies' exist for the promotion of equal treatment irrespective of racial or ethnic origin? (Body/bodies that correspond to the requirements of Article 13. If the body you are mentioning is not the designated body according to the transposition process, please clearly indicate so).*

The trade unions and the Equality Ombudsman are the main organisations that today support victims in bringing their complaints. The Equality Ombudsman received 1559 new cases in 2012. There were 485 disability cases, 514 cases regarding ethnic origin, 256 cases regarding sex, 168 cases of alleged age discrimination, 82 cases relating to the religion ground, 41 cases regarding sexual orientation and 16 cases regarding transgender identity or expressions. Protections during parental leave 63 cases and 210 cases were there is no discrimination ground. The total number of grounds referred to in all cases is 1835 and the total number of cases is 1559. It is thus only in a small minority of the cases that more than one discrimination ground is involved.[218]

There are a number of local anti-discrimination bureaus that provide advice to victims of discrimination and sometimes represent them in court. So far they have limited the risks by taking cases regarding smaller amounts and thus not taking the risk to pay the opposite parties full legal expenses.[219] One of them (Örebro rättighetscenter) has successfully acted on behalf of a private person in Göta Court of Appeal.[220] However, normally a local anti-discrimination bureau, asks the client to contact the Equality Ombudsman if the client need help to afford to go to court.

Local anti-discrimination bureaus are idealistic organisations[221] working to combat discrimination on all the grounds of discrimination. Ordinance (2002:989) on state support for activities to counter act discrimination gives the organisations a possibility to apply for financial support. The ordinance requires the organisation to provide free

[218] Equality Ombudsman, Yearly Report 2012, p. 13 and 15.
[219] Code of Legal Procedure (1942:740) Ch. 1 Sec. 3 d in conjunction with Ch. 17 Sec. 8 a says that if the procedure is about something worth less than approximately 2.400 Euros (a half basic price amount) the right of the winning party to have legal costs re-imbursed by the loser is limited in a quite narrow way.
[220] Göta Court of Appeal, Judgment 2011-09-30, Örebro Rättighetscenter against Götavi Invest AB, Case No FT 198-11.
[221] Foundations are allowed to apply for the financial support as well but the author does not know about any existing anti discrimination bureau created this way.

legal advice to persons suffering from discrimination and also to take part in the public debate, arrange seminars to the general public and so on. Each local anti discrimination bureau apply for new funding each year and new bureaus can always be made and start to compete for the funds. If the money allocated to this particular support is used up the funding stops. New bureaus will then not be able to get any funding.

b) *Describe briefly the status of this body (or bodies) including how its governing body is selected, its sources of funding and to whom it is accountable. Is the independence of the body/bodies stipulated in the law? If not, can the body/bodies be considered to be independent? Please explain why.*

The Equality Ombudsman works under the Government. It is a govermental authority. In Sweden all govermental authorities are independent when deciding individual cases according to the Instrument of Goverment Ch. 12 Sec. 2. Trying to influence any govermental authorithy on the handling of a individual case is one of the worst things a minister can do. Not even the parliament is allowed to do that. Instructions – regardless of whether it is the goverment or the parliament who issue the instructions – must refer to general principles on how to act.

The Equality Ombudsman is funded by the state but its basic instructions are given in laws. All decisions by the Ombudsman are in principle made by the Ombudsman herself. Any other person making decisions, does so on delegation with authority ultimately being traced back to the Ombudsman. Should any decision violate the law governing the activities of the Equality Ombudsman the Chancellor of Justice (justitiekanslern known as JK) may intervene because the Equality Ombudsman is an authority working under the government. The Parliamentary Ombudsman (Justitieombudsmannen, known as JO) may also intervene, because Acts made by the Parliament govern the activity of the Equality Ombudsman.

The very general nature of the instructions in the Acts is important here. In the new Discrimination Act there are for instance no rules on how to make decisions on which cases should be taken to Court. Therefore decisions of the Equality Ombudsman cannot violate any instruction and there will be no legal base for JK or JO to intervene. JO and JK are the two most important supervising authorities in Sweden.

The independence of the Equality Ombudsman is enhanced in many ways. But the most important is the fact that it receives its instructions in the form of laws enacted by the Parliament. Such instructions must by their nature be of a very general nature. The general nature of the instructions protects the Equality Ombudsman from interference from JK or JO. The Government is not allowed to use the normal tools to give general instructions to independent agencies, like regulation letters, to control the activities of the Equality Ombudsman. The regulation letter of the Equality Ombudsman is void of instructions regarding politically sensitive choices .

There is no governing body. Such a body would have made the Equality Ombudsman less independent. Neither the government nor any organisation has formal influence in decision making. Instead there is an advisory board regulated in Section 5 of the decree (2008:1401) with Instructions for the Equality Ombudsman. This board is chaired by the Ombudsman and has up to ten members appointed by the Ombudsman for two years at a time.[222]

The Equality Ombudsman must be considered to be independent.

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

The Equality Ombudsman has the right to investigate complaints concerning discrimination as well as the right to represent individuals in cases that are of importance in terms of case law or otherwise. The instruction given in The Equality Ombudsman Act (2008:568) goes beyond discrimination and instructs the Ombudsman to work for "equal rights and possibilities".[223] The Ombudsman has the right to give independent advice and support more generally to individuals and institutions, engaged in education, information and opinion shaping efforts – including independent surveys, reports and recommendations - to combat discrimination and to propose legislative measures to the Government.

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

Yes, the Equality Ombudsman has these competences.

e) *Are the tasks undertaken by the body/bodies independently (notably those listed in the Directive 2000/43; providing independent assistance to victims of discrimination in pursuing their complaints about discrimination, conducting independent surveys concerning discrimination and publishing independent reports).*

Yes, The Equality Ombudsman does all three things in an independent way.

[222] This board first met on the 9 of February 2010.[222] The members are highly qualified and have different academic and working experiences. They are diverse with regard to sex and ethnic background and they are paid. There is absolutely no other rule regarding their composition than the rule stating that the number shall not exceed 10. No NGO can claim a right to a seat nor can the Ombudsman be required to appoint a certain number of members representing NGOs, employers, trade unions or any other group.

[223] Section 2.

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

Yes, the Equality Ombudsman has these competences.

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

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

Here the Ombudsman is at an advantage compared to an ordinary lawyer as the Ombudsman may, according to Chapter 4 Section 3 of the Discrimination Act, order the suspected discriminator to provide information, allow access to the workplace and enter into discussions with the Ombudsman and such an order can be subjected to a financial penalty.[224] The financial penalty will gain legal force only after a district court has ordered the payment and the legality of the order itself, as well as the reasonableness of the amount, can be decided upon by the district court. The Equality Ombudsman cannot impose other sanctions on the discriminator.

As regards active measures the Ombudsman works as a normal authority, visiting employers and universities, checking their equality plans and so on. If somebody fails to fulfil their duties the Board Against Discrimination[225] may – on the Ombudsman's application – issue an order to comply with a specific request before a certain date (or for the future) subject to a financial penalty according to Ch. 4 Sec. 5 of the Discrimination Act. The financial penalty will gain legal force only after a district court has ordered the payment and the legality of the order itself – as well as the reasonableness of the amount – can be decided upon by the district court.

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

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

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

The Ombudsman Against Ethnic Discrimination had a special obligation to assist the Romany population. It was instructed to give extra priority to this ethnicity in the "regulation letters" it received from the Government.[226] The main goal behind its policy towards the priority groups[227] was to make them able to fend for themselves. Educating them about discrimination law and identifying the discrimination they face were two important parts.

Reference groups consisting of representatives of the priority group and the DO is one way of performing these functions and at the same time build networks which may continue when DO eventually steps back.

As the new Equality Ombudsman gets its instructions from the Parliament by law, its regulation letter is empty of instructions. The law describes the competence widely and no specific ethnic group is mentioned. It is for the Ombudsman to make the correct priotities.[228] A report evaluating the work on the Roma situation and following up the report "Discrimination against Romanies in Sweden" from 2004 was published in the 2011.[229] There have been many cases involving Roma and the Ombudsman will analyse these cases and give guidelines on how to work with Roma issues in the future. Roma will no longer be a special group per se. They will be seen as one of the five national minorities. One of the Equality Ombudsman's main tasks is to combat discrimination in individual cases and since the situation for the Roma is harder than for other groups, having a lot of cases from this ethnic group is likely in the future as well. The Roma Right Report from 2011 is a clear indication on the intention of the Equality Ombudsman to keep the Roma situation as a priority area.

[226] Every authority under the government receives a "regulation letter" once a year. It consists inter alia of instructions from the Government to the authority for the coming year. General instructions - like an instruction to give priority to the problems of the Romany population - are normal and are not considered to affect the authority's independence.
[227] National ethnic minorities including Roma, persons originating from the middle east, Muslims, persons originating from Africa, women with non-European origin.
[228] Government bill 2007/08:95 p. 378 f.
[229] Equality Ombudsman 2011, Romers rättigheter (Roma Rights).

8 IMPLEMENTATION ISSUES

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

Describe briefly the action taken by the Member State

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

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

The Ombudsman Co-operates with other state agencies in these endeavours. One example is that the Equality Ombudsman participates in the training programmes of the Prosecutor General, directed at all public prosecutors. The same goes for the training programmes for judges organised by the National Courts Administration. Another example is the Ombudsman's work with the Swedish National Agency for Education and the Swedish School Inspectorate regarding discrimination, harassments and other degrading treatment of children in school. The Ombudsman further participates as expert or member of different official inquiries.

According to the (2001:526) Ordinance on the Responsibility of Public Agencies to Effectuate the Governments Disability Policy any public authority is under the obligation to make information available also for different groups of people with disabilities through a number of means.[230]

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

As was already indicated there is in Sweden a fairly weak role played by NGOs other than trade unions and employer organisations, may be with the exception of the different organisations within the movement of people with disabilities. To the extent there are NGO's the Ombudsman have an on-going dialogue. As for the Government, the consultations procedures anticipating any bill or other legislative initiative traditionally have ensured a dialogue with the relevant organisations. To my knowledge, the improvement of such a dialogue within and outside these processes is consistent concern. The increasing dialogue between policymakers and NGOs is

[230] See further the 'Guidelines for an Accessible Public Service' by the Disability Ombudsman, www.tillganglighet.se.

also reflected by the support provided for the establishment of a national NGO-centre against racism as well as to local NGO-run anti-discrimination bureaus.

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

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

d) to specifically address the situation of Roma and Travellers. Is there any specific body or organ appointed on the national level to address Roma issues?

In 2002 a council on Roma Issues was formed. It was an advisory board and had a broad representation from the Roma community, representing all larger Roma groups in Sweden. It has been abolished and has been replaced by a delegation consisting of ten members of which five have Roma background.[231] This delegation has an instruction to investigate the Roma situation in Sweden, to support local projects with the objective to improve the situation of the Romany population and to disseminate information. This delegation has co-operated with Roma organizations and its work has resulted in official Swedish Governmental Report SOU 2010:55 suggesting inter alia legislative changes. This delegation has now been closed down. Instead Stockholm County Administrative Board has taken over the responsibility for all five national minorities. It does so in co-operation with the Sami Parliament. The four other national minorities are not represented by an organisation which can be described as "theirs". Thus it no longer exist an organisation specifically addressing all sorts of problems affecting Roma and Travellers. There is however a duty for the Administrative Board to continue the delegation's work towards local authorities.

Furthermore the government has adopted a Roma strategy for inclusion in the society, covering the years 2012-2032. The goal is that at the end of the period, the Roma population shall have the same living standard with regard to housing, unemployment, education and so on, as the majority has. Creating a documentation

[231] The delegation consists of academics, civil servants, and specialists on the Roma situation.

of violations committed by the state in the last 100 years and correcting it where it is possible is one element of this plan.[232]

The Living History Forum is a Government agency which has been commissioned with the task of promoting issues relating to tolerance, democracy and human rights – with the Holocaust as its point of reference. They are disseminating information and creating a dialogue with the society at large on inter alia the situation of the Roma people.

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

a) Are there mechanisms to ensure that contracts, collective agreements, internal rules of undertakings and the rules governing independent occupations, professions, workers' associations or employers' associations do not conflict with the principle of equal treatment? These may include general principles of the national system, such as, for example, "lex specialis derogat legi generali (special rules prevail over general rules) and lex posteriori derogat legi priori (more recent rules prevail over less recent rules).

The relevant mechanisms are precisely the Ombudsman supervising the Discrimination Act in its entirety and the possibilities this provide for individual claimants. In addition the role played by the trade unions to support their members must also be mentioned.

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

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.[233] However, the investigator did not, as required by art. 16(a) of the Directive, carry out any general screening of laws and administrative provisions for incompatibilities with the requirements of the Directive (at least not in any comprehensive way).[234] This is probably more problematic in the area of ethnic discrimination, particularly with respect to indirect discrimination. Obvious examples of problematic provisions would include requirements regarding Swedish citizenship or to have a degree or diploma from a Swedish educational institution to be able to exercise certain professions. - According to Ytterberg (the former HomO), there are no discriminatory laws and provisions with respect to sexual orientation

[232] http://www.regeringen.se/content/1/c6/18/70/42/7b673682.pdf .
[233] Government White Paper 2002:43: *An Extended Protection against Discrimination* [*Ett utvidgat skydd mot diskriminering, bet. SOU 2002:43*].
[234] Idem, page 143.

discrimination in employment or occupation still in force.[235] However, according to Lappalainen the measures undertaken thus far seem to have been insufficiently thorough, at least in terms of examining regulations or administrative provisions. The Government enquiry basically asserted that this was not needed, without making more than a cursory analysis.

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

9 CO-ORDINATION AT NATIONAL LEVEL

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

Is there an anti-racism or anti-discrimination National Action Plan? If yes, please describe it briefly.

There is no ministry for integration and equality in Sweden. The integration minister Erik Ullenhag works in the Labour Market Ministry and the (sex) equality minister Maria Arnholm works in the Education Ministry. Maria Larson is the minister for children and the elderly. She works from the Social Ministry. The main minister with responsibility for the grounds covered by this report is Erik Ullenhag and the main ministry is thus the Labour Market Ministry.

There is no current National Action Plan.[236] There was a National Action Plan for 2006-2009 regarding human rights. Anti-discrimination was an important part of that plan. There is a Government White Paper from the Delegation for Human Rights suggesting inter alia the creation of a national institute for human rights.[237] The 2006-2009 National Action Plan has been evaluated in Government White Paper 2011:29. The evaluation is positive towards creating new such plans[238] and it also advises the government to go ahead and create a national institute for human rights.

There is no current National Action Plan but the government is working toward creating a new plan.[239] There was a National Action Plan for 2006-2009 regarding human rights. Anti-discrimination was an important part of that plan. There is a Government White Paper from the Delegation for Human Rights suggesting inter alia the creation of a national institute for human rights.[240] The 2006-2009 National Action Plan has been evaluated in Government White Paper 2011:29. The evaluation is positive towards creating new such plans and it also advises the government to go ahead and create a national institute for human rights.

With regard to a national institute for human rights it is too early to say which way the wind blows, but a new National Action Plan is on its way. There has been a consultation process involving 400 representatives of the civic society and a new plan is likely in the near future.

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[236] There is a national action plan against violent extremism for the years 2012-2014. But there is no national actionplan against other forms of discrimination.
[237] SOU 2010:70.
[238] There is a fact sheet in English on the government's current work to combat intolerance, but there is no plan. http://www.government.se/sb/d/574/a/195525 .
[239] The government describes its commitment to make a new (third) action plan regarding human rights in general (including discrimination) in its half time report to the UN council on human rights, p. 36. A/2012/2841/DISK.
[240] SOU 2010:70.

ANNEX

1. **Table of key national anti-discrimination legislation**
2. **Table of international instruments**
3. **Previous case-law**

ANNEX 1: TABLE OF KEY NATIONAL ANTI-DISCRIMINATION LEGISLATION

Please list below the main transposition and Anti-discrimination legislation at both Federal and federated/provincial level

Country: Sweden **Date: 1 January 2013**

Title of Legislation (including amending legislation)	Date of adoption: Day/month/ year	Date of entry in force from: Day/month/ year	Grounds covered	Civil/Administrative/ Criminal Law	Material Scope	Principal content
Discrimination Act (2008:567)	04/06/2008	01/01/2009	Sex, transgender identity or expression, ethnicity, religion, disability, sexual orientation and age	Civil/Administrative	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,	Prohibition of direct and indirect discrimination as well as harassment, instructions to discriminate and rules on active Measures.

					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	
The (1962:700) Penal Code Abbreviation BrB	21-12-1962	01-01-1965	Ethnicity, religion and other belief, sexual orientation	Criminal law	Access to goods and services, protection against hatred	The crime of unlawful discrimination and hate speech.

ANNEX 2: TABLE OF INTERNATIONAL INSTRUMENTS

Country: Sweden **Date: 1 January 2013**

Instrument	Date of signature (if not signed please indicate) Day/month/year	Date of ratification (if not ratified please indicate) Day/month/year	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	Yes 29-09-1967	Yes 06-12-1971	No	No	No

Instrument	Date of signature (if not signed please indicate) Day/month/year	Date of ratification (if not ratified please indicate) Day/month/year	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?
and Political Rights					
Framework Convention for the Protection of National Minorities	Yes 01-02-1995	Yes 09-02-2000	No	No	No
International Convention 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
Convention on the Elimination of Discrimination Against Women	Yes 07-03-1980	Yes 02-07-1980	No	No	No

Instrument	Date of signature (if not signed please indicate) Day/month/year	Date of ratification (if not ratified please indicate) Day/month/year	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?
ILO Convention No. 111 on Discrimination	Ratification and signature is the same act (I think) The Swedish legislator did not treat it as two steps.	Yes 20-06-1962	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

ANNEX 3: PREVIOUS CASE-LAW

Name of the court:
Date of decision:
Name of the parties:
Reference number: (or place where the case is reported).
Address of the webpage: (if the decision is available electronically)

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

The old abolished civil law Acts

Labour Court

Ethnicity and Religion or Belief.
Before 2009 the "Racial Directive" was as regard employment issues (mainly) implemented through the (1999:130) Ethnic Discrimination Act. All but two of the 39 cases tried by the Labour Court were lost by the employee-side alleging discrimination.

Name of the court: Labour Court
Date of decision: 4 December 2002
Name of the parties: The Ombudsman Against Ethnic Discrimination v. Tjänsteföretagens Arbetsgivarförbund and GfK Sverige Aktiebolag
Reference number: case 2002 No. 128
Brief summary: Z.D. was a young woman, born in Bosnia but a Swedish resident since the age of ten. She applied for a position advertised by a marketing company. The work implied doing market evaluations through phone interviews. During the recruitment process – in between two planned interviews – Z.D. phoned the company.

On this occasion the person in charge of the recruitment commented that Z.D. did not speak perfect Swedish. The conversation was terminated by the company and no more contacts were made with Z.D. The Labour Court – applying a reversed burden of proof[241] – found that the recruitment process was terminated by the company for reasons (among others) related to the language skills of Z.D. These language requirements were not justified by the tasks to be performed and thus amounted to indirect discrimination according to the 1999 Act. (The company did not even try to defend the language requirements but argued other reasons not to hire Z.D.) This is the only case in which the Labour Court made a finding of ethnic discrimination

[241] This case, and several of the others, took place before the express rule on the reversed burden of proof was introduced in 2003.

based on the evidence[242] under the act, SEK 40 000 (approx. 4 400 Euro) was awarded in damages to the job applicant.

Name of the court: Labour Court
Date of decision: 18 June 2003
Name of the parties: The Ombudsman Against Ethnic Discrimination v. Försäkringskasseförbundet and Jämtlands läns Allmänna Försäkringskassa
Reference number: case 2003 No. 55
Brief summary: I.P. was born in 1947 in the Czech Republic and became a Swedish resident in 1972. She had upheld successive fixed-term contracts with the local social security agency. When she, in difference to ten other employees in "a similar situation" was not offered a renewal, the Court found a prima facie case of discrimination to have been proven, and it was for the employer to "justify" his actions. The Court found it proven that "personal reasons" such as lacking ability to adjust and co-operate and not related to ethnicity was the employer's reasons not to renew the contract. Of interest here is the Labour Court's statement that, as regards the burden of proof, it is decisive that the employer convincingly show that reasons not related to ethnicity is behind his actions, whereas "it is not a general requirement that the employer's reasons are especially qualified, such as to also justify the no-application of other labour law regulations, for instance, the rules on priority to re-hiring" (in the Employment Protection Act, my remark). The case was lost by the ombudsman and the plaintiff.

Name of the court: Labour Court
Date of decision: 27 August 2003
Name of the parties: The Ombudsman Against Ethnic Discrimination v. Swede-Eye AB
Reference number: case 2003 No. 58
Brief summary: M.S. originated from India but was adopted in Sweden already as a baby. M.S. applied for a position as a receptionist in an Optic store. She was not among the 8 persons interviewed for the position although she – from a formal point of view - was equally or better qualified than the person finally appointed.

The Labour Court, however, accepted that the employer's merit-evaluation process was founded on assessments related to age[243] (similar to that of the one person otherwise working in the store) and selling experience, not really reflected in the position advertisement. According to the Court, there was not "a similar situation" at hand and a prima facie case of discrimination thus not proven. Moreover, the employer had shown that those of the about 100 applicants for the position who had mainly working experience from the nursing sector were set aside from the beginning, among them M.S. The case was thus lost despite evidence of ethnicity-related remarks from a company representative following the appointment.

[242] Discrimination was also found in Labour Court case 2001 nr 52. But that was a judgement by default. The employer never showed up in court.
[243] Age discrimination was not prohibited at this time.

Name of the court: Labour Court
Date of decision: 24 September 2003
Name of the parties: The Ombudsman Against Ethnic Discrimination v. Sveriges Verkstadsförening and Westinghouse Atom AB
Reference number: case 2003 No. 73
Brief summary: H.A. was an engineer born and educated in Iran and consecutively also in Sweden. He applied for a position with Westinghouse Atom AB. The ombudsman alleged discrimination since H.A., who was at least as qualified for the position as other applicants and more qualified than the person finally appointed, was not selected for an interview nor appointed. From a prior telephone conversation between H.A. and the person responsible for the recruitment the latter found him "aggressive". The Labour Court, however, discarded discrimination since it found it proven that H.A.'s application never reached the person in charge of the recruitment process due to an administrative mistake. The administrative routines as such were not proven discriminatory either. The case was thus lost.

Name of the court: Labour Court
Date of decision: 7 July 2004
Name of the parties: Oberoende Fackföreningens Centralorganisation v. Sveriges Verkstadsförening and Ericsson AB
Reference number: case 2004 No. 68
Brief summary: The case concerned four employees, represented by a "minority"[244] organisation, claiming discrimination on the grounds of ethnicity when they were all dismissed as a consequence of labour shortage on the basis of a collective agreement deviating from the legislated seniority rules.
The "redundancy agreement list" (avtalsturlistan) included some 500 employees and was made by the employer and the established trade union holding a collective agreement at the work-place, in accordance with the rules in the 1982 Employment Protection Act.
The Labour Court found it not proven – against the testimonies of the employer and the union representatives – that ethnicity was ever an argument in these negotiations and a prima facie case of discrimination was thus not proven.

Name of the court: Labour Court
Date of decision: 19 January 2005
Name of the parties: The Ombudsman Against Ethnic Discrimination v. Comsol AB
Reference number: case 2005 No. 3
Brief summary: This case concerned a woman of Russian origin, born in 1960 and a Swedish resident since 1992. She applied for a position as an accountant and was, according to DO, directly and indirectly discriminated against when she was dismissed from the recruitment process following a telephone conversation with the company's representative, not chosen for an interview and not appointed for the position. During the conversation the fact that the woman was of Russian origin and

[244] I.e. an organisation not holding a collective agreement with the employer.

the fact that she did not speak perfect Swedish were touched upon. The conversation resulted in a request of complementary information on her merits, however, and did not amount to a discriminatory decision on behalf of the employer, according to the Labour Court. Nor did the plaintiff show that she was in a "similar situation" with the other ones selected for an interview or the man finally appointed, since the verifications presented to the employer did not rightly reflect her merits.

Finally, it was not demonstrated that the employer really applied indirectly discriminatory requirements as regard language skills or requirements of a Swedish education. The case was lost.

Name of the court: Labour Court
Date of decision: 26 January 2005
Name of the parties:
Lärarförbundet v. Almega and Khalid El Mouselhi (the Modern School of Sweden)
Reference number: case 2005 No. 14
Brief summary: M.B. was born in Iran and became a Swedish resident in 1991. She applied for a post as pre-school teacher at the School in June 2002. No one was appointed. Later – in July – a post as a pre-school teacher was advertised and later on given to another person. M.B. had sent in her application by FAX and the case concerns whether her application ever caught the eye of the School's recruiter. Given the circumstances the Court finds that the plaintiff has not been able to prove this and thus not to state a prima facie case of discrimination. The case was lost.

Name of the court: Labour Court
Date of decision: 9 February 2005
Name of the parties: Svenska Kommunalarbetareförbundet v. Föreningen Vårdtagarna and Attendo Care Aktiebolag
Reference number: case 2005 No. 21
Brief summary: A part-time nurse at a nursing home for elderly people had taken on an extra job at the nursing home assisting with certain "activities". (Her work involvement amounted to 68% of full-time in its totality.)

When her religion (Nonconformist Lutheran) prevented her to taking part in the many activities which related to traditional feasts and formed a considerable part of the extra job, the employer withdrew her involvement in the extra tasks leaving her with the original part-time work as a nurse (56% of full-time).

No discrimination was considered to have taken place, as the employer would have been expected to have treated a hypothetical comparator who refused to carry out the same tasks for other reasons than religion in a similar way. With regard to the discrimination issue the case was thus lost. But with regard to the Sections 18 and 7 of the Employment Protection Act the plaintiff won and the dismissal was declared invalid. Section 7 contains a duty for the employer to avoid dismissal by finding other tasks for the employee if that is possible (the relocation duty). This duty goes beyond

the requirement of active measures and in dismissal cases the rules on active measures in the Discrimination Act are thus not important.

Name of the court: Labour Court
Date of decision: 19 October 2005
Name of the parties: The Ombudsman Against Ethnic Discrimination v. the Municipality of Norrköping
Reference number: case 2005 No. 98
Brief summary: The claimant from former Yugoslavia was among four job applicants for a position as a municipal architect who were invited for an interview. As a result of his lack of Swedish language skills, demonstrated during the interview he was disregarded for the position. The Ombudsman, representing the victim, claimed that his language skills had been misinterpreted and that this amounted to direct discrimination on the grounds of ethnicity. In the alternative, she argued that the language requirements amounted to unlawful indirect discrimination. The Court found that the interview had actually gone bad and that this was not a case of direct discrimination. The question was then whether the language requirements amounted to indirect discrimination. No, said the Court. The position as the municipal architect implied acts of public governance and it was objectively justified, adequate and necessary to require good (though not perfect) knowledge of written and spoken Swedish of the person to be appointed. The case was thus lost.

Name of the court: Labour Court
Date of decision: 10 May 2006
Name of the parties: Svenska Kommunalarbetareförbundet v. Region Skåne
Reference number: case 2006 No. 60
Brief summary: The claimant from Kosovo was among the job applicants for a position as a truck-driver at the University Hospital in Lund but was not among the 8 applicants invited for an interview. The claimant was found to have proven a prima facie case of discrimination – he was as qualified as at least three of the persons invited for an interview.

The hospital was, however, found to have been able to show that he was omitted not on grounds of ethnicity but since his local knowledge of the hospital under-ground transportation system had not been made known to the hospital in the employment application.

This knowledge was of only marginal importance for the job, as it was quickly learned. But the employer had more than one hundred well qualified applicants and had made this knowledge vital to the employment process - The case was lost.

Name of the court: Labour Court
Date of decision: February 2007
Name of the parties: The Ombudsman Against Ethnic Discrimination v. The Municipality of Örebro.
Reference number: case 2007 No. 16

Brief summary: A Palestinian man applied for a position of a principal/unit manager in the municipality. He was interviewed by three different groups of interviewers and one of the groups consisted of trade union representatives. In this group he was asked how he – as a Muslim – felt about the fact that many women worked at the unit. He found the question so insulting that it should be regarded as harassment and thus amounted to discrimination. Therefore he refused to answer it.

The trade unions had a right to participate in the employment decision by collective agreements. They introduced themselves to the applicant as representatives of their organisations. They represented only their organisations and they never received any instruction from the municipality. The municipality had not delegated its right to decide which applicant to choose to the trade unions. It had neither delegated its functions as an employer to the trade unions and thus the municipality could not be held responsible for their actions. With this decision on the responsibility of the municipality there was no need to determine if the question asked constituted harassment and thus was discriminatory.

Name of the court: Labour Court
Date of decision: May 2007
Name of the parties:
The Ombudsman Against Ethnic Discrimination v. Laika film & amp.
Reference number: case 2007 No. 45
Brief summary: An Iranian film photographer applied for a position at the company by mail. He received an answer also by mail thanking him for his application and stating that he was well qualified for the job with regard to his previous work experience. The answer also stated that the company looked for employees who spoke and wrote good Swedish and that his application contained too many errors to get him an interview. The employer admitted that this mail amounted to discrimination. But the person sending it did not have the authority to do so. The employer claimed that it could not be held responsible when an individual employee acts without instructions or knowledge of her superiors. The Labour Court agreed with the employer. It should also be noted that the employer had called the Iranian to an interview and had done its best to repair the damage done by the erring employee.

Name of the court: Labour Court
Date of decision: June 2008
Name of the parties: The Ombudsman Against Ethnic Discrimination v. Swedish Air Transport Industry Employers' Association (Flygarbetsgivarna) and BF Scandinavian Aviation Academy.
Reference number: case 2008 No 47
Brief summary: An Algerian woman (S.L) applied for a trainee position leading to temporary job as a desk clerk. A Swedish woman was hired. S.L had equal formal merits to her. The Ombudsman Against Ethnic Discrimination claimed that the employer decision was based on S.L's ability to speak Swedish and used notes from

a telephone call made by an official at the ombudsman to a manager directly involved in the employment decision as evidence.
The Court, however, accepted the employer's claim that language skill was only one of several personal skills important to the decision. Capacity to meet customers in a nice way, service mindedness, flexibility and an ability to cope with stress were other important factors. All of these abilities were assessed by the employer based on the interview and the Court found no reason to question the employer's assessment of S.L.

Name of the court: Labour Court
Date of decision: January 2009
Name of the parties: The Equality Ombudsman v. The Municipality of Härryda and Swedish Association of Local Authorities and Regions.
Reference number: case 2009 No 4
Brief summary: A Gambian man (D.B) worked at a sheltered housing. One co-worker called him “blackey” and he called this co-worker “whitey”. His closest manager reacted towards this offensive line of talk and called in his co-worker. The co-worker claimed that D.B was not offended by the line of talk. The manager also asked D.B whether he was offended or not, but he did not reply to the question. The Labour Court stated that the word “blackey” could under many circumstances be regarded as harassment. But in this case D.B was considered equally responsible for the inappropriate line of talk. Therefore there was no harassment and the employer had no duty to investigate the case any further than had been done.

Name of the court: Labour Court
Date of decision: February 2009
Name of the parties: The Equality Ombudsman v. ICA and Adecco
Reference number: case 2009 No 16
Brief summary: A Bosnian man A.H. applied through a temporary agency firm (Adecco) for a job regarding graphic description at ICA (a food store chain). Three other persons – all of Swedish ethnic origin - were hired by ICA, following the recruitment procedure. A.H. had equal or better educational and professional merits compared to the three persons employed. However ICA regarded him as “over qualified”. The employer thought that he had worked with graphic design rather than with graphic description and doubted that he would be content with a “non artistic” job producing promotional material from templates.

The two persons interviewing A.H. perceived him to be an “individualist” with a creative disposition rather than a “team player” and two persons working at two of A.H.’s previous employers described him in the same way.

The Labour Court found that the employer had valid reasons to prefer “team oriented” persons and persons who would concentrate on their work with the templates without thinking of the graphic design issues involved earlier in the production process. Since A.H. did not have the personality required for the job he

was not better qualified than the three persons employed and thus there was no prima facie case of discrimination.

Name of the court: Labour Court
Date of decision: November 2009
Name of the parties: The Equality Ombudsman v. Municipality of Eslöv.
Reference number: case 2009 No 87
Brief summary: A Macedonian woman (M.R) applied for a position called placement assistant (placeringsassistent). A Swedish man was hired. M.R was one of four persons (out of 62 applicants) who made it to the interview. The interview was based on her application and the employer asked her what she meant by calling herself a "specialist" in certain computer programs, "sensitive" (lyhörd), and "well organised". They also asked her why she had put the Swedish Social Insurance Agency (Försäkringskassan) as her employer during her parental leave. The Ombudsman argued that the employer had harassed M.R. by being condescending regarding her language skills. The Labour Court however found no prima facie case of discrimination. All four applicants making it to the interview had been asked hard questions about the way they had described themselves in their applications and it had not been shown that M.R. had been treated worse compared to the other three.

Name of the court: Labour Court
Date of decision: 16 February 2011
Name of the parties: The Equality Ombudsman v. Municipality of Helsingborg.
Reference number: case 2011 No 13
Brief summary: V.P. and A.K were two women from Bosnia and the former Soviet Union who worked with people with mental health problems. The Labour Court found that their closest manager two times had addressed A.K. as being one of the "girls from eastern Europe". That expression was degrading and was linked to the ethnic background of A.K. Thus it amounted to harassment on the ground of ethnicity. The Labour Court also said that the statement was not (sic) connected to the discrimination ground of sex.

Both women reacted to a picture put up by the manager in the lunch room before Christmas. It was a picture of a man, partly dressed in a leather suit and having an erection. He was wearing a hood and had a whip in his hand with two Christmas tree decorations on. A speech balloon said, "is there any naughty children here".

The Labour Court said that this picture was not so offensive that it could amount to a sexual harassment by itself. This picture could only constitute harassment if the manager were aware that the two workers felt offended by it, thus the first time of Christmas 2006 was not a violation of the old discrimination acts.

Even if V.P. told the manager that the picture was inappropriate in 2006, this would not suffice to make the setting up of the same picture the Christmas of 2007 an harassment. V.P. had not clearly stated to the manager that she felt personally offended by the picture.

In May 2008 V.P and A.K. wrote to the municipal board of social affairs and described the incident and made a formal complaint. In that connection they asked to be transferred to another workplace. Next Christmas they (together with a lot of other persons) received an e-mail with the same picture as a Christmas greeting from the manager. This time it was considered as a sexual harassment by the Labour Court. A.K. got 35 000 SEK (approximately 3 900 Euros) in combined damages for both ethnic harassment and sexual harassment and V.P. got 25 000 SEK (2 800 Euros) in damages.[245]

The Civil Court System and Administrative Boards

Name of the court: The Board of Appeal of Higher Education
Date of decision: 16 November 2007
Name of the parties:
Reference number: Reg. No. 46-777-07
Brief summary: A Japanese student wanted admission to doctoral studies at Linköping University.

He was under the misconception that a co-operation agreement with a foreign university or a scholarship of at least 4.8 million SEK (approximately 530 000 Euros) was needed. The requirements on Swedish students were not that high. The university treated his shown interest in doctoral studies badly and were criticised by Sweden National Agency for Higher Education. The student presented a prima facie case of discrimination and the burden of proof shifted to the university. The institution in question had admitted a relatively small number of doctoral students and a not insignificant number of those had foreign background. Doctoral students with and without external funding existed in both groups. When the Japanese student showed his interest in doctoral studies the institution had a bad financial situation and could only accept doctoral students with external funding. The university was held to have shown that the decision was neither directly nor indirectly linked to the student's ethnic background.

Name of the court: The Supreme Court
Date of decision: 01 October 2008
Name of the parties: Escape Bar and Restaurant v. The Ombudsman Against Ethnic Discrimination
Reference number: case T 2224-07
Brief summary: A group of law students was testing a number of restaurants and night-clubs from an ethnic discrimination point of view. Groups of white students and non-white students asked to be admitted to the premises. The white students were admitted but not the non-white students. They filmed this.

[245] This case is mainly about sex discrimination, but because this report has very few intersectional cases the author feels that it should be included.

The Appeal Court of Skåne and Blekinge upheld a decision by Malmö District Court where it is explicitly stated that even if the purpose of the visit to the night club was a part of an investigation into restaurant discrimination, the four persons had still been discriminated against under the civil law.[246]

The appeal court awarded the four students each a normal[247] 15 000 crowns (approximately 1 700 Euros) in civil damages.

The Supreme Court however found that the students' purpose behind their effort to be let into the establishment - to prove discrimination - had been fulfilled.

The students had no genuine desire to be let into the establishment and therefore had not been denied something they really tried to obtain.

It was for this reason equitable to reduce the civil damages; the Supreme Court awarded each one of the four students the sum of 5 000 crowns (approximately 560 Euros) in damages. Two of the five judges wrote a dissenting opinion awarding each student the normal level of civil damages.

Disability

The Labour Court

Note the activities of the trade unions. Four out of six disability cases in the Labour Court were taken there by the trade unions compared to two cases from the Equality Ombudsman (and its predecessor).

Name of the court: Labour Court
Date of decision: 12 March 2003
Name of the parties: The Disability Ombudsman v. Almega and Human Assistans Intressenter Stockholm AB
Reference number: case 2003 No. 22
Brief summary: The judgment concerned the application of the rules on the time limits to present a claim (Secs. 29 and 31 the 1999 Disability Discrimination Act and Secs. 64-66 the 1976 Codetermination at the Workplace Act) in the case the corresponding union did not choose to represent the plaintiff but action was taken by the ombudsman. The Court found the allegations to be within the time limits of the law.[248]

[246] Malmö District Court, judgement of 3-05-2006, case T3562-05, p. 8. The Appeal Court of Skåne and Blekinge, judgement of 24-04-2007, case T 1358-06.
[247] The Supreme Court's decision in the case above is widely regarded as setting a normal level of economic damages for this situation.
[248] The cases were later on settled. The time limit for the trade union was 4 month from becoming aware of the circumstances of the case, and the ombudsman had two month from the expiring of time limit for the union.

Name of the court: Labour Court
Date of decision: 4 June 2003
Name of the parties: Svenska Metallindustriarbetarförbundet v. Skandinaviska Raffinaderi Aktiebolag Scanraff and Kooperationens Förhandlingsorganisation
Reference number: Case 2003 No. 47
Brief summary: The plaintiff applied for a job as systems operator (driftoperatör) at an oil refinery. The plaintiff was offered the job subject to a physical exam. The doctor thereafter recommended a probationary employment (provanställning) due to the plaintiff's diabetes. However, the applicable collective bargaining agreement did not allow for a probationary employment. Thus, due to the plaintiff's illness the company decided to not employ him.

The Labour Court concluded that there was no support for the claim that the tasks of a systems operator in this case would involve any significant security risks that have a connection to his illness. Furthermore, the Court did not find it likely that shift work as such would involve special health risks for the plaintiff. Given these conclusions it was clear that the plaintiff had the necessary objective qualifications for the job. Thus, by not employing the plaintiff, the defendant directly discriminated in the manner proscribed by the law.

As to the issue of damages, the Court took the following into account. The plaintiff, by being denied the job, was subjected to a serious injury to dignity. On the other hand, the company based its actions upon the opinion of the company doctor. However, the company should have applied the general ideas of the need of a test to the individual before them – i.e. his particular circumstances and the actual effects of his illness. Due to the circumstances involved the Court determined that a relatively low amount of damages should be awarded – SEK 30 000 (approx. 3 300 Euro).

Name of the court: Labour Court
Date of decision: 8 October 2003
Name of the parties: SEKO v. Staten genom Kriminalvårdsstyrelsen
Reference number: case 2003 No. 76
Brief summary: The case concerned a warder at a Swedish prison employed in 1994, since 1997 with certain managerial tasks. As part of a reorganisation at the workplace, this and five other such supervising warder positions were internally advertised.

The plaintiff was among the "applicants" for one of these positions but was not appointed. Instead he continued as an ordinary warder without managerial tasks.

The Court first stated that both the former tasks of employment and the current ones were within his employment duties as agreed upon. He had thus not been separated from his employment and, moreover, the changes undertaken were within the employer's prerogative to distribute and allocate work. However, there was also the question whether the changes constituted such an "intrusive measure against an employee" due to functional disability as prohibited in Sec. 5 the 1999 Disability

Discrimination Act. The parties agreed that the plaintiff had a disability – back pains due to a traffic accident suffered in the year 2000 – which resulted in rather frequent sick-leaves. However, the Labour Court found that there was no evidence whatsoever that the decision not to appoint the plaintiff for managerial tasks was anyhow related to this disability.[249] The case was thus lost.

Name of the court: Labour Court
Date of decision: 30 March 2005
Name of the parties: Sveriges Civilingenjörsförbund and MK v. T&N Management Aktiebolag
Reference number: case 2005 No. 32
Brief summary: An employee (MK) who was diagnosed with multiple sclerosis was issued with a redundancy notice about three months after the employer was informed of his disease. The issue before the Court was whether the company had discriminated against MK on the grounds of his disability and/or disregarded Secs. 7 or 22 of the 1982 Employment Protection Act, i.e. the requirement of just cause and the seniority rules. MK was made redundant in a reorganisation of the company whereas two other employees who had worked for a considerably shorter period of time for the company were exempted as they were designated so-called "key-employees" according to Sec. 22 of the Employment Protection Act, and therefore had not been included in the short list for redundancy. The Court found that MK had been treated less favourably in comparison to the two other employees even though they had all been in comparable situations. The temporal connection between MK informing about his disease and the employer issuing the redundancy police gave reason to believe that MK was treated less favourably because of his disability. The Court then stated that the defence put forward was not convincing enough to find that the company had discharged its burden of proof providing sufficient evidence that the redundancy of MK lacked any connection with his disability.

The company was ordered to pay economic damages and damages for the violation (100 000 SEK or about 11 100 Euro) caused by discrimination.

Name of the court: The Labour Court
Date of decision: 27 September 2006
Name of the parties: SAC v. the Swedish Church
Reference number: case 2006 No. 97
Brief summary: The claimant, a priest in the Swedish Church, was denied a position as missionary in Brazil due to him being allergic to certain food. According to the applicable collective agreement a condition for such a position was that the employee in question had to be accepted by the insurance company contracted by the Swedish Church. The claimant had been accepted for such insurance but to a higher cost due

[249] The judgment in the Labour Court case 2003 No. 76 is not transparently argued in relation to the burden of proof rule. It is not clear whether the plaintiff's side is considered to have fulfilled its burden of proof and the employer's side thereafter did justify their decision or whether the plaintiff's side is considered not to have presented a prima facie case of discrimination.

to his allergy. Nevertheless, the employer took the decision not to appoint the claimant due to his allergy and the risks it implied. The Labour Court found direct discrimination on the grounds of disability to be at hand. The 1999 Disability Discrimination Act was found to be applicable despite the work was going to be carried out in Brazil since the parties were Swedish subjects and the employment entered into in Sweden and the allergy was clearly a disability covered by the Act. What was known about his allergy was not reason enough to deny him the position. The Employer was ordered to pay the claimant 50 000 SEK (approximately 5 600 Euros) in damages for the violation.

Name of the court: The Labour Court
Date of decision: 2 February 2010
Name of the parties: Equality Ombudsman v. Swedish Social Insurance Agency
Reference number: Case 2010 No. 13
Brief summary: M-L.J. applied for a position as an investigator/decision maker of sickness benefit and invalidity benefit cases. She was told that she could not be employed because the computer system could not be adapted to a person with her severe eye sight problem. Reasonable accommodation was at the heart of the case. The employer claimed that an adaptation of the computer system would require 20.000 (sic) man hours and supported the claim by testimony of employees responsible for the system.[250] That was not reasonable. The plaintiff failed to show that there existed other less expensive accommodation possibilities. No discrimination was found.

The Civil Court System and Administrative Boards

Name of the court: The Board of Appeal of Higher Education
Date of decision: 14 November 2003
Name of the parties:
Reference number: Reg. No. 42-334-03
Brief summary: In this case the Board decided that a requirement to submit a written thesis was not as such discriminatory to a dyslectic student. The Board stated that requirements on study results and examination cannot as such amount to discrimination when objectively justified and appropriate and necessary to reach that goal.

[250] The figure of 20.000 was naturally a estimation. The Equality Ombudsman could not question that this particular computer system would have been very expensive to adapt. The case also involved questions based on the extended responsibility for reasonable accommodation put on government agencies like the Social Insurance Agency. The fundamental problem of this case is that the Labour Court accepted the computer system as it was. The important question ought to have been that of whether the agency in the first place should have created a system that was so hard to adapt to the needs of persons with eye sight problems. The Labour Court criticised the agency for creating this system but nevertheless assessed reasonable accommodation in relation to the 20.000 man hours the adaptation actually would have cost.

Name of the court: Svea Court of Appeal
Date of decision: 02 June 2009
Name of the parties: The Equality Ombudsman v. Sturehof AB
Reference number: case T 7752-08
Brief summary: A women Y.L. was denied entrance to a restaurant. The doormen mistakenly believed her to be drunk and therefore turned her away. She had a medical condition (cerebral palsy) impairing her walk and her speech in a way that could easily be mistaken for alcoholic intoxication. There are three requirements in cases of direct discrimination. The first is "disfavour" which was fulfilled by the denied entrance. The second requirement is similar situation which was fulfilled by the woman being sober and properly dressed. Thus a presumption of discrimination was created. The third requirement is that there must be a causal link between the disfavour and a discrimination ground. The rules on burden of proof puts it upon the alleged discriminator to break the causal link, most often by proving a cause not related to the ground.

According to Svea Court of Appeal the causal link requires that the discriminator knows, assumes or mistakenly believes something relating to the discrimination ground.

If the discriminator is genuinely unaware of the fact that a person has a disability or is protected by another discrimination ground, there can be no causal link. The behaviour of the discriminator cannot be directly caused by a fact that he or she is unaware of.[251]

The two doormen had only met Y.L for a short time and the court believed them when they said that they mistakenly thought that she was drunk. Y.L. never told the two doormen that she had cerebral palsy.

In this case there was a discussion on how easy the mistake was to make. It was clear that it was easy to a layman. But it was debated - with experts on both sides - whether or not it was reasonable to educate the doormen to enable them to recognise the differences between impairment to walking and speech by persons suffering from cerebral palsy and drunk persons. Against this background there is an interesting and problematic obiter dictum, saying that it is not enough for the plaintiff to prove that the discriminator ought to have known about the medical condition. If the discriminator then proves that he or she did not know, the causal link is broken.

Sexual Orientation

There are no reported cases of sexual orientation discrimination in employment based on the (1999:133) Sexual Orientation Discrimination Act tried before the Labour Court.

[251] May be such cases can be addressed by applying the concept of indirect discrimination.

The so far only case concerning such discrimination was submitted by HomO in 2002, but the Labour Court never got to decide the case since a settlement was reached.[252] Statistics of the complaints presented to HomO's office are accounted for in Sec. 7 below.

The Civil Court System and Administrative Boards

Name of the court: The Supreme Court
Date of decision: 28 March 2006
Name of the parties: The Ombudsman Against Discrimination due to Sexual Orientation v. Restaurang Fridhem Handelsbolag
Reference number: case T 2100-05
Brief summary: The ombudsman filed the first law suit (on any discrimination ground) on the basis of the 2003 Act on 12 December 2003 to the Stockholm District Court in 2004.

The case concerned a complaint from a lesbian woman who, together with her girlfriend and some friends, was forced to leave a restaurant after having kissed her girlfriend on the premises.

The District Court found that the plaintiff had not been able to show the actual circumstances claimed – i.e. the non-offensive character of the kissing incident and that the order to leave the restaurant was not the result of the plaintiff's behaviour following the restaurant's complaint – and thus not a prima facie case of discrimination.

The Appeal Court, however, found a prima facie case of discrimination to have been proven and discrimination to be at hand. Damages were set to 50 000 SEK (approx. 5 600 Euro). The Supreme Court agreed with the Appeal Court that a prima facie case of discrimination was at hand but set the damages to only 15 000 SEK (approx. 1 700 Euro). With regard to the (limited) effects of the discriminatory act at hand the lower damages were deemed to be more in line with Swedish legal practices in this field.

Name of the court: Svea Court of Appeal
Date of decision: 5 November 2009
Name of the parties: Uppsala County Council v. The Equality Ombudsman
Reference number: case T 9187-08
Brief summary: A woman in a same sex couple had in vitro fertilisation treatment (IVF treatment). Six free treatments were given to all couples. The recipient needed to be less than 40 years old. After three treatments the woman reached 40. Her younger partner then applied for treatment. She was denied this because only one

[252] Labour Court case 2002 No. 76. The settlement reached implied damages on 35 000 SEK.

person in a couple could be given treatment. The District Court[253] found this rule discriminatory and awarded damages of 50.000 Swedish crowns. A woman in a heterosexual couple would have had a right to six treatments but this woman was denied the right because she lived with a same sex partner who already had received such treatment.

The Appeal Court said that one should not compare a woman living in same sex relationship with a woman living in a heterosexual relationship. The relevant comparison was between a heterosexual couple and a homosexual couple. In a heterosexual couple only one person can have a fertilized egg implanted in their womb. Therefore, the principle of equal treatment could not result in a requirement on the County Council to provide IVF treatment to both women in a same sex couple. The appeal court thus overruled the district court and found no discrimination.

The current (2008:567) Discrimination Act

Labour Court

Name of the court: The Labour Court
Date of decision: 15 December 2010
Name of the parties: Equality Ombudsman v. Swedish Agency for Government Employers
Reference number: Case 2010 no. 91
Brief summary: A.H., a 62 year old woman, applied for a position as a job coach[254] with the Public Employment Service. She was not called to an interview and two women, aged 27 and 36 were hired. A.H. was equally qualified to one of the persons hired and better qualified than the other one. Thus a presumption of age discrimination arose. She was also better qualified compared to a man who got an interview and therefore a presumption of sex discrimination arose as well.

The employer tried to disprove the casual link by claiming that A.H. was not suitable for the job because she had a supercilious attitude and lacked empathy. A.H. was a job seeker and the employer based its decision on the word of the two case officers working with her as a job seeker. The Labour Court believed the case officers to have said that about A.H. but also held that normal procedures would have been to call A.H. to an interview and take references regarding what her former employers thought of her. Making a decision not to hire A.H. only on the word of her case officers was such a big deviation from normal hiring procedures that the employer

[253] Uppsala District Court case T 499-08.
[254] A job coach is a form of career guide. They help the job seeker by looking at the CV and suggesting improvements, analyzing the job seekers competence, doing personality tests, training them for interviews and so on.

could not break the casual link to the discrimination grounds and was thus convicted of both sex and age discrimination. [255]

The discrimination award was set at 75 000 SEK (app. EUR 8 300) while the Equality Ombudsman had asked for 300 000 SEK (app. EUR 33 300).

Name of the court: The Labour Court
Date of decision: 23 March 2011
Name of the parties: Equality Ombudsman v. C.N. and her private business (enskild firma) Bright Hair and Beauty Salon and Café Next Door (Unlimited Partnership)
Reference number: Case 2011 no. 19
Brief summary:
C.N. worked as a hairdresser with her own firm and had a café together with M.A. The hair and beauty salon and the café were in the same building. She also rented out a hair-dresser chair to a third person S.F. who had her own firm. C.N. had agreed with the municipality to allow pupils to have trainee posts during the summer. H.S. a Muslim pupil wearing a head scarf applied for such a post and as she was advised by the municipality co-ordinator to seek this specific place she expected to get it. At first she was turned away because C.N. thought that they had enough trainees already. The municipal co-ordinator phoned C.N. and they agreed that H.S and the co-ordinator should meet C.N.

At the meeting they were met by S.F. According to H.S. and the co-ordinator, she said that C.N. was busy and therefore she would take care of the meeting. According to them she said that H.S must be willing to take her head scarf of if she wanted the traineeship.

According to C.N., she could not take any more trainees in her businesses and therefore she asked S.F., if she could have H.S in her (S.F:s) business. Thus C.N. was not responsible for any action S.F. had taken in her business.

[255] In Sweden it is very hard to convict an employer of discrimination. If there has been a proper procedure and the interviewers find that one applicant is better on informal criteria and that this outweighs the lesser formal qualifications of that person, the Labour Court always accepts such a statement. An employer following normal procedures assesses merit correctly in almost every case. The employment decision is then regarded as taken on merit alone and this breaks the casual link to discrimination. But not calling an obviously well qualified person to an interview, and not asking her previous employers for references regarding her human skills was a very big deviation from normal procedures. The employer was not allowed to asses her human skills only on the two case officers' words. Therefore the employer failed to break the presumed casual link by showing that the decision was based on merit.
In this case two things were decisive against the employer. The first thing was the deviations from normal procedures, the second thing was that the comment from the case officers was the third explanation given by the employer to the Equality Ombudsman. It was given only after the Ombudsman had proven the first two explanations to be false.

The Labour Court found that S.F. at the meeting had introduced herself as a representative of C.N. and at that point believed that she was representing her firms. However, The Labour Court found no evidence to support that C.N. had asked S.F. to represent her, nor had any representative of the café (C.N. or M.A.) given S.F. authority to act on their behalf.

The Equality Ombudsman thus lost the case. S.F. had never been a party to the legal proceedings and therefore the Court could not give a ruling with regard to her actions as an employer.[256]

Name of the court: The Labour Court
Date of decision: 4 May 2011
Name of the parties: Equality Ombudsman v. Aviation Employers (Flygarbetsgivarna) and Scandinavian Airlines System.
Reference number: Case 2011 no. 37
Brief summary: There was a redundancy situation regarding cabin crew. According to the Employment Protection Act a principle of seniority shall apply. The persons who have been employed for the longest time shall keep their job. This rule is however semi-mandatory and can thus be modified by collective agreements. A collective agreement permitted the employer to dismiss all persons above the age of 60 as they were entitled to full pension (roughly 70 % of previous pay) within the employer's pension scheme. The case concerned 25 of those persons.

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

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

The employers' actions violated both the Discrimination Act and section 32 a of the Employment Protection Act, prohibiting collective agreements requiring the worker to retire before the age of 67 and therefore there was no just cause for dismissal according to Section 7 of the Employment Protection Act. The dismissals were

[256] Had the issue of representation not been present (if for instance C.N. would have acted herself) it would certainly have been unlawful indirect discrimination to require the removal of a head scarf for the training post.

declared void. The 25 persons thus kept their employment and they were each awarded 125 000 SEK (13 800 Euros) in a combination of a discrimination award and non-pecuniary damages according to the Employment Protection Act. The Equality Ombudsman had asked for each claimant, 400 000 SEK in discrimination award and an additional 100 000 SEK for the violation of the Employment Protection Act.

Penal Law

Name of the court: The Supreme Court
Date of decision: 20 October 1999
Name of the parties: Nima S v. Karl Erik W.
Reference number: NJA 1999 s 639
Brief summary: *Illegal Discrimination – National Origin*
Iran-born Nima S applied for renting an apartment owned by a company in which the defendant was a partner. The Court held that it had been shown that the defendant had pointed out to Nima S that a conflict with an Iranian tenant had previously emerged, that a neighbouring tenant did not like Iranians and that his national origin therefore was a disadvantage. The Court held though that it had not been proven that the defendant had made clear to Nima S that he would not come in question for tenancy, however it was reasonable to believe that the defendant did not let Nima S compete on the same conditions as other applicants for tenancy.

There were however other circumstances pointing in another direction. In a message sent to all the applicants, among these Nima S, six weeks after the day of the discriminatory declarations, the defendant explained that the tenancy question still had not been determined. This supported the defendant's claim that Nima S was treated as an applicant among others. The defendant further claimed that he after the talks with Nima S started investigating his financial situation and found some uncertainties and that Nima S had no taxable income in 1996.

The tenancy was later given to a physician with stable finances. The Court therefore held that it could not be considered proven that the defendant had not let Nima S compete on the same conditions as the other applicants due to his national origin. The defendant was therefore acquitted.

Name of the court: The Supreme Court
Date of decision: 13 September 1999
Name of the parties: Ritva B vs. Stefan and Fredrik L.
Reference number: NJA 1999 s 556
Brief summary: For crime preventing purposes, a store laid down a prohibition denying persons dressed in wide, long and heavy skirts entrance to the store. The Roma woman Ritva B was denied entrance because she was dressed in traditional clothes. The Court held that the prohibition was shaped in a way that it in practice solely and generally applied to Roma women, something the defendants must have realized. The motive stated by the defendants – that such skirts may be used as a means of assistance for theft in the store – could not be considered

making the special treatment acceptable but rather apt to stress the discriminating character of the special treatment. Thus, the prohibition was held to imply illegal discrimination of Roma women. The defendants were therefore to pay an 1800 SEK (approx. 200 Euro) fine and 5000 SEK (approx. 560 Euro) damages.

The shop was not asked to stop prohibiting entry to persons wearing wide long and heavy skirts. This was a criminal law case, however, and to continue such illegal practices would of course imply a continued criminal offence.

Name of the court: The Supreme Court
Date of decision: 19 December 1996
Name of the parties: André S, Aliow A and Yoro S vs. Conny K.
Reference number: NJA 1996 s 768
Brief summary: The plaintiffs, all black, were denied entrance to a restaurant where the defendant worked as a bouncer. The reason given was that it was a live music evening, that the restaurant was full and that table reservations were required. The defendant later stated that he could not remember the exact reason why he turned the plaintiffs away. The Court began by stressing the difficulties in proving illegal discrimination in cases where no systematic discriminatory behaviour can be established. Since the evidence did not support such behaviour the question became whether the investigation could show that the defendant on the actual evening decided to turn away guests because of their race or skin colour.

Although it had not been shown that the restaurant was full it had not been elucidated that there was not another motive for the defendant's action. It could not be excluded that the plaintiffs – who had gone to the restaurant not with the motive to visit but to, as participants of a TV-program, investigate whether they should be illegally discriminated, and according to Yoro S with an expectation to be turned away – made such a negative impression on the defendant that he therefore decided to turn them away. That impression need not have had any connection with their race or skin colour. – No criminal offence was considered to be at hand.

Name of the court: The Supreme Court
Date of decision: 12 September 1994
Name of the parties: Aron O vs. Rudolf A.
Reference number: NJA 1994 s 511
Brief summary: Rudolf A, owner of a tenancy property, told one of his tenants, who were moving out, that he would let her suggest a new tenant. When he was contacted by the person suggested, Aron O's co-habitee, he was at first interested in giving her the contract but changed his opinion when he found out that she would be sharing the apartment with Aron O. The court held that it had been shown that this was due to the colour of Aron O's skin. Rudolf A was therefore found guilty of illegal discrimination. In assessing the sanction the court stressed that there are reasons to look severely upon illegal discrimination that takes place on such an, for the individual, important area as the housing market. The Court therefore stuck with the large fine ordered by the Court of Appeal, 37 500 SEK (approx. 4 200 Euro).

Name of the court: The Appeal Court Hovrätten over Skåne och Blekinge
Date of decision: 22 December 2006
Name of the parties: The Prosecutor v. Marinos
Reference number: case B 3145-05
Brief summary: The case has its background in situation testing. A group of law students was testing a number of restaurants and night-clubs from an ethnic discriminations point of view. At trial here was a "door-man" giving access to a group of Swedish looking students whereas he denied three other – non-Swedish looking – groups entrance. There were video-clips to prove the discrimination.
In contrast to the Local Court (Malmö Tingsrätt) who convicted the man in the first instance, the Appeal Court did not find a criminal offence to be at hand. The Swedish ethnic group was rather let in by a colleague of the "door-man" and neither the video-clips nor the statements in court gave a clear view of the motives for the dissimilar treatment of the different groups. According to the door-man there was a requirement of being on the guest-list, which he (wrongly) thought was met by the Swedish-looking group.

Name of the court: The Supreme Court
Date of decision: 29 November 2005[257]
Name of the parties: The General Prosecutor v. Åke Green
Reference number: case B 1050-05
Brief summary: A pastor held a long sermon entitled "Is homosexuality congenital or the powers of evil meddling with people" where he developed his religious beliefs with regard to homosexuality blaming homosexuals for AIDS, linking them to the sexual abuse of children and characterising them as "a serious cancerous growth on the body of society". A District Court had sentenced him to 1 month of prison for incitement to hatred according to Chapter 16 Sec. 8 the Swedish Penal Code, whereas the Court of Appeal acquitted him upon appeal.

The Supreme Court upheld the judgment of the Court of Appeal. The statements made by the pastor could not be considered to be direct expressions of Biblical verses but implied insulting judgments about the group in general overstepping the limits of an objective and responsible discourse regarding homosexuals.

The statements could therefore be deemed to have expressed contempt for homosexuals as a group according to the meaning of Chapter 16 section 8 of the Penal Code as expressed in the *travaux préparatoires*. However, Chapter16 section 8 also has to be interpreted in the light of the Swedish Constitution and the European Convention of Human Rights. The Constitutional provisions regarding freedom of religion and freedom of speech respectively, were not found to constitute a reason not to convict the pastor.

[257] www.hogstadomstolen.se/2005/Sammanst.htm (English translation of the case no longer available on internet).

As regards the European Convention of Human Rights, the Supreme Court did find, however, that it was "likely" that the European Court of Human Rights, in a determination of the restriction of (the defendant's) right to preach his Biblically-based opinion that a judgment to convict would constitute, would find that this restriction is not proportionate, and would therefore be a violation of the European Convention of Human Rights. Despite the pastor's extreme statements they could not be labelled a "hate speech", the Court said.

Name of the court: The Supreme Court
Date of decision: 6 January 2006
Name of the parties: The General Prosecutor v. FV et al
Reference number: case B 119-06
Brief summary: The four defendants had been spreading some hundred leaflets at the premises of a public school blaming homosexuals for AIDS and linking them to the sexual abuse of children. The Appeal Court acquitted the men referring to the Supreme Court judgment in the Green case (see above). As the Supreme Court did in Green, the Appeal Court found that the statements could be deemed to have expressed contempt for homosexuals as a group according to the meaning of Chapter 16 section 8 of the Penal Code as expressed in the *travaux préparatoires* but that Chapter 16 section 8 also had to be interpreted in the light of the ECHR and that a judgment to convict would constitute a violation of the European Convention on Human Rights.

The Supreme Court however made some distinctions in relation to the Green case. The leaflets had been distributed at a school. The defendants had no right to use the premises freely and the premises could be described as a relatively protected environment with regard to political and similar actions from outsiders.

The placing of the leaflets on the lockers resulted in young people receiving them without actually accepting them. It was therefore likely that the European Court of Human Rights would uphold the restriction as proportionate. The defendants were fined and three of them received conditional sentences and the fourth probation.

Describe trends and patterns in cases brought by Roma and Travellers and provide figures if available?

There were 514 cases initiated relating to ethnic origin at the Equality Ombudsman in 2012[258] and of those about 30 cases were initiated by Roma persons.[259][260] This can be compared to about 30 cases in 2011 40 cases in 2010,[261] 30 cases in 2009 and

[258] Equality Ombudsman, Yearly Report 2012, p. 15.
[259] Equality Ombudsman, phone call 2012-02-23 Heidi Pikkarainen.
[260] There is no obvious reason why the number of cases is lower in 2011 compared to 2010. If it continues to fall, then maybe the effects of the effort to reach Roma persons starting in 2004 may be diminishing. But there is no reason to draw such a conclusion from a single year.
[261] Equality Ombudsman, mail Heidi Pikkarainen.

50 cases registered in 2008 at the former Ombudsman Against Ethnic Discrimination. Thirty is a reasonably high figure.[262] Furthermore the Equality Ombudsman gives priority to Roma cases.[263] The chance of getting some sort of remedy is thus better for Roma complainants compared to the average complainant.[264]

The cases mainly regard normal daily activities. Many cases concern shops, for instance denying entrance or suspecting the customer of theft. Another large group of cases regards housing for instance refusals to be accepted as tenants or refusals of requests to barter[265] an apartment.[266] A growing group of cases in 2009 and 2010 relates to different forms of "social services" (socialtjänst), such as denial or withdrawal of financial support and taking children into state care.[267]

Other

Prior or to November 2010, schools had quite extensive right to decide not to allow niqab or burkas in the classroom, if they explained themselves to the pupils concerned and had a legitimate reason referring to pedagogical needs.

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

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

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

[265] A lease for a dwelling cannot be terminated by the landlord without just cause. The tenant can thus keep renting their apartment for life. There is a rent control and some contracts have a high value on the black market. The tenant cannot sell his or her contract but can under some circumstances barter the contract for another contract with a high value on the black market. If a landlord gives some tenants a wider right to barter their contracts, compared to what the law requires, they receive a valuable favour. The landlord can further always refuse a request to barter, and the tenant will then have to ask a Rental Board for permission instead. Exercising the right to say No can be a costly disfavour to the tenant, as the legal process may make the other party to the barter withdraw. He or she may be offered an apartment with another landlord not fighting the barter in the Rental Board. For information on why the bartering right is important in Sweden see note 38.

[266] The Ombudsman Against Ethnic Discrimination, Yearly Report 2008 p. 27.

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

The Swedish National Board of Education made a guideline of 15 pages in 2003 on burka and niqab. It emphasised that decisions must be made locally by the individual school. A general prohibition of burka or niqab was not permissible relying on the School Act. Decisions must be made case by case.

The central requirement was to have a dialogue with each woman who may have to remove her burka or niqab. The dialogue concerned common values for instance, equality between gender and other democratic values upon which the Swedish educational system relies. After such a dialogue, the Board was generally positive towards a local ban during class hours.

On the 30 of November 2010, the Equality Ombudsman decided on an important and widely debated niqab case.[268] A 24 year old ethnic Swede who converted to Islam and decided to wear a niqab for religious reasons was not allowed to follow an educational program training persons to become pre-school teachers (*barnskötare*).[269] The school claimed that a niqab made it harder to teach since the teacher could not read the face of the student if it was covered.

The School was not sanctioned. The Equality Ombudsman dropped the case, but only because the school found alternative solutions, and allowed the woman to wear her niqab if such solution did not work, if for instance the men could not be seated behind her.[270] This case was widely discussed in media and the discussion made it clear that schools following the old guidelines on Niqab and burkas risked violating the Discrimination Act, at least according to the Equality Ombudsman.

The School Inspectorate (created in 2008) issued new guidelines on 11 of January 2012.[271] The guidelines states that a prohibition of niqab or burkas can be acceptable for health and safety reasons and the examples provided in the guidelines are such as hygienic reasons in restaurants and food industry and health care and safety reasons in laboratories.

[268] Case 2009/103

[269] Please note that it was irrelevant to the case, whether or not here future employers would have the right to require that she does not wear a niqab. From the view of the employment sections of the Discrimination Act, the important question is whether or not she becomes a less good teacher if the children cannot read her facial expressions. The negative consequences of wearing a niqab are thus put on the pupils. We have no niqab case in the employment sector and this case is certainly not a legal precedent case. Firstly, the case was never tried by the courts, and secondly, if she is allowed to follow the education and get her degree, she is able to make a new decision on whether or not to wear a niqab when she starts working. But if she is excluded from the education, she may have problems finding employment for life.

[270] If for instance a group of pupils made a presentation for the class and that group included male members, these men needed to be in front of her during the presentation.

[271] Outside the time frame but as the old text is not relevant more it is better to put it in.

The new guidelines also recognise that niqab or burkas can create obstacles in the teaching situation and thus can be forbidden if the obstacle is manifest. There are no examples of manifest obstacles in the teaching meriting a prohibition.

Instead, the guidelines emphasise that such obstacles can in most cases be overcome by other means than to ask the pupil to remove her burka or niqab and that it is only in the few cases that such solutions are impossible that a prohibition is allowed. The examples given are examples where the teacher normally can solve the situation through less severe means. For instance that it is acceptable to require seeing the face only for the few second it takes to identify a pupil taking a test. If the teacher cannot read facial expressions it is harder to make sure that the pupil understands, but such a problem could be overcome with questions to the pupil.

The Equality Ombudsman supports the new guidelines.

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