

## **REPORT ON MEASURES TO COMBAT DISCRIMINATION**

### **Directives 2000/43/EC and 2000/78/EC**

#### **COUNTRY REPORT**

**The Netherlands**

**Marianne Gijzen**

**December 2004**

This report has been drafted for the **European Network of Legal Experts in the non-discrimination field** (on the grounds of Race or Ethnic origin, Age, Disability, Religion or belief and Sexual Orientation), established and managed by:

human european consultancy

Hooghiemstraplein 155

3514 AZ Utrecht

Netherlands

Tel +31 30 634 14 22

Fax +31 30 635 21 39

[office@humanconsultancy.com](mailto:office@humanconsultancy.com)

[www.humanconsultancy.com](http://www.humanconsultancy.com)

the Migration Policy Group

Rue Belliard 205, Box 1

1040 Brussels

Belgium

Tel +32 2 230 5930

Fax +32 2 280 0925

[info@migpolgroup.com](mailto:info@migpolgroup.com)

[www.migpolgroup.com](http://www.migpolgroup.com)

Information from previous country reports has been used.  
These full reports are available on the European Commission's website:

[http://europa.eu.int/comm/employment\\_social/fundamental\\_rights/policy/aneval/mon\\_en.htm](http://europa.eu.int/comm/employment_social/fundamental_rights/policy/aneval/mon_en.htm)

This report has been drafted as part of a study into measures to combat discrimination in the EU Member States, funded by the European Community Action Programme to combat discrimination. The views expressed in this report do not necessarily reflect the views or the official position of the European Commission.

## INTRODUCTION

### 0.1 The national legal system

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

The principles of equality and non-discrimination are captured by various realms of the law. Of importance are: the Constitution (*Article 1* of the Constitution enshrines a constitutional equality and non-discrimination guarantee), private and public employment law, *specific* additional statutory non-discrimination acts and, criminal law. Moreover since the Netherlands' constitutional system adheres to a "monist theory" of international law, international equality guarantees automatically filter into the national legal system (this is provided in *Articles 93* and *94* of the Constitution). In respect of the law-making procedure, statutory acts (*wetten in formele zin*) are the product of concerted action between the government on one hand, and both Chambers of Parliament (*Eerste en Tweede Kamer der Staten Generaal*) on the other. The Parliament may delegate legislative details to the government which may adopt governmental decrees or ministerial decrees. Private employment contracts are regulated by book 7 of the Civil Code (*Burgerlijk Wetboek*) and by specific statutory non-discrimination acts. Moreover, regulation may occur via Collective Labour Agreements (*CAO's*) per sector or per employer. The employment of most public employees is regulated by the Public Servants Act (*Ambtenarenwet*). For each sector of public employment there normally is also a Collective Labour Agreement.<sup>1</sup>

*Specifically with regard to the implementation of the Article 13 Directives into Dutch law the following is essential information for understanding the issues raised in this report<sup>2</sup>*

- *Age as a ground for discrimination*

Age is covered by a separate Act, out with the framework of the General Equal Treatment Act 1994 to be discussed hereinafter.<sup>3</sup> Implementation of the discrimination ground 'age' has been achieved by the adoption of the *Wet van 17 december 2003, houdende gelijke behandeling op grond van leeftijd bij de arbeid, beroep en beroepsonderwijs (Wet Gelijke Behandeling op grond van Leeftijd bij de Arbeid)*.<sup>4</sup> In this report this Act shall be referred to as the *Age Discrimination Act*. The Act entered into force on 1<sup>st</sup> of May 2004.<sup>5</sup> It is stressed that implementation of the ground 'age' covered by Directive 2000/78 occurred differently from that of the ground 'disability' (also covered by Directive 2000/78). Implementation of *age* has been achieved in Dutch law by a *single staged process*. By this I refer to the fact that the *bill on age discrimination* was aimed at the implementation of both the *age specific* and the

---

<sup>1</sup>See Kees Waaldijk, sexual orientation report of 24 August 2004.

<sup>2</sup>The template gives an opportunity to raise any important considerations in para. 9 of this report. However, in order to understand the matters at stake it is deemed necessary to raise these considerations at an early junction.

<sup>3</sup>See footnote 13, *infra*.

<sup>4</sup>Act of 17 December 2003, concerning the equal treatment on the ground of age in employment, occupation and vocational training (Act on Equal Treatment on the Ground of Age in Employment). *Staatsblad 2004, 30 [Law Gazette 2004, 30]*.

<sup>5</sup>The Act's entering into force has been determined by a governmental decision. See: *Besluit van 23 februari 2004, houdende vaststelling van de datum van inwerkingtreding van de Wet gelijke behandeling op grond van leeftijd bij de arbeid, Stb. 2004, 90 [Governmental Decision of 23 February 2004 concerning the establishment of a date of the entering into force of the Act on Equal Treatment on the ground of age in employment, Law Gazette 2004, 90]*.

*common provisions*<sup>6</sup> of Directive 2000/78 ‘in one go’. As will be highlighted hereinafter, this contrasts with the *modus* of implementation of *disability* which occurred via a *two staged process*.

- *Disability as a ground for discrimination*

Like *age*, *disability* has been regulated out with the general framework of the General Equal Treatment Act. Implementation of the ground *disability* occurred in contrast to *age* along the way of a *two-staged process* for reasons of political expediency.

1). *In the first stage* of implementation, the *disability specific* provisions of the Employment Framework Directive were implemented by the *Wet van 3 april 2003 tot vaststelling van de Wet Gelijke Behandeling op grond van Handicap of Chronische Ziekte*.<sup>7</sup> This Act entered into force on 1 December 2003 (except for Articles 7 and 8 of the Act which relate to ‘public transport’).<sup>8</sup> This Act shall in this report be referred to as the *Disability Discrimination Act*.

2). *In the second stage of implementation*, the *common provisions* were implemented by means of the adoption of the *Wet van 21 februari 2004 tot wijziging van de Algemene Wet Gelijke Behandeling en enkele andere wetten ter uitvoering van richtlijn 2000/43/EG en richtlijn 2000/78/EG (EG-Implementatiewet AWGB)*.<sup>9</sup> ‘Common provisions’ are provisions found in both the Employment Framework Directive and in the Race Directive which are applicable to all grounds for discrimination (including thus disability). This Act shall in this report be referred to as the *EC Implementation Act*. This Act *inter alia* complements the *Disability Discrimination Act in the first stage of implementation* in that it inserts the “*common provisions*” into that Act. The *EC Implementation Act* entered into force on the 1<sup>st</sup> of April 2004.<sup>10</sup>

- *Race, religion and belief and sexual orientation as grounds for discrimination*

The above grounds have been covered by Dutch law since 1994 by the *Algemene Wet Gelijke Behandeling*.<sup>11</sup> However, in various respects this Act had to be amended in order for it to be compatible with the requirements imposed by Directive 2000/43 and Directive 2000/78 The 1994 Act has thus been amended and complemented by the *EC Implementation Act* already

---

<sup>6</sup>*Common provisions* are those provisions which are found in both the Race and Employment Framework Directive and which are applicable to all grounds covered by these Directives. See *Memorie van Toelichting bij de EG Implementatiewet AWGB, Tweede Kamer, 2002-2003, 28 770, nr. 3, p. 7* [Explanatory Memorandum to the EC Implementation Act, Second Chamber of Parliament 2002-2003, 28 770, nr. 3, p. 7]. Examples are: the definitions of discrimination, the burden of proof, positive action, remedies, victimisation *etc.*

<sup>7</sup>Act of 3 April 2003 concerning the establishment of the Act on Equal Treatment on the grounds of disability or chronic disease, *Staatsblad* 2003, 206 [Law Gazette 2003, 206].

<sup>8</sup>The Act’s entering into force has been determined by a governmental decision. See: *Besluit van 11 augustus 2003, houdende vaststelling van het tijdstip van inwerkingtreding van de Wet gelijke behandeling op grond van handicap of chronische ziekte, Staatsblad* 2003, 329. [Governmental Decision of 11 August 2003, concerning the establishment of a date of the entering into force of the Act on Equal Treatment on the grounds of disability or chronic disease, *Law Gazette* 2003, 329].

<sup>9</sup>Act of 21 February 2004 regarding the amendment of the General Equal Treatment Act en some other Acts in order to implement Directive 2000/43/EC and Directive 2000/78/EC (EC Implementation Act AWGB). It is noted that AWGB stands for *Algemene Wet Gelijke Behandeling i.e., General Equal Treatment Act* which dates as of 1994.

<sup>10</sup>The Act’s entering into force has been determined by a governmental decision. See: *Besluit van 11 maart 2004, houdende vaststelling van het tijdstip van inwerkingtreding van de Wet van 21 februari 2004 tot wijziging van de Algemene Wet Gelijke Behandeling en enkele andere wetten ter uitvoering van richtlijn 2000/43/EG en richtlijn 2000/78/EG (EG Implementatiewet AWGB), Staatsblad* 2004, 120. [Governmental Decision of 11 March 2004, concerning the establishment of the date of the entering into force of the Act of 21 February 2004 regarding the amendment of the General Equal Treatment Act en some other Acts in order to implement Directive 2000/43/EC and Directive 2000/78/EC (EC Implementation Act AWGB), *Law Gazette* 2004, 120.

<sup>11</sup>*Algemene Wet Gelijke Behandeling* [General Equal Treatment Act] of 1994, *Stb.* [Law Gazette] 230.

referred to above. Importantly, the Dutch government has deemed it desirable to extend many of the amendments that were legally required for the grounds covered *both* by the 1994 Act *and* the Directives (*i.e.*, race, religion/belief, sexual orientation) to these grounds that are merely covered by the Dutch Act (*i.e.*, political opinion, sex, nationality and civil status).<sup>12</sup>

## **0.2 State of implementation**

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

1. *Arguably, the absence of the distinction in the Age Discrimination Act as between 'direct' and 'indirect' age distinction may fall short of the requirements under Directive 2000/78. This is especially so, given the existence of an identical 'objective justification test' for cases of direct and indirect age distinction. [See para. 2.2. under B of this report].*
2. *Definition of indirect discrimination: it is arguable that the Dutch legislator might need to bring the definition of 'indirect distinction' more in line with the Directives' requirements. [See para. 2.3. of this report].*
3. *The accumulative conditions in the harassment definition arguably fall short of the Directives' non regression clause'. [See para. 2.4. of this report].*
4. *Arguably, the Dutch government interprets the prohibition of 'instruction to make a distinction' unduly narrow. [See para. 2.5. of this report].*
5. *Arguably an unduly restrictive approach is adopted by the Dutch government as regards the 'personal applicability' of the Statutory Acts covered in this report. [See para. 3.1.3. of this report under 'sub conclusion'].*
6. *Arguably, It would have been conceptually more appropriate, had the Dutch government enshrined an exception of 'genuine occupational requirements' in the Age Discrimination Act. [See para. 4.1. of this report under subheading 'age'].*
7. *Partially reversed burden of proof – not applicable in victimisation claims. Arguably this falls short of EC requirements. [See para. 6.4. of this report].*
8. *Arguably a problem with the requirement that sanctions be 'effective', 'dissuasive' and 'proportionate'. [See para. 6.5. of this report].*

*Has the Member State taken advantage of the option to defer implementation of Directive 2000/78 to 2 December 2006 in relation to age and disability?*

The Dutch government did notify (16.12.2003) the use of three extra years for the implementation into Dutch law of the ground 'age'. However, eventually, the Age Discrimination Act entered into force on the 1<sup>st</sup> of May 2004 and thus, the requested extra time of three years has not been made use of (See however Article 18 of the GETA which enshrines a transitional provision on retirement before the age of 65).

## **0.3 Case-law**

*Provide a list of any important case-law within the national legal system relating to the application and interpretation of the Directives. This should take the following format:*

- a. *Name of the court*
- b. *Date of decision and reference number (or place where the case is reported). If the decision is available electronically, provide the address of the webpage.*
- c. *Name of the parties*
- d. *Brief summary of the key points of law (no more than several sentences)*

---

<sup>12</sup>Explanatory Memorandum to the EC Implementation Act, *supra* note 8, p. 3.

- List of *selected* cases by the Equal Treatment Commission<sup>13</sup>:

1. *Case 2004/161 of 13 December 2004*: differences in employment conditions including pay, between employees that are subsidised by *special supporting policies* for disabled people and colleague employees who are not so subsidised, do not constitute unlawful distinction under the Disability Discrimination Act. *Held: no breach. The disabled subsidised person was the applicant in this case. The respondent was the employer. Non disabled and thus non subsidised persons were better paid for work of equal value.*
2. *Case 2004/156 of 3 December 2004*: unlawful age distinction with regard to employment and working conditions. The employer's application of an age-related personnel policy (*leeftijdsbewust personeelsbeleid*) could not be objectively justified in the case at hand. The employer also failed to adequately react on the applicant's complaints of age discrimination by failing to mention the possibility of submitting a complaint of discrimination under the (internal) individual complaints procedure. Breach of employer's duty of care. *Held: breach. No objective justification since the means to achieve the aim pursued were not appropriate in the particular case at hand.*
3. *Case 2004/150 of 15 November 2004*: in this case the employer himself wished to learn from the Equal Treatment Commission, whether the employer's own rules concerning a gradual reduction of working hours for employees of 57,5 or older, and the regulation regarding extra days of holidays on the grounds of age, were in conformity with the Age Discrimination Act. In the Commission's view, both regulations could not be objectively justified. *Held: breach.*
4. *Case 2004/146 of 5 November 2004*: the respondent, a school, refuses a disabled job-applicant for the post of receptionist by reason of an alleged lack of authority. The Commission stresses that Article 17 of Directive 2000/78 explicitly states that employers cannot be obliged to hire candidates who cannot fulfil the essential requirements for the job. If a disabled person cannot perform the essential job requirements and, if a reasonable accommodation cannot alter this situation, an employer may lawfully refuse her. However, in the case at hand it did not concern a person who was not suitable for the post at hand. The Commission took the view that none of the Article 3 exceptions of the Disability Discrimination Act applied. Direct disability distinction. *Held: breach.*
5. *Case 2004/141 of 29 October 2004*: Unlawful (indirect) distinction on the grounds of age and employment duration (*arbeidsduur*) in a pension regulation which remunerates on the basis of a length of service requirement (*anciënniteit*). *Held: breach.*
6. *Case 2004/140 of 26 of October 2004*: This case was brought by an anti-discrimination bureau against an association that takes examinations for the hotel and restaurant branch (the respondent). The respondent offers 'accommodated' examinations to candidates who have a reading disability. However, €90 extra is charged for such an 'accommodated' exam. The Commission attached a broad interpretation to the notion of vocational training. Disabled persons had the right to a reasonable accommodation. In this case, bringing about a reasonable accommodation did not constitute a disproportionate burden upon the respondent. The Commission concluded unlawful distinction under the Disability Discrimination Act. *Held: breach.*
7. *Case 2004/130 of 11 October 2004*: unlawful age distinction by the refusal of the employer to offer the applicant (aged 60) a new post (after expiration of her temporary employment contract) and to re-enter into an employment relationship. In order to establish an unlawful distinction on a prohibited ground it is not necessary that this ground has been the *only reason* for the alleged distinction; it suffices if the prohibited ground has *also played a role*. Non-transparent procedures regarding the assessment of the employer's personnel, raises a presumption of unlawful distinction which in case, could not be rebutted. *Held: breach.*
8. *Case 2004-118 of 24 September 2004*: unlawful age distinction with regard to 1.) the granting of extra days of holidays to employees of 45 or older, and 2.) to employees who have more than 10, 15 or 20 years of service with the employer and 3.) with regard to the granting of reduced working hours to employees of 60 years and older. No objective justification. *Held: breach.*
9. *Case 2004/116 of 21 September 2004*: concerned the question whether the respondent makes unlawful distinction on the ground of sexual orientation and/or, on the ground of sex by excluding the two (homosexual) applicants from participation in a dancing competition organised by the respondent.

---

<sup>13</sup>All Opinions by the Equal Treatment Commission are available at [www.cgb.nl](http://www.cgb.nl) and can easily be searched on the basis of the case's reference number. The parties' names are kept anonymous in the Commission's case law.

In this case the Commission revised its earlier stance taken in *Case 1997-29* where it perceived a similar case as the one at hand, as an instance of *indirect sexual orientation distinction*. However, the Commission in the current case perceived the alleged distinction as *direct sexual orientation distinction*. According to the Commission, the refusal to let same sex partners participate in a dancing competition directly flows from taking the dominant heterosexual norm as a starting point. Therefore, the contested rule is *not neutral* notwithstanding that neither *hetero*-sexuals are allowed to dance with a partner of the same sex. In addition: direct sex discrimination: a fixed partition of the amount of women and men that may participate in the dancing competition directly refers to a person's sex. The amount of women that may participate is dependent upon the amount of men and *vice versa*. No applicable exception. *Held: breach*.

11. *Case 2004/112 of 8<sup>th</sup> September 2004. Headgear case; classical instance of indirect religious distinction in the area of goods and services. The respondent was a restaurant that conducted a policy according to which customers were prohibited from wearing headgear. As a consequence of this policy the four Muslim applicants who by reason of their belief wear headscarves were refused entry into the restaurant. Prima facie indirect religious distinction which could not be 'objectively justified'. Although the respondent's aim was legitimate, the means used to achieve it were neither appropriate nor necessary. Held: breach.*

10. *Case 2004-95 of 23 July 2004.* A director of a Roman Catholic School refused to communicate with the mother of a would-be pupil who (*i.e.*, the mother) wore a face-covering veil [niquaab]. Consequently, the pupil could not be registered with the school. The director himself wished to learn whether this was in breach of the General Equal Treatment Act. Indirect religious distinction which could not be objectively justified in the case at hand. *Held: breach*.

11. *Case 2004/90:* The respondent, an insurance company, acted in contravention of the Disability Discrimination Act in that the insurance terms specified less favourable conditions for reimbursement of dental costs for disabled compared with non disabled people. The applicant was the father of a disabled boy. The father and his family members were compulsorily insured through collective sickness insurance on the basis of the father's employment contract. The Commission firstly established its own competence to assess the case at hand by holding that it concerned here a *condition of employment*. It did so, in reference to the ECJ's case law in *Fischer (Case C 128/93 Jur 1994 p. I-4583)* and *Menauer (Case C 379/90 Jur. 2001, p. I-7275)* as well as its own established case law in the area of pension provision. It concluded a case of direct disability discrimination which could not be justified. *Held: breach*.

12. *Case 2004/67:* The employer's refusal to extend the applicant's temporary employment contract by reason of the applicant's recent medical history (the applicant had recently suffered from a heart attack) constituted unlawful direct disability distinction. The exception in Article 3 'a' of the Act [*public security and health exception*] could not successfully be relied on. Exceptions must be interpreted narrowly and the threshold to successfully invoke the Article 3 'an' exception is very high: *necessity* is required and, if a reasonable accommodation can be made to take away the risks for public security and health, the required necessity has diminished. *Held: breach*.

- Recent Age Discrimination Cases by the Dutch Supreme Court<sup>14</sup>

1. Dutch Supreme Court, 8 October 2004- Nr. C03/077HR- 16 pilots (*i.e.*, the applicants) *v.* Martinair Holland NV and the Vereniging van Nederlandse Verkeersvliegers [Association of Dutch Traffic pilots] (*i.e.*, the respondents). Principal legal question: *is compulsory retirement at the age of 56 of pilots employed with Martinair in breach of Article 1 of the Constitution and Article 26 of the International Covenant on Civil and Political Rights (ICCPR)?* The rationale for retirement of pilots at 56 is in order to guarantee 'circulation' ('doorstroming'): the idea is that any pilot's career (starting with a very costly education and ending with early retirement) is premised upon the guarantee that it will be possible for all pilots to reach the highest function level before retirement. Both the cantonal court and the district court ruled that this rationale formed an 'objective justification' (the aim of 'circulation' was legitimate; early retirement was an appropriate means to achieve it; proportionality was met). The Supreme Court affirmed this and rejected the applicants' claim.<sup>15</sup>

<sup>14</sup>The judgments are available at [www.rechtspraak.nl](http://www.rechtspraak.nl)

<sup>15</sup>The Case was decided on the basis of Article 1 of the Constitution and 26 ICCPR since the Directive and the Dutch Age Discrimination Act could not yet be relied on at the relevant material time. This was not disputed. However, a reference was indeed made to Article 16 of the Age Discrimination Act which basically says that, the prohibition of age distinction shall, until 2 December 2006, not apply to distinctions regarding termination of

2. Dutch Supreme Court, 8 October 2004, Nr. C03/133HR, applicant v. Koninklijke Luchtvaartmaatschappij NV (Royal Dutch Airlines) and the Association of Dutch Traffic Pilots (respondents). This case is equivalent to the case above under 1, both with regard to the legal question and outcome.

## **1. GENERAL LEGAL FRAMEWORK**

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

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

Since 1983 the Dutch Constitution (*Grondwet*) contains a general equality and non-discrimination guarantee. The constitutional equality guarantee is “open ended”<sup>16</sup>. *Article 1 of the Dutch Constitution reads as follows: All who are in the Netherlands<sup>17</sup> shall be treated equal in equal circumstances. Discrimination on the grounds of religion, belief, political opinion, race, sex or on any other ground shall be prohibited.*

A Parliamentary motion with a view to explicitly include ‘disability’ and ‘chronic disease’ in the list of covered grounds was introduced some two years ago<sup>18</sup>. However, notwithstanding the government’s intention to investigate options for an expansion of the Article 1 list<sup>19</sup>, no such extension has taken place thus far. The following regards the *material scope* of Article 1. The Constitutional equality guarantee is primarily addressed to the administration.<sup>20</sup> It binds the administration (and legislature) when acting (and legislating) in any area of social life including thus all areas covered by Directive 2000/43 and Directive 2000/78.

*b) Are constitutional anti-discrimination provisions directly applicable? c. Where a constitutional equality guarantee exists, can it be enforced against private actors?*

The Constitutional equality guarantee is beyond doubt directly applicable in *vertical relations*. With regard to its applicability in *private horizontal relations*, the following is said. It has been argued in legal doctrine, that Article 1 of the Constitution more easily applies in horizontal relations, in comparison with most other constitutional guarantees. However, the question as to whether or not Article 1 also applies in horizontal relations becomes less pertinent in view of the following. In order to ensure the applicability of the equality principle in private relations, the Constitutional guarantee has been elaborated in specific Statutory Non Discrimination Acts some of which have been referred to above under para. 0.1. As Waaldijk observes, the main functions of Article 1 of the Constitution are two-fold: *1. it serves to bar*

---

the employment contract as a result of having reached the – by the employment contract agreed- retirement age *lower than* the statutory retirement age, *provided* this had been agreed on before 1 May 2004 (when the Age Discrimination Act entered into force).

<sup>16</sup>The ‘open’ formulation follows from the phrase ‘or on any other ground’ which was added to the initial text of Article 1 by an amendment by the Second Chamber of Parliament *i.e.*, ‘Amendment Bakker’, *Tweede Kamer*, 1976-1977, 13 872, nr. 18. [Amendment Bakker, Second Chamber of Parliament, 1976-1977, 13 872, no. 18].

<sup>17</sup>The protective scope of Article 1 of the Constitution extends to any person on the territory of The Netherlands.

<sup>18</sup>06-12-2001, “Motie Rouvoet”, *Tweede Kamer*, 2001-2002, 28 000 XVI, nr. 63 [06-12-2001, “Motion Rouvoet”, Second Chamber of Parliament, 2001-2002, 28 000 XVI, nr. 63].

<sup>19</sup>Brief van de Minister van Binnenlandse Zaken en Koninkrijksrelaties, *Tweede Kamer*, 2001-2002, 28 000 XVI, nr. 112 [Letter of the Minister of Internal Affairs, 2001-2002, Second Chamber of Parliament, 2001-2002, 28 000 XVI, nr. 112]. It is noted that in respect of ‘disability and chronic disease’ the discussion on an (explicit) expansion of Article 1 of the Constitution to include these grounds had already taken place during the Parliamentary debates on the AWGB. See the amendment handed in by Groenman which however did not receive sufficient Parliamentary support. *Kamerstukken II* 1992/1993, 22 014, nr. 15 [Second Chamber of Parliament 1992/1993, 22 014, nr. 15].

<sup>20</sup>Kees Waaldijk sexual orientation report of 24 August 2004.



discriminatory legislation; 2. in practice, Article 1 has turned out to function as a basis upon which to adopt statutory anti discrimination laws which extend the equality principle to the realm of private horizontal relations.<sup>21</sup> This latter element is also of course achieved by the transposition of EC Equality Directive and by the UN Conventions on the elimination of Racial Discrimination and Discrimination against Women.

Formal Statutory Acts (i.e., Acts made by the government and the Parliament) may not be subjected to Constitutional review by the Courts, and thus, neither to a Constitutional ‘equality’ review. This follows from Article 120 of the Dutch Constitution.<sup>22</sup>

## **2. THE DEFINITION OF DISCRIMINATION**

### **2.1. Grounds of unlawful discrimination**

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

Sex (including pregnancy), religion, belief, political opinion, race, nationality, hetero-and homosexual orientation, civil status, discrimination on the grounds of employment duration, discrimination on the grounds of the employee’s permanent/ fixed-term contract, age and disability. Article 1 of the Constitution is ‘open-ended’.

#### **2.1.1 Definition of the grounds of unlawful discrimination within the Directives**

*a) How does national law on discrimination define the following terms: racial or ethnic origin, religion or belief, disability, age, sexual orientation?*

The terms *racial or ethnic origin, religion, belief, disability, age, sexual orientation* have not been defined by Dutch law. The law applies *symmetrically* in the sense that both persons of the dominant group (ethnic majority, religious majority, non-disabled people, young/ old people<sup>23</sup> and heterosexuals) and the ‘oppressed’ group [ethnic minority, religious minority [Muslims], disabled people, old people/ young people and homosexuals] are covered. The relevant exercise to be carried out by (semi)judicial bodies is thus not to define ‘race’, ‘religion’ *etc.*, but rather to assess whether in a particular case the alleged discriminatory behaviour amounts to an instance of unlawful race, religious *etc.*, discrimination.

*b) Where national law on discrimination does not define these grounds, how far have equivalent terms been used and interpreted elsewhere in national law (e.g. the interpretation of what is a ‘religion’)?*

With regard to the interpretation of notions such as ‘race’, ‘ethnic origin’, ‘religion’, ‘belief’, ‘disability’, and ‘sexual orientation’ the following may be said in the light of the case law and the *travaux préparatoires*:

- *Race*: Discrimination on the ground of race is prohibited by the General Equal Treatment Act. The Act does not define “race” but interpretative tools regarding the meaning

---

<sup>21</sup>*Ibid.*

<sup>22</sup>Dutch courts do however have the power to strike down parliamentary legislation that violates any directly applicable provision of international law (*viz.* Articles 93 and 94 of the Constitution).<sup>22</sup> With respect to discrimination, the Dutch courts rather frequently have to consider whether some piece of legislation violates art. 14 of the European Convention on Human Rights, art. 26 of the International Covenant on Civil and Political Rights, or any other international or European equality provision. See Kees Waaldijk, sexual orientation report of 24 August 2004.

<sup>23</sup>More than with any other ground is it difficult to establish who is the oppressed/ dominant group in the context of age discrimination. The reason for this is, as observed by Veldman, that with regard to “age” one may distinguish many different groups (50+/50-/ 25+/30-/ young people/ old people). See A. Veldman, “*Wet Leeftijdscriminatie gooit veel overhoop*” in *Sociaal Recht*, 2003, pp. 363-364, p. 363.



of this concept can be found in the Explanatory Memorandum [*Memorie van Toelichting*] to the Act.<sup>24</sup> The Explanatory Memorandum stresses that “race” is a broad concept which must be interpreted in line with the UN CERD (New York, 1966). The concept embraces: *race, colour, descent and national<sup>25</sup> or ethnic origin.<sup>26</sup> As said before, the EC Implementation Act has amended the General Equal Treatment Act in various respects. These will be considered throughout this report. However, the government has not deemed it necessary to explicitly enshrine the notion of ‘ethnic origin’ in the Act as this is sufficiently captured by ‘race’ as a concept.<sup>27</sup> This is a correct reasoning.*

The Opinions of the Equal Treatment Commission have also shed light upon the meaning of “race”. The Commission has rendered its Opinions in the light of the *travaux préparatoires* to the General Equal Treatment Act. In the assessment whether, in a particular case at hand, discrimination on the ground of *race* has occurred the Commission uses as a yardstick whether the applicant(s) belong to a *coherent group with collective physical, ethnic, geographical or cultural characteristics and which distinguishes itself from other groups by common features or a common behaviour.* (e.g., opinions 1997-119 and 1998/57). This has led the Commission to the conclusion that discrimination against roma (travellers) constitutes ‘direct distinction’ on the ground of race (e.g., Opinion 1997-119). In contrast, discrimination against asylum seekers does in itself not per se constitute direct race distinction (e.g., Opinion 1998-57 and 2001-69). Discrimination against asylum seekers most likely constitutes nationality distinction. However, if it concerns a group of asylum seekers which are all of a particular ethnic origin (e.g., a group which de facto only consists of people from Somalia) then discrimination against a person of this group may (also) constitute direct race distinction. (e.g. Opinion 1998-57).<sup>28</sup> Discrimination against Muslims can either be direct race or direct religion distinction depending on the facts of a case (e.g., Opinion 1998-57).

It is noted, that the Dutch Supreme Court did seem to conclude that discrimination of asylum seekers amounted to racial discrimination. However, it is not clear from the particular case whether this was ruled ‘in abstracto’, or, in reference to the particular case at hand.<sup>29</sup>

In opinion 1998/57, the Commission held that a claim of differential treatment of *Muslims* can be lodged both on the ground of religion and on the ground of race. The Muslims in the case at hand descended from particular areas and therefore, the “ethnic origin” aspect was determinative and a case of unlawful race discrimination was established. In opinions 1997/119, 1998/99 and 1999/65 the question was whether discrimination of *caravan dwellers* amounted to unlawful *race* discrimination. It is noted that here the Commission took also the aspect of a common *historical* background into account next to the above-indicated yardsticks. Moreover, the Commission has indicated that the perception of the group (to which the applicant(s) belong(s)) itself [a subjective factor!] plays an important role. In the opinions concerning caravan dwellers, the Commission has indicated that discrimination of caravan dwellers is not *a priori* race discrimination: this must be decided on a case by case basis.

Opinion 1998/48 concerned a Jewish applicant who claimed an instance of discrimination on the ground(s) of religion and/or ethnic origin. In reference to established case law by the Dutch Supreme Court the Commission affirmed that discrimination on the ground of Jewish

---

<sup>24</sup>Memorie van Toelichting bij de Algemene Wet Gelijke Behandeling, Tweede Kamer, 1990-1991, 22 014, nr. 3. [Explanatory Memorandum to the General Equal Treatment Act, Second Chamber of Parliament, 1990-1991, 22 014 nr. 3].

<sup>25</sup>It is to be noted that the notion of “national origin” only embraces nationality in an *ethnic* sense. Nationality in a *civic* sense is covered by the non-discrimination ground “nationality”.

<sup>26</sup>Explanatory Memorandum, footnote 26 *supra*, p. 13.

<sup>27</sup>Explanatory Memorandum to the EC Implementation Act, *supra* note 8, p. 3. Also, J.H. Gerards and A.W. Heringa, *Wetgeving Gelijke Behandeling*, Kluwer Deventer 2003, pp. 28-30.

<sup>28</sup>See L. Mulder, “Ras en Nationaliteit in de Oordelen van de Commissie Gelijke Behandeling”, *Migrantenrecht* 99/8.

<sup>29</sup>Hoge Raad [Supreme Court] 13 juni 2000, nr. 00274/99.

descent constitutes both race and religious discrimination. Discrimination on the ground of customs which are *inextricably* (my emphasis) linked up with a person's 'race' may also constitute unlawful race discrimination. A sheer prohibition of speaking a particular language such as the Turkish language has been held by the Commission to constitute unlawful race discrimination (opinion 2001-141).<sup>30</sup>

- *Religion and Belief*: In the Explanatory Memorandum to the EC Implementation Act<sup>31</sup>, the government made it clear that it wishes to stick to the term *levensovertuiging* [*philosophy of life*], rather than introducing the term *overtuiging* [*belief*], the term used by Directive 2000/78. According to the government there is no material difference between these two terms.<sup>32</sup> In addition to *levensovertuiging*, the Dutch Act also covers *religion* [*godsdiens*]. It is established case law by the Equal Treatment Commission that the right not to be discriminated against on the ground of religion incorporates *both* the right to hold a religion or belief, *and*, the right *to behave* in accordance with that religion and belief. (e.g., opinion 1997/46 and recent opinions 2004/112, 2004/148).<sup>33</sup> Moreover, acts or behaviour which form a direct expression of a person's religion or belief such as a refusal of a Muslim woman to shake a man's hand in public (opinion 1998/94) are embraced by the prohibition of religious discrimination. It follows also from the Commission's case law that an act/ behaviour which a given applicant alleges, is a *religious* act/ behaviour, needs not be considered as being *religious* by *all members* of the religious group to which the applicant belongs (e.g., opinion 2004/148, 2004/129). The notion *levensovertuiging* [*philosophy of life*] was interpreted by the Equal Treatment Commission in opinion 1997/15: it refers to a 'consistent view about life' such as is the case with Humanism or Anthroposophy. This however is not synonym of 'holding opinions about society'.<sup>34</sup> It follows from the case law, that this notion concerns a coherent set of ideas or fundamental opinions about the human existence.

- *Disability and Chronic Disease*: the concepts of 'disability' and 'chronic disease' have not been defined in the *Disability Discrimination Act*.<sup>35</sup> The government has deemed it unnecessary and undesirable to do so.<sup>36</sup> The *symmetric nature* of the Disability Discrimination Act makes, that this Act is applicable to both disabled and non-disabled people.<sup>37</sup> According to the Explanatory Memorandum to the *Disability Discrimination Act*, the concept of 'disability' [*handicap*] may embrace not only physical impairments, but also mental impairments and psychological impairments.<sup>38</sup>

In case 2004/67 the respondent *inter alia* contested, that the applicant's heart problems *in the past* constituted a "*disability or chronic disease*". The Equal Treatment Commission, in reference to the *travaux préparatoires*, stressed that a person is not only protected against disability discrimination, but, also against discrimination on the ground of a person's *assumed* (my underlining) *disability or chronic disease*. In the *travaux préparatoires* to the Disability

<sup>30</sup>The example was referred to by J.H. Gerards and A.W. Heringa, footnote 29 *supra*, p. 30.

<sup>31</sup>Footnote 8 *supra*.

<sup>32</sup>Explanatory Memorandum to the EC Implementation Act, footnote 8 *supra*, p. 3.

<sup>33</sup>Also: Explanatory Memorandum to the General Equal Treatment Act, footnote 26 *supra*, pp. 39-40. And, similarly, Memorie van Antwoord bij de Algemene Wet Gelijke Behandeling, 1990-1991, 22 014, nr. 5, pp. 39-40 [Memorandum in Reply to the General Equal Treatment Act, 1990-1991, 22 014, nr. 5, pp. 39-40].

<sup>34</sup>See also P.W.C. Akkermans and A.K. Koekkoek, De Grondwet, Een Artikelsgewijs commentaar [The Constitution, A Commentary by Article], Tjeenk Willink 1992 Zwolle, p. 110.

<sup>35</sup>Footnote 8, *supra*. The amendments in the second stage of implementation enshrined in the EC Implementation Act, have neither introduced a definition.

<sup>36</sup>Gelijke behandeling op grond van handicap of chronische ziekte, Memorie van Toelichting, Tweede Kamer, 2001-2002, 28 169, nr. 3, p. 9 [Equal treatment on the ground of disability and chronic disease, Explanatory Memorandum, Second Chamber of Parliament, 2001-2002, 28 169, nr. 3] p. 24.

<sup>37</sup>Explanatory Memorandum to the Disability Discrimination Act, footnote 38 *supra*, p. 9.

<sup>38</sup>*Ibid.*, p. 24.

Discrimination Act, the example has been mentioned of an ex cancer patient who is wrongly assumed to be chronically ill. This person *does* receive protection under the Act. In the same line of reasoning, the applicant's heart problems in case 2004/67 triggered the Act's protection against discrimination on the ground of disability/ chronic disease.

- *Age*: As said before, age has been transposed in a, from the General Equal Treatment Act separated, Act on Age Discrimination.<sup>39</sup> It is noted that the material contents of this Act will be discussed in much detail throughout this report. It is recalled that the Act entered into force on 1<sup>st</sup> of May 2004.<sup>40</sup> Again, the Act applies *symmetrically*: both young and old people are protected by the Act.

- *Sexual orientation*<sup>41</sup>: Dutch equal treatment law employs the terminology '*hetero- or homosexual orientation*', to refer to the terminology (in English) used by Directive 2000/78 i.e., '*sexual orientation*'.<sup>42</sup> The Dutch government opted for the term '*orientation*' [*gerichtheid*] rather than '*preference*' [*voorkeur*] given the vagueness of the latter term.<sup>43</sup> The term '*orientation*' expresses better than the term '*preference*', that not only *individual emotions* are covered by this notion, but also *concrete expressions thereof*.<sup>44</sup> A major other reason for the government's preference for the term '*orientation*' above '*preference*' has been that the latter term was likely to embrace '*paedophile orientation*'. The notion '*hetero- or homosexual orientation*' does cover '*bisexual orientation*' but it exclude '*transsexualism*' and '*transvestism*'. Discrimination on the ground of '*transsexualism*' or '*transvestism*' is regarded a form of *sex discrimination*.<sup>45</sup>

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

The Act on Age Discrimination makes no restrictions whatsoever to the scope of this ground for discrimination. All people are protected, both young and old people [the law applies *symmetrically*]. There is no cut-off point.

### **2.1.2. Assumed and associated discrimination**

*a) Does national law prohibit discrimination based on assumed characteristics? e.g. where a woman is discriminated against because another person assumes that she is a Muslim, even though that turns out to be an incorrect assumption.*

Discrimination on the ground of a *wrongly assumed race, religion/belief or sexual orientation, disability/ chronic disease or age*, also falls under the protective scope of the General Equal Treatment Act, the Disability Discrimination Act and the Age Discrimination Act. However, only the Disability Discrimination Act *explicitly* states this in the legal

---

<sup>39</sup>Footnote 6, *supra*.

<sup>40</sup>Footnote 7, *supra*.

<sup>41</sup>The meaning of '*sexual orientation*' in Dutch equal treatment law placed in the context of EC law has extensively been discussed by Kees Waaldijk in his sexual orientation report of 24 August 2004. The page limit of the present report allows for a brief discussion only. The discussion is largely based upon Kees Waaldijk's report.

<sup>42</sup>*Ibid.*

<sup>43</sup>J.H. Gerards and A.W. Heringa, footnote 29 *supra*, p. 33.

<sup>44</sup>*Ibid.*

<sup>45</sup>See Gerechtshof [Court of Appeal] Leeuwarden, 13 January 1995 Nederlandse Jurisprudentie 1995 nr. 243; and for example Opinions 98-12 and 00-73 of the Equal Treatment Commission. These cases are all cited by Kees Waaldijk, see footnote 43 *supra*.

definition of ‘direct distinction’ [*direct onderscheid*].<sup>46</sup> Article 1 “b” of the Act reads as follows: “*direct distinction: a distinction between persons on the ground of an actual or assumed disability or chronic disease*” [underlining is mine]. It is submitted that the word “*assumed*” has perhaps superfluously been added to the definition given that the Dutch Supreme Court and the Equal Treatment Commission have taken the view, that also the *ascription* of a discrimination ground is protected by the Equal Treatment Legislation (See opinion 02/84 of the Equal Treatment Commission with references to the judgment by the Dutch Supreme Court of 26 February 1993, NJ 1993, 507).

b) Does national law prohibit discrimination based on association with persons with particular characteristics (e.g. association with persons of a particular ethnic group)? If so, how?

With regard to the General Equal Treatment Act the following is observed. Article 1 ‘b’ of the Act enshrines the legal definition of ‘direct distinction’ on the grounds of *inter alia*, race, religion/ belief, and sexual orientation. This definition will be analysed in detail hereinafter under paragraph 2.2. The wordings of Article 1 ‘b’, do not require that the alleged distinction on the basis of (for example) race, religion/ belief, or sexual orientation, is de facto based on the race, religion/ belief, or sexual orientation, of the alleged victim.<sup>47</sup>

With regard to *disability*, the Disability Discrimination Act also offers protection to a person who is ‘in association with’ a person with a disability (e.g., the spouse of a severely disabled man). In the Parliamentary Comments to the Disability Discrimination Act, the government has explicitly stated that, in order to trigger the protection of the Act, the criterion is not so much *having a disability*, but, *being discriminated against* in comparison with a person who *does* or *does not have* a disability or chronic disease. However, in order to ‘profit’ from the right to an effective accommodation (reasonable accommodation), or from positive action measures, logically a person must be ‘disabled’ or ‘chronically ill’.<sup>48</sup> The conclusion must be that persons, who are disadvantaged by reason of their relationship with a ‘disabled person’, are most likely to be protected under the Disability Discrimination Act.

The following is worth observing in the context of the Age Discrimination Act. It shall be explained in detail throughout this report, that the Age Discrimination Act does not render the conventional distinction as between *direct distinction* and *indirect distinction* [*direct onderscheid v. indirect onderscheid*]. The rationales for this choice, will be become clear elsewhere in this report. Article 1(1) of the Age Discrimination Act enshrines the definition of *distinction* [*onderscheid*]. It reads as follows:

“*In this Act, distinction shall mean distinction on the grounds of age or on the grounds of other characteristics or conduct that results in discrimination on the grounds of age*”.

In my opinion, it does not necessarily follow from this definition that the phrase *on the grounds of age, per se* refers to the age of the affected person. By analogy to the reasoning adopted under the General Equal Treatment Act and the explicit provisions in the Disability Discrimination Act on this matter, a person who is disadvantaged by reason of her being associated with an old, or indeed young person, is most likely protected under the Age Discrimination Act. Basically, Dutch equality legislation is symmetrically formulated. In the Parliamentary comments to the Disability Discrimination Act it is stated crystal clear, that what matters is not having a disability but being discriminated against as compared with a person who does have or does not have a disability (however, if a person wishes to ‘profit’ from a reasonable accommodation/ positive action policy she must be ‘disabled’). In the Parliamentary comments to the Age Act nothing on this was said. However, clearly, the Age Discrimination Bill is also symmetrically formulated. Under the GETA the Commission has rendered

<sup>46</sup>The difference in terminology as between ‘discrimination’ (*discriminatie*) and ‘distinction’ (*onderscheid*) will be clarified hereinafter, under paragraph 2.2.

<sup>47</sup>See also Kees Waaldijk, Sexual Orientation Report of 24 August 2004.

<sup>48</sup>This logically applies also to the other mentioned grounds for discrimination.

case law in which it accepted that a person A could be discriminated against by a person B on the grounds of a person's C race. This however was in the context of instruction to make a direct distinction. Also, with regard to the ground 'sexual orientation', the Commission has ruled that distinctions based on the sex of a person's partner are regarded as distinctions on the ground of sexual orientation.<sup>49</sup> Discrimination based on association with persons on the grounds of race, religion/belief and sexual orientation is thus prohibited [but this is not explicitly provided for in the Statutory Acts].

## **2.2 Direct discrimination (Article 2(2)(a))<sup>50</sup>**

a) *How is direct discrimination defined in national law?*

### **A. Preliminary observations**

*Discrimination v Distinction [Discriminatie v Onderscheid].*

In this part of the report *direct discrimination* as a concept in non discrimination law shall be considered. The principal emphasis shall be upon *direct discrimination* in the specific Statutory non discrimination Acts covered by this report.

In order to understand Dutch non discrimination law the following is vital to bear in mind. *Article 1* of the Constitution, as well as the relevant Articles in the Criminal Code are centred on a concept of *discrimination*. In contrast, the Statutory non discrimination Acts are all centred on a *prohibition from making distinction [verbod om onderscheid te maken]*. The Statutory Acts do not therefore employ the term *discrimination*. What is the difference between *discrimination* and *distinction* in the Dutch non discrimination context? *Discrimination* in Dutch law has a highly pejorative connotation. This means, that this concept is strongly linked up with the idea of *disadvantage*. Connected to that, *discrimination* mirrors the theory of 'group justice' in the sense that the notion of *discrimination* is not a neutral notion, but one which is related to the disadvantaged position of the *group* to which a particular individual applicant belongs. In sharp contrast, the notion *distinction* is a neutral notion. It does not attach importance to the question, whether the individual applicant belongs to an 'advantaged' or 'disadvantaged' group in society (e.g., to the racial majority, or the racial minority). The explanatory memorandum to the General Equal Treatment Act<sup>51</sup>, clearly states that the prohibition of making *distinction*, is restricted to distinctions which cannot be *justified*. In other words: only unjustified distinctions are prohibited under the General Equal Treatment Act.<sup>52</sup> This same approach is followed by the Disability Discrimination Act<sup>53</sup> and the Age Discrimination Act<sup>54</sup> which equally focus upon the concept of *onderscheid*.

---

<sup>49</sup>See opinions 97-47 and 97-48; opinion 99-08; opinion 99-13.

<sup>50</sup>Given the Commission's wish to place particular emphasis on "age discrimination" I shall start off, after having raised a few general observations under heading A, with the analysis of direct discrimination in the context of the Age Discrimination Act (under heading B). I shall then deal with the notion of direct discrimination in the Disability Discrimination Act (under heading C). I shall lastly deal with the concept of direct discrimination under the General Equal Treatment Act (race, religion/ belief, sexual orientation) (under heading D).

<sup>51</sup>Footnote 26, *supra.*, p. 4.

<sup>52</sup>*Ibid.*,

<sup>53</sup>The Explanatory Memorandum to the Disability Discrimination Act has explicitly pointed out the analogy with the General Equal Treatment Act in this respect. See the Explanatory Memorandum, *footnote 39 supra.*, pp. 9-10.

<sup>54</sup>This has also explicitly been noted by the government in the Explanatory Memorandum to the Act on Age Discrimination. See *Memorie van Toelichting bij de Wet Gelijke Behandeling op grond van leeftijd bij arbeid, beroep en beroepsopleiding (Wet Gelijke Behandeling op grond van Leeftijd bij de Arbeid)*, Tweede Kamer, 2001-2002, 28 170, nr. 3., pp. 3-4. [Explanatory Memorandum to the Act on Equal Treatment on the ground of Age in Employment, Occupation and Vocational Training (Act on Equal Treatment on the ground of Age in Employment), Second Chamber of Parliament, 2001-2002, 28 170, nr., 3, pp. 3-4.

Given that Directives 2000/43 and 2000/78 employ the notion of *discrimination*, the transposition of these Directives fuelled a debate in Dutch legal circles, on the use of the correct legal terminology (*distinction* or *discrimination*?).

Indeed, the Council of State (*Raad van State*), which is the highest advisor of the government in drafting new legislation, had advised the government to abandon the neutral concept *distinction* and had shown itself advocate of using the more normative<sup>55</sup> concept *discrimination*.<sup>56</sup> The principal reason for this preference was in order to bring the terminology of Dutch anti-discrimination law in line with EC Equality Law.<sup>57</sup> However, the government has not followed this advice and it has received support for this stance from the Equal Treatment Commission.<sup>58</sup> In the Commission's view, the term *discriminatie* would wrongly give the impression that the alleged discriminator had the *intention* to discriminate and cause disadvantage.<sup>59</sup> Under both the Article 13 Directives and under the General Equal Treatment Act/ the Disability Discrimination Act/ the Age Discrimination Act, a perpetrator's intention to discriminate is not a material ingredient for the successfulness of a complaint. Thus, rather than being punitive in nature, the law's nature is *remedial*. As Waaldijk observes in his report on *sexual orientation*, the government has indicated that no problems have arisen in the case law with regard to the Dutch terminology and, that the European Commission has not pointed at any problems either.<sup>60</sup> In the government's opinion, the neutral term *distinction*, provides more legal certainty and hence, more legal protection.<sup>61</sup> The government has nevertheless promised that it would look into the question of the most appropriate terminology again.<sup>62</sup> As will be explained below in more detail, it appears that the Dutch term *distinction* is wider than the Directives' term *discrimination*. Therefore, the use of the Dutch term may be argued to be acceptable although there are also arguments that it might provide benefits to majority groups that could undermine the principle of equality rather than promote it.<sup>63</sup> <sup>64</sup> It is to be stressed that a consistent terminology across the various Acts is essential. This is especially so, in view of potential cases of so-called 'intersectional discrimination' (e.g., discrimination of a *black, disabled woman*).

---

<sup>55</sup>See Kees Waaldijk, Sexual Orientation Report of 24 August 2004.

<sup>56</sup>See: "Advies van de Raad van State en nader Rapport", *Tweede Kamer*, 2001-2002, 28 169, B, p. 5-6. [Advisory Opinion of the Council of State, Second Chamber of Parliament, 2001-2002, 28 169, B, p. 5-6] and "Implementatie van de richtlijnen inzake gelijke behandeling, Advies Raad van State en nader rapport", *Tweede Kamer*, 2001-2002, 28 187, A, p. 4-5. ["Implementation of the Directives on Equal Treatment, Advisory Opinion of the Council of State", Second Chamber of Parliament, 2001-2002, 28 187, A, p. 4-5].

<sup>57</sup>The same advice had also been given by the Interdepartmental Commission European Law [ICER i.e., *Interdepartementale Commissie Europees Recht*]. See: ICER, Implementatie Richtlijnen op grond van Artikel 13 EG Verdrag, conclusie en aanbevelingen, ICER 2001/54, p. 2. [ICER, Implementation of the Article 13 Directives, conclusions and recommendations, p. 2].

<sup>58</sup>Commentaar van de Commissie Gelijke Behandeling betreffende de Implementatie van de Gemeenschappelijke Bepalingen van de EG-Kaderrichtlijn (Richtlijn 2000/78/EG van 27 november 2000) en de EG Rassendiscriminatie Richtlijn (2000/43/EG van 29 juni 2000), p. 3. [Commentary by the Equal Treatment Commission on the Implementation of the Common Provisions of the EC Framework Directive (Directive 2000/78/EC of 27 November 2000) and the EC Racial Equality Directive (Directive 2000/43/EC of 29 June 2000), p. 3].

<sup>59</sup>*Ibid.*; See also, Marcel Zwamborn, Report on Religious Discrimination, May 2003.

<sup>60</sup>*Implementatie van de richtlijnen inzake gelijke behandeling*, Advies Raad van State en nader rapport, *Tweede Kamer*, 2001-2002, 28 187, A, p. 5. [Implementation of the Directives on Equal Treatment, Advisory Opinion of the Council of State, Second Chamber of Parliament, 2001-2002, 28 187, A, p. 5].

<sup>61</sup>Explanatory Memorandum to the EC Implementation Act, *footnote 8 supra*, p. 4.

<sup>62</sup>*Ibid.*

<sup>63</sup>These arguments are mostly strongly voiced in the work by Professor Rikki Holtmaat. See for example Professor Holtmaat's Article "Stop de inflatie van het discriminatiebegrip! Een pleidooi voor het maken van onderscheid tussen discriminatie en ongelijke behandeling" in *NJB*, 2003, nr. 25, pp. 1266-1276.

<sup>64</sup>Also, Kees Waaldijk, sexual orientation report of 24 August 2004.

### *Formal v. substantive equality*

Dutch equal treatment law largely advocates the *formal*, rather than *substantive*, equality approach. Thus, all persons and not only those belonging to the ‘disadvantaged groups’ in society are protected by the law. Unjustified *distinctions* are assessed at the level of the individual, not at the level of the group to which the individual belongs.<sup>65</sup> Moreover, positive action measures are perceived as being an exception to the central norm which dovetails with the formal equality approach. In a substantive approach, such measures would form part and parcel of the central norm.<sup>66</sup> It is however submitted that in various regards the substantive approach makes its presence felt. A-symmetry can be found in the context of ‘pregnancy’ and in certain other contexts.<sup>67</sup> The substantive approach especially permeated in the duty for the employer (or other addressees of the law) under the Disability Discrimination Act to make *effective accommodations* for disabled people. As will be discussed in detail in paragraph 2.6. of this report, the *duty to bring about an effective accommodation* forms part and parcel of the prohibition from making unlawful distinction. Thus, through this concept it is recognised that the equality principle not only combats the unequal treatment of equals, but also the equal treatment of unequal [*Thlimmenos doctrine*].<sup>68</sup>

## **B. Direct discrimination under the Age Discrimination Act**

### *a) How is direct discrimination defined in national law?*

Article 1(1) of the Act on Age Discrimination reads as follows:

*“In this Act, distinction shall mean distinction on the grounds of age or on the grounds of other characteristics or conduct that results in discrimination on the grounds of age”.*

This Article intends to implement Articles 2(1), and 2(2) under “a” (*direct discrimination*) and under “b” (*indirect discrimination*) of Directive 2000/78. In contrast to the conventional approach adopted in Dutch equal treatment legislation, no distinction has been made in the Age Discrimination Act as between *direct distinction* and *indirect distinction*. Thus, in this regard the legal approach for *age* clearly differs, compared with the other grounds for discrimination.<sup>69</sup> How has this different approach been rationalised? As the government has pointed out, Article 6 of Directive 2000/78 provides for a possibility of ‘objective justification’ for instances of *direct age discrimination*.<sup>70</sup> Given that both direct and indirect

---

<sup>65</sup>Kamerstukken *Eerste Kamer*, 1992-1993, 22 014, nr. 212b, p. 4 and nr. 212c, p. 8 [Parliamentary Documents First Chamber of Parliament, 1992-1993, 22 014, nr. 212b, p. 4 and 212c, p. 8] cited by K. Wentholt, “Het verbod om onderscheid te maken”, in: I.P. Asscher-Vonk and C.A. Groenendijk, *Gelijke Behandeling: Regels en Realiteit*, (1999) (Den Haag, SDU uitgevers), pp. 89-130, p. 91.

<sup>66</sup>T. Loenen, *Het Gelijkheidsbeginsel*, Ars Aequi Cahiers, Rechtstheorie deel 2, (1998) (Nijmegen: Ars Aequi Libri), pp. 66-67.

<sup>67</sup>See the following opinions by the Equal Treatment Commission: 98/131, 02/188, 03/47 cited by Kees Waaldijk in the Sexual Orientation Report of 24 August 2004.

<sup>68</sup>European Court of Human Rights in *Thlimmenos v. Greece*, where the Court held that “*the right not to be discriminated against (...) is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different*” (ECHR 06-04-2000). Similarly: ECJ, Case C-342/93 *Gillespie* [1996] ECR I-475.

<sup>69</sup>Explanatory Memorandum to the Age Discrimination Act, note 55 *supra*, p. 17.

<sup>70</sup>‘*Objective justification*’ as well as the other exceptions to the prohibition of age discrimination shall be dealt with in paragraph 4.7. of this report in much detail. In this paragraph, the objective justification test is only mentioned, in order to explain the absence of a distinction in the Dutch Age Discrimination Act as between ‘direct distinction’ and ‘indirect distinction’.



age discrimination may be ‘objectively justified’<sup>71</sup>, in the government’s view, any distinction between these two concepts becomes redundant.<sup>72</sup>

In its commentary on the *bill on Age Discrimination*<sup>73</sup>, the Equal Treatment Commission had advised the government to *make* the conventional schism between direct and indirect distinction within the proposed Statutory Act on Age Discrimination. In the Commission’s view, the sort of distinction (direct or indirect) that is at stake in a given case may have an impact upon the *modus* of review and upon the burden of proof.<sup>74</sup> However, the advice of the Equal Treatment Commission has not altered the government’s approach explained above.<sup>75</sup>

In the literature, the absence of the conventional schism between direct and indirect distinction has been criticised. In the view of *Grapperhaus*<sup>76</sup> for example, the absence of this distinction even results in the Dutch legislative approach, falling short of the requirements imposed upon the member states by Directive 2000/78. In *Grapperhaus*’ opinion, the objective justification test for indirect age discrimination contained in Article 2(2) ‘b’ under *i* of Directive 2000/78, is *different* from that of direct age discrimination contained in Article 6 of the Directive. It is recalled from well established case law by the European Court of Justice, that the objective justification test for indirect discrimination cases consists of three separate requirements: 1). *A legitimate aim*; 2). *Appropriateness*; 3). *Necessity*. This is now reflected in Article 2(2) ‘b’ under *i* of the Directive. *Grapperhaus* has argued that the test in Article 6 of Directive 2000/78 contains in addition to these three requirements, a *fourth* requirement, namely, the requirement that an exception to direct age discrimination must find an ‘origin’ within the national law of a member state. *Grapperhaus* extracts this fourth requirement from the phrase enshrined in Article 6 of the Directive *i.e.*, ‘*within the context of national law*’. Article 6 namely reads as follows:

“*notwithstanding Article 2(2) [which prohibits from direct and indirect discrimination and which contains the objective justification test for instances of indirect discrimination ], member states may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law<sup>77</sup>, they are objectively and reasonably justified by a legitimate aim (...), and if the means of achieving that aim are appropriate and necessary (...)*”.

In essence, *Grapperhaus* interprets the clause ‘*within the context of national law*’ as meaning that any *concrete* exception to *direct* age discrimination invoked in a given case, must find an origin within the national law (*e.g.*, within a (specific) Statutory Act outside the scope of the implementing Act ). This is however different for the ‘*genuine occupational requirement exception*’<sup>78</sup> to direct age discrimination given that this exception is separately (*i.e.*, outside

---

<sup>71</sup>*Indirect age discrimination* can be ‘objectively justified’ on the basis of Article 2(2) “b” under *i* of Directive 2000/78. Direct age discrimination can be ‘objectively justified’ on the basis of Article 6 of Directive 2000/78.

<sup>72</sup>Explanatory Memorandum to the Age Discrimination Act, note 55 *supra*, p. 17.

<sup>73</sup>Voorstel van Wet Gelijke Behandeling op grond van leeftijd bij de Arbeid, beroep en beroepsonderwijs (Wet Gelijke Behandeling op grond van Leeftijd bij de Arbeid), Tweede Kamer, vergaderjaar 2001-2002, 28170, nrs. 1-2 [Bill for an Act on Equal Treatment on the ground of age in Employment, occupation and vocational training), Second Chamber of Parliament, 2001-2002, 28170, nrs. 1-2].

<sup>74</sup>Commentaar van de Commissie Gelijke Behandeling inzake het voorstel voor een Wet gelijke behandeling op grond van leeftijd (2001) [Commentary by the Equal Treatment Commission on the Bill for the Act on Equal Treatment on the ground of age (2001)] available at [www.cgb.nl](http://www.cgb.nl).

<sup>75</sup>See also, Wet Gelijke Behandeling op grond van leeftijd, Nota naar Aanleiding van het Verslag, Tweede Kamer, 2001-2002, 28170, nr. 5, pp. 26-27. [Act on Equal Treatment on the grounds of Age, Second Chamber of Parliament, 2001-2002, 28170, nr. 5, pp. 26-27.

<sup>76</sup>F.B.J. Grapperhaus, “Het verbod op onderscheid op grond van leeftijd in arbeid en beroep”, *Ondernemingsrecht 2002-12*, pp. 356-363

<sup>77</sup>Underlining is mine. The Dutch version translates the phrase “within the context of national law” as follows: “in het kader van nationale wetgeving”. In my view this could best be translated “within the framework of national law” [the Dutch word “kader” meaning “framework”].

<sup>78</sup>As will be seen later on in this report, the *genuine occupational requirement exception* is not reflected altogether in the Act on Age Discrimination.

the scope of Article 6 of the Directive) laid down in Article 4 of Directive 2000/78.<sup>79</sup> And, the requirement that the exception must find an origin ‘within the national law’ has for certain specific exceptions been fulfilled (Grapperhaus acknowledges this), given that it is the Act on Age Discrimination itself which explicitly enshrines these exceptions (i.e., the exceptions regarding employment and labour market policies and regarding pensionable age).<sup>80</sup>

In the Parliamentary discussions, the question was raised by some MPs how the (half) open nature of the Dutch Age Discrimination Act, materialised in the possibility for objective justification for direct and indirect distinction alike, dovetailed with Article 6 of Directive 2000/78. Within the context of the debate on this particular question, these MPs took the view that according to Article 6, the objective justification must be based upon a national law (in line with a more ‘closed’ system<sup>81</sup> of non discrimination law).<sup>82</sup> However, the government did not agree with this view. Given that it has enshrined an identical test for both direct and indirect age distinction, it must be concluded that the government has not attached any material importance to the clause ‘within the context of national law’.

I submit that it is not fully clear what is meant by the phrase ‘*within the context of national law*’ and it is ultimately for the European Court of Justice to provide clarifications on this. However, it does appear to me, that this clause constitutes an *additional requirement* in the ‘objective justification test’ which conventionally in the context of instances of indirect discrimination only contains three requirements (*legitimate aim; appropriateness; necessity*). If it is accepted that a fourth requirement is indeed enshrined in the Article 6 test, then the absence of the distinction between *direct and indirect age distinction* in the Dutch Age Discrimination Act appears to be falling short of the Directive’s requirements. Attaching an identical ‘objective justification test’ to *direct and indirect distinction* within the Act on Age Discrimination appears, in reference to the above reasoning, in contravention of Directive 2000/78.

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

Of the grounds covered by this report, only *direct age distinction* may be objectively justified.<sup>83</sup> This follows from Article 7(1) under “c” of the Age Discrimination Act. This Article intends to transpose Article 6(1) of Directive 2000/78. Given that the Age Discrimination Act also contains exceptions that have explicitly been inserted by the legislator, this Act follows a ‘*half open system*’ of non discrimination law. This differs

---

<sup>79</sup>The above summary of *Grapperhaus*’ views is taken from F.B.J. Grapperhaus, “Het verbod op onderscheid op grond van leeftijd in arbeid en beroep”, *Ondernemingsrecht 2002-12*, pp. 356-363, especially at p. 359-361.

<sup>80</sup>These will be extensively dealt with in paragraph 4.7.

<sup>81</sup>With a ‘closed system’ it is meant that all discrimination grounds and all by the law permitted exceptions are explicitly listed within the Statutory Act (by the *legislator*). In such a system little scope for manoeuvre is left to the courts/semi judicial bodies. In contrast, in an ‘open system’ of non discrimination law, the Statutory Act contains an open-ended list of grounds for discrimination and, such a system gives leeway to the courts in deciding whether in a particular case the alleged instance of discrimination was justifiable. The courts generally decide this on the basis of an ‘objective justification test’. In a ‘half-open system’ some exceptions (to *direct age distinction*) are enshrined by the legislator within the Statutory Act itself, whereas other exceptions must be reviewed on the basis of the objective justification test. This is the scenario under the Dutch Age Discrimination Act.

<sup>82</sup>Parliamentary Papers 2001-2002, 28170, nr. 4 pp. 19-20, referred to also by *Grapperhaus*, footnote 78 *supra*.

<sup>83</sup>It is noted that the *Act on Prohibition of Distinction on the ground of Employment Duration* [Wet Onderscheid Arbeidsduur: WOA, of 1996] also allows for “objective justification” for instances of both direct and indirect distinction. This Act is contained within Article 7:648 of the Civil Code [*Burgerlijk Wetboek*] and in Article 125g of the Civil Servants Act [*Ambtenarenwet*]. It shall not be discussed in this report. The same holds for the Act on the Prohibition of Distinction on the ground of the employee’s temporary contract/ permanent contract (Article 7: 649 of the Civil Code).

fundamentally from the ‘closed system’ underpinning the General Equal Treatment Act and the Disability Discrimination Act. (NOTE: The only ‘open’ element in the GETA and the Disability Discrimination Act is the ‘objective justification’ for indirect distinction cases. However, as for direct distinction, all exceptions are listed within the respective Acts. This thus differs from the approach adopted in the Age Discrimination Act).

The test to be justified has been explained in detail in the previous section under sub question a.

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

Article 1(1) of the Age Discrimination Act defines *distinction* as follows:

*“In this Act, distinction shall mean distinction on the grounds of age or on the grounds of other characteristics or conduct that results in distinction on the grounds of age”.*

Article 1(1) transposes Articles 2(1) and 2(2) under ‘a’ and ‘b’ of Directive 2000/78 (regarding the concepts of direct and indirect discrimination).<sup>84</sup> Clearly, *direct discrimination* is implemented by the phrase ‘*distinction on the grounds of age*’, and *indirect discrimination* by the phrase ‘*[distinction] on the grounds of other characteristics or conduct that results in distinction on the grounds of age*’. I shall at this junction only deal with direct discrimination.

Directive 2000/78 defines direct discrimination in Article 2(2) under ‘a’ which reads:

*“direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1 [which includes the ground ‘age’].*

The Directive’s definition is much more elaborated than the Dutch definition. What can be said on the ‘comparative exercise’ and the element of ‘less favourable treatment’? In my view, ‘less favourable treatment’ implies the existence of a *detriment* [nadeelsvereiste] and of a *comparative exercise* [vergelijkbaarheidstoets]. With regard to the detriment part, the case law by the Equal Treatment Commission indicates that an applicant must, in order for him/her to successfully lodge a complaint, have suffered a sufficiently *measurable* (meetbaar) and *existing* (werkelijk) *detriment*. Moreover, the alleged detriment must be *protected by law* (door het recht beschermd belang)<sup>85</sup> With regard to the comparative exercise, I submit the following. The sub elements contained in the Directive’s definition i.e., *one person, treated, less favourably than another, is/has been/ would be treated, comparable situation* may, if an extensive reading is adopted, all be embraced by the single word *distinction*. However, this would really depend on the interpretation by the courts and the Equal Treatment Commission. In my view, the Dutch definition leaves it in a state of uncertainty whether or not a past or a hypothetical comparator is permitted for. It is not clear from the legal text, or from the Explanatory Memorandum, with whom an alleged victim of direct age distinction is to be compared. In order to avoid any misunderstandings, it would have been better had the Dutch government explicitly incorporated the sub elements laid down in the Directive’s definition, in the Dutch definition too.<sup>86</sup> However, a broad interpretation of the Dutch definition could in

---

<sup>84</sup>Explanatory Memorandum to the Age Discrimination Act, note 55 *supra*, p. 4.

<sup>85</sup>See the detailed analysis by J.H. Gerards, “Het toetsingsmodel van de CGB voor de beoordeling van indirect onderscheid”, in: *Gelijke Behandeling: Oordelen en Commentaar*, Kluwer 2003, pp. 77-95, and, J.H. Gerards and A.W. Heringa, *Wetgeving Gelijke Behandeling*, Kluwer Deventer 2003, pp. 43-44.

<sup>86</sup>See Kees Waaldijk “Combating sexual orientation discrimination in employment: legislation in fifteen EU Member States, Report of the European Group of Experts on Combating Sexual Orientation Discrimination.

my view guarantee that all the elements enshrined in the Directive's definition of direct discrimination are duly covered.

The following point is worth noting. The Age Discrimination Act's definition of *direct distinction* only mentions the word '*distinction*', whereas its counterpart definitions in the General Equal Treatment Act and the Disability Discrimination Act use the wording '*distinction between persons*' (Article 1 'b' of both last-mentioned Acts). I suggest that this slight difference in legal drafting might be explained as follows. It follows explicitly from the Explanatory Memorandum to the Age Discrimination Act, that *direct age distinction*, might not only occur if a *person's age* forms the basis of a given decision but also where *age categories* are employed in a given decision-making process.<sup>87</sup> In fact, then a distinction is made between *groups of persons*, rather than between *persons*.

A last question is *when* a distinction is a distinction *on grounds of age*? It is established case law from the Equal Treatment Commission that the relevant ground(s) (e.g., *age*) for an alleged distinction, need(s) not be the *sole reason* for that distinction. It suffices for establishing a distinction *on the grounds of age*, that *age* has been a material factor in making up for the alleged distinction. Or in the wording of the Commission: "[it suffices that the ground at stake] *has also played a role*".<sup>88</sup>

### ***C. Direct discrimination under the Disability Discrimination Act***

#### *a) How is direct discrimination defined in national law?*

Article 1 of the Disability Discrimination Act reads as follows:

*In this Act the following definitions shall apply:*

- a. Distinction: direct and indirect distinction as well as the instruction to make distinction;*
- b. Direct distinction: distinction between persons on the ground of an actual or an assumed disability or chronic disease;*
- (..)*

What was said above with regard to direct age distinction is also applicable here. The Directive's definition (Article 2(2) 'a') is much more elaborated and explicitly enshrines the possibility of a hypothetical comparison. Once again however, a broad interpretation of the clause *distinction between persons* could guarantee that all the elements of the Directive's definition are complied with. However, an explicit coverage of these elements in the definition of *direct distinction* in the Disability Discrimination Act would have been more accurate in my view.

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

Direct disability discrimination cannot be 'objectively justified' given that the Disability Discrimination Act rests upon a 'closed system' of non discrimination law.

---

[Final Version, offered to me by Dr. Kees Waaldijk, available with the author]. Waaldijk has come to similar conclusions on the basis of his analysis of "direct discrimination" in the context of sexual orientation law.

<sup>87</sup>For example, the governmental decree on 'dismissal' (*Ontslagbesluit*) employs age categories in a situation of collective dismissal for the purpose of determining the order of who should be dismissed first.

<sup>88</sup>See the recent opinion by the Equal Treatment Commission concerning an instance of age discrimination, *opinion 2004-130* and in which the Commission refers to other opinions in which this same stance is reflected (e.g., opinions 1995-15; 1999-34; 2001-113, RN 2002, 1507, annotated by M.S.A. Vegter and 2004-26).

c) *If the definition is based on 'less favourable treatment' does the law specify how a comparison is to be made?*

It is unclear from the definition of direct distinction in the Disability Discrimination Act, *with whom* (with *non disabled people*? Or perhaps also with *other disabled people* (with the same/a comparable/a different disability?)) a disabled person must be compared in case of an alleged instance of direct distinction. The question is neither further clarified by an examination of the Explanatory Memorandum to the Act.<sup>89</sup> Like the Age Discrimination Act and the General Equal Treatment Act, the Disability Discrimination Act applies symmetrically: both those who have experienced disability on the grounds that they have *e.g.*, a disability and those who have experienced differentiation on the grounds that they have *e.g.* no disability, are covered.<sup>90</sup>

#### **D. Direct discrimination under the General Equal Treatment Act (inter alia: race, religion and belief, sexual orientation)**

a) *How is direct discrimination defined in national law?*

Article 1 of the General Equal Treatment Act reads as follows:

*In this Act and in the provisions based upon this Act the following definitions shall apply:*

a. *Distinction: direct and indirect distinction, as well as the instruction to make a distinction;*

b. *Direct distinction: distinction between persons on the grounds of religion, belief, political opinion, race, sex, nationality, hetero-or homosexual orientation or marital status;*

(...)

In short, what has been suggested above in regard to direct age and disability distinction applies *eo ipso* with regard to the definition of direct distinction in the General Equal Treatment Act. Obviously, for the ground 'race' any EC standards flow from Directive 2000/43 and not from Directive 2000/73 (which has in the above been referred to within the context of age and disability discrimination law).

b) *Does the law permit justification of direct discrimination generally, or in relation to particular grounds? If so, what test must be satisfied to justify direct discrimination? (See also 4.7.1 below).* Direct distinction cannot be 'objectively justified'. The General Equal Treatment Act reflects a 'closed system' of non-discrimination law.

c) *If the definition is based on 'less favourable treatment' does the law specify how a comparison is to be made?*

What has been suggested in the context of direct age distinction under question c, is also applicable here.

### **2.3 Indirect discrimination (Article 2(2)(b))<sup>91</sup>**

#### **A. Indirect discrimination under the Age Discrimination Act**

a) *How is indirect discrimination defined in national law?*

---

<sup>89</sup>Explanatory Memorandum to the Disability Discrimination Act, note 39 *supra*.

<sup>90</sup>Explanatory Memorandum to the Disability Discrimination Act, note 39 *supra*, p. 9.

<sup>91</sup>Like is done in paragraph 2.3. on direct discrimination, the template questions shall be dealt with firstly, in the context of the Age Discrimination Act (under Heading A), secondly, in the context of the Disability Discrimination Act (under Heading B), and thirdly, in the context of the General Equal Treatment Act (under Heading C). This is for reasons of clarity.

As outlined earlier on in this report Article 1(1) of the Age Discrimination Act reads as follows:

*“In this Act, distinction shall mean distinction on the grounds of age or on the grounds of other characteristics or conduct that result in discrimination on the grounds of age”.*

As we have seen already, *indirect discrimination* is mirrored in the phrase *“distinction (..) on the grounds of other characteristics or conduct that results in discrimination on the grounds of age”*.<sup>92</sup>

Directive 2000/78 defines indirect discrimination as follows in Article 2(2) under “b”:  
*“Indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons unless (...)”*

A comparative analysis with the Dutch definition warrants the following comments:

1.) The Directive’s definition unequivocally enshrines a *detriment element* as follows from the phrase *at a particular disadvantage*. This is not the case with the Dutch definition. However, as has been explained in detail above in *paragraph 2.2.*, the Equal Treatment Commission’s case law indicates that a *measurable and existing detriment* which is *protected by law* is called for in the establishment of a claim. Even if this did not follow from the case law, the Dutch definition would still be in conformity with that of the Directive, since the former would then adopt a wider standard than the latter. This is permitted since an EC Directive only lays down *minimum standards*. (See also Article 8(1) of Directive 2000/78).<sup>93</sup>

2.) It might be argued that under the Directive’s definition of indirect discrimination, an applicant can more easily establish a case of indirect discrimination than under the Dutch definition. Under the Directive’s definition, an applicant needs to establish that the group to which the applicant belongs (*e.g.*, persons between over 60 years old) would be put *at a particular disadvantage*. In Dutch law, an applicant must in most instances establish a case of indirect distinction on the basis of numbers and statistics. Although facts of common knowledge can be forwarded to support statistical evidence, these are generally not accepted as an exclusive means of evidence. Only in very obvious cases does the ETC *not* require statistical numbers or ‘common knowledge facts’.<sup>94</sup>

---

<sup>92</sup>In paragraph 2.2. section **B**, under question *a*, it has been explained that no clear-cut distinction has been made in the Age Discrimination Act as between *direct* and *indirect* distinction. For reasons extensively dealt with before, this is in my view in contravention of the requirements imposed by Directive 2000/78. Similarly, the absence of the conventional schism has been criticised by the Equal Treatment Commission and in academic literature.

<sup>93</sup>See also Consideration 28 of Directive 2000/78. And as for Directive 2000/43, Article 6(1) and Consideration 25 of the Directive.

<sup>94</sup>J. Gerards, “Het toetsingsmodel van de CGB voor de beoordeling van indirect onderscheid”, in: *Gelijke Behandeling: Oordelen en Commentaar*, Kluwer 2003, pp. 77-95, pp. 81-83.

3.) As has been observed by Waaldijk<sup>95</sup>, the Directive's wording *apparently neutral provision, criterion or practice*, is (problematically) reduced in the Dutch definition to *other [i.e., other than age] characteristics or conduct that result in discrimination on the grounds of age*. The difference seems to be that whereas under the Dutch definition, a prohibited distinction can only be the result of a *characteristic or conduct* that makes *already* a certain distinction on the basis of a non-prohibited personal status, under the Directive indirect discrimination might also arise out of a general (non distinguishing) provision or practice.<sup>96</sup> This indeed appears to be falling short of the Directive's requirements. Moreover, it is not quite clear why the Dutch definition speaks of *characteristics or conduct*, whereas the Directive makes use of the wording *apparently neutral provision, criterion or practice*. In all, it is recommended that the Dutch legislator bring the definition of 'indirect age distinction' more in line with the definition of indirect discrimination in Directive 2000/78.

4.) In order to be complete, it is submitted that with regard to *indirect distinction*, the focus is upon the *effects* of the contested 'behaviour'. It is thus irrelevant whether or not the alleged perpetrator had the intent to discriminate.<sup>97</sup> This is both recognised in EC and Dutch law.

*b) What test must be satisfied to justify indirect discrimination?*

Much has been said on this in paragraph 2.2. above in this report under **B**, sub question *a*. Basically, Article 7(1) under 'c' of the Age Discrimination Act provides that:

*7(1) The prohibition of distinction (i.e., direct and indirect distinction as well as the instruction to make distinction ) does not apply if the distinction:*

*(...)*

*c.) is otherwise objectively justified by a legitimate aim and the means to reach that aim are appropriate and necessary.*

This clearly reflects the conventional stance taken by the European Court of Justice in indirect discrimination cases and which has been followed by the Equal Treatment Commission. Article 7(1) under 'c' of the Age Discrimination Act mirrors the core material elements of the objective justification test in indirect discrimination cases as laid down by Article 2(2) "b" under *i* of Directive 2000/78.

*c) Is this compatible with the Directives?*

Yes, it is (see under *b. supra*).

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

No, this is not specified by the law, or by the Explanatory Memorandum to the Age Discrimination Act.<sup>98</sup> The intrinsic nature of *indirect discrimination* makes however that the

---

<sup>95</sup>Kees Waaldijk "Combating sexual orientation discrimination in employment: legislation in fifteen EU Member States, Report of the European Group of Experts on Combating Sexual Orientation Discrimination. [Final Version, offered to me by Dr. Kees Waaldijk, available with the author]. Waaldijk has made the argument to follow, in the context of the concept of indirect sexual orientation discrimination. However, it can be extrapolated to the current discussion on indirect age distinction.

<sup>96</sup>*Ibid.*

<sup>97</sup>I.P. Asscher-Vonk, "Towards one Concept of Objective Justification" in: T. Loenen and P.R. Rodrigues, *Non-Discrimination Law – Comparative Perspectives*, (1999) (The Hague: Kluwer Law International) p. 39-51, at p. 43.

<sup>98</sup>Footnote 55 *supra*.



comparison is to be drawn at a *group level*, rather than at the individual level (as is the case with *direct discrimination*). In deciding whether a given group is placed at a particular disadvantage in comparison with another group, *statistical evidence* is considered of prime importance. As observed by Gerards and Heringa, the Equal Treatment Commission (as well as the Dutch Supreme Court in the very few cases it has rendered on the matter) tends to analyse ‘*disproportionate impact*’ in indirect discrimination cases by looking at *percentages*, rather than by looking at absolute numbers.<sup>99</sup> Facts of common knowledge are taken into account, either in the absence of relevant statistics or, to support such statistics.<sup>100</sup> As said, generally speaking facts of common knowledge are not accepted as an exclusive means of evidence. Only in plainly clear cases does the Equal Treatment Commission *not* require statistical numbers or ‘common knowledge facts’.<sup>101</sup>

## ***B. Indirect discrimination under the Disability Discrimination Act***

### *a) How is indirect discrimination defined in national law?*

Article 1 ‘c’ of the Disability Discrimination Act defines *indirect distinction* as follows:

*“indirect distinction: distinction on the ground of other qualities or acts than those meant by indent “b” which result in direct distinction”. [Indent b defines ‘direct distinction’ as follows: distinction between persons on the ground of an actual or an assumed disability or chronic disease” (Article 1 ‘b’ of the Disability Discrimination Act)].*

It is (perhaps superfluously) recalled that Article Article 2(2) under “b” of Directive 2000/78 defines the concept as follows: *“Indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons unless (...)”*

A comparison induces me to make the following comments. All what has been said above in the ‘*comparative analysis*’ of indirect age distinction, also applies here. However, an additional comment is the following. According to the Directive’s definition, an applicant who claims an instance of indirect disability discrimination must *have a particular disability*. This could cover a *past/ future disability as well as discrimination of a person whose e.g., family-member is disabled*. That an applicant ‘*must have a particular disability*’, does not explicitly follow from the wordings of the definition in the Act on Disability Discrimination. *It may thus be argued that the Dutch Act provides greater protection than the Employment Framework Directive in this respect*. Obviously, this is perfectly permissible, as the Directive only enshrines minimum requirements.

### *b) What test must be satisfied to justify indirect discrimination?*

Article 3(2) of the Disability Discrimination Act, after having been amended by the *EC Implementation Act*,<sup>102</sup> explicitly enshrines all the elements of the objective justification test

---

<sup>99</sup>See J.H. Gerards and A.W. Heringa, *Wetgeving Gelijke Behandeling*, Kluwer Deventer 2003, pp. 45-49, especially at p. 46-47 with references to the case law.

<sup>100</sup>*Ibid.*

<sup>101</sup>J. Gerards, “Het toetsingsmodel van de CGB voor de beoordeling van indirect onderscheid”, in: *Gelijke Behandeling: Oordelen en Commentaar*, Kluwer 2003, pp. 77-95, pp. 81-83.

<sup>102</sup>In the first stage of implementation, Article 3(2) of the Disability Discrimination Act only provided that ‘*the prohibition of distinction shall not apply with regard to indirect distinction that is objectively justified*’. In the second stage of implementation, *Article II, under C subsection 2* of the *EC Implementation Act* makes an amendment to Article 3(2) of the Disability Discrimination Act (of the first stage) with the effect, that in its amended format, all elements of the ‘objective justification test’ are explicitly reflected.

as laid down in Article 2(2) 'b' under *i* of Directive 2000/73. (*legitimate aim; appropriateness; necessity*).

*c) Is this compatible with the Directives?*

Yes, it is.

### ***C. Indirect discrimination on the grounds of race, religion/belief and sexual orientation covered by the General Equal Treatment Act***

*a) How is indirect discrimination defined in national law?*

Article 1 under 'c' of the General Equal Treatment Act enshrines the following definition of indirect distinction:

*“indirect distinction: distinction on the ground of other qualities or acts than those meant by indent “b” (i.e., (inter alia) religion, belief, (..) race, (...) hetero-or homosexual orientation (...)) which result in direct distinction”.*

All what has been said above under sub question *a* in regard to the grounds *age and disability*, applies *eo ipso* at this junction. (Obviously, for 'race' the EC requirements flow from Directive 2000/43 and not from Directive 2000/78).

*b) What test must be satisfied to justify indirect discrimination?*

Article 2(1) of the General Equal Treatment Act as amended by the *EC Implementation Act*, enshrines an objective justification test for indirect distinction cases which fully mirrors the well-known elements of '*legitimate aim*', '*appropriateness*', '*necessity*'.<sup>103</sup>

*c) Is this compatible with the Directives?*

Yes, it is.

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

*a) How is harassment defined in national law? Include reference to criminal offences of harassment insofar as these could be used to tackle discrimination falling within the scope of the Directives.*

*Pre-implementation* of Directives 2000/43 and 2000/78 'harassment' was not defined as a concept in Dutch *equal treatment legislation*.<sup>104</sup> In order to circumvent this lacuna, the Equal Treatment Commission attached a broad meaning to the notion of 'employment conditions' (which is one of the areas with regard to which the prohibition from making distinctions applies). It follows from the Commission's case law that 'employment conditions' also covers 'working conditions'. In essence, the Commission's case law provides that *the right to*

---

<sup>103</sup>Before the amendments brought about by the *EC Implementation Act*, these 3 elements of the test had not been explicitly enshrined. The amendment was made by *Article 1, under E subsection 1* of the *EC Implementation Act*, which amended Article 2(1) of the General Equal Treatment Act 1994. However, the Equal Treatment Commission anyhow adhered to these 3 elements in its case law, also before implementation of the Article 13 Directives.

<sup>104</sup>Outside the realm of equal treatment legislation, 'harassment', defined as 'sexual intimidation' has been enshrined since 1994 in the Act on Working Conditions (*Arbeidsomstandighedenwet 1998 which amended the 1994 version in certain regards*, Staatsblad 1999, 184 [Law Gazette 1999, 184]. It has been defined in the Schools Inspectorate Act of June 2002 [Wet op het Onderwijstoezicht Staatsblad 2002, nr. 387 [Law Gazette 2002, nr. 387]. See Kees Waaldijk "Combating sexual orientation discrimination in employment: legislation in fifteen EU Member States, Report of the European Group of Experts on Combating Sexual Orientation Discrimination. [Final Version, offered to me by Dr. Kees Waaldijk, available with the author].

*equality and non discrimination in regard to ‘employment conditions’ including ‘working conditions’, encapsulates a person’s right to be freed from ‘ground-related’ harassment in the workplace.*<sup>105</sup> It follows also from the Commission’s case law that the employer’s duty of care brings with it that he must have in place an *adequate complaints mechanism*.<sup>106</sup>

*Post-implementation* of the Directives, Dutch equal treatment law explicitly enshrines a concept of ‘harassment’. Article 1a of the General Equal Treatment Act has been inserted by the *EC Implementation Act* and reads as follows: *Article 1a:*

1. *The prohibition of distinction laid down in this Act shall also include a prohibition of harassment.*
2. *Harassment as referred to in the first subsection shall mean conduct related to the characteristics or behaviour as referred to in Article 1 under “b” (i.e., the grounds covered by the Act including race, religion, sexual orientation ) and, which has the purpose or effect of violating the dignity of a person and (my emphasis) creating an intimidating, hostile, degrading, humiliating or offensive environment.*
3. *Article 2, Article 5 subsections 2-6, Article 6a subsection 2 and Article 7 subsections 2 and 3 shall not apply to the prohibition of harassment contained in this Act. (These contain exceptions to the central norm. Harassment is per se prohibited ).*

Counterpart provisions are laid down in Article 1a of the Disability Discrimination Act (this was inserted by the *EC Implementation Act*) and in Article 2 of the Age Discrimination Act. The provision that age-related harassment can never be justified is laid down in Article 7(2) of the Age Discrimination Act. The Dutch definition does not mention the element of ‘unwanted’ (before the word ‘conduct’) as the Directives do. As indicated by Waaldijk, this omission does not lead to contravention of the EC standards: 1. national definitions of harassment are allowed for by the Directives; 2. the absence of ‘unwanted’ only amplifies the definition; 3. the burden of proof is lighter for the victim which was the goal pursued by the omission<sup>107</sup>. Moreover, the difficulty of ‘objectivity’ or ‘subjectivity’ of the test is left in the hands of the (semi)judiciary.

It follows from the above Dutch definition, that cumulative rather than alternative conditions must be met. The Equal Treatment Commission had advised the government to opt for alternative conditions but this advice has not been taken on.<sup>108</sup> It follows from the Commission’s case law pre implementation, that the infringement of a person’s dignity in itself was sufficient to establish a case of harassment (*i.e.*, of unlawful distinction with regard to the ‘employment conditions’). Thus, discriminatory/ harassing insults were by themselves sufficient ground to make out a case. In the new definitions, the alleged victim must also prove the element of ‘creating an intimidating, *etc.* environment’. Therefore in my view, the accumulative conditions appear to fall short of the Directives’ ‘non regression clause’.<sup>109</sup>

b) Is harassment prohibited as a form of discrimination?

Yes, it is. See under sub question *a* above.

---

<sup>105</sup>See inter alia the following Opinions of the Equal Treatment Commission: 96/88, 97/82, 97/91, 2001/131, 2003/138.

<sup>106</sup>I.P. Asscher Vonk and W.C. Monster, *Gelijke Behandeling bij de Arbeid*, Kluwer Deventer 2002, p. 165. Also, opinion 99/48 25 May 1999 *AB 1999*, nr. 353.

<sup>107</sup>See Parliamentary Papers, Second Chamber of Parliament, 2002-2003, 28 770, nr. A, pp. 14-15.

<sup>108</sup>Commentary by the Equal Treatment Commission on the implementation of the common provisions of the Employment Framework Directive and the Racial Equality Directive, pp 1-5, p. 3 available at [www.cgb.nl](http://www.cgb.nl)

<sup>109</sup>See also: D. Houtzager and N. Bochhah, “onderscheid op grond van ras bij de arbeid: nieuwe ontwikkelingen”, 2004, 7/8 *Sociaal Recht*, pp 272-278, p. 274.

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

The 1994 Act on Working Conditions enshrines a prohibition of *sexual harassment* and of *aggression and violence* at the workplace. The former prohibition is of help for women (and men) but also for *homosexual women and men*. The latter prohibition offers protection to other groups including racial and religious minorities, disabled people and older/young people. The latter prohibition is formulated broadly: it does not only offer protection against *ground-related* harassment but also against mobbing more generally. Harassment may also be litigated under the provisions of private employment law and tort law. This however goes beyond the scope of this template report.

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

*Does national law prohibit instructions to discriminate?*

Prior to implementation of the Article 13 Directives a prohibition of the *instruction to make distinction* was indeed *implied* within the General Equal Treatment Act.<sup>110</sup> However, in order to avoid any misunderstanding, implementation of the Article 13 Directives has meant that Article 1 under 'a' of the Act was complemented with the phrase '*as well as the instruction to make distinction*'. In its post-implementation format, Article 1 under 'a' reads:

*Article 1*

*In this Act the following definitions shall apply*

*a. Distinction: direct and indirect distinction, as well as the instruction to make distinction.*

(...).

The counterpart provisions in the Age and Disability Discrimination Acts are *Article 1(2) and Article 1 under 'a' respectively*.<sup>111</sup>

The following comments are worth mentioning. It has been indicated by the government that the notion of *instruction (opdracht)*, refers to '*opdracht*' in the meaning of Article 7:400 of the Dutch Civil Code (*Burgerlijk Wetboek*). This Article regulates the law on *contract for the provisions of services ('overeenkomst van opdracht')*.<sup>112</sup> In the explanatory memorandum to the Age Discrimination Act, the government mentions the example of an employer who instructs a recruitment agency to select for a given job only persons under the age of 30 (in absence of a sound justification for this). According to the explanatory memorandum, in a scenario such as the one given, both the person who *gives* the contested instruction and the person who *carries out the instruction*, act in contravention of the central norm. If the 'recipient' of the instruction refuses to abide by it and as a consequence thereof, she suffers damage she can hold the person who *gave* the instruction liable for that.<sup>113</sup>

The Equal Treatment Commission has suggested that the prohibition of 'instruction to make distinction' should also include a prohibition of the *passive toleration* of an existing discriminatory situation or act.<sup>114</sup> Regrettably the Commission's advice in this regard has not been followed by the government. The latter, unconvincingly, defended its own stance by saying that an *instruction to make distinction* implies *active* rather than *passive* behaviour. In my view, this merely mirrors a narrow interpretation of the verb *to instruct*. The government nevertheless has indicated that the toleration of existing discriminatory conduct or acts might nevertheless be embraced by the prohibition of making (direct or indirect) *distinction*.<sup>115</sup>

<sup>110</sup>Explanatory Memorandum *EC Implementation Act*, footnote 8 *supra*, p. 7.

<sup>111</sup>The Disability Discrimination Act was complemented with a prohibition of "*instruction to make distinction*" by the *EC Implementation Act* in the second stage of implementation.

<sup>112</sup>Explanatory Memorandum to the Age Discrimination Act, note 55 *supra*, p.18.

<sup>113</sup> *Ibid.*

<sup>114</sup>*Advice by the Equal Treatment Commission*, 2001/03, 30 May 2001, p. 6 and 2001/04, 13 June 2001, p. 4.

<sup>115</sup>Explanatory Memorandum to the Age Discrimination Act, note 55 *supra*, p.18.

A last and important point is the following. According to the government's explanation on the issue of '*instruction to make distinction*', an instruction which has been given *within the employment relationship* (e.g., the scenario where a director instructs a member of the personnel department to merely recruit (e.g.,) youngsters) is *not covered* by the prohibition of *instruction to make distinction*. In the government's view, such a scenario is embraced by the *exercise of authority* by the employer over the employee within the employment relationship (*gezagsuitoefening in het kader van de arbeidsovereenkomst*). Any *distinction* that might occur within this *exercise of authority* can only be attributed to the *employer*, to the exclusion of the *employee*.<sup>116</sup> This reasoning might fall short of what the Directives had in mind with the prohibition of *instruction to make distinction*. In my view, the Dutch government interprets the prohibition of *instruction to make distinction* unduly narrow.<sup>117</sup>

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

a) *How does national law implement the duty to provide reasonable accommodation for disabled people? In particular, specify when the duty applies, the criteria for assessing the extent of the duty and any definition of 'reasonable'. e.g. is the availability of financial assistance from the State taken into account in assessing whether there is a disproportionate burden?*

Article 2 of the Disability Discrimination Act reads as follows: "*The prohibition of making distinction also includes the duty for the person to whom the prohibition is addressed, to make effective accommodations in accordance to the need for this, unless doing so would constitute a disproportionate burden upon her*".

In most cases, 'the person to whom the prohibition is addressed will be the employer. Article 2 is an *asymmetric* provision. It implements the reasonable accommodation requirement found in Article 5 of Directive 2000/78. Instead of the term *reasonable* which is the term used in Article 5 of the Directive, Article 2 of the Disability Discrimination Act employs the term *effective*. In the government's view, the latter term reflects better than the term *reasonable*, that an accommodation must have the pursued *effect*.<sup>118</sup>

'Effective accommodation' is not defined by Article 2 of the Act. However, some interpretative guidance is given by the Explanatory Memorandum. Whether a given accommodation is *effective* must be assessed on the basis of a *two-staged test*. Firstly, it must be established that the accommodation is *appropriate* (does it enable the disabled person to do the job?) and *necessary*. Secondly, if both of these questions have been answered in the affirmative, the '(dis)proportionality' of the burden on the part of the employer must be assessed. This 'balancing exercise' between the interests of the disabled person *v.* those of the employer must be carried out in the light of 'open norms' of civil law (*i.e.*, the duty of the good employer and the notion of 'reasonableness').<sup>119</sup> *If financial compensation exists for the realisation of the effective accommodation, the accommodation cannot be regarded as 'disproportionate'*.<sup>120</sup>

---

<sup>116</sup>*Ibid.* p. 19.

<sup>117</sup>It is noted that most of what was said above, has been based upon comments made by the government in the explanatory memorandum to the Age Discrimination Act. However, there is nothing which suggests that the same line of reasoning would not also apply in the context of the other two Acts. After all, the prohibition of distinction as in all Acts been formulated in parallel wording.

<sup>118</sup>Explanatory Memorandum to the Disability Discrimination Act, footnote 39 *supra*, p. 25.

<sup>119</sup>Explanatory Memorandum to the Disability Discrimination Act, footnote 39 *supra*, p. 25-30.

<sup>120</sup>This follows from the explanatory memorandum to the Disability Discrimination Act, note 39 *supra*, p. 28. However, this is not explicitly mentioned in Article 2 of the Act.

The government underscored *Consideration 21* of the Preamble to Directive 2000/78<sup>121</sup> and added that the duration of the employment contract may be a weighty factor.<sup>122</sup> The duty to bring about an *effective accommodation* is *not* a generic obligation for (e.g.) the employer. This follows from the phrase ‘in accordance to the need’ (*‘al naar gelang de behoefte’*) of Article 2 of the Act. It must be clear to (e.g.) the employer that an accommodation is needed and what form of accommodation is needed.<sup>123</sup> The government has indicated that it is the responsibility of the disabled person to discuss the need for an accommodation.<sup>124</sup> The government expects that in practice both the need and the kind of accommodation called for will be decided in consultation between the employer and the future user. It is submitted that an interactive process involving the employee, the employers and trade unions negotiating a ‘reasonable accommodation’ is not specifically required by law. Neither is the provision of ‘reasonable accommodation’ connected by national law to positive action measures, but instead it forms part and parcel of the central norm, *i.e.*, the prohibition of making distinction (*verbod van onderscheid*). However, employers cannot be obliged to hire candidates who cannot fulfil the essential requirements for the job. This also follows from Article 17 FED and the Preamble.

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

As already said above, the duty to provide an effective accommodation forms part of the central norm, thus, a failure to meet this duty in principle counts as a form of *distinction*. However, the text of Article 2, in conjunction with that of Article 1 (*definitions of direct and indirect distinction*) and 3 (*regarding the exceptions to the central norm*), does not shed light upon the question whether an omission to bring about an *effective accommodation*, constitutes *direct, indirect or a third form of distinction*.

With regard to the duty to provide an ‘effective accommodation’, Article 2 of the Disability Discrimination Act provides that if this constitutes a *disproportionate burden* on the employer this duty shall not exist (*cf.* Article 5 of Directive 2000/78).

Article 3(1)<sup>125</sup> enshrines 3 exceptions to the *central norm* (*i.e.*, the prohibition to make distinction which according to Article 2 also includes the duty to make effective accommodations). In brief, the exceptions are: *public security and health* (indent ‘a’), *supportive social policies* (indent ‘b’) and *positive action measures* (indent ‘c’). Thus, a textual reading of Article 3(1) suggests that these three exceptions could also lift the effective accommodation duty, as this falls within the central norm. However, logically and in accordance with what the government has observed in its explanatory memorandum, *only* the exception in indent ‘a’ (*public security and health*) can have the effect of ‘lifting’ the duty enshrined in Article 2.<sup>126</sup> Consequently, the other two exceptions in indents ‘b’ and ‘c’ cannot be invoked by employers with respect to their effective accommodation duty. It is indeed difficult to perceive in what ways the exceptions in indents ‘b’ (‘supportive social policies’) and ‘c’ (‘positive action measures’) could be applicable in a case concerning the failure of bringing about an ‘effective accommodation’.

---

<sup>121</sup>On the factors to be considered when determining whether making a reasonable accommodation would amount to a disproportionate burden.

<sup>122</sup>It is submitted that this might however trigger indirect *sex* discrimination since women are more likely than men to be employed on the basis of a fixed term contract.

<sup>123</sup>This is also explicitly stated by the Equal Treatment Commission in its first opinion under the Disability Discrimination Act. See para. 5.14 of opinion 2004/21.

<sup>124</sup>Explanatory Memorandum to the Disability Discrimination Act, footnote 39 *supra*, p. 26.

<sup>125</sup>Article 3(2) moreover stipulates that indirect differentiation can be objectively justified.

<sup>126</sup>Explanatory Memorandum to the Disability Discrimination Act, footnote 39 *supra*, p. 33.

It is noted that the Disability Discrimination Act does not enshrine an exception in regard to the armed forces, which would however have been allowed for by Article 3(4) of Directive 2000/78.

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

#### **3.1 Personal scope**

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

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

As observed by Zwamborn in the summary on religious discrimination, the principle in Dutch law is that “all persons in the Netherlands shall be treated equally in equal circumstances”, as provided for in Article 1 of the Constitution.<sup>127</sup> Thus, the protective scope provided by criminal law, civil law, (specialised) equal treatment legislation and administrative law covers *any person on the territory of the Netherlands*.

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

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

For purposes of protection against discrimination no such distinction is made.

##### **3.1.3 Scope of liability**

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

To whom is the prohibition from making distinction addressed? In other words: *who can claim rights against whom* under the Age Discrimination Act, the Disability Discrimination Act and the General Equal Treatment Act? And, what do Directives 2000/43 and 2000/78 provide with regard to these questions? In the context of the Article 13 Directives, the following is observed. It remains unclear from the text of the Article 13 EC Directives to whom the prohibition of discrimination including, harassment and the instruction to discriminate, is addressed. For instance, if a colleague worker harasses an employee at the workplace, may only the *formal employer* be held responsible for the harassing acts (vicarious liability)? Or, may the victim hold the colleague worker him/herself responsible for the vicious treatment?

Article 3(1) of Directive 2000/78 provides as follows: “*Within the limits of areas of competence conferred on the Community, this Directive shall apply to all persons [underlining] as regards both the public and private sectors, including public bodies, in relation to (...)*”.<sup>128</sup>

A counterpart provision is found in Article 3(1) of Directive 2000/43.<sup>129</sup>

---

<sup>127</sup>Marcel Zwamborn, Religion Summary of June 2004.

<sup>128</sup>After “in relation to”, a number of areas of employment are mentioned in indents ‘a’-‘d’.

<sup>129</sup>After “in relation to” Directive 2000/43 lists a number of areas of social life to which the Directive applies in indents ‘a’-‘h’.



In my view the phrase *all persons* is sufficiently ample to cover in the context of employment: *employers, employees and third persons*. All may subject another person to discriminatory or harassing treatment connected to a covered non-discrimination ground. Since Directive 2000/43 goes beyond employment, '*all persons*' is ample enough in my view, to cover landlords, schools, hospitals and so forth. A similar conclusion has been drawn by Whittle and Holtmaat.<sup>130</sup> This may consequently mean that an alleged victim of discrimination or harassment may directly litigate against the individual perpetrator (*e.g.*, a colleague employee, the employer, a third person, the landlord *etc.*). However, nothing is specifically said in the Directives on the matter of *vicarious liability* which, it seems, remains a matter of the Member States' autonomy. However, Member States must guarantee that sanctions are *effective, proportionate and dissuasive* as follows from Article 15 of Directive 2000/43 and Article 17 of Directive 2000/78).<sup>131</sup>

In the context of the Dutch non-discrimination Acts I submit the following. No single Article in the Age Discrimination Act, the Disability Discrimination Act and the General Equal Treatment Act specifies *to whom* the prohibition of making distinction, including harassment, is addressed. Although, and as will be seen under paragraph 3.2. concerning 'material scope', all of the three Acts specify the *areas of social life* to which each Act applies, the Acts remain silent on the matter of 'personal applicability'.<sup>132</sup> With regard to the employment area, *i.e.*, the only area that is commonly covered by the three Acts, the central norm is addressed not only to *private and public employers*, but also to *organisations from employers, organisations of workers, employment offices, (public) job agencies, pension funds, some external advisors, ("liberal") professionals, bodies of liberal professionals, training institutions, schools, universities etc.*<sup>133</sup> However, from this it is not clear whether colleague workers or third persons can be held liable under the Acts? The matter was explicitly raised in the Parliamentary discussions on the implementation of the Directives. *It follows clearly from these discussions, that the government has not intended to render the non discrimination Acts applicable in relationships between colleagues, let alone in relationships with third persons.*<sup>134</sup> The government defends this by noting that between colleagues *inter se*, there is no contract or relationship of authority.<sup>135</sup> However, it was indicated by the government that those employees who in name of their employer, exercise authority over their co-employees

---

<sup>130</sup>See R. Whittle, "The Framework Directive for equal treatment in employment and occupation: an analysis from a disability rights perspective", 2002, 27 *European Law Review*, pp. 303-326. p. 316, also cited by R. Holtmaat, R. Holtmaat, "(Seksuele) Intimidatie en (on)gelijke behandeling: nieuwe normen, nieuwe praktijken"? Enkele overwegingen bij de nieuwe EG-Richtlijnen op dit terrein en de wijze waarop deze in Nederland worden geïmplementeerd", in *Gelijke Behandeling Oordelen en Commentaar* 2003, Kluwer, pp. 89-106, p. 97, footnote 47.

<sup>131</sup>In other words, the Directives seem not to require, that Member States *must* regulate *the employer's liability* for acts done by colleagues or by third parties in such cases in which the employer could have reasonably been expected to prevent the acts complained of from occurring.

<sup>132</sup>E. Cremers-Hartman, "Werkingsfeer AWGB (Art. 3, 4 sub c, 5 lid 1, 6, 7 lid 1 AWGB)", in I.P. Asscher Vonk, and C.A. Groenendijk *Gelijke Behandeling: Regels en Realiteit*, The Hague 1999 SDU Uitgevers, pp. 29-88, p. 33.

<sup>133</sup>*Ibid.*

<sup>134</sup>Explanatory Memorandum to the Age Discrimination Act, footnote 55 *supra*, p. 19 (where this was said in the context of harassment). Also, Parliamentary Papers Second Chamber of Parliament, 2002-2003, 28770, nr. 5, p. 28.

<sup>135</sup>Kees Waaldijk "Combating sexual orientation discrimination in employment: legislation in fifteen EU Member States, Report of the European Group of Experts on Combating Sexual Orientation Discrimination. [Final Version, offered to me by Dr. Kees Waaldijk, available with the author].

are addressees of the central norm. *De facto*, such an employee functions in the capacity of employer.<sup>136</sup>

*Sub conclusion: in the light of the presumed broad scope of personal applicability of Directive 2000/43 and 2000/78, it appears to me that the Dutch government's view namely, that the Dutch non discrimination Acts are directed to employers and other organisations but not to employees (and third persons), is unduly restrictive.*

The purported inapplicability of the Dutch Acts in relationships between colleagues *inter se*, appears particularly problematic in the context of work-related *harassment*. In its current format and in the light of the Parliamentary comments, the law prevents an alleged victim of harassment from holding a colleague or a third person directly liable for the contested acts. The only way to do this would be by seeking recourse to the general provisions of *tort law* enshrined in the Dutch Civil Code.

However, and this also follows from the Equal Treatment Commission's case law *pre implementation* of the Directives, there rests a *general duty of care* upon the employer to maintain a discrimination-free and safe workplace. An employee's right not to be discriminated against in this employment and working conditions, embraces the right to be free from discrimination and harassment at the workplace.<sup>137</sup> In opinion 2004/11 for example, the Equal Treatment Commission *inter alia* ruled upon the applicant's complaint of racial harassment by a colleague worker. The Commission considered that "(...) *the employer's duty to refrain from distinction in employment also includes the duty to supervise that those who are under his authority refrain from and are protected against discrimination*" (para. 5.8). An employer's failure to do so, results in principle in an act of distinction by the employer.<sup>138</sup>

The employer's vicarious liability for harassing acts by a *third person* was for example at stake in opinion 97/82. The case concerned racial harassment of a nurse, by a patient. The Commission repeated its stance that the employer is under a legal duty to prevent from occurring acts of harassment done by persons under his supervision. The Commission took the view that, although the alleged harassing acts were not done by a colleague worker but by a third person, this did not circumscribe whatsoever the employer's duty of care.<sup>139</sup>

*Sub conclusion: under the Dutch Equal Treatment Acts the person exercising authority may be held responsible for acts of distinction including harassment done by employees or third persons. This follows from the case law by the Equal Treatment Commission already pre implementation of the Directives.*

Beyond the scope of Dutch equal treatment legislation, the following is essential to take account of. The employer may be held vicariously liable for discriminatory or harassing acts done by colleague workers under *general private employment law*. The relevant Articles upon which a claim can be based are 1. *the good employer's practice (goedwerkgeversschap,*

---

<sup>136</sup>Explanatory Memorandum to the Age Discrimination Act, footnote 55 *supra*, p. 19 (where the government observed this in the context of harassment).

<sup>137</sup>See also, I.P. Assher-Vonk and W.C. Monster, *Gelijke Behandeling bij de Arbeid*, Kluwer, Deventer 2002, 164.

<sup>138</sup>See also for example opinion 2004/08 (race and religion).

<sup>139</sup>Although and as will be explained under 'enforcement issues', the Commission's opinions are not binding, an opinion by the Commission that has been ruled in the victim's favour can still be valuable in terms of recognition of the complaint and of emotional satisfaction. See: A. Geers, "Intimidatie op de werkplek", in G. van Manen (ed.) *De Rol van het Aansprakelijkheidsrecht bij de verwerking van persoonlijk leed*, Boom 2003, pp. 183-198, p. 194.

Article 7:611 of the Civil Code); 2. the employer's general duty of care (i.e., the employer's liability for damages suffered by an employee in the performance of job-related duties, laid down in Article 7:658 of the Civil Code). Both of these Articles are directed at the employer's liability for acts done by the employer himself, or by others over whom the employer has control. It is disputed in legal circles whether Article 7:658, can form the legal basis for claims that regard mere *psychological damage, rather than physical damage*.<sup>140</sup><sup>141</sup> It is submitted that damage resulting from discriminatory treatment and harassment is most often *of a psychological kind*. Although the Dutch Supreme Court has given no decisive answer, the *lower courts* have been prepared to accept Article 7:658 Civil Code, in cases of *sexual harassment*, as a basis for financial compensation of psychological damage resulting from sexually harassing acts.<sup>142</sup>

## **3.2 Material Scope**

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

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

Yes, it does.<sup>143</sup> However, Article 17 of the Age Discrimination Act enshrines an exception (which is of a temporary kind): till 1<sup>st</sup> January 2008 at the latest, the Act on Age Discrimination shall not apply to the military service. In the Disability Discrimination Act and the General Equal Treatment Act, there are no exclusions to the Acts' scope concerning the armed forces.

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

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

Article 5(1) of the General Equal Treatment Act and which is located within paragraph 3 that reads '*provisions in the area of employment and the liberal profession*', prohibits from making unlawful distinctions in the context of employment. No unlawful distinctions shall be made with regard to the following areas:

---

<sup>140</sup>A. Geers, footnote 138 *supra*, pp. 183-198, p. 188 with further references to the literature on this question. Also, M.S.A Vegter, "Aansprakelijkheid werkgever voor psychische schade werknemer als gevolg van seksuele intimidatie van de werknemer", in *Aansprakelijkheid, Verzekering en Schade*, nr. 5, October 2001, pp. 133-140, p. 134.

<sup>141</sup>With regard to Article 7:611 of the Civil Code, the Dutch Supreme Court has decided that this Article may be relied upon to claim compensation for damages of a mere psychological kind. See HR 11 juli 1993, NJ 1993 667 (*Nuts/Hofman*) cited by A. Geers, footnote 138 *supra*, pp. 183-198, p. 188, footnote 12.

<sup>142</sup>See M.S.A Vegter, "Aansprakelijkheid werkgever voor psychische schade werknemer als gevolg van seksuele intimidatie van de werknemer", in *Aansprakelijkheid, Verzekering en Schade*, nr. 5, October 2001, pp. 133-140, p. 134-135 where she extensively elaborates on the case law. The relevant cases to which she refers are Rb Rotterdam [Rotterdam District Court] 30 september 1999, *JAR* 1999, 230.n Pres. Rb Amsterdam [President of Rotterdam District Court] 22 februari 2001, *Rechtspraak Nemesis* 2001, 1319. Kantongerecht [Cantonal Court] Harderwijk 25 april 2001, *JAR* 2001, 118. In the last case referred to, an amount of about €14.000 (at the time Fl. 30000) was awarded for psychological damages.

<sup>143</sup>The relevant Articles within the Acts which provide this, will be mentioned and commented upon in the subparagraphs to follow.

- a. public advertising of employment and procedures leading to the filling of vacancies;
- b. employment mediation (inserted by the EC Implementation Act);
- c. the commencement or termination of an employment relationship;
- d. the appointment and dismissal of civil servants;
- e. terms and conditions of employment;
- f. permission for staff to receive education or training during or prior to employment;
- g. promotions;
- h. working conditions (inserted by the EC Implementation Act).

The Age Discrimination Act and the Disability Discrimination Act enshrine counterpart provisions in *Article 3* and *Article 4* respectively. These Articles reflect exactly the same material contents as does *Article 5(1)* of the General Equal Treatment Act although sometimes the sequence of subsections differs. Both public and private labour relations are covered. *The central norm applies to the entire employment process i.e., from the moment of notice of a vacancy, to the commencement of the employment relationship or public appointment, until its termination.*<sup>144</sup>

The following is said with regard to self-employment. In the General Equal Treatment Act, *self-employment* is covered by *Article 6*. This Article provides that “*it shall be unlawful to make distinctions with regard to the conditions for and access to the liberal professions and with regard to pursue the liberal professions or for development within them*”. The counterpart Articles reflecting an identical content as *Article 6*, are *Article 4* of the Age Discrimination Act and *Article 5* of the Disability Discrimination Act. It is to be noted that the term “self employment” is not used in the mentioned Articles which instead speak of the “liberal profession”. As observed by Waaldijk, the term “liberal profession” (“free occupation”) might be slightly narrower in scope than “self-employment” (the term used in the Directives). However, the problem can easily be circumvented by attaching a broad interpretation to the term “liberal profession” in order to guarantee that not only doctors, architects etc are covered, but also free lancers, solo traders, entrepreneurs *etc.*<sup>145</sup> This might seem odd for a British reader since in English, the term ‘liberal profession’ is quite a lot narrower than self-employment and could not ‘easily’ be approximated. However, in the Dutch equality legislation context the usage of ‘liberal profession’ has not led to problems. The ETC has at all times attached a very broad meaning to this notion. Discrimination is thus prohibited in such working relationships where the hierarchy between the ‘employer’ and ‘employee’ is absent.

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

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

The above areas are fully covered by *Article 5(1)* of the General Equal Treatment Act, subsections *c, d, e, h*. In the Age Discrimination Act by *Article 3* subsections *c, d, e, h*. In the Disability Discrimination Act by *Article 4* subsections *b, c, e, h*.

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

---

<sup>144</sup>See for example, the Explanatory Memorandum to the Disability Discrimination Act, footnote 39 *supra*, p. 34. See applies *eo ipso* in the context of the Age Discrimination Act and General Equal Treatment Act.

<sup>145</sup>Kees Waaldijk “Combating sexual orientation discrimination in employment: legislation in fifteen EU Member States, Report of the European Group of Experts on Combating Sexual Orientation Discrimination. [Final Version, offered to me by Dr. Kees Waaldijk, available with the author].

Note that there is an overlap between ‘vocational training’ and ‘education’. For example, university courses have been treated as vocational training in the past by the Court of Justice. Other courses, especially those taken after leaving school, may fall into this category.

The prohibition of distinction in the areas of *vocational training and guidance* is laid down in Article 5 of the Age Discrimination Act and in Article 6 of the Disability Discrimination Act. Both Articles are drafted in parallel and thus, can be interpreted identically.

Subsection *a* of both Articles lays down the prohibition of distinction with regard to *vocational guidance*. (*loopbaanoriëntatie en beroepskeuzevoorlichting*).

Subsection *b* renders the central norm applicable to *education oriented towards entry to and functioning in the labour market* (*onderwijs gericht op toetreding tot en functioneren op de arbeidsmarkt*). In short, this might be referred to as ‘vocational training’ although this term is not as such used within the respective Articles. However, both Articles are located under a heading which reads: *vocational training*. And de facto, this heading only consists of Article 6 and Article 5 of the Age and Disability Discrimination Act respectively.

The explanatory memorandums to the Acts provide guidance as to what is meant by subsection *b*. Hereinafter, this will be analysed in reference to the Explanatory Memorandum to the Disability Discrimination Act. However, all what will be said applies *eo ipso* to the Age Discrimination Act.

Subsection “b” covers education which is a last step prior to entering the labour market including retraining and further training courses.<sup>146</sup> *In concreto* this embraces: practical education (*praktijkonderwijs*), (which forms part of ‘secondary education’); technical and vocational training for 16-18 year-olds (*middelbaar beroepsonderwijs*); technical and vocational training for 18+ (*hoger beroepsonderwijs*) and university education. However, regular ‘secondary education’ (*voortgezet onderwijs*) is not covered.<sup>147</sup> The *establishments* that are covered are not only those which are recognised or subsidised by the Ministry, but also those establishments which are not recognised or subsidised by the Ministry or whose regulation is left to the market.<sup>148</sup>

Subsections *a* and *b* of Articles 5 and 6 of the Age and Disability Discrimination Act respectively, are not directed to a specific addressee. These subsections are therefore directed to ‘everybody’. As to subsection *b*, this is addressed to *public education, private/denominational education, and, education that is not publicly funded*.<sup>149</sup>

*Subsection b covers more than Article 3(1) ‘b’ of the Employment Framework Directive. The Directive only prohibits discrimination at the stage of ‘entry to’ vocational training. The Dutch Acts cover the entire path from registration until termination of education.*<sup>150</sup>

In the context of the General Equal Treatment Act I submit the following with regard to *vocational training and guidance*. Article 7 of the Act, which is located under paragraph 4 of the Act which reads *other (i.e., other than employment and self employment ) provisions in the socio-economic area*, renders the central norm applicable to (in brief):

---

<sup>146</sup>Explanatory Memorandum to the Disability Discrimination Act, footnote 39 *supra*, p. 38.

<sup>147</sup>‘*Praktijkonderwijs*’ is an exception to this, given that this is oriented towards those who will not obtain a diploma in regular secondary education or by vocational training. ‘*Praktijkonderwijs*’ prepares pupils for relatively simple jobs on the labour market.

<sup>148</sup>Explanatory Memorandum to the Disability Discrimination Act, footnote 39 *supra*, p. 38.

<sup>149</sup>Explanatory Memorandum to the Disability Discrimination Act, footnote 39 *supra*, p. 37.

<sup>150</sup>Explanatory Memorandum to the Disability Discrimination Act, footnote 39 *supra*, p. 37-38.

1. *The supply of or permission of access to goods or services which also embraces all forms of education;*<sup>151</sup>
2. *The provision of career orientation and guidance (loopbaanoriëntatie);*
3. *Advice or information regarding the choice of an educational establishment or career.*<sup>152</sup>

However, it is furthermore specified in Article 7 that the Act only applies to the above areas if the alleged discriminatory acts are committed: *a. in the course of carrying on a business or exercising a profession; b. by the public service; c. by institutions which are active in the field of housing, social services, health care, cultural affairs or education or, d. by private persons not engaged in carrying on a business or exercising a profession in so far as the offer is made publicly. This does entirely cover that what is mentioned in Article 3(1) 'b' of the Directives.*

*It is to be emphasised that the material scope regarding goods, services and the entire education field as laid down in Article 7 of the General Equal Treatment Act, applies to all grounds that are covered by the Act. In this regard the Dutch law goes far beyond that what is strictly required by Directive 2000/78.*

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

The General Equal Treatment Act has been amended by the *EC Implementation Act* in order to extend the Act's material scope with (in brief): *membership of organisations*. A new *Article 6a* in the Act provides the following: *"it shall be unlawful to make distinctions with regard to the membership of or involvement in an employers' organisation or trade union, or a professional occupational organisation, as well as with regard to the benefits which arise from that membership or involvement"*. Similarly, the Disability Discrimination Act as adopted in the "first stage" of implementation has in the same respect been amended in the "second stage" by the *EC Implementation Act*. This has resulted in the insertion of *Article 5a* which is identical to *Article 6a* of the General Equal Treatment Act. The relevant Article in the Age Discrimination Act is *Article 6*.

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

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

In order to implement Article 3(1) "e" (and "f" see hereinafter under para. 3.2.7.) the *EC Implementation Act* complements the General Equal Treatment Act with a *new Article 7a*.

Subsection 1 of this new Article reads as follows: *"without prejudice to Article 7, it shall be unlawful to make distinctions on the ground of race in social protection, including social security and social advantages"*.

---

<sup>151</sup>The material scope of the General Equal Treatment Act covers the entire field of education. It thus offers here a wider protection than the Directives.

<sup>152</sup>The numbering 1-3 is mine.

*It is stressed that the Act's expansion to this effect only applies to the ground "race" (which as said before, also includes "ethnic origin"). As indicated by Waaldijk, the other non-discrimination grounds are only subjected to the constitutional and international prohibitions of discrimination in the above areas of social life.<sup>153</sup> It appears from the Explanatory Memorandum to the EC Implementation Act, that health care is embraced by the wide notion of "social protection". The government indicates in the explanatory memorandum that "(...) the notion of social protection covers [inter alia] (...) all aspects of healthcare, welfare and social security".<sup>154</sup>*

It is worth noting that the government in the Explanatory Memorandum explicitly notes that the *personal applicability* of Article 7a of the Act is *not* limited to the government, although, the government is indeed the most *important* addressee, especially where it concerns social security issues. This is a worthwhile observation given that unilateral governmental acts have traditionally been excluded from the material scope of the Act. However, as the government has indicated, the fact that unilateral governmental acts are now covered within the specific context of Article 7a, shall not be understood to mean that all unilateral governmental acts now fall within the Act's material scope. In the by the law prescribed evaluation of the General Equal Treatment Act, it shall however be examined whether a wider coverage of unilateral governmental acts would be desirable.<sup>155</sup>

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

*This covers a broad category of benefits that may be provided by either public or private actors, for example, discounts on access to municipal leisure facilities. It may be difficult to give an exhaustive analysis of whether this category is fully covered in national law, but you should indicate whether national law explicitly addresses the category of 'social advantages' or if discrimination in this area is likely to be unlawful.*

*Social advantages* are explicitly mentioned in Article 7a (see the definition of this Article in the previous sub-paragraph). Subsection 2 of Article 7a specifies that "*the concepts of social protection, social security and social advantages, mentioned in subsection 1, can be defined by governmental decree. A governmental decree determined pursuant to the first sentence, shall not be recommended earlier than four weeks after which the draft has been submitted to both Chambers of the States General (Parliament)*". No such decree has been adopted thus far. However, interpretative tools regarding the meaning of "*social advantages*" are laid down in the Explanatory Memorandum to the EC Implementation Act. Also, its relationship with "*social security*" is explained in the Memorandum. "*Social security*" concerns the legal social insurance schemes which cover the risks that occur if a person loses his income as a result of (*e.g.*) unemployment, illness, disability, age and decease. It moreover covers child benefits.<sup>156</sup>

With regard to the notion of "*social advantages*" it is observed by the government in the Explanatory Memorandum, that this notion must be interpreted in the light of ECJ case law rendered in the context of *Regulation 1612/68* on free movement of workers.<sup>157</sup> In the government's view, the notion of *social advantages* refers to advantages of an economic and

---

<sup>153</sup>Sexual orientation report of 24 August 2004 by Kees Waaldijk.

<sup>154</sup>Explanatory Memorandum to the EC Implementation Act, footnote 8 *supra*, p. 14.

<sup>155</sup>Explanatory Memorandum to the EC Implementation Act, footnote 8 *supra*, pp. 14-15.

<sup>156</sup>Explanatory Memorandum to the EC Implementation Act, footnote 8 *supra*, p. 14.

<sup>157</sup>See for example the ECJ's case law in Case C-261/83 *Castelli* of 12 July 1984 and Case C-249/83 (*Hoecx*) of 27 March 1985, as referred to in the explanatory memorandum to the EC Implementation Act, footnote 8 *supra*, p. 15.

cultural kind which may be granted by both private and public entities. These may include student grants, public transport reductions and reductions for cultural or other events. Advantages offered by private entities are for example reductions to entry prices for cinema and theatre.<sup>158</sup>

### **3.2.8 Education (Article 3(1)(g) Directive 2000/43)**<sup>159</sup>

*This covers all aspects of education, including all types of schools*

It has already been said that the General Equal Treatment Act is integrally applicable to all aspects of education, including all types of schools (Article 7). This thus applies to “race” and “ethnic origin” but also to “religion/belief” and “sexual orientation” (as well as all other by the General Equal Treatment Act covered grounds). *In this regard, Dutch law goes beyond the requirements imposed by the Directives.*<sup>160</sup> Vocational training that is given before or during the employment relationship is regulated by Article 5(1) under “e” (now “f”) of the General Equal Treatment Act. With regard to the ground ‘disability’ the following may be said.<sup>161</sup> In the Netherlands disabled children can be denied access to education in regular schools if the school thinks that it cannot properly serve or teach the particular child in question. Judicial review of such a decision is “marginale toetsing.” [“marginal review”]. Children who apply and qualify for special education may no longer be refused admission to special schools. This is effective since August 30, 2003 when the *leerlinggebonden financiering lgf* (individualised pupil financing) took effect. Prior to that, disabled children with a developmental age of two years or less were routinely granted dispensation from the *leerplicht* [duty to learn] so that they could attend medical day care centres, outside the purview of the educational system. Since the lgf has taken effect, a Cluster 3 school (for intellectual learning disabilities, multiple disabilities and long-term and chronic illness) can no longer deny admission on the ground of low IQ or developmental age.

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

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

The access to and supply of goods and services is covered by Article 7 of the General Equal Treatment Act. Subsection 1 of Article 7 provides as follows:

*“It shall be unlawful to make distinctions in offering or permitting access [the underlined part was added by the EC Implementation Act] to goods and services, in concluding, implementing or terminating agreements on the subject (...), if such acts of distinction are committed<sup>162</sup>”:*

---

<sup>158</sup>Explanatory Memorandum to the EC Implementation Act, footnote 8 *supra*, p. 15.

<sup>159</sup>The types of education which are covered by the Age Discrimination Act and the Disability Discrimination Act have been explained in paras. 3.2.1. – 3.2.5 above.

<sup>160</sup>See also, Notitie over de Implementatie van Richtlijn 2000/78/EG en Richtlijn 2000/43/EG [Note concerning the Implementation of Directive 2000/78/EC and Directive 2000/43/EC], Parliamentary Documents, 2001-2002, 28 187, nr. 1, p. 10-11].

<sup>161</sup> I am grateful to J. Schoonheim (lecturer in Law at the University of Maastricht) who provided me with this information.

<sup>162</sup>It is to be noted that the limitations to follow under “a” – “d” are also applicable with regard to the remainder of areas covered by Article 7 i.e., 2. the provision of career orientation and guidance [*loopbaanoriëntatie*]; 3.



- a. *in the course of carrying on a business of exercising a profession;*
- b. *by the public service;*
- c. *by institutions which are active in the field of housing [my emphasis], social services, health care, cultural affairs or education; or*
- d. *by private persons not engaged in carrying on a business or exercising a profession, in so far as the offer is made publicly.*

As already indicated, Article 7 is applicable to all grounds covered by the *General Equal Treatment Act* thus including, race (and ethnic origin), religion/belief, sexual orientation. *In this regard, Dutch law extends beyond the Article 13 Directives' requirements.* It is emphasised that unilateral governmental decisions are not covered by the realm of Article 7.<sup>163</sup> Article 7 is limited to commercial transactions in the areas of goods and services by the government, to the exclusion of legislative acts/ unilateral governmental decisions. *In short: not all acts by the administration are covered by the General Equal Treatment Act.* All governmental acts are however “governed” by Article 1 of the Constitution, with regard to which the Equal Treatment Commission however lacks jurisdiction.<sup>164</sup>

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

*To which aspects of housing does the law apply? Are there any exceptions?*

*Housing* as an area in which the central norm applies is captured by Article 7(1) subsection “c” GETA. No *specific* exceptions apply as regard ‘housing’ (other than those exceptions which will be dealt with below).

## 4. EXCEPTIONS

***Preliminary observation:*** The General Equal Treatment Act and the Disability Discrimination Act are based on a ‘closed’ system of non discrimination law: exceptions to the central norm are explicitly and exhaustively listed within these Acts. The Age Discrimination Act is based on a ‘half open’ system of non discrimination law: certain exceptions have been explicitly enshrined within the Act alongside a possibility for objective justification (for both direct and indirect distinction).<sup>165</sup>

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

For reasons of clarity I shall answer this question hereinafter for each ground separately.

- *Race and ethnic origin*

---

advice or information regarding the choice of an educational establishment or career, and which have been analysed above.

<sup>163</sup>J.H. Gerards and A.W. Heringa, *Wetgeving Gelijke Behandeling*, Kluwer Deventer 2003, pp. 72-73, with references to the case law by the Equal Treatment Commission.

<sup>164</sup>*Ibid.*, p. 74.

<sup>165</sup>As explained before, the Age Discrimination Act does however not distinguish between these two types of ‘distinction’.

The exception in Article 4 of Directive 2000/43 is mirrored in new subsection 'b' of Article 2(4) of the General Equal Treatment Act.<sup>166</sup> Article 2(4) "b" reads as follows:

*"The prohibition of making distinctions on the grounds of race as it is contained in this Act, shall not apply:*

- a. (...)*
- b. if the distinction concerns a person's [outer] racial appearance and constitutes, by reason of the nature of the particular occupational activity concerned, or of the context in which it is carried out, a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate to that objective."*

In contrast to Article 4 of Directive 2000/43 that speaks of a *characteristic related to racial or ethnic origin*, the Dutch provision specifies that only *[outer] racial appearances* may constitute a *genuine occupational requirement*.<sup>167</sup> This means that *race in se* is not regarded as a permissible ground for a given distinction.<sup>168</sup> Only *physical differences* (skin colour, hair type etc.) may form a basis for a distinction, to the exclusion of *sociological differences*. In my view, the Directive's provision is ample enough to cover *sociological differences*. The General Equal Treatment Act does not allow for example a care institution, which looks after the well being of young Moroccan delinquents, to express in a job advertisement a preference for a *Moroccan* social worker.<sup>169</sup> It appears to me that the Directive would allow this. One might take the view that since the Dutch standard is stricter and that this is thus in conformity with the Directive; on the other hand the Dutch approach might strike down what might be otherwise permissible positive action.

Article 2(4) subsection 'a' enshrines an equivalent subsection to subsection 'b', however outside the employment sphere. Directive 2000/43 does not enshrine an equivalent exception outside the sphere of employment. The subsection *a* exception already exists since 1994. The *EC Implementation Act* has added a 'proportionality requirement'. It reads as follows:

*"The prohibition of making distinction on the grounds of race as it is contained in this Act, shall not apply:*

- a. in cases where a person's racial appearance is a determining factor, provided that the aim is legitimate and the requirement is proportionate to that aim*
- b. (...)"*

The exceptions under *a* and *b* have been elaborated in a governmental decree of 1994.<sup>170</sup> The Decree exhaustively indicates to which categories the Article 2(4) exceptions apply. These are:

- a. The profession or activity of actor, dancer or artist insofar that the profession or activity regards the performance of a certain role (elaboration of subsection 'b');*
- b. Mannequins, models for photographers, artists etc., insofar as in reasonableness requirements can be imposed upon outer appearances (elaboration of subsection 'b');*

---

<sup>166</sup>This was done by the *EC Implementation Act*. With the insertion of a new subsection *b* the government has intended to follow more closely the wordings of the Directive. See Explanatory Memorandum to the EC Implementation Act footnote 8 *supra* p. 10. However, pre implementation the 'genuine occupational requirement exception' was also covered by the more general wording of subsection *a* of Article 2(4). This subsection will be discussed hereinafter.

<sup>167</sup>Explanatory Memorandum to the EC Implementation Act footnote 8 *supra*, p. 10.

<sup>168</sup>J.H. Gerards and A.W. Heringa, *Wetgeving Gelijke Behandeling*, Kluwer Deventer 2003, p. 129.

<sup>169</sup>See also Opinion 1997/51 of the Dutch Equal Treatment Commission.

<sup>170</sup>*Besluit Gelijke Behandeling* van 18 Augustus 1994, Stb 657 (*Governmental Decree on Equal Treatment* of 18 August 1994, Law Gazette 657).

c. Participation in beauty contests insofar as appearances connected with a person's race, are vital in the light of the contest's aims (elaboration of subsection 'a' );  
d. The provision of services that can only be provided to persons having certain outer appearances (elaboration of subsection 'a' ). (The examples given by the government are special hair dress services for people with 'afro-hair' or skin treatment for persons with a particular skin type).

- *Religion, belief, sexual orientation*

Although Directive 2000/78 would have allowed for it (Article 4(1) of the Directive) no genuine occupational requirements exception has been enshrined in the General Equal Treatment Act for these grounds. In fact, the Act only allows for such a defence with regard to the grounds *race* and *sex*. However, in the context of the exceptions of Article 5(2) of the GETA, institutions founded on religious principles, or on political principles, or schools founded on the basis of religious denomination may impose requirements on the occupancy of a post which, in view of the organisation's purpose, are necessary to live up to its founding principles. The Article 5(2) exceptions are not so much rationalised by the idea of 'genuine occupational requirements' though. *They were regarded necessary in order to reconcile the constitutional principle of equality with other constitutional principles, namely the freedom of religion and the freedom of education as well as the freedom of political opinion.*

- *Disability*

*Genuine and occupational requirements* have not been defined under the Disability Discrimination Act. The government's view is that, in contrast to *race* and *sex*, no scenario is imaginable in which 'disability' would constitute a genuine occupational requirement.<sup>171</sup> An amendment was submitted by a member of Parliament in this respect, however, without any effect.<sup>172</sup>

- *Age*

Since Age Discrimination Act makes no distinction as between 'direct' and 'indirect' distinction, and since 'objective justification' is provided for both types of 'distinction' (Article 7(1) 'c' of the Act), the government considered a separately enshrined exception regarding 'genuine occupational requirements', a redundant exercise. In this view, in cases in which 'age' is considered a genuine occupational requirement, this can be assessed via the objective justification test.<sup>173</sup> Conceptually speaking, this is arguably open to criticism' In fact, the Article 4(1) exception of the Directive is in this view apparently regarded as a species of the Article 6 exception of the Directive.<sup>174</sup> It would have been preferable, had the government explicitly enshrined the genuine occupational requirements exception and out with the context of the *age specific defences* of Article 6 of the Directive as implemented in Article 7 of the Age Discrimination Act.

## 4.2 Employers with an ethos based on religion or belief

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

With regard to the matter of "*religious ethos*" the General Equal Treatment Act on the one hand sets *boundaries to the Act's scope of applicability* and on the other hand, provides for

---

<sup>171</sup>Explanatory Memorandum to the Disability Discrimination Act, footnote 39 *supra*, p. 35.

<sup>172</sup>Amendement Terpstra, *Tweede Kamer*, 2001-2002, 28 169, nr. 11 (26-06-02) [Amendment Terpstra, Second Chamber of Parliament, 2001-2002, 28 169, nr. 11 of 26-06-02). This amendment was rejected.

<sup>173</sup>Explanatory Memorandum to the Age Discrimination Act, footnote 55, *supra*, p. 35.

<sup>174</sup>See F.B.J. Grapperhaus, "Het verbod op onderscheid op grond van leeftijd in arbeid en beroep", *Ondernemingsrecht 2002-12*, pp. 356-363, p. 362.

*exceptions*. With regard to ‘boundaries’, it is noted that the Act does not apply altogether to the *internal affairs* of churches, of other religious communities, or of associations of a spiritual nature. The rationale for this lies in the principle of *freedom of religion* and in the *division between state and church*. As Waaldijk observes *in concreto*: the profession of priest, rabbis, imams, etc., are exempted from the scope of the Act.<sup>175</sup> It is to be noted that only purely *internal affairs* of Churches fall out with the scope of the GETA. Thus, for example, the employment relationship between a gardener or a cleaner with a Church or a religious community falls within the scope of the GETA. This is arguably different for the employment relationship between a sexton and the Church. As observed by Gerards and Heringa, the more the legal relationship is disconnected from the rationales of freedom of religion and the division between state and church, the less likely is it to be considered as a purely internal affair.<sup>176</sup>

With regard to ‘exceptions’<sup>177</sup> the following is said.

- *Article 5(2) ‘a’ of the General Equal Treatment Act*

This Article contains an exception to the prohibition of distinction in employment for *institutions founded on religious or ideological principles*. It provides as follows:

*“[the prohibition of distinction in employment shall not apply to ] the freedom of an institution founded on religious or ideological principles to impose requirements which, having regard to the institution’s purpose, are necessary for the fulfilment of the duties attached to a post; such requirements may not lead to distinction on the sole grounds of political opinion, race, sex, nationality, heterosexual or homosexual orientation or civil status”.*

According to this provision, the following conditions must be fulfilled:

1. It must concern an institution that is founded on religious or ideological principles. The Equal Treatment Commission in its assessment of this, looks at both the institution’s statutes and, at what the institution *de facto* does, in order to materialise its religious or ideological foundations.<sup>178</sup>
2. There must be a direct and logical link between the imposition of job requirements, and the institution’s purpose.<sup>179</sup> In order to assess this link, regard must be had to the *concrete circumstances* of a case at hand.<sup>180</sup>
3. The institution must conduct a consequent and fixed policy for the safeguarding of its religious or ideological identity.<sup>181</sup> The policy must be targeted at maintaining the institution’s purpose and founding principles.
4. The distinction made must be necessary for the fulfilment of the duties attached to a post. In other words: the required religion or belief must be an essential ingredient for the effective

---

<sup>175</sup>K. Waaldijk, Sexual Orientation Summary of 23 July 2004.

<sup>176</sup>J.H. Gerards and A.W. Heringa, *Wetgeving Gelijke Behandeling*, Kluwer Deventer 2003, p. 105.

<sup>177</sup>It is to be observed that the General Equal Treatment Act in new *Article 6a* under “b” also enshrines a counterpart exception to the ones explained above, with regard to the membership of organisations. This new Article has been inserted by the EC Implementation Act.

<sup>178</sup>Parliamentary Documents 1991-92, nr. 10, p. 22, where it is indicated, that in determining whether or not an institution is indeed founded upon religious/ideological principles, regard may be had to ‘course of behaviour’, ‘statutes’, ‘publications’ and ‘other sources’.

<sup>179</sup>Parliamentary Documents 1991-1992, *Memorandum in Reply to the General Equal Treatment Act*, p. 80. Also, Parliamentary Documents 1991-1992, nr. 10, p. 20.

<sup>180</sup>Parliamentary Documents II 1990-1991, 22 014, nr. 10, p. 21.

<sup>181</sup>See Parliamentary Documents 1991-1992, nr. 10, p. 22. Also J.H. Gerards and A.W. Heringa, *Wetgeving Gelijke Behandeling*, Kluwer Deventer 2003, p. 105.

performance of the job.<sup>182</sup> *Necessity* is assessed by the ETC on the basis of a *marginal reasonableness test*.<sup>183</sup>

5. No breach of the “sole ground” construction (see explanation hereinafter under ‘*the sole ground construction*’).<sup>184</sup>

- *Article 5(2) ‘c’ of the General Equal Treatment Act*

Subsection *c* provides that religious distinctions may lawfully be made by private educational establishments. Article 5(2) *c* reads as follows:

*“[the prohibition of distinction in employment shall not apply to ] the freedom of a private educational establishment to impose requirements on the occupancy of a post which, in view of the establishment’s purpose, are necessary for it to live up to its founding principles, although such requirements may not lead to discrimination on the sole ground of political opinion, race, sex, nationality, heterosexual or homosexual orientation or civil status”.*

According to this provision, the following conditions must be fulfilled:

1. It must concern a private educational establishment;
2. There must be a direct and logical link between the imposition of religious job requirements and the institution’s purpose;<sup>185</sup>
3. The establishment must conduct a consequent policy for the safeguarding of its religious or ideological identity.
4. The distinction must be necessary for the institution to live up to its founding principles (The Equal Treatment Commission makes use of a marginal reasonableness test).
5. There may be no breach of the ‘sole ground construction’ (see explanation hereinafter under ‘*the sole ground construction*’).

The following is emphasised. Institutions under *a* may only make distinctions that are necessary *for the effective performance of the job*. Distinctions under *c*, must (only) *be necessary in order for the establishment to effectively realise its founding principles*.<sup>186</sup> This implies, that establishments under *c*, are granted more leeway in making distinctions than institutions under *a*. After all, establishments under *c*, may impose requirements that are not directly linked up with the performance of a person’s duties within that establishment.<sup>187</sup> Establishments under *c*, may even impose requirements upon the acts of (would be) employees which take place *outside* the sphere of the establishment, if this is necessary for the effective realisation of the establishment’s founding principles.<sup>188</sup>

*Do the exceptions under ‘a’ and ‘c’ comply with Article 4(2) of Directive 2000/78?*

***The exception under ‘a’***

As has also been indicated by Waaldijk, the exception under *a* in the Dutch Equal Treatment Act is slightly differently formulated than its counterpart definition in the Directive. The Directive uses as main yardstick whether, while having regard to the organisation’s ethos, *a*

---

<sup>182</sup>Parliamentary Documents 1991-1992, nr. 3, *Explanatory Memorandum*, p. 18 and J.H. Gerards and A.W. Heringa, *Wetgeving Gelijke Behandeling*, Kluwer Deventer 2003, p. 105.

<sup>183</sup>Parliamentary Documents II 1990/91, 22 014 nr. 5, p. 51.

<sup>184</sup>See for example Opinion 2003-145 by the Equal Treatment Commission. The above steps are all represented in the Commission’s line of reasoning towards its final Opinion on the case at hand.

<sup>185</sup>Parliamentary Documents 1991-1992, nr. 3, *Explanatory Memorandum*, p. 7.

<sup>186</sup>Parliamentary Documents 1991-1992, nr. 3, *Explanatory Memorandum*, p. 18.

<sup>187</sup>Parliamentary Documents 1991-1992, nr. 3, *Explanatory Memorandum*, p. 8 and p. 17.

<sup>188</sup>J.H. Gerards and A.W. Heringa, *Wetgeving Gelijke Behandeling*, Kluwer Deventer 2003, p. 109.

person's religion or belief constitutes a *genuine, legitimate and justified occupational requirement*, by reason of the nature of the occupational activities or of the context in which they are carried out. In the Dutch Equal Treatment Act, it is of prime interest, *that the distinction made be necessary for the fulfilment of the duties attached to a post*. If one regards the exception under *a*, in the light of the case law of the Equal Treatment Commission, it appears to me that the Dutch law is in conformity with the Directive. The word 'necessary' implies in my view that the requirements must be 'legitimate' and 'justified'. That the requirements must be 'genuine' is also reviewed by the Commission. It has been seen that the Commission looks at the institution's statutes and at what the institution does in practice, in order to realise its religious and ideological foundations. The Commission's line of reasoning is largely based upon the guidance given in the Parliamentary Documents to the Article 5(2) 'a' exception.

### ***The exception under 'c'***

It has been stressed that the imposed requirements need *not necessarily be linked up with a person's job performance*. Even behaviour outside the establishment might be a factor that can be taken into account by the establishment in its decision as to whether or not a given person 'matches' with the founding principles underlying the establishment. Requirements must however be 'necessary' for the effective realisation of the institution's founding principles. It is recalled that Article 4(1) of the Directive provides that (...) *a person's religion or belief constitutes a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos (..)*. It appears to me, that the Directive more than the Dutch exception, establishes a link with the person's (would be) occupation. In my view therefore, the Dutch exception under 'c' is too broadly interpreted and thus, not in conformity with Directive 2000/78.

### ***The 'sole ground' construction***

Article 4(2) of the Directive specifies that the difference in treatment 'should not justify discrimination on another ground'. This so-called 'sole ground construction' is equivalent to the clause in Article 4(2) of the Employment Framework Directive which states that "(...) this difference of treatment (...) should not justify discrimination on another ground".

The Dutch text provides that, 'requirements may not lead to a distinction *on the sole ground of political opinion, race, sex, nationality, hetero-or homosexual orientation or civil status*'. What is meant by these phrases? Basically, in the Dutch context, the phrase means that the grounds referred to except for religion or belief, may never constitute an *autonomous ground* for the (contested) distinction/ job requirements.<sup>189</sup>

The 'sole ground construction' aims at eliminating the possibility that a distinction is *de facto* made on the grounds of political opinion, race, sex, nationality, hetero-or homosexual orientation or civil status, *under the guise of exceptions* which are permitted by the law (i.e., the exceptions enshrined in 'a' and 'c' for the grounds religion and belief).

In essence, the construction has played an important role with regard to the question whether a Christian School may lawfully refuse cohabitating homosexuals for a teaching position. It is stated clearly in the Parliamentary Documents that the 'sole fact' that a person is homosexual,

---

<sup>189</sup>The Explanatory Memorandum points out that in respect of the grounds 'race' and 'sex' it is difficult to see how 'accessory circumstances' or 'concomitant' behaviour could possibly result in the justification of a discriminatory act. The Memorandum only gives one example of justified discrimination on the grounds of race. The example given is that of Jewish associations which impose differentiating requirements on the ground of Jewish descent. The differentiation is a direct consequence of the Jewish belief. The special relationship in this example between *descent* on the one hand and *religion and belief* on the other hand may at certain instances justify the discriminatory act. See: Parliamentary Documents 1991-1992, nr. 3, *Explanatory Memorandum*, p. 19.

may *in se* not lead to the refusal to hire such a person/ to dismiss her.<sup>190</sup> However, this may be different if ‘*additional circumstances*’<sup>191</sup> are taken into account.<sup>192 193</sup> The Directive’s wording in Article 4(2) seems not to permit whatsoever that ‘*additional circumstances*’ play a material role unless such circumstances coincide with the person’s religion or belief. The interpretation attached by the government and which has been followed by the Equal Treatment Commission regarding ‘*additional circumstances*’ appears unduly broad and therefore, not in conformity with the Directive.<sup>194</sup>

*b. Are there any specific provisions or case law in this area relating to conflicts between the rights of organisations with an ethos based on religion and belief and other rights to non-discrimination?*

In the above, the situation concerning Christian Schools and Homosexual teachers has been explained. The matter was at stake in *Opinion 1999-38* of the Equal Treatment Commission. The Commission considered the ‘sole ground construction’ in the context of Article 5(2) under ‘c’: homosexuality *in se* could not be the reason for a distinction. It then considered ‘additional circumstances’ that is: could the actual cohabitation be a relevant additional circumstance? The Equal Treatment Commission attached high importance to the following. In order for an Establishment to know whether the different interests at stake, i.e., the right for the homosexual to equality of treatment *v.* its own right to freedom of education, can be reconciled, the Establishment must invite the homosexual person for an interview. In this interview the different view points can be mutually discussed. However, the a priori refusal of a homosexual person without granting her a chance to express her viewpoints makes that the Article 5(2) under ‘c’ exception will not be successfully relied upon.<sup>195 196</sup>

### **4.3 Armed forces and other specific occupations**

*a) Does national law provide for an exception for the armed forces in relation to age or disability discrimination (Article 3(4), Directive 2000/78)?* See para. 3.2.1. of this template report.

*b) Are there any provisions or exceptions relating to employment in the police, prison or emergency services (Recital 18, Directive 2000/78)?* No, there are not.

### **4.4 Nationality discrimination**

*Both the Race Directive and the Framework Employment Directive include exceptions relating to difference of treatment based on nationality (Art 3(2) in both Directives).*

*a) How does national law treat nationality discrimination?*

Nationality discrimination is prohibited by the General Equal Treatment Act. Thus, the Dutch Act goes beyond the requirements stemming from Directive 2000/43. Distinction on the grounds of nationality is in principle prohibited as follows from Article 1 of the Act.

---

<sup>190</sup>See Parliamentary Documents First Chamber of Parliament, 1992-1993, 22 014 nr. 212 c pp. 10-11.

<sup>191</sup>In the Parliamentary comments the example is given of a teacher in social studies at a denominational school. This teacher is homosexual and cohabitates with a same sex partner. According to the example, the teacher may in reasonableness be expected to elaborate in his classes upon the concept of “marriage”. See Parliamentary Documents 1990-1991 *Memorandum in Reply*, p. 41.

<sup>192</sup>Parliamentary Documents 1991-1992, nr. 3, *Explanatory Memorandum*, p. 18-19. Parliamentary Documents II 1990/91, 22 014 nr. 5, p. 49.

<sup>193</sup>See also *Opinion 1999-38* of the Equal Treatment Commission and J.H. Gerards and A.W. Heringa, *Wetgeving Gelijke Behandeling*, Kluwer Deventer 2003, p. 105.

<sup>194</sup>Also Kees Waaldijk, *Sexual Orientation Report* of 24 August 2004.

<sup>195</sup>J.H. Gerards and A.W. Heringa, *Wetgeving Gelijke Behandeling*, Kluwer Deventer 2003, p. 109.

<sup>196</sup>See also *opinion 1996-39*.

However, Article 2(5) of the Act enshrines exceptions to this. The prohibition on the grounds of nationality shall not apply, if the distinction is based upon *generally binding rules* (i.e., Statutory Acts and Acts by the administration such as governmental decrees) or on *written or unwritten rules of international law*. Moreover, the prohibition shall not apply in such cases where ‘nationality’ is a determining factor (e.g., nationality requirements imposed upon players for the national football team).

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

Article 1 of the Constitution provides that “all persons in the Netherlands shall be treated equally in equal circumstances”. Protection against discrimination offered by Article 1 of the Constitution, by criminal law, by civil law and under the specific Statutory Anti-Discrimination Acts, is not tied to any nationality requirement.

#### **4.5 Family benefits**

*Work-related benefits include, for example, survivor’s pension entitlements, free or discounted travel for certain family members, free or discounted health insurance, parenting leave to care for the child of a partner, etc.*

*a) How does the law treat work-related family benefits that are restricted to opposite-sex couples (whether married or unmarried)?*

With regard to ‘distinctions’ as between ‘same sex couples’ and ‘opposite sex couples’, the following is observed.<sup>197</sup> Distinctions based on the sex of a person’s *partner*, are regarded as distinctions on the ground of *sexual orientation*. This follows not only from the Parliamentary Documents but it has also been confirmed by the Equal Treatment Commission in various opinions.<sup>198</sup> It is therefore prohibited to make distinctions between same-sex and opposite-sex partners, with the same civil status. However, in two cases which had arisen prior to the ECJ’s *Grant judgment*, the Equal Treatment Commission regarded the distinction between same-sex and opposite-sex partners as a form of *direct sex discrimination*. In one case, the organiser of ballroom dancing competitions wished to learn whether the rule that only *opposite* sex couples could participate in these competitions was in conformity with the principle of equal treatment. The Commission held: *direct sex distinction* and, *indirect distinction on the ground of sexual orientation* which could not be justified.<sup>199</sup> In the other case, the Commission held ‘*direct sex distinction*’ and it did not look altogether at the question of sexual orientation.<sup>200</sup>

Both cases had arisen outside the employment context.

*Note: The Commission has recently revised its stance in Case 2004/116 of 21 September 2004. In this case the rule that only opposite sex partners may participate in the respondent’s dancing competition was regarded as an instance of direct sexual orientation distinction as well as direct sex distinction. (See list of selected cases in para. 0.3. of this report) [].*

Distinction between *married* and *unmarried* partners constitutes ‘direct distinction’ on the ground of *marital status (burgerlijke staat)*. The General Equal Treatment Act prohibits this in the employment context. However, in regard to *survivor’s pensions*, the Act in Article 5(6) enshrines an exception for distinctions based on marital status. [This exception is still existent. It is currently so, that the prohibition of distinction on the ground of marital status also applies with regard to pension provision, with the exception of survivor’s pensions provided that the survivor’s pension provision was arranged before 1994 (entering into force

---

<sup>197</sup>What follows hereinafter in para. 4.5. is based entirely upon the sexual orientation report of 24 August by Kees Waaldijk. This applies also to any information found in the footnotes.

<sup>198</sup>See opinions 97-47 and 97-48; opinion 99-08; opinion 99-13.

<sup>199</sup>Opinion 97-29.

<sup>200</sup>Opinion 98-10. The scope of this report is too short to consider this case in more detail.



of GETA) ]. It is for that *and* for symbolic reasons that some (unmarried) same sex partners have tried to challenge cases of *direct distinction on the ground of civil status, as indirect sexual orientation distinctions*. After all, until 1<sup>st</sup> of April 2001, only opposite sex partners could lawfully marry in the Netherlands. Thus, discrimination against unmarried employees, constituted a particular disadvantage for homosexual/ lesbian employees. That this constitutes indirect distinction on the ground of sexual orientation has been recognised by the courts<sup>201</sup>, as well as by the Equal Treatment Commission<sup>202</sup>, also in the context of pensions<sup>203</sup>. Given that since 2001 same sex couples may lawfully marry, direct distinction against unmarried employees can hardly ever be challenged on the basis of a claim of indirect sexual orientation distinction.<sup>204</sup>

*b) Is there an exception in the national law, particularly in relation to sexual orientation discrimination, for national laws on marital status and work-related benefits dependent thereon (Recital 22, Directive 2000/78)? Article 5(6) of the General Equal Treatment Act contains an exception with regard to survivor's pensions (see also above under a).*

*c) In states where other forms of legally-recognised partnership exist (e.g. registered partnership), does the law permit restrictions on work-related family benefits that exclude such couples?*

Registered partnership was introduced on 1<sup>st</sup> of January 1998 in the Netherlands, both for same and opposite sex couples.<sup>205</sup> Distinction between married and registered partners (or, between registered and non registered partners) constitutes *direct distinction* on the ground of marital (civil) status, *prohibited* by the General Equal Treatment Act.<sup>206</sup> The Equal Treatment Commission has indicated that, the exception to the prohibition of distinction on the ground of civil status in Article 5(6) (regarding survivor's pensions) must be interpreted strictly and narrowly: distinctions between married and registered survivors are therefore not covered by the exception in Article 5(6).<sup>207</sup>

#### **4.6 Health and safety**

*Are there exceptions in relation to disability and health and safety (Article 7(2), Directive 2000/78)? Are there exceptions relating to health and safety law in relation to other grounds, for example, ethnic origin or religion where there may be issues of dress or personal appearance (turbans, hair, beards, jewellery etc)?*

---

<sup>201</sup>Hoge Raad (Supreme Court) 19 October 1990 *Nederlandse Jurisprudentie*, 1992, nr. 119 (*obiter dictum* with respect to a claim of two women who wanted to marry each other); *Gerechtshof* (Court of Appeal) Amsterdam, 6 May 1993 *Nederlandse Jurisprudentie*, 1994, nr. 681 (with respect to family property law); *Rechtbank* (District Court) Den Haag, 23 October 1997 (Migrantenrecht 1997, nr. 130-131 with respect to immigration law).

<sup>202</sup>Opinion 96-52 (confirmed by *Gerechtshof* (Court of Appeal) Amsterdam 2 October 1997, *Rechtspraak Nemesis* 1998, nr. 822. This case was about free international train travel for unmarried partners of Dutch rail employees.

<sup>203</sup>Opinions 98-110; 98-115.

<sup>204</sup>See Article 30 of Book 1 of the Dutch Civil Code as amended by the *Wet Openstelling Huwelijk* (Act on the Opening Up of Marriage), of 21 December 2000 (Staatsblad (Law Gazette) 2001, nr. 9). A translation is available at [www.emmeijers.nl/waaldijk](http://www.emmeijers.nl/waaldijk).

<sup>205</sup>Articles 80a-80e of Book 1 of the Dutch Civil Code, as amended by the Act of 5 July 1997 (Staatsblad [Law Gazette] 1997, nr. 324; and hundreds of provisions in other Acts, as amended by the *Aanpassingswet Geregistreerd Partnerschap* (Registered Partnership Adjustment Act) of 17 December 1997, Staatsblad [Law Gazette] 1997, nr. 660. Both laws came entered into force on 1<sup>st</sup> January 1998.

<sup>206</sup>See also, Opinion 99-13 by the Equal Treatment Commission (requirement of the same number of days off for the employee's partnership registration, as for his wedding).

<sup>207</sup>See the Opinions 02-111 and 02-113 by the Equal Treatment Commission.

Yes, there are. Article 3(1) 'a' of the Disability Discrimination Act reads as follows:

- 3(1) “*The prohibition of distinction shall not apply if:*  
a. *the distinction is necessary for the protection of public security and health;*  
(...)”

A similar counterpart exception has not been enshrined in the General Equal Treatment Act or in the Age Discrimination Act. However, safety and security issues may come at the surface in the ‘objective justification test’ for indirect discrimination cases. For example, a prohibition of headscarves during gymnastics for reasons of safety and security can be objectively justified.

In the context of the Disability Discrimination Act the following is observed.<sup>208</sup> As with any exception, the above exception must be interpreted narrowly. It follows from the Parliamentary History that a high threshold is set for any successful reliance upon this exception. If an employer claims that a distinction on the ground of disability is necessary for reasons of health, safety or security, he must duly motivate his claim. If it is possible to take away the alleged risk by means of making an ‘effective accommodation’, the exception can no longer be successfully relied on. Under the 1998 Working Conditions Act and under private employment law, the employer has a duty to eliminate/ reduce much as possible any risk to the health and well being of his employees. It is not clear from the Parliamentary History or from existing case law whether an employer can exclude a disabled person on the ground that the work will pose a risk to the disabled person's own health or safety (but not the health and safety of others). Neither is it clear whether a disabled individual can decide for him/ herself that he/ she wishes to accept such a risk. Moreover, it is not clear whether the employer would be excluded from liability should the disabled individual suffer harm in such circumstances.

## 4.7 Exceptions related to discrimination on the ground of age

### 4.7.1 Direct discrimination

a) *Is it possible, generally, or in specified circumstances, to justify direct discrimination on the ground of age? If so, is the test compliant with the test in Article 6, Directive 2000/78?*

Direct and indirect age distinction may both be ‘objectively justified’ under Article 7(1) ‘c’ of the Age Discrimination Act. With regard to the ‘compliance’ question above, I refer to *para.* 2.2. above, under *heading B*, under *subheading ‘a’*.

b) *Does national law permit differences of treatment based on age for any activities within the material scope of Directive 2000/78? Yes, it does. Article 7(1) indents ‘a’ and ‘b’ enshrine two exceptions that are deemed a priori to be ‘objectively justified’.*

Indent ‘a’: provides that the prohibition of age distinction shall not apply if the distinction is based on employment- or labour market policies which are aimed at promoting labour participation of certain age categories provided that such policies are enshrined in a Statutory Act or in a Governmental Decree.<sup>209</sup> [Transposition of Art. 6(1) of Directive 2000/78].

Indent ‘b’: the prohibition of age distinction shall not apply if the distinction regards the termination of the employment relationship, either by reason of having reached the statutory

---

<sup>208</sup>See also A.C. Hendriks, *Wet Gelijke Behandeling op grond van handicap of chronische ziekte*, Actualiteiten Sociaal Recht, Kluwer Deventer 2003, p. 66-67.

<sup>209</sup>A concrete example of this exception concerns the *Act on a Minimum Wage and Minimum Holiday Allowance (Wet Minimumloon en Minimum Vakantietoelage)*. This Act contains both a maximum and a minimum age limit of 65 and 23 years old respectively. The Act's purpose is the promotion of employment in general and paid employability for young persons specifically. See Explanatory Memorandum to the Age Discrimination Act, footnote 55 *supra*, pp. 28-30. The indent ‘a’ exception reflects the exception of *Article 6(1)* of Directive 2000/78.

retirement age (65), or, of a *higher* (not lower!)<sup>210</sup> age than that provided this higher age has been laid down by Statutory Act or governmental decree, or has been mutually agreed on by the parties involved. [Transposition of Art. 6(2) of Directive 2000/78]. *Article 16* of the Act provides that the prohibition of age distinction shall, until 2 December 2006, *not* apply to distinctions regarding termination of the employment contract as a result of having reached the – by the employment contract agreed- retirement age *lower than* the statutory retirement age, *provided* this had been agreed on before 1 May 2004 (when the Age Discrimination Act entered into force). After that time, ‘objective justification’ is called for.

*Article 8* of the Act renders the central norm inapplicable in regard to (occupational) pension provision (supplementary to pension provision on the basis of social security law) and in regard to actuarial calculations for pension provision. Article 8(2) provides in essence, that the prohibition of age distinction shall not apply to the admission or entitlement to pension provision<sup>211</sup>, nor to the fixing under such provision of different ages for employees or categories of employees. Article 8(3) renders the central norm inapplicable in regard to the use of age criteria in actuarial calculations. [Transposition of Art. 6(2) of Directive 2000/78].

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

*Are there any special conditions set by law for older or younger workers in order to promote their vocational integration, or for persons with caring responsibilities to ensure their protection? If so, please describe these.* It was said in the previous paragraph, that Article 7(1) ‘a’, enshrines an exception for labour market policies that are aimed at the promotion of labour participation of certain age categories thus including paid employability of young people. Moreover, any such special conditions may pass the test of ‘objective justification’ enshrined in 7(1) ‘c’ of the Act. No special conditions exist for persons with caring responsibilities.

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

*Are there exceptions permitting minimum and/or maximum age requirements in relation to access to employment and training?* No, but such requirements might be ‘objectively justified’ under 7(1) ‘c’. It is stressed that Article 9 of the Act specifies that if, in regard to public advertising of employment a distinction on the ground of age is made, the reason for this distinction must be *explicitly* mentioned.

#### **4.7.4 Retirement**

*a) What is the retirement age? Have there been recent changes in this respect or are any planned in the near future?* The retirement age is 65 years old. No concrete changes have been planned to my knowledge although there is an ongoing political debate on this issue.

*b) Does national law require workers to retire at a certain age?*

No worker in the Netherlands is required by law to retire at a certain age. Private employment law specifies nothing in this respect. However, the age of 65 underpins many social security laws (which belong to the realm of public (employment) law). The compulsory Statutory employees’ insurances (*wettelijk verplichte werknemersverzekeringen*) stop at the age of 65 years old. Since a person of 65 years or older is no longer insured it is *de facto* an enormous barrier to stay in employment. It has already been said, that the Age Discrimination Act considers a dismissal at the age of 65 or more ‘objectively justified’.

---

<sup>210</sup>It follows from the Explanatory Memorandum that indent ‘b’ does not apply to dismissal based upon reaching a pensionable age which is *lower* than 65 years. See Explanatory Memorandum to the Age Discrimination Act, footnote 74 *supra*, p. 32. See however Article 16 of the Age Discrimination Act explained hereinafter.

<sup>211</sup>A concept defined in Article 8(1) of the Age Discrimination Act.

c) Does national law permit employers to require workers to *retire* because they have reached a particular age? Yes, (as previously said) the Age Discrimination Act permits employers to require workers to retire at the statutory pensionable age or an age higher than that. Moreover, so-called ‘functional age dismissal’ (*functioneel leeftijdsontslag*) falls to be considered under Article 7(1) ‘c’ [*general objective justification*]. In short, it refers to the dismissal of persons whose professional functioning presumably declines given the nature of the job (e.g., firemen or pilots). Such dismissals are often rationalised by health, safety and security considerations (i.e., the *legitimate aim*). However, *necessity, appropriateness and proportionality* must be met too.<sup>212</sup>

*In this respect, does the law on protection against dismissal apply to all workers irrespective of age?* Yes, it does. However, it has been provided for in employment law, that in case of the restructuring of a company, the so-called ‘*last in first out*’ principle may be used as a yardstick in the choice as to whom to dismiss first. The principle works to the advantage of older workers (and constitutes ‘indirect distinction’ of younger workers). The principle has also been accepted in the case law. The Explanatory Memorandum to the Age Discrimination Act explicitly says that the use of this principle may be ‘*objectively justified*’ under Article 7(1) ‘c’ of the Act. It is noted that the ‘*last in first out*’ principle currently forms object of debate in the Dutch Parliament.<sup>213</sup>

*For both of the above questions, please indicate whether the ages differ for women and men. No, they do not.*

#### 4.7.5 Redundancy

a) Does national law permit age or seniority to be taken into account in selecting workers for redundancy? Yes, it does. See para. 4.7.4. above on the ‘*last in first out* principle’. That principle however only applies in regard to dismissals which are necessary due to a restructuring of the company.

b) If national law provides compensation for redundancy, is this affected by the age of the worker? Yes, it is. Compensation is calculated on the basis of the so-called ‘cantonal courts formula’ (*kantonrechtformule*) i.e.,  $a \times b \times c$ .<sup>214</sup> The factor *a* stands for the employee’s number of years of service. This factor is connected to the employee’s age. Until 40 years old, every full year of service counts for 1, between 40-50 years old it counts for 1.5, and, as from 50 years old it counts for 2. (Factor *b* reflects a remuneration component (monthly gross salary) and factor *c* is a ‘correction factor’).

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

---

<sup>212</sup>Illustrative in this regard is a case that was brought by a number of referees in which they challenged the age limits of respectively 47 and 49 as used by the Royal Dutch Football Association (KNVB). The legitimate aim pursued was that of well-functioning referees. However, given the broad range of instruments (e.g., medical tests, condition tests and knowledge tests) which render an *individual* assessment of a person’s capability for the job of referee possible, it was in breach of the proportionality principle to set general age limitations. See Amsterdam Court of Appeal [Hof Amsterdam] 13-01-2000, JAR 2000, 42.

<sup>213</sup>On 18<sup>th</sup> December 2003 the Second Chamber of Parliament accepted a Motion (Motion by the MPs Verburg, Weekers, Bakker and Noorman den Uyl) which begged the government to reconsider the usage of the *last in first out* principle in cases of dismissal for reasons related to the economic situation of a company. See Parliamentary Documents II, 2003-2004, 29 200, XV, nr. 48). See also the recent Note on Reconsideration of the Last in First Out Principle in cases of of dismissal for reasons related to the economic situation of a company, available at [www.szw.nl](http://www.szw.nl).

<sup>214</sup>See H.L. Bakels, I.P. Asscher Vonk, W.J.P.M. Fase, *Schets van het Nederlands Arbeidsrecht*, Kluwer Deventer 2003, p. 179.

*Does national law include any exceptions that seek to rely on Article 2(5) of the Framework Employment Directive? No, it does not.*

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

*Please mention any other exceptions to the prohibition of discrimination (on any ground) provided in national law. The exceptions to age and disability distinction have all been mentioned throughout this report. In the context of the General Equal Treatment Act, the following exceptions have not been mentioned so far:*

- 1. Article 4 of the General Equal Treatment Act provides that the Act shall be without prejudice to the provisions in the Act on Equal Treatment between women and men and to a number of equal treatment provisions in the Civil Code.*
- 2. Article 5(3) of the General Equal Treatment Act: exception regarding the private nature of the employment relationship.*
- 3. Article 7(2) of the General Equal Treatment Act: grants private educational establishments the freedom to impose requirements governing admission to or participation in the education that the establishment provides. Article 7(2) accords with the exception in Article 5(2) 'c' of the General Equal Treatment Act (see para. 4.2. of this report), however, Article 7(2) applies to the entry of pupils to denominational schools [and thus not to employment].*
- 4. Article 7(3) of the General Equal Treatment Act: contains an exception regarding the private nature of the circumstances at which the legal relationship sees. (e.g., a woman who rents a room in her own house may lawfully require that the person who rents the room is female).*
- 5. The internal affairs of associations fall outwit the scope of the General Equal Treatment Act. This follows from the Parliamentary History and is not explicitly provided for in any Article of the Act. However, it is noted that new Article 6a (membership of employers' associations and trade unions) must be respected.*

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

*What scope does national law provide for taking positive action in respect of racial or ethnic origin, religion or belief, disability, age or sexual orientation?*

*Do measures of positive action exist in your country? Which are the most important?*

*Refer, in particular, to the measures related to disability and any quotas for access of disabled persons to the labour market.*

The General Equal Treatment Act and the Disability Discrimination Act enshrine an exception (formal equality approach!) for positive action measures. A counterpart exception has not been enshrined in the Age Discrimination Act.

1. This is reflected in Article 2(3) ['sex'<sup>215</sup> and 'race'] of the General Equal Treatment Act, as partially amended by the *EC Implementation Act*.<sup>216</sup> *No positive action exception applies to the grounds 'religion/belief' and 'sexual orientation'.* Article 2(3) in its post-implementation format imposes the following conditions to positive action measures and policies:

- 1. The initiative must be a specific measure;*
- 2. the measure is aimed at the conferral of a preferential position for women or for people belonging to ethnic minorities;*
- 3. the measure is*

---

<sup>215</sup>This is not covered by this report. Amendments to Article 2(3) General Equal Treatment Act were induced by Directive 2000/43 for the ground 'race'. The amendments for the grounds 'sex' are however not based on this Directive. Positive Action for women is based on Article 141(4) EC Treaty.

<sup>216</sup>The possibility for positive action measures for women and persons belonging to racial minorities, had existed since the adoption of the Act in 1994. The amendments made only served to bring the Dutch provision more in line with the conditions for affirmative action as enshrined in Directive 2000/43.

aimed at the *removal* or the *reduction* of factual inequalities; 4. there must be a *proportionate* relationship between the measure and the objective pursued. This last element is not required by Directive 2000/43. The Dutch definition leaves *less scope* for affirmative action policies and programmes, since it does not allow measures which aim at *preventing*, in addition to *removing* or *reducing* disadvantages.<sup>217</sup> The government has indicated its intention to draw up a special governmental memorandum (*nota*) on the issue of positive action.<sup>218</sup> To my knowledge, this has not been issued yet.

Lastly, the following is observed. In 1998 the *Act on the Promotion of Labour Participation of Ethnic Minorities* entered into force (*Wet Stimuleren Arbeidsdeelname Minderheden: Wet Samen*).<sup>219</sup> This Act obliged employers to create a situation whereby the % of the workforce of ethnic minorities within an organisation is approximately equivalent to the % of ethnic minorities within the region. However, the Act expired on 31 December 2003.

2. Article 3(1) subsection 'c' of the Disability Discrimination Act enshrines a positive action exception to the prohibition of distinction under that Act. The same explanation as above applies here. Article 3(1) under 'b', enshrines for a possibility for *supportive social policies* for disabled people. In contrast to 'positive action measures', these are not 'time restricted'. The Dutch government has introduced several supportive measures designed to promote the reintegration of disabled people in society over the past years. The 1998 Act on the Reintegration of Disabled People in Employment (*Wet op de (Re)integratie Arbeidsgehandicapten*, hereinafter: *REA*)<sup>220</sup> is of particular importance. This Act aims at creating a coherent set of measures which facilitate the (re)integration of 'employment disabled people' ('*arbeidsgehandicapten*') in employment. The means to achieve this objective are in essence: faster payment of expenses (related to (re)integration) to employers; flexible application of qualifications for benefits and, a reduction of the risks for employers.<sup>221</sup> The *REA* also has the purpose of achieving a clear allocation of responsibilities between the various actors involved with (re)integration. The *REA* enshrines the *possibility* for prescribing a *quota i.e.*, the obligation for employers to employ a certain number of 'employment disabled persons'. However, this possibility has not been made use of so far.<sup>222</sup> In essence the *REA* aims at reducing or taking away objections by employers to the employment of disabled persons.

## **6. REMEDIES AND ENFORCEMENT**

**6.1 Judicial and/or administrative procedures (Article 7 Directive 2000/43, Article 9 Directive 2000/78)** *What procedures exist for enforcing the principle of equal treatment (judicial/administrative/alternative dispute resolution such as mediation)? Are these binding or non-binding? Please note whether there are different procedures for employment in the private and public sectors. In relation to the procedures described, please indicate any costs or other barriers litigants will face (e.g. necessity to instruct a lawyer?) and any other factors that may act as deterrents to seeking redress (e.g. strict time limits, complex procedures, location of court or other relevant body)?*

---

<sup>217</sup>See Explanatory Memorandum to the EC Implementation Act, footnote 8, supra, p. 9.

<sup>218</sup>See Explanatory Memorandum to the EC Implementation Act, footnote 8, supra, p. 9.

<sup>219</sup>Staatsblad 1998, 241 [Law Gazette 1998, 241].

<sup>220</sup>Wet op de (Re)integratie Arbeidsgehandicapten, wet van 23 April 1998, *Stb.* 290, meest recentelijk gewijzigd bij de wet van 15 december 1999, *Stb.* 564 [Act on the Reintegration of Disabled People in Employment, Act of 23 April 1998, *law gazette* 290, most recently amended by the Act of 15 December 1999, *law gazette*, 564].

<sup>221</sup>D. Beekman and E.J. Kronenburg Willems, *Wet op de Re(integratie) arbeidsgehandicapten*, PS Special Wet *REA*, (1998).

<sup>222</sup>Space prevents me from discussing the *REA* into more detail. I refer to the Baseline Study on Disability Discrimination (2004) by Waddington and Gijzen for more details on this Statutory Act.

The statutory non discrimination acts do not enshrine *compulsory* judicial procedures.<sup>223</sup> If discrimination occurs in private employment, the conventional civil law procedures apply. If it occurs in public employment, the ordinary procedures of administrative law apply.<sup>224</sup> These procedures lead to a *legally binding outcome*. In addition, the non discrimination acts provide for a special (non compulsory) procedure before the Equal Treatment Commission.<sup>225</sup> The Commission is a semi-judicial body which renders *non binding Opinions*. After it has rendered an Opinion, a complaint may still be lodged before the conventional civil/administrative courts if the applicant wishes to obtain a *binding* judgment. The Commission is a low threshold body: no legal representation is required. Moreover, the procedure before the Commission does not cost anything. With regard to time limits, the following is said. Administrative law procedures: the *General Act on Administrative Law* provides that in principle an appeal must be lodged *within 6 weeks* counted as from the day *after the day* on which the contested decision has been made known. Civil law procedures: *ex* Article 8(2) of the General Equal Treatment Act (Art. 9(2) Disability Discrimination Act and Art. 11(3) Age Discrimination Act) an applicant who wishes to contest the lawfulness of the termination of the employment contract (discriminatory dismissal/ victimisation dismissal) must do so within *2 months* after the termination of the employment contract. (See also: Articles 7:647(2), 7:649(2) and 7:648(1) of the Civil Code).<sup>226</sup> A legal claim with regard to the nullification of the employment contract can no longer be made after 6 months have passed after the day on which the employment contract was terminated (Article 8(3) of the General Equal Treatment Act/ Art. 9(3) Disability Discrimination Act/ Art. 11(4) Age Discrimination Act). With regard to procedures before the Commission: Article 14 (1) 'c' of the General Equal Treatment Act only sets a requirement of *reasonableness*. (This applies also in the context of procedures lodged under the Age and Disability Discrimination Acts).

To my knowledge no specific rules exist requiring that courts/ buildings/ Commission are physically accessible. Neither is it specified anywhere to my knowledge that information must be provided in Braille. No special procedures exist for dealing with individuals with a learning disability. Sign language interpretation must legally seen not be provided to my knowledge. The person who feels discriminated against can file a petition at the Equal Treatment Commission *in writing* (Article 12 GETA). For non-Dutch people this is not always an easy task and therefore it is possible to specify the complaint during an interview at the Commission's office.<sup>227</sup> By analogy, special provisions might be made for persons with a disability.

## **6.2 Legal standing and associations (Article 7(2) Directive 2000/43, Article 9(2) Directive 2000/78) What are the criteria for an association to engage in judicial or other procedures?**

a) *in support of a complainant?*

b) *on behalf of one or more complainants?*

Under Article 3:305a and 305b of the Civil Code and Article 1:2(3) of the *General Act on Administrative Law* interest groups can take legal action in court. (The partially reversed burden of proof also applies here). Interest groups also have the right to ask the Equal Treatment Commission to start an investigation. The interest group must have full legal

---

<sup>223</sup>See K. Waaldijk, Sexual Orientation Report of 24 August 2004.

<sup>224</sup>The civil court has moreover competence in cases in which discriminatory contractual agreements are at stake. And, with regard to unilateral governmental decisions e.g., concerning the allocation of social security benefits/ social advantages, administrative procedures apply.

<sup>225</sup>The procedure before the Equal Treatment Commission and the Commission's competences will be examined in paragraph 7 on Specialised Bodies.

<sup>226</sup>J.H. Gerards and A.W. Heringa, *Wetgeving Gelijke Behandeling*, Kluwer Deventer 2003, p. 199.

<sup>227</sup>This information comes from J. Goldschmidt, *Equality law and the work of the Equal Treatment Commission in the Netherlands*, available with the author.

powers and it must follow from its statutes that it represents the interests of those whose protection is the objective of the statutory equality acts. (Article 12(2) 'e' of the General Equal Treatment Act).

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

Does national law require or permit a shift of the burden of proof from the complainant to the respondent? Identify the criteria applicable in the full range of existing procedures and concerning the different types of discrimination, as defined by the Directives (including harassment). Article 10(1) General Equal Treatment Act lays down the 'partially reversed burden of proof'. The Article was inserted by the EC Implementation Act. It reads as follows: "if a person who considers herself to have been wronged through 'distinction' as referred to in this Act established before a court facts from which it may be presumed that distinction has taken place, it shall be for the respondent to prove that the contested act was not in contravention of this Act". The equivalent Articles in the Disability Discrimination Act and Age Discrimination Act are Articles 10(1) and 12(1) respectively. Subsection 2 of these three Articles provides that the partially reversed burden of proof also applies in group actions under Article 3:305a Civil Code and Article 1:2(3) of the *General Act on Administrative Law*. Strictly spoken, the partially reversed burden of proof does not apply in procedures before the Equal Treatment Commission. The exception in Article 8(5) and 10(5) of the Directives is applicable. However, on a voluntary basis the Commission nevertheless applies it in its case law.

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

All three Acts protect against victimisation dismissal and against other forms of disadvantage as a result of the fact that a person has invoked the statutory equality act or has otherwise assisted in proceedings under these Acts, e.g., by means of a testimony. The relevant Articles in the GETA are Article 8(1) which pertains to 'victimisation dismissal' and Article 8a [introduced by the EC Implementation Act] which protects against other [i.e., other than dismissal] forms of disadvantage. Article 8(1) reads as follows: "*If an employer terminates an employee's employment in contravention of section 5, on the grounds that the employee has invoked section 5, either at law or otherwise, or has provided assistance in relation to it, such termination shall be invalid*".

Article 8a reads as follows: "*Adverse treatment in reaction to a person's reliance either at law or otherwise on this Act or provision of assistance in relation to it shall be prohibited*". Equivalent Articles are enshrined in the Disability Discrimination Act (Articles 9(1) and 7a respectively) and in the Age Discrimination Act (Articles 11(2) and 10 respectively). The burden of proof rules (see above) do not apply in victimisation cases.<sup>228</sup>

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

*What are the sanctions applicable where unlawful discrimination has occurred? Consider the different sanctions that may apply where the discrimination occurs in private or public*

---

<sup>228</sup>See Parliamentary Papers II, 2002-2003 28 770, nr. 5, p. 35, referred to by Kees Waaldijk "Combating sexual orientation discrimination in employment: legislation in fifteen EU Member States, Report of the European Group of Experts on Combating Sexual Orientation Discrimination. [Final Version, offered to me by Dr. Kees Waaldijk, available with the author].



*employment, or in a field outside employment. Are there any ceilings on the maximum amount of compensation that can be awarded? Is there any information available concerning the extent to which the available sanctions have been shown to be - or are likely to be - effective, proportionate and dissuasive, as is required by the Directives?*

1. According to Article 8(1) of the General Equal Treatment Act, Article 11(1) and 11(2) Age Discrimination Act, and Article 9(1) Disability Discrimination Act, discriminatory dismissals and victimisation dismissals are invalid (void) (*vernietigbaar*). This applies both with regard to public and private employment. The employee can invalidate the termination of the contract and can thereupon claim wages. He can also claim to be reinstated in the job. Or, he can claim compensation for pecuniary damages under the sanctions of general administrative/contract or tort law.

2. Contractual provisions which are in conflict with the General Equal Treatment Act, the Age Discrimination Act and the Disability Discrimination Act, shall be null and void. This follows from Article 9, Article 13 and Article 11 of these Acts respectively.

As also observed by Waaldijk, it is seriously doubted in academic legal circles, whether the range of sanctions available under the equal treatment legislation is in conformity with the requirement that sanctions be ‘*effective, proportionate and dissuasive*’.<sup>229</sup>

## **7. SPECIALISED BODIES**

*Body for the promotion of equal treatment (Article 13 Directive 2000/43)*

*Does a ‘specialised body’ or ‘bodies’ exist for the promotion of equal treatment irrespective of racial or ethnic origin? Describe briefly the status of this body (or bodies) including how its governing body is selected, its sources of funding and to whom it is accountable.*

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

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

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

*Is the work undertaken independently?*

The functions of the Dutch Equal Treatment Commission are on the one hand semi-judicial in character and on the other hand, of a preventive kind. Hereinafter the most important functions of the Commission shall be outlined.

The Commission’s principal function is to investigate alleged discriminatory instances. In addition to the conventional procedures under civil and administrative law, the Commission has jurisdiction with regard to (*inter alia*) the General Equal Treatment Act, the Age Discrimination Act and the Disability Discrimination Act. The Commission is a *semi-judicial* low threshold body that gives non-binding Opinions. It works independently. It is noted that Articles 12, 13, 14, 15, 20(2) and 33 of the General Equal Treatment Act are equally applicable in the context of the Age and Disability Discrimination Acts.

---

<sup>229</sup>*Ibid* with references to R. Holtmaat, “Uit de Keuken van de Europese Unie: de Gelijkebehandelingsrichtlijnen op grond van Artikel 13 EG Verdrag”, in T. Loenen et al., (eds.) *Gelijke Behandeling: Oordelen en Commentaar 2000*, Deventer Kluwer 2001, pp. 105-124 and to I.P. Asscher-Vonk, ‘Sancties’ & Conclusie Juridische Analyse’, in I.P. Asscher-Vonk & C.A. Groenendijk (eds.) *Gelijke Behandeling Regels en Realiteit*, Den Haag SDU 1999, pp. 202-234 and pp. 301-319.

It follows from Article 12(2) of the General Equal Treatment Act that complaints can be lodged by:

1. 'Victims' of alleged cases of 'distinction';
2. Natural person/ legal person/ competent authority wishing to know whether they are acting in contravention of the respective Statutory Equality Acts; [assessment of one's own 'conduct'].
3. Those charged with the judgment of a dispute concerning an alleged unlawful distinction (e.g., a judge in a civil law procedure).
4. A works council or a committee which believes that unlawful distinction is taking place in the company or civil service unit within which it has been appointed.
5. A legal person with full legal powers which, in accordance with its constitution or statutes, represents those whose protection is the objective of the relevant Statutory Equality Acts. [class actions].
6. The ETC also may conduct an investigation by its own motion (Article 12(1) General Equal Treatment Act. [It is thus not needed that a complaint is filed by another person; in such cases where the Commission suspects entrenched systematic discriminatory patterns it is entitled to conduct an investigation by its own motion. However, according to Article 12(1) the Commission may only do so in the public sector or in one or more sectors of society. Thus, it may not do so in an individual organisation or institution].<sup>230</sup>

The Commission's investigation procedure is mentioned in Article 21 of the GETA and elaborated on in a separate Governmental Decree. It follows from Article 19 GETA that in principle, all parties involved in the investigation of an alleged complaint are under the duty to provide the Commission with all information that is requested from them by the Commission. A failure to do so can be sanctioned by criminal law.<sup>231</sup>

The Commission after instituting an investigation must forward its findings, in writing and with reasons, to the petitioner, the person said to be guilty of unlawful differentiation and, if relevant, the victim of unlawful differentiation (Article 13(1) General Equal Treatment Act).

In certain instances the Commission does not initiate proceedings, namely when: the request is manifestly unfounded; the interest of the petitioner or the importance of the behaviour concerned is manifestly insufficient; the period of time which has elapsed since the unlawful differentiation took place is such that an investigation can no longer reasonably be conducted (Article 14 (1) General Equal Treatment Act).

In regard to 'sanctions', Articles 13(2), 13(3) and 15 of the General Equal Treatment Act are important. Sanctions under these Articles are imposed by the Commission, not by the courts. Under Article 13(2), the Commission may make *recommendations* when forwarding its findings (in an Opinion) to the party found to have made unlawful distinction. Under Article 13(3) the Commission may also forward its findings in an Opinion to the Ministers concerned, and to organisations of employers, employees, professionals, public servants, (consumers of goods and services) and to relevant consultative bodies. Under Article 15(1) the Commission may bring legal action with a view to obtaining a ruling that conduct contrary to the relevant equal treatment legislation is unlawful, requesting that such conduct be prohibited or eliciting an order that the consequences of such conduct be rectified.<sup>232</sup> This

---

<sup>230</sup>See also J. Goldschmidt, Equality law and the work of the Equal Treatment Commission in the Netherlands, available with the author.

<sup>231</sup> Ibid.

<sup>232</sup>Unless the person affected by the alleged discriminatory conduct has made reservations (Article 15(2) of the General Equal Treatment Act.

power must be regarded in light of the fact that the Commission's Opinions are not binding. The Commission has never made use of this possibility.

The Commission consists of 9 members, including a chairman and two vice chairmen and 9 substitute members (Article 16 of the General Equal Treatment Act). The Chairman and both vice chairmen must have the same qualifications than those which are required for the profession of 'district judge' (*rechterlijk ambtenaar*). Members of the Commission are appointed by the Minister of Justice with agreement of the Ministers of the *Interior, Social and Labour Affairs, Education and Science and Welfare/Health and Culture* (Article 16(3) of the General Equal Treatment Act). By means of disciplinary measure, a Commission member may be dismissed by the Dutch Supreme Court in case that member seriously impedes the course of the law or, the trust that has been put on him/ her.<sup>233</sup> In addition to the above, the Commission also performs a consultative function (e.g., to the Government when drafting laws) as well as an informative and research function. The Commission disseminates information through brochures, newsletters, annual bulletins, its website etc. The Commission's annual bulletin indicates the number of complaints in a given year and provides summaries of the Opinions rendered in that year.<sup>234</sup>

*If there is any data regarding the activities of the body (or bodies), include reference to this (keeping in mind the need to examine whether the race equality body is functioning properly). For example, annual reports, statistics on the number of complaints received in each year or the number of complainants assisted in bringing legal proceedings. All of these can be found at the Commission's website [www.cgb.nl](http://www.cgb.nl) as well as in the Commission's annual reviews.*

**8. IMPLEMENTATION ISSUES** [All information under this heading was kindly provided by Ms Marjon Rensen of the Ministry of Social Affairs and Labour].

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

*Describe briefly the action taken by the Member State*

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

- Information on Websites of the Ministries (<[file://www.szw.nl](http://www.szw.nl)> [www.szw.nl](http://www.szw.nl) and <[file://www.vws.nl](http://www.vws.nl)> [www.vws.nl](http://www.vws.nl));
- Advertisements on websites and papers (May and September 2004);
- Publication of (up to date) information brochures;
- Publication of informative Articles in professional and non professional journals and in the News letter of the Equal Treatment Commission.
- Symposium for persons working in personnel departments, works councils, and collective agreement negotiators in October 2003;
- Campaign "Discrimination? Phone right away" ['Discriminatie? Bel Gelijk'] (Publication Campaign concerning a telephone helpline), financed by the European Commission and the joint Ministries and which has started in June 2004;
- Campaign Discrimination? Not against me! [Discriminatie? Niet met mij!], (project on empowerment) financed by the European Commission and the joint Ministries and which has started in 2005;
- With regard to 'disability and chronic disease': social discussion through the European Year of people with a disability and through the campaign 'The Challenge for ...' [Campagne 'De uitdaging voor...'] a help desk has been set up.
- In 2005 information sessions are coming up (in joint cooperation with the Dutch association of personnel managers and the Equal Treatment Commission) and publication of Articles is foreseen.

<sup>233</sup>J.H. Gerards and A.W. Heringa, *Wetgeving Gelijke Behandeling*, Kluwer Deventer 2003, p. 157.

<sup>234</sup> See also J. Goldschmidt, *Equality law and the work of the Equal Treatment Commission in the Netherlands*, available with the author.

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

- The Ministry of Social Affairs and Labour set up the (informal) Network *Equal Treatment* in 2003. Participants in this network are: NGOs, the social partners and the relevant Ministries (see under para. 10 of this report). The Network convenes twice a year in order to exchange information on equal treatment. Twice a year the Newsletter of the Equal Treatment Commission is published.
- The NGOs participate in the management commissions of various projects and campaigns including the campaign 'Discrimination? Phone right away!'. For other projects: see part C hereinafter.
- With regard to disability and chronic disease: a subsidy has been granted to various NGOs with a view to the provision of information (The Chronically Ill and Disability Council; the Federation of Old People's associations'; LFB commonly strong (*LFB Onderling Sterk*). Moreover, with regard to the helpdesk mentioned above under A, a cooperation has taken place between the Equal Treatment Commission, the Commission 'the Working Perspective' [*Commissie Het Werkend Perspectief*] and Handicap and Study [*Handicap & Studie*].
- With regard to the ground 'age': a subsidy has been granted to the National Bureau Age Discrimination, for the project called '*age and employment*' (see further under C hereinafter).
- With regard to the ground 'race': The National Bureau against Race Discrimination and the Dutch Institute of Psychologists – and under the auspices of the Ministry of Social Affairs and Labour - jointly work on a procedure concerning the taking of psychological tests with ethnic minorities.

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

1. The Ministry of Social Affairs has executed the so-called 'Article 13 Project' which consists of the following:

- Small and medium sized companies' courses & training (information sessions for Intermediates).
- Small and medium sized companies' courses & training (information sessions for personnel managers).
- Small and medium sized companies/ AV Breed training (promotion of expertise of Collective Agreement Negotiators of branched organisations via the small sized and intermediate companies' courses & training).
- Providing information: Articles have been written and have appeared multiple professional journals.
- Big Companies Project [*Grote Bedrijven Project*]: interviews with big companies on equal treatment.

2. Participation of the Social Partners in the Network Equal Treatment. Info on this Network has been given under B above.

3. Project 'Age and Employment' (for which a subsidy has been granted by the Ministry of Social Affairs and Labour to the National Bureau on Age Discrimination). This project sees at the promotion of expertise of inter alia: works councils, employers, trade unions, personnel managers and employment mediators.

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

*a) Are there mechanisms to ensure that contracts, collective agreements, internal rules of undertakings and the rules governing independent occupations, professions, workers' associations or employers' associations do not conflict with the principle of equal treatment?*

Article 9 of the GETA, Article 13 of the Act on Age Discrimination and Article 11 of the Disability Discrimination Act stipulate that 'agreements' which are in contravention of the equal treatment legislation shall be null and void.

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

I am not sure given that there are so many laws, regulations and rules available in a country. It is therefore hardly possible to answer this question with certainty. However, to my knowledge there are not.

**9. OVERVIEW** *This section is also an opportunity to raise any important considerations regarding the implementation and enforcement of the Directives that have not been mentioned elsewhere in the report. Not applicable.*

#### **10. COORDINATION AT NATIONAL LEVEL**

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

For various (legislative) procedures and paths, frequent cooperation exists between the Ministries of: *Interior and Kingdom Affairs, Justice, Education/Culture/Science, Social Affairs and Labour* and *Health/Welfare/Sports*. For certain specified projects, the Ministries of *Housing, Planning and Environment* and *Traffic and Water* are also involved. The coordination can be mirrored in the following way:

- Equal Treatment in Employment: (inter alia: Equal Treatment Act Men/Women): *Ministry of Social Affairs and Labour.*
- Age Discrimination: *Ministry of Social Affairs and Labour.*
- Disability Discrimination: *Ministry of Health Welfare and Sports*
- General Equal Treatment Act: *Ministry of the Interior and Kingdom Relations.*

**ANNEX 1: TABLE OF KEY NATIONAL ANTI-DISCRIMINATION LEGISLATION**

**WEBSITES:** [www.cgb.nl](http://www.cgb.nl) (and [www.overheid.nl](http://www.overheid.nl)).

Name of Country

**THE NETHERLANDS**

Date

**DECEMBER 2004**

Title of Legislation (including amending legislation)	In force from:	Grounds covered	Civil/Administrative/ Criminal Law	Material Scope	Principal content
This table concerns only key national legislation; please list not more than 10 anti-discrimination laws (which may be included as parts of laws with wider scope). Where the legislation is available electronically, provide the webpage address.	Please give month / year			e.g. public employment, private employment, access to goods or services	e.g. prohibition of direct and indirect discrimination or creation of a specialised body
1. The Act on Equal Treatment between Women and Men 1989 (NB: after that year the Act has been amended several times).	1989 (Law Gazette 1989, 168).	Sex	Civil law and administrative law	<i>Grosso modo</i> : Access to employment (public and private), remuneration, the liberal profession, vocational training and pension provision. (pension provision since 1999).	Prohibition of direct and indirect distinction. Protection against victimisation. The Equal Treatment Commission has competence to give Opinions regarding the interpretation of the Act.
2. Articles 7:646 and 7:647 of the Civil Code.		Sex	Civil Law	Equal Treatment between men and women within employment (7:646) and protection against victimisation dismissal (7:647).	Prohibition of direct and indirect distinction. [Direct sex distinction also includes distinction on the ground of pregnancy/maternity]. Protection against discriminatory and victimisation dismissal. Equal Treatment Commission has competence with regard to Article 7:646 Civil Code.
3. General Equal Treatment Act	1994 (Law Gazette 1994, 230).	Religion, belief, political opinion, race, sex, nationality, hetero-or homosexual orientation, civil status.	Civil and administrative law.	Employment, goods and services, education, health, and, <i>social security and advantages</i> (for the ground 'race' only).	Prohibition of direct and indirect distinction, instruction to discriminate, prohibition of harassment, protection against

The Netherlands Country report on measures to combat discrimination

					victimisation, competence of Equal Treatment Commission.
4. Act on Prohibition of Distinction on the ground of Employment Duration (Article 7:648 of the Civil Code and 125g of the Civil Servants Act	1996	Employment duration (arbeidsduur).	Civil and administrative law	Employment (private and public)	Prohibition of distinction ( <i>no</i> distinction is made between <i>direct</i> and <i>indirect</i> distinction). Both are susceptible for 'objective justification'. Protection against discriminatory and victimisation dismissal. Competence of Equal Treatment Commission.
5. Act amending the Act on Equal Treatment between men and women and Titel 7.10 of the Civil Code in order to implement the EC Burden of Proof Directive in cases of discrimination on the ground of sex.	2000 (Law Gazette 2000, 635).	Sex	Civil and administrative law	Employment and Pension Provision	Introduction of the partially reversed burden of proof.
6. Act on the Prohibition of Distinction on the ground of the employee's temporary contract/ permanent contract (Article 7: 649 of the Civil Code).	2002 (Law Gazette 2002, 560)	Temporary contract/ permanent contract	Civil Law	Conditions of Employment	Prohibition of distinction ( <i>no</i> distinction is made between <i>direct</i> and <i>indirect</i> distinction). Both are susceptible for 'objective justification'. Protection against discriminatory and victimisation dismissal. Competence of Equal Treatment Commission.
7. Act on Equal Treatment on the ground of Age in Employment	1 <sup>st</sup> of May 2004.	Age (both young and old age)	Civil and administrative law	Employment (public and private).	Prohibition of distinction, instruction to discriminate, harassment, victimisation, competence equal treatment commission
8. Act on Equal Treatment on the ground of disability or chronic disease	1 <sup>st</sup> of December 2003	Disability and chronic disease	Civil and administrative law	Employment (public and private) and transport	Prohibition of distinction, instruction to discriminate, harassment, victimisation, competence equal treatment commission

*The Netherlands Country report on measures to combat discrimination*

9. EC Implementation Act General Equal Treatment Act 2004	1 <sup>st</sup> of April 2004	Amends (inter alia) the General Equal Treatment Act + the Disability Discrimination Act with a view to compliance with the Article 13 EC Directives	Civil and administrative law		
10. Article 1 of the Constitution	1983	religion, belief, political opinion, race, sex or on any other ground (open ended clause).	Constitutional Law	Predominantly vertical relations but might also have an effect in horizontal relations.	Equality guarantee and prohibition of discrimination (pejorative concept).

Name of country **The NETHERLANDS DECEMBER 2004**

Instrument	Signed (yes/no)	Ratified (yes/no)	Derogations/reservations relevant to equality and non-discrimination	Right of individual petition accepted?	Can this instrument be directly relied upon in domestic courts by individuals?
European Convention on Human Rights (ECHR)	Yes	Yes	No	Yes	Yes
Protocol 12, ECHR	Yes	Yes	No	Yes	Yes
Revised European Social Charter	Yes	No	This cannot be said at this stage, since reservations are usually made at Ratification.	Ratified collective complaints protocol? Signed: yes. Ratified: No.	Yes
International Covenant on Civil and Political Rights	Yes	Yes	No	Yes	Yes
International Convention on Economic, Social and Cultural Rights	Yes	Yes	No	Not applicable	Yes
Convention on the Elimination of All Forms of Racial	Yes	Yes	No	Yes	Yes



*The Netherlands Country report on measures to combat discrimination*

Discrimination					
Convention on the Elimination of Discrimination Against Women	Yes	Yes	No	Yes	Yes
ILO Convention No. 111 on Discrimination	Yes	Yes	No, not to my knowledge		Yes