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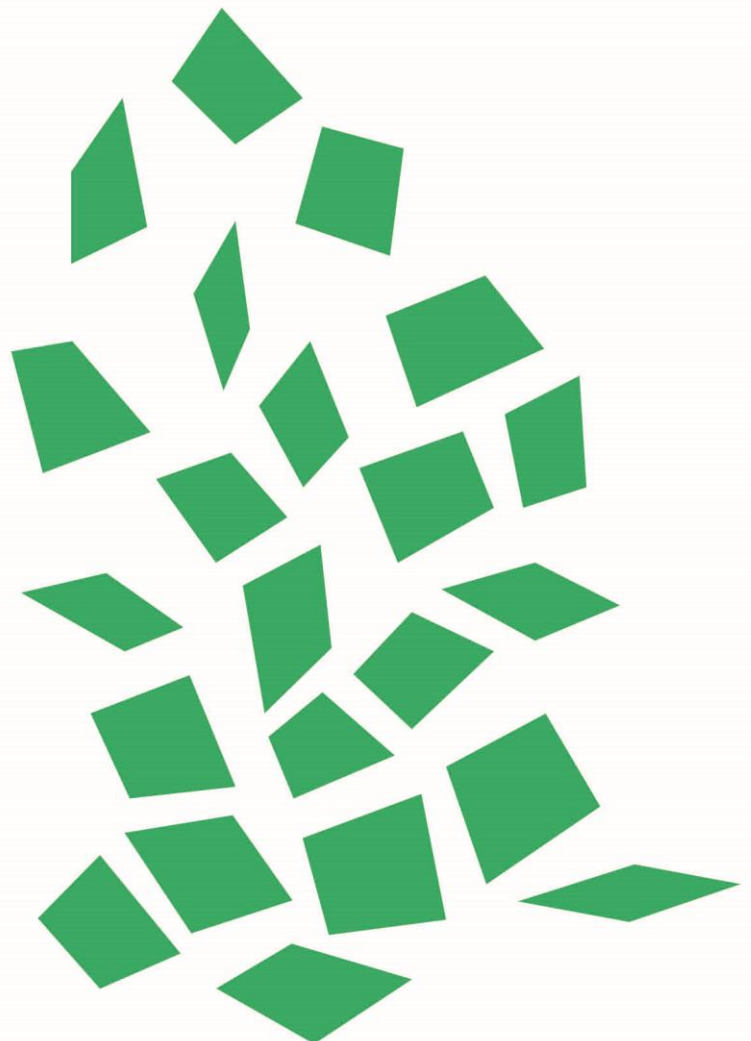
# Country report

## Non-discrimination

Sweden

2019

including summary



*Justice  
and Consumers*

**EUROPEAN COMMISSION**

Directorate-General for Justice and Consumers  
Directorate D — Equality and Union citizenship  
Unit D.1 Non-discrimination and Roma coordination

*European Commission  
B-1049 Brussels*

# **Country report**

## **Non-discrimination**

Transposition and implementation at national level of  
Council Directives 2000/43 and 2000/78

### **Sweden**

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Reporting period 1 January 2018 – 31 December 2018

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\* The author has gratefully built on the reports written until 2018 by the previous expert Per Norberg.

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Luxembourg: Publications Office of the European Union, 2019

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PDF ISBN 978-92-76-00247-5

ISSN 2599-9176

doi:10.2838/571852

DS-BB-19-033-EN-N

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## EXECUTIVE SUMMARY

### 1. Introduction

Sweden has long had various minorities such as the Roma, Finns, the Jewish community as well as the Sami, an indigenous population. Nevertheless, Sweden has long viewed itself as a homogenous country. This has been changing in large part due to various types of immigration since the 1950s. During the 1950s through to the 1970s, there was labour migration to Sweden. From the 1970s onwards, various groups of refugees arrived due to turbulence around the world. In addition to those from EU countries, there are many people in Sweden who were born in other parts of the world. In 2018, the population reached 10.2 million. The proportion of foreign-born inhabitants increased from 6.7 % in 1970 to 19.1 % in 2018.<sup>1</sup> Ethnicity is not monitored, but Sweden's detailed statistics can provide relevant proxies, such as statistics concerning country of birth.

Sweden considers itself to be a secular country. At the same time, most people still belong to the Lutheran church, the former state church. Various other congregations have been established in recent years. This has brought certain issues concerning discrimination due to religion as well as freedom of religion to the forefront.

Racialised ethnic groups are particularly affected by discrimination and exclusion. The persistent history of racism and discrimination concerning the Roma has received some recognition in recent years.<sup>2</sup> Persons perceived to be Muslims or from the Middle East are also clearly affected.<sup>3</sup> A 2018 report underlined the clearly negative effects of racism/race discrimination on Afro-Swedes in the labour market.<sup>4</sup>

There have been a number of issues concerning recognition and equality in relation to disability and sexual orientation. In respect of these grounds and those of ethnicity and religion, equality silos were established that reinforced the way in which laws against discrimination developed.

Sweden's first law against discrimination, adopted in 1970, was a criminal law provision prohibiting discrimination due to race or religion by merchants in the provision of goods and services.<sup>5</sup> However, it was the later civil laws against discrimination in working life that set the pattern for the equality silos.

The primary example was the prohibition of sex discrimination in working life that entered into effect in 1980<sup>6</sup> and the establishment of the Sex Equality Ombudsman (JämO). During the 1980s, Sweden rejected the expansion of the mandate of the JämO to ethnicity in addition to a refusal to prohibit workplace ethnic discrimination in the same manner that applied to sex discrimination. Instead a law against ethnic discrimination from 1986 established the office of the Ombudsman against Ethnic Discrimination. In spite of its title,

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<sup>1</sup> Statistics Sweden (2018), *Summary of Population Statistics 1960–2018*, accessed 2019-03-11, <https://www.scb.se/en/finding-statistics/statistics-by-subject-area/population/population-composition/population-statistics/pong/tables-and-graphs/yearly-statistics--the-whole-country/summary-of-population-statistics/>.

<sup>2</sup> See Ministry of Culture (2014) *Den mörka och okända historien: vitbok om övergrepp och kränkningar av romer under 1900-talet* (The Dark and Unknown History – a White Paper on Abuses and Rights Violations against Roma in the 20th Century), Ds 2014:8.

<sup>3</sup> Oxford Research AB (2013) *Forskning om diskriminering av muslimer i Sverige*, (Research on discrimination of Muslims in Sweden), accessed 2019-03-11, <https://www.do.se/globalassets/publikationer/rapport-forskning-diskriminering-muslimer-sverige.pdf>.

<sup>4</sup> CEMFOR (Uppsala University) (2018), *Anti-Black Racism and Discrimination in the Labour Market*, Report 2018:22, Stockholm County Administrative Board, accessed 2019-03-11, <https://www.lansstyrelsen.se/download/18.4e0415ee166afb5932419bf7/1542881639062/Rapport%202018-22%20Anti-Black%20racism%20and%20discrimination.pdf>.

<sup>5</sup> Sweden, Government bill 1970:87 concerning ratification of ICERD. Initially the law was found in Penal Code 16:8a, which was changed to 16:9 in 1971. At the time the Government determined that ratification did not require the introduction of laws against race discrimination in working life.

<sup>6</sup> Act (1979:1118) on equality between women and men in working life.

it did not prohibit ethnic discrimination.<sup>7</sup> In 1994, due to international criticism, ethnic discrimination in working life was prohibited and the Ombudsman was in theory able to bring lawsuits for damages on behalf of victims.<sup>8</sup> However, proof of intent was required, a much higher standard than applied to sex discrimination. It was not until 1999 that three relatively modern laws against discrimination were adopted concerning the grounds of: ethnicity and religion, disability and sexual orientation. Three separate ombudsmen were established for supervision and enforcement in relation to each of the grounds.

The 1999 laws did not allow for positive treatment or more effective proactive measures, as was the case with sex discrimination. One key step forward was the application of the same burden of proof regardless of the ground. During the 2000s, anticipating and transposing EU law played a key role in the various laws that were adopted. Nevertheless, sex discrimination maintained a primary role within the equality silos and the hierarchy concerning protection and enforcement.

To understand Swedish labour law, it is necessary to understand the dominant role of the social partners. Employees and employers are highly organised. Labour market issues are largely determined through collective bargaining with legislation playing a secondary role. Due to their special role, the social partners, were influential in slowing and weakening the development of discrimination law concerning working life. Such laws were viewed as a potential encroachment on their power. Other NGOs, such as those representing groups that are discriminated against, have only recently started to play a role in relation to the development and enforcement of laws against discrimination.

Sweden has developed a fairly comprehensive welfare state. Social and economic benefits have been formulated only to a limited extent in terms of rights, giving rise to legal claims. The enforcement of individual rights, particularly by groups that are generally affected by discrimination, has not been a strong part of Swedish legal culture. Furthermore, the constitutional tradition in regard to fundamental rights has been weak. This is changing, however, due to the increasingly important role played by EU law, the European Convention on Human Rights, and the Swedish Constitution.

## **2. Main legislation**

There are constitutional provisions with respect to discrimination in the Swedish Instrument of Government (part of Sweden's Constitution). While not establishing enforceable rights, according to the first chapter, public institutions shall combat discrimination based on an open list of grounds. However, in Chapter 2, Article 12 provides protection against laws and regulations that discriminate against a minority due to their ethnic origin, colour, or other similar circumstances, or on account of sexual orientation and Article 13 prohibits laws and regulations that discriminate on the basis of sex. The relationship to the European Union and EU law is regulated through the Instrument of Government (1:10 and 10:6) and other laws.

The European Convention on Human Rights (ECHR) was incorporated into national law in 1995, and was given quasi-constitutional status. Basically, any law that contradicts the rights set forth in the Convention is void and may not be applied. Sweden has also ratified various other human rights instruments.<sup>9</sup> However, if an international instrument has not been incorporated or transformed into legislation, such instruments are not part of the internal Swedish hierarchy of laws. Nevertheless, Swedish laws should be interpreted by the courts in conformity with such international instruments.

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<sup>7</sup> Sweden, Act against ethnic discrimination, (1986:442).

<sup>8</sup> Sweden, Act against ethnic discrimination, (1994:134).

<sup>9</sup> See Annex 2 of this report for a full list.



By 2008, Sweden's seven civil anti-discrimination laws contained the protections required by EU law, with the exception of age.<sup>10</sup> There were the four single-ground civil laws covering working life along with three multi-ground civil laws prohibiting discrimination in other fields such as education. For implementation purposes, Sweden had four anti-discrimination ombudsmen for the grounds of sex, ethnicity and religion, disability and sexual orientation.

On 1 January 2009, the seven acts were repealed and merged, along with their hierarchies of protection, into the Discrimination Act (2008:567). The grounds of age and transgender identity and expression were also added. The ombudsmen were merged into the Equality Ombudsman (DO). Various amendments have been made to the act since 2009, including adding a new form of discrimination, inadequate accessibility concerning disability (outside of employment) in 2015. In 2016, the act was amended to level up the general active measures or duties, so as to cover all grounds. At the same time, certain more specific duties only apply to sex, for example, pay gap surveys.

In addition to civil law, there are criminal law provisions on discrimination, such as Penal Code 16:9 which bans unlawful discrimination by merchants on the grounds of ethnicity, religion, sexual orientation and transgender identity or expression with regard to the provision of goods and services. Prosecutions under 16:9 are rare, in part because the same area is covered by the Discrimination Act. There is also the 'hate speech' provision in Penal Code 16:8 concerning the same grounds as in 16:9.

The Regulation on anti-discrimination conditions in public contracts (2006:260), requires Sweden's largest national Government agencies to include an anti-discrimination condition in their larger public procurement service and building contracts. The purpose is to increase awareness of and compliance with the Discrimination Act.

Generally speaking, Swedish law fulfils the minimum requirements of the Directives 2000/78/EC and 2000/43/EC. Furthermore, especially as regards religion, sexual orientation, age and disability, domestic law goes beyond the requirements of EU law since the full material scope of Directive 2000/43/EC essentially applies to all grounds. Certain additional grounds are also covered, such as transgender identity and expression.

### **3. Main principles and definitions**

Essentially the relevant EU definitions and prohibitions of direct and indirect discrimination, harassment, sexual harassment and instructions to discriminate can be found in the Discrimination Act (Chapter 1, Section 4). Victimisation is also prohibited under the act.

The prohibition of discrimination also covers discrimination by association (relating e.g. to a spouse or child) as well as wrongful perceptions about the person discriminated against (e.g. the person is perceived to be a Muslim, even though they are a Christian).

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

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<sup>10</sup> Sweden, Equal Opportunities Act, (sex discrimination in employment) (*jämställdhetslagen*) (1991:433); the Act on measures against discrimination in working life on grounds of ethnicity, religion or other belief (*lagen om åtgärder mot etnisk diskriminering i arbetslivet*) (1999:130); the Act prohibiting discrimination in working life due to disability (*lagen om förbud mot diskriminering i arbetslivet av personer med funktionshinder*) (1999:132); the Act prohibiting discrimination in working life due to sexual orientation (*lagen om förbud mot diskriminering i arbetslivet på grund av sexuell läggning*) (1999:133); the Act on equal treatment of students at universities (*lagen om likabehandling av studenter i högskolan*) (2001:1286); the Act prohibiting discrimination (outside of working life and education) (*lagen om förbud mot diskriminering*) (2003:307); and the Act prohibiting discrimination against pupils (*lag om förbud mot diskriminering och annan kränkande behandling av barn och elever*) (2006:67).

In 2018, there were two important cases decided by the Labour Court concerning indirect discrimination. In the handshake case, a female applicant inquired about a job as an interpreter. When she refrained from shaking the hand of the male representative due to religious reasons, the recruitment process was terminated. The woman stated that she did not shake hands with men or women when she was in mixed company. Based on certain facts the court determined that the company's actions were not appropriate and necessary, thus constituting indirect discrimination.<sup>11</sup>

In another case, a woman with a 50 % disability was told that she was not eligible to work for a temporary employment agency since the collective agreement required applicants to have another 'main employment/activity'. The court determined that this was a case of indirect discrimination as the requirement was not appropriate and necessary.<sup>12</sup>

Inadequate accessibility is a new form of discrimination since 2015.<sup>13</sup> It broadens the reasonable accommodation requirement in EU law beyond the field of employment to e.g. the provision of goods and services.

There is no specific prohibition of multiple discrimination in the law. However, many cases can be said to involve multiple discrimination. The issue of multiple discrimination was to some extent dealt with in Labour Court case 2010 No 91.<sup>14</sup> Several grounds were involved, and thus multiple discrimination. In the author's opinion, even though the court did not clearly refer to the issue, the judgement for the claimant indicates that some form of multiple discrimination or intersectionality analysis was used. This case and others have led to various discussions in Sweden about the role of intersectionality and multiple discrimination.<sup>15</sup>

#### **4. Material scope**

The material scope of the Discrimination Act fulfils the minimum standards established by EU law and in various ways extends beyond the material scope required by EU law since religion, sexual orientation, disability and age are essentially covered in the same way as sex and ethnicity.<sup>16</sup> The Discrimination Act sets out the material scope by specifying the following headings: working life; education; labour market policy activities and employment services not under public contract; starting or running a business and professional recognition; membership of certain organisations; goods, services and housing etc.; health and medical care and social services etc.; social insurance system, unemployment insurance and financial aid for studies; national military service and civilian service; and public employment.

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

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<sup>11</sup> Labour Court, 2018 No. 51.

<sup>12</sup> Labour Court, 2018 No. 42.

<sup>13</sup> Sweden, Act (2014:958) changing the Discrimination Act (2008:567).

<sup>14</sup> Labour Court, 2010 No 91, *Equality Ombudsman v State Employment Board* (Statens arbetsgivarverk) (judgment of 15.12.2010).

<sup>15</sup> See for example Schömer, E. (2012) *Multiple discrimination: A smokescreen over differences*, RETFÆRD ARGANG 35 2012 NR. 3/138, available at: [http://retfaerd.org/wp-content/uploads/2014/08/Retfaerd\\_3\\_2012\\_3.pdf](http://retfaerd.org/wp-content/uploads/2014/08/Retfaerd_3_2012_3.pdf).

<sup>16</sup> For example, the Discrimination Act essentially already fulfils the minimum standard that would apply if and when the Proposal (COM (2008) 426 final) for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation is adopted.

relevant issue is that the Discrimination Act does not, as a general rule, protect legal persons.

## 5. Enforcing the law

Civil proceedings regarding working life under the Discrimination Act are dealt with in accordance with the Labour Disputes Act, assuming that the claimant is represented by a union or the Equality Ombudsman (DO).<sup>17</sup> The DO's right to represent a victim is subsidiary to the right of a trade union to represent its members. The procedures are the same concerning employees in the private and public sectors. However, with regard to state employees, due to the constitutional rules on objective grounds in hiring, the complementary route of appealing against a decision through administrative procedures is sometimes available. If an individual brings an employment case without the support of the DO or a union, the case is first heard by a district court, with the Labour Court functioning as a court of appeal. The Labour Court is a special court and its decisions are final.

Cases outside working life are dealt with in the ordinary court system, i.e. the relevant district court with appeals going to the appeal court and possibly the Supreme Court.<sup>18</sup>

Beyond the DO and the unions, the Discrimination Act gives certain qualified non-profit organisations the right to bring actions in their own name as a party, assuming that the victim grants them a power of attorney. However, for NGOs that represent discriminated groups, taking legal action, such as going to court, is not part of their advocacy culture. However, 2018 may constitute a breakthrough in that DHR, a disability organisation, took on a case even though the Equality Ombudsman had refused to do so. DHR established facts that demonstrated inadequate accessibility as discrimination concerning a bus.<sup>19</sup> Up until this case, to the extent that NGOs took on cases, they were brought as small claims in order to avoid the risks inherent in the loser pays rule, where the losing party is required to pay the winning party's trial costs, including attorney's fees.

There is increasing interest in enforcement among NGOs. Both the 'Law as a tool for social change' project and the 'From talk to action' project are examples of this tendency in the field of disability discrimination.<sup>20</sup> After concluding that the current enforcement system is insufficient, the NGOs involved in these projects have decided that discriminated groups need to take on the issue of more effective enforcement themselves. They have also realised that that is an important form of advocacy.<sup>21</sup>

An NGO known as Law as a Tool (MLSV) filed several discrimination cases in 2018. The Government requires the removal of assistance devices from pupils who are known to have dyslexia when they take national tests at school. Local government bodies are responsible for the schools and are thus the defendants, even though they are following the instructions of the National School Agency. Discrimination lawsuits were filed against a number of local government bodies on the same day, along with a claim against the state based on the actions of the School Agency. This led to substantial impact in the form of publicity and awareness raising, even though no trials have yet been held.<sup>22</sup> The trials will take place during 2019.

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<sup>17</sup> Sweden, Labour Disputes (Judicial Procedure) Act (1974:371).

<sup>18</sup> Some higher education cases may also be brought before the Board of Appeal for Higher Education.

<sup>19</sup> Gävle District Court, 2018-06-11, *DHR v Region Gävleborg*, Mål nr T 240-16.

<sup>20</sup> *Lagen som verktyg* (The law as a tool for social change), available at: <https://lagensomverktyg.se>, and *Frañ snack till verkstad* (From talk to action), available at: <https://funktionsrattskonventionen.se/om-projektet/>.

<sup>21</sup> One example of inspiration is Disability Rights Advocates, whose offices are in New York and California. See the DRA website at: <https://dralegal.org>.

<sup>22</sup> Dagens Nyheter (2018) 'Barn med dyslexi nekas hjälpmedel – nu stäms Skolverket och tre kommuner' 1/9/2018, <https://www.dn.se/nyheter/sverige/barn-med-dyslexi-nekas-hjalpmedel-nu-stams-skolverket-och-tre-kommuner/>. TV4 (2018), 'Nekades dyslexistöd vid prov - kommuner stäms', 31/8/2018, <https://www.tv4.se/nyheterna/klipp/nekades-dyslexistod-vid-prov-kommuner-stams-11350574>. Swedish

Individuals can hire their own lawyers, but they then run the risk of being required to pay not only their own lawyer's fees but also the winning party's legal costs. This economic risk is prohibitive for most victims of discrimination.

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

A shifted burden of proof of discrimination had already been introduced under the old acts and is specified in the 2009 Discrimination Act. Nevertheless, very few cases of discrimination have been won so far, particularly concerning ethnic discrimination. There are indications that a key problem lies in a more restrictive application of the burden of proof by the Labour Court as compared to the ordinary courts.<sup>23</sup> A case from 2016 in Stockholm District Court<sup>24</sup> and a similar case in the Labour Court in 2017<sup>25</sup> concerning religion and discrimination illustrate this issue. The evidence given was basically identical. The courts had similar analyses but differed as to who should bear the burden of proof, with the party that had been discriminated against prevailing in the district court, while the Labour Court instead found that the party discriminated against had failed to carry their burden of proof.

Statistics from the DO indicate that settlements are not uncommon. The same is certainly true for the trade unions.

Contracts found to be discriminatory can be declared void. However, discrimination compensation is the main form of sanction. The 2009 act, in addition to the possibility of declaring discriminatory contracts void, introduced a new form of sanction: discrimination compensation. Beyond providing compensation to the victim, the courts have been instructed by law to give particular attention to the aim of discouraging infringements of the law. The level of discrimination compensation was therefore expected to be higher in the future as compared to the damages awarded prior to 2009.

As the discrimination compensation awards are still relatively low, it would be hard to consider sanctions in Sweden as proportionate, effective and dissuasive.

A recent study examined the awards granted by the Labour Court over a long period of time. According to the analysis, the amounts awarded in discrimination cases are about 4.5 % higher today than they were in 1980, adjusting for inflation. Given the 170 % increase in trial costs and fees since the 1980s, the conclusion is that the small increase does not reach the threshold of enhanced compensation envisaged by the change in terminology in the 2009 Discrimination Act. The study concludes that the trends concerning compensation awarded and increasing lawyers' costs and fees, combined with low success rates, 'create a significant deterrent for plaintiffs bringing discrimination claims.'<sup>26</sup>

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

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TV (2018), 'Dyslexiförbundet: Skolverket diskriminerar elever med dyslexi', 31 August 2018 at <https://www.svt.se/nyheter/inrikes/dyslexiforbundet-vill-stamma-kommuner-for-diskriminering-av-barn-med-dyslexi>.

<sup>23</sup> Farkas, L. and O'Farrell, O. (2014), *Reversing the burden of proof: Practical dilemmas at the European and national level*, p. 76.

<sup>24</sup> Stockholm District Court, case T 3905-15, *Equality Ombudsman v The Swedish State through Karolinska institutet* (judgment of 16.11.2016).

<sup>25</sup> Labour Court, 2017 no. 65, *Equality Ombudsman v Public Dentists of Stockholm County* (judgment of 20.12.2017).

<sup>26</sup> Carlson, L. (2017) *Comparative Discrimination Law: Historical and Theoretical Frameworks*, Brill, pp. 79-80.

One potential complementary tool in Sweden for increasing the cost risks of discrimination for those with the power to discriminate, which in turn would lead to more effective implementation of the Discrimination Act, can be found in the Regulation on anti-discrimination clauses in public contracts (2006:260).<sup>27</sup> If meaningful sanctions are attached to these clauses, such as potential cancellation and limiting the ability to compete for future contracts, such clauses should increase the interest of e.g. employers in proactive anti-discrimination measures.<sup>28</sup> The total value of all public sector contracts in Sweden is over EUR 56 billion (SEK 600 billion) annually.<sup>29</sup> However, so far there has been little follow-up of such clauses, so their effectiveness today is doubtful.

## 6. Equality bodies

The DO is the key public institution for supervising compliance with the Discrimination Act. The DO has the right to investigate complaints concerning discrimination in relation to all grounds and the right to take cases to court on behalf of an individual. The DO can also: provide advice, independent assistance and support to individuals and institutions more generally; engage in educational, informative and opinion-shaping work to combat discrimination; propose legal and other measures to the Government that may be of use in combating discrimination; monitor international developments; and undertake other suitable measures to promote equality and counteract discrimination. Independent surveys and reports are important parts of this work.

During 2018, the DO has increased its focus on issuing supervisory decisions that are not legally binding and not subject to appeal. The decisions are intended to provide guidance as to the application of the law. This has also led to a substantial decrease in the number of lawsuits filed in 2018 in comparison to previous years. Four lawsuits were filed in 2018. Nevertheless, the DO explains:

'The DO's task of exercising supervision concerning compliance with the provisions of the Discrimination Act should not be confused with the DO's possibility of representing individuals in court. The most important function of supervision is preventive and shall, among other things, strengthen the willingness of the supervisory subject's to comply with the law.'<sup>30</sup>

Local NGOs known as anti-discrimination bureaux should be mentioned here. They are beginning to take cases to court. So far, they have limited their risks mainly by taking cases to court as small claims cases, thus avoiding the risk of being required to pay the opposing parties' full legal expenses if they lose. At the same time, as the DO has given less priority to individual cases, there is mounting pressure on the bureaux to step in to provide advice and assistance, including taking cases to court.

## 7. Key issues

The Equality Ombudsman has changed its priorities, decreasing its focus on investigating complaints, taking cases to court or engaging in settlements. Instead, more priority has been given to information and education efforts including issuing assessments of discrimination that are not legally binding and cannot be appealed. Individual complaints are at times transformed into more general supervisory inquiries or a follow-up of active

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<sup>27</sup> Regulation on anti-discrimination clauses in public contracts (2006:260) (*Förordning (2006:260) om antidiskrimineringsvillkor i upphandlingskontrakt*), available at: <http://rkrattsbaser.gov.se/sfst?bet=2006:260>.

<sup>28</sup> Although it was changed to a large extent, the original proposal for the regulation as a complementary tool to the laws against discrimination and its potential effects can be seen in Government white paper 2005:56, *The Blue and Yellow Glass House: Structural Discrimination in Sweden*, pp. 579-584.

<sup>29</sup> Swedish Government (2016), *Varför behövs en nationell upphandlingsstrategi?* (Why is a national public procurement strategy needed?) p. 4.

<sup>30</sup> Equality Ombudsman (DO) (2019) *Annual Report 2018*, p. 33.

duties. In the author's opinion, the focus is thus on information as a means of improving attitudes and hopefully future behaviour, rather than more effective enforcement of the law as a more direct means of affecting behaviour, and thus deeper underlying attitudes. The DO also has some focus on monitoring the duty to carry out active measures, which include carrying out wage surveys as well as various promotional activities. At the same time there is little focus on the DO's ability to bring legal pressure through the powers in the act. In the author's view, these actions carry with them the risk of a similarly ineffective focus, with the idea that information – as opposed to implementation of the law – is the key to social change.

The risk of ending up in court for a person who discriminates against Afro-Swedes, Roma, the disabled or others, is extremely small, especially given the decreasing number of investigations by the DO and the limited mandate of the unions. In practical terms, only those who have sufficient financial resources to go to court can hope to get justice. A Government inquiry on this issue presented its results in 2016.<sup>31</sup> Although, the DO was encouraged to investigate more cases and take more cases to court, the only relatively specific measure proposed was increased funding for the NGO-run anti-discrimination bureaux.

Given the decreased focus on access to justice by the DO and the limited interest shown by the unions in going to court, the prospects for the development of case law concerning the prevention portion of discrimination compensation are becoming correspondingly limited. This applies to case law in general.

In addition to the issue of the lack of access to justice, the problem of the burden of proof is probably the most important principle-based legal issue. In the long run, a system where it is easier to prove discrimination in the general or ordinary courts, rather than in the Labour Court, is unsustainable.

There is a recognition in the legislative history of the need for case law in order to provide a clearer understanding of the norms that are being set by the Discrimination Act. At the same time, the results of the Government inquiry and the limited number of cases in the courts seem to indicate that there is a problem. More attention needs to be paid to the issue of access to justice. This is not just a question of processing more cases on behalf of individuals – important as that is – but is about the development of case law through sustained and engaged advocacy. Just as those with the power to discriminate need to be challenged on their actions, those with the power to decide discrimination cases also need to be challenged, so that they can learn to recognise, understand and counteract discrimination.

In the author's opinion, it is not the law itself that changes norms, but the implementation of the law, including through case law. Moreover, it is not just case law that is required, but a critical mass of cases, which in turn increases the cost risks of discrimination, thus providing an added incentive for those who discriminate to change their behaviour and norms so that fewer people are subjected to discrimination. Although the law needs to provide redress for victims, the long term goal of the law should be that potential victims are not subject to discrimination in the first place.

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<sup>31</sup> Swedish Government (2016) White Paper SOU 2016:87, *Bättre skydd mot diskriminering (Better Protection Against Discrimination)*, available at: <https://www.regeringen.se/4af295/contentassets/b42c019548304be987083fb37f73d74f/battre-skydd-mot-diskriminering-sou-201687>.



## INTRODUCTION

### The national legal system

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

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

In practice, the right to initiate legislation lies predominantly with the Government. Its right to make legislative proposals to Parliament is guaranteed by the Constitution.<sup>32</sup> The process starts with a legal inquiry, after which the results are sent out to relevant parties for comments on the proposed legislation. The Government then formulates a bill specifying and explaining the proposed legislation, including reflections on the comments. The bill is then submitted to the Parliament. The report from the Parliament's standing committee is debated in the Parliament. If there are political differences, the two sides normally suggest different wordings concerning the proposed legislation. Formally, there is the main proposal in the standing committee and a reservation or reservations by the minority in the committee. The various formulations are put to a vote. The majority side's arguments in the standing committee and the Government bill (if the Government wins the vote) are thus regarded as 'approved' by the Parliament.<sup>33</sup> Therefore, these two documents have considerable importance when interpreting the law.

The application of the Discrimination Act is divided between the Labour Court and the general court system (district courts, courts of appeal and the Supreme Court). The Labour Court deals with all aspects of the employer-employee relationship. It is a single-instance system in cases where the worker is represented by his or her trade union and the employer has a collective agreement with that union or, in certain cases, where the Equality Ombudsman (DO) represents a claimant in accordance with Chapter 6, Sections 1-2 of the Discrimination Act. Otherwise, it is a two-instance system, with the district courts constituting the first instance court with a right of appeal to the Labour Court.

Collective agreements cover 90 % of workers on the Swedish labour market and are very important in setting the rules.<sup>34</sup> There is no national minimum wage. Generally, work as a civil servant is governed by contracts and collective agreements in largely the same way as in private employment. Certain special rules apply to public employment, especially in the state sector. These mainly concern the recruitment process, where some constitutional rules on objectivity apply.

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

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<sup>32</sup> Swedish Instrument of Government (*Regeringsformen* 1974:152), Chapter 4, Article 4, adopted 28.02.1975. Sometimes the opposition parties agree on a piece of legislation that the Government does not want.

<sup>33</sup> Formally, it is only the report of the standing committee that is being debated but, as the Government almost always repeats what is said in the Government bill and most often wins, in practice it is the Government bill that is used as the main interpretation source, as it is much more detailed.

<sup>34</sup> See Eurofound (2017), *Living and working in Sweden*, 18.10.2017, available at: <https://www.eurofound.europa.eu/country/sweden#collective-bargaining>.

## List of main legislation transposing and implementing the directives

The main legislation transposing and implementing the directives is the Discrimination Act (2008:567). It covers seven grounds: sex, ethnicity, religion and belief, sexual orientation, disability, age and transgender identity and expression. The most recent amendment, enacted on 23 November 2017,<sup>35</sup> concerned some details that are not relevant to this report.

Two other minor changes occurred in 2017. First, the exemption of businesses with fewer than 10 employees from the rules on inadequate accessibility (which is linked to the duty of reasonable accommodation) was repealed.<sup>36</sup> Secondly, it is now possible to appeal certain decisions by a university to the Higher Education Appeals Board, based on an assertion that they are a violation of the Discrimination Act. The board can declare the university's decision void, send it back and request a new decision. However, this does not include any possibility of getting a discrimination compensation award; the new arrangements only create the possibility of correcting a discriminatory act or omission.<sup>37</sup>

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

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

The main idea of the 2009 Discrimination Act was to replace the seven previous acts with one comprehensive act regulating all aspects of discrimination falling under civil law as well as full compliance with the EU anti-discrimination directives. Much of its content is based on the seven older discrimination acts,<sup>38</sup> which were limited to certain grounds and certain areas. Case law regarding these previous acts, and the relevant legislative materials, particularly the Government bills and the standing committee reports referring to these older acts, are thus still important tools for understanding the law.

The Penal Code has two sections of relevance.<sup>39</sup> The crime of unlawful discrimination by merchants concerning the provision of goods and services covers race, skin colour, national or ethnic origin, religious belief, sexual orientation and transgender identity or expression.

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<sup>35</sup> Sweden, Act 2017:1128 Changing the Discrimination Act, adopted 23.11.2017.

<sup>36</sup> Sweden, Act 2017:1081 Changing the Discrimination Act, adopted 16.11.2017. This act comes into effect on 01.05.2018.

<sup>37</sup> Sweden, Act 2017:282 Changing the Discrimination Act, adopted 13.04.2017.

<sup>38</sup> Sweden, Equal Opportunities Act (*Jämställdhetslagen*) (1991:433), adopted on 30.03.1991; Act on Measures against discrimination in working life on grounds of ethnicity, religion or other belief (*Lag om åtgärder mot etnisk diskriminering i arbetslivet*) (1999:130), adopted on 11.03.1999; Prohibition of Discrimination in Working Life of People with Disability Act (*Lag om förbud mot diskriminering i arbetslivet av personer med funktionshinder*) (1999:132), adopted on 11.03.1999; Act on a ban against discrimination in working life on grounds of sexual orientation (*Lag om förbud mot diskriminering i arbetslivet på grund av sexuell läggning*) (1999:133), adopted on 11.03.1999; Equal Treatment of Students at Universities Act (*Lag om likabehandling av studenter i högskolan*) (2001:1286), adopted on 20.12.2001; the 2003 Prohibition of Discrimination Act (*Lag om förbud mot diskriminering*) (2003:307), adopted on 05.06.2003.

<sup>39</sup> The two relevant sections are Chapter 16, Sections 8 (hate speech) and 9 (unlawful discrimination). The latest important changes involved adding the grounds of transgender identity or expression to Section 8 (Act 2018:1744) and Section 9 (Act 2018:540). These acts amended the Penal Code (1962:700).



It is seldom used today. One reason for this is that it may be preferable, due to the burden of proof rules and the issue of discrimination compensation, for victims to file civil complaints under the Discrimination Act as opposed to filing criminal complaints under Penal Code 16:9 (unlawful discrimination). However, the crime of unlawful agitation or hate-speech under Penal Code 16:8 (which covers the same grounds) can still have an important function concerning matters that do not fall under the Discrimination Act.

## 1 GENERAL LEGAL FRAMEWORK

Constitutional provisions on protection against discrimination and the promotion of equality

The Constitution of Sweden includes the following articles dealing with non-discrimination: the 1975 Instrument of Government, Chapter 1 Section 2, Chapter 2 Sections 12-13 and Chapter 12 Section 5. Chapter 2, Section 19 of the Instrument of Government is also important, as it incorporates the European Convention on Human Rights (ECHR) and its discrimination rules.

Chapter 1, Section 2 of the Instrument of Government contains generally formulated goals concerning equal opportunities and non-discrimination.<sup>40</sup> All the grounds of the directives are covered, but as these are only policy goals, they are not considered to be directly applicable in any sense.

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

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

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

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

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<sup>40</sup> Sweden, Instrument of Government (1975). Chapter 1, Section 2(5), sentence 2 states: 'The public institutions shall combat discrimination of persons on grounds of gender, colour, national or ethnic origin, linguistic or religious affiliation, functional disability, sexual orientation, age or other circumstance affecting the individual'.

## 2 THE DEFINITION OF DISCRIMINATION

### 2.1 Grounds of unlawful discrimination explicitly covered

The following grounds of discrimination are explicitly prohibited by national law: sex; transgender identity or expression; ethnicity; religion or other belief; disability; sexual orientation; and age.

#### 2.1.1 Definition of the grounds of unlawful discrimination within the directives

a) Racial or ethnic origin

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

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

There is case law that provides some clarity concerning the concepts of race or ethnic origin. One case in this area involved a landlord taking higher rent from refugees. The trial court, based on a restrictive view of the term 'ethnic origin', determined that refugees were not protected by the prohibition against ethnic discrimination – refugees were not an ethnicity. In 2010, the court of appeal reversed the judgment of the trial court.<sup>41</sup> The court held that the term ethnic origin had to be interpreted more broadly, given the intent of the act. This meant that refugees fell within the protection of the law, which also meant that the landlord's actions violated the law. Discrimination against refugees, foreigners, immigrants or any other mixed group defined as being 'non-Swedish' in the eyes of the discriminator can generally be regarded as ethnic discrimination. Since the concept of discrimination relates to the ground and not to the person, it is not necessary to determine whether or not the victim of discrimination actually belongs to a specific ethnic group.

Sweden has for a number of years been working towards the elimination of the word 'race' from Swedish law. According to the Government's assessment, neither Directive 2000/43 nor Directive 2000/78 requires the word 'race' to be used. Directive 2000/43 requires effective protection against race discrimination, which, according to the Government, is achieved under the Discrimination Act as currently written. The author of this report contends that this assessment is correct, in that it is likely that the Court of Justice of the European Union (CJEU) would come to the same conclusion. The directives require the establishment of certain minimum standards, but implementation differs according to national traditions and allows for some flexibility. The directives do not necessarily require specific words to be used in achieving those goals. However, in the author's opinion, there are certain policy and implementation risks involved, even if removing the word 'race' would not necessarily violate the directives. Due to a denial of race discrimination as a problem in Sweden, Swedish policymakers were slow to adopt modern legislation in this regard. Symbolic laws – at best – were adopted to change attitudes rather than behaviour. The removal of the word 'race' may in turn feed into the more general denial of racism as a Swedish problem and thus confuse judges, lawyers and others in implementing the Discrimination Act. As far as terminology related to discrimination is concerned,

<sup>41</sup> Göta Court of Appeal, judgment of 25.02.2010, T 1666-09 at <http://www.do.se/globalassets/diskrimineringsarenden/hovratt/dom-hovratt-skaret-fastighetsbolag-omed-20068982.pdf>.

policymakers tend to be sensitive to the interests of organisations representing discriminated groups. This relates to empowerment. However, there seems to have been little interest in the opinions of those affected by the term 'race', particularly Swedes with an African heritage. Furthermore, since policymakers seem to believe that such changes are an important step in the effective implementation of the Discrimination Act, this may in turn be a hindrance to the development of actual improvements in the law.

#### b) Religion and belief

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

There is no case law where it has been necessary to define religion or belief more deeply. For example, in the 2018 handshake case,<sup>42</sup> the Labour Court accepted the refusal to shake hands with persons of the opposite sex as a part of the complainant's religion without a detailed analysis of the religion at hand, referring to the case law of the European Court of Human Rights. This indicates that a deeper analysis of religious practices is not needed. However, that does not mean that such practices must necessarily be accepted by others, since the practice must be weighed against the interests of others, such as employers.

It is also possible that such cases raise the issue of multiple discrimination, for example, discrimination due to religion, ethnicity and/or sex. Although the author of this report does not know of any cases where the issues have been clearly defined, the Government bill for the Discrimination Act points out the complementary and overlapping nature of the grounds of ethnicity and religion:

'What can be perceived as a cultural or traditional behaviour or expression can generally be assumed to fall under the grounds of discrimination ethnic affiliation if it is not considered to be covered by the ground of religion or other belief. Together, the two grounds of discrimination cover a broad area and it can be assumed that in practice that it is of subordinate importance which of the discrimination grounds is referred to in e.g. a negotiation or before a court.'<sup>43</sup>

Therefore a court would not necessarily have to delve that deeply into whether the wearing of a headscarf, niqab or burqa is rooted in religion or ethnicity.

There are situations where the question of definition may be important. If the members of a small group, such as the Jehovah's Witnesses, hold a moral conviction (for example, that gambling is a sin), then it is connected to religion, even if most Christians believe otherwise. When protection for a practice is upheld only by a minority within a congregation, the delimitation of religious belief as opposed to individual philosophical and moral choices can be problematic. Nevertheless, it seems that courts will typically accept the claimant's statement that their religious belief is important to him or her in adopting the practice in question.<sup>44</sup>

#### c) Disability

According to Chapter 1, Section 5(4), disability means:

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<sup>42</sup> Labour Court, 2018 no. 51, *Equality Ombudsman v Almega/Semantix Interpreters*, judgment of 15-08-2018.

<sup>43</sup> Sweden, Government bill 2007/08:95, p. 122 (author's translation).

<sup>44</sup> See e.g. Svea Court of Appeal, case T 777-16, 22-03-2017, concerning religious views on gambling and Labour Court, 2018 no. 51 concerning a refusal to shake hands with a person of the opposite sex.

'Long-lasting 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'.<sup>45</sup>

The definition is thus stated in general terms, one requirement being that the limitation in functional capacity must be long lasting. For example, a person with a broken arm will not be covered by the law, since the disability caused is of a temporary nature. There is no threshold of 'severity', nor is there any reference to the ability to engage in 'normal life activities' or 'professional life', for that matter. The latter forms part of the assessment as regards a 'similar situation'. However, until there is clear case law on the point, it will be difficult to define the issues more closely.

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

No Swedish claimant has, to the author's knowledge, lost a case because his or her disability issues/medical problems were not regarded as a disability. The focus on the perception of the discriminator makes it quite immaterial whether or not the disability is as severe as the discriminator believes. For further details see section 2.1.3.a below.

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

The Swedish definition is therefore in accordance with the decision by the CJEU in joined cases *Ring and Skouboe Werge* (C-335/11 and C-337/11).<sup>46</sup> The claimant is normally not worse off, because in practice, the Swedish definition focuses on the discriminator's perception of functional limitations.

#### d) Age

Under Chapter 1, Section 5(6) of the Discrimination Act, age is defined as 'length of life to date'. This definition includes all ages and makes it clear that the young as well as the old are protected. There is no case law on the definition itself. All case law deals either with justifications provided by the discriminator or with whether two persons are in a similar

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<sup>45</sup> The Swedish Government's translation of the law into English, translates the term '*varaktig*' as permanent. However, that can lead to some confusion, as other translations of *varaktig* might be 'enduring' or 'lasting'. In this context, the author of this report considers 'long-lasting' to be a more accurate translation than 'permanent'.

<sup>46</sup> CJEU, Judgment of 11 April 2013, *Ring and Skouboe Werge*, Joined cases C-335/11 and C-337/11, EU:C:2013:222.

situation. In the author's opinion, Sweden is slowly coming to grips with the issue of age discrimination. This is a complex process, since age discrimination has long been such an accepted part of society in terms of laws, collective agreements and patterns of behaviour. In turn, this is the reason for the broader exceptions allowed by Swedish and EU law. However, one clear change seems to be that age discrimination is no longer a generally accepted defence to assertions of sex or ethnic discrimination. Prior to the adoption of the 2009 Discrimination Act, it was difficult to overcome an employer's assertion that an applicant was rejected because of their age (which was legal), and thus not their sex or ethnicity (which was illegal).

#### e) Sexual orientation

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

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

In 2006, the Supreme Court decided a case where a lesbian woman, her girlfriend and some other friends from work had been asked to leave a restaurant because the lesbian pair were kissing and hugging each other.<sup>47</sup> It was a 'he-said, she-said' case, with the restaurant manager claiming that they did not merely kiss and hug but were also involved in heavy petting (*hångla*). The appeal court and the Supreme Court placed the burden of proof upon the restaurant and they failed to prove anything more than kissing and hugging, which was permitted according to the restaurant. This case is considered to have provided important guidance concerning all grounds of discrimination with regard to the distribution of the burden of proof. At the same time, the concept of discrimination on the ground of sexual orientation has not been perceived as being particularly problematic in Sweden.

#### 2.1.2 Multiple discrimination

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

However, many cases can be said to involve multiple discrimination. There are two basic types of cases. One type can be exemplified by Labour Court case 2010 No 91.<sup>48</sup> The employer in this case was held to be liable for both age and sex discrimination. The discrimination was based on the failure to call a 62-year-old woman to a job interview, and the failure to hire her. Two younger, less qualified women were given the jobs. The employer claimed, among other things, that the woman was not suitable for the job, but failed to demonstrate this and thus failed to overcome a presumption of both age discrimination and sex discrimination concerning 1) being called in for an interview and age discrimination concerning 2) being given the job. The Labour Court stated that the combination of two types of discrimination committed by the same failure to act was not a reason to increase the level of the discrimination award. It was treated as a single infringement. At the same time, in the author's opinion, it is interesting that the compensation awarded was relatively large, based on the idea that the woman should have

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<sup>47</sup> Supreme Court (NJA 2006 p. 170): *Ombudsman Against Discrimination due to Sexual Orientation v Restaurang Fridhem Handelsbolag* (judgment of 28.03.2006).

<sup>48</sup> Labour Court, 2010 No 91, *Equality Ombudsman v State Employment Board* (Statens arbetsgivarverk) (judgment of 15.12.2010).

been given the job – although this is not so easy to determine, as she was never interviewed for the position. Although the issue was not discussed by the court, the final result seems to have required an intersectionality analysis.

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

The other type of multiple discrimination can be exemplified by Labour Court case 2011 No. 13.<sup>49</sup> The case regarded two different alleged instances of harassment, one involving ethnicity and the other involving sex. The rules on the burden of proof were applied to each of these two offences separately, and the claimant won. The compensation is higher when there are separate offences concerning the same individual, but the fact that one offence concerned ethnicity and the other concerned sex does not seem to have affected the combined level of compensation awarded by the Labour Court. The claimant would probably have received the same amount even if both offences had related to the same discrimination ground.

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

There is also no case law in which the issue has been directly addressed by the courts. Nevertheless, current case law is being used, by academics among others, as the basis for analysing the role of multiple discrimination and intersectionality. In the author's opinion, these analyses may lead to improved arguments in the courts in this field, which in turn could lead to pressure to establish case law or relevant legislation. This seems to have been part of the pattern developed in the US and Canada, where the issue of intersectionality was initially brought into focus through critical analyses of case law by academics.

### **2.1.3 Assumed and associated discrimination**

#### a) Discrimination by assumption

In Sweden, discrimination based on a perception of or an assumption about a person's characteristics is prohibited by national law.

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

The principles on mistaken assumption can cut both ways in Sweden. A mistaken assumption regarding a behaviour being caused by alcohol intoxication was a valid defence for a restaurant that had refused entry to a person with a disability. The personnel had concluded that the individual was drunk, when in fact the relevant behaviour (walking unevenly/slurred speech) was caused by a disability. The appeal court quoted the preparatory works on mistaken assumptions and did its best to apply the same principle both ways. The court basically concluded that there had to be a recognition by the discriminator that there was a disability issue in order to conclude that disability

<sup>49</sup> Labour Court, 2011 No. 13, *Equality Ombudsman v Helsingborgs stad* (judgement 16-02-2011). Available at <http://www.arbetsdomstolen.se/upload/pdf/2011/13-11.pdf>.

discrimination had occurred. The focus in Sweden is thus on what the discriminator knows, believes or mistakenly assumes about the claimant's abilities, not the abilities themselves.<sup>50</sup> At the same time a mistaken assumption concerning a person's disability led to a finding of discrimination in a case where a child was taken into custody due to assumptions relating to disability concerning the parents. Here, the key was the reliance by the municipality on norms concerning the lack of caretaking ability by persons with cognitive disabilities. There was a failure to examine the mother and the father as individuals.<sup>51</sup>

#### b) Discrimination by association

In Sweden, discrimination based on association with persons with particular characteristics is prohibited in national 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 may be associated with the ground of religion. This applies to disability as well. If a person is treated less favourably because he or she is the primary carer of a child with a disability, this treatment would be regarded as associated with the disability ground. Swedish law is thus in line with the reasoning established in *Coleman v. Attridge Law and Steve Law*.<sup>52</sup>

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

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

*'Direct Discrimination:* that someone<sup>53</sup> is disadvantaged by being treated less favourably than someone else is treated, has been treated or would have been treated in a comparable situation, if this disadvantaging is associated with sex, transgender identity or expression, ethnicity, religion or other belief, disability, sexual orientation or age'.

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

#### a) Justification for direct discrimination

The ban on direct discrimination is limited by the possibility of justification. However, the only legal justifications are the specific exceptions stipulated by the directives. These are discussed in chapter 4 of this report.

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<sup>50</sup> Svea Court of Appeal, case T 7752-08, *Equality Ombudsman v Sturehof* (judgment of 02.06.2009). Available at <http://www.do.se/globalassets/diskrimineringsarenden/hovratt/dom-hovratt-sturehof-ho-201318302.pdf>.

<sup>51</sup> Svea Court of Appeal, case T 5096, *Equality Ombudsman v Sigtuna Municipality* (judgment of 11.04.2014). Available at: <http://www.do.se/globalassets/diskrimineringsarenden/hovratt/dom-hovratt-sigtuna-kommun-anm-2011274.pdf>.

<sup>52</sup> The Svea Court of Appeal case T 1912-13, seems to confirm this. A mother was refused child insurance for a child because the child's hearing impairment was severe enough to entitle the mother to a care benefit for her. This was discrimination not only against the child but the mother as well. Both received a discrimination compensation award.

<sup>53</sup> If a group has been discriminated against, each person goes to court as an individual or makes an individual complaint with the Equality Ombudsman. It is easy to deal with many such cases together in a single process if many persons have been discriminated against in the same way by the same discriminator. A group of persons cannot be a discriminator. It is only the person (actual or legal) who is legally responsible for the activity that is regarded as a discriminator.



## 2.2.1 Situation testing

### a) Legal framework

In Sweden, situation testing is permitted in national law.

Due to the procedural rules on freedom of evidence, situation testing has been accepted by Swedish civil courts as evidence. The same principle applies in criminal proceedings as well.

The principle of freedom of evidence as a general rule is stated in Chapter 35, Section 1 of the Swedish Code of Judicial Procedure (1942:740).<sup>54</sup> Evidence must be assessed in accordance with the circumstances at issue. As a general rule, evidence that is relevant will be allowed. This principle also applies to illegally obtained evidence.<sup>55</sup> The fact that the law is silent on situation testing must, against this background, be interpreted as meaning that situation testing is clearly permitted, especially given the cases mentioned below.

### b) Practice

In Sweden, situation testing has been used on a few occasions by NGOs and victims of discrimination. Although not involved in the collection of such evidence, the DO has been willing to use the evidence when it is presented to the DO.

The former Ombudsman against Ethnic Discrimination was involved in several cases where situation testing was used by potential victims as a method to counteract discrimination and to contribute to the evidence. Situation testing was also recommended to the DO and civil society as a tool following the Government inquiry into structural discrimination.<sup>56</sup>

Situation testing has been accepted by the courts as evidence of discrimination, and the authorities can use public money to act as legal representatives<sup>57</sup> of claimants relying on evidence obtained by situation testing in the courts.<sup>58</sup> However, the authorities are reluctant to get involved in carrying out situation testing themselves as a means of obtaining evidence in individual cases. It is not forbidden, however, and authorities have not been required to refrain from doing this.

It is worth noting that although the Supreme Court upheld the lower court decisions concerning discrimination through the use of situation testing, the court also reduced the amount of damages due to the systematic nature of the testing in 2008.<sup>59</sup> The court was

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<sup>54</sup> The rules on evidence are also based on the 'principle of best possible evidence'. For instance, an affidavit is not allowed if the person could have been heard as a witness.

<sup>55</sup> In other words, it is possible for a criminal to be sent to prison on the basis of that illegally obtained evidence, while at the same time a police officer can be convicted for collecting evidence in an illegal manner.

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

<sup>57</sup> Swedish law allows the Equality Ombudsman (DO) to act as the formal claimant or party in civil cases. Among other things, this means that the DO takes on the risk of paying the winning party's legal costs if the case is lost.

<sup>58</sup> The Ombudsman Against Ethnic Discrimination represented the four claimants in the Escape case. Malmö District Court, judgment 03.05.2006, case T 3562-05. Skåne and Blekinge Appeal Court, judgment of 24.04.2007, case T 1358-06. Supreme Court, *Escape Bar and Restaurant v The Ombudsman Against Ethnic Discrimination* (case T-2224-07 judgment of 01.10.2008). NJA 2008, p. 915.

<sup>59</sup> Supreme Court, NJA 2008 p. 915: 'Mot det måste dock ställas risken för att allmänhetens stöd för lagstiftningen kan motverkas om den kommer att uppfattas som ett medel för någon enskild att genom ett planmässigt och systematiskt förfarande berika sig, en risk som blir särskilt påtaglig om ersättningen utgår med belopp som överstiger vad som i och för sig kan anses utgöra skälig kompensation för den förnedring som kränkningen fört med sig. Det finns vidare anledning att framhålla, att det på ett mer principiellt plan

concerned about eroding the public's confidence in the law if individuals were able to systematically exploit violations of the law in order to enrich themselves. The case concerned a group of law students who were tired of the inability of the public authorities to enforce either the 2003 civil law prohibition against discrimination or the criminal law prohibition against ethnic discrimination in nightclubs and restaurants. Thus they set out to document the occurrence of discrimination and litigate claims of ethnic discrimination through the use of situation testing.<sup>60</sup> With the Ombudsman against Ethnic Discrimination representing them they prevailed with the discrimination claims at the trial and appeal courts, which awarded damages of around EUR 1 500 (SEK 15 000) for each claimant. The Supreme Court, while accepting the evidence, nevertheless lowered the damages to EUR 500 (SEK 5 000) with each party bearing their own legal costs for all three judicial instances. The Supreme Court reasoned that the victims had expected the discrimination since they used situation testing, which meant that the damage to them was not as great as it would have been to claimants who did not anticipate such unlawful discrimination. The presumed intent of the Court was to discourage the use of situation testing and litigation to combat discrimination.

Situation testing is close to the idea of crime provocation, which is generally not allowed in Sweden. Authorities cannot ask a citizen to commit a crime they would otherwise not have committed. In the discrimination field, however, the discriminator is asked to do something legal – for instance allowing a person to eat at a restaurant. The documentation of the refusal creates evidence of discrimination. This is more in the realm of evidence provocation, which is accepted, although limitations may apply to authorities that do not apply to private persons.<sup>61</sup> The unclear legal situation regarding these limitations led the Ombudsman against Ethnic Discrimination to argue that explicit permission for the ombudsman to carry out situation testing under the Discrimination Act is necessary if the authorities are to use situation testing as a method of gathering evidence.<sup>62</sup>

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

It should be noted that, until 2005, when the above-mentioned inquiry was carried out, situation testing had for many years been banned as a research method for demonstrating the occurrence of discrimination – at least in practice.<sup>63</sup> However, situation testing is now accepted not just as a legal tool for proving discrimination in the courts but also as a research tool that clearly demonstrates the occurrence of discrimination.<sup>64</sup> Situation testing has been used in particular by researchers on ethnic discrimination in both the housing market and the labour market. However, it is not uncontroversial. In a survey commissioned by the Equality Ombudsman, it is stated that there has been so much research based on 'applications from fictive applicants' that there is question of whether it

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är olämpligt att någon planerat och avsiktligt kan göra förtjänst på annans av samhället önskade handlingar.' Author's translation: 'Against this however, the risk that the public's support for the legislation can be undermined must be taken into account, if such actions are perceived as a way for an individual to enrich themselves through this type of systematic process, a risk that becomes particularly evident if the compensation is paid in amounts exceeding what which in itself can be considered as reasonable compensation for the humiliation brought by the violation. Furthermore, there is reason to emphasize that it is inappropriate on a more principled level that a person can plan to and intentionally make a profit on another person societally undesirable acts'. Available at <https://lagen.nu/dom/nja/2008s915>.

<sup>60</sup> One of the students used these experiences as a basis for his master's thesis: Hamzeh, H. (2005), *Praktikprovning: Tre ljusa killar är ett sällskap – tre mörka killar ett gäng* (Situation testing: Three white guys are a party – three dark guys are a gang), Stockholm University, 2005.

<sup>61</sup> See Ombudsman Against Ethnic Discrimination (2005) *Discrimination Tests as Evidence*, (*Diskriminerings tester som bevismedel*) Dnr 419-2005, p. 2.

<sup>62</sup> Ombudsman Against Ethnic Discrimination (2005), *Discrimination Tests as Evidence*, Dnr. 419-2005.

<sup>63</sup> Lappalainen, P. (2005) SOU 2005:56, *Det blågula glashuset – strukturell diskriminering i Sverige*, (The Blue and Yellow Glass House – Structural Discrimination in Sweden), pp. 466-468.

<sup>64</sup> See for example Skedinger, P. and Carlsson, M. (2011), 'Reglering eller diskriminering – vad hindrar etablering?', *FORES Studie* 2011:4. Here it is pointed out that new research using situation testing in the recent past has clearly demonstrated that discrimination contributes to the employment gap between 'Swedes' and 'immigrants': <http://lnu.diva-portal.org/smash/get/diva2:801233/FULLTEXT01.pdf>.

is ethically acceptable to subject employers to more such research. Indeed, it is claimed that this has led to increased difficulties in obtaining funding for such research.<sup>65</sup>

At the same time, it is the author's assessment that the concern of funders and others may also reflect an interest in returning to a period when research using situation testing was in practice banned by the Government, or at least Government funders of research. Situation testing is effective, yet it was described as unethical for long periods as a research method in Sweden - at the same time that it was a tool used in research in much of Europe and North America, as well as by the ILO, to demonstrate the occurrence of discrimination. Other research methods made it easier to deny that this research actually showed the existence of discrimination (for example, the statistical differences in employment rates between 'Swedes' and 'immigrants' could be attributed to other non-discrimination factors, and interviews with immigrants concerning their experiences of discrimination related to 'their' feelings, rather than actual discrimination).<sup>66</sup>

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

'If the landlord does not answer your questions or if you suspect that you do not receive the correct treatment when seeking a rental apartment and that this is connected to a discrimination ground, you may ask one or more of your friends to apply for the same apartment. If the other person is offered a contract for the apartment and if you are in a similar situation to that person, there is reasonable ground to suspect discrimination. The Equality Ombudsman has won a case based on discrimination testing'.<sup>67</sup>

In 2014, the Equality Ombudsman reached a settlement with a petrol station that refused to rent out cars to three Roma persons. The state television company had set up the situation testing scenario as part of a programme on ethnic discrimination.<sup>68</sup>

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

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

#### **a) Prohibition and definition of indirect discrimination**

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

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

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<sup>65</sup> See, for example, Oxford Research (2013), *Forskningsöversikt om rekrytering i arbetslivet* (Overview of Research on Recruitment in Working Life), p. 38.

<sup>66</sup> See e.g. Banton, M. (1997), 'The ethics of practice-testing', *New Community* 23(3): pp. 413-420, July 1997; Knocke, W. (2000), 'Integration or Segregation? Immigrant Populations Facing the Labour Market in Sweden', *Economic and Industrial Democracy*, 1 August 2000, Volume 21, issue 3, pp. 361-380, 372-373; Rapport från Integrationsverkets workshop den 14-15 oktober 2004, *Tillämpningen av Situation testing - metodologi i analysen av arbetsmarknadsdiskriminering*, available at: <https://mkcentrum.se/wp-content/uploads/2019/05/Situation-Testing.pdf>; Lappalainen, P. (2005) Swedish Government White Paper SOU 2005:56, *Det blågula glashuset: strukturell diskriminering i Sverige* (The Blue and Yellow Glass House: Structural Discrimination in Sweden), from p. 577.

<sup>67</sup> Equality Ombudsman (2011), *Roads to Rights*, p. 34.

<sup>68</sup> Equality Ombudsman, ANM 2013/828-30 (Statoil AB).

*Indirect Discrimination:* whereby someone<sup>69</sup> 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’.

Concerning recent case law there are two important cases. In Labour Court case 2018 No. 42,<sup>70</sup> a disabled woman was excluded from being eligible to work for a temporary employment agency due to her registration as being 50 % disabled, which meant that she did not fit into the framework of the collective agreement with the union. According to the agreement, only persons who had a different primary occupation were eligible. Here it was interpreted as meaning that the claimant did not have a different primary occupation since she was 50 % disabled. The court ruled that this constituted indirect discrimination.

In Labour Court case 2018 No. 51<sup>71</sup> a woman had applied for a job as an interpreter. The recruitment process was terminated when the woman refused to shake hands with a male representative of the company due to religious reasons, but instead held her hand over her heart as a sign of respect. The court determined that the refusal to shake hands was a manifestation of her religion, and that the ECHR provided some protection for such manifestations. The defendant asserted that it had a handshake policy as an issue of neutrality for interpreters. Various facts were relevant. The work involved phone interpreting. Not shaking hands would have been accepted if the issue was fear of germs. The woman stated that she did not shake hands with men or women when she was in mixed company. Since she greeted everyone by holding her hand over her heart when she was in mixed company, the court reasoned that this should not be taken as a negative sign concerning anyone. On those facts the court determined that the company’s actions were not appropriate and necessary, thus constituting indirect discrimination, given the particular facts of the case. The key here was the idea of equal treatment.

#### b) Justification test for indirect discrimination

Guidance is given in the preparatory works to both the Discrimination Act and the previous acts. For instance, as regards the 1999 Act prohibiting discrimination in working life due to sexual orientation, the example given of presumed unlawful indirect discrimination is that of a childcare centre requiring prospective employees to have experience of raising biological children of their own. As regards disability, according to the former Disability Ombudsman, for example, requiring a driver’s licence can be a form of indirect discrimination. A licence is a necessary requirement for a job as a taxi driver, but does not have to be essential, for example, for a job as a journalist. The Government bill for the Discrimination Act uses language skills as an example when discussing the idea of a legitimate purpose and under what circumstances a criterion can be appropriate and necessary in order to achieve such a purpose.<sup>72</sup>

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.

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<sup>69</sup> If a group has been discriminated against, each person goes to court as an individual or makes an individual complaint with the Equality Ombudsman. It is easy to deal with many such cases together in a single process if many persons have been discriminated against in the same way by the same discriminator. A group of persons cannot be a discriminator. It is only the person (actual or legal) who is legally responsible for the activity that is regarded as a discriminator.

<sup>70</sup> Labour Court, 2018 No. 42 available at <http://www.arbetsdomstolen.se/upload/pdf/2018/42-18.pdf>.

<sup>71</sup> Labour Court, 2018 No. 51 available at <http://www.arbetsdomstolen.se/upload/pdf/2018/51-18.pdf>.

<sup>72</sup> Sweden, Government bill 2007/08:95, p. 491.

There are a number of cases relating to indirect discrimination. Section 6.3 of this report contains two examples concerning religion and the burden of proof. A further example illustrates the influence of relevant evidence from other countries.

One individual case showing a clear influence from another country is the *Karolinska Institutet* case.<sup>73</sup> A Muslim dental student was required to work with bare forearms due to a national regulation on hygiene. The court gave equal credibility to a British expert's opinion as to the hygienic acceptability of disposable forearm protection in the UK and the Swedish experts' opinion as to why there was a genuine hygiene concern and regulation in Sweden. Although the state established legitimate concerns, the state's expert also admitted that the British example showed that similar disposable protection had been used there, and no one had been able to show a relevant statistical increase in infection risk. Thus it was determined that the education provider had not overcome the shifted burden of proof, leading to a decision on indirect discrimination. It may be assumed that the case would have been lost without the testimony of the British expert.

A similar situation arose a year later, this time involving a Muslim dentist. Based on essentially the same evidence, and with a determination of equal credibility, the Labour Court shifted the burden of proof back to the complainant as the state had a wide margin of appreciation in such cases, leading to a determination that there was no indirect discrimination.<sup>74</sup>

### **2.3.1 Statistical evidence**

#### a) Legal framework

The entry into force of the GDPR (General Data Protection Regulation) on 26 May 2018 replaced Sweden's Personal Information Act (*Personuppgiftslagen*) (1998:204) containing rules on the right to register personal information in accordance with the previous EU directive. Article 9 of the GDPR dealing with personal data processing and exceptions is of particular relevance to discrimination issues. Although the prohibition in Article 9(1) relates to special categories of personal data, such as 'data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, and the processing of genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation', Article 9 also contains a variety of exceptions that should make it possible to nevertheless collect useful data without violating the regulation.

At the same time Sweden applied the previous rules based on an EU directive in an extremely restrictive manner, so it may take a while to determine the boundaries of the GDPR.

There is no special legislation that is intended to provide statistical data for discrimination cases.

Since indirect discrimination often requires a comparison of group impact, 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. In Sweden, statistical evidence is permitted by national law (given the freedom of evidence principle) and has been used in order to establish indirect sex discrimination.<sup>75</sup>

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<sup>73</sup> Stockholm District Court, case T 3905-15, *Equality Ombudsman v Swedish State through Karolinska institutet* (judgment of 16.11.2016).

<sup>74</sup> Labour Court, 2017 case No. 65, *Equality Ombudsman v The People's Dentists of Stockholm County* (judgment 20.12.2017).

<sup>75</sup> For example, statistics formed an important part of the Labour Court case 2005 No. 87. The court

As a general rule, information is not maintained concerning ethnicity, religion, sexual orientation or disability. On the other hand, the sex and the age of individuals are generally known.

For general statistics purposes the tax authorities maintain the population register (*folkbokföringsregistret*). This register contains information, *inter alia*, on the place of birth and nationality of a person, as well as the place of birth of their parents and the date of their taking up residence in Sweden. Religion and belief are not registered as such, but church membership may be registered with the tax authorities so that they can provide assistance in collecting church membership fees.<sup>76</sup> No information on disability or sexual orientation is included in the population register.

The general inquiry into living conditions undertaken by Sweden Statistics includes health information on impaired vision, hearing or mobility and severe mental or psychiatric problems. This information is relevant to the discrimination ground of disability.<sup>77</sup> Disability is linked to a person's health and is therefore considered to be sensitive information. The views of the courts on statistics can be somewhat unclear, nevertheless there seems to be some basic expectation concerning the production of statistics or at least some statistical analysis.<sup>78</sup>

In November 2012 the Equality Ombudsman, at the request of the Government, reported its observations to the Government concerning the role of statistics in relation to the work against discrimination.<sup>79</sup> The Ombudsman's report contained various important principles for future work. One was that nobody should be forced to provide sensitive information regarding themselves. Nobody should thus be forced to reveal their sexual orientation, religion etc. and if they do choose to reveal it, anonymity must be granted. A second important principle is that of self-categorisation. A person must be allowed to belong to the ethnicity, religion, sexual orientation etc. that he or she feels part of. There cannot be a state classification. A third principle is that the views of groups who distrust society<sup>80</sup>

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determined that a car manufacturer had violated the prohibition against indirect discrimination by imposing certain height requirements for the job, which meant that, statistically, a large number of women would be automatically ineligible for the job.

<sup>76</sup> The Swedish State provides assistance to some churches by having the tax authorities assist them by collecting 'church fees'. Today, this is not a church tax as it was prior to the separation between the Swedish state and the Swedish church, but an income-related membership fee. If a church wants this assistance, its members must be registered with the tax authority. Currently there are 18 churches that receive this assistance, of which the largest is the former Swedish state church. The list of other churches can be seen at: <https://www.skatteverket.se/privat/skatter/arbeteochinkomst/skattetabeller/avgifttillandratrossamfund.4.1.8e1b10334ebe8bc80005629.html>.

<sup>77</sup> Equality Ombudsman (2012), *Statistikens roll i arbetet mot diskriminering – En fråga om strategi och trovärdighet* (The role of statistics in the work against discrimination – A question of strategy and credibility), p. 9, available at: <https://www.do.se/globalassets/publikationer/rapport-statistikens-roll-arbetet-mot-diskriminering2.pdf>.

<sup>78</sup> See, for example, Stockholm District Court, judgment 28/01-2013, *Equality Ombudsman v If Insurances*. The company refused to insure children if the parent received a form of child care benefit reserved for disabled or long-term sick children. This could not be direct discrimination, as the group of children consisted of sick but not necessarily disabled children. It was not indirect discrimination either, as the Ombudsman had not shown what proportion of children receiving the benefit were disabled; simply asserting that disabled children were typically disadvantaged by the rule that was applied was not enough. It is important to note that the appeal court held that there was direct discrimination based on the idea that it was enough to show that there was a direct connection (*samband med*) to two different groups of children – those with disabilities and those with illnesses. This was enough to constitute direct discrimination, since an individual analysis had not been made concerning access to insurance. See Svea Appeal Court 08.10.2013 case T 1912-13, at: <http://www.do.se/lag-och-ratt/diskrimineringsarenden/if-skadeforsakring-ab/>.

<sup>79</sup> Equality Ombudsman (2012), *Statistikens roll i arbetet mot diskriminering – En fråga om strategi och trovärdighet* (The role of statistics in the work against discrimination – A question of strategy and credibility).

<sup>80</sup> Representatives of some groups, including the Roma, are worried that research may be used to stigmatise the group further. For historical reasons, even in the recent past, these groups have been highly suspicious of the uses that such statistics can or will be put to. There are big differences regarding the level of trust between the groups and the authorities, which may be relevant. See Equality Ombudsman (2012),

must be taken into account in such a manner as to build up trust in the research. One approach can be to make sure the research is done by people such groups can trust.

#### b) Practice

In Sweden, statistical evidence, when available and relevant, can in practice be used to establish indirect discrimination. However, to the knowledge of the author, there is no case law other than in relation to sex discrimination using statistics concerning groups that are discriminated against. As regards sex discrimination, statistics have first and foremost been used in cases concerning equal pay, but also employment to some extent. The most well known case involved height requirements imposed by a car manufacturer.<sup>81</sup> Even in these cases, there was no real legal dispute regarding the use of statistics as such.

### 2.4 Harassment (Article 2(3))

#### a) Prohibition and definition of harassment

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

In Sweden, harassment explicitly constitutes a form of discrimination.

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

*'Harassment:*<sup>82</sup> conduct that violates a person's<sup>83</sup> dignity and that is associated with one of the grounds of discrimination, a certain sex, transgender identity or expression, a certain ethnicity, a certain religion or other belief, a certain disability, a certain sexual orientation or a certain age'.

The material scope is thus wide. In general, all six forms of discrimination apply in all areas. There is no area where harassment is exempted.

#### b) Scope of liability for harassment

In Sweden, where harassment is perpetrated by an employee, the employee is almost never liable<sup>84</sup> and the employer is liable if the harasser was in a managerial position or if the employer was informed about the harassment and failed to investigate and prevent it.

In working life, the prohibition applies to the employer in the employment context. The employer may be a natural or a legal person. Under Chapter 2, Section 1 of the Discrimination Act, a person who has the right to make decisions on the employer's behalf

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*Statistikens roll i arbetet mot diskriminering*, p. 93ff. Trust is at the centre of the Equality Ombudsman's preliminary report.

<sup>81</sup> Statistics formed an important part of the Labour Court case 2005 No. 87. The court determined that a car manufacturer had violated the prohibition against indirect discrimination by imposing certain height requirements for the job, which meant that, statistically, a large number of women would be automatically ineligible for the job.

<sup>82</sup> Sexual harassment, an additional form of harassment, is found in Chapter 1, Section 4(5). Sexual harassment is harassment connected to sexual desire, and can happen between persons of the same sex as well as between persons of the opposite sex. In Sweden this is so uncontroversial that it would have been very strange to mention it in the law. There is at least one same-sex harassment case in the courts that the author knows of. For reasons of anonymity the author refers here only to the Equality Ombudsman's case number ANM 2015/2431.

<sup>83</sup> If a group has been discriminated against, each person goes to court as an individual or makes an individual complaint with the Equality Ombudsman. It is easy to deal with many such cases together in a single process if many persons have been discriminated against (harassed) in the same way by the same discriminator. A group of persons cannot be a discriminator. It is only the person (actual or legal) who is legally responsible for the activity that is regarded as a discriminator.

<sup>84</sup> Harassment might under some circumstances fall under a section in Chapter 5 of the Penal Code (defamation etc.).



in matters concerning the employee shall be equated with the employer. An employer can thus only be made responsible for employees who are given the authority to represent the employer towards other employees – i.e. management at different levels. A fellow worker lacks such authorisation concerning their fellow workers; thus, an individual employee cannot sue another employee for harassment under the Discrimination Act.

Nevertheless, there is some protection concerning harassment between employees. According to Chapter 2, Section 3 of the Discrimination Act:

'If an employer becomes aware that an employee considers that he or she has been subjected in connection with work to harassment or sexual harassment by someone performing work or carrying out a traineeship at the employer's establishment, the employer is obliged to investigate the circumstances surrounding the alleged harassment and where appropriate take the measures that can reasonably be demanded to prevent harassment in the future.'

This obligation also applies with respect to a person carrying out a traineeship or performing work as temporary or borrowed labour.

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. This indicates that this law does not apply to harassment by clients. However, it is possible that this situation will be covered by the various rules related to an employer's responsibility for the work environment, which includes responsibility for the psycho-social work environment (1977 Work Environment Act).

## **2.5 Instructions to discriminate (Article 2(4))**

### a) Prohibition of instructions to discriminate

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

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

*'Instructions to discriminate:* orders or instructions to discriminate against someone<sup>85</sup> in a manner referred to in points 1–5 that are given to someone who is in a subordinate or dependent position relative to the person who gives the orders or instructions or to someone who has committed herself or himself to performing an assignment for that person'.

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

### a) Scope of liability for instructions to discriminate

In Sweden, the person giving the instructions is liable for issuing the instruction to discriminate if, in addition to there being a subordinate, a dependency or an assignment relationship, a disadvantageous effect has occurred in regard to one or more persons. If such an effect does not occur, then the instruction does not violate the Discrimination Act.

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<sup>85</sup> If a group has been discriminated against, each person goes to court as an individual or makes an individual complaint with the Equality Ombudsman. It is easy to deal with many such cases together in a single process if many persons have been discriminated against in the same way by the same discriminator. A group of persons cannot be a discriminator. It is only the person (actual or legal) who is legally responsible for the activity that is regarded as a discriminator.



Basically, this means that the person receiving the instruction must have acted in accordance with the instruction. There is one exception indicated in the legislative materials. If the instruction points out a specific person (or several specific persons) as the target of discrimination, that person has had his rights violated (*blivit kränkt*), and there is thus a violation of the prohibition against discrimination. This can occur if, for example, gossip develops due to the instruction, even if the instruction was never carried out.<sup>86</sup>

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

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

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

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

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

In Sweden, the duty on employers to provide reasonable accommodation for people with disabilities is included in the law. It is defined as the concept of 'inadequate accessibility'.<sup>87</sup>

Inadequate accessibility has, from 1 January 2015, become a form of discrimination in the Discrimination Act (Chapter 1, Section 4(3)), and it applies in most of the areas covered by the act.<sup>88</sup> Before 2015 – when 'reasonable accommodation' was the term used – a lack of reasonable accommodation could result in direct discrimination, because the comparable situation should be assessed as if the worker or student had been accommodated.

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

It is defined as follows:

'Inadequate accessibility':<sup>89</sup> that a person with disability is disadvantaged through a failure to take measures for accessibility to enable the person to come into a situation comparable with that of persons without this disability where such measures are reasonable on the basis of accessibility requirements in laws and other statutes, and with consideration to:

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<sup>86</sup> Sweden, Government bill 2007/08, pp. 494-495.

<sup>87</sup> 'Inadequate accessibility' is the term used in the unofficial translation of the Discrimination Act. See: <http://www.government.se/information-material/2015/09/discrimination-act-2008567/>.

<sup>88</sup> Act (2014:958) on changing the Discrimination Act (2008:567), adopted on 08.07.2014. Government bill 2013/14:198. Even prior to 2015, a failure by an employer (and in limited cases education providers) to provide reasonable accommodation could lead to a finding of discrimination. The main purpose of the inadequate accessibility concept was to expand the duty of reasonable accommodation to others with the power to prevent disability discrimination, such as providers of goods and services.

<sup>89</sup> The author refers to the Government's unofficial translation of the Discrimination Act, available at: [https://www.government.se/4a788f/contentassets/6732121a2cb54ee3b21da9c628b6bdc7/oversattning-diskrimineringslagen\\_eng.pdf](https://www.government.se/4a788f/contentassets/6732121a2cb54ee3b21da9c628b6bdc7/oversattning-diskrimineringslagen_eng.pdf).

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

This change is of no practical importance in the field of employment as – according to the preparatory works – the old legal praxis remains unchanged with regard to accommodation measures in employment. The protection is, however, extended to cover trainees in basic and secondary education.<sup>90</sup>

#### b) Practice and case law

It is not really possible to specify what accommodation is to be classified as ‘reasonable support and accommodation measures’ in accordance with Swedish law, since the case law is limited. Nor is it possible to specify what would be recognised as a disproportionate burden and thus be seen as going beyond what is reasonable with regard to support and adaptation measures.<sup>91</sup> The following accommodation measures were mentioned in the legislative materials accompanying the Discrimination Act as examples of requirements of measures to be taken an employer: improvements related to physical accessibility, the acquisition of technical support, and changes in work tasks, time schedules or working methods.<sup>92</sup>

The reasonableness of requiring measures to be undertaken can vary depending on the employer. This determination must be made from case to case, depending on such factors as the employer’s ability to bear the costs, the ability to undertake a measure, the problems caused for the employer by the measure and the expected length of the employment. According to the former Disability Ombudsman, the mere possibility of obtaining a subsidy will not be taken into account in assessing reasonableness. This can be taken into account, however, if it becomes apparent during the recruitment process that a subsidy will be received.<sup>93</sup>

General legislation outside the field of discrimination is important here, especially the 1977 Working Environment Act and the employer’s duty to undertake ‘rehabilitation measures’<sup>94</sup> regarding those who are already employed, in combination with the 1982 Employment Protection Act, which imposes a duty of fairly far-reaching accommodation.<sup>95</sup> These duties are sometimes more far reaching than those of the Discrimination Act. However, these far-reaching obligations apply only if the worker has a good chance of returning to work for the employer in question.

One may conclude from case 2013 No. 78 that the Labour Court is reluctant to ask the employer to permanently<sup>96</sup> change a fellow worker’s tasks in way that makes his or her work worse in order to provide an accommodation for the sake of the work of a person with a disability. The case concerned a bus driver who – due to a stroke – could not drive

<sup>90</sup> Sweden, Government bill 2013/14:198, pp. 74 and 115.

<sup>91</sup> A departmental inquiry (DS 2010:20) which suggested changing the wording of Chapter 1 Section 4 of the Discrimination Act and creating a non-exhaustive list of six factors that are relevant when assessing the concept of reasonable accommodation (p. 27).

<sup>92</sup> Sweden, Government bill 2007/08:95 p. 148.

<sup>93</sup> Swedish employers have extensive managerial rights and cannot be forced to seek subsidies.

<sup>94</sup> The goal of rehabilitation is the employee’s return to the workplace or the provision of support for an individual in maintaining his position in the workplace. Rehabilitation in relation to working life is further regulated by the Social Security Code (*Socialförsäkringsbalk* 2010:110), adopted on 04.03.2010.

<sup>95</sup> See also, for instance, Inghammar (2001), ‘Discrimination of People with Disabilities. Normative Aspects of Disability and Work in a Swedish, English and EC Context’, in: Numhauser-Henning (ed.), *Legal Perspectives on Equal Treatment and Non-Discrimination*, Kluwer Law International, The Hague.

<sup>96</sup> During the period when it was uncertain whether or not the bus driver would become healthy enough to drive at peak hours, the employer worked hard to help the driver with job training, for instance allowing him to drive buses with a reserve driver present in the bus.

during peak hours, early mornings and late evenings. Creating such a schedule for another worker could not be required of the employer, and the disabled worker was dismissed.<sup>97</sup>

In a case from 2017, the Labour Court found that there was no discrimination when a university refused to hire a lecturer who was deaf. The Equality Ombudsman and the university agreed that an interpreter between sign language and spoken language was needed. The cost to the employer was disputed with regard to, *inter alia*, how much could be financed with employment policy allowances. The Labour Court started by assessing the case as if the Equality Ombudsman had done the correct cost assessment of SEK 520 000 (approximately EUR 49 000) per year as a net cost for the education provider. That cost was considered excessive (unreasonable), and the Ombudsman lost the case.<sup>98</sup>

#### c) Definition of disability and non-discrimination protection

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

‘Long-lasting 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 limitations in functional capacity must be long lasting. For more information, see section 2.1.1.c above.

The definition of a disability for the purposes of claiming reasonable accommodation is not different from the one for claiming protection from non-discrimination in general.

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

In Sweden, failure to meet the duty of reasonable accommodation for people with disabilities does count as discrimination, because it amounts to inadequate accessibility for an individual, which is a separate form of discrimination – and the third in a list of six forms of discrimination under the Discrimination Act (see section 2.6.a above).

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

Outside the labour market, the prohibition of this form of discrimination is complementary, but subsidiary to other legislation that provides for accessibility, such as building regulations, and extends a duty of reasonable accommodation to, for example, providers of goods and services. The changes to the act (the introduction in 2015 of new legal demands exemplified in the preparatory works),<sup>99</sup> are such that the relevant actions were probably undertaken even where there was no legal duty to do so. Before 2015, a restaurant could refuse to have a member of staff read the menu to a blind guest because

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<sup>97</sup> Labour Court 2013 No. 78, *Equality Ombudsman v Veolia and the Swedish Bus and Coach Federation* (judgment of 23.10.2013). See: <http://www.arbetsdomstolen.se/upload/pdf/2013/78-13.pdf>.

<sup>98</sup> Labour Court 2017 No. 51, *Equality Ombudsman v Södertörn University* (judgment 11.10.2017). There was thus no need for the Labour Court to assess whether or not the true cost was higher, as the university claimed.

<sup>99</sup> On the Equality Ombudsman home page, many examples are given where there is no express legal duty elsewhere, but where an obligation nevertheless may exist under the new rules of inadequate accessibility under the Discrimination Act (<http://www.do.se/om-diskriminering/vad-ar-diskriminering/bristande-tillganglighet/#1>). The first of these examples is that a customer may ask to have the menu read to him or her at a restaurant. The second concerns assistance in picking and packing groceries in a grocery store. The Equality Ombudsman has taken these two examples from Government bill 2013/14:198, p. 65.

a fully sighted guest did not have this right. However, in acting this way, the management would have been likely to offend not only the blind guest but also the majority of sighted people witnessing the refusal.

The difference between the restaurant example and the school example (below under section 2.6.e) is that the School Act has for a long time required all schools to make reasonable accommodations for pupils with disabilities, while there were no such duties for restaurants. Therefore, the new form of discrimination creates new duties for certain entities, such as restaurants, but not for schools.

The proportionality test is embedded in the definition of inadequate accessibility/lack of reasonable accommodation (see section 2.6.a above). Given the examples in the preparatory works, the room in which to apply this test is quite limited when there is no special legislation to rely on.

If there is a determination that there has been a failure to meet the duty of reasonable accommodation, the principal sanctions are awards of discrimination compensation and the ability of the court to declare contract clauses and certain actions, such as dismissals, null and void in certain situations. What the duty will mean concerning the types of reasonable accommodation that can be demanded in various situations will depend on the development of case law.

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

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

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

Since 2015, there has been a duty to provide reasonable accommodation for people with disabilities in most of the areas where the Discrimination Act applies. This duty is contained within the prohibition of the form of discrimination known as 'inadequate accessibility'.<sup>100</sup> The areas covered are working life, education, labour market policy activities and employment services not under public contract, starting or running a business and professional recognition, membership of certain organisations, services, meetings or public events, health and medical care and social services, the social insurance system, unemployment insurance and financial aid for studies, national military service and civilian service, and public employment.

Before 2015, the prohibition of discrimination by education providers applied when, by taking 'reasonable measures regarding the accessibility and usability of the premises, they can see to it that a person with a disability' is put in a comparable situation to people

<sup>100</sup> Sweden, Act 2014 (958) on changing the Discrimination Act (2008:567), adopted on 08.07.2014; Government bill 2013/14:198. According to Chapter 2 Section 12 c, the prohibition of discrimination in the form of a lack of reasonable accommodation (inadequate accessibility) does not apply to housing, private persons offering services or goods to the general population or if the measure in question concerns goods and services and the buildings where they are offered and the claimant seeks actions that go beyond what was required when the building was made. There was also an exception for employers with fewer than 10 employees that was repealed as of 1 May 2018, Government bill 2016/17:220, an expanded protection against discrimination in the form of inadequate accessibility.

without such a disability.<sup>101</sup> This duty applied to higher education only. Today's rules on inadequate accessibility apply throughout the education sector.

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

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

There is still little case law on the new rules on inadequate accessibility. However, as they rely heavily on laws and other forms of legislation to provide the accommodation level that can be required,<sup>102</sup> the biggest change is probably that a discrimination award as a remedy becomes possible, which is valuable for the claimant, especially if civil damages were not possible before. Many public law regulations have conditional fines that are payable to the state as the main sanction – i.e. a court order linked to a financial penalty if not followed.

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

In a situation such as that of schools, where there is a clear legal duty to provide accommodation through administrative law, the Discrimination Act still helps by providing potential sanctions (discrimination compensation) that may be more effective than those in other laws and regulations, which often only provide for the imposition of conditional fines by a Government authority.<sup>103</sup> The concept of inadequate accessibility is – in those situations – related to accommodation required by other legislation.<sup>104</sup>

Inadequate accessibility outside working life and its interplay with other regulations was examined for the first time in a 2017 case concerning a pupil who used a wheelchair and

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<sup>101</sup> Sweden, Discrimination Act (*Diskrimineringslagen* 2008:567, adopted on 05.06.2008), Chapter 2, Section 5.

<sup>102</sup> With regard to costs within the different sectors, the Government repeatedly states that the costs are small because new requirements are not being introduced. See Sweden, Government bill 2013/14:198, Chapter 13.

<sup>103</sup> In December 2017 the Equality Ombudsman filed a lawsuit against a school for trying to convince the parents of an autistic child that he would be better off in a special school. The question of whether or not he would be better off depended partly on what accommodation could be provided by the ordinary school. In the view of the Equality Ombudsman, not providing a clear promise of necessary support amounts to discrimination in the form of a lack of reasonable accommodation. The Equality Ombudsman asked for a discrimination award of SEK 150 000 (approximately EUR 16 500) for the child, and SEK 50 000 (approximately EUR 5 500) for each parent. A large part of this case is about the school's duties under the School Act. Equality Ombudsman, case ANM 2017/1261.

<sup>104</sup> For more information, see Skaraborg County District Court, 2017-05-24, *Equality Ombudsman v Vara Municipality*, available on the Ombudsman's website at: <http://www.do.se/globalassets/diskrimineringsarenden/tingsratt/dom-tingratten-skola-anm-2016-9402.pdf>.

who had for three years attended a school with inadequate access ramps. In particular, he was required to use ramps that were steep or without railings. On two occasions, his wheelchair tipped over as a consequence. The school and the municipality were aware of these issues but failed to act appropriately. The district court held that this was discrimination in the form of inadequate accessibility, resulting in an award to the pupil of approximately EUR 2 800 (SEK 30 000) from the municipality. Due to the gravity of the circumstances, the Equality Ombudsman appealed the case in order to obtain a higher discrimination compensation award. On 15 May 2018, Göta Appeal Court increased the award to EUR 7 000 (SEK 75 000).<sup>105</sup>

It should be pointed out that the idea was never to create a definition of inadequate accessibility that could be used to impose high costs on service providers when accommodation is not required by other legislation. This can be seen in the wording of the act as well as in the preparatory works. Nevertheless, the act does impose new accommodation duties.<sup>106</sup>

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

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

The Discrimination Act contains provisions in Chapter 3, Sections 1-7 requiring employers to undertake active measures to counteract discrimination and promote equal rights and opportunities in relation to the seven grounds protected under anti-discrimination law. This active duty has the character of public law in that enforcement is primarily left up to a government body, the Equality Ombudsman, even if unions can play a subsidiary role.

The new rules in Chapter 3 of the Discrimination Act, which entered into force in 2017, contain few material requirements, and no material requirement that can be said to relate to reasonable accommodation.<sup>107</sup>

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

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

It could be said that the wearing of the niqab in schools raises the issue of a form of reasonable accommodation.<sup>108</sup> In some cases, schools have asked a person to remove their niqab. Such demands (not allowing a partial or full face covering in class) formally apply to everyone, but particularly affect certain Muslims. This may involve indirect

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<sup>105</sup> Göta Appeal Court, 15.05.2018, *Equality Ombudsman v Vara Municipality*, Case T 1773-17.

<http://www.do.se/globalassets/diskrimineringsarenden/hovratt/dom-hovratt-kommun-anm2016940.pdf>.

<sup>106</sup> This follows from a literal interpretation of the definition in Chapter 1 Section 4(3) of the Discrimination Act (*Diskrimineringslagen* 2008:567, adopted on 05.06.2008). If there is no legislation stipulating a duty to take on a certain cost, this weighs heavily in favour of the service provider. On the Equality Ombudsman's home page, many examples are given where there is no express legal duty elsewhere, but where an obligation nevertheless may exist under the new rules of inadequate accessibility under the Discrimination Act (<http://www.do.se/om-diskriminering/vad-ar-diskriminering/bristande-tillganglighet/#1>). The first of these is that a customer may ask to have the menu read to him or her at a restaurant. The second concerns assistance in picking and packing groceries in a grocery store. The Equality Ombudsman has taken these two examples from Government bill 2013/14:198, p. 65.

<sup>107</sup> The new rules emphasise the work process and give considerable freedom to employers to choose which areas shall be given priority. Therefore, the rules in this chapter are not relevant with regard to reasonable accommodation.

<sup>108</sup> Equality Ombudsman, Case 2009/103.

discrimination, depending on the proportionality or 'appropriate and necessary' test. A relevant question is whether the legitimate purpose could have been solved by other means. Potentially, reasonable accommodation is an underlying element in assessing various cases of indirect discrimination.<sup>109</sup>

In the 2017 midwife case decided by the Labour Court,<sup>110</sup> the applicant was essentially seeking a reasonable accommodation from the employer, meaning that she would not have to take part in abortions due to her religious beliefs. Applying a proportionality test, the court found that the demands made by the employer were appropriate and necessary. Thus, there was no indirect discrimination.

A somewhat different situation featured in a 2017 appeal court case,<sup>111</sup> where a Jehovah's witness in a public unemployment programme who was receiving an activity grant was asked to apply for a job at the Swedish National Lottery and Gambling Monopoly. His job would have involved selling companies packages of lottery tickets with the customer's logo on it so that they could give them out to employees or customers or use them for other promotional purposes. His job would thus not involve selling tickets to individuals. Given his religious convictions against gambling, he refused to go to the interview. He thus lost his place in the programme, including the activity grant. The court concluded that elements of indirect discrimination were present, and that the actions of the Government were disproportionate in relation to the negative consequences for the complainant. The state, given its evidence, failed to overcome the presumption of indirect discrimination.<sup>112</sup>

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

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<sup>109</sup> Equality Ombudsman, Case 2009/103 involved a school where these circumstances applied. In the end, the Ombudsman decided not to pursue the case because the school found alternative solutions, and allowed the woman to wear her niqab if such a solution did not work, for instance if the men could not be seated behind her.

<sup>110</sup> See section 12.2 of this report. Labour Court, 12.04.2017, *E.G. v Jönköping County*, Case 23/2017, available at: <http://www.arbetsdomstolen.se/upload/pdf/2017/23-17.pdf>.

<sup>111</sup> See section 12.2 of this report. Svea Court of Appeal, 22.03.2017, *Swedish State Through the National Employment Agency v Equality Ombudsman*, Case T 777-16, available at: <http://www.do.se/globalassets/diskrimineringsarenden/hovratt/dom-hovratt-arbetsformedlingen-anm-2014-1037.pdf>.

<sup>112</sup> The two cases concerning indirect discrimination related to dentists and the requirement of bare arms are other cases where the proportionality test can be said to play a role. See section 2.3 above. Stockholm District Court, case T 3905-15, *Equality Ombudsman v The Swedish State through Karolinska institutet* (judgment of 16.11.2016) and Labour Court, 2017 No. 65, *Equality Ombudsman v Public Dentists of Stockholm County* (judgment of 20.12.2017).



### 3 PERSONAL AND MATERIAL SCOPE

#### 3.1 Personal scope

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

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

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

###### a) Protection against discrimination

In Sweden, the personal scope of anti-discrimination law covers all natural persons, but does not cover legal persons for the purpose of protection against discrimination. This does not follow from a specific section. Some Sections of Chapter 2 of the Discrimination Act contain wording such as 'the jobseeker', 'the child, pupil or student' and so on, where it is obvious that a legal person cannot fall under the protected category. In other cases where the wording is unclear, there is a general statement in the preparatory works that legal persons are not protected.<sup>113</sup>

The Discrimination Act thus generally protects natural persons.<sup>114</sup> Nevertheless, as regards the act's applicability to working life, the general concept of 'employee' is a compulsory concept, which is not for the parties concerned to decide upon. Within this concept it is perfectly possible for the Labour Court, in the last instance, to look beyond or ignore the fact that a contract may be agreed between the employer and a legal entity run by the 'employee' alone.

The former four Ombudsmen against discrimination have unanimously criticised the fact that no explicit protection against discrimination is provided for legal persons, something that they concluded is required by the directive.<sup>115</sup> In 2006, the Discrimination Inquiry Commission proposed a protection for legal persons in a number of (but not all) areas covered by non-discrimination legislation.<sup>116</sup> However, legal persons still have no explicit protection – which is potentially a problem in relation to Directive 2000/43.

###### b) Liability for discrimination

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

In one interesting example, in Labour Court case 2007 No. 45, the employee who sent a discriminatory email to a job applicant was not authorised to make decisions regarding the job application of the Iranian job applicant concerned.<sup>117</sup> The employee did not represent

<sup>113</sup> Sweden, Government bill 2007/08:95, p. 91.

<sup>114</sup> Sweden, Government bill 2007/08:95, p. 90.

<sup>115</sup> The Ombudsman against Discrimination due to Sexual Orientation, Hans Ytterberg, argues the following: 'First of all, we have pointed to the fact that Art. 3(1) of the Directive provides that the Directive shall apply to *all* persons and that recital 12 states that *any* direct or indirect discrimination as regards the areas covered by the Directive should be prohibited throughout the Community. Furthermore, membership in employers' associations (which is one area explicitly covered by the Directive) is almost exclusively relevant to legal persons, at least in Sweden. It would therefore make little sense to prohibit discrimination with respect to such membership but at the same time exclude legal persons from that protection'.

<sup>116</sup> Swedish Government white paper SOU 2006:22, *En sammanhållen diskrimineringslagstiftning*, (A Cohesive Discrimination Legislation) p. 332ff. Available at <https://www.regeringen.se/rattsliga-dokument/statens-offentliga-utredningar/2006/02/sou-200622/>.

<sup>117</sup> Labour Court, 2007 No. 45 *Ombudsman Against Ethnic Discrimination v Laika film & amp* (Judgment of



the employer on this issue, thus the email that was sent was outside the scope of their employment. The court therefore held that there was no violation of the Discrimination Act for which the employer was liable. It should be pointed out that the employer never argued or demonstrated that the lack of authorisation was known about or should have been known about by the Iranian applicant. This restriction on the vicarious liability of employers limits the scope of the prohibition on discrimination in a way that could be problematic in relation to EU law. In this case, in the author's opinion, there is a question of whether even Swedish law was applied properly.

Labour Court case 2011 No. 19<sup>118</sup> is another example of a case where there was a question as to the extent of an employer's liability for employees or others who are said to be acting on behalf of their employer. Here, a trainee applicant participated in an interview with S.F., an independent contractor in a hair salon. The issue was whether S.F. represented herself or C.N., the beauty salon employer. The interview by S.F. and C.N.'s subsequent refusal to offer a trainee position were asserted to be discriminatory due to, among other things, comments about the applicant's headscarf during the interview. The court did not find that the applicant, acting through the DO, had shown that S.F. was acting on behalf of C.N. as the potential employer of the trainee. Thus, the applicant lost the case based on legal reasoning regarding which employees or other persons an employer is responsible for.

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

#### a) Protection against discrimination

In Sweden, the personal scope of national anti-discrimination law (the Discrimination Act) does not cover the private and public sectors, including public bodies. The protection does not extend to legal persons. However, in general, natural persons in both the private and the public sectors are covered by the protection against discrimination.

#### b) Liability for discrimination

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

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

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

## **3.2 Material scope**

### **3.2.1 Employment, self-employment and occupation**

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16.05.2007) <http://www.arbetsdomstolen.se/upload/pdf/45-07.pdf>.

<sup>118</sup> Labour Court, 2011 No. 19, *Equality Ombudsman v C.N. and her private business (enskild firma) Bright Hair and Beauty Salon and Café Next Door Unlimited Partnership*, (judgment of 23.03.2011) <http://www.arbetsdomstolen.se/upload/pdf/2011/19-11.pdf>.

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

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

1. The principle of vicarious liability in relation to discrimination law is restricted by case law when employees act outside their authority to an extent that is problematic. Furthermore, the legal concept of employer may be too narrow, as the employer is regarded as the legal person itself or the natural person who as a representative of this legal person makes decisions regarding the employees. The employer is thus directly responsible only when an employee discriminates against another employee *and* the latter is subordinate to or dependent upon the former.<sup>119</sup>
2. Discrimination and harassment by fellow workers or third parties is not directly prohibited.
3. The protection against discrimination or victimisation does not fully cover self-employed persons (see below section 3.2.2 – two or more self-employed workers working together are not protected from discrimination by one other).<sup>120</sup>
4. Discrimination against legal persons is not prohibited in working life.

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

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

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

However, no prohibition in the Discrimination Act is applicable between two or more self-employed business partners. For example, suppose that a private company needs a big paint job carried out, for which they want to hire four different persons. Three of them raise objections against the fourth because of her religion or sex. They convince the

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<sup>119</sup> There is a general line of thinking on vicarious liability that is problematic, and Chapter 1 Section 4(5) and Chapter 2 Section 1 of the Discrimination Act (*Diskrimineringslagen* 2008:567, adopted on 05.06.2008) provide two examples of this general thinking. See Labour Court, 2007 No. 45 and 2011 No. 19. In these two cases, it is obvious that the applicant/trainee had reason to believe that the person who was allegedly behaving in a discriminatory manner was acting on behalf of the employer, but there was no protection for persons acting under such a belief, however well founded that belief may have been.

<sup>120</sup> Chapter 2 Sections 10 and 11 apply to the legal person that distributes financial support, decides on qualifications, issues authorisations or provides other benefits to members or the general public. No prohibition in the Discrimination Act (*Diskrimineringslagen* 2008:567), adopted on 05.06.2008, is applicable between two self-employed business partners.

company not to give her a contract and to give the job to someone else – or, if she gets the contract, they harass her. There is no specific prohibition that covers this scenario. In his report of 28 July 2004, the Ombudsman Against Discrimination due to Sexual Orientation, Hans Ytterberg, made the following remark:

‘With respect to self-employment, the [now repealed 1999 Sexual Orientation Discrimination Act] does not seem to fully implement the directive. Self-employed business partners, for example, apparently are not protected against harassment or other forms of discrimination from one another, a situation which to me clearly seems to be covered by the directive (see Arts. 2(3) and 3 of the directive). It is also a situation which has appeared in the requests for advice and support that the Ombudsman’s office has come across since the entering into force of the Act.’<sup>121</sup>

This criticism can be directed at the 2009 Discrimination Act as well.<sup>122</sup>

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

In Sweden, national legislation prohibits discrimination in working conditions including pay and dismissals, for all five grounds and for both private and public employment.

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

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

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

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

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

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

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<sup>121</sup> See the quote in Numhauser-Henning, A., (2005) *Report On Measures To Combat Discrimination, Directives 2000/43/EC and 2000/78/EC, COUNTRY REPORT Sweden 2005*, p. 35.

<sup>122</sup> The reader is invited to reflect on whether or not self-employed persons should be protected against discrimination by each other according to the directive. It depends on the interpretation of Articles 3(1)(a) and 2(3).

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

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

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

a) Article 3.3 exception (Directive 2000/78)

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

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

Sweden's national law does not rely on Article 3(3) of Directive 2000/78.

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

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

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

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

The crime of unlawful discrimination set out in the Swedish Penal Code (16:9) contains some provisions making it a criminal offence for anyone running a private business to treat customers unfavourably in the provision of goods and services because of their sexual orientation, religion or ethnicity. The provision also covers anyone employed in such a private enterprise or acting on behalf of it, as well as anyone acting in their capacity of employee within the public administration, when dealing with the public. This means that discriminatory treatment in areas such as healthcare, education and social security can be considered a criminal offence under certain circumstances.

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

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

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

The relevant provisions are in Chapter 2, Sections 5-8 of the Discrimination Act. The prohibition of discrimination applies to all grounds, and the forms of discrimination are described in Chapter 1, Section 4 of the Discrimination Act. According to Chapter 2, Section 5 of the act prohibits discrimination in regard to all levels of education, from pre-schools to universities. This broad scope led to the use of the term education provider in the act.

#### a) Pupils with disabilities

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

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

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

For inadequate accessibility, Chapter 1 Section 4(3) of the Discrimination Act relies on other legislation, for example the School Act (2010:800), to formulate the demands that are adequate. 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.<sup>123</sup> This provision applies to all pupils, but pupils with disabilities are more likely than other groups to be denied a place at their school of choice for this reason.

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

If the child (through its parents) asks to be placed in a special class and this request is denied, the new form of discrimination, inadequate accessibility, may apply. Failure to fulfil the requirements of the School Act may, since 1 January 2015, result in a discrimination compensation award.<sup>124</sup>

#### b) Trends and patterns regarding Roma pupils

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<sup>123</sup> Sweden, School Act (*Skollag* 2010:800), adopted on 23.06.2010, Chapter 10, Section 30.

<sup>124</sup> The importance of the discrimination award is that it raises the victim's potential level of compensation. This can be illustrated by Appeal Court for Western Sweden case T-2957-15, *School Inspectorate v Municipality of Marks* (judgment 15-12-22). In this case, a teacher had put Scotch tape over the mouth of a three-year-old pupil for a short time. This treatment was degrading (but not connected to any discrimination ground). The School Inspectorate wanted damages under the School Act at the same level as the discrimination awards under the Discrimination Act. The court of appeal disagreed and allowed only the lower level of damages in accordance with normal civil law principles. In Sweden, damages of this type are not meant to achieve a preventive effect.

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

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

The specific situation of Roma in the Swedish schooling system with regard to discrimination is described in the report of the former Ombudsman against Ethnic Discrimination, *Discrimination against Roma in Sweden* from 2004, which was followed up in the 2012 report by the Equality Ombudsman, *Roma Rights (Romers rättigheter)*. The work carried out on discrimination complaints concerning Roma can be seen in the reports above. The subjects of these complaints cover public services, housing and employment. A general overview can be found in a report from the Swedish National Agency for Education, *Roma in School (Romer i skolan)*.<sup>125</sup>

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

Municipalities have a duty to arrange minority language education, although it is difficult to assert that people have the right to demand it. One pupil is enough to activate this duty. However, when the Swedish National Agency for Education reported back to the Government in November 2013, 6 % of school heads said that the conditions necessary to provide language education did not exist.<sup>126</sup> As a part of the national Roma strategy, five municipalities have become pilot areas and received state funding for, *inter alia*, improving education. In these municipalities, Roma pupils were seldom encouraged to take the minority language classes, and the problems of finding qualified teachers sometimes led the municipalities to hope for low attendance.<sup>127</sup>

Some important legal background to this discussion is provided by a case that the Equality Ombudsman took to court, claiming that the failure to provide language education in Romani Chib violates the now repealed 2006 Act on a ban against discrimination and other degrading treatment of children and pupils. The Equality Ombudsman argued that, with regard to national minorities, the treatment of children with Swedish as their mother tongue is the relevant measurement of a comparable situation.<sup>128</sup> If they actively seek such a teacher on the national labour market, for instance, they should be equally active in finding a teacher in Romani Chib.

The Ombudsman lost the case.<sup>129</sup> The district court stated that the relevant measurement of a comparable situation lay with other minorities. The municipality had not worked less hard to find teachers of Romani Chib compared with the mother tongues of other minorities, including refugees. The judgment was appealed, but Göta Court of Appeal decided not to grant the appeal's request.<sup>130</sup> From this case it follows that, even though there is a duty for the municipalities to provide minority language education, there is no

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<sup>125</sup> Swedish National Agency for Education (2007), *Roma in School (Romer i skolan)* Report 2007 No. 292.

<sup>126</sup> Swedish National Agency for Education (Skolverket) (2013), *Report on Governmental Assignment*, 28.11.2013 Dnr 2012:518, p. 3. More than 50 school heads out of 886 gave this answer.

<sup>127</sup> Swedish National Agency for Education (Skolverket) (2013), *Report on Governmental Assignment*, 28.11.2013 Dnr 2012:518, p. 3.

<sup>128</sup> Equality Ombudsman, 11.11.2010 OMED 2007/1109 Act 116, p. 4.

<sup>129</sup> Eksjö District Court, Case T 1395-09, *Equality Ombudsman v Vetlanda Municipality*, judgment of 21.10.2010. <http://www.do.se/globalassets/diskrimineringsarenden/tingsratt/dom-tingsratt-vetlanda-kommun-omed-20071109.pdf>.

<sup>130</sup> Göta Court of Appeal, case T 3264-10.

effective legal remedy if this does not happen. There is no corresponding right on the part of the pupil to require this education.

In the 2013 report, a majority of school heads reported that their schools did not teach from a Swedish Roma perspective with regard to Roma culture, language, history or religion.<sup>131</sup> In 2014, detailed information was produced in order to assist schools regarding how a Roma perspective could be introduced concerning Swedish history, societal knowledge and so on.<sup>132</sup> Each school has been given both materials for pupils and guidance for teachers.<sup>133</sup>

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

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

In Sweden, national legislation prohibits discrimination in access to and supply of goods and services as formulated in the Racial Equality Directive. The prohibition of discrimination concerning goods, services and housing in Chapter 2, Section 12 of the Discrimination Act applies to all grounds (including age, disability, religion or belief and sexual orientation), and to all forms of discrimination as described in Chapter 1, Section 4 of the Discrimination Act. In particular Chapter 1, Section 4(3) concerning inadequate accessibility covers the failure to adapt goods or a service to meet the needs of a person with a disability as a form of discrimination.

The prohibition of all forms of discrimination applies to the disability ground with regard to goods, services and housing (although inadequate accessibility is sometimes exempted).<sup>134</sup> This has been the case since the 2003 Goods and Services Act. Insurance companies frequently use medical conditions for risk assessments, and there is no need for a legal exception. In 2011, in the *Trygg Hansa* case, Stockholm District Court stated:<sup>135</sup>

'Discrimination is when a person has had a less favourable 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, the court found that it was correct of the insurance company to deny sickness insurance to a child with a hearing problem. The company could not establish whether the hearing problem had a root cause that made other illnesses more likely. Until this information was available, it could not design an individualised contract with higher fees

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<sup>131</sup> Swedish National Agency for Education (Skolverket) (2013), *Report on Governmental Assignment*, 28.11.2013 Dnr 2012:518 p. 3.

<sup>132</sup> The material can be found at: <https://www.skolverket.se/skolutveckling/inspiration-och-stod-i-arbetet/stod-i-arbetet/kampanj-stodpaket-undervisa-om-romer> and <https://www.skolverket.se/skolutveckling/inspiration-och-stod-i-arbetet/stod-i-arbetet/material-for-att-undervisa-om-nationella-minoriteter/undervisa-om-den-nationella-minoriteten-romer>. The Equality Ombudsman has a role in promoting the use of this material. Equality Ombudsman (2016) *Annual Report 2015*, p. 22 (Ds 2014:8).

<sup>133</sup> Swedish Government (2016) White Paper 2016:44, p. 66ff.

<sup>134</sup> Sweden, Discrimination Act, Chapter 2, Section 12c. Exceptions apply to housing (for private persons) and to requirements to adapt buildings unless the requirements are specified either in the building permit or in the formal notice permitting the building work to start. As of 01.05.2018, the exemption for companies with less than 10 employees will no longer be in force.

<sup>135</sup> Stockholm District Court, case T 20377-09, *Equality Ombudsman v Trygg Hansa* (judgment of 08.03.2011), p. 11, available at: [www.do.se/globalassets/diskrimineringsarenden/tingsratt/dom-tingsratt-trygg-hansa-ho-2007371.pdf](http://www.do.se/globalassets/diskrimineringsarenden/tingsratt/dom-tingsratt-trygg-hansa-ho-2007371.pdf).

or exemptions. Since this was impossible, it was not discriminatory to deny insurance altogether. The Equality Ombudsman did not appeal this verdict.

The Government has been particularly concerned about providing an exception in the Discrimination Act concerning age and discrimination related to goods and services. Chapter 2, Section 12b states:

'The prohibition of discrimination in Section 12 associated with age;

1. does not prevent the application of provisions of an act in which a certain age is prescribed,
2. does not apply to the provision of insurance services,
3. does not prevent the application of lower age limits for admission to establishments where spirit drinks, wine, strong beer and other fermented alcoholic beverages which the business operator is licensed to serve are served on a commercial basis, and
4. does not prevent other differential treatment on grounds of age either if the differential treatment serves a legitimate purpose and the means that are used are appropriate and necessary to achieve that purpose.'

These exceptions are clearly much broader than any of those that apply to other grounds. The breadth of the exceptions indicates the Government's understanding of the extent to which age is used as a defining category within society and the difficulties of applying discrimination as a concept to those same categories.

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

In 2013, another case following the same line of reasoning was decided. Svea Court of Appeal found discrimination because the insurance company had denied insurance without assessing a child with a hearing impairment and giving enough consideration to the medical condition of this particular child. If the statistics are accurate enough with regard to the individual, statistical discrimination is not considered to be a form of direct discrimination with regard to insurance and disability.<sup>136</sup>

All of this leads to the question of whether a country that extends the prohibition of discrimination to areas outside the directives is free to define the concept of direct discrimination more narrowly compared with the directive within those areas.<sup>137</sup>

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<sup>136</sup> Svea Court of Appeal, *Equality Ombudsman v If Insurances*, case T 1912-13 (judgment of 08.10.2013), at: <http://www.do.se/globalassets/diskrimineringsarenden/hovratt/dom-hovratt-if-skadeforsakring-anm-20111922.pdf>.

<sup>137</sup> The European Court of Justice regards statistical discrimination as a form of direct discrimination. Case C-236/09 (*Test Achats*), where the insurance providers were not allowed to use the sex of the customer in order to determine insurance fees, is a prime example of that. The fact that men statistically have more accidents than women is not a valid defence for directly using a person's sex to determine the insurance fees for cars. However, with regard to disability and insurance, statistical differences between persons with a disability and persons without makes them not comparable, and thus a presumption of discrimination cannot arise. Note that the fact that the concept of direct discrimination covers statistical discrimination is so strong that the directive in question (2004/113) contained a clause exempting the insurance sector, and it was this clause that got struck down by the CJEU. The Swedish Discrimination Act could have extended the protection for disability to services and then exempted the insurance sector, as in Directive 2004/113. However, extending the protection for disability to the insurance sector and then defining a comparable situation as if statistical discrimination is not a form of direct discrimination would have been confusing. If an EU concept such as direct discrimination is used, then it should (according to the author) be used correctly.



a) Distinction between goods and services available publicly or privately

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

The Discrimination Act applies to:

'persons who *outside the private or family sphere* are offering goods, services or housing to the public'.<sup>138</sup>

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

If an item is offered to the general public through a newspaper advertisement or on a sales website, it may be regarded as being outside of the private or family sphere. Selling a car or renting out a room can fall within the family sphere if it happens only occasionally. However, if someone rents out a room regularly and advertises it as soon as it is free, that may be regarded as falling within the public sphere. A private person's pursuit of an extra income may be considered to be within the public sphere.<sup>139</sup>

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

In Sweden, national legislation prohibits discrimination in relation to housing as formulated in the Racial Equality Directive. Chapter 2, Section 12 of the Discrimination Act prohibits discrimination in relation to the provision of goods, services and housing outside the sphere of private and family life. In addition to race, the grounds covered are age, disability, religion or belief and sexual orientation.

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

Housing falls under Chapter 2, Sections 12-12c of the Discrimination Act. The Government bill<sup>140</sup> to the Discrimination Act states that 'occasional instances'<sup>141</sup> (*enstaka*) of selling or renting out a dwelling should be regarded as being within the private/family sphere. Selling an apartment or a house will thus often be exempted from the law.<sup>142</sup> A realistic scenario is that an estate agent presents two possible buyers to the seller and the seller chooses the lower bid due to ethnic reasons. As long as it is the seller's decision and the estate agent treats both buyers equally, there is no unlawful discrimination under the act.

Situation testing in different forms has been undertaken by, among others, the Swedish Union of Tenants and researchers at Linnaeus University.<sup>143</sup> In 2007, when the researchers

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<sup>138</sup> Sweden, Discrimination Act (*Diskrimineringslagen* 2008:567 adopted on 05.06.2008), Chapter 2, Section 12, point 1.

<sup>139</sup> Compare Government bill 2007/08:95, p. 245-247, 519, and Fransson-Stüber (2015), *Diskrimineringslagen: en kommentar* (The Discrimination Act: A Commentary), p. 314.

<sup>140</sup> The Government bill is the document where the Government describes the new Act to the Parliament. If the Act is adopted in accordance with the proposal of the Government – as was the case with the Discrimination Act – this bill becomes the most important source for interpreting the wording of the new act, at least before there is any case law. See Section 0.1 of this report.

<sup>141</sup> 'Sporadic occasions' may be more than one occasion. A person may, for instance, sell their apartment and buy a new one with a new partner, separate, sell the apartment and buy another apartment. As long as the apartments are bought and sold for housing reasons, as opposed to financial reasons, the sales are sporadic occasions.

<sup>142</sup> Sweden, Government bill 2007/08:95, p. 244.

<sup>143</sup> Ombudsman against Ethnic Discrimination (2008), *Diskriminering på den svenska bostadsmarknaden – En rapport från DO:s särskilda arbete under åren 2006–2008 kring diskriminering på bostadsmarknaden* (*Discrimination on the Swedish Housing Market*). At <http://www.do.se/globalassets/publikationer/rapport->



2018. Much of the focus seems to have been on analysis and information related to employment discrimination. In relation to the housing market, the DO notes that a decision has been made to focus its efforts on counteracting discrimination in the provision of rental apartments and in connection with the sale of housing. The one specific issue mentioned by the DO is that a legal analysis (*rättsutredning*) has been started with the purpose of clarifying the current state of the law concerning discrimination and housing sales to see, among other things, whether there are gaps in the protection against discrimination. Once completed, the DO can use the legal analysis to inform the Government about the need for additional regulation, as well as influencing the DO's future work with strategic litigation.<sup>150</sup>

a) Trends and patterns regarding housing segregation for Roma

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

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

In principle, most Roma people who have housing seem to live in relatively good housing conditions in Sweden. However, a significant number of them are poor, require housing allowances and live in accommodation owned by municipal housing companies. These people encounter considerable housing discrimination when they seek to buy apartments or houses or try to rent on the private or public market.<sup>151</sup> Therefore, they often end up living in municipal housing company accommodation, where waiting lists and certain selection criteria can be more objective. It should be pointed out that these apartments are generally of a good standard.

The Swedish housing market is highly segregated in the three biggest cities. This segregation is mostly two-dimensional. Some areas are 'Swedish-dense'. In those areas, the Swedish ethnic majority is predominant. Other areas are 'Swedish-sparse'. The typical ethnic neighbourhood in Sweden has no dominant group. The municipal housing companies are often the largest or at least among the largest landlords in many areas. It may be assumed that the average Roma lives in such a neighbourhood. There have been some cases where local politicians have made discriminatory statements like 'Vänersborg cannot absorb more Gypsies'.<sup>152</sup> Similar comments have been made by representatives of public housing companies, too.<sup>153</sup>

The previous Ombudsman against Ethnic Discrimination dealt with about 50 housing cases each year.<sup>154</sup> Many landlords have no formal waiting list system where prospective tenants can register their interest in renting an apartment.<sup>155</sup> Minorities suspect discrimination when a landlord prefers to allow an apartment to remain empty instead of accepting them as tenants. Harassment by neighbours or the landlord is another common complaint.

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<sup>150</sup> Equality Ombudsman (2017) *Redovisning av regeringsuppdrag om särskilda insatser för att motverka diskriminering på arbets- och bostadsmarknaden*, Diarienummer LED 2017/384. At <http://www.do.se/globalassets/om-do/redovisning-regeringsuppdrag-arbets-bostadmarknad.pdf>.

<sup>151</sup> There are several studies using situation testing that indicate this, for instance the Ombudsman against Ethnic Discrimination (2008), *Discrimination on the Swedish Housing Market 2008:3* and Ahmed, A. and Hammarstedt, M. (2007), *Discrimination on the housing market – a field experiment on the internet*, Växjö.

<sup>152</sup> Ombudsman against Ethnic Discrimination (2003), *Discrimination Against Romanies in Sweden*, Report on DO project 2002 and 2003, p. 16.

<sup>153</sup> Ombudsman against Ethnic Discrimination (2003), *Discrimination Against Romanies in Sweden*, Report on DO project 2002 and 2003, p. 18.

<sup>154</sup> There were 55 complaints submitted in 2008. Ombudsman against Ethnic Discrimination (2009), *Annual Report 2008*, p. 18.

<sup>155</sup> Equality Ombudsman (2011), *Roma rights (Romers rättigheter)*, p. 44. This is presented as a factor making discrimination harder to address.

Termination of the rental contract, refusal to allow a trade of the apartment<sup>156</sup> or denial of membership in a housing cooperative are also common complaints.<sup>157</sup>

Over the years, Roma people have brought many housing cases to the previous Ombudsman as well as to the Equality Ombudsman. The most recent housing discrimination case concerning ethnicity on the DO's website involved a 2013 settlement on behalf of a Roma woman. She had signed the contract, paid a deposit, and received the key. The next day the landlord cancelled the contract, the reason being that the neighbours did not want her living there due to her Roma background. The settlement was for SEK 50 000 (EUR 4 672).

There is little to indicate that the situation has improved for Roma people. As part of the Government's Roma inclusion strategy 2012-2032, the National Board of Housing, Building and Planning was given the role of counteracting housing discrimination against Roma 2016-2018. The board's responsibility was extended in 2019.<sup>158</sup>

The board developed a first overview report in 2014<sup>159</sup> and a follow-up report in 2018.<sup>160</sup> Some basic conclusions are that Roma experience discrimination in various parts of the housing process (finding housing, living in the housing and leaving housing). At the same time there is a strong reluctance to submit complaints. On the other hand, housing companies were basically of the opinion that discrimination against Roma did not occur. The board's main efforts have been directed towards developing and disseminating an educational programme on the equal treatment of Roma, directed towards housing companies. Although the programme takes up the various relevant issues, according to the 2018 report, housing companies have shown a low level of interest.

In the opinion of the author of this report, it seems likely that the housing companies would show a greater interest in the education programme if they also saw a greater risk of enforcement of the Discrimination Act.

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<sup>156</sup> The possibility of trading a first-hand contract for an apartment with another person under certain circumstances is a valuable legal right in the Swedish rental housing system.

<sup>157</sup> Ombudsman against Ethnic Discrimination (2006), *Ethnic Discrimination on the Housing Market* (Etnisk diskriminering på bostadsmarknaden), PM 2006-01-01.

<sup>158</sup> National Board of Housing, Building and Planning (2019) *Counteracting discrimination of Roma on the housing market* at <https://www.boverket.se/sv/samhallsplanering/uppdrag/motverka-diskriminering-av-romer-bostadsmarknaden/>.

<sup>159</sup> National Board of Housing, Building and Planning (2014), *Boverkets nulägesbeskrivning – en del av romsk inkludering 2012–2032*, Rapport 2014:27 at <https://www.boverket.se/sv/om-boverket/publicerat-av-boverket/publikationer/2014/boverkets-nulagesbeskrivning/>.

<sup>160</sup> National Board of Housing, Building and Planning (2018), *Boverkets andra nulägesbeskrivning – en del av romsk inkludering 2012–2032*, Rapport 2018:25, pp. 5-6.

## **4 EXCEPTIONS**

### **4.1 Genuine and determining occupational requirements (Article 4)**

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

Chapter 2, Section 2 of the Discrimination Act is formulated as follows:

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

In the preparatory works, it is made clear that typical examples concerning this clause include those where a Muslim organisation has the right to demand that an imam be of the Muslim faith, or an organisation campaigning for equal rights for gays and lesbians or an interest organisation serving a certain immigrant group may have a right to require that, for some 'core' positions, the employees themselves should be homosexuals or should have the relevant immigrant background. At the same time, it is emphasised that exceptions from the prohibition of discrimination must be given a narrow interpretation.<sup>161</sup> Concerning an organisation, only the positions that are 'visible' to the public or of particular relevance can come into question, not an entire organisation per se, and not automatically. The employer must, furthermore, have a strong motive for applying the exception, and the position must clearly have required the qualification concerned. Religious communities do not have a special status under the Discrimination Act, but they are explicitly mentioned in the preparatory works, along with other examples.

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

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

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

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

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

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

Chapter 2, Section 15, also covers enrolment procedures, admission tests and other examinations of personal circumstances under the National Total Defence Service Act (1994:1809). The act still applies, but nowadays the state does not force any person to do military service against their wishes. Conscription was reintroduced in 2018.<sup>162</sup>

<sup>161</sup> Sweden, Government bill 2002/03:65, pp. 185-187 and Government bill 2007/08:95, pp. 155-157.

<sup>162</sup> In March 2017, the Government decided to reintroduce conscription, starting in 2018. As only 4 000 out of a yearly cohort of 100 000 persons will serve and as their willingness to serve is a selection criterion, there is

#### 4.4 Nationality discrimination (Article 3(2))

##### a) Discrimination on the ground of nationality

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

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

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

'Citizenship in itself is not covered by the discrimination ground ethnicity. Nevertheless, unjustified requirements concerning e.g. Swedish citizenship risk being determined to be indirect discrimination since such requirements typically are less favourable to persons with another ethnic or national origin than Swedish.'<sup>163</sup>

Under Chapter 11, Section 11 of the Instrument of Government, Swedish citizenship is required for judges. Chapter 6, Section 2 says that Government ministers must have Swedish citizenship. The Chancellor of Justice, the Parliamentary Ombudsman and the three Auditors General are the other examples where Swedish nationality is required by Instrument of Government.<sup>164</sup>

Positions to which the person is elected by the Parliament require Swedish citizenship, in accordance with Chapter 7, Section 11 of the Parliament Act (1974:153). This act has a semi-constitutional status. As regards other legislation, there are some (rare) occasions where Swedish citizenship is required.<sup>165</sup>

##### b) Relationship between nationality and 'racial or ethnic origin'

National origin and citizenship are two of many factors that can lie at the heart of ethnicity.<sup>166</sup> The overlap is thus recognised by the law, and no person can be left unprotected. A stateless person will always have an ethnic/national origin. The word 'race' has been deliberately omitted. In Sweden, discrimination on this basis will be regarded as ethnic discrimination, being a ground similar to that of skin colour.<sup>167</sup>

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

##### a) Benefits for married employees

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a strong possibility of it becoming a reality only for those who want to serve.

<sup>163</sup> Sweden, Government bill 2007/08:95, p. 497.

<sup>164</sup> Sweden, Government bill 2009/10:80, p. 333.

<sup>165</sup> See also SOU 2000:106, *Medborgarskap i svensk lagstiftning* at <https://www.regeringen.se/rattsliga-dokument/statens-offentliga-utredningar/2000/12/sou-2000106/>. This government inquiry included an inventory of the areas where citizenship requirements exist.

<sup>166</sup> According to Chapter 1 Article 5(3) of the Discrimination Act, ethnic origin is defined as 'national or ethnic origin, skin colour or other similar circumstance'.

<sup>167</sup> The reasons for omitting the word 'race' are discussed in section 2.1.1 of this report. Although the author believes the removal of the word 'race' does not violate EU law, this is not necessarily a positive development with regard to Directive 2000/43.

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

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

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

#### b) Benefits for employees with opposite-sex partners

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

On 1 April 2009, the Swedish Parliament amended the Marriage Code to allow two persons to marry regardless of their sex. This entered into force in May 2009. At the same time, the Registered Partnership Act<sup>168</sup> was repealed and registered partnerships were converted into marriages. This was done in order to emphasise that a homosexual family of parents and children is the same as a heterosexual family.

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

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

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

The ordinary exception in Chapter 2, Section 2 of the Discrimination Act (genuine and determining occupational requirement) applies to the employer. Regarding persons with disabilities, it is relevant for the employer to take into consideration not only security issues and the health and safety of others at the workplace, but also the health and safety of the person with a disability. However, the burden of proof can sometimes be shifted to the employer, who then has to prove that the contested measure is necessary to protect health and safety.<sup>169</sup> In Labour Court case 2003 No. 47,<sup>170</sup> the risks of shift work for an employee with diabetes were not proven and the refusal to employ him was deemed to constitute direct discrimination.

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

#### **4.7.1 Direct discrimination**

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<sup>168</sup> Sweden, Act on Registered Partnership (*Lag om registrerat partnerskap*) (1994:1117), adopted on 23.06.1994; original preparatory work: bet. 1993/94:LU28. Now repealed.

<sup>169</sup> Formally, Chapter 6 Section 3 of the Discrimination Act applies to all forms of discrimination. In practice, a shift of the burden of proof has only happened in situations which could easily have occurred regarding other grounds such as sex or ethnicity (see for instance footnote below). The author knows of no case where the shift of burden of proof has been decisive in a reasonable accommodation case.

<sup>170</sup> Labour Court 2003 No. 47, *Swedish Metal Workers Union v Scandinavian Refinery Ltd (Scanraff) and Cooperative Employers Organisation* (judgment of 04.06.2003).



In Sweden, national law provides an exception to direct discrimination in relation to age in Chapter 2, Section 2(3) and (4) of the Discrimination Act.

a) Justification of direct discrimination on the ground of age

In Sweden, national law provides for justifications for direct discrimination on the ground of age.

Chapter 2 Section 2(3) of the Discrimination Act allows age limits without the need to justify them with regard to the right to a pension or to survivor's benefits or disability benefits in individual contracts or collective agreements. Subsection 4 allows:

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

This test, as applied thus far, is in compliance with the test in Article 6 of Directive 2000/78.

There is a general possibility to justify age discrimination with a legitimate aim if the means are appropriate and necessary in pursuit of this aim. The preparatory works for the Discrimination Act describe the scope for justification as being quite broad. Age limits are common in collective agreements, and the system as such works well according to the Government. Therefore, the courts are encouraged to look at a collective agreement in a holistic way, including its relationship to the relevant social security provisions, rather than singling out individual clauses in a collective agreement for scrutiny.<sup>171</sup> At the same time, the Government rejected demands for a presumption of collective agreements being compatible with Directive 2000/78.<sup>172</sup> Any benefit in a collective agreement can be seen as a 'certain advantage linked to employment' within the meaning of Article 6(1)(b) of the directive. In the author's opinion, the scope for justification is likely to become too broad unless the Labour Court makes a narrow interpretation of the law. Two examples from the preparatory works concerning conditions fulfilling a legitimate aim and normally being both appropriate and necessary are that:<sup>173</sup>

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

In Labour Court case 2011 No. 37,<sup>174</sup> the Labour Court made a narrow interpretation of the scope for different treatment with regard to age. The case concerned a redundancy situation regarding an airline's cabin crew personnel. According to the Employment Protection Act, the principle of seniority was to apply. Those persons who had been employed for the longest time were to have the highest level of job security. This rule is only semi-mandatory, however, and can thus be modified by collective agreements. A collective agreement in this case permitted the employer to dismiss all persons above the age of 60, as they were entitled to a full pension (roughly 70 % of previous pay) under the employer's pension scheme. The case concerned 25 persons.

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

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<sup>171</sup> Sweden, Government bill 2007/08:95, p. 177.

<sup>172</sup> Sweden, Government bill 2007/08:95, p. 177.

<sup>173</sup> Sweden, Government bill 2007/08:95, p. 179.

<sup>174</sup> Labour Court 2011 No. 37, *Equality Ombudsman v Aviation Employers (Flygarbetsgivarna) and Scandinavian Airlines System* (judgment of 04.05.2011) at <http://www.arbetsdomstolen.se/upload/pdf/2011/37-11.pdf>.



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

The dismissals were declared void. The 25 persons thus kept their employment and they were each awarded SEK 125 000 (EUR 11 700) in a combination of a discrimination compensation award and non-pecuniary damages under the Employment Protection Act (*Lagen om Anställningsskydd*).<sup>175</sup>

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

b) Permitted differences of treatment based on age

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

The general exception in Chapter 2 Section 2(4) of the Discrimination Act will allow any differential treatment that passes the proportionality test. The prohibition does not prevent '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.'

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

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

There is a specific exception in the Discrimination Act for age limits concerning pensions, survivor's benefits and disability benefits, in individual contracts and collective agreements.<sup>176</sup>

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

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

Within labour market policy regulations there are a number of rules which expressly refer to age, aimed at promoting the vocational integration of young and old people, respectively. Age limits are often uncontroversial. There is, for instance, a 'work guarantee' for people younger than 25. It was introduced as an amendment to the Regulation on a work guarantee for young persons and has the aim of ensuring that a young person gets a suitable place in an education programme or traineeship within three months of registering with the National Employment Agency.<sup>177</sup>

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<sup>175</sup> The reform of 2013 extending the protection for age discrimination did not affect the prohibition of discrimination in the labour market.

<sup>176</sup> Sweden, Discrimination Act (2008:567) Chapter 2, Section 2(3).

<sup>177</sup> Sweden, Regulation (2007:813) on a work guarantee for young persons, (updated by SFS 2017:1165). The words 'work guarantee' have been put inside quotation marks because the act contains goals and not a legally enforceable guarantee.

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

#### **4.7.3 Minimum and maximum age requirements**

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

Minimum or maximum age requirements are dealt with under the proportionality test in Chapter 2, Section 2(4) of the Discrimination Act (see section 4.7.1 above).

#### **4.7.4 Retirement**

##### **a) State pension age**

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

An individual can collect a pension and still work.

According to the Swedish statutory pension scheme introduced in 1998,<sup>178</sup> there is no fixed upper pension age. The income-related public pension scheme opens up for part-time or full-time pensions from the age of 61.<sup>179</sup>

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

However, the right to the basic pension scheme – the ‘guaranteed pension’ – requires the beneficiary to be 65 years of age.<sup>180</sup> Even this pension can be postponed and thus increased in accordance with actuarial principles.

##### **b) Occupational pension schemes**

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

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

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<sup>178</sup> Sweden, Social Security Code (*Socialförsäkringsbalk*) (2010:110), adopted on 04.03.2010, Chapters 62-67.

<sup>179</sup> There is a political compromise backed by most of the political parties in the Parliament to raise this age to 62 in 2020 and to 63 and 64 at three-year intervals, but there is no legislation as yet. See: <http://www.regeringen.se/pressmeddelanden/2017/12/blockoverskridande-overenskommelse-for-langsiktigt-hojda-och-trygga-pensioner/>.

<sup>180</sup> There is a political compromise backed by most of the political parties in the Parliament to raise this age to 66 in 2023 and to 67 in 2026, however a person who has worked for 44 years shall still have a right to take it at 65. There is no legislation as yet. See: <http://www.regeringen.se/pressmeddelanden/2017/12/blockoverskridande-overenskommelse-for-langsiktigt-hojda-och-trygga-pensioner/>. Due to investigating the proposal and the election in 2018, finalisation of this compromise was put off until 2019.

In most cases, an individual cannot collect an occupational pension and still work full-time for their employer.

There are over 300 occupational pension schemes in Sweden.

Generally speaking, occupational pension schemes contain (mostly flexible) rules on pensionable age. Pensions can thus normally be deferred if an individual wishes to work for longer, and the scheme will provide more pension income in such cases.<sup>181</sup> It is possible to collect a pension and still work. The age of 55 is the earliest age at which a pension fund can allow a person to start withdrawing their pension.<sup>182</sup> Many occupational pension schemes thus have this age limit; 60 and 65 are other common age limits.

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

c) State imposed mandatory retirement ages

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

d) Retirement ages imposed by employers

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

Within employment law there is a right for the employee to stay on until he or she reaches the age of 67, despite what may have been agreed between the parties.<sup>183</sup> At this point it is possible for the employer to unilaterally terminate the employment with one month's notice. This was accepted by the CJEU in the *Hörfeldt* case.<sup>184</sup> On a general level, most Swedes accumulate a viable pension by the age of 67. This age limit is therefore proportional and can be defended as an integral part of the general labour market system.

However, in the *Keolis* case,<sup>185</sup> the employer legally dismissed bus drivers at the age of 67. The employer then offered to re-hire the staff on a fixed short-term hourly basis (for instance filling in at short notice for permanently employed drivers calling in sick). When they reached the age of 70, their employment was not renewed. This was considered to be direct age discrimination. The Labour Court stated that the permission to dismiss with regard to the Discrimination Act (or to refuse to prolong temporary employment) without an individual assessment exists only at the age of 67. Only at this age is there explicit permission in the Employment Protection Act for dismissals without just cause.<sup>186</sup>

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<sup>181</sup> Collective agreements on pensions are very diverse. The normal practice today is that a young person belongs to a prefunded system based on actuarial principles. Elderly workers quite often belong to a defined benefits system, and some systems have a combination of a defined contribution with guaranteed defined benefits for those with many years of participation. Such systems do not always work on actuarial principles (with regard to the defined benefit part) if the worker decides to postpone their retirement.

<sup>182</sup> Sweden, Income Tax Act (*Inkomstskattelag*) (1999:1229) adopted on 16.12.1999, Chapter 58 Section 8 sets this age as the lowest possible for favourable tax treatment.

<sup>183</sup> The rule also outlaws collective agreements stipulating a lower retirement age, something which has been criticised by the ILO, Case No. 2171, GB 286/11 (part II), March 2003. The law (Section 32a of the 1982 Employment Protection Act) has not yet been revised.

<sup>184</sup> European Court of Justice, judgment of 5 July 2012, *Torsten Hörfeldt v Posten AB*, Case C-141/11, EU:C:2012:421.

<sup>185</sup> Labour Court, 2015 No. 51, *Equality Ombudsman v Keolis AB* (judgment of 16.09.2015).

<sup>186</sup> In the Employment Protection Act, there is a free choice on fixed-term contracts once the worker is 67 or older. However, the Discrimination Act still applies to any refusal to prolong employment that may involve discrimination. This is problematic, as a fixed-term contract that expires when the person reaches the age of 67 can be a valid termination without the need to apply the special exception for dismissals at 67.

e) Employment rights applicable to all workers irrespective of age

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

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

In the latter case, just cause is considered to exist (the decision as to whether there is a shortage of work rests entirely with the employer) but lay-offs have to be carried out in accordance with the last-in, first-out principle under Section 22. Regardless of the reason for the dismissal, the notice period (between one to six months) required relates to the prior period of employment and is thus indirectly related to age.

At the age of 67, the worker loses the right to seniority under Section 33 of the Employment Protection Act and can thus be dismissed in a redundancy case. The same section also gives the employer the right to dismiss the worker with one month's notice at this age. Should the employer not do this, the old employee cannot be dismissed for personal reasons without just cause any more, but presumably the protection will be much weaker. There is no case law on this. Employers normally dismiss workers who reach 67 years. If they want to keep the worker, they give the worker a fixed-term contract - on which there is no restriction if the worker is 67 years or older, in accordance with Section 5 (4) of the Employment Protection Act.<sup>187</sup> The fact that the Discrimination Act could be applicable to the refusal to renew such a contract at an age significantly above 67 – as was decided in the *Keolis* case<sup>188</sup> – was a surprise to many people.

f) Compliance of national law with CJEU case law

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

#### 4.7.5 Redundancy

a) Age and seniority taken into account for redundancy selection

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

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

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

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

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

<sup>187</sup> For a description of the *Keolis* case see section d above.

<sup>188</sup> Labour Court, 2015 No. 51, *Equality Ombudsman v Keolis AB* (judgment of 16.09.2015).

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

b) Age taken into account for redundancy compensation

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

Collective agreements for white-collar workers and for workers in the public/state sector sometimes provide packages including extra unemployment benefits, re-training on favourable terms and even early retirement if the worker who is being made redundant is over 60.<sup>189</sup>

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

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

#### **4.9 Any other exceptions**

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

- Age limits set by law are accepted within the social security field under Chapter 2, Section 14b(1) of the Discrimination Act.
- Age limits set in laws for goods and services are permitted under Chapter 2, Section 12b(1) of the Discrimination Act.
- Age limits in the insurance sector are permitted under Chapter 2, Section 12b(2) of the Discrimination Act.
- Minimum age limits for places that are allowed to serve alcohol are permitted under Chapter 2, Section 12b(3) of the Discrimination Act.
- Age limits set in laws governing healthcare and social services are also permitted under Chapter 2, Section 13b(1) of the Discrimination Act.
- Discrimination in the form of inadequate accessibility does not apply to housing under Chapter 2, Section 12c(1) of the Discrimination Act.
- Inadequate accessibility as a form of discrimination does not apply to private persons under Chapter 2, Section 12c(2) of the Discrimination Act.
- A seller of goods or provider of services who has fulfilled the accessibility requirements in the building regulations at the time the premises were built cannot be required to undertake any further accessibility measures. This is stated in Chapter 2, Section 12c(4) of the Discrimination Act.
- According to Chapter 2, Section 15 of the Discrimination Act, a specific exception is made for discrimination due to age concerning the prohibition of discrimination in

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<sup>189</sup> See further descriptions and discussions of such collective agreements in relation to the sustainability of the Swedish pension system in Government White Paper 2012:28, pp. 316-320.

relation to enrolment procedures, enlistment for and the performance of national military or civilian service and admission examinations for and during the performance of other equivalent military training.

- According to Chapter 2, Section 16 of the Discrimination Act, a specific exception is made for discrimination due to age concerning the obligation by the military or other organisations referred to in Chapter 2, Section 15 to investigate and take measures against harassment and sexual harassment. If they are employed by the military, the normal rules apply.

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

### a) Scope for positive action measures

In Sweden, the extent to which positive action is allowed depends on the ground (racial or ethnic origin, religion or belief, disability, age or sexual orientation) and the area of prohibition. There is no general clause allowing positive action. Concerning working life, there is a clause that allows positive action concerning sex.

Positive action in relation to persons with disabilities is generally allowed. Measures benefiting this group may disfavour persons with no disabilities, but that group is not protected by the Discrimination Act and thus the discrimination is lawful. The protection provided for disability is 'asymmetric' as compared with, for example, the protection for ethnicity, which protects 'Swedes' and 'non-Swedes', the protection for the ground of sex, which protects men and women, and the protection for sexual orientation, which protects heterosexuals, homosexuals and bisexuals.

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

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

Ethnicity has an exception from the prohibition of discrimination regarding labour market policy activities and for starting or running a business (Chapter 2, Sections 9 and 10). Ethnicity and religion or other belief have an exception in the context of adult education centres and study associations (Chapter 2, Section 6). These are qualified as exceptions in the legislation but actually form provisions that allow for positive action measures.

A right for members of certain religions to refuse military service is also specified (Chapter 2, Section 15).

There are no exceptions in the act concerning sexual orientation.

The Discrimination Act also contains rules on 'active measures'. From an EU legal perspective, such measures are within the realm of positive action in a more general sense. The act requires that employers continuously carry out goal-oriented work concerning all discrimination grounds so as to actively promote equality in working life.<sup>190</sup> Education providers are also required to undertake continuous goal-oriented work with regard to all grounds (Chapter 3, Sections 1-3).

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<sup>190</sup> Sweden, Discrimination Act (2008:567), Chapter 3 Sections 1-3.

Both employers and education providers need to have a ready-made procedure in place to handle instances of sexual harassment and other harassment on any ground that may be reported by students/pupils/employees (Chapter 3, Sections 6 and 18).<sup>191</sup>

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

b) Quotas in employment for people with disabilities

In Sweden, national law does not provide for quotas for people with disabilities in employment.

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<sup>191</sup> With regard to employers, this duty includes victimisation too. As regards active measures, the Ombudsman works as a regulatory authority, visiting employers and universities, checking their equality plans and so on. If somebody fails to fulfil their duties, the Board Against Discrimination may – on the Ombudsman’s application – issue an order to comply with a specific request before a certain date (or in the future), subject to a financial penalty under Chapter 4, Section 5 of the Discrimination Act. The financial penalty will gain legal force only after a district court has ordered the payment. The legality of the order itself – as well as the reasonableness of the amount – can be decided upon by the district court. As far as the author knows, a district court has never ordered such a payment, and applications to the Board Against Discrimination have been extremely rare.



## 6 REMEDIES AND ENFORCEMENT

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

The procedures for enforcing the principle of equal treatment in Sweden are listed below.

- a. Judicial proceedings in the Labour Court (starting in the civil court if the worker is represented by someone other than a trade union with a collective agreement or by the Equality Ombudsman).
- b. Civil proceedings in the general court system.
- c. If a trade union with a collective agreement represents a member, there must be negotiations with a view to settling the conflict, which must take place before going to the Labour Court, according to Section 11 of the Co-Determination Act in conjunction with Chapter 4, Section 7 of the Labour Procedure Act (1974:371). Cases are often settled at this stage.
- d. The Equality Ombudsman negotiates with the employer before going to the Labour Court.<sup>192</sup>
- e. Criminal complaints concerning Penal Code 16:9 concerning unlawful discrimination can be submitted to the police for prosecution.

It is not possible, as a general rule, to use the administrative courts or procedures to address discrimination under the Discrimination Act. No administrative body can apply the Discrimination Act directly. However, there are some situations where a discriminatory situation can be resolved by an administrative body and through the application of other laws and regulations. If, for instance, a parent gets a decision from the School Appeal Board concluding that the accommodation costs necessary for accepting their child to a school are not substantial,<sup>193</sup> the school must take on those costs. This means that the discrimination issue has been resolved, but at the same time the decision does not lead to an award of discrimination compensation. Some state employment decisions can be appealed as well, and the claimant may obtain the job if they prove that they are better qualified. This means that the discrimination issue can also be dealt with in this framework, although this type of proceeding cannot lead to a discrimination compensation award.

Along the same lines, on 1 July 2017 a mechanism was introduced in the education sector to bring an alleged violation of the Discrimination Act to the Higher Education Appeals Board in some situations. However, this does not include any possibility of obtaining a discrimination award; it is possible only to correct the discriminatory act or omission, for instance by replacing a tutor who has discriminated against a student.<sup>194</sup>

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

In the Labour Court, a trade union or the Equality Ombudsman can act on behalf of the worker; in the general court system, the Equality Ombudsman can act on behalf the claimant.

One of the tasks of the Ombudsman is to investigate complaints of discrimination. This includes the provision of advice, but also – at the Ombudsman’s discretion – of representing

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<sup>192</sup> The law does not require this but having the Labour Court as the only instance presupposes well-prepared cases, and that includes these negotiations. Chapter 4, Section 3 of the Discrimination Act gives the Equality Ombudsman the ability to decide on a financial penalty (which can be appealed to the administrative court) if the employer does not show up.

<sup>193</sup> Sweden, School Act (*Skollag*) (2010:800 adopted on 23.06.2010), Chapter 9, Section 15 in conjunction with Chapter 28, Section 12(6).

<sup>194</sup> Sweden, Act 2017:282 changing the Discrimination Act, adopted 13.04.2017.

the victim of discrimination in settlement proceedings or, ultimately, in a court of law. Should the individual concerned be a member of a trade union, the right of the Ombudsman is subsidiary to the right of the trade union to represent its member.

Civil proceedings regarding working life under the Discrimination Act are to be dealt with in accordance with the Labour Disputes Act.<sup>195</sup> Depending on whether the employer is bound by a collective agreement, whether the person who alleges discrimination is or is not a member of the trade union with the collective agreement, and whether the trade union is willing to take up the claim, the case may be heard in the first instance either by the district court (*tingsrätt*) with ordinary judges as in other civil cases, or the Labour Court (*Arbetsdomstolen*), in a special composition comprised of a majority of judges with a judicial background and a minority of members with a background in labour market organisations.<sup>196</sup>

Whereas it is the injured individual (or an NGO) who has standing (*locus standi*) as the claimant at the district court, it is the trade union that takes that position when claims are dealt with at the Labour Court at first (and last) instance. A lawsuit taken to the district court in accordance with the described rules may always be appealed to the Labour Court, whereas a decision of the Labour Court – whether at first or second instance – is not subject to further appeal. As has already been indicated, the Ombudsman can also bring a case directly to the Labour Court. When the DO takes on a claimant's case and the claimant provides a power of attorney, the DO becomes the named party in the case.

Concerning state employees, there are constitutional rules regarding objective grounds on hiring. If the claimant is better qualified, he or she is entitled to get the job. This solution is not available under the Discrimination Act; a court can only grant a discrimination compensation award. Using the administrative procedures relating to these rules is sometimes an alternative or complementary way to appeal against a discriminatory decision.

The Equality Ombudsman may represent victims of discrimination in all areas covered by the Discrimination Act. Cases outside working life will be dealt with by the ordinary court system, i.e. the relevant district court in the first instance. Discrimination in connection with social security, for instance, (an example of an area that normally falls under administrative law) is thus dealt with under the general court system, and the ordinary rules on civil procedure apply.<sup>197</sup>

The relatively few cases that end up in the court system should not be taken as proof that action is not taken in cases of discrimination. A number of cases are settled out of court. The same is probably true concerning the trade unions. Most complaints are settled during the mandatory negotiations prior to a claim being presented to the Labour Court. In cases that are settled, the remedies are pretty much the same as those that apply in the case law of the Labour Court. At times though a settlement can involve better results, since settlements are not necessarily limited to economic compensation. For example, a settlement can include compensation combined with employment, which is something a court could not order. Legal costs can also be reduced through settlements.

#### b) Barriers and other deterrents faced by litigants seeking redress

With regard to discrimination cases, inside as well as outside the labour market, there are various obstacles for potential discrimination litigants, such as low levels of rights awareness, low levels of trust in the legal system, low levels of experience with lawyers

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<sup>195</sup> Sweden, Act (1974:371) on Labour Law Procedure.

<sup>196</sup> As regards the Swedish Labour Court, see, for instance, the European Court of Human Rights, *AB Kurt Kellermann v Sweden*, case 41975/98, judgment of 26.10.2004.

<sup>197</sup> Some university or higher education cases may also be brought before the Board of Appeal for Higher Education.

and the legal system, limited awards if successful and substantial economic risks related to litigation, particularly given the 'loser pays' rules. At the same time, those with the power to discriminate, such as employers and Government agencies, generally have a natural advantage due to their economic position as well as familiarity and experience with the legal system and access to expertise.

As regards the general time limit under the Discrimination Act, a claim must be presented within two years of when the alleged discriminatory act took place.<sup>198</sup> Individuals can (but do not have to) rely on private attorneys, but this means an increase in the cost risks should the case be lost. The procedures are the same regardless of whether the case concerns a private sector or public sector employee.

If the claimant asks for less than SEK 22 000 (EUR 2 060), a simplified small claims procedure may be used. In theory, the small claims procedure is based on the idea that a claimant does not need an attorney. The right of the winning party to recover legal costs is limited to only minor costs in small claims cases.<sup>199</sup> For many people, the cost of going to court is a major hurdle, especially considering the cost risks of losing. Sweden has a loser pays system, meaning that if the claimant loses they will be liable not only for their own lawyer's fees, but also for the winning party's lawyer's fees. There is no situation in which an enforceable decision can be made free of charge. Therefore, the ability of the DO or the trade unions to go to court on behalf of victims is very important for persons with limited means. When the DO or a trade union takes on a case, it is as the named party, which also means that they are taking on the economic risk of losing the case.

A complex system of rather short time limits applies in working life.<sup>200</sup> Dismissal claims are regulated by the 1982 Employment Protection Act, which also sets out the applicable time limits. If the claim seeks to declare a dismissal null and void, the procedure could take place weeks from the occurrence of the act or – in certain cases – one month after the end of the employment. If the claim concerns only indemnification, it can take about four months. The 1976 Co-Determination Act applies to cases concerning wage compensation. Here, the general time limit is four months from gaining knowledge of the act, with a maximum of two years from its occurrence.<sup>201</sup> Within these time limits, it is possible to bring a discrimination suit after the employment relationship has ended.

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

If a person has very limited (or no) financial resources and is not represented by the Equality Ombudsman or a trade union, it is possible to ask for legal aid under certain

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<sup>198</sup> Sweden, Discrimination Act (2008:567), Chapter 6, Section 6.

<sup>199</sup> There is a list of permitted expenses: one hour of legal aid at the current rate, a small claims fee, travel costs, costs for witnesses and translation costs.

<sup>200</sup> Sweden, Discrimination Act (2008:567), Chapter 6, Sections 4 and 5.

<sup>201</sup> If someone brings an action as a result of a *notice of termination or summary dismissal*, the rules in the 1982 Employment Protection Act (LAS) apply. To have a dismissal declared null and void, the employer must be notified about the claim within two weeks of the dismissal. A lawsuit must be presented within two weeks thereafter or, if conciliation negotiations have taken place, within two weeks of the termination of such negotiations (Section 40 LAS). As regards damage claims, the employer will be notified about the claim within four months after the damaging activity occurred, and a lawsuit must be presented within four months after that or, should conciliation negotiations have taken place, within four months of terminating such negotiations (Section 41 LAS). With regard to *any other action*, the rules in the Co-Determination Act (MBL) apply. Conciliation negotiations must be demanded by the relevant trade union within four months of becoming aware of the damaging act and within two years of the act itself (Section 64 MBL). A lawsuit must be presented within three months after terminating such negotiations (Section 65). If an employee cannot be represented by a trade union, he or she must present the claim to the court within four months of becoming aware of the damaging act and within two years of the act itself (Section 66 MBL).

circumstances in employment cases to help with the costs of going to court. In certain cases legal insurance is available as well.

In cases going to the general courts (usually non-employment cases), it is possible for the court to rule that both parties shall bear their own costs if the claimant loses but had good reason (*skälig anledning*) to go to court in accordance with Chapter 6, Section 7 of the Discrimination Act.<sup>202</sup> In the author's opinion, this possibility is seldom used, as there is little clarity about how the courts will apply this exception to the loser pays rule. Rather than addressing what is an important issue concerning access to justice, the courts, particularly the Labour Court, seem to be more concerned about ensuring a restrictive application of this exception to the general rule.<sup>203</sup>

#### c) Number of discrimination cases brought to justice

In Sweden, there are no available statistics on the number of cases related to discrimination brought to justice. However, in the Labour Court, there were six judgements during 2018: 2018 no. 11 (obesity as a disability/union); 2018 no. 19 (handshake case, religion and ethnicity/union); 2018 no. 42 (disability/DO); 2018 no. 51 (handshake case/DO); 2018 no. 74 (pregnancy and sex discrimination/DO); 2018 no. 80 (parental leave/DO). Four of the cases were brought by the DO and two were brought by unions.

The DO also had three discrimination cases decided by the general courts. The DO won a case concerning inadequate accessibility and the Social Insurance Agency's web service in a district court. The DO has appealed the case asking for an increase in the compensation award.<sup>204</sup> In another case concerning an inadequate accessibility at a school, the DO had successfully appealed by receiving an increased award of compensation.<sup>205</sup> In a third case, concerning ethnic discrimination and access to services, the DO appealed to the Supreme Court, asking for a decision requesting a preliminary ruling from the CJEU. The request was granted.<sup>206</sup>

#### d) Registration of discrimination cases by national courts

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

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

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

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<sup>202</sup> The Equality Ombudsman cannot use this rule. It only applies to private persons. An anti-discrimination bureau, as a legal person under private law, would be able to use it. See, for instance, Scania and Blekinge Court of Appeal, case FT 1948-12, *Forum for Equal Rights v IKEA* (judgment of 18.03.2013). An anti-discrimination bureau helped a mother to sue IKEA for not letting her disabled daughter play in the playroom. She demanded SEK 20 000 (EUR 2 200) as a discrimination award. IKEA admitted that it had treated her daughter badly. IKEA accepted SEK 20 000 as fair compensation but did not admit to discrimination. The case was tried by both the district court and the appeal court because the classification of the decision as discrimination or otherwise was important to both parties.

<sup>203</sup> One significant example can be seen in Labour Court 2015 No. 57 from 2015 (30.09.2015). The claimant brought a disability discrimination case before a district court. He lost the case, but the court determined that the parties should be liable for their own costs, as the claimant had sufficient reason for at least taking the case to court. He appealed the case to the Labour Court, which came to the same judgment as the district court: there had been no discrimination. However, the Labour Court ordered the claimant to pay SEK 1 663 400 (EUR 156 322) as compensation for the winning party's legal costs.

<sup>204</sup> Information about the case is available on the DO's website at <http://www.do.se/lag-och-ratt/diskrimineringsarenen/forsakringskassans-webbplats/>.

<sup>205</sup> Information about the case is available on the DO's website at <http://www.do.se/lag-och-ratt/diskrimineringsarenen/kommunskola/>.

<sup>206</sup> Information about the case is available on the DO's website at <http://www.do.se/lag-och-ratt/diskrimineringsarenen/flygbolaget-bra/>.

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

Labour unions have legal standing to litigate discrimination cases where one of their members is involved, in accordance with Chapter 4, Section 5 of the Labour Procedure Act. The Equality Ombudsman can also act on behalf of a claimant. The right of the Equality Ombudsman to represent a victim is subsidiary to a labour organisation's right to represent its members under Chapter 6 Section 2(3) of the Discrimination Act.

If a union member has consented, the union enters the case as the named party, and takes on the cost risks of losing the case. The unions have their own experienced negotiators and lawyers. Two of the larger union confederations even have their own specialised law firm – LO-TCO Rättsskydd AB.

Chapter 6 Section 2 of the Discrimination Act gives non-profit organisations whose statutes state that they are to protect their members' interests the right to bring actions in their own name as a party representing an individual person. The association must have the consent of the individual and be suited to representing the individual in the case, taking account of its activities and its interest in the matter, its financial ability to bring an action and other circumstances. This right is subsidiary to that of a trade union in the employment field. One issue here though is that due to the economic risks involved, such organisations usually file their cases as small claims cases.

This provision on the ability of NGOs to act as parties was added to the law because of an interpretation of the minimum requirements of the EU anti-discrimination directives.<sup>207</sup> At the same time, prior to the change in the law, NGOs always had the possibility of providing assistance in the form of covering a victim's potential legal costs. However, for many years, this type of action was outside Sweden's legal and political culture, at least for NGOs that did not represent the stronger interests in society (such as unions or employers' organisations).

Anti-discrimination bureaux in particular have been allowed to enter into cases as parties.<sup>208</sup> There have been some questions about the right of a bureau to represent claimants in court in accordance with the rules in the Discrimination Act. It now seems clear that they have that right.<sup>209</sup>

The reduction in the number of complaints dealt with by the Equality Ombudsman due to a focus on 'strategic' complaints and means of dealing with discrimination other than through individual complaints, has led to increasing reliance by victims on the bureaux. This occurs especially since the Ombudsman often refers complainants to the bureaux as a potential source of advice and support.

The bureaux are thus increasingly looking at ways of taking cases to court. Among other things, they take part in the public debate, arrange seminars for the general public and provide anti-discrimination training for the private and public sectors. The inspiration for their work came from similar bureaux in the Netherlands and the UK, and more indirectly from public interest law firms in the United States.

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<sup>207</sup> See, for example, the reference in the Government bill referring to Article 7(2) of the Racial Equality Directive and Article 9(2) of the Equal Treatment in Working Life Directive.

<sup>208</sup> Local anti-discrimination bureaux are non-governmental organisations whose members are other organisations and sometimes individuals. In 2018, 16 bureaux received funding from the national Government according to the Annual Report of the Swedish Agency for Youth and Civil Society ([https://www.muuf.se/sites/default/files/publikationer\\_uploads/mucf\\_arsredovisning\\_2018.pdf](https://www.muuf.se/sites/default/files/publikationer_uploads/mucf_arsredovisning_2018.pdf)). The bureaux were created in order to combat discrimination on all grounds. They typically provide free legal advice to persons suffering from discrimination.

<sup>209</sup> See, for example, Göta Court of Appeal, Judgment of 30.09.2011, *Örebro Rättighetscenter v Götavi Invest AB*, Case No. FT 198-11, and Malmö mot diskriminering, the bureau that has been the most active in actually taking cases to court. Available at: <https://malmomotdiskriminering.se>.

In this regard, it may be noted that the 2016 Government white paper 2016:87, on measures to improve the implementation of the anti-discrimination principle, proposed a substantial increase in funding to the local anti-discrimination bureaux, given their increasing workloads.

Even beyond the work of the local anti-discrimination bureaux, civil society has been developing an increased awareness of the importance of being more proactive concerning the development of case law related to discrimination. The main LGBT organisation in Sweden, RFSL, has brought a number of cases in the administrative courts that involve discriminatory treatment (but not the Discrimination Act), partly with the help of local anti-discrimination bureaux. In addition, two disability organisations have received funding for projects to raise awareness of the law and to increase the potential for civil society to take cases to court.<sup>210</sup> This is mentioned here since it is only in recent years that civil society organisations representing discriminated-against groups have seen the advocacy potential in taking on an enforcement role concerning the law.

Even if civil society is increasingly realising the need to get cases to court, they seldom have the economic resources that may be needed for effective representation. Thus, another idea that is developing involves the Fund for Discrimination Cases (*Talerättsfonden*),<sup>211</sup> which was established in 2017 by a number of equality and discrimination experts. The organisation is still in its initial stages, and its purpose is to raise money for a fund that can provide economic support for some strategic discrimination cases. It is thought that this could help encourage more private cases, thus providing a healthy 'competition' or complement to the work done by the unions and the Ombudsman.

It bears repeating that one key issue about the identity of the named party is that, other than in small claims cases, they risk being ordered to pay the winning party's legal costs – which can be substantial.

This leads to the final alternative, which is private representation. According to Swedish procedural law, anyone can in theory engage in proceedings or support a complaint as a legal representative, in accordance with Chapter 12, Section 22 of the Swedish Code on Judicial Procedure (1942:740). The person is presented to the court and the court makes a formal decision whether to accept that person as a legal representative (*rättegångsbiträde*). If the person is law abiding and does not risk becoming involved in the proceedings as a witness or something similar, there is usually no problem. A legal representative (*rättegångsbiträde*) may speak on behalf of the claimant and the claimant is bound by what he or she says or does, unless the claimant immediately declares a different opinion. However, most legal representatives are jurists with a law degree. They will often be members of the Swedish Bar Association (*Advokatsamfundet*), and the title of *Advokat* (lawyer) is reserved to members of the bar. Unlike in some other countries, however, lawyers in Sweden, as members of the bar, do not have a monopoly on the right of representation in civil law cases. In this situation, the claimant risks becoming fully liable for their own legal costs as well as those of the opposing party if they lose the case.

b) Engaging in support of victims of discrimination (joining existing proceedings)

In Sweden, unions and other organisations are not entitled to act in support of victims.

As stated in section 6.2.a above, organisations can represent victims but under Swedish procedural law they are not allowed to join or intervene in existing proceedings. Sweden does not have the equivalent of friend of the court or *amicus curiae* briefs.

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<sup>210</sup> For information on the 'Law as a tool for social change' project, run by the Independent Living Institute, see: <https://lagensomverket.se>; for information on the 'From talk to action' project, run by Funktionsrätt Sverige (Disability Rights Federation), see: <http://funktionsratt.se/projekt/fran-snack-till-verkstad/>.

<sup>211</sup> Fund for Discrimination Cases – *Talerättsfonden*. See: <http://talerattsfonden.se>.

c) Actio popularis

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

When an organisation goes to court in its own name in Sweden (see section 6.2.a above), this must be done in order to support or represent a specific victim.

d) Class action

There is a possibility under Swedish law – outside of labour law – to submit a class action (or group proceeding) to a district court for claims arising from the same issue.<sup>212</sup> Such cases are to be dealt with according to the rules on civil disputes. However, class actions are not allowed if the case can be appealed to, for example, the Labour Court. Thus, labour law cases fall outside the scope of the act, but discrimination in other fields can result in class actions.<sup>213</sup>

This means that a person can pursue a lawsuit on their own behalf, but with legal consequences for other persons, even though they are not parties to the case.<sup>214</sup>

There are various types of difficulties related to the use of class actions, which is probably why there have been so few since the law came into effect in 2003.

Nevertheless, there is one class action that the author can mention. In this case, R brought a class action on behalf of 43 women who asserted that they had been passed over in favour of less qualified men in the admissions process at a university for veterinarians. The district court held that they had all been discriminated against and were each awarded damages<sup>215</sup> of SEK 35 000 (EUR 3 270). The appeal court, in agreeing with the district court, concluded that the admissions system was disproportionate with regard to its goals, and that this constituted discrimination.<sup>216</sup>

This case shows that, under the right circumstances, it is possible to bring an action for discrimination in fields other than working life. Even though there are various questions and difficulties related to the use of class actions, they can have significant potential under the right circumstances. They also provide NGOs in particular with the potential to combine situation testing with a class action, for example in the case of inadequate accessibility.

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

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

This is stated in Chapter 6, Section 3 of the Discrimination Act:

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

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<sup>212</sup> Sweden, Group Proceedings Act (*Lag om grupprättegång*) (2002:599).

<sup>213</sup> Sweden, Government bill 2001/02:107, p. 139.

<sup>214</sup> Even if each member of the group must be treated as a party by the court, the court must know all the members of the group. The judgment will be legally binding on all the members of the group. However, important developments in the case need to be communicated by the court to all of the group members.

<sup>215</sup> The case involved the laws prior to the 2009 Discrimination Act, which is why damages rather than discrimination compensation was awarded.

<sup>216</sup> Svea Court of Appeal, judgment 21.12.2009, T-3552-09. At: <http://centrumforrattvisa.se/wp-content/uploads/2010/10/Svea-hovratts-dom.pdf>.

This section applies to all six forms of discrimination including harassment and the new form of discrimination, inadequate accessibility. The victim of discrimination must be able to present facts that make it possible to presume that discrimination has occurred (a similar situation and unfavourable treatment). Thereafter the burden of proof is shifted to the other party who must show that one of the requirements is not fulfilled or that the unfavourable treatment was not associated with the ground in question. No intent to discriminate is required.

It could be asserted that it is hard to prove a prima facie case of discrimination in the Labour Court. At the same time, the problem may simply lie with the Labour Court's difficulties in properly applying the rules on shifting the burden of proof. It does not seem to be as difficult to establish a prima facie case in the general court system. Håkan Sandesjö (the temporary Equality Ombudsman for most of 2011)<sup>217</sup> made a preliminary study for the Ministry of Integration and Equality on judgments in discrimination cases between 1999 and 2009 involving the four former discrimination Ombudsmen. The success rate in the general court system was 70.8 %. In the Labour Court, the rate was 19.5 % and, if the discrimination was on the ground of ethnicity, the rate of success dropped to 4.3 %.<sup>218</sup>

In their commentary explaining the 2009 Discrimination Act, Fransson and Stüber point out a possible difference in the handling of the burden of proof.<sup>219</sup> The Supreme Court treats the less favourable treatment in a similar situation as the fact that makes the presumption apply. The eased level of proof thus sometimes applies when the claimant proves a similar situation and the less favourable treatment.<sup>220</sup> The Labour Court applies the presumption more narrowly. The claimant must always prove the similar situation and the less favourable treatment according to normal standards of proof. The presumption applies only to the causal link between these two facts and the discrimination ground. That being so, the Labour Court perhaps applies the rules on a shifted burden of proof in a manner that is too restrictive, especially with regard to ethnicity.<sup>221</sup>

The difference between the general courts and the Labour Court was also taken up in a Government white paper. The inquiry report stated that it seemed to be accepted by the Labour Court and the general courts that the rule now involves a presumption (*en presumptionsregel*) and is not a shared burden of proof rule. At the same time, the report seemed to be asserting that the big difference was that the general courts used the rule, while the Labour Court tended not to. The inquiry thus appeared to conclude that an even clearer wording of the rule in the act would help.<sup>222</sup> However, no change in the law has yet been proposed.

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<sup>217</sup> The removal of the former Ombudsman, Katri Linna, took place in February 2011. Agneta Broberg started on 1 October 2011. Sandesjö was not involved with the Equality Ombudsman when the report was made in 2010.

<sup>218</sup> Sandesjö, H. (2010) (Jurcom AB), *Domar i diskrimineringsmål 1999-2009*, p. 11.

<sup>219</sup> Fransson–Stüber (2015), *Diskrimineringslagen: en kommentar* (The Discrimination Act: A Commentary), second edition, Chapter 6 Section 3. See Sandesjö, H. (2010), p. 14. In cases where the rule on the burden of proof has been decisive, the success rate in the general court system was 90 % against 19 % in the Labour Court.

<sup>220</sup> See Supreme Court (NJA 2006 p. 170): *Ombudsman Against Discrimination due to Sexual Orientation v Restaurang Fridhem Handelsbolag* (judgment of 28.03.2006). The main question was whether the same-sex couple had engaged in heavy petting or merely shown affection, which was allowed in the restaurant. The restaurant owner failed to prove they had engaged in anything beyond the normal kissing and hugging that was allowed.

<sup>221</sup> There are other possible explanations for the difference in the claimants' success rates. One possible explanation is that obvious cases of discrimination are often settled in the negotiations between the employer and the trade union at a local or central level, which must take place before going to the Labour Court if a trade union is representing one of its members. There is also an ongoing discussion, however, on whether judges appointed by trade unions and employer organisations are neutral, if important parts of the collective bargaining system are affected by the outcome. See Sandesjö, H. (2010), p. 18.

<sup>222</sup> Government White Paper 2016:87, pp. 462-463.



In 2017, the Labour Court dealt for the first time with a case that was fairly similar to a case that had been dealt with in the general court system one year earlier. In both cases, the focus was on implementation of the burden of proof.

These cases turned on whether there is an alternative to bare lower arms for a Muslim dental student (district court) or a Muslim dentist (Labour Court). The focus was on the application of health and safety regulations, the desire of those involved not to work with their lower arms exposed due to religious reasons and whether or not an application of this rule constituted indirect discrimination.

The 2016 district court case involved a female Muslim dental student at Karolinska Institutet.<sup>223</sup> In accordance with the dental programme, she was required to perform clinical tasks with bare forearms. She asked if she could wear special disposable forearm protection instead of having bare forearms, because she did not want to show this part of her body to strangers.

The institute, drawing on National Health and Welfare Board Regulation (2007:19),<sup>224</sup> made a formal decision denying this request. The state, in defending the content of the rules, said that simple rules such as having bare forearms were easier to follow in everyday situations than complex rules with alternatives, and that simplicity was important for rules that need to be followed every day and for every patient. It also said that, as the arms are harder to clean if they are covered, a disposable forearm protection could contaminate the person's work clothes when taken off, as well as increasing the amount of waste produced. The state had experts from the institute itself and from the Public Health Authority testifying that having bare arms was necessary to achieve the hygienic standards required by the regulation.

The Equality Ombudsman brought in a British expert describing the reasons why British authorities believe that there is no hygienic problem with disposable forearm protection.

The court decided that both the British expert's reason as to why disposable forearm protection was acceptable and the Swedish experts' statements on why there were genuine hygienic reasons against their use seemed scientific and credible, and that it was not possible to believe one more than the other. However, it was the education provider (as the alleged discriminator), who bore the burden of proof with regard to the justification of possible indirect discrimination once the prima facie case was established. The district court applied the rules of burden of proof in accordance with the established practice in the general courts. Therefore, the state lost the case. The state had legitimate concerns, but even the state's expert admitted that the British example showed that such disposable protection had been used in the UK, and no one had been able to demonstrate a relevant increase of infection risk there.

The woman was awarded SEK 5 000 (EUR 468) as a discrimination award. Normally, SEK 10 000 (EUR 936) is a minimum award (SEK 5 000 for the injury and SEK 5 000 as a prevention award). In this case, the injury was small (*måttlig*). The denial of the woman's demand was based on a serious evaluation of the situation and was addressed in a formal decision – that is, it was not arbitrary. In future, every Muslim will presumably be correctly treated by this education provider in such situations. A prevention award was therefore deemed unnecessary.

The state did not appeal the decision, thus accepting the district court's decision that the rule in the regulation was disproportionate.

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<sup>223</sup> Stockholm District Court, judgment 2016-11-16, case number T 3905-15, available at: <http://www.do.se/globalassets/diskrimineringsarenanden/tingsratt/dom-tingsratt-karolinska-2014-1987.pdf>.

<sup>224</sup> Now Regulation (2015:10).

The *Karolinska* case was followed by one in the Labour Court in 2017, in which the court came to the opposite conclusion, even though it was deciding a case based on essentially the same evidence.<sup>225</sup> The Labour Court case arose in an employment setting during the claimant's clinical work as a dentist. The hygiene standards were thus the same in both cases, as they stemmed from the same National Health and Welfare regulation.

The reasoning of the Labour Court was very similar to that of the district court up to the point when the employer presented the objective justification. Like the district court in the previous case, it considered that the experts on both sides were credible. The employer showed reasons why it was genuinely (albeit theoretically) possible that there could be a hygiene problem. The expert for the Equality Ombudsman showed that it was not possible to detect increased infections in Britain connected to permitting the use of disposable lower arm protection there.

The case was thus decided on the basis of how the rules on the burden of proof were to be applied, just like in the district court. However, while the district court placed the burden of proof on the discriminator, because it is the discriminator who should be responsible for proving an objective justification, the Labour Court did the opposite.

The Labour Court said that, when the employer presented the genuinely objective theoretical hygiene reasons, the burden of proof shifted back to the claimant. Since the Equality Ombudsman failed to disprove the assertions of the employer's expert, the Equality Ombudsman lost the case. The main argument for this outcome was that, when patient safety is at risk, the employer must be allowed a wide margin of appreciation when setting hygiene rules (*försiktighetsprincipen* – the duty-of-care principle) and thus any remaining doubt must fall on the claimant.

In this case, the Labour Court appeared to choose to add a footnote to the burden of proof rules – a footnote that is not easy to find in the directives, the Discrimination Act or the preparatory works. The case illustrates the disparity between two court systems when they have a different approach to the EU rules on the burden of proof and where no one can demand that the Labour Court ask for a preliminary ruling from the CJEU, even when there is an obvious need for one.<sup>226</sup> At the same time, the Swedish Supreme Court was reluctant to send questions to the CJEU in previous years. This in turn resulted in the so-called revolt of the lower courts, which ended up bypassing the Swedish Supreme Court by sending questions directly to the CJEU.<sup>227</sup>

The two cases discussed above are quite controversial. Many people are against any 'concessions' at all concerning Muslims, and thus applaud the Labour Court for its application on the rules of burden of proof.

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<sup>225</sup> Labour Court, 2017 case No. 65, *Equality Ombudsman v The People's Dentists of Stockholm County* (Judgment 20.12.2017).

<sup>226</sup> If both Sweden and Britain take patient security seriously and still decide on different policies with regard to disposable lower arm protection, it is perfectly possible that the CJEU would have decided to allow the Member States a wide margin of appreciation and that the Labour Court would have been allowed to decide the case as it did. It is also possible, however, that the CJEU would have said that, if the claimant showed that an alternative solution had been applied in another country without any indications of increased infections, then any remaining uncertainty should fall on the employer, as they bore the burden of proof for the objective justification in an indirect discrimination case as a matter of principle. In the author's view, the latter reasoning seems to be the most rational. This was possibly a reason for the Labour Court not to send the issue to the CJEU – or at least they did not want to take that chance.

<sup>227</sup> The key issue was that of *ne bis idem* (no one shall be tried twice for the same offence) in relation to EU law. The lower court's action led to a judgment in the Åkerberg Fransson case (Case C-617/10 *Fransson* [2013]), which forced the Supreme Court to change its recently established case law. This also led to the re-examination of a large number of cases. See, for example, Fast, K. (2013), 'Tusen skäl att förekomma istället för att förekommas – en kommentar till dubbelbesträffningsfallen i EU-domstolen och Högsta domstolen 2013' (A thousand reasons to act rather than being required to react – a commentary on the double jeopardy cases in the CJEU and the Swedish Supreme Court), *Juridisk Tidskrift* 2013-14 nr 1, pp. 24-44.

Today, the Karolinska Institutet applies the ruling from the district court by allowing disposable lower-arm protection, while dental clinics do not need to do so with regard to employees.<sup>228</sup> At some point or another, an education provider is likely to follow the practice of the Labour Court and, when that happens, the general court system will presumably have to decide whether or not to ask for a preliminary ruling from the CJEU.

In the author's opinion, one of the difficulties for the Labour Court in applying the burden of proof may relate to certain broader legal and cultural factors concerning the court. The Labour Court was created mainly as a special arena where the unions and employers' organisations could settle disputes concerning rights and duties under collective bargaining agreements. They still appoint the majority of the judges. It is only in discrimination cases that the majority of judges are made up of the 'law' judges. The main original issue was – and still is – collective rights. At the same time, individual rights have increasingly become part of Swedish law, including labour law, particularly since the country joined the EU. To a large extent, discrimination law concerns individual rights, even if individual cases can be an important tool for exposing structural discrimination relating to the rights of groups that have been marginalised. For a long time, the social partners jointly opposed the adoption of such laws. This history forms part of the environment within which the Labour Court functions even today, i.e. the world of the social partners, rather than the world of the individual. The general courts perhaps find themselves a little closer to the idea of individual rights. This background provides at least some additional explanation of how two court systems can seemingly implement the same rule in very different ways.

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

In Sweden, there are legal measures that provide protection against victimisation. Victimisation is forbidden in Chapter 2, Sections 18 and 19 of the Discrimination Act.

Victimisation (*repressalier*) is defined in the preparatory works as acts, statements and omissions to act which lead to a disadvantage or a sense of discomfort for the individual.<sup>229</sup>

The prohibition protects all persons involved in an investigation, including witnesses and persons reporting discrimination or those who have helped the victim in other ways. According to Chapter 6, Section 3 of the Discrimination Act, the shifted burden of proof applies in victimisation cases.

Even though it involves sex discrimination, it is worth noting that one of the lawsuits filed by the DO in 2018 involves the issue of victimisation.<sup>230</sup>

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

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

The basic sanction in the Discrimination Act is the discrimination compensation award, which is regulated in Chapter 5, Section 1. This is complemented by the possibility of declaring certain acts, such as the termination of contracts, or discriminatory contract clauses void (Chapter 5, Section 3). There are no other remedies under the act open to the individual who has been the target of discrimination.<sup>231</sup>

The concept of discrimination compensation (*diskrimineringsersättning*) was created, at least in theory, in order to make it easier for the courts to provide higher amounts of

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<sup>228</sup> Radio interview on 8 December 2016 with Mats Trulsson, Head of Odontology Department, Karolinska Institutet, available at: <http://sverigesradio.se/sida/artikel.aspx?programid=128&artikel=6582632>.

<sup>229</sup> Sweden, Government bill 2007/08 p. 531-532.

<sup>230</sup> DO's website at <http://www.do.se/lag-och-ratt/diskrimineringsarenen/repressalier---bolag-i-katrineholm/>.

<sup>231</sup> With regard to breaches of active duties, a court order involving a financial penalty can in theory be issued.

compensation than was previously the case in relation to damages. Discrimination compensation awards are not supposed to be in line with the low general levels of civil damages in other legal areas. The award includes a right to compensation or damages for the violation caused by the discrimination. Chapter 5 Section 1 also requires the courts to give 'particular attention to the purpose of discouraging future infringements'. There is a compensatory goal as well as a preventive goal.

In working life there is also a basic right to *economic damages*. However, in recruitment and promotion cases, the individual is not considered to have a right to obtain the employment or promotion in question.<sup>232</sup> Economic injuries are thus not compensated. However, the violation still leads to a non-economic injury, which is compensated. As is usually the case in Swedish labour law, if it is reasonable, damages can occasionally be reduced or removed completely. Depending on the discriminatory act, other labour law provisions may apply in parallel, such as the rules of the Employment Protection Act in cases of dismissal or those of the Co-Determination Act in cases where a collective agreement is violated.

The declaration of provisions in collective agreements and in individual contracts as invalid is possible in all areas of the law under Chapter 5, Section 3.

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

Violations of the penal provision on unlawful discrimination are punished by a fine or imprisonment for a period not exceeding one year and can result in an obligation to pay financial compensation in accordance with Chapter 16, Section 9 of the Penal Code.<sup>233</sup> The maximum prison sentence for hate speech, as set out in Chapter 16, Section 8, is two years.

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

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

For sanctions under the Discrimination Act, no differentiation is made between the public sector and the private sector.<sup>234</sup>

In relation to the duty to undertake active measures, the Ombudsman works in the same way as a normal authority, visiting employers and universities, checking their equality plans and so on. If somebody fails to fulfil their duties, the Board Against Discrimination<sup>235</sup>

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<sup>232</sup> In the state sector, however, a consequence of the public law character of the constitutional provisions as regards objective grounds on hiring is that a discriminatory decision may be appealed through administrative procedures, with the discriminated-against person actually being given the position in question.

<sup>233</sup> See Stockholm District Court, case B-16349-13, *Public Prosecutor v Jonas Taipani Thesén* (judgment of 18.02.2015). The three victims were each awarded SEK 5 000 (EUR 550) in a case where they were refused admittance to a shop. The owner was fined the same amount (100 income-related units). If the case had been considered under the Discrimination Act, the discrimination award could possibly have been higher, and the rules on a shifted burden of proof would have applied.

<sup>234</sup> With regard to alternative procedures for public employees, see section 6.1.a above.

<sup>235</sup> The board is an administrative authority. It consists of a chairman and a vice-chairman, who must be judges. There are 11 other members: two are appointed by the Government as neutral members; six members are appointed by the Government on the suggestion of trade unions and employer organisations; one member is appointed by the Government as representing ethnic or religious minorities in Sweden; one is appointed on the suggestion of the Disabled Associations Cooperation Organisation; and one is appointed

may – on the Ombudsman’s application – issue an order to comply with a specific request before a certain date (or in the future), subject to a financial penalty in accordance with Chapter 4, Section 5 of the Discrimination Act. The financial penalty will gain legal force only after a district court has ordered the payment. The legality of the order itself, as well as the reasonableness of the amount, can be decided upon by the district court. The unions can also do this under certain circumstances.

Finally, to the extent that there are quasi-judicial powers or aspects within the mandate of the Equality Ombudsman, they have been rarely exercised, at least in formal terms. One indication is that only two decisions have been issued by the Board against Discrimination since its creation in 2009.<sup>236</sup> One decision was initiated by a union and the other decision related to a request for an order under penalty of a fine originally filed by the previous Gender Equality Ombudsman prior to the creation of the DO in 2009. It is possible that the whole enforcement structure concerning active measures is weak and should be removed and replaced. At the same time, this would be easier to assert if the limits of the law were tested at least once or twice by the DO. It should be noted that only the DO and the unions have the power to do this.

#### b) Ceiling and amount of compensation

Swedish law currently provides no ceiling on compensation in discrimination cases. Nevertheless, compensation levels are low. The record for the amount awarded was set in 2014 by Svea Court of Appeal in a child custody case. Having a child taken away from its parents was seen as the worst injury that could be suffered, and therefore the discrimination award was set at SEK 150 000 (EUR 14 000) for each of the parties involved (both parents and the child).<sup>237</sup>

There are no statistics on the average amount of compensation to victims.

In 2012, the Equality Ombudsman pointed out that, although it was too early to make definitive conclusions, the introduction of the term ‘discrimination compensation’ (*diskrimineringsersättning*) in 2009 to replace the term ‘damages’ (*skadestånd*) had not thus far resulted in any significant (*nämnvärd*) increase in the amounts awarded.<sup>238</sup> In 2014, the Equality Ombudsman concluded that various judgments indicated that the compensation levels for less severe violations would in many cases be too low to have a dissuasive effect. This was considered by the DO to be a problem in relation to the EU requirement concerning dissuasive sanctions: ‘Ineffective sanctions actually means the anti-discrimination legislation will not live up to the goal of protecting those who most need it’.<sup>239</sup> In its *Annual Report 2017*, the DO highlighted the need for more effective sanctions concerning violations of the Discrimination Act.<sup>240</sup>

The need for more effective sanctions seems to be in line with the conclusions drawn by Laura Carlson in her analysis of compensation paid in employment discrimination cases. According to her calculations, the amounts that are currently being awarded by the Labour Court, adjusting for inflation, are about 4.5 % higher than they were in 1980. She points out that this does not appear to reach the threshold of enhanced compensation, as was envisaged by the change in terminology that came with the Discrimination Act in 2009. She also points out that this modest increase in compensation should be compared with the 170 % increase in trial costs and fees since the 1980s. She concludes that the trends concerning compensation awarded and increasing legal costs and fees, combined with low

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on the suggestion of the Swedish Federation for Lesbian, Gay, Bisexual and Transgender Rights.

<sup>236</sup> Board against Discrimination. <https://namndenmotdiskriminering.se/beslut.html>.

<sup>237</sup> Svea Court of Appeal, case T 5096, *Equality Ombudsman v Sigtuna Municipality* (judgment of 11.04.2014). Available at: <http://www.do.se/globalassets/diskrimineringsarenen/hovratt/dom-hovratt-sigtuna-kommunanm-2011274.pdf>.

<sup>238</sup> Equality Ombudsman (2013), *Annual Report 2012*, p. 24.

<sup>239</sup> Equality Ombudsman (2015), *Annual Report 2014*, p. 60.

<sup>240</sup> Equality Ombudsman (2018), *Annual Report 2017*, pp. 3, 7 and 35.

success rates, 'create a significant deterrent for claimants bringing discrimination claims'.<sup>241</sup>

The Equality Ombudsman previously decided to proceed with a number of cases regarding the labour market, asking for SEK 75 000 to SEK 400 000 (EUR 7 000 to EUR 37 500). The Labour Court has previously awarded between SEK 30 000 and SEK 50 000 (EUR 2800 to EUR 4 700) in similar cases. The Ombudsman has further settled several cases at the level of SEK 100 000 (EUR 9 362), with one record-breaking case of SEK 200 000 (EUR 18 724).<sup>242</sup> This settlement is impressive in relation to the discrimination awards in AD 2010 No. 91<sup>243</sup> (SEK 75 000 or approximately EUR 7 000); AD 2011 No. 37<sup>244</sup> (SEK 125 000 or EUR 11 700). In the former case, the Equality Ombudsman asked for SEK 300 000 (EUR 28 100); in the latter case the Ombudsman asked for SEK 400 000 (EUR 37 440) as a discrimination award and SEK 100 000 (EUR 9 360) for the violation of the Employment Protection Act. An amount of SEK 125 000 (approximately EUR 11 700) was awarded in a one-for-all compensation for the violation of both acts.

However, since the preparatory works on which the Discrimination Act is based are vague regarding the expected new levels of compensation, there is a large amount of legal uncertainty. The Supreme Court helped clarify some of the uncertainty in two cases decided on the same day in 2014.<sup>245</sup> In the *Veolia* case, a bus driver had problems closing the doors of the bus. Two immigrants were sitting together, and one of them had her knee close to the stop request button. The bus driver walked over to them and removed her knee from the vicinity of the button (in a non-discriminatory way according to the courts). He also said that they should return to 'Taliban country' and made a rude gesture. The discrimination award was set by the appeal court at SEK 20 000 (EUR 1 870) each.<sup>246</sup> The Supreme Court increased the amount to SEK 25 000 (EUR 2 340) on the basis that this violation was as severe as a violation through words without threats can be. The violation award was set at SEK 15 000 (EUR 1 400) each. Furthermore, SEK 20 000 (EUR 1 870) was to be added as a prevention award. Normally a prevention award is the same amount as the award for the violation.

If only one person had been discriminated against, that person would have received SEK 15 000 plus the full prevention award (SEK 15 000 plus SEK 15 000). Since two persons were to share the prevention amount, the court set the amount at a total of SEK 20 000, to be divided between the two persons involved, as the court concluded that SEK 30 000 (EUR 2 800) would have been too harsh for the perpetrator.

There are some situations where one may be able to identify a standard level of compensation, for instance in the case of a person not being allowed to eat at a restaurant, resulting in damages of SEK 15 000 (EUR 1 400) under normal circumstances. It is unclear what will happen to these levels. The author believes that violations concerning a restaurant or nightclub are probably less severe compared with the bus case. At the same time, some restaurants seem to encourage discrimination if for no other reason than that they think it will be more lucrative for them. Potentially, the prevention award should be

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<sup>241</sup> Carlson, L. (2017), *Comparative Discrimination Law: Historical and Theoretical Frameworks*, Brill, pp. 79-80.

<sup>242</sup> Case 2009/1640 (Telenor). The case concerned parental leave but, as it is a record sum, it should be reported even if it involves discrimination outside the grounds covered by this report.

<sup>243</sup> *Equality Ombudsman v Swedish Agency for Government Employers* (judgment of 15.12.2010). A.H., a 62-year-old woman, applied for a position as a job coach with the Public Employment Service. She was not called to an interview, and two women aged 27 and 36 were hired. A.H. was at least as qualified as one of the persons hired and was better qualified than the other. Thus, a presumption of age discrimination arose. She was also better qualified compared with a man who got an interview, and therefore a presumption of sex discrimination arose as well.

<sup>244</sup> Collective agreement permitting the employer to dismiss all employees above the age of 60 in a redundancy case (described in section 4.7.1 above).

<sup>245</sup> Supreme Court, case T 3592-13, *Equality Ombudsman v Veolia* (judgment of 26.06.2014). The second case was Supreme Court, case T 5507-12, *Equality Ombudsman v Stockholm County* (judgment of 26.06.2014), NJA 2014, p. 499.

<sup>246</sup> In Sweden, the ground of ethnicity also covers race.

much higher here compared with the bus case, where the employer presumably had a substantial interest in their bus driver behaving properly.

As to sanctions, Swedish law generally provides for low levels of compensation or damages. For example, a discrimination compensation award of even SEK 80 000 (EUR 7 500) will hardly deter a larger employer. For large employers or businesses, the threat of publicity is real and probably much more significant.<sup>247</sup> For small employers or small businesses, the sanctions may be said to be a deterrent.

There is an important potential complementary sanction, which, even though there seems to be little follow-up concerning implementation, has substantial potential as a complementary tool in relation to the Discrimination Act. Under the Regulation on anti-discrimination conditions in contracts (2006:260), Sweden's largest national Government agencies must include an anti-discrimination condition in their larger public procurement service and building contracts. The purpose of the regulation is to increase awareness of and compliance with the Discrimination Act (2008:567).<sup>248</sup>

It is hard to say very much about the effects of this regulation or those used by some local authorities (e.g. Stockholm, Malmö and Botkyrka). The total value of all public sector contracts in Sweden is over SEK 600 billion (EUR 56.1 billion) annually.<sup>249</sup> The national Government's contracts are valued at about SEK 200 billion (EUR 18.7 billion). There have been no evaluations or follow-up of the clauses used by the different agencies. Nevertheless, in the author's opinion, if the anti-discrimination conditions have been formulated in such a manner that serious potential sanctions such as cancellation are included as a part of the contract, their preventive potential is substantial. There is currently little risk in violations of the Discrimination Act, given the limited risks around detection, enforcement and economic sanctions, and particularly in relation to active measures. Even if the detection risks are minimal, however, if a business risks losing a contract worth SEK 50 million (EUR 4.7 million), for instance, due to a violation of the Discrimination Act, this probably means that the company has a much greater incentive to deal with active measures in a more serious manner than has been the case hitherto. This would also be an important factor concerning individual complaints.

### c) Assessment of the sanctions

An economic efficiency analysis of discrimination awards was commissioned by the Equality Ombudsman and undertaken by a professor of national economics.<sup>250</sup> From an economic standpoint, there are clear deficiencies. Discrimination awards are divided into two parts. One portion is intended to compensate the victim for the violation of his or her integrity. The other portion – the prevention portion – is intended to dissuade the discriminator in

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<sup>247</sup> See, for instance, Skåne and Blekinge Court of Appeal, case FT 1948-12, *Forum for Equal Rights v IKEA* (judgment of 18.03.2013). An anti-discrimination bureau helped a mother to sue IKEA for not letting her disabled daughter play in the playroom. She demanded SEK 20 000 (EUR 2 200) as a discrimination award. IKEA admitted that it had treated her daughter badly. IKEA accepted SEK 20 000 as fair compensation but would not admit to discrimination. The case was tried by both the district court and the appeal court because the classification of the decision as discrimination or otherwise was important to both parties. The author knows of an employment case regarding promotion, where an anti-discrimination bureau sued for SEK 20 000 and settled for SEK 70 000. The settlement included a secrecy clause of high value to the discriminator.

<sup>248</sup> Regulation (2006:260) on anti-discrimination conditions in public contracts (*Förordning om antidiskrimineringsvillkor i upphandlingskontrakt*), available at: <http://rkrattsbaser.gov.se/sfst?bet=2006:260>. There is an unofficial translation at: <https://www.global-regulation.com/translation/sweden/2988722/ordinance-%25282006%253a-260%2529-on-anti-discrimination-clauses-in-procurement-contracts.html>.

<sup>249</sup> Swedish Government (2016), 'Varför behövs en nationell upphandlingsstrategi?' (Why is a national public procurement strategy needed?) p. 4. <http://www.regeringen.se/49eaf7/globalassets/regeringen/dokument/finansdepartementet/pdf/2016/upphandlingsstrategin/nationella-upphandlingsstrategin.pdf>.

<sup>250</sup> Stenek, J. (2015), *En Samhällsekonomisk analys av diskrimineringsersättningen* (17.12.2015), available from the Equality Ombudsman – document LED 2015/299 17.



relation to future violations. The most basic deficiency according to the report is that the prevention portions of discrimination awards seem to be too low to prevent future infringements. From an econometric efficiency standpoint, the discrimination award would need to be extremely high on some occasions if the low detection risk in many areas is to be properly taken into account.

In the author's opinion, it should be obvious that it is highly doubtful that Sweden, due to its legal, social and political culture, will ever develop extremely high discrimination compensation awards. This issue was also discussed by the writer of the report for the Equality Ombudsman.<sup>251</sup> It should nevertheless be obvious that higher awards are necessary if the law is to become more effective. Greater justification for this could come from understanding the substantial damage arising in various situations, as well as the damage caused to third parties, as was pointed out in the above-mentioned report. These issues have been missing from the discussion of the preventive potential of discrimination awards, just as, in the author's opinion, a serious discussion has been lacking concerning the sanctions and remedies system under the Discrimination Act, as well as other potential sanction or support measures in the public sector to counteract discrimination.

In the author's opinion, the sanctions in respect of the labour market would be more effective if there was a right to damages for economic loss in cases of recruitment and promotions, at least in regard to the most qualified applicant. The most qualified applicant, if he or she can prove that discrimination occurred, would not have a right to the job, but the right to damages as if they had been hired and fired. This type of change would raise the cost risks associated with discrimination without radically changing the system of damages in Sweden.

Outside the labour market, the sharply reduced level of civil damages in cases where discrimination is proved by situation testing may violate the principle of effectiveness, according to the author, at least with regard to nightclubs.<sup>252</sup> However, this legal situation may change with the Discrimination Act and the goal of discouraging future infringements. The author believes that the Supreme Court case from 2014<sup>253</sup> is well reasoned, which makes it possible to state that the damage to the individual in a case where the individual willingly participates in situation testing is small, although the importance of stopping an economically profitable discriminatory behaviour by a club owner should lead to a high prevention award as a part of the discrimination award. The Equality Ombudsman is of the opinion that the low level of awards made to persons suffering from discrimination with regard to access to goods and services is a real problem (SEK 20 000 or EUR 1 900 being a typical award).<sup>254</sup>

As to the overall question of whether the available sanctions are, or are likely to be, effective, proportionate and dissuasive, there are two basic issues. The first issue would arise if Sweden were to be found to be non-compliant with the directives regarding the sanctions available in Sweden. In the author's opinion this is unlikely, since Sweden can be considered as more effective than many other countries in this regard.

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<sup>251</sup> See Stenek, J. (above) p. 21. He cites an example of employment discrimination where the detection risk is probably below 0.1 % and where a EUR 2 000 evaluation of the damage to the individual would result in a EUR 2 million prevention award. He concludes that such high sums would be seen as unfair lottery winnings for the individuals receiving them, and that such a system would lose public support in the long run.

<sup>252</sup> Supreme Court, *Escape Bar and Restaurant v Ombudsman Against Ethnic Discrimination* (case T-2224-07 judgment of 01.10.2008). Nightclubs have strong economic incentives to give preference to high-status persons and exclude low-status persons when admitting guests. Sharply reducing the civil damages for the only effective and available means to prove such discrimination will probably lead to continued discrimination based on a cost-benefit analysis by the nightclub owner.

<sup>253</sup> Supreme Court case T 3592-13, *Equality Ombudsman v Veolia* (judgment of 26.06.2014). The second case was Supreme Court case T 5507-12, *Equality Ombudsman v Stockholm County* (judgment of 26.06.2014), together known as NJA 2014 – p. 499. See above section 6.5.b.

<sup>254</sup> Equality Ombudsman (2015) *Annual Report 2014*, p. 54.



However, the more important issue is whether the current system for sanctions is sufficiently effective, proportionate and dissuasive to bring about the goals of the directives and thus the goals of the Discrimination Act. In the author's opinion, given the current state of the legislation and the case law, this is doubtful. The potential sanctions are not the only issue, but they are an important one.

As was pointed out in the 2005 inquiry into structural discrimination, the overall system for promoting equality and counteracting discrimination needs to concentrate on the idea that if discrimination costs, or carries with it, substantial cost risks, most people with the power to discriminate can refrain from their discriminatory tendencies. The key is not necessarily sanctions, but convincing those with the power to discriminate to work seriously on preventing discrimination. The end goal is not compensation for victims, but rather that potential victims are not subjected to discrimination in the first place.<sup>255</sup>

Some changes in the law could and should be made, including in relation to economic damages relating to recruitment and promotion. At the same time, policymakers need to take a more holistic view, by examining other legal tools that can help to ensure the effectiveness of the principle of equality.

One idea is a review of the rules on class actions, so that they become more effective, especially in discrimination cases. This should also mean that class actions are available in labour law as well.

Concerning restaurant and nightclub discrimination, almost all such establishments have liquor service licences, granted by their local authority. These licences are a privilege and not a right. The licences could be tied, through the Alcohol Act, to the idea that the licence holder is put on notice that discrimination is a violation of the trust granted to them by the public, and that discrimination can lead to revocation of the licence.

Another idea takes the form of a revised regulation on anti-discrimination conditions in public contracts, which clearly indicates that the contractor will agree to abide by the Discrimination Act, as well as making a written report about the fulfilment of their duties under the Discrimination Act at the request of the contracting entity, and that the contracting entity retains the right to cancel the contract if these conditions are violated.

In the author's opinion, this type of approach to the issue of what policymakers can do concerning sanctions in a broad sense can help to ensure that they actually become effective, proportionate and dissuasive.

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<sup>255</sup> Lappalainen, P. (2005) *Det blågula glashuset: strukturell diskriminering i Sverige* (The Blue and Yellow Glass House: Structural Discrimination in Sweden), white paper SOU 2005:56.

## **7 BODIES FOR THE PROMOTION OF EQUAL TREATMENT (Article 13 Directive 2000/43)**

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

Sweden has a specialised body designated for the promotion of equal treatment irrespective of racial/ethnic origin, in accordance with Article 13 of the Racial Equality Directive: the Equality Ombudsman (DO). The DO has a broad anti-discrimination and equality promotion mandate established by law (the Equality Ombudsman Act). The grounds covered by the DO's mandate are sex, transgender identity or expression, ethnicity, religion and other belief, disability, sexual orientation, and age. The DO's scope of action includes, but is not limited to, working life, education, labour market policy activities and employment services, starting or running a business and professional recognition, membership of certain organisations, goods, services and housing, health and medical care and social services, national military service and civilian service and, to a limited extent, public sector employment.

The head of the DO is appointed by the Government. All responsibility for the agency lies with the head of the agency. There is no governing board or anything similar.

- b) Political, economic and social context for the designated body

In 2009 and 2010, there was extensive public criticism of the Equality Ombudsman (DO). Much of this had its beginnings in a case taken to court concerning discrimination against a Muslim man. His labour market subsidy was withdrawn for failing to shake hands in an interview for an apprentice position with a potential employer who was a woman. The DO won the case in February 2010.<sup>256</sup> This resulted in massive and almost unanimous criticism of the DO in editorials. Feminists and politicians were especially critical. Few seemed to have read the actual judgment, and it was the DO that was criticised, but in general there was little criticism of the court. On top of the media criticism of the DO, there were also problems concerning the administrative management of the DO. In February 2011, the head of the office was removed. News reports at the time stated that the Government acted, among other things, due to a slowness of decision-making.<sup>257</sup>

Although it may be asserted that there is broad political support for the Equality Ombudsman, this seems to be dependent on the DO being relatively uncontroversial and unchallenging. It appears to the author of this report that victims of discrimination have had less and less trust in the DO, at least since 2011. The DO asserts that it has become more strategic. According to a former Gender Equality Ombudsman, the DO has moved from trying to use the law to promote equality through taking on cases and assisting victims to merely providing information concerning discrimination.<sup>258</sup> Agreement with this criticism can be found among NGOs and various experts in the field.<sup>259</sup>

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<sup>256</sup> Stockholm District Court, case T 7324-08, *Equality Ombudsman v Arbetsförmedlingen* (judgment of 8.2.2010) at <https://www.do.se/globalassets/diskrimineringsarenen/tingsratt/dom-tingsratt-arbetsformedlingen-omed-20067612.pdf>.

<sup>257</sup> See, for example, Expressen (2011), 'Regeringen sparkar DO Katri Linna' (The Government fires DO Katri Linna), 1 February 2011, available at: <https://www.expressen.se/nyheter/regeringen-sparkar-do-katri-linna/>.

<sup>258</sup> Svenaeus, L. (2018) 'Amnesti råder för brott mot diskrimineringslagen' (There is an ongoing amnesty for violations of the Discrimination Act) 30.02.2018, available at: <https://www.svd.se/amnesti-rader-for-brott-mot-diskrimineringslagen>.

<sup>259</sup> Some examples: 'Kritik mot DO: "Lagen har urholkats"' (Criticism of the DO: the law has been hollowed out), interview with the union for journalists at <https://www.etc.se/inrikes/kritik-mot-do-lagen-har-urholkats>. 'DO får hård kritik för "tandlöshet" och "slarv"' (DO subject of hard criticism due to toothless and careless work), a disability think tank, Independent Living Institute presents an analysis of the DO's work for a year on active measures at <https://www.arbetaren.se/2018/10/19/do-far-hard-kritik-for-tandloshet-och-slarv/>. Also see in particular the criticism from the former Gender Equality Ombudsman, Lena Svenaeus in fn 258 and 263.

This development is taking place in an environment where, even though there has been increased funding for certain equality issues (including for the DO and the new Gender Equality Agency), the political debate is becoming increasingly focused on law and order issues – largely in response to fears of increasing support for Sweden’s far-right party. The elections in September 2018 led to an increase in the votes for that party, causing confusion about the results. After many months of speculation, a minority Government, consisting of the Social Democrats and Greens was formed with the support of two centre right parties.

Discussion is ongoing in Sweden concerning the creation of a national human rights institute (NHRI). Although there is broad support for such a body in the Parliament, at least in theory, the support seems rather limited in that the Parliament rejected the idea of establishing the NHRI as a parliamentary agency. Instead, the Parliament sent the issue back to the Government. The issue of an NHRI has been on the table since at least 2010. In October 2018, a departmental inquiry recommended the establishment of the NHRI as a Government agency with greater independence than most Government agencies.<sup>260</sup>

The Swedish Gender Equality Agency<sup>261</sup> was opened on 1 January 2018. The task of the agency is to coordinate, follow up and in different ways support the effective implementation of the Government’s gender equality policy. This is to be done in cooperation with other Government authorities, as well as municipalities, county councils, regions, civil society and industry. There may potentially be some overlap with the work of the Equality Ombudsman, but this is not yet clear.

The income and expenses for the Equality Ombudsman were about EUR 9.6 million (SEK 103 million) during each year from 2014 to 2016. There have been no dramatic increases or reductions since the Equality Ombudsman was created in 2009. In 2017, the budget was approximately EUR 10.5 million (SEK 112 million) and in 2018 it was approximately EUR 11.6 million (SEK 124 million). The latest increase consists of compensation for inflation of SEK 2 million and a further SEK 10 million for various activities. The budget has thus increased over the last two years.<sup>262</sup> The funding for equality promotion other than through the Equality Ombudsman increased from EUR 5.8 million (SEK 62 million) to EUR 7.4 million (SEK 79 million) in 2018.

It is not easy to assess the balance between supportive and hostile news coverage in the popular press. However, in the view of the author, the press coverage of the Equality Ombudsman seems to be decreasing in general. The only party that seems interested in a debate concerning the Equality Ombudsman is the far-right party, which wants the DO to be defunded. Some topics, such as the matter of the handshake and other issues related to Muslims, give rise to debate, sometimes heated. Although there is no active political campaign against the Equality Ombudsman except from the extreme right, there is no active support either. Various civil society organisations seem to have realised that they themselves must become more active in taking cases to court. At the same time, the former Gender Equality Ombudsman has severely criticised the Equality Ombudsman’s strategy and current approach to handling complaints. She points out that the Ombudsman is moving its focus from legal strategy and the tools provided by law to an information strategy that will convince those with the power to discriminate to voluntarily refrain from discrimination. Her criticism relates to all discrimination grounds, and not just gender.<sup>263</sup>

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<sup>260</sup> Sweden, *Förslag till en nationell institution för mänskliga rättigheter i Sverige* (Proposal on a national human rights institution in Sweden). Ds 2019:4. At [https://www.regeringen.se/4927e4/contentassets/49ea6f55b95242ff8d8375afd9324741/ds-2019-4\\_web.pdf](https://www.regeringen.se/4927e4/contentassets/49ea6f55b95242ff8d8375afd9324741/ds-2019-4_web.pdf).

<sup>261</sup> See Government information available at: <http://www.government.se/articles/2018/01/the-new-swedish-gender-equality-agency-inaugurated-in-gothenburg/> and the agency’s website at: <https://www.jamstalldhetsmyndigheten.se/en/>.

<sup>262</sup> Sweden, Government bill 2017/18:1, Expenditure Area 13, p. 45. Of that amount, SEK 0.7 million is for the Board Against Discrimination, Regulation letter for the Equality Ombudsman 2018. Ku2017/02634/DISK.

<sup>263</sup> Some examples where the author of this report has translated the headlines into English: Svenaeus, L.

The unions play an important role, but there is no overview of the discrimination cases they are taking on, so it is hard to know how they are dealing with such cases.

Very few cases are brought by individual complainants – the cost risks related to losing are too high for most people, perhaps especially those who are most likely to be victims. Some of the cases taken on by the local anti-discrimination bureaux lead to settlements. If and when a bureau brings a case to court, it will generally be a small claims matter, which avoids the risk of being required to pay the winning party's legal costs.

In summary, the equality body exists in a political, economic and social context where it has a practical monopoly on the development of case law.

### c) Institutional architecture

In Sweden, the designated body does not form part of a body with multiple mandates.

The mandate of the Equality Ombudsman (DO) extends to counteracting discrimination and promoting equality in relation to the grounds of sex, transgender identity or expression, ethnicity, religion or other belief, disability, sexual orientation and age. The DO's mandate is set out in the Equality Ombudsman Act. The DO has the duties described in the Discrimination Act (2008:567) as well as the duty to promote equality in other respects.

Thus the DO's mandate includes representing claimants in the courts as well as the provision of advice and other support to those subjected to discrimination. In addition, the DO shall inform, educate, discuss and have other contacts with Government agencies, enterprises, individuals and organisations, follow international developments and have contacts with international organisations, follow research and development work, propose legislative amendments or other anti-discrimination measures to the Government, and initiate other appropriate measures.

The annual regulation letter,<sup>264</sup> which requires the DO to report back to the Government regarding specific tasks, can have some effect on the agency's priorities.

The Equality Ombudsman does not have a mandate as a general human rights institution in that its mandate is limited to the fundamental human right of equality and non-discrimination.<sup>265</sup> In theory it cannot deal with an infringement of a human right that is totally unconnected to a discrimination ground. However, the Equality Ombudsman has a wide scope of appreciation when it decides which areas to give priority and how to interpret those areas. For example, with regard to the Sami people, their rights as an indigenous

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(2018) 'There is an amnesty today for violations of the Discrimination Act', 30.02.2018, available at: <https://www.svd.se/amnesti-rader-for-brott-mot-diskrimineringslagen>; 'Procedural circus when the DO handles cases on sexual harassment', available at: <http://www.dagensjuridik.se/2017/11/processrattsliq-cirkus-nar-do-hanterar-mal-om-sexuella-trakasserier-2>; Response by the DO, 'Attempting to get an admission of sexual harassment is not a circus. Your criticism is not serious', available at: <http://www.dagensjuridik.se/2017/11/inte-cirkus-att-forsoka-fa-sexuella-trakasserier-konstaterade-din-kritik-ar-oserios-lena-sve>; Counter-response by Lena Svenaeus, '135 sexual harassment complaints to the DO, but few lead to investigations or attempts to find a solution', at: <http://www.dagensjuridik.se/2017/11/135-anmalningar-om-sexuella-trakasserier-till-do-men-fa-utredningar-eller-forsok-till-uppgor>.

<sup>264</sup> Every year, the Equality Ombudsman receives a regulation letter from the Government setting out tasks on which the DO must report back to the Government on, usually in its annual report. Occasionally the DO can be assigned special tasks that are to be reported back to the Government in some other manner. Regulation letters are given to all Government agencies. From 2009 to 2012, the DO would get a 'blank' regulation letter to ensure its independence. Since 2013 these letters have included various tasks to be reported back to the Government.

<sup>265</sup> The Equality Ombudsman (DO) applied to the UN a number of years ago as an 'A' status national human rights institution. The UN determined that the DO did not fulfil the requirement of independence (given the background of how the head of the agency was removed by the Government) and has a mandate that was too limited, as it related only to equality and non-discrimination.

people are not directly a part of the Ombudsman's official mandate, but their rights are so interlinked with their ethnic background that the Ombudsman can work on that basis anyway.

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

i) Status of the body

The Equality Ombudsman (DO) is a Government authority and is thus a separate legal person.

The DO is currently placed under the Government's Ministry for Culture and Democracy, and is appointed by the Government. The person appointed as the DO is responsible for the actions of the agency (*en enrådighetsmyndighet*).

There is no governing body. Such a body would have made the Equality Ombudsman less independent. Neither the Government nor any other organisation has a formal influence on the DO's decision-making. Instead, there is an advisory board regulated under Section 5 of the Equality Ombudsman Regulation (2008:1401). This board is chaired by the Ombudsman and has up to 10 members appointed by the Ombudsman for a term of two years.<sup>266</sup>

The Equality Ombudsman gets its annual funding from the Government, based on a budget approved by the Parliament.

The Equality Ombudsman recruits and manages its own staff.

In Sweden, all governmental authorities are independent when deciding individual cases, in accordance with the Instrument of Government Chapter 12, Section 2. Trying to influence any governmental authority on the handling of an individual case is one of the worst things that a minister can do – not even the Parliament is allowed to influence individual cases. Instructions, whether issued by the Government or the Parliament, must consist of general principles on how to act. This applies to staffing decisions as well. A general instruction may be given, for instance on trying to provide apprenticeships for newly arrived immigrants with little education. However, the Government cannot, for example, instruct any authority to hire a particular individual.

ii) Independence of the body

The word 'independent' is not stipulated in the Equality Ombudsman Act, but the body is nevertheless independent. At least initially, based on the legislative materials and their references to the Paris Principles, certain special measures were taken to underline the DO's independence. In addition, Sweden has a long theoretical tradition of a wall of separation between the Government and all governmental authorities. The Instrument of Government Chapter 12, Section 2 (which is part of the Swedish Constitution) prohibits the Government (and all other public bodies and representatives including the Parliament) from interfering in any individual case of any governmental authority. It would thus not be possible for the Government to interfere in an individual case without a change in the Constitution.

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<sup>266</sup> This board first met on 09.02.2010. The main rule is that the number of members must not exceed 10. Originally the idea was to have a broad representation of NGOs, academics, the social partners, Government agencies and others relevant to the work. According to the 2018 DO Annual Report (p. 59) there are four members, one from private industry, the head of a Government agency, a union policy advisor, and a representative of the Swedish Association of Local Authorities and Regions. While they may be experienced in various ways, it is hard to see that they represent interests where challenging the actions of the social partners or Government agencies is a priority.

However, if the issue of actions in individual cases is disregarded, it is obvious that the Government can control the actions of an independent Government authority in other ways. This can include removal of the head of the authority, as well as the use of a regulation letter or possibly changing the mandate if the authority was established by Government regulation. One of the reasons for establishing the Equality Ombudsman through the Equality Ombudsman Act was that a change in the law, and thus the DO's mandate, would require approval by Parliament. Several of the previous anti-discrimination ombudsmen were created on the basis of a Government regulation, not an act. The act thus added an extra measure of independence.

Normally, if a governmental authority is to have a supervisory board, the Government appoints the board. The rule laid down in Section 5 of the Equality Ombudsman Regulation (2008:1401) clearly states that the Equality Ombudsman selects her own advisory board. This is an example of the high degree of independence given to the Equality Ombudsman. Even this measure was adopted, at least in part, with reference to the Paris Principles. However, it should be noted that the Government can basically revoke a regulation at any time.

The Equality Ombudsman has independence mainly based on the general and constitutionally protected tradition of independent authorities in Sweden, as well as being established by law. Initially, this independence was complemented by some special independence-enhancing measures. However, in practice, it should be pointed out that one of the major reasons why the Equality Ombudsman's application to the UN for status as a national human rights institution was rejected was the lack of independence demonstrated by the manner in which the Swedish Government was able to easily remove the head of the Equality Ombudsman in 2011.

Although the DO is established by law, and even though the legislative materials for that law refer, *inter alia*, to the Paris Principles, the removal of the agency head in 2011 and the increasingly detailed regulation letters clearly indicate that the DO is accountable and is held accountable in regard to the interests of the Government. In the author's view, the DO's independence can be questioned since this situation can naturally cause problems if the DO takes positions that are contrary to the Government's interests. It becomes easier, consciously or subconsciously, to find positions that are less controversial.

Instructions can be given by the Government to the Equality Ombudsman by regulation letter. So far, this has been used for specific requests, such as surveys on different topics or reporting on certain issues. When the Equality Ombudsman was created in 2009, there was an understanding that the Ombudsman would receive only a blank regulation letter. This was one way of indicating the particular independence of the Ombudsman, with reference, *inter alia*, to the Paris Principles. This was adhered to through 2012. Since then, the regulation letters have included various reporting demands. Based on the regulation letter currently in force, the Ombudsman has a special duty, among other things, to report its work on wage surveys to the Government.<sup>267</sup> The regulation letter has now clearly become a means of influencing the work of the Equality Ombudsman.

All Government authorities (including the Equality Ombudsman) report back to the Government on the basis of their regulation letter. Even though the regulation letter for the Equality Ombudsman possibly contains fewer detailed

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<sup>267</sup> Equality Ombudsman, 2018 regulation letter, available at: <https://www.esv.se/statsliggaren/regleringsbrev/?RBID=18906>.

requests compared with the regulation letters of other Government authorities, the requests necessarily affect the independence of the office.

e) Grounds covered by the designated body/bodies

The Equality Ombudsman covers seven grounds of discrimination: sex, sexual orientation, ethnicity, religion and belief, disability, age and transgender identity or expression. In addition, the DO, in accordance with the Parental Leave Act (1995:584) has the right to bring cases on behalf of individuals regarding the prohibition against unfavourable treatment related to parental leave.

The Swedish Discrimination Act is to a large extent built upon the idea that all seven grounds are equal. Therefore, none of its staff only deal with a single ground, and there is no specified budget for specific grounds. When a priority is decided on, for example the issue of harassment, it can often transcend the various grounds, or it can be only a part of a ground, for instance Islamophobia or Afrophobia. The priorities are not based on the grounds, but rather on a determination of which issues need an increased focus.

In Sweden, intersectional cases can be a problem. One benefit of the Equality Ombudsman's mandate concerning all grounds has been the increased understanding that many complaints can involve multiple grounds, even if the individual did not realise this in the beginning. If they had approached a single-ground authority, the other ground or grounds might have been missed.

Migrants are protected by the prohibition against ethnic discrimination in the Discrimination Act. Basically, such cases are dealt with like all other cases, and they are not a special priority for the DO. There is presumably a high level of discrimination against undocumented migrants or those who are to be expelled, but complaints will probably not be made to the DO very often, since such complaints are generally publicly accessible documents. Persons living under the threat of expulsion often avoid contacts that they believe might make the police aware of their whereabouts. It may be noted that the Equality Ombudsman was highly critical of Sweden's reform of its asylum rules, which sought to move towards the lowest level permitted by international rules.<sup>268</sup>

There is an increasing lack of clarity about the attention given to any particular ground. There are short-term political issues directing attention to specific grounds, ranging from gender equality and active measures to gender mainstreaming (not equality mainstreaming) in Government agencies to sexual harassment, and others concerning LGBT issues, disability issues, anti-Roma issues, Islamophobia and Afrophobia. At the same time, there seems to be a shifting away from using the law as a tool for change regardless of ground to using the law as an informational tool.

The level of attention given to the various grounds can also be described as unsatisfactory in that the NGOs related to these different grounds all seem to be dissatisfied with the work of the DO on 'their' ground, particularly concerning complaints. The author tends to agree with the NGOs in that the DO has pulled back from using complaints, but this does not seem to be aimed at favouring particular grounds; rather, all grounds are disfavoured, which is connected with the implementation of the DO's focus on information and education as a tool for social change.

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

i) Independent assistance to victims

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<sup>268</sup> Equality Ombudsman (2016) *Begränsningar av möjligheten att få uppehållstillstånd i Sverige* (Limitations on the possibility to receive a residence permit in Sweden), Diarienummer LED 2016/57, Remissvar på Lagrådsremiss Ju2016/01307/L7, 10.03.2016, available at: <http://www.do.se/om-do/vad-gor-do/remissvar/remissvar-under-2016/begransningar-av-mojligheten-att-fa-uppehallstillstand-i-sverige/>.



The DO has the competence to provide independent assistance to victims. The issue instead is when and where the DO chooses to provide assistance. One problem is that effective exercise of this power also depends on an understanding of discrimination as well as the trust of the victims, both individually and in general.

The powers are exercised independently. Once the decision has been made to take on a case, including the willingness to take it to court, one indication of independence is the willingness to take on some cases of a controversial nature, such as the handshake or headscarf cases.

Concerning the cases that are actually taken to court, the DO seems to be committing the personnel and other resources that are needed in order to be effective, and it appears that a high level of courtroom advocacy is provided.

As for the cases that are settled, the DO has a basic policy against settlements unless the opposing party admits to discrimination as part of the settlement. Although the thinking concerning an admission of wrongdoing is understandable, in the view of the author of this report, that approach is not as effective as it could be. One reason is that, given such an admission, the settlement will presumably focus on the compensation paid. This potentially limits the possibilities with regard to more far-reaching settlements. For example, if someone applies for a job with a large employer, a settlement including a different but similar job, some compensation, and possibly a requirement of equality training for the employer's upper level management could be more attractive, both for society and for the individual involved. This is particularly true if the individual is unemployed and is offered a job that fits their educational background and experience.

The Government inquiry tasked with investigating how more people can receive help in pursuing discrimination complaints recommended that the DO develop a broader policy on potentially adopting a more creative approach to settlements. The inquiry report stated that

'The Equality Ombudsman's primary task, also in the future, should be to help the parties reach agreement. However, in our opinion the Equality Ombudsman should broaden its work involving consensual solutions, and examine the possibility for parties to reach agreement in more cases'.<sup>269</sup>

It is interesting to note the inquiry's reference to the DO's expressed views on settlements:

'Due to the imbalance in the power relations between the DO and the party accused of discrimination, it is also problematical that the DO works towards a settlement in cases where the legal situation is unclear or there is a dispute on the issue of guilt'.<sup>270</sup>

Naturally, it is important to be concerned that this imbalance in power is not used improperly.

In the view of the author of this report, it is even more important that the DO is concerned about the substantial imbalance of power between those who have the power to discriminate and the victims of discrimination. In the author's view, providing a counterweight to those with the power to discriminate was the primary reason for the development and establishment of equality bodies

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<sup>269</sup> Sweden, Government White Paper 2016:87, p. 34.

<sup>270</sup> Sweden, Government White Paper 2016:87, p. 160.



in the first place. Policymakers and civil society organisations recognised that, otherwise, little would change, regardless of what the law said. This is of particular relevance when civil laws are used by the state to contribute to substantive change; civil laws here have a twofold purpose: redress for the victims and social change so that there is less need for redress.

It is difficult to say much about the effectiveness of those cases that are investigated that lead to supervisory decisions. The complaints that are to be investigated are those that the DO has in theory determined can have a great impact, can affect societal development and can promote equal rights and opportunities.<sup>271</sup> These investigations are said to be neutral up until the time that the DO expresses a willingness to take them to court. Some then lead to settlements, some to court cases and some to other measures. The inquiry nevertheless recommended that the DO look for alternative resolution measures, even if going to court is not possible or is undesirable. The inquiry also recommended improvements to communications with the person submitting the complaint as well as with the person complained against. As one alternative, the inquiry recommended that the DO should provide clearer motivations when it decides not to take particular cases to court.

According to the Government inquiry, only a small number of complaints are investigated: although it may vary from year to year, the percentage of complaints that are investigated is about 15-20 % – in other words, most complaints are not investigated.<sup>272</sup> Although the inquiry pointed out that it is not reasonable to require the DO to investigate all complaints, it recommended that more of them should be investigated.<sup>273</sup> It is hard to conclude that the DO is being particularly effective with regard to complaints in cases where the decision to send a form letter in response is based solely on the complaint. It is certainly possible that a number of complaints may be rejected on the basis of the complaint itself, especially if the person reading the complaint has substantial experience in dealing with discrimination and discrimination law – but presumably the most skilled and experienced are not involved at this stage. It is also obvious that, if 80-85 % of complaints are rejected, some of them will involve cases that fit the categories that should have been given priority, even according to the DO's own standards.

One problem concerning effectiveness is the decreasing number of cases taken on by the Ombudsman that lead to settlements or a decision by the courts. Individuals who have a case run substantial economic risks if they go to court without the support of the DO (or their union). For a number of years, individual complainants seem to have found it increasingly hard to get their cases investigated by the DO, with even less chance of obtaining support in taking a case to court, particularly given the DO's stated focus on cases of broader interest. Effectively protecting victims of discrimination was the focus of a Government inquiry, which recommended that the DO investigate more cases.<sup>274</sup> Since the proposals were merely recommendations, however, they will be given little weight by the DO, as is indicated by the DO's response to the inquiry, in which the DO basically rejected the recommendations for it to investigate more cases and pursue more settlements.<sup>275</sup>

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<sup>271</sup> Sweden, Government White Paper 2016:87, p. 164.

<sup>272</sup> Sweden, Government White Paper 2016:87, p. 186.

<sup>273</sup> Sweden, Government White Paper 2016:87, p. 33-34 (in English).

<sup>274</sup> See Committee Directives 2014:10 and 2014:79 and Government White Paper 2016:87, p. 25. A case taken to the point where the alleged discriminator is asked to reply creates a basic investigation even if the Ombudsman decides not to go to court. This may cause the alleged discriminator to change their practice, and it may be helpful should the individual decide to go to court.

<sup>275</sup> See the DO response at: <http://www.do.se/om-do/vad-gor-do/remissvar/remissvar-under-2017/battre-skydd-mot-diskriminering/>.

ii) Independent surveys and reports

The Swedish Equality Ombudsman (DO) has the competence to conduct independent surveys and publish independent reports. This is stated in the Equality Ombudsman Act.

One or two reports will be produced during a typical year, although there may be anything between no reports and five reports published in any individual year. The reports are generally of a high quality, in that they are produced by professionals in the field (often external experts). Normally, these reports describe the facts, and they are not designed to advocate a change to legal rules and so on.

The effectiveness with which the DO exercises its competence to conduct reports and surveys is hard to assess, since it is hard to understand the strategy behind them. They mainly seem to be informational tools that could just as well be produced by other authorities, research institutes or NGOs. In that respect they can be considered to be less than effective since they are seldom intended to break new ground or provide tools that actually challenge discrimination.

iii) Recommendations

The Swedish Equality Ombudsman (DO) has the competence to issue independent recommendations on discrimination issues according to the Equality Ombudsman Act.

In the legislative process, the Equality Ombudsman always gives an opinion on new legislation that is relevant to the equality field. The adoption of the new and very restrictive asylum legislation<sup>276</sup> and the Roma registration scandal<sup>276</sup> are both examples of the Equality Ombudsman taking positions on issues that fall outside the Discrimination Act but that are still of relevance to the field of discrimination.

The collaboration between the School Inspectorate and the Equality Ombudsman on the guiding principles for schools regarding the wearing of headscarves and burkas/niqabs is another example of the Equality Ombudsman acting independently but together with another Government authority.

The Equality Ombudsman is regarded as an expert in its field when dealing with other Government authorities or commenting on proposed legislation.

Although the Equality Ombudsman is considered to be an expert, in the author's opinion it is difficult to conclude that the independent recommendations are particularly effective as the recommendations are seldom challenging and generally lack the support of the victims of discrimination.

iv) Other competences

Under Section 1 of the Equality Ombudsman Act (2008:568), in addition to the duties described in the Discrimination Act (2008:567), the DO shall work to counteract discrimination and promote equality concerning sex, transgender

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<sup>276</sup> Several years ago the police in southern Sweden established a register containing the names of thousands of Roma persons and their relations, including small children and deceased persons. The Equality Ombudsman concluded it was possible that ethnic profiling was being used by the police in its work and that there was a risk of discriminatory actions that could violate Section 17, Chapter 2 of the Discrimination Act, which led to a recommendation by the Ombudsman that the police investigate the occurrence of ethnic profiling and if needed undertake the necessary actions. Available at: <https://www.do.se/lag-och-ratt/stallningstaganden/tillsyn-av-polismyndigheten/>.

identity or expression, ethnicity, religion or other belief, disability, sexual orientation or age. Section 3 exemplifies the broad mandate by specifying that, within the DO's sphere of activities, the DO shall: inform, educate, discuss and have other contacts with Government agencies, enterprises, individuals and organisations; follow international developments and have contacts with international organisations; follow research and development work; propose legislative amendments or other anti-discrimination measures to the Government; and initiate other appropriate measures. This last phrase was put in to indicate that the DO has a broad and independent mandate that is clearly not limited to the issues set out in the rest of Section 3. These are examples of, but not limits on, what the DO may choose to do to counteract discrimination and promote equality. Thus, in the author's opinion, the Ombudsman has substantial freedom within its budgetary constraints to determine other potential activities and duties that may be needed beyond those enumerated in the act. Exactly what those are or could be will be unclear until the Ombudsman decides to actually test the limits of its mandate.

For the past few years, according to the annual reports, increasingly larger portions of the budget are being dedicated to communication and awareness raising, promotion and support of good practice and policy advice. In the author's opinion, this is what is generally done in Sweden concerning social change, in the belief that investment in education and information will affect attitudes. However, as stated before, Swedes generally have good attitudes, or at least the politically correct ones, which is why such actions do not necessarily solve the problems at issue, although a focus on information and awareness raising provides a convenient means for saying that such issues are being dealt with.

g) Legal standing of the designated body/bodies

In Sweden, the Equality Ombudsman has legal standing to bring discrimination complaints on behalf of identified victims who provide a power of attorney to the DO. The DO then becomes the party in the case, which means that the DO will pay the other party's legal costs if the case is lost.

Chapter 4 of the Discrimination Act sets out the tasks of the Equality Ombudsman under the act, and Section 2 refers to its right under Chapter 6, Section 2 to go to court on behalf of an individual who has suffered discrimination. The Equality Ombudsman needs the permission of the victim if a case is taken to court - but no other permission.

The Equality Ombudsman cannot act as *amicus curiae*.

The Equality Ombudsman cannot bring discrimination complaints on behalf of non-identified victims to court. Some commentators assert that the limitation of the DO's mandate to identified victims is problematic, and that Swedish law is not in line with the first point of the operative part of the *Firma Feryn* case.<sup>277 278</sup> On the other hand, in the author's opinion the CJEU was quite clear in stating:

'Consequently, Article 7 of Directive 2000/43 does not preclude Member States from laying down, in their national legislation, the right for associations with a legitimate interest in ensuring compliance with that directive, or for the body or bodies designated pursuant to Article 13 thereof, to bring legal or administrative proceedings to enforce the obligations resulting therefrom without acting in the name of a specific

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<sup>277</sup> European Court of Justice, judgment of 10 July 2008, *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV*, case C-54/07, EU:C:2008:397.

<sup>278</sup> See Gambinius Göransson et al, *The Discrimination Law* 2d ed. (Diskrimineringslagen 2:a upplagan), 2011, pp. 43-44.

complainant or in the absence of an identifiable complainant. It is, however, solely for the national court to assess whether national legislation allows such a possibility’.

Although national legislation *can* allow for such a power, when the Court states that the directive does not preclude Member States from making such provision, the Court did not say that the directive requires it.

#### h) Quasi-judicial competences

Generally speaking, the Swedish Equality Ombudsman is not a quasi-judicial institution. It is more of an equality promotion body that can, among other things, take cases to court. However, it does have some formal quasi-judicial aspects.

In certain situations, the Ombudsman may, under Chapter 4, Section 3 of the Discrimination Act, order the suspected discriminator to provide information, allow access to the workplace and enter into discussions. Such an order can be subject to a financial penalty.<sup>279</sup> The financial penalty will gain legal force only after a district court has ordered the payment. The legality of the order itself, as well as the reasonableness of the amount, can only be decided upon by the district court. The Equality Ombudsman cannot impose other sanctions on the discriminator.

#### i) Registration by the body/bodies of complaints and decisions

The Equality Ombudsman registers the number of inquiries, complaints and decisions (by ground, field, type of discrimination, etc). These data are available to the public and are presented in the annual report. The statistics for the previous year are made available around the end of February. Each annual report from 2009 onwards can be easily downloaded from the Equality Ombudsman’s home page.

In total, 2 994 telephone inquiries and 1 541 written inquiries were answered in 2018.<sup>280</sup> These mainly involved working life and education. Ethnicity and disability issues tend to dominate. The numbers have been relatively similar in recent years.

In 2018, the Equality Ombudsman received 2 567 complaints<sup>281</sup> (as compared with 2 475 during 2017, 2 276 in 2016, 2 382 in 2015 and 1 981 in 2014) in relation to the Discrimination Act or the Parental Leave Act.<sup>282</sup>

In 2018, the DO has substantially increased its focus on supervisory decisions. This has in turn resulted in the filing of fewer lawsuits than in previous years.<sup>283</sup> In 2018, the DO filed a total of four lawsuits and seven court judgements were issued in cases that the DO had taken on.<sup>284</sup>

In 2018, 650 supervisory decisions were made as compared to 203 in 2017.<sup>285</sup> In 2016, 204 decisions to investigate were made, 13 of which resulted in the Ombudsman initiating

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<sup>279</sup> Chapter 4, Section 4. One difference compared with the previous legal situation is that the Ombudsman can issue these orders without going through a discrimination board.

<sup>280</sup> Equality Ombudsman (2019), *Annual Report 2018*, p. 42.

<sup>281</sup> Equality Ombudsman (2019), *Annual Report 2018*, p. 65.

<sup>282</sup> Equality Ombudsman (2018) *Annual Report 2017*. Equality Ombudsman (2017) *Annual Report 2016*, pp. 40 and 42. There were a further 369 cases. See also: *Annual Report 2015*, p. 43; *Annual Report 2014*, p. 46.

<sup>283</sup> Equality Ombudsman (2019), *Annual Report 2018*, p. 36.

<sup>284</sup> Equality Ombudsman (2019), *Annual Report 2018*, p. 35.

<sup>285</sup> Equality Ombudsman (2019), *Annual Report 2018*, p. 34.

court proceedings.<sup>286</sup> This can be compared with 16 initiations of court proceedings in 2015 and 25 in 2014.<sup>287</sup>

In 2018, there were 740 disability complaints, 734 regarding ethnic origin, 386 regarding sex, 305 regarding age, 146 regarding religion, 80 regarding sexual orientation, 68 regarding transgender identity or expression and 85 regarding parental leave.

In 2017, there were 749 disability complaints, 710 regarding ethnic origin, 350 regarding sex, 274 regarding age, 218 regarding religion, 67 regarding sexual orientation, 59 regarding transgender identity or expression and 83 regarding parental leave.<sup>288</sup>

In 2016, there were 674 disability complaints, 695 regarding ethnic origin, 316 regarding sex, 238 regarding age, 152 regarding religion, 55 regarding sexual orientation, 54 regarding transgender identity or expression and 76 regarding parental leave.<sup>289</sup>

#### j) Stakeholder engagement

Section 3 of the Equality Ombudsman Act states that the Ombudsman will have various types of contacts with stakeholders. However, these are mentioned only in general. This means it is up to the Ombudsman to determine its priorities in regard to the various stakeholders.

In its annual reports, the DO brings up the importance of a continuous exchange of knowledge with civil society so that the DO can identify problems in society relating to the risk of discrimination:

'Which actors the DO cooperates with, the purpose and the form of the cooperation, depends on which changes the DO wants to contribute to and how the cooperation can contribute to the work for change. In addition, the DO has a continuous exchange of knowledge that is connected to each respective discrimination ground'.<sup>290</sup>

As regards civil society and discriminated-against groups, the 2018 annual report refers to one larger meeting with local anti-discrimination bureaux. Otherwise the DO has meetings with individuals and NGOs representing, for example, women, immigrants, persons with disabilities and the LGBT community, when it is considered necessary. Other meetings can occur in relation to specific issues, such as discrimination against Muslims, Afro-Swedes or the Sami.

For example, as a consequence of the Government's special task on knowledge-increasing measures on Afrophobia, the DO took several actions on the basis of various meetings with the Afro-Swedish community. One of these actions involved commissioning the Institute for Future Studies to produce a pilot project to develop one or more methods to illustrate how discrimination affects the access of Afro-Swedes to equal rights and opportunities. According to the DO, all of the work has been carried out in close cooperation with Afro-Swedes.<sup>291</sup>

Another special Government task in 2018 involved cooperation with civil society organisations and other Government agencies concerning current LGBT issues. This

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<sup>286</sup> Equality Ombudsman (2017), *Annual Report 2016*, p. 42. Four of those cases were related to the ground of sex (counting a pregnant transgender man as a sex case like other pregnancy cases). Three cases were ethnic cases, and one concerned religion. See also the *Annual Report 2015*, p. 44 and *Annual Report 2014*, p. 47.

<sup>287</sup> Equality Ombudsman (2016) *Annual Report 2015*, at: <http://www.do.se/globalassets/om-do/diskrimineringsombudsmannen-arsredovisning-2015.pdf>.

<sup>288</sup> Equality Ombudsman (2018), *Annual Report 2017*, p. 58.

<sup>289</sup> Equality Ombudsman (2018), *Annual Report 2017*, p. 58.

<sup>290</sup> Equality Ombudsman (2017), *Annual Report 2016*, p. 18.

<sup>291</sup> Equality Ombudsman (2018), *Annual Report 2017*, p. 41.

resulted in: a seminar during Europride 2018 on questions faced by same sex couples as new parents; a Government agency conference on leadership and LGBT issues, and internal DO training.<sup>292</sup>

Concerning more broad-based civil society associations, local anti-discrimination bureaux are run by NGOs in various parts of Sweden. One form of cooperation involves the Equality Ombudsman being present at local educational events on non-discrimination arranged by the local anti-discrimination bureau. The bureaux, in providing advice and assistance, refer suitable complaints to the DO.

The DO also takes part in meetings and projects with employers' associations and unions. In 2018, the DO arranged a seminar focused on the social partners at the national level concerning sexual harassment and the protection against discrimination.<sup>293</sup>

The DO cooperates with other state agencies, depending on the specific issues involved. One example of this is its cooperation with bodies such as the Authority for Participation (Myndigheten för delaktighet) concerning the changes in the law on inaccessibility as a new form of discrimination. The Ombudsman further cooperates with other authorities as an expert or as a member of different official inquiry teams.

The DO will report to the Government on work being done by local authorities to counteract racism, including success factors and challenges, as a part of its task of examining the situation of racism in Sweden.<sup>294</sup> This work is clearly based on cooperation with local authorities.

Overall, it can be said that the DO engages with a broad variety of stakeholders based on its understanding of its own priorities – or the Government's priorities. It may be pointed out that the Government, in allocating certain special tasks, adds a budget related to those tasks. One example is the Afrophobia project, mentioned above.

Finally, in the opinion of the author of this report, the DO seems to be more interested in engaging with stakeholders with the power to discriminate rather than those who represent discriminated groups.

#### k) Roma and Travellers

There have been many cases involving Roma, and the Ombudsman plans to analyse these cases and issue guidelines on how to address Roma issues in the future. Although the Roma were a special focus for a number of years, in particular as one of the five national minorities, this is no longer the case. However, since one of the Equality Ombudsman's main tasks is to combat discrimination in individual cases, and it is likely that there will continue to be a high number of cases from this ethnic group in the future due to their risk of discrimination, it is likely that the DO will continue some of this work as a practical matter.<sup>295</sup>

An important settlement reached in 2017 concerned a Roma woman whose child had been taken into custody and placed with a non-Roma family. The mother was denied visiting rights. The municipality admitted that this decision had been based on stereotypical perceptions of Roma culture and that a further factor in the mistake was the fact that the

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<sup>292</sup> Equality Ombudsman (2019), *Annual Report 2018*, pp. 44-45.

<sup>293</sup> Equality Ombudsman (2019), *Annual Report 2018*, p. 22.

<sup>294</sup> Equality Ombudsman (2019), *Annual Report 2018*, p. 45.

<sup>295</sup> Equality Ombudsman (2015) *Annual Report 2014*, from p. 53. Discrimination against the Roma people with regard to goods, services and housing is a priority area. The Ombudsman strives to take up some such cases each year in order to keep the public aware of the risk of being taken to court. However, the Ombudsman is doubtful regarding the effectiveness of this strategy (low amounts of discrimination awards being one problem). Compare Equality Ombudsman (2017) *Annual Report 2016*, pp. 9 and 35.

woman was not allowed to communicate in her own language. The municipality agreed to pay compensation.<sup>296</sup>

Cases that were investigated but not taken to court in 2016 include those of several shops and restaurants that denied service to Roma customers.<sup>297</sup> Such cases are hard to prove.

As a practical matter, it seems that Roma will continue to be at least a de facto priority group.

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<sup>296</sup> Equality Ombudsman case 2016/1971. This case, settled in March 2017, was highly sensitive. The custody decision itself was not discriminatory (the mother could not take care of the child); it was only the decision on visitation rights that was discriminatory. Therefore, no further details are given. There are two types of settlements. One type is where the perpetrator denies discrimination but accepts that a mistake has been made and offers compensation. This settlement was of the other type, whereby the municipality accepted that its mistake amounted to discrimination.

<sup>297</sup> Equality Ombudsman (2017) *Annual Report 2016*, p. 35.

## 8 IMPLEMENTATION ISSUES

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

- a) Dissemination of information about legal protection against discrimination (Article 10 Directive 2000/43 and Article 12 Directive 2000/78)

Beyond the activities of the Equality Ombudsman involving reports, training programmes and dialogue with NGOs and social partners, which are discussed above, further national and local activities are mentioned below. Some of them are connected with the DO's activities already mentioned above.

The Government has undertaken various initiatives that are worth noting:

- The DO's task on increasing awareness about Afrophobia.
- The national strategy for equal rights and opportunities concerning sexual orientation and gender identity and expression (the DO is specified as one of five strategic Government agencies involved).
- A budget increase of SEK 10 million (EUR 936 000) in 2018 for the DO and a substantial increase in the funding for local anti-discrimination bureaux.<sup>298</sup>
- In 2018, the DO, according to its regulation letter, carried out a large information campaign concerning disability discrimination and inadequate accessibility.<sup>299</sup>

The Swedish Inheritance Fund provided support to two projects ('Law as a tool for social change'<sup>300</sup> and 'From talk to action')<sup>301</sup> run by different disability organisations aimed at spreading information about implementation of the Discrimination Act and counteracting discrimination in other ways, especially by raising awareness about the need to take cases to court and the process for doing so.

The work of the Swedish network of cities against racism and discrimination continues to be of interest.<sup>302</sup> Their work to some extent involves the dissemination of information about the directives and the national laws that stem from them. In this respect, it is worth mentioning the work of UNESCO LUCS – a UNESCO regional initiative intended to bring together the initiatives undertaken by local authorities along with researchers and civil society, for example on integration and anti-discrimination. One effort by UNESCO LUCS and the Mångkulturellt Centrum in this regard was the 2016 publication *Equality - Local demands you can make! Tools for those who want to counteract discrimination and promote human rights*.<sup>303</sup> Among other things, the book takes up the issue of what cities can do to promote equality as employers, service providers, public contractors and rule-makers. In practical terms, this deals with the implementation of the principles of the EU anti-discrimination directives.

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<sup>298</sup> Government press release, 'Increased support to the work against discrimination', 20 September 2017, available at: <http://www.regeringen.se/artiklar/2017/09/regeringen-foreslar-forstarkt-satsning-mot-diskriminering/>.

<sup>299</sup> Equality Ombudsman (2019) *Annual Report 2018*, p. 46-47.

<sup>300</sup> 'Law as a tool for social change' – see: <https://lagensomverktyg.se>.

<sup>301</sup> 'From talk to action' – see: <http://funktionsratt.se/projekt/fran-snack-till-verkstad/>.

<sup>302</sup> See the website of Sweden's Association of Local and Regional Governments, at: <https://skl.se/demokratiledningstyrning/manskligarattigheterjamstallldhet/rasismdiskriminering/natverkmotrasmochdiskriminering.699.html>.

<sup>303</sup> UNESCO LUCS, available at: <http://unescolucs.se>. Mångkulturellt centrum, *Lika rätt! Ställ krav på kommunen*, available at: [https://mkc.nordicshops.com/index.html?submenu\\_id=-1](https://mkc.nordicshops.com/index.html?submenu_id=-1).



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

As has already been indicated, a fairly weak role is played by the discrimination ground-specific NGOs in Sweden, with the possible exception of certain organisations within the disability movement and the main LGBT organisation (RFSL).

NGOs dealing with discrimination are encouraged to be members of and to form local anti-discrimination bureaux. Some bureaux, like the one in Malmö, seem to have become fairly important voices in counteracting discrimination in their regions, which gives them an interesting platform from which to engage in dialogue with others.

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

As has already been indicated, the social partners traditionally play a key role in the Swedish labour market, and a variety of issues are collectively bargained and regulated by means of collective agreements. The new rules on active duties that entered into force at the start of 2017 have made it necessary for the Ombudsman to have contacts with the Confederation of Swedish Enterprise.<sup>304</sup> In the regulation letter for 2018 there is a special duty to report back to the Government on these activities.<sup>305</sup> These new rules expand the role of the trade unions with regard to active duties.

- d) Addressing the situation of Roma and Travellers

There is no specific body on the national level to address Roma issues. However there are various actions taken in regard to Roma as well as in regard to their status as a national minority.

In 2018, the Parliament adopted Government Bill 2017/18:199 (a strengthened minority policy), which included amendments strengthening the Act on national minorities and minority languages (2009:724).<sup>306</sup> The amendments enter into effect on 1 January 2019. This also means strengthening the rights of Roma, particularly language rights. At the same time, although rights have been strengthened, the criticisms levelled by the DO and Civil Rights Defenders (an NGO financed by private and public sources) concerning the lack of enforcement mechanisms in the law were not addressed.<sup>307</sup> Quite simply, the law provides rights, but is weak on remedies.

From 2016 to 2018, as part of the Government's strategy for Roma inclusion, the National Board of Housing, Building and Planning (Boverket) was given the task of raising awareness about the situation of Roma and counteracting discrimination against them on the housing market.<sup>308</sup>

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<sup>304</sup> Equality Ombudsman (2017) *Annual Report 2016*, p. 1.

<sup>305</sup> Equality Ombudsman, 2018 regulation letter, available at:

<https://www.esv.se/statsliggaren/regleringsbrev/?RBID=18906>.

<sup>306</sup> Government bill 2017/18:199, En stärkt minoritetspolitik (A strengthened national minority policy). Also see Lagen (2009:724) om nationella minoriteter och minoritetsspråk (Act on national minorities and minority languages).

<sup>307</sup> Civil Rights Defenders, Responses of 5 October 2017 to SOU 2017:60, available at:

<https://www.regeringen.se/4a9135/contentassets/02f13dcbc4b7401eba0bd2ebc31c406e/civil-right-defendes.pdf> and of 6 March 2018 to SOU 2017:88, available at:

<https://www.regeringen.se/496dd7/contentassets/9d6ff20902c34927b3d9d4cdf2cf3862/civil-rights-defenders.pdf>. DO, Responses of 2 October 2017 to SOU 2017:60, available at:

<https://www.regeringen.se/4a9136/contentassets/02f13dcbc4b7401eba0bd2ebc31c406e/diskrimineringsombudsmannen.pdf> and of 19 March 2018 to SOU 2017:88, available at:

<https://www.regeringen.se/496594/contentassets/9d6ff20902c34927b3d9d4cdf2cf3862/diskrimineringsombudsmannen.pdf>.

<sup>308</sup> See the minister's press release at: <http://www.regeringen.se/pressmeddelanden/2016/05/boverket-ska->

The Roma are one of five national minorities in Sweden. The Stockholm County Administrative Board has been given special responsibility for all five national minorities. There is a continuing duty for the administrative board to continue its coordination and follow-up work in relation to the way in which Sweden's minority policy is implemented throughout the country.<sup>309</sup>

Furthermore, the Government is continuing to work on its national strategy for Roma inclusion covering the years 2012-2032. The goal is that, at the end of the period, the Roma population will have the same living standards with regard to housing, employment, education and so on, as the majority.

Even if there is no specialised work by the DO aimed specifically at the Roma, some activities, such as the 2018 focus on discriminatory practices within social services, originate from complaints from Roma and are of great relevance to the Roma people.<sup>310</sup>

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

### a) Mechanisms

The relevant mechanisms involve the Ombudsman supervising the Discrimination Act in its entirety, taking into account the possibilities that this provides to individual claimants. In addition, the role played by the trade unions in supporting their members must also be mentioned, as well as the work done by the anti-discrimination bureaux. No Swedish act allows direct discrimination in areas where the Discrimination Act prohibits it. The author has not heard of a conflict of laws with regard to this. Generally, legal principles, such as good faith and good practice on the labour market, can be said to assist in combating discrimination.

### b) Rules contrary to the principle of equality

The task of proposing legislation in order to implement the directive into Swedish national law was given to a special investigator, who presented her report in the spring of 2002.<sup>311</sup> However, the investigator did not, as required by Article 16(a) of the directive, carry out any general screening of laws and administrative provisions for incompatibilities with the requirements of the directive (at least not in any comprehensive way).<sup>312</sup>

According to Hans Ytterberg (the former Ombudsman Against Discrimination on the Ground of Sexual Orientation), there are no discriminatory laws and provisions with respect to sexual orientation discrimination in employment or occupation still in force.<sup>313</sup>

This is more problematic in the area of differential treatment due to ethnicity, particularly with respect to indirect discrimination. Obvious examples of problematic provisions would include requirements regarding Swedish citizenship or the need to hold a degree or diploma from a Swedish educational institution in order to be able to exercise certain professions. These requirements have to a large extent been removed. However, in the opinion of the author of this report, the measures undertaken thus far seem to have been insufficiently thorough, at least in terms of examining regulations or administrative provisions in relation

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[motverka-diskriminering-av-romer-pa-bostadsmarknaden/](http://www.minoritet.se/romsk-inkludering/).

<sup>309</sup> Stockholm Administrative County Board and national minorities, available at:

<http://www.minoritet.se/romsk-inkludering/>.

<sup>310</sup> Equality Ombudsman (2017) *Annual Report 2016*, p. 50. Also see Equality Ombudsman (2019), *Annual Report 2018*, 29-30.

<sup>311</sup> Government White Paper, 2002:43: An Extended Protection against Discrimination (*Ett utvidgat skydd mot diskriminering*, bet. SOU 2002:43).

<sup>312</sup> Government White Paper, 2002:43: An Extended Protection against Discrimination (*Ett utvidgat skydd mot diskriminering*, bet. SOU 2002:43), p. 143.

<sup>313</sup> Ytterberg, H. (2004), *Sexual Orientation Report* of 28 July 2004. This report still holds, in the sense that there is no more recent report that has investigated the issue.

to ethnic origin. One of the examples that can be pointed out is voting by immigrants in local elections. In the 1970s, Sweden granted the right to vote in local elections to immigrants who had been residents for at least three years. In the late 1990s, the law was changed so that immigrants who were EU citizens as well as those from Norway and Iceland were given the right to vote locally as soon as they crossed the border, whereas the three-year rule was retained for all other immigrants. Apparently, non-European immigrants still needed to develop an understanding of local conditions, democracy and language. The practical result is that some new immigrants are allowed to vote immediately, while a large number must wait. Although this is not a violation of the directives, it makes for an odd example of the official acceptance of unequal treatment on a key democratic issue, essentially between European immigrants as opposed to non-European immigrants.<sup>314</sup>

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<sup>314</sup> Lappalainen, P. (2005), Government White Paper SOU 2005:56, *Det blågula glashuset – strukturell diskriminering i Sverige*, (The Blue and Yellow Glass House – Structural Discrimination in Sweden), pp. 448, 471, 597-600.

## **9 COORDINATION AT NATIONAL LEVEL**

The elections in September 2018 led to confusion as to the results. The key issue became whether the conservative Alliance coalition made up of the Moderate Party, the Christian Democrats, the Center Party and the Liberals would form a government dependent on the far right Sweden Democrats, or if the Social Democrats and the Green Party could work out some kind of agreement with the Center Party and the Liberals. Negotiations took a much longer time than had occurred previously in Sweden. By the end of 2018, it was still unclear as to the type of government that would be formed.<sup>315</sup>

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<sup>315</sup> An agreement for a functioning government was reached after the cut-off date for this report, in January 2019.

## 10 CURRENT BEST PRACTICES

### 1. 2018 Report on racism and discrimination concerning Afro-Swedes

In 2018, the Stockholm County Administrative Board commissioned a report from CEMFOR, Uppsala University. The results were presented in 2018 in *Anti-Black Racism and Discrimination in the Labour Market*.<sup>316</sup>

The report's findings are not entirely unexpected:

'Taken together, these results reveal that anti-Black racism and discrimination negatively influence the situation that Afro-Swedes find themselves in on the Swedish labour market. In comparison to the rest of the population, Afro-Swedes are over-represented in unemployment figures or they are referred to low status- and low-paying jobs. Racism and discrimination have also resulted in a situation where Afro-Swedes are not provided with the same opportunities where they can increase the probability that they will be awarded a high-status position, a managerial position, or equitable remuneration by dint of their own efforts in obtaining further qualifications, in comparison to the rest of the population.'<sup>317</sup>

The report goes on to make some important suggestions such as:

- the Government investigate how it might broaden the scope of the Discrimination Act with respect to employers' mandatory responsibility to survey and implement an action plan with respect to pay differences between men and women to also include pay differences between employees that may be caused by other grounds for discriminatory practices, including national or ethnic origin, skin colour, or other similar circumstance;
- this investigation result in the formulation of suggested sanctions that can be used against employers who contravene the Discrimination Act;
- the establishment of an agency responsible for collating surveys and action plans that can be used against discrimination in the labour market and at the workplace.

The idea of requiring pay difference analyses to also examine a factor such as ethnicity would make the process more complex, while at the same time it should also contribute to greater actual fairness, since looking at only the sex factor can often be misleading. In addition, the system of sanctions needs to be more robust and effective. Finally, new and more proactive methods need to become more mainstream, which is the role that such an agency could serve.

### 2. Civil society cooperation concerning bringing a focus to discrimination by schools and the national school agency against children with dyslexia - raising awareness through enforcement

Various NGOs joined together in 2018 to bring several lawsuits against local authorities and a claim against the national Government concerning discrimination against children with dyslexia.

Certain national tests are given annually in schools around the country. Children with dyslexia throughout the school year are allowed to use certain assistance devices to help them read. However, when taking the national tests, they are not allowed to use the

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<sup>316</sup> CEMFOR (Uppsala University) (2018) *Anti-Black Racism and Discrimination in the Labour Market*, Report 2018:22, Stockholm County Administrative Board, accessed 2019-03-11, <https://www.lansstyrelsen.se/download/18.4e0415ee166afb5932419bf7/1542881639062/Rapport%202018-22%20Anti-Black%20racism%20and%20discrimination.pdf>.

<sup>317</sup> CEMFOR (Uppsala University) (2018) *Anti-Black Racism and Discrimination in the Labour Market*, Report 2018:22, Stockholm County Administrative Board, pp.12-13.

devices. The schools, run by local authorities, assert that they do this due to the instructions issued by the National Agency for Education.

The NGO known as the Dyslexia Association has pointed out the problem unsuccessfully for a number of years. A local anti-discrimination bureau had some complaints about the issue but was uncertain about how to go forward. This led to contacts with a disability anti-discrimination NGO known as Law as a tool for social change (MLSV), its associated project and *Talerättsfonden* (a relatively new fund set up to help individuals bring strategic cases).

These organisations cooperated in various ways to prepare and file several lawsuits around the country on the same day in August 2018, as well as filing a claim against the national Government with the Chancellor of Justice due to the actions of the National Agency for Education. Local government is liable for the potentially discriminatory actions of schools, while the liability of the national Government for discriminatory rules requiring discrimination by schools is somewhat unclear. The Agency for Education asserts that its actions do not fall within the framework of the Discrimination Act, as the agency is not an education provider within the meaning of the act.

The press conference held the same day led to broad media coverage, both on TV and in the newspapers. This means that there has been substantial impact in the form of publicity and awareness raising, even though no trials have yet been held.<sup>318</sup> As the cases develop, the legal impact concerning the implementation of the Discrimination Act should become apparent during 2019.

These cases are in part related to the empowerment work carried out within the frameworks of the 'Law as a tool for social change' project and the 'From talk to action' project concerning disability, equality and non-discrimination that were funded by the National Inheritance Fund.<sup>319</sup> They focused on various types of awareness raising, particularly encouraging the targets of discrimination to realise that, if they want the Discrimination Act to be applied in practice, they have to be part of the process. This means a willingness to actually take cases to court – a willingness to test the law. The dyslexia cases are a practical example of how civil society can move in this direction, potentially even providing a healthy 'competition' or complement to the Equality Ombudsman and the unions. This is the type of action that, in the long run, the author expects will help to transform law in theory to law in action.

3. The Law as a tool for social change project carried out a study of the Swedish Equality Ombudsman's (DO's) work on compliance with the duty to undertake active measures to promote equality and counteract discrimination<sup>320</sup>

During 2018, the Independent Living Institute, through the Law as a tool for social change project, asked the DO for copies of all of the cases involving active measures during the period from January 2017 to February 2018. Of the 96 decisions received and analysed by the project's lawyer Ola Linder, there were problems indicated in 54 cases. In 36 cases, the conclusion was that there were no problems and in three cases the situation was

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<sup>318</sup> Dagens Nyheter (2018) 'Barn med dyslexi nekas hjälpmedel – nu stäms Skolverket och tre kommuner' 1/9/2018, <https://www.dn.se/nyheter/sverige/barn-med-dyslexi-nekas-hjalpmedel-nu-stams-skolverket-och-tre-kommuner/>. TV4 (2018), 'Nekades dyslexistöd vid prov - kommuner stäms', 31/8/2018, <https://www.tv4.se/nyheterna/klipp/nekades-dyslexistod-vid-prov-kommuner-stams-11350574>. Swedish TV (2018), 'Dyslexiförbundet: Skolverket diskriminerar elever med dyslexi', 31 August 2018 at <https://www.svt.se/nyheter/inrikes/dyslexiforbundet-vill-stamma-kommuner-for-diskriminering-av-barn-med-dyslexi>.

<sup>319</sup> *Lagen som verktyg* ('Law as a tool for social change') – see <https://lagensomverktyg.se/>; *Från snack till verkstad* ('From talk to action') – see: <https://funktionenrattskonventionen.se/om-projektet/>.

<sup>320</sup> Law as a tool website, 'STUDY – Deficiencies in the DO:s supervisory work compliance with the duty to undertake active measures' (*GRANSKNING: Brister i DO:s tillsyn över kraven på aktiva åtgärder*) at <https://lagensomverktyg.se/2018/granskning-brister-tillsyn/#om-undersokningen>.

unclear. Three of the cases had nothing to do with active measures, even though the request was limited to active measures cases.

The Discrimination Act was amended in 2017 in relation to the active measures duty that applies to employers and education providers. The DO has the primary responsibility in Sweden for supervising compliance with the active measures required by law. This led to the project's interest in examining the DO's work on compliance. The project, as well as the legislature, considers the work on active measures to be an important part of the Discrimination Act, meaning that compliance is of interest. The project points out that the DO's decisions concerning active measures cases cannot be appealed.

The analysis by the project resulted in various conclusions and recommendations:

- Only a few cases are reported on the DO's website which means that essentially only the entity under supervision receives information about the case. This means that the impact on changing norms in society is limited leading to the conclusion that the supervisory work is not particularly effective.
- Very few complaints lead to a supervisory investigation, even in cases where the facts warrant an investigation from a legal perspective.
- Many cases do not lead to any measures by the DO even when the DO concludes that there is a failure to live up to the requirements in the law.
- The DO's decisions essentially provide information about the expansion of the law in regard to active measures, but provide little guidance. The project points out that more detailed and specific information about the meaning of the law would have a greater impact.
- There are seldom any time frames set for compliance with the law.
- The DO's decisions often focus on a certain aspect of the Discrimination Act such as sexual harassment. The decisions should also bring up other parts of the act such as inadequate accessibility.
- None of the decisions resulted in a specific order combined with a conditional financial penalty. Only two cases in 10 years are reported on the website of the Discrimination Board. The project points out that if more cases involving the risk of a financial penalty were submitted to the Discrimination Board, this would lead to a greater interest in compliance with the active measures duty.
- Establishing routines for following up active measures cases would probably lead to greater compliance.
- The project recommends connecting individual complaints to the work on active measures as a means to make both more effective. As a part of this, the project recommends that the DO engage in an improved dialogue with those who submit complaints.

This project is important in various ways, particularly as an example of civil society empowering itself in terms of its advocacy and watchdog role in relation to government agencies and the law itself.

4. Survey showing that doctors are subjected to harassment due to ethnicity and/or religion by patients and/or relatives

The Swedish Medical Association, the union and professional organisation for doctors, as part of its anti-discrimination work carried out a survey together with the news division of SVT, Sweden's national public service TV company. Of the 2 226 doctors surveyed, 505 stated that they had been the subject of some form of harassment, relating in particular to ethnicity and/or religion, by patients or their relatives. The Medical Association's goal is improved work by employers in relation to the work environment in which harassment and

discrimination takes place. The Medical Association encouraged employers to carry out such surveys on an annual basis.<sup>321</sup>

As in other fields, the multi-ethnic nature of Sweden is becoming increasingly apparent in the healthcare sector. This survey exposes various problem areas that need to be dealt with by employers in particular, but also by unions and policymakers.

## 5. Handshake case

The DO's creative advocacy in the handshake case in 2018<sup>322</sup> demonstrated a current best practice in that it allowed for a breakthrough in a difficult field. Here the decisive factor seemed to be a willingness by the prospective Muslim employee to treat everyone equally without violating her religious beliefs, i.e. by not shaking hands with men or women. In the author's opinion, the handshake cases seem to have resulted in an odd societal trauma that seems more based on a quest for conformity rather than a realisation that freedom of religion requires some difficult analyses as a society changes from perceiving itself as mono-religious to recognising itself as a multi-religious society.

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<sup>321</sup> Swedish Medical Association (2018), 'Oroande många läkare utsätts för kränkande behandling', press release 28-12-2018 at [https://www.mynewsdesk.com/se/sveriges\\_lakarforbund/pressreleases/oroande-maanga-laekare-utsaetts-foer-kraenkande-behandling-2816750](https://www.mynewsdesk.com/se/sveriges_lakarforbund/pressreleases/oroande-maanga-laekare-utsaetts-foer-kraenkande-behandling-2816750). Also see 'Om läkarutbildningens kvalitet. Grundutbildningsenkät 2018' (On the quality of medical education. Basic education survey 2018) at <https://slf.se/app/uploads/2018/05/om-lakarutbildningens-kvalitet-2018.pdf>.

<sup>322</sup> Labour Court, 2018, No. 51 2018-08-15, *Equality Ombudsman v Almega/Semantix Interpreters*, <http://www.arbetsdomstolen.se/upload/pdf/2018/51-18.pdf>.



## 11 SENSITIVE OR CONTROVERSIAL ISSUES

### 11.1 Potential breaches of the directives (if any)

Generally, Sweden fulfils the requirements set by the directives. The following points are problematic in the opinion of the author:

- Discrimination against legal persons is not prohibited in working life (see section 3.1.2).
- The principle of vicarious liability in relation to discrimination law is restricted when employees in theory act outside their authority to an extent that is problematic. Furthermore, the legal concept of 'employer' may be too narrow, as the employer is regarded as the legal person itself or the natural person who, as a representative of this legal person, makes decisions regarding the employees. The employer is thus directly responsible only when an employee discriminates against another employee *and* the latter is subordinate to or dependent upon the former.<sup>323</sup>
- Compared with the general court system, the Labour Court seems to apply the rules on burden of proof more restrictively towards the claimant. The 2017 dentist case is the first essentially similar case that has been tried in both systems and clearly demonstrates this difference. The Labour Court's practice does not seem to be in compliance with the directives, while the practice of the civil courts seems to be compliant. Furthermore, it seems to be very hard to win cases of ethnic discrimination in the Labour Court (see section 6.3).
- In cases concerning recruitment, including promotion cases, there is no right to economic compensation (see section 6.5.a).
- When implementing the prohibition on discrimination with regard to disability outside the Directive 2000/78, a different concept of direct discrimination, which does not conform to the demands of the directive, is sometimes used (see section 3.2.9).<sup>324</sup>
- The Equality Ombudsman is currently working on harassment cases and is trying to get a preliminary ruling from the CJEU. In Sweden, the claimant must show either that the offending employee has a managerial position or that the employer knows about the harassment but has not taken action. The Equality Ombudsman wants an answer to the following questions:<sup>325</sup>

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<sup>323</sup> Some legal experts in the field consider the issue of vicarious liability to be problematic given Chapter 1 Section 4(5) and Chapter 2 Section 1 of the Discrimination Act (*Diskrimineringslagen* 2008:567). In Labour Court cases 2007 No. 45 and 2011 No. 19 it is obvious that the worker/trainee had every reason to believe that the person with the alleged discriminatory behaviour was acting on behalf of the employer, but there is no protection for persons acting under such a belief, however well founded that belief may have been. At the same time, if an employee had discriminated against a customer, the employer would probably have been liable even if the employee went beyond the powers granted by the employer. Concerning experts see e.g. Fransson, S. (2016) 'Preventionspåslag och upprättelseersättning - nya konstruktioner av ersättning i diskrimineringsstvister' in *Sui generis - Festskrift till Stein Evju, Mulder, Hotvedt, Nesvik & Løkken Sundet* (eds.). P. 224-234 and Hellborg, S. (2018). *Diskrimineringsansvar* (Liability for discrimination), p. 151-154

<sup>324</sup> The Court of Justice of the European Union regards statistical discrimination as a form of direct discrimination. Case C-236/09 (*Test Achats*), where the insurance providers were not allowed to use the sex of the customer in order to determine insurance fees, is a prime example of this. The fact that men statistically have more accidents than women is not a valid defence for directly using a person's sex to determine the insurance fees for cars. However, with regard to disability and insurance, statistical differences between persons with and without disabilities makes them non-comparable, and thus a presumption of discrimination cannot arise. Please note that the fact that the concept of direct discrimination covers statistical discrimination is so strong that the directive in question (2004/113) contained a clause exempting the insurance sector, and it was this clause that got struck down by the CJEU. The Swedish Discrimination Act could have extended the protection for disability to services and then exempted the insurance sector, as per Directive 2004/113. However, extending the protection for disability to the insurance sector and then defining a comparable situation as if statistical discrimination is not a form of direct discrimination cannot be right. If an EU concept such as direct discrimination is used, then, in the view of the author, it must be used correctly.

<sup>325</sup> Two cases regarding sex (therefore not reported here) have been heard by the Labour Court (2016 No. 56 and 2016 No. 38). The Ombudsman won the cases, but failed to get the legal answers (the discriminators were found to have managerial positions).

1. Is the limitation of responsibility to employees with managerial positions in accordance with the directives?
2. If it is in accordance with the directives, what is the subjective requirement concerning the knowledge of the employer: should they know, or is a higher barrier for the claimant allowed according to EU law?

### **11.2 Other issues of concern**

While the formal independence of the Equality Ombudsman (DO) itself is not a concern, independence becomes a concern when the work of the DO moves to a simplified focus on information as the primary tool for social change rather than actual implementation and development of the law as a tool for social change. This is connected in turn with the lack of case law, which in part is due to the enforcement strategies of the DO and the unions, the relative lack of power of civil society organisations representing discriminated persons and groups, and the barriers in access to justice related to the cost risks of taking discrimination cases to court.

In the author's opinion, an equality body necessarily needs to be willing to at least occasionally confront those with power in society, not just in court but in other forums as well. This applies to employers, business owners, unions, civil servants, researchers, politicians and others. This creates an uncomfortable situation for civil servants working for the DO or in other Government capacities. This is especially true in a country that has an international reputation as a champion of human rights, a reputation that is also believed in by much of the Swedish population, including civil servants themselves. This makes it hard to understand the underlying issues related to discrimination, especially in relation to the use of law for social change. Regarding those who are less powerful in Sweden, there is a legal tradition of adopting laws that state principles but lack remedies. Basically, all of the key elements of Swedish discrimination law have been inspired by or transplanted from the EU or other jurisdictions. This applies to a civil law ban on discrimination, the establishment of an equality body, a shifted burden of proof, indirect discrimination, sexual harassment and active measures.

However, in the author's opinion, moving from law on paper to law in action requires an understanding of the current legal and political environment, as well as the direction in which it needs to go. This means understanding that case law must now be developed, even with regard to less powerful interests. This is a disruptive change as regards the Swedish model, where collective thinking has reigned and individual rights have not been considered particularly significant, at least not in regard to the less powerful. As a rule, 'they' have been expected to accept the consensus of those with power. This is one reason why a key factor going forward is empowerment. One key test, when it comes to empowerment, is to see whether the law means what it says.

This is why the following are key concerns and/or needs:

- The lack of case law in regard to the Discrimination Act and related fields. Indirect discrimination is one of several areas.
- The DO needs to investigate more complaints, more effectively. This is needed for building up the knowledge of DO staff concerning discrimination as well as the trust of the victims and groups representing victims. Even from a strategic litigation viewpoint, development of this knowledge and trust is key.
- The slow development of public interest law firms that serve discriminated-against groups.
- Amendment of the Discrimination Act in a way that can lead to larger and more substantive awards, e.g. economic damages for the most qualified job applicant.
- Furthermore, the potential triggering of anti-discrimination clauses in public contracts should be followed up as well as the need for injunctive relief, and the possibility of

forward-looking orders on reporting back to the courts on the implementation of active measures.

- In the same way as unions (i.e. subsidiary to the DO's actions), other NGOs should also have a right to follow-up the implementation of active measures.
- Reducing the cost risks placed on victims of discrimination who take cases to court on their own.
- The establishment of a test case fund based at least initially on public funding, controlled mainly by NGOs, which can provide support in potentially strategic cases.
- On discrimination awards, the possibilities concerning the prevention portion should be considered as a potential source of financing for the fund above. For example, if 50 % of the preventive (or dissuasive) portion is to be paid into a test case fund, the courts might be more easily convinced that they should make awards that are both compensatory and dissuasive. The author believes that one hindrance to more dissuasive awards being made is the fear that the courts have of unjust enrichment of the victim. This idea could help remove that obstacle.

Even from a middle-class perspective, going to court is something few want to contemplate, especially in Sweden's non-litigious society. It should thus be clear that many discrimination victims cannot afford to assert their rights. For an employer or a business that discriminates against Roma or Afro-Swedes or others, the risk of ending up in court is small. Even if they end up in court, the risks for the discriminator are generally minor. The discrimination awards are limited, and both the awards and the legal fees are generally business expenses. For the discriminated-against, the risk can be their entire savings, if they have any.

One alternative is to support the anti-discrimination bureaux so that they can take more cases to court, at least in terms of strategic litigation and legal activism. To the extent that there are role models in Sweden, the Civil Rights Defenders organisation is one and another is the Centre for Justice. Long-term strategic thinking is important, along with an understanding that it is necessary to risk losing in order to win, that today's losses may be necessary for tomorrow's successful cases, that settlements can provide a basis for moving forward, that the trust of the client is key, and that the courtroom, while important, is just one part of the arena. Winning in court but not being heard elsewhere is not really winning.

The Government white paper 2016:87, on measures to improve the implementation of the anti-discrimination principle provided some arguments for the creation of a new Anti-Discrimination Board. In the author's opinion, however, the suggested general framework, along with the need for an additional inquiry, meant that the idea had little chance of gaining serious support. The inquiry treated the issue of discrimination as if it were a simple consumer case that could be resolved on the basis of written submissions. The critical comments by various actors in the field will probably mean that this idea will be disregarded.

Unfortunately, other than proposing increased funding for the anti-discrimination bureaux and suggesting that the DO should voluntarily investigate and act on more individual complaints, the inquiry suggested little that was relevant to the implementation of the anti-discrimination principle. In particular, nothing was suggested that would lessen the cost risks for an individual who wants to take a case to court. Furthermore, there were no suggestions that would increase the cost risks of those with the power to discriminate.

## 12 LATEST DEVELOPMENTS IN 2018

### 12.1 Legislative amendments

There were no legislative amendments to anti-discrimination law in 2018.

### 12.2 Case law

**Name of the court:** Labour Court

**Date of decision:** 15 August 2018

**Name of the parties:** *Equality Ombudsman v Almega/Semantix Interpreters*

**Reference number:** Case 51/2018

**Address of the webpage:** <http://www.arbetsdomstolen.se/upload/pdf/2018/51-18.pdf>

**Brief summary:** A woman was inquiring about a job as an interpreter. When she met the male representative of the company, she refrained from shaking his hand due to religious reasons, and placed her hand over her heart. The recruitment process was then terminated referring to the policy on the need for neutrality for interpreters. Various facts were relevant. The work involved phone interpreting. Not shaking hands would have been accepted if a fear of germs was at issue. The woman stated that she did not shake hands with men or women when she was in mixed company. On those facts the court determined that the company's actions were not appropriate and necessary, and had thus subjected the woman to indirect discrimination.

The court awarded SEK 40 000 (EUR 3 750) in discrimination compensation and ordered the defendants to pay the trial costs of the DO in the amount of SEK 36 741 (SEK 3 445).

The controversial nature of the case is indicated by the fact that there were two dissenting judges.

**Name of the court:** Labour Court

**Date of decision:** 20 June 2019

**Name of the parties:** *Equality Ombudsman v Manpower/Bemanningsföretagen*

**Reference number:** Case 42/2018

**Address of the webpage:** <http://www.arbetsdomstolen.se/upload/pdf/2018/42-18.pdf>

**Brief summary:** A woman with a disability that involved a decreased work capacity of 50 %, had contacted a temporary employment agency three times about being included in a framework contract through which the company could hire out temporary employees to companies on the basis of need. The company employed for such positions only people who had another main employment/activity. The woman explained that she received a 50 % disability compensation, which led to the company stating that she was then not eligible. The issue was whether she was subjected to direct or indirect discrimination due to disability through the company's treatment as well as the company's requirement of another 'main employment/activity'. This requirement had been agreed to in a collective agreement with a union.

The court determined that the requirement of another 'main employment/activity' was not appropriate and necessary, thus holding that she had been subjected to indirect discrimination.

Due to the fact that there were several incidents, SEK 110 000 (EUR 10 315) was awarded in discrimination compensation and the defendants were required to pay the trial costs of the DO, SEK 78 766 (EUR 7 390).

**Name of the court:** Labour Court

**Date of decision:** 11 April 2018

**Name of the parties:** *Unionen v Kunskapsskolan/Almega*

**Reference number:** Case 19/2018

**Address of the webpage:** <http://www.arbetsdomstolen.se/upload/pdf/2018/19-18.pdf>

**Brief summary:** The main issue was whether there was direct or indirect discrimination when a female substitute teacher was required to shake hands with her male co-workers. When in the teacher's lounge, instead of shaking a male co-worker's hand, she put her hand over her heart as an alternative greeting. A similar incident occurred later the same day. She left the school after being told by the principal, as she understood it, that she had to shake hands with male colleagues due to the School Act (*skollagen*) and the educational plan (*läroplanen*).

The court concluded that the evidence was unclear as to whether the principal had stated that the teacher had to shake hands with her male co-workers. What is clear is that rather than answering the principal's questions, she chose to leave the school, which also meant that it was unclear that a demand had been placed on her, an issue that the school would have had an added duty to investigate.

The court concluded that the claimant, given the lack of clarity about the demand, had failed to shift the burden of proof, thus also concluding that the evidence did not support a conclusion that discrimination had occurred. The trade union, Unionen, was also ordered to pay the defendants' trial costs, SEK 348 226 (EUR 32 650).

**Name of the court:** Labour Court

**Date of decision:** 21 February 2018

**Name of the parties:** *Industrifacket Metall v Staten genom Arbetsgivarverket*

**Reference number:** Case 11/2018

**Address of the webpage:** <http://www.arbetsdomstolen.se/upload/pdf/2018/11-18.pdf>

**Brief summary:** A person who had substituted as a prison officer, applied for a course that would lead to a job as a prison officer. He was extremely overweight.

The question for the court was whether he was refused admission to the course and job due to his weight, which in turn potentially constituted a disability within the meaning of the Discrimination Act.

The court concluded that the claimant's weight did not constitute a disability in itself in the meaning of the act. Nevertheless the defendant's comments about the claimant's weight indicated an assumption about the weight constituting a disability, thus shifting the burden of proof. The issue then became whether the defendant had shown that there was no connection between the admission to the course and the incorrectly presumed disability, i.e. that he had not been subject to discrimination. The defendant showed that the reason for the decision was his lack of personal suitability and that each of the six people admitted to the course had better objective qualifications.

The court concluded that the defendant had shown (*visat*) that there was no connection between the presumed disability and the refusal of admission to the education.

The union was ordered to pay the trial costs of the defendants, SEK 182 801 (EUR 17 140).

**Name of the court:** Stockholm District Court

**Date of decision:** 11 September 2018

**Name of the parties:** *Equality Ombudsman v Swedish Social Insurance Agency*

**Reference number:**

**Address of the webpage:**

<http://www.do.se/globalassets/diskrimineringsarenanden/tingsratt/dom-tingsratt-tillganglighet-forsakringskassan-anm-2016-1554.pdf>

**Brief summary:** A woman with visual impairment tried to apply for parental benefit via the Social Insurance Agency's web service. It then turned out that the web service could not be used with screen readers, a tool that reads the information on a computer screen and then presents it in the form of, for example, synthetic speech.

During 2015-2016, the woman had several contacts with the Swedish Social Insurance Agency, but was told that she should ask a relative or colleague for help, or visit a service office. The DO concluded that the woman has been subject to discrimination in the form of inadequate accessibility because the Social Insurance Agency did not take reasonable measures to rectify the problem. The Social Insurance Agency's failure meant that the woman was not in a comparable situation with people without her disability. Her case took longer than necessary and the compensation she received was greatly delayed.

A lawsuit was filed. The court held that the agency had failed to undertake reasonable accommodation measures from May 2015 to May 2016 to resolve the problem, particularly given its position as a huge Government agency. Discrimination compensation in the amount of SEK 20 000 (EUR 1 875) was awarded. The court determined an increased prevention supplement was not called for as this situation was insufficiently egregious.

The DO has appealed the case claiming that the amount of damages should be increased.

**Name of the court:** Göta Appeal Court

**Date of decision:** 15 May 2018

**Name of the parties:** *Equality Ombudsman v Vara kommun*

**Reference number:** T 1773-17

**Address of the webpage:**

<http://www.do.se/globalassets/diskrimineringsarenden/hovratt/dom-hovratt-kommun-anm2016940.pdf>

**Brief summary:** For three years, a pupil who used a wheelchair had attended a school with inadequate access ramps. On two occasions, his wheelchair tipped over as a consequence. In a lawsuit, the Equality Ombudsman asked for SEK 75 000 (EUR 7 000). The district court determined that this was discrimination in the form of inadequate accessibility and awarded the pupil SEK 30 000 (EUR 2 800). The Equality Ombudsman appealed the case seeking a higher award and the Appeal Court granted an award of SEK 75 000 (EUR 7000). Vara Municipality (Vara kommun) conceded concerning the DO's claim and withdrew its own appeal positions.

**Name of the court:** Svea Appeal Court

**Date of decision:** 15 March 2018

**Name of the parties:** *Equality Ombudsman v Braathens Regional Aviation (BRA)*

**Reference number:**

**Address of the webpage:**

<http://www.do.se/globalassets/diskrimineringsarenden/hovratt/dom-hovratt-flygbolag-anm2017-1260.pdf>

**Brief summary:** A male passenger, AA, who was sitting in a plane preparing to fly to Stockholm, was removed by two guards and forced to undergo a further and more extensive security check. The man was subsequently denied the opportunity to re-board the plane. After investigating the issue, the DO determined that these actions were based on AA's ethnicity and thus demanded SEK 10 000 (EUR 950) as a discrimination compensation award via a lawsuit. BRA consented to payment of the amount demanded, while at the same time stating that this was not an admission that discrimination had occurred. In accordance with the Swedish rules of procedure for this type of dispositive case, the district court issued a judgment for the amount requested without an examination of the facts in the case. The court also denied the DO's request for a finding that discrimination had taken place, as well as a request for a referral to the CJEU for a preliminary ruling.

This case was appealed to Svea Appeal Court, which confirmed the trial court decision.

This appeal court decision was appealed to the Supreme Court with a request for a referral to the CJEU. The Supreme Court, on 18 December 2018, in Case Ö 2343-18, issued a decision requesting a preliminary ruling from the CJEU. The question submitted was:

'Must a Member State in a case of infringement of a prohibition laid down in Directive 2000/43/EC, where the victim requests discrimination compensation, always examine whether discrimination has occurred - and, where appropriate issue a finding of discrimination - whether or not the accused has or has not acknowledged that discrimination occurred, if this is requested by the victim, in order for the requirement in Article 15 on effective, proportionate and dissuasive sanctions to be considered fulfilled?'<sup>326</sup>

**Name of the court:** Gävle District Court

**Date of decision:** 11 June 2018

**Name of the parties:** *DHR v Region Gävleborg*

**Reference number:** Mal nr T 240-16

**Address of the webpage:**

**Brief summary:** LW was refused service on a bus due to his wheelchair. The bus driver pointed out he was not trained to use the bus's step lift. As the Discrimination Act includes inadequate accessibility as a form of discrimination according to Chapter 1, Section 4(3), and among other things the EU Regulation No 181/2011 concerning the rights of passengers in bus and coach transport points out that people with disabilities, like other people, should have comparable accessibility, LW asserted that the refusal of service constituted discrimination. A complaint was submitted to the Swedish Equality Ombudsman (DO). The DO chose to not pursue the case. LW then turned to DHR (Delaktighet, Handlingskraft, Rörelsefrihet - a disability organisation). DHR determined that it would take on the case as an NGO on behalf of LW.

The court determined that discrimination had occurred and awarded discrimination compensation to DHR/LW. The result was positive in that it showed that the law could work. It was also important due to the courage shown by a civil society organisation (DHR) in taking the case, even though Swedish Equality Ombudsman (DO) was unwilling to act. The risks would have even been greater for LW on his own. Civil society organisations that represent discriminated groups have little tradition of enforcing civil laws. DHR's success may contribute to the increasing interest of civil society in enforcement as part of a new tradition concerning advocacy.

**Name of the court:** Stockholm Administrative Court

**Date of decision:** 25 June 2018

**Name of the parties:** *Swedish Data Protection Authority v Company X*

**Reference number:** Case no. 13371-17

**Address of the webpage:**

**Brief summary:** The company appealed an order by the Swedish Data Protection Authority (DPA) to cease registering sensitive personal data on employees' sexual orientation and ethnicity because it violated Section 13 of the Personal Data Act. The EU General Data Protection Regulation (GDPR) came into effect in the meantime, so the court examined the issue in relation to the GDPR. The case concerned the collection of sensitive personal data (ethnicity and sexual orientation) by a private company.

The company asserted that it registered sensitive personal data on the basis of voluntary consent and thus had a legal basis for the data collection. The purpose of the collection was solely for statistical purposes in order to improve the diversity and equal treatment at the company through, for example, analyses of the results at a group level in relation to employment, promotion and employee turnover. The goal was to ensure that decisions to employ etc. are taken without regard to factors such as sex, age, ethnicity or sexual orientation. The information was to be collected over time so that the company could follow up whether sexual orientation or ethnicity, for example, can affect career opportunities. NGOs had been consulted and the company also referred to an employer's legal duty to undertake active equality measures under the Discrimination Act.

<sup>326</sup> See <http://www.hogstadamstolen.se/Avgoranden/Begaran-om-forhandsavgorande/O-2343-18/> and <http://www.do.se/lag-och-ratt/diskrimineringsarenen/flygbolaget-bra/>.

The DPA recognised the goal of the data collection as legitimate, but nevertheless questioned the collection, particularly due to the issues of proportionality and the voluntariness of the consent. The company was thus ordered to cease its registration of information. The Administrative Court denied the company's appeal. The court determined that GDPR applied and that it was in principle similar to the repealed Personal Data Act. The court noted that since the provision of information was voluntary, there was a substantial risk that the data collected would be insufficient to fulfil the company's goals concerning its statistical purpose, which in turn would mean that sensitive data was stored unnecessarily. At the same time, the information to be collected was too detailed in regard to the company's goals. Furthermore, the court determined that it was probable that the data would need to be stored for quite a long time given the company's ambitions in relation to seeing patterns in promotion and so on. The court thus held that the company's handling of personal data was in violation of GDPR. The court also denied the company's petition for a preliminary ruling from the CJEU concerning 1) whether national law can be used to establish a presumption that an employer cannot use an employee's consent as a basis for dealing with the employee's personal data, and 2) whether consent is seen as voluntary if those registered have received clear information that sensitive data provision is a wholly voluntary choice, free from negative or positive consequences, that access to the information is extremely limited, and that refraining to provide information is a clear alternative.

The case was not appealed by the company.



## ANNEX 1: TABLE OF KEY NATIONAL ANTI-DISCRIMINATION LEGISLATION

The main transposition and anti-discrimination legislation at both federal and federated/provincial level.

**Country:** Sweden  
**Date:** 31 December 2018

<p><b>Title of the law: The Discrimination Act (2008:567)</b> No common abbreviation Date of adoption: 05.06.2008 Entering into force: 01.01.2009 Amended by Act (2017:1128) changing the Discrimination Act Date of adoption: 23.11.2017 Entering into force: 01.01.2018 Web link: <a href="https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/diskrimineringslag-2008567_sfs-2008-567">https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/diskrimineringslag-2008567_sfs-2008-567</a> Grounds protected: Sex, transgender identity or expression, ethnicity, religion and other belief, disability, sexual orientation, and age Civil/administrative/criminal law: Civil and administrative law Material scope: Public and private employment, education, labour market policy activities and employment services, starting or running a business and professional recognition, membership of certain organisations, goods services and housing, health and medical care, social services, social insurance, unemployment insurance and financial aid for studies, national military service and civilian service Principal content: Prohibition of direct and indirect discrimination, harassment, sexual harassment, victimisation, inadequate accessibility and instructions to discriminate (civil law part) and rules on active measures (administrative law part)</p>
<p><b>Title of the law: The Equality Ombudsman Act (2008:568)</b> Abbreviation: No abbreviation Date of adoption: 05.06.2008 Entering into force 01.01.2009 Amended by Act (2014:959) changing the Equality Ombudsman Act Date of adoption: 26.06.2014 Entering into force: 01.01.2015 Grounds protected: Sex, transgender identity or expression, ethnicity, religion and other belief, disability, sexual orientation, and age. Web link: <a href="https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/lag-2008568-om-diskrimineringsombudsmannen_sfs-2008-568">https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/lag-2008568-om-diskrimineringsombudsmannen_sfs-2008-568</a> Grounds protected: Sex, transgender identity or expression, ethnicity, religion and other belief, disability, sexual orientation, and age Civil/administrative/criminal law: Administrative law Material scope: The internal and external work of the Equality Ombudsman Principal content: A description of the broad mandate of the Equality Ombudsman</p>
<p><b>The (1962:700) Penal Code 16:8 (hate speech) and Penal Code 16:9 (unlawful discrimination by merchants)</b> Abbreviation: BrB 16:8 and BrB 16:9 Date of adoption: 21.12.1962 Entering into force: 01.01.1965 Latest relevant amendment: Act (2018:1744) changing the Penal Code Entering into force 01.01.2019 Web link: <a href="https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/brottsbalk-1962700_sfs-1962-700">https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/brottsbalk-1962700_sfs-1962-700</a> Grounds covered: race, skin colour, national or ethnic origin, religion, sexual orientation, and transgender identity or expression</p>

Civil/administrative/criminal law: Criminal law

Material scope: Access to goods and services (including housing), protection against racial and other hatred

Principal content: The crimes of unlawful discrimination and hate speech

**Title of the law: Regulation (2006:260) on anti-discrimination clauses in public contracts**

Abbreviation: None

Date of adoption: 2006-04-06

Entering into force: 2006-04-06

Amended by SFS 2016:1168, Regulation on amending regulation (2006:260) on anti-discrimination clauses in public contracts

Date of adoption: 1 December 2016

Entering into force: 1 January 2017

Web link: [https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/forordning-2006260-om\\_sfs-2006-260](https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/forordning-2006260-om_sfs-2006-260)

Grounds protected: The purpose of the regulation is to raise awareness of and compliance with the Discrimination Act (2008:567). Thus protection is provided to all of the grounds in the Act

Civil/administrative/criminal law: Administrative law

Material scope: The regulation applies to Sweden's largest government agencies in their larger contracts for services and building contracts

Principal content: The government agencies covered shall include an anti-discrimination clause in all of their contracts for services and building contracts if the contract:

1. has a duration of 8 months or longer
2. has a total value of at least SEK 750 000

## ANNEX 2: TABLE OF INTERNATIONAL INSTRUMENTS

Country: Sweden

Date: 31 December 2018

Instrument	Date of signature	Date of ratification	Derogations/ reservations relevant to equality and non-discrimination	Right of individual petition accepted?	Can this instrument be directly relied upon in domestic courts by individuals?
European Convention on Human Rights (ECHR)	Yes 28.11.1950	Yes 04.02.1952	No	Yes	Yes
Protocol 12, ECHR	Not signed	-	-	-	-
Revised European Social Charter	Yes 03.05.1996	Yes 29.05.1998	Art. 8.2, 8.4, 8.5, 12.4, E	Ratified collective complaints protocol? Yes Signed 09.11.1995 Ratified 29.05.1998	No
International Covenant on Civil and Political Rights	Yes 29.09.1967	Yes 06.12.1971	No	No	No
Framework Convention for the Protection of National Minorities	Yes 01.02.1995	Yes 09.02.2000	No	No	No
International Covenant on Economic, Social and Cultural Rights	Yes 29.09.1967	Yes 06.12.1971	No	No	No
Convention on the Elimination of All Forms of Racial Discrimination	Yes 05.05.1966	Yes 06.12.1971	No	Yes	No
Convention on the Elimination	Yes 07.03.1980	Yes 02.07.1980	No	Yes (Optional Protocol /	No

<b>Instrument</b>	<b>Date of signature</b>	<b>Date of ratification</b>	<b>Derogations/ reservations relevant to equality and non-discrimination</b>	<b>Right of individual petition accepted?</b>	<b>Can this instrument be directly relied upon in domestic courts by individuals?</b>
of Discrimination Against Women				24 Apr 2003)	
ILO Convention No. 111 on Discrimination	Yes 20.06.1962	Yes 20.06.1963	No	No	No
Convention on the Rights of the Child	Yes 26.01.1990	Yes 29.06.1990	No	No	No
Convention on the Rights of Persons with Disabilities	Yes 30.03.2007	Yes 15.12.2008	No	Yes	No

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