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# Country report

## Non-discrimination

Sweden

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including summary



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# **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 2021 – 31 December 2021

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## EXECUTIVE SUMMARY

### 1. Introduction

Sweden has long been home to various minorities such as the Roma, Finns, the Jewish community as well as the Sami, an indigenous population. Nevertheless, Sweden has also long viewed itself as an ethnically homogenous country. This has gradually been changing in large part due to various types of immigration since the 1950s. From 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 2020, the population reached almost 10.45 million. The proportion of foreign-born inhabitants increased from 6.7 % in 1970 to 20 % in 2021.<sup>1</sup> Ethnicity is not monitored, but Sweden's detailed statistics provide relevant proxies, such as statistics concerning country of birth and parents' country of birth.

Racialised ethnic groups are particularly affected by discrimination and exclusion. The persistent Swedish 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> The evident negative effects of racism/race discrimination on Afro-Swedes in the labour market are well-documented.<sup>4</sup>

Sweden considers itself to be a secular country. At the same time, most people still belong to the Lutheran church, which was formerly the state church (up to 2000). Various congregations other than the former state church have become more established in recent years. This has brought to the forefront certain issues concerning discrimination based on religion as well as freedom of religion. This applies in particular to persons presumed to be Muslims. They may actually be Muslims or in the eyes of the discriminator are mistakenly perceived to be Muslims due to markers such as their name, skin colour, country of birth and/or accent.

In recent years, greater visibility has been given to certain disability and sexual orientation equality law issues through mobilisation of the LGBTIQ community and CSOs working in the area of rights of persons with disabilities. These grounds, as well as sex, ethnicity and religion, were initially addressed in separate laws that in essence created equality silos, reinforcing the development of uneven legal protection for the different grounds.

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 – based on separate laws and enforcement authorities.

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<sup>1</sup> Statistics Sweden (2019), *Summary of Population Statistics 1960–2020*, available at: <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> 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), available at: <https://www.do.se/globalassets/publikationer/rapport-forskning-diskriminering-muslimer-sverige.pdf>.

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

<sup>5</sup> 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. Penal Code 16:9 was seldom invoked.

The first equality silo was created by the prohibition of sex discrimination in working life that entered into effect in 1980<sup>6</sup> along with the establishment of the Sex Equality Ombudsman (JämO). In the 1980s, Sweden rejected the expansion of the mandate of the JämO to ethnicity along with a similar ban on ethnic discrimination in working life. Instead, a 1986 law against ethnic discrimination established the Ombudsman against Ethnic Discrimination. In spite of the law's title, the law did not prohibit ethnic discrimination, but simply addressed the combating of ethnic discrimination through consultations and the provision of advice by the Ombudsman.<sup>7</sup> Due to international criticism, ethnic discrimination in working life was prohibited in 1994 and the Ethnicity Ombudsman was given the power to go to court.<sup>8</sup> However, proof of specific 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.<sup>9</sup> In addition, three separate ombudsmen were established for oversight and enforcement in relation to these 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 shifted burden of proof regardless of the ground. During the 2000s, transposing EU law played a key role as new laws were adopted. Nevertheless, sex discrimination maintained the 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 (approximately 70 % of employees and 95 % of employers). Labour market issues are largely resolved through collective bargaining, while legislation plays a secondary, often fallback role. Due to their powerful role, the social partners were influential in weakening the development of discrimination law concerning working life. Such laws were viewed as an encroachment on their power.

Sweden has 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. In contrast, Chapter 2 provides protections that can be asserted by individuals. 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. Article 13 prohibits laws and regulations that discriminate on the basis of sex. The relationship to EU law is regulated through the Instrument of Government (1:10 and 10:6) and other laws. Furthermore, the

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

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

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

<sup>9</sup> 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); 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).



European Convention on Human Rights (ECHR) was incorporated into national law in 1995 and given quasi-constitutional status.

Sweden has also ratified various other human rights instruments.<sup>10</sup> However, if an international instrument has not been incorporated or transformed into legislation, such instruments are not part of the national hierarchy of laws. Nevertheless, Swedish laws are to be interpreted by the courts in conformity with such international instruments.

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

On 1 January 2009, the seven acts were essentially merged, along with their hierarchies of protection, into the Discrimination Act (2008:567). The grounds of age and transgender identity and expression were added. The ombudsmen were merged into the Equality Ombudsman (DO). Various amendments have been adopted since 2009. In 2015, a new form of discrimination concerning disability discrimination – inadequate accessibility – was introduced. While the reasonable accommodation requirements of Directive 2000/78 were already in effect, this change expanded the concept of a lack of reasonable accommodation as disability discrimination beyond employment to other areas of society. In 2016, the Discrimination Act was amended to level up the general active measures so as to cover all grounds. At the same time, certain more specific duties, such as pay gap surveys, still only apply to sex.

There are also certain relevant criminal law provisions. Although prosecutions are rare, Penal Code 16:9 still 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. 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 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, regarding 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. In addition, transgender identity and expression are covered.

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

The relevant EU definitions and prohibitions of direct and indirect discrimination, harassment, sexual harassment and instructions to discriminate are in the Discrimination Act (Chapter 1, Section 4). Victimisation is also prohibited.

The law covers discrimination by association (e.g. a spouse or child) as well as wrongful perceptions about the person who is discriminated against (e.g. where the person is wrongly perceived to be a Muslim). This is based on case law and the legislative materials. The additional form of discrimination, inadequate accessibility, expands reasonable accommodation beyond working life to education and other areas of social life.

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<sup>10</sup> See Annex 2 of this report for a full list.

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.

In 2021, in a preliminary ruling concerning ethnic discrimination in case C-30/19, the CJEU<sup>11</sup> held that Articles 7 and 15 of Directive 2000/43 preclude a national law preventing a court from examining a claim seeking a declaration or finding of discrimination where the defendant agrees to pay the compensation claimed without however recognising the existence of discrimination. This meant that national courts should disapply any contrary provisions of national law. This ruling led to a resolution of the underlying case by the Swedish Supreme Court when the defendant admitted the discrimination.<sup>12</sup> In a district court case concerning sexual orientation, the judgment in case C-30/19 was relevant concerning awarding legal costs to the Equality Ombudsman, since the defendant delayed admitting discrimination until the trial was about to begin.<sup>13</sup> Beyond the CJEU case C-30/19 and the resulting Supreme Court case, other cases from the district and appeal courts dealt with reasonable accommodation, the burden of proof and inadequate accessibility.<sup>14</sup> Finally, a district court held that the employer was liable in a case where the discriminatory behaviour concerning ethnicity of healthcare workers contributed to the death of a patient.<sup>15</sup> Among other things, this case dealt with the idea that the patient's discrimination claim survived his death and could be filed by his estate. The wife of the deceased man was also able to claim discrimination compensation under the circumstances.

#### 4. Material scope

The material scope of the Discrimination Act fulfils the minimum standards established by EU law. It also goes beyond the scope required by EU law since religion or other belief, sexual orientation, disability and age are essentially covered in the same way as sex and ethnicity.<sup>16</sup> The material scope is set through the 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 care and social services; social insurance system, unemployment insurance and financial aid for studies; national military service and civilian service; and discriminatory treatment by public employees.

The Discrimination Act applies to all aspects of the employer-employee relationship in both the public and private sectors.

#### 5. Enforcing the law

Victims of discrimination have three basic options. Complaints can be taken to the Equality Ombudsman (DO), a union or an NGO. Due to the loser-pays rule, for most people the option of a private lawyer carries too much economic risk. In Sweden the loser pays the winning party's legal costs, which can be substantially more than any potential discrimination compensation award. In recent years the DO has taken only a small number of cases to court, focusing on awareness raising. Only a small number of the thousands of complaints submitted to the DO were investigated. Of those investigated, the outcome was generally a DO opinion that was not legally binding. However, 2021 may indicate a change. The new head of the office, appointed in December 2020, has initiated a shift in focus in

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<sup>11</sup> CJEU, Judgment of 15 April 2021, *Diskrimineringsombudsmannen v Braathens Regional Aviation AB*, C-30/19, EU:C:2021:269.

<sup>12</sup> Supreme Court, case Ö 2343-18, *Diskrimineringsombudsmannen v Braathens* (21.12.2021).

<sup>13</sup> Varberg District Court, case T 2717-21, *DO v AA/Musikstudion*, (17.12.2021).

<sup>14</sup> See section 12.2 below.

<sup>15</sup> Göteborg District Court, case T 17336-19, *DO v Region Västra Götaland*, (26.05.2021).

<sup>16</sup> The Discrimination Act essentially fulfils the minimum standard that would apply if 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.

2021 towards investigation and enforcement of individual claims, while pointing out the key role of individual complaints in regard to the DO's broad mandate. When the DO takes a case to court, the DO also assumes the economic risk. If a case is taken on by a union, the union also assumes the economic risk. Few cases are taken to court by the unions, but presumably such cases are often settled.

Finally, victims can turn to an NGO, such as a local anti-discrimination bureau. If the case is not settled, on rare occasions, a bureau can take a case to court. Such cases are generally filed as small claims cases, as NGOs cannot afford the economic risk. Sweden is just beginning to develop an NGO tradition where enforcement of laws can be seen not just as a way of helping individuals recover compensation, but also as a form of advocacy that helps to achieve the societal purpose of a law against discrimination by stimulating a change in behavioural norms. Although this is common for the social partners, enforcement by less powerful NGOs is seen as a foreign idea. At the same time, equality law itself was once a foreign idea. The dyslexia cases mentioned in section 10 and section 12.2 of this report are examples of strategic litigation by civil society NGOs.

Discrimination claims regarding working life are dealt with in the Labour Court as the first instance court, assuming that the claimant is represented by a union or the DO. 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 for employees in the private and public sectors. If an individual brings an employment case on their own, 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>17</sup>

A shifted burden of proof concerning discrimination is specified in the Discrimination Act. Nevertheless, few discrimination cases are successful, particularly those concerning ethnicity. 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.

The 2009 act, in addition to the possibility of declaring discriminatory contracts void, introduced a new term for the primary sanction: discrimination compensation. Beyond providing compensation to the victim, the courts are also supposed to give particular attention to the aim of prevention. 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, the sanctions are, in practice, scarcely proportionate, effective and dissuasive.

A recent study examining awards granted by the Labour Court since the 1980s points out that discrimination awards today are about 4.5 % higher than they were in 1980. There has also been a 170 % increase in trial costs since the 1980s. The study concludes that the trends concerning compensation awarded and increasing lawyers' costs and fees, combined with low success rates and the loser-pays rule, 'create a significant deterrent for plaintiffs bringing discrimination claims.'<sup>18</sup>

Compared with the ordinary court system, the Labour Court seems to pay much less attention to deterrence. 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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<sup>17</sup> Some higher education cases may also be brought before the Board of Appeal for Higher Education.

<sup>18</sup> Carlson, L. (2017) *Comparative Discrimination Law: Historical and Theoretical Frameworks*, Brill, pp. 79-80.

Beyond prohibiting discrimination, the Discrimination Act imposes a duty on employers and education providers to undertake equality promotion measures, in particular concerning men and women. There are questions about the effectiveness of this duty related to lack of enforcement and limited sanctions.<sup>19</sup>

One potential complementary tool in Sweden for increasing the cost risks of discrimination can be found in the Regulation on anti-discrimination conditions in public contracts (2006:260).<sup>20</sup> If the conditions contain meaningful sanctions, such as the risk of contract cancellation, such conditions would increase the interest of employers in proactive anti-discrimination measures.<sup>21</sup> The total value of all public sector contracts in Sweden is over EUR 56 billion (SEK 600 billion) annually. However, so far there has been little follow-up of such clauses, so their current effectiveness is doubtful.

## 6. Equality bodies

The DO is the key public institution for supervising compliance with the Discrimination Act. The DO's broad mandate includes investigating complaints and the right to take cases to court on behalf of individuals. The DO can also, for example, provide advice and support; engage in educational and opinion-shaping efforts; propose legal and other measures for combating discrimination; and undertake other suitable measures to promote equality. Independent surveys and reports are important parts of this work.

The focus of the DO during 2011-2020 was increasingly on information and the issuing of non-binding opinions rather than on court cases. However, the new head of the office, appointed in December 2020, has instituted a shift in focus towards the investigation and enforcement of individual claims, indicating that this work will also be the starting point for the equality promotion work of the DO, among other things. He has indicated that enforcement is a necessary foundation for supporting other efforts concerning supervision of compliance.

## 7. Key issues

There are three key issues with respect to the lack of efficacy concerning the Swedish discrimination legislation: the approach of the Equality Ombudsman (DO) in 2011-2020 and the success of the shift in focus established in 2021; access to justice more generally; different courts seeming to implement the burden of proof in different ways.

The move by the DO away from enforcement of the law to an emphasis on information, education and non-binding opinions that cannot be appealed was a key issue and problem from 2011 to 2020, particularly given the DO's primary role in access to justice, broad mandate and the economic risks that individuals face when bringing litigation. There was a clearly decreased focus on investigating complaints and representing individuals. The new DO, appointed in December 2020, has started the process in shifting the work of the DO to the investigation and enforcement of complaints, as well as indicating that that work is to inform the DO's other work concerning equality promotion and supervision of compliance with the Discrimination Act. A key issue going forward will be how quickly and effectively the shift in focus will be implemented both internally within the DO and

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<sup>19</sup> See e.g. White Paper SOU 2020:79 *Effektivare tillsyn över diskrimineringslagen – aktiva åtgärder och det skollagsreglerade området* (More effective supervision of the Discrimination Act – active measures and the issue of schools) and Svenaeus, L. (2020) *Tio år med Diskrimineringsombudsmannen – En rapport om nedmontering av Diskrimineringsskyddet* (Ten years with the Equality Ombudsman – A report on the dismantling of the protection against discrimination).

<sup>20</sup> Regulation on anti-discrimination conditions in public contracts (2006:260) (*Förordning (2006:260) om antidiskrimineringsvillkor i upphandlingskontrakt*), available at: <http://rkrattsbaser.gov.se/sfst?bet=2006:260>.

<sup>21</sup> The original proposal for the regulation, which specified cancellation as a potential sanction, can be seen in Government white paper 2005:56, *The Blue and Yellow Glass House: Structural Discrimination in Sweden*, pp. 579-584.

externally concerning not only the potential victims but also those with the power to discriminate as well as the power to prevent discrimination. In the expert's opinion, if the DO is willing to use its full powers to establish a serious risk of enforcement under the Discrimination Act, this should lead to some of the actual changes envisioned by the Act, but it will also lead to some resistance from e.g. employers, unions, businesses and Government agencies. Actually implementing the law is a challenge to the status quo.

On access to justice more broadly, Sweden's loser-pays rule is a primary hindrance to the ability of bureaux and other NGOs as well as individuals to enforce the law. There is an imbalance in power between the victims of discrimination and those with the power to discriminate, yet at the same time, the Swedish system is based on an underlying assumption of an equality of arms. The victims have little experience with the law, lawyers and the courts, and, if they lose, they risk losing their limited resources in legal fees. At the same time, even if they are successful, the compensation amounts are limited. As a result of the cost risks, the few cases that NGOs take to court are usually filed as small claims cases. On the other hand, the cost risks for employers and merchants accused of discrimination constitute tax deductible 'business' expenses, whether they win or lose. Also, if a civil servant is accused of discrimination, the Government will pay for the lawyers and any awards granted.

The final issue is the use of the burden of proof, which seems to vary among the courts. The ordinary court system seems to have one way of implementing the burden, while the approach of the Labour Court seems more restrictive. Different applications of the burden, either as shared or shifted, result in different decisions in two very similar cases concerning religion and discrimination: one case from 2016 in Stockholm District Court<sup>22</sup> and a similar case in the Labour Court in 2017.<sup>23</sup> Having two relatively different applications of the same rules by different court systems seems unsustainable in the long run.

To sum up, in the author's opinion, it is not the law itself that changes norms, but the implementation of the law through a critical mass of cases combined with strategic litigation. Just as those with the power to discriminate need to be challenged about 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. This critical mass should in turn increase the cost risks of discrimination providing an added incentive for those who discriminate to change their behaviour so that fewer people are subjected to discrimination. Although the law needs to provide redress for victims, the long-term goal of the law is that potential victims are not subjected to discrimination in the first place.

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<sup>22</sup> Stockholm District Court, case T 3905-15, *Equality Ombudsman v The Swedish State through Karolinska Institute* (16.11.2016).

<sup>23</sup> Labour Court 2017 No. 65, *Equality Ombudsman v Public Dentists of Stockholm County* (20.12.2017).

## INTRODUCTION

### The national legal system

The power to enact laws is vested in the Swedish Parliament (*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.

As the Parliament is ultimate arbitrator of the law, the courts have historically played a lesser, and more deferential role. However, case law is increasingly being given an important role, largely due to the Europeanisation of the Swedish legal system.

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>24</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 Council on Legislation (*Lagrådet*), composed of justices from the Supreme Court and the Administrative Supreme Court, is then consulted on the constitutionality and consistency of laws. The Council's opinions are not binding. 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>25</sup> Therefore, these two documents have considerable importance when interpreting the law.

In general, the Discrimination Act is implemented within the general court system (district courts, courts of appeal and the Supreme Court) and/or the Labour Court. Discrimination in all areas except the labour market is in essence 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 same applies to the Supreme Court concerning a further appeal. Sweden also has a three-tier administrative court system, but in general, it has limited relevance to discrimination issues.<sup>26</sup>

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 her or his 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 the Discrimination Act. Otherwise, it is a two-instance system, with the district courts constituting the first instance, with a right of appeal to the Labour Court.

Collective agreements cover about 90 % of workers on the Swedish labour market and are very important in setting the rules.<sup>27</sup> There is no national minimum wage. Generally, work

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<sup>24</sup> Swedish Instrument of Government (*Regeringsformen* 1974:152), Chapter 4, Article 4, adopted 28 February 1975. Sometimes the opposition parties agree on a piece of legislation that the Government does not want.

<sup>25</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>26</sup> Nevertheless, in relation to the administrative courts, see the three cases described in section 12.2. In two cases, as the courts were able to reach a decision based solely on the freedom of religion, they decided that they did not need to examine the issue of a violation of the Discrimination Act. In the third case, the court determined that the Discrimination Act did not apply.

<sup>27</sup> See Eurofound (2017), *Living and working in Sweden*, 18 October 2017, available at:

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.

### **List of main legislation transposing and implementing the directives**

The main legislation transposing and implementing the directives is the Discrimination Act (2008:567).<sup>28</sup> It covers seven grounds: sex, ethnicity, religion and belief, sexual orientation, disability, age and transgender identity and expression. It was adopted on 5 June 2008 and came into effect on 1 January 2009.

In addition, the Equality Ombudsman Act (2008:568)<sup>29</sup> was adopted on 5 June 2008 and came into effect on 1 January 2009. The Act provides a broad mandate to the Ombudsman concerning oversight of the Discrimination Act, including the right to go to court on behalf of individual victims.

The Discrimination Act is comprehensive. It covers all the grounds of the two directives as well as discrimination due to sex and transgender identity and expression. The areas covered by the act are: working life; education; labour market policy activities and employment services not under public contract; starting or running a business and professional recognition; membership of certain organisations; goods, services, housing and 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 discriminatory treatment by public employees.

The Penal Code has two sections of some relevance. Penal Code 16:9<sup>30</sup> (unlawful discrimination) prohibits discrimination due to race, skin colour, national or ethnic origin, religious belief, sexual orientation and transgender identity or expression by merchants concerning the provision of goods and services. It was seldom used before the 2009 act, and is now used even less. However, the crime of unlawful agitation or hate speech under Penal Code 16:8<sup>31</sup> (which covers the same grounds) can still have an important function concerning matters that do not fall under the Discrimination Act.

The Regulation on anti-discrimination conditions in public contracts (2006:260) could become an important complement to the Discrimination Act. Sweden's largest Government agencies must include an anti-discrimination condition in their larger public procurement construction and service contracts. The purpose of the regulation is to increase awareness of and compliance with the Discrimination Act.<sup>32</sup>

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<https://www.eurofound.europa.eu/country/sweden#collective-bargaining>.

<sup>28</sup> Discrimination Act (2008:567).

<sup>29</sup> Equality Ombudsman Act (2008:568).

<sup>30</sup> Penal Code 16:9 (*olaga diskriminering*).

<sup>31</sup> Penal Code 16:8 (*hets mot folkgrupp*).

<sup>32</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>.

## 1 GENERAL LEGAL FRAMEWORK

### **Constitutional provisions on protection against discrimination and the promotion of equality**

The Constitution of Sweden consists of four different documents. The 1975 Instrument of Government contains the provisions that are most relevant in this context, particularly 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>33</sup> All the grounds of the directives are covered, but as these are only policy goals, they cannot be asserted by individuals.

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.

On questions of direct applicability, the traditional answer in Swedish legal culture has been that the Constitution is generally not directly applicable and for a long time, constitutional arguments were looked at with considerable scepticism. In 1975 a new Instrument of Government was adopted to replace the one from 1809. At the same time, judicial review by the courts was extremely limited in that an act of Parliament could only be set aside if it was clearly unconstitutional. However, this is changing. One reason is membership of the EU and the changes it led to in the Constitution (e.g. Chapter 1, Section 10 and Chapter 10, Section 6). Another important change was the introduction in 1994 of Chapter 2, Section 19, stating that courts should set aside parliamentary acts that violate the ECHR. In addition, there was the constitutional reform in 2010 that removed the requirement that acts of Parliament could be declared unconstitutional only if the act was clearly unconstitutional. Thus far, it is hard to say that the 2010 change has made a major difference.

The protection from discrimination that stems from the Instrument of Government alone is not sufficient for fulfilling the requirements of the directives. This applies to the areas covered as well as the grounds protected.

Nevertheless, at least in principle, aside from Chapter 1, Section 2, these various provisions are directly applicable and can be enforced against the state, although they cannot be directly enforced against private individuals.

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<sup>33</sup> 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, according to the legislative preparatory works, the definition of ethnicity 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 a combination of both) is often unclear – both for those who discriminate and for those who are the victims.

Case law provides some clarity concerning the concepts of race or ethnic origin. One case involved a landlord charging refugees a higher rent. 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>34</sup> The court held that the term ethnic origin had to be interpreted 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 the victim of discrimination actually belongs to a specific ethnic group.

For a number of years Sweden worked 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 agrees 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 historical denial of race discrimination as a problem in Sweden, 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, 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

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<sup>34</sup> Göta Appeal Court, 25.02.2010, T 1666-09, *Equality Ombudsman v. Skaret*.

affected by the term 'race', particularly Swedes with an African heritage. Furthermore, since policymakers seemed to believe that the removal of the word race was relevant to 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 legislative 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.<sup>35</sup>

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>36</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.<sup>37</sup> 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>38</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 her or him in adopting the practice in question.<sup>39</sup>

#### c) Disability

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

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<sup>35</sup> Government bill 2007/08:95, pp.120-122.

<sup>36</sup> Labour Court 2018 No. 51, *Equality Ombudsman v Almega/Semantix Interpreters*, 15.08.2018.

<sup>37</sup> The Labour Court refers to e.g. *İzzettin Doğan and Others v. Turkey* [GC], No. 62649/10, 2016, paragraph 68; *Eweida and Others v. the United Kingdom*, Nos. 48420/10, 59842/10, 51671/10 and 36516/10, 2013, paragraphs 82 and 83; and *S.A.S. v. France* [GC], No. 43835/11, 2014, paragraph 108.

<sup>38</sup> Government bill 2007/08:95, p. 122 (author's translation).

<sup>39</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>40</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 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, as stated in the legislative preparatory works, covers illnesses that can be expected to limit functional capacity in the future, including HIV, cancer and multiple sclerosis (MS).<sup>41</sup> 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 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 no connection needs to be shown to barriers in private life or barriers in professional life. 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, although somewhat different, is at least equally as broad as the definition in the decision by the CJEU in joined cases *Ring and Skouboe Werge* (C-335/11 and C-337/11).<sup>42</sup> The claimant is normally not worse off, because in practice, the Swedish definition focuses on the discriminator's perception of functional limitations.<sup>43</sup>

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<sup>40</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>41</sup> Government bill 2007/08:95, p. 123.

<sup>42</sup> CJEU, Judgment of 11 April 2013, *Ring and Skouboe Werge*, Joined cases C-335/11 and C-337/11, EU:C:2013:222.

<sup>43</sup> Nevertheless, see section 2.1.3.a below, which indicates that a person can find themselves in a situation where they are not protected from disability discrimination in a limited number of cases due to a mistaken perception by the discriminator.

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 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 legislative 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.

### 2.1.2 Multiple discrimination

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

There are two basic types of multiple discrimination/intersectionality cases. One type is exemplified by Labour Court case 2010 No 91.<sup>44</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 (both men and women were interviewed, including an older man, but not the complainant) 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 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>45</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 one of the two claimants was successful on

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<sup>44</sup> Labour Court 2010 No. 91, *Equality Ombudsman v State Employment Board* (15.12.2010).

<sup>45</sup> Labour Court 2011 No. 13, *Equality Ombudsman v Helsingborgs stad* (16.02.2011).

both claims. 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 damages 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.<sup>46</sup> 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 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 legislative 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 in order to conclude that disability 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>47</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

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<sup>46</sup> See e.g. Schömer, E. (2016) 'Sweden, a Society of Covert Racism: Equal from the Outside: Everyday Racism and Ethnic Discrimination in Swedish Society', *Oñati Socio-legal Series* [online], 6 (3), pp. 837-856. Available from: <http://ssrn.com/abstract=2834059>; Votinius, J.J. (2016) 'Intersectionality as a Tool for Analysing Age and Gender in Labour Law' in: Manfredi S., Vickers L. (eds) *Challenges of Active Ageing*, pp. 95-115. Palgrave Macmillan, London; Pylkkänen, A., Wennberg L. (2012) 'Intersektionalitet i rätten: en metod för att synliggöra det osynliggjorda' (Intersectionality in the law: a method to make visible the invisible), *Ratfaerd*, no. 3/138, pp. 12-28.

<sup>47</sup> Svea Court of Appeal, case T 7752-08, *Equality Ombudsman v Sturehof* (02.06.2009).

cognitive disabilities. There was a failure to examine the mother and the father as individuals.<sup>48</sup>

b) Discrimination by association

In Sweden, discrimination based on association with persons with particular characteristics is prohibited in national law. As the definition of (direct) discrimination is related to the ground and not to the person, the prohibition applies.<sup>49</sup> 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>50</sup>

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

a) Prohibition and definition of direct discrimination

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

*'Direct Discrimination: that someone<sup>51</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.'*

b) Justification for direct discrimination

The ban on direct discrimination is limited by the possibility of justification in terms of the specific exceptions stipulated by the directives. These are discussed in section 4 of this report.

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

a) Prohibition and definition of indirect discrimination

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

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

*'Indirect Discrimination: whereby someone<sup>52</sup> is disadvantaged by the application of a provision, a criterion or a procedure that appears neutral but that may put people*

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<sup>48</sup> Svea Court of Appeal, case T 5096, *Equality Ombudsman v Sigtuna Municipality* (11.04.2014).

<sup>49</sup> See Discrimination Act (2008:567) Chapter 1, Section 4(1).

<sup>50</sup> Svea Court of Appeal, T 1912-13, *Equality Ombudsman v. If insurance* (08.10.2013), 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>51</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>52</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

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>53</sup> a woman with disability 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>54</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 as to justifications is given in the legislative preparatory works to both the Discrimination Act and the previous acts.<sup>55</sup> 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>56</sup> The basic principle

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for the activity that is regarded as a discriminator.

<sup>53</sup> Labour Court 2018 No. 42, *Equality Ombudsman v. Bemanningsföretagen and Manpower*.

<sup>54</sup> Labour Court 2018 No. 51, *Equality Ombudsman v. Almega and Semantix*.

<sup>55</sup> The current Discrimination Act (2008:567) was largely the result of a consolidation of seven earlier civil laws against discrimination. Four were essentially single-ground laws related to working life. Three were multi-ground laws related to higher education, pupils, and other areas of social life such as goods and services. Unless the laws have been specifically changed in 2008 or later, the earlier preparatory works are still applicable. The previous laws are the 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).

<sup>56</sup> Government bill 2007/08:95, p. 491.

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.

There are a number of cases relating to indirect discrimination. Section 6.3 of this report contains two examples concerning indirect discrimination due to religion and the application of the burden of proof. While the justification test applied seems compatible with the directives, the problem was in the differing applications of the burden of proof to what were essentially the same patterns of fact.

### 2.3.1 Statistical evidence

#### a) Legal framework

In Sweden, there is legislation regulating the collection of personal data.

As an EU member state, the GDPR (General Data Protection Regulation) is applicable as of 26 May 2018, replacing Sweden's Personal Information Act (*Personuppgiftslagen*) (1998:204), which had contained 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. 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. However, Sweden applied the previous rules based on an EU directive in an extremely restrictive manner, so it may take some time to determine the boundaries of the GDPR.<sup>57</sup>

In Sweden, statistical evidence may be admitted under national law, concerning any ground, in order to establish indirect discrimination. Sweden's general procedural rules allow the free presentation of any evidence. The primary restriction is that it must be relevant.

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 – like all other evidence – has 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>58</sup>

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.

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<sup>57</sup> There is only one lower administrative case examining the issue of a company trying to develop more detailed statistics that could help counteract patterns of discrimination and equality promotion by the company (Stockholm Administrative Court, 25 June 2018, *Swedish Data Protection Authority v Company X*, case 13371-17). The court determined, given the previous Swedish law and GDPR, that the company's data collection was based on insufficient voluntariness and insufficient proportionality. The court also referred to the DO's officially expressed negative opinions on individual mapping statistics.

<sup>58</sup> For example, statistics formed an important part of the Labour Court 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.



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>59</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>60</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>61</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>62</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>63</sup> 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.

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<sup>59</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.4.18e1b10334ebe8bc80005629.html>.

<sup>60</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>61</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 childcare benefit reserved for children with disabilities or long-term sick children. This could not be direct discrimination, as the group of children consisted of sick but not necessarily children with disabilities. It was not indirect discrimination either, as the Ombudsman had not shown what proportion of children receiving the benefit were disabled; simply asserting that children with disabilities 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/diskrimineringsarenen/if-skadeforsakring-ab/>.

<sup>62</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>63</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), *Statistikens roll i arbetet mot diskriminering* (The role of statistics in the work against discrimination), p. 93ff. Trust is at the centre of the Equality Ombudsman's preliminary report.

b) Practice

In Sweden, in practice, statistical evidence has been used in some cases and can be used in order to establish indirect discrimination. This assumes that statistical evidence is available and relevant.

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>64</sup> Even in these cases, there was no real legal dispute regarding the use of statistics as such. Statistical data related to other grounds are generally not available, so it would be hard to say whether there is a reluctance to use them. At the same time, as the courts have issued judgments finding indirect discrimination on other grounds, the lack of precise statistics was apparently not a hindrance in those cases.

## 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>65</sup> conduct that violates a person's<sup>66</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.'

When the 2009 act was adopted, there was some discussion in the legislative preparatory works on whether the definition fulfilled the requirements of the EU directives. In particular, there was a question of whether the words 'with the purpose or effect of' (*som syftar till eller leder till*) should be inserted into the phrase 'conduct violating a person's dignity'. The Government concluded that a person's intent was not the key factor, given the wording of the directives that even unintended consequences could be discriminatory. In other words, it is the effects of the conduct that are decisive. It was also concluded that where conduct was intended to violate someone's dignity, but which has failed to do so, it can be said that no one has been disadvantaged. In that situation, there is no one who can make a claim for discrimination, nor is there anyone who can ask for redress or compensation.<sup>67</sup> Although it is possible to question Sweden's compliance given the wording of the directive, in the

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<sup>64</sup> Statistics formed an important part of the Labour Court 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>65</sup> Sexual harassment, an additional form of harassment, is found in Chapter 1, Section 4(5). Sexual harassment is defined as conduct of a sexual nature that violates the dignity of another person. This conduct can arise between individuals irrespective of their sex. 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>66</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>67</sup> Government bill 2007/08:95, p. 106.

expert's opinion there is some logic to the Swedish position. It is worth noting that Article 2(3) of the Racial Equality Directive states, 'the concept of harassment may be defined in accordance with the national laws and practice of the Member States.'

The legislative materials state the following points in relation to the concept of harassment. The behaviour at issue must be unwelcome and it is the victim's assessment that determines whether the behaviour or actions are unwelcome. At the same time, the harasser must have had an insight that her or his behaviour was offensive in a way that could constitute discrimination. In order to be successful, the person harassed, in practice, should thus make it clear to the harasser that the behaviour is perceived to be offensive. Finally, the materials also state that certain behaviours are so offensive that this should be clear to the harasser, meaning that no particular indication from the person who has been harassed is needed. There must also be a connection to one of the discrimination grounds.<sup>68</sup>

In any case, the material scope is 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>69</sup> 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 in matters concerning the employee shall be equated with the employer. An employer can thus only be made responsible for employees who are given such authority to represent the employer in relation to 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).

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<sup>68</sup> Government bill 2007/08:95, p. 493. The Svea Appeal Court case (29.11.2019) in section 12.2 below illustrates some of the points in the legislative materials.

<sup>69</sup> Harassment might under some circumstances fall under a section in Chapter 5 of the Penal Code (defamation etc.).

## 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.

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>70</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.

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

In Sweden, the person giving the instructions is liable for issuing the instruction to discriminate if, in addition to there being a subordinate, a dependency or an assignment relationship, a disadvantageous effect has occurred in regard to one or more persons. If such an effect does not occur, then the instruction does not violate the Discrimination Act. Basically, this means that the person receiving the instruction must have acted in accordance with the instruction. There is one exception indicated in the legislative materials. If the instruction points out a specific person (or several specific persons) as the target of discrimination, that person has had his rights violated (*blivit kränkt*), and there is thus a violation of the prohibition against discrimination. This can occur if, for example, gossip develops due to the instruction, even if the instruction was never carried out.<sup>71</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.

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<sup>70</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>71</sup> Government bill 2007/08, pp. 494-495.

## 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 persons with disabilities in the area of employment

In Sweden, the duty on employers to provide reasonable accommodation for persons with disabilities is included in the law. It was covered by the 2009 Discrimination Act.<sup>72</sup> The law was changed in 2015 to extend the concept of reasonable accommodation to cover not only employment but also other areas of social life, such as education and access to goods and services. It is currently defined under 'inadequate accessibility'.<sup>73</sup> Even though the wording of the law was changed, the Government was clear in pointing out that previous rules related to reasonable accommodation in employment were not affected by the change in the Discrimination Act. Furthermore, the Government emphasised the idea that, in general, reasonable accommodation in relation to employment carried more weight as compared to other areas covered by inadequate accessibility, due to the nature of the employment relationship.<sup>74</sup>

Inadequate accessibility was added as a form of discrimination to the Discrimination Act (Chapter 1, Section 4(3)) from 1 January 2015. The other forms of discrimination are direct, indirect, harassment, sexual harassment and instructions to discriminate. Inadequate accessibility applies to most of the areas covered by the act including the prohibition of discrimination in working life in Chapter 2, Section 1.<sup>75</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. Also, reasonable accommodation did not apply to other areas, such as access to goods and services.

The current term is written in such a way that it is supposed to accommodate every area where the new broadened prohibition applies. In other words, the reasonable accommodation duty applies not only to working life, but also to areas of social life, such as education and access to goods and services.

It is defined as follows:

*'Inadequate accessibility'*:<sup>76</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>72</sup> Reasonable accommodation was also already provided through the much earlier act on disability discrimination in working life, the 1999 Act prohibiting discrimination in working life due to disability (*lagen om förbud mot diskriminering i arbetslivet av personer med funktionshinder*, 1999:132).

<sup>73</sup> 'Inadequate accessibility' is the term used in the translation of the Discrimination Act on the Government's website at: <http://www.government.se/information-material/2015/09/discrimination-act-2008567/>.

<sup>74</sup> Government bill 2013/14:198, pp. 128-129.

<sup>75</sup> Act (2014:958) on changing the Discrimination Act (2008:567), 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. Note that the duty here is primarily an individualised reasonable accommodation duty. As pointed out in the text of the law, there are other laws and statutes that include a focus on providing accessibility in a broader sense.

<sup>76</sup> The author refers to the translation of the Discrimination Act including amendments through 2014 on the Government's website 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.<sup>77</sup>

This change has little practical importance in the field of employment as – according to the legislative preparatory works – the previous rules continue to apply with regard to accommodation measures in employment. The protection is, however, extended to cover trainees in basic and secondary education. The expansion in coverage primarily related to fields other than employment.<sup>78</sup>

The availability of financial assistance from the state concerning reasonable accommodation can be taken into account, depending on the circumstances, in assessing whether the accommodation is a disproportionate burden.<sup>79</sup>

Since the case law is limited, it is not easy to specify what accommodations will be classified as reasonable support and accommodation measures in accordance with Swedish law. It is also difficult 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>80</sup> The following accommodation measures were mentioned in the legislative materials accompanying the 2009 Discrimination Act as examples of requirements of measures to be taken by an employer: improvements related to physical accessibility, the acquisition of technical support, and changes in work tasks, time schedules or working methods.<sup>81</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 employee's needs, as well 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. Government subsidies for reasonable accommodation measures can be taken into account if it is clear, for example, during the recruitment process, that a subsidy will be received.<sup>82</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>83</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>84</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.

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<sup>77</sup> These three elements are assumed to equate to the 'disproportionate burden' test.

<sup>78</sup> Government bill 2013/14:198, pp. 74, 115 and 128.

<sup>79</sup> See e.g. Labour Court 2017 No. 51, *Equality Ombudsman v Södertörn University* and Fransson-Stüber (2015), *Diskrimineringslagen: en kommentar* (The Discrimination Act: A Commentary) and section 2.6.b below on case law.

<sup>80</sup> See the 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>81</sup> Government bill 2007/08:95 p. 148.

<sup>82</sup> See Government bill 1997/98:179 p. 54, Government Bill 2007/08:95 pp. 150 and 200, and Fransson-Stüber (2015), *Diskrimineringslagen: en kommentar* (The Discrimination Act: A Commentary) p. 143.

<sup>83</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), 4 March 2010.

<sup>84</sup> See also, for instance, Inghammar, A. (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.

b) Case law

Labour Court case 2013 No. 78 indicates that the court is reluctant to ask the employer to permanently<sup>85</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 work more than 50 % and could not, among other things, drive during the early mornings and late evenings, or in certain types of traffic. Creating such a schedule for another worker could not be required of the employer, and the worker with disability was dismissed.<sup>86</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 EUR 49 000 (approximately SEK 520 000) per year as a net cost for the education provider. That cost was considered excessive (unreasonable), and the Ombudsman lost the case.<sup>87</sup> Concerning this case, in 2020, the UN Committee on the Rights of Persons with Disabilities issued a decision that was highly critical of Sweden and the manner in which reasonable accommodation was dealt with in this case, particularly the failure to engage in a dialogue with the job applicant. The committee pointed out that the concept of reasonable accommodation requires an individual dialogue about the alternatives.<sup>88</sup> This communication presumably applies to all states and international organisations that have ratified CRPD, including the EU.

In 2020, in the field of labour law, the Police Authority admitted that it had failed to live up to its duty to adequately investigate the need for additional accommodation measures concerning a probationary employee, thus accepting responsibility for discrimination in the form of inadequate accessibility. The employee however failed in their attempt to assert that the Police Authority was also liable for indirect discrimination, which would have led to the right to receive economic damages and not just discrimination compensation.<sup>89</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.

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<sup>85</sup> During the period when it was uncertain whether the bus driver would become healthy enough to drive during 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.

<sup>86</sup> Labour Court 2013 No. 78, *Equality Ombudsman v Veolia and the Swedish Bus and Coach Federation* at: <http://www.arbetsdomstolen.se/upload/pdf/2013/78-13.pdf>.

<sup>87</sup> Labour Court 2017 No. 51, *Equality Ombudsman v Södertörn University*. There was thus no need for the Labour Court to assess whether or not the true cost was higher, as the university claimed.

<sup>88</sup> UN Committee on the Rights of Persons with Disabilities (2021) *Views adopted by the Committee under article 5 of the Optional Protocol, concerning communication No. 45/2018*, 2020-08-21, CRPD/C/23/D/45/2018. Also see Section 10 in EELN Country Report, Non-discrimination Sweden 2021.

<sup>89</sup> Labour Court 2020 No. 13, *Fackförbundet ST (ST Union) v Staten genom Arbetsgivarverket* (Sweden through the Swedish Agency for Government Employers).

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 persons with disabilities

In Sweden, failure to meet the duty of reasonable accommodation in employment for persons with disabilities is recognised as a form of discrimination. This failure 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). Inadequate accessibility is a free-standing form of discrimination in relation to, for example, direct and indirect discrimination. In conjunction with the prohibition against discrimination in working life in Chapter 2, Section 1 of the Discrimination Act, inadequate accessibility imposes a duty of reasonable accommodation in employment.

One difficulty with the idea of reasonable accommodation involves the burden of proof. The claimant must at least suggest the potential accommodation after which the burden shifts to the defendant concerning the lack of reasonableness. In order to assert the reasonableness of the need for accommodation, the cost of the accommodation has to somehow be assessed. It is not clear who has to determine the reasonableness of an accommodation and how it can be proven. Is it enough for a defendant to simply assert that the cost would be prohibitive? In a Labour Court case from 2010, a visually impaired job applicant asserted discrimination by the Social Insurance Agency when it failed to provide various types of reasonable accommodation. The defendant provided testimony concerning unreasonableness related to costs which was enough to convince the court. The court may have made the right decision, yet it still seems that in practice the claimant bore the burden of proving the reasonableness of the accommodation sought – regardless of the shifting of the burden of proof.

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

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

Since 2015, there has been a duty to provide reasonable accommodation for persons with disabilities in most of the areas where the Discrimination Act applies. This duty, (as discussed above in subsection a), is contained within the prohibition of the form of discrimination known as 'inadequate accessibility'.<sup>90</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 persons without such a disability.<sup>91</sup> This duty applied to higher education only. Today's rules on inadequate accessibility apply throughout the education sector.

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<sup>90</sup> 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.

<sup>91</sup> Discrimination Act (2008:567), Chapter 2, Section 5.



The Education 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). Under the provisions introduced in 2015, a violation of the Education 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 2015 rules had been applied to housing, this situation could have changed but, according to Chapter 2, Section 12c of the Discrimination Act, the prohibition of discrimination in the form of inadequate accessibility does not apply with regard to housing.<sup>92</sup>

The case law still needs development concerning the 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>93</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 Education Act establishes a minimum standard of accessibility that also encompasses an individualised duty of reasonable accommodation. If that standard is fulfilled, there will be no examination of inadequate accessibility based on the Discrimination Act. Thus, the introduction of this 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. The concept of inadequate accessibility is – in those situations – related to accessibility required by other legislation.<sup>94</sup>

A 2019 case, *Malmö mot diskriminering (MmD) v Malmö stad*, illustrates the interplay between the Discrimination Act and the Education Act. The city of Malmö took more than a year to investigate and adapt the schooling situation with regard to A's learning disabilities. Malmö was required to do so due to the requirements of Chapter 3 of the Education Act. After receiving a complaint, the Schools Inspectorate concluded that the school should have been much quicker in developing and implementing the special measures related to A's needs. MmD was able to use the Inspectorate's decision, among other factors, for its lawsuit against Malmö. The district court determined that A had been subjected to a violation of the Discrimination Act in the form of inadequate accessibility

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<sup>92</sup> The Government was worried about the potential problems associated with determining that inadequate accessibility containing a requirement of reasonable accommodation concerning housing could cause. Therefore, a broad exception was established. See Government bill 2013/14:198, pp. 93-94.

<sup>93</sup> With regard to the costs for different sectors, the Government repeatedly states that the costs are small as new requirements are not being introduced. See Government bill 2013/14:198, Chapter 13.

<sup>94</sup> For more information, see Skaraborg County District Court, 2017.05.24, *Equality Ombudsman v Vara Municipality*, at: <https://www.do.se/globalassets/diskrimineringsarenden/hovratt/dom-hovratt-kommun-anm2016940.pdf>.

and awarded EUR 1 900 (SEK 20 000) in discrimination compensation.<sup>95</sup> The Appeal Court upheld the decision of the district court.<sup>96</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 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>97</sup>

It should be pointed out that the idea was not to create a definition of inadequate accessibility that could be used to impose high costs on service providers when accessibility is not required by other legislation. This can be seen in the wording of the act as well as in the legislative preparatory works. Nevertheless, the act does impose new accommodation duties.<sup>98</sup>

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 legislative 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 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 is that the Education 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 legislative preparatory works, the room in which to apply this test seems limited when there is no special legislation to rely on.

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<sup>95</sup> Malmö District Court, Case no. FT 11162-18, 28.11.2019. For more information see section 12.2 of the EELN Country Report, Non-discrimination Sweden 2020.

<sup>96</sup> Skåne and Blekinge Appeal Court, Case FT 3884-19, 2020-04-29. Also see section 12.2 of the EELN Country Report, Non-discrimination Sweden 2021.

<sup>97</sup> Göta Appeal Court, Case T 1773-17, 15.05.2018, *Equality Ombudsman v Vara Municipality*, at <http://www.do.se/globalassets/diskrimineringsarenanden/hovratt/dom-hovratt-kommun-anm2016940.pdf>.

<sup>98</sup> This follows from a literal interpretation of the definition in Chapter 1 Section 4(3) of the Discrimination Act (2008:567). If there is no legislation stipulating a duty to take on a certain cost, this weighs heavily in favour of the service provider. The Equality Ombudsman's homepage gives some examples 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>99</sup> Government bill 2013/14:198, p. 65.

If there is a determination that there has been a failure to meet the duty of reasonable accommodation, the primary 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 a 2021 case, *Equality Ombudsman (DO) v. Svealandstrafiken AB*,<sup>100</sup> AA, who was in a wheelchair, was not allowed on the buses run by Svealandstrafiken AB. The bus drivers had inaccurately guessed that AA's wheelchair together with AA's weight was more than 300 kg. For safety reasons, 300 kg is considered to be the maximum weight. The DO asserted, among other things, that the failure to adequately educate bus drivers as to the weights of various wheelchairs constituted discrimination in the form of inadequate accessibility. The district court held that the bus company had not subjected AA to discrimination on the four occasions when he was not allowed to ride the bus since the company had done what was reasonable in order to ensure that AA could ride the bus. The fact that he was denied this opportunity on four occasions due to failures in judgement by the bus driver did not mean that he had been disadvantaged concerning accessibility. The DO appealed. The Appeal Court determined that the burden of proof concerning a claim of inadequate accessibility should be dealt with in the same way as in regard to indirect discrimination. Once a disadvantage has been shown, to avoid liability, the transport company must refer to and prove that reasonable measures have been undertaken. Furthermore, the Court states that, given the law, it is only in limited circumstances that references to safety reasons will allow a transport company to refuse transportation to a person with a disability. The Court determined that the transport company's reference to the lack of knowledge of its personnel was not enough to overcome its burden. In fact, if that was enough, that would render the protection against inadequate accessibility illusory. The Court held, contrary to the trial court, that Svealandstrafiken was liable for inadequate accessibility discrimination in relation to AA and was to pay discrimination compensation of EUR 5 600 (SEK 60 000) as well as the legal costs and fees of the DO in both the appeal court and the district court, EUR 3 164 (SEK 33 856).

In another 2021 case, *Equality Ombudsman (DO) v. Sweden through the Social Insurance Agency*, the DO had been successful in the district court in asserting inadequate accessibility due to the Swedish Social Insurance Agency's failure to take reasonable measures in 2015-2016 to adapt its website so that it could be used by a screen reader. On appeal, the Appeal Court reversed the trial court's judgement, holding that the evidence presented was insufficient to establish discrimination under the law. In part this had to do with the evolving technology in the field.<sup>101</sup>

In 2021, in the following two district court cases the claimant was unsuccessful in asserting disability discrimination due to the failure to provide reasonable accommodation.

*LK v. Sweden through the Chancellor of Justice*,<sup>102</sup> is a result of the three dyslexia cases against local governments<sup>103</sup> where the courts in three separate cases determined that the failure to allow these three pupils with dyslexia to use their ordinary assistance devices when taking national exams in the third and sixth grades did not constitute discrimination. The appeals courts in those cases determined that even though they agreed that the pupils were disadvantaged, the measures taken had a legitimate purpose and the means used were appropriate and necessary, thus there was no indirect discrimination, nor discrimination in the form of inadequate accessibility. The pupils asserted that use of their devices was a necessary reasonable accommodation. The courts disagreed, concluding that the accommodation measures provided, a longer time for the exams and a quieter space,

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<sup>100</sup> See section 12.2 below.

<sup>101</sup> See section 12.2 below.

<sup>102</sup> See section 12.2 below.

<sup>103</sup> See section 10 below and section 12.2 in EELN Country Report, Non-discrimination Sweden 2021.

fulfilled the duty to provide reasonable accommodation. The courts essentially came to this conclusion based on the idea that the schools, in carrying out the tests, were following the instructions issued by the National Agency for Education. At the same time, it seems that once the court accepted the idea of a legitimate purpose, there was little reason to require evidence that the means were appropriate and necessary since the agency had produced the instructions. Contrary evidence was not taken into account. As the National Agency for Education was the source of the discrimination, LK filed this lawsuit asserting that the agency was an education provider in the meaning of the Act. The lawsuit asserted, among other things, that a broad interpretation of the term education provider was necessary since the national exams affect grades, which meant that the agency was providing or controlling a key portion of her education and thus acting as an education provider in a manner that resulted in detriments to her. The instructions led to discrimination against her as a result of the failure to provide reasonable accommodation in the form of her ordinary assistance devices. The Solna District Court, after limiting the evidence to only written evidence and oral pleadings, determined that the National Agency for Education was not an education provider and could not therefore be held liable for discrimination under the Swedish Discrimination Act. The court also determined that the agency's instructions did not amount to indirect discrimination under the European Convention on Human Rights, essentially applying the reasoning applied by the earlier appeal court cases, i.e. that the National Agency for Education had legitimate reasons for the instructions that applied to the tests and that they were proportionate in relation to the goals that were to be achieved with the tests. This case has been appealed.

*Malmö mot Diskriminering (MmD) v. Sweden through Lund University*,<sup>104</sup> involved a claim that the university failed to provide satisfactory reasonable accommodation in relation to the exams to be taken by JS. JS wanted an exam to be broken up into two parts with a day in between, as well as a general decision that she should have that accommodation in regard to all of her exams. The examiner agreed that the exam could be taken in two sessions about a month apart (the ordinary exam and the scheduled re-examination) or JS could have three hours longer during the ordinary exam. JS said that this was unsatisfactory, and thus lodged the complaint. Lund District Court determined that the reasonable accommodation offered concerning the exam was adequate, and that the failure to provide a general decision on reasonable accommodation did not constitute inadequate accessibility in the manner claimed by MmD. The court also decided that the parties should bear their own legal costs. The case has been appealed.

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 form of discrimination known as 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>105</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>104</sup> See section 12.2 below.

<sup>105</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>106</sup>

In the 2017 midwife case decided by the Labour Court,<sup>107</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, 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>108</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>106</sup> Equality Ombudsman, Case 2009/103 involved a school where these circumstances applied. In the end, the Ombudsman did not pursue the case because the school found alternative solutions.

<sup>107</sup> Labour Court 2017 No. 65, *E.G. v Jönköping County*, available at: <http://www.arbetsdomstolen.se/upload/pdf/2017/23-17.pdf>.

<sup>108</sup> Svea Court of Appeal, 22.03.2017, *National Employment Agency v Equality Ombudsman*, Case T 777-16, available at: <http://www.do.se/globalassets/diskrimineringsarenanden/hovratt/dom-hovratt-arbetsformedlingen-anm-2014-1037.pdf>.

### **3 PERSONAL AND MATERIAL SCOPE**

#### **3.1 Personal scope**

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

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

In principle, persons with irregular status are entitled to the protection of 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 legislative preparatory works that legal persons are not protected.<sup>109</sup>

The Discrimination Act thus generally protects natural persons.<sup>110</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.

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>111</sup> Most of the consultation responses were positive, with several of the discrimination ombudsmen at the time asserting that the proposal should go further. However, the Government rejected this in the final bill that became law, indicating that further analysis was needed and that coverage of legal persons was not an explicit requirement of the directives.<sup>112</sup> Thus 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, 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>113</sup> The employee did not represent

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<sup>109</sup> Government bill 2007/08:95, p. 91.

<sup>110</sup> Government bill 2007/08:95, p. 90.

<sup>111</sup> 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>112</sup> Government bill 2007/08:95, pp. 90-91.

<sup>113</sup> Labour Court 2007 No. 45 *Ombudsman Against Ethnic Discrimination v Laika film & amp* (16.05.2007), available at: <http://www.arbetsdomstolen.se/upload/pdf/45-07.pdf>.

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 the author's opinion, there is a question of whether even Swedish law was applied properly in this case.<sup>114</sup>

Labour Court case 2011 No. 19<sup>115</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, for the purpose of protection against discrimination. 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. The national provisions are presumed to comply with the directives.

#### **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, even if the officer is carrying out her or his official duties in a discriminatory manner. 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.

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<sup>114</sup> Also see Labour Court 2007 No. 16, *Ombudsman Against Ethnic Discrimination v Örebro* (14 May 2007) concerning a union representative, during a job interview, questioning an applicant about e.g. his ability, coming from a Muslim country, to work in a female dominated workplace. The court held that the union representatives were not acting on behalf of the employer and had no liability for the actions of the union.

<sup>115</sup> Labour Court 2011 No. 19, *Equality Ombudsman v C.N. and Bright Hair and Beauty Salon and Café Next Door Unlimited Partnership*, (23.03.2011), <http://www.arbetsdomstolen.se/upload/pdf/2011/19-11.pdf>.

## 3.2 Material scope

### 3.2.1 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 access to employment and occupation in various sections. Chapter 2, Section 1 applies to employment. 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 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>116</sup>

This criticism can be directed at the 2009 Discrimination Act as well.<sup>117</sup>

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

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

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<sup>116</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>117</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 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.

### **3.2.3 Access to all types and 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 adult lifelong learning courses or vocational training provided by technical schools or universities.

The prohibition of discrimination in the education sector applies to all sorts of education providers, from those teaching small children to those teaching university students. It applies to all forms of education including vocational training. In Sweden, the phrase 'vocational training' is not used as an official category when distinguishing between different forms of education. Chapter 2 Section 1(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.

### **3.2.4 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, the Discrimination Act 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.

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.

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

In Sweden, the Discrimination Act 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 of the Act's discrimination grounds are covered, including age, disability, religion or belief and sexual orientation. 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.

a) Article 3.3 exception (Directive 2000/78)

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

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

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

All of the Act's discrimination grounds are covered, including age, disability, religion or belief and sexual orientation.

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.

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

In Sweden, the Discrimination Act 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. 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.

There are three primary Government agencies that deal with schools: the Swedish National Agency for Education, Swedish Schools Inspectorate, and the National Agency for Special Needs Education and Schools. According to Chapter 1, Section 4 of the Swedish Education Act (2010:800) a basic idea guiding all Swedish schools is that everyone should have access to an equivalent education. As a part of this, the education should take into account the different needs of pupils. Support and stimulation are to be provided so that pupils can develop and grow as much as possible. In principle, this means that a starting point is a focus on all children, given their different needs, and not a separate categorisation of pupils

in need of special support with special rights. Schools, healthcare and social services are to cooperate in regard to pupils at risk.

Of the 950 000 pupils in compulsory schools, only about 500 attend state-run special schools. Thus, most pupils in need of special support are in general basic compulsory classes. If this is not possible, schools must very clearly indicate why other educational options should be considered. Previously, the debates focused on prerequisites for mainstreaming, whereas now the focus has shifted to the need to justify segregated options for pupils.<sup>118</sup>

Children with learning disabilities can attend mainstream compulsory schools or compulsory schools for pupils with learning disabilities. An action plan must be drawn up for pupils in need of special support. The plans are usually developed by teachers in consultation with pupils, their parents and specialist support teachers (Chapter 3, Sections 6-12). Special support will be provided depending on the needs. There are also a number of special schools that are available for pupils with particular needs related to e.g., visual or hearing impairments or certain other more severe issues. According to the Education Act, all pupils, in principle, have the right to choose their school, assuming the school can meet their needs.

The National Agency for Special Needs Education and Schools, SPSM, works to ensure that children, young people and adults – regardless of functional ability – have adequate conditions to fulfil their educational goals. SPSM has a broad knowledge of the educational consequences of disabilities as well as special needs support, education in special needs schools and accessible teaching materials.

Sweden has the ambition of ensuring that all pupils, including those with special needs, receive an education that corresponds to their potential. This does not mean that there are no problems concerning discrimination against pupils with disabilities. For example, see section 12.2 below concerning the pupils with dyslexia who asserted that their schools, following the instructions of the Swedish National Agency for Education, did not allow them to use the assistance devices they used daily in school, during the national exams. The Education Agency asserted that the devices would mean that the ability of students to comprehend reading materials would not be tested. It is noteworthy that SPSM, the Swedish agency specialised in such issues, submitted a statement to the courts pointing out that some pupils read with their fingers, some with their eyes and some with their ears. In spite of this, the pupils lost their appeals.

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

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 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) the policy is that they should be provided with extra lessons at no cost, 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

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<sup>118</sup> European Agency for Special Needs and Inclusive Education (2020) 'Country information for Sweden - Systems of support and specialist provision', available at <https://www.european-agency.org/country-information/sweden/systems-of-support-and-specialist-provision>.

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>119</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 in Romani Chib did not exist.<sup>120</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>121</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>122</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>123</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 request to appeal.<sup>124</sup> From this case it follows that, even though there is a duty for municipalities to provide minority language education, there is no effective legal remedy if this does not happen. There is no corresponding right on the part of the pupil to require this education.

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>125</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>126</sup> Each school has been given both materials for pupils and guidance for teachers.<sup>127</sup>

An overall assessment of the current right of Roma children to an education was made in a 2019 master's thesis. The author of the thesis concluded that although Sweden has taken

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<sup>119</sup> National Agency for Education (*Skolverket*) (2007), *Romer i skolan* (Roma in School) Report 2007 No. 292.

<sup>120</sup> National Agency for Education (2013), *Report on Governmental Assignment*, 28 November 2013 Dnr 2012:518, p. 3. More than 50 school heads out of 886 gave this answer.

<sup>121</sup> National Agency for Education (2013), *Report on Governmental Assignment*, 28 November 2013 Dnr 2012:518, p. 3.

<sup>122</sup> Equality Ombudsman, 11 November 2010, case OMED 2007/1109 Act 116, p. 4.

<sup>123</sup> Eksjö District Court, Case T 1395-09, *Equality Ombudsman v Vetlanda Municipality*, 21 October 2010, available at: <http://www.do.se/globalassets/diskrimineringsarenen/tingsratt/dom-tingsratt-vetlanda-kommun-omed-20071109.pdf>.

<sup>124</sup> Göta Court of Appeal, case T 3264-10, 9 February 2011.

<sup>125</sup> National Agency for Education (*Skolverket*) (2013), *Report on Governmental Assignment*, 28 November 2013 Dnr 2012:518 p. 3.

<sup>126</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>.

<sup>127</sup> White Paper SOU 2016:44, p. 66ff.

some important measures, such as education in schools concerning Roma culture and history and the use of Roma teaching assistants and bridge-builders, at the same time, there is a tendency to focus on Roma attitudes to education as a problem, while too little is being done to deal with structural discrimination in Sweden and its education system.<sup>128</sup> The conclusion, by the author of the master's thesis, is that there are problems with the strategy; to some extent this is based on a 2018 report by the Swedish National Agency for Education.<sup>129</sup>

The Stockholm County Administrative Board was tasked in May 2020 with increasing the amount of knowledge available concerning the exposure of children and young people to antiziganism (anti-Gypsyism). The Board published a report in 2021 on this topic, which was submitted to the Government. The report points out that even though schools should be a safe and secure place for children and young persons, the interviews with young Roma indicated that they experience a sense of insecurity in school connected with their Roma identity. This indicates that they experience a limitation on their fundamental rights. To provide security and enable young Roma to be open about their Roma identity, the Board proposed various measures concerning the education of teachers and administrators, systematic work on equality in schools, and the production of educational materials, along with other materials, focused on other target groups.<sup>130</sup>

The author of this report finds it 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 as well as the importance that individual rights enforcement can also have on structural discrimination. Furthermore, despite the ongoing Government work, the activities being carried out lack a sufficiently meaningful empowerment perspective in the author's opinion.

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

In Sweden, the Discrimination Act prohibits discrimination in access to and the 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>131</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>132</sup>

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<sup>128</sup> Langhammer, M. (2019) *Romska barns rätt till utbildning – som jämlika deltagare* (The right of Roma children to education – as equal participants) Master's thesis, Spring term 2019, Uppsala University.

<sup>129</sup> National Agency for Education (*Skolverket*), *Nulägesbeskrivning av romers situation i skolan* (Current description of the situation of Roma in school), 2018.05.02, Diary number: 2017:885.

<sup>130</sup> See: Stockholm County Administrative Board (2021) [Redovisning av uppdrag att öka kunskapen om romska barns och ungas utsatthet för antiziganism](#) (Report on task to increase knowledge about Roma children's and young people's exposure to anti-Gypsyism) 9 September 2021.

<sup>131</sup> 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.

<sup>132</sup> Stockholm District Court, case T 20377-09, *Equality Ombudsman v Trygg Hansa* (8 March 2011), p. 11, at: [www.do.se/globalassets/diskrimineringsanden/tingsratt/dom-tingsratt-trygg-hansa-ho-2007371.pdf](http://www.do.se/globalassets/diskrimineringsanden/tingsratt/dom-tingsratt-trygg-hansa-ho-2007371.pdf).

'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 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. In particular, the exception in point 3 related to the common practice among pubs, nightclubs and others in appealing to audiences of certain ages.

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.

A 2013 case followed the same line of reasoning. The 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>133</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>134</sup>

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<sup>133</sup> Svea Court of Appeal, *Equality Ombudsman v If Insurances*, case T 1912-13 (8 October 2013), at: <http://www.do.se/globalassets/diskrimineringsarenden/hovratt/dom-hovratt-if-skadeforsakring-anm-20111922.pdf>.

<sup>134</sup> The European Court of Justice regards statistical discrimination as a form of direct discrimination. Case

This has become an important issue also with regard to the dyslexia cases. Does reasonable accommodation mean one thing concerning working life, which is covered by EU law, and another concerning education, which is not covered? How does the EU, in particular the CJEU, view the UN CRPD committee decision in *Sahlin v Sweden*,<sup>135</sup> in which the requirement of a dialogue is a necessary component of reasonable accommodation in working life? Will EU law reflect this interpretation of reasonable accommodation? If it does, is it acceptable under EU law that the term 'reasonable accommodation' is given different meanings at the national level in regard to employment, covered by EU law, as opposed to vocational education, including university education, which is not covered by EU law?

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 and banks) and those that are only available privately (e.g. those restricted to members of a private group).

The Discrimination Act applies to:

'Persons who *outside the private or family sphere* are offering goods, services or housing to the public.'<sup>136</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>137</sup>

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

In Sweden, the Discrimination Act prohibits discrimination in the area of 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, Section 12 applies to all of the grounds covered by the Act, including age, disability, religion or belief and sexual orientation.

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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. The fact that men statistically have more accidents than women is not a valid defence for directly using a person's sex to determine car insurance fees. 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 at issue (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.

<sup>135</sup> UN Committee on the Rights of Persons with Disabilities, *Sahlin v Sweden*, CRPD/C/23/D/45/2018, at [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2f23%2fD%2f45%2f2018&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2f23%2fD%2f45%2f2018&Lang=en).

<sup>136</sup> Discrimination Act (2008:567), Chapter 2, Section 12, point 1.

<sup>137</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.

Housing falls under Chapter 2, Sections 12-12c of the Discrimination Act. 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'. The Government bill<sup>138</sup> to the Discrimination Act states that 'sporadic occasions'<sup>139</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>140</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>141</sup> In 2007, when the researchers sent out 500 identical applications signed with a name indicating a Swedish female, she got to see the apartment in 20 % of cases. When the name signalled a Muslim man, only 4 % of the applications led to him being shown the apartment.<sup>142</sup> Neither example could lead to a discrimination case, since no physical person had suffered less favourable treatment (*missgynnande*). There was no one who could go to court or to the Ombudsman, and the researchers themselves had not been discriminated against.

The former Ombudsman against Ethnic Discrimination produced a major report in 2008 focusing on ethnic discrimination and housing. It was based on analyses of complaints and a series of exchanges with discriminated groups as well as those working in the field of housing. The report underlined discrimination issues in relation to both the acquisition of housing as well as living in housing. Among other recommendations, the report underlined the need for ongoing mutual learning exchange between the Ombudsman and discriminated groups, particularly since one problem is the lack of trust in Government agencies.<sup>143</sup>

Although these discrimination studies are rather old, they have helped to dispel the idea of self-segregation as the primary problem. Research on housing segregation in relation to ethnicity and socio-economic factors over the years has indicated an increase in segregation. A 2014 study found discrimination to be an important factor.<sup>144</sup> At the same time, a recent study from 2019, while not directly looking at discrimination, concluded:

*'The diversity gains* – the influx of human capital, the reinforcement of innovative and entrepreneurial capacity, cultural enrichment, increased supply of less expensive services, etc. – primarily benefit those who are wealthy. *The diversity burden* – increased competition for jobs, wages and public healthcare, education and social

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<sup>138</sup> The Government bill is the document where the Government describes the new Act to the Parliament. If the Act is adopted as proposed – as was the case with the Discrimination Act – this bill becomes the most important source for interpreting the new act, at least before there is any case law. See the Introduction of this report.

<sup>139</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, and not commercial reasons, the sales are sporadic.

<sup>140</sup> Government bill 2007/08:95, p. 244.

<sup>141</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), <http://www.do.se/globalassets/publikationer/rapport-diskriminering-svenska-bostadsmarknaden.pdf>.

<sup>142</sup> Ahmed, A. and Hammarstedt, M. (2007), *Discrimination on the housing market – a field experiment on the internet*.

<sup>143</sup> Ombudsman against Ethnic Discrimination (2008), *Diskriminering på den svenska bostadsmarknaden – En rapport från DO:s särskilda arbete 2006–2008* (Discrimination on the Swedish Housing Market – A report from the DO's special work 2006-2008) at: <http://www.do.se/globalassets/publikationer/rapport-diskriminering-svenska-bostadsmarknaden.pdf>.

<sup>144</sup> Guevara, B. (2014) '*Segregation: Utbredning, orsaker, effekter och möjliga åtgärder, Ett kunskapsunderlag om segregation inom projekt KAIROS*' (Segregation: expansion, causes, consequences, and potential measures), *Mistra Urban Futures Papers, Paper 2014:3*, available at: [https://www.mistraurbanfutures.org/sites/mistraurbanfutures.org/files/kunskapsunderlag\\_segregation\\_0.pdf](https://www.mistraurbanfutures.org/sites/mistraurbanfutures.org/files/kunskapsunderlag_segregation_0.pdf).



care – are primarily borne by those who are poor. Immigration is, in other words, a redistributive policy that reinforces current inequalities in society.<sup>145</sup>

Although housing segregation studies do not necessarily provide an analysis of ethnic discrimination in housing, they provide some stimulus to the Government in relation to both segregation and discrimination in housing. This is indicated by the Government's long-term strategy to decrease and counteract segregation.<sup>146</sup>

In 2017, the Equality Ombudsman (DO) was given extra funding for a two-year period for an added focus on employment and housing discrimination. The Government's proposal for this work has a clear emphasis on educational and information efforts but says nothing about more effective or increased enforcement of the Discrimination Act in relation to employment and housing.<sup>147</sup> The DO reported back on this work to the Government in 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 was that a legal analysis (*rättsutredning*) had 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 were gaps in the protection against discrimination. The DO stated that, once completed, the legal analysis could be used to inform the Government about the need for additional regulation, as well as influencing the DO's work in relation to strategic litigation.<sup>148</sup> The legal analysis, completed in 2018, confirmed the preliminary indications that the Discrimination Act together with other laws covers most situations related to the sale of housing.<sup>149</sup>

In 2020, the Government instructed the National Board of Housing, Building and Planning to analyse and assess whether there are negative tendencies in the provision of housing that could indicate ethnic discrimination, in particular, and to ascertain the extent to which these negative tendencies constitute obstacles to people establishing themselves on the housing and labour market. The task also included examining the provision of rental housing, with and without security of tenure, as well as examining the housing situation of children. This resulted in the publication of a report in 2021: *Risk för diskriminering och hinder för etablering på bostadsmarknaden* (The risk of discrimination and obstacles to establishment on the housing market).<sup>150</sup> Among other things, the report points out that the studies analysed indicate that people from the Middle East and North Africa as well as Swedish citizens with a Roma background run a higher risk of ethnic discrimination in

<sup>145</sup> Love, B. (2019) *Diversity and segregation in Sweden*, Swedish Union of Tenants, p. 37, available at: [https://www.hyresgastforeningen.se/globalassets/faktabanken/rapporter/2018/diversity-and-segregation-in-sweden-pdf-285-mb.pdf? t\\_id=p67n3P0n\\_ysEw8mAAbrbqQ%3d%3d& t\\_uid=7KIX6gnPSBKARN8IcJLZkg& t\\_q=diversity+and+segregation& t\\_tags=language%3asv%2csiteid%3a6b2a719e-0680-4c14-8579-4ba3422121e6%2candquerymatch& t\\_hit.id=Hyresgastforeningen\\_Web\\_Features\\_Shared\\_Media\\_PdfFile/\\_d60995e0-c2b0-40c1-9042-a2284c06747d& t\\_hit.pos=1](https://www.hyresgastforeningen.se/globalassets/faktabanken/rapporter/2018/diversity-and-segregation-in-sweden-pdf-285-mb.pdf? t_id=p67n3P0n_ysEw8mAAbrbqQ%3d%3d& t_uid=7KIX6gnPSBKARN8IcJLZkg& t_q=diversity+and+segregation& t_tags=language%3asv%2csiteid%3a6b2a719e-0680-4c14-8579-4ba3422121e6%2candquerymatch& t_hit.id=Hyresgastforeningen_Web_Features_Shared_Media_PdfFile/_d60995e0-c2b0-40c1-9042-a2284c06747d& t_hit.pos=1).

<sup>146</sup> Swedish Government (2018), *Regeringens långsiktiga strategi för att minska och motverka segregation* (The long-term Government strategy for decreasing and counteracting segregation).

<sup>147</sup> Government decision, 2017-08-24. Ku2017/01798/DISK, *Uppdrag till Diskrimineringsombudsmannen om särskilda insatser för att motverka diskriminering* (Task to the DO on special efforts to counteract discrimination), <https://www.regeringen.se/4a5758/contentassets/b2cbdb3b7a5647bea42bd8ac5aab9fd6/uppdrag-till-diskrimineringsombudsmannen-om-sarskilda-insatser-for-att-motverka-diskriminering>.

<sup>148</sup> Equality Ombudsman (2017) *Redovisning av regeringsuppdrag om särskilda insatser för att motverka diskriminering på arbets- och bostadsmarknaden*, Diarienummer LED 2017/384 (Review of Government tasks on special efforts to counteract discrimination in employment and housing), available at: <http://www.do.se/globalassets/om-do/redovisning-regeringsuppdrag-arbets-bostadsmarknad.pdf>.

<sup>149</sup> Equality Ombudsman (2018), *B3 Insatser mot bristande likabehandling i samband med försäljning – rättsutredning*, Diarienummer LED 2018/196, document 2 (B3 Efforts against the lack of equal treatment in connection with sales – legal analysis).

<sup>150</sup> National Board of Housing, Building and Planning (2021) *Risk för diskriminering och hinder för etablering på bostadsmarknaden* (The risk of discrimination and obstacles to establishment on the housing market).

housing as compared to other discrimination grounds, and in comparison with people born in Sweden to Swedish-born parents or with a background in western countries.<sup>151</sup>

a) Trends and patterns regarding housing segregation for Roma

In Sweden, there are indications of housing segregation and 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 of their 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.

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 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 'Vänerns borg cannot absorb more Gypsies'.<sup>152</sup> Similar comments have also been made by representatives of municipal housing companies.<sup>153</sup>

Over the years, Roma have brought a number of housing cases to the previous Ombudsman as well as to the Equality Ombudsman.<sup>154</sup> One example is the housing discrimination case on the DO's website that involved a 2013 settlement on behalf of a person perceived to be 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 EUR 4 672 (SEK 50 000).<sup>155</sup>

There is little to indicate that the situation has improved for Roma. 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. As a part of this role, the board has developed web-based training focusing on the equal treatment of Roma in the housing market, aimed at landlords and property owners.<sup>156</sup> This also involved a consultation. The board's responsibility was extended through 2020.<sup>157</sup>

The board developed a first overview report in 2014<sup>158</sup> and a follow-up report in 2018.<sup>159</sup> Some basic conclusions are that Roma experience discrimination in various parts of the

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<sup>151</sup> National Board of Housing, Building and Planning (2021) *Risk för diskriminering och hinder för etablering på bostadsmarknaden*, p. 27.

<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> Ombudsman against Ethnic Discrimination (2003), *Discrimination Against Romanies in Sweden, DO project 2002 and 2003*. Ombudsman against Ethnic Discrimination (2006), *Etnisk diskriminering på bostadsmarknaden* (Ethnic Discrimination on the Housing Market), PM 2006-01-01. Equality Ombudsman (2011), *Romers rättigheter* (Roma rights).

<sup>155</sup> DO's website at: <https://www.do.se/lag-och-ratt/diskrimineringsarenden/hyresvard-filipstad/>.

<sup>156</sup> National Board of Housing, Building and Planning (2019) *Counteracting discrimination of Roma on the housing market*, available at: <https://www.boverket.se/sv/samhallsplanering/uppdrag/motverka-diskriminering-av-romer-bostadsmarknaden/>. National Board of Housing, Building and Planning (2019), 'Training for equal treatment of Roma at the housing market' (*Utbildning för likabehandling av romer på bostadsmarknaden*) at: <https://www.boverket.se/sv/om-boverket/publicerat-av-boverket/webbutbildning/utbildning-for-likabehandling-av-romer-pa-bostadsmarknaden/>.

<sup>157</sup> National Board of Housing, Building and Planning (2021) *Annual Report 2020*, (*Rapport 2021:4*), p. 133.

<sup>158</sup> National Board of Housing, Building and Planning (2014), *Boverkets nulägesbeskrivning – en del av romsk inkludering 2012-2032* (The board's current view – a part of Roma inclusion 2012-2032), *Rapport 2014:27*.

<sup>159</sup> National Board of Housing, Building and Planning (2018), *Boverkets andra nulägesbeskrivning – en del av*

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 public and private 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. The board's education efforts concerning Roma and discrimination in housing continued throughout 2020.<sup>160</sup>

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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*romsk inkludering 2012–2032*, (The board's current view – a part of Roma inclusion 2012-2032) Rapport 2018:25, pp. 5-6.

<sup>160</sup> National Board of Housing, Building and Planning Annual Report 2020, (*Rapport 2021:4*), p. 76.

## **4 EXCEPTIONS**

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

In Sweden, the Discrimination Act 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, promotion or education or training for promotion, by reason of the nature of the work or the context in which the work is carried out, the characteristic constitutes a genuine and determining occupational requirement that has a legitimate purpose and the requirement is appropriate and necessary to achieve that purpose.'

In the legislative 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 legislative 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, the Discrimination Act 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 Recitals 18 and 19, Directive 2000/78)**

In Sweden, the Discrimination Act 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). An exception was needed for the ground of age discrimination due to the large variety of laws and regulations relating to age and service in the armed forces.<sup>162</sup> There is no exception in regard to disability.

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

<sup>162</sup> Government bill 2007/08:95, p. 278.

In Sweden, the scope of the exception is not explicitly limited to safeguarding the combat effectiveness of the armed forces. However, this is presumably the intention expressed in the Government bill concerning the exception for age.<sup>163</sup>

In Sweden, the scope of the exception concerning age presumably does not extend to other non-combat staff, such as civilians employed in administrative positions in the army, since the focus of Chapter 2, Section 15 is on those doing compulsory military service or volunteering for military or civil service.

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>164</sup>

#### **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 nationality.

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>165</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>166</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>167</sup>

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<sup>163</sup> Government bill 2007/08:95, p. 278: 'Var och en av dessa och andra förekommande åldersgränser har i de sammanhang de tillkommit ansetts berättigade, t.ex. av hänsyn till rikets säkerhet eller personalförsörjningen inom försvaret.' (Author's translation: 'Each of these and other existing age limits relate to contexts in which they were considered justified, e.g. for the sake of the national security or the supply of defence personnel').

<sup>164</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 a strong possibility of it becoming a reality only for those who want to serve.

<sup>165</sup> Government bill 2007/08:95, p. 497.

<sup>166</sup> Government bill 2009/10:80, p. 333.

<sup>167</sup> See also SOU 2000:106, *Medborgarskap i svensk lagstiftning* (Citizenship in Swedish legislation) available 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.

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>168</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>169</sup>

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

In Sweden, there are no exceptions in relation to disability and health and safety, as allowed 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>170</sup> In Labour Court case 2003 No. 47,<sup>171</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.

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

##### **4.6.1 Direct discrimination**

a) Exceptions to the prohibition of direct discrimination on grounds of age

In Sweden, the Discrimination Act provides for specific exceptions 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.

b) Justification of direct discrimination on the ground of age

In Sweden, the Discrimination Act provides for justifications for direct discrimination on the ground of age.

Chapter 2 Section 2(4) allows for:

'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.

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<sup>168</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>169</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.

<sup>170</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>171</sup> Labour Court 2003 No. 47, *Swedish Metal Workers Union v Scandinavian Refinery Ltd (Scanraff) and Cooperative Employers Organisation*.

There is thus a general possibility to justify age discrimination with a legitimate aim if the means are appropriate and necessary in pursuit of this aim. The legislative 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>172</sup> At the same time, the Government rejected demands for a presumption of collective agreements being compatible with Directive 2000/78.<sup>173</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 legislative preparatory works concerning conditions fulfilling a legitimate aim and normally being both appropriate and necessary are that:<sup>174</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 a 2011 case,<sup>175</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.

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 were each awarded EUR 11 700 (SEK 125 000) to be paid by the employer in a combination of a discrimination compensation award and non-pecuniary damages under the Employment Protection Act (*Lagen om anställningsskydd*).<sup>176</sup>

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

<sup>173</sup> Government bill 2007/08:95, p. 177.

<sup>174</sup> Government bill 2007/08:95, p. 179.

<sup>175</sup> Labour Court 2011 No. 37, *Equality Ombudsman v Aviation Employers (Flygarbetsgivarna) and Scandinavian Airlines System* (04.05.2011), at <http://www.arbetsdomstolen.se/upload/pdf/2011/37-11.pdf>.

<sup>176</sup> The reform of 2013 extending the protection for age discrimination did not affect the prohibition of discrimination in the labour market.

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

c) 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.

According to Chapter 2 Section 2(3), the prohibition against discrimination in working life does not prevent 'the application of age limits with regard to the right to pension, survivor's or invalidity benefits in individual contracts or collective agreements'.

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.'

d) Fixing of ages for admission to occupational pension schemes

In Sweden, national law allows occupational pension schemes to fix ages for admission to the scheme, 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>177</sup> In the view of the author of this report, the wording of this exception means that the Act allows for the use of age criteria in actuarial calculations concerning the benefits mentioned.

#### **4.6.2 Special conditions for younger or older workers**

In Sweden, there are special conditions set by law for older and younger workers in order to promote their vocational integration.

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>178</sup>

#### **4.6.3 Minimum and maximum age requirements**

In Sweden, there are no exceptions permitting minimum and/or maximum age requirements in relation to access to employment 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 4.6.1.b above).

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<sup>177</sup> Discrimination Act (2008:567) Chapter 2, Section 2(3).

<sup>178</sup> 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.



#### 4.6.4 Retirement

##### a) State pension age

In Sweden, there is no state pension age at which individuals must begin to collect their state pensions.

If an individual wishes to work beyond the state pension age, the pension can be deferred. Here the term 'state pension age' means the age at which a person can start to collect her or his pension. If a person wishes to work, 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>179</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 62.

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>

##### b) Occupational pension schemes

In Sweden, there is no standard 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.

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 the 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> The age of 55 is the earliest age at which a pension fund can allow a person to start withdrawing their

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<sup>179</sup> Social Security Code (*Socialförsäkringsbalk*) (2010:110), adopted on 04.03.2010, Chapters 62-67.

<sup>180</sup> There is a political compromise under discussion to raise this age to 66 in 2023 and to 67 in 2026. There is no legislation as yet. Information available at the Pensions Agency: <https://www.pensionsmyndigheten.se/forsta-din-pension/sa-fungerar-pensionen/garantipension-om-du-har-laq-pension>.

<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.

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 state-imposed mandatory retirement age.

d) Retirement ages imposed by employers

In Sweden, national law permits employers to set the retirement age at 68 years as from 2020 and 69 years as from 2023<sup>183</sup> by contract, collective bargaining or unilaterally.

Within employment law there is a right for the employee to stay on until he or she reaches the age of 68 years as from 2020 and 69 years as from 2023, despite what may have been agreed between the parties.<sup>184</sup> At this point it is possible for the employer to unilaterally terminate the employment with one month's notice. This principle was accepted by the CJEU in the *Hörnfeldt* case.<sup>185</sup> On a general level, most Swedes accumulate a viable pension by the age of 67. This general 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>186</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>187</sup>

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<sup>188</sup> differentiates between dismissal on personal grounds (which requires just cause) and dismissal due to a shortage of work for business reasons.

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<sup>182</sup> 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> Pensions Agency at: <https://www.pensionsmyndigheten.se/ga-i-pension/planera-din-pension/hoid-pensionsalder>.

<sup>184</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>185</sup> Judgment of 5 July 2012, *Torsten Hörnfeldt v Posten AB*, Case C-141/11, EU:C:2012:421.

<sup>186</sup> Labour Court 2015 No. 51, *Equality Ombudsman v Keolis AB* (16.09.2015).

<sup>187</sup> The age of 67 applied previously. According to the Employment Protection Act, as amended on 18 June 2019, an employee has the right to keep working until the age of 68 from 2020 and to the age of 69 from 2023. There is a free choice on fixed-term contracts once the worker is 68 or 69 respectively or older. However, the Discrimination Act still applies to any refusal to prolong employment that may involve discrimination.

<sup>188</sup> Employment Protection Act (*Lag om anställningsskydd*) (1982:80). An English translation is available on the Government's website at <https://www.government.se/government-policy/labour-law-and-work-environment/198280-employment-protection-act-lag-om-anstallningsskydd/>.

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 of the Employment Protection Act. 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 68 as from 2020 and 69 as from 2023, 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. Previously, employers normally dismissed workers who had reached the age of 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 68 years or older, in accordance with Section 5(4) of the Employment Protection Act.<sup>189</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>190</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 mandatory retirement.

#### 4.6.5 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<sup>191</sup> 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.

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

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<sup>189</sup> For a description of the *Keolis* case see section 4.6.4.d above.

<sup>190</sup> Labour Court 2015 No. 51, *Equality Ombudsman v Keolis AB* (16 September 2015).

<sup>191</sup> Employment Protection Act (*Lag om anställningsskydd*) (1982:80).

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>192</sup>

**4.7 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.

**4.8 Any other exceptions**

In Sweden, other exceptions to the prohibition of discrimination (on any ground covered by this report) 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 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

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<sup>192</sup> See further descriptions and discussions of such collective agreements in relation to the sustainability of the Swedish pension system in Government White Paper SOU 2012:28, pp. 316-320.

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 specifically allowed by the Discrimination Act 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.

In working life, there is a clause that allows for positive action only in relation to sex (Chapter 2, Section 2(2)). In particular, even though it was proposed by the relevant Government inquiry, the Government made it clear in the bill proposing the current Discrimination Act that positive action in working life concerning ethnicity was not to be allowed.<sup>193</sup>

Positive action in relation to sex is also allowed more broadly in relation to other areas in Chapter 2 of the Discrimination Act such as education (Section 6(1)), labour market policy activities (Section 9(1)), starting or running a business (Section 10), membership of certain organisations (Section 11), and goods, services and housing (Section 12a). Positive action concerning ethnicity, religion or other belief in relation to education is allowed only concerning 'a folk high school or a study association' (Section 6, para 2). In relation to Sections 9, 10 and 11, positive action concerning ethnicity is essentially allowed to the same extent that it is allowed in relation to sex. Otherwise, positive action is not mentioned in the Act in relation to the other grounds.

While not specified in the Discrimination Act, positive action in relation to persons with disabilities is generally allowed due to the asymmetric nature of the prohibition against discrimination. 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 presumably 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.

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.

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<sup>193</sup> Government bill 2007/08:95 p. 161-171.

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>194</sup> Education providers are also required to undertake continuous goal-oriented work with regard to all grounds (Chapter 3, Sections 1-3).

Both employers and education providers need to have a ready-made procedure in place to handle instances of sexual harassment and other harassment on any ground that may be reported by students/pupils/employees (Chapter 3, Sections 6 and 18).<sup>195</sup>

b) Quotas in employment for persons with disabilities

In Sweden, national law does not provide for quotas for the employment of persons with disabilities.

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<sup>194</sup> Discrimination Act (2008:567), Chapter 3 Sections 1-3.

<sup>195</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)

- a) Available procedures for enforcing the principle of equal treatment
- Judicial proceedings in the Labour Court (starting in the district court if the worker is represented by someone other than a trade union with a collective agreement or by the Equality Ombudsman).
  - Judicial proceedings in the general court system, primarily concerning discrimination outside of the field of working life.
  - 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.
  - The Equality Ombudsman negotiates with the employer before going to the Labour Court.<sup>196</sup>
  - Criminal complaints related to Penal Code 16:9 concerning unlawful discrimination can be submitted to the police for prosecution.

As a general rule, the administrative courts and procedures are not used to address discrimination under the Discrimination Act.<sup>197</sup> 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 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>198</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, due to rules in the Instrument of Government (Constitution) concerning objective grounds on hiring, can be appealed through administrative proceedings.<sup>199</sup> If the claimant is better qualified, he or she is entitled to the job, but not a discrimination compensation award. Under the Discrimination Act, a court can only grant a discrimination compensation award but not the job. Thus, using these administrative procedures is sometimes an alternative or complementary way to appeal against a discriminatory decision.

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 Appeal Board in some situations. However, this does not include any possibility of obtaining a discrimination award; it is only possible to correct the discriminatory act or omission, for instance by replacing a tutor who has discriminated against a student.<sup>200</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.

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<sup>196</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 power to issue an order subject to a financial penalty (which can be appealed to the Board Against Discrimination) if the employer does not show up.

<sup>197</sup> However, see the three administrative court cases described in section 12.2.

<sup>198</sup> Education Act (*Skollag*) (2010:800), Chapter 9, Section 15 in conjunction with Chapter 28, Section 12(6).

<sup>199</sup> Instrument of Government, Chap. 12, Art. 5 (2): 'When making appointments to posts within the State administration, only objective factors, such as merit and competence, shall be taken into account.'

<sup>200</sup> Act (2017:282) changing the Discrimination Act.



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 of 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 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.<sup>201</sup>

Civil proceedings regarding working life under the Discrimination Act are to be dealt with in accordance with the Labour Disputes Act.<sup>202</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>203</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 as the named party when claims are dealt with at the Labour Court as the 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 as the first or second instance – is not subject to further appeal. As already 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. Although the DO, an NGO or a union can become the named party in a discrimination case, this still assumes that the injured individual has signed a power of attorney concerning the case.

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>204</sup>

The relatively few cases that end up in the court system should not necessarily be taken as proof that action is not taken in cases of discrimination. A number of cases are presumably settled out of court. The same is probably true concerning the trade unions. Most labour 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.

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<sup>201</sup> Discrimination Act (2008:567), Chapter 6, Section 2(3).

<sup>202</sup> Act (1974:371) on Labour Law Procedure.

<sup>203</sup> As regards the Swedish Labour Court, see, for instance, the European Court of Human Rights, *AB Kurt Kellermann v Sweden*, No. 41975/98, judgment of 26 October 2004.

<sup>204</sup> Some university or higher education cases may also be brought before the Board of Appeal for Higher Education.

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. Some examples are low levels of rights awareness, low levels of trust in the legal system, low levels of experience with lawyers and the legal system and limited awards if successful. These factors tend to complement what is presumably the most important deterrent: the huge economic risk related to litigation, particularly given the 'loser pays' rules. Potential litigants seldom have the resources to be able to risk paying EUR 10 000 – 20 000 or more for the other party's legal costs if they lose, which is the general rule. This is on top of their own costs for a lawyer. At the same time, those with the power to discriminate, such as employers, business owners 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. Furthermore, for those taken to court for discrimination, the costs for legal services and the compensation they may be required to pay are generally considered to be normal tax-deductible business expenses. If the person who is alleged to have carried out the discrimination is a Government employee and the discrimination was within the framework of their employment, the Government employer will pay for their legal representation, as well as any discrimination compensation that is ordered.

If the claimant asks for less than EUR 2 060 (SEK 22 000), 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>205</sup> This is why anti-discrimination bureaux and other NGOs tend to file their cases as small claims cases.

Individuals have the option of using private attorneys, but given the loser-pays system, they are naturally hesitant, and there are presumably few attorneys who are willing to take on such cases. There is thus little chance that individuals will go to court except in those limited cases where the DO (or a union or other NGO) agrees to provide representation. Thus, for most people, the willingness of the DO (or a union or other NGO) to represent victims is very important. When the DO or a trade union or another NGO 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.

These issues can be illustrated by examining the limited number of cases for 2021 as described in section 12.2 below, which provide some indications of the barriers faced by litigants. In the district court case, *Equality Ombudsman (DO) v Region Västra Götaland*, where the DO successfully represented the estate of the deceased and his wife concerning discrimination contributing to the man's death, the court awarded EUR 7 620 (SEK 80 000) to the man's estate and a separate award of EUR 2 860 (SEK 30 000) to his wife. Beyond this, the court ordered the region to pay about EUR 106 000 (SEK 1.1 million) to the DO in legal fees.<sup>206</sup> In the two individual 2020 Labour Court appeals against a district court decision, the individuals were required to pay more than EUR 20 000 in legal costs when they lost.<sup>207</sup> These figures clearly illustrate the economic risk involved for the individual and the benefit of representation by the DO.

Another result of the loser-pays rules can be seen in the cases supported or filed by NGOs over the years. They are almost always brought as small claims cases. While this limits the cost risks involved if the case is unsuccessful, this also limits the potential discrimination

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<sup>205</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>206</sup> See section 12.2 below: *Equality Ombudsman (DO) v Region Västra Götaland*.

<sup>207</sup> See section 12.2 of the EELN Country Report, Non-discrimination Sweden 2021, *S.K.H. v Södersjukhuset Aktiebolag and T.H. v Staten genom Domstolsverket (State through the Swedish National Courts Administration)*.

compensation. Nevertheless, they have at least been able to bring important test cases to court on behalf of the individuals involved as well as others that could potentially benefit.

In discrimination cases taken to the courts by individuals (usually non-employment cases), it is possible for a court to rule that both parties will bear their own costs, in accordance with Chapter 6, Section 7 of the Discrimination Act, if the individual claimant loses but had good reason (*skälig anledning*) for taking the case to court.<sup>208</sup> The rule is designed to encourage individuals with good faith claims. For example, in *Malmö mot Diskriminering (MmD) v Sweden through Lund University* (described in detail in section 12.2 below), the court ordered the parties to bear their own costs even though MmD lost the case. Unfortunately, this case seems to be more of an exception rather than the rule. In the author's opinion, individuals and NGOs seldom attempt to use this possibility 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. In a 2015 case, the district court determined that the claimant had good reason to bring his case, so in spite of losing, ruled that both parties should bear their own costs. On appeal, the Labour Court disregarded the trial court's analysis and ordered the losing claimant to pay the winning party's legal costs in the amount of EUR 156 322 (SEK 1 663 400).<sup>209</sup>

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 DO or a trade union, it is possible to ask for legal aid under certain limited circumstances in employment cases to help with the costs of going to court. In certain limited cases legal insurance may be available as well.

Obviously, the economic risks for most individuals in such cases are quite high and/or too high, while at the same time the potential compensation is relatively low. Those bodies that have the economic means to take cases to court, the DO and the unions, generally seem unwilling to do so. At the same time, those with very limited means, individuals and NGOs seem to be developing at least some means to test the law in the courts. They rely on the small claims procedure, their limited resources and the pro bono work of lawyers and others.

In the author's opinion, this means that few individuals are willing to enforce their rights even if they have very good cases. The low number of cases in 2021 is a clear indication of the issue. At a societal level, this also means that the Discrimination Act, due to a lack of a critical mass of cases and case law, will have only limited effects in changing social norms. This is presumably a key goal of the Discrimination Act as well as the EU's anti-discrimination directives. If the legislature wants to achieve greater access to justice for individuals as well as increased effectiveness of the Discrimination Act, the courts need greater guidance concerning the distribution of costs. One possibility would be a binding decision at the preliminary stage of a case concerning good faith, relieving the individual's risks concerning legal costs.<sup>210</sup> Another would be the establishment of an NGO-run test

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<sup>208</sup> This rule does not apply to cases filed by the Equality Ombudsman. As to cases where the Labour Disputes (Judicial Procedure) Act (1974:371) applies, an equivalent rule in Chapter 5, Section 2 of the Labour Disputes (Judicial Procedure) Act (1974:371) can be applied.

<sup>209</sup> See Labour Court 2015 No. 57 (30.09.2015).

<sup>210</sup> See the proposal of the Swedish Section of the International Commission of Jurists (2020), *Program för Rättsstaten Sverige 2019 (Program for the Rule of Law in Sweden 2019)* at <https://www.icj-sweden.org/program-for-rattsstaten-sverige-upplaga-2020-av-svenska-avdelningen-av-internationella-juristkommissionen/>.

case fund similar to the Canadian Court Challenges Program.<sup>211</sup> These are potential ways to contribute to the long-term goal of equality as a fundamental human right.

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>212</sup> The procedures are the same regardless of whether the case concerns the private sector or the public sector.

At the same time, a complex system of rather short time limits applies in relation to working life.<sup>213</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 must take place within 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, the employer must be notified within 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>214</sup> Within these time limits, it is possible to bring a discrimination suit after the employment relationship has ended.

c) Number of discrimination cases brought to justice

In Sweden, statistics on the number of cases related to discrimination brought to justice are not available.

Although the direct overall statistics are not readily available, the information is accessible. In the Labour Court, there was only one judgment concerning the Discrimination Act in 2021. There were five in 2020. The 2021 case, *Saco-S Union v Sweden*, brought by a union against Sweden through the Swedish Maritime Administration, concerned age discrimination.<sup>215</sup>

Although the DO had no cases in the Labour Court in 2021, the DO had six cases decided in the ordinary courts in 2021 in addition to the successful case in the CJEU, *Diskrimineringsombudsmannen v. Braathens Regional Aviation AB*.<sup>216</sup> In addition, two cases filed by civil society organisations/individuals were decided in 2021. All of these cases are summarised in section 12.2 below.<sup>217</sup>

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<sup>211</sup> Government of Canada, Court Challenges Program. Available at: <https://www.canada.ca/en/canadian-heritage/services/funding/court-challenges-program.html> and <https://www.canada.ca/en/canadian-heritage/services/funding/court-challenges-program/background.html>.

<sup>212</sup> Discrimination Act (2008:567), Chapter 6, Section 6.

<sup>213</sup> Discrimination Act (2008:567), Chapter 6, Sections 4 and 5.

<sup>214</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).

<sup>215</sup> See section 12.2 below.

<sup>216</sup> CJEU, Judgment of 15 April 2021, *Diskrimineringsombudsmannen v Braathens Regional Aviation AB*, C-30/19, EU:C:2021:269. Also see sections 10 and 12.2 below.

<sup>217</sup> Section 12.2 contains the following cases: Labour Court, Case 38/2021, *Saco-S Union v Sweden*, 18.08.2021; Supreme Court, Case Ö 2343-18, *DO v Braathens Regional Aviation*, 21.12.2021; CJEU, Case C-30/19, *Diskrimineringsombudsmannen v Braathens*, 15.04.2021; Solna District Court, Case FT 10318-20, *LK v Sweden through the Chancellor of Justice*, 22.12.2021; Varberg District Court, Case T 2717-21, *DO v AA/Musikstudion*, 17.12.2021; Svea Appeal Court, Case T 3836-20 *DO v Svealandstrafiken AB*, 19.10.2021; Solna District Court, Case T 11857-19, *DO v Restaurangen*, 17.06.2021; Göteborg District Court, Case T

d) Registration of national court decisions on discrimination

In Sweden, court decisions on discrimination 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 in proceedings on behalf of victims of discrimination (representing them)

In Sweden, the trade unions, the Equality Ombudsman and non-profit organisations are entitled to act on behalf of victims of discrimination. They can all become the named party, with the permission of the claimant, which means they also take on the economic risks and would have to pay the opposing party's legal costs if they lose the case.

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 union's right to represent its members under Chapter 6 Section 2(3) of the Discrimination Act.

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. While unions have priority concerning the right to represent members, members do not have a right to demand representation. There can be situations where the union does not want to deal with a member's legal problems due to its understanding of the cases as well as conflicting interests that a union may have ranging from conflicts between members to conflicts between the individual member's interests and the union's own interests.

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. The organisation must have the consent of the individual and be suited to represent the individual, taking into account 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 important issue here is that due to the economic risks involved, such organisations usually file their cases as small claims cases. In small claims cases, the cost risks are minimal, but this also limits the amount of discrimination compensation that can be requested.

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>218</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). There was no tradition of NGOs of maintaining their own legal expertise or establishing public interest law firms to provide that expertise. This is slowly changing.

Anti-discrimination bureaux in particular have been allowed to enter into cases as parties on behalf of claimants.<sup>219</sup> There have been some questions about the right of a bureau to

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17336-19, *DO v Region Västra Götaland*, 26.05.2021; Lund District Court, Case T 4019-19, *Malmö mot Diskriminering (MmD) v Sweden through Lund University*, 19.05.2021; Svea Appeal Court, Case T 9308-18, *DO v Sweden through the Social Insurance Agency*, 12.03.2021.

<sup>218</sup> See, for example, the reference in the Government bill to Article 7(2) of the Racial Equality Directive and Article 9(2) of the Equal Treatment in Working Life Directive.

<sup>219</sup> Local anti-discrimination bureaux are non-governmental organisations whose members are other organisations and sometimes individuals. In 2019, 17 bureaux received funding from the national

represent claimants in court in accordance with the rules in the Discrimination Act. It now seems clear that they have such a right.<sup>220</sup> There is also an expectation that they will increasingly take cases to court.

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 even the Ombudsman 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.

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 LGBTIQ organisation in Sweden, RFSL, has brought some cases in the administrative courts that involve discriminatory treatment (but not within the terms of the Discrimination Act), partly with the help of local anti-discrimination bureaux.<sup>221</sup> A project called the Law as a tool for social change helped to develop an NGO that is now known as Disability Rights Defenders Sweden (DRDS). DRDS has been a driving force behind the cases concerning discrimination against pupils with dyslexia during national exams.<sup>222</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.

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

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Government according to the Swedish Agency for Youth and Civil Society (<https://www.mucf.se/vi-har-fatt-bidrag?org=&projekt=&bidragsnamn=Antidiskrimineringsverksamhet&bidragstyp=All&ort=&beviljatar=All&=Sök#views-exposed-form-bidrag-page-1>). The bureaux were created in order to combat discrimination on all grounds. They typically provide free legal advice and support to victims of discrimination.

<sup>220</sup> See, for example, Göta Court of Appeal, Judgment of 30 September 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>.

<sup>221</sup> On 19 December 2012, the Administrative Appeal Court decided that the requirement of sterilisation prior to a person applying for a change of gender marker violated the Swedish Constitution as well as Articles 8 and 14 of the European Convention of Human Rights. See <https://tgeu.org/swedish-court-repeals-sterilization-requirement/>. The actual case, Administrative Appeal Court case number 1968-12, is available at: <http://databas.infosoc.se/rattsfall/24519/fulltext>. Also see RFSL's press release concerning compensation for those who had been sterilised, available at: <https://www.rfsl.se/en/aktuellt/historic-victory-trans-people-swedish-parliament-decides-compensation-forced-sterilizations/>.

<sup>222</sup> See Disability Rights Defenders at: <https://www.independentliving.org/drd> and section 10 below.

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. Nevertheless, most legal representatives have 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 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 proceedings 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.

- 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 represent a specific victim.

However, in 2020, a Government inquiry was tasked with investigating whether measures are needed to strengthen the protection against discrimination in cases where there is no individual injured party.<sup>223</sup> In 2021, the inquiry concluded that there is no obligation for Member States to introduce provisions concerning sanctions when there is no identifiable victim. Nevertheless, the inquiry also concluded that Sweden should introduce such provisions, thus proposing an amendment to the Discrimination Act that would make it possible to prohibit the dissemination of statements or communications expressing contempt for a person or a group of persons linked to a ground of discrimination by a person who has a leading position in an activity or organisation.<sup>224</sup>

- 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>225</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. Labour law cases fall outside the scope of the act, but discrimination in other fields can result in class actions.<sup>226</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>227</sup>

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<sup>223</sup> Supplementary directive to the Inquiry into effective and appropriate supervision of the Discrimination Act, Dir. 2020:102.

<sup>224</sup> An expanded protection against discrimination (*Ett utökat skydd mot diskriminering*), SOU 2021:94.

<sup>225</sup> Group Proceedings Act (*Lag om grupprättegång*, 2002:599).

<sup>226</sup> Government bill 2001/02:107, p. 139.

<sup>227</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.

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 relevant to discrimination law. 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>228</sup> of EUR 3 270 (SEK 35 000). 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>229</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, the Discrimination Act requires a shift 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.’

This section applies to all six forms of discrimination including harassment and 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 proof of intent to discriminate is required. At the same time there seems to be a different interpretation of the burden of proof in the general court system as opposed to the Labour Court.

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>230</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>231</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

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<sup>228</sup> The case involved the laws prior to the 2009 Discrimination Act, which is why damages rather than discrimination compensation was awarded.

<sup>229</sup> Svea Court of Appeal, 21.12.2009, T-3552-09, available at: <https://centrumforrattvisa.se/wp-content/uploads/02-Svea-hovrätt-dom-2009-12-21.pdf>.

<sup>230</sup> Fransson–Stüber (2015), *Diskrimineringslagen: en kommentar* (The Discrimination Act: A Commentary), 2d ed., Chap. 6, Sec. 3. Also, 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>231</sup> See Supreme Court, NJA 2006 p. 170, *Ombudsman Against Discrimination due to Sexual Orientation v Restaurang Fridhem* (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.



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>232</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 (*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>233</sup> However, no change in the law has yet been proposed.

In 2017, the Labour Court dealt with a case that was quite 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 an application of this rule constituted indirect discrimination.

The 2016 district court case involved a female Muslim dental student at Karolinska Institute.<sup>234</sup> In accordance with the dental programme, she was required to perform clinical tasks with bare forearms. She asked if she could wear disposable forearm protection instead of having bare forearms, because she did not want to show this part of her body to strangers. Karolinska Institute, referring to a National Health and Welfare Board Regulation (2007:19),<sup>235</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

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<sup>232</sup> There are other possible explanations for the difference in the claimants' success rates. One possibility 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. They 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. Also, see Sandesjö, H. (2010), p. 18.

<sup>233</sup> White Paper SOU 2016:87, pp. 462-463.

<sup>234</sup> Stockholm District Court, 16.11.2016, Case No. T 3905-15, available at: <http://www.do.se/globalassets/diskrimineringsarenden/tingsratt/dom-tingsratt-karolniska-2014-1987.pdf>.

<sup>235</sup> Currently Regulation 2015:10.

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

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

The *Karolinska* case was followed by one in the Labour Court in 2017, in which the court came to the opposite conclusion, even though it was deciding a case based on essentially the same evidence.<sup>236</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 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.

The case was thus decided on the basis of how the rules on the burden of proof were to be applied. 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 legislative 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>237</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

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<sup>236</sup> Labour Court 2017 No. 65, *Equality Ombudsman v The People's Dentists of Stockholm County*, 20 December 2017.

<sup>237</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.

so-called revolt of the lower courts, which ended up bypassing the Swedish Supreme Court by sending questions directly to the CJEU.<sup>238</sup>

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

Today, the Karolinska Institute 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>239</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 Sweden 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 prohibited in accordance with Chapter 2, Sections 18 and 19 of the Discrimination Act.

Victimisation (*repressalier*) is defined in the legislative preparatory works as acts, statements and omissions to act which lead to a disadvantage or a sense of discomfort for the individual.<sup>240</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.

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<sup>238</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 dubbelbestraffningsfallen 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.

<sup>239</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>240</sup> Government bill 2007/08 p. 531-532.

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

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

The basic sanction in the Discrimination Act is the discrimination compensation award, which is regulated in Chapter 5, Section 1. This is complemented by the possibility of declaring certain acts, such as the discriminatory 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>241</sup>

An important case affecting sanctions in Sweden was taken to the CJEU by the DO. According to Swedish procedural law, if the compensation requested is paid by the defendant, the complainant has no right to a judicial determination of discrimination. In the case of *Diskrimineringsombudsmannen v Braathens Regional Aviation AB*, the DO brought a lawsuit against the airline, asserting that it had discriminated on the basis of ethnicity when a man was removed from a plane, forced to undergo an extensive security check and subsequently denied the opportunity to re-board the plane. Without admitting discrimination, the airline paid the requested compensation of EUR 950 (SEK 10 000). Once such a payment is made, according to the courts, that ends the case. The DO appealed, wanting a hearing on the issue of discrimination and a declaratory judgment, asserting that the complainant had a right to a hearing on the discrimination issue, and that that was the minimum required by the EU directives. Further, the DO wanted the courts to submit the issue to the CJEU. After an appeal, in 2018 the Supreme Court agreed to send the following question for a preliminary ruling:

'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?'

The case was decided in 2021 in favour of the DO. The CJEU essentially held that if there was no admission of discrimination, the payment of compensation was insufficient as a matter of EU law, and that the complainant had the right to a hearing. When the case was thereafter sent back to the Swedish Supreme Court, the Supreme Court held that as Braathens agreed to an admission, there was no longer any reason to rule on the issue of having a hearing at the time. The Court also pointed out that the issues raised by the CJEU ruling were more appropriately dealt with by the legislature rather than by the courts in the context of individual cases.<sup>242</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 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 such infringements'. There is a preventive goal as well as a compensatory goal.

In working life there is also a basic right to *economic damages* concerning employees. However, in recruitment and promotion cases, the individual is not considered to have a

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<sup>241</sup> With regard to breaches of active duties, a court order involving a financial penalty can in theory be issued.

<sup>242</sup> CJEU, Judgment of 15 April 2021, *Diskrimineringsombudsmannen v Braathens Regional Aviation AB*, C-30/19, EU:C:2021:269. Also see sections 10 and 12.2 below.

right to obtain the employment or promotion in question.<sup>243</sup> Economic injuries are thus not compensated and in such cases only the non-economic injury is compensated. As is usually the case in Swedish labour law, if it is reasonable, damages can 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 issued.

Violations of the penal provision on unlawful discrimination can be 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. The maximum prison sentence for hate speech, as set out in Chapter 16, Section 8, is two years.

Beyond the provisions in the Discrimination Act, harassment by fellow workers or students may also, under certain circumstances, be regulated by general criminal law provisions relating to such behaviour, e.g. as harassment, verbal abuse, threats, assault or hate speech. In such cases, a complaint filed with the police may also result in sanctions against the individual directly responsible for the actions.

Sanctions under the Discrimination Act are normally applied to, for example, an employer, university, labour union or employers' association. This follows from expressions such as 'employer' or 'university' in the provisions on financial compensation.

For sanctions under the Discrimination Act, no differentiation is made between the public sector and the private sector.<sup>244</sup>

In relation to the duty to undertake active measures, the Ombudsman in theory works in the same way as a normal authority, visiting employers and universities, checking their equality documentation and so on. If somebody fails to fulfil their duties, the Board Against Discrimination<sup>245</sup> 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>246</sup> One decision was initiated by a union and the other decision

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<sup>243</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>244</sup> With regard to alternative procedures for public employees, see section 6.1.a above.

<sup>245</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 on the suggestion of the Swedish Federation for Lesbian, Gay, Bisexual and Transgender Rights.

<sup>246</sup> Board Against Discrimination, available at: <https://namndenmotdiskriminering.se/beslut.html>.

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 test the limits of the active measures provisions in the Discrimination Act.

b) Compensation – maximum and average amounts

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 EUR 14 000 (SEK 150 000) for each of the parties involved (both parents and the child).<sup>247</sup>

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

In 2012, the Equality Ombudsman pointed out that, although it was too early to make definitive conclusions, replacing the term 'damages' (*skadestånd*) with 'discrimination compensation' (*diskrimineringsersättning*) in 2009 had not thus far resulted in any significant (*nämnvärd*) increase in the amounts awarded.<sup>248</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>249</sup> In its Annual Report 2017, the DO highlighted the need for more effective sanctions concerning violations of the Discrimination Act.<sup>250</sup>

The need for more effective sanctions seems to be in line with the conclusions drawn by Professor Laura Carlson in her analysis of compensation paid in employment discrimination cases. According to her calculations, the amounts 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 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 success rates, 'create a significant deterrent for claimants bringing discrimination claims'.<sup>251</sup>

Some of the Labour Court discrimination awards are notable, such as 2010 No. 91<sup>252</sup> EUR 7 000 (or approximately SEK 75 000) and 2011 No. 37<sup>253</sup> (EUR 11 700 or

<sup>247</sup> Svea Court of Appeal, case T 5096, *Equality Ombudsman v Sigtuna Municipality* (11.04.2014). Available at: <http://www.do.se/globalassets/diskrimineringsarenden/hovratt/dom-hovratt-sigtuna-kommun-anm-2011274.pdf>.

<sup>248</sup> Equality Ombudsman (2013), *Annual Report 2012*, p. 24.

<sup>249</sup> Equality Ombudsman (2015), *Annual Report 2014*, p. 60.

<sup>250</sup> Equality Ombudsman (2018), *Annual Report 2017*, pp. 3, 7 and 35.

<sup>251</sup> Carlson, L. (2017), *Comparative Discrimination Law: Historical and Theoretical Frameworks*, Brill, pp. 79-80.

<sup>252</sup> Labour Court 2010 No. 91, *Equality Ombudsman v Swedish Agency for Government Employers* (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>253</sup> Labour Court 2011 No. 37. Collective agreement permitting the employer to dismiss all employees above

SEK 125 000). In the former case, the Equality Ombudsman asked for EUR 28 100 (SEK 300 000); in the latter case the Ombudsman asked for EUR 37 440 (SEK 400 000) as a discrimination award and EUR 9 360 (SEK 100 000) for the violation of the Employment Protection Act. An amount of EUR 11 700 (approximately SEK 125 000) was awarded in a one-for-all compensation for the violation of both acts.

However, since the legislative 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>254</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 EUR 1 870 (SEK 20 000) each.<sup>255</sup> The Supreme Court increased the amount to EUR 2 340 (SEK 25 000) on the basis that this violation was as severe as a violation through words without threats can be. The violation award was set at EUR 1 400 (SEK 15 000) each. Furthermore, EUR 1 870 (SEK 20 000) 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 EUR 1 400 (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 EUR 1 870 (SEK 20 000), to be divided between the two persons involved, as the court concluded that EUR 2 800 (SEK 30 000) 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 EUR 1 400 (SEK 15 000) 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 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 EUR 7 500 (SEK 80 000) will hardly deter a larger employer. For large employers or businesses, the threat of publicity is real and probably much more significant.<sup>256</sup> For small employers or small businesses, the sanctions are possibly a deterrent, but for even this to be effective it requires there to be some risk that the DO, the unions, civil society organisations will try to enforce the law.

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the age of 60 in a redundancy case.

<sup>254</sup> Supreme Court, case T 3592-13, *Equality Ombudsman v Veolia* (26 June 2014). The second case was Supreme Court, case T 5507-12, *Equality Ombudsman v Stockholm County* (26 June 2014), NJA 2014, p. 499.

<sup>255</sup> In Sweden, the ground of ethnicity also covers race.

<sup>256</sup> See, for instance, Skåne and Blekinge Court of Appeal, case FT 1948-12, *Forum for Equal Rights v IKEA* (18.03.2013). An anti-discrimination bureau helped a mother to sue IKEA for not letting her daughter with disability play in the playroom. She demanded EUR 2 200 (SEK 20 000) 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.

## 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>257</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 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. The report also states that 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 large discrimination compensation awards. This issue was also discussed by the author of a report for the Equality Ombudsman.<sup>258</sup> It should nevertheless also be obvious that larger awards or other forms of sanctions 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 complementary issues such as anti-discrimination clauses in public contracts or other similar anti-discrimination measures related to the public sector.

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, in theory, violate the principle of effectiveness, according to the author, at least with regard to nightclubs.<sup>259</sup> However, this situation may change if there is a greater focus on discouraging future infringements. The author finds that the Supreme Court case from 2014<sup>260</sup> provides some positive reasoning concerning the preventive portion of the compensation, especially if a focus is placed on the importance of stopping what is thought to be economically profitable discriminatory behaviour by a club owner. This could lead to a higher prevention award as a part of the discrimination award. The Equality Ombudsman is of the opinion that the low level of

<sup>257</sup> Stenek, J. (2015), *En samhällsekonomisk analys av diskrimineringsersättningen* (A socioeconomic analysis of discrimination compensation), available from the Equality Ombudsman – document LED 2015/299 17.

<sup>258</sup> See Stenek, J. *En samhällsekonomisk analys av diskrimineringsersättningen*, 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>259</sup> Supreme Court, *Escape Bar and Restaurant v Ombudsman Against Ethnic Discrimination* (case T-2224-07, 1 October 2008). Presumably nightclubs feel they 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>260</sup> Supreme Court case T 3592-13, *Equality Ombudsman v Veolia* (26 June 2014). The second case was Supreme Court case T 5507-12, *Equality Ombudsman v Stockholm County* (26 June 2014), together known as NJA 2014 – p. 499. See section 6.5.b above.



awards made to persons suffering from discrimination with regard to access to goods and services is a real problem (EUR 1 900 or SEK 20 000 being a typical award).<sup>261</sup>

As to the overall issue of whether the available sanctions are, or are likely to be, effective, proportionate and dissuasive, there are two basic questions. The first question is whether Sweden is non-compliant with the directives regarding the available sanctions. In the author's opinion this is unlikely, since Sweden's sanctions can be considered to be more, or at least as effective, as those in many other countries.

However, the more important question 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>262</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, 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, as it can lead to disorder in nightlife, is a violation of the trust granted to them by the public, and that discrimination can therefore lead to revocation of the licence.

There is an important additional 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 public contracts (2006:260), Sweden's largest national Government agencies must include an anti-discrimination condition in their larger public procurement building and service contracts. The purpose of the regulation is to increase awareness of and compliance with the Discrimination Act (2008:567).<sup>263</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

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<sup>261</sup> Equality Ombudsman (2015) Annual Report 2014, p. 54.

<sup>262</sup> Lappalainen, P. (2005), White Paper SOU 2005:56, *Det blågula glashuset: strukturell diskriminering i Sverige* (The Blue and Yellow Glass House: Structural Discrimination in Sweden).

<sup>263</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>.

contracts in Sweden in 2016 was over EUR 56.1 billion (SEK 600 billion).<sup>264</sup> The national Government's contracts are valued at about EUR 18.7 billion (SEK 200 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 are 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 violating the Discrimination Act, given the limited risks around detection, enforcement and economic sanctions. This applies particularly in relation to active measures. However, even if the detection risks are minimal, if a business risks losing, for instance, a contract worth EUR 4.7 million (SEK 50 million) due to a violation of the Discrimination Act, this should mean 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.

In the author's opinion, these types of approaches to the issue of what policymakers can do concerning sanctions, i.e. focusing on the cost risks of discrimination, can help to ensure that sanctions actually become effective, proportionate and dissuasive.

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<sup>264</sup> Swedish Government (2016), 'Varför behövs en nationell upphandlingsstrategi?' (Why is a national public procurement strategy needed?) p. 4, available at: <http://www.regeringen.se/49eaf7/globalassets/regeringen/dokument/finansdepartementet/pdf/2016/upphandlingsstrategin/nationella-upphandlingsstrategin.pdf>.

## 7 BODIES FOR THE PROMOTION OF EQUAL TREATMENT (Article 13 Directive 2000/43)

- a) Body designated for the promotion of equal treatment irrespective of racial/ethnic origin according to Article 13 of the Racial Equality Directive

In Sweden, the specialised body designated for the promotion of equal treatment irrespective of racial/ethnic origin, in accordance with Article 13 of the Racial Equality Directive, is 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.

- b) Political, economic and social context of 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>265</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>266</sup>

Although it can 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. At the same time, 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>267</sup> Agreement with this criticism can be found among NGOs and various experts in the field.<sup>268</sup> It is

<sup>265</sup> Stockholm District Court, case T 7324-08, *Equality Ombudsman v Arbetsförmedlingen* (8.2.2010) available at: <https://www.do.se/globalassets/diskrimineringsarenanden/tingsratt/dom-tingsratt-arbetsformedlingen-omed-20067612.pdf>.

<sup>266</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>267</sup> Svenaeus, L. (2018) 'Amnesti råder för brott mot diskrimineringslagen' (There is an ongoing amnesty for violations of the Discrimination Act) 30.02.2018, at: <https://www.svd.se/amnesti-rader-for-brott-mot-diskrimineringslagen>.

<sup>268</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-tandloschet-och-slarv/>. Also see in particular the criticism from Lena Svenaeus, the former Gender Equality Ombudsman: Svenaeus, L. (2018) 'Amnesti råder för brott mot diskrimineringslagen' and Svenaeus, L.

noteworthy that when the former Ombudsman's contract had run its course in 2020, a new Ombudsman was appointed in December 2020. Once appointed, he indicated a desire to shift the focus of the DO to individual complaints. This shift in focus permeates the 2021 annual report, and there are indications that it is affecting the daily work of the DO.

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 months of speculation, a minority Government, consisting of the Social Democrats and Greens, was finally formed in January 2019 with the support of two centre-right parties. That coalition fell apart in late 2021, with the establishment of an even smaller minority Government based on the Social Democrats. This minority Government will presumably remain in place until the elections that will take place in September 2022.

On 9 June 2021, Parliament adopted a law establishing a Swedish Institute for Human Rights.<sup>269</sup> The Institute started its activities on 1 January 2022. This is a long-overdue development given the need for a body to protect and promote human rights. Although the Institute will not deal with individual complaints, nevertheless, as equality rights are fundamental human rights, discrimination is expected to be one of the key issues that it will address. A domestic motivating factor behind the establishment of a Swedish Institute has been the lobbying efforts of civil society organisations that work on equality issues.

The income and expenses for the Equality Ombudsman were about EUR 9.6 million (SEK 103 million) for each year from 2014 to 2016. There have been no dramatic increases or reductions since the Equality Ombudsman was created in 2009. In 2020, the income including the Government grant was about EUR 11.3 million (SEK 121.7 million) and for 2021 about EUR 11.7 million (SEK 126 million).<sup>270</sup> The Government's budget proposal for the Equality Ombudsman for 2022 is about EUR 12 million (SEK 129.7 million).<sup>271</sup>

At the end of 2021, the Equality Ombudsman had 104 employees. There was a relatively large turnover of personnel in 2021, which may have some connection to a shift in direction.<sup>272</sup> The new Equality Ombudsman (as of December 2020), Lars Arrhenius, emphasises in the introduction to the *Annual Report 2020* that in 'the coming years it is important that among other things there is an increase in the number of legal cases and guidance decisions.'<sup>273</sup> This shift in direction was confirmed in the *Annual Report 2021*:

'Early in the fall of 2021, the Ombudsman decided on a comprehensive plan for the work of gradually developing the direction of the organisation. This plan states, among other things, that based on the DO's tasks, the core focus of the organisation will be on investigating reports of discrimination complaints, submitting compensation claims and filing lawsuits in court concerning violations of the Discrimination Act.'<sup>274</sup>

This core focus is also intended to guide the equality promotion work of the Equality Ombudsman. This is a quite different direction from the previous years where the focus

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(2020) [Tio år med Diskrimineringsombudsmannen - En rapport om nedmontering av Diskrimineringskyddet](#) (Ten years with the Equality Ombudsman – a report on the dismantling of the protection against discrimination).

<sup>269</sup> Act establishing a Swedish Institute for Human Rights (*Lag om Institutet för mänskliga rättigheter*, 2021:642). Also see Flash Report, Sweden, 20 July 2021.

<sup>270</sup> Equality Ombudsman (2022), *Annual Report 2021*, p. 86.

<sup>271</sup> Government bill 2021/22:1, Expenditure Area 13, p. 41.

<sup>272</sup> Equality Ombudsman (2022), *Annual Report 2021*, pp. 79-80.

<sup>273</sup> Equality Ombudsman (2021), *Annual Report 2020*, p. 4.

<sup>274</sup> Equality Ombudsman (2022), *Annual Report 2021*, p. 4.

was on information, awareness raising and non-binding opinions, as reflected in Lena Svenaeus' 10 year overview, discussed below.

In October 2020, Lena Svenaeus released a thorough examination of the DO entitled *Ten years with the Equality Ombudsman – A report on the dismantling of the protection against discrimination*.<sup>275</sup> As the title indicates, the report is critical. This well-researched and documented report shines a light on the major drawbacks that have developed during the previous 10 years. Svenaeus underlines the idea that the DO, instead of focusing on its primary task, which is the protection of individuals from discrimination, has directed the activities of the DO towards so-called preventive work through information, awareness-raising and decisions that are not legally binding – in other words, work that is known to be ineffective or at least where there is little research to show that it is effective. This has resulted in a clear deterioration of the protection against discrimination and reduced respect for the Discrimination Act. Among other things she points out the decrease in the cases filed by the DO during those 10 years to only three or four per year, as well as the shift in terminology where 'complaints' filed by individuals have been reduced to 'tips and notifications of discrimination' from the public.<sup>276</sup> This has occurred in a situation where the DO has more than 100 employees and an annual budget that has grown to more than EUR 12 million. Svenaeus is also critical of the Government for not providing greater guidance concerning the protection of equality rights and calls on the Government to establish an inquiry on clarifying the DO's mandate and how it can best be fulfilled.

Beyond the DO, the unions presumably play an important role, but there is no overview of the discrimination cases they take on, so it is hard to know how they are dealing with them. At the same time it is worth noting that some unions have been highly critical of the DO's oversight concerning both individual complaints as well as active measures. They have gone so far as to suggest the establishment of a separate equality body for the labour market.<sup>277</sup> The former DO responded by asserting that the unions did not understand the law, the mandate of the DO or the limits placed on the DO as an administrative authority.<sup>278</sup> The new DO seems to be developing a new direction as well as having a different understanding of the law and the mandate of the DO.<sup>279</sup>

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. The dyslexia cases have shown that despite being small claims cases, this approach can have strategic value.<sup>280</sup> Win or lose, those cases seem to have brought more media and official attention to the issue than years of civil society lobbying.

In summary, the Swedish equality body, the Equality Ombudsman (DO) exists in a political, economic and social context where it has a practical monopoly on the development of case law as well as dominance in other ways. Among other factors, given the small number of cases taken to court, the strategic importance of the DO was being increasingly questioned. In this regard, the shift in direction set out by the new head of the DO is promising. In the

<sup>275</sup> Svenaeus, L. (2020) [Tio år med Diskrimineringsombudsmannen - En rapport om nedmontering av Diskrimineringsskyddet](#) (Ten years with the Equality Ombudsman – A report on the dismantling of the protection against discrimination).

<sup>276</sup> For more details, see section 7.f.i below.

<sup>277</sup> Erkers, H., Furuberg, M. (Akademikerförbundet SSR) (2019) 'Skärp tandlös tillsyn av diskrimineringslagen', (Strengthen the toothless oversight of the Discrimination Act), *Arbetet*, 21.03.2019, at: <https://arbetet.se/2019/03/21/skarp-tandlos-tillsyn-av-diskrimineringslagen/>.

<sup>278</sup> Broberg, A. (2019) 'Rättsliga missförstånd bakom Akademikerförbundet SSR:s kritik' (Misunderstandings about the law are behind the union criticism), *Arbetet*, 27.03.2019, at: <https://arbetet.se/2019/03/27/rattsliga-missforstand-bakom-akademikerforbundet-ssrs-kritik/>.

<sup>279</sup> Equality Ombudsman (2022), *Annual Report 2021*.

<sup>280</sup> See section 10 below.

opinion of the author, the shift in direction shows a recognition of the idea that education and awareness raising are insufficient to deal with discrimination, and that these issues are not the primary role of an equality body, especially in a situation where access to justice for victims of discrimination is very limited.

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 (2008:568). The DO has the duties described in the Discrimination Act (2008:567) as well as the duty to promote equality in other respects.

The DO's mandate includes the right to represent 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>281</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>282</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 very broad mandate in relation to setting its priorities and how to work with those priorities. For example, with regard to the Sami, their rights as an indigenous people are not a direct part of the Ombudsman's official mandate, but their rights are so interlinked with their ethnic background that the Ombudsman has at times put an emphasis on Sami-related issues.

d) Status of the designated body – 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 mandate of the Government's Ministry of Employment. The DO is appointed by the Government. The person appointed as the DO is

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<sup>281</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>282</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. Sweden established an Institute for Human Rights which became operational on 1 January 2022.

responsible for the actions of the agency, and thus determines its focus and direction (*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>283</sup>

The Equality Ombudsman receives 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. Neither the Government nor 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. 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, in theory, 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.

However, if the issue of actions in individual cases is disregarded, it is obvious that the Government can direct 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 a 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, rather than 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 their own advisory board. This is an example of the independence given to the Equality Ombudsman. Even this measure was adopted, at least in part, with reference to the Paris Principles. However, it

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<sup>283</sup> This board first met on 9 February 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 representing groups who experience discrimination, academics, the social partners, Government agencies and others relevant to the work. According to the DO's *Annual Report 2021* there were five members of the board. Two of these represent civil society organisations that fit with the DO's new direction concerning individual complaints, Amnesty International Sweden and the Uppsala Anti-discrimination bureau (See: Equality Ombudsman (2022), *Annual Report 2021*, pp. 10, 90).

should be noted that the Government can basically amend or revoke e.g. the Equality Ombudsman 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 take positions that are less controversial. This presumably contributed to the increasing focus of the former Ombudsman (2011-2020) on education and awareness raising rather than enforcement.

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 would allow the DO to set its priorities on the basis of its legal mandate without interference by the Government. This was adhered to through 2012. Since then, the regulation letters have included various reporting demands depending on the Government's particular interests at the time.

The regulation letter has 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 requests compared to those for other Government authorities, the requests necessarily affect the independence of the office.

Although there are issues that can be discussed, the DO can be considered to be independent in practice.

e) Grounds covered by the designated body

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 involved did not realise this in the beginning. If they had approached a single-ground authority, the other ground or grounds might have been missed.

There are short-term political issues directing attention to specific grounds, ranging from gender equality and active measures to gender mainstreaming (not equality mainstreaming) by Government agencies to sexual harassment, and others concerning LGBTIQ issues, disability issues, anti-Roma issues, Islamophobia and Afrophobia.

Nevertheless, in the author's opinion, there is a determination by the DO to pay an equivalent level of attention to each ground. At the same time, in recent years, civil society organisations related to the grounds have expressed dissatisfaction concerning the attention paid by the DO to 'their' ground. However, this was not because certain grounds were disfavoured, but rather was due to a general move away from individual complaints in favour of the former DO's focus on and belief in information and education as a tool for social change. It should also be noted that the new head of the agency, appointed in December 2020, has indicated that he wants to see a greater focus on individual cases.

- f) Competences of the designated body – and their independent exercise
  - i) Independent assistance to victims

In addition to the duties described in the Discrimination Act, the broad mandate specified in the Equality Ombudsman Act states in Section 2 that the DO 'shall provide advice and other support so as to help enable anyone who has been subjected to discrimination to claim their rights.' As with the previous ombudsmen, along with the Discrimination Act (Chapter 6, Section 2), this also means the right to represent individuals, with their permission, in court. Thus the DO clearly has the formal competence to provide independent assistance to victims.

The key issue then becomes when and in which cases the DO chooses to provide assistance. 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 cases of a controversial nature, such as the handshake cases.

In the few cases that are actually taken to court, the DO seems to commit 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. Two examples of this during 2021 are the *Braathens* case and the *Equality Ombudsman (DO) v Region Västra Götaland* case. They are described in more detail below in section 12.2.

As for the cases that are settled, the DO has had a general 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 worthwhile than a settlement including only an admission of wrongdoing and compensation, 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.

It is interesting to note the former DO's reaction to a suggestion by a Government inquiry that the DO be more active in achieving 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>284</sup>

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 investigated is about 15-20 % – in other words, most complaints are not investigated.<sup>285</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>286</sup> Effectively protecting victims of discrimination was the focus of the Government inquiry discussed above, which recommended that the DO investigate more cases and pursue more settlements.<sup>287</sup> As the proposals were merely recommendations, the former DO basically rejected them by stating that 'the DO's public law mission concerning ensuring compliance with the Discrimination Act can hardly be combined with an oversight where the purpose is to investigate and put forward the civil law claims of private individuals.'<sup>288</sup>

In the author's opinion, given the statements above by the former DO and the lack of focus on the actual victims, there was a decreasing focus on the role of providing *independent assistance to victims* over a number of years. The comments above refer to the former head of the DO and the policies and culture established from 2011-2020. A new agency head was appointed in December 2020. It is important to note that, according to the *Annual Report for 2021*, the new DO has begun work to change the direction of the DO's operations in line with certain starting points, including that the DO exists to act on behalf of those who are discriminated against or are at risk of being discriminated against, and that the DO must investigate more complaints with the goal of achieving redress, including taking cases to court. These starting points are to be reflected throughout the activities of the DO. Furthermore, the work on individual complaints will also become a starting point for the DO's work on equality promotion.<sup>289</sup>

## ii) Independent surveys and reports

The Swedish Equality Ombudsman (DO) has the competence to carry out and publish independent surveys and reports. This is stated in Section 3 of the Equality Ombudsman Act.

A few 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 for changes in legal rules or bringing about actual change in behaviour.

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<sup>284</sup> White Paper SOU 2016:87, p. 160.

<sup>285</sup> White Paper SOU 2016:87, p. 186.

<sup>286</sup> White Paper SOU 2016:87, pp. 33-34 (in English).

<sup>287</sup> See Committee Directives 2014:10 and 2014:79 and especially White Paper SOU 2016:87, p. 33-34. As stated by the inquiry, 'We do not believe it is reasonable to propose that the Equality Ombudsman investigate all the complaints it receives. However, we do believe that the Ombudsman should investigate more cases by notifying the reported party so that they learn of the complaint and are given the opportunity to respond to it. This may lead to the reported party revising their procedures or voluntarily offering some form of compensation to the victim. In addition, more parties will learn that they have been reported and awareness about discrimination can spread. More victims of discrimination can obtain redress.'

<sup>288</sup> See the DO response to White Paper SOU 2016:87, 15 September 2017 ('*Vad särskilt gäller utredningens rekommendationer om myndighetens arbete med tillsyn och förlikningar bedömer DO att myndighetens offentlighetsrättsliga uppdrag att säkerställa diskrimineringslagens (2008:567) efterlevnad svårligen kan förenas med en tillsyn vars ändamål är att utreda och framställa enskildas civilrättsliga anspråk*') at: <http://www.do.se/om-do/vad-gor-do/remissvar/remissvar-under-2017/battre-skydd-mot-diskriminering/>.

<sup>289</sup> Equality Ombudsman (2022) *Annual Report 2021*, p. 4.

Three reports were published in 2021: *Statistics concerning discrimination reports, tips and complaints received by DO 2015–2020*; *Differences that may pose risks of discrimination? A qualitative study that examines differences in the social services inputs that can pose a risk of discrimination*; and *Preventing sexual harassment in working life - what does research show?*.<sup>290</sup>

In the author's opinion the effectiveness with which the DO exercises its competence to carry out reports and surveys has been hard to assess. However, given the new direction focusing on discrimination, greater clarity concerning the strategy behind the reports may become more apparent. Over many years, the reports at best seem to have been informational tools that could just as well have been produced by other authorities and mainstream information outlets. In that respect they could be considered to be less than effective since they are seldom intended to break new ground or provide tools that actually challenge discrimination. Presumably the point of independence in this regard is the ability to formulate challenging questions and explore difficult issues that others are unwilling to pursue.

### 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 gives its opinions on new legislation that is relevant to the equality field. The adoption of the 2016 restrictive asylum legislation (*lagen* 2016:752) and the Roma registration scandal<sup>291</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.

In the author's opinion, it was difficult to see the former Equality Ombudsman's independent recommendations as effective since the recommendations were seldom challenging and generally lacked the support of the targets or victims of discrimination as well as of other actors, such as the unions and academics. The new Ombudsman has indicated that the DO is to move in a new direction. Presumably the goal is to make more effective recommendations as well.

### 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

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<sup>290</sup> Equality Ombudsman (2021) *Statistik över anmälningar, tips och klagomål som har inkommit till DO 2015-2020* (Statistics concerning discrimination reports, tips and complaints received by DO 2015–2020); *Skillnader som kan utgöra risker för diskriminering? En kvalitativ studie som synliggör skillnader i socialtjänstens insatser som skulle kunna utgöra risker för diskriminering och hinder för individers tillgång till lika rättigheter och möjligheter* (Differences that may pose risks of discrimination? A qualitative study that examines differences in the social services inputs that can pose a risk of discrimination); *Förebygga sexuella trakasserier i arbetslivet – vad visar forskning?* (Preventing sexual harassment in working life - what does research show?). All three reports are available on the [DO's website](#).

<sup>291</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 DO 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. The DO recommended 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/>.

discrimination and promote equality concerning sex, transgender identity or expression, ethnicity, religion or other belief, disability, sexual orientation or age. Section 3 exemplifies the broad mandate by specifying that, within 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 underline that the DO's broad and independent mandate 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.

In the author's opinion, the developments of recent years indicate that the former DO was shrinking the office's broad mandate rather than testing its limits. However, the new direction announced by the head of the DO appointed in December 2020 indicates an intention to use the broad mandate provided to the office. Thus it seems that the DO is leaving behind the idea that information on its own leads to social change, and is moving towards more critical analyses where the focus is on behaviour rather than attitudes.

g) Legal standing of the designated body

In Sweden, the Equality Ombudsman (DO) has legal standing to bring discrimination complaints on behalf of identified victims to court, assuming they provide a power of attorney to the DO. The DO then becomes the party in the case, which means that the DO will be liable for 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.

In Sweden, the DO does not have legal standing to bring discrimination complaints *ex officio* to court.

In Sweden, the DO does not have legal standing to intervene in legal cases concerning discrimination, for example, as an *amicus curiae*.

In Sweden, the DO does not have legal standing to bring discrimination complaints on behalf of non-identified victims to court. Some experts have asserted that the limitation of the DO's mandate to identified victims is problematic, particularly against the background of the *Firma Feryn* case.<sup>292</sup> Nevertheless, in the author's opinion the CJEU was quite clear in stating:

'Consequently, Article 7 of Directive 2000/43 does not preclude Member States from laying down, in their national legislation, the right for associations with a legitimate interest in ensuring compliance with that directive, or for the body or bodies designated pursuant to Article 13 thereof, to bring legal or administrative proceedings to enforce the obligations resulting therefrom without acting in the name of a specific complainant or in the absence of an identifiable complainant. It is, however, solely for the national court to assess whether national legislation allows such a possibility.'<sup>293</sup>

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<sup>292</sup> See e.g. Göransson, H. et al (2011) *The Discrimination Law* 2d ed. (*Diskrimineringslagen 2:a upplagan*), 2011, pp. 43-44.

<sup>293</sup> Judgment of 10 July 2008, *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV*, C-54/07, EU:C:2008:397, Paragraph 27.

Although national legislation *can* allow for such a power, when the Court states that the directive does not preclude Member States from making such a provision, the Court did not say that the Directive requires it. In 2020, a Government inquiry was tasked with investigating whether measures are needed to strengthen the protection against discrimination in cases where there is no individual injured party.<sup>294</sup> In 2021, the inquiry concluded that there is no obligation for Member States to introduce provisions concerning sanctions when there is no identifiable victim.<sup>295</sup> Nevertheless, the inquiry also concluded that Sweden should introduce such provisions, thus proposing an amendment to the Discrimination Act that would make it possible to prohibit the dissemination of statements or communications expressing contempt for a person or a group of persons linked to a ground of discrimination by a person who has a leading position in an activity or organisation.<sup>296</sup>

#### 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, Sections 3 and 4 of the Discrimination Act, order the suspected discriminator to provide information, allow access to the workplace and enter into discussions subject to a financial penalty. Such an order can be appealed to the Board Against Discrimination.

Concerning the active measures duty to promote equality and counteract discrimination that applies to employers and education providers, a person who fails to fulfil their obligations may be ordered to fulfil them. Such an order, combined with a financial penalty, can be issued by the Board Against Discrimination upon application of the DO (Chapter 4, Section 5 of the Discrimination Act).

#### i) Registration by the body of complaints and decisions

The Equality Ombudsman registers the number of inquiries and complaints it receives (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.

Due to a change in the manner that such information is registered, the figures that apply to more recent years can vary substantially in comparison to earlier years.

According to the 2021 annual report, in 2021 the DO received 3 278 complaints concerning discrimination (as compared to 2 882 in 2020, 2 166 in 2019, and 2 025 in 2018). Both 2020 and 2021 showed large increases compared to previous years. The increase in 2020 is largely attributed to the introduction of the new online form that was made available on

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<sup>294</sup> Supplementary directive to the Inquiry into effective and appropriate supervision of the Discrimination Act, Dir. 2020:102.

<sup>295</sup> The inquiry's conclusion was based on its analysis of the CJEU judgments of 10 July 2008, *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV*, C-54/07, EU:C:2008:397; 25 April 2013, *Asociația Accept v Consiliul Național pentru Combaterea Discriminării*, C-81/12, EU:C:2013:275; and 23 April 2020, *NH v Associazione Avvocatura per I diritti LGBTI – Rete Lenford*, EU:C:2020:289. See White paper SOU 2021:94, *Ett utökat skydd mot diskriminering* (An expanded protection against discrimination) p. 30-31 and 71-79. Available at: <https://www.regeringen.se/rattsliqa-dokument/statens-offentliga-utredningar/2021/12/sou-202194/>.

<sup>296</sup> White paper SOU 2021:94, *Ett utökat skydd mot diskriminering* (An expanded protection against discrimination).

1 September 2020. The increase in 2021 concerning discrimination is also attributed largely to the online form.<sup>297</sup>

In 2021, the distribution of discrimination complaints was as follows: 1 212 concerned disability, 1 033 ethnicity, 585 sex, 624 age, 222 religion or other belief, 96 sexual orientation, 78 transgender identity or expression and 177 concerned sexual harassment.<sup>298</sup> The distribution of the grounds related to complaints has remained relatively stable over the years. Complaints concerning ethnicity and disability tend to dominate, followed by sex and age.

In 2021, the DO filed two lawsuits and six court decisions were issued in cases that the DO had filed. The number of court decisions is somewhat larger compared to 2020 when the DO was involved in three court decisions. The DO also entered into four settlements in 2021 as compared to three in 2020.<sup>299</sup> The number of court decisions where the DO had filed the lawsuit in 2020 and 2021 can be compared to earlier periods such as 2015 with 10 cases<sup>300</sup> and 2010 with 15 cases.<sup>301</sup>

The DO's work in 2021 has been characterised by the shift in focus toward individual cases as a starting point for the DO. This has also involved a move away from the focus on general oversight investigations and decisions.<sup>302</sup>

j) Roma and Travellers

Over the years there have been many cases involving Roma. However, in the *Annual Report for 2021*, Roma are only mentioned in relation to a settlement where a hotel had discriminated against two Roma women.<sup>303</sup> Although Roma are not taken up as a specific priority, cases involving Roma seem to occur comparatively often. At least in part this seems to be due to the obvious and open character of the discrimination, which means that the evidence is quite apparent.

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<sup>297</sup> Equality Ombudsman (2022) *Annual Report 2021*, pp. 100-101, Figure 1 and Table 1.

<sup>298</sup> Equality Ombudsman (2022) *Annual Report 2020*, Table 3, p. 102.

<sup>299</sup> Equality Ombudsman (2022) *Annual Report 2021*, p. 22.

<sup>300</sup> Equality Ombudsman (2016) *Annual Report 2015*, p. 44.

<sup>301</sup> Equality Ombudsman (2011) *Annual Report 2010*, p. 20.

<sup>302</sup> Equality Ombudsman (2022) *Annual Report 2021*, pp. 21, 24.

<sup>303</sup> Equality Ombudsman (2022) *Annual Report 2021*, p. 27.

## 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)

The activities of the Equality Ombudsman involving reports, training programmes and dialogue with NGOs, the social partners and Government authorities are ongoing. In 2021 there was a special focus on the dialogue with civil society organisations that represent the victims of discrimination, in particular concerning the DO's shift in focus towards the investigation of individual claims. This emphasised the importance of building up the trust of civil society organisations and the important role that this trust can play in the development of discrimination claims. The DO points out that these renewed efforts have led to positive reactions from civil society. This has also led to the addition of two civil society representatives to the DO's advisory board.<sup>304</sup>

- 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)

In 2020, the Government tasked the Ombudsman for Children with developing a knowledge base concerning the exposure of children and young persons to racism. The task is to be carried out in cooperation with the DO, the National Agency for Education, the Child and Student Ombud at the Schools Inspectorate and the Swedish Media Council. The Ombudsman's mission includes gaining knowledge of their experience from children and young people as well as from relevant organisations in civil society.<sup>305</sup> The DO has carried out work in this field during 2021, including work on the development of communication materials directed at children and young people about the DO and its activities.<sup>306</sup>

The Government continues to provide subsidies to local anti-discrimination bureaux. They constitute a key element in providing assistance to victims of discrimination, in terms of advice, representation and awareness-raising. NGOs dealing with discrimination are encouraged to be members of and to form local anti-discrimination bureaux. Some bureaux, like the one in Malmö, have become important voices in counteracting discrimination in their regions, which gives them an interesting platform from which to engage in dialogue with others.<sup>307</sup> In 2021, the Swedish Agency for Youth and Civil Society Affairs published an analysis of the results and effects of the subsidy for anti-discrimination activities during 2019. The Agency concludes that the results and effects that the organisations have reported are well in line with the purpose of the grant. The Agency also considers that the contribution to the anti-discrimination bureaux is of great importance to their existence and activities. The hope is that the report will provide the Government with a relevant basis for assessing how the contribution to anti-discrimination activities can be developed.<sup>308</sup>

The National Board of Housing, Building and Planning was tasked with analysing the risks of discrimination and other obstacles to accessing the housing market. This was to be done in cooperation with the DO, the Delegation against Segregation and the Ombudsman for Children. In addition, the analysis was to involve contacts with the relevant bodies such as

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<sup>304</sup> Equality Ombudsman (2022) *Annual Report 2021*, p. 35.

<sup>305</sup> Swedish Government, decision 29.10.2020, at: <https://www.regeringen.se/4ab985/contentassets/f1a4d848359a46219e97471faf6f128b/uppdrag-till-bo-om-barns-och-ungas-utsatthet-for-rasism.pdf>.

<sup>306</sup> Equality Ombudsman (2022) *Annual Report 2021*, pp. 74-75.

<sup>307</sup> For more information about the anti-discrimination bureaux, see section 10 below.

<sup>308</sup> Agency for Youth and Civil Society Affairs (2021) *Antidiskrimineringsverksamheter 2021* (Anti-discrimination activities 2021), available in Swedish at <https://www.mufo.se/publikationer/antidiskrimineringsverksamheter-2021>.

landlords, tenants' associations, local government authorities and civil society organisations.<sup>309</sup> In 2021 this resulted in the report, *Risk of discrimination and obstacles to establishment on the housing market*.<sup>310</sup>

- 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)

The DO maintains an ongoing dialogue with the social partners concerning equal treatment. This also includes the DO's work directed toward unions and employers. In 2021, this involved, for example, reaching out to the social partners in different ways concerning the DO's 'Digital Guide to Active Measures', which was developed and updated on the basis of cooperation and discussion with the social partners.<sup>311</sup>

- d) Addressing the situation of Roma and Travellers

Currently 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 their status as a national minority.

In 2019, a departmental inquiry proposed the establishment of a Government authority, to be called the Agency for Roma Issues (Myndigheten för romska frågor).<sup>312</sup> It is to have responsibility at the national level for promoting work on the human rights of Roma, including providing support to the work on counteracting antiziganism (anti-Gypsyism). This departmental inquiry has not yet led to a concrete proposal.

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>313</sup> In 2021, the Board published its *Report on its assignments to coordinate, follow up and implement initiatives within the framework of the strategy for Roma inclusion*; on the website, the report was announced with the headline, 'The pandemic has put the municipalities' work on Roma inclusion on hold' (*Pandemin har satt kommuners arbete med romsk inkludering på paus*).<sup>314</sup>

The Government is continuing to work on its national long-term and coordinated 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, etc., as the majority population.<sup>315</sup>

<sup>309</sup> Government decision, 25.06.2020,

<https://www.regeringen.se/4a2657/contentassets/31cf08ce18d541259df158844a9efb91/uppdrag-till-boverket-att-analysera-risker-for-diskriminering-och-hinder-for-etablering-pa-bostadsmarknaden.pdf>.

<sup>310</sup> National Board of Housing, Building and Planning (2021) *Risk för diskriminering och hinder för etablering på bostadsmarknaden*. Available in Swedish at <https://www.boverket.se/sv/om-boverket/publicerat-av-boverket/publikationer/2021/risk-for-diskriminering-och-hinder-for-etablering-pa-bostadsmarknaden/>.

<sup>311</sup> Equality Ombudsman (2022), *Annual Report 2021*, pp. 61-63. Also see *Din guide till aktiva åtgärder mot diskriminering* (Your guide to active measures against discrimination) at <https://aktiva-atgarder.do.se>.

<sup>312</sup> Ds 2019:15, *Långsiktighet och stadga i arbetet framåt - en myndighet för romska frågor* (A long-term vision and stability in the work going forward – an Agency for Roma Issues), <https://www.regeringen.se/rattsliga-dokument/departementsserien-och-promemorior/2019/07/ds-201915/>.

<sup>313</sup> Stockholm County Administrative Board at <http://www.minoritet.se/romsk-inkludering>.

<sup>314</sup> Stockholm County Administrative Board (2021) *Redovisning av uppdrag att samordna, följa upp och genomföra insatser inom ramen för strategin för romsk inkludering* (Report on its assignments to coordinate, follow up and implement initiatives within the framework of the strategy for Roma inclusion).

<sup>315</sup> Swedish Government (2011), *En samordnad och långsiktig strategi för romsk inkludering 2012-2032*, Skr. 2011/12:56, at: <https://www.regeringen.se/rattsliga-dokument/skrivelse/2012/02/skr.-20111256-/>.



## **8.2 Measures to ensure compliance with the principle of equal treatment (Article 14 Directive 2000/43, Article 16 Directive 2000/78)**

### a) Compliance of national legislation (Articles 14(a) and 16(a))

The comprehensive Discrimination Act came into effect in 2009. Prior to that there were various laws against discrimination that had also been adopted to ensure compliance with the directives.

The task of proposing legislation in order to implement the directives into Swedish national law was given to a special investigator, who presented her report in the spring of 2002. Concerning Articles 14(a) and 16(a), the investigator pointed out that the inquiry did not find any laws or regulations that violated the prohibitions against discrimination in the directives. At the same time, the investigator pointed out that the inquiry's knowledge was incomplete concerning the potential existence of discriminatory regulations. This applied in particular to regulations of a lower status than those found in the Swedish Code of Statutes (SFS – *Svensk författningssamling*).<sup>316</sup>

There have been no reports of laws, regulations or administrative provisions that are directly contrary to the principle of equal treatment in the directives. Furthermore, Chapter 2, Article 12 of the Constitution states that no act of law or other provision may imply the unfavourable treatment of anyone because they belong to a minority group due to their ethnic origin, colour, or other similar circumstances, or on account of sexual orientation. Article 13 provides a similar protection concerning gender. In addition, the European Convention on Human Rights (ECHR) was incorporated into national law in 1995 and given quasi-constitutional status. More particularly, Chapter 2, Article 19 of the Constitution states that no act of law or other provision may be adopted that contravenes Sweden's undertakings under the ECHR. This can be important since the ECHR contains an open list of discrimination grounds, thus complementing Articles 12 and 13.

The potential application of these articles was limited until the changes in the Constitution in 2010. Until 2010, these articles provided protection against discriminatory laws adopted by the Parliament only if the laws clearly violated the Constitution (*uppenbarhetsrekvisitet*). However, various amendments were adopted in 2010 that came into effect in 2011. Chapter 11, Article 14, concerning judicial review, now provides that if a court finds that a provision conflicts with a rule of fundamental law or other superior statute, the provision will not be applied. Furthermore, it is not only the courts but other public bodies administering justice that are to apply this standard of judicial review.<sup>317</sup> Therefore, even if discriminatory laws were somehow to get through the protections built into the legislative process, the Swedish Constitution provides the tools for setting aside such laws.

Thus, given the lack of reports on discriminatory laws and provisions, and the current state of judicial review, which provides the potential for not applying such laws, Sweden seems to have adopted the necessary measures to transpose and implement Articles 14(a) and 16(a).

### b) Compliance of other rules/clauses (Articles 14(b) and 16(b))

The author does not know of any other rules/clauses that are directly contrary to the principle of equal treatment. Furthermore, the Discrimination Act transposes Article 14(b) and 16(b) respectively, since according to Chapter 5, Section 3 such rules/clauses in

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<sup>316</sup> White Paper SOU 2002:43: An Extended Protection against Discrimination (*Ett utvidgat skydd mot diskriminering*, bet. SOU 2002:43), p. 143.

<sup>317</sup> Sveriges Riksdag (2016), *The Constitution of Sweden: the Fundamental Laws and the Riksdag Act*, p. 46, at: <https://www.riksdagen.se/en/SysSiteAssets/07.-dokument--lagar/the-constitution-of-sweden-160628.pdf/>.

contracts, collective agreements, etc. that are contrary to the principle of equal treatment can be modified or declared invalid (null and void).

## 9 COORDINATION AT NATIONAL LEVEL

2021 turned out to be a turbulent year in politics. During the summer of 2021, the minority coalition consisting of the Social Democrats and the Green Party was re-shuffled. Prime Minister Löfven then resigned in November so that another Social Democrat, Magdalena Anderson, could take over. Due to certain votes in the Riksdag, the Green Party left the coalition in November 2021, and the Social Democrats were allowed to continue as a single party minority Government, presumably at least until the elections in September 2022.

Discrimination issues are included in the mandate of the Ministry of Employment and placed in the portfolios of Eva Nordmark, Minister for Employment and Gender Equality, and Johan Danielsson, Minister for Housing and Deputy Minister for Employment. Several Government agencies including the Equality Ombudsman, the Board Against Discrimination, the Gender Equality Agency and the newly established Institute for Human Rights are within the responsibility of the Employment Ministry.

In 2016, Sweden adopted a national plan to combat racism, similar forms of hostility and hate crime.<sup>318</sup> The plan provides a basis and a focus for the on-going work to combat racism and hate crime in the strategic areas identified by the Government: greater knowledge, education and research; improved coordination and monitoring; greater support for and more in-depth dialogue with civil society; strengthening preventive measures online; and a more active legal system. The plan sets out a structure for coordination and follow-up that lays the groundwork for long-term strategic work. Specific anti-racism measures that are undertaken over the years refer to various relevant parts of this plan. Responsibility for this plan is distributed among several ministries, in particular the Ministry of Culture, the Ministry of Justice and the Ministry of Home Affairs.

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<sup>318</sup> Swedish Government (2017) *A comprehensive approach to combat racism and hate crime: National plan to combat racism, similar forms of hostility and hate crime*, available in English, at: <https://www.government.se/492382/contentassets/e6047ff54c00452895005f07e2e2ba39/a-comprehensive-approach-to-combat-racism-and-hate-crime>.

## 10 CURRENT BEST PRACTICES

1. The dyslexia cases. Civil society cooperation on strategic litigation concerning discrimination by schools and the National Agency for Education against children with dyslexia during national exams through the refusal to allow them to use the assistance devices they normally use in school. Raising awareness and empowerment through enforcement.

This best practice that was initiated in 2018 is ongoing. Various NGOs joined together in 2018 to support strategic litigation on behalf of three pupils against local authorities that are responsible for schools as well as a claim against the National Agency for Education concerning discrimination against pupils with dyslexia.

National tests are set annually in schools around the country. During the school year, children with dyslexia are allowed to use assistance devices to help them read. Instead of reading with their eyes, the devices help them to read with their ears. However, when taking the national tests, they are not allowed to use the devices. The schools, run by local authorities, assert that they are following the guidelines issued by the National Agency for Education. The agency set the guidelines for the national tests, including the requirement concerning the removal of assistance devices from pupils with dyslexia during such tests.

In brief, two cases were lost at the district court level in 2019 and one was successful. In 2020 the cases were appealed to separate courts of appeal where each case was lost. Leave to appeal to the Supreme Court was denied (see the description of the cases in section 12.2). The NGOs also supported the filing of a lawsuit in 2020 against the National Agency for Education as the agency's guidelines did not allow for the reasonable accommodations needed by these pupils. The NGOs are also considering assisting one of the pupils in sending an individual communication to the UN CRPD Committee due to Sweden's failure to live up to the requirements of the CRPD concerning reasonable accommodation. Presumably, thousands of pupils are affected annually by the issue.

The Dyslexia Association has pointed out the problem for many years. Disability Rights Defenders (an NGO formerly known as Law as a tool for social change), Talerättsfonden (a discrimination litigation fund) and the Dyslexia Association cooperated in finding pupils and supporting their cases. Although the lawsuits against the schools and local government bodies were unsuccessful in the end, they generated substantial publicity concerning the issue, both locally and nationally.<sup>319</sup>

The case against the National Education Authority on behalf of LK was unsuccessful at the trial court level. See section 12.2 below. The case has been appealed.

Furthermore, an individual communication on behalf of another pupil was submitted to the UN CRPD Committee. The communication in particular references an earlier CRPD Committee decision, *Sahlin v Sweden*,<sup>320</sup> clarifying that reasonable accommodation requires a dialogue with the individual, and that the reasonableness of the accommodation

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<sup>319</sup> Dagens Nyheter (2018) 'Barn med dyslexi nekas hjälpmedel – nu stäms Skolverket och tre kommuner' (Children with dyslexia denied assistance devices – now the Schools Agency and three local governments are sued) 01.9.2018, available at: <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' (Denied dyslexia assistance devices during exams – local governments sued), 31.08.2018, <https://www.tv4.se/nyheterna/klipp/nekades-dyslexistod-vid-prov-kommuner-stams-11350574>. Swedish TV (2018), 'Dyslexiförbundet: Skolverket diskriminerar elever med dyslexi', (Dyslexia NGO: the Schools Agency discriminates against pupils with dyslexia) 31.08.2018 at: <https://www.svt.se/nyheter/inrikes/dyslexiforbundet-vill-stamma-kommuner-for-diskriminering-av-barn-med-dyslexi>.

<sup>320</sup> UN Committee on the Rights of Persons with Disabilities, *Sahlin v Sweden*, CRPD/C/23/D/45/2018, at [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2f23%2fD%2f45%2f2018&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2f23%2fD%2f45%2f2018&Lang=en).

is also related to that dialogue. According to the complainants, there was no individual dialogue in any of the cases.

A potentially broader issue here is whether the EU is using the *Sahlin* case as a means for explaining how the EU views reasonable accommodation, in particular given the EU's ratification of CRPD. In other words, there is a question as to whether the failure to have a dialogue, by itself, is a violation of the concept of reasonable accommodation under EU law.

The dyslexia cases are a practical example of how civil society can cooperate in relation to enforcement, potentially even providing a healthy 'competition' or complement to the Equality Ombudsman and the unions. In the long run, the author expects that this type of action will help to transform law in theory into law in action.

2. *Ten years with the Equality Ombudsman – A report on the dismantling of the protection against discrimination*, written by Lena Svenaeus, a researcher in law and sociology and Gender Equality Ombudsman 1994-2000.<sup>321</sup>

This report provides a clear and concise analysis by the author of the dismantling of the protection against discrimination over a 10-year period. Although having been published in late 2020, this report is having ongoing effects during 2021 as a potential model for continuing follow-up of the work of the Equality Ombudsman, possibly by civil society organisations or others. Although it would be hard to find someone with the author's unique combination of practical hands-on experience and theoretical research expertise, this type of report would be useful in most countries. Svenaeus documents the shift from working on cases enforcing the law, thus helping individuals enforce their rights as well as contributing to changes in broader social norms, which seems to be the purpose of using civil law as a tool for social change. There has been a shift in focus to dealing with non-discrimination as if it is primarily a problem of a lack of knowledge, which can be resolved through enlightenment in the form of reports, short internet films, educational materials and non-binding opinions from an equality body that seems to lack an interest in enforcing the law. This shift also means dealing less with the victims of discrimination, which can be difficult and time-consuming, and dealing more with those who have the power to discriminate and who are more 'polished', making communication less challenging. It is more comfortable communicating with people such as other civil servants, employers and unions, than with distraught, upset and confused victims of discrimination. However, the nature of the work of an equality body seems to be determining how to make life uncomfortable for those who discriminate. Basically, Svenaeus is pointing out that the focus has to be on enforcement in individual cases as well as active measures. These will in turn stimulate the need of those with the power to discriminate to understand and actually implement the educational materials, reports, etc., that are produced.

A new Equality Ombudsman was appointed in late 2020. The ideas in Svenaeus's report seem to be reflected, at least to some extent, in the shift in direction indicated in the DO's *Annual Report 2021*.

3. Strategic litigation carried out by the Equality Ombudsman resulting in the CJEU judgment in *Diskrimineringsombudsmannen v Braathens Regional Aviation AB*.<sup>322</sup>

Concerning a case in which an airline passenger was taken off a plane by Braathens so that he could be put through an additional and more extensive security check, the DO filed

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<sup>321</sup> Svenaeus, L. (2020) *Tio år med Diskrimineringsombudsmannen - En rapport om nedmontering av Diskrimineringsskyddet* (Ten years with the Equality Ombudsman – A report on the dismantling of the protection against discrimination) at: <https://arenaide.se/wp-content/uploads/sites/2/2020/11/svenaeus-2020-tio-ar-med-diskrimineringsombudsmannen-komprimerad.pdf>.

<sup>322</sup> CJEU, Judgment of 15 April 2021, *Equality Ombudsman (DO) v Braathens Regional Aviation AB*, C-30/19, EU:C:2021:269.

a lawsuit for EUR 950 (SEK 10 000), asserting that the airline's behaviour constituted direct ethnic discrimination. Braathens was willing to pay the amount asked for, but unwilling to admit that their actions constituted discrimination. As the district court refused the DO's request for a hearing on the discrimination itself (i.e. for a declaratory judgment), the DO appealed the case through to the Supreme Court. At each level the DO asserted that a failure to hear the discrimination case and make a declaratory judgment would constitute a violation of EU law, resulting in the DO's request that the Supreme Court refer the matter to the CJEU for a preliminary ruling. The Supreme Court submitted the question to the CJEU.

The CJEU, based on its understanding of Swedish procedural law, agreed with the DO, essentially holding that if there was no admission of discrimination even if the compensation requested was agreed to, EU law required that it should be possible to require a hearing before the court concerning the substance of the case, i.e. discrimination. This case may make it easier for civil society organisations to take on discrimination cases as small claims cases, and still be able to achieve a judicial determination of discrimination if the defendant denies that discrimination occurred.

4. Government support provided to local anti-discrimination bureaux. This is on-going best practice that has become increasingly important as the DO has decreased its work on individual complaints, including taking fewer cases to court.

In 2021, about EUR 2.61 million (SEK 28 million) was divided between 18 local anti-discrimination bureaux around Sweden. They not only provide advice and assistance at the local level to victims, but they are also increasingly taking on cases that can be taken to court. As their offices are local, there is greater potential for victims to actually meet a lawyer or expert in contrast to the situation at the DO, which has its office in Stockholm. They can also provide training and awareness raising at the local level. As they are local NGOs, presumably they can also develop greater local knowledge of the circumstances faced by victims. This means that they can also provide expertise to and for local organisations in relation to equality issues that can come up in a city council or a regional council. Furthermore, these bodies can undertake local initiatives to counteract discrimination or contribute to equality promotion measures.

5. The 'Widening the norm in practice' project published two important reports in 2021 - *Equality data in the workplace: with a focus on ethnicity* by Yamam Al-Zubaidi and *White privileges and discrimination – processes that maintain racialised inequalities on the labour market* by Martin Wolgast and Sima Nourali Wolgast.<sup>323</sup>

The Stockholm County Administrative Board, as part of its multi-year 'Widening the norm in practice' (*Vidga normen*) project, which receives funding from the European Social Fund, published several reports of particular interest concerning discrimination.<sup>324</sup> The work of the Stockholm County Administrative Board (Länsstyrelsen Stockholm) has been mandated by the Government as a part of carrying out the National plan against racism, similar forms of hostility and hate crime.

While all employers are required under the Discrimination Act to undertake active measures to prevent discrimination and to promote equal rights and opportunities, there is little guidance about how the work should be carried out and how results of such active measures can or should be measured. For a variety of reasons, this can be particularly

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<sup>323</sup> Al-Zubaidi, Y. (2021) *Jämlikhetsdata på arbetsplatsen – med fokus på etnisk tillhörighet* (Equality data in the workplace: with a focus on ethnicity); Wolgast, M. and Wolgast, S.N. (2021) *Vita privilegier och diskriminering – Processer som vidmakthåller rasifierade ojämlikheter på arbetsmarknaden* (White privileges and discrimination – processes that maintain racialised inequalities on the labour market).

<sup>324</sup> The project has received funding for the years 2018-2021. For information in Swedish see <https://www.vidqanormen.se>. For a summary in English see <https://www.vidqanormen.se/english-summary/>.

problematic in regard to ethnicity, due to the political opposition to the development of meaningful data. To some extent this has been a key component of denial concerning ethnic discrimination in Sweden. Some call this the choice of ignorance by policymakers.<sup>325</sup> Yamam Al-Zubaidi, an equality and diversity expert with a focus on equality data, has developed a report that provides knowledge about the legal framework as well as practical guidance on how statistics on ethnicity could be developed and used in the work on active measures. The report ends with certain thoughts on future action. One that is of particular interest is the idea that the Equality Ombudsman (DO) and the Swedish Authority for Privacy Protection (IMY) should work with the social partners to develop guidelines on what can be done in the field of equality data, particularly concerning ethnicity. This could help the authorities and others to move away from the focus on what cannot be done or the idea that nothing can be done.<sup>326</sup>

Another key component of denial by policymakers and others is understanding the occurrence of ethnic discrimination. The publication of the 2021 report, *White privileges and discrimination – processes that maintain racialised inequalities on the labour market*, by authors Martin Wolgast and Sima Nourali Wolgast could play an important role in raising awareness. The report was produced by the Department of Psychology at Lund University. As pointed out in the report, earlier research shows that structural discrimination linked to skin colour occurs in the labour market in Sweden, but: 'This report shows HOW racism in working life occurs and what different mechanisms at the societal, organisational and individual level create and perpetuate inequality linked to skin colour.' Against the background of the multi-level problem described by the authors, one of several recommendations is that directives and practices in this area should be changed so that official statistics are collected and reported in a way that as much as possible reflects the social reality of 'race' in today's Sweden.<sup>327</sup>

### Artificial intelligence (AI) and discrimination

There were no specific best practices that could be identified in relation to the use of artificial intelligence (AI) to improve the effective implementation of the national legislation transposing the directives. Nevertheless, the potential discriminatory results of AI as well as the potential of using AI to promote equality are increasingly being examined in Sweden by various stakeholders. The Equality Ombudsman (DO) has carried out a mapping of how certain Government agencies use AI and automated decision making, and the extent to which they know about the risks in relation to discrimination. The mapping was carried out through the submission of surveys to 34 agencies and interviews with six agencies. There is an ongoing project to use the mapping to produce guidance on how to answer questions from Government agencies and others about AI and the risks related to discrimination along with various awareness-raising activities.<sup>328</sup> An example from the research field that can lead to more effective implementation of the national legislation is funding for a project to examine the increasing use of AI for decision making in the public sector and the risk of discrimination, for example, by the tax authorities or the national insurance agency.<sup>329</sup>

<sup>325</sup> See e.g. Lappalainen, P. (2005), White Paper SOU 2005:56, *Det blågula glashuset: strukturell diskriminering i Sverige* (The Blue and Yellow Glass House: Structural Discrimination in Sweden). The white paper underlines the idea that denial of ethnic discrimination has permeated Sweden's policymaking related to immigrants, integration and diversity (p. 467-468, 536-546); Simon, P. (2008) 'The choice of ignorance: The debate on ethnic and racial statistics in France', *French Politics, Culture & Society*, Vol. 26, Nr. 1, pp. 7-31; Simon P. (2010) 'Statistics, French Social Sciences and Ethnic and Racial Social Relations', *Revue française de sociologie*, pp. 51-1, 2010, 159-174, 161-162, and; Al-Zubaidi, Y. (2020) 'Some reflections on racial and ethnic statistics for anti-discrimination purposes in Europe', *European equality law review*, Issue 2020/2, pp. 62-72.

<sup>326</sup> Al-Zubaidi, Y. (2021) [Jämlikhetsdata på arbetsplatsen – med fokus på etnisk tillhörighet](#) (Equality data in the workplace: with a focus on ethnicity).

<sup>327</sup> Wolgast, M. and Wolgast, S.N. (2021) [Vita privilegier och diskriminering – Processer som vidmakthåller rasifierade ojämlikheter på arbetsmarknaden](#) (White privileges and discrimination – processes that maintain racialised inequalities on the labour market).

<sup>328</sup> Equality Ombudsman (2022), *Annual Report 2021*, p. 43.

<sup>329</sup> See Fast, K. (2020) *Regulatory AI-Use, Ethics and Law - Swedish and Scandinavian Legal Perspectives*

Another example is the research project studying Swedish companies to see whether the use of artificial intelligence in the recruitment process can enhance the inclusion of disadvantaged groups.<sup>330</sup> The Government's interest in the field thus far can be seen in the document *National Approach to Artificial Intelligence*.<sup>331</sup> The idea here is to determine future priorities concerning AI, particularly the potential in the development of AI. Sustainable AI also means avoiding various risks, such as discrimination in the development process.

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*within Taxation and Social Insurance*, Foundation for Jurisprudential Research at:  
<https://srf.wallenberg.org/beviljade-anslag-2020-0>.

<sup>330</sup> For a description of the project, see the page on the [website of the Institute for Futures Studies](#): 'Can the implementation of artificial intelligence in the recruitment process enhance the inclusion of disadvantaged groups? A study of Swedish companies'.

<sup>331</sup> Swedish Government (2019) *National Approach to Artificial Intelligence*, available (in English) at:  
<https://www.government.se/information-material/2019/02/national-approach-to-artificial-intelligence/>.



## 11 SENSITIVE OR CONTROVERSIAL ISSUES

### 11.1 Potential breaches of the directives at the national level

In general, Sweden fulfils the requirements set by the directives. However, in the opinion of the author, the following points are problematic:

- 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. This may be one of the reasons why it seems harder to win cases of ethnic discrimination in the Labour Court (see section 6.3 of this report, as well as Article 8 Directive 2000/43 and Article 10 Directive 2000/78).
- Discrimination against legal persons is not prohibited in working life (see section 3.1.2 of this report, and Recital 16, Directive 2000/43).
- 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. This type of limitation brings up the question of whether the directive has been transposed in the correct manner (see sections 3.1.2.b and 3.2.1 of this report, and Articles 7 and 15 of Directive 2000/43 and Articles 9 and 17 of Directive 2000/78).
- In cases concerning recruitment, including promotion cases, there is no right to economic compensation (see section 6.5.a of this report and Article 15 Directive 2000/43 and Article 17 Directive 2000/78). If there was a right to economic damages, at least for the most qualified applicant, they would clearly contribute to the effectiveness and dissuasiveness of the sanctions and still be proportional.
- In *Equality Ombudsman (DO) v Braathens Regional Aviation AB*,<sup>332</sup> the CJEU's preliminary ruling stated that:

'Articles 7 and 15 of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, read in the light of Article 47 of the Charter of Fundamental Rights of the European Union, must be interpreted as precluding a national law which prevents a court that is seised of an action for compensation based on an allegation of discrimination prohibited by that directive from examining the claim seeking a declaration of the existence of that discrimination where the defendant agrees to pay the compensation claimed without however recognising the existence of that discrimination. It is for the national court hearing a dispute between private persons to ensure, within its jurisdiction, the judicial protection for litigants flowing from Article 47 of the Charter of Fundamental Rights by disapplying as necessary any contrary provision of national law.'

In applying the preliminary ruling to the *Braathens* case before it, the Swedish Supreme Court ruled that since *Braathens*, after the CJEU judgment, provided an admission of discrimination as required by the CJEU, there was no longer any reason to rule on the issue of a hearing on a declaratory judgment. At the same time, the court writes in a very unusual supplement to the decision that the issues that are

<sup>332</sup> CJEU, Judgment of 15 April 2021, *Equality Ombudsman (DO) v Braathens Regional Aviation AB*, C-30/19, EU:C:2021:269.

relevant in the case are of such a nature that they should be handled by the legislature and not by the courts in individual cases. Going forward, the issue is going to be how and the extent to which the courts apply the preliminary ruling of the CJEU.

### 11.2 Other issues of concern

The formal independence of the Equality Ombudsman (DO) itself is not a great concern. However, independence becomes a concern when the work of the DO shifts to a simplified focus on information about the law as the primary tool for social change during a period of about 10 years, rather than actual implementation and development of the law as a tool. This shift in focus undermines not only the DO, but also anti-discrimination work being carried out by others. The DO appointed in December 2020 has clearly indicated a shift away from the previous focus on information and toward enforcement of the Discrimination Act. In the author's opinion, his ability to fulfil this shift in focus is a concern given the culture that has been established within the agency over many years.

A related issue of concern is 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. The loser-pays rule is a particular hindrance which slows the development of the critical mass of cases as well as more substantive case law (through strategic litigation), both of which are needed in order to achieve the primary goal of the directives as well as the Discrimination Act.

As indicated by the dyslexia cases (see section 10 above), some civil society organisations are starting to recognise the need for civil society advocacy in the courts as well as in legislation. This type of understanding by civil society is vital to providing added encouragement to the DO's shift in strategy. Enforcing laws against discrimination, particularly since this often is a challenge to the status quo, challenges 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. Challenging those with the power to discriminate, and to prevent discrimination, can create an uncomfortable situation for civil servants working for the DO, especially when the DO has a practical monopoly in the field. However, if civil society enforcement develops as a serious complement to e.g. the DO, this can help to sharpen the focus of the DO concerning enforcement.

In the author's opinion, moving from law in books 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 be developed, even on behalf of less powerful interests. This is something of a disruptive change as regards the Swedish model, where collective thinking and a consensus culture has reigned (at least a consensus of the more powerful interests), and in which individual rights have not always been at the forefront.

This is why the following are key concerns and/or needs:

- Does reasonable accommodation, as defined in the CRPD, mean one thing concerning working life and another concerning education? In *Sahlin v Sweden*,<sup>333</sup> the UN CRPD committee determined that Sweden had violated the CRPD provisions by failing to engage in a dialogue with Sahlin concerning reasonable accommodation in the workplace. What is the relevance of the *Sahlin* decision to the term 'reasonable accommodation' in EU law, e.g. in relation to Directive 2000/78 concerning employment? If *Sahlin* applies to the directive, can Sweden apply a different standard

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<sup>333</sup> UN Committee on the Rights of Persons with Disabilities, *Sahlin v Sweden*, CRPD/C/23/D/45/2018, at [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolNo=CRPD%2fC%2f23%2fd%2f45%2f2018&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolNo=CRPD%2fC%2f23%2fd%2f45%2f2018&Lang=en).

- for reasonable accommodation concerning education, which is not covered by Directive 2000/78, as opposed to employment? This is relevant due to the ongoing issue involving pupils with dyslexia and the removal of their ordinary assistance devices during national exams.
- The lack of case law in regard to the Discrimination Act and related fields.
  - The DO needs to investigate more complaints, more effectively. This is needed to build up the trust of victims and groups representing victims as well as the knowledge of DO staff concerning discrimination. Even from a strategic litigation viewpoint, development of this knowledge and trust is key.
  - The slow development of public interest law firms that serve victims of discrimination.
  - 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.
  - The use of anti-discrimination conditions in public contracts should be followed up and strengthened.
  - The need for injunctive relief, for example, in the form of forward-looking orders on reporting back to the courts on the implementation of active measures should be investigated.
  - Civil society organisations other than unions should have a right, subsidiary to the DO's actions, to follow up the implementation of active measures.
  - The cost risks placed on victims of discrimination who take cases to court on their own need to be shifted. A claimant who prevails should be able to recover reasonable costs, while a defendant who prevails should be able to recover their costs only if the claim was manifestly unreasonable, etc. See e.g. Article 19 of the European Commission's proposal for a pay transparency directive.<sup>334</sup>
  - A test case fund should be established, based at least initially on public funding, controlled mainly by civil society organisations, which can provide support to potentially strategic cases. Inspiration could be gained from Canada's Court Challenges programme.<sup>335</sup>
  - Concerning the prevention portion of discrimination compensation awards, the law could be amended so that a large part of the preventive portion of the awards is to be paid into the test case fund. This might make it easier to convince the courts that they should make larger awards related to prevention. The author believes that one hindrance to more dissuasive awards is the fear that the courts seem to have of unjust enrichment concerning discrimination victims.<sup>336</sup> This type of approach could help to remove that obstacle.

### **Artificial intelligence (AI) and its potential discriminatory results are increasingly being discussed and examined in Sweden by a variety of stakeholders.**

In 2021, Daniel Westman produced a report for the Confederation of Swedish Enterprise: *Vem tar ansvar för AI? Gällande lagstiftning, framlagda reformförslag och övergripande analys* (Who takes responsibility for AI? Current legislation, proposals for reform and an overall analysis). In particular he discusses the effectiveness of the Discrimination Act in relation to certain aspects of AI applications. The three issues he mentions relate to the problems in relation to indirect discrimination, the idea that AI often generates its own

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<sup>334</sup> European Commission (2021) [Proposal for a directive of the European Parliament and of the Council to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms](#), Brussels, 4 March 2021, COM(2021) 93 final.

<sup>335</sup> Government of Canada, Court Challenges Program. Available at: <https://www.canada.ca/en/canadian-heritage/services/funding/court-challenges-program.html> and <https://www.canada.ca/en/canadian-heritage/services/funding/court-challenges-program/background.html>.

<sup>336</sup> See the Supreme Court NJA 2008 p. 915. The case involved four young men who filed discrimination complaints with the DO. They used situation testing at a nightclub to establish ethnic discrimination. The DO won the case in the trial court and appeal court. The result was the same in the Supreme Court except that the damages awarded were reduced from a 'normal' amount of EUR 1 370 (SEK 15 000) to EUR 460 (SEK 5 000). The reduction was due to the use of situation testing which indicated that the victims were less injured since they expected the discrimination to occur. The underlying theme seemed to be the idea of unfair enrichment. Available at: <https://lagen.nu/dom/nja/2008s915>.

assessment criteria, and the difficulties in detecting and proving discrimination when separate AI systems work together, i.e. function as a 'black box'.<sup>337</sup> Another focus is on the potential for fairer recruitment processes combined with the risk of discrimination through the use of AI in recruitment. One example is a 2020 master's thesis entitled 'Is AI the Key to Equal Recruitment? - A qualitative study on how artificial intelligence affects discrimination and prejudice during the recruitment process.'<sup>338</sup> The authors conclude that AI can help to reduce the risk of discrimination in the recruitment process. However, this presupposes the development of unbiased AI-technology. Among others the DO has emphasised the potential risks related to discrimination when algorithms become part of activities such as a recruitment process.<sup>339</sup> The DO also produced a report on data processing using algorithms and risks of discrimination, which mentions various concerns including the use of AI in relation to employment recruitment.<sup>340</sup> Another example is funded research to examine the increasing use of AI for decision making in the public sector, for example, by the tax authorities or the national insurance agency. Here the question is ensuring not just non-discrimination but also correct decision making.<sup>341</sup> In any case, it is clear that AI is increasingly discussed in various circles. Nevertheless, hopefully those working with the issue will not lose sight of the fact that concerning discrimination, AI builds in the prejudices that already exist at the human level. The Government's interest in the field thus far can be seen in the document *National Approach to Artificial Intelligence*.<sup>342</sup> The idea here is to determine future priorities concerning AI, particularly the potential in the development of AI. Sustainable AI also means avoiding various risks such as discrimination in the development process.

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<sup>337</sup> Westman, D. (2021) [Vem tar ansvar för AI? Gällande lagstiftning, framlagda reformförslag och övergripande analys](#) (Who takes responsibility for AI? Current legislation, proposals for reform and an overall analysis), Confederation of Swedish Enterprise. See in particular pp. 16-18.

<sup>338</sup> Samo, I and Ömansson, M. (2020) *ÄR AI NYCKELN TILL EN LIKVÄRDIG REKRYTERING? - En kvalitativ studie om hur artificiell intelligens påverkar diskriminering och fördomar under rekryteringsprocessen*, (Is AI the Key to Equal Recruitment? - A qualitative study on how artificial intelligence affects discrimination and prejudice during the recruitment process), Mälardalens University, <http://www.diva-portal.org/smash/get/diva2:1437574/FULLTEXT01.pdf>.

<sup>339</sup> Equality Ombudsman at: <https://aktiva-atgarder.do.se/exempel/rekrytering-och-befordran/artificiell-intelligens-ai>.

<sup>340</sup> Equality Ombudsman (2021) [Kunskapsöversikt om användningen och utvecklingen av automatiserad databehandling med algoritmer \(artificiell intelligens\) och stordata och diskriminering eller risker för diskriminering](#) (Research overview of the use and development of automated data processing with algorithms (artificial intelligence) and big data and discrimination or risks of discrimination).

<sup>341</sup> See Fast, K. (2020) *Regulatory AI-Use, Ethics and Law - Swedish and Scandinavian Legal Perspectives within Taxation and Social Insurance*, Foundation for Jurisprudential Research at: <https://srf.wallenberg.org/beviljade-anslag-2020-0>.

<sup>342</sup> Swedish Government (2019) *National Approach to Artificial Intelligence*, available (in English) at: <https://www.government.se/information-material/2019/02/national-approach-to-artificial-intelligence/>.

## 12 LATEST DEVELOPMENTS IN 2021

### 12.1 Legislative amendments

There were no legislative amendments to anti-discrimination law in 2021.

### 12.2 Case law

#### LABOUR COURT

**Relevant discrimination ground(s):** Age

**Name of the court:** Labour Court

**Date of decision:** 18 August 2021

**Name of the parties:** *Saco-S Union v Sweden through the Swedish Agency for Government Employers (Arbetsgivarverket) representing the Swedish Maritime Administration (Sjöfartsverket)*

**Reference number:** *Case 38/2021*

**Address of the webpage:** <http://www.arbetsdomstolen.se/upload/pdf/2021/38-21.pdf>.

**Brief summary:** A local collective agreement for maritime pilots (*lotsar*) contains a provision that pilots will not work after the age of 60. MB was employed as a pilot by the Maritime Administration. When MB turned 60 he indicated that he did not want to take out his pension but that he wanted to continue working in accordance with the conditions that applied before he turned 60. The Maritime Administration agreed to this. The dispute that arose was that according to the Union, this action constituted a violation of the collective agreement giving the Union the right to general damages (*allmänt skadestånd*) due to the Administration's failure to find another type of employment for MB as well as violations of the collective agreement. The Maritime Administration, concerning the discrimination issue, denied liability, asserting instead that implementation of the collective agreement condition in this manner would constitute a violation of the prohibition against direct age discrimination in the Discrimination Act. Thus, due to Chapter 1, Section 3 of the Act, the agreement should have no legal effect as it restricts someone's rights under the Act. Furthermore, the condition in the agreement did not serve a legitimate purpose, and even if it did, the means were not appropriate and necessary as required by Chapter 2, Section 2 (4) concerning differential treatment on grounds of age.

The Labour Court determined that the provision, if applied, would have entailed a disadvantage due to age. The Court also held that the age limit served a legitimate purpose, at least in relation to meeting the increased needs of older people for rest and protecting the pilot and others from accidents and death (but not in relation to maritime safety in general). Furthermore, the means used were appropriate and necessary in relation to the increased need for rest. The court based its decision at least in part on an analysis of CJEU case law in determining that means used were appropriate and necessary. Thus the provision did not constitute a violation of the Discrimination Act. The Court relied on statistical evidence concerning an increased risk of accidents and deaths concerning boat pilots over the age of 60. After determining that the collective agreement was valid, the Court ordered, as a result of the violation of the collective agreement, the payment of EUR 7 064 (SEK 75 000) in general damages to Saco-S Union along with a payment of EUR 17 209 (SEK 182 700) in legal fees. There were two judges who dissented on the basis that they did not consider the age limit to be a legitimate purpose, nor were the means appropriate and necessary.

#### THE SUPREME COURT and the CJEU

**Relevant discrimination ground(s):** Ethnicity

**Name of the court:** Supreme Court

**Date of decision:** 21 December 2021

**Name of the parties:** *Equality Ombudsman (DO) v Braathens Regional Aviation*

**Reference number:** Ö 2343-18

**Address of the webpage:**

<https://www.domstol.se/globalassets/filer/domstol/hogstodomstolen/avgoranden/2021/o-2343-18.pdf>

**Brief summary:** The initial complaint in this case involved an airline passenger being taken off a plane by Braathens so he could be put through an additional and more extensive security check. He was not allowed to board the plane after that. After submitting a complaint, the DO investigated and concluded that the treatment was based on the man's external appearance, and thus a question of direct discrimination with a connection to ethnicity. A lawsuit was filed in a district court, demanding EUR 950 (SEK 10 000) in discrimination compensation as well as a request that the court ask for a preliminary ruling from the CJEU in case there were relevant problems with the DO's case. Braathens agreed to pay the amount requested, which was confirmed by the district court issuing a decision requiring the airline to pay the discrimination compensation. However, the decision of 17 October 2017 was handed down without an assessment concerning discrimination and without there being an admission of discrimination by the airline. The district court stated that Swedish procedural law, in the present situation, and with regard to the type of finding requested by the DO, cannot make such a finding once a defendant has agreed to pay the compensation demanded by the claimant. The court is not to make a separate finding concerning the substance of the underlying claims. The DO appealed due to the failure to make a finding of discrimination. The appeal court upheld the trial court decision. In May 2018 the DO appealed to the Supreme Court and asked that the Supreme Court request a preliminary ruling from the CJEU. After granting leave to appeal, the Supreme Court requested a preliminary ruling.

On 15 April 2021 the CJEU issued a preliminary ruling in case C-30/19 *DO v Braathens Regional Aviation AB*. The ruling states:

'Having regard to all the foregoing considerations, the answer to the question referred is that Articles 7 and 15 of Directive 2000/43, read in the light of Article 47 of the Charter, must be interpreted as precluding a national law which prevents a court that is seised of an action for compensation based on an allegation of discrimination prohibited by that directive from examining the claim seeking a declaration of the existence of that discrimination where the defendant agrees to pay the compensation claimed without however recognising the existence of that discrimination. It is for the national court hearing a dispute between private persons to ensure, within its jurisdiction, the judicial protection for litigants flowing from Article 47 of the Charter by disapplying as necessary any contrary provision of national law.'

The case then went back to the Swedish Supreme Court. In its decision of 21 December 2021, the Supreme Court states that after the preliminary ruling by the CJEU, the company changed its earlier position by making such an affirmation, i.e. an admission of discrimination, as required by the European Court of Justice's judgment. According to the Supreme Court, this meant that there was no longer any reason to have the violation of rights determined within the framework of a declaratory judgment. At the same time, the court writes, in a very unusual supplement to its decision, that the CJEU judgment raises a number of issues that are of such a nature that they should be handled by the legislature and not the courts through individual cases.

**Relevant discrimination ground(s):** Ethnicity

**Name of the court:** CJEU, Court of Justice of the European Union

**Date of decision:** 15 April 2021

**Name of the parties:** *Diskrimineringsombudsmannen (Equality Ombudsman – DO) v Braathens Regional Aviation AB*

**Reference number:** Case C-30/19

**Address of the webpage:**

<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62019CJ0030&from=en>

**Brief summary:** This case is the preliminary ruling that was decisive concerning the Swedish Supreme Court case summarised above. The DO asserted that a complainant had the right, under EU law, to a declaratory judgment concerning discrimination even if the defendant agreed to pay the compensation requested but failed to provide an admission of discrimination. The CJEU found that the complainant in such a case has the right to a declaratory judgment under EU law.

## THE APPEAL COURTS AND THE DISTRICT COURTS

**Relevant discrimination ground(s):** Disability

**Name of the court:** Solna District Court

**Date of decision:** 22 December 2021

**Name of the parties:** *LK v Sweden through the Chancellor of Justice*

**Reference number:** Case FT 10318-20

**Address of the webpage:** N/A

**Brief summary:** From 2011-2017, LK was a student at Söderkullaskolan in Malmö. LK has difficulties reading and writing (dyslexia) and therefore has the use of certain assistance devices and accommodations in the regular classroom situation. These assistance devices include access to an iPad with a spelling programme as well as books that are recorded. LK also has access to a speech synthesis service (a voice book user service). During the period 2 March – 18 May 2017, national exams that were to affect the grades of students were carried out for grade 6 at the school. The national exams in Swedish consisted of subtests B1 and B2 and C1 and C2. In carrying out subtests B1 and B2, LK was not allowed to use her ordinary assistance devices. However, she was allowed accommodations in the form of additional test time and testing in a special room. The school was required to follow the National Agency for Education's teacher instructions (*läroanvisningar*) regarding which aids are allowed during the national tests.

LK previously brought a lawsuit concerning among other things indirect disability discrimination and inadequate accessibility against Malmö municipality, primarily focused on the failure to provide reasonable accommodation measures that were relevant to LK's needs (i.e. her ordinary assistance devices). LK lost in the district as well as on appeal. The courts essentially held that although LK was disadvantaged, the municipality showed that its actions had a legitimate purpose, given that it was following the National Agency's instructions, and that the means were appropriate and necessary. Furthermore, the reasonable accommodation measures provided were satisfactory. The courts did not find it necessary to take into account the assertions by dyslexia specialists, civil society organisations and the National Agency for Special Needs Education that children with dyslexia read with their ears and not just their eyes or that taking away the children's ordinary aids would necessarily lead to lower results and thus lower grades – without actually testing their abilities. The Supreme Court did not grant leave to appeal. This lawsuit has essentially the same claims as the one against Malmö and basically the same evidence, except that it is now being directed against the National Agency for Education that created the teacher's instructions that led to discrimination during the national tests. LK also asserts that the teacher instructions, as applied, constitute an instruction to discriminate.

The district court, in its judgment, stated that two questions are posed by this case. Has the state, through the National Agency for Education, discriminated against LK through its instructions concerning the national tests on reading ability, and if there is thus a legal basis for requiring the state to pay discrimination compensation or damages to LK? An initial question is whether the National Agency for Education can be considered an education provider that is prohibited from discriminating in the field of education. This is required by Chapter 2, Section 5 of the Discrimination Act. The court held that the National

Agency is not an education provider within the meaning of the Act, which also means that the Agency cannot be held liable for discrimination in education. As to the question of whether LK has a right to damages because of a violation of the European Convention on Human Rights, the court pointed out that there is agreement that LK was disadvantaged due to her not being allowed to use her ordinary assistance devices and the fact that the accommodation measures provided by the instructions could not fully compensate for her disability. The issue then becomes whether there has been a legitimate purpose for not allowing the use of her ordinary assistance devices during the test and was this procedure appropriate and necessary to achieve the legitimate purpose (proportionality). Referring to e.g. the appeal court cases where this issue was examined, the court held that the National Agency for Education had legitimate reasons for the directives and instructions that applied to the tests and that they were proportionate in relation to the goals that were to be achieved with the tests.

**Relevant discrimination ground(s):** Sexual orientation

**Name of the court:** Varberg District Court

**Date of decision:** 17 December 2021

**Name of the parties:** *Equality Ombudsman (DO) v AA / Musikstudion*

**Reference number:** Case T 2717-21

**Address of the webpage:**

<https://www.do.se/download/18.56175f8817b345aa7651248/1640075231740/domtingsratt-pro-2021-7.pdf>

**Brief summary:** A man had ordered a music service from a company owned by AA in western Sweden that offers music services where customers can write and record music together with the company's owners. When the company owner realised that the customer was homosexual, the service was cancelled. A complaint was submitted to the DO and the DO filed a lawsuit on behalf of the complainant against AA for EUR 2 340 (SEK 25 000). AA admitted the violation of the Discrimination Act but opposed the requirement of paying the legal fees of the DO. According to AA, he had never opposed paying the discrimination compensation, which meant that the DO had filed the case needlessly. In turn, the DO pointed out that up to the time when the lawsuit was filed, there was no admission of a violation of the Discrimination Act. In particular, the DO noted that a complainant had a right to have the issue of discrimination determined in a court proceeding, referring to the CJEU decision in case C-30/19 *Braathens Regional Aviation AB*. According to the DO this means that the right to a judicial review is independent of whether the defendant considers that he has fulfilled the payment claim that the discrimination gives rise to. Therefore, the award of legal costs and fees should follow the general rule. The court agreed with the DO and granted judgment in favour of the DO concerning the discrimination compensation as well as the legal costs and fees.

**Relevant discrimination ground(s):** Disability

**Name of the court:** Svea Appeal Court

**Date of decision:** 19 October 2021

**Name of the parties:** *Equality Ombudsman (DO) v Svealandstrafiken AB*

**Reference number:** T 3836-20

**Address of the webpage:**

<https://www.do.se/download/18.56175f8817b345aa765e02/1634733703558/domhovratt-UPP-2018-877.pdf>

**Brief summary:** Several times AA was not allowed on the buses run by Svealandstrafiken AB.<sup>343</sup> The bus drivers had determined, incorrectly, that AA's wheelchair together with AA's weight was more than 300 kg. For safety reasons, 300 kg is considered to be the maximum weight. The DO asserted, among other things, that the failure to adequately educate bus drivers as to the weights of various wheelchairs constituted discrimination in the form of inadequate accessibility. The district court held that the bus company had not subjected

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<sup>343</sup> Svealandstrafiken AB is a corporation in which all of the shares are owned by two regional governments, Region Västmanland and Region Örebro län. Sweden is divided into 21 self-governing regions and 290 municipal governments.



AA to discrimination on the four occasions when he was not allowed to ride the bus. The court determined that the company had done what was reasonable in order to ensure that AA could ride the bus. The fact that he was denied this opportunity on four occasions due to failures in judgement did not mean that he had been disadvantaged concerning accessibility. The DO thus lost the case and was also ordered to pay Svealandstrafiken's legal costs of EUR 9 054 (SEK 92 000).

The DO appealed the case. The appeal court determined that the burden of proof concerning a claim of inadequate accessibility should be dealt with in the same way as in regard to indirect discrimination. Once a disadvantage has been shown, to avoid liability the transport company must refer to and prove that reasonable measures have been undertaken. Furthermore, the court states that, given the law, it is only in limited circumstances that references to safety reasons will allow a transport company to refuse transportation to a person with a disability. The court determined that the transport company's reference to the lack of knowledge of its personnel was not enough to overcome its burden. In fact, if that was enough, that would render the protection against inadequate accessibility illusory. The court held, contrary to the trial court, that Svealandstrafiken was liable for inadequate accessibility discrimination in relation to AA and was to pay discrimination compensation of EUR 5 600 (SEK 60 000) as well as the legal costs and fees of the DO in both the appeal court and the district court, EUR 3 164 (SEK 33 856).

**Relevant discrimination ground(s):** Disability

**Name of the court:** Solna District Court

**Date of decision:** 17 June 2021

**Name of the parties:** *Equality Ombudsman (DO) v Restaurangen*

**Reference number:** Case T 11857-19

**Address of the webpage:**

<https://www.do.se/download/18.4719c6e31791a23945f2acc/1624976881124/dom-tingsratt-pro-2019-8.pdf>

**Brief summary:** A restaurant refused to serve a glass of wine to a woman using a wheelchair. She tried repeatedly to order without success and never got an explanation as to why she was not allowed to place an order. She complained to the DO and the DO filed a lawsuit demanding that the restaurant pay EUR 2 822 (SEK 30 000) due to disability discrimination. In its judgment the court held the actions of the restaurant constituted disability discrimination. Given the evidence provided by the DO, the burden of proof shifted to the restaurant, which was unable to show that there was no discrimination. The court thus awarded EUR 2 860 (SEK 30 000) in discrimination compensation as well as EUR 2 440 (SEK 25 950) in legal fees.

**Relevant discrimination ground(s):** Ethnicity

**Name of the court:** Göteborg District Court

**Date of decision:** 26 May 2021

**Name of the parties:** *Equality Ombudsman (DO) v Region Västra Götaland*

**Reference number:** T 17336-19

**Address of the webpage:**

<https://www.do.se/download/18.4719c6e31791a23945f1ac1/1622633070650/Dom-tingsratt-PRO-2019-7-tillganqliq.pdf>

**Brief summary:** According to the complaint to the DO, the manner in which Västra Götaland, the regional government body responsible for healthcare, dealt with a man suffering from a brain haemorrhage constituted direct ethnic discrimination. This resulted in a failure to provide the necessary emergency medical care within a sufficient time period. The man died. After its investigation, the DO filed a lawsuit against Region Västra Götaland for discrimination related to ethnicity. The DO asserted that a white, non-Muslim man and his wife, of Swedish ethnic origin, would have received more favourable treatment than the deceased and his wife, who were non-white and Muslim, received. The lawsuit included a demand for the payment of EUR 57 174 (SEK 600 000) to the man's estate as well as an assessment of the discrimination incurred by the man's wife due to the failure of the care

staff to listen to her information about her husband's health. The district court held in the judgment that the downgrading of the man's condition was related to the man's ethnicity thus constituting a violation of the Discrimination Act. The court also held that the man's wife had been subjected to discrimination given the manner in which the medical staff treated her. Västra Götaland asserted, among other things, that discrimination compensation sought on behalf of the dead man constituted the type of personal damages that could not be inherited, and since he had not instituted legal proceedings prior to his death, his estate did not have a right to the compensation. The court disagreed, holding that since discrimination compensation also contains a preventive aspect, it has a purpose that is larger than that attributed to personal damages that attach to the individual. Thus the court awarded EUR 7 620 (SEK 80 000) to the man's estate and a separate payment of EUR 2 860 (SEK 30 000) to his wife. The court also ordered the payment of EUR 106 404 (SEK 1 117 202) in legal fees to the DO. The case has been appealed.

**Relevant discrimination ground(s):** Disability

**Name of the court:** Lund District Court

**Date of decision:** 19 May 2021

**Name of the parties:** *Malmö mot Diskriminering (MmD) v Sweden through Lund University*

**Reference number:** Case T 4019-19

**Address of the webpage:** N/A

**Brief summary:** Due to JS's disability, Lund University made certain decisions concerning reasonable accommodation measures concerning her studies. For exams, the examiner is responsible for providing accommodation measures. Concerning the course at hand, JS applied for a decision giving her a right to have the exam broken into two parts as well as for a general decision from the university that, due to her disability, she would have a right to have longer exams broken up into two parts taking place on separate days, with at least a day between them for recuperation. The examiner checked with the university's unit for educational support, which limited its recommendation to providing more time for the exam. The examiner determined that there were reasons for dividing up the exam into separate days, which in turn raised the question of how this should be done. A short time span between the exam days would require the creation of a special exam only for JS, which in turn would result in the loss of anonymity in grading JS's exam as well as equality between the students. According to the examiner this would also mean that the differences between JS and the other students would be so large that JS would no longer be placed in a comparable situation. The examiner therefore offered to have JS take part in the exam on the ordinary exam date, 11 January 2018, and in the second part on the ordinary re-examination date of 19 February 2018. She was also given the alternative of having three hours longer for the exam on 11 January 2018. The university determined that this possibility fulfilled the need for a reasonable accommodation. As the university did not agree to her request, JS contacted MmD, a local anti-discrimination bureau. MmD filed a lawsuit on JS's behalf stating that both the failure to provide her with a reasonable accommodation in the form of a two-day exam with a day between concerning an exam on 11 January 2018, as well as the failure to issue a general decision in this regard constituted discrimination, giving JS a right to discrimination compensation. MmD requested compensation for its legal costs as well as requesting that the legal costs be carried by the parties if MmD lost the case, in accordance with Chapter 6, Section 7 of the Discrimination Act. Lund University denied liability as reasonable accommodation measures were made available. Also, a general decision, by its nature would not constitute a reasonable accommodation under the Discrimination Act. Furthermore, there was no reason to not follow the general rules that apply concerning legal fees when a party loses a case.

Lund District Court determined that the reasonable accommodation concerning the exam on 11 January 2018 was adequate and that the failure to provide a general decision on reasonable accommodation measures did not constitute inadequate accessibility in the

manner claimed by MmD. The court also decided that the parties should bear their own legal costs.

**Relevant discrimination ground(s):** Disability

**Name of the court:** Svea Appeal Court

**Date of decision:** 12 March 2021

**Name of the parties:** *Equality Ombudsman (DO) v Sweden through the Social Insurance Agency*

**Reference number:** Case T 9308-18

**Address of the webpage:**

<https://www.do.se/download/18.4719c6e31791a23945f16a6/1622193922967/dom-hovratt-ANM-2016-1554.pdf>

**Brief summary:** A woman with a visual impairment tried to apply for parental benefits via the Swedish Social Insurance Agency's website. It turned out that the website could not be used with a screen reader, a tool that reads the information on a computer screen and then presents it in the form of, for example, synthetic speech. During the years 2015-2016, the woman had had several contacts with the Swedish Social Insurance Agency, but was told that she could only apply by asking a relative or colleague for help, or by going to a service office. After a complaint to the DO, the DO concluded that asking a relative or visiting an office were not acceptable options. Among other things, the DO pointed out that an application contains private information about finances that an individual should not have to share with outsiders. In addition, getting to a service office would have added costs both in terms of time and money. The DO asserted that the woman had been subjected to discrimination in the form of inadequate accessibility because the Swedish Social Insurance Agency did not take reasonable measures to rectify the problem. The Agency's failure to act meant that the woman was not put in a comparable situation with persons without her disability. Her application for benefits took longer than necessary and when she received them, they were greatly delayed. The DO then sued Sweden through the Swedish Social Insurance Agency due to discrimination in the form of inadequate accessibility.

In the district court judgment, the court held that the Swedish Social Insurance Agency had not taken the reasonable measures prescribed by law during the period in which the woman tried to use the website, which meant that she had been subjected to discrimination in the form of inadequate accessibility. On appeal, the appeal court reversed the district court's judgment, holding that the evidence presented was insufficient to establish discrimination under the law. The appeal court stated that if it was determined that AA had been disadvantaged due to the failure of the Social Insurance Agency to undertake measures to bring AA into a situation comparable with persons without AA's disability, it became necessary to determine which demands concerning accessibility measures it would be reasonable to place on the Agency. The appeal court determined that AA had been disadvantaged. In determining the issue of reasonableness, the court pointed out that the standard set out in the preparatory works was that where there are provisions on accessibility in law, EU regulations or other legislation, these provisions should serve as the starting point for the assessment of reasonableness, and that it should not be considered reasonable to require measures that go beyond such accessibility requirements. It was also stated that someone who has fulfilled such requirements should be able to assume that additional requirements do not follow from the Discrimination Act and that in those areas where there are no provisions on accessibility in another law, this means that the accessibility measures that may be required should be of a simpler nature (Government Bill 2013/14:198, p. 61 and 127). Concerning accessibility to the e-service provided by the Social Insurance Agency, there were guidelines indicating that Government e-services should achieve a certain international standard (WCAG 2.0). However, the Court of Appeal determined that the language of the law could not be interpreted to mean guidelines. Therefore, the reasonable accessibility measures that could be demanded at the time in question could only be of a simpler nature. As the measures needed at the time were more complex and demanding, they were not reasonable according to the appeal court. In part

this had to with the evolving technology in the field. The Supreme Court denied an application for a leave to appeal.

## ANNEX 1: MAIN TRANSPOSITION AND ANTI-DISCRIMINATION LEGISLATION

**Country:** Sweden  
**Date:** 1 January 2022

**Title of the law: The Discrimination Act (2008:567)**

No common abbreviation

Date of adoption: 05.06.2008

Entering into force: 01.01.2009

Amended by Act (2017:1128) changing the Discrimination Act

Date of adoption: 23.11.2017

Entering into force: 01.01.2018

Web link: [https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/diskrimineringslag-2008567\\_sfs-2008-567](https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/diskrimineringslag-2008567_sfs-2008-567)

Grounds protected: Sex, transgender identity or expression, ethnicity, religion and other belief, disability, sexual orientation, and age.

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).

**Title of the law: The Equality Ombudsman Act (2008:568)**

Abbreviation: No abbreviation

Date of adoption: 05.06.2008

Entering into force 01.01.2009

Amended by Act (2014:959) changing the Equality Ombudsman Act

Date of adoption: 26.06.2014

Entering into force: 01.01.2015

Grounds protected: Sex, transgender identity or expression, ethnicity, religion and other belief, disability, sexual orientation, and age.

Web link: [https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/lag-2008568-om-diskrimineringsombudsmannen\\_sfs-2008-568](https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/lag-2008568-om-diskrimineringsombudsmannen_sfs-2008-568)

Grounds protected: Sex, transgender identity or expression, ethnicity, religion and other belief, disability, sexual orientation, and age

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

**The (1962:700) Penal Code 16:8 (hate speech) and Penal Code 16:9 (unlawful discrimination by merchants)**

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: [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)

Grounds covered: race, skin colour, national or ethnic origin, religion, sexual orientation, and transgender identity or expression

Criminal law

Material scope: Access to goods and services (including housing), protection against racial and other hate speech

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: 06.04.2006

Entering into force: 06.04.2006

Amended by SFS 2016:1168, Regulation on amending regulation (2006:260) on anti-discrimination clauses in public contracts

Date of adoption: 01.12.2016

Entering into force: 01.01.2017

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.

Administrative law

Material scope: The regulation applies to Sweden's largest government agencies in their larger contracts for building and services.

Principal content: The government agencies covered shall include an anti-discrimination clause in all of their contracts for building and services 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: INTERNATIONAL INSTRUMENTS****Country: Sweden****Date: 1 January 2022**

<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>
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
ILO Convention No. 111 on Discrimination	Yes 20.06.1962	Yes 20.06.1963	No	No	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>
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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