

**REPORT ON MEASURES TO COMBAT DISCRIMINATION
Directives 2000/43/EC and 2000/78/EC**

**COUNTRY REPORT
Estonia
State of affairs up to 8 January 2007
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INTRODUCTION

0.1 The national legal system

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

The Estonian national legal system is typical for continental Europe. Historically it has been influenced by German (and to a lesser degree Russian and Scandinavian) legal traditions. The main sources of normative legal rules are provisions of the Constitution, laws and by-laws (secondary legislation). Case law (court decisions) cannot be regarded as a source of normative legal rules (legislation of general application). However, the decisions of the National (Supreme) Court¹ do influence local legal practice to a considerable extent (they can be used as guidelines by the local legal community).

At the top of the Estonian legal system is the Constitution² which includes the most important legal provisions (including provisions regarding fundamental human rights and freedoms and general principles of non-discrimination). The next level consists of the laws adopted by the *Riigikogu* – the Parliament. According to Article 102 of the Constitution, all laws shall be adopted in accordance with the Constitution. The third level comprises other legal acts adopted by competent authorities on the basis of laws (e.g. decrees of the Government of the Republic). Additionally, there are normative acts of local self-government, which are valid on the respective territories: “[a]ll local issues shall be resolved and managed by local self-governments, which shall operate independently pursuant to law” (Article 154 (1)).

According to Article 123 of the Constitution, Estonia cannot enter into international treaties which are in conflict with its Constitution. Furthermore, “[i]f laws or other legislation of Estonia are in conflict with international treaties ratified by the *Riigikogu*, the provisions of the international treaty shall apply”. Additionally, at a referendum held on 14 September 2003, the people of Estonia amended the Constitution with the following provision³: “As of Estonia’s accession to the European Union, the Constitution of the Republic of Estonia applies taking account of the rights and obligations arising from the Accession Treaty.” Furthermore, “generally recognised principles and rules of international law are an inseparable part of the Estonian legal system” (Article 3 (1)).

In Estonia justice shall be administered by the courts solely in accordance with the Constitution and the law (Article 146 of the Constitution). “The court shall not apply any law or other legislation that is in conflict with the Constitution. The National Court shall declare invalid any law or other legislation that is in conflict with the provisions and spirit of the Constitution” (Article 152). A request to review the constitutionality of legislation of general application or international treaties may be filed with the National Court by the President of

¹ *Riigikohus*, the court of highest instance in Estonia

² *Eesti Vabariigi põhiseadus, Riigi Teataja* 1992, 26, 349 *Riigi Teataja* (hereinafter RT) – Official State Gazette

³ RT I 2003, 64, 429. Valid since 14 December 2003

the Republic, the Legal Chancellor (the Chancellor of Justice)⁴, the *Riigikogu* or a local council. Additionally, a court may initiate proceedings by delivering its judgment or ruling to the National Court (Article 4 of the Law on Constitutional Review Court Procedure⁵).

To sum up, provisions of the Constitution and international treaties (including those against discrimination) are directly applicable in Estonian courts and further legislation shall not violate these provisions. In the frame of certain procedures, laws and other legal acts that violate the Constitution may be proclaimed invalid by the National Court.

0.2 State of implementation

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

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

Before the accession of Estonia into the EU there was no specific anti-discrimination legislation. Furthermore, most of recent positive changes in this field were the result of the harmonization of Estonian legislation with the *acquis communautaire*.

The example of Estonian employment-related legislation might be very instructive. The Labour Code of the Estonian Soviet Socialist Republic⁶ (adopted in 1972) made it illegal to allow or give preferences, or to restrict rights in a direct or indirect way on the grounds of sex, race, ethnic origin or attitude towards religion (Article 18). After Estonia regained independence in 1991, a new Law on Employment Contracts⁷ (1992) included a much longer list of grounds prohibiting such illegal behaviour⁸. However, this norm has usually been perceived as a declaration and has been applied in practice extremely rarely. The transposition of the Directives was a chance to challenge the situation and to make these merely declarative provisions working statutes⁹.

In the beginning of 2002 the Ministry of Justice¹⁰ prepared the Draft Law on Equality and Equal Treatment¹¹ (Draft Law on Equality), which was submitted to the Parliament by the Government of the Republic on 21 October 2002 (Draft no. 1198 SE). On 14 December 2001, the Government initiated the Draft Law on Gender Equality¹² (Draft Law no. 927 SE),

⁴ *Õiguskantsler*

⁵ *Põhiseaduslikkuse järelevalve kohtumenetluse seadus*, RT I 2002, 29, 174

⁶ *ENSV Teataja*, 1972, 28, lisa 1; 1975, 9, 69; 1977, 1, 11; 1984, 16, 178; 1988, 30, 376. *ENSV Teataja* - Official State Gazette

⁷ *Eesti Vabariigi töölepingu seadus*, RT 1992, 15/16, 241

⁸ Sex, ethnic origin, colour, race, native language, social origin, social status, previous activities, religion, political or other opinion, membership in a political party or attitude towards the duty to serve in the armed forces of employees or employers. It was also made illegal to restrict the rights of employees or employers on the grounds of marital status, family obligations, membership in citizens' associations or representation of the interests of employees or employers (Article 10 (1) in version valid until 30 April 2004).

⁹ Before 2002 only one non-declarative discrimination-related provision was introduced into Estonian legislation: Article 5¹ of the Law on Wages (*Palgaseadus*; RT I 1994, 11, 154) which was to ensure equal payment irrespective of sex.

¹⁰ *Justiitsministeerium*

¹¹ *Võrdõiguslikkuse ja võrdse kohtlemise seaduse eelnõu*.

¹² *Soolise võrdõiguslikkuse seaduse eelnõu*

which was prepared by the Ministry of Social Affairs¹³. The explanatory note to the Draft Law on Equality argues that discrimination is not widespread in Estonia; however, it is still possible, especially on the grounds of sex or ethnic origin. The Draft Law implemented ten different community Directives in the field of non-discrimination¹⁴. According to the special analysis made in 2003, its provisions could effectively transpose the overwhelming majority of the requirements of Directives 2000/78/EC and 2000/43/EC¹⁵ (referred to here as the Directives).

In late 2002 - early 2003 the Ministry of Social Affairs advocated the adoption of a separate law on gender-related issues. As a result of long-running disputes in Parliament, both the Draft Law on Equality and the Draft Law on Gender Equality were not approved by the *Riigikogu* before the parliamentary election of March 2003. Two months later, in May 2003, the Minister of Justice and Minister of Social Affairs officially discussed the prospects of the draft laws to address discrimination. It was decided that a single law would cover all grounds of discrimination and that the Ministry of Social Affairs would be responsible for the preparation of a new draft. A working group of representatives of both ministries had to submit a draft to the Government for approval by 1 September 2003¹⁶.

Meanwhile it was also decided to make a special body for the promotion of equal treatment, the Office of the Legal Chancellor¹⁷ (or Chancellor of Justice), an ombudsman-like institution. On 11 February 2003 a number of amendments¹⁸ to the Law on the Legal Chancellor¹⁹ were adopted by the Parliament, and new functions were ascribed to the institution from 1 January 2004.

Finally, on 7 April 2004, the Parliament adopted the comprehensive Law on Gender Equality²⁰ – a new draft law submitted by the Ministry of Social Affairs in 2003. However, the Ministry of Justice failed to submit to the Parliament at the same time a new comprehensive law to deal with grounds of discrimination other than sex.

Nevertheless, a few days before EU enlargement – on 22 April 2004 – the Estonian Parliament introduced amendments²¹ to the Law on Employment Contracts. According to the explanatory note attached to the draft, these amendments were to implement nine Community directives (including Directives 2000/78/EC and 2000/43/EC²²) in several work-related spheres. Interestingly, since December 2003 the Parliament has discussed a draft of the new Law on Employment Contracts (Draft no. 212) that included several anti-discrimination provisions. However, in April 2004 this draft was still under discussion and two parliamentary factions proposed, as a temporary solution, to amend an ‘old’ (then and now valid) Law on Employment Contracts to ensure harmonisation of the Estonian labour

¹³ *Sotsiaalministeerium*

¹⁴ See explanatory note attached to the Draft no. 1198 SE (9th *Riigikogu*); available at <http://www.riigikogu.ee> (20.01.2006).

¹⁵ Vadim Poleshchuk, *Report on Measures to Combat Discrimination in the 13 Candidate Countries. Country Report: Estonia*, MEDE European Consultancy and Migration Policy Group: Brussels and Utrecht, May 2003

¹⁶ Ministry of Justice; Written communication no. 3-2-4/2162 of 6 June 2003

¹⁷ *Õiguskantsler*.

¹⁸ RT I 2003, 23, 142

¹⁹ *Õiguskantsleri seadus*, RT I 1999, 29, 406

²⁰ *Soolise võrdõiguslikkuse seadus*, RT I 2004, 27, 181

²¹ RT I 2004, 37, 256

²² See explanatory note attached to the Draft no. 330 SE (10th *Riigikogu*); available at <http://www.riigikogu.ee> (01.10.2004)

legislation with the *acquis* by 1 May 2004²³. Anti-discrimination provisions that were introduced into the 'old' Law were almost identical with those in draft no. 212. The above-mentioned amendments have been valid in Estonia since the day of accession. As for the draft of the new Law on Employment Contracts, it was withdrawn in May 2005.

In the *Riigikogu* there were no real discussions before the adoption of the amendments to the Law on Employment Contracts²⁴, and the explanatory note attached to the draft law did not include much detail or interpretation of proposed anti-discrimination provisions.

To sum up, the transposition of the Directives into Estonian legislation has not been finalised as yet. There are only two laws that have been specially amended to implement some of their requirements: the Law on Employment Contracts and the Law on the Legal Chancellor. The *major* remaining problems related to the implementation of the Directives are the following:

1. The material scope of application of the Law on Employment Contracts is narrower than that of the employment-related provisions of Directives 2000/43/EC and 2000/78/EC. It is worth mentioning that the Law on Employment Contracts does not regulate the work of public officials, the self-employed and some other categories of the working population. There are no special provisions regarding access to membership in workers' organisations.
2. Several areas covered by the Race Directive, such as education (but not employees' training), social protection and advantages, access to publicly available goods and services and housing, are still lacking any specific anti-discrimination rules.
3. The wording of the provisions regarding harassment in the Law on Employment Contracts seems not to be in line with the requirements of the Directives. Concerns might also be raised regarding the wording of provisions on the burden of proof in cases of discrimination.
4. The concept of victimisation as such is still lacking in Estonian legislation in the fields protected by the Directives.
5. The concept of reasonable accommodation has not been properly implemented in Estonian legislation.
6. The Law on Employment Contracts provides victims of discrimination with a right to demand compensation for material and moral damage. However, the relevant provisions do not include any details to ensure that the compensation paid to a victim of discrimination is effective, proportionate and dissuasive.
7. The Office of the Legal Chancellor ('a special body') will certainly experience difficulties in dealing with discrimination in the fields other than ordinary employment, as there are no specific legal provisions to tackle these issues. There are no legal provisions requiring this body to provide 'independent assistance to victims of discrimination' according to the meaning of Directive 2000/43/EC.

²³ See minutes of the *Riigikogu* plenary session of 13 April 2004; available at <http://www.riigikogu.ee> (01.10.2004)

²⁴ See minutes of the *Riigikogu* plenary sessions of 13 April, 20 April and 22 April 2004; available at <http://www.riigikogu.ee> (01.10.2004)

In its 2004 communication, the Ministry of Justice admitted that the above-mentioned changes in the Law on Employment Contracts were not enough to claim complete transposition of the Directives²⁵. It seems, however, that the Ministry later changed its attitude to the problem of transposing Directive 2000/43/EC. In its 2005 communication, the Ministry argued that Article 12 of the Constitution includes the fundamental right not to be discriminated against and that, consequently, no special laws or legal norms are necessary to introduce the principle of non-discrimination in the fields of education, access to goods and services, employment of public officials, etc²⁶.

As for the Ministry of Social Affairs, it argued in 2005 that a special comprehensive law might be necessary to implement all the provisions of both Directives²⁷. In April 2006 the Directive 2000/78/EC was in the official list of those directives that were not implemented in due time by Estonia²⁸. However there were also remarks that the Directive 2000/78/EC has been partially transposed by the Law on Employment Contracts and the Law on the Legal Chancellor. The Directive 2000/43/EC could not be found in the same list.

Nevertheless, in late 2006 the Ministry of Justice finalised the draft Law on Equal Treatment²⁹, which was elaborated in reply to the concerns raised by the European Commission in an official letter to the Estonian Government.³⁰ The aim of the draft law is to finalise transposition of the Directives into Estonian legislation. The Ministry of Justice involved NGOs and social partners in the process of preparation of the draft law and followed many of their recommendations. The draft was submitted to the Government on 25 January 2007 (Draft no. 1101).

If adopted, the draft law may create a better system of protection of discrimination victims in all areas and on all grounds protected by the Directives 2000/43/EC and 2000/78/EC. The scope of application of a draft law will be much wider while it bans discrimination on any ground and in almost all areas of 'social' life. The draft law is also evidence that the Estonian authorities finally decided to adopt one comprehensive law to transpose the directives rather than to introduce amendments to numerous legal acts.

Considering the 'warning letters' of the European Commission, there are reasons to believe that the new law will be adopted by the end of June 2007 (i.e. before the summer break in the work of the parliament). The first reading of draft was on 14 February 2007. Hopefully, it will not be withdrawn by a new government after the national elections (4 March 2007).

0.3 Case law

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

a. Name of the court

²⁵ Ministry of Justice; Written communication no. 3-2-04/12609 of 23 November 2004

²⁶ Ministry of Justice; Written communication no. 3-2-4/9168 of 12 August 2005

²⁷ Ministry of Social Affairs; Written communication no. 3-6/7592 of 5 September 2005

²⁸ Tähtaja ületanud direktiivide ülevõtmiseks vajalike õigusaktide koondtabel 01.04.2006 seisuga (The Consolidated Table of Legal Acts which are Necessary for Transposition of the Expired Directives, as of 1 April 2006), p. 10, available at http://www.riigikantselei.ee/failid/lev_tmata_direktiivid_seisuga_01.04.2006.pdf (accessed 20.01.2007).

²⁹ Võrdse kohtlemise seaduse eelnõu

³⁰ See explanatory note attached to the Draft no. 1101 SE (10th Riigikogu); available at <http://www.riigikogu.ee> (20.01.2007).

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

Please use this section not only to update, complete or develop last year's report, but also to include information on important and relevant case law concerning the equality grounds of the two Directives, even if it does not relate to the legislation transposing them (e.g. if it concerns previous legislation unrelated to the transposition of the Directives)

As was mentioned above, case law (court decisions) cannot be regarded as a source of normative legal rules in Estonia, although the decisions of the National Court do have a significant practical importance. The first legal acts to transpose the Directives (substantive law) have been valid in Estonia only since January-May 2004 and there was no opportunity for relevant court practice to have been developed by January 2007. As a result the analysis and interpretation of new Estonian anti-discrimination provisions cannot be based on an analysis of the practices of the Estonian judiciary. This statement is equally valid for procedures of the Estonian special body (the Legal Chancellor).

In recent years references to discrimination have been quite rare in the Estonian courts. However, the National Court heard several cases where alleged discrimination or unequal treatment were among the parties' main arguments. They normally cited Article 12 of the Constitution. Relevant details in this regard will be presented in the next section of this report. However, it is worth emphasising that the practice of the National Court regarding the interpretation and implementation of Article 12 of the Constitution is neither detailed nor comprehensive.

1. GENERAL LEGAL FRAMEWORK

Constitutional provisions on protection against discrimination and the promotion of equality

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

Article 11 of the Estonian Constitution stipulates that rights or freedoms may be restricted only in accordance with the Constitution, while Article 12 of the Constitution establishes an explicit ban on discrimination:

“Everyone is equal before the law. No one shall be discriminated against on the basis of ethnic origin, race, colour, sex, language, origin, religion, political or other opinion, property or social status, or on other grounds.

The incitement of ethnic, racial, religious or political hatred, violence or discrimination shall, by law, be prohibited and punishable. The incitement of hatred, violence or discrimination between social strata shall, by law, also be prohibited and punishable”.

In one of its decisions the Constitutional Review Chamber of the National Court claimed that the general principle of equality is applicable to “all spheres of life”³¹. As it was summarised by an Estonian scholar who studied the application of this provision by the National Court, “Article 12 of the Constitution does ban unequal treatment in all spheres of activities which are regulated and protected by the State. Legislative, executive and judicial powers should observe the principle of equal treatment... The principle of equal treatment is valid for all laws regardless of their scope of application”³². In other words, the material scope of the application of Article 12 of the Estonian Constitution is wider than that of the Directives (as stipulated in Article 3 (1) of both Directives).

The principle of equality before the law as established in Article 12 was interpreted in a decision of the Constitutional Review Chamber of the National Court³³:

"17. The equality of legislation requires, as a rule, that persons who are in similar situations must be treated equally by law. This principle expresses the idea of essential equality: those who are equal, have to be treated equally and those who are unequal must be treated unequally. But not every unequal treatment of equals amounts to the violation of the right to equality. The prohibition to treat equal persons unequally has been violated if two persons, groups of persons or situations are treated arbitrarily unequally. An unequal treatment can be regarded arbitrary if there is no reasonable cause therefore.

The Chamber admits that although the review of arbitrariness is extended to the legislator, the latter must be awarded a wide margin of appreciation. If there is a reasonable and appropriate cause, unequal treatment in legislation is justified".

In one of its decisions the Constitutional Review Chamber stated that public authorities cannot justify unequal treatment solely with reference to difficulties of an administrative or technical character³⁴.

The second sentence of Article 12 (1) of the Constitution does not provide an exhaustive list of grounds for discrimination. The National Court did not have a chance to study the question regarding the applicability of this provision in the case of discrimination on the basis of age, disability or sexual discrimination, i.e. grounds which are not explicitly mentioned in this sentence³⁵. According to the formal legal interpretation of different scholars, this provision might be a basis for protection against discrimination on any grounds³⁶.

³¹ Decision of the Constitutional Review Chamber of the National Court of 6 March 2002; published in RT III 2002, 8, 74

³² Katri Lõhmus, *Võrdsusõiguse kontroll Riigikohtus ja Euroopa Inimõiguste Kohtus (Control over Equality in the National Court and in the European Court of Human Rights)*, *Juridica* no.2, vol. 11 (2003), p.109

³³ Decision of the Constitutional Review Chamber of the National Court of 3 April 2002; published in RT III 2002, 11, 108

³⁴ Decision of the Constitutional Review Chamber of the National Court of 21 January 2004; published in RT III 2004, 5, 45

³⁵ Nevertheless, disability and age in the context of Article 12 (1) were studied by the National Court. There was a case concerning the granting of access to the simplified procedure of naturalization for a disabled person without regard to the officially recognised degree of severity of disability (Decision of the National Court *en banc* of 10 December 2003; published in RT III 2004, 1, 1). Another recent case concerned the unequal treatment of people with different types of old-age pensions (Decision of the Constitutional Review Chamber of the National Court of 21 June 2005; published in RT III 2005, 24, 250)

³⁶ However, some scholars do not follow this approach. See details in Katri Lõhmus, *Võrdsusõiguse kontroll Riigikohtus ja Euroopa Inimõiguste Kohtus (Control over Right to Equality in the National Court and in the European Court of Human Rights)*, *Juridica* no.2, vol. 11 (2003), p.109

It is worth mentioning that in April 2005 the Civil Law Chamber of the National Court delivered a decision³⁷ in an 'equal pay for equal work' case in which it came to the conclusion that any payment might be made for work agreed by a worker and an employer if their agreement did not violate Article³⁸ 5¹ of the Law on Wages³⁹ and Article 10 of the Law on Employment Contracts (both included the *exhaustive* lists of the grounds of banned discrimination). Importantly, in its analysis, the Court did not use Article 12 of the Constitution, with its open-ended list of grounds. Nevertheless, the Legal Chancellor (specialised body) believes that the list provided in Article 10 of the Law on Employment Contracts only emphasises the most important grounds of prohibited discrimination. He argues that by virtue of Article 12 of the Constitution and general principles of law (respect for fundamental rights and freedoms) in employment relations the list of grounds of prohibited discrimination shall be regarded as open or unlimited⁴⁰.

To sum up, a flexible mechanism of protection against discrimination can be based on Article 12 of the Constitution. However, there is no developed and comprehensive practice of application of these provisions by the National Court.

Article 9(1) of the Constitution guarantees rights and freedoms for both citizens of Estonia and foreigners on its territory. However, the Constitution also permits differential treatment of non-citizens in certain social fields, e.g. in Articles 28, 29 and 31 (see section 4.4 of this report for details).

According to Article 49 of the Constitution, "everyone has the right to preserve his or her ethnic identity". Freedom of conscience and religion is proclaimed in Article 40.

The Constitution also provides special guarantees to the elderly and disabled: "...An Estonian citizen has the right to state assistance in the instances of old age, incapacity to work, loss of a provider, or need. The categories and extent of assistance, and the conditions and procedure for the receipt of assistance shall be provided by law..." (Article 28 (2)).

The constitutional principle of non-discrimination is repeated in some other laws, e.g. in the Law on Cultural Autonomy of National Minorities⁴¹ (Article 3), the Law on Wages (Article 5) and the Law on Advertising⁴² (Article 5, which bans offensive and discriminatory advertising), etc.

b) Are constitutional anti-discrimination provisions directly applicable?

Yes. Article 12 of the Constitution is directly applicable as well as other relevant constitutional provisions.

³⁷ Decision of the Civil Law Chamber of the National Court of 28 April 2005; published in RT III 2005, 16, 166

³⁸ In Estonia, special numbering may be used for new articles that are to amend the text of the law. For instance, Article 2¹, Article 2², etc means that the text was amended with new provisions that were placed between Article 2 and Article 3.

³⁹ *Palgaseadus*, RT I 1994, 11, 154

⁴⁰ Legal Chancellor; Written communication no. 6-1/060300/0602801 of 19 April 2006

⁴¹ *Vähemusrahvuse kultuuriautonoomia seadus*, RT I 1993, 71, 1001

⁴² *Reklaamiseadus*, RT I 1997, 52, 835

- c) *In particular, where a constitutional equality clause exists, can it (also) be enforced against private actors (as opposed to the State)?*

On personal scope, there are no limitations on using the provisions of Article 12 against the state, public bodies or institutions as well as against natural and legal private persons.

2. THE DEFINITION OF DISCRIMINATION

2.1 Grounds of unlawful discrimination

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

As was mentioned above in section 1 of this report, Article 12 of the Estonian Constitution does ban discrimination on any ground.

The Penal Code⁴³ bans activities which publicly incite people to hatred or violence on the basis of ethnic origin, race, colour, sex, language, origin, religion, sexual orientation, political opinion or financial or social status (Article 151). Article 152 of the Code penalises ‘violation of equality’, which is referred to as “unlawful restriction of the rights of a human being or granting of unlawful preferences to a human being (*inimene*) on the basis of his or her ethnic origin, race, colour, sex, language, origin, religion, sexual orientation, political opinion or financial or social status”. Additionally, Article 153 of the Code banned discrimination based on the genetic characteristics of the person, and Articles 154-155 provide for the protection of freedom of religion. Emphasis should be placed on the fact that such grounds as age and disability are not referred to in Articles 151 and 152 of the Penal Code. However, sexual orientation as a protected ground was added to the text of the Code in 2006.⁴⁴

The amended Law on Employment Contracts prohibits ‘unequal treatment’ on the basis of sex, racial origin, age, ethnic origin, level of language proficiency, disability, sexual orientation, the duty to serve in the defence forces, marital or family status, family-related duties, social status, representation of the interests of employees or membership in workers' associations, political opinions or membership of a political party or religious or other beliefs (Article 10 (3)). The draft Law on Equal Treatment is going to add other grounds to this list (namely, colour, origin and property status). However, ‘membership of a political party’ will be abolished as a protected ground. The ground ‘level of language proficiency’ will be substituted with ‘language’ (Article 26 (2)). The same draft law (Article 28 (4)) will introduce to the Law on Public Service a new Article 36¹ (1) with the list of grounds prohibited for discrimination (it will be identical with the amended list in Article 10 (3) in the Law on Employment Contracts).

Article 5 of the Law on Wages prohibits increasing or reducing wages on the grounds of an employee’s sex, ethnic origin, colour, race, native language, social origin, social status, previous activities, religion, political or other opinion, or attitude towards the duty to serve in the defence forces. It also prohibits reducing wages on the grounds of marital status, family

⁴³ *Karistusseedustik*, RT I 2001, 61, 364, RT I 2002, 86, 504

⁴⁴ RT I 2006, 31, 234

obligations, membership in citizens' associations or representation of the interests of employees or employers. The Law on Wages does not explicitly mention such grounds as age, disability or sexual orientation.

The Law on Gender Equality prohibits discrimination on the ground of sex (Article 1 (2)).

The draft Law on Equal Treatment foresees protection on any ground, while race, ethnic origin, colour, language, disability, age, sexual orientation, religious and other beliefs are explicitly mentioned⁴⁵ (Article 1 (1)). *The draft will substitute the definitions of direct and indirect discrimination and harassment provided for in the Law on Employment Contracts.*

2.1.1 Definition of the grounds of unlawful discrimination within the Directives

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

Is there a definition of disability on national level and how does it compare with the concept adopted by the European Court of Justice in case C-13/05, Chacón Navas, Paragraph 43, according to which "the concept of 'disability' must be understood as referring to a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life"?

The national current *anti-discrimination legislation* (including the Law on Employment Contracts) does not include special definitions of racial or ethnic origin, religion or belief, disability, age or sexual orientation. There is no case law to address this issue either.

The draft Law on Equal Treatment stipulates a definition of 'disability' similar to the Law on Social Benefits for Disabled Persons⁴⁶ but without references to the necessity of personal assistance, guidance or supervision for a disabled person (see below). The term 'disability' is laconically defined as "the loss of or an abnormality in an anatomical, physiological or mental structure or function of a person" (Article 5). This definition is even wider than the concept adopted by the European Court of Justice in case C-13/05, Chacón Navas, Paragraph 43 (the Estonian draft legislation does not make any reference to the consequences of impairment in professional life.)

The draft Law on Equal Treatment does not provide for definition of racial or ethnic origin, religion or belief, age or sexual orientation.

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

In practice, in Estonia the term 'race' presupposes the existence of human races whose representatives differ mainly by appearance and skin colour. Additionally, the Constitution

⁴⁵ The full list: race, ethnic origin, colour, language, origin, religion, political or other opinion, property or social status, age, disability, sexual orientation, or on other grounds

⁴⁶ *Puuetega inimeste sotsiaaltoetuste seadus*, RT I 1999, 16, 273; RT I 2002, 39, 245

(Article 12), the Penal Code (Articles 151 - 152) and the draft Law on Equal Treatment (Article 1 (1)) treat (skin) colour as a separate ground of discrimination.

There is no mandatory registration of ethnic origin in Estonian identification documents. In fact, people are free to choose any ethnic affiliation. Estonian legislation includes only the definition of a 'national minority' which is normally understood as a 'privileged' ethnic minority group. One of the basic elements of the definition of national minority members is that they are citizens of Estonia who "differ from Estonians by their ethnic affiliation, cultural and religious idiosyncrasies, or language" (Article 1 of the Law on Cultural Autonomy of National Minorities). The State Programme "Integration in Estonian Society 2000-2007" (approved by the Government of the Republic in 2000⁴⁷) makes a distinction (in section 6.2.1) between a 'national minority' and an 'ethnic minority'. Those who came to live in Estonia after the Second World War as a result of migration were classified as ethnic minorities. This differentiation is rarely used in practice.

At the moment in Estonia the terms 'ethnic origin' (*etniline päritolu*) and 'nationality' (*rahvus*) are normally used as synonyms while ethnic affiliation is understood by many policymakers and ordinary persons in primordial terms. Conversely, the term 'citizenship' (*kodakondsus*) is ethnically neutral. According to the 2000 national census results there were representatives of more than 100 ethnic groups residing in Estonia (including Roma as a single ethnic group). Ethnic non-Estonians made up 1/3 of all residents but most of them (80%) were ethnic Russians⁴⁸. 20% of the total population were not citizens of Estonia (among which were stateless former Soviet citizens ('persons with undetermined citizenship') (12.4%) and citizens of the Russian Federation (6.3%))⁴⁹.

In the anti-discrimination context in Estonia, legislation normally uses the terms 'faith' or 'religious belief' without further specification. In general, religious affiliation and ethnic origin are understood as completely different categories. For instance, Muslims in Estonia might only be members of a religious group (not representatives of an ethnic group whose members are primarily Muslims by religion). Jews are also treated as a national minority.

The 2000 national census employed the following *basic* subcategories of religious affiliation: 'followers of a particular faith', 'persons indifferent to any faiths', 'atheists'. According to the census the group of followers of particular faiths was quite small (29.2% of all of the Estonian population aged 15 and older), and 90% of those were Lutherans or Orthodox Christians. The number of Judaists and Muslims was insignificant. 6.1% of the population as a whole were atheists. Ethnic non-Estonians were considerably more religious than ethnic Estonians⁵⁰.

In Estonia religious organisations and institutions are at the centre of legal regulation in the field of religion and belief. They require to be officially registered in order to be entitled to all the rights provided for them in legislation. Quite recently, religious organisations of Estonian

⁴⁷ *Riigi Teataja Lisa* 2000, 49, 740; *Riigi Teataja Lisa* (hereinafter RTL) is an appendix to the Official State Journal.

⁴⁸ *2000 Population and Housing Census: Citizenship, Nationality, Mother Tongue and Command of Foreign Languages II*, Tallinn: Statistical Office of Estonia, 2001, Table 8

⁴⁹ *2000 Population and Housing Census: Citizenship, Nationality, Mother Tongue and Command of Foreign Languages II*, Tallinn: Statistical Office of Estonia, 2001, Table 2

⁵⁰ *2000 Population and Housing Census: Education and Religion IV*, Tallinn: Statistical Office of Estonia, 2002, Table 92.

pagans experienced problems with registration. In 2004 the Law on Churches and Congregations⁵¹ was amended⁵² to permit using in the official name of a religious organisation words other than ‘church’, ‘congregation’, ‘association of congregations’ and ‘monastery’/‘convent’). As a result the problem with the registration of pagan associations was solved. This proved that, in the legal sense, there should be no obstacles to the recognition of any religious groups in Estonia.

The Law on Social Benefits for Disabled Persons defines the term ‘disability’ as “the loss of or an abnormality in an anatomical, physiological or mental structure or function of a person.” The degree of severity depends on the fact if the person needs personal assistance, guidance or supervision constantly, in every twenty-four hour period or at least once a week. (Article 2). According to Article 2²(2) of the Law, “a medical assessment committee or a medical expert shall determine the degree of severity of a disability and shall identify the additional expenses”. The type of social benefit paid to a disabled person depends on the degree of severity of the disability.

Again, the terms ‘age’ and ‘sexual orientation’ have not been specially defined in Estonian legislation in the non-discrimination context. It is worth mentioning that the Law on Gender Equality does not also refer to sexual orientation.

As for the pending legislation, the explanatory note attached to the draft Law on Equal Treatment includes the following clarifications regarding the protected grounds:⁵³

- *Race* (‘rass’) – a group of people with certain hereditary features;
- *Ethnicity* (‘rahvus’) – ethnic origin; not to be mixed with nationality/citizenship (‘kodakondsus’);
- *Religious, political and other beliefs* (‘Usutunnistus, poliitilised või muud veendumused’) – religious beliefs refer to a religious ‘world view’; political and other beliefs are all non-religious beliefs;
- *Disability* ‘puue’ - the loss of or an abnormality in an anatomical, physiological or mental structure or function of a person.

The explanatory note does not include clarification for such grounds as ‘age’ and ‘sexual orientation’ (but provides the reasons of their incorporation into the text of the draft law).

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

There are no such provisions in current of draft Estonian legislation.

d) Please describe any legal rules (or plans for the adoption of rules) or case law (and its outcome) in the field of anti-discrimination which deal with situations of multiple discrimination.

There are no such legal rules or case law in Estonia. There are no plans for the adoption of these rules as well.

⁵¹ *Kirikute ja koguduste seadus*, RT I 2002, 24, 135

⁵² RT I 2004, 54, 391

⁵³ See explanatory note attached to the Draft no. 1101 SE (10th *Riigikogu*); available at <http://www.riigikogu.ee> (20.01.2007).

2.1.2 Assumed and associated discrimination

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

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

National law or case law is silent about these issues.

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

a) How is direct discrimination defined in national law?

Article 12 of the Constitution provides for a general ban on discrimination. However, it does not include a definition of this term. Several other laws (listed in section 1 of this report) include different versions of this general constitutional provision. However, since 1 May 2004, two legal acts have included detailed definitions of the term: the Law on Employment Contracts and the Law on Gender Equality.

Thus, the Law on Employment Contracts listed definitions of *direct* and *indirect unequal treatment* (it was decided to use these terms instead of ‘direct’ and ‘indirect discrimination’). However, harassment is qualified as *direct discrimination* (Article 10² (4)). There are good reasons to believe that the terms ‘unequal treatment’ and ‘discrimination’ are used in the Law as synonyms⁵⁴.

The definitions provided in the Law on Employment Contracts are rather similar to those in the Directives:

“Article 10². Prohibition of direct and indirect unequal treatment

(1) It is prohibited to treat unequally employees or persons applying for employment either directly or indirectly.

(2) Direct unequal treatment shall be taken to occur where one person applying for employment or an employee is treated less favourably than another person applying for employment or another employee is, has been or would be treated in a comparable situation, on any of the grounds specified in Article 10 (3).

...”

⁵⁴ However, the Estonian scholar Gaabriel Tavits believes that the term ‘unequal treatment’ was used because it may refer to activities with and *without* a discriminating component. Cf. Gaabriel Tavits, *Muudatused töölepinguliste suhete õiguslikus reguleerimises: kaitse otsinguil Euroopa Liidu abiga (Changes in the Legal Regulation of Relations on the Basis of an Employment Contract: In Quest of Protection with the Assistance of the European Union)*, *Juridica* no.8, vol. 12 (2004), p.556. If this interpretation is correct, it is still not very clear why the Law on Employment Contracts does not include a special definition of ‘discrimination’ and why its definitions of ‘direct and indirect unequal treatment’ are so similar to the definitions of ‘direct and indirect discrimination’ in the Directives.

The full list of the grounds listed in Article 10 (3) of the Law on Employment Contracts is provided in section 2.1 of this report. This list includes race, ethnic origin, age, disability, sexual orientation, religious or other belief.

There are no other implementing provisions regarding this definition of ‘unequal treatment’. Court practice in this area is still to be developed in the near future. Considering the formal legal interpretation of this provision, it seems to comply with the requirements of the Directives regarding ‘direct discrimination’. However, further details and specifications in the text of the law (similar to the scrutinising provisions of the Law on Gender Equality) might prove very useful.

The draft Law on Equal Treatment defines ‘discrimination’ as an unjustified unequal treatment on a particular ground (Article 3 (1)). Direct discrimination shall be taken to occur where one person is treated less favourably than another person is, has been or would be treated in a comparable situation, on any of the grounds specified in Article 1 (1) (Article 3 (2)).

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

The exceptions to the prohibition on discrimination are provided in Article 10¹ of the Law on Employment Contracts:

“For the purposes of this Law, the following shall not be deemed to be unequal treatment:

- 1) the granting of preferences on grounds of pregnancy, confinement or giving care to minors or adult children who are incapacitated for work or parents who are incapacitated for work;
- 2) the granting of preferences on grounds of representing the interests of employees or membership in associations representing the interests of employees;
- 3) the granting of preferences to disabled workers, including the creation of a working environment that takes into account the special needs of disabled workers;
- 4) taking account of the sex, level of language proficiency, age or disability upon employment of a person, or upon giving work-related tasks instructions or enabling access to retraining or in-service training, if this is an essential and determinative professional requirement arising from the nature of the professional activity, or related conditions;
- 5) allowing a suitable working and rest time regime which satisfies the religious requirements of an employee”.

The draft Law on Equal Treatment defines ‘discrimination’ as an unjustified unequal treatment on a particular ground (Article 3 (1)). According to Article 9 (1), discrimination can be justified if it has a legitimate aim and the means of achieving that aim are proportionate to it. However, this provision cannot be applied in case of direct discrimination on the ground of race, ethnic origin and colour as well as in case of harassment (on any ground) (Article 9 (2)). In other words, direct discrimination on all other grounds (including age, disability, religion or belief and sexual orientation) can be justified. This is an interpretation of Article 2 (5) of the Directive 2000/78/EC made by the authors of the Estonian draft law in conjunction with

Article 11 of the Estonian Constitution.⁵⁵ It is also worth mentioning in this context that genuine and determining occupational requirements in Article 10 (1) of the draft Law on Equal Treatment constitute exceptions to direct discrimination on any ground.

Article 11 of the Estonian Constitution permits restrictions on rights and freedoms "in accordance with the Constitution". However, such restrictions must be necessary in a democratic society and shall not distort the nature of the rights and freedoms restricted. A similar wording is used in Article 9 (1) of the draft Law on Equal Treatment. Article 2 (5) of the Directive 2000/78/EC is much more detailed and it refers to justifications on the basis of public security, the maintenance of public order and the prevention of criminal offences, the protection of health and to the protection of the rights and freedoms of others. While Article 9 (1) of the draft law is fully in line with the Estonian constitutional provisions, the question can be raised regarding the scope of interpretation of Article 2 (5) of the Directive 2000/78/EC.

The draft Law on Equal Treatment (Article 26 (5)) is going to amend Article 10¹ of the Law on Employment Contracts (exceptions). Thus, section 3 (granting of preferences to disabled workers) will be applicable to both workers and persons applying for employment and section 4 will include solely references to genuine and determining occupational requirement.

The draft Law on Equal Treatment (Article 28 (4)) will introduce to the Law on Public Service a new Article 36¹ (2) with the list of exceptions to the prohibition on discrimination (it will be almost identical with the amended list in Article 10¹ in the Law on Employment Contracts).

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

There are no specific provisions to address this issue in Estonian current or draft legislation (other than those mentioned in section 2.2.a).

2.2.1 Situation Testing

- a) Does national law permit the use of 'situational testing'? If so, how is this defined and what are the procedural conditions for the admissibility of such evidence in court?*
- b) Is there any reluctance to use situational testing as evidence in court (e.g. ethical or methodology issues)? In this respect, does evolution in other countries influence your national law (European strategic litigation issue)?*
- c) Outline important case law within the national legal system on this issue.*
- d) Outline how situation testing is used in practice and by whom. (e.g. NGOs)*

The national law does not specifically address the use of 'situational testing'. There is no case law on this matter either. There are no indications that foreign case law may influence the situation in Estonia in this regard.

⁵⁵ See explanatory note attached to the Draft no. 1101 SE (10th Riigikogu); available at <http://www.riigikogu.ee> (20.01.2007).

The author is also not aware of any cases in which Estonian trade unions, NGOs or any other institutions have applied this method in practice. The author believes that the main reason therefore is not necessary reluctance but lack of awareness about such methods of prove.

The Code of Civil Procedure⁵⁶ provides for the following concept of evidence (Article 229):

“1) Evidence in a civil matter is any information which is in a procedural form provided by law and on the basis of which the court, pursuant to the procedure provided by law, ascertains the existence or lack of facts on which the claims and objections of the parties and other participants in the proceedings are based and other facts relevant to the just adjudication of the matter.

(2) Evidence may be the testimony of a witness, statements of a party or third party, documentary evidence, physical evidence, an on-the-spot visit of inspection or an expert opinion...”

The formal interpretation of these provisions leads us to believe that situation testing could be recognised by Estonian courts.

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

a) How is indirect discrimination defined in national law?

The amended Law on Employment Contracts only includes the following definition of indirect ‘unequal treatment’ (Article 10² (3)):

“Indirect unequal treatment shall be taken to occur where an apparently neutral provision, criterion or practice would put employees or persons applying for employment at a particular disadvantage compared with other employees or persons applying for employment on any of the grounds specified in Article 10 (3), unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.”

Again, the full list of the grounds listed in Article 10 (3) of the Law on Employment Contracts is provided in section 2.1 of this report. This list includes race, ethnic origin, age, disability, sexual orientation, religious or other belief. The definition of indirect discrimination appears to comply with the Directives.

The draft Law on Equal Treatment defines ‘discrimination’ as an unjustified unequal treatment on a particular ground (Article 3 (1)). Indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put a group of persons at a particular disadvantage compared with others on a ground specified in Article 1 (1) (Article 3 (4)). The draft law does not provide any further details on which test should be satisfied to prove indirect discrimination in a particular case.

There are several provisions in Estonian law that employ differential treatment on the basis of Estonian language proficiency and citizenship, which is outside the scope of the Directives. However, differential treatment on these grounds may under certain circumstances lead to

⁵⁶ RT I 2005, 26, 197; 2005, 49, 395

indirect discrimination based on racial or ethnic origin. Interestingly, during the sociological study that was carried out in Tallinn in 2005, people were asked about reasons for the over-representation of ethnic Estonians in the highest political positions. 32% of ethnic Estonians (and only 19% of ethnic non-Estonians) referred to citizenship to explain this situation. As for ethnic minorities, 48% of them mentioned ethnic origin as a main reason (against 9% of majority members)⁵⁷.

- b) What test must be satisfied to justify indirect discrimination?*
- c) Is this compatible with the Directives?*

According to Article 10¹ of the Law on Employment Contracts, “giving preferences to employees with disabilities, including the creation of appropriate work conditions for them” is not regarded as unequal treatment (see also section 2.2.b of this report). The Law does not provide much detail regarding the test which must be satisfied to justify indirect discrimination (see 2.3.a). However, this legal act appears to be in line with the Directives.

As it was mentioned above, according to the draft Law on Equal Treatment discrimination (including all types of indirect discrimination) can be justified if it has a legitimate aim and the means of achieving that aim are proportionate to it (Article 9 (1)).

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

The Law on Employment Contracts does not stipulate how a comparison is to be made in cases of age discrimination. Similar provisions cannot be either found in the draft Law on Equal Treatment.

2.3.1 Statistical Evidence

- a) Does national law permit the use of statistical evidence to establish indirect discrimination? If so, what are the conditions for it to be admissible in court?*
- b) Is the use of such evidence commonly used? Is there any reluctance to use statistical data as evidence in court (e.g. ethical or methodology issues)? In this respect, does evolution in other countries influence your national law?*
- c) Please illustrate the most important case law in this area.*

National law does not address the issue of statistical evidence in the context of discrimination. There is no case law or any other important practical examples in this field in Estonia. The author believes that the main reason therefore is not necessary reluctance but lack of awareness of legal practitioners about such methods of prove. There are no indications that foreign case law may influence the situation in Estonia in this regard. However, Estonian law does not explicitly ban the use of statistical evidence in courts (see also the definition of evidence in civil procedure in section 2.2.1). Furthermore, the explanatory note to the draft Law on Equal Treatment refers to statistical and sociological data in the context of indirect discrimination⁵⁸.

⁵⁷ Sociological study in Tallinn conducted by LICHR and Saar Pool, September 2005. Database of the study; Question 14 (on file with the author)

⁵⁸ See explanatory note attached to the Draft no. 1101 SE (10th Riigikogu); available at <http://www.riigikogu.ee> (20.01.2007).

d) Are there national rules which permit data collection? Please answer in respect of all 5 grounds.

In Estonia the rules regarding the collection of data on individuals are stipulated in the Law on Personal Data Protection adopted in 2003⁵⁹. The first Law on Personal Data Protection was adopted in 1996⁶⁰ and the system of data protection is still under construction in the country. To the best of the author's knowledge the issue of data protection in the anti-discrimination context has never been publicly addressed. One of the reasons for that is that the first comprehensive anti-discrimination norms (substantive law) were adopted as late as 2004.

Data on ethnic or racial origin, disability, religion or belief or sexual orientation are regarded as sensitive personal data by the Law on Personal Data Protection (Article 4 (3)), and quite rigid rules were stipulated for their processing. Concerns were raised by the local academic community that these rules are a considerable burden for those dealing with scientific research (this fact is reflected in the 2004 annual report of the Data Protection Inspectorate⁶¹).

According to the Law on Personal Data Protection (Article 24), processors of sensitive personal data are required to register the processing of such data with the Data Protection Inspectorate. The Inspectorate shall refuse to register processing if, *inter alia*, there is no legal basis for the processing of the data or the conditions for its processing do not comply with the requirements of the law. The main principles of the processing of data read as follows (Article 6):

- “1) the principle of legality – personal data may be collected in an honest and legal manner;
- 2) the principle of purposefulness – personal data may be collected only for specified and legitimate purposes and personal data shall not be processed in a manner which fails to comply with the purposes of data processing;
- 3) the principle of minimality – personal data may be collected only to the extent which is necessary for the purposes for which they are collected;
- 4) the principle of restriction on use – personal data may be used for other purposes only with the consent of the data subject or with the permission of a competent body;
- 5) the principle of data quality – personal data shall be kept up to date and shall be complete and necessary for the given purpose of the data processing;
- 6) the principle of security – security measures to prevent the involuntary or unauthorised alteration, disclosure or destruction of personal data shall be applied in order to protect the data;
- 7) the principle of individual participation – a data subject shall be notified of data collected on him or her, access to data pertaining to the data subject shall be ensured to him or her and the data subject has the right to demand the rectification of inaccurate or misleading data”.

⁵⁹ *Isikuandmete kaitse seadus*, RT I 2003, 26, 158

⁶⁰ RT I 1996, 48, 944

⁶¹ Andmekaitse Inpektsioon, *Ettekanne 2004*, at <http://www.dp.gov.ee/?js=1> (20.01.2007)

Without appropriate administrative practice we may only *presume* that the fight against discrimination could be recognised as a legitimate purpose for personal data processing. However, in its 2006 communication, the Data Protection Inspectorate stressed that the opportunities of employers are limited by both the principle of minimality and Article 30 (2) of the Law on Employment Contracts, which prohibits the requesting of documents which are not prescribed by law or governmental decrees. In fact, an employer may under certain circumstances possess only that information which pertains to the health or disability of his or her employee. As for educational and medical institutions, they may under certain conditions collect information on the disabilities of their students or clients. Institutions that provide communal housing services are not supposed to collect any sensitive personal data, stated the Inspectorate⁶². Under such circumstances it is rather difficult for employees or clients to get any statistical evidence to prove cases of indirect discrimination.

At the same time, there are no limits on the courts to use general statistical or census data if appropriate. For instance, according to the Law on Wages “[a]n employer does not have the right to disclose information concerning the wages calculated, paid or payable to an employee or information concerning the employee’s wage conditions without the consent of the employee or basis arising from the law” (Article 8 (3)). However, this prohibition does not apply in cases where information is required by a court, the Prosecutor's Office, a pre-trial investigation authority, the Tax and Custom Board, the Statistical Office, the Labour Inspectorate or the State Audit Office, or in cases prescribed by the Law on Anti-Corruption and in other laws (Article 8 (3¹)). The draft Law on Equal Treatment is going to provide similar rights to the equal treatment and equality commissioner (a new specialised body) (Article 27).

The last national census took place in Estonia in 2000. Its database includes information on citizenship, ethnic origin, native language, religion, a situation of disability for one year or longer, place of birth, place of birth of parents, year of arrival in Estonia, etc (Law on Population and Housing Census⁶³, Article 9). Estonia also keeps a Population Register, which includes data on citizenship, place of birth, when and from where a person arrived in Estonia, etc. Additionally, the register includes references to a person’s close relatives (such as parents) and therefore to their personal information. Information on ethnic origin and native language is collected with the person’s consent. The register does not deal with data on religion or disability (Law on Population Register⁶⁴, Article 21). The databases of neither the 2000 census nor the Population Register include information regarding sexual orientation. Both the Law on Population and Housing Census and the Law on Population Register provide for rigid rules of personal data protection.

2.4 Harassment (Article 2(3))

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

b) Is harassment prohibited as a form of discrimination?

⁶² Data Protection Inspectorate; Written communication no. 1.2-2/05/457 of 25 January 2006

⁶³ *Rahva ja eluruumide loenduse seadus*, RT I 1998, 52/53, 772

⁶⁴ *Rahvastikuregistri seadus*, RT I 2000, 50, 317

The concept of harassment in Estonia is rather new and is mostly related to the process of transposition of the Directives. Since 1 May 2004 two laws have included detailed definitions of harassment: the Law on Employment Contracts and the Law on Gender Equality. Even before that, the Law on the Cultural Autonomy of National Minorities prohibited actions “[t]o ridicule and to obstruct the practice of ethnic cultural traditions and religious practices and to engage in any activity, which is aimed at the forcible assimilation of national minorities (Article 3 (2)).” However, the provision of this Law lacks guarantees of implementation.

The Law on Employment Contracts refers to harassment as a form of direct discrimination (Article 10² (4)):

“For the purposes of this Law, harassment shall be deemed to be a form of direct discrimination on any of the grounds specified in Article 10 (3). Harassment shall be taken to occur where unwanted conduct or an unwanted act, either verbal, non-verbal or physical, takes place against a person in a relationship of subordination or dependency with the purpose or effect of violating the dignity of the person and of creating a disturbing, intimidating, hostile, degrading, humiliating or offensive environment, and the person rejects such conduct or tolerates it for the reason that it affects his or her access to an office or employment or in order to maintain the employment relationship, to have access to training, to receive remuneration or to have access to other advantages or benefits.”

Again, the full list of the grounds listed in Article 10 (3) of the Law on Employment Contracts is provided in section 2.1 of this report. This list includes race, ethnic origin, age, disability, sexual orientation and religious or other belief.

This definition is not fully in line with the relevant provisions of the Directives because it presupposes ‘subordination’ or ‘dependency’ between a perpetrator and a victim of harassment. This provision is identical with the definition of ‘harassment’ in the Law on Gender Equality (Article 3 (1)) which was adopted earlier than the relevant amendments to the Law on Employment Contracts.

The draft Law on Equal Treatment defines harassment as an unwanted conduct on a particular ground with the purpose or effect of violating the dignity of the person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. Harassment is referred to as a form of direct discrimination (Article 3 (3)). This definition will be fully in line with the both Directives. As it was mentioned above, it will substitute the definition of harassment provided for in the Law on Employment Contracts.

Additionally, several articles of the Penal Code include provisions that could be used by victims of the most violent acts of harassment. For instance, the Penal Code makes punishable a threat to kill, to cause damage to a person’s health or to cause significant damage to or destroy property (Article 120), as well as physical abuse (Article 121).

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

No. Under circumstances of ‘non-violent’ harassment, a victim can only use those legal means that provide for the protection of honour and dignity in cases of insult and defamation. According to Article 25 of the Constitution, “everyone has the right to compensation for moral and material damage caused by the unlawful action of any person”. The new Penal Code has decriminalised these offences. However, they are still subject to civil liability. This is to emphasise that Estonian courts recognise the right to compensation for moral damages caused by private persons and state officials alike⁶⁵. However, according to the Law on Obligations⁶⁶, compensation for non-material damage caused by breach of an individual’s right (including defamation) must be paid only if it is justified by the circumstances of the case (Article 134 (2)). A special Law on State Liability⁶⁷ now provides the bases of and procedure for the protection and restoration of rights violated through the exercise of powers of a public authority and the performance of other public duties, and also provides compensation for the damage caused. Additionally, a recently adopted Law on Victim Support⁶⁸ makes it possible for a crime victim to apply for publicly funded compensation.

2.5 Instructions to discriminate (Article 2(4))

Does national law prohibit instructions to discriminate?

The formal legal and grammatical interpretation of Article 12 of the Constitution leads to the conclusion that it bans instructions to discriminate on any ground.

Article 10² (5) of the Law on Employment Contracts stipulates that “[a]n instruction given to a person to discriminate against another person shall be deemed to be discrimination”. The same provision can be found in the draft Law on Equal Treatment (Article 3 (5)).

As for criminal offences, provisions regarding accomplices (abettors) may be used. “An abettor is a person who intentionally induces another person to commit an intentional unlawful act” (Article 22 (2) of the Penal Code). According to the general rules, “a punishment shall be imposed on an accomplice pursuant to the same provision of law which prescribes the liability of the principal offender”. These provisions can be applied in the context of Article 151 (incitement to hatred or violence) and Article 152 (violation of equality) (see also section 2.1 of this report).

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

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

⁶⁵ See e.g. Decision of the Civil Law Chamber of the National Court of 29 November 2000; published in RT III 2000, 29, 316

⁶⁶ *Võlaõigusseadus*, RT I 2001, 81, 487; RT I 2002, 60, 374

⁶⁷ *Riigivastutuse seadus*, RT I 2001, 47, 260

⁶⁸ *Ohvriabi seadus*, RT I 2004, 2, 3

- b) Does failure to meet the duty count as discrimination? Is there a justification defence? How does this relate to the prohibition of direct and indirect discrimination?
- c) Has national law implemented the duty to provide reasonable accommodation in respect of any of the other grounds?

The only relevant provision of the Law on Employment Contracts is the above-mentioned instruction not to regard as ‘unequal treatment’ (i.e. either direct or indirect discrimination) the “granting of preferences to disabled workers, including the creation of a working environment that takes into account the special needs of disabled workers” (Article 10¹). Thus, the Law on Employment Contracts does not prescribe any positive obligation on the part of an employer to satisfy the special needs of disabled workers and does not regard a lack of such ‘preferences’ as discrimination.

According to Article 10 (1) of the Law on Occupational Health and Safety⁶⁹, an employer shall create suitable working and rest conditions for disabled workers (as well as for pregnant women, women who are breastfeeding and minors). Furthermore, “[t]he work and workplace of a disabled worker shall be adapted to his or her physical and mental abilities” (Article 10 (4)). A special working environment council⁷⁰ shall assist in the creation of suitable working conditions and work organisation for female workers, minors and disabled workers (Article 18 (6) 5). It seems that the standards provided for in the Law on Occupational Health and Safety are less demanding than those stipulated in Article 5 of Directive 2000/78/EC. First, they deal only with ‘workers’ and do not explicitly regulate the situation of access to employment. Second, the relevant provisions of the Law on Occupational Health and Safety do not address the issue of advancement in employment or access to training of a person with a disability. One will have to wait for interpretation of these standards in the Estonian courts.

The new Law on Employment Services and Allowances⁷¹ (or the Law on Labour Market Services and Benefits; valid since 1 January 2006) only provides unemployed disabled people with special services, including ‘accommodation of the workplace and means to work’. This service might be granted on the basis of an administrative contract between the Labour Market Board and an employer, in which the state will compensate the employer for up to 50% of the expenses that are necessary for that accommodation, up to a specified maximum amount (Article 20). Another service, namely ‘providing free use of a technical appliance necessary for work’, might be offered on the basis of an administrative contract between the Labour Market Board and an employer or a disabled person (Article 21). Two other new services are ‘support at the interview [with a potential employer]’ and ‘work with [the assistance of] a support person’ (Articles 22-23). According to Article 9 (5) of the Law, all of these services will only be granted to disabled persons if they are necessary to overcome the disability-related obstacle to his or her employment, and if other employment services (e.g. information on the situation in the labour market, employment mediation, vocational training, etc) have been ineffective.

The Law on Employment Services and Allowances was not adopted to implement Directive 2000/78/EC. This Law does not oblige employers to do something for disabled persons. It

⁶⁹ *Töötervishoiu ja tööohutuse seadus*, RT I 1999, 60, 616

⁷⁰ A working environment council is a body for co-operation between an employer and the workers’ representatives which resolves occupational health and safety issues in the enterprise (Law on Occupational Health and Safety, Article 18 (1))

⁷¹ *Tööturuteenuste ja -toetuste seadus*, RT I 2005, 54, 430

will, however, create a positive framework for the reasonable accommodation of disabled people in Estonia. The partial reimbursement by the state of accommodation expenses will hopefully influence the strategy of employers and will encourage them to employ disabled people, which is an important role as there are currently no effective legal norms to address the issue of reasonable accommodation in Estonia. The provisions of this law might be of added value for a worker who has become disabled in the employer's enterprise as a result of an occupational accident or occupational disease. According to the Law on Occupational Health and Safety (Article 10 (3)), an employer is required to enable, pursuant to the procedure provided by employment laws, such a worker to continue work suitable for him or her in the enterprise.

The draft Law on Equal Treatment will introduce several provisions, which will be quite similar to the provision in Article 5 of the Directive 2000/78/EC. Article 11 (1) stipulates that employers shall take reasonable measures to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer. In order to determine what would amount to a 'disproportionate burden' account should be taken of the "financial and other costs entailed, the scale of the financial resources of the organisation or undertaking in question, and the possibility of obtaining public or other funding" (Article 11 (2)).

d) Does national law require buildings and infrastructure to be designed and built in a disability-accessible way? If so, could and has a failure to comply with such legislation be relied upon in a discrimination case based on the legislation transposing Directive 2000/43?

According to Article 3 (9) of the Law on Building⁷², "[i]f required for the purpose of use of the construction works, the works, parts thereof which are for public use and the premises and sites thereof shall be accessible to and usable by persons with reduced mobility and by visually impaired and hearing impaired persons". The detailed requirements are established in the decree of 28 November 2002 by the Minister of Economic Affairs and Communications⁷³ for both public places (including infrastructure) and public buildings (e.g. administrative buildings, hospitals, educational institutions etc.). According to Article 19 of the decree, the rules regarding the accessibility of buildings for disabled people are equally applicable to existing public buildings if they are renovated.

The Law on Building does not relate to the transposition of the anti-discrimination directives⁷⁴. Violation of its norms would be unlikely to be treated in Estonia as discrimination on the ground of disability. Additionally, under those circumstances where Estonian legislation does not provide for any detailed obligations as regards the reasonable accommodation of disabled people, it will be difficult to use the norms of the Law on Building in disputes between an employer and disabled workers or potential workers.

⁷² *Ehitusseadus*, RT I 2002, 47, 297

⁷³ *Nõuded liikumis-, nägemis- ja kuulmispuudega inimeste liikumisvõimaluste tagamiseks üldkasutatavates ehitistes*, RTL 2002, 145, 2120

⁷⁴ See explanatory note attached to Draft no. 805 SE (9th *Riigikogu*); available at <http://www.riigikogu.ee> (20.01.2007).

2.7 Sheltered or semi-sheltered accommodation/employment

- a) *To what extent does national law make provision for sheltered or semi-sheltered accommodation/employment for disabled workers?*
- b) *Would such activities be considered to constitute employment under national law?*

There are no special provisions in the law regarding sheltered or semi-sheltered accommodation/employment for disabled workers. However, the state promotes the employment of disabled persons by paying social tax within certain limits for a worker who receives a pension for incapacity for work (Law on Social Tax, Article 6 (1) 5).⁷⁵ Such work is considered as ordinary employment.

The Law on Employment Services and Allowances also stipulates the so-called wage allowance. For six months the state will pay within certain limits 50% of a wage of a person who belongs to a group of risk (unemployed persons who were more than 12 months running registered unemployed (6 months in case of persons aged 16-24) or who were released from a prison within 12 months before registration as unemployed (Article 18)). Many disabled people may benefit from this regulation because unemployment rate among them (including long-term unemployment) is traditionally high.

3. PERSONAL AND MATERIAL SCOPE

3.1 Personal scope

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

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

Two relevant national laws (the Law on Employment Contracts and the Law on the Legal Chancellor) do not include any specifications regarding the rights of EU and non-EU nationals or residential status in the anti-discrimination context. The same approach is used in the draft Law on Equal Treatment: This act will not be applied in cases concerning the right of non-EU citizens to entry into, stay, reside or work in Estonia (Article 2 (2)).

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

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

In Estonia there are very few relevant provisions to be found. However, it would be safe to claim that in local legal tradition only natural persons could be recognised as victims of discrimination.

As was mentioned in section 1 of this report, Article 12 of the Constitution should be observed by the state, public authorities, natural and legal private persons (and both legal and

⁷⁵ These provisions are used in practice.

natural persons might be regarded as ‘discriminators’). According to grammatical interpretation, this provision provides only natural persons with protection against discrimination. However, “[t]he rights, freedoms and duties set out in the Constitution shall extend to legal persons in so far as this is in accordance with the general aims of legal persons and with the nature of such rights, freedoms and duties” (Article 9 (2)). Thus, the constitutional provision makes it possible to grant legal persons protection against discrimination (provided there are changes in local legal theory in the future).

Article 152 of the Penal Code bans unlawful restriction of the rights of a ‘human being’ or granting of unlawful preferences to a ‘human being’ (*inimene*). As for offenders, the relevant anti-discrimination provisions of the Penal Code (listed in section 2.1 of this report) are applicable solely to natural persons (with the exception of the provisions regarding incitement to hatred, Article 151).

The Estonian Office of the Legal Chancellor is a special quasi-judicial body and a body for the promotion of equality. Everyone (formally both natural and legal persons) enjoys the right to apply to the Chancellor with complaints regarding discrimination perpetrated by both natural and legal persons (Article 19 of the Law on the Legal Chancellor). However, we would not expect legal persons to be recognised as victims of discrimination by this institution. These are no practical examples to confirm or reject this assumption.

Detailed substantive legal provisions in the fields covered by the Directives can be found only in the Law on Employment Contracts. This Law extends to all employees and employers who enter into employment contracts (Article 5) and it prohibits discrimination against employees or persons applying for employment either directly or indirectly (Article 10² (2)). In any case, the employee may only be a natural person (Article 2). As for employers, they could be either legal or natural persons (Article 3).

3.1.3 Scope of liability

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

Estonian anti-discrimination legislation is silent about these issues⁷⁶. According to the general rule, however, “[i]f one person engages another person in the person's economic or professional activities on a regular basis, the person shall be liable for any damage unlawfully caused by the other person on the same basis as for damage caused by the person, if the causing of damage is related to the person's economic or professional activities” (Article 1054 (1) of the Law on Obligations).

⁷⁶ This problem was specifically addressed only in the Law on Gender Equality. Article 6 (2) of this Law established that the activities of an employer shall also be deemed to be discriminating if “he or she fails to ensure that employees are protected from sexual harassment in the working environment”.

3.2 Material Scope

Article 12 of the Constitution is applicable to all spheres of life (see section 1 of this report).

As mentioned above, only two laws include specific anti-discrimination provisions, the Law on Employment Contracts and the Law on Gender Equality. The material scope of the Law on Employment Contracts is much narrower than that of the Directives because it is applicable solely to the relations that form the basis of the contract in question. Additionally, under Article 7, the Law cannot be applied in the following cases:

- 1) service as a member of the *Riigikogu*, the *President of the Republic* or an *official* appointed to office by the President of the Republic or the *Riigikogu*;
- 2) state *officials* and local government officials whose service relationships are regulated by the Law on Public Service⁷⁷;
- 3) active service in the *armed forces*;
- 4) work as a member of a *farm family* for family enterprise in a family farm enterprise or family enterprise;
- 5) *household work* by parents, spouses or children for one another and *care* by such persons for one another;
- 6) work by family members in a *shared household* and *care* for family members;
- 7) work on the basis of a *contract of service*. Contracts of service are regulated by a specific law⁷⁸.
- 8) work in a *religious organisation* as a person conducting religious services if the founding document of the organisation does not require entry into an employment contract with the person⁷⁹;
- 9) performance of a transaction on the basis of an *authorisation* if the person performing the transaction receives income from the transaction and bears proprietary risk for the success of the transaction;
- 10) relationships of *directors of bodies*, of legal persons or Estonian branches of foreign companies, and members of *administrative boards* of state enterprises with legal persons, Estonian branches of foreign companies or state enterprises.
- 11) activities based on contracts for services or other *civil law contracts*.
- 12) work performed during *imprisonment*. The Law on Employment Contracts extends to people who community work in lieu of imprisonment, subject to the exceptions prescribed by other laws.
- 13) other activities directly prescribed by law and persons directly referred to by law.

The Office of the Legal Chancellor, as a quasi-judicial institution and a body for the promotion of equal treatment, may deal with discrimination, and there are very few limits for the Chancellor as regards material scope (see section 6.1 of this report for details). However, his or her work is mostly regulated by procedural legal norms. Without relevant substantive law it will be extremely difficult for the Office to deal with victims of discrimination in fields

⁷⁷ *Avaliku teenistuse seadus*, RT I 1995, 16, 228; RT I 1999, 7, 112

⁷⁸ Contract of services (*teenistuseleping*) is a rather specific type of employment. Such contracts are signed, for instance, by the members of the management boards of the publicly owned *Eesti Raadio* and *Eesti Televisioon* (Article 32² (4) of the Law on Broadcasting, *Ringhäälinguseadus*, RT I 1994, 42, 680).

⁷⁹ See section 4.2 of this report for details.

other than that of employment. It is worth mentioning that, in cases of sex discrimination, the Chancellor will have at his or her disposal the full set of legal provisions required under the Law on Gender Equality to deal with sex discrimination in all spheres of 'social life'.

The draft Law on Equal Treatment is applicable in all spheres of 'social life' with the exception of 1. relations in family or private life; 2. gender equality issues; 3. the right of non-EU citizens to the entry into, stay, reside or work in Estonia (Article 2 (2)). Gender related issues will be regulated by the Law on Gender Equality.

3.2.1 Employment, self-employment and occupation

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

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

The Law on Employment Contracts is the only employment-related legal act that includes specific anti-discrimination provisions within the scope of the Directives. According to Article 5 of the Law, "[t]he Law on Employment Contracts extends to all employees and employers who enter into employment contracts..." As mentioned in the previous section, certain types of employment will not be regulated by this Law. Most importantly, the Law is not applicable to the work of state or local self-government officials; to active service in the armed forces; or to work in a religious organisation as a person conducting religious services (if an employment contract is not required according to the founding documents of the organisation). Naturally, the Law is not applicable to self-employment.

It is worth emphasising that employment contracts will be entered into by state and local self-government bodies and institutions with their workers who are NOT public officials (the so-called support staff, e.g. drivers, cleaners etc).

In any case, the general anti-discrimination provisions of the Constitution may be applied to all sectors of public and private employment and occupation, including contract work, self-employment, military service and the holding of a statutory office (see section 1 of this report for details).

The draft Law on Equal Treatment is applicable in all spheres of 'social life', while employment, access to profession, self-employment, membership in professional unions is explicitly mentioned in the text (Article 2 (1)). All five grounds of discrimination will be covered.

3.2.2 Conditions for access to employment, to self-employment or to occupations, including selection criteria, recruitment conditions and promotion, whatever the branch of activity and at all levels of the professional hierarchy (Article 3(1)(a)). Is the public sector dealt with differently to the private sector?

As mentioned above, the Law on Employment Contracts is the only employment-related legal act that includes specific anti-discrimination provisions within the scope of the

Directives. According to Article 10 (1)-(2) of the Law, these provisions are applicable to employment, entry into *employment* contracts and promotion. Furthermore, ‘persons applying for employment’ are explicitly mentioned in the relevant anti-discrimination provisions (Article 10²).

Estonian legislation does not include specific anti-discrimination provisions regarding access to self-employment, employment in the public sector or access to occupations (other than the general anti-discrimination provisions of the Constitution studied in section 1 of this report).

The draft Law on Equal Treatment is applicable in all spheres of ‘social life’, while employment, entry into employment contracts, employment or selection in (public) service, promotion, conditions of access to profession are explicitly mentioned in the text (Article 2 (1)). All five grounds of discrimination will be covered.

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

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

In Estonian legislation the relevant provisions may be found in the Law on Employment Contracts. The anti-discrimination provisions of this Law are applicable to: remuneration, promotion in employment or office, giving work-related tasks and the termination of employment contracts (Article 10 (2)). Additionally, Article 5 of the Law on Wages includes a general ban on discrimination (in force since March 1994):

“It is prohibited to increase or reduce wages on the grounds of an employee’s sex, ethnic origin, colour, race, native language, social origin, social status, previous activities, religion, political or other opinion, or attitude towards the duty to serve in the defence forces. It is prohibited to reduce wages on the grounds of marital status, family obligations, membership in citizens’ associations or representation of the interests of employees or employers”.

The draft Law on Equal Treatment is applicable in all spheres of ‘social life’, while working conditions, promotion, remuneration, giving work-related task and termination of employment contracts and release of official from service are explicitly mentioned in the text (Article 2 (1)). All five grounds of discrimination will be covered.

b) In respect of occupational pensions, how does national law ensure the prohibition of discrimination on all the grounds covered by Directive 2000/78?

The national law does not elaborate these issues. If adopted, the draft Law on Equal Treatment will be applicable in all spheres of ‘social life’. Systems of social and health protection as well as social insurance are explicitly mentioned in the text of the draft (Article 2 (1)). All five grounds of discrimination will be covered.

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

Note that there is an overlap between ‘vocational training’ and ‘education’. For example, university courses have been treated as vocational training in the past by the Court of Justice. Other courses, especially those taken after leaving school, may fall into this category. Does the national Anti-discrimination law apply to vocational training outside the employment relationship, such as that provided by technical schools or universities?

In Estonian legislation the only relevant provisions may be found in the Law on Employment Contracts. The anti-discrimination provisions of this Law are applicable to access to retraining or in-service training (Article 10 (2)). In the context of Estonian legislation ‘retraining’ and ‘in-service training’ would cover the notions of ‘vocational guidance’, ‘vocational training’, ‘advanced vocational training and retraining’ and ‘practical work experience’ mentioned in Article 3 (1) (b) of Directive 2000/78/EC.

The draft Law on Equal Treatment is applicable in all spheres of ‘social life’, while access to retraining or in-service training (at workplace) as well as professional training, professional guidance and education are explicitly mentioned in the bill (Article 2 (1)). If adopted, the draft law will regulate anti-discrimination issues in the area of professional training outside employment relations (including technical schools and universities). All five grounds of discrimination will be covered.

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

The Estonian Law on Trade Unions⁸⁰, the Law on the Estonian Bar Association⁸¹ and the Law on Notaries⁸² do not include an explicit ban on discrimination by trades unions or the above-mentioned professional organisations. There are no special laws that regulate the work of employers’ organisations (in most cases they are run as ordinary non-profit organisations). Under Article 4 (1) of the Law on Trade Unions, “[p]ersons have the right to found trade unions freely, without prior permission, and to join or not to join trade unions.” Furthermore, constitutional anti-discrimination provisions (see section 1 of this report) may be applied to membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, as well as the benefits provided by such organisations.

Article 10 (3) of the Law on Employment Contracts prohibits discrimination on the grounds of representing the interests of employees or membership in workers' associations. The ground ‘membership in workers’ associations’ was included in the text of this provision in

⁸⁰ *Ametiühingute seadus*, RT I 2000, 57, 372

⁸¹ *Advokatuuriseadus*, RT I 2001, 36, 201

⁸² *Notariaadiseadus*, RT I 2000, 104, 684

April 2004 along with other amendments necessary to implement the Directives. Before that date the law included the ground of ‘membership in citizens’ organisations’.

The draft Law on Equal Treatment is applicable in all spheres of ‘social life’, while membership in workers’ and employer’s organisations, as well as professional organisations is explicitly mentioned (Article 2 (1)). All five grounds of discrimination will be covered.

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

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

In relation to religion or belief, age, disability and sexual orientation, does national law seek to rely on the exception in Article 3(3), Directive 2000/78?

In Estonia there are no specific anti-discrimination provisions as regards social protection, including social security and healthcare. In these areas only general constitutional rules regarding the ban on discrimination may be used (see section 1 of this report for details). This statement is valid for any grounds of discrimination.

The draft Law on Equal Treatment is applicable in all spheres of ‘social life’, while social and health protection and social insurance are explicitly mentioned (Article 2 (1)). All five grounds of discrimination will be covered.

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

This covers a broad category of benefits that may be provided by either public or private actors, granted to people because of their employment or residence status, for example, reduced rate train travel for large families, child birth grants, funeral grants and discounts on access to municipal leisure facilities. It may be difficult to give an exhaustive analysis of whether this category is fully covered in national law, but you should indicate whether national law explicitly addresses the category of ‘social advantages’ or if discrimination in this area is likely to be unlawful.

In Estonia there are no specific anti-discrimination provisions as regards social advantages. In this area only general constitutional rules regarding the ban on discrimination may be used (see section 1 of this report for details). This statement is valid for any grounds of discrimination.

In previous years the Office of the Legal Chancellor (an ombudsman-like institution and equality body), identified a breach of the equality principle in access to social advantages, but not on grounds protected under the Directives (the case concerned differences in price for tickets for the Tallinn public transport system for residents and non-residents of the Estonian

capital⁸³). However, there are reasons to believe that the same approach might be used by the Chancellor in cases of unequal treatment in access to social advantages within the scope of the Directives.

The draft Law on Equal Treatment is applicable in all spheres of ‘social life’ (Article 2 (1)). All five grounds of discrimination will be covered.

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

This covers all aspects of education, including all types of schools. *Please also consider cases of segregation in schools, affecting notably the Roma community. If such cases exist, please refer also to relevant legal/political discussions that may exist in your country on the issue.*

In Estonia there are no specific anti-discrimination provisions in regard to education. However, general constitutional rules on the ban on discrimination may be used in this field (see section 1 of this report for details). This statement is valid for any grounds of discrimination.

According to Article 4 (1) of the Law on Education⁸⁴ the state and local self-government shall ensure for every person an opportunity to receive obligatory education (this requirement is essentially based on Article 37 of the Constitution). In conjunction with Article 12 of the Constitution this provision might be interpreted to the effect that obligatory education should be provided without any discrimination on any grounds. Several other provisions might be used by state and local government authorities to this end. For instance, “[d]epending on the need of students to receive special education, special support, special treatment due to behavioural problems, or treatment, a basic school or a upper secondary school may be a school for students with special needs or alternatively a sanatorium school” (Article 4 (1) of the Law on Basic School and Upper Secondary School⁸⁵). The Minister of Education and Research establishes special rules enabling disabled persons to study in vocational schools (Article 14 (4) of the Law on Vocational School⁸⁶). The Law on Adult Education⁸⁷ established certain guarantees for adults who want to continue their studies. For instance, local authorities shall provide for interested adults basic and secondary education, shall facilitate the provision of professional education and shall support the provision of training to unemployed persons, persons seeking work, other socially underprivileged persons and disabled persons (Article 7).

There is no problem concerning the segregation of ethnic minorities in the Estonian school system. However, there might be small minority groups that experience difficulties in access to general schools due to low proficiency in either Estonian or Russian, e.g. Roma. In 2006, the European Commission against Racism and Intolerance (ECRI), of the Council of Europe, informed that it had further received reports that “in Valga and Tartu some Roma children are

⁸³ See the annual report of the Legal Chancellor presented to the *Riigikogu* on 30 September 2004, published in RTL 2004, 131, 2029, p 3.6

⁸⁴ *Eesti Vabariigi haridusseadus*, RT I 1992, 12, 192

⁸⁵ *Põhikooli- ja gümnaasiumiseadus*, RT I 1993, 63, 892, RT I 1999, 42, 497

⁸⁶ *Kutseõppeasutuse seadus*, RT I 1998, 64-65, 1007; RT I 2001, 68, 406

⁸⁷ *Täiskasvanute koolituse seadus*, RT I 1993, 74, 1054; RT I 1998, 71, 1200

sent to schools for mentally handicapped children simply because they do not speak Estonian”.⁸⁸ However, similar information has never been provided from other publicly available sources. In 2003/4 academic year there were 56 Roma-speaking pupils in Estonian schools (mostly at the basic school level)⁸⁹ (the total number of Roma in the beginning of 2000 was at least 542⁹⁰). In Central Estonia in 2004 only 7 (out of 19) school age Roma children attended educational institutions.⁹¹ In 2005/6 academic year there were even less Roma-speaking children in schools (36).⁹² In 2005 the semi-official non-Estonians’ Integration Foundation was involved in mapping of the Roma people situation in Estonia. As a result it provided support for the creation of Roma people day centres in Valga and Tartu.⁹³

The draft Law on Equal Treatment is applicable in all spheres of ‘social life’, while education is explicitly mentioned (Article 2 (1)). All five grounds of discrimination will be covered.

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

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

In Estonia there are no specific anti-discrimination provisions as regards access to and supply of goods and services. However, in this area, general constitutional rules regarding the ban on discrimination may be used (see section 1 of this report for details). This statement is valid for any grounds of discrimination.

Nevertheless, several provisions of the Law on Trading⁹⁴ and the Law on Public Transport⁹⁵ might be useful in the non-discrimination context. They were not drafted as a means to fight discrimination in access to goods and services. However, practising lawyers might refer to these provisions in the interests of victims of discrimination.

As for access to the supply of goods and services, Article 4 (2) 1 of the recently adopted Law on Trading makes it an offence for a trader “illegally to restrict or favour the sale of goods or services or to influence consumers through disparagement of the goods or services of other traders, through the prohibited use of a business name or in any other manner which is contrary to good trade ethics and practice”. Article 30 of the same Law foresees liability (fines) for ‘violation of requirements established for sale of goods or services’.

⁸⁸ European Commission against Racism and Intolerance, *Third Report on Estonia, adopted on 24 June 2005 made public on 21 February 2006, CRI(2006)1*, section 138

⁸⁹ Ministry of Education and Research; Written communication no. 3.1-3/4172 of 3 August 2004

⁹⁰ Statistical Office of Estonia, *2000 Population and Housing Census: Citizenship, Nationality, Mother Tongue and Command of Foreign Languages II*, Tallinn: Statistical Office of Estonia, 2001, Table 7

⁹¹ *Baltic News Service*, (16.09.2004)

⁹² Ministry of Education and Research; Written communication no. 3.1-3/204 of 13 April 2006

⁹³ Non-Estonians’ Integration Foundation, *Integration Yearbook 2005*, Tallinn: MEIS, 2006, p. 62

⁹⁴ *Kaubandustegevuse seadus*, RT I 2004, 12, 78

⁹⁵ *Ühistranspordiseadus*, RT I 2000, 10, 58

The recently adopted Requirements for Carriage by Bus, Tram or Trolleybus and for Taxi Service and for Carriage of Baggage⁹⁶ (adopted by a decree of the Minister of Economy and Communications) includes an explicit ban against taxi drivers denying taxi service without good reasons, which are listed in Article 16 (4) of the same requirements (Article 16 (3)). Violations of these rules are punishable by fine according to Article 54² of the Law on Public Transport.

The draft Law on Equal Treatment is applicable in all spheres of ‘social life’, while access to publicly available goods and services is explicitly mentioned (Article 2 (1)). All five grounds of discrimination will be covered.

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

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

In Estonia there are no specific anti-discrimination provisions as regards housing. In this area only general constitutional rules on the ban on discrimination may be used as well as criminal law provisions (see section 1 of this report for details). This statement is valid for any grounds of discrimination.

The draft Law on Equal Treatment is applicable in all spheres of ‘social life’, while housing is explicitly mentioned (Article 2 (1)). All five grounds of discrimination will be covered.

4. EXCEPTIONS

4.1 Genuine and determining occupational requirements (Article 4)

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

As mentioned above, within the scope of the Directives the only employment-related legal act with specific anti-discrimination provisions is the Law on Employment Contracts. Article 10¹ (4) of this Law provides for the following exceptions to the prohibition on discrimination pursuant to law:

“taking account of the sex, level of language proficiency, age or disability upon employment of a person, or upon giving work-related tasks or enabling access to retraining or in-service training, if this is an essential and determinative professional requirement arising from the nature of the professional activity or related conditions”.

This provision was included in the text of the Law on Employment Contracts in April 2004 along with other specific anti-discrimination provisions. Before this date it was only permitted to take into account employees’ sex in hiring or assigning duties if this was unavoidable due to the nature of the work or working conditions, and to require language skills necessary for the work and to pay compensation for having proficiency in languages (Article 10 (2) of the Law on Employment Contracts in version valid before 1 May 2004).

⁹⁶ *Sõitjate bussiliiniveo, bussijuhuveo, taksoveo ja pagasiveo üldeeskiri*, RTL 2004, 71, 1176

It is interesting to note that the Law does not foresee the possibility of taking into account as an “essential and determinative professional requirement” the race, ethnic origin, religion or belief or sexual orientation of employees.

In general, this provision appears to be in line with the Directives. However, there is no special reference to the legitimate aim or the principle of proportionality of the occupational requirement.

The draft Law on Equal Treatment stipulates a provision regarding genuine and determining occupational requirements (Article 10 (1)), which is worded almost identically to that in the Directives.

4.2 Employers with an ethos based on religion or belief

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

Estonian legislation does not include any specific provisions regarding the discrimination of workers of organisations with an ethos based on religion or belief in the context of the requirements of the Directives. However, the only relevant employment-related act - the Law on Employment Contracts – will not be applied to “work in a religious organisation as a person conducting religious services if the founding document of the organisation does not require entry into an employment contract with the person” (Article 7).

This provision has been valid in Estonian legislation since the date of adoption of the Law on Employment Contracts in 1992. Its aim was to address the specific situation of religious organisations. However, at the moment this provision may also be used in order not to apply non-discrimination provisions of this Law to work as a priest, etc. It is up to the religious organisation to stipulate or not to stipulate in its founding document (i.e. statutes or articles of association) an obligation to enter into an employment contract with the person concerned. To sum up, the non-application of discrimination-related provisions to religious organisations is a result of “grey areas” in Estonian legislation, not of specific regulation.

It is worth mentioning that other employees of religious institutions shall work on the basis of employment contracts. Therefore they will be protected by the anti-discrimination provisions of the relevant law. In the context of application/non-application of the Law on Employment Contracts, the Labour Inspectorate (public inspection institution) only checks if a person conducts religious services or not⁹⁷. According to the meaning of Directive 2000/78/EC (Article 4 (2)), religion or belief may constitute a genuine, legitimate and justified occupational requirement for persons conducting religious services.

Complaints concerning the activities of natural persons or legal persons in private law do not fall under the competence of the Office of the Legal Chancellor (a special quasi-judicial institution and a body for the promotion of equal treatment) if they “concern professing and

⁹⁷ Interview with the Reverend Igor Prekup, Representative of the Estonian Orthodox Church of Moscow Patriarchate in the Estonian Union of Churches, Maardu, 15 January 2005.

practising of faith or working as a minister of a religion in religious associations with registered articles of association” (Article 35⁵(2) of the Law on the Legal Chancellor). This rule is similar to the relevant provision of the Law on Gender Equality (Article 2 (2)).

The draft Law on Equal Treatment stipulates in Article 10 (2)-(3) relevant provisions regarding employers with an ethos based on religion or belief, which are worded almost identically to that in the Directives.

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

There are no specific provisions or case law in this area in Estonia.

4.3 Armed forces and other specific occupations

a) Does national law provide for an exception for the armed forces in relation to age or disability discrimination (Article 3(4), Directive 2000/78)?

b) Are there any provisions or exceptions relating to employment in the police, prison or emergency services (Recital 18, Directive 2000/78)?

There are no special anti-discrimination provisions regarding the armed forces, the police, prison or emergency services or other fields of public service in Estonia.

For certain groups of public officials, maximum age limits were established, e.g. 50-60 years of age for military servicemen (Article 112 of the Law on Military Defence Service⁹⁸); 55-60 years of age for policemen (on the basis of Article 49 of the Law on Police Service⁹⁹); 58-60 years of age for some categories of prison officials (Article 152 of the Law on Imprisonment¹⁰⁰). Exceptionally, service in the police and prisons may be prolonged until pensionable age. Military servicemen are entitled to special pensions under the above-mentioned Law on Military Defence Service. Police and prison officers, as well as some other groups of officials and non-officials (e.g. miners, civil pilots, etc), are entitled to special pensions under the separate Law on Pensions for Years in Service¹⁰¹ and other legal acts.

For military servicemen and policemen the Government shall provide for requirements concerning the state of health necessary for the performance of duties (Article 79 (2) of the Law on Military Defence Service and 8 (2) of the Law on Police Service). According to Article 111 of the Law on Military Defence Service, a serviceman shall be released from contractual service within one month of the date of the decision of the medical committee by which “he or she was declared unfit for active service for health reasons”. On the basis of Article 117 (1) of the Law on Public Service, a public official may be released from the service if his or her health “does not allow the official to perform his or her duties continuously as required”. This provision is valid for policemen, prison officers and most other groups of public officials.

⁹⁸ *Kaitseväeteenistuse seadus*, RT I 2000, 28, 167; RT I 2003, 31, 195

⁹⁹ *Politseiteenistuse seadus*, RT I 1998, 50, 753

¹⁰⁰ *Vangistusseadus*, RT I 2000, 58, 376, RT I 2002, 84, 492

¹⁰¹ *Eesti Vabariigi väljateenitud aastate pensionide seadus*, RT 1992, 21, 294

The draft Law on Equal Treatment does not elaborate this issue. Its anti-discrimination provisions shall apply to all areas of social life, including armed forces and other specific occupations.

4.4 Nationality discrimination

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

a) How does national law treat nationality discrimination?

As mentioned above, Article 12 of the Estonian Constitution establishes an explicit ban on discrimination on any ground, including nationality (citizenship). Article 11 stipulates that rights or freedoms may be restricted only in accordance with the Constitution. Article 9 (1) guarantees rights and freedoms for both citizens of Estonia and foreigners on its territory. Nevertheless, the Estonian Constitution permits a differential treatment of non-citizens in certain social fields:

“Article 28.

...

An Estonian citizen has the right to state assistance in the case of old age, incapacity for work, loss of a provider, or need. ...Citizens of foreign states and stateless persons who are in Estonia have this right equally with Estonian citizens, unless otherwise provided by law.

...”

“Article 29.

An Estonian citizen has the right to freely choose his or her area of activity, profession and place of work... Citizens of foreign states and stateless persons who are in Estonia have this right equally with Estonian citizens, unless otherwise provided by law.

...”

“Article 31.

Estonian citizens have the right to engage in enterprise and to form commercial undertakings and unions... Citizens of foreign states and stateless persons who are in Estonia have this right equally with Estonian citizens, unless otherwise provided by law.”

In most cases resident aliens in Estonia enjoy the same free access to social benefits as Estonian citizens. Estonian citizens as well as aliens with any type of a residence permit are subject to the Law on Social Welfare¹⁰² (Article 4), the Law on Social Benefits for Disabled Persons (Article 3), the Law on State Pension Insurance¹⁰³ (Article 4), the Law on State Family Benefits¹⁰⁴ (Article 2), the Law on Employment Services and Allowances (Article 3), etc.

¹⁰² *Sotsiaalhoolekande seadus*, RT I 1995, 21, 323; RT I 2001, 98, 617

¹⁰³ *Riikliku pensionikindlustuse seadus*, RT I 2001, 100, 648

¹⁰⁴ *Riiklike peretoetuste seadus*, RT I 2001, 95, 587

In general, in the non-official domain, there are quite few limits on non-citizens' employment as compared with Estonian citizens. For instance, a non-citizen cannot be a head of an in-house guard unit (Article 22 (2) of the Law on Guard Service¹⁰⁵). However, according to the general rule, non-citizens cannot work as state or municipal officials (Article 14 of the Law on Public Service). Nevertheless, the recent amendments¹⁰⁶ to the Law on Public Service have allowed exceptions to be made for citizens of the EU member states (now Article 14 (3)):

“A citizen of a Member State of the European Union who conforms to the requirements established by law and on the basis of law may also be appointed to a position. Only Estonian citizens shall be appointed to positions which involve exercise of public authority and protection of public interest. Such positions are related to, for example, the direction of the administrative agencies specified in Article 2 (2)-(3) of this Law¹⁰⁷, the exercise of state supervision, national defence and judicial power, the processing of state secrets, representation of public prosecution and diplomatic representation of the state, as well as positions in which an official has the right, in order to guarantee public order and security, to restrict the basic rights and freedoms of persons”.

Citizens of EU Member States make up a very small percentage of the alien population of Estonia. The majority of minority members are stateless persons ('persons with undetermined citizenship') or Russian citizens (12% and 6% of the total population respectively according to the 2000 national census)¹⁰⁸.

There are no specific anti-discrimination principles relating to the entry into Estonia or residence in Estonia of third-country nationals and stateless people. However, it is generally accepted that constitutional anti-discrimination provisions are applicable in such cases (even including cases of entry visa applications¹⁰⁹). The margin of appreciation of Estonian authorities is understood to be very broad. Thus, certain groups of residents are deprived of the right to receive permanent residence permits in Estonia, e.g. former Soviet/Russian military servicemen and their family members (mostly Russians by ethnic origin) (now covered by Article 12 (2¹) of the Law on Aliens). There were claims that this prohibition constituted discrimination on the ground of belonging to a certain social group (social status). However, the Decision of the Administrative Law Chamber of the National Court¹¹⁰ states the following: “According to international law, a State possesses the right to decide the presence of a foreigner on its territory. The Constitution does not provide a foreigner with a basic right to live and to stay in Estonia. There will be no discrimination according to the meaning of Article 12 of the Constitution if the requirements for granting a permanent residence permit are related to membership of a particular group”.

¹⁰⁵ *Turvaseadus*, RT I 2003, 68, 461. An in-house guard unit is a unit of an undertaking, state authority or local government authority which guards property owned or possessed by the undertaking, state authority or local government authority (Article 18 (1)).

¹⁰⁶ RT I 2004, 29, 194

¹⁰⁷ I.e. in state and local self-government administrative agencies

¹⁰⁸ Statistical Office of Estonia, *2000 Population and Housing Census: Citizenship, Nationality, Mother Tongue and Command of Foreign Languages II*, Tallinn: Statistical Office of Estonia, 2001, Table 2

¹⁰⁹ Ministry of Foreign Affairs; Written communication of 24 May 2004 no. 27.1/653

¹¹⁰ Decision of the Administrative Law Chamber of the National Court of 4 May 2001; published in RT III 2001, 16, 170

The draft Law on Equal Treatment provides protection against discrimination on any ground (Article 1 (1)), i.e. citizenship shall be regarded as a protected ground. However, Article 2 (2) 3 explicitly stipulates that the Law on Equal Treatment is not applied in cases relating to the right of non-EU citizens to entry into, stay, reside or work in Estonia.

The Legal Chancellor (as an ombudsman) may deal with nationality discrimination in public domain (relevant provisions do not include any limitations – Article 19 (1) of the Law on the Legal Chancellor).

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

There are no legal provisions that explicitly or implicitly rely on Art 3 (2) in Estonian anti-discrimination law.

4.5 Family benefits

Some employers, both public and private, provide benefits to employees in respect of their partners. For example, an employer might provide employees with free or subsidised private health insurance, covering both the employee and their partner. Certain employers limit these benefits to the married partners or unmarried opposite-sex partners of employees. This question aims to establish how national law treats such practices. Please note this question is focused on benefits provided by the employer. We are not looking for information on state social security arrangements.

(a) Does national law permit an employer to provide benefits that are limited to those employees who are married?

(b) Does national law permit an employer to provide benefits that are limited to those employees with opposite-sex partners?

As mentioned above, only two Estonian laws include specific anti-discrimination provisions (Law on Employment Contracts and Law on Gender Equality).

Article 10 (2) of the Law on Employment Contracts stipulates that employers shall not discriminate against employees through remuneration, promotion in employment or office, giving work-related tasks, termination of employment contracts, access to retraining or in-service training or *otherwise in employment relations*. According to the formal legal interpretation of this provision, it shall apply to *any* employment relations, including the provision of work-related benefits.

As mentioned above, the Law on Employment Contracts (Article 10 (3)) prohibits discrimination on the grounds of sexual orientation, marital or family status, family-related duties and social status (see the full list of grounds of prohibited discrimination in section 2.1 of this report). However, “grant of preferences on grounds of pregnancy, confinement, giving care to minors or adult children incapacitated for work and parents who are incapacitated for work” shall not be deemed to be discrimination (Article 10¹).

In other words, access to work-related family benefits seems to fall within the material scope of the anti-discrimination provisions of the Law on Employment Contracts that ban ‘unequal treatment’ on grounds of sexual orientation, marital or family status, family-related duties and

social status. At the same time some preferences that might be important for cohabiting couples and families shall not be regarded as discrimination. These preferences are worded in 'neutral form' and most of them refer not to 'family' or 'family life', but to pregnancy, confinement, giving care to children and parents etc. This 'neutral form' might be very important in the context of sexual orientation discrimination. In Estonia the concept of 'family' does not tend to cover couples of the same sex. According to the Law on Family¹¹¹, the right to become spouses (to found a family) is reserved to representatives of the opposite sexes (Article 1 (1)).

The Law on Wages prohibits to reduce wages on the grounds of the marital status and family obligations (Article 5).

The concept of registered partnership does not exist in local legislation.

As for the Law on Gender Equality, it does not regulate problems relating to discrimination on the grounds of sexual orientation.

The draft Law on Equal Treatment does not include any specific provisions regarding family benefits. However, they will be covered, while the draft law will be applicable in all spheres of 'social life' (Article 2 (1)). Furthermore, all five grounds of discrimination will be covered.

4.6 Health and safety

Are there exceptions in relation to disability and health and safety (Article 7(2), Directive 2000/78)?

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

The only relevant provisions could be found in the Law on Employment Contracts. Article 10¹ of this Law makes it possible for an employer to take into account disability as well as sex, the level of language proficiency and age "upon employment of a person, or upon giving work-related tasks or enabling access to retraining or in-service training, if this is an essential and determinative professional requirement arising from the nature of the professional activity or related conditions".

In Estonia, very special attention is paid to health and safety in certain industries. Government Decree no. 214 of 22 July 1992 approved the lists of industries where prior and periodic medical examinations are required¹¹². The lists are divided into four groups: 1. work dangerous for one's health (work connected to chemical, biological, physical factors, and aerosols); 2. dangerous work (such as gas pipeline service); 3. work where control is necessary to prevent the spread of contagious diseases (production of food, providing services to children and young people etc); 4. work where control is necessary in the interests of public safety (connected to transport).

¹¹¹ *Perekonnaseadus*, RT I 1994, 75, 1326

¹¹² *Tööde loetelu, kus nähakse ette töötajate eelnev ja perioodiline tervise kontrollimine*, RT 1992, 34, 454.

As for dress and personal appearance, no exceptions relating to health and safety were established for ethnic or religious minorities. At the same time legal acts may provide for rigid dress requirements in certain areas of production (e.g. the decree of the Minister of Social Affairs on the production of medicaments¹¹³).

The draft Law on Equal Treatment does not elaborate this issue.

4.7 Exceptions related to discrimination on the ground of age

4.7.1 Direct discrimination

a) Is it possible, generally, or in specified circumstances, to justify direct discrimination on the ground of age? If so, is the test compliant with the test in Article 6, Directive 2000/78, account being taken of European Court of Justice Case C-144/04, Mangold ?

b) Does national law permit differences of treatment based on age for any activities within the material scope of Directive 2000/78?

Estonian legislation does not provide much detail on this issue. However, Article 10¹ of the Law on Employment Contracts shall not regard as discrimination

“...taking account of ... the age upon employment of a person, or upon giving work-related tasks or enabling access to retraining or in-service training, if this is an essential and determinative professional requirement arising from the nature of the professional activity or related conditions...”

Estonian law has established minimum and maximum age requirements in both the public and private domains (see section 4.7.3 of this report). No special rules are currently established for older workers regarding their access to employment, retirement or redundancy (ordinary employment).

Qualifying requirements for the access of various age groups to several state-provided benefits may not be the same in Estonia. For instance, according to the Law on State Pension Insurance a pension of a disabled person (‘pension for incapacity for work’) may be received by a person with a certain record of work years. These requirements are not the same for different age groups (Article 15).

The draft Law on Equal Treatment does not specifically address the issue of age discrimination. According to the general rule, however, discrimination can be justified if it has a legitimate aim and the means of achieving that aim are proportionate to it (Article 9 (1)).

In case Mangold the European Court of Justice decided that Article 6 (1) of the Directive 2000/78/EC shall be interpreted as precluding a provision of national law, which authorises the conclusion of fixed-term employment contracts, without justification, with workers aged 52 and over, “unless there is a close connection with an earlier contract of employment of

¹¹³ *Ravimite tootmise eeskiri*, RT I 2005, 2, 4

indefinite duration concluded with the same employer”¹¹⁴. There are no similar restrictions in Estonian legislation.

c) Does national legislation allow occupational pension schemes to fix ages for admission to the scheme or entitlement to benefits under it taking up the possibility provided for by article 6(2)?

The Law on Funded Pensions¹¹⁵ provides for the conditions and procedure for “the making of contributions to and payments from funded pensions with the purpose of creating the opportunity for persons who have made contributions to a funded pension to receive additional income, besides state pension insurance, after reaching pensionable age” (Article 1). According to Article 66 (1) of the Law, persons born before 1 January 1983 are not required to make contributions to a mandatory funded pension. However, persons born in 1942-1982 are entitled to make contributions to a mandatory funded pension only if they submit a choice application¹¹⁶ in 2002-2010 (the deadline is different for various age groups (Article 66 (2)).

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

Are there any special conditions set by law for older or younger workers in order to promote their vocational integration, or for people with caring responsibilities to ensure their protection? If so, please describe these.

The Law on Employment Contracts does not regard as discrimination privileges related to pregnancy and birth; taking care of minor children, disabled adult children and parents (Article 10¹).

According to the Law on Holidays¹¹⁷ (Article 9 (2)) an extended annual holiday (35 calendar days) shall be granted to minors and persons who are granted a pension for incapacity to work or the national pension on the basis of incapacity to work pursuant to the Law on State Pension Insurance.

Special rules are applied to the termination of employment contracts with minor workers under the Law on Employment Contracts. For instance, an employer does not have the right to terminate such contracts due to unsatisfactory results within a probationary period (Article 93).

Estonian legislation also imposes certain limitations for minors’ employment in the interests of protecting their health and moral integrity (Article 2¹ of the Law on Employment Contracts). The Law on Working and Rest Time¹¹⁸ bans overtime for minors (Article 8 (1))

¹¹⁴ EU/Official Journal C 36, 11/02/2006, p. 10-11

¹¹⁵ *Kogumispensionide seadus*, RT I 2004, 37, 252

¹¹⁶ An application to be submitted in order to acquire units of a pension fund. Most importantly, it shall include the name of the pension fund chosen by the person (Articles 14 (1) and 15 (1) of the Law on Funded Pensions). This application is necessary to join the system of funded pensions.

¹¹⁷ *Puhkuseseadus*, RT I 2001, 42, 233

¹¹⁸ *Töö- ja puhkeaja seadus*, RT I 2001, 17, 78

and bans or imposes limits on work in the evening or night time (Article 11). The same Law introduces a general reduction in working time for minors (Article 5).

According to Article 10 (1) of the Law on Occupational Health and Safety, an employer shall create suitable working and rest conditions for disabled workers, pregnant women, women who are breastfeeding, and minors. See sections 2.6 for details.

4.7.3 Minimum and maximum age requirements

Are there exceptions permitting minimum and/or maximum age requirements in relation to access to employment (notably in the public sector) and training?

According to Article 2 (1) of the Law on Employment Contracts a natural person who has attained 18 years may be an employee. Under certain circumstances a minor aged 13 or older could also be an employee (Article 2¹). A minimum age requirement for higher and senior officials is 21; other officials shall be aged 18 or older (Article 14 of the Law on Public Service).

By way of exception, Estonian law has provided other minimum age requirements for several important public positions (such as the President of the Republic under Article 79 (3) of the Constitution). Additionally there may also be maximum age requirements (e.g. for military servicemen, policemen and prison officers; see section 4.3 for details). Some laws may require a minimum number of years of work in a particular area for certain positions as a precondition of employment (e.g. Law on Public Prosecutor Office¹¹⁹).

4.7.4 Retirement

In this question it is important to distinguish between pensionable age (the age set by the state, or by employers or by collective agreements, at which individuals become entitled to a state pension, as distinct from the age at which individuals retire from work), and mandatory retirement ages (which can be state-imposed, employer-imposed, imposed by an employee's employment contract or imposed by a collective agreement).

a) Is there a state pension age, at which individuals must begin to collect their state pensions? Can this be deferred if an individual wishes to work for longer, or can an individual collect a pension and still work?

The Law on State Pension Insurance (Article 7) stipulates (for both men and women) that persons who have attained 63 years of age and whose pension qualifying period earned in Estonia is 15 years have the right to receive an old-age pension. The same article foresees a transition period for women born between 1944 and 1952. Old-age pensions with favourable conditions can be received by people with a certain type of disability, people who have raised disabled children or three or four children, rehabilitated persons and people who participated in the clean-up of the accident at the Chernobyl nuclear power station (Article 10).

¹¹⁹ Prokuratuuriseadus, RT I 1998, 41/42, 625; RT I 2004, 66, 457

A person who receives a state old-age pension may work and collect his or her pension. However, the survivor's pension and national pension¹²⁰ shall not be paid to people who are employed while certain exceptions are possible (Article 43 (1) of the Law on State Pension Insurance). Additionally, an early-retirement pension¹²¹ will not be paid to a working pensioner before he or she has attained pensionable age (Article 43 (1)).

b) Is there a normal age when individuals can begin to receive payments from occupational pension schemes and other employer-funded pension arrangements? Can payments from such occupational pension schemes be deferred if an individual wishes to work for longer, or can an individual collect a pension and still work?

The Law on Funded Pensions provides for the conditions and procedure for “the making of contributions to and payments from funded pensions with the purpose of creating the opportunity for persons who have made contributions to a funded pension to receive additional income, besides state pension insurance, after reaching *pensionable age*” (Article 1) (italics added).

In general, payments from employer-funded pension arrangements shall not be influenced by an individual’s wish to work longer.

c) Is there a state-imposed mandatory retirement age(s)? Please state whether this is generally applicable or only in respect of certain sectors, if so please state which. Have there been recent changes in this respect or are any planned in the near future?

A state-imposed mandatory retirement age was stipulated only for some categories of military and law-enforcement officials. See section 4.3 for details.

d) Does national law permit employers to set retirement ages (or ages at which the termination of an employment contract is possible) by contract, collective bargaining or unilaterally?

The national law does not explicitly permit retirement age to be set by contract, collective bargaining or unilaterally (although this does not apply to some categories of military and law-enforcement officials - see section 4.3 for details). Furthermore, such arrangements would nowadays probably be recognised as discriminatory (see comments under 4.7.4 e).

e) Do the law on protection against dismissal and other laws protecting employment rights apply to all workers irrespective of age if they remain in employment, or are these rights lost on attaining pensionable age or another age (please specify)?

For the above questions, please indicate whether the ages are different for women and men.'

¹²⁰ A national pension is paid to a person of pensionable age, a disabled person etc with an insufficient pension qualifying period (Law on State Pension Insurance, Article 22 (1)).

¹²¹ “A person who has worked for the pension qualifying period ... for grant of an old-age pension has the right to receive an early-retirement pension up to three years before attaining the pensionable age” (Law on State Pension Insurance, Article 9 (1)).

In general the Law on Employment Contracts and the Law on Public Service foresee the same protection against dismissal for workers irrespective of their age (and this applies to both men and women). However, according to the Law on Public Service, an official may be released from service due to age when he or she attains sixty-five years (Article 120). Article 131 (3) of the Law foresees three months' wages by way of compensation to officials made redundant due to age.

Similar regulation was provided for in the Law on Employment Contracts as of 1 January 2006. However, the relevant provisions of that Law were abolished by the Parliament on 8 February 2006¹²². This was a reaction to a report of the Legal Chancellor¹²³ (an ombudsman-like institution and equality body) that had been submitted to the Parliament. The Chancellor requested to review the related provisions of the Law on Employment Contracts. In his report the Chancellor claimed that the provisions of the Law on Employment Contracts might conflict with the non-discrimination principle of the Constitution and EU law and that there were seemingly no good reasons to justify such unequal treatment of older workers.

It is worth mentioning that similar arguments might be used to attack the above-mentioned Article 120 of the Law on Public Service (see also section 4.7.3). The Legal Chancellor (equality body) is of opinion that this article violates both Article 12 of the Constitution (general ban of discrimination) and Article 6 of the Directive 2000/78. The Chancellor informed about his opinion the Constitutional committee of *Riigikogu* and the Ministry of Social Affairs.¹²⁴ However, draft law to abolish Article 120 of the Law on Public Service (Draft no. 935) was not supported by the parliament (it was withdrawn from the procedure on 9 January 2007).¹²⁵

4.7.5 Redundancy

a) Does national law permit age or seniority to be taken into account in selecting workers for redundancy?

The provisions regarding redundancy in the Law on Employment Contracts were not changed in April 2004 when this act was amended with specific anti-discrimination provisions.

According to Article 99 of the Law on Employment Contracts, upon the termination of employment contracts due to lay-offs, a preferential right to remain at work should be enjoyed by representatives of employees, followed by full-time staff members and workers with better performance results. However,

“[i]n the case of equal performance results, preference is given to employees who have contracted an *occupational disease* or received a work *injury* by fault of the employer; who have worked for the employer *longer*; who have dependants; or who are developing their professional skills and expertise in an educational institution which provides special education” (italics added).

¹²² RT I 2006, 10, 64

¹²³ Report published at <http://www.oiguskantsler.ee/index.php?pageID=105> (20.01.2007)

¹²⁴ Legal Chancellor; Written communication no. 5-3/0607858 of 30 November 2006

¹²⁵ Information provided at <http://www.riigikogu.ee> (20.01.2007)

Similar provision could be found for public officials under Article 116 (2) of the Law on Public Service).

Thus, according to these rules, people with employment-related disabilities and older workers may under certain circumstances have a preferential right to remain at work.

b) If national law provides compensation for redundancy, is this affected by the age of the worker?

No. Compensation in cases of redundancy depends only on the length of employment of a worker for the employer (Article 90 of the Law on Employment Contracts). The same rule is applicable to public officials (Article 131 (1) of the Law on Public Service).

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

Does national law include any exceptions that seek to rely on Article 2(5) of the Framework Employment Directive?

Estonian current or draft legislation does not elaborate these issues.

4.9 Any other exceptions

Please mention any other exceptions to the prohibition of discrimination (on any ground) provided in national law.

The Law on Employment Contracts now bans the unequal treatment of full-time and part-time employees and people working on the basis of permanent and temporary employment contracts. However, differential treatment is possible if it is justified by objective reasons under laws and collective agreements (Articles 13¹ and 13²). The same Law will not regard as discrimination “allowing a suitable working and rest time regime which satisfies the religious requirements of an employee” (Article 10¹).

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

a) What scope does national law provide for taking positive action in respect of racial or ethnic origin, religion or belief, disability, age or sexual orientation? Please refer to any important case law or relevant legal/political discussions on this topic.

As mentioned above, the Law on Employment Contracts does not regard as discrimination privileges afforded to disabled people, including the creation of appropriate work conditions for them and making appropriate arrangements related to work and free time to satisfy employees' religious needs (Article 10¹). It creates a legal framework for positive action on behalf of employers and their organisations (however, this provision establishes no positive obligations in this respect). On the basis of the Law on Occupational Health and Safety, an employer shall create suitable working and rest conditions for disabled workers, pregnant women, women who are breastfeeding, and minors (Article 10 (1)) (see also section 2.6 for details).

The draft Law on Equal Treatment (Article 6) will permit adopting measures to prevent or minimise inequality on the protected grounds. However these measures shall be proportionate to the objective sought.

b) Do measures of positive action exist in your country? Which are the most important? Refer to measures taken in respect of all 5 grounds, in particular refer to the measures related to disability and any quotas for access of disabled people to the labour market and any measures related to Roma.

The Estonian State promotes the employment of disabled people by paying social tax for a worker who receives a pension for incapacity for work (see section 2.7 for details). This can be treated as a positive action.

There are no quotas for the access of disabled persons to the labour market nor any quotas or legally established legal action measures related to Roma.

6. REMEDIES AND ENFORCEMENT

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

- a) What procedures exist for enforcing the principle of equal treatment (judicial/administrative/alternative dispute resolution such as mediation)?*
- b) Are these binding or non-binding?*
- c) Can a person bring a case after the employment relationship has ended?*

In relation to each, please note whether there are different procedures for employment in the private and public sectors.

In relation to the procedures described, please indicate any costs or other barriers litigants will face (e.g. necessity to instruct a lawyer?) and any other factors that may act as deterrents to seeking redress (e.g. strict time limits, complex procedures, location of court or other relevant body).

In general, a victim of discrimination may address quasi-judicial institutions or courts for the protection of his or her rights.

A specific protection against discrimination within the scope of the Directives is provided only in the field of employment on the basis of the Law on Employment Contracts (see section 3.2 of this report for details). Disputes which arise between employees and employers in the application of this Law will be solved by a labour dispute resolution body (labour dispute commissions¹²⁶ or courts - see below). *Additionally*, discrimination disputes shall be resolved pursuant to the procedure specified in the Law on the Legal Chancellor (Article 142 of the Law on Employment Contracts).

1. Quasi-judicial institutions

¹²⁶ *Töövaidluste komisjonid*

A. Legal Chancellor

As mentioned in section 0.2, in the context of the implementation of the Directives, the Estonian Legal Chancellor was provided with new rights and was given an obligation to deal with discrimination in both the private and public domains. An overview of the structure and functions of this office is given in section 7 of this report.

According to Article 19 of the Law on the Legal Chancellor,

“1) Everyone has the right of recourse to the Legal Chancellor in order to have his or her rights protected by way of filing a petition to request verification whether or not a state agency, local government agency or body, legal person in public law, natural person or legal persons in private law performing public duties ... adheres to the principles of observance of the fundamental rights and freedoms and to the principles of sound administration.

(2) Everyone has the right of recourse to the Legal Chancellor for the conduct of a conciliation procedure if he or she finds that a natural person or a legal person under private law has discriminated against him or her on the basis of:

- 1) sex;
- 2) race;
- 3) ethnic origin;
- 4) colour;
- 5) language;
- 6) origin;
- 7) religion or religious beliefs;
- 8) political or other opinion;
- 9) property or social status;
- 10) age;
- 11) disability;
- 12) sexual orientation; or
- 13) other attributes specified by law.

(3) No court judgment shall have entered into force in the matter of the petition, and at the time of the filing of the petition, the matter shall not be subject to judicial proceedings or mandatory quasi-judicial complaint proceedings.”

This is a version of Article 19, which has been valid since 1 January 2004¹²⁷. Complaints (petitions) mentioned in section 1 of Article 19 may include information about discrimination. There are very few limitations regarding material scope.

The Chancellor may refuse to review a filed complaint (petition) if the person has the possibility to file a challenge or resort to any other legal remedies (Article 34 (2)). The Office of the Legal Chancellor interprets this provision to the effect that their body is supposed to influence, not to duplicate work of other public control institutions¹²⁸. At the same time the Legal Chancellor's Office is an equality body (see section 7 of the report). It is not quite

¹²⁷ RT I 2003, 23, 142

¹²⁸ Legal Chancellor; Written communication no. 14-1/060262/0601253 of 14 February 2006

obvious if this provision may be used in cases regarding discrimination-related complaints in public sector (see below).

In the case of a conciliation procedure (private sector), the Chancellor will not deal with complaints if they concern 1) the professing or practising of faith or working as a minister of a religion in religious associations with registered articles of association; 2) relations in family or private life; 3) the exercising of the right of succession (Article 35⁵ (2)).

For the Legal Chancellor, the main problem will be the absence of substantive law provisions (concerning non-discrimination issues) in the areas other than employment. Only gender-related discrimination is elaborated in Estonian legislation in a very detailed manner (in the Law on Gender Equality).

During proceedings in a matter, the Legal Chancellor shall establish the facts relevant to the matter and, if necessary, collect evidence on his or her own initiative for such purpose. Additionally he or she may obtain the opinion of specialists in relevant issues (Article 21 of the Law on the Legal Chancellor). The Chancellor shall have unrestricted access to documents, other materials and areas which are in the possession of the agencies under investigation, and to the parties to the conciliation proceedings (Article 27 (1)). He or she also has the right to collect information and explanations from the agencies under investigation and the parties to the conciliation proceedings. These agencies, the parties of the proceedings and other persons and agencies shall communicate such information and explanations as required under the terms prescribed by the Legal Chancellor (Articles 28 and 29). According to Article 30, in the course of proceedings the Chancellor may “take testimonies from persons concerning whom there is information that they know facts relevant to the matter and are capable of providing truthful testimonies concerning such facts”.

According to the Law on the Legal Chancellor, in the case of *discrimination by public institutions*, a procedure can be initiated on the basis of a victim's application or at the Chancellor's own initiative (Article 34 (1)). The Chancellor has the right to commence disciplinary proceedings against officials who obstruct the activities of the Chancellor or his or her adviser (Article 35 (2)). Proceedings are completed when the Legal Chancellor formulates his or her position, assessing whether the activities of the agency under investigation are legal and in compliance with the principles of sound administration (Article 35¹(1)). The Chancellor may provide criticism and suggestions and express his or her opinion in other ways, or make proposals for the elimination of the violation (Article 35¹(2)). Such an opinion of the Legal Chancellor is not of a legally binding nature. However, the law foresees a mechanism to ensure the fulfilment of the Chancellor's suggestion and proposals:

“Article 35². Insurance of compliance with proposal of Legal Chancellor

(1) An agency who receives a suggestion or proposal from the Legal Chancellor shall inform the Legal Chancellor, within the term set by him or her, of the details of compliance with the suggestion or proposal.

(2) The Legal Chancellor has the right to make inquiries concerning compliance with his or her suggestions and proposals. An agency who receives an inquiry shall answer without delay.

(3) Upon non-compliance with a suggestion or proposal of the Legal Chancellor or failure to answer an inquiry of the Legal Chancellor by an agency, the Legal Chancellor may report such fact to the authority which exercises supervision over the agency, to the Government of the Republic or to the *Riigikogu*.

(4) The Legal Chancellor may inform the public of his or her suggestions or proposals, and compliance or failure to comply therewith”.

Additionally, the Chancellor may make a recommendation for the provision of legal aid to petitioners or for the exemption of petitioners from state fees in court proceedings in matters within his or her competence (Article 35³).

According to the Ministry of Justice such suggestions and proposals are always fulfilled by public bodies because of the high level of respect for the Chancellor¹²⁹.

Cases of *discrimination by natural persons and legal persons in private law* can be solved through a special conciliation procedure. The aim of this procedure is to reach an agreement between a victim and a person suspected of discrimination. The conciliation procedure can be initiated only on the basis of a victim's application (Article 35⁵). However, an alleged discriminator is not obliged to participate in it (Article 35¹¹ (1)). It is not very clear how this provision complies with a rule regarding a shift in the burden of proof, which was established in the Law on Employment Contracts (see section 6.3 for details). According to the draft Law on Equal Treatment a provision on shift in the burden of proof will not be applicable in a conciliation procedure at the Legal Chancellor's Office (because this procedure is purposely not mentioned in Article 8 of the draft).

In a conciliation procedure, the Chancellor shall set the time and place for holding a session and shall notify the petitioner and respondent thereof (Article 35⁹ (2)). The role of the Chancellor at the session is of crucial importance:

“Article 35¹². Proposal to resolve dispute and enter into agreement

(1) The Legal Chancellor shall make a proposal to resolve the dispute and enter into an agreement, and shall communicate such proposal to the parties to the conciliation proceedings at the end of a session, or shall set a term during the session within which he or she will communicate the proposal to the petitioner and respondent.

(2) In the proposal, the Legal Chancellor shall present his or her substantiated opinion on the discrimination allegations formed by him or her in the course of the proceedings based on the evidence obtained and the established facts. In the proposal, the Legal Chancellor may suggest that the respondent perform appropriate acts, and take measures for payment of compensation and restitution of the petitioner's rights. The Legal Chancellor may propose that the respondent compensates for the reasonable expenses which the petitioner has borne or that the respondent bears the costs of the services of specialists, interpreters, translators or witnesses”.

The agreement between parties in a conciliation procedure is obligatory and enforceable by bailiff (Article 35¹⁴). If a conciliation procedure fails, a victim may address the court for the protection of his or her rights (Article 35¹⁵).

¹²⁹ Ministry of Justice; Written Communication no. 3-2-4/2162 of 11 February 2003

It is guaranteed that a person may file a complaint to the Legal Chancellor within one year in the case of discrimination by public institutions and within four months in the case of discrimination by a natural person or a legal person in private law (Article 34 and Article 35⁶).

The Office of the Legal Chancellor is a quasi-judicial impartial institution and it shall not provide independent assistance to victims of discrimination in pursuing their complaints about discrimination (in practice, however, the Office will inform an applicant about his or her rights).

In 2004-2006 there were only eight applications with a request to start a conciliation procedure and five of them were not considered for formal reasons. As for valid applications, in all three cases an alleged discriminator declined participation in the proceedings and therefore they were ceased¹³⁰. This raised serious concerns regarding the efficiency of the procedure.

As for discrimination by public authorities, the Chancellor's Office does not keep separate statistics of such incidents¹³¹. However, there is information that the average number of such requests is very small.

No state fee is to be paid in cases of recourse to the Legal Chancellor.

B. Labour Dispute Commissions

In Estonia individual labour disputes are solved by labour dispute resolution bodies, namely labour dispute commissions and courts (Article 4 (1) of the Law on Resolution of Individual Labour Disputes¹³²). The labour dispute commissions are established within the local labour branches of the Labour Inspectorate¹³³ (Article 11 (1)).

The Law on Employment Contracts establishes the following deadlines:

“Article 143. Period for recourse to dispute resolution body

(1) The parties have recourse to a labour dispute resolution body for resolution of disputes which arise in the application of this Law within four months after the date following the date on which they became aware or should have become aware of the violation of their rights.

(2) The parties have recourse to a labour dispute resolution body to dispute the justification for termination of an employment contract within one month, calculated from the date which followed the date that they became aware or should have become aware of the violation of their rights”.

¹³⁰ Legal Chancellor; Written communications no. 5-3/0503214 of 14 June 2005, no. 5-3/0600912 of 1 February 2006, and no. 5-3/0608588 of 5 January 2007

¹³¹ Legal Chancellor; Written communication no. 9-3/1081 of 22 July 2004

¹³² *Individuaalse töövaidluse lahendamise seadus*, RT I 1996, 3, 57

¹³³ According to Article 25(1) of the Law on Occupational Health and Safety, the Labour Inspectorate shall arrange for the exercise of state supervision in the working environment over compliance with the requirements of legislation regulating occupational health and safety and labour relations. In the framework of an ordinary administrative procedure, this institution may make a precept to an employer concerning different violations of labour-related legal acts, including anti-discrimination provisions (Article 145 of the Law on Employment Contracts).

Some Estonian scholars believe that the procedure of the labour dispute commissions cannot be used by ‘persons applying for employment’ (see sections 2.2 and 2.3 of this report) because this institution is competent to deal solely with disputes between employers and employees¹³⁴.

The labour dispute commissions follow a procedure established in the Law on Resolution of Individual Labour Disputes (and the Code of Civil Procedure). Their decisions shall be based on law and shall be substantiated (Article 22 (2) of the Law on Resolution of Individual Labour Disputes). If the parties do not agree with a decision of a labour dispute commission, they have recourse to the courts, which may hear the same labour dispute (Article 24 (1)). According to Article 25 of the Law,

“(1) A decision of a labour dispute commission enters into force after expiry of the term for recourse to a court if no party files a statement of claim to a county court...

(2) A decision of a labour dispute commission which has entered into force is binding on the parties

...”

Furthermore, such a decision is enforceable by bailiff (Article 26 (2)).

Recourse to labour dispute commissions is exempt from state fees (Article 9 (1)).

In 2006 labour disputes commissions received altogether seven complaints with demands related to the issue of discrimination¹³⁵. At the same time, according to the sociological study, “Working Life Barometer 2005” (commissioned by the Ministry of Social Affairs), a considerable share of respondents claimed that, either often or from time to time, they had been witnesses of unequal treatment of other workers at their present workplace on the following grounds: older age (14%), official language proficiency (11%), younger age (11%), disability (8%), ethnic origin (6%), female sex (5%)¹³⁶.

C. Proposed position of the equal treatment and equality commissioner

The draft Law on Equal Treatment foresees creation of the position of an equal treatment and equality commissioner. In fact, the authorities decided to widen the competence of the gender equality commissioner, a specialised body introduced by the Law on Gender Equality: Thus, the commissioner will deal any grounds of discrimination and will get some new responsibilities (see below).

According to the draft law, the equal treatment and equality commissioner shall provide opinions concerning possible cases of discrimination (Article 16). The purpose of an opinion is to provide an assessment which, in conjunction with the Law on Equal Treatment, international agreements binding on Estonia and other legislation, allows for an assessment of

¹³⁴ Gaabriel Tavits, *Muudatused töölepinguliste suhete õiguslikus reguleerimises: kaitse otsinguil Euroopa Liidu abiga (Changes in the Legal Regulation of Relations on the Basis of an Employment Contract: In Quest of Protection with the Assistance of the European Union)*, *Juridica* no.8, vol. 12 (2004), p.557

¹³⁵ Labour Inspectorate; Written communication of 9 January 2007

¹³⁶ *Tööelu Baromeeter 2005 Elanikkonna uuringu aruanne*, Saar Poll, Tallinn, 2006. p. 42. Available at [http://www.sm.ee/est/HtmlPages/TooeluBaromeeter-aruanne16-01-2006/\\$file/Tööelu%20Baromeeter-aruanne%2016-01-2006.pdf](http://www.sm.ee/est/HtmlPages/TooeluBaromeeter-aruanne16-01-2006/$file/Tööelu%20Baromeeter-aruanne%2016-01-2006.pdf) (20.01.2007)

whether the principle of equal treatment has been violated in a particular legal relationship (Article 17 (2)).

As it was mentioned above, the draft Law on Equal Treatment bans discrimination on any ground and in all spheres of 'social' life (Article 1 (1)). Persons who suffer from discrimination as well as (natural and legal) persons¹³⁷ who have a legitimate interest in monitoring compliance with the requirements for equal treatment shall receive an opinion of the commissioner (Article 17 (1)).

Interestingly, the above-mentioned procedure is not regarded as a "resolution of disputes concerning discrimination" (Article 22 (1)). The commissioner's opinion is not legal binding.

An overview of proposed functions of the equal treatment and equality commissioner is given in section 7 of this report. At this point it is suffice to mention that there will be two equality bodies in Estonia: the Legal Chancellor and the equal treatment and equality commissioner. Both will have a mandate to deal with complaints of discrimination victims. However, specific tasks will be assigned to the commissioner such as to provide *assistance* to people pursuing their complaints about discrimination or to publish specific *reports* regarding equal treatment (Article 16 of the draft Law on Equal Treatment).

2. Courts

A victim of discrimination can use criminal procedures (if he or she suffered from crimes stipulated by the Penal Code), administrative court procedures (complaints against the action of an official or state/municipal institution) or civil procedures (e.g. for moral damage). Discrimination-related cases will be solved on the basis of general rules and standards. The only exception will be an application of provisions regarding a shift in the burden of proof established by the Law on Employment Contracts and the Law on Gender Equality (not applicable in criminal procedure) (see section 6.3 for details).

State legal aid is granted on the basis of the Law on State Legal Aid¹³⁸ to insolvent natural or legal persons in connection with proceedings in an Estonian court or administrative authority.

In Estonia 20% of the population does not speak Estonian (most of those speak Russian)¹³⁹ while Estonian is the only *official language* of court procedure. Nevertheless, exceptions to this rule are possible (Article 5 of the Law on Courts¹⁴⁰).

According to Article 10 (2) of the Code of Criminal Procedure¹⁴¹, the assistance of a translator or interpreter shall be ensured for the participants in court proceedings and for those parties who are not proficient in Estonian. However, some concerns might be raised regarding the relevant provisions of the new Code of Civil Procedure (valid since 1 January 2006). Article 34 (1) of the Code permits the parties to use a translator's services. However,

¹³⁷ In this context the Estonian term 'a person' (isik) shall refer to both natural and legal persons.

¹³⁸ *Riigi õigusabi seadus*, RT I 2004, 56, 403

¹³⁹ Statistical Office of Estonia *2000 Population and Housing Census: Citizenship, Nationality, Mother Tongue and Command of Foreign Languages II*, Tallinn: Statistical Office of Estonia, 2001, Table 15

¹⁴⁰ *Kohtute seadus*, RT I 2002, 64, 390

¹⁴¹ *Kriminaalmenetluse seadustik*, RT I 2003, 27, 166, RT I 2004, 65, 456

if the court cannot immediately find a translator, this may be made the obligation of a party who is not proficient in Estonian. Importantly, if this party fails within a certain time limit to find a translator or an Estonian-speaking representative, the court may still examine the case on its merits (or, if this party is a plaintiff, the case may be dismissed). These provisions are valid for administrative court procedures as well, on the basis of Article 5 of the Code of Administrative Court Procedure¹⁴². The above-mentioned rules will also be used in discrimination-related disputes.

A problem may also arise regarding the language of legal actions and complaints. At present, the courts reject most legal actions and complaints in Russian with reference to the provisions regarding official court language. However, in some cases, such complaints have been accepted.¹⁴³ To a certain extent, language-related problems may be solved by application of the Law on State Legal Aid.

As for *people with disabilities*, the use of sign language in courts is quite widespread in Estonia. We are not aware of any instances of the use of Braille. Public buildings (including courts) are normally wheelchair accessible (see also information about the Law on Building in section 2.6). Additionally, the Law on Traffic¹⁴⁴ (Chapter 10) establishes a legal framework for the organisation of road mobility for physically disabled people and parking for vehicles used by them; the granting of parking cards for people with physical disabilities; special rights for physically disabled drivers and drivers of vehicles servicing physically disabled or blind people.

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

Please list the ways in which associations may engage in judicial or other procedures

a) in support of a complainant

b) on behalf of one or more complaints (please indicate if class actions are possible)

There are no special provisions in Estonian legislation allowing association with legitimate interest to be engaged in judicial procedures in support of a complainant or on behalf of one or more complainants. However, in penal, civil and administrative court procedure, the workers of associations and other entities with a legitimate interest may be legal representatives of one or more victims of discrimination.

In conciliation proceedings for the resolution of a discrimination dispute at the Office of the Legal Chancellor, a person (meaning both natural and legal persons) who has a legitimate interest in verifying compliance with the requirements for equal treatment may also act as a representative (Article 23 (2) of the Law on the Legal Chancellor). According to the author's information, the Chancellor recognised at least once a worker of the Tallinn-based Legal Information Centre for Human Rights as a discrimination victim's representative in a conciliation procedure. Additionally, the Office would recognise even independent complaints filed by NGOs in the interests of a victim with the aim of conciliation. However,

¹⁴² *Halduskohtumenetluse seadustik*, RT I 1999, 31, 425

¹⁴³ Interview with a practicing pro-minority lawyer Mr. Andrei Arjupin, Tallinn, 1 October 2005

¹⁴⁴ *Liiklusseadus*, RT I 2001, 3, 6; RT I 2002, 92, 531

the conciliation process will be stopped if a victim or a suspected discriminator fails to give his or her consent to the procedure¹⁴⁵.

According to the draft Law on Equal Treatment, persons (meaning both natural and legal persons) who have a legitimate interest in monitoring compliance with the requirements for equal treatment may apply for an opinion of an equal treatment and equality commissioner (Article 22 (2)).

The same draft law stipulates that persons (meaning both natural and legal persons) who have a legitimate interest in monitoring compliance with the requirements for equal treatment may be a representative in the procedures at the Legal Chancellor's Office and labour disputes commissions. As for civil court procedure, the draft law ensured for such persons a status of an 'advisor'¹⁴⁶ (Article 22 (3)).

In the context of Estonian procedural norms and practices a representative or an advisor of a discrimination victim will be a natural person. The added value of new provisions of the draft law will be the *guaranteed* recognition in this capacity of persons working for human rights NGOs or other relevant organisations/institutions. For instance, at the moment in the areas covered by this report trade unions have a guaranteed right (Article 17 (7) of the Law on Trade Unions) to represent and defend their members in individual labour disputes in a civil court and labour dispute commissions, normally with worker's proxy (Article 16 (2)). In practice, the proxy is issued to a concrete employee of a trade union or to a lawyer who is working for a trade union. It seems that a new regulation foreseen in the draft Law on Equal Treatment will be applied in a quite liberal manner and there shall be no obstacles for NGOs to be actively involved in the procedures (while in a civil court procedure the guaranteed status of an advisor will be quite modest).

Class actions are not possible in Estonia.

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

Does national law require or permit a shift of the burden of proof from the complainant to the respondent? Identify the criteria applicable in the full range of existing procedures and concerning the different types of discrimination, as defined by the Directives (including harassment).

Before 1 May 2004 Estonian legislation did not use the concept of a shift in the burden of proof. Nowadays, relevant provisions can be found in the Law on Employment Contracts and the Law on Gender Equality. Thus, in Estonia, provisions regarding a shift in the burden of proof will be applicable only in the fields covered by these acts. However, the material scope of the application of the Law on Employment Contracts is much narrower than that of the Directives (see section 3.2 of this report for details).

¹⁴⁵ Legal Chancellor; Written communication no. 5-3/0600912 of 1 February 2006

¹⁴⁶ An advisor is a person who may assist a participant in a court proceeding. He or she may appear in court together with the participant and provide explanations. An advisor cannot perform procedural acts or file petitions (Code of Civil Procedure, Article 228 (1)-(2)).

The Law on Employment Contracts states:

“Article 144¹. Shared burden of proof in disputes concerning unequal treatment

(1) Where an employee or a person applying for employment finds that the employer has unequally treated him or her on the basis of an attribute specified in Article 10 (3), the employee or person applying for employment shall submit to a labour dispute resolution body¹⁴⁷ or to the Legal Chancellor an application containing the facts in proof of the unequal treatment. If on the basis of the application submitted by an employee or a person applying for employment it may be presumed that direct or indirect unequal treatment has occurred, the employer shall be required, at the request of the labour dispute resolution body or the Legal Chancellor, to explain the reasons for his or her conduct or decision. The refusal by an employer to give explanations shall be deemed to be equal to acknowledgement of unequal treatment.

(2) Shared burden of proof does not apply in criminal procedure”.

The full list of the grounds listed in Article 10 (3) of the Law on Employment Contracts is provided in section 2.1 of this report. This list includes race, ethnic origin, age, disability, sexual orientation, religious or other belief. As mentioned above, harassment is explicitly interpreted as discrimination in the text of the Law.

Article 144¹ uses the term ‘to explain’ or ‘to clarify’ (*selgitama*). This verb is definitely less demanding than the verb ‘to prove’ used in Article 8 of Directive 2000/43/EC and Article 10 of Directive 2000/78/EC.

As mentioned in section 6.1, an alleged discriminator may refuse to participate in a conciliation procedure at the Legal Chancellor’s Office. Under these circumstances Article 144¹ of the Law on Employment Contracts may not be used at all.

To the best of the author’s knowledge, provisions regarding a shift of burden have not been implemented in courts as yet.

The draft Law on Equal Treatment foresees provisions regarding ‘shared burden of proof’. Again, a person shall submit to a court, a labour disputes commission or equal treatment and equality commissioner an application containing the facts in proof of the unequal treatment. Then an alleged discriminator must prove that he or she does not breach principle of equal treatment. The refusal or failure to prove shall be deemed to be equal to acknowledgement of unequal treatment. Shared burden of proof does not apply in criminal and administrative court procedure (Article 8). Again, this principle is also not applied in procedures in the Office of the Legal Chancellor (one of the possible reasons of this decision is that a conciliation procedure is voluntary).

The draft Law on Equal Treatment will introduce a new obligation: An alleged discriminator shall give within 15 days relevant written explanations in response to a written request supplied by a person who finds that he or she has been a victim of discrimination (Article 7).

¹⁴⁷ Labour disputes commissions or courts

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

What protection exists against victimisation? Does the protection against victimisation extend to persons other than the complainant? (e.g. witnesses or people who help the victim of discrimination to present a complaint)

Historically, there were legal provisions in Estonia that incorporated the concept of victimisation. For instance Article 134¹ of the old Criminal Code (invalid since 1 September 2002) penalised “[i]ntentional restriction by an official of a person’s rights and interests, as protected in law, in order to pursue a person because he or she submitted in due procedure proposals, applications, complaints, or because they included criticism, or because of criticism expressed in any other form”.

Another relevant (and still valid) provision is Article 94 of the Law on Employment Contracts, which puts limits on the employer’s opportunities to terminate an employment contract with an employee who is elected to represent other employees.

Regrettably, no special provisions regarding victimisation have been introduced into Estonian legislation in the fields covered by the Directives.

It is worth mentioning that the concept of victimisation was introduced into the Law on Gender Equality. Article 6 (2) of this Law regards it as discrimination if an employer “downgrades the working conditions of an employee or terminates an employment relationship with him or her due to the fact that the employee has made reference to the rights and obligations provided for in this Law”.

The draft Law on Equal Treatment defines as discrimination an adverse treatment, which is a reaction to a complaint regarding discrimination or to a support provided to a person who has submitted such complaint (Article 3 (6)).

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

- a) What are the sanctions applicable where unlawful discrimination has occurred? Consider the different sanctions that may apply where the discrimination occurs in private or public employment, or in a field outside employment.*
- b) Is there any ceiling on the maximum amount of compensation that can be awarded?*

There is no developed practice of implementing the new anti-discrimination provisions by courts or quasi-judicial institutions (see section 0.3 for details). In this section we can only give some information regarding general principles established under Estonian legislation.

According to Article 152 (1) of the Penal Code (violation of equality), “[u]nlawful restriction of the rights of a human being (*inimene*) or granting of unlawful preferences to a human being on the basis of his or her ethnic origin, race, colour, sex, language, origin, religion, sexual orientation, political opinion, financial or social status is punishable by a fine of up to 300 fine units or by detention”. The same act, if committed at least twice, or “significant damage is thereby caused to the rights or interests of another person protected by law or to public interests”, is punishable by a pecuniary punishment or up to one year of imprisonment

(Article 152 (2)). In 2002 – 2006 the Police Board registered only one incident (report of an offence) on the basis of Article 152 of the Penal Code (the incident referred to limitation of political activity). Furthermore, the police decided that there were no grounds to commence investigation in this case.¹⁴⁸

The issues of discrimination in the fields covered by the Directives have been elaborated only in the Law on the Legal Chancellor and the Law on Employment Contracts. According to the latter, a worker or a person applying for employment against whom the employer has discriminated has the right to demand from the employer compensation for the material and moral damage suffered. However, a person with whom the employer refused to enter into an employment contract shall not have the right to demand entry into an employment contract (Article 10³).

Upon the introduction of non-discrimination provisions to the Law on Employment Contracts, the sanctions for illegal termination of a contract remained unaltered:

“Article 117. Liability of employer upon illegal termination of employment contract

(1) Upon illegal termination of an employment contract by an employer, the employee has the right to demand reinstatement in his or her position, amendment of the statement which was the basis for termination of the employment contract and payment of his or her average wages for the time of compelled absence from work.

(2) If an employee waives reinstatement of his or her position, the employer is required to pay compensation to the employee amounting up to six months' average wages.

(3) If a representative of the employee waives reinstatement of his or her position, the employer is required to pay compensation to the representative amounting to six months' average wages”.

Thus, this provision established an automatic limit on the total amount of compensation for illegal termination of employment contracts where the employee waives reinstatement of his or her position (additionally, a six month fixed compensation is provided for under Article 135 (2) of the Law on Public Service). In discrimination cases Article 117 of the Law should be examined in conjunction with Article 10³, which provides for compensation for both material and *moral* damage. There are no limits under Article 10³ regarding the total amount of compensation. In any case, the maintenance of the ‘six month rule’ is a rather controversial issue and the draft Law on Equal Treatment is going to amend the Law on Employment Contracts and the Law on Public Service to abolish above-mentioned limits in case of termination of an employment contract or release of an official from service due to discrimination (Article 26 (7) – (8)).

We have already mentioned that Article 25 of the Constitution provides for the right to compensation for moral and material damage caused by the unlawful action of any person. Until recently, court judgments regarding the payment of moral compensation were rare in Estonia. There is a degree of consensus in the local legal community that moral compensation is to be paid only in exceptional cases and that this compensation shall not be very large. For

¹⁴⁸ Police Board; Written communications no. PA2-1.11.2/3177 of 18 July 2006 and no. PA_2.1-20.2/5648 of 12 January 2007

instance, in 2000 the Civil Law Chamber of the National Court obliged the state to pay compensation for moral damages caused by the unlawful actions of a public official. These damages were recognised as being approximately equal to the average monthly salary “taking into consideration the level of prosperity in society”¹⁴⁹.

The obligation to pay compensation (supposedly including compensation for moral damage) may be included in the final agreement of a conciliation procedure (Article 35¹² (2) of the Law on the Legal Chancellor). We await further implementation of this provision in future. Additionally, it is not so obvious how the Legal Chancellor shall deal with the issue of compensation in cases of discrimination by public authorities.

The draft Law on Equal Treatment provided for the right of an injured party to demand compensation for damage and termination of discrimination. Furthermore, a victim may demand a ‘reasonable amount of money’ be paid as compensation for non-pecuniary damage caused by the violation (Article 23 (1)-(2)). “Upon determination of the amount of compensation, a court shall take into account, inter alia, the scope, duration and nature of the discrimination. A court shall also take into account whether the violator has eliminated the discriminating circumstances or not” (Article 23 (3)). These provisions are very similar to that of the Law on Gender Equality (Article 13).

c) Is there any information available concerning:

- *the average amount of compensation available to victims*
- *the extent to which the available sanctions have been shown to be - or are likely to be - effective, proportionate and dissuasive, as is required by the Directives?*

Without cases having been heard in the National Court or at the Legal Chancellor’s Office the author cannot provide the average amount of compensation available to victims or make any assessments as regards their effectiveness, proportionality or dissuasiveness.

7. SPECIALISED BODIES

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

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

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

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

A. The Legal Chancellor

In Estonia some functions of a ‘specialised body’ under the meaning of Directive 2000/43/EC have been ascribed to the Office of the Legal Chancellor.

¹⁴⁹ Decision of the Civil Law Chamber of the National Court of 29 November 2000; published in RT III 2000, 29, 316

According to Article 139 of the Constitution “[t]he Legal Chancellor shall be, in his or her activities, an independent official who shall review the legislation of the legislative and executive powers and of local self-governments for conformity with the Constitution and the laws. The Legal Chancellor shall analyse proposals made to him or her concerning the amendment of laws, the passage of new laws, and the activities of state agencies, and, if necessary, shall present a report to the *Riigikogu*...”

In 1999 the *Riigikogu* adopted a new Law on the Legal Chancellor¹⁵⁰ that provided this official with some new functions that were not mentioned in the text of the Constitution. Since 1 June 1999 the Chancellor’s Office has been an ombudsman-like institution. Everyone was granted the right to address the Chancellor with complaints regarding the activities of public institutions (including cases of discrimination). No limits regarding grounds of unequal treatment in the public domain were established in the text of the Law. Additionally, since 1 January 2004¹⁵¹ the Legal Chancellor has been able to deal with cases of alleged discrimination by a natural person or a legal person in private law (on the basis of sex, race, ethnic origin, colour, language, origin, religion or religious beliefs, political or other opinion, property or social status, age, disability, sexual orientation or other grounds specified by law) (see section 6.1. of this report for details).

According to Article 23 of the Law on the Legal Chancellor, a petitioner shall file a complaint in person or through an authorised representative. “In conciliation proceedings for the resolution of discrimination disputes, a person who has a legitimate interest in checking compliance with the requirements for equal treatment may also act as a representative”. A petitioner has the right to file a complaint orally.

The office of the Legal Chancellor is situated in the capital city. However, since June 2001 there has been a permanent representative of the Legal Chancellor’s Office in Ida-Viru County (a region near the Estonian-Russian boarder where minorities constitute the majority of the population). The Legal Chancellor and his advisors receive individuals in the Tallinn office as well as in other cities and towns in Estonia. In practice, it is possible to send written applications and complaints by post or to submit them electronically in Estonian, Russian or English on the web-page of the Chancellor¹⁵². Russian is also often used when complaints are presented orally to the Chancellor and his advisors.

As mentioned in section 6.1, the Chancellor cannot initiate the so-called conciliation procedure (discrimination by private natural or legal persons) without an application from a victim. However, this is possible in cases of discrimination by public bodies and institutions. Furthermore, in such cases the Chancellor “may make a recommendation for the provision of legal aid to petitioners or the exemption of petitioners from state fees in court proceedings in matters within his or her competence” (Article 35³).

It is worth mentioning that the Legal Chancellor is not obliged to grant legal aid or other assistance to a victim of discrimination. However, in practice a victim will be provided with

¹⁵⁰ *Õiguskantsleri seadus*, RT I 1999, 29, 406

¹⁵¹ Amendments adopted on 11 February 2003. Published in RT I 2003, 23, 142

¹⁵² At <http://www.oiguskantsler.ee> (05.01.2007)

basic information on his or her rights if s/he approaches the Legal Chancellor's Office with a written or oral request/complaint¹⁵³.

The Legal Chancellor has other duties regarding the fight against discrimination in Estonian society (Article 35¹⁶ of the Law on the Legal Chancellor):

- “1) to analyse the effect of the implementation of legislation on the condition of members of society;
- 2) to advise and inform the Government of Estonia, governmental and local government institutions, other interested persons and the general public on issues related to the implementation of the principles of equality and equal treatment;
- 3) to make proposals to the Government of the Republic, governmental and local self-government institutions, and employers to change legal acts;
- 4) to promote co-operation between private and legal persons and institutions on an international and domestic level in the interests of adherence to the principles of equality and equal treatment;
- 5) to promote in co-operation with other persons and bodies the principles of equality and equal treatment.”

Thus, the Chancellor is explicitly authorised to issue recommendations on discrimination issues but not to conduct relevant surveys and publish reports. In practice, however, as an independent official who shall review the legislation (Article 139 of the Constitution), the Chancellor prepares general annual reports on Estonian legislation and produces smaller reports (opinions) with legal analysis, inter alia, on discrimination issues.

B. The Legal Chancellor

As it was mentioned above, the draft Law on Equal Treatment bans discrimination of any ground and in almost all spheres of ‘social life’ with the exception of 1. relations in family or private life; 2. gender equality issues; 3. the right of non-EU citizens to the entry into, stay, reside or work in Estonia (Articles 1 (1) and 2 (1)-(2)). Sex discrimination will be commissioner's responsibility on the basis of the Law on Gender Equality (Chapter V).

The draft Law on Equal Treatment foresees creation of the position of an equal treatment and equality commissioner. In fact, the authorities decided to widen the competence of the gender equality commissioner, a specialised body introduced by the Law on Gender Equality (now deals solely with sex discrimination issues). One of the possible reasons for that decision seems to be openly recognised unwillingness of the Legal Chancellor to be the main (and in some areas the only) equality body in Estonia, which is responsible for anti-discrimination policies. The Chancellor believes that it can undermine his independence provided for in the Constitution, especially his independence vis-à-vis the European Commission.¹⁵⁴

According to the draft, the commissioner shall (Article 16):

- 1) monitor compliance with the requirements of the Law on Equal Treatment;

¹⁵³ Legal Chancellor; Written communication no. 5-3/0600912 of 1 February 2006

¹⁵⁴ Legal Chancellor; Written communication no. 5-3/0608246 of 13 December 2006

- 2) *advise and provide assistance to people* pursuing their complaints about discrimination;
- 3) provide opinions concerning possible cases of discrimination on the basis of persons' applications or on his or her own initiative on the basis of obtained information;
- 4) analyse the effect of the implementation of legislation to the condition of the members of the society;
- 5) make proposals (meaning also recommendations) to the Government of the Republic, government agencies, local governments and their agencies for amendments to legislation;
- 6) advise and inform the Government of the Republic, government agencies and local government agencies on issues relating to the implementation of the Law on Equal Treatment;
- 7) *publish reports* on implementation of the equal treatment;
- 8) co-operate with other persons and institutions in the interests of promotion of the principle of equal treatment;
- 9) take measures to promote equality.

Thus, with the adoption of the Law on Equal Treatment, there will be two equality bodies in Estonia: the Legal Chancellor and the Equal treatment and equality commissioner. In a comparative context we can summarise their main tasks as follows (Articles 19 and 35¹⁶ of the Law on the Legal Chancellor and Article 16 of the draft Law on Equal Treatment):

First, victims of discrimination in the public domain will be able to address one of these institutions. The Chancellor and the Commissioner may conduct an ombudsman-style procedure and issue a legally nonbinding decision/recommendation.

Second, victims of discrimination in the private domain may address the Chancellor with the request to start a conciliation procedure. If succeeded, the procedure will end up with legally binding decision. Alternatively, the Commissioner may be addressed to conduct an ombudsman-style procedure. His or her decision will not be binding in legal terms.

Third, only the Commissioner will have an explicit duty to advise and provide assistance to people pursuing their complaints about discrimination.

Forth, both the Chancellor and the Commissioner will be obliged to analyze the effect of the implementation of legislation to the condition of the members of the society and to make proposals to governmental bodies for amendments to legislation. However, only the Commissioner will be responsible for drafting of specific reports dedicated to discrimination issues.

Fifth, both institutions will be obliged to promote equal treatment, to inform about relevant principles and to enhance cooperation in the field.

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

Again, the Office of the Legal Chancellor is a non-judicial impartial institution and it shall not provide independent assistance (other than as mentioned above) to victims of discrimination in pursuing their *court* complaints about discrimination. His or her advisors are not supposed to bring discrimination-related legal actions or complaints to courts or to intervene in court proceedings (similar rights are not foreseen for an equal treatment and equality commissioner in the draft Law on Equal Treatment).

However, the Chancellor may use his or her right to file a request with the National Court to review the constitutionality of legislation of general application (including discrimination-related cases). This opportunity is scrutinised in Article 6 of the Law on Constitutional Review Court Procedure. Additionally, “[e]veryone has the right of recourse to the Chancellor to review the conformity of a law or other legislation of general application with the Constitution or the law” (Article 15 of the Law on the Legal Chancellor).

As for the equal treatment and equality commissioner, the draft Law on Equal Treatment (Article 16) foresees his or her duty to advise and provide assistance to people pursuing their complaints about discrimination. However, this is neither right nor obligation of the Commissioner to bring discrimination complaints or to intervene in legal cases concerning discrimination.

e) Is the work undertaken independently?

The Legal Chancellor is appointed by the Parliament, on the proposal of the President of the Republic, for a term of seven years (Article 140 (1) of the Constitution). In directing his or her office, the Legal Chancellor has the same rights which are granted by law to a minister in directing a ministry (Article 141 (1)). The Chancellor is independent in his or her decision-making, and the Office has a budget of its own (fixed in the annual state budget). This body comes under the control of the State Audit Office¹⁵⁵, which is an independent state body exercising economic control (on the basis of Article 7 (1) of the Law on the State Audit Office¹⁵⁶).

The Legal Chancellor is a constitutional body, which is the best guarantee for its existence. However, the functions of the Chancellor as an ombudsman and equality body are specified in a law, not in the Constitution. As a result these functions could potentially be withdrawn by the Parliament.

According to the draft Law on Equal Treatment, an equal treatment and equality commissioner will be an independently acting expert appointed for five-year period by the Minister of Social Affairs. His or her activities, supported by the office, will be funded by the state budget. The statute of the office is to be adopted by the Government of the Republic (Article 15).

f) If there are any data regarding the activities of the body (or bodies), make reference to them (keeping in mind the need to examine whether the race equality body is functioning

¹⁵⁵ Riigikontroll

¹⁵⁶ Riigikontrolli seadus, RT I 2002, 21, 117

properly). For example, annual reports, statistics on the number of complaints received in each year or the number of complainants assisted in bringing legal proceedings.

Since 1 January 2004 the efficiency of the Legal Chancellor's Office concerning the fight against discrimination has not been very high. As mentioned above, in 2004 -2006 there have been only eight applications to the Legal Chancellor with a request to start a conciliation procedure, and none of those resulted in an agreement. The Office does not keep separate statistics on cases of discrimination by public bodies and institutions. However, in 2004-2006 there were very few such complaints¹⁵⁷.

According to the Constitution, the Legal Chancellor may participate in sessions of the Parliament and the Government, with the right to speak (Article 141 (2)). Additionally, the Legal Chancellor shall present an annual report to the *Riigikogu* on the conformity of legislation passed by the legislative and executive branches and by local authorities with the Constitution and the law (Article 143). To the best of our knowledge, the problems of discrimination on racial or ethnic grounds were not addressed by the Chancellor on the above-mentioned occasions

8. IMPLEMENTATION ISSUES

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

Describe briefly the action taken by the Member State

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

The problem of the fight against discrimination has only very recently been recognised by Estonian officials. The changes that have been made were mostly prompted by the necessity to implement Directives 2000/43/EC and 2000/78/EC and the directives on gender equality. Unfortunately, after accession to the EU, local policy makers have been demonstrating much less interest towards discrimination-related issues.

At the moment, the level of awareness of discrimination issues in Estonian society is rather low. Special measures are badly needed to put into effect recent changes in the Law on Employment Contracts. However, there is not much sign of the state or local authorities undertaking the action required. Nevertheless, the Office of the Legal Chancellor, representatives of the Ministry of Justice, the Ministry of Social Affairs and some other institutions have repeatedly demonstrated their willingness to distribute relevant information in written form and on specific occasions (seminars, workshops etc)¹⁵⁸.

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

¹⁵⁷ Legal Chancellor; Written communications no. 5-3/0503214 of 14 June 2005, no. 5-3/0600912 of 1 February 2006, and no. 5-3/0608588 of 5 January 2007

¹⁵⁸ Interview with Mr. Aleksei Semjonov, Director of the Legal Information Centre for Human Rights, Tallinn, 5 February 2006

The Office of the Legal Chancellor deems it necessary to promote dialogue with the third sector in this field. A statement to that effect was made by the Chancellor in a letter sent to one of the leading Estonian pro-minority NGOs¹⁵⁹. This is fully in line with Article 35¹⁶ of the law that regulates its activities (see section 7 of this report for details). Additionally, in the course of 2004 the Office organised several meetings with NGOs dealing with anti-discrimination work.

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

The most successful work in this area concerns the promotion of the rights of employees with disabilities. Thus, in recent years several seminars, awards, competitions and other initiatives have been organised by public authorities in co-operation with NGOs representing people with disabilities and employers' associations, e.g. the Estonian Employers' Confederation¹⁶⁰. Valuable initiatives in the field were also introduced by the Labour Market Board.

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

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

These may include general principles of the national system, such as, for example, "lex specialis derogat legi generali (special rules prevail over general rules) and lex posteriori derogat legi priori (more recent rules prevail over less recent rules).

Without doubts, the principles of *lex specialis derogat legi generali* and *lex posteriori derogat legi priori* are known to Estonian law.

The provisions of the Estonian Constitution are directly applicable and the basic principle of equal treatment is provided for in Article 12.

According to the common rule in relation to undertaking transactions (including treaties of any kind) as stipulated in Articles 86 and 87 of the Law on General Principles of the Civil Code¹⁶¹, a transaction which is contrary to the public order, good morals or the law is void. A breach of the constitutional provision will obviously be recognised as being contrary to good morals or as a significant violation of the law.

In cases of unlawful discriminatory practice against employees, Article 16 of the Law on Employment Contracts can be applied. It specifies the invalidity of unilateral decisions of employers that are unfavourable to employees:

“Terms established by unilateral decisions of employers, which are less favourable to employees than those prescribed by law, administrative legislation, collective

¹⁵⁹ Legal Chancellor; Written communication no. 9-3/1081 of 22 July 2004. The letter was addressed to the Legal Information Centre for Human Rights.

¹⁶⁰ Eesti Töandjate Keskkliit; information provided at <http://www.ettk.ee> (20.03.2007)

¹⁶¹ Tsiviilseadustiku üldosa seadus, RT I 2002, 35, 216

agreements or employment contracts are invalid. The law, administrative legislation, collective agreement or employment contract applies instead of the invalid terms.”

The employees can also claim that any discriminatory clauses in their employment contract are void. According to Article 125 (1) 8 of the same Law, “on the basis of an action by the victim, a labour dispute resolution body shall declare an employment contract invalid if it was entered into with the employee under the influence of fraud, violence, a threat, or a malicious agreement with the representative of the employer.”

According to Article 4 (2) of the Law on Collective Agreements¹⁶², the terms and conditions of a collective agreement which are ‘less favourable to employees than those prescribed in a Law or other legislation’ are invalid.

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

We are not aware of any regulations or rules which are manifestly contrary to the principle of equality and still in force in Estonia.

9. OVERVIEW

Despite considerable changes in 2003-2004, Estonian legislation is still not in line with several provisions of the Directives. The only relevant changes were made in the Law on Employment Contracts and the Law on the Legal Chancellor. The latter regulates the work of the Office of the Legal Chancellor in its capacity as a special quasi-judicial institution and a body for the promotion of equality.

The Law on Employment Contracts is applicable solely to the relations between an employer and an employee on the basis of an employment contract. Additionally, people who have applied for employment are protected. However, the Law on Employment Contracts does not regulate the work of public officials and self-employment. Furthermore, it does not refer to access to trade unions and other workers organisations.

The relevant amendments to the Law on Employment Contracts (valid from 1 May 2004) include definitions of direct and indirect ‘unequal treatment’ and harassment; they also prohibit instructions to discriminate. The list of grounds of discrimination is much longer than that in both Directives (sex, racial origin, age, ethnic origin, level of language proficiency, disability, sexual orientation, the duty to serve in the defence forces, marital or family status, family-related duties, social status, representation of the interests of employees or membership in workers' associations, political opinions or membership in a political party or religious or other beliefs). The Law is applicable to any relations between employers and employees. However, according to its definition harassment will take place only in “a relationship of subordination or dependency”.

In the Law on Employment Contracts a provision regarding a shift in the burden of proof was worded as an obligation to give clarification. The provisions regarding reasonable accommodation developed into a permission to adopt a privileged approach to disabled workers in the context of the working environment (however, the Law on Occupational

¹⁶² *Kollektiivlepingu seadus*, RT I 1993, 20, 353

Health and Safety includes a provision that an employer is to create suitable working and rest conditions and to adapt a workplace for a disabled employee). The concept of victimisation was not integrated into the text of the Law on Employment Contracts. The right of compensation for physical or moral damage to a victim of discrimination was specifically referred to. However, this provision does not include any details and seems to be of a merely declarative nature.

Naturally, the material scope of the Law on Employment Contracts is narrower than that of the Directives. As a result, there are no specific anti-discrimination rules in the field of education (but not employees' training), social protection and advantages, access to publicly available goods and services, and housing.

Since 1999 the Office of the Legal Chancellor has functioned as an ombudsman-like institution, dealing with discrimination committed by public bodies and institutions. In 2004, everyone received the right of recourse to the Chancellor if he or she found that a private natural or legal person had discriminated against him or her ('conciliation procedure'). There are very few limits for the Chancellor as regards material scope. There is no list of prohibited grounds of discrimination if they are committed by public bodies or institutions. However, the Chancellor may deal with discrimination by private persons only on the following grounds: sex, race, ethnic origin, colour, language, origin, religious, political or other belief, property or social status, age, disability, sexual orientation or other grounds of discrimination provided for in law.

Public information about the new responsibilities of the Legal Chancellor is limited, which has resulted in a very small number of complaints (8) on the basis of the new provisions of the Law on the Legal Chancellor in 2004-2006 ('conciliation procedure'). The Chancellor will certainly experience difficulties dealing with discrimination on grounds other than gender and/or in fields other than ordinary employment because, in Estonia, there are no specific legal provisions to address these issues.

One may also regard as rather problematic the rule that an alleged discriminator is not obliged to participate in a conciliation procedure at the Legal Chancellor's Office. It makes a provision regarding a shift in the burden of proof very vague in such cases. In a conciliation procedure at the Legal Chancellor's Office, a person who has a legitimate interest in checking compliance with the requirements for equal treatment may also act as a representative. No special rules have been established in this regard for court proceedings.

It is worth emphasising, however, that most of these problems can be solved by the draft Law on Equal Treatment, if adopted.

10. COORDINATION AT NATIONAL LEVEL

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

The main body to deal with non-discrimination-related issues is the Office of the Legal Chancellor. The functions and tasks of this institution were described in section 7.

Estonian legislation still needs changes in order to comply fully with the requirements of the Directives. Up until now two ministries have been involved in the process: the Ministry of Justice and the Ministry of Social Affairs. However, the draft Law on Equal Treatment was drafted by the Ministry of Justice.

ANNEX

- 1. Table of key national anti-discrimination legislation**
- 2. Table of international instruments**

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

Title of Legislation (including amending legislation)	In force from:	Grounds covered	Civil/Administrative/ Criminal Law	Material Scope	Principal content
Constitution of the Republic of Estonia (<i>Eesti Vabariigi põhiseadus</i>)	03/07/1992	unlimited (“ethnic origin, race, colour, sex, language, origin, religion, political or other opinion, property or social status, or other grounds”)	Administrative	not specified	Equality before the law; prohibition of discrimination
Law on Amendments to the Law on the Legal Chancellor and Related Laws (<i>Õiguskantsleri seaduse muutmise ja sellega seotud seaduste muutmise seadus</i>)	01/01/2004	not specified (public sector); sex, race, ethnic origin, colour, language, origin, religious, political or other belief, property or social status, age, disability, sexual orientation or other ground of discrimination provided for in the law (private sector)	Administrative (with elements of civil)	not specified (public domain); the Chancellor will ignore discrimination-related complaints that concern 1) the professing and practising of faith or working as a minister of religion in religious associations with registered articles of association; 2) relations in family or private life; 3) the exercising of the right of succession (private domain)	procedure in cases of discrimination by 1) state agency, local government agency or body, legal person in public law, natural person or legal persons in private law performing public duties; 2) a natural person or a legal person in private law; responsibilities of the Chancellor as a body for the promotion of equality

Law on Amendments to the Law of the Republic of Estonia on Employment Contracts and to the Decision of the Supreme Soviet of the Republic of Estonia "Implementation of the Law of the Republic of Estonia on Employment Contracts" (<i>Eesti Vabariigi töölepingu seaduse ja Eesti Vabariigi Ülemnõukogu otsuse "Eesti Vabariigi töölepingu seaduse rakendamise kohta" muutmise seadus</i>)	01/05/2004	sex, racial origin, age, ethnic origin, level of language proficiency, disability, sexual orientation, the duty to serve in the defence forces, marital or family status, family-related duties, social status, representation of the interests of employees or membership in workers' associations, political opinions or membership of a political party or religious or other beliefs	Civil/Administrative	Employment relations ("entry into employment contract; payment of wages; promotion; giving of work tasks; termination of employment contract; opportunities for training, retraining and advanced training; and other instances of employment relations")	prohibition of direct and indirect 'unequal treatment', harassment, instruction to discriminate, changes regarding burden of proof
Penal Code (<i>Karistusseadustik</i>)	01/09/2002	ethnic origin, race, colour, sex, language, origin, religion, sexual orientation, political opinion, financial or social status (incitement and discrimination), genetic risks (discrimination)	Criminal	not specified; acts of incitement should be public	prohibition of incitement and discrimination ("incitement to hatred or violence" and "unlawful restriction of rights or granting of unlawful preferences")
Law on Gender Equality (<i>Soolise võrdõiguslikkuse seadus</i>)	01/05/2004	gender (sex)	Administrative/Civil	all spheres of public life (excluding professing and practising faith or working as a minister of religion)	prohibition of direct and indirect discrimination, harassment, instruction to discriminate,

				in a registered religious association and relations in family or private life)	changes regarding burden of proof, victimisation etc; detailed provisions regarding one of the 'specialised bodies' (gender equality commissioner), responsibilities of public and private actors regarding the implementation of gender mainstreaming strategy.
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NOTE: the texts of most Estonian laws are available in English on the Internet at: <http://www.legaltext.ee>.

ANNEX 2: TABLE OF INTERNATIONAL INSTRUMENTS**ESTONIA**

Instrument	Signed (yes/no)	Ratified (yes/no)	Derogations/ reservations relevant to equality and non- discrimination	Right of individual petition accepted?	Can this instrument be directly relied upon in domestic courts by individuals?
European Convention on Human Rights (ECHR)	yes	yes	no	yes	yes
Protocol 12, ECHR	yes	no	---	---	---
Revised European Social Charter	yes	yes	no; however, it is worth mentioning that Estonia decided not to be bound by Article 26 (the right to dignity at work)	Additional Protocol to the European Social Charter Providing for a System of Collective Complaints - no	yes
International Covenant on Civil and Political Rights	yes	yes	no	yes	yes
Framework Convention for the Protection of National Minorities	yes	yes	no; however, according to the Estonian declaration only Estonian citizens may be recognised as national minority members	---	yes (in the case of self-executing norms)

International Covenant on Economic, Social and Cultural Rights	yes	yes	no	---	yes
Convention on the Elimination of All Forms of Racial Discrimination	yes	yes	no	no	yes
Convention on the Elimination of Discrimination Against Women	yes	yes	no	no	yes
ILO Convention No. 111 on Discrimination	yes	yes	no	---	yes
Convention on the Right of the Child	yes	yes	no	---	yes