

Combating sexual orientation discrimination in employment: legislation in fifteen EU member states

Report of the *European Group of Experts
on Combating Sexual Orientation Discrimination*¹
about the implementation up to April 2004 of
*Directive 2000/78/EC establishing a general framework
for equal treatment in employment and occupation*

16 Sweden

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16.1 General legal situation

16.1.1 Constitutional protection against discrimination

See 16.1.2 below.

16.1.2 General principles and concepts of equality

The way the Swedish legal system has related to issues of fundamental human rights from the beginning of the 20th century and onwards has been greatly influenced by what has been called the Scandinavian school of legal realism (*'le réalisme Scandinave'*). In short, the advocates of this legal theory were most famous for their scepticism against older ideas of 'natural' rights. The realists took as their point of departure a view that statements about conditions not observable in time and space – e.g. value judgements such as 'right' and 'wrong' or 'good' and 'evil' – were merely metaphysical. This sceptical attitude towards any concept of natural or innate rights has been heavily criticised, and in my opinion rightly so, for contributing to the undermining of the position and concrete legal importance of civil rights law in Sweden.³

This very influential legal theory kept its strong position in Swedish legal and political science up to the early 1980s. It was not until 1995 that the European Convention on Human Rights⁴ became directly applicable as national law in Sweden.⁵ And there is still no general, directly applicable and legally binding, provision guaranteeing equality and prohibiting discrimination in the Swedish Constitution. The resistance against the creation of any form of Constitutional court has been persistent. Furthermore, the right under the Constitution⁶ of all courts of law and other institutions of public administration to exercise constitutional control over Acts of Parliament and Government Decrees, including the right to set aside such provisions, is a weak one insofar as it requires the 'error', i.e. the inconsistency of such a legal provision with one of higher constitutional ranking, to be 'obvious' for this right to constitutional control to apply.

The Swedish Constitution consists of four 'fundamental laws' [*grundlagar*], i.e. the Instrument of Government, the Act of Succession to the Throne, the Freedom of the Press Act and the Fundamental Law on Freedom of Expression [*Regeringsformen, Successionsordningen, Tryckfrihetsförordningen and Yttrandefrihetsgrundlagen*, respectively].

³ For an overview of legal philosophy in Sweden, see e.g. Nergelius, 1996, 94.

⁴ Convention for the Protection of Human Rights and Fundamental Freedoms, Adopted in Rome on 4 November 1950. Entered into force on 3 September 1953.

⁵ *Lag (1994:1219) om den europeiska konventionen angående skydd för de mänskliga rättigheterna och de grundläggande friheterna* [Act of Parliament (1994:1219, which means that the Act has been published as no. 1219 in the 1994 edition of *Svensk författningssamling, SFS*, the Official Bulletin for the publication of Acts of Parliament and Government Decrees) on the European Convention for the Protection of Human Rights and Fundamental Freedoms], available at < www.homo.se.

⁶ Article (art.) 14 of chapter (ch.) 11 of the Instrument of Government. The Instrument of Government is available on the web site of the Swedish Parliament, however in Swedish only at: http://rixlex.riksdagen.se/htbin/thw/?%24%7BHTML%7D=SFST_LST&%24%7BHTML%7D=SFST_DO&%24%7BHTML%7D=SFST_ERR&%24%7BHTML%7D=26&%24%7BHTML%7D=TRIPSHOW%7D=format%3DTHW&%24%7BHTML%7D=SFST&%24%7BHTML%7D=FREE&%24%7BHTML%7D=BET=&RUB=regeringsform&ORG=.

The Instrument of Government⁷ contains provisions regarding the basic principles of Government, fundamental rights and freedoms, the role of the Head of State, the Parliament, the Government, courts of law and other bodies of public administration as well as basic rules for legislation, financial powers, the State's relations to other states, Parliamentary control and situations of war or danger of war.

With respect to equality and non-discrimination, the Instrument of Government prescribes that public power shall be exercised with respect for the equal value of all and the liberty and dignity of each individual.⁸ This provision is a reflection of the country's obligations under international human rights law to respect the principle of non-discrimination. This principle includes also sexual orientation. In light thereof, and in light of the development of national legislation on non-discrimination regardless also of sexual orientation, the provision must be interpreted as implicitly covering also sexual orientation discrimination.

However, this provision is not legally binding in any way and thus cannot be directly relied upon in litigation before the courts in individual cases.⁹ The same goes for certain other provisions in the Instrument of Government e.g. regarding the personal, economic and cultural welfare of the individual as a fundamental aim of all public activity or the obligation of public institutions to promote the ideals of democracy. This section of the Instrument of Government was amended,¹⁰ with legal effect from 1 January 2003 to include an obligation upon 'public bodies' [*det allmänna*], a term which includes also both Parliament and Government, to take action against discrimination on grounds of sexual orientation, as well as sex, colour of skin, national or ethnic origin, language or religion, disability, age or similar conditions connected to the personality of an individual.'

The term 'take action against' [*motverka*] would seem to include an obligation to abolish any remaining discriminatory legislation as well as an obligation on all public bodies themselves to refrain from discriminating acts. Since this amendment is also not legally binding, the only kind of control is political.

When it comes more specifically to access to employment within the public administration, the general constitutional provisions are supplemented by other, indeed legally binding, provisions of the Instrument of Government,¹¹ according to which regard may be had only to objective factors, e.g. the skills and the previous experience of an applicant, when hiring someone for a job in the Civil Service. This constitutional rule has in its turn been followed up by the passing of the Civil Service Act.¹² Finally, hiring decisions within the Civil Service can for the most part also be subject to administrative appeal to the Government itself, e.g. on the grounds that undue consideration has been given to other factors than those allowed by the Constitution.

⁷ Latest consolidated version published in SFS 2002:904, in Swedish only.

⁸ 1 kap. 2 § *regeringsformen* [art. 2 of ch. 1, Instrument of Government].

⁹ Prop. [Government Bill] 1973:90, page 194.

¹⁰ *Lag (2002:903) om ändring i regeringsformen* [Act (2002:903) amending the Instrument of Government], prop. [Government Bill] 2001/02:72, bet. [Parliament Standing Committee Report] 2001/02:KU18 and 2002/03:KU6.

¹¹ Art. 9(2) of ch. 11.

¹² *Lagen (1994:260) om offentlig anställning*.

My office¹³ has repeatedly criticised the lack of a general, directly applicable and legally binding constitutional provision against discrimination, so far unsuccessfully.¹⁴ This matter has also been the subject of several, however equally unsuccessful, motions tabled in Parliament.¹⁵ The Instrument of Government contains two provisions making discriminatory legislation unlawful regarding other grounds for discrimination, one¹⁶ on the grounds of sex – albeit at the same time giving exceptional leave for (a) positive action legislation, and (b) legislation dealing with compulsory service in the armed forces – and the other¹⁷ prohibiting legislation that would treat citizens as well as other persons staying in Sweden unfavourably because of their belonging to an ethnic minority.

It could be argued – and I for one indeed argue this – that although the Constitution lacks an explicit ban on discrimination in general and on discrimination based on sexual orientation in particular, there is at least an indirect constitutional protection against some forms of such discrimination. This claim is supported by the fact that the Instrument of Government¹⁸ prescribes that no act of law or other provision may be adopted, which contravenes Sweden's undertakings under the European Convention on Human Rights. This provision is supplemented by the already mentioned Act of Parliament on the European Convention, which incorporates the Convention into internal Swedish law. Thus, the Government has an obligation not only not to violate the Convention but also to uphold the respect and protection for the rights enshrined in it. The Court of Human Rights in Strasbourg has consistently interpreted that Convention as applying also to homosexuals¹⁹ and guaranteeing the right to non-discrimination regardless also of sexual orientation.²⁰

Swedish law can be said to take a dual approach to the concepts of formal and substantive equality and non-discrimination. This is made clear by the existing mixture of provisions prohibiting direct discrimination (primarily aimed at 'formal equality between individuals) on the one hand and prohibitions against indirect discrimination, provisions allowing for positive action or imposing obligations to promote equal rights (more focused on 'group rights') on the other.²¹

The formal status in Swedish law of European Community law in case of a conflict with internal Swedish legal provisions, not least with the 'fundamental laws' of constitutional rank, has been much discussed. The Instrument of Government contains no provisions giving explicit precedence to EC law. International treaties that Sweden is a signatory to also do not automatically

¹³ *Ombudsmannen mot diskriminering på grund av sexuell läggning* [the Office of the Ombudsman against Discrimination on grounds of Sexual Orientation], see <www.homo.se>. Also see 16.5.2 below.

¹⁴ See e.g. official opinions to the Government, 12 June 2001 and 26 June 2002, available although in Swedish only at www.homo.se.

¹⁵ Bet. [Parliamentary Standing Committee Report] 1995/96:KU8, 1996/97:KU14, 1997/98:KU32 and 1999/2000:KU11, available although in Swedish only at www.riksdagen.se/debatt/sfst/index.asp.

¹⁶ Art. 16 of ch. 2.

¹⁷ Art. 15 of ch. 2.

¹⁸ Art. 23 of ch. 2.

¹⁹ See e.g. *Dudgeon v. United Kingdom* (1981), ECtHR, Series A, No. 45, *Lustig-Prean & Beckett v. United Kingdom* and *Smith & Grady v. United Kingdom* (ECtHR, 27 September 1999).

²⁰ See e.g. *Salgueiro Da Silva Mouta v. Portugal* (ECtHR, 21 December 1999), and *Karner v. Austria* (ECtHR, 24 July 2003).

²¹ See also e.g. Numhauser-Henning, 2000, 149.

become law in this country, but must first be incorporated or transformed into internal national law (according to the so-called dualistic principle). However, internal Swedish law, including constitutional law, must be interpreted in conformity with the country's international treaty obligations whenever possible. Furthermore, according to the Instrument of Government, legislative power may be handed over to the European Union (EU).²² And, the transitional provisions to the 1994 original amendment of this Instrument of Government provision that paved the way constitutionally for Swedish membership of the EU in the first place, make it clear that the 'acquis communautaire' as it stood at the time of the accession, i.e. including the general principle of supremacy of EC law, was good internal Swedish law from a constitutional point of view.²³ Thus by interpretation, the precedence of EC law over internal Swedish law, including constitutional law, may at least in principle be considered as legally rooted also in the Swedish Constitution. Further provisions regarding the relationship between Sweden and the EU, e.g. with respect to legislative powers and the effect in Sweden of EC law can be found in the 'Accession to the European Union Act'.²⁴

16.1.3 Division of legislative powers relating to discrimination in employment

The Swedish Constitution contains few provisions on the subject of employment legislation. The Instrument of Government states²⁵ that in particular it is incumbent on public institutions to secure the right to work. Chapter 2 of the Instrument of Government contains a list of fundamental rights and freedoms, among which appear also the right of trade unions, employers and employers' associations to take industrial actions (strikes, lockouts etc.) unless otherwise provided in an Act of Parliament or under an agreement between the parties.²⁶ Restrictions affecting the right to practice a certain profession may be introduced only in order to protect pressing public interests and never solely in order to further the economic interests of a particular person or enterprise.²⁷

Legislative initiative lies predominantly with the Government in Sweden. Its right to make legislative proposals to Parliament is guaranteed by the Constitution.²⁸ Although the same right is also guaranteed to each Member of Parliament, it is in practice very unusual that legislation is adopted by approving such a private member's bill. The *adoption* of 'Acts of Law' [*lagar*], however comes under the sovereign competence of Parliament alone. In certain areas a delegation of legislative powers is permitted from Parliament to Government, and in its turn from the Government to government agencies.²⁹

²² Art. 5 of ch. 10, Instrument of Government; *Lag (2002:903) om ändring i regeringsformen* [Act (2002:903) amending the Instrument of Government]; prop. [Government Bill] 2001/02:72, bet. [Parliament Standing Committee Report] 2001/02:KU18 and 2002/03:KU6. In force as of 1 January 2003; previously such a hand over was possible only in relation to the European Communities (EC).

²³ Prop. [Government Bill] 1993/94:114, page 23; bet. [Parliament Standing Committee Report] 1993/94:KU21, page 10.

²⁴ *Lag (1994:500) med anledning av Sveriges anslutning till Europeiska unionen*.

²⁵ Art. 2(2) of ch. 1.

²⁶ Art. 17 of ch. 2.

²⁷ Art. 20 of ch. 2.

²⁸ Art. 3 of ch. 4, Instrument of Government.

²⁹ For further studies of the Swedish legislative system in these respects, see e.g. Strömberg, 1989.

Legislative provisions relating to the personal status of private subjects or the personal and economical relations between private subjects – i.e. matters of civil law legislation – must be adopted in the form of Acts of Parliament, and thus fall under the exclusive competence of Parliament.³⁰ Employment legislation falls under this category. Neither local nor regional authorities have any legislative powers in this field.

16.1.4 Basic structure of employment law

Up until the mid 1960s, public employment was governed by unilaterally adopted provisions. Gradually this system has changed and nowadays work as a civil servant is ruled by contracts and collective agreements largely the same way as is the case for private employment. Some particularities still remain however (see above under 16.1.2).

Two cornerstones in Swedish employment law are the Employment Protection Act³¹ and the Codetermination in the Workplace Act.³² The former contains rules on e.g. the hiring of employees and the different kinds of permitted employment contracts, as well as rules regarding dismissals. The latter contains an intricate system of rules on information and negotiations, to guarantee the influence of employees and labour unions on decisions taken by management in a work place. Other important parts of Swedish employment law in general are the Trade Union Representatives (Status in the Work Place) Act,³³ the Working Hours Act,³⁴ the Annual Leave Act³⁵ and the Parental Leave Act.³⁶ They would all seem to be in conformity with art. 16 of the Directive as they do not, as far as I can see, contain any provisions that are directly or indirectly discriminatory on grounds of sexual orientation.

Employment law is considered to be a core part of Swedish social protection legislation. One result of this is that legal provisions in this field which provide for minimum standards to protect the rights of employees cannot be waived e.g. through individual contracts.³⁷ To a large extent they would also be considered as mandatory even in situations where, according to Swedish private international law rules, otherwise the laws of a foreign jurisdiction apply. Collective bargaining agreements between a labour union and an employer or an employers' association also have a very strong legal position in Swedish labour law and therefore can play an important role in the efforts to prevent and counteract discrimination. Otherwise compulsory legal provisions can, on the other hand, often be set aside if the parties to a collective agreement agree to do so.³⁸ Any attempt to do so with respect to legal provisions prohibiting discrimination would however be null and void. See further under 16.6.3 below.

³⁰ Art. 2 of ch. 8, Instrument of Government

³¹ *Lag (1982:80) om anställningsskydd.*

³² *Lag (1976:580) om medbestämmande i arbetslivet.*

³³ *Lag (1974:358) om facklig förtroendemans ställning på arbetsplatsen.*

³⁴ *Arbetsstidslag (1982:673).*

³⁵ *Semesterlagen (1977:480).*

³⁶ *Föräldraledighetslagen (1995:584).*

³⁷ See e.g. art. 2(2), Employment Protection Act (1982:80) and art. 4(1) Codetermination in the Workplace Act (1976:580).

³⁸ See e.g. Art. 2(3-6), Employment Protection Act (1982:80) and Art 4(2-3), Codetermination in the Workplace Act (1976:580).

16.1.5 Provisions on sexual orientation discrimination in employment or occupation

Legal provisions specifically targeting employment discrimination based on sex or gender have been in force in Sweden for more than two decades. This body of law is not known, however, to have been used by courts to outlaw also sexual orientation discrimination. Until the adoption of the Act (1999:133) on a Ban on Discrimination in Working Life because of Sexual orientation,³⁹ there was no specific legislation protecting against sexual orientation discrimination in employment. This does not mean, however, that there was no protection at all against such discrimination.⁴⁰

With respect to discrimination during the process of hiring someone for public employment, certain protection is to be found in general provisions demanding that for such employment regard be had only to objective factors, e.g. the skills and experience of an applicant (see 16.1.2 above). Also, the binding and normative effects of collective bargaining agreements under Swedish employment law can provide protection against discriminatory working conditions. Furthermore, the fact that employers are legally bound by what are considered to be good customs and practices in working life also provide some protection against discriminatory conditions in the workplace.

When it comes to the termination of employment contracts, generally applicable provisions in the Employment Protection Act⁴¹ require objective justification for dismissals. Although the Labour Court [*Arbetsdomstolen* or 'AD'] reportedly has never tried a case where the reason for a dismissal was the sexual orientation of an employee, it is generally believed that such a dismissal would be considered unlawful already under these provisions.

When it comes to harassment against an employee on grounds of her sexual orientation, there are general penal provisions on e.g. harassment,⁴² assault and battery,⁴³ unlawful threats⁴⁴ or verbal abuse⁴⁵ that may be applicable, as well as certain administrative provisions under the Work Environment Act.⁴⁶ The penal law provision on unlawful discrimination (see 16.1.8 below), however, is *not* considered applicable in employment matters.⁴⁷

The aforementioned Act on a Ban on Discrimination in Working Life on grounds of Sexual Orientation entered into force 1 May 1999 (hereinafter only referred to as the 1999 Sexual Orientation Discrimination Act).⁴⁸ It has since been

³⁹ *Lag (1999:133) om förbud mot diskriminering i arbetslivet på grund av sexuell läggning.*

⁴⁰ Prop. [Government Bill] 1997/98:180 *om en lag om förbud mot diskriminering i arbetslivet på grund av sexuell läggning* [proposing an Act on a Ban against Discrimination in Working Life on grounds of Sexual Orientation], pages 15-16.

⁴¹ Most importantly art. 7 and 18.

⁴² Art. 7 of ch. 4, Penal Code (1962:700).

⁴³ Art. 5-6 of ch. 3, Penal Code.

⁴⁴ Art. 5 of ch. 4, Penal Code.

⁴⁵ Ch. 5, Penal Code.

⁴⁶ *Arbetsmiljölagen (1977:1160).*

⁴⁷ Holmqvist, 2002, ch. 16, p. 45.

⁴⁸ *Lag (1999:133) om förbud mot diskriminering i arbetslivet på grund av sexuell läggning*, prop. 1997/98:180, bet. 1998/99:AU4 'Ny lagstiftning mot diskriminering i arbetslivet' [Act (1999:133) on a Ban on Discrimination in Working Life on grounds of Sexual Orientation, Government Bill (1997/98:180) and Parliament Standing Committee Report (1998/99:AU4) New Legislation against Discrimination in Working Life]. An unofficial translation into English of the Act can be found at the web site of the Office of the Ombudsman against Discrimination on grounds of Sexual Orientation, www.homo.se/o.o.i.s?id=1226. The

amended, inter alia to more fully implement the Directive.⁴⁹ The amended version entered into force 1 July 2003.

The Act applies to both public and private employment alike. It covers the whole process of recruitment and hiring of employees, employment conditions including salary and other forms of employment benefits, vocational guidance, professional training, practical work experience, promotion and other significant measures taken by an employer in relation to an employee as well as dismissals. Harassment as well as instructions to discriminate are defined as forms of discrimination. The Act also contains specific provisions obliging employers to take action against harassment that an employee may be subjected to by fellow workers and a ban on retaliation (victimisation) because of complaints submitted against an employer. The Act also orders the setting up of the Office of the Ombudsman against Discrimination on grounds of Sexual Orientation and conveys legal powers on the Ombudsman, ultimately the right to litigate individual cases of discrimination before the Labour Court on behalf of the injured party (formally in the Ombudsman's own name).

With respect to discriminatory practices relating to vocational training, it is relevant to mention also the Equal Treatment of Students at Universities Act (2001:1286)⁵⁰ (hereinafter referred to only as the 2001 Equal Treatment of

Government bill as well as the Parliament Standing Committee Report, although in Swedish only, can be found on the web site of the Swedish Parliament at

http://rixlex.riksdagen.se/htbin/thw?%24%7BHTML%7D=PROP_LST&%24%7BOOHTML%7D=PROP_DOK&%24%7BSNHTML%7D=PROP_ERR&%24%7BMAXPAGE%7D=26&%24%7BCCL%7D=define+reverse&%24%7BTRIPSHOW%7D=format%3DTHW&%24%7BBASE%7D=PROPARKIV9798&%24%7BFREETEXT%7D=&PRUB=&DOK=&PNR=180&ORG=

and

http://rixlex.riksdagen.se/htbin/thw?%24%7BHTML%7D=BET_LST&%24%7BOOHTML%7D=BET_DOK&%24%7BSNHTML%7D=BET_ERR&%24%7BMAXPAGE%7D=26&%24%7BTRIPSHOW%7D=format%3DTHW&%24%7BCCL%7D=define+reverse&%24%7BBASE%7D=BETARKIV9899&%24%7BFREETEXT%7D=&BRUB=&BNR=AU04, respectively.

⁴⁹ *Lag (2003:310) om ändring i lagen (1999:133) om förbud mot diskriminering i arbetslivet på grund av sexuell läggning*, prop. 2002/03:65; bet. 2002/03:AU07 *Ett utvidgat skydd mot diskriminering* [Act (2003:310) amending the Act (1999:133) on a Ban on Discrimination in Working Life on grounds of Sexual Orientation, Government Bill (2002/03:65); Parliament Standing Committee Report (2002/03:AU07) An Extended Protection against Discrimination. An unofficial translation into English of the consolidated version of the Act can be found at the web site of the Office of the Ombudsman against Discrimination on grounds of Sexual Orientation, www.homo.se/o.o.i.s?id=1226. The Government bill as well as the Parliament Standing Committee Report, although in Swedish only, can be found on the web site of the Swedish Parliament at

http://rixlex.riksdagen.se/htbin/thw?%24%7BHTML%7D=PROP_LST&%24%7BOOHTML%7D=PROP_DOK&%24%7BSNHTML%7D=PROP_ERR&%24%7BMAXPAGE%7D=26&%24%7BCCL%7D=define+reverse&%24%7BTRIPSHOW%7D=format%3DTHW&%24%7BBASE%7D=PROPARKIV0203&%24%7BFREETEXT%7D=&PRUB=&DOK=&PNR=65&ORG=

and

http://rixlex.riksdagen.se/htbin/thw?%24%7BHTML%7D=BET_LST&%24%7BOOHTML%7D=BET_DOK&%24%7BSNHTML%7D=BET_ERR&%24%7BMAXPAGE%7D=26&%24%7BTRIPSHOW%7D=format%3DTHW&%24%7BCCL%7D=define+reverse&%24%7BBASE%7D=BETARKIV0203&%24%7BFREETEXT%7D=&BRUB=&BNR=AU07, respectively.

⁵⁰ *Lag (2001:1286) om likabehandling av studenter i högskolan*. The full text of the Act is available – albeit at present only in Swedish – at the web site of the Ombudsman against Discrimination on grounds of Sexual Orientation: www.homo.se. The *travaux préparatoires* are found in prop. (Government Bill) 2001/02:27, bet. (Parliament Standing Committee Report) 2001/02:UbU05, available in Swedish on the web site of the Swedish Parliament at:

http://rixlex.riksdagen.se/htbin/thw?%24%7BHTML%7D=PROP_LST&%24%7BOOHTML%7D=PROP_DOK&%24%7BSNHTML%7D=PROP_ERR&%24%7BMAXPAGE%7D=26&%24%7BCCL%7D=define+reverse&%24%7BTRIPSHOW%7D=format%3DTHW&%24%7BBASE%7D=PROPARKIV0102&%24%7BFREETEXT%7D=&PRUB=&DOK=&PNR=27&ORG=, and

http://rixlex.riksdagen.se/htbin/thw?%24%7BHTML%7D=BET_LST&%24%7BOOHTML%7D=BET_DOK

Students at Universities Act). This Act plays a role since such training (especially at a more advanced level) is sometimes provided for by universities and other establishments of higher education. The act protects students and applicants against direct and indirect discrimination, harassment and instructions to discriminate. It obliges the universities to take active measures to promote equal opportunities regardless of e.g. sexual orientation. The Act also contains specific provisions obliging employers to take action against harassment that a student may be subjected to by fellow students and university employees and a ban on retaliation (victimisation) because of complaints submitted against the university. According to the Act the Ombudsman against Discrimination on grounds of Sexual Orientation has legal standing to litigate individual cases before the courts on behalf of the injured party (formally in the Ombudsman's own name).

A separate Discrimination Prohibition Act has also entered into force 1 July 2003⁵¹ with respect to labour exchange, measures and requirements relating to the setting up and running of a private business (self-employment), requirements for the exercise of certain occupations, membership in organisations of workers or employers as well as occupational organisations and the provision of goods and services. The amendment gives the Ombudsman against Discrimination on grounds of Sexual Orientation legal standing to litigate individual cases of discrimination before the courts on behalf of the injured party (formally in the Ombudsman's own name) also in these new areas. As is the case for the situations covered by the 1999 Sexual Orientation Discrimination Act and the 2001 Equal Treatment of Students at Universities Act, the main sanction for violating the discrimination prohibition in the new areas would be a court order to pay damages to the plaintiff. See further details in paragraph 16.6.2 below.

16.1.6 *Important case law precedents on sexual orientation discrimination in employment or occupation*

As already mentioned there have been no reported cases of sexual orientation discrimination in employment tried before the Labour Court. The first and so far only case⁵² concerning such discrimination was submitted by my office under the 1999 Sexual Orientation Discrimination Act in 2002, but the Labour Court never got to decide the case since a settlement was reached. Since the creation of the office of the Ombudsman, 1 May 1999, the office has dealt with more than 60 employment related complaints, 20 of which have resulted either in a formal settlement or in the unsatisfactory situation complained about having been remedied.

[%24%7BSNHTML%7D=BET_ERR&%24%7BMAXPAGE%7D=26&%24%7BTRIPSHOW%7D=format%3DTHW&%24%7BCCL%7D=define+reverse&%24%7BBASE%7D=BETARKIV0102&%24%7BFREETEXT%7D=&BRUB=&BNR=UbU05>](#), respectively.

The *travaux préparatoires* to the amendment of the Act, in force 1 July 2003, bringing it more in line with the Directive, are the same as those mentioned in note 48 above.

⁵¹ *Lag (2003:307) om förbud mot diskriminering* [Discrimination Prohibition Act (2003:307)]. The full text of the Act is available – albeit at present only in Swedish – at the web site of the Ombudsman against Discrimination on grounds of Sexual Orientation: www.homo.se. The *travaux préparatoires* are the same as the ones mentioned in note 47 above.

⁵² Case n° A 30/02 with the Labour Court [*Arbetsdomstolen*]; Ombudsman's dossier n° 289/01, decision 27 June 2002 to close the case after an out of court settlement was reached.

16.1.7 Provisions on discrimination in employment or occupation that do not (yet) cover sexual orientation

Both the Act (1991:433) Concerning Equality between Men and Women [*Jämställdhetslagen*] and the Act (1999:130) on Measures against Discrimination in Working Life on grounds of Ethnic Origin, Religion or Belief [*Lag om åtgärder mot diskriminering i arbetslivet på grund av etnisk tillhörighet, religion eller annan trosuppfattning*] contain provisions not just prohibiting discrimination, but also obliging employers to take active measures to prevent discrimination and promote equal opportunities. The Act (1991:433) Concerning Equality between Men and Women also allows for positive action in the sense that it allows a difference in treatment based on sex if this is a part of a planned strategy to promote equal rights regardless of sex. There are at present no corresponding provisions regarding sexual orientation discrimination.

16.1.8 Provisions on sexual orientation discrimination in other fields than employment and occupation

Since 1 July 1987 the Swedish Penal Code⁵³ contains some provisions aimed at targeting sexual orientation discrimination in a broad sense. First of all there is a specific penal law provision on unlawful discrimination⁵⁴ making it a criminal offence for anyone running a private business to treat customers unfavourably because of their homosexuality (N.B. not their sexual orientation in general). The provision covers also anyone employed in such private enterprise or acting on behalf of it, as well as anyone acting in their capacity of employee within the public administration, when dealing with the public. This means that discriminatory treatment of homosexuals also in areas like health care, education and social security under certain circumstances can be considered a criminal offence.

The only reported case⁵⁵ regarding homosexual orientation discrimination tried under this provision concerned a priest of the Church of Sweden, which at the time of the case was still not formally separated from the state. The priest was therefore technically speaking a civil servant. The priest had refused to baptise a child because the godparents chosen by the parents of the child were a homosexual couple. The priest was charged with unlawful discrimination but was acquitted, both by the district court and at appellate court level. The ruling was not appealed to the Supreme Court. The reasons given in the appellate court ruling was that the priest was not rendering a public service (for the purposes of this provision) to the godparents. The ruling also suggests that he indeed had discriminated against both the child and its parents, however not because of *their* homosexuality but because of the homosexuality of a third party (that of the god parents), which is not explicitly covered by the penal provision.

The unlawful discrimination provision of the Penal Code has been widely criticised – not least in the field of ethnic discrimination – for being inefficient, mainly because of the burden of proof rule that comes with the provision's being

⁵³ *Brottsbalken* (1962:700).

⁵⁴ Art. 9(4) of ch. 16, Penal Code.

⁵⁵ *Svea hovrätts dom (DB 209) den 20 december 1989* [Ruling n° DB 209 by Svea Court of Appeals, Stockholm, 20 December 1989].

a part of criminal law.⁵⁶ This criticism has resulted in the introduction of new civil law anti-discrimination legislation with respect to provision of goods and services, also see 16.1.5 above. This new legislation also amends existing law in order to more fully implement both the Directive and the Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial and ethnic origin.

Art. 8 of chapter 16 of the Swedish Penal Code [16 kap. 8 § brottsbalken] contains a 'hate speech' provision, which has its counterpart also in the Freedom of the Press Act and the Fundamental Law on Freedom of Expression.⁵⁷ The provision makes it a criminal offence to spread a message which is threatening or degrading to a group of persons and which alludes to their sexual orientation. The practical purpose of the provision is to counteract the spreading of such messages alluding to homosexuals as a collective group among the population. Individual persons are not protected by these provisions but can instead rely on the slander or verbal abuse provisions of the Penal Code.⁵⁸

The penal procedural provisions regarding verbal abuse cases⁵⁹ give some special protection in cases related to the homosexuality of the victim. According to the general rule, the crime of 'insult' [*förolämpning*] can only be prosecuted by the victim herself. The public prosecutor does not have legal standing in such cases. However, in cases where the insult has a link to ethnic origin or homosexuality public prosecutors have legal standing to prosecute provided that the victim has made a complaint and it is considered to be in the public interest to do so.

A specific hate crimes provision⁶⁰ since 1 July 1994 makes a homophobic motive for a crime a statutory aggravating circumstance for the courts to take into account when sentencing someone for any violation of penal provisions. That the provision was intended to cover also homophobic motives was made clear already in the *travaux préparatoires* of the original version of this article. With effect from 1 July 2002 the legal text itself of the provision explicitly mentions sexual orientation.

Outside of the penal law area, there are sexual orientation discrimination provisions also in the already mentioned Equal Treatment of Students at Universities Act (2001:1286)⁶¹ The Act prohibits unfavourable treatment of students and applicants by universities and certain other establishments of higher education, for reasons related to e.g. sexual orientation. The Act also

⁵⁶ See e.g. the report (SOU [SOU: Statens Offentliga Utredningar - public enquiry report] 2001:39) of the 1999 Special Rapporteur on Discrimination: An Effective Ban on Discrimination; About Discrimination and the Terms Race and Sexual Orientation [*Ett effektivt diskrimineringsförbud, Om olaga diskriminering och begreppen ras och sexuell läggning, bet. SOU 2001:39 av 1999 års Diskrimineringsutredning*] and the report (SOU 2002:43) of the 2001 Committee on Discrimination: An Extended Protection against Discrimination [*Ett utvidgat skydd mot diskriminering, bet. SOU 2002:43 av Diskrimineringsutredningen 2001*]. In the latter, a civil law legislation was proposed in order to more effectively ban discrimination in the field of provision of goods and services. The Government (and in the end Parliament) agreed with the report's proposals; see prop. [Government Bill] 2002:65, *Ett utvidgat skydd mot diskriminering* [An Extended Protection against Discrimination], pages 74-75.

⁵⁷ *Tryckfrihetsförordningen* and *Yttrandefrihetsgrundlagen*, respectively.

⁵⁸ Ch. 5 and art. 5 of ch. 4.

⁵⁹ Ch. 5 Penal Code.

⁶⁰ Art. 2(7) of ch. 29, Penal Code.

⁶¹ *Lag (2001:1286) om likabehandling av studenter i högskolan.*

obliges such bodies to actively promote equal rights of students regardless of e.g. sexual orientation. According to these provisions the Ombudsman against Discrimination on grounds of Sexual Orientation has legal standing in litigating individual cases before the courts under the Act.

See also the 2003 Discrimination Prohibition Act, 16.1.5 above.

16.2 The prohibition of discrimination required by the Directive

16.2.1 Instrument(s) used to implement the Directive

The 1999 Sexual Orientation Discrimination Act, the Discrimination Prohibition Act (2003:307), the 2001 Equal Treatment of Students at Universities Act and the penal provision on unlawful discrimination all play a part in implementing the Directive in Swedish law. The same goes for the general employment law framework, including general principles of good customs and practices regarding e.g. dismissals, and the strong position of collective bargaining agreements in Swedish employment law. To a large extent, Swedish law is in conformity with the Directive. The reason why it is relevant to mention also the 2001 Equal Treatment of Students at Universities Act in this context is that some forms of vocational training and advanced vocational training take place at universities or equivalent establishments of higher education. Since the staff of such establishments often are civil servants, also the Penal Code provision on unlawful discrimination is relevant in this context.

16.2.2 Concept of sexual orientation (art. 1 Directive)

In both the 1999 Sexual Orientation Discrimination Act and the 2003 Discrimination Prohibition Act, the term '*sexuell läggning*' [sexual disposition] is used.⁶² The term is given a legal definition directly in art. 2 and art. 4(2) respectively of the Acts, where it says that the term includes homosexual, bisexual and heterosexual orientation [disposition].⁶³ In the *travaux préparatoires*,⁶⁴ the Government makes it clear that the intention is to create a legal protection that covers the whole population. All individuals in principle belong to one of these three categories (transsexuality is a question of gender, not of sexual orientation). Thus the Acts do not provide for a minority protection but a human rights protection. The same definition is used in the 2001 Equal Treatment of Students at Universities Act.⁶⁵

⁶² See also par. 16.3.1.

⁶³ Art. 2 of the 1999 Sexual Orientation Discrimination Act: *Med sexuell läggning avses homosexuell, bisexuell och heterosexuell läggning* [sexual orientation is taken to mean homosexual, bisexual and heterosexual orientation]. Art. 4(2) of the 2003 Discrimination Prohibition Act: *I denna lag avses med sexuell läggning: homosexuell, bisexuell eller heterosexuell läggning* [For the purposes of this Act, sexual orientation shall be taken as meaning homosexual, bisexual or heterosexual orientation].

⁶⁴ Prop. [Government Bill] 1997/98:180, pages 20-22 and prop. [Government Bill] 2002/03:65, pages 83-84 and 204.

⁶⁵ Art. 2(5): *I denna lag avses med [...] sexuell läggning: homosexuell, bisexuell eller heterosexuell läggning* [For the purposes of this Act, sexual orientation shall be taken as meaning homosexual, bisexual or heterosexual orientation].

16.2.3 Direct discrimination (art. 2(2)(a) Directive)

This article of the Directive is implemented through art. 3 of the 1999 Sexual Orientation Discrimination Act, art. 3(1) of the 2003 Discrimination Prohibition Act and art. 7 of the 2001 Equal Treatment of Students at Universities Act.⁶⁶

16.2.4 Indirect discrimination (art. 2(2)(b) Directive)

Art. 4 of the 1999 Sexual Orientation Discrimination Act, art. 3(2) of the 2003 Discrimination Prohibition Act and art. 8 of the 2001 Equal Treatment of Students at Universities Act together implement the Directive. The wordings of these provisions are virtually the same as that of art. 2(2)(b) of the Directive. The Penal Code provision on unlawful discrimination⁶⁷ in principle only prohibits direct discrimination. It has, however, been interpreted by the Supreme Court as prohibiting also such apparently neutral conditions, which in practice have a negative impact *almost exclusively* on one single ethnic group (roma women). The case concerned a department store that would not allow entrance to customers dressed in long, wide and heavy skirts.⁶⁸

16.2.5 Prohibition and concept of harassment (art. 2(3) Directive)

The 1999 Sexual Orientation Discrimination Act, the 2003 Discrimination Prohibition Act and the 2001 Equal Treatment of Students at Universities Act all contain provisions defining harassment as a form of prohibited discrimination.⁶⁹ The definitions of harassment are somewhat broader than the one found in the Directive, in that they do not require that the behaviour also creates an intimidating, hostile, degrading, humiliating or offensive environment, but only that it violates the dignity of a person and that it be related to sexual orientation

⁶⁶ Art. 3 of the 1999 Sexual Orientation Discrimination Act states: 'An employer must not discriminate against an employee or an applicant for employment by treating that person less favourably than the employer treats, has treated or would have treated another person in a comparable situation, if the unfavourable treatment is linked to sexual orientation' ['En arbetsgivare får inte missgynna en arbetssökande eller en arbetstagare genom att behandla honom eller henne sämre än arbetsgivaren behandlar, har behandlat eller skulle ha behandlat någon annan i en jämförbar situation, om missgynnandet har samband med sexuell läggning.'].
Art. 3(1) of the 2003 Discrimination Prohibition Act states: 'For the purposes of this Act, discrimination shall be taken as meaning 1. direct discrimination: that an individual person is discriminated against by being treated less favourably than another person is treated, has been treated or would have been treated in a comparable situation, if the unfavourable treatment is linked to ethnic origin, religion or belief, sexual orientation or disability' ['I denna lag avses med diskriminering 1. direkt diskriminering: att en enskild person missgynnas genom att behandlas sämre än någon annan behandlas, har behandlats eller skulle ha behandlats i en jämförbar situation, om missgynnandet har samband med etnisk tillhörighet, religion eller annan trosuppfattning, sexuell läggning eller funktionshinder.'].
Art. 7 of the 2001 Equal Treatment of Students at Universities Act states: 'A university must not discriminate against a student or an applicant by treating him or her less favourably than the university treats, has treated or would have treated another person in a comparable situation, if the unfavourable treatment is linked to sex, ethnic origin, religion or belief, sexual orientation or disability' ['En högskola får inte missgynna en student eller en sökande genom att behandla honom eller henne mindre förmånligt än högskolan behandlar, har behandlat eller skulle ha behandlat någon annan i en jämförbar situation, om missgynnandet har samband med könstillhörighet, etnisk tillhörighet, religion eller annan trosuppfattning, sexuell läggning eller funktionshinder.'].
⁶⁷ Art. 9(4) of ch. 16.
⁶⁸ Supreme Court ruling reported in *NJA (Nytt Juridiskt Arkiv)* [a bulletin which publishes rulings by the Swedish Supreme Court] 1999 s 556.
⁶⁹ Art. 4a of the 1999 Sexual Orientation Discrimination Act, art. 3(3) of the 2003 Discrimination Prohibition Act and art. 4 and 8a of the 2001 Equal Treatment of Students at Universities Act.

etc.⁷⁰ On the other hand, the definitions seem to fall short of what the Directive requires since they do not cover a conduct that takes place with the purpose of violating the dignity of a person unless it also actually has that effect. At the face of it, however, this shortcoming would seem to be of minor importance for all practical purposes. The provisions omit the qualification of ‘unwanted’, the reason for this being that such a criterion is understood to be an integral part of the term ‘harassment’ in Swedish [*trakasserier*].

Furthermore, both the 1999 Sexual Orientation Discrimination Act and the 2001 Equal Treatment of Students at Universities Act contain a form of protection against harassment, not explicitly foreseen in the Directive. Art. 8 of the former and art. 6 of the latter oblige an employer/university, which has knowledge about the fact that an employee/student feels that she has suffered harassment related to sexual orientation, to investigate the matter and, when appropriate, to take action to prevent such harassment from continuing. This obligation applies also to situations where the employer/university cannot in any way be held responsible directly for the harassment itself.

16.2.6 *Instruction to discriminate (art. 2(4) Directive)*

The 1999 Sexual Orientation Discrimination Act, as amended from 1 July 2003, contains a provision, which prohibits an employer from giving an order or instruction to an employee to discriminate against another employee or against a person applying for a job, directly, indirectly or through harassment.⁷¹ Also protected against such orders or instructions are persons who, without being employed, are seeking or undergoing practical work experience with the employer.⁷² The 2001 Equal Treatment of Students at Universities Act contains the corresponding prohibition.⁷³ The 2003 Discrimination Prohibition Act also includes a provision, which prohibits orders or instructions to discriminate against someone, directly, indirectly or through harassment.⁷⁴ The provision covers orders or instructions given to someone who is under the command of, or in a position of dependency of, the instructor. The same goes for someone who has a contractual obligation to carry out a task for the instructor.⁷⁵ To the very narrow extent that the penal provision on unlawful discrimination is at all applicable to circumstances covered by the Directive - e.g. to discriminatory treatment of students taking part in advanced vocational training organised by a university or similar establishment of higher education - the Penal Code's provisions on instigation to commit a crime⁷⁶ may also apply to instructions to discriminate in this area.

⁷⁰ ‘... uppträdande i arbetslivet som kränker en arbetssökandes eller arbetstagares värdighet och som har samband med sexuell läggning” and ‘... uppträdande som kränker en students eller en sökandes värdighet i högskolestudierna, om uppträdandet har samband med [...], sexuell läggning’, respectively.

⁷¹ Art.4b and art. 3-4a 1999 Sexual Orientation Discrimination Act: ‘En arbetsgivare får inte lämna order eller instruktioner till en arbetstagare om diskriminering av en person enligt 3-4 a §§’.

⁷² Art. 2a.

⁷³ Art. 8b and art. 7-8a.

⁷⁴ Art. 3(4) and art. 3(1-3).

⁷⁵ ‘...instruktioner att diskriminera: order eller instruktioner att diskriminera en person enligt 1-3 som lämnas åt någon som står i lydnads- eller beroendeförhållande till den som lämnar ordern eller instruktionen eller som gentemot denna åtagit sig att fullgöra ett uppdrag’.

⁷⁶ Art. 9(4) of ch. 16 and art. 4 of ch. 23.

A problem, however, with the provisions prohibiting instructions to discriminate, is that they have been given a narrow drafting or in certain circumstances have been accompanied by guidelines in the *travaux préparatoires* for their interpretation that are limiting, in my opinion thereby not living up to the standards required by the Directive. Some situations where an effective protection against instructions to discriminate would indeed seem needed, and which may well be covered by the Directive, thereby now seem not to be covered in Swedish national law. Were e.g. a group of customers or employees to put pressure on an employer in order to instigate discriminatory practices against an employee or someone applying for a job with that employer, on grounds related to sexual orientation, the provisions would not apply. The same goes for a group of students threatening to leave a course on advanced vocational guidance if the education provider allows e.g. an openly gay or lesbian person into the study group.⁷⁷ The provisions also do not prohibit an employer to give instructions to a company, which leases out members of its work force temporarily to the employer, not to send an openly gay or lesbian person. This is so because the wording of art. 4b together with art. 2a and 3-4a of the 1999 Sexual Orientation Discrimination Act seem to make unlawful only such instructions by an employer, which are given to one of the employer's own employees or someone who, without being employed, are seeking or undergoing practical work experience with the employer.

According to the *travaux préparatoires*,⁷⁸ only such instructions that lead to a discriminatory effect are covered by the prohibition. This has been motivated by the lack of sanctions anyway for situations where no discriminatory effect has occurred. At the same time however, it is also clearly indicated⁷⁹ that this requirement does not mean that the instruction actually has to have been obeyed for the prohibition to apply. Also in situations e.g. where an instruction has become widely talked about and thereby known by the person who was the intended victim of discrimination, there is a discriminatory effect for the purposes of these provisions.

16.2.7 *Material scope of applicability of the prohibition (art. 3 Directive)*

Art. 5(1) of the 1999 Sexual Orientation Discrimination Act prohibits direct and indirect discrimination, harassment and instructions to discriminate, in public as well as private employment, when an employer:

- decides to employ someone, selects job applicants for an employment interview or undertakes other measures during the recruitment process;
- makes a decision concerning promotion or selects an employee for an education or training that may lead to promotion;
- makes a decision or undertakes other measures related to access to practical work experience;
- makes a decision or undertakes other measures related to vocational training or guidance;

⁷⁷ Prop. [Government Bill] 2002/03:65, page 101.

⁷⁸ Prop. [Government Bill] 2002/03:65, page 101-103.

⁷⁹ Idem.

- decides on the application of salary conditions or other employment conditions;
- directs or distributes the work; or,
- dismisses, terminates, lays off or undertakes other intrusive measures against an employee.

For the purposes of this provision persons who, without being employees, apply for, or undergo, practical work experience with an employer are considered as applicants for employment or employees, respectively.⁸⁰ The same cannot, however, be said for persons who, without being employees, carry out work at a certain work place, e.g. under a contract by that work place and a human resources company, which leases out temporary work force to employers, see also under 16.2.6 above. In this respect, article 3 of the Directive would seem not to have been fully implemented in Swedish national law.

There are probably few situations, in my opinion, where an unfavourable treatment of a job applicant or an employee by an employer (or a representative of the employer, e.g. a shop manager, which under the Act is considered to be the same thing), would not fit under any of the subcategories of the material scope of the Act.

A flaw in the implementation of the Directive worth mentioning is the fact that the Act does not explicitly cover 'working conditions', but only 'employment conditions'. The expression 'employment conditions' would in the Swedish context imply a more limited scope, notably only such terms or conditions for the employment which are regulated by an employment contract (individual or collective), whilst the Directive in my opinion requires also factual circumstances under which work is carried out, to be covered by the prohibition against discrimination.

If vocational guidance, vocational training, advanced vocational training or retraining, including practical work experience are carried out within the system of higher education, the 2001 Equal Treatment of Students at Universities Act will most often be applicable. Art. 9 of this Act stipulates that the prohibition against direct and indirect discrimination, harassment and instructions to discriminate shall apply when a university;

- decides on the admittance of a student to the university or undertakes any other measure that is of importance for such admittance,
- decides on exams or makes any other assessment of study performance,
- decides on or makes any other similar assessment related to:
 - a) crediting of education,
 - b) study breaks or continuation of studies after study breaks,
 - c) change of tutor,
 - d) withdrawal of tutor or other resources in connection with research,
 - e) grants for doctoral students, or
- undertakes other intrusive measures against a student.

⁸⁰ Art. 2a of the 1999 Sexual Orientation Discrimination Act.

Furthermore, art. 5 of the 2003 Discrimination Prohibition Act prohibits direct and indirect discrimination, harassment and instructions to discriminate in relation to activities implementing labour market policies.⁸¹ Such activities include labour exchange, vocational guidance and training as well as practical work experience.⁸² Discrimination in these areas may sometimes also come under the penal provision on unlawful discrimination.⁸³

Until 2003 Swedish written law did not contain any provisions specifically regulating non-profit organisations, like labour unions or employers' associations. Through case law primarily regarding labour unions,⁸⁴ certain principles for legal control by the courts over the relationship between such organisations and their members or prospect members have, however, been established. According to these principles, non-profit organisations – as a difference from economical organisations – are considered private and thus closed entities. Nevertheless, such non-profit organisations that are of considerable importance for the possibilities of individuals to earn their living (labour unions and occupational organisations, and probably also employers' associations, would come under this category) have been subject to judicial review when it comes to membership and benefits. Thus, such organisations have already operated under the principle of right to equal treatment and their decisions e.g. to refuse membership, have been tried by the courts although allegedly not with reference to sexual orientation.

With the entering into force of the 2003 Discrimination Prohibition Act, there are now also statutory provisions prohibiting discrimination with respect to self-employment and membership or involvement in labour unions or employers' unions as well as professional organisations. Art. 6 of the Act⁸⁵ provides that discrimination on grounds of inter alia sexual orientation is forbidden in relation to the granting of economic support, permissions, registration or any similar measures, which are needed or can be of importance for an individual (i.e. natural person) to be able to become or continue to be self-employed.

With respect to self-employment, the Act does not seem to fully implement the Directive. Self-employed business partners, for example, apparently are not protected against harassment or other forms of discrimination from one another, a situation which to me clearly seems to be covered by the Directive (see art. 2(3) and 3 of the Directive). It is also a situation which has appeared in the requests for advice and support that the Ombudsman's office has come across since the entering into force of the Act. This example also shows that the personal scope of the Act is too narrow, in so far that its prohibitions are only

⁸¹ Art. 5 of the 2003 Discrimination Prohibition Act: *'Diskriminering som har samband med etnisk tillhörighet, religion eller annan trosuppfattning, sexuell läggning eller funktionshinder av arbetssökande eller arbetstagare är förbjuden 1. vid förmedling av arbete hos den offentliga arbetsförmedlingen eller annan som bedriver arbetsförmedling, och 2. i fråga om andra insatser inom den arbetsmarknadspolitiska verksamheten'*.

⁸² Prop. (Government Bill) 2002/03:65, pages 110-111.

⁸³ Art. 9(4) of ch. 16, Penal Code.

⁸⁴ *Nytt Juridiskt Arkiv* 1945 s. 290, 1946 s. 83, 1948 s. 513 and 1977 s. 129. References are for yearbook and page respectively, where rulings are to be found.

⁸⁵ Art. 6 of the 2003 Discrimination Prohibition Act: *'Diskriminering som har samband med etnisk tillhörighet, religion eller annan trosuppfattning, sexuell läggning eller funktionshinder är förbjuden i fråga om ekonomiskt stöd, tillstånd, registrering eller liknande som behövs eller kan ha betydelse för att en enskild person skall kunna starta eller bedriva näringsverksamhet'*.

directed against ‘the employer’, albeit in a wide sense of the term; see also under 16.2.8 below.

Art. 7 of the Act⁸⁶ provides that discrimination on grounds of inter alia sexual orientation is forbidden in relation to the granting of a certificate, authorisation, registration, approval or any similar measures, which are needed or can be of importance for an individual (i.e. natural person) to be able to exercise a certain profession.

Art. 8 of the Act⁸⁷ provides that discrimination on grounds of inter alia sexual orientation is forbidden in relation to 1) membership or participation in an association of employees (i.e. a labour union), an association of employers or an association of persons of a certain profession, and 2) the benefits awarded by such organisations to their members.

16.2.8 *Personal scope of applicability: natural and legal persons whose actions are the object of the prohibition*

The prohibition of discrimination in the 1999 Sexual Orientation Discrimination Act is directed against ‘the employer’. The term employer includes both individual natural persons who employ other individuals to do work for them and legal persons, e.g. companies, public bodies, organisations etc., as employers. Furthermore the term includes anyone employed to represent the employer in relation to other employees, i.e. management on different levels. The prohibition of discrimination in the 2001 Equal Treatment of Students at Universities Act is, correspondingly, directed against ‘the university’. That term also includes anyone employed to represent the university in relation to students. The discrimination prohibition in the 2003 Discrimination Prohibition Act is directed against the respective legal entity concerned, as such. Therefore, in the case of e.g. the public labour exchange, the state itself would be the object of the prohibition. Correspondingly, the public entity responsible for issuing permits and authorisations etc, as well as the labour unions, professional organisations or employers’ associations concerned (see 16.2.7 above), as such would be the objects of the prohibition in their respective areas. Employees representing these legal entities could however not be held liable as individuals for such discrimination (art. 16 of the Act).

The discrimination prohibitions are not aimed at fellow workers or third parties, e.g. clients or customers. The obligation for employers to deal with harassment on grounds of sexual orientation,⁸⁸ however, covers harassment between fellow workers. The corresponding provisions in the 2001 Equal Treatment of Students at Universities Act⁸⁹ have an even more open wording. They stipulate that a university must investigate and, when necessary, take action against a conduct,

⁸⁶ Art. 7 of the 2003 Discrimination Prohibition Act: *‘Diskriminering som har samband med etnisk tillhörighet, religion eller annan trosuppfattning, sexuell läggning eller funktionshinder är förbjuden i fråga om behörighet, legitimation, auktorisation, registrering, godkännande eller liknande som behövs eller kan ha betydelse för att en enskild person skall kunna utöva ett visst yrke’.*

⁸⁷ Art. 8 of the 2003 Discrimination Prohibition Act: *‘Diskriminering som har samband med etnisk tillhörighet, religion eller annan trosuppfattning, sexuell läggning eller funktionshinder är förbjuden i fråga om 1. medlemskap eller medverkan i en arbetstagarorganisation, arbetsgivarorganisation eller yrkesorganisation, och 2. förmåner som en sådan organisation tillhandahåller sina medlemmar’.*

⁸⁸ Art. 8 of the 1999 Sexual Orientation Discrimination Act.

⁸⁹ Art. 4 and 6.

which a student is subject to, which violates her dignity in relation to the university studies. This would cover harassment from other students or from teachers, but could also cover such harassment from e.g. an entrepreneur running the student canteen.

If an employer uses a job agency to recruit staff, the employer is still responsible for any discriminatory treatment that occurs during the recruitment process. However, discriminatory actions by the public labour exchange are not the responsibility of the employer.⁹⁰ Such conduct would however be covered by art. 5 of the 2003 Discrimination Prohibition Act and could also constitute a criminal offence under the unlawful discrimination provision of the Penal Code. An employer cannot be held responsible for discrimination directly by a person who, without being employed, is doing work for the employer under a contract between the employer and e.g. a human resources business which leases out its employees to the employer.

16.3 What forms of conduct in the field of employment are prohibited as sexual orientation discrimination?

16.3.1 Discrimination on grounds of a person's actual or assumed heterosexual, homosexual or bisexual preference or behaviour

The definition of sexual orientation in Swedish anti-discrimination legislation relevant to employment is unambiguous at first sight. Sexual orientation means homosexual, bisexual or heterosexual orientation.⁹¹ The fact that a person *is* homo-, bi- or heterosexual subsequently is a factor, which an employer, an educational establishment or a goods or services provider etc. is not allowed to take into account. On the other hand, from what is said in the *travaux préparatoires* it could be concluded that sexual *behaviour* would not be covered by the prohibition of discrimination. In its Bill to Parliament proposing the 1999 Sexual Orientation Discrimination Act, the Government seeks to clarify that a variety of sexual conducts that may be found in individuals regardless of whether they are homosexual, bisexual or heterosexual are not protected by the discrimination prohibition.⁹² In the Bill proposing to Parliament the passing of the 2001 Equal Treatment of Students at Universities Act,⁹³ the Government refers to the definition of sexual orientation in the 1999 Sexual Orientation Discrimination Act. The same is the case for the *travaux préparatoires* to the 2003 Discrimination Prohibition Act.⁹⁴ The remarks in the Bill introducing the 1999 Sexual Orientation Discrimination Act run the risk of leading to the erroneous conclusion that the anti-discrimination provisions would only cover differences in treatment related to the orientation or preference itself and never on grounds of sexual behaviour. This, however, is not the case.

⁹⁰ Prop. [Government Bill] 1997/98:180, pages 35-36; bet. [Parliament Standing Committee Report] 1998/99:AU4, page 52.

⁹¹ Art. 2 of the 1999 Sexual Orientation Discrimination Act, art. 2(5) of the 2001 Equal Treatment of Students at Universities Act and art. 4(2) of the 2003 Discrimination Prohibition Act.

⁹² Prop. [Government Bill] 1997/98:180, page 22.

⁹³ Prop. [Government Bill] 2001/02:27, pages 28-29.

⁹⁴ Prop. [Government Bill] 2002/03:65, page 84.

The Swedish legislator has instead chosen to draw the line at *specific* sexual behaviours that can be found in persons, irrespective of their sexual orientation. Such behaviours or desires are not covered by the anti-discrimination legislation. To avoid, however, that e.g. employers try to circumvent the anti-discrimination legislation by simply submitting that the difference in treatment in a given case was due not to the victim's being homosexual, but to the fact that she was having homosexual relations, Parliament decided to make the following clarification. The fact that a person is living together with someone of her own sex in an intimate relationship, whether in a registered partnership or not, or the fact that she is *at all* having sexual relations with someone of her own sex, must be considered as a natural expression of the sexual orientation itself, the same way that this is the case for heterosexuals. Therefore, an employer may not take into account any behaviour that has such a natural link to the sexual orientation itself, whichever orientation that may be, unless he can prove that the behaviour has a definite relevance for the aptitude of the employee to perform her duties on the job.⁹⁵ This clarification will have a strong effect on the interpretation by the courts since its wording is clear and it is included in the Parliament Standing Committee report, which led to the adoption of the Act.

Discrimination on grounds of a mistaken assumption about a person's sexual orientation is also covered by the provisions, which prohibit discrimination. The original wording of the provisions in the 1999 Sexual Orientation Discrimination Act which prohibit discrimination, and oblige an employer to investigate and take action against alleged harassment,⁹⁶ on grounds of sexual orientation suggested that only discrimination based on the victim's own sexual orientation was prohibited. The provisions of the 2001 Equal Treatment of Students at Universities Act⁹⁷ were originally drawn up in the same way. That this was indeed not the intention of the legislator is at least to some extent supported already by submissions made in the *travaux préparatoires* to the 1999 Sexual Orientation Discrimination Act.⁹⁸ At any rate, in the new and amended legislative texts, in force from 1 July 2003, there is no link whatsoever to the injured party's own sexual orientation as a prerequisite for the legislation to apply.⁹⁹ Instead the provisions state that discrimination, etc., which *relates to sexual orientation*, shall be prohibited.¹⁰⁰

All provisions that apply to homosexual preference or behaviour are equally applicable to bisexual preference and behaviour. All employment related legislation uses a definition of sexual orientation, which includes bisexual – and for that matter heterosexual – behaviour. The only possible exception being the penal provision on unlawful discrimination, which speaks explicitly about a person's homosexuality. On the other hand this provision can very seldom be of relevance in employment matters.

⁹⁵ Bet. [Parliament Standing Committee Report] 1998/99:AU4, page 20.

⁹⁶ Art. 3-4 and 8.

⁹⁷ Art. 3-4 and 6-9.

⁹⁸ Bet. [Parliament Standing Committee Report] 1998/99:AU4, pages 19-20.

⁹⁹ Art. 3 of the 2003 Discrimination Prohibition Act, art. 3-4b of the 1999 Sexual Orientation Discrimination Act as amended by the Act (2003:310) amending the 1999 Sexual Orientation Discrimination Act and art. 4, 6-8b of the 2001 Equal Treatment of Students at Universities Act, as amended by the Act (2003:311) amending the 2001 Equal Treatment of Students at Universities Act.

¹⁰⁰ [...] *som har samband med sexuell läggning*'.

16.3.2 *Discrimination on grounds of a person's coming out with, or not hiding, his or her sexual orientation*

The point of departure of the Swedish anti-discrimination legislation, and therefore also the point of reference when making the necessary comparisons, is that homosexuals must have the right to relate to their sexual orientation the same way as heterosexuals are allowed to relate to theirs, also at work and in public. Empirical evidence¹⁰¹ also shows that this is a crucial stepping-stone in the development of an employment environment characterised by equality in dignity and rights, regardless also of sexual orientation. Or: it is when homosexuals start to behave the same way as heterosexuals do without even being aware of it, that they encounter discrimination. In individual discrimination cases where the behaviour and not the orientation itself is being cited by an employer as the reason for a certain treatment of an employee, as was also the case in the so far only case litigated before the Labour Court on the basis of the 1999 Sexual Orientation Discrimination Act,¹⁰² it is therefore crucial to try to establish how a heterosexual person would have been treated if behaving in a comparable way. For the discrimination prohibition to apply, it is only required that the unfavourable treatment is *related* to sexual orientation (see 16.3.1 above, and 16.3.4 below). Therefore there can be no doubt that discrimination on grounds of a person's coming out is covered by the prohibition.

16.3.3 *Discrimination between same-sex partners and different-sex partners*

Any difference in treatment, which is linked to the fact that an employee or an applicant for employment has a partner of the same sex instead of having a partner of the opposite sex (or vice versa) would be considered sexual orientation discrimination; see further under 16.3.1 above.

Indeed, one of the first initiatives taken by the Office of the Ombudsman against Discrimination on grounds of Sexual Orientation was to initiate (out of court) proceedings against the parties to collective bargaining agreements for all employees working in the public administration (whether on a national, regional or local level). These collective agreements all included a definition of spouse/partner for the purposes of survivor's pensions, which discriminated against informal cohabitants of the same sex (i.e. who had not registered their partnership) compared to unmarried heterosexual couples. The result of these proceedings was that all the relevant collective bargaining agreements were subsequently amended to include a sexual orientation neutral definition of spouse/partner/cohabitant, since the existing provisions were illegal under the 1999 Sexual Orientation Discrimination Act.¹⁰³

Civil status is not *in itself* a prohibited ground for discrimination. General employment protection rules against e.g. unfair dismissals, as well as principles of good practices in the labour market, would however in many cases cover discrimination between married and unmarried partners. When it comes to discrimination between married spouses and registered partners, it should be

¹⁰¹ See the web site of the Ombudsman against Discrimination on grounds of Sexual Orientation at www.homo.se for short summaries – although at present in Swedish only – of complaints dealt with.

¹⁰² Case n° A 30/02 with the Labour Court [*Arbetsdomstolen*], Ombudsman's dossier n° 289/01, decision 27 June 2002 to close the case after an out of court settlement.

¹⁰³ Ombudsman's decision 21 October 1999 and 8 December 1999 respectively; dossier n° 23/1999.

pointed out that the whole *raison d'être* of the Swedish Registered Partnership Act¹⁰⁴ was to create a legal frame-work for homosexual couples, which corresponds to that of civil marriage for heterosexuals. The legal consequences of a registered partnership under Swedish law are also virtually identical to those of a marriage. A difference in treatment caused by the fact that an individual is living in a registered partnership with someone of her own sex instead of being married to someone of the opposite sex (or for that matter vice versa) would therefore most probably qualify as direct sexual orientation discrimination under Swedish law. There is no reported case law from the courts on the matter. But the principle issue used to arise in relation to the Penal Code provision on unlawful discrimination.¹⁰⁵ According to this provision, different treatment of cohabitants – who until 1 July 2003 also came under two 'different but equal' sets of rules under Swedish law – depending on whether they are of the same sex or different sexes, amounts to unlawful discrimination.¹⁰⁶ It is therefore almost certain that the same would apply to registered partners compared to married spouses, under civil law legislation. Such a difference in treatment would also qualify as indirect sexual orientation discrimination, since same-sex couples cannot marry and different-sex couples cannot register partnership under Swedish law. Swedish anti-discrimination legislation contains no exceptions for differences in treatment based on marital status or civil status.

It is worth mentioning that the Swedish Parliament on the 29 of April 2004 approved with overwhelming majority a proposal to order the Government to set up a special commission with the task to look into the possibilities of opening up the legal institution of marriage itself (and not just registered partnership/civil union) also to same-sex couples.

16.3.4 *Discrimination on grounds of a person's association with gay/lesbian/bisexual/heterosexual individuals, events or organisations*

The original wording of the provisions in the 1999 Sexual Orientation Discrimination Act which prohibit discrimination, and oblige an employer to investigate and take action against alleged harassment,¹⁰⁷ on grounds of sexual orientation suggested that only discrimination based on the victim's own sexual orientation was prohibited. The provisions of the 2001 Equal Treatment of Students at Universities Act¹⁰⁸ were originally drawn up in the same way.

This apparent requirement, that a discriminatory treatment be linked to the victim's own sexual orientation, has been repeatedly criticised by myself as well as by the other Ombudsmen against discrimination in Sweden. I for one have also made it clear that until there is a compelling case law precedent to the contrary, my office would continue to submit that all these provisions apply *mutatis mutandis* also to situations where someone has suffered discrimination or harassment because of the sexual orientation of a third party, as well as e.g. because of having publicly defended the right to equal treatment regardless of

¹⁰⁴ *Lag (1994:1117) om registrerat partnerskap* [Act (1994:1117) on Registered Partnership]; original *travaux préparatoires*: bet. [Parliament Standing Committee Report] 1993/94:LU28.

¹⁰⁵ Art. 9(4) of ch. 16, Penal Code.

¹⁰⁶ See Holmqvist, 2002, Ch. 16.

¹⁰⁷ Art. 3-4 and 8.

¹⁰⁸ Art. 3-4 and 6-9.

sexual orientation. There has been no case law contradicting this standpoint. And, it was at least to some extent supported by submissions made already in the original *travaux préparatoires* to the 1999 Sexual Orientation Discrimination Act.¹⁰⁹ There have also been cases where settlements out of court have been successfully negotiated in such circumstances. At any rate, in the new and amended legislative texts, in force from 1 July 2003, there is no link whatsoever to the injured party's own sexual orientation as a prerequisite for the legislation to apply.¹¹⁰ Instead the provisions state that discrimination, etc., which *relates to sexual orientation*, shall be prohibited. Thereby discrimination against a person on grounds of her association with gay/lesbian/ bisexual individuals, events or organisations etc. would be covered by the discrimination prohibitions.

16.3.5 *Discrimination against groups, organisations, events or information of/for/on lesbians, gays or bisexuals*

The 1999 Sexual Orientation Discrimination Act, the 2001 Equal Treatment of Students at Universities Act, the 2003 Discrimination Prohibition Act and the Penal Code provision on unlawful discrimination, all protect natural persons only. Nevertheless there is a possibility, however largely theoretical, that in certain circumstances a discriminatory conduct against a legal person can be construed as in practice affecting one or several identified natural persons. One example would be if the owner of a building refused to renew the contract of a private business run by one single person and the reason for that is that the landlord has found out that the shop owner is a gay man. In this case the prohibition of discrimination in relation to access to and supply of goods and services¹¹¹ as well as the penal provision on unlawful discrimination¹¹² may apply as long as the business is run by the owner alone and is set up as a non-corporate one.

Through the Swedish implementation process leading up to the new and amended legislation, the Ombudsmen against discrimination have unanimously criticised the fact that no explicit protection against discrimination is provided for legal persons. Our experience is that such a protection is needed. It is furthermore, in our opinion, required by the Directive. First of all, we have pointed to the fact that art. 3(1) Directive provides that the Directive shall apply to *all* persons and that recital 12 states that *any* direct or indirect discrimination as regards the areas covered by the Directive should be prohibited throughout the Community. Furthermore, membership of employers' associations (which is one area explicitly covered by the Directive) is almost exclusively relevant for legal persons, at least in Sweden. It would therefore make little sense to prohibit discrimination with respect to such membership but at the same time exclude legal persons from that protection.

If a business were to be discriminated against by an employers' association, e.g. because it caters primarily to gay/lesbian customers or because it sells literature or art dealing with sexual orientation issues it would not be protected by the Act. This is so because the Act does not protect legal persons (only

¹⁰⁹ Bet. [Parliament Standing Committee Report] 1998/99:AU4, pages 19-20.

¹¹⁰ See note 98 above.

¹¹¹ Art. 9 of the 2003 Discrimination Prohibition Act.

¹¹² Art. 9(4) of ch. 16, Penal Code.

natural persons) from discrimination. However, most members of employers' associations – at least in Sweden – are companies, not individual human beings. This lack of effective protection against discrimination would seem to be contrary to the Directive.

In 2002, the Swedish Government commissioned a Committee with Parliamentary representation to consider a more coherent and all-inclusive Swedish anti-discrimination legislation.¹¹³ This Committee's task also includes looking at the need for protection for legal persons against discrimination. The Committee has been given until 1 July 2005 to complete its report.

16.3.6 *Discrimination on grounds of a person's refusal to answer, or answering inaccurately, a question about sexual orientation*

There is no explicit prohibition against asking about someone's sexual orientation. However, if such a question is put e.g. during an employment interview and the applicant does not get the job in the end, the burden of proof rules would be favourable to the applicant. That is the case whether or not she has chosen to answer the question, since the employer would have to prove that the decision not to hire her had nothing to do with her answer, or refusal to answer, to such a question. The standpoint of the legislator is that in principle the sexual orientation of an employee/applicant can be of no relevance to an employer.¹¹⁴ Correspondingly, therefore, there can be no obligation to answer, or answer truthfully, a question about one's sexual orientation. Discrimination on grounds of such circumstances is thus covered by the prohibition. Persistent questioning about the sexual orientation of an employee could also be considered as sexual orientation harassment.

16.3.7 *Discrimination on grounds of a person's previous criminal record due to a conviction for a homosexual offence without heterosexual equivalent*

It is difficult to imagine such a situation since there have not been such offences for a very long time under Swedish criminal law.

16.3.8 *Harassment*

The concept of harassment according to the new and amended provisions as of 1 July 2003 has been defined in a broader manner than the original texts in that it does not require any link between a conduct which violates the dignity of a person and that person's own sexual orientation. Its scope of application therefore is wide. See further 16.2.5 above.

The revealing of a person's sexual orientation against her or his will must be considered a violation of the dignity of that person, and would therefore be considered as sexual orientation harassment. Therefore, such a conduct would

¹¹³ Dir. [Government instructions for the Committee] 2002:11. The instructions may be found in Swedish only at the Government's web site: www.regeringen.se. Go to the site of the Ministry of Industry [Näringsdepartementet] and click on the Sec. 'Direktiv' (instructions/commissions for committees and special investigators).

¹¹⁴ Prop. [Government Bill] 1997/98:180, page 21 and bet. [Parliament Standing Committee Report] 1998/99:AU4, page 20.

not be allowed. Derogatory language about a gay, lesbian or bisexual person can be considered as harassment, at least if this behaviour is being directed at a gay, lesbian or bisexual person herself. If negative opinions about homosexuality in general are expressed in an aggressive way or in a derogatory language this can also be considered as harassment if directed at someone who is gay, lesbian or bisexual. This may also be the case if such opinions are expressed repeatedly when this has not been called for and some person, regardless of sexual orientation, has made it clear that she considers these repeated expressions of opinion offensive.¹¹⁵

Unwelcome sexual advances, regardless of the sex of the person subjected to such conduct, are considered as sexual harassment. Under the Act (1991:433) concerning Equality between Men and Women [*Jämställdhetslagen*], employers are obliged to take measures in order to prevent and counteract such conduct.¹¹⁶ The 2001 Equal Treatment of Students at Universities Act contains corresponding provisions.¹¹⁷ Such advances, if made with reference to sexual orientation, would also be considered as harassment under the different provisions, which prohibit sexual orientation discrimination.

16.4 Exceptions to the prohibition of discrimination

16.4.1 Objectively justified indirect disadvantages (art. 2(2)(b)(i) Directive)

When it comes to objectively justified indirect disadvantages (art. 2(2)(b)(i) Directive), both the 1999 Sexual Orientation Discrimination Act, the 2001 Equal Treatment of Students at Universities Act and the 2003 Discrimination Prohibition Act include such exceptions,¹¹⁸ phrased virtually in the same way as the relevant provision in the Directive itself. The question is what kind of apparently neutral criteria etc. would put persons with a certain sexual orientation at a particular disadvantage? In the *travaux préparatoires* to the 1999 Sexual Orientation Discrimination Act,¹¹⁹ the example given is that of a childcare centre requiring prospective employees to have experience of raising biological children of their own. I, for one, would challenge this example for two reasons. First of all, homosexuals have, and always have had, children of their own. And secondly – and more fundamentally – how do you prove that such a requirement in practice actually does put homosexuals *as a group* at a particular disadvantage? Statistics are seldom a useful tool when it comes to trying to say something general about this community in society. So, therefore the indirect discrimination provision may prove difficult to use at all with respect to sexual orientation discrimination.

One such criterion, however, does come to mind. That is if a requirement is made that a person be married to qualify for a job. This would of course put

¹¹⁵ Ombudsman's Dossier N° 101/02 closed 13 May 2002 after the complainant's labour union had negotiated a settlement, which the complainant accepted.

¹¹⁶ 6, 22 a §§ *jämställdhetslagen* (1991:433) [art. 6 and 22 a of the Act (1991:433) concerning Equality between Men and Women].

¹¹⁷ Art. 4-6.

¹¹⁸ Art. 4, 8 and 3(2) respectively.

¹¹⁹ Prop. [Government Bill] 1997/98: 180, page 23.

homosexuals at a particular disadvantage compared to heterosexuals, since the former group cannot legally marry under Swedish law. There is no need for statistics to prove that. Indeed, it could be argued that the Directive makes an exception for discrimination based on marital status. There is, however, no article to that effect in the Directive, only the non-binding recital 22, which states that the Directive is without prejudice to national laws on marital status and the benefits dependent thereon. At any rate, there is no such exception for discrimination on grounds of marital status in any of the Swedish anti-discrimination acts.

16.4.2 Measures necessary for public security, for the protection of rights of others, etc. (art. 2(5) Directive)

See 16.4.4 below.

16.4.3 Social security and similar payments (art. 3(3) Directive)

With respect to social security payments and the like there are no provisions in the 1999 Sexual Orientation Discrimination Act, the 2001 Equal Treatment of Students at Universities Act or the 2003 Discrimination Prohibition Act, which explicitly exclude such benefits from the scope of application of the prohibition. Because of the relatively detailed way the scopes of these Acts have been drafted, however, such payments will in practice generally be excluded. One exception though relates to the payment of grants to post-graduate students. Such grants, which could be considered as social security payments, are indeed explicitly covered by the 2001 Equal Treatment of Students at Universities Act.¹²⁰ Furthermore, the general prohibition of discrimination on grounds of homosexual orientation in the Penal Code¹²¹ covers discriminatory treatment by civil servants in all areas of public administration, including those dealing with social security payments. Since, however, there is no ban on discriminatory *legislation* with a binding legal effect in the Swedish Constitution, the penal provision can only be relied upon if a discriminatory conduct by such a civil servant is not the result of discriminatory provisions in the law itself. The 2003 Discrimination Prohibition Act indeed prohibits discrimination related to social security, but only on grounds of ethnic origin, religion or belief. The government has, however, at the end of April 2004 published a proposal for public consultation, which would put sexual orientation at the same level with those grounds for the purpose of prohibiting sexual orientation discrimination also with respect to social security benefits, health care etc.

16.4.4 Occupational requirements (art. 4(1) Directive)

The 1999 Sexual Orientation Discrimination Act originally contained one explicit provision creating an exception from the ban on discrimination.¹²² The provision stated that the prohibition of direct discrimination does not apply if a difference in treatment is justified taking into account other interests that are obviously of greater importance than the interest in stopping employment discrimination on

¹²⁰ Art. 9(3)(e) 2001 Equal Treatment of Students at Universities Act.

¹²¹ Art. 9(4) of ch. 16 Penal Code.

¹²² Art. 3(2) 1999 Sexual Orientation Discrimination Act.

grounds of sexual orientation. The 2001 Equal Treatment of Students at Universities Act contained a corresponding provision.¹²³

In the *travaux préparatoires* to the Acts, examples were given of situations that have been intended to be covered by the exceptions.¹²⁴ These include important public interests, e.g. national security, equality between women and men, the right according to general employment protection provisions of other persons to priority for re-employment because of having earlier been laid off on grounds of lack of work, etc. All these examples were, however, in my opinion irrelevant to the exception provisions. If someone is treated less favourably than another person because of such circumstances, there is no link to the person's sexual orientation in the first place and therefore no discrimination has taken place. Hence, there can be no need to apply the exception. This way of looking at the original exception provision was later adopted also by the legislator and this general exception was repealed as far as the 1999 Sexual Orientation Discrimination Act is concerned.¹²⁵

The issue of religion related biases was also raised in the original Bill, but the government made it clear¹²⁶ that the exceptional provision is not intended to accommodate the wish of religious communities to discriminate against a person on grounds of his or her sexual orientation. Parliament treated the three separate, but in this respect identical, anti-discrimination bills on ethnicity and religion, sexual orientation and disabilities all together.

The Parliament Standing Committee *agreed* with the Government on the religious communities issue but felt the need to make one further clarification regarding all the prohibited grounds for discrimination,¹²⁷ stating that in some very rare exceptional cases it may be justified to take into account a person's ethnic belonging, religious belief, disability or sexual orientation. The Committee then went on to say that examples of such situations may be when interest organisations for immigrants, homosexuals or persons with disabilities or religious organisation are seeking to employ someone for a vital position within the organisation. In some such circumstances, having a certain ethnic background, sexual orientation, disability or religion, respectively, may be a genuine occupational requirement. Legitimacy for the organisation may also require that such factors be taken into account.

The wording as well as the examples, taken together with the agreement of the Standing Committee with the government's rejection of an exception for religious communities vis-à-vis persons with a homosexual orientation, would indicate that the exception to the prohibition cannot be used 'across the grounds'. By this I mean that an organisation for gay rights may have the right to require a certain sexual orientation in an employee, just as a church would have the right to require a certain religious belief. However, the gay rights organisation would not be allowed to discriminate on grounds of religion and the church not on grounds of sexual orientation.

¹²³ Art. 7(2) 2001 Equal Treatment of Students at Universities Act.

¹²⁴ Prop. [Government Bill] 1997/98:180, pages 30-31 and 66; prop. [Government Bill] 2001/02:27, pages 41-42 and 91 respectively; bet. [Parliament Standing Committee Report] 1998/99:AU4, pages 49-51.

¹²⁵ Prop. [Government Bill] 2002/03:65, page 185.

¹²⁶ Prop. [Government Bill] 1997/98: 180, page 31, para. 2.

¹²⁷ Bet. [Parliament Standing Committee Report] 1998/99:AU4, pages 50-51.

In the amendment to the 1999 Sexual Orientation Discrimination Act, in force as of 1 July 2003, the exception provision has been redrafted to make clearer what situations are covered.¹²⁸ The amended wording now reflects the direct wording of art. 4(1) of the Directive. In the *travaux préparatoires* to the amendment, it is made clear that the typical examples born in mind for the use of this exceptional clause are that a muslim organisation has the right to demand that an imam be of muslim belief, that an organisation for equal rights for gays and lesbians or an interest organisation, which caters for a certain immigrant group may have the right to require that for some 'core' positions the employees themselves be homosexual or have that same immigrant background. At the same time it is underlined that the exception from the prohibition of discrimination must always be given a very narrow interpretation.¹²⁹ In my opinion, the amendment to the legislation supports my original interpretation of the exceptional provision.

However, no amendment has been proposed – much less approved by Parliament – for the corresponding exceptional provision of the 2001 Equal Treatment of Students at Universities Act, which increases the incoherence of Swedish anti-discrimination legislation, a fact which I have also criticised in contacts with the Government. However, further amendments regarding the entire area of education have been announced by the Swedish Government and hopefully these ill-motivated differences in form, if not in substance, between the different parts of the legislation will then be made to go away. A comprehensive review of Swedish anti-discrimination legislation with the purpose to try and create a more coherent and all-inclusive legislation is currently the task of yet another special Parliamentary Committee, to be completed by 1 July 2005.¹³⁰

16.4.5 *Loyalty to the organisation's ethos based on religion or belief (art. 4(2) Directive)*

In Swedish anti-discrimination law there is no specific exception from the discrimination prohibition with respect to loyalty to the ethos of a religiously based employer. A general loyalty principle is considered an integral part of *any* employment contract under Swedish employment law. This general principle of loyalty must, however, to some extent yield to several other fundamental interests, e.g. the constitutional right to freedom of expression. Likewise, considering the content of the *travaux préparatoires* to the 1999 Sexual Orientation Discrimination Act described above, it would seem that a church or religious organisation could not refer to this principle in demanding that homosexual employees do not have intimate same sex relationships, unless they also demand abstinence/ceibacy of heterosexual employees. As I have accounted for above, the fact that a person is living together with someone of her own sex in an intimate relationship, whether in a registered partnership or not, or the fact that she is *at all* having sexual relations with someone of her own sex, must be considered as a natural expression of the sexual orientation itself, the same way that that is the case for heterosexuals. Therefore, if an employer would take into account any behaviour that has such a natural link to

¹²⁸ Prop. [Government Bill] 2002/03:65, page 185.

¹²⁹ Prop. [Government Bill] 2002/03:65, page 185-187.

¹³⁰ See note 112 above.

the sexual orientation itself, whichever that orientation may be, that would mean taking into account the sexual orientation *itself* and has nothing to do with the loyalty principle.

This, to me, would indeed seem to be the case also according to the Directive itself, since Art. 4(2)(2) deals with the right of a religiously based employer to ‘thus’ require individuals working for them to act in good faith and with loyalty. The ‘thus’ indicates that this subparagraph must be read together with the first one of art. 4(2), which in its turn clearly states that the making use of the exception to the prohibition of discrimination cannot justify discrimination on any other ground but religion or belief.

To conclude, there is in my opinion no support – neither in the legal texts themselves nor in the *travaux préparatoires* to the Swedish anti-discrimination legislation – for any greater margin of appreciation for religiously based employers than for others, when it comes to sexual orientation discrimination. So far there is, however, no case law on the matter. *See also 16.4.4 above.*

16.4.6 Positive action (art. 7(1) Directive)

Swedish anti-discrimination legislation with respect to sexual orientation does not allow for measures of positive action that would otherwise amount to discrimination. One exception, however, is the penal provision on unlawful discrimination. Since this provision only forbids discrimination on grounds of a person’s homosexuality, a treatment that favours homosexuals over heterosexuals would not be outlawed by this provision.

16.4.7 Exceptions beyond the Directive

There are no exceptions to the Swedish employment anti-discrimination legislation with respect to sexual orientation that go beyond what is allowed by the Directive.

16.5 Remedies and enforcement

16.5.1 Basic structure of enforcement of employment law

The general point of departure in Swedish employment law is that the social partners, i.e. the labour unions of workers or professionals on the one hand and employers or employers’ associations on the other, negotiate any differences regarding alleged breaches of employment protection law or collective bargaining agreements. If such negotiations end in disagreement, the dissatisfied party can bring the case before the special Labour Court [*Arbetsdomstolen* or ‘AD’], whose characteristics to a large extent remind of arbitration. The dissatisfied party would sometimes be the organisation on either side and sometimes the individual employee or job seeker or employer, supported and represented by their respective organisation. The rulings of *Arbetsdomstolen* are final. An individual worker, who is either not a member of any labour union or whose labour union decides not to represent the worker, may also sue an employer/employers’ association in a corresponding situation but then the litigation would start at district court level with the possibility of

appeal to *Arbetsdomstolen*. The sanctions are invalidation of decisions and the ordering of payment of damages. Employment decisions taken by government agencies can also be subject to administrative appeal to the Government itself.

16.5.2 Specific and/or general enforcement bodies

The 1999 Sexual Orientation Discrimination Act orders the setting up of the Office of the Ombudsman against Discrimination on grounds of Sexual Orientation.¹³¹ The relevant provision states that *'[f]or the purposes of enforcing this Act there shall be an Ombudsman against Discrimination on grounds of Sexual Orientation. The Ombudsman against Discrimination on grounds of Sexual Orientation is appointed by the Government.'*¹³² The Act conveys legal powers on the Ombudsman, ultimately the right to litigate individual cases of discrimination before the Labour Court on behalf of the injured party.¹³³ Similar legal powers are given to the Ombudsman under the 2001 Equal Treatment of Students at Universities Act¹³⁴ and the 2003 Discrimination Prohibition Act.¹³⁵ Through a Government Decree¹³⁶ the mandate of the Office of the Ombudsman has been extended. The Decree commissions the Ombudsman to counteract homophobia and discrimination on grounds of sexual orientation in all walks of life. The Ombudsman shall inter alia give advice and support to individuals who have suffered discrimination, engage in education, information and opinion shaping efforts to combat homophobia and sexual orientation discrimination, propose to the Government legal and other measures that may be of use for that purpose and monitor international developments in these fields.¹³⁷

The opinions delivered by the Ombudsman are not in themselves binding upon the parties. Within the scope of application of the 1999 Sexual Orientation Discrimination Act, the 2001 Equal Treatment of Students at Universities Act and the 2003 Discrimination Prohibition Act, the Ombudsman, as I have already mentioned, can litigate cases on behalf of individual injured parties (although technically this would be done in the Ombudsman's own name). In other areas the Ombudsman can e.g. also – as can anyone – request public prosecutors to review decisions not to prosecute or to drop charges in criminal investigations. On a few occasions, such requests have successfully been made, sometimes also resulting in the reopening of criminal investigations, prosecution and verdicts of conviction in cases where the victim's sexual orientation has played an important part. In cases of e.g. unlawful discrimination it has also not been uncommon that the Ombudsman has been able to reach an out of court settlement between the parties.

¹³¹ Art. 16 of the 1999 Sexual Orientation Discrimination Act.

¹³² Art. 16 of the 1999 Sexual Orientation Discrimination Act: *'För att se till att denna lag följs skall det finnas en ombudsman mot diskriminering på grund av sexuell läggning. Ombudsmannen mot diskriminering på grund av sexuell läggning utses av regeringen.'*

¹³³ See e.g. art. 16-18 and 24.

¹³⁴ See e.g. art. 16 and 18.

¹³⁵ See e.g. art. 19 and 22.

¹³⁶ *Förordningen (1999:170) med instruktion för Ombudsmannen mot diskriminering på grund av sexuell läggning (HomO)* [Government Decree (1999:170) with Instructions for the Ombudsman against Discrimination on grounds of Sexual Orientation], available also in English at the web site of the Ombudsman against Discrimination on grounds of Sexual Orientation, at www.homo.se.

¹³⁷ Art. 1-2 of the Decree.

16.5.3 *Civil, penal, administrative, advisory and/or conciliatory procedures (art. 9(1) Directive)*

Under both the 1999 Sexual Orientation Discrimination Act and the 2001 Equal Treatment of Students at Universities Act as well as under the 2003 Discrimination Prohibition Act, there are no formal procedures for dealing with a discrimination complaint prior to litigation in the courts. The Acts form an integral part of the civil law system, however. This means that the Ombudsman is compelled to try to persuade the party against whom a complaint has been made to comply loyally with the law and that an out of court settlement must be the first priority if possible. The penal provision on unlawful discrimination is not applicable to employment matters.¹³⁸ However, it could be found applicable on the discriminatory treatment of a student by a public university in relation to e.g. advanced vocational training. In that case criminal procedures may be initiated against the university by a public prosecutor or the private party herself. The Ombudsman does not have legal standing before the courts in criminal procedures.

16.5.4 *Civil, penal and/or administrative sanctions (art. 17 Directive)*

The 1999 Sexual Orientation Discrimination Act provides that any contract that allows for discriminatory treatment not permitted under the Act is invalid. Discriminatory decisions by an employer shall be declared invalid upon request of the employee. A discriminated employee has a right to financial compensation. In some instances, however, statutory rules put an upper limit on such financial compensation. These limits may be in violation of general EC law rules on effective remedies and can therefore not be considered to be in conformity with art. 17 of the Directive. There is, furthermore, no possibility of obtaining a court ruling ordering an employer to hire a job applicant who has suffered discrimination during the hiring process, nor to order the reinstatement of a dismissed employee. This limitation on the sanctions available seems to fall short of the Directive's requirement for *effective* sanctions. Provisions on financial compensation as a sanction for discrimination are found also in the 2001 Equal Treatment of Students at Universities Act. Some decisions taken by a university on discriminatory grounds may also be subject to administrative appeal. Sanctions in the form of declarations of invalidity and orders to pay compensation apply also to violations of the 2003 Discrimination Prohibition Act. Violations of the penal provision on unlawful discrimination are punished by a fine or imprisonment for a time not exceeding one year and can also result in the obligation to pay financial compensation.

16.5.5 *Natural and legal persons to whom sanctions may be applied*

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

¹³⁸ Holmqvist, 2002, Ch. 16, p. 45.

abuse, threats or assault.¹³⁹ In such cases, a complaint may result in sanctions also against the individual directly responsible for the actions.

16.5.6 Awareness among law enforcers of sexual orientation issues

All law enforcement bodies have been commissioned by the Government to give priority to inter alia homophobic crimes. To a varying degree, these bodies co-operate with e.g. the Office of the Ombudsman against Discrimination on grounds of Sexual Orientation in this respect. One example of how this is done is that the Office regularly participates in the training programmes of the Prosecutor General, directed at all public prosecutors. The same goes for the training programmes for judges organised by the National Courts Administration [*Domstolsverket*]. The office, furthermore, has a wide-ranging co-operation with both labour unions and some employers' associations on the subject of enforcing the 1999 Sexual Orientation Discrimination Act. The same is true for universities and student bodies with respect to the 2001 Equal Treatment of Students at Universities Act.

16.5.7 Standing for interest groups (art. 9(2) Directive)

Under the 1999 Sexual Orientation Discrimination Act, labour unions have legal standing to litigate discrimination cases where one of their members is involved. As a matter of fact, in such cases the Ombudsman only has a right to take on the case if the labour union decides not to represent its member.¹⁴⁰ Student bodies do not have the corresponding legal standing under the 2001 Equal Treatment of Students at Universities Act. No other interest organisations have legal standing, neither under these two acts, nor under the 2003 Discrimination Prohibition Act, in possible violation of art. 9(2) of the Directive. This fact has been criticised by myself as well as by the other Ombudsmen, so far to no avail.

16.5.8 Burden of proof of discrimination (art. 10 Directive)

A shared burden of proof of discrimination is enforced by both the 1999 Sexual Orientation Discrimination Act¹⁴¹ and the 2001 Equal Treatment of Students at Universities Act¹⁴² as well as by the 2003 Discrimination Prohibition Act.¹⁴³ The relevant provision in each of these acts provides that when the person who submits a complaint of discrimination (direct, indirect or in the form of harassment or instructions to discriminate) or victimisation, establishes facts from which it is reasonable to assume that she has been subjected to discrimination or victimisation, the defendant has to prove that there has been no discrimination or victimisation.¹⁴⁴

¹³⁹ See under 16.1.5 above.

¹⁴⁰ Art. 24-25 of the 1999 Sexual Orientation Discrimination Act.

¹⁴¹ Art. 23a of the 1999 Sexual Orientation Discrimination Act.

¹⁴² Art. 17a of the 2001 Equal Treatment of Students at Universities Act.

¹⁴³ Art. 21 of the 2003 Discrimination Prohibition Act.

¹⁴⁴ See e.g. art. 21 of the 2003 Discrimination Prohibition Act: 'Om den som anser sig ha blivit diskriminerad eller utsatt för repressalier visar omständigheter som ger anledning att anta att han eller hon blivit diskriminerad eller utsatt för repressalier, är det svaranden som skall visa att diskriminering eller repressalier inte förekommit'.

16.5.9 *Burden of proof of sexual orientation*

There is no need for proving the sexual orientation under neither the 1999 Sexual Orientation Discrimination Act, the 2001 Equal Treatment of Students at Universities Act nor the 2003 Discrimination Prohibition Act.¹⁴⁵ However of course, one way for the defendant to prove that there has been no direct discrimination is to prove that she or he had no knowledge of the sexual orientation of the plaintiff. In that sense, the burden of proof regarding the *knowledge* of the sexual orientation of a complainant weighs on the defendant. This is made clear in the *travaux préparatoires*.¹⁴⁶ It should be noted that also a misconception of the sexual orientation of the discriminated party leading to discriminatory treatment, is covered by the prohibition of discrimination. So, in conclusion, what the defendant has to prove to fend off an allegation of direct discrimination, once the burden of proof has shifted to that side, is that he or she neither knew about nor had reason to assume the presence of the sexual orientation factor in question – or, of course, prove that the action taken had no link at all to that sexual orientation. Note however, that there is no need for the discrimination to be intentional in order to be unlawful.

16.5.10 *Victimisation (art. 11 Directive)*

Victimisation as a result of someone's having made a complaint about a violation of the 1999 Sexual Orientation Discrimination Act, the 2001 Equal Treatment of Students at Universities Act or the 2003 Discrimination Prohibition Act is prohibited and sanctioned by financial compensation.¹⁴⁷ The same applies to victimisation of any person who has taken part in the investigation of such a complaint.

16.6 Reform of existing discriminatory laws and provisions

16.6.1 *Abolition of discriminatory laws (art. 16(a) Directive)*

See para. 16.6.2 below.

16.6.2 *Abolition of discriminatory administrative provisions (art. 16(a) Directive)*

Acts of Parliament, Government Decrees as well as administrative provisions can of course always be abolished or amended if the competent bodies decide to do so. Acts of Parliament can only be abolished or amended by another Act of Parliament.¹⁴⁸ As a general principle, Parliament is always free to also legislate in areas where there are already provisions of lower constitutional ranking, i.e. that have been decided by the Government or by administrative bodies.¹⁴⁹

¹⁴⁵ Prop. [Government Bill] 1997/98: 180, page 49-50, prop. [Government Bill] 2001/02:27 page 55-56 and prop. [Government Bill] 2002/03:65, pages 106-108 respectively.

¹⁴⁶ *Idem*.

¹⁴⁷ Art. 7 and 13, 11 and 13 and art. 14 and 17, respectively.

¹⁴⁸ Art. 17 of ch. 8 of the Instrument of Government.

¹⁴⁹ Art. 14 of ch. 8 of the Instrument of Government.

The Legislative Council [*Lagrådet*] should always be consulted before any important legislative bills are put before Parliament. The task of the Legal Council is to scrutinise the proposal's compatibility with e.g. the Constitution and principles of the rule of law and legal certainty, as well as how the proposal fits with the rest of the legal system. Also the compatibility with EC law and international treaties is a part of this scrutiny.¹⁵⁰

There is no constitutional court in the Swedish legal system. Instead, under the Constitution¹⁵¹ all courts of law and other institutions of public administration have a right to exercise constitutional control over Acts of Parliament, Government Decrees and administrative provisions, in the sense that they can set them aside when being asked to interpret and apply them in an individual case. They cannot, however, set them aside in the abstract, i.e. abolish them or amend them. Furthermore, this system for constitutional control is a weak one insofar as, in the cases of Acts of Parliament and Government Decrees, it requires the 'error', i.e. the inconsistency of the questioned provision with one of higher constitutional ranking, to be 'obvious' for the right to set the rule aside to apply.¹⁵²

The task of proposing legislation in order to implement the Directive into Swedish national law was given to a special investigator, who presented her report in the spring of 2002.¹⁵³ However, the investigator did not, as required by art. 16(a) of the Directive, carry out any general screening of laws and administrative provisions for incompatibilities with the requirements of the Directive (at least not in any comprehensive way).¹⁵⁴ This is probably more problematic in the area of ethnic discrimination, particularly with respect to indirect discrimination. Obvious examples of problematic provisions would include requirements regarding Swedish citizenship or to have a degree or diploma from a Swedish educational institution to be able to exercise certain professions.

In the case of sexual orientation discrimination, I have not been able to identify any legal or administrative provisions that make explicit reference to a person's sexual orientation. Any remaining provisions with discriminatory effects would therefor probably be of the kind that deals with rights and obligations of partners. However, any such provisions have been effectively taken care of by the general equality provisions of the Registered Partnership Act¹⁵⁵ and the Cohabitation Act¹⁵⁶ respectively. The equality provisions of the Registered Partnership Act state that the legal consequences of a registered partnership are the same as those of a marriage and that all provisions in Swedish law (i.e. including administrative provisions) regarding married spouses, apply *mutatis mutandis* also to registered partners, with the exceptions specified directly in the Registered Partnership Act. None of the exceptions specified are of any relevance for the implementation of the Directive. The corresponding provision of the Cohabitation Act says that terms like 'cohabitants' or 'persons living

¹⁵⁰ Art. 18 of ch. 8 of the Instrument of Government.

¹⁵¹ Art. 14 of ch. 11 of the Instrument of Government.

¹⁵² *Idem*.

¹⁵³ Report SOU 2002:43: *An Extended Protection against Discrimination* [*Ett utvidgat skydd mot diskriminering, bet. SOU 2002:43*].

¹⁵⁴ *Idem.*, page 143.

¹⁵⁵ Art. 1 of ch. 3 of the Registered Partnership Act (1994:1117).

¹⁵⁶ Art. 1(1-2) of the Cohabitation Act (2003:376).

together under marriage like circumstances', or other similar terms, in legal and administrative provisions, mean any two persons who are permanently living together as a couple and who keep a joint house hold, thereby providing ex lege for equal rights regardless of sexual orientation.

16.6.3 *Measures to ensure amendment or nullity of discriminatory provisions included in contracts, collective agreements, internal rules of undertakings, rules governing the independent occupations and professions, and rules governing workers' and employers' organisations (art. 16(b) Directive)*

Any agreement or contract is null and void to the extent that it prescribes, or allows for, such discrimination as is prohibited by the 1999 Sexual Orientation Discrimination Act.¹⁵⁷ This nullity provision does not have any counterparts in the 2001 Equal Treatment of Students at Universities Act or the 2003 Discrimination Prohibition (Goods and Services) Act. It only applies to discriminatory agreements regarding relations between an employer on the one side and employees, job applicants and those undergoing occupational training or carrying out work at a work place without being employed there, on the other. Provisions in agreements regarding the independent professions or workers' and employers' organisations prescribing or allowing for discrimination, are thus not covered by this 'automatic' nullity clause. They can however be amended or declared void upon the request of an injured party, see below.

According to art. 10(1) of the 1999 Sexual Orientation Discrimination Act, if an employee is discriminated against on the basis of a provision in an agreement with the employer, that provision must be amended or declared void upon the petition of the employee. If the questioned provision is of such importance to the agreement as a whole that it would be unfair to apply the rest of the agreement as it stands, it may be amended also in other respects or be declared null and void in its entirety.¹⁵⁸ If an employee is discriminated against as a result of the employer having cancelled an agreement or undertaken any similar legal action, that action must also be declared null and void if the employee so demands.¹⁵⁹

Furthermore, the fact that employers are legally bound by what are considered to be good customs and practices in working life also provides some protection against discriminatory conditions in a workplace. Discrimination on grounds of sexual orientation would almost certainly be considered as a violation of such principles.

A decision by a university or other institution of higher education may be appealed on the submission that it is discriminatory on grounds of int. al. sexual

¹⁵⁷ Art. 9 of the 1999 Sexual Orientation Discrimination Act: *Ett avtal är ogiltigt i den utsträckning som det föreskriver eller medger sådan diskriminering som avses i 3-5 §§.*

¹⁵⁸ Art. 10(1): *Om en arbetstagare diskrimineras genom en bestämmelse i ett avtal med arbetsgivaren på något sätt som är förbjudet enligt denna lag, skall bestämmelsen jämkas eller förklaras ogiltig, om arbetstagaren begär det. Har bestämmelsen sådan betydelse för avtalet att det inte skäligen kan krävas att detta i övrigt skall gälla med oförändrat innehåll, får avtalet jämkas även i annat hänseende eller i sin helhet förklaras ogiltigt.*

¹⁵⁹ Art. 10(2) of the 1999 Sexual Orientation Discrimination Act: *Om en arbetstagare diskrimineras på något sätt som är förbjudet enligt denna lag genom att arbetsgivaren säger upp ett avtal eller vidtar en annan sådan rättshandling, skall rättshandlingen förklaras ogiltig, om arbetstagaren begär det.*

orientation. The decision may then be declared void and the university ordered to try the issue at stake again.¹⁶⁰

Discriminatory provisions in contracts, agreements etc. regarding professional or occupational organisations as well as organisations of employees or employers, shall be amended or declared null and void upon the petition of the discriminated member of such an organisation. If the provision in question is of such importance to the agreement as a whole that it would be unfair to apply the rest of the agreement as it stands, it may be amended also in other respects or be declared null and void in its entirety.¹⁶¹ If a person is discriminated against as a result of the cancellation of an agreement or any similar legal action, that action must also be declared null and void if the discriminated person so demands.¹⁶² Internal rules inside the kind of organisations that we are dealing with here are to be considered as conditions of a standard contract, which a potential member must adhere to if she or he wants to become a member of the organisation. Therefore, the possibility of having such internal rules amended or declared void would come under the amendment and nullity provisions of the 2003 Discrimination Prohibition (Goods and Services) Act. They could also be attacked on the basis of the general nullity clause in art. 36 of the Swedish Contracts Act (see below).

Art. 36(1) of the Swedish Contracts Act (1915:218)¹⁶³ provides a general protection against unreasonable contract conditions. It states that a provision in a contract or agreement may be amended or declared null and void if the provision is unreasonable taking into account the contents of the agreement, the circumstances under which the agreement was made or that have occurred after that, as well as other relevant circumstances. If the questioned provision is of such importance to the agreement as a whole that it would be unfair to apply the rest of the agreement as it stands, it may be amended also in other respects or be declared null and void in its entirety.¹⁶⁴ When determining whether or not such a condition is to be deemed unreasonable, special attention must be paid to the need for protection of consumers and other particularly vulnerable parties to a contract.¹⁶⁵ The provision also applies to unreasonable conditions in relation to other forms of legal action than the making of contracts.¹⁶⁶ Contract conditions that are discriminatory on grounds of sexual orientation would almost certainly be considered as unreasonable under this provision.

¹⁶⁰ Art. 14 of the 2001 Equal Treatment of Students at Universities Act.

¹⁶¹ Art. 15(1) of the 2003 Discrimination Prohibition (Goods and Services) Act: *Om någon diskrimineras genom en bestämmelse i ett avtal på ett sätt som är förbjudet enligt denna lag, skall bestämmelsen jämkas eller förklaras ogiltig, om den som diskriminerats begär det. Har bestämmelsen sådan betydelse för avtalet att det inte skäligen kan krävas att detta i övrigt skall gälla med oförändrat innehåll, får avtalet jämkas även i annat hänseende eller i sin helhet förklaras ogiltigt.*

¹⁶² Art. 15(2) of the 2003 Discrimination Prohibition (Goods and Services) Act: *Diskrimineras någon på ett sätt som är förbjudet enligt denna lag genom uppsägning av ett avtal eller genom en annan sådan rättshandling, skall rättshandlingen förklaras ogiltig, om den som diskriminerats begär det.*

¹⁶³ Lag (1915:218) om avtal och andra rättshandlingar på förmögenhetsrättens område.

¹⁶⁴ *Avtalsvillkor får jämkas eller lämnas utan avseende, om villkoret är oskäligt med hänsyn till avtalets innehåll, omständigheterna vid avtalets tillkomst, senare inträffade förhållanden och omständigheterna i övrigt. Har villkoret sådan betydelse för avtalet att det icke skäligen kan krävas att detta i övrigt skall gälla med oförändrat innehåll, får avtalet jämkas även i annat hänseende eller i sin helhet lämnas utan avseende.*

¹⁶⁵ Art. 36(2): *Vid prövning enligt första stycket skall särskild hänsyn tagas till behovet av skydd för den som i egenskap av konsument eller eljest intager en underlägsen ställning i avtalsförhållandet.*

¹⁶⁶ Art. 36(3). *Första och andra styckena äga motsvarande tillämpning i fråga om villkor vid annan rättshandling än avtal.*

Articles 9 and 10 of the 1999 Sexual Orientation Discrimination Act do not explicitly cover the situation where a discriminatory treatment is prescribed or allowed for, not in a contract or an agreement but in the internal rules of an employer. Sometimes the issuing of such internal rules by an employer may be considered as a “similar legal action” in the sense of art. 10(2) of the 1999 Sexual Orientation Discrimination Act (see above). In that case the rule must be declared void upon the request of an employee. Otherwise they could also be attacked on the basis of the general principles of good customs and practices in working life.

The Office of the Ombudsman against Discrimination on grounds of Sexual Orientation has dealt with a few cases of discriminatory provisions in collective bargaining agreements and internal rules of an employer.

The collective bargaining agreements for all civil servants on a national, regional and local level used to contain provisions regarding survivor's pensions, which were directly discriminatory on grounds of sexual orientation, in the sense that such a pension would only be paid out to a surviving cohabitant of the opposite sex. After the Ombudsman's office had initiated discussions with the contracting parties, all these bargaining agreements were changed and are now sexual orientation neutral.¹⁶⁷ The same result was brought about in relation to a collective bargaining agreement in the private employment sector with respect to architects.¹⁶⁸

In relation to the Armed Forces, the Ombudsman's office decided to open a dossier regarding the internal rules for the appointments of defence attachés with Swedish embassies abroad. The internal policy of the Supreme Commander was found to be discriminatory on grounds of both sexual orientation and sex and was therefor subsequently amended.¹⁶⁹

In a few other cases, the monitoring of the Ombudsman led to the conclusion that there were no discriminatory provisions in the agreements anymore and that the complaints had been caused by an information problem in that employees had not been informed of the already amended content of the agreement.¹⁷⁰

Also in the case of the internal rules of a political party, the same discriminatory conditions were found and subsequently rectified.¹⁷¹ In yet another case, the Ombudsman's office came to the conclusion that the internal rules of the Church of Sweden for recruiting employees for its missions abroad, were discriminatory since they required the employees to be married and did not treat registered partners the same way. Also this policy was rectified after the intervention of the Ombudsman's office.¹⁷²

16.6.4 *Discriminatory laws and provisions still in force*

As far as I have been able to determine, there are no discriminatory laws and provisions with respect to sexual orientation discrimination in employment or

¹⁶⁷ Ombudsman's dossiers no. 23/1999 and 199/2000.

¹⁶⁸ Ombudsman's dossier no. 243/2000.

¹⁶⁹ Ombudsman's dossier no. 209/2001.

¹⁷⁰ Ombudsman's dossiers no. 167/1999 and 295/2000.

¹⁷¹ Ombudsman's dossier no. 107/2001.

¹⁷² Ombudsman's dossier no. 334/2001.

occupation still in force. When it comes to written internal rules of individual employers, that is of course impossible to know for certain, but at least at the Ombudsman's office we have had no such indications in the form of complaints or requests for advice and support from individual victims of discrimination.

Likewise, interviews carried out by the Ombudsman's office with representatives of labour unions, employers associations, government officials, academics in the field, lesbian and gay interest organisations and private companies have not resulted in any such indications.

16.7 Concluding remarks

The 1999 Sexual Orientation Discrimination Act, the Discrimination Prohibition Act (2003:307), the 2001 Equal Treatment of Students at Universities Act and the penal provision on unlawful discrimination all play a part in implementing the Directive in Swedish law. The same goes for the general employment law framework, including general principles of good customs and practices regarding e.g. dismissals, and the strong position of collective bargaining agreements in Swedish employment law. To a large extent, Swedish law is in conformity with the Directive.

Nevertheless, there are some flaws in the implementation that deserve to be highlighted:

- There are no explicit provisions according to which discriminatory internal rules of an employer may be amended or declared null and void, see 16.2.3.
- The prohibition of instructions to discriminate has been drafted too narrowly, see 16.2.6.
- The protection against discrimination or victimisation does not fully cover self-employed persons, see 16.2.7.
- The protection against discrimination does not cover persons carrying out work in a work place without being employed there, see 16.2.7.
- The scope of application of the law implementing the Directive does not include 'working conditions', see 16.2.7.
- Discrimination and harassment from fellow workers or third parties are not as such prohibited, see 16.2.8.
- Discrimination against legal persons, e.g. with respect to membership and benefits of employers' associations, is not prohibited, see 16.3.5.
- The provision providing an exception from the prohibition on direct discrimination in the 2001 Equal Treatment of Students at Universities Act is still too wide, see 16.4.4.
- There are statutory rules limiting the financial compensation that can be afforded to a victim of employment discrimination in certain situations, see 16.5.4.

- Student organisations and interest groups for equal rights regardless of sexual orientation do not have any right to engage themselves on behalf of or in support of victims of discrimination, see 16.5.7.

The future development of the Swedish anti-discrimination legislation is very much discussed at present. As already mentioned, the Government has commissioned¹⁷³ a special Commission with parliamentary representation and a number of additional experts, to consider the possibilities of creating a more coherent anti-discrimination legislation covering all grounds of discrimination and possibly also completely new areas in society. The task is extremely comprehensive. The Committee has been given time until 1 July 2005 to complete its task.

List of literature used in footnotes

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¹⁷³ Dir. [Government instructions for Committees] 2002:11. The instructions may be found – albeit in Swedish only – at the Government's web site: www.regeringen.se. Go to the site of the Ministry of Industry [Näringsdepartementet] and click on the section 'Direktiv' (instructions/commissions for committees and special investigators).

