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Strengthening anti-discrimination policies

Document 3

**Comparative Study
on Anti-discrimination Legislation and Policy
in Ireland, the Netherlands and the United Kingdom**

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1 Ireland

1.1 Introduction

Until the early nineties Ireland has been a country of emigration. The latest wave of emigration in 1988-1989 took away about 70.600 people, who represented about 2 percent of the total population. Then Ireland changed its political approaches – especially in installing a stronger social partnership.

Following a tremendous economic growth (a plus of 500.000 jobs), and a situation of next to no unemployment, Ireland changed from a country of emigration into one of immigration. A large proportion of the immigrants are still the re-emigrating Irish emigrants (about 46% of immigrants).

The Irish population is to a large extent very homogenous in regard to ethnicity. The largest minority group is formed by the ‘Traveller Community’ – a group that suffers a lot from social exclusion and discrimination.

In the middle of the 90ies the Prime Minister installed a consultative commission on racism, including all major NGOs in the field. This commission elaborated – in connection with developing EU-awareness – two draft anti-discrimination laws that were then put into force in 1998 and 1999. The Employment Equality Act 1998 (EEA) and the Equal Status Act 2000 (ESA) form a basis for Irish anti-discrimination policy that is by now seen as one of the most developed in the world.

The EEA 1998 prohibits discrimination, on the following grounds: gender, marital status, family status, disability, age, sexual orientation, religion, race (including colour, nationality, ethnic/national origin) and membership of the Traveller community.

Discrimination is prohibited in the areas of recruitment, terms and conditions, training and termination of employment. The ESA 2000 prohibits discrimination, on the same grounds as the EEA 1998, in the areas of the supply of goods and services, accommodation and education. The legislation broadly has equal application in respect of all the grounds mentioned with certain exceptions, for example, in regard to exemptions and positive action.

There is also a strong political will to keep up these high standards in equality issues. Following the General Election, in June 2002 a Programme for Government between Fianna Fail and the Progressive Democrats was agreed and, while the document does not contain a specific reference to the transposition of the anti-discrimination directives, nevertheless it does contain a section entitled ‘**Supporting Diversity & Tolerance**’ which gives the following undertakings:

- *We will uphold the entitlement of all people to equal treatment before the law.*
- *We will undertake an annual review of the Anti-Racism Campaign in order to identify new avenues to combat racism*
- *We will complete a review of the laws on incitement to hatred and ensure that people who incite racial hatred have no place in Irish society*
- *We will enhance the excellent work which is currently underway in our schools, to educate for diversity and promote tolerance*
- *We will appoint an expert group on managing cultural change to advise Government on strategic issues and integrated approach to this complex issue*
- *We will review campaigns designed to promote tolerance and understanding between the settled and travelling communities and maintain multi-annual funding for targeted programmes.*

Under 'Housing', the programme includes:

- *We will ensure the implementation of local authority Traveller Accommodation Plans*

Under 'Equality & Law Reform', the programme includes:

- *We will publish regular reviews of the operation of equality legislation and ensure that the enforcement authorities are in a position to effectively carry out their duties*

The government also installed and financed some important national key-actors in this field:

The **Equality Authority** was established in 1999 and has functions under the EEA 1998 and the ESA 2000, which include working towards the elimination of conduct prohibited under the equality legislation and to promoting equality of opportunity in the matters covered by the legislation.

A **National Action Plan against Racism** will have implications for a wide range of Government Departments. In recognition of this fact the Cabinet Sub-Committee on Social Inclusion will oversee the development of the plan.

A National Action Plan against Racism Steering Group to oversee the development phase of the plan, up to the establishment of a monitoring mechanism to oversee implementation.

The **Human Rights Commission** is an independent body set up under legislation to keep under review the adequacy and effectiveness of the laws protecting human rights. The Commission has established a sub committee on racism drawn from its own membership and the members of the Northern Ireland Human Rights Commissions.

In 1998 the **National Consultative Committee on Racism and Interculturalism** was established, funded mainly by the Department of Justice, Equality and Law Reform. Its tasks include developing an integrated and strategic approach to racism

and its prevention. In addition the NCCRI informs policy development and seeks to build consensus through dialogue in relation to racism and inter-culturalism.

The **KNOW RACISM-National Anti-Racism Awareness Programme Committee** was established by Government and launched in 2001. The Committee is a partnership of government departments, agencies and non-governmental organisations. Its overall aim is to provide an ongoing structure to develop programmes and actions aimed at developing an integrated approach against racism and to act in a policy advisory role to the Government. The Committee has to date supported local awareness raising initiatives, provided support for an Anti-Racism Workplace Week, the International Day against Racism and the European Week against Racism.

1.2 The Legislation

An overall framework already exists in Ireland at national level for combating discrimination on the grounds of racial or ethnic origin and to put into effect the principle of equal treatment. This framework is built on constitutional and legislative provisions.

The principle **constitutional provisions** :

'All citizens shall, as human persons, be held equal before the law. This shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function.' (Article 40.1)

'The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.' (Article 40.3.1)

'The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name and property rights of every citizen for the exercise of the following rights, subject to public order and morality'. (Article 40.3.2)

The principal **legislative provisions** include:

Employment Equality Act 1998 (EEA 1998) – prohibits discrimination in the general field of employment on the following grounds; gender, marital status, family status, race, age, disability, sexual orientation, religious belief, or membership of the Traveller community. The 'ground of race' is defined as including race, colour, nationality, or ethnic or national origins.

Equal Status Act 2000 (ESA 2000) prohibits discrimination in the supply of goods and services, the provision of accommodation or education, and in regard to registered clubs (i.e. a club holding a licence to sell liquor). The legislation contains a prohibition on discrimination on the same nine grounds as in the EEA 1998 outlined above.

Unfair Dismissals Acts 1973-1993 – provides that dismissal of an employee wholly or mainly on various grounds including race or colour / membership of the Traveller community shall be deemed to be an unfair dismissal.

Prohibition of Incitement to Hatred Act 1989 – prohibits incitement to hatred on various grounds including race, colour, religion, nationality or ethnic or national origins / membership of the Traveller community.

The **Employment Equality Act** counteracts and prohibits discrimination in the following areas:

- Recruitment – access to employment
- Working conditions
- Wages and salaries
- Promotion, vocational training, and guidance
- Working experience and access to it
- Part-time or full-time work

Direct and indirect discrimination are both covered as well as harassment and sexual harassment and victimisation are. The prohibition of sexual harassment includes employers, fellow employees and clients.

In general, the act imposes a quite strong pressure on the employers to actively take measures to ensure equality within his/ her workforce. So the act makes it necessary for employers to take preventive action. Those employers who can prove at least some activity in this respect can stand their cases in court even when the burden of proof is shifted on them.

The EEA provisions have been recently strengthened by the introduction of a statutory 'Code of Practice on Sexual Harassment and Harassment at Work'. The Code makes reference to both the EEA provisions and to the directives. It stresses the importance of employers having in place accessible and effective policies and procedures to deal with harassment.

The **Equal Status Act** broadens the scope of the principle of equal treatment to cases from outside the workplace sphere.

The act provides that a person shall not discriminate on any of the prohibited grounds in disposing of goods to the public or a section of the public or in providing a service, whether the disposal or provision is for consideration or otherwise and whether the service provided can be availed of only by a section of the public.

The EAS also provides for protection against discrimination in regard to access to educational and training institutions, childcare, membership to clubs, mobbing, harassment, discriminatory advertising and instruction to discriminate.

Section 15 (1) of the ESA states that the act will not require a person who provides goods or services to deal with a customer in certain 'public order' circumstances. These are circumstances which would lead a reasonable individual, having the responsibility, knowledge and experience of the person, to believe, on grounds other than discriminatory grounds, that to deal with the customer would produce 'a substantial risk of criminal or disorderly conduct or behaviour or damage to property at or in the vicinity of the place in which the goods or services or the premises or accommodation are located'.

Example of jurisdiction:

Section 15 has been considered by an Equality Officer in *John Ward & Michael Ward v The Boathouse Pub* who held that members of the Traveller community had been discriminated against when they were told that they would only be served one drink. John Ward's brother had previously been barred, but the Equality Officer held that Section 15(1) did not apply, as the service provider *'had no justifiable reason to believe that John Ward was personally likely to be the cause of trouble'*. (Equality Officer Decision DEC-S2001-001 16/03/01)

Fears by owners of pubs

The access by members of the Traveller community to pubs is a large problem in Ireland. As can be seen from the Equality Authority Annual Report a considerable number of cases have been taken by Travellers against pub owners for discrimination generally in relation to a refusal of service to Travellers. This has led to a concerted campaign by organisations representing pub owners to have the Equal Status Act 2000 amended as allegedly going too far in the rights afforded to, in particular, Travellers. Thus publicans were reported as being concerned that they could no longer refuse members of minority groups, for any reason, for fear that a case will be taken against them on the grounds of discrimination. It was felt that the defence, allowed by the legislation, of acting in accordance with the terms of the drinks licence to maintain an orderly house 'may not stand up well in relation to an equal status case' Similarly publicans were reported as being 'ready to fight back against equality legislation' particularly in regard to the prohibiting of practices such as operating 'regulars only' or quotas when it came to serving Travellers. The Minister for Justice, Equality and Law Reform has stated that the provisions of Section 15 of the ESA 2000 were intended to enable service providers, including licensees, to maintain control of their premises without contravening the anti-discrimination law and that it would be of concern to him if the section was not achieving its aim.

Exemptions to protect private life in housing:

The ESA is also applicable in cases of discrimination in housing and accommodation. The act does however exempt situations where the person providing the accommodation (or a near relative of that person) resides there.

A further exemption applies where the premises concerned come within the statutory definition of '*small premises*', for example, in premises comprising residential accommodation for more than one household, there is not normally accommodation for more than three households.

Other exemptions:

- Differences in the treatment of persons in relation to annuities, pensions, insurance policies or any other matters related to the assessment of risk. The treatment is required to be effected by reference to actuarial or statistical data or other relevant underwriting or commercial factors and be reasonable having regard to the data or other factors.
- Differences in the treatment of persons, inter alia, on the ground of race, reasonably required for reasons such as authenticity in connection with a dramatic performance or other entertainment
- Differences in the treatment not already covered by the Act in the disposal of goods or the provision of services, which can reasonably be regarded as goods or a service suitable only to the needs of certain persons.

Discrimination by association

In addition the ESA includes in the definition of discrimination a situation where a person is discriminated against due to his/her association with another person in circumstances where similar treatment of that other person would have amounted to discrimination. This Section was applied by an Equality Officer in a recent decision where it was held that the complainant had been discriminated against through his association with a member of the Traveller Community.

1.3 Institutional Setting

The Equality Authority

With the coming into force of the ESA 2000 the former 'Employment Equality Agency' was changed into the new 'Equality Authority'.

This state-run body has the duty to represent individuals in their discrimination claims, to promote the idea of equality especially in the workplace. It is entitled to create codes of practice and has far reaching investigation powers concerning the implementation of anti-discrimination measures in private companies and other institutions. It can also help these in providing plans of action to reach these aims.

The Equality Authority was 2001 budgeted with 1,6 million Irish Pounds and employs 53 staff persons (1 January 2003).

The Equality Authority seeks to bring about positive change in the situation of those experiencing inequality by:

1. promoting and defending the rights established in the equality legislation, and
2. providing leadership in:
 - building practical commitment to addressing equality issues,
 - creating broader awareness of equality issues,
 - celebrating the diversity in Irish society,
 - mainstreaming equality considerations across all sectors.

The mandate of the Equality Authority covers the nine grounds of gender, marital status, family status, sexual orientation, religion, age, disability, race and membership of the Traveller community.

Its three core objectives according to the strategic plan are to:

- promote and defend the rights established under the Employment Equality Act and the Equal Status Act;
- support the development of a capacity for realizing equality outcomes in the workplace and in the provision of goods, services, education and accommodation;
- contribute to a focus on equality in both the private and public sectors, and across society.

The Board of the Equality Authority is appointed by the Minister for Justice, Equality and Law Reform, and comprises 12 members including an independent Chair and Vice-Chair. Board members are drawn from employer organizations, employee organizations and from organizations and groups who have knowledge of, or experience in, equality issues or in consumer and social affairs, goods and services, law, finance, management and administration.

According to both the 1998 and the 2000 Act, the EA is established as an independent body. The EA does not receive instructions concerning its work.

One of the most important institutions in the Irish concept is the **Director for Equality Investigations**, who is entitled to:

- handle complaints and claims of persons, who feel discriminated against;
- question and hear people, whose testimony could be of some use for these cases;
- give binding decisions or orders in a concrete case – these can concern a complete plan of action or a compensation for the victim.

The first reaction to a complaint usually is that the director sends the alleged discriminator a notice about the complaint and a proposal on how to end this discrimination. If there is no adequate reaction to that, then the formal proceedings start. The director can therefore question people and enter premises or apply for search warrants. If the respondent is reluctant in providing information, the Equality Officer can draw negative consequences from this behaviour.

If there seems to be a chance for a settlement of the conflict outside formal procedures, the case can – at all states – be handed over to a specialised equality mediation officer. If the mediation process fails, the director can give his/ her binding decision. These decisions can be appealed against at the Labour Court or Circuit Court.

1.4 Other good practice

The Irish Congress of Trade Unions, the Irish Business and Employers' Confederation, the Construction Industry Federation and the Equality Authority have jointly produced a resource pack entitled **Supporting an anti-racist workplace**. The Pack contains a statement of commitment by the two sides of industry to work together in partnership to promote anti-racist workplaces and to act together and within their own spheres of influence to promote a positive approach to diversity and inter-culturalism. The Pack also includes material defining racism/xenophobia and cultural diversity; outlining the relevant legislation; and practical activities for developing an anti-racist workplace.

The **Programme for Prosperity and Fairness** (the national social partnership agreement) provides for the establishment of a Framework for the Development of Equal Opportunities at the Level of the Enterprise. The Framework includes representatives from the Irish Business and Employers Confederation, Public Sector Employers, the Irish Congress of Trade Unions, the Department of Justice, Equality and Law Reform and the Equality Authority. The purpose of the Framework is to assist in the development and implementation on a voluntary basis of equal opportunity policies at enterprise level and provide encouragement, training, information and support to employers and employees/representatives.

1.5 Statistics about the workload for the Equality Authority

A The Employment Equality Act

Grounds	2001	2002	total
Age	30	18	48
Disability	54	39	93
Gender	74	88	162
Family Status	2	1	3
Marital Status	3	1	4
Race	64	43	107
Religious Belief	3	3	6
Sexual Orientation	8	9	17
Traveller Community	1	9	10
Mixed	23	16	39
Total	262	227	489

Employment Equality Act 1998-Casework Activity

Employment Equality Act- All	Total	Gender	Marital Status	Family Status	Sexual Orientation	Religious Belief	Age	Disability	Race	T.C.	Mixed
Access to Employment	91	6	0	1	2	2	17	33	18	4	8
Access to Promotion	37	12	1	0	0	0	11	6	1	0	6
Access to Training	11	1	0	0	0	1	1	4	4	0	0
Working Conditions	98	22	1	2	5	3	6	22	31	0	6
Harassment	40	3	1	0	4	0	3	9	11	1	8
Dismissal	134	66	0	0	5	0	4	16	28	5	10
Equal Pay	39	19	1	0	0	0	4	1	14	0	0
Sexual Harassment	25	25	0	0	0	0	0	0	0	0	0
Victimisation	8	6	0	0	1	0	0	1	0	0	0
Advertising	6	2	0	0	0	0	2	1	0	0	1

Total 489 162 4 3 17 6 48 93 107 10 39

Enquiries for the year 2002
Equal Status Act 2000

Type of Query:	
Access to Pub / Nightclub	273
Access to Shop	27
Accommodation	65
Advertising	10
Banking / Loans	15
Best Practice	8
Car Insurance	58
Educational Establishments	97
General Information	466
Harassment	21
Health Insurance	13
Mortgage Protection	5
Other	794
Provision of Service	104
Reasonable Accommodation	25
Registered Clubs	53
Sexual Harassment	6
Transport	14
Victimisation	7
Total	2,06

Equal Status Act 2000-Casework Activity

Equal Status Act-All	Total	Gender	Marital Status	Family Status	Sexual Orientation	Religious Belief	Age	Disability	Race	T.C.	Mixed
Provision of Goods and Services											
Licensed											
Premises	413	4	0	10	16	1	24	15	10	324	9
Insurance	34	2	0	0	1	0	17	3	5	3	3
Shops	30	2	0	1	0	0	4	3	4	16	0
Social Welfare	12	2	1	0	2	1	1	3	0	0	2
Health Boards	14	0	0	0	0	0	3	6	5	0	0
Local Authorities	18	1	1	0	0	0	0	4	0	11	1
State/											
Departments	53	1	0	0	0	0	1	5	3	43	0
Transport	19	0	0	0	0	0	8	8	1	0	2
Banking/Financial											
Services	11	0	0	0	1	0	2	4	3	1	0
Accommodation											
Private	19	2	0	2	0	0	0	0	3	0	12
Public Housing	25	0	0	1	0	0	0	3	6	12	3
Education	40	2	0	1	1	4	1	14	7	4	6
Registered											
Clubs	18	16	0	0	1	0	0	0	0	1	0
Harassment	21	0	0	0	1	3	0	3	6	7	1
Victimisation	2	0	0	0	0	0	0	1	0	1	0
Misc. Issues	60	6	4	1	9	2	5	15	13	1	4
Enforcement											
Proceedings	6	1	0	0	0	0	0	0	0	5	0
Total	795	39	6	16	32	11	66	87	66	429	43

Grounds	total	2002	2001
Age	66	28	38
Disability	87	61	26
Gender	39	19	20
Family Status	16	9	7
Marital Status	6	4	2
Race	66	40	26
Religious Belief	11	9	2
Sexual Orientation	32	18	14
Traveller Community	429	89	340
Mixed	43	28	15
Total	795	305	490

Overview of Main Headings

Provision of Goods/Services	604
Accommodation	44
Education	40
Registered Clubs	18
Harassment	21
Victimisation	2
Enforcement Proceedings	6
Misc Issues	60
Total	795

2 Netherlands

2.1 Introduction

In the course of the 20th century the Netherlands changed from an emigrant to an immigrant society. Immigration after the Second World War occurred in three distinct periods. The first period is characterised by the de-colonisation of Indonesia, as a consequence of which Moluccans and Dutch-Indonesian people immigrated to the Netherlands. The second period is the phase of manpower recruitment under a guest worker-scheme, during which mainly Turks and Moroccans came. The independence of Surinam also caused a large influx of people in this period. The final period since the mid of the seventies is characterised mainly by family-reunification and asylum-migration.

In 2001 15.987 million people were living in the Netherlands, among whom 2.870 million immigrants. About half of these immigrants originate from western countries such as the fourteen countries of the European Union, the United States and former Yugoslavia. People from Indonesia, including many Dutch nationals with Indonesian roots, are classified as 'western' immigrants. The other half of immigrants in the Netherlands come from Turkey, Morocco, Surinam, the Netherlands Antilles and Aruba, and other non-western countries. Since 1996 the number of immigrants from 'western' countries has increased by 4,5 %, the number from non-western countries by more than a quarter (CBG 2002). Immigrants from Turkey (319.600), Morocco (272.740), Surinam (308.825) and from the Netherlands Antilles and Aruba (117.090) are the largest immigrant groups.

The Netherlands did not consider itself to be an immigration country until 1979, when the WSR published a report entitled 'Ethnic Minorities in the Netherlands'. Following the report the government started to develop a general approach to the integration of immigrants, which focused on the assumption that the Netherlands had become a country of immigration. The so-called 'Minderhedennota' of 1983, which was supported by all parties in parliament, formulated the main targets of the new Dutch integration policy, legal equality and equality of chances: *'The main objective is to achieve a society in which members of minorities resident in the Netherlands have an equal place and every opportunity to develop their potential both individually and as a group'*, the declaration stated (Ministerie van Binnenlandse Zaken 1983, S. 10).

In the eighties central government policy on ethnic minorities concentrated on supporting cultural diversity of minority groups. During the eighties, the policy shifted to the 'hard issues' employment, education and housing. The focus on valuing and supporting ethnic diversity gradually shifted to a more integrationist approach in the nineties. Now language-training and professional training and mainstreaming into

general policy measures dominate policies vis-à-vis third country immigrants (cf. Doornik 1998, p.98ff.).

2.2 The Legislation

2.2.1 International Conventions

International Covenant on the Elimination of All Forms of Racial Discrimination (ICERD)

The Netherlands ratified the *ICERD* in 1971. As a result, the Netherlands introduced anti-discrimination provision into the Penal Code (see below). In 1976 the Supreme Court confirmed, that the definition of discrimination as given in the *ICERD* was directly applicable in the Netherlands¹. The *ICERD*-definition is interpreted widely: In 2000, the Supreme Court decided, that asylum seekers, residing in an asylum centre, also would fall under the protection of the *ICERD*². Refusing them admittance to a discotheque would constitute indirect discrimination, because they would fall under the concept of ‘race’ as defined in the *ICERD*.

2.2.2 Constitutional provisions

Article 1 of the *Dutch Constitution of 1983* formulates a general principle of equality and forbids discrimination. The article applies to all persons on Dutch territory and applies to any public body and authority.

Article 1 (Equality)

All persons in the Netherlands shall be treated equally in equal circumstances. Discrimination on the grounds of religion, belief, political opinion, race, or sex or on any other grounds whatsoever shall not be permitted.

Article 1 cannot be invoked between civilians. The constitutional system necessitates the transposition of fundamental rights into specialized legislation. The first law to include specific provisions on racial discrimination was the Penal Code (1971).

After that, the *Equal Treatment Act* was adopted in 1994 under civil legislation. In order to promote the opportunities of ethnic minorities on the labour market, an Act was introduced in 1994, which required employers to reach a proportionate representation of ethnic minorities in their workforce. This act was repealed in 1998

¹ Dutch Supreme Court, Judgement of June 15, 1976.

² Dutch Supreme Court, Judgement of June 13, 2000.

and replaced by *the Act on the Enhancement of Equal Labour Market Participation of Allochthones (Wet Stimulerend Arbeidsdeelname Minderheden, WBEAA)* of 1994.

2.2.3 Criminal Law

Following the ratification of the *International Convention on the Elimination of all forms of Racial Discrimination (ICERD)* in 1971, the Dutch government introduced penal sanctions on public insult based on race, religion, belief or sexual orientation. The *Penal Code* was the first law in the Netherlands to address racial discrimination. Apart from insult, the incitement of others to hatred or discrimination, as well as the publication and dissemination of racist material and participating in or supporting activities aimed at discrimination were made punishable. Finally, discriminatory acts performed in a profession or trade or in public service also are a criminal offence.

The definition of discrimination, as laid down in the *Penal Code* (Article 90 quarter), is modelled after the definition of the *ICERD*. It defines discrimination as ‘*any distinction, exclusion, restriction or preference which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life*’. This definition includes both direct (the purpose) and indirect (the effect) discrimination. According to case law, the term ‘race’ includes ethnic and national origin, skin colour and descent. The *Penal Code* forbids indirect discrimination altogether, as it does not allow for any objective justification for a neutral criterion or practice, which might lead to indirect discrimination.

The provisions in the *Penal Code* provide to all aspects of public life, but not to the private sphere. Civil law and the *Equal Treatment Act* cover discrimination in private life. In this case, the definitions of the *Penal Code* are used as points of reference.

2.2.4 Civil Law

New Civil Code

The ‘*New Civil Code*’ does not contain a definition of discrimination or equal treatment. In practice, general norms (good faith, proper administration, apparent unusual dismissal) are referred to in discrimination cases. Discrimination can also constitute a wrongful act under the provision on tort (Article 162, book 6 *New Civil Code*). Anyone who has committed a wrongful act may be obliged to remedy or rectify the damage that result from it. A favourable ruling of the Equal Treatment Commission will facilitate a positive ruling and subsequent damages in a court of civil law. In a case involving the Equal Treatment Commission’s predecessor, the

Commission on Equal Treatment of Men and Women, the Supreme Court has ruled that ‘a judgement contrary to the Commission’s ruling can only be given on well-founded reasons’ (HR 13.11.1987) (Zwamborn 2002, p.24).

It is a regular practice of judges to refer to the definition of discrimination in the *ICERD* and the *Penal Code* to assess cases on discrimination in the field of civil law (Zwamborn 2002, p.18).

Equal Treatment Act 1994

The most important piece of legislation in the field of anti-discrimination is the *Equal Treatment Act of 1994* (*Allgemene Wet Gelijke Behandeling AWGB 1994*), which reflects the constitutional provision on equality. The *Equal Treatment Act of 1994* provides for equal treatment of persons irrespective of religion, belief, political opinion, nationality, race, sex, heterosexual or homosexual orientation or civil status. Age and disability are not included into the Act, but in the *Act Prohibiting Discrimination based on Age or Disability of 2002* (*Wet Onderscheid Bepaalde en Onbepaalde Tijd (WOBOT) 2002*), which basically extends the provisions of the *Equal Treatment Act* to the reasons of discrimination mentioned³.

The Act established a closed system of anti-discrimination prohibiting discrimination in specific fields (employment, education and the provision of goods and services) on the grounds mentioned and giving an exhaustive list of exemptions. The *Equal Treatment Act* followed a series of previous Acts, starting with the 1975 Equal Pay Act.

Section 1 of the Act defines discrimination as direct and indirect discrimination. Direct discrimination is defined as ‘distinction/discrimination⁴ between persons on the grounds of religion, belief, political opinion, nationality, race, sex, heterosexual or homosexual orientation or civil status’ (Article 1.b) and indirect discrimination as ‘distinction/discrimination on the grounds of other characteristics or behaviour than those meant under (b), resulting in direct discrimination.’ (Article 1.c)

The definition of indirect discrimination/distinction varies between the *Penal Code* and the *ICERD* and the *Equal Treatment Act*. Whereas the *ICERD*-definition and the

³ Due to the implementation in 2002, there is no case law yet available with regard to discrimination based on age.

⁴ The Dutch term ‘onderscheid’, which is used in the bill, can be translated as ‘distinction’ as well as ‘discrimination’. The original wording is: ‘In deze wet en de daarop berustende bepalingen wordt verstaan onder: a. onderscheid: direct en indirect onderscheid; b. direct onderscheid: onderscheid tussen personen op grond van godsdienst, levensovertuiging, politieke gezindheid, ras, geslacht, nationaliteit, hetero- of homoseksuele gerichtheid of burgerlijke staat; c. indirect onderscheid: onderscheid op grond van andere hoedanigheden of gedragingen dan die bedoeld in onderdeel b, dat direct onderscheid tot gevolg heeft.’

Penal Code forbid indirect discrimination altogether and do not allow any objective justification of an apparently neutral criterion or provision, which in effect leads to discrimination, the *Equal Treatment Act* gives leeway for objective justification for indirect *distinction*. According to Article 2.1, *indirect distinction*, which is objectively justified, is not prohibited. The Equal Treatment Commission has developed a test for objective justification using the following criteria (Zwamborn 2002, p. 15):

- a) There should not be discrimination whatsoever related to the goal of indirect distinction.
- b) The means which are chosen to reach the goal should respond to real needs of the organisation/person that uses the means.
- c) The means should be appropriate and necessary to reach the goal.

Whereas indirect distinction may be objectively justified, direct distinction/discrimination is forbidden altogether, except in the cases where the law explicitly allows an exception. These cases are listed in Article 2.2, 2.3 and 2.4 Discrimination is allowed in cases where sex is a determining factor (2.2), and in cases when the aim of the discrimination is ‘to place women or persons belonging to a particular ethnic or cultural minority group in a privileged position in order to eliminate or reduce de facto inequalities and the discrimination is reasonably proportionate to that aim’ (2.3) or in cases where a person’s racial appearance is a determining factor (2.4). The Equal Treatment Decree provides an exhaustive list of cases to which the exemptions of Article 2.4 apply (Zwamborn 2002, p. 19):

- a) actors, dancers and other artists, if the part which one is playing so requires;
- b) mannequins, models for photographers, artists etc, in those cases where one can reasonably require certain specific features and appearances;
- c) beauty contests where appearances are relevant in relation to the aim of the contest;
- d) providing services that can only be rendered to persons with certain features and/or appearance.

The Act also allows for several exemptions for specific institutions (Art. 5.1): Religious institutions and institutions based on ideological or political principles may impose requirements which according to the institution’s purpose, are necessary to the fulfilments of the duties attached to the post, but these requirements may not lead on discrimination on the sole grounds of political opinion, race, sex, nationality, heterosexual or homosexual orientation or civil status (Article 5.2). Similarly, private educational establishments may impose requirements on the occupancy of a post, which are necessary to live up to its founding principles, provided they do not lead to discrimination on the sole grounds of political opinion, race, sex, nationality, heterosexual or homosexual orientation or civil status (Article 5.3). Employment relationships of a private nature are exempt from the provisions of Article 5.1

provided the requirements imposed on the private employment relationship are reasonable. Requirements with regard to political opinion may reasonably be imposed in connection with employment in administrative or advisory bodies and with employment to confidential posts (Article 5.4, 5.5). Discrimination on grounds of civil status in relation to pension provision is allowed.

In the case law of its rulings, the Equal Treatment Commission has established that institutions, which want to hire persons belonging to an ethnic or cultural minority on a preferential basis, can only invoke the exception of positive action, if this is laid down in a written and publicised policy, and if the unequal position has been determined (Houtzager 2001, p. 30).

Article 5.1 of the Act prohibits employment discrimination, which is defined as discrimination in the following fields:

- public advertising of employment and procedures leading to the filling of vacancies;
- the commencement or termination of an employment relationship;
- the appointment and dismissal of civil servants;
- terms and conditions of employment;
- permitting staff to receive education or training during or prior to employment;
- promotion.

Article 6 forbids discrimination with regard to the conditions for and access to the liberal professions.

Article 7 of the Act forbids discrimination in offering goods and services, including the conclusion, implementation and termination of contracts. The Article applies as well to private companies as the public sector and all institutions in the field of housing, social services, health care, cultural affairs or education. Article 7 also covers offers of private persons not engaged in carrying on a business or exercising a profession, in so far as the offer is made publicly. The same exemptions as in Article 5 apply to educational establishments, provided the exemptions do not lead to discrimination based on the sole grounds of political opinion, race, sex, nationality, heterosexual or homosexual orientation or civil status, and on legal relationships of a private nature (Article 7.2, 7.3).

Article 8 and 9 of the Act make it unlawful to terminate an employment contract because an employee has approached the court or other institutions due to an alleged violation of Article 5 (protection against victimisation) and declares all contractual provisions conflicting with the Act as null and void. There are no other sanctions against the perpetrator mentioned in the Act. The Equal Treatment Commission (see

below) cannot impose damages on the perpetrator in the case of a conviction. In this case, the victim has to approach the Court to demand damages.

Article 10 allows organizations representing the interest of people who could invoke the Act to bring legal action, provided that the victims allow so.

Where ethnic and cultural minorities are concerned, the Commission also invokes the regulations of the *WET SAMEN* (see below). The Commission issued rulings in two similar cases, where a city council asked explicitly for members of ethnic minorities to apply for jobs as social workers. People from Dutch origin could not apply. On the complaint of a Dutch citizen, the Commission ruled that the preferential treatment of ethnic minorities was allowed. The Commission argued, that in this case the Act on the stimulation of labour participation of ethnic minorities (*Wet SAMEN, see below*), had to be taken into account, which requires organisations to reach a proportionate participation of ethnic minorities in their staff. Because the *Wet SAMEN* is an implementation of section 2.2 of the ICERD, the Equal Treatment Act needs to be interpreted in conjunction with this Convention, the Commission argued. This meant, according to the Commission, that the criteria for positive action should not be interpreted too narrowly, as the objective of the *WET SAMEN* includes reaching de facto equality of minority groups on the labour market and thus allows for privileging members of minority groups, as long they are underrepresented in the staff of the company concerned (Houtzager 2001, p. 31).

The *Equal Treatment Act* does not provide for a shift in the burden of proof, but in its proceedings the Equal Treatment Commission has accepted the principle since 1994. A shift in the burden of proof generally is accepted, when an individual is confronting an institution. If there is prima-facie evidence of discrimination, the institution has to prove, that there was no discrimination. Statistical data on the position of minority groups are accepted as prima-facie evidence (Houtzager 2001, p.31).

Administrative Law

The *General Act on Administrative Law (Algemene Wet Bestuursrecht)* does not contain equal treatment provisions. However, equal treatment is one of the main principles of proper administration (*Algemene Beginselen van Behoorlijk Bestuur*), which are incorporated in the *General Act on Administrative Law*. Although not directly related to equal treatment issues, the *Act on Stimulation of Labour participation of Ethnic Minorities (Wet SAMEN)* is the main instrument of administrative law related to anti-discrimination issues.

The *WET SAMEN* was introduced in 1998 and succeeded a previous act (Act on the Enhancement of Equal Labour Market Participation of Allochtones (WBEAA) of 1994), which had the same goal: to achieve a proportionate representation of ethnic

minorities in the workforce. The Acts are seen as the implementation of article 2.2 of the *ICERD*. Both the public and the private sector fall under the scope of the Act.

The Act is not specifically aimed at combating racial discrimination, but it is a useful tool to reduce discrimination in the labour market. It obliges firms employing a staff of 35 persons or more to recruit a proportion of immigrant workers equal to the proportion of immigrants living in the region where the firm is established. These firms have to report yearly about their efforts to the employment services. The employers' council of the company is allowed to attach its judgement about the annual report as an integral part of it. Further to the written yearly report the companies have to develop a written plan to improve the participation of ethnic minorities at all levels of the workforce in the company or organisation.

In order to fulfil their obligations, companies with more than 35 staff have to report about the ethnic composition of their workforce. They may do so be either referring to an objective procedure outlined in the Act, using a table of designated countries of origin⁵ for the qualification as member of a minority group, or according to a procedure called 'restrictive self-evaluation'. This procedure states, that if the country of birth of one or both of the parents of the employee differs from that of the employee and if at least one of the stated countries belongs to the group of designated countries, the employee may choose whether s/he want to belong to the designated group. As the employer has to decide, if the employees are allowed self-identification, the quality of the data differs strongly in between companies.

Compared to the Act of 1994, the new Act relies more on voluntary involvement of companies than on mandatory interventions, which characterised the 1994 Act, which in practice was never really put in action due to the resistance of the employers. The new Act introduces a more pronounced co-responsibility of employees' councils and labour unions and the employer and employers' organisations. Of 21.000 companies covered by the Act, three quarters run a registration system, and 49 percent filled in their yearly report in 1999. The majority of the measures reported pertain to recruitment and preferential treatment, a minority is directed at career mobility and prevention of discharge. The proportion of minorities in companies under the act has increased by 30% as compared to 23% within companies not obliged to report. Only in 2/3 of the filed report have works-councils attached their opinion. It is striking, that many municipalities do not comply with the need to reporting: only 55% of the municipalities, as against of 49% of private companies, have filed their report in 1998 (cf. Glastra et al 2002, p. 173f.)

⁵ Turkey, Morocco, Surinam, the Dutch Antilles, Aruba, Moluccans, the former Yugoslavia, several countries of South and Central America, Africa and Asia.

2.2.5 Soft Law

The Netherlands is an example for a well-established system of self-regulatory practices with regard to discrimination. Company-based ‘Codes of Conduct’, which usually contain guidelines for the management and the staff on how to avoid discriminatory practices, are widely found in Dutch companies. They usually focus on recruitment and selection procedures and define proper procedures for staff behaviour and treatment of members of minority groups. The quality of their implementation varies: According to a recent study (KPGM 2001), Codes of Conduct are implemented mainly in larger companies with formal recruitment and promotion procedures. Reflecting the growing diversity of the workforce, larger companies have developed strategies for ‘diversity management’, which advocate a business case for diversity arguing that a proper management of a culturally diverse staff increases the competitiveness of the company.

2.2.6 Agreements between Social Partners

Although not directly related to anti-discrimination issues, agreements between the social partners are an important tool to improve the position of minorities at the labour market. In 2000, the social partners signed an agreement between the association of small and medium enterprises and the labour office granting to employ 20.000 members of minority groups until May 2001 in small and medium enterprises. The agreement was prolonged until end of 2002 and led to 40.000 new jobs for members of minority groups. A similar agreement was signed in 2002 for companies between 500 and 150.000 employees. This agreement was not signed at the level of social partner organisations, but at company level. Until March 2002, 110 companies signed the agreement, which led to the creation of 60.000 new employment contracts with minority members. Several municipal authorities (e.g. Amsterdam, Rotterdam) run specific programmes to enhance the employment of minority members among their staff or make subsidies for companies dependent on their to employ a certain number or percentage of members of minority groups (Grünell/van der Berge 2003, p.7)

2.3 Institutional Setting

2.3.1 The Equal Treatment Commission

The Equal Treatment Act also established the *Equal Treatment Commission* (*Commissie gelijke behandeling*: CGB). The Commission incorporated the tasks of previously existing Commissions. These Commissions dealt with the 1975 Equal Pay Act and the 1980/1989 Equal Treatment in the Workplace Act (*Wet Gelijke Behandeling*: WGB). The CGB not only covers the observance of the Equal

Treatment Act, but also plays a central role in encouraging the implementation of other equal treatment and non-discrimination laws, such as the WGB and the Act prohibiting discrimination on the basis of working hours (*Wet verbod onderscheid arbeidsduur*: WOA).

The CGB consists of nine commissioners, including a Chair and two co-Chairs. In addition there are at least nine deputy commissioners who are asked to fill in when the Commission is short of members who can investigate cases; deputy commissioners sometimes have more specialized expertise in specific fields.

The CGB has been established as an independent commission (Article 16 Equal Treatment Act). The commissioners and deputy commissioners are appointed by the Minister of Justice in consultation with four other ministers (Minister of the Interior, Minister of Employment & Social Security, Minister of Education & Science, Minister of Welfare, Health & Cultural Affairs). The commissioners and deputy commissioners are appointed for a period of six years and may be reappointed. The Chair and the Vice Chairs have to fulfil the same admission criteria as for the admission to the post of a district judge, the other members are selected according to their expertise in the field of equality policies and legislation. The status of the commissioners is similar to the one of judges, their salaries and working conditions are regulated in a separate law (*het Rechtspositiebesluit*), and they may only be dismissed after a procedure similar to the one followed in the judiciary.

The Commission has three chambers, one dealing with gender-based discrimination, one with race and nationality and one with the remaining discrimination grounds. Staff of some 40 persons supports the work of the Commission. In 2001 the total budget of the Commission was 3.5 Million Euros (*De Commissie gelijke behandeling 2001*, p. 5)

The tasks of the Commission comprise four main issues: investigating complaints on the request of a complainant and giving a ruling; investigating an issue on its own initiative and giving a ruling; giving recommendations in addition to the rulings and bringing cases before the courts.

A written application for a ruling can be made by:

- a) anyone who feels that he/she has been discriminated in the sense of the Acts on discrimination;
- b) a natural or legal person or competent authority, wishing to know whether they are making unlawful distinctions;
- c) anyone responsible for deciding on disputes concerning discrimination;
- d) a workers' council thinking that discrimination might take place within the organisation;

- e) a legal person (organisation or society) which has the formal aim to defend the interests of those to whom the Acts apply;
- f) a witness of discrimination.

The Commission's rulings are non-binding. With the adoption of the *Equal Treatment Act*, the choice was made not to give a binding status to the rulings. The main reason was that the Commission was intended to be a body with a low threshold, with a more or less informal procedure. Binding rulings would increase the threshold and it was feared that fewer people would apply for the Commission's ruling. In order to ensure the enforcement, however, the possibility was created for the Commission to bring cases before a court of justice.

As well the quality of the rulings, the authority of the Commission and the active investigation powers are elements in the impact of the Commission's work. A major shortcoming is the weak legal status of its rulings and the lack to pass decisions on damages, which has been criticised by the Commission as well as by researchers. It has been proposed, that courts, which pass judgements on cases, which have been handled by the Commission, should only be allowed to deviate from the Commission's ruling if they explicitly motivate their disagreement with the ruling (Houtzager 2001, p.31). Up to now, courts may decide whether or not they take the Commission's ruling into account or even whether they want to refer to the ruling at all. Despite the fact that the rulings are non-binding, many parties against whom a ruling was directed follow the Commission's observations and act according to the ruling. However, victimisation is common, especially where the complaint concerned the employment. Almost half of the complainants who submitted a complaint against their employer, said to have encountered disadvantages at work and a third changed jobs because of the complaint (Houtzager 2001, p. 32).

In 2002, the Commission received 304 complaints and passed 206 rulings (including cases of previous years) 98 rulings concerned cases of sex discrimination, 71 racial discriminations and discrimination based on nationality or religion. In 2000, 41% of all rulings concerned sex discrimination and 48% discrimination based on race, nationality or religion. The majority of cases were labour-related complaints about recruitment and selection, a difference in salary and harassment on the shop floor. Outside the labour sphere, the Commission looked into various complaints.

A number of people complained about the conditions applied by telecom companies for the use of mobile telephones. Immigrants with a specific temporary residence permit (a D-document) were excluded from getting a mobile connection; the Commission ruled that this constituted indirect discrimination⁶. Also the requirement to show additional identification papers before a mobile connection was issued, was

⁶ Rulings 2000-28 to 200-32.

decided to constitute indirect discrimination; people with a place of birth in the Netherlands were not asked to show additional papers (Houtzager 2001, p. 32).

A breakdown of cases between 1995 and 2000 is shown below:

(Ground/Year	1994/95	1996	1997	1998	1999	2000	Total
Sex	122	90	102	118	88	86	606
Race/nationality	44	77	94	104	64	54	436
Religion	7	16	19	18	15	20	95
Personal beliefs	1	4	3	1	3	1	13
Sexual preference	13	13	17	22	9	7	81
Marital status	8	14	19	35	11	13	110
Political conviction		2	3	1	1	1	8
Working hours*		32	27	24	88	11	182
Not specified				20	19		39
Total	205	221	289	346	242	193	1570

* Since November 1996.

Source: CGB 2001, p. 12

2.3.2 Support Structure

In the case of racial and ethnic discrimination, the work of the CBR is supported by the existence of 25 local anti-discrimination offices and the 'National Bureau against Discrimination' (Landelijk Bureau Racismebestrijdig, LBR), which forms a part of the umbrella-organisation 'FORUM' and provides anti-discrimination training and prevention activities. The 25 local anti-discrimination offices are organized as Non-Governmental Organisations and provide victim-support and conflict mediation. The state, the provinces and the local municipalities fund them. The offices act as a kind of filter for the CBR, as de facto most cases of racial discrimination are at first reported to a local anti-discrimination office, which prepares the files for the procedure at the CBR. It has to be noted, that the funding of the anti-discrimination offices is regulated by a separate law granting state funding for local antiracism activities⁷. Furthermore consultation and funding of representative organisations of major immigrant groups is also granted by specific legal regulations⁸.

The *National Bureau against Racism* (LBR) is an independent organisation funded by the Department of Justice, working as a national centre of expertise for the prevention

⁷ Regulation for the promotion of professionalisation of the anti-discrimination bureaus (Stimuleringsregeling professionalisering antidiscriminatiebureaus), Netherlands Official Journal (Staatsvourant, 9 March 2001, No. 49, p1., cf. Zwamboorn 2002, p. 31, fn 42.

⁸ Wet overleg minderhedenbeleid. Netherlands Official Journal (Staatsblad) 1997, p.335, cf Zwamboorn 2002, p. 32, fn 43

of racial discrimination in the Netherlands. LBR provides its expertise to assist individuals and organisations in a practical fashion, through a team of information advisors, documentation specialists, legal and policy advisors and researchers. Key areas of work include: the labour market, housing, the media, education welfare and the legal system. A hotline for discrimination-related offences on the Internet (MDI) was established in 1997 and is funded by the government. The LBR cooperates with the local antiracism offices and provides legal training and counselling for them.

2.4 Examples of Good Practice

Whereas the lack of powers of the Equal Treatment Commission to give binding rulings and to decide about damages somehow impedes the work of the Dutch anti-discrimination system, the support-structure for the Commission can be considered as a prime example of good practice: As mentioned above, 25 local anti-discrimination offices, which are organised as NGO's and loosely coordinated by the 'National Bureau against Discrimination' (Landelijk Bureau Racismebestrijdig, LBR), give victims of racist discrimination support on the local level and prepare cases for the Commission. It has to be noted, that these offices are jointly funded by the state, the provinces and the municipalities and that their funding is regulated in a separate law. The law also regulates, that in any cases concerning the integration of minority groups, representative organisations have to be consulted, this consultation procedure is a major part of policy making in the field of integration and anti-discrimination (cf. Zwamboorn 2002, p. 32)

Other examples of good practice include the following:

To improve the implementation of the WET SAMEN, the government developed various incentives to promote compliance with the SAMEN law. A telephone helpdesk was created to field questions about the law. The web site <http://www.wetsamen.nl> provides information to the public about the SAMEN law, the role of business advisors on minorities and the labour market in general and since 2001 also offers data on employers' reports filed under the SAMEN law. A task force to influence companies and intermediaries to use the potential offered by minorities was set up. The task force is comprised of social partners, branch organisations, the national government, employment service and employment agencies. Within the local labour offices, ethnic minority advisers have been employed to bring employers into contact with potential employees with minority background.

The language-training and familiarisation programme for new immigrants, which was laid down in the 'Newcomers Integration Act' (Wet-Inburgering-Nieuwkomers WIN) of 1998, was enacted primarily in order to improve the labour-market integration of

new immigrants. It consists of 500 hours compulsory language-training and 100 hours compulsory familiarisation-courses for any new immigrant from non-Western countries. According to the law, new immigrants are provided with compulsory language training according to their level of knowledge and have the right to receive assistance in seeking employment during their first year of stay. The full programme consists of an exploratory phase of no more than four months, an integration phase of no more than one year (language classes and introduction to Dutch society and career opportunities) and the final phase of no more than six months, during which time the participants are referred to follow-up programmes or the labour market. The state-funded programme is administered by the municipalities and implemented in conjunction with immigrants NGO's and local adult-education organisations (Van Beetz 2000, p.5)

3 United Kingdom

3.1 Introduction

With regard to immigrant and minority groups, the United Kingdom operates a distinct framework of ‘race-relations policy’. The concept as well as the terminology are unique in Europe and only can be explained by the specific history of British colonialism.

As most other European countries, the UK started to recruit foreign labour in the sixties to fill the demand of the growing economy. Although the government first focused on recruitment in Europe, most of the immigrants entering the country came from the former British colonies on the Indian subcontinent and the Caribbean. Because of their former colonial status, inhabitants of the former colonies were regarded as subjects of the Queen and possessed the same political and legal rights as the resident population in Britain (right to residence, right to access to the labour market, civil rights, voting rights at all levels). Coming from former colonies most immigrants also had at least some knowledge of English and of the British culture.

Colonial rule having been legitimated by the ideology of an all-encompassing and benevolent Commonwealth, immigrants could not be treated as second-class-citizens legally. Thus the growth of racism against (black) immigrants in the early 60’s did not only lead to the pressure to reduce immigration and withdraw residence rights in the UK from Commonwealth citizens, but also induced the move to legally prohibit discrimination based on skin colour. Strongly influenced by the desire to prevent the development of race riots like in the USA, already in 1965 a first ‘Race Relations Act’ comes into force. It was followed by the Race Relations Act 1968 and 1976, which was the first comprehensive anti-discrimination legislation in Europe. Amended 2000 and 2002, the Act still is one of the strongest anti-discrimination-laws in the world.

This peculiar framework also influenced statistical counting and definitions. Until 1991 there was no ethnic question in the census, but only a question about place of origin. Due to pressure of academics and minority groups, the census of 1991 first included an ‘ethnic origin’ question, which was mainly based on the ‘white-black’-dichotomy. The census of 2001 introduced a five-fold categorisation with 16 subgroups.

According to the Census 2001⁹, 54.153.898 people (92,1%) reported their ethnic affiliation as ‘white’, 677.117 (1,2%) as ‘mixed’, 2.331.423 (4,0%) as ‘Asian or Asian

⁹ <http://www.statistics.gov.uk/cci/nugget.asp?id=273>

British', 1.148.738 (2,0%) as 'Black or Black British', 247.403 (0,4%) as 'Chinese' and 230.615 (0,4%) as 'Other Non-White'. Members of minority ethnic groups are heavily concentrated in the most populous areas of England, with relatively small numbers in Scotland and Wales. Nearly half of the total ethnic minority population lived in London, where they comprised 29% of the residents.

In Northern Ireland, 1.670.988 persons (99,12%) reported their ethnic affiliation as 'white' and 3.320 (0,2%) as 'mixed'. The largest other ethnic groups are the Chinese (4145, 0,25%), Irish Travellers (1710, 0,1%) and Indians (1569, 0,09%)¹⁰.

3.2 The Legislation

3.2.1 International Conventions

The United Kingdom has signed and ratified a large number of international legal instruments relevant in the field of combating racism and intolerance, the most important of them being the ICERD, with the exception of Article 14, which allows individual communications to be considered by the Committee for the Elimination of Racial Discrimination.

3.2.2 Constitutional provisions

Neither the United Kingdom as a whole nor any of its countries have a codified constitution. In 1998, the 'Human Rights Act' has been adopted, which requires all legislation to be interpreted as far as possible in a way which is compatible with the European Convention on Human Rights (ECHR) and which makes it unlawful for public authorities to act in a way which is incompatible with the rights set out in the ECHR. The Human Rights Act is a fundamental 'shift' in the underlying principles of UK law, which is based on the doctrine of the sovereignty of Parliament, according to which the Parliament of Westminster remains competent to repeal any legislation, even if the United Kingdom is bound by international law to have and enforce such legislation. (cf. ECRI 2001, p.6)

¹⁰ http://www.nisra.gov.uk/census/pdf/standard_tables_section1.pdf

3.2.3 Criminal Law

The Crime and Disorder Act 1998, in force since September 1998, created new offences of racially aggravated forms of violence and harassment in the Public Order Act 1986 and the Protection from Harassment Act 1997 and gave statutory force to the case-law which requires judges to consider evidence of racist motivation for any offence as an aggravating factor in sentencing. Furthermore, part III of the Public Order Act 1986 penalises incitement to racial hatred. The Football Act 1991 prohibits football match spectators from taking part in chanting of an indecent or racist nature (ECRI 2001, p.8, MPG 2002, p.12).

It has to be noted, that Section 3 of the Protection from Harassment Act 1997 also enables the victim of harassment to bring proceedings in the civil court for damages and for an injunction to restrain the defendant from further acts of harassment. Breach of the injunction is a criminal offence punishable by imprisonment (MPG 2002, p. 12).

3.2.4 Civil Law

In the United Kingdom, racial discrimination is outlawed by an elaborated system of anti-discrimination legislation and enforcement. Until now, there is no legislation against discrimination based on sexual orientation and age¹¹. A bill against age discrimination implementing the age strand of the European Employment Directive (Council Directive 2000/78/EC of 27 November 2000) is in preparation and will come into force from October 2006¹².

In Great Britain, there exists no legislation formally protecting against religious discrimination. The Human Rights Act 1998 incorporated into domestic legislation provisions of the European Charter of Human Rights, like the right to freedom of thought, conscience and religion. In Northern Ireland, discrimination based on adherence to the Roman Catholic or the Protestant Denomination is outlawed by the Fair Employment and Treatment (Northern Ireland) Order 1998.

The legal framework against racial discrimination in the United Kingdom is based on civil law provisions. The relevant bills include:

¹¹ The government has published a ‘Voluntary Code of Practice on Age Diversity’ in 1999. The Code offers advice for employers on eliminating age discrimination and introducing good practice to improve people management in their business and may be accessed at www.dfes.gov.uk/agediversity/.

¹² cf. Dti 2003, p.6, http://www.dti.gov.uk/er/equality/age_consultation.pdf

- The Race Relations Act 1976 (RRA 1976) as amended by the Race Relations (Amendment) Act 2000 (RR(A)A 2000) and the Race Relations Act 1976 (Amendment) Regulations 2003 (RRA(A)R 2003), which applies in Great Britain.
- The Race Relations (Northern Ireland) Order 1997 (RR(NI)O 1997), which applies in Northern Ireland.
- The Fair Employment Act 1976 (FEA 1976) as amended by the Fair Employment Act 1989 and the Fair Employment and Treatment (Northern Ireland) Order 1998 (FET(NI)O 1998), which applies only in Northern Ireland.

As well the Race Relations Act 1976 and the Race Relations (Northern Ireland) Order 1997 refer to discrimination 'on racial grounds', which is defined as any of the following grounds: colour, race, nationality, ethnic or national origin (Section 3(1) RRA 1976, Article 5 RR(NI)O 1997). The 1997 Order includes, for Northern Ireland, the category of being an Irish Traveller. They make it unlawful for anybody to discriminate on those grounds. Both acts render 'pressure to discriminate' unlawful, i.e. inducing another person to perform an act of unlawful discrimination, and forbid any advertisement which indicates that an employer is intending to discriminate on the grounds of 'race'. The legislation applies to employment, training, education and the provision of goods and services. The provisions of the acts spell out precisely how it is unlawful to discriminate at any stages of recruitment, and how employees, once recruited, cannot be discriminated against in regard to their terms of employment or opportunities for development.

In the case of *Mandla – v-Lee* (1983) the House of Lords set out a definition of an 'ethnic group':

'The essential requirements of an ethnic group for purposes of the Race Relations Act are that there is a long shared history of which the group is conscious and a cultural tradition of its own, including family and social customs. Additionally one or more of the following will help to distinguish an ethnic group: a common geographical origin or descent from common ancestors; a common language not necessarily peculiar to the group; a common literature that is peculiar to the group; a common religion different from that of neighbouring groups or surrounding community; a sense of being a minority or an oppressed or dominant group within a larger community.'

As well the UK Race Relations legislation as the Legislation in Northern Ireland include a number of exceptions and exemptions of the Act. Under Section 5 of the RRA 1976 and Article 8 of the RR(NI)O 1997, the provisions of the law relating to employment do not apply to any employment where membership to a particular group is a genuine occupational qualification for the job. The original formulation of the RRA 1976, which included a comprehensive list of exemptions, has been adopted in 2003 to comply with Article 4 of the EU Race Directive implementing a general exemption in cases where 'being of a particular race or of particular ethnic or national

origin is a genuine and determining occupational requirement'. (RRA(A)R 2003, Section 7). The Fair Employment and Treatment (Northern Ireland) Order 1998 contains comparable provisions with regard to holding particular religious beliefs or political opinions.

As well the RRA 1976 and the RR(NI)O 1997 outlaw both *direct* and *indirect* discrimination (Section 1(1)a, 1(1)b RRA 1976, Article 3(1)a-b, 3(3) RR(NI)O 1997). They also provides protection against victimisation (Section 2 RRA 1976, Article 4 RR(NI)O 1997), as they grant protection to individuals who are treated less favourably than other persons by reason of their bringing a complaint under the Act, giving information in proceedings brought by another person, or alleging that there has been discrimination contrary to the Act.

Both acts give individual victims a right of direct access to the civil courts and industrial tribunals for legal remedies against unlawful discrimination. Industrial tribunals are composed of a legally qualified chairperson and two lay members who are generally recruited from workers' and employers' organisations. Individuals who lodge a complaint with an industrial tribunal may get preliminary legal assistance from a solicitor at little or no cost, provided their income is within a certain limits, under the Legal Aid Act. The legal aid scheme however, does not extend to the tribunal proceedings itself. The relevant courts or industrial tribunals award damages and compensation. While there are cases in which awards have exceeded the amount of 100.000 pounds sterling, the average award in employment cases is approximately 6.000 pounds sterling, and in non-employment cases well below 1.000 pounds sterling (MPG 2002, p.30).

The RRA(A)R 2003 improved the regulations on the burden of proof. Whereas the RRA 1976 only allowed for a limited shift of the burden of proof, now, once the complainant or claimant has established a *prima facie* case, the onus is on the person alleged to have committed the act of unlawful discrimination or harassment to prove that he/she did not commit such an act.

A major improvement of anti-discrimination legislation has been achieved by the Race Relations (Amendment) Act 2000, which extends the RRA 1976 to prohibit discrimination in all functions of public authorities. The Act applies to England, Scotland and Wales. In Northern Ireland, the Northern Ireland Act of 1998 similarly requires public authorities to have due regard to the desirability of promoting good relations between people of different ethnic backgrounds in all their actions. The RR(A)A 2000 implemented a series of suggestions of the so-called 'MacPherson-Report', which thoroughly examined the murder of the black teenager Steven Lawrence and the failures of the police in the handling of the case. The most important suggestion of the MacPherson-Report was to focus on the structural

dimensions of discrimination within organisations and to define discrimination with regard to organisational behaviour as

'the collective failure of an organisation to provide an appropriate and professional service to people because of their colour, culture or ethnic origin. It can be seen or detected in processes, attitudes and behaviour which amount to discrimination through unwitting prejudice, ignorance, thoughtlessness, and racist stereotyping which disadvantage minority ethnic people' (The Stationery Office 1999, 6.34).

Consequently, the RR(A)A 2000 focuses on the functions of public authorities. The term 'public authority' is defined very widely: Anyone whose work involves functions of a public nature must not discriminate on racial grounds while carrying out these functions. Thus not only central and local government or the police are covered by the Act, it will also apply to any private or voluntary organisation carrying out any public function like running schools, providing residential care or enforcing parking controls. All these institutions have to deliver their services free of racial discrimination and must not discriminate in employment.

Further to the extension to public authorities the Act also imposes a positive duty on public authorities to tackle institutional racism and to improve race relations in all areas of their work. All public authorities listed in a schedule to the Act (central and local authorities, regional development agencies and enterprise networks, police and public bodies like the National Health Service or governing bodies of schools etc.) are required to have due regard to the need to eliminate unlawful discrimination and promote equality of opportunity and good race relations in carrying out their functions. They are expected to consider the implications for racial equality of everything they do. The Home Secretary may, by order, impose specific duties that state what each public authority must do in order better to comply with the general duty. The Commission of Racial Equality (CRE) is given the power to issue codes of practice to provide practical guidance to public authorities on how to fulfil their general and specific duties.

Thus, all public authorities and bodies covered by the Act (including private organisations delivering public functions) have to implement adequate procedures of ethnic monitoring with regard to recruitment, advancement and training. Public authorities and bodies with a staff of more than 150 persons have to publish the results of their monitoring in a yearly report. Larger public bodies, as defined by a decree of the Home Secretary, have to implement 'Race Equality Schemes' with a detailed plan of measures to improve equality in employment (CRE 2003). If the CRE is of the opinion that an authority does not follow its legal obligations, it can issue recommendations and/or bring the case before the court.

In Northern Ireland, similar legislation does apply. Further the Race Relations (Northern Ireland) Act and the Fair Employment (Northern Ireland) Act of 1989

outlaw employment discrimination on grounds of religion and political opinion in both private and public employment. Religion is defined as adherence to the catholic or protestant denomination.

The Fair Employment (Northern Ireland) Act is the most powerful anti-discrimination legislation in place in Europe. It provides for the establishment of a Fair Employment Commission (FEC) and the Fair Employment Tribunal (FET). The Act provides for compulsory registration of employers with more than ten workers with the FEC, the compulsory annual monitoring of the workforce and of applicants for employment. It provides for compulsory reviews of employment, recruitment and promotion practice every three years and demands affirmative action with goals and timetables. Both criminal penalties and economic sanctions against bad practice are applied, including exclusion from public tendering. The affirmative action provisions require the estimation of the expected composition of an organisation's workforce based on the information regarding the religious composition of the geographical catchment area or labour market sectors from which employees are drawn. Affirmative action may inter alia require the abandonment of informal recruitment methods or of a preference for relatives of existing employees, outreach training or advertising, that applicants from members of either religion are particularly sought, if that religion is underrepresented. As the FET can issue enforcement orders or impose monetary penalties, its powers are substantially greater than that of the CRE

3.2.5 Soft Law

The RRA 1976 authorizes the CRE to issue so-called 'Codes of Practice'. Since the beginning of the eighties several 'Codes of Practice' have been developed and published by the CRE.

These 'Codes of Practice' are a peculiar type of soft law within the British legal system. They themselves do not impose legal obligations and only have advisory status. However, evidence about the performance of the Code's recommendations can be taken into account in proceedings under the Race Relations Act, inter alia by industrial tribunals deciding whether an act of unlawful discrimination has occurred and when assessing the degree of liability by employers for such an act. If employers take the steps that are set out in the code to prevent their employees from doing acts of unlawful discrimination they may avoid liability for such acts in any legal proceedings brought against them.

The first 'Code of Practice' published 1984 by the CRE was the 'Code of Practice for the Elimination of Racial Discrimination and the Promotion of Equal Opportunities in Employment'. It was drawn up in consultation with employers associations and trade unions and explains in detail what measures can be regarded as racial discrimination

and what procedures, albeit formally non-discriminatory, might induce discrimination in effect. It gives recommendations on policies that can be implemented in order to help to eliminate racial discrimination and enhance equality of opportunity at the work-floor. This code was followed by several other codes, covering education, primary health care, the maternity service, rented housing, owner occupied housing and equality standards for local government. Although there is no robust evidence for the effects of the code, a survey of the CRE in 1993/94 showed that 90% of the big companies with more than 7.000 employees had installed internal measures against discrimination, which more or less followed the suggestions of the code (Meager 1999, p.10).

3.3 Institutional Setting

The RRA 1976 established an independent Commission for Racial Equality (CRE, <http://www.cre.gov.uk>) which, although funded by the government, exists independently of it. It is a statutory body comprised of 15 Commissioners who are selected and appointed by the Home Secretary. Its statutory duties are:

- to work towards the elimination of racial discrimination;
- to promote equality of opportunity and good relations between persons of different racial backgrounds;
- to keep the operation of the Act under review and to make such recommendations for amending it, as may be appropriate, to the Secretary of State.

The Commission for Racial Equality is a single-issue-body and only dealing with racial discrimination. It is vested with wide powers and has a major law enforcement function (Section 48-51, 58-61). It can

- conduct formal investigations where it is believed that discrimination is or has been occurring;
- issue non-discrimination notices;
- institute legal proceedings in cases of persistent discrimination;
- take proceedings in respect of discriminatory practices, advertisements and in respect of discriminating instructions or pressure;
- assist at individual complaints.

Its powers include statutory powers to require production of documents and oral evidence. Formal investigation powers are not used in relation to individual complaints, which are considered by industrial tribunals and civil courts. Often, individual cases act as a trigger, alerting the Commission to discriminatory practices within an organisation and leading to formal investigations into organisations, firms or areas of economic activity. Where an investigation discloses acts of unlawful discrimination, the Commission can issue a non-discrimination notice requiring the

respondent or organisation to bring the particular acts of discrimination to an end and to inform the Commission by a specified date of the measures taken to prevent further discrimination. The notice remains in force for 5 years and, if not followed by the company, may be enforced by the civil courts¹³. Since 1977, the Commission has carried approximately hundred formal investigations in a wide range of public and private organisations (MPG 2002, p.28).

The CRE is a well-financed institution (annual budget 2002: approximately 19 million Pound, CRE 2003, S.59) with approximately 220 employees and – beside headquarters in London – five local offices in North-, Central and West England, Scotland and Wales. The CRE supports the work of almost 100 local Racial Equality Councils. These are autonomous voluntary bodies set up across the UK to promote equality at local level. In Northern Ireland there is an ‘Equality Commission’, with similar tasks and powers.

The CRE also has the right to support individuals in civil proceedings before labour courts (‘industrial tribunal’). It can take over costs, send staff as lawyers and give legal advice. In most cases an agreement out of court of the controversy parties is reached. Only very rarely those accused of discrimination refuse to cooperate with the Commission.

Further to its legal powers, the CRE has the task to evaluate the effectiveness of the RRA 1976 and to suggest improvements. It has published several reviews of the RRA 1976 (1985, 1992, 1998), which partly have been implemented by the RR(A)A 2000. The CRE also has the duty to promote the idea of equality and good race relations and thus has run several promotion and public-relations-campaigns on the issue¹⁴.

In the year 2002, the CRE was asked for support and/or agency before court in 1300 cases, more than half of them (761) concerning the labour market. In 337 cases the claimant identified him/herself as ‘black’ origin, in 143 as ‘Indian’ and in 14 cases as ‘Pakistani’. In 600 cases the CRE advised regarding the further legal procedure, in 52 cases it reached a direct compromise between the parties. In 137 cases the CRE represented the complainant before court. In all cases, 492,099 pounds sterling were awarded as compensation. Additionally, the CRE answered 224 inquiries regarding the formulation of job advertisements and advertisement and worked on 100 cases of discriminating announcements and public announcements (CRE 2003, S.25 ff.)

¹³ A formal investigation on its own cannot provide damages to victims of discrimination, who will have to approach the appropriate court or industrial tribunals.

¹⁴ See www.cre.gov.uk/index.html

3.4 Examples of Good Practice

Since the beginning of British anti-discrimination policies, the municipal level has played an important role in implementing the Race Relations Act 1976. In larger cities local 'Race Equality Councils' have been established since the 1970s. In the beginning, they mainly focused on the internal staffing procedures of the municipal authorities concerned. In the late 80s and 90s they widened their scope of action to include measures of contract compliance and developed a 'multi-agency-approach' bringing together all relevant stakeholders – local representatives of the CRE, the police, local housing associations, education and social authorities and local minority and immigrant organisations – in the field of local anti-discrimination work. The main task of the Councils now is to coordinate and focus measures against discrimination and to prevent racial harassment and violence (cf. ECRI 1999, S.16). Several cities, (e.g. Birmingham, Manchester, Leicester) have developed specific programmes to implement equality policies, including ethnic monitoring and equality targets (cf. Europaforum Wien 2002).

According to the Local Government Act 1998 the municipal administration has the right to implement compliance with anti-discrimination legislation as criterion for public tendering. Companies adopting the relevant Codes of Practice are privileged in contracting ('Contract Compliance'), thus the local government may indirectly influence the local economy to comply with anti-discrimination legislation. According to a recent study, 75% of all companies competing for public tenders as opposed to only 18% of companies not interested in public tenders have installed internal anti-discrimination procedures, 80% declared themselves as 'equal opportunities employers' in public advertisement (Wrench/Modood 2000, S. 48). The RR(A)A 2000 has improved the powers of the local governments to implement contract compliance, as it implements a positive duty on local governments to improve race relations.

A further particular strategy to implement equality policy in practice, which mostly can be found in municipal administrations, is the implementation of 'Equal Opportunities Action Plans' and 'Equality Targets'. They specify concrete steps and schedules for the implementation of equality measures and monitoring instruments. 'Equality Targets' have above all the goal of improving the employment level of minority members and/or of their position in the functional hierarchy and impose clear quantitative goals upon the management to reach a certain percentage of minority employment in defined period of time. In some cities (Birmingham, Manchester) the obligation of the management for reaching the goals is strengthened by the fact, that fulfilling the target is made a precondition for the prolongation of the contract of the unit management. These measures often are supported by specific

outreach-activities (job-fares for minority groups, advertising in minority newspapers etc) and mentoring-systems (see Wrench/Modood 2000, S. 50ff.).

3.5 Specific regulations in Northern Ireland

Due to its specific history, anti-discrimination policy in Northern Ireland has developed in a different legal and political framework than in Great Britain. In its beginning, anti-discrimination legislation concerned discrimination based on adherence to the catholic or protestant denomination or on political conviction (Fair Employment (Northern Ireland) Act 1989). In 1997, the 'Race Relations (Northern Ireland) Order 1997' passed parliament installing inter alia a 'Commission for Racial Equality' for Northern Ireland. The 'Northern Ireland Act' 1998 installed a positive duty of the authorities to prevent discrimination and improve equality, covering several possible reasons of discrimination. This 'horizontal approach', which is more akin to the Irish than to the British framework, also led to the integration of the 'Race Relations Commission' into the newly build 'Equality Commission', which covers several areas of discrimination and – in this respect – is more similar to the Irish Equality Authority than to the CRE, in 1999.

The 'Equality Commission for Northern Ireland' has comparable duties and powers like the CRE. In the area of religious discrimination, the protection of discrimination is stronger than in all other areas. Companies with a staff of more than 10 have to monitor the religious composition of their staff and have to implement measures to reach a religious composition of their staff, which is similar to the recruitment area. They have to report about these measures to the employment authorities all three years. The Equality Commission may force a company to implement these measures and may impose sanctions or exclude the company from public tendering in the case of non-compliance¹⁵.

¹⁵ Cf. Equality Commission for Northern Ireland 2003:
http://www.equalityni.org/yourrights/equality_law.htm#FairEmployment

4 Conclusion

In all three countries, as well civil- as criminal law provisions prohibit discrimination. In the UK, specific laws for different reasons of discrimination exist, whereas all reasons of discrimination are covered by a single Act in Ireland and the Netherlands. In their specific anti-discrimination legislation, the laws in the UK and Ireland allow their respective implementation bodies to issue orders forcing the perpetrator to change its procedures and behaviours, whereas the Dutch law only declares discriminatory contracts and regulations void. In all three countries, damages may be awarded in cases of discrimination. In the UK and the Netherlands, the relevant courts and industrial tribunals award these damages; the implementation bodies only may support or represent the victim before the court. In Ireland damages may be awarded to the victim directly by the Equality Authority. This approach which gives the implementation authorities the right to award damages, follows a 'one stop' principle with low thresholds for approaching justice, whereas the British and Dutch regulations seem to be rather complicated and might prevent victims to take action.

In general, the legal provisions of all three countries are rather similar and more or less modelled along the line of the British Race Relations Act and the EU-directives, which have been strongly influenced by the British RRA. All include specific definitions of direct and indirect discrimination and victimization. It is noteworthy, that the Netherlands allow for the direct application of the ICERD-definition of discrimination, which is stronger than the definition in the EU-directives. Differences can be found with regard to the regulations of exemptions from the act due to genuine occupational requirements, where the Netherlands operate an exhaustive list of cases to which exemptions apply, whereas the British and Irish legislation do not give a comparable list. In the Netherlands, the Equal Treatment Commission has developed a test for objective discrimination with regard to genuine occupational requirements and stated that there is a need for a written and publicized policy of the institution, which wants to apply exemptions based on genuine occupational requirements. This practice is noteworthy.

In all three countries, well-funded implementation bodies do exist. In The UK and Ireland, the implementation structure is based mainly on state-bodies with a broad mandate including the representation of victims before the court, conducting formal investigations, campaigning for equality and reviewing the existing legislation. In the UK, local outlets of the Commission for Racial Equality ease access for the public.

In The Netherlands, the Equal Treatment Commission has a more limited mandate concentrating on the issuing of opinions to cases of discrimination brought before the Commission. An NGO-based structure of 25 local anti-discrimination offices and a national office against discrimination support its work. The funding of these offices is regulated by law, giving them the role of ‘first contact’ points. They act as a kind of filter to the commission, try to settle cases and prepare cases for the commission and the courts. This model of inclusion of the civil society in everyday anti-discrimination action is noteworthy and an important element for the widespread public acceptance of anti-discrimination legislation in the Netherlands.

Both the British Race Relations Commission and the Irish Equality Authority may conduct formal investigations in companies or institutions and may issue binding orders forcing the respective companies or institutions to change their procedures in order to prevent further discrimination. If not followed, these orders may be implemented by the courts. Both institutions have the power to access all relevant documents in the case of a formal investigation. These powers are a central element for the implementation of an effective anti-discrimination system.

The Dutch Equal Treatment Commission is lacking comparable powers, which is seen as detrimental to its efficiency by the Commission itself and by researchers. The lack of formal powers is somehow compensated by the fact, that the Netherlands have implemented ethnic monitoring procedures in larger companies through the ‘Wet Samen’, which forces companies with more than 35 employees to publicly report their activities for implementing ethnic equality on the workplace. Nevertheless, the British and Irish solution seems to be more effective than the Dutch.

‘Codes of Practice’ are known in all three countries. Only in Britain, they have a peculiar legal status granting them more legal weight than in the other countries. Comparing the effectiveness of Codes of Practice in the Netherlands and Britain, there is clear evidence of the superiority of the British system, which should serve as a blueprint for the implementation of Codes of Practice.

In the United Kingdom, the latest amendment of the anti-discrimination legislation has established a positive duty of public bodies to act against discrimination and further equality. A wide definition of a public body is applied, including any private company or institution delivering public services or acting as contractor to a public authority. All these bodies have to review their practices and implement measures preventing discrimination and safeguarding equality. This provision also applies to public tendering, making ‘contract compliance’ – favourable contracting for companies proving compliance with anti-discrimination legislation – a strong tool for public authorities to further equality in the private sector.

In all three countries, agreements of the social partners and within companies play an important role in improving the position of immigrants and ethnic minorities in the workplace. In the beginning, internal equality policies have been mainly introduced by global companies, but in the meantime have become more widespread especially in the Netherlands and the United Kingdom, where employment diversity has become a business case.

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