

## THE PRICE OF PREJUDICE: LABOUR MARKET DISCRIMINATION ON THE GROUNDS OF GENDER AND ETHNICITY

### LEGAL AND INSTITUTIONAL FRAMEWORK IN FORCE IN 2007

This document presents, for 23 OECD countries, a detailed description of the legal and institutional anti-discrimination framework in force in 2007. These descriptions are mainly based on information provided by OECD governments, with some comments and information added by the Secretariat, based on institutional and academic studies available. The description of the legislation in force, as well as, the description of the role of the so-called equality body in place, do not necessarily reflect the official opinion of governments of OECD member countries.

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## AUSTRALIA

### Part 1. Legal framework for employment discrimination

Main anti-discrimination laws:

Australia is a federal state. Federal, state and territory anti-discrimination laws operate concurrently. However, once a complaint of unlawful discrimination is dealt with in one jurisdiction, it cannot be considered in another. More precisely: A person cannot make a complaint of discrimination with HREOC or initiate a proceeding under the federal legislation after they have made a complaint, instituted a proceeding or taken any other action under an analogous State or Territory law about the same events (section 10(4) of the Sex Discrimination Act and section 6A(2) of the Racial Discrimination Act). This operates to prevent complainants "double dipping" by lodging the same complaint in multiple jurisdictions.

There is no generally applicable equivalent legal barrier to prevent a complaint being withdrawn or finalised after conciliation at HREOC and then being lodged in a State or Territory jurisdiction, although the principal of 'double dipping' does operate in most jurisdictions to prevent claimants from obtaining multiple remedies for the same complaint. There are also limited timeframes in some State and Territory jurisdictions in which to make a complaint (6 months in some jurisdictions, 12 months in others). A State or Territory agency may decline a complaint because it has already been dealt with by HREOC. Where a State or Territory agency does deal with a matter that has been dealt with by HREOC, it will take the outcome of those proceedings into account.

At the federal level there are five principal pieces anti-discrimination legislation; *Age Discrimination Act* (implemented in 2004), *Disability Discrimination Act* (implemented in 1992), *Human Rights and Equal Opportunity Commission Act* (implemented in 1986), *Racial Discrimination Act* (implemented in 1975) and *Sex Discrimination Act* (implemented in 1984). The Australian Industrial Relations Commission may also conciliate discrimination complaints in the context of unlawful termination claims.

In addition, each state and territory of Australia has anti-discrimination legislation:

New South Wales Anti-Discrimination Act (implemented in 1977), Victoria Equal Opportunity Act (implemented in 1995) and Racial and Religious Tolerance Act (implemented in 2001), Queensland Anti-Discrimination Act (implemented in 1991), Western Australia Equal Opportunity Act (implemented in 1984), South Australia Equal Opportunity Act (implemented in 1984), Tasmania Anti-Discrimination Act (implemented in 1998), Australian Capital Territory Discrimination Act (implemented in 1991) and Northern Territory Anti-Discrimination Act (implemented in 1992).

Note: Tables below refer to the Federal Legislation

Relevant courts:

At the federal level, the relevant courts are the Federal Court of Australia and the Federal Magistrates Court of Australia. The Human Rights and Equal Opportunity Commission (HREOC) is not a court but also has a role in the federal anti-discrimination framework as the 'Specialised Body' (see Part 2 for further information about HREOC).

Notes: At the state and territory level the relevant bodies are;

- The Anti-Discrimination Board of New South Wales and the Administrative Decisions Tribunal,
- The Victorian Equal Opportunity and Human Rights Commission and the Victorian Civil and Administrative Tribunal,
- The Anti-Discrimination Commission of Queensland and the Anti-Discrimination Tribunal,
- The Western Australia Equal Opportunity Commission and the State Administrative Tribunal,
- The South Australia Equal Opportunity Commission and the Equal Opportunity Tribunal,
- Tasmanian Office of the Anti-Discrimination Commissioner and the Anti-Discrimination Tribunal,
- The Australian Capital Territory Human Rights Commission and the Discrimination Tribunal, and
- The Northern Territory Anti-Discrimination Commission and the Local Court.

Of these state and territory bodies, only the Northern Territory Local Court is a court proper.

Legal scope/definition of the (hereinafter) so-called gender and ethnic grounds:

At the federal level:

- Sex, explicitly including: pregnancy, potential pregnancy, breastfeeding (including the act of expressing milk), family responsibilities, marital status and sexual harassment
- Race, colour, descent, national extraction, nationality, national or ethnic origin, social origin, racial harassment and immigration status

Note: At the state and territory level (while there are some differences in terminology):

- Sex, explicitly including: pregnancy, family responsibilities (except in South Australia), marital status and sexual harassment. Note, not all state and territory laws expressly prohibit discrimination on the grounds of potential pregnancy or breastfeeding however, discrimination on these grounds may be considered unlawful sex discrimination.
- Race includes colour, nationality, national origin, descent or ancestry, ethnicity or ethnic origin. In NSW, the definition of 'race' also includes ethno-religious origin. In Victoria, the Racial and Religious Tolerance Act covers religious belief or activity. Similarly, the ACT and Northern Territory's anti-discrimination legislation prohibits discrimination on the grounds of religious belief or activity.

Table 1.1 Prohibited acts, areas of concern, coverage, legal assistance and representation

		Gender	Ethnicity
Type of discrimination	Direct discrimination Indirect discrimination, i.e. where a provision criterion or practice is applied to all employees but puts one protected group at a particular disadvantage and cannot be shown to be a proportionate means of meeting a legitimate aim. Pressure and instruction to discriminate Harassment	Yes Yes  Yes Yes	Yes Yes  Yes Yes
Areas of concern	Hiring process Wage Type of employment contract (permanent vs. fixed term) Working time (atypical work schedule, part-time vs. full-time) Promotion Job and vocational training Transfer Redundancy and dismissal  Notes: It is unlawful to discriminate on the ground of sex by subjecting an employee to any detriment or by denying an employee access, or limiting their access, to any benefit associated with employment. It is also unlawful to discriminate on the grounds of the race, colour or national or ethnic origin of any relative or associate of an employee.	Yes Yes Yes Yes Yes Yes Yes Yes Yes	Yes Yes Yes Yes Yes Yes Yes Yes Yes
Coverage	Private sector Public sector Employment agencies Trade unions (as regards membership)  Notes: In addition, it is unlawful to discriminate on the ground of sex against commission agents, contract workers, partners and authorities or bodies that control authorisations or qualifications that facilitate practicing a profession, trade or occupation.  It is not unlawful to discriminate against a person on the ground of their sex in relation to: - a position in relation to which it is a genuine occupational qualification to be a person of the opposite sex of the person (the circumstances where this exemption applies are outlined in section 30(2) of the <i>Sex Discrimination Act 1984</i> ) - employment to perform domestic duties on the premises on which the first-mentioned person resides - a position which involves the care of a child or children in the child's or children's residence - the ordination, appointment, training or selection of priests, ministers of religion, members of a religious order, or people to perform duties for or participate in any religious observance or practice - any act or practice of a body established for religious purposes, being an act or practice that conforms to the doctrines, tenets or beliefs of that religion or is necessary to avoid injury to the religious susceptibilities of adherents of that religion - employment as a member of the staff of a religious educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, where the person's sex, marital status or pregnancy would conflict with the religious sensibilities of the adherents to that religion, or - employment, engagement or appointment in the Defence Force in a position involving the performance of combat duties (where the person is a woman), or - in connection with the activities of voluntary bodies, or - certain competitive sporting activities.	Yes Yes Yes Yes	Yes Yes Yes Yes

		Gender	Ethnicity
Legal assistance other than private lawyer	<p>It is not unlawful to discriminate against a person on the ground of race, colour or national or ethnic origin in relation to:</p> <ul style="list-style-type: none"> <li>- employment of a person on a ship or aircraft (not being an Australian ship or aircraft) if that person was engaged, or applied for that employment outside Australia,</li> <li>- an act in relation to employment in a dwelling-house or flat occupied by a person on whose behalf an act was done or by a relative of either of those persons.</li> </ul> <p>Specialised body (e.g. equal treatment body) Any relevant public utility institutions and associations Trade unions (please indicate if it is for their members only)</p> <p>Notes: We are aware of some trade unions which provide legal assistance to members only. HREOC can provide general information and advice to members of the public. For example, HREOC can provide assistance to formulate a complaint and reduce it to writing, and to prepare the necessary forms to apply to the Federal Court or Federal Magistrates Court. It also provides assistance on the choice of jurisdiction. A person who has commenced, proposes to commence, or is a respondent to proceedings in the Federal Court or Federal Magistrates Court in relation to a discrimination matter, may apply to the Attorney-General for legal or financial assistance.</p>	Yes Yes Yes	Yes Yes Yes
Legal representation other than private lawyer	<p>Specialised body (e.g. equal treatment body) Any relevant public utility institutions and associations Trade-unions (please indicate if it is for their members only)</p> <p>Notes: We are aware of some trade unions which provide legal representation to members only.</p> <p>Legal representation is not required to lodge or conciliate a complaint of unlawful discrimination through HREOC. However, complainants may request that a lawyer, advocate or support person lodge their complaint and/or attend conciliation with them.</p> <p>In court proceedings regarding a discrimination claim, a party may be self-represented, represented by a barrister or solicitor, or, unless the court considers it inappropriate, represented by a person who is not a barrister or solicitor.</p> <p>While HREOC does not provide complainants with legal representation in a matter that has proceeded to the Federal Court or Federal Magistrates Court, it may seek the leave of the Court to intervene in the proceedings or to assist the court as <i>amicus curiae</i>. HREOC may help a person prepare the necessary forms to apply to the Federal Court or Federal Magistrates Court and has a duty to do so where the complaint involves human rights.</p> <p>Legal aid services operate in each state and territory of Australia. Some legal aid services are free of charge, however legal representation is subject to means and merits testing, and not all applicants will be eligible for a grant of aid. There are also many community legal centres throughout Australia which provide a range of legal services to the public, including legal advice. Community legal centres receive government funding.</p>	No Yes Yes	No Yes Yes

Table 1.2 Burden of proof

		Gender	Ethnicity
Burden of proof	<p>Employee/claimant → <b>except during conciliation (see notes)</b> Shift of burden of proof (the employee/claimant provides facts, then the employer/respondent has to provide proofs – see below for a detailed description)</p> <p>Notes: HREOC generally attempts to conciliate a complaint of unlawful discrimination before the complaint can be referred to the courts. A conciliation conference is not a public hearing, a court of law or a tribunal. That means parties do not have to prove or disprove the complaint. Instead, conciliation allows people to state their point of view, discuss the issues in dispute and settle the matter on their own terms. Only if a discrimination matter cannot be conciliated and the complainant applies to the</p>	Yes* Yes	Yes* Yes

		Gender	Ethnicity
	Federal Court or Federal Magistrates Court does the complainant have the burden of proving the unlawful discrimination while the employer/respondent, if they claim an exemption from the operation of the legislation applies, will have the burden of proving that exemption.		
Additional information in the case of burden of proof on the claimant	<p><b>Standard of proof</b> What is the relevant standard of proof that should be applied, as set by law or established by case law? - Beyond a reasonable doubt (such as the typical standard for criminal cases) - On the balance of probabilities (such as the typical standard for civil disputes) - Other (please specify)</p> <p><b>Typical/standard evidence</b> admissible in courts (or other relevant bodies), as set by law or established by case law: Direct evidence (i.e. any written or verbal statement by the employer/respondent), <b>only</b>. No clear legal guidance for indirect evidence (e.g. case-by-case basis only) Statistical evidence Situation testing</p> <p>Notes: It is generally accepted that there is a need to distinguish between identification of the appropriate standard of proof (on the balance of probabilities in a civil case) and the quality of evidence which will satisfy the standard in a particular case, which is not fixed. The evidence required to satisfy the standard of proof may vary according to the gravity of the accusations or contentions to be evaluated. This is reflected in s 140 of the Evidence Act 1995 (Cth), which applies to unlawful discrimination proceedings (and civil proceedings generally). It provides: (1) In a civil proceeding, the court must find the case of a party proved if it is satisfied that the case has been proved on the balance of probabilities. (2) Without limiting the matters that the court may take into account in deciding whether it is so satisfied, it is to take into account: (a) the nature of the cause of action or defence; and (b) the nature of the subject matter of the proceeding; and (c) the gravity of the matters alleged. Subsection (2) is an expression of the <i>Briginshaw principle</i>. The principle therefore applies in all cases. What the principle actually requires will depend on the facts of the particular case. Therefore, there is not a different standard of proof in regards to anti discrimination cases but instead the matters listed in s 140(2) will be relevant in assessing whether the civil standard of proof is satisfied.</p>	<p>No Yes No</p> <p>No false Yes No</p>	<p>No Yes No</p> <p>No False Yes No</p>
Additional information in the case of shift of burden of proof	<p><b>Direct discrimination</b></p> <p><b>Main steps</b> Can the main steps of the procedure be described as follows? 1. The employee/claimant has to supply prima facie evidence whereby it may be <b>presumed</b> that there has been discrimination. 2. The employer/respondent has the burden of <b>proving</b> that his/her practice is not discriminatory.</p> <p>If not, please specify the procedures. Step 2 only: if the employer/respondent claims that an exemption from the operation of the legislation applies, it will have the burden of proving that exemption.</p> <p>In practice, is presumption – as opposed to stronger evidence of discrimination – sufficient to shift the burden of proof?</p> <p><b>Typical/standard prima facie evidence</b> admissible in courts (or other relevant bodies), as set by law or established by case law: Direct evidence (i.e. any written or verbal statement by the employer/respondent), <b>only</b>. No clear legal guidance for indirect evidence (e.g. case-by-case basis only) Statistical evidence Situation testing</p>	<p>No</p> <p>No</p> <p>No</p> <p>No False Yes No</p>	<p>No</p> <p>No</p> <p>No</p> <p>No False Yes No</p>
	<p><b>Indirect discrimination</b></p> <p><b>Main steps</b> Can the main steps of the procedure be described as follows? 1. The employee/claimant has to clearly identify and define the employment practice in question.</p>	<p>Yes, partly*</p>	<p>Yes, partly**</p>

		Gender	Ethnicity
	<p>2. The employee/claimant has to show that the practice <b>has or may have</b> a differentiated impact on one protected group.</p> <p>3. The employer/respondent has the burden of demonstrating that the policy or practice in question is job related for the position in question and consistent with business necessity.</p> <p>4. If the employer/respondent satisfies this requirement, evidence can be supplied on the existence/lack of the existence of a less discriminatory practice</p> <p>Notes:  * No to 4. Indeed, since the judgement is made on the balance of probabilities, the sequencing imposed by step 4 is meaningless (all elements of proof are simultaneously provided).  ** Yes for steps 1 &amp; 2, but "or may have" in step 2 should be replaced with 'is likely to have'. Yes for step 3: the burden is on the employer to show the practice is reasonable in the circumstances (see further below).</p> <p>In step 2 above is the term "has" more accurate than "may have"?</p> <p>In step 4 above, if the employer/respondent demonstrates that a practice is consistent with business necessity, then:</p> <ul style="list-style-type: none"> <li>- does it fall to the employee/claimant to demonstrate that a less discriminatory alternative exists that meets the business need but that the employer refuses to adopt it? <b>or</b></li> <li>- does it fall to the employer/respondent to demonstrate that a less discriminatory alternative that meets the business need does not exist?</li> </ul> <p>Notes:  Step 2: For 'gender', the relevant test is whether the practice <b>has or is likely to have</b> a differentiated impact. For 'ethnicity', the test is the <b>purpose or effect</b> of the practice.  Step 4: The relevant test is whether the condition, requirement or practice imposed is reasonable in the circumstances. The existence / lack of existence of a less discriminatory practice is only one factor to be considered in determining reasonableness.</p> <p><i>Typical/standard prima facie evidence</i> to be provided to courts or other relevant bodies, as set by law or established by case law:  Direct evidence ( i.e. any written or verbal statement by the employer/respondent), <b>only</b>.  No clear legal guidance for indirect evidence (e.g. case-by-case basis only)  Use of a distinction criteria that appear to be intrinsically suspicious. Please specify (for example, a requirement to work full-time might be unlawful discrimination against women)  Statistical evidence</p> <p>Notes:  Courts have taken judicial notice of the fact that women are more likely to seek access to part-time work.</p>	<p>No</p> <p>n/a</p> <p>n/a</p> <p>No</p> <p>No false</p> <p>Yes</p> <p>Yes</p>	<p>No</p> <p>n/a</p> <p>n/a</p> <p>No false</p> <p>Yes</p> <p>Yes</p>
	<p><b>Harassment</b>  Analysed on a case-by-case basis, by looking at all the circumstances and the context.</p> <p>Notes:  The test for sexual harassment has both subjective and objective elements. The sexual conduct must be both unwelcome (subjective) and occur in circumstances in which a reasonable person would have anticipated that the person harassed would be offended, humiliated or intimidated (objective).  The equivalent test for offensive behaviour based on racial hatred is objective – whether the act is reasonably likely in all the circumstances to offend, insult, humiliate or intimidate; and the act is done because of the race, colour or national or ethnic origin of the other person. Note there are specific exemptions, e.g. where the behaviour is done reasonably and in good faith in the performance of artistic work.</p>	<p>Yes</p>	<p>Yes</p>

Table 1.3 Employee compensation and employer penalties

		Gender	Ethnicity
Employee compensation	<b>Injunctive relief/reinstatement</b>		
	- Always made available to the employee/claimant, but the latter can choose monetary compensation in lieu of relief/reinstatement, or	No	No
	- Always made available to the employee/claimant, without alternative option, or	No	No
	- Always made available to the employee/claimant, but the employer/respondent can choose monetary compensation in lieu of relief/reinstatement, or	No	No
	- Never made available to the employee/claimant.	No	No
	Notes:		
	The court always has a discretion to grant injunctive relief/reinstatement to the claimant and will do so where that is appropriate in the circumstances.		
	<b>Monetary compensation</b>		
	Back pay (please indicate if there is a cap)	Yes	Yes
	Reimbursement of lawyer's and attorney's fees and costs	Yes	Yes
In lieu of relief/reinstatement, compensation for future lost earnings (e.g., in case of dismissal, this may correspond to lost earnings until the employee finds a new job):	Yes	Yes	
- Floor or minimum (amount): none.....			
- Cap or maximum (amount): none.....			
- Average compensation (amount): not available (but see comment below)			
- Median compensation (amount): not available (but see comment below)			
Compensation for psychological injury:	Yes	Yes	
- Floor or minimum (amount): none.....			
- Cap or maximum (amount): none.....			
- Average compensation (amount): not available (but see comment below)			
- Median compensation (amount): not available (but see comment below)			
Notes:			
The amount of damages awarded for unlawful discrimination will vary according to the circumstances of the individual case. The compensation amounts which have recently been awarded where sex discrimination in employment was established range from \$750 ( <i>Cooke v Plauen Holdings</i> [2001] FMCA 91) to \$41,488 ( <i>Evans v National Crime Authority</i> [2003] FMCA 375). The compensation amounts which have recently been awarded where racial discrimination in employment was established range from \$17,000 to \$85,000 ( <i>Baird v Queensland</i> [2006] FCAFC 198). (FMCA = citations from Federal Magistrates Court of Australia, FCAFC = citations from Federal Court of Australia)			
<b>Recent examples</b>			
- In <i>Dare v Hurley</i> [2005] FMCA 844 the court held that the employer had dismissed the claimant because of her need for maternity leave. The claimant received damages for the distress caused to her by the dismissal and special damages for her economic loss. The court awarded \$3,000 in general damages and \$9,005.51 in special damages for the applicant's economic loss.			
- In <i>Fenton v Hair &amp; Beauty Gallery Pty Ltd</i> [2006] FMCA 3 the court found that the claimant was discriminated against on the ground of pregnancy when she was sent home by her employer despite being 'fit, ready and able to work'. She was awarded \$838 for economic loss and \$500 for non-economic loss on the basis that she 'was annoyed by being sent home but suffered no real harm'.			
- In <i>Rankilor v Jerome Pty Ltd</i> [2006] FMCA 922 the court found that the claimant was discriminated against on the basis of her sex when an employee of the respondent employer had referred to the applicant's gender in derogatory and insulting terms. She was awarded total compensation of \$2,000 (inclusive of legal costs) on the basis that a significant part of her mental distress in attempting to resolve her complaint against the employer could not be attributed to the employee's remarks about her gender.			
- In <i>Baird v Queensland</i> [2006] FCAFC 198 the Full Federal Court awarded damages as agreed between the parties, having found that the underpayment of wages to the Aboriginal appellants was racially discriminatory. There were six appellants to the case and the amounts awarded were between \$17,000 and \$85,000.			
- In <i>Carr v Boree Aboriginal Corp</i> [2003] FMCA 408, the court found that the respondent			

		Gender	Ethnicity
	employer through its agents and servants, had unlawfully discriminated against Ms Carr and dismissed her because of her 'race or non-Aboriginality'. The court accepted the claimed amount for special damages and awarded \$11,848.61 for loss of earnings, made up of lost wages, holiday pay and unpaid overtime together with interest. The applicant was also awarded \$7,500.00 for general damages for 'hurt, humiliation and distress'.		
Employer additional penalties and obligations	<p><b>Civil provisions</b> None Court may order the publicity of the decision</p> <ul style="list-style-type: none"> <li>- Within the firm (e.g. notices to all employees addressing the violations of a specific charge and advising them of their rights under the laws)</li> <li>- Outside the firm (please indicate: media, trade-unions, etc.) Federal Court and Federal Magistrates Court decisions are publicly available on Australian legal websites.</li> </ul> <p>The employer may be required to take corrective or preventive actions to cure the source of the identified discrimination</p> <p>Other (please specify): The court may make any orders it thinks fit including any of the following orders or orders to a similar effect:</p> <ul style="list-style-type: none"> <li>- an order requiring the employer to perform any reasonable act or course of conduct to redress any loss or damage suffered by the claimant</li> <li>- an order requiring the employer to vary the termination of a contract or agreement to redress any loss or damage suffered by the claimant, and</li> <li>- an order requiring the respondent to employ or re-employ the claimant, and</li> <li>- an order requiring payment of damages by way of compensation, and</li> <li>- interim injunctions pending determination of complaint</li> </ul> <p><i>Other important additional information/comments:</i></p> <p>Vicarious liability provisions also apply so that an employer may be held liable for the unlawful acts of an employee or agent in connection with his or her duties as an employee or agent, unless they can establish that they took all reasonable steps to prevent the employee from doing the act. In addition to receiving complaints of unlawful discrimination, the Human Rights and Equal Opportunity Commission can inquire into complaints of breaches of human rights and workplace discrimination (including discrimination in employment on the basis of trade union activity, sexual preference, medical record and criminal record) under the <i>Human Rights and Equal Opportunity Commission Act 1986</i> (Cth), either in response to a request or complaint or on its own initiative. When the Commission receives a complaint of a breach of human rights or workplace discrimination, it will attempt to resolve the complaint through conciliation. If conciliation is unsuccessful or inappropriate and the Commission finds a breach has occurred, then the Commission can prepare a report of the complaint including recommendations for action, for the Attorney-General.</p> <p><b>Penal provisions</b> None Fine (please see below) Prison sentence (please see below)</p> <p>Other (please specify):</p> <p>Additional penal provisions exist for:</p> <ul style="list-style-type: none"> <li>- failure to attend compulsory conferences with HREOC (maximum fine of 10 penalty units, currently equal to \$1100)</li> <li>- failure to comply with HREOC requests for information or documents (maximum fine of 10 penalty units, currently equal to \$1100)</li> <li>- providing false or misleading information (maximum of 6 months imprisonment)</li> </ul> <p>In relation to sex discrimination:</p> <ul style="list-style-type: none"> <li>- publishing or displaying discriminatory advertisements and notices (maximum fines of \$1000 for a person or \$5000 for a body corporate)</li> <li>- disclose of particulars of a complaint of sex discrimination (maximum fines of \$1000 for a person or \$5000 for a body corporate)</li> <li>- victimisation (maximum fine of \$2500 or up to 3 months imprisonment, or both for a person, or a maximum fine of \$10000 for a body corporate), and</li> <li>- insulting, hindering, obstructing, molesting or interfering with a person exercising a power or function under the Sex Discrimination Act (maximum fine of \$1000 for a person or \$5000 for a body corporate).</li> </ul>	False Yes Yes Yes Yes	False Yes Yes Yes Yes



		Gender	Ethnicity
	<p>In relation to racial discrimination:</p> <ul style="list-style-type: none"> <li>- refusing to employ; dismissing or threatening to dismiss from employment; prejudicing or threatening to prejudice; or intimidating or coercing or imposing any pecuniary or other penalty upon another person because they have complained or are proposing to make a complaint (maximum fine of \$2,500 or 3 months imprisonment for a person, or both; or maximum fine of \$10,000 for a body corporate)</li> <li>- hindering, obstructing, molesting or interfering with a person exercising or performing any of the powers or functions under the Racial Discrimination Act (fine of \$1,000 for a person or \$5,000 for a body corporate).</li> </ul> <p>In Australia's federal system of government, state and territory courts are responsible for the trial and sentencing of those who commit offences under federal laws. Subsection 20AB(1) of the <i>Crimes Act 1914</i> provides a mechanism for federal offenders to access a number of sentencing options that are available in the states and territories. However, they can only be imposed on federal offenders who are sentenced in the jurisdictions and locations in which the options are available.</p> <p>The provision specifically identifies some of these sentencing options including community service orders, work orders, sentences of periodic detention, attendance centre orders, sentences of weekend detention or attendance orders. Other sentencing options are prescribed by regulation, including home detention and intensive correction orders. Subsection 20AB(1) also empowers courts to impose sentencing options that are 'similar' to the ones set out in the provision or listed in the regulations.</p> <p>Other important additional information/comments: It is also unlawful (but not penal) for a person to publish or display an advertisement or notice that indicates or could be understood to indicate sex or racial discrimination.</p>		

Table 1.4 Protection against victimisation (retaliation)

		Gender	Ethnicity
Protected actions	<p>It is prohibited to treat the employee/protected person less favourably (so-called "adverse action") because s/he has (so-called "protected action"):</p> <ul style="list-style-type: none"> <li>- brought proceedings against discrimination</li> <li>- given evidence or information in connection with any proceedings against discrimination.</li> <li>- participated as a witness in any proceedings against discrimination</li> </ul> <p>- Other protected actions (or any important additional information/comments):</p> <p>In addition, the Sex Discrimination Act prohibits subjecting or threatening to subject a person to any detriment because s/he:</p> <ul style="list-style-type: none"> <li>• has made or proposes to make a complaint to HREOC under the Sex Discrimination Act or Human Rights and Equal Opportunity Commission Act</li> <li>• proposes to bring proceedings under the Sex Discrimination Act or Human Rights and Equal Opportunity Commission Act</li> <li>• proposes to provide information or documents to a person exercising a function under the Sex Discrimination Act or Human Rights and Equal Opportunity Commission Act</li> <li>• has attended or proposes to attend a conciliation conference</li> <li>• proposes to appear as a witness in a proceeding under the Sex Discrimination Act or Human Rights and Equal Opportunity Commission Act</li> <li>• has reasonably asserted or proposes to assert, any rights of the person or the rights of any other person under the Sex Discrimination Act or Human Rights and Equal Opportunity Commission Act, or</li> <li>• has made or proposes to make an allegation that a person has done an act of unlawful discrimination under the Sex Discrimination Act.</li> </ul> <p>The Racial Discrimination Act makes it unlawful for a person to:</p> <ul style="list-style-type: none"> <li>• refuse to employ another person,</li> <li>• dismiss, or threaten to dismiss, another person from the other's person's employment,</li> </ul>	<p>Yes Yes Yes</p>	<p>Yes Yes Yes</p>

		Gender	Ethnicity
	<ul style="list-style-type: none"> <li>prejudice, or threaten to prejudice, another person in the other person's employment, or</li> <li>intimidate or coerce, or impose any penalty (monetary or otherwise) upon another person,</li> </ul> for any of the following reasons: <ul style="list-style-type: none"> <li>because the other person has made or proposes to make a complaint to HREOC under the Racial Discrimination Act or the Human Rights and Equal Opportunity Commission Act,</li> <li>because the other person has furnished, or proposes to furnish, any information or documents to a person exercising or performing any powers or functions under the Racial Discrimination Act or the Human Rights and Equal Opportunity Act,</li> <li>because the other person has attended or proposes to attend, a conference held under the Racial Discrimination Act or the Human Rights and Equal Opportunity Act.</li> </ul>		
Proof of causal connexion	<p><i>Burden of proof:</i></p> <ul style="list-style-type: none"> <li>i) employee/protected person → <b>However, if the matter is prosecuted by the CDPP, it will have the burden of proof (see comment below).</b></li> <li>ii) employer/respondent within a given lapse of time from the concerned event. Please specify conditions of application and lapse of time.</li> <li>iii) shift of burden of proof. Please specify main steps.</li> </ul> <p>In cases (i) and (iii), when the causal connexion shall be first shown or established by the employee/protected person:</p> <ul style="list-style-type: none"> <li>the link can be demonstrated by evidence that the adverse action occurred shortly after the protected activity (and the employer/respondent was aware of the complainant's protected activity before taking the action), so that the employment relationship is implicitly or explicitly (please specify) protected during a certain period of time (please specify)</li> </ul> <p><b>Comment:</b> The link may be demonstrated by evidence that the adverse action occurred shortly after the protected activity. However, <b>this evidence may not be determinative</b> - this would be a matter for the court to consider in all the circumstances of the case. However, <b>the employment relationship is not necessarily protected</b> during a certain period of time unless the employee has lodged a complaint with HREOC then obtained a court injunction to have the employment relationship explicitly maintained. Proving the causal connection does not automatically imply reinstatement.</p> <p>- other (please specify):</p> <p>Victimisation is a criminal offence. The usual process is for a complaint to be made to an appropriate policing agency such as the Australian Federal Police. If that agency considers there is sufficient evidence to merit a prosecution, the matter would be referred to the Commonwealth Director of Public Prosecutions (CDPP) for prosecution. The CDPP would hold the burden of proving all elements of the offence beyond reasonable doubt, including the element of causal connection. Alternatively, complaints of victimisation can be lodged with HREOC for conciliation. If conciliation is unsuccessful, the complainant can apply to the Federal Court or Federal Magistrates Court where they would have the burden of proving victimisation (including a causal connection) on the balance of probabilities.</p>	<p>Yes</p> <p>No</p> <p>No</p> <p>Yes/No (but see comment)</p> <p>Yes</p>	<p>Yes</p> <p>No</p> <p>No</p> <p>Yes/No (but see comment)</p> <p>Yes</p>
Employee compensation and employer penalty	<p>Compared to provisions described in Table 1.3:</p> <p>- additional employee/protected person compensation: If victimisation is established as part of a civil law claim by the Federal Court or Federal Magistrates Court, the compensation as outlined in Table 1.3 is available.</p> <p>-additional employer/respondent penalties: If victimisation is established as part of a civil law claim by the Federal Court or Federal Magistrates Court, the penalties outlined in Table 1.3 are available. If victimisation is successfully prosecuted by the CDPP, the penalty which can be imposed is: a maximum fine of \$2500 or imprisonment for a maximum of 3 months, or both, in the case of a natural person; a maximum fine of \$10,000 in the case of a body corporate.</p>	<p>No automatic provision</p> <p>Yes (but see comment)</p>	<p>No automatic provision</p> <p>Yes (but see comment)</p>

Table 1.5 Relationship with standard labour laws

		Gender	Ethnicity
Labour law and discrimination	<p>According to standard labour law(s) or code, would dismissal solely based on gender or ethnicity considered to be unjust dismissal? If yes, please specify since when: Since 1993. The provisions are broadly based on ILO Convention 158. Provisions under the Workplace Relations Act 1996 (WR Act) prohibit employers from dismissing an employee on the grounds of sex, race, colour, and national extraction or social origin, among other things. Dismissal on the ground of gender or ethnicity would be considered unlawful dismissal, which would attract more serious remedies than unjust dismissal.</p> <p>Is there a provision requiring equal pay for work of equal value in standard labour law(s) or code? If yes, please specify since when: Equal pay for work of equal value has been an established principle of federal industrial tribunals since 1972. Under the WR Act, equal remuneration orders can be made by the Australian Industrial Relations Commission (AIRC) on application from an employee, or a trade union or the Sex Discrimination Commissioner. The object of the equal remuneration provisions is to give effect to the anti-discrimination conventions; the Equal Remuneration Recommendation 1951; and the Discrimination (Employment and Occupation) Recommendation 1958. The WR Act also guides the AIRC, the Workplace Authority and the Australian Fair Pay Commission (AFPC) to take account of the needs of certain vulnerable groups and the need to prevent and eliminate discrimination in the workplace. In addition, the Act directs the AIRC and AFPC to apply the principle that men and women should receive equal remuneration for work of equal value.</p> <p>Other areas of discrimination covered by standard labour law(s) or code (hiring, promotion, etc...); please specify</p> <p>Other prohibited grounds for dismissal under the WR Act, in addition to those outlined above, are sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion and political opinion.</p>	Yes	Yes
Complaints	<p>Are discrimination complaints concerning dismissals more often lodged under standard labour law(s) or code, than under specific anti-discrimination laws?</p> <p>Are discrimination complaints concerning pay more often lodged under standard labour law(s) or code, than under specific anti-discrimination laws?</p> <p>Other important additional information/comments: The data on dismissal and pay complaints are not disaggregated by grounds of complaint (i.e. gender/ethnicity) by either the Australian Industrial Registry, HREOC or the Federal courts. Complaints for unlawful termination of employment due to sex or ethnic discrimination can also be lodged under the WR Act and dealt with by the Federal courts. 20% of terminations of employment applications to the Australian Industrial Relations Commission in 2006/07 were unlawful termination matters, and a further 39% were both unfair and unlawful termination matters. While it is not known what proportion of these figures relates to gender or ethnic discrimination, it is likely that both forms of discrimination have been the subject of complaints to the Australian Industrial Relations Commission.</p>	n/a	n/a
Evaluations	<p>Please indicate below references to existing evaluations/studies on the effectiveness of anti-discrimination laws with respect to standard labour law(s):</p> <p>Report to the ILO on Equal Remuneration and on anti-discrimination.</p>		

Table 1.6 Positive action

		Gender	Ethnicity
Compulsory actions	Are employers <b>required</b> by law to take actions to increase diversity/prevent discrimination?	Yes	Yes
	If yes, what actions are required? - make regular public reports on employment composition in terms of gender or ethnicity - process only anonymous job applications	Yes No	No No
	- obligation for large employers to have a person in the HRM department in charge of the employer's anti-discrimination policy (please specify the size threshold of application, if any) - quotas (please specify the areas: e.g. executives in firms above a certain size)	No	No
	Notes: Under federal anti-discrimination laws employers, regardless of their size, may be legally responsible for discrimination and harassment which occurs in the workplace or in connection with a person's employment unless the employer can prove they took 'all reasonable steps' to prevent the harassment or discrimination. This legal responsibility is called 'vicarious liability'. What constitutes 'all reasonable steps' is not defined in the legislation because what is reasonable for a large corporation may not be reasonable for a small business. Instead, it is determined on a case-by-case basis. This means employers must actively implement measures to minimise the risk of discrimination and harassment occurring. HREOC has developed a range of resources to assist employers to take 'reasonable steps' to prevent harassment and discrimination in the workplace. In 1999 the government established the Equal Opportunity for Women in the Workplace Agency (EOWA). Pursuant to the Equal Opportunity for Women in the Workplace Act 1999, employers with more than 100 employees must report to EOWA on the actions they are taking to achieve equal opportunity for women in the workplace. EOWA's role is to assist large employers in the development and implementation of workplace equal opportunity programs, to undertake research and educational programs and to promote understanding and acceptance of equal opportunity for women in the workplace. In practice this means that for most businesses with 100 or more employees, there would be a person employed to administer the EOWA legislation as part of a human resources function. Failure to report to EOWA implies disqualification from entering in contractual relationship with the Commonwealth (contract compliance)		
Voluntary actions	Are employers <b>allowed</b> to take actions to increase diversity/prevent discrimination?	Yes	Yes
	If yes, what actions are allowed? - make regular public reports on employment composition in terms of gender or ethnicity - establish a plan to ensure that the employment composition in terms of gender or ethnicity is balanced.	Yes Yes	Yes Yes
	- quotas (please specify the areas: e.g. executives)	No	No
	Notes: Employers with more than 100 employees report to EOWA on the actions they are taking to achieve equal opportunity for women in the workplace. EOWA focuses on building business partnerships and relationships with employer groups and individual employers. Positive action is allowed under the SDA to achieve equality "if it is taken solely for that purpose".		
Public employers' practices	Do public employers normally take actions to increase diversity/prevent discrimination?	Yes	Yes
	If yes, what actions? - make regular public reports on employment composition in terms of gender or ethnicity - establish a plan to ensure that the employment composition in terms of gender or ethnicity is balanced	Yes Yes	Yes Yes
	- process only anonymous job applications	No	No
	- have at least one person in the HRM department in charge of the employer's anti-discrimination policy - quotas (please specify the areas: e.g. high-rank officials)	Yes No	Yes No
	Other (or any important additional information/comments): The legislative framework for the Australian Public Service (APS) places a strong emphasis on the importance of diversity and equity in employment. In particular, the APS		

		Gender	Ethnicity
	<p>Values state that the APS provides a workplace that is free from discrimination and recognises and utilises the diversity of the Australian community that it serves, and promotes equity in employment.</p> <p>The Public Service Act 1999 requires that agency heads establish workplace diversity programmes to assist in giving effect to the APS Values. In 2005-2006, 96% of Australian Government agencies indicated that they had a workplace diversity programme in place. Further, under the Public Service Commissioner's Directions, agency heads are required to put in place measures aimed at removing employment disadvantage on the basis of gender, being a Torres Strait Islander person or Indigenous Australian, race or ethnicity and physical or mental disability. In 2005-2006, the APS implemented the APS Employment and Capability Strategy for Aboriginal and Torres Strait Islander Employees. This aims to address employment disadvantage for Indigenous Australians in the Australian Public Service.</p> <p>The Australian Public Service Commission monitors workplace diversity trends in terms of gender, race or ethnicity, Indigenous status and disability. This information is relevant to monitoring employment-related disadvantage. The provision of equal employment opportunity data by employees is voluntary, with the exception of information relating to the sex of employees.</p>		
Incentives	<p>Is there a policy to increase incentives for employers to increase diversity/prevent discrimination?</p> <p>Policy instruments used:</p> <ul style="list-style-type: none"> <li>- Delivery of "labels" or certificates stating that the employer has a diversity-friendly business/employment practice.</li> <li>- financial incentives to establish a plan to ensure that the employment composition in terms of gender or ethnicity is balanced</li> <li>- financial incentives for processing only anonymous job applications</li> <li>- financial incentives for having a person in the HRM department in charge of the employer's anti-discrimination policy and/or hiring a consultant to establish a diversity plan.</li> <li>- financial incentives for quotas (please specify the areas: e.g executives)</li> </ul> <p>Other (or any important additional information/comments):</p> <p>Failure to report to EOWA implies disqualification from entering in contractual relationship with the Commonwealth (contract compliance)</p> <p>Since 2001, EOWA has been hosting Business Achievement Awards to honour leaders in the field of equal employment opportunity.</p> <p>EOWA also awards 'Employer of Choice for Women' citations to organisations that are leading the way in their programmes to advance women. Organisations whose achievements have been acknowledged by this award can use this citation in their recruitment, advertising and other company promotional material.</p> <p>The Department of Employment and Workplace Relations encourages employers to adopt flexible, family-friendly working arrangements through initiatives such as the National Work and Family Awards, the Workplaces Flexibility Industry projects, the Work and Family website and fact sheets.</p> <p>The Department of Employment and Workplace Relations aims to improve the circumstances of Indigenous Australians through the Indigenous Economic Development Strategy. There are a range of Indigenous specific programmes and services that form part of this strategy to assist Indigenous people into employment and encourage employers to employ Indigenous people. These include Structured Training and Employment Projects (STEP), targeted industry strategies and the Corporate Leaders for Indigenous Employment Programme.</p> <p>The Department also recognises excellence in recruiting and retaining Indigenous employees through its annual Jobs Careers Future Awards.</p> <p>Assistance is available for employers who recruit and retain Indigenous employees through programmes such as Wage Assistance.</p>	<p>Yes</p> <p>Yes</p> <p>No</p> <p>No</p> <p>No</p> <p>No</p>	<p>Yes</p> <p>Yes</p> <p>Yes</p> <p>N/A</p> <p>No</p> <p>No</p>

**Part 2. Institutional framework: specialised bodies (SB) combating discrimination (e.g. equal treatment bodies)**

Table 2.1 **Activities of SBs not related to individual discrimination cases: Public information and evaluation**<sup>a</sup>

	<b>Gender</b>	<b>Ethnicity</b>
Is there a specialised body (SB) in charge of carrying out some of all of the following public information and policy evaluation functions?	Yes	Yes
Human Rights and Equal Opportunity Commission (HREOC), 1986, independent statutory agency		
This SB has the statutory power to:	Yes	Yes
- run information campaigns to inform the public of their legal rights	High	High
<b>in practice</b> , importance of the above mentioned activity in the actual overall workload	Yes	Yes
- run campaigns to change public opinion	Medium	Medium
<b>in practice</b> , importance of the above mentioned activity in the actual overall workload	Yes	Yes
- publish statistics on discrimination	High	High
<b>in practice</b> , importance of the above mentioned activity in the actual overall workload	Yes	Yes
- carry out evaluations of the legal and institutional anti-discrimination framework	High	High
<b>in practice</b> , importance of the above mentioned activity in the actual overall workload	Yes	Yes
- make policy recommendations	High	High
<b>in practice</b> , importance of the above mentioned activity in the actual overall workload	Yes	High
- produce codes of good practice for employers	Yes	Yes
<b>in practice</b> , importance of the above mentioned activity in the actual overall workload	Medium	Medium

Note: a) High/Medium/Low mean above average / close to average / below average, respectively.

Table 2.2 **Activities of SBs not related to individual discrimination cases: Control and correction**<sup>a</sup>

	<b>Gender</b>	<b>Ethnicity</b>
Is there a specialised body (SB) in charge of carrying out some of all of the following control and correction functions?	Yes	Yes
Human Rights and Equal Opportunity Commission (HREOC), 1986, independent statutory agency.		
This SB has the statutory power to	No	No
- randomly conduct formal investigations of companies and organisations.	n/a	n/a
<b>in practice</b> , importance of the above mentioned activity in the actual overall workload	No	No
- conduct formal investigations of companies and organisation where there is evidence of discrimination.		
Note: Only where that evidence is brought before HREOC in the form of a complaint. Thus the answer is No if not related to individual discrimination cases, although HREOC can act on its own initiative to inquire into human rights issues where there is concern as to a potential breach.		
<b>In practice</b> , importance of the above mentioned activity in the actual overall workload	n/a	n/a
- oblige a company or an organisation to change the way it operates when discriminatory practices are found.	No	No
<b>in practice</b> , importance of the above mentioned activity in the actual overall workload	n/a	n/a
- take legal action against companies or organisations that apply discriminatory practices	No	No
<b>in practice</b> , importance of the above mentioned activity in the actual overall workload	n/a	n/a
- take legal action against organisations that attempt to promote discrimination or to instruct others to discriminate.	No	No
<b>in practice</b> , importance of the above mentioned activity in the actual overall workload	n/a	n/a
Other (or any Important additional information/comments): HREOC's ability to investigate companies and organisations is dependent upon receiving a complaint/s. HREOC is unable to make legally enforceable orders or findings. In 1995 the High Court of Australia, in <i>Brandy v The Human Rights and Equal Opportunity Commission</i> , determined that under Australia's constitution HREOC could not be given the power to make enforceable decisions after public hearings. This power rests with the Federal Court and Federal Magistrates Court.		

Note: a) High/Medium/Low mean above average / close to average / below average, respectively.

Table 2.3 Role of SBs in individual discrimination cases

	Gender	Ethnicity
<p>Is there a specialised body (SB) with specific functions related to individual discrimination cases?</p> <p>Human Rights and Equal Opportunity Commission (HREOC), 1986, independent statutory agency.</p> <p>In addition to receiving complaints of unlawful discrimination, the Human Rights and Equal Opportunity Commission can inquire into complaints of breaches of human rights and workplace discrimination (including discrimination in employment on the basis of trade union activity, sexual preference, medical record and criminal record) under the <i>Human Rights and Equal Opportunity Commission Act 1986</i> (Cth). When the Commission receives a complaint of a breach of human rights or workplace discrimination, it will attempt to resolve the complaint through conciliation. If conciliation is unsuccessful or inappropriate and the Commission finds a breach has occurred, then the Commission can prepare a report of the complaint including recommendations for action, for the Attorney-General. It is important to note that unlike other anti-discrimination laws that the Commission administers, a complainant cannot apply to have their complaint heard in court if conciliation is unsuccessful.</p>	Yes	Yes
<p>Was this body created by anti-discrimination laws (or did anti-discrimination laws establish a specific mandate for it)?</p>	Yes	Yes
<p><b>Formal linkage between equal treatment body activities and complaint lodging and procedures</b></p> <p>Does the SB act as a one-stop shop where claimant can access information, lodge a complaint, receive advice? HREOC is unable to give legal advice to members of the public nor can it represent members of the public. However, it can provide general information and advice to members of the public. For example, HREOC can provide assistance to formulate a complaint and reduce it to writing, and to prepare the necessary forms to apply to the Federal Court or Federal Magistrates Court.</p> <p>As soon as, or before, a discrimination complaint is brought to court, is the claim formally transmitted to the SB? → A complaint has to be made to HREOC before it can proceed to the federal courts.</p> <p>Discrimination complaints must be lodged with the SB beforehand, which acts as one-stop shop to start the procedure. The SB has the statutory power to provide advice and information to claimants (or both parties) on their legal rights and what options they have. <b>In practice</b>, the SB carries on the above mentioned process as soon as it receives a discrimination claim.</p> <p>The SB has the statutory power to provide claimants with legal assistance. <b>In practice</b>, SB provides legal assistance to claimants during court proceedings. The SB has the statutory power to provide claimants with legal representation. <b>In practice</b>, the SB provides legal representation to claimants during court proceedings.</p> <p>Notes: While HREOC does not provide complainants with legal representation in a matter that has proceeded to the Federal Court or Federal Magistrates Court, it may seek the leave of the Court to intervene in the proceedings or to assist the court as <i>amicus curiae</i>. HREOC may help a person prepare the necessary forms to apply to the Federal Court or Federal Magistrates Court. The SB can also intervene in proceedings with the leave of the court.</p>	<p>Yes (partly)</p> <p>Yes.</p> <p>Yes</p> <p>Yes</p> <p>Yes, duty</p> <p>No</p> <p>No</p> <p>No</p> <p>No</p>	<p>Yes (partly)</p> <p>Yes.</p> <p>Yes</p> <p>Yes</p> <p>Yes, duty</p> <p>No</p> <p>No</p> <p>No</p> <p>No</p>
<p><b>Investigation of discrimination claims</b></p> <p>The SB has the legal authority to compel people (and in particular, the employer) to provide all of the information it requires to investigate a discrimination claim. Does the court accept evidence from the SB? Does the court accept the SB's evaluation of the validity of the discrimination complaint? <b>In practice</b>, the SB formally investigates discrimination claim: Inquiry include power to require production of information, attendance at compulsory conferences, conciliation and review of available evidence.</p> <p>Please indicate below the main tools the SB uses to investigate a discrimination claim:</p> <p>Any employer's failure to provide the requested information to the SB will: - have no implication for the court ruling. - potentially be used to draw inferences on discrimination if the case is brought before court. Any employer's failure to comply with the code of practices issued by the SB (or other relevant body) will:</p>	<p>Yes</p> <p>Yes</p> <p>No</p> <p>Yes, duty</p> <p>Yes/No*</p> <p>Yes*</p>	<p>Yes</p> <p>Yes</p> <p>No</p> <p>Yes, duty</p> <p>Yes/No*</p> <p>Yes*</p>

	<b>Gender</b>	<b>Ethnicity</b>
<ul style="list-style-type: none"> <li>- have no implication for the court ruling.</li> <li>- potentially be used to draw inferences on discrimination if the case is brought before court.</li> </ul>	Yes/No* Yes*	Yes/No* Yes*
<p>Notes:</p> <p>* Whether it has an implication or not is a discretionary matter for the court to determine. A matter cannot proceed to litigation until it has been investigated by the SB.</p>		
<p><b>Mediation/conciliation procedure</b></p> <p>The SB has the statutory power to help both parties to resolve the dispute through a mediation/conciliation procedure. Mediation/conciliation is a free and voluntary process for both parties. <b>In practice</b>, the SB carries out mediation/conciliation procedures, so that a court ruling may not be necessary. →HREOC has a statutory duty to attempt to conciliate complaints. A consequence of conciliating a complaint is that it does not proceed to court.</p> <p>The mediation/conciliation procedure is <b>usually</b> initiated:</p> <ul style="list-style-type: none"> <li>- before the case is brought to court</li> <li>- before any formal investigation starts or at an early stage of the process → Determined on a case by case basis.</li> <li>- after any investigation has produced primary evidence of discrimination (but before a litigation decision has been reached) → Determined on a case by case basis.</li> </ul>	Yes  Yes Yes, duty.   Yes Yes/No  Yes/No.	Yes  Yes Yes, duty.   Yes Yes/No  Yes/No
<p>Other (or any important additional information/comments)</p>		
<p>The SB acts as a neutral third party assisting both opposing parties in the mediation/conciliation procedure. The mediation/conciliation procedure is confidential: no details of the discussion taking place in its course can be repeated to court, nor are made public. The same rule applies to the terms of the settlement. → HREOC does not make any details of the settlement public. However, the parties may agree as part of a settlement that they will do so. If the parties, including the SB, reach settlement agreement, the latter is legally binding and the charge is dismissed. → If the complaint settles then it is considered to be resolved, not dismissed The SB secures the enforcement of settlement agreements reached under its assistance and/or responsibility. → It is a matter for a party to legally enforce a settlement agreement.</p>	Yes Yes  Yes  No	Yes Yes  Yes  No



### Part 3. Statistics on mediation/conciliation procedures and court cases

Notes: The figures provided in this Part are for complaints under federal anti-discrimination legislation lodged with HREOC in connection to employment. They do not include complaints made under state or territory legislation to state or territory bodies. The number of complaints made under state and territory legislation is far greater than the number of complaints made under federal legislation. Complaints lodged in one year might not have been resolved or dismissed in one year. Similarly complaints unsuccessful conciliations might not have been treated by courts in the same year. It is difficult therefore to construct precise ratios with these data. But they are nonetheless informative.

Table 3.1 **Statistics**

		<b>Gender</b>	<b>Ethnicity</b>
General statistics	Total number of discrimination complaints received	2006 402 2005 287 2004 299 2003 309 2002 318	2006 110 2005 84 2004 72 2003 78 2002 78
	Protected population (number of persons aged 15-64 covered by the law in question) As at 30 June 2006, there were 13,273,702 people aged between 15 and 64 years which usually reside in Australia.		
Mediation/ conciliation procedures	Number of received complaints treated by the SB, <i>of which:</i>		
	- number of complaints dismissed by the SB for no reasonable cause	2006 31 2005 19 2004 38 2003 56 2002 43	2006 12 2005 44 2004 53 2003 90 2002 67
	- number of unsuccessful mediations/conciliations although reasonable cause was found	2006 74 2005 92 2004 90 2003 102 2002 104	2006 54 2005 34 2004 34 2003 45 2002 43
	- number of successful mediations/conciliations	2006 161 2005 155 2004 173 2003 169 2002 156	2006 45 2005 36 2004 36 2003 37 2002 38
	- other (please specify)		
	Other complaints finalised due to being: withdrawn, dealt with by another remedy (for example, an Industrial Relations Commission or Health Care Complaints Authorities), more than 12 months old when lodged, not unlawful or administratively closed (for example, where the complaint is also lodged with a state discrimination body).	2006 85 2005 78 2004 88 2003 79 2002 68	2006 59 2005 42 2004 31 2003 43 2002 109
	Average duration of mediation/conciliation procedures	2006 5mths 2005 6mths 2004 6mths 2003 6mths 2002 7mths	2006 6mths 2005 6mths 2004 6mths 2003 6mths 2002 7mths
	Conciliation is a component of the complaint investigation process and is not measured separately. HREOC has an integrated approach to complaint management so the investigation/conciliation processes blend. Some matters may be resolved within a few days of being lodged while some matters may take 6 months depending on complexity of investigation and conciliation processes. Timeframes provided are from receipt to finalisation of complaints.		
	Average employee/claimant compensation under mediation/ conciliation procedures Reported figures are median rather than average data because extremely high or low settlements can skew the average settlement amount. There is no automated way of collating this information although HREOC periodically reports this information in research conducted by the complaint handling section. The most recent information is provided.	2004 \$6000 2003 \$6000 2002 \$5000	2004 \$5250 2003 \$5000 2002 \$6000

		Gender	Ethnicity
Court procedures	<p>Number of court cases: Due to the record-keeping methods of the federal courts, specific figures for the number of court cases regarding discrimination in employment on the grounds of gender and ethnicity were not available.</p>	Not Available	Not Available
	<p>Between 1 July 2003 and 30 June 2007, there were 109 claims filed with the Federal Court or Federal Magistrates Court under the Sex Discrimination Act. It is unknown what proportion of these claims are employment related.</p> <p>Between 1 July 2003 and 30 June 2007, there were 70 claims filed with the Federal Court or Federal Magistrates Court under the Racial Discrimination Act. It is unknown what proportion of these claims are employment related.</p> <p>Note, these figures relate only to the court cases filed under federal anti-discrimination laws and do not include cases filed with state or territory courts and tribunals.</p> <p>Also, between 1 July 2003 and 30 June 2007, there were 212 claims of unlawful termination under the Workplace Relations Act filed with the Federal Court or Federal Magistrates Court. These claims may or may not have involved a gender or ethnic discrimination aspect.</p>		
	<p><i>of which</i></p> <ul style="list-style-type: none"> <li>- number of complaints dismissed by court for default procedures (or administrative reasons)</li> <li>- number of complaints dismissed by court for no reasonable cause</li> <li>- number of cases withdrawn by the complainant(s)</li> <li>- number of court rulings with favourable outcomes for the complainant(s)</li> </ul>		
	<p>- other (please specify): Due to the record-keeping methods of the courts, the level of detail required to answer these questions was not available in the time permitted.</p> <p>Between 1 July 2003 and 30 June 2007, the courts finalised 157 unlawful termination matters (which may or may not have included a discrimination aspect):</p> <ul style="list-style-type: none"> <li>- 96 were discontinued or withdrawn</li> <li>- 19 were transferred to another jurisdiction</li> <li>- 14 were dismissed</li> <li>- 20 were dismissed by consent</li> <li>- 6 were granted or allowed</li> <li>- 2 were granted or allowed by consent</li> <li>- 0 were granted or allowed in part</li> </ul> <p>Between 1 July 2003 and 30 June 2007, the courts finalised 511 human rights matters (which may or may not have related to employment and which included discrimination matters on all grounds, not just gender and ethnicity):</p> <ul style="list-style-type: none"> <li>- 221 were discontinued or withdrawn</li> <li>- 36 were transferred to another jurisdiction</li> <li>- 135 were dismissed</li> <li>- 40 were dismissed by consent</li> <li>- 33 were granted or allowed</li> <li>- 11 were granted or allowed in part</li> <li>- 35 did not have results recorded</li> </ul>		
	<p>Average duration of court procedures</p> <p>From filing a claim to finalisation by the court, the average duration of:</p> <ul style="list-style-type: none"> <li>- human rights matters is 221 days in the Federal Magistrates Court and 223.9 days in the Federal Court.</li> <li>- unlawful termination matters was 111 days in the Federal Magistrates Court and 148.2 days in the Federal Court.</li> </ul>		

## AUSTRIA

### Part 1. Legal framework for employment discrimination

Main anti-discrimination laws:

- Equal Treatment Act, Federal Law Gazette I Nr. 66/2004, last amended Federal Law Gazette I Nr. 82/2005. This act covers employment in the private sector and was enacted in 1979, containing at first only rules on equal pay for men and women. Several amendments from 1984 to 2001 and enactment of the EU directives in 2004 implementing provisions for discrimination protection concerning age, sexual orientation, religion and ideology and ethnicity.
- Act on the Equal Treatment Commission and the Equal Treatment Office, Federal Law Gazette Nr. 108/1979, last amended Federal Law Gazette I Nr. 66/2004 and Federal Law Gazette I Nr. 82/2005.

Relevant courts:

- Employment tribunal
- Equal Treatment Commission: This institution serves to enforce the Equal Treatment Act. Given that it is neither a public authority nor a court, it examines the existence of discrimination in individual cases in a relatively informal way. Being a conciliation board, its ruling has no binding effect on independent courts. Rather, the primary object is to help parties achieve an agreement as rapidly and unbureaucratically as possible.
- District authority: It fines employers or job placement agencies, when they violate the principle of none discrimination job advertisements, upon demand of job applicants and the Ombud for Equal Treatment (administration penal procedure).

Legal scope/definition of the (hereinafter) so-called gender and ethnic grounds:

- Gender: sex, especially by referring to marital and family status.
- Ethnicity: ethnic origin.

**Table 1.1 Prohibited acts, areas of concern, coverage, legal assistance and representation**

		Gender	Ethnicity
Type of discrimination	Direct discrimination	Yes	Yes
	Indirect discrimination, i.e. where a provision criterion or practice is applied to all employees but puts one protected group at a particular disadvantage and cannot be shown to be a proportionate means of meeting a legitimate aim. Pressure and instruction to discriminate Harassment	Yes Yes	Yes Yes
	Other: victimisation (all grounds) violation of the principle of non discrimination job advertisements (all grounds)		
Areas of concern	Hiring process	Yes	Yes
	Wage Type of employment contract (permanent vs. fixed term) Working time (atypical work schedule, part-time vs. full-time) Promotion Vocational training and re-training Transfer Redundancy and dismissal	Yes Yes Yes Yes Yes Yes Yes	Yes Yes Yes Yes Yes Yes Yes
	Others/notes: • Working conditions (all grounds) • Voluntary social benefits (all grounds) • Access to vocational counselling, vocational basic and continuing training, as well as re-training outside of an employment relationship (all grounds) • Membership and active participation in an employees' organization or an		

		Gender	Ethnicity
	<p>organization with members belonging to a specific occupational group, including recourse to services/benefits of such organizations (all grounds)</p> <ul style="list-style-type: none"> <li>• Conditions of access to self-employed gainful activities (all grounds)</li> <li>• Job advertisements (all grounds)</li> </ul> <p>The areas "Type of employment contract" and "Working time" are not mentioned explicitly but the can be subsumed under the area "Working conditions". Moreover, ban on discrimination for part time contracts is enacted by the law on working time regulation, which can be used, together with the ETA, in legal cases where gender or ethnicity intersects with working time issues.</p>		
Coverage	<p>Private sector Public sector Employment agencies Trade unions (as regards membership)</p> <p>Others/notes:</p> <ul style="list-style-type: none"> <li>• Access to all types and to all levels of vocational guidance, basic and further vocational training and retraining, including practical work experience (all grounds)</li> <li>• Membership of, and involvement in, an organisation of workers or employers, or any organisation whose members belong to a particular professional or occupational category, including the right to receive benefits from such organisations (all grounds)</li> <li>• Conditions for access to self-employment provided that the Federal State is competent for the statutory regulation of the former (all grounds)</li> </ul> <p>The Equal Treatment Act covers also:</p> <ul style="list-style-type: none"> <li>• Employment relationships governed by the Act on Home Working of 1960, Federal Law Gazette Nr. 105/1961, and</li> <li>• Employment relationships of persons who have no employment contract but perform work under a mandate and for the account of certain individuals and are deemed to have a status similar to employees because of their economic dependence on the former.</li> </ul> <p>* The Federal Equal Treatment Act (enacted in 1993) covers employment of federal civil servants and employees.</p>	<p>Yes No* Yes Yes</p>	<p>Yes No* Yes Yes</p>
Legal assistance other than private lawyer	<p>Specialised body (e.g. equal treatment body) Any relevant public utility institutions and associations, <b>especially:</b></p> <ul style="list-style-type: none"> <li>• Chamber of labour (all grounds)</li> <li>• Nongovernmental organisations</li> </ul> <p>Trade unions: for their members only</p>	<p>Yes Yes  Yes</p>	<p>Yes Yes  Yes</p>
Legal representation other than private lawyer	<p>Specialised body (e.g. equal treatment body) before court Any relevant public utility institutions and associations</p> <p>Trade-unions: for members only</p> <p>Notes:</p> <p>* In the proceeding before the Equal Treatment Commission, a person affected by discrimination may be represented by the National Equal Treatment Body, or by a representative of a non-governmental organization, but their help ends at the doors of the courts.</p> <p>** Third party intervention within the regime of the Equal Treatment Act is only allowed for one specific NGO (Litigation Association of NGOs Against Discrimination) in the courts. This association is open for all specialised NGOs to join in but all NGOs not joining the Litigation Association are excluded from any special procedural rights. (Schindlauer, 2007)</p> <p>*** Before courts, the Chamber of Labour can also grant its members a complete protection so that they do not have to fear any costs.</p>	<p>No* Yes, but limited** Yes***</p>	<p>No* Yes, but limited** Yes***</p>

Table 1.2 Burden of proof

	Gender	Ethnicity
<p>Employee/claimant Shift of burden of proof (the employee/claimant provides facts, then the employer/respondent has to provide proofs – see below for a detailed description)</p> <p>Notes: * The amended Equal Treatment Act lowers the burden of proof for the plaintiff without completely switching it over to the respondent, when the plaintiff established facts from which it may be presumed that there has been direct or indirect discrimination. The law states that the respondent has to prove that "it is more likely that a different motive – documented by facts established by the respondent - was the crucial factor in the case or that there has been a legal ground of justification". So the respondent is obliged to prove the <b>likelihood</b> of established facts. (Schindlauer, 2007)</p>	No Partly*	No Partly*
<p><b>Direct discrimination</b></p> <p><i>Main steps</i> Can the main steps of the procedure be described as follows? 1. The employee/claimant has to supply prima facie evidence whereby it may be <b>presumed</b> that there has been discrimination. 2. The employer/respondent has the burden of <b>proving</b> that his/her practice is not discriminatory.</p> <p>If not, please specify the procedures.</p> <p>To the extent to which the person concerned invokes the fact of discrimination, he/she is required to establish probable cause of such discrimination. Then the defendant has to prove that when considering all facts and circumstances it appears more probable that a motive other than that for which the defendant has established probable cause has resulted in the unequal treatment, or that a ground for justification exists. Concerning harassment it is the responsibility of the defendant to furnish proof that when considering all facts and circumstances it appears probable that the facts for which the defendant has established probable cause correspond to the truth.</p> <p>In practice, is presumption – as opposed to stronger evidence of discrimination – sufficient to shift the burden of proof?</p> <p><i>Typical/standard prima facie evidence</i> admissible in courts (or other relevant bodies), as set by law or established by case law: Direct evidence (i.e. any written or verbal statement by the employer/respondent), <b>only</b>. No clear legal guidance for indirect evidence (e.g. case-by-case basis only) Statistical evidence Situation testing</p> <p>Notes: * The method of situation testing is not mentioned by any legislation. Generally there are no formal limits to establish evidence to a court as long as there is no explicit legal rule against it. So situation testing will be in principle permitted. There are no defined conditions for using this kind of evidence in court and as there is no case law yet, there is no information about how courts will handle such cases. (Schindlauer, 2007)</p>	Yes       Yes    No True Yes Yes*	Yes       Yes    No True Yes Yes*
<p><b>Indirect discrimination</b></p> <p><i>Main steps</i> Can the main steps of the procedure be described as follows? 1. The employee/claimant has to clearly identify and define the employment practice in question. 2. The employee/claimant has to show that the practice <b>has or may have</b> a differentiated impact on one protected group. 3. The employer/respondent has the burden of demonstrating that the policy or practice in question is job related for the position in question and consistent with business necessity. 4. If the employer/respondent satisfies this requirement, evidence can be supplied on the existence/lack of the existence of a less discriminatory practice</p> <p>If not, please specify the differences. see above</p> <p>In step 2 above is the term "has" more accurate than "may have"? In other words, can the potential (possible) impact of the contested employment practice be sufficient for shifting the burden of proof? In step 4 above, if the employer/respondent demonstrates that a practice is consistent with business necessity, then:</p>	Yes          No	Yes          No

	Gender	Ethnicity
<p>- does it fall to the employee/claimant to demonstrate that a less discriminatory alternative exists that meets the business need but that the employer refuses to adopt it? <b>or</b></p> <p>- does it fall to the employer/respondent to demonstrate that a less discriminatory alternative that meets the business need does not exist?</p> <p><i>Typical/standard prima facie evidence</i> to be provided to courts or other relevant bodies, as set by law or established by case law:  Direct evidence (i.e. any written or verbal statement by the employer/respondent), <b>only</b>.  No clear legal guidance for indirect evidence (e.g. case-by-case basis only)  Use of a distinction criteria that appear to be intrinsically suspicious. Please specify (for example, a requirement to work full-time might be unlawful discrimination against women)  Statistical evidence</p> <p>Notes:  * There is no case law, but also no general restriction for the use of statistical data. Until now no case of discrimination was brought to court using statistical data as evidence. There is a general lack of awareness about indirect discrimination and the possibility or necessity to use statistical data as evidence. (Schindlauer, 2007)</p>	<p>No</p> <p>Yes</p> <p>No</p> <p>True</p> <p>Yes</p> <p>Yes*</p>	<p>No</p> <p>Yes</p> <p>No</p> <p>True</p> <p>Yes</p> <p>Yes</p>
<p><b>Harassment</b>  Analysed on a case-by-case basis, by looking at all the circumstances and the context.</p>	<p>Yes</p>	<p>Yes</p>

Table 1.3 **Employee compensation and employer penalties**

		Gender	Ethnicity
Employee compensation	<p><b>Injunctive relief/reinstatement</b></p> <p>- Always made available to the employee/claimant, but the latter can choose monetary compensation in lieu of relief/reinstatement, or</p> <p>- Always made available to the employee/claimant, without alternative option, or</p> <p>→ <b>only available in the case of discriminatory dismissal</b></p> <p>- Always made available to the employee/claimant, but the employer/respondent can choose monetary compensation in lieu of relief/reinstatement, or</p> <p>- Never made available to the employee/claimant.</p> <p>Notes:  In the case of termination of employment a victim can only challenge the termination without the option to accept the termination and claim non-pecuniary damages. As many victims, for good reasons, refuse to go back to a discriminatory employer, discrimination of such victims is widely left unsanctioned (no reinstatement, no compensation). (Schindlauer, 2007).  There is an amendment to the law in Parliament which intends to make it possible for the plaintiff to choose between refutation and compensation, as well as to increase monetary compensation.</p> <p>In the following areas of concern the employee/claimant is entitled to claim a status free of discrimination. If this is not possible, the employee/claimant is entitled to monetary compensation. He/she cannot choose between alternative options.</p> <ul style="list-style-type: none"> <li>• Wage (all grounds)</li> <li>• Voluntary social benefits (all grounds)</li> <li>• Vocational training and re-training (all grounds)</li> <li>• Working conditions (all grounds)</li> <li>• Vocational counselling, vocational basic and continuing training, as well as re-training outside of an employment relationship (all grounds)</li> <li>• Membership and active participation in an employees' organization or an organization with members belonging to a specific occupational group, including recourse to services/benefits of such organizations (all grounds)</li> </ul> <p>Additionally: compensation for psychological injury</p> <p>In the event that the employment relationship was ended through a dismissal or otherwise prematurely terminated by the employer because of one of the grounds mentioned above or because of claims pursuant to the Equal Treatment Act which were not obviously</p>	<p>No</p> <p>Yes</p> <p>No</p> <p>No</p>	<p>No</p> <p>Yes</p> <p>No</p> <p>No</p>

		Gender	Ethnicity
	<p>unjustified, such notice of dismissal or termination of employment can be contested in court.</p> <p><b>Monetary compensation</b></p> <p>Back pay (please indicate if there is a cap)</p> <p>Reimbursement of lawyer's and attorney's fees and costs</p> <p>In lieu of relief/reinstatement, compensation for future lost earnings (e.g., in case of dismissal, this may correspond to lost earnings until the employee finds a new job):</p> <p>Compensation for psychological injury</p> <p>Notes: In the following areas of concern the employee/claimant is entitled to monetary compensation.</p> <ul style="list-style-type: none"> <li>• hiring process (all grounds): <b>A minimum of one monthly salary</b> if the job applicant would have been awarded the position had the selection not be discriminatory; or <b>maximum amount of euro 500</b> if the employer can prove that the victim would not have been recruited anyway (that is, the only damage suffered by an applicant as a result of discrimination was the refusal to take his/her application into consideration)</li> </ul> <p>Additionally: compensation for psychological injury</p> <ul style="list-style-type: none"> <li>• Promotion: The <b>income differential for at least three months</b> if the employee would have been promoted had the selection not been discriminatory. <b>A maximum of euro 500</b> if the employer can prove that the victim would not have been promoted anyway (that is, the only damage suffered by an applicant as a result of discrimination was the refusal to take his/her application into consideration).</li> <li>• Additionally, compensation for psychological injury</li> </ul> <p>Dismissal: No compensation if victim does not return to the discriminatory employer. Harassment: <b>minimum € 400,--</b> Sexual harassment: <b>minimum € 720,--</b></p>	<p>Yes</p> <p>Yes</p> <p>Yes</p> <p>Yes</p>	<p>Yes</p> <p>Yes</p> <p>Yes</p> <p>Yes</p>
Employer additional penalties and obligations	<p><b>Civil provisions</b></p> <p>None</p> <p>Court may order the publicity of the decision</p> <ul style="list-style-type: none"> <li>- Within the firm (e.g. notices to all employees addressing the violations of a specific charge and advising them of their rights under the laws)</li> <li>- Outside the firm (please indicate: media, trade-unions, etc.)</li> </ul> <p>The employer may be required to take corrective or preventive actions to cure the source of the identified discrimination</p> <p>Notes: * Court decisions in Austria are generally made public but the parties are not named.</p> <p>→ <b>Other:</b> The Equal Treatment Act establishes a very effective sanction for companies not observing the prohibition of discrimination: exclusion from assistance granted by the Federation (it does not extend the exclusion to public procurement, however). (Schindlauer, 2007; MIPEX)</p> <p><b>Penal provisions</b></p> <p>None</p> <p>Fine</p> <p>Any employer, who or private placement agency, that <b>advertises a job in a discriminatory manner</b> can be fined by the competent district authority with an amount of up to euro 360 (administrative penal)</p> <p>Prison sentence (please specify lengths, whether it applies only in specific cases and in which cases)</p>	<p>False</p> <p>No</p> <p>No*</p> <p>No</p> <p>False</p> <p>Yes</p> <p>No</p>	<p>False</p> <p>No</p> <p>No*</p> <p>No</p> <p>False</p> <p>Yes</p> <p>No</p>

Table 1.4 Protection against victimisation (retaliation)

		Gender	Ethnicity
Protected actions	It is prohibited to treat the employee/protected person less favourably (so-called "adverse action") because s/he has (so-called "protected action"): - brought proceedings against discrimination - given evidence or information in connection with any proceedings against discrimination. - participated as a witness in any proceedings against discrimination	Yes Yes Yes	Yes Yes Yes
Proof of causal connexion	<i>Burden of proof:</i> - i) employee/protected person - ii) employer/respondent within a given lapse of time from the concerned event. Please specify conditions of application and lapse of time. - iii) shift of burden of proof. Please specify main steps.  In cases (i) and (iii), when the causal connexion shall be first shown or established by the employee/protected person: - the link can be demonstrated by evidence that the adverse action occurred shortly after the protected activity (and the employer/respondent was aware of the complainant's protected activity before taking the action), so that the employment relationship is implicitly or explicitly (please specify) protected during a certain period of time (please specify)	No No  Partly, see 1.2  Yes	No No  Partly, see 1.2  Yes
Employee compensation and employer penalty	Compared to provisions described in Table 1.3: - additional employee/protected person compensation - additional employer/respondent penalties  Notes: * The Equal Treatment Act states that victimisation in the workplace sphere (defined as dismissal, notice of quit and any other detriment in reaction to a complaint or to the opening of proceedings enforcing the principle of equality) is prohibited and covers also other employees acting as witnesses or supporting the complaint of a victim. However, for victimisation that does not consist of dismissal, the law does not provide for explicit legal consequences, be they monetary compensation for the victim or other penalties for the employers. (Schindlauer, 2007)	No* No*	No* No*

Table 1.5 Relationship with standard labour laws

		Gender	Ethnicity
Labour law and discrimination	According to standard labour law(s) or code, would dismissal solely based on gender or ethnicity considered to be unjust dismissal? Is there a provision requiring equal pay for work of equal value in standard labour law(s) or code?  Notes: * The Law on equal treatment is considered to be part of the standard labour law. Therefore the given answer means that there are no other laws covering the field of discrimination in connected to discrimination.  Other areas of discrimination covered by standard labour law(s) or code (hiring, promotion, etc...); please specify Part-time work	No* No*	No* No*
Complaints	Are discrimination complaints concerning dismissals more often lodged under standard labour law(s) or code, than under specific anti-discrimination laws? Are discrimination complaints concerning pay more often lodged under standard labour law(s) or code, than under specific anti-discrimination laws?		
Evaluations	Please indicate below references to existing evaluations/studies on the effectiveness of anti-discrimination laws with respect to standard labour law(s):		



Table 1.6 **Positive action**

		<b>Gender</b>	<b>Ethnicity</b>
Compulsory actions	Are employers <b>required</b> by law to take actions to increase diversity/prevent discrimination?	Yes	No
	<p>If yes, what actions are required?</p> <ul style="list-style-type: none"> <li>- make regular public reports on employment composition in terms of gender or ethnicity</li> <li>- process only anonymous job applications</li> <li>- obligation for large employers to have a person in the HRM department in charge of the employer's anti-discrimination policy (please specify the size threshold of application, if any)</li> <li>- quotas (please specify the areas: e.g. executives in firms above a certain size)</li> </ul> <p>Other: According to Section 92 b Industrial Relation Act the employer and the works council have to discuss about affirmative action concerning women on company level.</p>	No No No No	
Voluntary actions	Are employers <b>allowed</b> to take actions to increase diversity/prevent discrimination?	Yes	Yes
	<p>If yes, what actions are allowed?</p> <ul style="list-style-type: none"> <li>- make regular public reports on employment composition in terms of gender or ethnicity</li> <li>- establish a plan to ensure that the employment composition in terms of gender or ethnicity is balanced</li> <li>- quotas (please specify the areas: e.g. executives)</li> </ul>	Yes Yes Yes	Yes Yes Yes
Public employers' practices	Do public employers normally take actions to increase diversity/prevent discrimination?	Yes	Yes
	<p>If yes, what actions?</p> <ul style="list-style-type: none"> <li>- make regular public reports on employment composition in terms of gender or ethnicity</li> <li>- establish a plan to ensure that the employment composition in terms of gender or ethnicity is balanced</li> <li>- process only anonymous job applications</li> <li>- have at least one person in the HRM department in charge of the employer's anti-discrimination policy</li> <li>- quotas (please specify the areas: e.g. high-rank officials)</li> </ul> <p>Other: Open quotas for federal civil servants – for women of at least equal qualification until a quota of 40% is reached and upheld. Ethnicity based job programmes are being pursued in some areas of civil service, e.g. the police.</p>	Yes Yes No Yes Yes	Yes No No Yes No
Incentives	Is there a policy to increase incentives for employers to increase diversity/prevent discrimination?	Yes	Yes
	<p>Policy instruments used:</p> <ul style="list-style-type: none"> <li>- Delivery of "labels" or certificates stating that the employer has a diversity-friendly business/employment practice.</li> <li>- financial incentives to establish a plan to ensure that the employment composition in terms of gender or ethnicity is balanced</li> <li>- financial incentives for having a person in the HRM department in charge of the employer's anti-discrimination policy and/or hiring a consultant to establish a diversity plan.</li> <li>- financial incentives for quotas (please specify the areas: e.g. executives)</li> </ul> <p>Notes: Though the legislation allows positive measures on all protected grounds of discrimination, in fact, positive measures do exist in Austria for disabled persons, women and recognised national minorities only (defined by the National Minorities Act as an ethnic group that comprises Austrian citizens with a non-German mother tongue and a common autonomous cultural heritage who have their residence and home in a part of the Austrian federal territory). (Schindlauer, 2007)</p>	Yes Yes No No	Yes Yes No No

**Part 2. Institutional framework: specialised bodies (SB) combating discrimination (e.g. equal treatment bodies)**

Table 2.1 **Activities of SBs not related to individual discrimination cases: Public information and evaluation**<sup>a</sup>

	<b>Gender</b>	<b>Ethnicity</b>
Is there a specialised body (SB) in charge of carrying out some of all of the following public information and policy evaluation functions?	Yes	Yes
The <b>Ombud for Equal Treatment</b> belongs to the Minister of Women, Media and Public Service. It is independent in performing its tasks. start of activity: gender 1990 start of activity: ethnicity 2004		
This SB has the statutory power to: - run information campaigns to inform the public of their legal rights <b>in practice</b> , importance of the above mentioned activity in the actual overall workload - run campaigns to change public opinion <b>in practice</b> , importance of the above mentioned activity in the actual overall workload - publish statistics on discrimination <b>in practice</b> , importance of the above mentioned activity in the actual overall workload - carry out evaluations of the legal and institutional anti-discrimination framework <b>in practice</b> , importance of the above mentioned activity in the actual overall workload - make policy recommendations <b>in practice</b> , importance of the above mentioned activity in the actual overall workload - produce codes of good practice for employers  <b>in practice</b> , importance of the above mentioned activity in the actual overall workload	Yes High Yes High Yes Low Yes Low Yes Medium Yes, but also done by unions ..	Yes High Yes High Yes Low Yes Low Yes Medium Yes, but also done by unions ..
Other: • conduct independent investigation into discrimination matters • publish reports		

Note: a) High/Medium/Low mean above average / close to average / below average, respectively.

Table 2.2 **Activities of SBs not related to individual discrimination cases: Control and correction**<sup>a</sup>

	<b>Gender</b>	<b>Ethnicity</b>
Is there a specialised body (SB) in charge of carrying out some of all of the following control and correction functions?	No	No
This SB has the statutory power to - randomly conduct formal investigations of companies and organisations. <b>in practice</b> , importance of the above mentioned activity in the actual overall workload - conduct formal investigations of companies and organisation where there is evidence of discrimination. <b>in practice</b> , importance of the above mentioned activity in the actual overall workload - oblige a company or an organisation to change the way it operates when discriminatory practices are found. <b>in practice</b> , importance of the above mentioned activity in the actual overall workload - take legal action against companies or organisations that apply discriminatory practices <b>in practice</b> , importance of the above mentioned activity in the actual overall workload - take legal action against organisations that attempt to promote discrimination or to instruct others to discriminate. <b>in practice</b> , importance of the above mentioned activity in the actual overall workload		

Note: a) High/Medium/Low mean above average / close to average / below average, respectively.

Table 2.3 **Role of SBs in individual discrimination cases**

	<b>Gender</b>	<b>Ethnicity</b>
<p>Is there a specialised body (SB) with specific functions related to individual discrimination cases?</p> <p><b>Ombud for Equal Treatment</b> (see Table 2.1), and Commission for Equal Treatment (ETC)</p> <p>The Ombud is responsible for counselling and supporting victims of discrimination. To fulfil these functions, in the case of an alleged infringement of the equality principle, the Ombud for Equality can ask for a written statement from the employer. Moreover, the Ombud can request additional information from the employer, the works council / shop steward or the staff employed by the enterprise concerned. These persons are obliged to pass on the information required by the Ombud in the performance of his/her duty.</p> <p>The Ombud for Equality is integrated in the proceeding before the Equal Treatment Commission. If the Ombud assumes that the equality principle has not been complied with and proves it to the satisfaction of the Equal Treatment Commission, the latter institutes – motu proprio – proceedings. It can request the Ombud to carry out a formal investigation. By authority of the Senate, the Ombud may enter the premises of the enterprises and inspect the records. At his/her request copies or photocopies of such records or of excerpts therefrom have to be made available to him/her. The Ombud can involve the works council in his/her investigative activities. The visit to an enterprise shall be announced with due notice, so that the employer can be personally present or name a representative who is present during the visit.</p> <p>After the investigation, the ETC has to give an expert opinion on questions related to the breach of the principle of equal treatment. The sessions of the ETC are confidential and not open to the public, but its expert opinions on whether a violation of the obligation to equal treatment had occurred have to be made public (cases are published on a website, in an anonymous and condensed form, Schindlauer, 2007). The ETC can make suggestions to put an end to the discrimination, but their judgements are not binding. Claims for compensation or claims to performance cannot be asserted, since this comes under the exclusive jurisdiction of the court of justice.</p>	Yes	Yes
<p>Was this body created by anti-discrimination laws (or did anti-discrimination laws establish a specific mandate for it)?</p>	Yes	Yes
<p><b>Formal linkage between equal treatment body activities and complaint lodging and procedures</b></p> <p>Does the SB act as a one-stop shop where claimant can access information, lodge a complaint, receive advice?</p> <p>As soon as, or before, a discrimination complaint is brought to court, is the claim formally transmitted to the SB?</p> <p>Discrimination complaints must be lodged with the SB beforehand, which acts as one-stop shop to start the procedure.</p> <p>The SB has the statutory power to provide advice and information to claimants (or both parties) on their legal rights and what options they have.</p> <p><b>In practice</b>, the SB carries on the above mentioned process as soon as it receives a discrimination claim.</p> <p>The SB has the statutory power to provide claimants with legal assistance.</p> <p><b>In practice</b>, SB provides legal assistance to claimants during court proceedings.</p> <p>The SB has the statutory power to provide claimants with legal representation.</p> <p><b>In practice</b>, the SB provides legal representation to claimants during court proceedings.</p>	<p>Yes</p> <p>No</p> <p>No</p> <p>Yes</p> <p>..</p> <p>Yes</p> <p>..</p> <p>..</p>	<p>Yes</p> <p>No</p> <p>No</p> <p>Yes</p> <p>..</p> <p>Yes</p> <p>..</p> <p>Yes , before the ETC No, before the courts</p> <p>..</p>
<p><b>Investigation of discrimination claims</b></p> <p>The SB has the legal authority to compel people (and in particular, the employer) to provide all of the information it requires to investigate a discrimination claim.</p> <p>Does the court accept evidence from the SB?</p> <p>Does the court accept the SB's evaluation of the validity of the discrimination complaint?</p> <p><b>In practice</b>, the SB formally investigates discrimination claims.</p> <p>Notes: * The Ombud for Equality is integrated in the proceeding before the ETC. It can use its tools only in the proceeding before the ETC. The decisions of the civil and labour courts will be the only legally binding decisions as the procedures at the ETC only result in a non-binding "opinion". However, <b>the Equal Treatment Act states in its § 61 that courts have to take these opinions into consideration and that they have to give clear reasons in case they come to a dissenting decision.</b> (Schindlauer, 2007)</p>	<p>Yes</p> <p>To some extent*</p> <p>Yes</p>	<p>Yes</p> <p>To some extent*</p> <p>Yes</p>

	Gender	Ethnicity
<p>Any employer's failure to provide the requested information to the SB will:</p> <ul style="list-style-type: none"> <li>- have no implication for the court ruling.</li> <li>- potentially be used to draw inferences on discrimination if the case is brought before court.</li> </ul>	No* Yes*	No* Yes*
<p>Any employer's failure to comply with the code of practices issued by the SB (or other relevant body) will:</p> <ul style="list-style-type: none"> <li>- have no implication for the court ruling.</li> <li>- potentially be used to draw inferences on discrimination if the case is brought before court.</li> </ul>	No No	No No
<p>Notes:</p> <p>* see above. If no evidence is given to the Commission by the employer the final opinion will be given in spite of it. Failure to provide evidence is being taken into consideration.</p>		
<p><b>Mediation/conciliation procedure</b></p> <p>The SB has the statutory power to help both parties to resolve the dispute through a mediation/conciliation procedure.</p> <p>Mediation/conciliation is a free and voluntary process for both parties.  <b>In practice</b>, the SB carries out mediation/conciliation procedures, so that a court ruling may not be necessary.</p> <p>The mediation/conciliation procedure is <b>usually</b> initiated:</p> <ul style="list-style-type: none"> <li>- before the case is brought to court</li> <li>- before any formal investigation starts or at an early stage of the process</li> <li>- after any investigation has produced primary evidence of discrimination (but before a litigation decision has been reached)</li> </ul> <p>Note: There is no formal mediation/conciliation procedure. Instead, the Commission gives an opinion and seeks the voluntary compliance of the parties with it. Then, if the parties come to an agreement, the latter is legally binding, but the Commission does not secure its enforcement.</p> <p>The SB acts as a neutral third party assisting both opposing parties in the mediation/conciliation procedure.  The mediation/conciliation procedure is confidential: no details of the discussion taking place in its course can be repeated to court, nor are made public. The same rule applies to the terms of the settlement.  If the parties, including the SB, reach settlement agreement, the latter is legally binding and the charge is dismissed.  The SB secures the enforcement of settlement agreements reached under its assistance and/or responsibility.</p>	<p>Not explicitly*</p> <p>Yes</p> <p>No</p>	<p>Not explicitly*</p> <p>Yes</p> <p>No</p>

**Part 3. Statistics on mediation/conciliation procedures and court cases** → No statistics available

**Main additional references:**

**Schindlauer, D. (2007)**, *Report on Measures to Combat Discrimination – Country Report: Austria*, European Commission [http://www.ec.europa.eu/employment\\_social/fundamental\\_rights/pdf/legnet/arep07\\_en.pdf](http://www.ec.europa.eu/employment_social/fundamental_rights/pdf/legnet/arep07_en.pdf)

## BELGIUM

### Partie 1. Cadre juridique prévu pour la discrimination dans l'emploi

Principales lois anti-discrimination:

- Loi du 10 mai 2007 tendant à lutter contre certaines formes de discrimination (note : ne concerne pas la discrimination sexiste ni ethnique)
- Loi du 10 mai 2007 tendant à lutter contre la discrimination entre les femmes et les hommes.
- Loi du 10 mai 2007 modifiant la loi du 30 juillet 1981 tendant à réprimer certains actes inspirés par le racisme et la xénophobie.

The Federal State is responsible for regulating employment contracts and general rules of civil and criminal law. To the extent it takes the form of such rules, antidiscrimination legislation will therefore normally be dealt with at federal level. However, since these residual competences of the Federal State may not be exercised in order to intrude upon areas which are reserved to the Regions or Communities, they may not affect, in particular, the exclusive competence of the Regions and Communities to define the status of their personnel (public bodies and personnel of the governments); the exclusive competence of the Communities to define the status of schoolteachers and other personnel in the educational sector; or the exclusive competence of the Communities in the field of disability policy. All the federal entities – the Flemish Community/Region, the Region of Brussels-Capital, the Walloon Region, the French-speaking Community and the German-speaking Community – have taken various initiatives in the above mentioned areas, but the general rules are nevertheless laid down at federal level. (De Schutter, 2007)

Tribunaux compétents : Tribunal de première instance, tribunal du travail, tribunal de commerce, instance pénal

Définition légale des caractéristiques protégées, ci-après notées genre et ethnicité :

- Genre : Discrimination fondée sur le sexe, explicitement pour les motifs suivants : grossesse, l'accouchement, la maternité et le changement de sexe.
- Ethnicité : Discrimination fondée sur la nationalité, une prétendue race, la couleur de peau, l'ascendance ou l'origine nationale ou ethnique.

Tableau 1.1 Type de discrimination, domaines concernés, acteurs visés, assistance et représentation légales

		Genre	Ethnicité
Type de discrimination	Discrimination directe	Oui	Oui
	Discrimination indirecte, autrement dit dans les cas où une disposition ou une pratique vise tous les salariés mais affecte particulièrement un groupe protégé et ne peut être considérée comme un moyen approprié pour atteindre un objectif légitime.	Oui	Oui
	Pressions et consignes en vue d'exercer une discrimination	Oui	Oui
	Harcèlement	Oui	Oui
Domaines concernés	Processus de recrutement	Oui	Oui
	Salaires	Oui	Oui
	Type de contrat de travail (permanent ou de durée déterminée)	Oui	Oui
	Durée du travail (horaire atypique, temps partiel ou temps plein)	Oui	Oui
	Promotion	Oui	Oui
	Emploi et formation professionnelle	Oui	Oui
	Transfert	Oui	Oui
	Licenciement et renvoi	Oui	Oui
	Autres :	Oui	Oui
	L'accès aux biens et services et la fourniture de biens et services à la disposition du public. La protection sociale, en ce compris la sécurité sociale et les soins de santé. Les avantages sociaux. Les régimes complémentaires de sécurité sociale. La mention dans une pièce officielle ou dans un procès-verbal. L'affiliation à et l'engagement dans une organisation de travailleurs ou d'employeurs ou		

		Genre	Ethnicité
	toute autre organisation dont les membres exercent une profession donnée, y compris les avantages procurés par ce type d'organisations. L'accès, la participation et tout autre exercice d'une activité économique, sociale, culturelle ou politique accessible au public.		
Acteurs visés	Secteur privé Secteur public Agences pour l'emploi (agences publique, mais pas explicitement mentionnée dans la loi) Syndicats (adhérents)	Oui Oui Oui  Oui	Oui Oui Oui  Oui
Assistance juridique autre que les services d'un avocat indépendant	Organe spécialisé (par ex. organe chargé de faire respecter l'égalité de traitement) Toute institution ou association d'utilité publique compétente Syndicats : pour leurs membres  Autres : Les organisations représentatives des employeurs Les organisations représentatives des travailleurs indépendants. La Loi du 10 mai 2007 tendant à lutter contre la discrimination entre les femmes et les hommes (arts.31-33) stipule que, peuvent ester en justice dans les litiges auxquels l'application de la présente loi donnerait lieu : - le Centre pour l'égalité des chances et la lutte contre le racisme ; - tout établissement d'utilité publique et toute association, jouissant de la personnalité juridique depuis au moins trois ans à la date des faits, et se proposant par ses statuts de défendre les droits de l'homme ou de combattre la discrimination ; - les organisations représentatives des travailleurs et des employeurs. Lorsque la victime de la discrimination est une personne physique ou une personne morale identifiée, l'action du Centre et des groupements d'intérêts ne sera recevable que s'ils prouvent qu'ils ont reçu l'accord de la victime.	Oui Oui Oui  Oui	Oui Oui Oui  Oui
Représentation juridique autre que celle assurée par un avocat indépendant	Organe spécialisé (par ex. organe chargé de faire respecter l'égalité de traitement) Toute institution ou association d'utilité publique compétente Syndicats : pour leurs membres  Autres : Les organisations représentatives des employeurs Les organisations représentatives des travailleurs indépendants.	Oui Oui Oui  Oui	Oui Oui Oui  Oui

Tableau 1.2 Charge de la preuve

	Genre	Ethnicité
Salarié/demandeur Renversement de la charge de la preuve (le salarié/demandeur présente des éléments de fait et l'employeur/défendeur doit à son tour fournir des preuves – voir ci-dessous pour une description détaillée)	Non Oui	Non Oui
<b>Discrimination directe</b>  <i>Principales étapes</i> Peut-on décrire comme suit les principales étapes de la procédure ? 1. Le salarié/demandeur doit fournir un commencement de preuve qui permet de <b>présumer</b> de l'existence d'une discrimination. 2. L'employeur/défendeur a la charge de <b>prouver</b> que sa pratique n'est pas discriminatoire.  En pratique, la présomption – par opposition à des preuves plus solides de discrimination – est-elle suffisante pour inverser la charge de la preuve ?  <i>Arguments/faits permettant au salarié d'établir une présomption de discrimination recevable devant les tribunaux (ou d'autres organes compétents), conformément à la législation ou à la jurisprudence :</i>  - Preuves directes (autrement dit toute déclaration écrite ou verbale de l'employeur/demandeur), <b>uniquement</b> . - Il n'existe pas d'indications précises, dans la loi ou la jurisprudence, pour les preuves indirectes (par exemple, on procède uniquement au cas par cas)	Oui            Non Vrai	Oui            Non Vrai

	<b>Genre</b>	<b>Ethnicité</b>
- Données statistiques - Testing	Oui Oui	Oui Oui
Autres preuves indirectes :		
<b>Discrimination indirecte</b>  <i>Principales étapes</i> Peut-on décrire comme suit les principales étapes de la procédure ? 1. Le salarié/demandeur doit identifier et définir clairement la pratique en matière d'emploi en question. 2. Le salarié/défendeur doit montrer que la pratique <b>a ou peut avoir</b> un impact distinct sur un groupe protégé. 3. L'employeur/défendeur a la charge de démontrer que la politique ou la pratique en question est spécifique à l'emploi considéré et répond aux besoins du service. 4. Si l'employeur/défendeur satisfait à cette exigence, des preuves peuvent être fournies sur l'existence/l'absence d'une pratique moins discriminatoire  Dans l'étape 2 ci-dessus, est-il plus précis de dire « peut avoir » que « a » ? En d'autres termes l'impact potentiel (possible) de la pratique d'emploi contestée est-il suffisant pour inverser la charge de la preuve ?  Dans l'étape 4 ci-dessus, si l'employeur/défendeur démontre qu'une pratique répond aux besoins du service : - incombe-t-il au salarié/demandeur de démontrer qu'il existe une autre pratique moins discriminatoire qui satisfait aux besoins du service mais que l'employeur refuse d'adopter ? <b>ou</b> - incombe-t-il à l'employeur/défendeur de démontrer qu'il n'existe pas de pratique moins discriminatoire qui répond aux besoins du service ?  <i>Arguments/faits permettant au salarié d'établir une présomption de discrimination recevable</i> devant les tribunaux (ou d'autres organes compétents), conformément à la législation ou à la jurisprudence :  - Preuves directes (autrement dit toute déclaration écrite ou verbale faite par l'employeur/défendeur), <b>uniquement</b> . - Il n'existe pas d'indications précises, dans la loi ou la jurisprudence, concernant les preuves indirectes (par exemple on ne procède qu'au cas par cas) - Utilisation d'un critère de distinction qui semble intrinsèquement suspect. - Données statistiques	Oui   Oui  Non Oui  Non Vrai Oui* Oui	Oui   Oui  Non Oui  Non Vrai Oui Oui
* Exemple de discrimination indirecte, tel que mentionné sur le site de l'Institut pour l'Égalité des Femmes et des Hommes : Seuls les collaborateurs à temps plein se voient attribuer une voiture de fonction. Vu que la grande majorité des travailleurs à temps partiel sont des femmes, cette mesure leur porte préjudice de manière indirecte.		
<b>Harcèlement</b> Analysé au cas par cas, en examinant toutes les circonstances et le contexte.	Oui	Oui

Tableau 1.3 **Compensation accordée au salarié et pénalités imposées à l'employeur**

	<b>Genre</b>	<b>Ethnicité</b>
Compensation accordée au salarié		
<b>Réhabilitation/réintégration</b> - Toujours accessible au salarié/demandeur, mais ce dernier peut opter pour une compensation financière à la place de la réhabilitation/réintégration, ou - Toujours accessible au salarié/demandeur, sans autre option, ou - Toujours accessible au salarié/demandeur, mais l'employeur/défendeur peut choisir de verser une compensation financière au lieu d'accepter la réhabilitation/réintégration, ou - Jamais accessible au salarié/demandeur.	Oui Non Oui Non	Oui Non Oui Non
<b>Compensation financière</b>		
Paiement des arriérés de salaire	Oui	Oui
Remboursement des honoraires et frais d'avocat	Oui	Oui

		Genre	Ethnicité
	<p>A la place de la réhabilitation/réintégration, versement d'indemnités pour les futurs salaires perdus (par exemple, en cas de licenciement, ceci peut correspondre aux salaires perdus jusqu'à ce que le salarié retrouve un nouvel emploi) :</p> <ul style="list-style-type: none"> <li>- Indemnisation plancher ou minimum (montant) : .....</li> <li>- Indemnisation plafond ou maximum (montant) : .....</li> <li>- Indemnisation moyenne (montant) : .....</li> <li>- Indemnisation médiane (montant) : .....</li> </ul> <p>Indemnisation du dommage psychologique :</p> <ul style="list-style-type: none"> <li>- Indemnisation plancher ou minimum (montant) : .....</li> <li>- Indemnisation plafond ou maximum (montant) : .....</li> <li>- Indemnisation moyenne (montant) : .....</li> <li>- Indemnisation médiane (montant) : .....</li> </ul> <p>Notes :</p> <p>La personne qui a contrevenu à l'interdiction de la discrimination doit verser à la victime une indemnité correspondant, <b>selon le choix de la victime</b>, soit à une somme forfaitaire, soit au dommage réellement subi par la victime. <b>Dans ce dernier cas, la victime doit prouver l'étendue du préjudice par elle subi.</b></p> <p>L'indemnisation forfaitaire du préjudice moral subi est fixée à un montant de <b>650 euros</b>; ce montant est porté à <b>1300 euros</b> dans le cas où le contrevenant ne peut démontrer que le traitement litigieux défavorable ou désavantageux aurait également été adopté en l'absence de discrimination, ou en raison d'autres circonstances, telle la gravité particulière du préjudice moral subi.</p> <p>Si le préjudice matériel ne peut pas être réparé par le biais de l'application de la sanction de nullité de toutes dispositions ou clauses contractuelles discriminatoires, l'indemnisation forfaitaire pour le dommage matériel et moral équivaut à <b>6 mois de rémunération brute</b>, ou <b>3 mois</b> si l'employeur démontre que le traitement litigieux défavorable ou désavantageux aurait également été adopté en l'absence de discrimination.</p> <p>(Sources : Loi du 10 mai 2007 tendant à lutter contre la discrimination entre les femmes et les hommes, art.23 ; Loi du 10 mai 2007 modifiant la loi du 30 juillet 1981 tendant à réprimer certains actes inspirés par le racisme et la xénophobie, art.16)</p>	Non	Non
		Oui*	Oui*
Sanctions et obligations supplémentaires imposées à l'employeur	<p><b>Dispositions prises en matière civile</b></p> <p>Aucune</p> <p>Le tribunal peut ordonner que la décision soit rendue publique</p> <ul style="list-style-type: none"> <li>- Au sein de l'entreprise (par exemple des avis sont adressés à tous les salariés pour les informer des violations d'une charge spécifique et leur indiquer quels sont les droits qui leur sont reconnus par la législation)</li> <li>- En dehors de l'entreprise (veuillez préciser : médias, syndicats, etc.)</li> </ul> <p>L'employeur peut être tenu de prendre des mesures correctives ou préventives pour remédier à la discrimination identifiée.</p> <p>Autres:</p>	Faux	Faux
		Oui	Oui
		Oui	Oui
		Ou	Oui
		Non	Non
	<p><b>Dispositions en matière pénale</b></p> <p>Aucune</p> <p>Amende</p> <p>Peine d'emprisonnement</p>	Faux*	Faux*
		Non**	Oui***
		Non**	Oui***



		Genre	Ethnicité
	Autres :	Non	Non
	Notes : * Les dispositions pénales sont applicables en cas de discrimination directe ou indirecte intentionnelle. ** Loi du 10 mai 2007 tendant à lutter contre la discrimination entre les femmes et les hommes : Pour le secteur privé, les dispositions pénales (art.27) portent sur l' <b>incitation</b> à la discrimination, à la haine ou à la violence (qui est punie d'un emprisonnement de 1 mois à 1 an et d'une amende de 50 à 1000 euros, ou de l'une de ces peines seulement), <b>mais pas sur la discrimination elle-même</b> . En revanche, tout fonctionnaire ou officier public, tout dépositaire ou agent de l'autorité ou de la force publique qui, dans l'exercice de ses fonctions, commet une discrimination à l'égard d'une personne en raison de son sexe, est puni d'un emprisonnement de 2 mois à 2 ans (art.28). *** Loi du 10 mai 2007 modifiant la loi du 30 juillet 1981 tendant à réprimer certains actes inspirés par le racisme et la xénophobie : Quiconque, dans le domaine des relations de travail, commet une discrimination à l'égard d'une personne en raison de l'un des critères protégés, est puni d'un <b>emprisonnement d'un mois à un an</b> et d'une <b>amende de cinquante euros à mille euros</b> , ou de l'une de ces peines seulement (art.25). Les mêmes peines sont applicables dans les cas d'incitation à la discrimination, à la haine ou à la violence (art.20).		

Tableau 1.4 Protection contre la victimisation (représailles)

		Genre	Ethnicité
Actions protégées	Il est interdit de traiter le salarié/la personne protégée moins favorablement parce qu'il ou elle a (« action protégée ») : - engagé des poursuites pour discrimination - fourni des preuves ou des informations en relation avec des poursuites pour discrimination. - participé en tant que témoin à des poursuites pour discrimination	Oui Oui Oui	Oui Oui Oui
Preuve de la relation causale	<i>Charge de la preuve :</i> - i) salarié/personne protégée - ii) employeur/défendeur pendant un certains laps de temps, à compter du moment où l'action protégée a été engagée par le salarié. Veuillez préciser les conditions d'application et la durée de cette période. → 12 mois suivant l'introduction de la plainte. Lorsqu'une action de justice a été introduite, ce délais est prolongé jusqu'à échéance des 3 mois suivant la décision de justice. - iii) renversement de la charge de la preuve. Veuillez préciser les principales étapes.  Dans les cas i) et iii), i.e. lorsque la relation causale doit au départ être établie par le salarié/personne protégée : - La relation causale peut être établie au moyen d'éléments prouvant que l'employeur a engagé une action pénalisant le salarié (ou autre personne protégée) peu de temps après que ce dernier se soit engagé dans une activité protégée (dont l'employeur avait connaissance). En d'autres termes, la relation d'emploi est implicitement ou explicitement (veuillez préciser) protégée pendant un certain laps de temps à compter du début de l'action protégée (veuillez préciser).  - Autres (veuillez préciser) :	Non Oui  Non	Non Oui  Non
Compensation accordée au salarié et sanctions imposées à l'employeur	Dispositions supplémentaires, par rapport celles décrites dans le tableau 1.3. - compensations accordées au salarié/à la personne protégée - sanctions imposées à l'employeur/au défendeur		

Tableau 1.5 Relation avec la législation standard/générale du travail

		Genre	Ethnicité
Législation du travail et discrimination	<p>Selon la législation (ou code) du travail standard/générale, un licenciement motivé uniquement par le sexisme ou la discrimination ethnique serait-il considéré comme un licenciement abusif ?</p> <p>Dans l'affirmative, veuillez préciser depuis quelle date :</p>	Oui	Oui
	<p>La législation (ou code) du travail standard/générale contient-elle une disposition imposant l'égalité de rémunération pour un travail égal ?</p> <p>Dans l'affirmative, veuillez préciser depuis quand : 1999</p>	Oui	Oui
	<p>Autres domaines de discrimination couverts par la législation (ou code) du travail standard/générale → embauche</p>		
Plaintes	<p>Les plaintes pour discrimination en cas de licenciement sont-elles déposées plus souvent en vertu de la législation (ou code) du travail standard/générale qu'en vertu de lois anti-discrimination spécifiques ?</p>	Non	Non
	<p>Les plaintes pour discrimination portant sur la rémunération sont-elles déposées plus souvent en vertu de la législation (ou code) du travail standard/générale qu'en vertu de lois anti-discrimination spécifiques ?</p>	Non	Non
Évaluations	<p>Veuillez indiquer ci-dessous les références aux évaluations/études existantes portant sur l'efficacité des lois anti-discrimination par rapport à la législation du travail standard/générale :</p>		

Tableau 1.6 Action positive

		Genre	Ethnicité
Mesures obligatoires	<p>Les employeurs sont-ils <b>tenus</b> par la législation de prendre des mesures pour accroître la diversité/prévenir la discrimination ?</p> <p>Dans l'affirmative, quelles mesures sont obligatoires ?</p> <ul style="list-style-type: none"> <li>- publier régulièrement des rapports sur la composition de la population employée indiquant la proportion d'hommes et de femmes ou l'origine ethnique</li> <li>- ne traiter que les demandes d'emploi anonymes</li> <li>- obliger les gros employeurs à désigner au sein du service de la gestion des ressources humaines une personne chargée de la politique anti-discrimination de l'entreprise (indiquer, le cas échéant, la taille minimale de cette dernière)</li> <li>- fixer des quotas (veuillez préciser dans quels domaines : par exemple les cadres supérieurs dans les entreprises au-delà d'une certaine taille)</li> </ul> <p>Autres (ou toute autre information/observation complémentaire importante) :</p>	Non	Non
Mesures volontaires	<p>Les employeurs sont-ils <b>autorisés</b> à prendre des mesures pour accroître la diversité/prévenir la discrimination ?</p>	Oui	Oui
	<p>Dans l'affirmative, quelles mesures sont autorisées ?</p> <ul style="list-style-type: none"> <li>- publier régulièrement des rapports sur la composition de la population employée indiquant la proportion d'hommes et de femmes ou l'origine ethnique</li> <li>- établir un plan pour s'assurer que la composition de la population active est équilibrée du point de vue de la proportion d'hommes et de femmes ou de l'origine ethnique</li> <li>- fixer des quotas (veuillez préciser dans quels domaines : par exemple les cadres supérieurs)</li> </ul>	Oui	Oui/
		Oui	Oui
		Oui	Oui
	<p>Autres (ou toute autre information/observation complémentaire importante) :</p>		

		<b>Genre</b>	<b>Ethnicité</b>
Pratiques des employeurs publics	Les employeurs publics prennent-ils normalement des mesures pour accroître la diversité/prévenir la discrimination ?	Oui	Oui
	Dans l'affirmative, quelles sont ces mesures ?		
	- publier régulièrement des rapports sur la composition de la population employée indiquant la proportion d'hommes et de femmes ou l'origine ethnique	Non	Non
	- établir un plan pour s'assurer que la composition de la population active est équilibrée du point de vue de la proportion d'hommes et de femmes ou de l'origine ethnique	Oui	Oui
	- ne traiter que les demandes d'emploi anonymes	Non	Non
	- nommer au sein du département de la gestion des ressources humaines au moins une personne responsable de la politique anti-discrimination de l'employeur	Oui	Oui
	- fixer des quotas (veuillez préciser dans quels domaines : par exemple les fonctionnaires de haut rang)	Oui	Oui
	Autres (ou toute autre information/observation complémentaire importante) :		
Mesures d'incitation	La politique suivie consiste-t-elle à développer les incitations pour les employeurs à accroître la diversité/prévenir la discrimination ?	Oui	Oui
	Moyens utilisés :		
	- Octroi de « labels » ou de certificats attestant que les pratiques de l'employeur favorisent la diversité dans l'activité et sur le plan de l'emploi.	Oui	Oui
	- Incitations financières pour établir un plan qui garantisse que la composition de la population active est équilibrée du point de vue de la proportion d'hommes et de femmes ou de l'origine ethnique.	Oui	Oui
	- Incitations financières pour que l'employeur désigne au sein du service de la gestion des ressources humaines une personne responsable de sa politique anti-discrimination et/ou recrute un consultant pour établir un plan en matière de diversité.	Non	Non
	- Incitations financières à fixer des quotas (veuillez préciser les domaines, par exemple cadres supérieurs).	Non	Non
	Autres (ou toute autre information/observation complémentaire importante) :		

**Partie 2. Cadre institutionnel : organes spécialisés dans la lutte contre la discrimination (par exemple organes chargés de garantir l'égalité de traitement)**

Tableau 2.1 **Activités des organes spécialisés non liées au traitement des cas individuels de discrimination : Information du public et évaluation<sup>a</sup>**

	Genre	Ethnicité
Existe-t-il un organe spécialisé auquel ont été confiées certaines des fonctions d'information du public et d'évaluation des politiques ci-après?	Oui*	Oui**
<p><b>* Cellule de plainte au sein de l'Institut pour l'égalité des femmes et des hommes</b> Créé par une loi du 16 décembre 2002, opérationnel depuis février 2004 lors de l'arrivée de la direction. Organisme d'intérêt public (organe indépendant mais sous tutelle du ministre de l'égalité des chances).</p> <p><b>** Centre pour l'égalité des chances et la lutte contre le racisme</b> Service public autonome, créé en 1993.</p>		
L'organe spécialisé est habilité à :	Oui	Oui
- mener des campagnes d'information pour informer le public des droits qui lui sont reconnus par la loi <b>en pratique</b> , importance de l'activité susmentionnée dans l'ensemble des activités conduites par l'organisme en question	Moyenne	Importante
- mener des campagnes pour faire évoluer l'opinion publique <b>en pratique</b> , importance de l'activité susmentionnée dans l'ensemble des activités conduites par l'organisme en question	Oui Moyenne	Oui Importante
- publier des statistiques sur la discrimination <b>en pratique</b> , importance de l'activité susmentionnée dans l'ensemble des activités conduites par l'organisme en question	Oui Importante	Oui Moyenne
- réaliser des évaluations du cadre juridique et institutionnel anti-discrimination <b>en pratique</b> , importance de l'activité susmentionnée dans l'ensemble des activités conduites par l'organisme en question	Oui Moyenne	Oui Importante
- formuler des recommandations sur les actions à mener <b>en pratique</b> , importance de l'activité susmentionnée dans l'ensemble des activités conduites par l'organisme en question	Oui Moyenne	Oui Importante
- élaborer des codes de bonne pratique pour les employeurs <b>en pratique</b> , importance de l'activité susmentionnée dans l'ensemble des activités conduites par l'organisme en question	Oui Faible	Oui Moyenne
Autres (ou toute autre information/observation complémentaire importante) :		

Note : a) Importante/moyenne/faible signifie resp. supérieure à la moyenne / proche de la moyenne / inférieure à la moyenne.

Tableau 2.2 **Activités des organes spécialisés non liées au traitement des cas individuels de discrimination :**  
Mesures de contrôle et correctives<sup>a</sup>

	Genre	Ethnicité
Existe-t-il un organe spécialisé chargé de certaines des fonctions de contrôle et correctives ci-après ?	Oui	Oui
Cf. Tableau 2.1		
Cet organe spécialisé est habilité à		
- réaliser de manière aléatoire des enquêtes formelles auprès de sociétés et d'organisations. <b>en pratique</b> , importance de l'activité susmentionnée dans l'ensemble des activités conduites par l'organisme en question	Non	Oui Faible
- effectuer des enquêtes formelles auprès de sociétés et d'organisations lorsque des faits de discrimination ont été avancés. <b>en pratique</b> , importance de l'activité susmentionnée dans l'ensemble des activités conduites par l'organisme en question	Non	Oui Importante
- obliger une société ou une organisation à modifier ses règles de fonctionnement lorsque des pratiques discriminatoires sont mises en lumière <b>en pratique</b> , importance de l'activité susmentionnée dans l'ensemble des activités conduites par l'organisme en question	Non	Non
- engager des poursuites judiciaires contre les sociétés ou organisations qui ont des pratiques discriminatoires <b>en pratique</b> , importance de l'activité susmentionnée dans l'ensemble des activités conduites par l'organisme en question	Oui Faible	Oui Importante
- engager des poursuites judiciaires contre les organisations qui essaient d'encourager la discrimination ou qui ordonnent à d'autres de faire preuve de discrimination. <b>en pratique</b> , importance de l'activité susmentionnée dans l'ensemble des activités conduites par l'organisme en question	Oui Faible	Oui Moyenne
Autres (ou toute autre information/observation complémentaire importante) :		

Note : a) Importante/moyenne/faible signifie resp. supérieure à la moyenne / proche de la moyenne / inférieure à la moyenne.

Tableau 2.3 Rôle des organes spécialisés dans les cas individuels de discrimination

	Genre	Ethnicité
Existe-t-il un organe spécialisé chargé de fonctions spécifiques en relation avec les cas individuels de discrimination ?	Oui	Oui
Cf. Tableau 2.1		
Cet organe a-t-il été créé en application de la législation anti-discrimination (ou a-t-il été doté d'un mandat spécifique en vertu de cette législation) ?	Oui	Oui
<b>Liaison formelle entre les activités de l'organe spécialisé et celles des tribunaux</b>		
L'organe spécialisé est-il un guichet unique pour le demandeur, où celui-ci peut avoir accès à des informations, déposer plainte et être conseillé ?	Non	Oui
Dès que le tribunal est saisi d'une plainte pour discrimination, la plainte est-elle officiellement transmise à l'organe spécialisé ?	Non	Non
Les plaintes pour discrimination doivent être <b>d'abord</b> déposées auprès de l'organe spécialisé, qui est un guichet unique chargé de lancer la procédure.	Non	Non
L'organe spécialisé est habilité à fournir des conseils et des informations aux demandeurs (ou aux deux parties) sur les droits qui leur sont reconnus par la loi et sur les options qui s'offrent à eux.	Oui	Oui
<b>En pratique</b> , l'organe spécialisé engage la procédure décrite ci-dessus dès qu'il reçoit une plainte pour discrimination.	dans peu de cas	Oui, il en a l'obligation
L'organe spécialisé est habilité à fournir aux demandeurs une assistance juridique.	Oui	Oui
<b>En pratique</b> , l'organe spécialisé fournit une assistance juridique aux demandeurs pendant l'instance.	dans peu de cas	dans peu de cas*
L'organe spécialisé est habilité à assurer une représentation juridique aux demandeurs.	Oui	Oui
<b>En pratique</b> , l'organe spécialisé assure une représentation juridique aux demandeurs pendant l'instance.	dans peu de cas	dans peu de cas*
Notes :		
* Statistiques générales du centre sur l'ensemble des plaintes reçues (i.e. tous caractères protégés et secteurs confondus) : Avis/documentation dans 67% des cas ; conciliation/médiation dans 15% des cas ; procédure judiciaire dans 5% (réorientation de la plainte dans le reste des cas)		
<b>Instruction des plaintes pour discrimination</b>		
L'organe spécialisé est autorisé par la loi à contraindre les personnes (et, en particulier, l'employeur) à fournir toutes les informations dont il a besoin pour instruire une plainte pour discrimination.	Non	Non
Le tribunal accepte-t-il les éléments de faits fournis par l'organe spécialisé ?	Non	Oui
Le tribunal tient-t-il compte de l'évaluation par l'organe spécialisé de la validité de la plainte pour discrimination ?	Non	Oui
<b>En pratique</b> , l'organe spécialisé instruit officiellement les plaintes pour discrimination.	Non	Oui, il en a l'obligation *
* Principaux instruments auxquels l'organe spécialisé recourt pour instruire une plainte pour discrimination : avis/documentation, conciliation/médiation, rappel à la loi, saisine des autorités disciplinaires, saisine de la justice		
Tout défaut de communication des informations demandées à l'organe spécialisé de la part de l'employeur :		
- est sans incidence sur la décision du tribunal.		
- peut éventuellement conduire à une présomption de discrimination si l'affaire est portée devant le tribunal.	Sans objet → capacités d'investigation limitées	Sans objet → capacités d'investigation limitées
Tout manquement de la part de l'employeur à l'application du code de pratiques publié par l'organe spécialisé (ou un autre organe compétent) :		
- est sans incidence sur la décision du tribunal.		
- peut éventuellement conduire à une présomption de discrimination si l'affaire est portée devant le tribunal.	Non Oui	Sans objet Sans objet
<b>Procédure de médiation/conciliation</b>		

	Genre	Ethnicité
L'organe spécialisé est habilité à aider les deux parties à régler le différend par le biais d'une procédure de médiation/conciliation.	Oui	Oui
La médiation/conciliation est une procédure gratuite et volontaire pour les deux parties. <b>En pratique</b> , l'organe spécialisé mène des procédures de médiation/ conciliation, pour éviter de saisir le tribunal.	Oui Oui, dans bien des cas	Oui Oui dans bien des cas
La procédure de médiation/conciliation est <b>généralement</b> lancée : - avant que l'affaire soit portée devant le tribunal - avant le début de toute enquête formelle ou à un stade précoce de la procédure - après qu'une enquête formelle ait permis de réunir des faits de discrimination (mais avant qu'une décision de justice ait été prise)	Oui Oui Non	Oui Oui Non
L'organe spécialisé joue le rôle de tierce partie neutre qui aide les deux parties en présence dans la procédure de médiation/conciliation.	Oui	Non sauf exception (peut se constituer partie civile)
La procédure de médiation/conciliation est confidentielle : aucun détail des discussions auxquelles elle donne lieu ne peut être répété devant le tribunal, ni rendu public. La même règle s'applique aux modalités du règlement.	Oui	Oui dans la médiation formelle
Si les parties, y compris l'organe spécialisé, parviennent à un accord, ce dernier est contraignant du point de vue juridique et l'accusation est abandonnée.	Non	Non
L'organe spécialisé fait appliquer les accords de règlements conclus avec son aide ou sous sa responsabilité.	Non	Non sauf exception

**Partie 3. Statistiques relatives aux procédures de médiation/conciliation et aux cas portés devant les tribunaux**

Tableau 3.1 **Statistiques**

		<b>Genre</b>	<b>Ethnicité</b>
Statistiques générales	<p>Nombre total de plaintes pour discrimination reçues Population protégée (nombre de personnes âgées de 15 à 64 ans visées par la loi en question)</p> <p>Notes : * Tous secteurs confondus. Secteur emploi : 45, dont 44,4% relatives à la sélection, à l'engagement + annonces; 35,5% relatives à la grossesse; 21,1% relatives aux conditions de travail. ** tous secteurs confondus. Secteur emploi : 171, dont 38% relatives à l'embauche, 35% relatives aux relations de travail, 17% relatives au licenciement</p>	<p>156 en 2006* 6.818.862 (en 2004)</p>	<p>650 en 2006**</p>
Procédures de médiation/conciliation	<p>Nombre de plaintes reçues traitées par l'organe spécialisé,</p> <p><i>dont</i> :</p> <ul style="list-style-type: none"> <li>- nombre de plaintes écartées par l'organe spécialisé pour absence de causes/raisons valables</li> <li>- nombre de médiations/conciliations ayant échoué, alors que des causes/raisons valables avaient été reconnues</li> <li>- nombre de médiations/conciliations ayant réussi</li> <li>- autres (veuillez préciser)</li> </ul> <p>Durée moyenne des procédures de médiation/conciliation</p> <p>Compensation moyenne accordée au salarié/demandeur dans le cadre des procédures de médiation/conciliation</p> <p>Notes : * Depuis fin 2006, l'Institut s'est doté d'un instrument de traitement et de gestion rationnel des plaintes introduites : la base de données "GenderClaim". Cet outil devrait également permettre de mettre en évidence les discriminations persistantes en matière d'égalité des femmes et des hommes et sur cette base: de développer une stratégie et des recommandations sur la législation en matière de lutte contre les discriminations; d'améliorer la pertinence de résolution des plaintes introduites; de compléter les éléments d'analyse par l'ajout d'indicateurs européens et internationaux; de répondre mieux et de manière plus précise aux demandes d'information émanant d'institutions publiques ou de centres de recherches. ** Statistiques générales du centre sur l'ensemble des plaintes reçues (i.e. tous caractères protégés et secteurs confondus) : avis/documentation dans 67% des cas ; conciliation/médiation dans 15% des cas ; procédure judiciaire dans 5% ; réorientation de la plainte dans le reste des cas.</p>	<p>n.d.*</p>	<p>Voir **</p>
Tribunaux	<p>Nombre de cas portés devant les tribunaux</p> <p><i>dont</i> :</p> <ul style="list-style-type: none"> <li>- nombre de plaintes rejetées par le tribunal pour vice de procédure (ou pour des raisons administratives)</li> <li>- nombre de plaintes rejetées par le tribunal pour absence de causes/raisons valables</li> <li>- nombre de plaintes retirées par le(s) demandeur(s)</li> <li>- nombre de décisions de justice favorables au(x) demandeur(s)</li> <li>- autres (veuillez préciser)</li> </ul> <p>Durée moyenne des instances</p>	<p>n.d.</p>	<p>n.d.</p>



### Principales références complémentaires

**Centre pour l'égalité des chances et la lutte contre le racisme (2006)**, *Rapport Annuel 2006*,  
<http://www.diversiteit.be/NR/rdonlyres/1B16935C-E4ED-496F-AFB2-64999DC90C5F/0/jaarverslag2006frans.pdf>

**Institut pour l'égalité des femmes et des hommes (2006)**, *Rapport d'activités 2006*,  
<http://www.iewm.fgov.be/DocListPub.aspx?levelID=62&lang=fr&themelD=13>

**De Schutter, O. (2007)**, *Report on Measures to Combat Discrimination – Country Report: Belgium*, European Commission,  
[http://europa.eu.int/comm/employment\\_social/fundamental\\_rights/policy/aneval/mon\\_en.htm](http://europa.eu.int/comm/employment_social/fundamental_rights/policy/aneval/mon_en.htm)

## CANADA

### Part 1. Legal framework for employment discrimination

Main anti-discrimination laws:

**Canadian Human Rights Act (CHRA):** main federal anti-discrimination law (federal jurisdiction).

Canada is a federation and, under its Constitution, legislative and executive powers are conferred on two levels of government, which are each sovereign in their respective spheres. As a rule, labour law falls under the jurisdiction of the provinces and territories, except for certain sectors that belong to the **federal jurisdiction**. These sectors include the federal public service, the banking sector, the transportation sector and telecommunications. As a result, about 1.1 million of the roughly 15 million Canadian workers are covered by federal labour legislation, and the rest – roughly 93% – come under **provincial and territorial jurisdiction**, which each has their own labour and anti-discrimination laws and regimes. However, laws similar to the CHRA exist in all ten provinces and three territories. As a result, anti-discrimination provisions as established in the CHRA **are fairly representative of the overall Canadian situation**.

Relevant courts:

- **Canadian Human Rights Tribunal:** administrative body created under the CHRA.
- **Labour Arbitrator/Tribunals:** can apply the CHRA.
- **Federal Court of Canada:** judicial review of decisions made by either the Canadian Human Rights Commission or the Canadian Human Rights Tribunal.

Also: Federal Court of Appeal: hears relevant appeals from the Federal Court of Canada; and Supreme Court of Canada: Canada's ultimate appeal body.

Legal scope/definition of the (hereinafter) so-called gender and ethnicity grounds:

- Gender: Sex, explicitly including: pregnancy, child-birth, pregnancy, family status and marital status.
- Race, colour, national or ethnic origin.

The ground of sex has been interpreted by the Commission, Tribunal and Courts to include pregnancy, childbirth, related medical conditions, and breastfeeding. Family status has been interpreted by the Commission, Tribunal and Courts to include family / child-care responsibilities and marital status. The CHRA also includes a separate provision for sexual harassment and one for sexual orientation which in some circumstances is related to gender. The grounds of race, colour, national and/or ethnic origin as well as religion are all included in the CHRA. These grounds are often related in complaints received by the Commission.

Table 1.1 Prohibited acts, areas of concern, coverage, legal assistance and representation

		Gender	Ethnicity
Type of discrimination	Direct discrimination	Yes	Yes
	Indirect discrimination, i.e. where a provision criterion or practice is applied to all employees but puts one protected group at a particular disadvantage and cannot be shown to be a proportionate means of meeting a legitimate aim.	Yes	Yes
	Pressure and instruction to discriminate	Yes	Yes
	Harassment	Yes	Yes
Areas of concern	Hiring process	Yes	Yes
	Wage	Yes	Yes
	Type of employment contract (permanent vs. fixed term)	Yes	Yes
	Working time (atypical work schedule, part-time vs. full-time)	Yes	Yes
	Promotion	Yes	Yes
	Job and vocational training	Yes	Yes
	Transfer	Yes	Yes
	Redundancy and dismissal	Yes	Yes
Coverage	Private sector	Yes	Yes

		Gender	Ethnicity
	Public sector Employment agencies Trade unions (as regards membership)  Comments: The Commission has jurisdiction over the Federal public service, Federally regulated private sector and Federally regulated unions.	Yes No Yes	Yes No Yes
Legal assistance other than private lawyer	Specialised body (e.g. equal treatment body) Any relevant public utility institutions and associations Trade unions (please indicate if it is for their members only)  Comments: <ul style="list-style-type: none"> <li>The majority of cases received by the Commission are filed by individual complainants. The Commission does give complainants some guidance when filing complaints but not legal assistance.</li> <li>Trade unions may do so, but their involvement is more often limited to pay equity complaints. They will generally participate in the case if it is referred to Tribunal.</li> <li>Other public interest bodies that advocate for the elimination of discrimination against certain groups, include gender and ethnicity, may file complaints or assist complainants in filing. They may also seek intervener status and participate at Tribunal.</li> <li>Commission counsel only participates at Tribunal hearings when the Commission views it in the public interest to do so. Factors considered include: whether the legal issues raised in the complaint are settled; the vulnerability of the complainant; and whether broad public policy issues were raised in the complaint.</li> </ul> Complainants at Tribunal may be self-represented or hire their own counsel.	No Yes Yes	No Yes Yes
Legal representation other than private lawyer	Specialised body (e.g. equal treatment body) Any relevant public utility institutions and associations Trade-unions (please indicate if it is for their members only)  Comments: Complainants at Tribunal may be self-represented or hire their own counsel.  * Commission counsel only participates at Tribunal hearings when the Commission views it in the public interest to do so. Factors considered include: whether the legal issues raised in the complaint are settled; the vulnerability of the complainant; and whether broad public policy issues were raised in the complaint. Commission counsel represents the Commission, not the complainant: it takes a public interest at Tribunal and this position is not always consistent with the position of the complainant.  ** Other public interest bodies that advocate for the elimination of discrimination against certain groups, include gender and ethnicity, may seek intervener status and participate at Tribunal.  *** Trade unions may do so, but their involvement is more often limited to pay equity complaints. They will generally participate in the case if it is referred to Tribunal.	No* Yes** Yes***	No* Yes** Yes***

Table 1.2 Burden of proof

		Gender	Ethnicity
Burden of proof	Employee/claimant Shift of burden of proof  Comments: The complainant must establish a <b>prima facie case</b> . This means that in the absence of a response from the respondent it has been established that <b>it is more probable than not that the alleged discrimination took place</b> . The burden then shifts to the respondent to provide a reasonable explanation or justification for the differential treatment or to disprove that it occurred.	Yes Yes	Yes Yes

		Gender	Ethnicity
Additional information in the case of burden of proof on the claimant	<p><b>Standard of proof</b> What is the relevant standard of proof that should be applied, as set by law or established by case law? - Beyond a reasonable doubt (such as the typical standard for criminal cases) - On the balance of probabilities (such as the typical standard for civil disputes)</p> <p><i>Typical/standard evidence</i> admissible in courts (or other relevant bodies), as set by law or established by case law: Direct evidence (i.e. any written or verbal statement by the employer/respondent), <b>only</b>. No clear legal guidance for indirect evidence (e.g. case-by-case basis only) Statistical evidence Situation testing</p> <p>Comments: The evidence required in each case obviously depends on the circumstances in each case. Statistical evidence is usually only required when there are allegations against a larger policy or practice that is adversely affecting a larger population.</p> <p>* The CHRA provides that no complaint may be dealt with by the Commission where the complaint is based solely on statistical information that purports to show that members of one or more designated groups are underrepresented in the employer's workforce.</p>	<p>No Yes</p> <p>No True Yes* Yes</p>	<p>No Yes</p> <p>No True Yes* Yes</p>
Additional information in the case of shift of burden of proof	<p><b>Direct discrimination</b></p> <p><i>Main steps</i> Can the main steps of the procedure be described as follows? 1. The employee/claimant has to supply prima facie evidence whereby it may be <b>presumed</b> that there has been discrimination. 2. The employer/respondent has the burden of <b>proving</b> that his/her practice is not discriminatory.</p> <p>In practice, is presumption – as opposed to stronger evidence of discrimination – sufficient to shift the burden of proof?</p> <p><i>Typical/standard prima facie evidence</i> admissible in courts (or other relevant bodies), as set by law or established by case law: Direct evidence (i.e. any written or verbal statement by the employer/respondent), <b>only</b>. No clear legal guidance for indirect evidence (e.g. case-by-case basis only) Statistical evidence Situation testing</p> <p>Comments: There is no presumption of discrimination, however, the content of a <i>prima facie</i> case is fluid. However, if no direct evidence exists the Tribunal has used the term “subtle scent of discrimination” to describe a workplace environment that appeared to be intolerant. This appears to lower the threshold but evidence is still needed.</p>	<p>Yes</p> <p>No</p> <p>No True Yes Yes</p>	<p>Yes</p> <p>No</p> <p>No True Yes Yes</p>
	<p><b>Indirect discrimination</b></p> <p><i>Main steps</i> Can the main steps of the procedure be described as follows? 1. The employee/claimant has to clearly identify and define the employment practice in question. 2. The employee/claimant has to show that the practice <b>has or may have</b> a differentiated impact on one protected group. 3. The employer/respondent has the burden of demonstrating that the policy or practice in question is job related for the position in question and consistent with business necessity. 4. If the employer/respondent satisfies this requirement, evidence can be supplied on the existence/lack of the existence of a less discriminatory practice</p> <p>Comments: The employer <b>must demonstrate</b> that the policy is either non-discriminatory or that is a <i>bona fide occupational requirement</i>. This requires the employer to demonstrate that the policy was adopted in good faith, <b>the standard is rationally connected to job performance</b> and that it is <b>impossible to accommodate the complainant without undue hardship</b>.</p>	<p>Yes</p>	<p>Yes</p>

		Gender	Ethnicity
	In step 2 above is the term "has" more accurate than "may have"? In other words, can the potential (possible) impact of the contested employment practice be sufficient for shifting the burden of proof?	No	No
	In step 4 above, if the employer/respondent demonstrates that a practice is consistent with business necessity, then: - does it fall to the employee/claimant to demonstrate that a less discriminatory alternative exists that meets the business need but that the employer refuses to adopt it? <b>or</b> - does it fall to the employer/respondent to demonstrate that a less discriminatory alternative that meets the business need does not exist?	No Yes	No Yes
	<b>Comments:</b> <b>The employer must demonstrate that accommodation is not possible without undue hardship.</b>		
	<i>Typical/standard prima facie evidence</i> to be provided to courts or other relevant bodies, as set by law or established by case law: Direct evidence (i.e. any written or verbal statement by the employer/respondent), <b>only</b> . No clear legal guidance for indirect evidence (e.g. case-by-case basis only) Use of a distinction criteria that appear to be intrinsically suspicious. Please specify (for example, a requirement to work full-time might be unlawful discrimination against women) Statistical evidence	No True Yes Yes*	No True Yes Yes*
	* Statistical evidence is usually only required when there are allegations against a larger policy or practice that is adversely affecting a larger population. The CHRA provides that no complaint may be dealt with by the Commission where the complaint is based solely on statistical information that purports to show that members of one or more designated groups are underrepresented in the employer's workforce.		
	Other indirect evidence: The Canadian Human Rights Tribunal recently held that use of the criteria of " <b>overqualification</b> " to screen out an applicant had an adverse effect on qualified, visible minority immigrant based on a combination of statistical and sociological information. The supporting evidence was that as a group, visible minority immigrants in Canada are more highly educated than the Canadian born population. Visible minority immigrants face barriers to employment at their level of qualification. These barriers force highly qualified visible minority immigrants to seek lower skilled jobs. Therefore, Immigrants often accept work for which they are overqualified because they are denied employment at their level of qualification.		
	<b>Harassment</b> Analysed on a case-by-case basis, by looking at all the circumstances and the context.	Yes	Yes

Table 1.3 Employee compensation and employer penalties

		Gender	Ethnicity
Employee compensation	<b>Injunctive relief/reinstatement</b> - Always made available to the employee/claimant, but the latter can choose monetary compensation in lieu of relief/reinstatement, or - Always made available to the employee/claimant, without alternative option, or - Always made available to the employee/claimant, but the employer/respondent can choose monetary compensation in lieu of relief/reinstatement, or - Never made available to the employee/claimant.	No No No No	No No No No
	Note from the CHRC: Set on a case-by-case basis. The Tribunal will make what it deems to be the best remedial option given the circumstances. While reinstatement is always an option, it is rarely ordered.		
	<b>Monetary compensation</b> Back pay (please indicate if there is a cap)	Yes	Yes

		<b>Gender</b>	<b>Ethnicity</b>
	<p>Reimbursement of lawyer's and attorney's fees and costs</p> <p>In lieu of relief/reinstatement, compensation for future lost earnings (e.g., in case of dismissal, this may correspond to lost earnings until the employee finds a new job):</p> <ul style="list-style-type: none"> <li>- Floor or minimum (amount): .....</li> <li>- Cap or maximum (amount): .....</li> <li>- Average compensation (amount): .....</li> <li>- Median compensation (amount): .....</li> </ul> <p>Compensation for psychological injury:</p> <ul style="list-style-type: none"> <li>- Floor or minimum (amount): .....</li> <li>- Cap or maximum (amount): ..... <b>\$20 000</b> (pain &amp; suffering)</li> <li>- Average compensation (amount): .....</li> <li>- Median compensation (amount): .....</li> </ul> <p><b>Other:</b> Special compensation for <b>wilful or reckless</b> employer behaviour: no more than \$20 000.</p> <p>Note from the CHRC: Monetary remedies are provided for in the CHRA. Awards are very case specific. No statistics available to answer the average and median compensation question.</p>	<p>Yes</p> <p>Yes</p> <p>Yes</p>	<p>Yes</p> <p>Yes</p> <p>Yes</p>
Employer additional penalties and obligations	<p><b>Civil provisions: NOT APPLICABLE</b></p> <p>None</p> <p>Court may order the publicity of the decision</p> <ul style="list-style-type: none"> <li>- Within the firm (e.g. notices to all employees addressing the violations of a specific charge and advising them of their rights under the laws)</li> <li>- Outside the firm (please indicate: media, trade-unions, etc.)</li> </ul> <p>The employer may be required to take corrective or preventive actions to cure the source of the identified discrimination</p> <p><b>Penal provisions</b></p> <p>None</p> <p>Fine</p> <p>Prison sentence (please specify lengths, whether it applies only in specific cases and in which cases)</p> <p>Notes:</p> <p>* The CHRA is remedial legislation as opposed to penal.</p> <p>However, there is one penalty provision in the CHRA and that is for violations of s.13 of the legislation which makes it an offence to communicate hate messages on the internet or by other telephonic means. The employer may be ordered to pay a penalty of no more than \$10,000. The CHRA also provides for a fine <b>not exceeding \$50,000</b> in case of victimisation/retaliation as well as for a person obstructing an investigator or a member or panel of the Tribunal in carrying out their functions.</p>	<p>true</p> <p>Yes*</p> <p>No</p>	<p>true</p> <p>Yes*</p> <p>No</p>

Table 1.4 **Protection against victimisation (retaliation)**

		<b>Gender</b>	<b>Ethnicity</b>
Protected actions	<p>It is prohibited to treat the employee/protected person less favourably (so-called "adverse action") because s/he has (so-called "protected action"):</p> <ul style="list-style-type: none"> <li>- brought proceedings against discrimination</li> <li>- given evidence or information in connection with any proceedings against discrimination.</li> <li>- participated as a witness in any proceedings against discrimination</li> </ul>	<p>Yes</p> <p>Yes</p> <p>Yes</p>	<p>Yes</p> <p>Yes</p> <p>Yes</p>
Proof of causal connexion	<p><i>Burden of proof:</i></p> <ul style="list-style-type: none"> <li>- i) employee/protected person</li> <li>- ii) employer/respondent within a given lapse of time from the concerned event. Please specify conditions of application and lapse of time.</li> <li>- iii) shift of burden of proof. Please specify main steps.</li> </ul>	<p>Yes</p> <p>No</p> <p>No</p>	<p>Yes</p> <p>No</p> <p>No</p>

		Gender	Ethnicity
	<p>Comments: Part III, Art 59 of the <i>Canadian Human Rights Act</i>: “No person shall threaten, intimidate or discriminate against an individual because that individual has made a complaint or given evidence or assisted in any way in respect of the initiation or prosecution of a complaint or other proceeding under this Part, or because that individual proposes to do so”</p> <p>Under the <i>Canadian Human Rights Act</i>, it is a discriminatory act to retaliate against a person who filed a complaint or any person acting on his/her behalf. <b>The normal civil burden of proof applies, i.e. balance of probabilities. There is no shifting burden to the employer/respondent. A causal connection may be proven either through direct evidence or by inference through circumstantial evidence.</b></p> <p>In cases (i) and (iii), when the causal connexion shall be first shown or established by the employee/protected person: - the link can be demonstrated by evidence that the adverse action occurred shortly after the protected activity (and the employer/respondent was aware of the complainant's protected activity before taking the action), so that the employment relationship is implicitly or explicitly (please specify) protected during a certain period of time (please specify) - other (please specify)</p> <p>Notes: There are no temporal requirements to prove retaliation under the <i>Canadian Human Rights Act</i> other than the fact that a complaint must be filed prior to the alleged acts of retaliation. Although it may become more difficult to prove it is possible that an alleged act of retaliation may occur many years after the filing of a complaint.</p>	No  No	No  No
Employee compensation and employer penalty	<p>Compared to provisions described in Table 1.3: - additional employee/protected person compensation - additional employer/respondent penalties: <b>Fine not exceeding \$50,000.</b></p>	Yes	Yes

Table 1.5 Relationship with standard labour laws

		Gender	Ethnicity
Labour law and discrimination	<p>According to standard labour law(s) or code, would dismissal solely based on gender or ethnicity considered to be unjust dismissal?</p> <p>The Canada Labour Code, Part III (Labour Standards) does not specifically identify specific subjects that can be described as unjust. If an employee feels they were unjustly dismissed, and meet certain criteria under the Code, they may file a complaint. An inspector assists the parties to settle the complaint. If it is not possible to settle the complaint, the complainant may request the Minister of Labour to appoint an independent adjudicator to decide and rule on the case. However, at present, arbitrators under the <i>Canada Labour Code</i> cannot determine complaints of unjust dismissal where the dismissal is alleged to be based solely on gender or ethnicity, which are prohibited grounds of discrimination under the <i>Canadian Human Rights Act</i>.</p> <p>Is there a provision requiring equal pay for work of equal value in standard labour law(s) or code? If yes, please specify since when.</p> <p>Where an inspector has reasonable grounds at any time for believing that an employer is engaging or has engaged in a discriminatory practice, the inspector may notify the Canadian Human Rights Commission or file a complaint with that Commission under section 40 of the <i>Canadian Human Rights Act</i>. Provisions requiring equal pay for work of equal value on the basis of gender <u>only</u> are only in the <i>Canadian Human Rights Act</i>, section 11. There is no protection in standard labour laws.</p> <p>Notes: <b>Answers relate to the Canada Labour Code</b>, which is the main labour law at the federal level. All provinces and territories have similar laws. As a result, <b>answers are very representative of the Canadian situation.</b></p>	No  Yes	No  Yes

		Gender	Ethnicity
Complaints	Are discrimination complaints concerning dismissals more often lodged under standard labour law(s) or code, than under specific anti-discrimination laws?	No	No
	Are discrimination complaints concerning pay more often lodged under standard labour law(s) or code, than under specific anti-discrimination laws?	No	No
	Notes: Complaints for these matters are more often filed utilizing Human Rights Legislation rather than Labour Standards Codes.		
Evaluations	Please indicate below references to existing evaluations/studies on the effectiveness of anti-discrimination laws with respect to standard labour law(s):	N/A	N/A

Table 1.6 Positive action

		Gender	Ethnicity
<p><b>Notes:</b> Answers relate to the federal Employment Equity Act, which is the main positive action legislation at the federal level. Only one other province has such a legislation. Therefore, <b>these answers cover only about 10% of Canadian workers.</b> The province of Quebec has passed the "Act respecting equal access to employment in public bodies" ("Loi sur l'accès à l'égalité en emploi dans des organismes publics") which is almost identical to the federal "Employment Equity Act". It requires employers to take positive action to promote the employment of disadvantaged groups. The major difference is that the federal Act applies to the federal public sector and to federally-regulated private sector companies, whereas the Quebec Act applies only to the Quebec public sector.</p>			
Compulsory actions	Are employers <b>required</b> by law to take actions to increase diversity/prevent discrimination? → Employers who are subject to the <i>Employment Equity Act</i> are required to take actions to increase diversity/prevent discrimination by implementing an employment equity program.	Yes	Yes
	If yes, what actions are required? • make regular public reports on employment composition in terms of gender or ethnicity → Employers covered under the Legislated Employment Equity Program (LEEP) are required to report annually to the Labour Program on the progress of their employment equity plan.	Yes	Yes
	• process only anonymous job applications • obligation for large employers to have a person in the HRM department in charge of the employer's anti-discrimination policy → Employers who have implemented employment equity are encouraged to adopt anti-discrimination policies in an effort to eliminate barriers to employment. The <i>Act</i> does not specifically require a person in the HRM department be responsible for anti-discrimination policies.	No No	No No
	• quotas → The <i>Employment Equity Act</i> does not require employers to implement quotas. It instead encourages employers to establish numerical and non-numerical goals both in the short and long-term to eliminate barriers to increase representation of designated groups. Comments: <b>Numerical goals are not meant to be quotas.</b> Goals are based on realistic and achievable considerations related to the organization's need to hire, and the availability of qualified individuals. These goals are adapted to the organization's particular needs and situation, and there are no penalties if goals are not met.	No	No
<p><b>Notes:</b> As regard employer obligations, the EEA: • Clarifies existing employer obligations to implement employment equity without imposing overly onerous obligations. • Establishes the same core requirements for public and private sector employers for developing and implementing employment equity plans and programs. • Clarifies that implementing employment equity does not require quotas, measures that cause undue hardship for an employer, the creation of new positions, the hiring or promotion of unqualified individuals, or hiring and promotion without regard for the merit principle in the public sector.</p>			



		Gender	Ethnicity
Voluntary actions	Are employers <b>allowed</b> to take actions to increase diversity/prevent discrimination?	Yes	Yes
	If yes, what actions are allowed? - make regular public reports on employment composition in terms of gender or ethnicity - establish a plan to ensure that the employment composition in terms of gender or ethnicity is balanced - quotas: See above remarks on quotas.	Yes Yes	Yes Yes
		No	No
Public employers' practices	Do public employers normally take actions to increase diversity/prevent discrimination?	Yes	Yes
	If yes, what actions? • Make regular public reports on employment composition in terms of gender or ethnicity → Only if the employer is subject to the Legislated Employment Equity Program (LEEP)	Yes and no	Yes and no
	• establish a plan to ensure that the employment composition in terms of gender or ethnicity is balanced → if an employer is subject to the <i>Employment Equity Act</i> , they are <b>required to institute an employment equity plan</b> that would ensure that the employment composition in terms of designated groups (women, visible minorities, Aboriginal peoples and persons with disabilities) is balanced.	Yes	Yes
	• process only anonymous job applications • have at least one person in the HRM department in charge of the employer's anti-discrimination policy	No No	No No
	• quotas: See above remarks on quotas.	No	No
Incentives	Is there a policy to increase incentives for employers to increase diversity/prevent discrimination?	Yes	Yes
	Policy instruments used: • Delivery of "labels" or certificates stating that the employer has a diversity-friendly business/employment practice.	Yes	Yes
	→ Employers subject to the Federal Contractor's Program (FCP) with over 100 employees will only be eligible for government contracts if they have signed a Certificate of Commitment related to employment equity. If employers with over 100 employees fail to implement employment equity while participating in FCP will not be able to acquire government contracts over \$25,000		
	• financial incentives to establish a plan to ensure that the employment composition in terms of gender or ethnicity is balanced → Employers subject to the Federal Contractor's Program (FCP) with over 100 employees will only be eligible for government contracts if they have signed a Certificate of Commitment related to employment equity. If employers with over 100 employees fail to implement employment equity while participating in FCP will not be able to acquire government contracts over \$25,000	No	No
	• financial incentives for having a person in the HRM department in charge of the employer's anti-discrimination policy and/or hiring a consultant to establish a diversity plan.	No	No
• financial incentives for quotas (please specify the areas: e.g. executives)	No	No	

**Part 2. Institutional framework: specialised bodies (SB) combating discrimination (e.g. equal treatment bodies)**

Table 2.1 **Activities of SBs not related to individual discrimination cases: Public information and evaluation<sup>a</sup>**

	<b>Gender</b>	<b>Ethnicity</b>
<p>Is there a specialised body (SB) in charge of carrying out some of all of the following public information and policy evaluation functions?</p> <p>The <b>Canadian Human Rights Commission</b> was established in 1978 as a public, independent body. It is responsible for the implementation of the <i>Canadian Human Rights Act</i> and the <i>Employment Equity Act</i>. This commission acts at <b>the federal jurisdiction level</b> only, but similar bodies exist in almost all provinces and territories. As a result, answers are fairly representative of the overall Canadian situation.</p> <p>In the provinces of Ontario and British Columbia, and the territory of Nunavut, where there is no specialized body that receives and processes complaints of discrimination, complainants take their complaints directly to an administrative tribunal that reviews the complaints and rules on them.</p>	Yes	Yes
<p>This SB has the statutory power to:</p> <ul style="list-style-type: none"> <li>- run information campaigns to inform the public of their legal rights</li> <li><b>in practice</b>, importance of the above mentioned activity in the actual overall workload</li> <li>- run campaigns to change public opinion</li> <li><b>in practice</b>, importance of the above mentioned activity in the actual overall workload</li> <li>- publish statistics on discrimination</li> <li><b>in practice</b>, importance of the above mentioned activity in the actual overall workload</li> <li>- carry out evaluations of the legal and institutional anti-discrimination framework</li> <li><b>in practice</b>, importance of the above mentioned activity in the actual overall workload</li> <li>- make policy recommendations</li> <li><b>in practice</b>, importance of the above mentioned activity in the actual overall workload</li> <li>- produce codes of good practice for employers</li> <li><b>in practice</b>, importance of the above mentioned activity in the actual overall workload</li> </ul>	<p>Yes</p> <p>Medium</p> <p>Yes</p> <p>Low</p> <p>Yes</p> <p>High</p> <p>Yes</p> <p>High</p> <p>Yes</p> <p>High</p> <p>Yes</p> <p>Medium</p>	<p>Yes</p> <p>Medium</p> <p>Yes</p> <p>Low</p> <p>Yes</p> <p>High</p> <p>Yes</p> <p>High</p> <p>Yes</p> <p>High</p> <p>Yes</p> <p>Medium</p>

Note: a) High/Medium/Low mean above average / close to average / below average, respectively.

Table 2.2 **Activities of SBs not related to individual discrimination cases: Control and correction<sup>a</sup>**

	<b>Gender</b>	<b>Ethnicity</b>
<p>Is there a specialised body (SB) in charge of carrying out some of all of the following control and correction functions?</p> <p>The Canadian Human Rights Commission</p>	Yes	Yes
<p>This SB has the statutory power to</p> <ul style="list-style-type: none"> <li>- randomly conduct formal investigations of companies and organisations.</li> <li><b>in practice</b>, importance of the above mentioned activity in the actual overall workload</li> <li>- conduct formal investigations of companies and organisation where there is evidence of discrimination.</li> <li><b>in practice</b>, importance of the above mentioned activity in the actual overall workload</li> <li>- oblige a company or an organisation to change the way it operates when discriminatory practices are found.</li> <li><b>in practice</b>, importance of the above mentioned activity in the actual overall workload</li> <li>- take legal action against companies or organisations that apply discriminatory practices</li> <li><b>in practice</b>, importance of the above mentioned activity in the actual overall workload</li> <li>- take legal action against organisations that attempt to promote discrimination or to instruct others to discriminate.</li> <li><b>in practice</b>, importance of the above mentioned activity in the actual overall workload</li> </ul>	<p>Yes</p> <p>High</p> <p>Yes</p> <p>High</p> <p>Yes</p> <p>High</p> <p>Yes</p> <p>High</p> <p>Yes</p> <p>High</p>	<p>Yes</p> <p>High</p> <p>Yes</p> <p>High</p> <p>Yes</p> <p>High</p> <p>Yes</p> <p>High</p> <p>Yes</p> <p>High</p>

Note: a) High/Medium/Low mean above average / close to average / below average, respectively.

Table 2.3 **Role of SBs in individual discrimination cases**

	<b>Gender</b>	<b>Ethnicity</b>
Is there a specialised body (SB) with specific functions related to individual discrimination cases? The Canadian Human Rights Commission.	Yes	Yes
Was this body created by anti-discrimination laws (or did anti-discrimination laws establish a specific mandate for it)?	Yes	Yes
<b>Formal linkage between equal treatment body activities and complaint lodging and procedures</b>		
Does the SB act as a one-stop shop where claimant can access information, lodge a complaint, receive advice?	Yes	Yes
As soon as, or before, a discrimination complaint is brought to court, is the claim formally transmitted to the SB?	Yes	Yes
Discrimination complaints must be lodged with the SB beforehand, which acts as one-stop shop to start the procedure.	Yes	Yes
The SB has the statutory power to provide advice and information to claimants (or both parties) on their legal rights and what options they have.	Yes	Yes
<b>In practice</b> , the SB carries on the above mentioned process as soon as it receives a discrimination claim.	Yes, duty	Yes, duty
The SB has the statutory power to provide claimants with legal assistance.	Yes	Yes
<b>In practice</b> , SB provides legal assistance to claimants during court proceedings.	Yes, in few cases	Yes, in few cases
The SB has the statutory power to provide claimants with legal representation.	Yes	Yes
<b>In practice</b> , the SB provides legal representation to claimants during court proceedings.	Yes, in few cases	Yes, in few cases
<b>Investigation of discrimination claims</b>		
The SB has the legal authority to compel people (and in particular, the employer) to provide all of the information it requires to investigate a discrimination claim.	Yes	Yes
Does the court accept evidence from the SB?	Yes*	Yes*
Does the court accept the SB's evaluation of the validity of the discrimination complaint?	Yes*	Yes*
<b>In practice</b> , the SB formally investigates discrimination claims.	Yes, duty**	Yes, duty**
<b>Comments:</b> * The court will take into account the Commission's assessment, but makes up its own mind as to the validity of the complaint. ** The Commission has a duty to investigate complaints, but often, a settlement is reached by parties before an investigation takes place.		
Any employer's failure to provide the requested information to the SB will: - have no implication for the court ruling. - potentially be used to draw inferences on discrimination if the case is brought before court.	No Yes	No Yes
Any employer's failure to comply with the code of practices issued by the SB (or other relevant body) will: - have no implication for the court ruling. - potentially be used to draw inferences on discrimination if the case is brought before court. → See above comments	No Yes	No Yes
<b>Mediation/conciliation procedure</b>		
The SB has the statutory power to help both parties to resolve the dispute through a mediation/conciliation procedure.	Yes	Yes
Mediation/conciliation is a free and voluntary process for both parties.	Yes	Yes
<b>In practice</b> , the SB carries out mediation/conciliation procedures, so that a court ruling may not be necessary.	Yes, in many cases	Yes, in many cases
The mediation/conciliation procedure is <b>usually</b> initiated:		
- before the case is brought to court	Yes	Yes
- before any formal investigation starts or at an early stage of the process	Yes	Yes
- after any investigation has produced primary evidence of discrimination (but before a litigation decision has been reached)	Yes	Yes

	Gender	Ethnicity
<p>Comments:  Mediation and conciliation refer to two distinct procedures. The main difference is that <b>mediation is voluntary while conciliation is mandatory</b>. The Commission encourages use of mediation early in the complaint process, although it is available at any stage up to Tribunal hearings. Conciliation generally takes place after an investigation of the facts, before a case is referred to the Tribunal. However, the Commission can order conciliation at an earlier stage. The roles of the conciliator and the mediator are quite similar. But, unlike mediators, conciliators give direct feedback on the strengths and weaknesses of arguments, opinions and proposals.</p>		
<p>The SB acts as a neutral third party assisting both opposing parties in the mediation/conciliation procedure.</p>	Yes/No	Yes/No
<p>The mediation/conciliation procedure is confidential: no details of the discussion taking place in its course can be repeated to court, nor are made public. The same rule applies to the terms of the settlement.</p>	Yes	Yes
<p>If the parties, including the SB, reach settlement agreement, the latter is legally binding and the charge is dismissed.</p>	Yes*	Yes*
<p>The SB secures the enforcement of settlement agreements reached under its assistance and/or responsibility.</p>	Yes	Yes
<p>* Note: The charge is <u>usually</u> withdrawn – not dismissed –, but not automatically; it is something that the parties usually agree to, as part of the settlement.</p>		

**Part 3. Statistics on mediation/conciliation procedures and court case**

Table 3.1 **Statistics**

		<b>Gender</b>	<b>Ethnicity</b>
General statistics	The following data are for the calendar year 2006, federal jurisdiction. Total number of discrimination complaints received. Protected population (number of persons aged 15-64 covered by the law in question)	138 About 500,000	197 Not available
Mediation/ conciliation procedures	Number of received complaints treated by the SB,  <i>of which:</i> - number of complaints dismissed by the SB for no reasonable cause - number of unsuccessful mediations/conciliations although reasonable cause was found - number of successful mediations/conciliations - other: cases which were rejected because the Commission had no jurisdiction, or which were sent to other resolution mechanisms (such as a grievance procedure)	38 15  36 49	54 21  51 70
	Average duration of mediation/conciliation procedures	About 2-3 months	About 2-3 months
	Average employee/claimant compensation under mediation/ conciliation procedures	Not available, settlements are generally confidential	Not available, settlements are generally confidential
Court procedures	Number of court cases  <i>of which</i> - number of complaints dismissed by court for default procedures (or administrative reasons) - number of complaints dismissed by court for no reasonable cause - number of cases withdrawn by the complainant(s) - number of court rulings with favourable outcomes for the complainant(s) - other (please specify)	Not available	Not available
	Notes: Court decisions cannot be summarized in the above-described manner. There are several levels of courts that may rule on a single complaint. Some of the rulings deal with judicial issues rather than with the substance of the complaints. In addition, complaints generally include many allegations, and the courts may rule in favour of the complainant for some allegations, and against the complainant for other allegations; as a result, a clear-cut win or lose demarcation does not exist in many cases.		
	Average duration of court procedures: <b>See preceding note.</b>	Not available	Not available

## CZECH REPUBLIC

### Partie 1. Cadre juridique prévu pour la discrimination dans l'emploi

Principales lois anti-discrimination :

Loi portant sur l'égalité de traitement et sur les moyens juridiques de la protection contre les discriminations et modifiant certaines Lois (Loi anti-discrimination) – entrée en vigueur prévue le 1 Janvier 2008

Les informations reportées dans les tableaux 1.1 à 1.6 font référence aux dispositions légales en application en 2007, dont :

- art. 14 de la Convention de sauvegarde des Droits de l'Homme et des Libertés fondamentale ;
- **art. 4 par. 1, 2 et 9, art. 12 par. 1 point a) de la Loi n° 435/2004 Rec. portant sur l'emploi ;**
- art. 110 du Code du Travail, Loi n° 262/2006 (égalité des rémunérations) ;
- art. 80 par. 1 de la Loi n° 218/2002 Rec. portant sur le service public dans les organes administratifs et sur la rémunération de ces employés et des autres employés des organes administratifs (Loi de service) ;
- art. 2 par. 3 de la Loi n° 221/1999 Rec. portant sur les soldats professionnels.

Tribunaux compétents : tribunal de l'emploi ou autre tribunal civil, tribunal administratif, instance pénale.

Définition légale des caractéristiques protégées, ci-après notées genre et ethnicité :

- Genre : discrimination fondée sur le sexe, incluant explicitement les motifs suivants : responsabilités familiales et situation matrimoniale.
- Ethnicité : discrimination fondée sur la race, l'ascendance, l'origine nationale ou ethnique.

**Tableau 1.1 Type de discrimination, domaines concernés, acteurs visés, assistance et représentation légales**

		Genre	Ethnicité
Type de discrimination	Discrimination directe	Oui	Oui
	Discrimination indirecte, autrement dit dans les cas où une disposition ou une pratique vise tous les salariés mais affecte particulièrement un groupe protégé et ne peut être considérée comme un moyen approprié pour atteindre un objectif légitime.	Oui	Oui
	Pressions et consignes en vue d'exercer une discrimination	Oui	Oui
	Harcèlement	Oui	Oui
Domaines concernés	Processus de recrutement	Oui	Oui
	Salaires	Oui	Oui
	Type de contrat de travail (permanent ou de durée déterminée)	Oui	Oui
	Durée du travail (horaire atypique, temps partiel ou temps plein)	Oui	Oui
	Promotion	Oui	Oui
	Emploi et formation professionnelle	Oui	Oui
	Transfert	Oui	Oui
	Licenciement et renvoi	Oui	Oui
Acteurs visés	Secteur privé	Oui	Oui
	Secteur public	Oui	Oui
	Agences pour l'emploi	Oui	Oui
	Syndicats (adhérents)	Oui	Oui
Assistance juridique autre que les services d'un avocat indépendant	Organe spécialisé (par ex. organe chargé de faire respecter l'égalité de traitement)	Non	Non
	Toute institution ou association d'utilité publique compétente	Oui	Oui
	Syndicats (veuillez indiquer si seuls leurs membres en bénéficient)	Oui	Oui
	Notes : voir aussi Bouckova (2007), p48.		

		Genre	Ethnicité
Représentation juridique autre que celle assurée par un avocat indépendant	Organe spécialisé (par ex. organe chargé de faire respecter l'égalité de traitement) Toute institution ou association d'utilité publique compétente Syndicats (veuillez indiquer si seuls les membres en bénéficient)  Notes : voir aussi Bouckova (2007), p48.	Non Oui Oui	Non Oui Oui

Tableau 1.2 Charge de la preuve

	Genre	Ethnicité
Salarié/demandeur Renversement de la charge de la preuve (le salarié/demandeur présente des éléments de fait et l'employeur/défendeur doit à son tour fournir des preuves – voir ci-dessous pour une description détaillée) Voir Bouckova (2007), p. 48	Non Oui	Non Oui
<b>Discrimination directe</b>  <i>Principales étapes</i> Peut-on décrire les étapes principales de la procédure de façon suivante ? 1. L'employé/plaignant doit présenter des preuves prima facie fondant le <b>soupçon</b> qu'une discrimination s'est produite. 2. La charge de la preuve incombe à l'employeur/défendeur pour démontrer que ses démarches ne présentaient pas de caractère discriminatoire.  Notes : Art. 133bis de la Loi n° 99/1963 portant code de procédure civile : (1) Dans les affaires relatives au travail, <b>le juge considère les faits invoqués pour affirmer qu'une partie a été victime d'une discrimination fondée sur le sexe, l'origine raciale ou ethnique, la religion, la foi, les convictions, l'handicap, l'âge ou l'orientation sexuelle comme prouvés à moins que le contraire ne s'avère, lors de la procédure.</b>	Oui	Oui
<b>Discrimination indirecte</b>  <i>Principales étapes : voir supra – discrimination directe</i>		
<b>Harcèlement</b> Art. 4 par. 9 de la Loi n° 435/2004 Rec. portant sur l'emploi : <i>Le harcèlement fondé sur le sexe, l'orientation sexuelle, l'origine raciale ou ethnique, l'handicap, l'âge, la religion ou la foi et le harcèlement sexuel sont considérés comme une discrimination. – voir supra, discrimination directe.</i>	Oui	Oui

Tableau 1.3 Compensation accordée au salarié et pénalités imposées à l'employeur

		Genre	Ethnicité
Compensation accordée au salarié	<p><b>Réhabilitation/réintégration et compensations monétaires</b></p> <p><i>Art. 4 par. 10,11 et 12 de la Loi n° 435/2004 Rec. portant sur l'emploi :</i>  (10) Lorsqu'il se produit, à l'occasion de l'exercice du droit à l'emploi, une infraction aux droits et obligations découlant de l'égalité de traitement ou une discrimination, la personne physique concernée a le droit de revendiquer :  a) qu'il soit mis fin à ces infractions,  b) que les conséquences de ces infractions soient réparées et  c) qu'il lui soit donné une satisfaction adéquate.  (11) Lorsqu'il a été porté un grave préjudice à la dignité ou à l'estime d'une personne physique et que les dispositions du paragraphe 10 se sont avérées insuffisantes pour la réparation, ladite personne physique a le droit à une réparation pécuniaire du préjudice moral subi.  (12) Le montant de la réparation visée au paragraphe 11 est arrêté, sur la proposition de la personne physique, par le tribunal, compte tenu de la gravité du préjudice subi et des circonstances de l'infraction aux droits et obligations.</p> <p><i>Art. 17 de La Loi n° 262/2006 portant code du travail :</i> Les moyens juridiques de la protection contre les discriminations dans les relations de travail sont régis par une norme particulière.</p> <p><i>Claim of material damages and non-pecuniary damages (Bouckova, 2007, p.50):</i>  While material damages can generally be claimed by individuals who suffer material losses due to unlawful acts or any other violation of a duty established by law or a contract, nonpecuniary damages can only be claimed when this is expressly permitted by law. In cases where non-pecuniary damages are caused by acts of discrimination, the Law on Employment and the Civil Code (in provisions concerning personality protection) allow for non-material damages to be claimed. The amount of non-pecuniary damages awarded in such a procedure is determined by the court which takes into account the seriousness of the damage and the circumstances of the case (See Section 13 Para 3 of Law no. 64/1961 Coll., Civil Code, Sec. 4 Para. 11 of Law no. 435/2004 Coll., on Employment). The court can award non-pecuniary damages of up to the amount requested by the petitioner, but can also award a lower amount. The amounts vary considerably – <b>the courts have awarded the plaintiffs in discrimination cases amounts ranging from 20,000 CZK to 200,000 CZK (€645 to €6,451).</b></p>	Oui	Oui
Sanctions et obligations supplémentaires imposées à l'employeur	<p><b>Dispositions prises en matière civile</b></p> <p>Aucune</p> <p>Le tribunal peut ordonner que la décision soit rendue publique</p> <ul style="list-style-type: none"> <li>- Au sein de l'entreprise (par exemple des avis sont adressés à tous les salariés pour les informer des violations d'une charge spécifique et leur indiquer quels sont les droits qui leur sont reconnus par la législation)</li> <li>- En dehors de l'entreprise (veuillez préciser : médias, syndicats, etc.)</li> </ul> <p>L'employeur peut être tenu de prendre des mesures correctives ou préventives pour remédier à la discrimination identifiée.</p> <p>Autres:</p> <p>Art. 11 et 24 de la Loi n° 251/2005. portant sur l'inspection du travail : infractions et délits administratifs dans le domaine du traitement et discriminations avec la possibilité d'imposer une amende à l'employeur dans le montant allant jusqu'à 400 000 CZK.</p> <p>Administrative procedures cover both misdemeanours and administrative offences. Relevant administrative procedures provide investigative powers for administrative bodies and inspectorates, as established within the scope of specific laws. Employment offices and Labour Inspectorates, using their powers in the area of employment and labour relations are competent to investigate misdemeanours and administrative offences involving discrimination and to impose sanctions.</p> <p>Sec. 139 and 140 of Law no. 435/2004 Coll., on Employment: <b>Natural or legal persons or employers who violate the Law on Employment or the Labour Code's provisions on discrimination may be fined up to 1 million CZK (approx. €31,949).</b></p> <p>The Law on Employment defines the competencies of employment offices and the Administrative Code governs their procedures. Procedures can be initiated by a complainant or on an employment office's own initiative. In the event that a complaint is initiated, the complainant is not an actual party in the administrative procedure. Penalties become income for the state budget. (source: Bouckova, 2007, p. 46 and 49)</p>	<p>Faux</p> <p>Non</p> <p>Non</p> <p>Non</p> <p>Oui</p>	<p>Faux</p> <p>Non</p> <p>Non</p> <p>Non</p> <p>Oui</p>



		Genre	Ethnicité
	<p><b>Dispositions en matière pénale</b>  Aucune  Amende (veuillez préciser les montants)  Peine d'emprisonnement (veuillez préciser la durée, si elle ne s'applique qu'à des cas spécifiques et lesquels)</p>	Vrai	Vrai

Tableau 1.4 Protection contre la victimisation (représailles)

		Genre	Ethnicité
Actions protégées	<p>Il est interdit de traiter le salarié/la personne protégée moins favorablement parce qu'il ou elle a (« action protégée ») :</p> <ul style="list-style-type: none"> <li>- engagé des poursuites pour discrimination</li> <li>- fourni des preuves ou des informations en relation avec des poursuites pour discrimination.</li> <li>- participé en tant que témoin à des poursuites pour discrimination</li> </ul> <p>Art. 14 par. 2 de la Loi n° 262/2006 Rec. portant code du travail :  L'employeur ne doit pas sanctionner ni désavantager l'employé, de quelle que façon que ce soit, pour revendiquer, d'une manière légitime, ses droits découlant des relations de travail.</p>	<p>Oui Non Non</p>	<p>Oui Non Non</p>
Preuve de la relation causale	<p><i>Charge de la preuve :</i></p> <ul style="list-style-type: none"> <li>- i) salarié/personne protégée</li> <li>- ii) employeur/défendeur pendant un certains laps de temps, à compter du moment où l'action protégée a été engagée par le salarié. Veuillez préciser les conditions d'application et la durée de cette période.</li> <li>- iii) renversement de la charge de la preuve. Veuillez préciser les principales étapes.</li> </ul> <p>Dans les cas i) et iii), i.e. lorsque la relation causale doit au départ être établie par le salarié/personne protégée :</p> <ul style="list-style-type: none"> <li>- La relation causale peut être établie au moyen d'éléments prouvant que l'employeur a engagé une action pénalisant le salarié (ou autre personne protégée) peu de temps après que ce dernier se soit engagé dans une activité protégée (dont l'employeur avait connaissance).</li> </ul> <p>En d'autres termes, la relation d'emploi est implicitement ou explicitement (veuillez préciser) protégée pendant un certain laps de temps à compter du début de l'action protégée (veuillez préciser).</p>	<p>Oui Non Non Oui Non explicite</p>	<p>Oui Non Non Oui Non explicite</p>
Compensation accordée au salarié et sanctions imposées à l'employeur	<p>Compensations accordées au salarié/à la personne protégée autres que celles décrites dans le tableau 1.3. Veuillez préciser ci-dessous.</p> <p>Sanctions imposées à l'employeur/au défendeur autres que celles décrites dans le tableau 1.3. Veuillez préciser ci-dessous.</p> <p>Art. 140 par. 1 point a) et par. 4 point a) de la Loi n° 435/2004 Rec. portant sur l'emploi :  Il peut être imposé à l'employeur, pour une infraction à l'interdiction de discrimination ou pour un manquement à l'obligation d'assurer l'égalité de traitement, une amende allant jusqu'à un million CZK.</p>	Oui	Oui

Tableau 1.5 Relation avec la législation standard/générale du travail

		Genre	Ethnicité
Législation du travail et discrimination	<p>Selon la législation (ou code) du travail standard/générale, un licenciement motivé uniquement par le sexisme ou la discrimination ethnique serait-il considéré comme un licenciement abusif ? Dans l'affirmative, veuillez préciser depuis quelle date.</p> <p>Au moins depuis 1966. Actuellement, l'art. 52 du code du travail</p>	Oui	Oui

		Genre	Ethnicité
	La législation (ou code) du travail standard/générale contient-elle une disposition imposant l'égalité de rémunération pour un travail égal ? Dans l'affirmative, veuillez préciser depuis quand. Autres domaines de discrimination couverts par la législation (ou code) du travail standard/générale (embauche, promotion, etc...) ; veuillez préciser	Oui depuis 1992	Oui, depuis 1992
Plaintes	Les plaintes pour discrimination en cas de licenciement sont-elles déposées plus souvent en vertu de la législation (ou code) du travail standard/générale qu'en vertu de lois anti-discrimination spécifiques ? Les plaintes pour discrimination portant sur la rémunération sont-elles déposées plus souvent en vertu de la législation (ou code) du travail standard/générale qu'en vertu de lois anti-discrimination spécifiques ? Autre information/observation complémentaire importante :	Oui  Oui	Oui  Oui
Évaluations	Veuillez indiquer ci-dessous les références aux évaluations/études existantes portant sur l'efficacité des lois anti-discrimination par rapport à la législation du travail standard/générale :		

Tableau 1.6 **Action positive**

		Genre	Ethnicité
Mesures obligatoires	Les employeurs sont-ils <b>tenus</b> par la législation de prendre des mesures pour accroître la diversité/prévenir la discrimination ? Dans l'affirmative, quelles mesures sont obligatoires ? - publier régulièrement des rapports sur la composition de la population employée indiquant la proportion d'hommes et de femmes ou l'origine ethnique - ne traiter que les demandes d'emploi anonymes - obliger les gros employeurs à désigner au sein du service de la gestion des ressources humaines une personne chargée de la politique anti-discrimination de l'entreprise (indiquer, le cas échéant, la taille minimale de cette dernière) - fixer des quotas (veuillez préciser dans quels domaines : par exemple les cadres supérieurs dans les entreprises au-delà d'une certaine taille) Autres (ou toute autre information/observation complémentaire importante) :	Non	Non
Mesures volontaires	Les employeurs sont-ils <b>autorisés</b> à prendre des mesures pour accroître la diversité/prévenir la discrimination ? Dans l'affirmative, quelles mesures sont autorisées ? - publier régulièrement des rapports sur la composition de la population employée indiquant la proportion d'hommes et de femmes ou l'origine ethnique - établir un plan pour s'assurer que la composition de la population active est équilibrée du point de vue de la proportion d'hommes et de femmes ou de l'origine ethnique - fixer des quotas (veuillez préciser dans quels domaines : par exemple les cadres supérieurs) Autres: Art. 12 par. 2 de la Loi n° 435/2004 Rec. portant sur l'emploi : L'employeur ne doit pas, lors du recrutement d'employés, exiger des renseignements portant, entre autres, sur l'appartenance à un peuple, l'origine raciale ou ethnique.	Oui       Oui	Oui       Oui
Pratiques des employeurs publics	Les employeurs publics prennent-ils normalement des mesures pour accroître la diversité/prévenir la discrimination ? Dans l'affirmative, quelles sont ces mesures ? - publier régulièrement des rapports sur la composition de la population employée	Non	Non

		Genre	Ethnicité
	<p>indiquant la proportion d'hommes et de femmes ou l'origine ethnique</p> <ul style="list-style-type: none"> <li>- établir un plan pour s'assurer que la composition de la population active est équilibrée du point de vue de la proportion d'hommes et de femmes ou de l'origine ethnique</li> <li>- ne traiter que les demandes d'emploi anonymes</li> <li>- nommer au sein du département de la gestion des ressources humaines au moins une personne responsable de la politique anti-discrimination de l'employeur</li> <li>- fixer des quotas (veuillez préciser dans quels domaines : par exemple les fonctionnaires de haut rang)</li> </ul> <p>Autres (ou toute autre information/observation complémentaire importante) :</p>		
Mesures d'incitation	<p>La politique suivie consiste-t-elle à développer les incitations pour les employeurs à accroître la diversité/prévenir la discrimination ?</p> <p>Moyens utilisés :</p> <ul style="list-style-type: none"> <li>- Octroi de « labels » ou de certificats attestant que les pratiques de l'employeur favorisent la diversité dans l'activité et sur le plan de l'emploi.</li> <li>- Incitations financières pour établir un plan qui garantisse que la composition de la population active est équilibrée du point de vue de la proportion d'hommes et de femmes ou de l'origine ethnique.</li> <li>- Incitations financières pour que l'employeur désigne au sein du service de la gestion des ressources humaines une personne responsable de sa politique anti-discrimination et/ou recrute un consultant pour établir un plan en matière de diversité.</li> <li>- Incitations financières à fixer des quotas (veuillez préciser les domaines, par exemple cadres supérieurs).</li> </ul> <p>Autres (ou toute autre information/observation complémentaire importante) :</p>	<p>..</p> <p>..</p> <p>Non</p>	<p>..</p> <p>..</p> <p>Non</p>

## **Partie 2. Cadre institutionnel : organes spécialisés dans la lutte contre la discrimination (par exemple organes chargés de garantir l'égalité de traitement)**

**Employment offices and Labour Inspectorates**, using their powers in the area of employment and labour relations are competent to investigate misdemeanours and administrative offences involving discrimination and to impose sanctions. The Law on Employment defines the competencies of employment offices and the Administrative Code governs their procedures. Procedures can be initiated by a complainant or on an employment office's own initiative. In the event that a complaint is initiated, the complainant is not an actual party in the administrative procedure. Penalties become income for the state budget. Natural or legal persons or employers who violate the Law on Employment or the Labour Code's provisions on discrimination may be fined up to 1 million CZK (approx. €31,949).

Source: Bouckova (2007, p. 46 and 49)

### **Extrait de l'exposé des motifs de la loi anti-discrimination (texte n° 253/0)**

La République tchèque, suivant les directives CE, est tenue de charger un organisme de promouvoir l'égalité de traitement ; cet organisme doit apporter aux personnes victimes d'une discrimination une aide indépendante pour engager une procédure pour discrimination, procéder à des études indépendantes concernant les discriminations, publier des rapports indépendants et formuler des recommandations sur toutes les questions liées à ces discriminations. **A l'heure actuelle, il n'existe, dans l'ordre juridique de la République, aucune institution chargée de poursuivre ces tâches et capable d'assurer, de manière efficace, l'égalité de traitement et la lutte contre les discriminations, conformément aux directives CE.**

**Dans le domaine de l'égalité de traitement et de la lutte contre les discriminations, sont compétents les tribunaux, les offices du travail, les inspectorats du travail et l'Inspection commerciale tchèque (COI). Dans une mesure limitée, le Médiateur est également compétent dans ce domaine. Peuvent s'y engager aussi des organismes non étatiques. Pourtant, il n'appartient à la compétence d'aucune des ces institutions de poursuivre au moins une tâche prévue pour un tel organisme par les directives CE pertinentes, comme le démontre l'aperçu suivant.**

**Conformément aux dispositions des directives pertinentes, la loi proposée vise également à désigner une institution qui sera chargée de mener des actions dans le domaine de l'égalité de traitement et de la protection contre les discriminations. L'institution désignée devrait servir d'intermédiaire pour permettre l'accès à l'assistance juridique en matière de protection contre les discriminations, formuler des recommandations et des avis, procéder à des études indépendantes et informer le public.**

#### **Parmi les recommandations les plus importantes, il appartient :**

- l'indépendance de l'institution devrait être garantie par la loi et grâce à des compétences bien définies
- pour s'assurer que les victimes des discriminations obtiennent l'aide qui leur est nécessaire, l'institution doit être facilement accessible
- pour assurer la continuité et l'indépendance, les ressources financières devraient faire partie du budget fiscal
- l'accent mis sur l'aide apportée dans des cas individuels devrait être complété par un accent mis sur des changements structurels de longue durée dans la pratique
- l'aide devrait être apportée gratuitement aux victimes, ainsi qu'aux témoins de la discrimination
- rôle politique : l'institution devrait bénéficier d'une possibilité, expressément garantie, de participer à la rédaction des projets de loi et de présenter des observations relatives à ces derniers
- l'institution devrait disposer des ressources suffisantes pour pouvoir procéder à des études qui représentent un instrument accessible d'analyse du niveau de discriminations et de problèmes liés à l'égalité de traitement
- l'institution devrait soutenir la coordination des études et planifier, en longue durée, des sujets qui doivent être incorporés dans les études
- l'institution devrait porter l'accent sur l'éducation qui est un moyen pour atteindre le changement de la pratique de sorte que les cas de discriminations ne se reproduisent pas

**Lors de la préparation du projet de loi, il a été, d'une part, examiné la possibilité de créer un organisme nouveau et, d'autre part, évalué les possibilités de confier ces tâches à une des institutions déjà existantes.**

Parmi les raisons invoquées pour soutenir la variante de l'élargissement des compétences du Médiateur, on peut citer l'opinion que l'organisme en question devrait exercer une fonction pareille à celle du Médiateur actuel et que du point de vue du système, il se ressemble – en général, au moins, aux institutions « du type Médiateur » avec lesquelles il partage certaines caractéristiques (indépendance, défaut de compétence pour imposer des sanctions, caractère préventif de l'action exercée). Dans d'autres pays également, par exemple en Suède, Finlande ou Norvège (État membre de l'EEE). Un autre argument avancé pour confier cet agenda au Médiateur est de l'ordre pratique et politique. Une extension de compétence serait moins onéreuse et, par conséquent, probablement plus acceptable du point de vue politique qu'une création d'une nouvelle institution.

D'un autre point de vue, on peut argumenter en faveur de l'attribution de cet agenda au Médiateur en évoquant le fait qu'on obtiendrait, par cette décision, une concentration de toutes les tâches à une institution spécialisée, ce qui est en conformité avec la tendance actuelle. Certains pays de l'UE où il y avait plusieurs institutions destinées à la promotion de l'égalité se sont décidés, pour des raisons spécifiques au contenu des fonctions de ces dernières ainsi que pour des raisons économiques, à en faire une seule. On peut citer l'exemple du Royaume-Uni où on procédera, conformément à la nouvelle loi sur l'égalité de traitement de 2006 (Equality Act 2006), à la fusion des trois institutions existantes (Commission pour l'égalité des chances, Commission pour l'égalité raciale et

Commission pour les droits des handicapés) pour en créer l'unique Commission pour l'égalité et les droits de l'homme. Une évolution similaire peut être observée en Norvège où le „Centre contre la discrimination fondée sur l'ethnicité“ a été remplacé par le « Médiateur contre la discrimination » avec un mandat plus large, incluant tous les motifs de discrimination selon les directives CE.

Contre la solution évoquée, des arguments du caractère juridique ainsi que du caractère pratique ont été soulevés. Le plus important parmi eux est le fait que la compétence d'un organisme assurant l'égalité de traitement doit porter également sur les sujets de droit privé, tandis que la compétence du Médiateur ne comporte, pour l'instant, que des sujets choisis de droit public. Or, l'expérience de la République tchèque ainsi que de l'étranger montre que les auteurs de discriminations se recrutent, pour la plupart, parmi les sujets de droit privé. Au temps de la discussion parlementaire sur le projet originel de la loi anti-discrimination, une modification de la loi sur le Médiateur a été adoptée (loi n° 381/2005 Rec.), étendant la compétence du Médiateur à la conduite des visites préventives systématiques dans des lieux où se trouvent ou peuvent se trouver des personnes dont la liberté est limitée par le pouvoir public ou en conséquence de leur dépendance des soins fournis conformément à la loi. La compétence du Médiateur (uniquement en ce qui concerne les visites systématiques des lieux de détention) a déjà été, par cette modification, étendue à certains sujets de droit privé (notamment des établissements privés fournissant des services sociaux et de santé à caractère résidentiel). Étant donné la nature spécifique de l'action menée par le Médiateur au sujet de ces opérateurs, si ce changement ne signifie pas une rupture essentielle dans la délimitation de ses compétences, il marque un signe précurseur d'une tendance de différenciation de l'action du Médiateur, différenciation dont le projet de la loi anti-discrimination vise l'augmentation.

**A part le Médiateur, il n'existe, à l'heure actuelle, aucune institution dont la compétence pourrait faire objet d'une proposition réaliste d'extension à l'ensemble de l'agenda par les directives.**

Toute autre variante devrait prévoir une répartition de l'agenda parmi les institutions existantes ce qui est lié à de nombreux inconvénients : perte du lien direct entre les activités de recherche et d'assistance, non-enchaînement institutionnel, échange d'expériences entre les spécialistes rendue plus difficile, exigence accrue au niveau de la coordination. En plus, il est difficile de trouver, parmi les institutions existantes, une institution qui puisse exercer, en réalité, ne fût-ce qu'une des actions exigées.

Parmi les institutions qui, à l'état actuel de la législation, participent à la lutte contre les discriminations, ne sont évidemment envisageables ni la COI ni les inspectorats du travail, dont le statut d'organes administratifs exclut toute modification de leur compétence en ce sens (ils ne pourraient pas prêter l'assistance juridique ni servir d'intermédiaire pour y permettre l'accès ; ils ne pourraient pas exercer d'autres fonctions non plus).

Lors des discussions, d'autres institutions ont été mentionnées comme porteurs potentiels de différentes parties de l'agenda en question : l'Office du Président de la République, un des comités ou sous-comités de la Chambre des députés du Parlement de la République tchèque, le Conseil du gouvernement pour les Droits de l'Homme et le commissaire du gouvernement pour les Droits de l'Homme ou un des premiers ministres adjoints. Toutes ces propositions doivent être considérées comme très difficiles à réaliser.

**Étant donné la nécessité de créer ou de désigner une institution qui se consacrera systématiquement à l'égalité de traitement, il sera procédé à une extension de la compétence du Médiateur, dans une mesure qui permettra l'exercice, par le Médiateur, de toutes les fonctions exigées. Ainsi, le Médiateur servira d'intermédiaire pour permettre l'accès à l'assistance juridique, formuler des recommandations et des avis, procéder à des études indépendantes et informer le public. Par ailleurs, il sera nécessaire d'étendre la compétence du Médiateur à tous les organismes concernés par l'égalité de traitement, c'est-à-dire et les sujets de droit public, et les sujets de droit privé. En même temps, les droits du Médiateur, assez larges d'ailleurs, devront être limités pour les raisons de son activité dans le domaine de l'égalité de traitement et de la protection contre les discriminations, car il n'est pas envisageable qu'il puisse appliquer certains de ses droits également vis-à-vis des sujets de droit privé (par exemple la conduite des inspections sur place, le droit de consulter la documentation pertinente etc.). Par l'extension de la compétence du Médiateur au domaine de l'égalité de traitement et de la protection contre les discriminations, ses compétences et ses droits varieront donc en fonction des cas particuliers dont il s'occupera.**

#### Principales références complémentaires

**Boucková, P. (2007),** *Report on Measures to Combat Discrimination – Country Report: Czech Republic*, European Commission, [http://www.ec.europa.eu/employment\\_social/fundamental\\_rights/pdf/legnet/csrep07\\_en.pdf](http://www.ec.europa.eu/employment_social/fundamental_rights/pdf/legnet/csrep07_en.pdf)

## DENMARK

### Part 1. Legal framework for employment discrimination

Main anti-discrimination laws:

- The Act on Prohibition of Discrimination on the Labour Market, cf. Consolidated Act No. 31 of 12 January 2005. Additional amending acts: Act No. 240 of 27 March 2006 (exemption for young persons) and Act No. 1542 of 20 December 2006 (raises the age limit on when agreements can be made on compulsory dismissal from 65 years to 70 years).
- Act on the prohibition against unequal treatment due to race and ethnicity (Ethnic Equal Treatment Act.) Nr. 374 of 28 May 2003,
- The Act on Equal Treatment etc., cf. Consolidated Act. Nr. 734 of 28. June 2006
- The Act on Equal Pay, cf. Consolidated Act. Nr. 906 of 27. August 2006 (first time passed, 1976)
- The Gender Equality Act, cf. Consolidation Act No. 553 of 2 July 2002

Anti-discrimination legislation on the ground of race passed for the first time in 1971 (Act on Prohibition against Differential Treatment on Grounds of Race etc)

Note: most of these acts are not applicable in Greenland and the Faroe Islands

Relevant courts:

Civil courts and the Gender Equality Board

Complaints of gender discrimination can be lodged with the Gender Equality Board and can then be appealed before a civil court of law. If an employee is a member of a trade union and a collective agreement covers the subject-matter of the complaint, the complainant must first approach her or his trade union. If the trade union either cannot or will not submit the matter to industrial arbitration or to the Labour Court, the Board holds the competence to handle the case. No appeal before administrative courts can be undertaken for decisions taken by the Board. Board may award compensation and set aside dismissals (Art. 19(1) Gender Equality Act). Where the decisions made by the Board or the settlements made with the assistance of the Board are not observed, the Minister for Gender Equality shall, at the complainant's request and on his or her behalf, bring the matter before the courts (Art 22(2) Gender Equality Act).

Complaints for ethnic discrimination can be lodged with the Complaints Committee for Ethnic Legal Treatment and subsequently with a civil court through a law suit, if the Committee finds evidence of discrimination, to obtain financial compensation. The Committee cannot impose sanctions or award the complainant any kind of damages as a result of discrimination. However, in cases where the Committee finds that there has been discrimination, the Committee can recommend granting of free legal aid at the courts. Yet free legal aid, if any, is granted only for the first hearing and not for appeal if the first hearing, despite the Committee's appreciation, yields an outcome that is not favourable to the plaintiff. Alternatively the complainant can lodge its complaint directly with civil courts. In the case of union members, the Committee can handle the complaint only if they do not receive aid from the union concerning that complaint. The Committee is administratively under the authority of the Danish Institute for Human Rights. A reform of the system of protection against discrimination is currently being debated. This would include the replacement of the Complaints Committee by a new Complaints Board on Equal Treatment – not linked with the Danish Institute for Human Rights. This Board would also have the possibility to award victims of discrimination compensation for non-pecuniary damages (Liebig, 2007).

Legal scope/definition of the (hereinafter) so-called gender and ethnic grounds:

- Gender: Sex, explicitly including: pregnancy, childbirth or related medical conditions.
- Ethnicity: Racial or ethnic (or national) origin. In many laws also religion. Differential treatment on the basis of citizenship is not unlawful.

**Table 1.1** Prohibited acts, areas of concern, coverage, legal assistance and representation

		<b>Gender</b>	<b>Ethnicity</b>
Type of discrimination	Direct discrimination	Yes	Yes
	Indirect discrimination, i.e. where a provision criterion or practice is applied to all employees but puts one protected group at a particular disadvantage and cannot be shown to be a proportionate means of meeting a legitimate aim.	Yes	Yes
	Pressure and instruction to discriminate	Yes	Yes
	Harassment	Yes	Yes
	Other: Gender: Sexual harassment	yes	No
Areas of concern	Hiring process	Yes	Yes
	Wage	Yes	Yes
	Type of employment contract (permanent vs. fixed term)	Yes	Yes
	Working time (atypical work schedule, part-time vs. full-time)	Yes	Yes
	Promotion	Yes	Yes
	Job and vocational training	Yes	Yes
	Transfer	Yes	Yes
	Redundancy and dismissal	Yes	Yes
Other: Training	Yes	Yes	
Coverage	Private sector	Yes	Yes
	Public sector	Yes	Yes
	Employment agencies	Yes	Yes
	Trade unions (as regards membership)	Yes	Yes
	Other: Employers associations	Yes	Yes
Legal assistance other than private lawyer	Specialised body (e.g. equal treatment body)	Yes	Yes
	Any relevant public utility institutions and associations	No	No
	Trade unions: for their members only	Yes	Yes
	Notes: Trade unions for members only		
Legal representation other than private lawyer	Specialised body (e.g. equal treatment body)	Yes	No
	Any relevant public utility institutions and associations	No	No
	Trade unions: for their members only	Yes	Yes
	Notes: The Gender Equality Board has since 2000 provided legal representation in approx. 25 cases brought before the civil courts. This competence will be expanded to the new board on equal treatment in all cases of discrimination. In the case of ethnic discrimination, the Complaints Committee for Ethnic Legal Treatment can suggest that financial assistance be granted if the case is considered strong and no financial means. Yet free legal aid, if any, is granted only for the first hearing and not for appeal if the first hearing, despite the Committee's appreciation, yields an outcome that is not favourable to the plaintiff (Hansen, 2007).		

**Table 1.2 Burden of proof**

	<b>Gender</b>	<b>Ethnicity</b>
Employee/claimant Shift of burden of proof (the employee/claimant provides facts, then the employer/respondent has to provide proofs – see below for a detailed description)	No Yes	No Yes, but see (*)
Notes: * According to the Act on prohibition of differential treatment in the labour market, the principle of the shift of burden of proof applies in all cases of discrimination. However, it should be noted that the principle of freedom to assess evidence applies at the same time in cases of discrimination. In practice, case law shows that the burden of the proof is not necessarily shifted even in the presence of written statements		

	Gender	Ethnicity
<p>(e.g. Mr. X vs. Copenhagen Technical School, City Court of Copenhagen, 29 Nov. 2005) In cases of dismissal on grounds of pregnancy or maternity the burden of proof is reversed, which means it is incumbent upon the employer to prove that dismissal of an employee did not take place on the grounds of pregnancy and maternity, etc.</p> <p><b>Direct discrimination</b></p> <p><i>Main steps</i> Can the main steps of the procedure be described as follows? 1. The employee/claimant has to supply prima facie evidence whereby it may be <b>presumed</b> that there has been discrimination. 2. The employer/respondent has the burden of <b>proving</b> that his/her practice is not discriminatory.</p> <p>In practice, is presumption – as opposed to stronger evidence of discrimination – sufficient to shift the burden of proof?</p> <p><i>Typical/standard prima facie evidence</i> admissible in courts (or other relevant bodies), as set by law or established by case law: Direct evidence (i.e. any written or verbal statement by the employer/respondent), <b>only</b>. No clear legal guidance for indirect evidence (e.g. case-by-case basis only) Statistical evidence Situation testing</p> <p>Other indirect evidence (or any important additional information/comments):</p> <p>*Case law shows that courts are fairly independent in their appreciation of each case and the burden of the proof is not necessarily shifted even in the presence of written statements (e.g. Mr. X vs. Copenhagen Technical School, City Court of Copenhagen, 29 Nov. 2005)</p> <p>** Although statistical evidence is admitted in courts, collecting statistics concerning race is not permitted in Danish law, which makes it difficult the use of statistical evidence in race discrimination cases. Statistical evidence concerning sexes: Act No. 445 of 7 June 2001 amended the Equal Pay Act. This amendment contained two main elements: the right of the wage-earner to pass on information concerning wages; and an obligation for enterprises with more than 10 employees to draw up gender-divided wage statistics upon request.</p> <p>*** As far as situation testing is concerned the only case law concerns applications of Criminal law for cases unrelated with employment. Yet, drawing on this case law one can argue that situation testing will be admitted in courts.</p>	<p>Yes</p> <p>Yes</p> <p>No True Yes Yes***</p>	<p>Yes*</p> <p>Yes</p> <p>No True Yes** Yes***</p>
<p><b>Indirect discrimination</b></p> <p><i>Main steps</i> Can the main steps of the procedure be described as follows? 1. The employee/claimant has to clearly identify and define the employment practice in question. 2. The employee/claimant has to show that the practice <b>has or may have</b> a differentiated impact on one protected group. 3. The employer/respondent has the burden of demonstrating that the policy or practice in question is job related for the position in question and consistent with business necessity. 4. If the employer/respondent satisfies this requirement, evidence can be supplied on the existence/lack of the existence of a less discriminatory practice</p> <p>In step 2 above is the term "has" more accurate than "may have"? In other words, can the potential (possible) impact of the contested employment practice be sufficient for shifting the burden of proof?</p> <p>In step 4 above, if the employer/respondent demonstrates that a practice is consistent with business necessity, then: - does it fall to the employee/claimant to demonstrate that a less discriminatory alternative exists that meets the business need but that the employer refuses to adopt it? <b>Or</b> - does it fall to the employer/respondent to demonstrate that a less discriminatory alternative that meets the business need does not exist?</p> <p>Notes: Concerning step 4: It depends on the concrete circumstances of the case, appreciated by courts on a case-by-case basis.</p> <p><i>Typical/standard prima facie evidence</i> to be provided to courts or other relevant bodies, as set by law or</p>	<p>Yes</p> <p>Yes</p> <p>No guidance in the law No guidance in the law</p>	<p>Yes</p> <p>Yes</p> <p>No guidance in the law No guidance in the law</p>



	Gender	Ethnicity
<p>established by case law:  Direct evidence ( i.e. any written or verbal statement by the employer/respondent), <b>only</b>.  No clear legal guidance for indirect evidence (e.g. case-by-case basis only)  Use of a distinction criteria that appear to be intrinsically suspicious. Please specify (for example, a requirement to work full-time might be unlawful discrimination against women)  Statistical evidence</p>	No True Yes  Yes	No True Yes  Yes
<p><b>Harassment</b>  Analysed on a case-by-case basis, by looking at all the circumstances and the context.</p>	Yes	Yes

Table 1.3 **Employee compensation and employer penalties**

		Gender	Ethnicity
Employee compensation	<p><b>Injunctive relief/reinstatement</b>  - Always made available to the employee/claimant, but the latter can choose monetary compensation in lieu of relief/reinstatement, or  - Always made available to the employee/claimant, without alternative option, or  - Always made available to the employee/claimant, but the employer/respondent can choose monetary compensation in lieu of relief/reinstatement, or  - Never made available to the employee/claimant.</p> <p>Notes:  In cases about dismissal on grounds of pregnancy or maternity, and cases about dismissal on grounds of claims for equal pay, including equal pay conditions or passing on information on pay, reinstatement is possible, but rarely chosen.</p> <p><b>Monetary compensation</b>  Back pay (please indicate if there is a cap)</p> <p>Reimbursement of lawyer's and attorney's fees and costs</p> <p>In lieu of relief/reinstatement, compensation for future lost earnings (e.g., in case of dismissal, this may correspond to lost earnings until the employee finds a new job):  Compensation for psychological injury:</p> <p>Notes:  The amount of compensation and back pay is determined by the civil courts and the Gender Equality Board and varies depending on the concrete circumstances of the case. Compensation for violation of the act on prohibition of differential treatment varies between DKK 10,000 and DKK 100,000.</p>	No  No No  No  ?  ?  Yes  Yes	No  No No  Yes  ?  ?  Yes  Yes
Employer additional penalties and obligations	<p><b>Civil provisions</b>  None  Court may order the publicity of the decision  - Within the firm (e.g. notices to all employees addressing the violations of a specific charge and advising them of their rights under the laws)  - Outside the firm (please indicate: media, trade-unions, etc.)  The employer may be required to take corrective or preventive actions to cure the source of the identified discrimination</p> <p><b>Penal provisions</b>  None  Fines  Prison sentence</p> <p>Notes:  Fine – approx. 1.000 DKK. Fines are enacted for discriminatory job-ads. To be enforced, the ad needs to be brought to the attention of the local police.</p>	True  No  No No  false Yes No	True  No  No No  false Yes No

Table 1.4 Protection against victimisation (retaliation)

		Gender	Ethnicity
Protected actions	<p>It is prohibited to treat the employee/protected person less favourably (so-called "adverse action") because s/he has (so-called "protected action"):</p> <ul style="list-style-type: none"> <li>- brought proceedings against discrimination</li> <li>- given evidence or information in connection with any proceedings against discrimination.</li> <li>- participated as a witness in any proceedings against discrimination</li> </ul> <p>Notes: It follows from the explanatory notes to the act on prohibition of differential treatment on the labour market that also colleagues claiming equal treatment of other colleagues are protected against victimisation. Conversely, according to Hansen (2007), it is unclear whether protection against victimisation applies to other witnesses.</p>	<p>Yes Subject to judicial interpretation Subject to judicial interpretation</p>	<p>Yes Subject to judicial interpretation Subject to judicial interpretation</p>
Proof of causal connexion	<p><i>Burden of proof:</i></p> <ul style="list-style-type: none"> <li>- i) employee/protected person</li> <li>- ii) employer/respondent within a given lapse of time from the concerned event. Please specify conditions of application and lapse of time.</li> <li>- iii) shift of burden of proof. Please specify main steps.</li> </ul> <p>Victimisation is not a kind of unlawful discrimination, and therefore the principle of shared burden of proof does not apply in this respect. The standard of the proof that applies is the same as for other disputes (Hansen, 2007).</p> <p>In cases (i) and (iii), when the causal connexion shall be first shown or established by the employee/protected person:</p> <ul style="list-style-type: none"> <li>- the link can be demonstrated by evidence that the adverse action occurred shortly after the protected activity (and the employer/respondent was aware of the complainant's protected activity before taking the action), so that the employment relationship is implicitly or explicitly (please specify) protected during a certain period of time (please specify)</li> </ul>	<p>Yes No No</p>	<p>Yes No No</p>
Employee compensation and employer penalty	<p>Compared to provisions described in Table 1.3:</p> <ul style="list-style-type: none"> <li>- additional employee/protected person compensation → Compensation is granted, but only subject to winning the trial and with no special provision applying to victimisation/retaliation</li> <li>- additional employer/respondent penalties</li> </ul>	<p>None None</p>	<p>None None</p>

Table 1.5 Relationship with standard labour laws

		Gender	Ethnicity
Labour law and discrimination	<p>According to standard labour law(s) or code, would dismissal solely based on gender or ethnicity considered to be unjust dismissal? If yes, please specify since when.</p> <p>Is there a provision requiring equal pay for work of equal value in standard labour law(s) or code? If yes, please specify since when.</p>	<p>Yes, 1978 Yes, 1976 The Act on Equal Pay</p>	<p>Yes, 1996 Yes 1996</p>
Complaints	<p>Are discrimination complaints concerning dismissals more often lodged under standard labour law(s) or code, than under specific anti-discrimination laws?</p> <p>Are discrimination complaints concerning pay more often lodged under standard labour law(s) or code, than under specific anti-discrimination laws?</p>	<p>No No</p>	<p>No No</p>

Evaluations	References to existing evaluations/studies on the effectiveness of anti-discrimination laws with respect to standard labour law(s): → References to more recent evaluations/studies cannot be given, but court practice is being watched closely.		
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Table 1.6 **Positive action**

		<b>Gender</b>	<b>Ethnicity</b>
Compulsory actions	Are employers <b>required</b> by law to take actions to increase diversity/prevent discrimination?  Notes: Act no 562 of 9 June 2006 amended the Equal Pay Act. This amendment contains an obligation for enterprises with more than 35 employees to draw up gender-divided wage statistics.	No, but see note	No
Voluntary actions	Are employers <b>allowed</b> to take actions to increase diversity/prevent discrimination?  Notes: It is possible for employers to take action if they have a dispensation. Without dispensation it is possible to promote gender equality in training by providing it for one sex	No	No
Public employers' practices	Do public employers normally take actions to increase diversity/prevent discrimination?	No	No
Incentives	Is there a policy to increase incentives for employers to increase diversity/prevent discrimination?	No	No

**Part 2. Institutional framework: specialised bodies (SB) combating discrimination (e.g. equal treatment bodies)**

Table 2.1 **Activities of SBs not related to individual discrimination cases:** Public information and evaluation<sup>a</sup>

	Gender	Ethnicity
Is there a specialised body (SB) in charge of carrying out some of all of the following public information and policy evaluation functions?	Yes	Yes
<ul style="list-style-type: none"> <li>Eg. KVINFO and the Danish Institute for Human Rights (DIHR)</li> <li>KVINFO is Denmark's Centre for Information on Women and Gender and offers information and resources on women and society in Denmark, gender research, legislation, women's history, notable women and much more. KVINFO's story goes back to 1964, and was founded by the librarian and writer Nynne Koch. In 1979 KVINFO became an independent division under The Royal Library. In 1987 it gained status as a self-governing institution under the Ministry of Culture.</li> <li>DIHR is an independent, national human rights institution modelled in accordance with the UN Paris Principles. The Institute, which was established by statute in 2002, carries on the mandate vested in the Danish Centre for Human Rights in 1987.</li> </ul>		
This SB has the statutory power to:	Yes	Yes
- run information campaigns to inform the public of their legal rights	Yes	Yes
- run campaigns to change public opinion	Yes	Yes
- publish statistics on discrimination	Yes	Yes
- carry out evaluations of the legal and institutional anti-discrimination framework	Yes	Yes
- make policy recommendations	Yes	Yes
- produce codes of good practice for employers	Yes	Yes

Table 2.2 **Activities of SBs not related to individual discrimination cases:** Control and correction<sup>a</sup>

	Gender	Ethnicity
Is there a specialised body (SB) in charge of carrying out some of all of the following control and correction functions?	No	No
This SB has the statutory power to		
- randomly conduct formal investigations of companies and organisations.		
- conduct formal investigations of companies and organisation where there is evidence of discrimination.		
- oblige a company or an organisation to change the way it operates when discriminatory practices are found.		
- take legal action against companies or organisations that apply discriminatory practices		
- take legal action against organisations that attempt to promote discrimination or to instruct others to discriminate.		

Table 2.3 **Role of SBs in individual discrimination cases**

	Gender	Ethnicity
Is there a specialised body (SB) with specific functions related to individual discrimination cases?	Yes, but see comment below	Yes
Gender: The Gender Equality Board, although being rather an administrative tribunal (with sanctioning power) rather than a standard specialised body fulfils, as regards individual discrimination cases, most of the functions of a standard specialised body. The only main difference is that the Board does not have the statutory function to provide legal advice to complainants without starting a procedure. The Board can also help parties to find a settlement agreement. The Board held its first meeting in July 2000. The Board is also an independent authority.		
Ethnicity: The Complaints Committee for Ethnic Equal Treatment. The Complaints Committee's task is to handle individual complaints of differential treatment on the basis of race or ethnic origin. The		

	Gender	Ethnicity
<p>Complaints Committee can also handle complaints of citizens who have been subjected to adverse treatment as a result of having filed a complaint of differential treatment on the basis of race or ethnic origin. The Complaints Committee for Ethnic Equal Treatment was established at the Institute for Human Rights by the Act on Ethnic Equal Treatment (Act no. 374 of 28 May 2003). The body is independent.</p> <p>Note: The Act on Ethnic Equal Treatment (Act no. 374 of 28 May 2003) is administered by the Ministry for Refugee, Immigration and Integration Affairs (the Integration Ministry)</p>		
Was this body created by anti-discrimination laws (or did anti-discrimination laws establish a specific mandate for it)?	Yes	Yes
<p><b>Formal linkage between SB activities and court procedures</b></p> <p>Does the SB act as a one-stop shop where claimant can access information, lodge a complaint, receive advice?</p> <p>Notes:  Gender: Yes but only if this function is not performed by one's own union In addition lodging a complaint with the Board is equivalent to start the procedure  Ethnicity: Yes but only if this function is not performed by one's own union In addition, to some extent, lodging a complaint with the Committee is equivalent to start the procedure (although less formally than with the Gender Equality Board)</p> <p>As soon as a discrimination complaint is brought to court, is the claim formally transmitted to the SB?  Discrimination complaints must be lodged with the SB beforehand, which acts as one-stop shop to start the procedure.  → gender: Yet it is a convenient place where to start the procedure for non-union members</p> <p>The SB has the statutory power to provide advice and information to claimants (or both parties) on their legal rights and what options they have.  The SB has the statutory power to provide claimants with legal assistance  → gender: <b>in appeals, and under certain conditions</b> (see comments above)  The SB has the statutory power to provide claimants with legal representation.  → <b>in appeals, and under certain conditions</b> (see comments above)</p>	<p>Yes, but see note</p> <p>No</p> <p>No (see above).</p> <p>Yes, partially</p> <p>Yes, but see note</p> <p>Yes, but see note</p>	<p>Yes, but see note</p> <p>No</p> <p>No</p> <p>Yes, partially</p> <p>Yes</p> <p>No</p>
<p><b>Investigation of discrimination claims</b></p> <p>The SB has the legal authority to compel people (and in particular, the employer) to provide all of the information it requires to investigate a discrimination claim.  Does the court accept evidence from the SB?.</p> <p>Does the court accept the SB's evaluation of the validity of the discrimination complaint?  → gender: yes, although court judgement is independent (as in a standard appeal procedure)  <b>In practice</b>, the SB formally investigates discrimination claims.</p> <p>Any employer's failure to provide the requested information to the SB will:  - have no implication for the court ruling.  - potentially be used to draw inferences on discrimination if the case is brought before court.</p> <p>Any employer's failure to comply with the code of practices issued by the SB (or other relevant body) will:  - have no implication for the court ruling.  - potentially be used to draw inferences on discrimination if the case is brought before court.</p> <p>Important additional information/comments on the investigation procedure:  Act No. 445 of 7 June 2001 amended the Equal Pay Act. This amendment contains an obligation for enterprises with more than 10 employees to draw up gender-divided wage statistics upon request</p> <p><b>Mediation/conciliation procedure</b></p> <p>The SB has the statutory power to help both parties to resolve the dispute through a mediation/conciliation procedure.  Mediation/conciliation is a free and voluntary process for both parties.</p>	<p>Yes</p> <p>Yes</p> <p>Yes,</p> <p>Yes, in principle</p> <p>?</p> <p>?</p> <p>Yes</p> <p>No</p> <p>Yes, but see note</p> <p>Yes</p>	<p>No</p> <p>Yes, in principle</p> <p>Yes, but not at all binding /No</p> <p>Yes, in principle</p> <p>?</p> <p>?</p> <p>Yes</p> <p>No</p> <p>Yes, but see note</p> <p>Yes</p>

	<b>Gender</b>	<b>Ethnicity</b>
<p>The mediation/conciliation procedure is <b>usually</b> initiated:</p> <ul style="list-style-type: none"> <li>- before the case is brought to court</li> <li>- before any formal investigation starts or at an early stage of the process</li> <li>- after any investigation has produced primary evidence of discrimination (but before a litigation decision has been reached)</li> </ul>	<p>Yes Yes ?</p>	<p>Yes Yes No</p>
<p>Notes:</p> <p>When the <b>Complaints Committee for Ethnic Equal Treatment</b> receives a complaint, it considers whether the complaint is suitable for mediation. If both parties agree to try to resolve the conflict through mediation, the Complaints Committee will provide two mediators. The mediators are impartial third-parties educated to mediate in conflicts, and their role is to aid the parties in resolving the conflict</p> <p>The Gender Equality Board doesn't have the authority to mediate. However, it can help parties to find a settlement agreement through mediation.</p>		
<p>The SB acts as a neutral third party assisting both opposing parties in the mediation/conciliation procedure.</p> <p>The mediation/conciliation procedure is confidential: no details of the discussion taking place in its course can be repeated to court, nor are made public. The same rule applies to the terms of the settlement.</p> <p>If the parties, including the SB, reach settlement agreement, the latter is legally binding and the charge is dismissed.</p> <p>→ Ethnicity: Yes, but might be subject to judicial interpretation</p> <p>The SB secures the enforcement of settlement agreements reached under its assistance and/or responsibility.</p>	<p>Yes, but see note above Yes  Yes  No</p>	<p>Yes Yes  Yes, but see note No</p>

### Part 3. Statistics on mediation conciliation procedures and court cases

Table 3.1 **Statistics**

		<b>Gender</b>	<b>Ethnicity</b>
General statistics	<p>Total number of discrimination complaints received</p> <p>Gender: In 2006 the Gender Equality Board received 63 complaints. In 2005 66 complaints. In 2004 43 complaints. About 50% of the Board's cases represent complaints from women who are not union members and who were dismissed, while pregnant or on maternity leave. The other half deals with infringements of the Act on Gender Equality or infringements of other legislation (CEDAW, 2004).</p> <p>Ethnicity: The Complaints Committee for Ethnic Equal Treatment received 75 complaints in 2006 and 77 complaints in 2005</p> <p>Protected population (number of persons aged 15-64 covered by the law in question)</p>	<p>No general statistics exist, but there are statistics concerning the administrative complaints boards.</p> <p>Approx. 2.750.000</p>	<p>No general statistics exist, but there are statistics concerning the administrative complaints boards.</p> <p>Approx. 2.750.000</p>
Mediation/ conciliation procedures	Number of received complaints treated by the SB	129 in 2005-2006	152 in 2005-2006
Court procedures	<p>Number of court cases</p> <p>Note: The Gender Equality Board provided legal representation in approx. half of them.</p> <p>Average duration of court procedures</p>	Approx. 50 cases are brought before the civil courts every year.	<p>?</p> <p>Less than one year (MIPEX, 2007)</p>

#### Main additional references

**CEDAW (2004)**, Consideration of reports submitted by States parties under article 18 of the Convention on the Elimination of All Forms of Discrimination against Women, Sixth periodic report of States parties: Denmark, CEDAW/C/DNK/6, New York: United Nations.

**Hansen, N.H. (2007)**, *Report on Measures to Combat Discrimination – Country Report: Denmark*, European Commission [http://www.ec.europa.eu/employment\\_social/fundamental\\_rights/pdf/legnet/dkrep07\\_en.pdf](http://www.ec.europa.eu/employment_social/fundamental_rights/pdf/legnet/dkrep07_en.pdf)

**Liebig, T. (2007)**, *The Labour Market Integration of Immigrants in Denmark*, *OECD Social, Employment and Migration Working Paper No. 50*. [www.oecd.org/els/workingpapers](http://www.oecd.org/els/workingpapers)

**MIPEX (2007)**, *Migrant Integration Policy Index – Full Result Table*, British Council and Migration Policy Group, Brussels <http://www.integrationindex.eu/multiattachments/2704.html>

## FINLAND

### Part 1. Legal framework for employment discrimination

Main anti-discrimination laws:

The amended Act on Equality between Women and Men (609/1986) effective 1 July 2005

The amended Act on the Ombudsman for Equality and the Equality Board (610/1986) effective 1 December 2000

The Non-Discrimination Act (21/2004) effective 1 February 2004 (ethnic origin, nationality, language)

The Act on the Ombudsman for Minorities (660/2001), effective 1 September, 2001. The act has been amended in 2004 the same time when the Non-Discrimination Act entered into force.

The Provincial Act on Prevention of Discrimination in the province of Åland (66/2005).

Further prohibitions concerning discrimination are included in legislation on employment and civil service relationships which apply alongside the provisions of the Non-Discrimination Act e.g. Employment Contracts Act (55/2001), effective 1 June, 2001. The provisions on prohibition of discrimination in the Employment Contracts Act (55/2001), the Seamen's Act (423/1978) and the State Officials Act (304/2003) have been amended at the same time when the Non-Discrimination Act entered into force so that the prohibited grounds for discrimination are in accordance with the requirements of the directives.

See also: Constitution of Finland; Penal Code; Legislation on social affairs and health; Administrative Procedure Act; Legislation on means of livelihood; Legislation on training and education.

Relevant courts: Criminal trial in district court, Civil trial in district court, Labour Court (collective agreements)

Legal scope/definition of the (hereinafter) so-called gender and ethnic grounds:

- Gender: sex, explicitly including: pregnancy, childbirth or related medical conditions, breastfeeding, family responsibilities and marital status
- Ethnicity: race, colour, national or ethnic origin.

**Table 1.1 Prohibited acts, areas of concern, coverage, legal assistance and representation**

		Gender	Ethnicity
Type of discrimination	Direct discrimination	Yes	Yes
	Indirect discrimination, i.e. where a provision criterion or practice is applied to all employees but puts one protected group at a particular disadvantage and cannot be shown to be a proportionate means of meeting a legitimate aim.	Yes	Yes
	Pressure and instruction to discriminate	Yes	Yes
	Harassment	Yes	Yes
	Other (or any important additional information/comments):		
Areas of concern	Hiring process	Yes	Yes
	Wage	Yes	Yes
	Type of employment contract (permanent vs. fixed term)	Yes	Yes
	Working time (atypical work schedule, part-time vs. full-time)	Yes	Yes
	Promotion	Yes	Yes
	Job and vocational training	Yes	Yes
	Transfer	Yes	Yes
	Redundancy and dismissal	Yes	Yes
	Other (or any important additional information/comments):		
Coverage	Private sector	Yes	Yes
	Public sector	Yes	Yes
	Employment agencies	Yes	Yes
	Trade unions (as regards membership)	Yes	Yes



		Gender	Ethnicity
	Other (please indicate also exemptions – e.g. firms below a certain threshold – as well as any important additional information/comments):		
Legal assistance other than private lawyer	Specialised body (e.g. equal treatment body) Any relevant public utility institutions and associations Trade unions (please indicate if it is for their members only) Other (or any important additional information/comments):	Yes Yes Yes	Yes Yes Yes
Legal representation other than private lawyer	Specialised body (e.g. equal treatment body) Any relevant public utility institutions and associations Trade-unions: Only for their members  Notes: In Finland, there are no general procedural law provisions on associations' and other legal persons' right to institute proceedings and right of intervention in discrimination cases. There is no mandatory representation by an attorney-at-law in Finland, so associations or organisations may serve as an attorney or counsel for a person that has been discriminated against, if the person so requests. Pursuant to the legislation in force, a person may in general exercise a plaintiff's right of action only in cases that concerns himself or herself, and a power of attorney is required of the attorney.	No Yes Yes	No Yes Yes

Table 1.2 **Burden of proof**

	Gender	Ethnicity
Employee/claimant Shift of burden of proof (the employee/claimant provides facts, then the employer/respondent has to provide proofs – see below for a detailed description)	No Yes	No Yes
<b>Direct discrimination</b>  <i>Main steps</i> Can the main steps of the procedure be described as follows? 1. The employee/claimant has to supply prima facie evidence whereby it may be <b>presumed</b> that there has been discrimination. 2. The employer/respondent has the burden of <b>proving</b> that his/her practice is not discriminatory.  In practice, is presumption – as opposed to stronger evidence of discrimination – sufficient to shift the burden of proof?  <i>Typical/standard prima facie evidence</i> admissible in courts (or other relevant bodies), as set by law or established by case law: Direct evidence (i.e. any written or verbal statement by the employer/respondent), <b>only</b> . No clear legal guidance for indirect evidence (e.g. case-by-case basis only) Statistical evidence Situation testing Other indirect evidence (or any important additional information/comments):	Yes  Yes  No True Yes Yes	Yes  Yes  No True Yes Yes
<b>Indirect discrimination</b>  <i>Main steps</i> Can the main steps of the procedure be described as follows? 1. The employee/claimant has to clearly identify and define the employment practice in question. 2. The employee/claimant has to show that the practice <b>has or may have</b> a differentiated impact on one protected group. 3. The employer/respondent has the burden of demonstrating that the policy or practice in question is job related for the position in question and consistent with business necessity. 4. If the employer/respondent satisfies this requirement, evidence can be supplied on the existence/lack of the existence of a less discriminatory practice  In step 2 above is the term "has" more accurate than "may have"? In other words, can the potential (possible) impact of the contested employment practice be sufficient for shifting the burden of proof?	Yes  Yes	Yes  No

	Gender	Ethnicity
<p>In step 4 above, if the employer/respondent demonstrates that a practice is consistent with business necessity, then:</p> <ul style="list-style-type: none"> <li>- does it fall to the employee/claimant to demonstrate that a less discriminatory alternative exists that meets the business need but that the employer refuses to adopt it? <b>or</b></li> <li>- does it fall to the employer/respondent to demonstrate that a less discriminatory alternative that meets the business need does not exist?</li> </ul>	No Yes	No Yes
Other (or any important additional information/comments): Steps 3 and 4 go together in that the business necessity must be shown to be 'genuine' and 'determining'.		
<p><i>Typical/standard prima facie evidence</i> to be provided to courts or other relevant bodies, as set by law or established by case law</p> <p>Direct evidence ( i.e. any written or verbal statement by the employer/respondent), <b>only</b>.</p> <p>No clear legal guidance for indirect evidence (e.g. case-by-case basis only)</p> <p>Use of a distinction criteria that appear to be intrinsically suspicious. Please specify (for example, a requirement to work full-time might be unlawful discrimination against women);</p> <p>Statistical evidence</p>	No True Yes, see note (*) Yes	No True Yes, see note (**) Yes
<p>Notes:</p> <p>* Unnecessary requirements relating to military service, physical qualities (gender)</p> <p>** Unnecessary language and/or nationality requirements (ethnicity)</p>		
<p><b>Harassment</b></p> <p>Analysed on a case-by-case basis, by looking at all the circumstances and the context.</p>	Yes	Yes

Table 1.3 **Employee compensation and employer penalties**

	Gender	Ethnicity
<p>Employee compensation</p> <p><b>Injunctive relief/reinstatement</b></p> <ul style="list-style-type: none"> <li>- Always made available to the employee/claimant, but the latter can choose monetary compensation in lieu of relief/reinstatement, or</li> <li>- Always made available to the employee/claimant, without alternative option, or</li> <li>- Always made available to the employee/claimant, but the employer/respondent can choose monetary compensation in lieu of relief/reinstatement, or</li> <li>- Never made available to the employee/claimant.</li> </ul> <p><b>Monetary compensation</b></p> <p>Back pay (please indicate if there is a cap)</p> <p>Reimbursement of lawyer's and attorney's fees and costs</p> <p>In lieu of relief/reinstatement, compensation for future lost earnings (e.g., in case of dismissal, this may correspond to lost earnings until the employee finds a new job):</p> <ul style="list-style-type: none"> <li>- Floor or minimum (amount): .....No floor (ethnicity and gender)</li> <li>- Cap or maximum (amount): .....No cap (ethnicity and gender)</li> <li>- Average compensation (amount): ...No statistics on this (ethnicity and gender)</li> <li>- Median compensation (amount): ....No statistics on this (ethnicity and gender)</li> </ul> <p>Compensation for psychological injury:</p> <ul style="list-style-type: none"> <li>- Floor or minimum (amount): .....</li> <li>- Cap or maximum (amount): .....</li> <li>- Average compensation (amount): ...No statistics on this (ethnicity and gender)</li> <li>- Median compensation (amount): ....No statistics on this (ethnicity and gender)</li> </ul>	No No No Yes Yes Yes Yes Yes, see note (*) below	No No No Yes Yes Yes Yes Yes, see note (**) below

		Gender	Ethnicity
	<p>Notes:</p> <p>* Section 11 of the Act on Equality between Women and Men:  “(2) The compensation payable shall amount to <b>no less than EUR 3,000. In cases concerning employee recruitment, the compensation payable shall not exceed EUR 15,000.</b> When the amount of compensation is being determined, the nature and the extent and duration of the discrimination shall be taken into account, as well as any financial penalty imposed or ordered for payment based on an offence against the person arising from the same action by virtue of other legislation.  (3) The compensation may be reduced beyond the minimum amount prescribed above, or the liability to pay compensation may be waived completely, if this is deemed reasonable in view of the offender’s financial situation and attempts to prevent or eliminate the effects of the action, and other circumstances of the case. If the severity and other circumstances of the discrimination provide grounds for so doing, the maximum amount of compensation may be exceeded.”</p> <p>** Section 9 of the Non-Discrimination Act: <b>“Compensation shall not exceed 15,000 euros, depending on the severity of the infringement.</b> In determining the level of compensation, due consideration shall be given to the type and extent of the discrimination and its duration, the attitude to his/her actions on the part of the person who has infringed section 6 or section 8, any reconciliation reached between the parties, the restoration of a legal position of equality, the financial position of the offender and other circumstances [...]. Imposition of compensation is not mandatory if not imposing it would be a reasonable decision in the circumstances. Where special cause exists, the maximum level of compensation may be exceeded if this is justified by the duration and severity of the discrimination and other circumstances of the case.”</p>		
Employer additional penalties and obligations	<p><b>Civil provisions</b>  None  Court may order the publicity of the decision  - Within the firm (e.g. notices to all employees addressing the violations of a specific charge and advising them of their rights under the laws)  - Outside the firm (please indicate: media, trade-unions, etc.)  The employer may be required to take corrective or preventive actions to cure the source of the identified discrimination</p> <p>Other (please specify):</p> <p>The employer may be ordered to pay just satisfaction, which strictly speaking is different from simple compensation (for monetary losses and/or psychological damage).</p> <p>The Equality Board may prohibit the continuation or repeat of unlawful actions and if necessary, can enforce its decision with the threat of a fine. (Gender Equality Unit and the Ombudsman for Equality, 2005, p.40)</p> <p><b>Penal provisions</b>  None  Fine (please specify amounts): <b>No fixed amount (both ethnicity and gender)</b>  Prison sentence (please specify lengths, whether it applies only in specific cases and in which cases): <b>Up to 6 months (both ethnicity and gender)</b></p> <p>Notes: Section 14a of the Act on Equality between Women and Men and Section 20 of the Non-Discrimination Act explicitly refer to Chapter 47 Section 3 of the Penal Code, which provides that: “An employer, or a representative thereof, who when advertising for a vacancy or selecting an employee, or during employment without an important and justifiable reason puts a job seeker or an employee in an inferior position (1) because of race, national or ethnic origin, colour, language, sex, age, relations, sexual preference or state of health; or (2) because of religion, political opinion, political or industrial activity or a comparable circumstance shall be sentenced for work discrimination to a fine or to imprisonment for at most six months.”</p>	<p>False</p> <p>No</p> <p>No</p> <p>No</p> <p>Yes</p> <p>False</p> <p>Yes</p> <p>Yes</p>	<p>False</p> <p>No</p> <p>No</p> <p>No</p> <p>Yes</p> <p>False</p> <p>Yes</p> <p>Yes</p>

Table 1.4 Protection against victimisation (retaliation)

		Gender	Ethnicity
Protected actions	It is prohibited to treat the employee/protected person less favourably (so-called "adverse action") because s/he has (so-called "protected action"): - brought proceedings against discrimination - given evidence or information in connection with any proceedings against discrimination. - participated as a witness in any proceedings against discrimination	Yes Yes Yes	Yes Yes Yes
Proof of causal connexion	<i>Burden of proof:</i> - i) employee/protected person - ii) employer/respondent within a given lapse of time from the concerned event. Please specify conditions of application and lapse of time. - iii) shift of burden of proof. Please specify main steps.  Gender: If the employee presents a matter regarding discrimination to a court of law or competent authority and the facts give cause to believe the matter is one of gender discrimination, the defendant must prove that there has been no violation of gender equality but that the action was for an acceptable reason.  In cases (i) and (iii), when the causal connexion shall be first shown or established by the employee/protected person: - the link can be demonstrated by evidence that the adverse action occurred shortly after the protected activity (and the employer/respondent was aware of the complainant's protected activity before taking the action), so that the employment relationship is implicitly or explicitly (please specify) protected during a certain period of time (please specify) - other (please specify):	No No  Yes (joint burden of proof)  Yes (to some extent)	Yes No  No  Yes (to some extent)
Employee compensation and employer penalty	Compared to provisions described in Table 1.3: - additional employee/protected person compensation - additional employer/respondent penalties,;	.. ..	No No

Table 1.5 Relationship with standard labour laws

		Gender	Ethnicity
Labour law and discrimination	According to standard labour law(s) or code, would dismissal solely based on gender or ethnicity considered to be unjust dismissal? If yes, please specify since when.  Is there a provision requiring equal pay for work of equal value in standard labour law(s) or code? If yes, please specify since when. Notes:  The law does not expressly mention equal pay, but prescribes a more general obligation to treat employees equitably since 1986.  Gender: Equality Act section 8 states: "...the action of an employer shall be deemed to constitute discrimination if the employer... applies the pay or other terms if employment in such a way that one or more employees find themselves in a less favourable position than ...other employees ...performing the same work or work of equal value." Since 1986  Other areas of discrimination covered by standard labour law(s) or code (hiring, promotion, etc...); please specify → <b>All aspects of employment relationship</b>	Yes, 1986  Yes	Yes, 1986  Yes
Complaints	Are discrimination complaints concerning dismissals more often lodged under standard labour law(s) or code, than under specific anti-discrimination laws? Are discrimination complaints concerning pay more often lodged under standard labour law(s) or code, than under specific anti-discrimination laws?	Yes  No	No  No

	Other important additional information/comments: There are no statistics for these two questions for ethnicity or gender, so the answers represent subjective evaluations of the situation.		
Evaluations	Please indicate below references to existing evaluations/studies on the effectiveness of anti-discrimination laws with respect to standard labour law(s): <b>None exist (both ethnicity and gender).</b>		

Table 1.6 **Positive action**

		Gender	Ethnicity
Compulsory actions	<p>Are employers <b>required</b> by law to take actions to increase diversity/prevent discrimination?</p> <p>If yes, what actions are required?</p> <ul style="list-style-type: none"> <li>- make regular public reports on employment composition in terms of gender or ethnicity</li> <li>- process only anonymous job applications</li> <li>- obligation for large employers to have a person in the HRM department in charge of the employer's anti-discrimination policy (please specify the size threshold of application, if any)</li> <li>- quotas (please specify the areas: e.g. executives in firms above a certain size)</li> </ul> <p>Other (or any important additional information/comments):</p>	<p>Yes</p> <p>Yes, in firms with at least 30 employees No No</p> <p>No</p>	No
Voluntary actions	<p>Are employers <b>allowed</b> to take actions to increase diversity/prevent discrimination?</p> <p>If yes, what actions are allowed?</p> <ul style="list-style-type: none"> <li>- make regular public reports on employment composition in terms of gender or ethnicity</li> <li>- establish a plan to ensure that the employment composition in terms of gender or ethnicity is balanced</li> <li>- quotas (please specify the areas: e.g. executives)</li> </ul> <p>Other (or any important additional information/comments):</p>	<p>Yes</p> <p>Yes</p> <p>Yes</p> <p>Yes, if so established in the firms gender equality plan</p>	<p>Yes</p> <p>Yes</p> <p>Yes</p> <p>No</p>
Public employers' practices	<p>Do public employers normally take actions to increase diversity/prevent discrimination?</p> <p>If yes, what actions?</p> <ul style="list-style-type: none"> <li>- make regular public reports on employment composition in terms of gender or ethnicity</li> <li>- establish a plan to ensure that the employment composition in terms of gender or ethnicity is balanced</li> <li>- process only anonymous job applications</li> <li>- have at least one person in the HRM department in charge of the employer's anti-discrimination policy</li> <li>- quotas (please specify the areas: e.g. high-rank officials): see note below</li> </ul> <p>Gender: Equality Act section 4a: The proportion of both women and men in government committees, advisory boards and other corresponding bodies, and in municipal bodies established for the purpose of inter-municipal cooperation, but excluding municipal councils, must be at least 40 per cent, unless there are special reasons to the contrary.</p>	<p>Yes</p> <p>Yes</p> <p>Yes</p> <p>No</p> <p>No</p> <p>Yes</p>	<p>Yes</p> <p>Yes</p> <p>Yes</p> <p>No</p> <p>No</p> <p>No</p>
Incentives	<p>Is there a policy to increase incentives for employers to increase diversity/prevent discrimination?</p> <p>Policy instruments used:</p> <ul style="list-style-type: none"> <li>- Delivery of "labels" or certificates stating that the employer has a diversity-friendly business/employment practice. → <b>The Ombudsman for Equality gives out an annual equality prize to a public/private employer who has promoted gender equality at the workplace in an exemplary fashion.</b></li> </ul>	<p>Yes</p> <p>Yes</p>	<p>Yes</p> <p>No</p>

		<b>Gender</b>	<b>Ethnicity</b>
	<ul style="list-style-type: none"> <li>- financial incentives to establish a plan to ensure that the employment composition in terms of gender or ethnicity is balanced</li> <li>- financial incentives for having a person in the HRM department in charge of the employer's anti-discrimination policy and/or hiring a consultant to establish a diversity plan.</li> <li>- financial incentives for quotas (please specify the areas: e.g. executives)</li> </ul>	No No No	No No No
	Other (or any important additional information/comments):		

**Part 2. Institutional framework: specialised bodies (SB) combating discrimination (e.g. equal treatment bodies)**

Table 2.1 **Activities of SBs not related to individual discrimination cases:** Public information and evaluation<sup>a</sup>

	<b>Gender</b>	<b>Ethnicity</b>
<p>Is there a specialised body (SB) in charge of carrying out some of all of the following public information and policy evaluation functions?</p> <p>Gender:                      - <b>Ombudsman for Equality</b>, established by law 1 January 1987. The Council of State appoints the Ombudsman and the term is for 5 years. The Office of the Ombudsman for Equality is administratively affiliated with the Ministry of Social Affairs and Health. The Ombudsman and the Office is an independent body but the financing is fixed annually with the Ministry.                      The duties of the Ombudsman for Equality are: i) to supervise compliance with the Act on Equality between Women and Men, particularly the prohibition of discrimination and the prohibition concerning discriminatory announcements; ii) through initiatives, advice and guidance, to promote compliance with the intent of the Act, iii) to provide information about the Act on Equality between Women and Men and its application; and iv) to monitor the extent to which gender equality has been achieved in different sectors of society. (Gender Equality Unit and the Ombudsman for Equality, 2005, pp.38-39)                      - <b>Council for Gender Equality</b>, established by Decree of the Council of State 31 May 1972 as a permanent advisory council in the state administration. The Council works in conjunction with the Ministry of Social Affairs and Health. The tasks of the Council are to monitor and further gender equality in society; develop initiatives and proposals, and deliver statements on the development of legislation and other measures; promote cooperation between officials, labour market organisations and other sectors; promote research and the use of research findings on gender equality; and monitor international developments on gender equality matters.</p> <p>Ethnicity: <b>Ombudsman for Minorities</b>, established by law 13 July 2001. The Council of State appoints the Ombudsman and the term is for 5 years. The Office of the Ombudsman for Minorities is administratively affiliated with the Ministry of Labour. The Ombudsman and the Office is an independent body but the financing is fixed annually with the Ministry. As of 1 January 2008, the Ombudsman and the Office will be affiliated with the Ministry of Interior.</p>	Yes	Yes
<p>This SB has the statutory power to:</p> <ul style="list-style-type: none"> <li>- run information campaigns to inform the public of their legal rights</li> <li><b>in practice</b>, importance of the above mentioned activity in the actual overall workload</li> <li>- run campaigns to change public opinion</li> <li><b>in practice</b>, importance of the above mentioned activity in the actual overall workload</li> <li>- publish statistics on discrimination</li> <li><b>in practice</b>, importance of the above mentioned activity in the actual overall workload</li> <li>- carry out evaluations of the legal and institutional anti-discrimination framework</li> <li><b>in practice</b>, importance of the above mentioned activity in the actual overall workload</li> <li>- make policy recommendations</li> <li><b>in practice</b>, importance of the above mentioned activity in the actual overall workload</li> <li>- produce codes of good practice for employers</li> <li><b>in practice</b>, importance of the above mentioned activity in the actual overall workload</li> </ul> <p>Notes:                      As acted in the Non-Discrimination Act (20 January, 2004) <b>the Ombudsman for Minorities does not have authority to investigate individual cases</b> as regards discrimination in employment. The responsible authority to do so is the <b>Occupational Safety and Health Authority</b>, which is under the auspices of Ministry of Health and Social Affairs. However the Ombudsman for Minorities has e.g. authority to carry out activities to promote good ethnic relations and to prevent discrimination in all sectors of the society, including employment.</p>	Yes Low Yes Low Yes Low Yes Medium Yes High Yes High	Yes Low Yes Low Yes Medium Yes Low Yes High Yes Low

Note: a) High/Medium/Low mean above average / close to average / below average, respectively.

Table 2.2 **Activities of SBs not related to individual discrimination cases: Control and correction<sup>a</sup>**

	<b>Gender</b>	<b>Ethnicity</b>
<p>Is there a specialised body (SB) in charge of carrying out some of all of the following control and correction functions?</p> <p>Gender:                      - <b>Ombudsman for Equality.</b> The Ombudsman for Equality has the right to carry out an inspection at the workplace if there are reasons to suspect that the employer is violating the Act on Equality between Women and Men. Other authorities must, if necessary, provide the Ombudsman with executive assistance in carrying out the inspection. (Gender Equality Unit and the Ombudsman for Equality, 2005, p.39)                      - <b>Equality Board,</b> established by law 1 January 1987. The Board works in conjunction with the Ministry of Social Affairs and Health as an independent administrative unit. It has a chairperson and four other members who are appointed by the Council of State for a three-year term at a time. The Board pools expertise on gender equality matters and working life. The Ombudsman for Equality or the central labour market organisations can bring discriminatory practices before the Equality Board. The Board can prohibit continuation or recurrence of activity violating the Equality Act. The Board can also issue opinions to the court of justice.</p> <p>Ethnicity: In compliance with the terms of the Non-Discrimination Act, employment relationship is supervised by the Occupational Safety and Health authorities (discrimination based on ethnic origin other than in employment relationship is supervised by the Ombudsman for Minorities and the Discrimination Board).</p> <p>The <b>Occupational Safety and Health Administration</b> operates in eight independent Inspectorates throughout the country. The office of occupational safety and health inspectorate operate as a district authority under the Ministry of Social Affairs and Health. Occupational safety and health inspectorate is an independent public authority established by the Act on Occupational Safety and Health authority 1<sup>st</sup> March 1993 (amendment of law from 1972).</p> <p>The Occupational Safety and Health Inspectorates take care, as authorities, of the practical enforcement of occupational safety and health. The Inspectorates give instructions and advice on applying regulations concerning working conditions, employment and equality and supervise that they are observed in workplaces. The Occupational Safety and Health Inspectorates also give employees advice on matters concerning occupational safety and health and employment. The occupational safety and health inspector has the right to visit all workplaces and other places under supervision and to look at the necessary documents as regards occupational safety and health enforcement. The Occupational Safety and Health Inspectorates can, if necessary, oblige the employer to redress defects in occupational safety and health in the workplace. The inspector is obligated to secrecy concerning business secrets and employees' health and the possible inspection requests made from the workplace. (Ministry of Social Affairs and Health, 2004, p.13-14)</p>	Yes	Yes
<p>This SB has the statutory power to</p> <ul style="list-style-type: none"> <li>- randomly conduct formal investigations of companies and organisations. <b>in practice,</b> importance of the above mentioned activity in the actual overall workload</li> <li>- conduct formal investigations of companies and organisation where there is evidence of discrimination. <b>in practice,</b> importance of the above mentioned activity in the actual overall workload</li> <li>- oblige a company or an organisation to change the way it operates when discriminatory practices are found. <b>in practice,</b> importance of the above mentioned activity in the actual overall workload</li> <li>- take legal action against companies or organisations that apply discriminatory practices <b>in practice,</b> importance of the above mentioned activity in the actual overall workload</li> <li>- take legal action against organisations that attempt to promote discrimination or to instruct others to discriminate. <b>in practice,</b> importance of the above mentioned activity in the actual overall workload</li> </ul> <p>Other (or any Important additional information/comments):</p>	<p>Yes</p> <p>Medium</p> <p>Yes</p> <p>Low</p> <p>Yes</p> <p>Low</p> <p>No</p> <p>..</p> <p>No</p> <p>..</p>	<p>Yes</p> <p>Medium</p> <p>Yes</p> <p>Medium</p> <p>Yes</p> <p>Medium</p> <p>Yes</p> <p>Low</p> <p>Yes</p> <p>Low</p>

Note: a) High/Medium/Low mean above average / close to average / below average, respectively.



Table 2.3 Role of SBs in individual discrimination cases

	Gender	Ethnicity
<p>Is there a specialised body (SB) with specific functions related to individual discrimination cases?</p> <p>Gender: <b>Ombudsman for Equality and Equality Board</b>            Anybody suspecting that she/he is the victim of prohibited discrimination can ask the Ombudsman for Equality for advice and guidance in the matter. Having established that obligations or provisions under the Act have been violated, the Ombudsman for Equality must try to prevent this by providing advice and guidance. The Ombudsman for Equality (or a central organization of employers' associations or of trade unions) may also place a matter before the Equality Board. The Equality Board may prohibit the continuation or repeat of unlawful actions. If necessary, the Board can enforce its decision with the threat of a penalty. A decision of the Equality Board can be appealed against to the Administrative Court. The Equality Board examines the matter in writing and must notify the party concerned of the matter it is considering. The parties are liable for their own expenses incurred during the process. The documents produced by the Ombudsman for Equality and the Equality Board are free of charge. (The Ombudsman may also provide assistance in a court case concerning the payment of compensation, but only if the case is of major significance for the application of the Act.) Source: Gender Equality Unit and the Ombudsman for Equality (2005), pp. 39-41.</p> <p>Ethnicity: <b>Ombudsman for Minorities and Occupational Safety and Health Administration</b></p>	Yes	Yes
<p>Was this body created by anti-discrimination laws (or did anti-discrimination laws establish a specific mandate for it)?</p>	Yes	Yes
<p><b>Formal linkage between equal treatment body activities and complaint lodging and procedures</b></p> <p>Does the SB act as a one-stop shop where claimant can access information, lodge a complaint, receive advice?            Yes</p> <p>As soon as, or before, a discrimination complaint is brought to court, is the claim formally transmitted to the SB?            No</p> <p>Discrimination complaints must be lodged with the SB beforehand, which acts as one-stop shop to start the procedure.            No</p> <p>The SB has the statutory power to provide advice and information to claimants (or both parties) on their legal rights and what options they have.            Yes</p> <p><b>In practice</b>, the SB carries on the above mentioned process as soon as it receives a discrimination claim.            Yes, duty</p> <p>The SB has the statutory power to provide claimants with legal assistance.            Yes</p> <p><b>In practice</b>, SB provides legal assistance to claimants during court proceedings.            No</p> <p>The SB has the statutory power to provide claimants with legal representation.            No</p> <p><b>In practice</b>, the SB provides legal representation to claimants during court proceedings.            No</p>	Yes No No Yes Yes No No No	Yes No No Yes No No No No
<p><b>Investigation of discrimination claims</b></p> <p>The SB has the legal authority to compel people (and in particular, the employer) to provide all of the information it requires to investigate a discrimination claim.            Yes</p> <p>Does the court accept evidence from the SB?            Yes</p> <p>Does the court accept the SB's evaluation of the validity of the discrimination complaint?            Yes</p> <p><b>In practice</b>, the SB formally investigates discrimination claims.            Yes, duty</p> <p><i>Please indicate below the main tools the SB uses to investigate a discrimination claim:</i>            The matters handled by the Ombudsman for equality and Equality Board must be presented in writing. However, the Board may invite the Ombudsman for Equality and the other parties concerned to be heard at the meeting. The Ombudsman for Equality has the right to carry out necessary inspections at a workplace, educational institution or organization representing labour market interests if there is reason to suspect that actions have been taken that are contrary to the Equality Act or that the obligations concerning equality laid down the Act have not otherwise been complied with. In carrying out an inspection, the Ombudsman is entitled to receive executive assistance from other authorities.            Court is not obliged to accept the evidence and information or the evaluation of the Ombudsman for Equality, the Equality Board or the occupational safety and health authority.            Occupational safety authorities can use actions in accordance with the provisions of the Act on Occupational Safety and Health Enforcement and Cooperation on Safety and Health at Workplaces (44/2006).</p> <p>Any employer's failure to provide the requested information to the SB will:            - have no implication for the court ruling.            - potentially be used to draw inferences on discrimination if the case is brought before court.</p>	Yes Yes Yes, duty No Yes	Yes Yes/No Yes Yes, duty Yes No

	Gender	Ethnicity
Any employer's failure to comply with the code of practices issued by the SB (or other relevant body) will: - have no implication for the court ruling. - potentially be used to draw inferences on discrimination if the case is brought before court.	No Yes	.. ..
Important additional information/comments on the investigation procedure: There is no code of practice issued by the Occupational Safety and Health Authority. OSH authority follows the provisions of the Non-discrimination Act (21/2004)		
<b>Mediation/conciliation procedure</b>  The SB has the statutory power to help both parties to resolve the dispute through a mediation/conciliation procedure. Mediation/conciliation is a free and voluntary process for both parties. <b>In practice</b> , the SB carries out mediation/conciliation procedures, so that a court ruling may not be necessary. The mediation/conciliation procedure is <b>usually</b> initiated: - before the case is brought to court - before any formal investigation starts or at an early stage of the process - after any investigation has produced primary evidence of discrimination (but before a litigation decision has been reached)  Notes: * No formal mediation or conciliation procedure. The Equality Board mainly acts as a semi-judicial body, empowered to give an opinion and seeking to secure the employers', educational institutions' or trade unions' voluntary compliance with it. If there is no voluntary compliance, the Board can enforce its decision with the threat of a penalty. <b>** The occupational safety and health authorities do not execute mediation/conciliations procedures.</b> Conciliation procedures are provided for in the Non-Discrimination Act (Sections 12, 13 and 15), except in case of employment-related discrimination.  The SB acts as a neutral third party assisting both opposing parties in the mediation/conciliation procedure. The mediation/conciliation procedure is confidential: no details of the discussion taking place in its course can be repeated to court, nor are made public. The same rule applies to the terms of the settlement. If the parties, including the SB, reach settlement agreement, the latter is legally binding and the charge is dismissed. The SB secures the enforcement of settlement agreements reached under its assistance and/or responsibility.	No, see note (*) Yes In few cases  Yes Yes No  Yes No No No	No, see note (**)

**Part 3. Statistics on mediation/conciliation procedure and court cases** → No data available

#### Main additional references

**Gender Equality Unit and the Ombudsman for Equality (2005)**, "The Act on Equality between Women and Men", Ministry of Social Affairs and Health, Gender Equality Publications 2005:2, <http://www.stm.fi/Resource.phx/publishing/store/2006/01/aa1138615659042/passthru.pdf>

**Ministry of Social Affairs and Health (2004)**, "Occupational Safety and Health in Finland", Brochures of the Ministry of Social Affairs and Health 2004:5, <http://www.stm.fi/Resource.phx/publishing/store/2004/11/hm1101115401134/passthru.pdf>

**Act on Equality between Women and Men** (609/1986; amendments up to 232/2005 included), <http://www.tasa-arvo.fi/Resource.phx/tasa-arvo/english/authorities/legislation/actonequality.htx>

**Non-Discrimination Act** (21/2004, as amended by Act No 50/2006), <http://www.finlex.fi/fi/laki/kaannokset/2004/en20040021.pdf>

## FRANCE

### Partie 1. Cadre juridique prévu pour la discrimination dans l'emploi

Principales lois anti-discrimination :

- Loi n° 2001-1066 du 16/11/01 relative à la lutte contre les discriminations
- Loi n° 2004-1486 du 30/12/04 portant création de la HALDE
- Loi n° 2005-102 du 11/02/05 pour l'égalité des droits et des chances, la participation et la citoyenneté des personnes handicapées
- Loi n° 2006-396 du 31/03/06 pour l'égalité des chances

**Pour l'essentiel, ces lois amendent le code du travail, le code civil et le code pénal, en y intégrant des dispositions relatives à la discrimination et à l'égalité des chances.**

Tribunaux compétents :

- Le juge du contrat de travail : les conseils de prud'homme
- Le juge administratif (fonction publique)
- Le juge civil
- Le juge pénal

Définition légale des caractéristiques protégées, ci-après notées genre et ethnicité :

- Genre : discrimination fondée sur le sexe, incluant explicitement les motifs suivants : grossesse, situation de famille.
- Ethnicité : discrimination fondée sur l'origine, de l'appartenance ou non-appartenance, vraie ou supposée, à une ethnie, une nation ou une race.

Note : précisez dans chaque cas les motifs correspondants.

Autres (ou toute autre information/observation importante) :

Les autres motifs prohibés sont : mœurs, orientation sexuelle, âge, caractéristiques génétiques, opinions politiques activités syndicales ou mutualistes, convictions religieuses, apparence physique, patronyme, état de santé ou handicap.

Tableau 1.1 **Type de discrimination, domaines concernés, acteurs visés, assistance et représentation légales**

		Genre	Ethnicité
Type de discrimination	Discrimination directe	Oui	Oui
	Discrimination indirecte, autrement dit dans les cas où une disposition ou une pratique vise tous les salariés mais affecte particulièrement un groupe protégé et ne peut être considérée comme un moyen approprié pour atteindre un objectif légitime.	Oui	Oui
	Pressions et consignes en vue d'exercer une discrimination	Oui	Oui
	Harcèlement	Oui	Oui
	Note :		
	Les concepts de discrimination directe et de discrimination indirecte ne sont pas définis par la législation et ne requièrent donc pas d'interprétation judiciaire, laquelle se réfère généralement à la définition fournie par les directives européennes (Latraverse, 2006). Projet de loi en cours introduisant dans la législation française les définitions des discriminations directes et indirectes, mais également du harcèlement discriminant. Le comportement consistant à enjoindre à quiconque de pratiquer une discrimination à l'encontre de personnes n'est pas couvert en tant que tel par le code du travail, le code civil ou le code pénal. Toutefois, le comportement d'injonction ou d'incitation à l'acte discriminatoire correspond à la notion de complicité dans les articles 121-6 et 121-7 du CP et est régi par les principes		

		Genre	Ethnicité
	généraux de responsabilité du droit civil. Les mêmes principes s'appliquent au service public (Latraverse, 2006).		
Domaines concernés	Processus de recrutement Salaires Type de contrat de travail (permanent ou de durée déterminée) Durée du travail (horaire atypique, temps partiel ou temps plein) Promotion Emploi et formation professionnelle Transfert Licenciement et renvoi  Autres : Accès au stage et à la formation professionnelle, mesures d'intéressement ou de distribution d'actions, reclassement d'affectation, de mutation ou de renouvellement de contrat.	Oui Oui Oui Oui Oui Oui Oui Oui	Oui Oui Oui Oui Oui Oui Oui
Acteurs visés	Secteur privé Secteur public Agences pour l'emploi Syndicats (adhérents)	Oui Oui Oui Oui	Oui Oui Oui Oui
Assistance juridique autre que les services d'un avocat indépdt.	Organe spécialisé (par ex. organe chargé de faire respecter l'égalité de traitement) Toute institution ou association d'utilité publique compétente, régulièrement constituées depuis 5 ans au moins. Syndicats (veuillez indiquer si seuls leurs membres en bénéficient)	Oui Oui  Oui	Oui Oui  Oui
Représentation juridique autre que celle assurée par un avocat indépdt.	Organe spécialisé: Haute Autorité de Lutte contre les Discriminations (HALDE) Toute institution ou association d'utilité publique compétente <b>régulièrement constituée depuis 5 ans au moins.</b> Syndicats (veuillez indiquer si seuls les membres en bénéficient)	Non Oui  Oui	Non Oui  Oui

Tableau 1.2 Charge de la preuve

		Genre	Ethnicité
Charge de la preuve	Salarié/demandeur Renversement de la charge de la preuve (le salarié/demandeur présente des éléments de fait et l'employeur/défendeur doit à son tour fournir des preuves – voir ci-dessous pour une description détaillée)  Notes : Dans le cas de la discrimination ethnique, le demandeur doit établir devant la juridiction compétente <b>les faits qui permettent de présumer</b> l'existence d'une discrimination. Le défendeur doit lui <b>prouver</b> que la mesure en cause est justifiée par des éléments objectifs étrangers à toute discrimination. En droit français, c'est donc un aménagement de la charge de la preuve qui est prévu, et non un renversement. Ce système ne concerne pas les juridictions pénales.	Aménage- Ment Oui	Aménage- Ment Oui
Procédures pénales	<i>Degré de preuve exigé</i> Quel est le degré de preuve exigé qui doit s'appliquer, conformément à la législation ou à la jurisprudence ? - Au-delà de tout doute raisonnable - Niveau de la probabilité la plus forte  <i>Preuves classiques/standard</i> recevables devant les tribunaux (ou d'autres organes compétents), conformément à la législation ou à la jurisprudence : - Preuve directe (autrement dit toute déclaration écrite ou verbale de l'employeur/défendeur), <b>uniquement.</b> - Il n'existe pas d'indications précises, dans la loi ou la jurisprudence, concernant les preuves indirectes (par exemple on ne procède qu'au cas par cas) - Données statistiques - Testing	Oui Non  Non Vrai Oui Oui*	Oui Non  Non Vrai Oui Oui*

		Genre	Ethnicité
	<p>Notes :</p> <p>* Le test de situation (testing) a été jugé recevable comme preuve de discrimination devant les juridictions pénales par jurisprudence de la Cour de cassation, sur la base du principe de la liberté complète de preuve dans les affaires pénales, et ce principe a été introduit dans le code pénal en son article 225-3-1 CP par la Loi du 9 mars 2006. Le ministère de la Justice a émis une circulaire ministérielle CRIM 2006-16 E8/26-06-2006 à l'adresse des procureurs de la République et du président de chaque tribunal afin de leur présenter les conditions d'application du principe du test de situation introduit dans le code pénal. Il y explique que la preuve d'une discrimination est recevable même lorsqu'elle résulte d'une action exécutée par la victime dans l'intention de provoquer un traitement différencié et dans l'intention de recueillir une preuve du comportement discriminatoire. L'intention de la victime n'a pas d'incidence sur l'infraction si le discriminateur a commis intentionnellement l'acte discriminatoire. Cependant, on ne pourra l'utiliser dans le contexte d'une offre fictive ou avec des personnes agissant sous une fausse identité se livrant à l'exécution d'un faux scénario. La victime doit agir sous sa propre identité, être une personne soumise vraiment à une inégalité de traitement. Si le refus porte sur une réalité fictive, le ministère estime qu'il n'y a pas d'infraction et que la situation ne peut donner lieu à une condamnation (Latraverse, 2006).</p>		
Procédures civiles	<p><b>Discrimination directe</b></p> <p><i>Principales étapes</i>          Peut-on décrire comme suit les principales étapes de la procédure ?          1. Le salarié/demandeur doit fournir un commencement de preuve qui permet de <b>présumer</b> de l'existence d'une discrimination.          2. L'employeur/défendeur a la charge de <b>prouver</b> que sa pratique n'est pas discriminatoire.</p> <p>En pratique, la présomption – par opposition à des preuves plus solides de discrimination – est-elle suffisante pour inverser la charge de la preuve ?          * Toutefois, selon Latraverse (2006), la tradition judiciaire veut que l'on aille devant le tribunal civil avec l'élément de la preuve aisément disponible à la partie.</p> <p><i>Arguments/faits permettant au salarié d'établir une présomption de discrimination recevable devant les tribunaux (ou d'autres organes compétents), conformément à la législation ou à la jurisprudence :</i></p> <ul style="list-style-type: none"> <li>- Preuves directes (autrement dit toute déclaration écrite ou verbale de l'employeur/demandeur), <b>uniquement</b>.</li> <li>- Il n'existe pas d'indications précises, dans la loi ou la jurisprudence, pour les preuves indirectes (par exemple, on procède uniquement au cas par cas)</li> <li>- Données statistiques</li> <li>- Testing</li> </ul> <p>Notes :          * Le test de situation (testing) n'a pas encore été utilisé comme preuve dans les affaires civiles. Cependant, si l'on considère l'irrecevabilité de la preuve obtenue illégalement dans des affaires civiles et les strictes exigences d'équité appliquées dans la procédure civile, on peut douter que le test de situation soit jugé recevable sur la base des règles générales de la preuve (Latraverse, 2006).</p>	Oui	Oui
	<p><b>Discrimination indirecte</b></p> <p><i>Principales étapes</i>          Peut-on décrire comme suit les principales étapes de la procédure ?          1. Le salarié/demandeur doit identifier et définir clairement la pratique en matière d'emploi en question.          2. Le salarié/défendeur doit montrer que la pratique <b>a ou peut avoir</b> un impact distinct sur un groupe protégé.          3. L'employeur/défendeur a la charge de démontrer que la politique ou la pratique en question est spécifique à l'emploi considéré et répond aux besoins du service.          4. Si l'employeur/défendeur satisfait à cette exigence, des preuves peuvent être fournies sur l'existence/l'absence d'une pratique moins discriminatoire</p> <p>Dans l'étape 2 ci-dessus, est il plus précis de dire "a" que "peut avoir" ? En d'autres termes l'impact potentiel (possible) de la pratique d'emploi contestée est il suffisant</p>	Oui*	Oui*
		Non	Non
		Vrai	Vrai
		Oui Voir (*)	Oui Voir (*)
		Oui	Oui
		Oui	Oui

		Genre	Ethnicité
	pour inverser la charge de la preuve ?		
	Dans l'étape 4 ci-dessus, si l'employeur/défendeur démontre qu'une pratique répond aux besoins du service : - incombe t-il au salarié/demandeur de démontrer qu'il existe une autre pratique moins discriminatoire qui satisfait aux besoins du service mais que l'employeur refuse d'adopter ? <b>ou</b> - incombe t-il à l'employeur/défendeur de démontrer qu'il n'existe pas de pratique moins discriminatoire qui répond aux besoins du service ?	Non Oui	Non Oui
	<i>Arguments/faits permettant au salarié d'établir une présomption de discrimination recevable devant les tribunaux (ou d'autres organes compétents), conformément à la législation ou à la jurisprudence :</i>  - Preuves directes (autrement dit toute déclaration écrite ou verbale faite par l'employeur/défendeur), <b>uniquement</b> . - Il n'existe pas d'indications précises, dans la loi ou la jurisprudence, concernant les preuves indirectes (par exemple on ne procède qu'au cas par cas) - Utilisation d'un critère de distinction qui semble intrinsèquement suspect. Veuillez préciser (par exemple, l'obligation de travailler à temps plein peut être discriminatoire à l'égard des femmes) - Données statistiques	Non Vrai Oui Oui	Non Vrai Oui Oui
	<b>Harcèlement</b> Analysé au cas par cas, en examinant toutes les circonstances et le contexte.	Oui	Oui

Tableau 1.3 Compensation accordée au salarié et pénalités imposées à l'employeur

		Genre	Ethnicité
Compensation accordée au salarié	<b>Réhabilitation/réintégration</b> - Toujours accessible au salarié/demandeur, mais ce dernier peut opter pour une compensation financière à la place de la réhabilitation/réintégration, ou - Toujours accessible au salarié/demandeur, sans autre option, ou - Toujours accessible au salarié/demandeur, mais l'employeur/défendeur peut choisir de verser une compensation financière au lieu d'accepter la réhabilitation/réintégration, ou - Jamais accessible au salarié/demandeur.	Oui non Non Non	Oui Non, Non Non
	<b>Compensation financière</b>  Paiement des arriérés de salaire (veuillez indiquer s'il y a un plafond)  Remboursement des honoraires et frais d'avocat	Oui Oui	Oui Oui
	A la place de la réhabilitation/réintégration, versement d'indemnités pour les futurs salaires perdus (par exemple, en cas de licenciement, ceci peut correspondre aux salaires perdus jusqu'à ce que le salarié retrouve un nouvel emploi) : - Indemnisation plancher ou minimum (montant) : ..... - Indemnisation plafond ou maximum (montant) : ..... - Indemnisation moyenne (montant) : ..... - Indemnisation médiane (montant) : ..... * Non fixé par la loi, décision du juge sur évaluation du préjudice estimé par le demandeur	Oui*	Oui*
	Indemnisation du dommage psychologique : - Indemnisation plancher ou minimum (montant) : ..... - Indemnisation plafond ou maximum (montant) : ..... - Indemnisation moyenne (montant) : ..... - Indemnisation médiane (montant) : ..... * Non fixé par la loi, décision du juge sur évaluation du préjudice estimé par le demandeur	Oui*	Oui*

		Genre	Ethnicité
Sanctions et obligations supplémentaires imposées à l'employeur	<b>Dispositions prises en matière civile</b>		
	Aucune	Faux	Faux
	Le tribunal peut ordonner que la décision soit rendue publique	Oui	Oui
	- Au sein de l'entreprise (par exemple des avis sont adressés à tous les salariés pour les informer des violations d'une charge spécifique et leur indiquer quels sont les droits qui leur sont reconnus par la législation)	Oui	Oui
	- En dehors de l'entreprise (veuillez préciser : médias, syndicats, etc.)	Oui	Oui
	L'employeur peut être tenu de prendre des mesures correctives ou préventives pour remédier à la discrimination identifiée.	Non	Non
	Autres		
	<b>Dispositions en matière pénale</b>		
Aucune	Faux	Faux	
Amende : <b>45000 euros maximum</b>	Oui	Oui	
Peine d'emprisonnement : <b>3 ans maximum</b>	Oui	Oui	
Autres	Non	Non	

Tableau 1.4 Protection contre la victimisation (représailles)

		Genre	Ethnicité
Actions protégées	Il est interdit de traiter le salarié/la personne protégée moins favorablement parce qu'il ou elle a (« action protégée ») :		
	- engagé des poursuites pour discrimination	Oui	Oui
	- fourni des preuves ou des informations en relation avec des poursuites pour discrimination.	Oui	Oui
	- participé en tant que témoin à des poursuites pour discrimination	Oui	Oui
Preuve de la relation causale	<b>Charge de la preuve :</b>		
	- i) salarié/personne protégée	Non	Non
	- ii) employeur/défendeur pendant un certains laps de temps, à compter du moment où l'action protégée a été engagée par le salarié. Veuillez préciser les conditions d'application et la durée de cette période.	Non	Non
	- iii) renversement de la charge de la preuve. Veuillez préciser les principales étapes.	Non	Non
	Dans les cas i) et iii), i.e. lorsque la relation causale doit au départ être établie par le salarié/personne protégée :		
	- La relation causale peut être établie au moyen d'éléments prouvant que l'employeur a engagé une action pénalisant le salarié (ou autre personne protégée) peu de temps après que ce dernier se soit engagé dans une activité protégée (dont l'employeur avait connaissance). En d'autres termes, la relation d'emploi est implicitement ou explicitement (veuillez préciser) protégée pendant un certain laps de temps à compter du début de l'action protégée (veuillez préciser).	Non	Non
	- Autres (veuillez préciser) :	Non	Non
Compensations et sanctions	Dispositions supplémentaires, venant s'ajouter à celles décrites dans le tableau 1.3.		
	- compensations accordées au salarié/à la personne protégée - sanctions imposées à l'employeur/au défendeur	Non Non	Non Non

Tableau 1.5 Relation avec la législation standard/générale du travail

		Genre	Ethnicité
Législation du travail et discrimination	Selon le code du travail, un licenciement motivé uniquement par le sexisme ou la discrimination ethnique serait-il considéré comme un licenciement abusif ?	Oui	Oui
	Dans l'affirmative, veuillez préciser depuis quelle date :	1982	1982
	Le code du travail contient-il une disposition imposant l'égalité de rémunération pour un travail égal ?	Oui	Oui
	Dans l'affirmative, veuillez préciser depuis quand :	1972	?
	Autres domaines de discrimination couverts par la législation (ou code) du travail standard/générale (embauche, promotion, etc....) ; veuillez préciser : Le champ de la lutte contre les discriminations couvre l'ensemble de la relation de travail et également l'embauche, l'accès à un stage ou à une formation.		
Plaintes	Les plaintes pour discrimination en cas de licenciement sont-elles déposées plus souvent en vertu du code du travail qu'en vertu de lois anti-discrimination spécifiques ?	Oui	Oui
	Les plaintes pour discrimination portant sur la rémunération sont-elles déposées plus souvent en vertu du code du travail qu'en vertu de lois anti-discrimination spécifiques ?	Oui	Oui
	L'objet principal des lois anti-discrimination est d'amender le code du travail. Les dispositions visant à lutter contre la discrimination sont donc intégrées au sein même du code du travail.		
Évaluations	Veuillez indiquer ci-dessous les références aux évaluations/études existantes portant sur l'efficacité des lois anti-discrimination par rapport à la législation du travail standard/générale :  <b>Bilan de la mise en œuvre de la loi du 16 novembre 2001</b> – Marie Thérèse Lanquetin et Manuela Grevy Association des Femmes de l'Europe méridionale – Décembre 2005	Oui	Oui

Tableau 1.6 Action positive

		Genre	Ethnicité
Mesures obligatoires	Les employeurs sont-ils <b>tenus</b> par la législation de prendre des mesures pour accroître la diversité/prévenir la discrimination ?	Oui	Non
	Dans l'affirmative, quelles mesures sont obligatoires ?		
	- publier régulièrement des rapports sur la composition de la population employée indiquant la proportion d'hommes et de femmes ou l'origine ethnique	Oui	
	- ne traiter que les demandes d'emploi anonymes	Non	
	- obliger les gros employeurs à désigner au sein du service de la gestion des ressources humaines une personne chargée de la politique anti-discrimination de l'entreprise (indiquer, le cas échéant, la taille minimale de cette dernière)	Non	
	- fixer des quotas	Non	
	Autres : Dispositions liées à l'égalité salariale entre les femmes et les hommes		
Mesures volontaires	Les employeurs sont-ils <b>autorisés</b> à prendre des mesures pour accroître la diversité/prévenir la discrimination ?	Oui	Oui
	Dans l'affirmative, quelles mesures sont autorisées ?		
	- publier régulièrement des rapports sur la composition de la population employée indiquant la proportion d'hommes et de femmes ou l'origine ethnique	Oui	Non
	- établir un plan pour s'assurer que la composition de la population active est équilibrée du point de vue de la proportion d'hommes et de femmes ou de l'origine ethnique	Oui	Non
	- fixer des quotas	Non	Non
	Autres : Accord National Interprofessionnel pour la diversité dans l'entreprise du 12 octobre 2006 en cours d'extension.		



		<b>Genre</b>	<b>Ethnicité</b>
Pratiques des employeurs publics	Les employeurs publics prennent-ils normalement des mesures pour accroître la diversité/prévenir la discrimination ?	Oui	Non
	Dans l'affirmative, quelles sont ces mesures ?		
	- publier régulièrement des rapports sur la composition de la population employée indiquant la proportion d'hommes et de femmes ou l'origine ethnique	Oui	Non
	- établir un plan pour s'assurer que la composition de la population active est équilibrée du point de vue de la proportion d'hommes et de femmes ou de l'origine ethnique	Oui	Non
	- ne traiter que les demandes d'emploi anonymes	Oui	Oui
	- nommer au sein du département de la gestion des ressources humaines au moins une personne responsable de la politique anti-discrimination de l'employeur	Non	Non
	- fixer des quotas	Non	Non
	Autres :		
Mesures d'incitation	La politique suivie consiste-t-elle à développer les incitations pour les employeurs à accroître la diversité/prévenir la discrimination ?	Oui	Oui
	Moyens utilisés :		
	- Octroi de « labels » ou de certificats attestant que les pratiques de l'employeur favorisent la diversité dans l'activité et sur le plan de l'emploi.	Oui	Non
	- Incitations financières pour établir un plan qui garantisse que la composition de la population active est équilibrée du point de vue de la proportion d'hommes et de femmes ou de l'origine ethnique.	Non	Non
	- Incitations financières pour que l'employeur désigne au sein du service de la gestion des ressources humaines une personne responsable de sa politique anti-discrimination et/ou recrute un consultant pour établir un plan en matière de diversité.	Non	Non
	- Incitations financières à fixer des quotas (veuillez préciser les domaines, par exemple cadres supérieurs).	Non	Non
	Autres :		

**Partie 2. Cadre institutionnel : organes spécialisés dans la lutte contre la discrimination (par exemple organes chargés de garantir l'égalité de traitement)**

Tableau 2.1 **Activités des organes spécialisés non liées au traitement des cas individuels de discrimination :**  
Information du public et évaluation

	Genre	Ethnicité
Existe t-il un organe spécialisé auquel ont été confiées certaines des fonctions d'information du public et d'évaluation des politiques ci-après?	Oui	Oui
Loi n° 2004-1486 du 30 décembre 2004 portant création de la Halde. Il s'agit d'une Autorité administrative indépendante. La HALDE est opérationnelle depuis le mois de juin 2005. Sa compétence couvre toutes les formes de discrimination, directe et indirecte, interdites par les lois françaises. Outre ses pouvoirs d'investigation, la Haute Autorité assure la promotion de l'égalité de traitement et a le pouvoir d'émettre des recommandations sur toutes les questions relatives à la discrimination, d'identifier et de promouvoir de bonnes pratiques professionnelles et de coordonner et mener des études et des travaux de recherche (Latraverse, 2006).	HALDE	HALDE
L'organe spécialisé est habilité à :	Oui	Oui
- mener des campagnes d'information pour informer le public des droits qui lui sont reconnus par la loi <b>en pratique</b> , importance de l'activité susmentionnée dans l'ensemble des activités conduites par l'organisme en question	Importante	Importante
- mener des campagnes pour faire évoluer l'opinion publique <b>en pratique</b> , importance de l'activité susmentionnée dans l'ensemble des activités conduites par l'organisme en question	Oui Importante	Oui Importante
- publier des statistiques sur la discrimination <b>en pratique</b> , importance de l'activité susmentionnée dans l'ensemble des activités conduites par l'organisme en question	Oui Moyenne	Oui Moyenne
- réaliser des évaluations du cadre juridique et institutionnel anti-discrimination <b>en pratique</b> , importance de l'activité susmentionnée dans l'ensemble des activités conduites par l'organisme en question	Oui Moyenne	Oui Moyenne
- formuler des recommandations sur les actions à mener <b>en pratique</b> , importance de l'activité susmentionnée dans l'ensemble des activités conduites par l'organisme en question	Oui Importante	Oui Importante
- élaborer des codes de bonne pratique pour les employeurs <b>en pratique</b> , importance de l'activité susmentionnée dans l'ensemble des activités conduites par l'organisme en question	Oui Moyenne	Oui Moyenne
Notes: Au fil des ans, le service public a élaboré un certain nombre de programmes de sensibilisation. La plupart des ONG, qu'elles aient pour objet la lutte contre le racisme ou la promotion des droits des personnes handicapées, des homosexuels, des personnes âgées ou malades, sont subventionnées par l'État, mènent des activités de diffusion et sont régulièrement consultées dans le processus législatif et d'options politiques (Latraverse, 2006).		

Note : a) Importante/moyenne/faible signifie supérieure à la moyenne / proche de la moyenne / inférieure à la moyenne, respectivement.

Tableau 2.2 **Activités des organes spécialisés non liées au traitement des cas individuels de discrimination :**  
Mesures de contrôle et correctives<sup>a</sup>

	Genre	Ethnicité
Existe t-il un organe spécialisé chargé de certaines des fonctions de contrôle et correctives ci-après ?	Oui	Oui
<p>La Haute Autorité (HALDE) est compétente pour enquêter sur les plaintes individuelles et collectives, que l'enquête ait été initiée sur sa propre initiative ou à la suite d'une demande écrite du plaignant, d'ONG, de syndicats ou de parlementaires. Ses pouvoirs d'enquête lui permettront de demander des explications à toute personne du secteur public ou privé, y compris de demander la communication de documents et l'audition de témoins concernés.</p> <p>En cas d'absence de coopération avec les services d'enquête, la loi prévoit la possibilité pour la Haute Autorité de demander une ordonnance du tribunal. Elle peut également demander que toutes les enquêtes nécessaires soient exécutées par un service de l'État quel qu'il soit et peut procéder aux visites de tous les sites non privés après en avoir averti préalablement le propriétaire et avoir obtenu son accord, comme il convient.</p> <p>Dans le cas d'une infraction pénale, la Haute Autorité transmettra la revendication aux juridictions pénales ou proposera une transaction pénale (voir notes Tableau 2.3). Elle peut aussi proposer plutôt une médiation aux parties ou clôturer l'enquête et devra, dans ce cas, transmettre ses conclusions et recommandations aux parties, qui disposeront alors d'une période déterminée pour s'y conformer. Si elles ne le font pas dans les temps impartis, la Haute Autorité aura le pouvoir d'attirer l'attention publique sur ses recommandations et pourra alerter les autorités concernées dans des affaires qui exigent des sanctions disciplinaires à l'encontre du défendeur.</p> <p>La Haute Autorité a également été conçue comme "auxiliaire de justice": la loi prévoit la possibilité pour les juridictions pénales, civiles et administratives de faire appel à ses observations dans les affaires en adjudication et permet à la Haute Autorité de chercher à obtenir la permission de soumettre ses observations devant toute juridiction. L'évolution de la pratique judiciaire tirera profit des nombreuses actions de formation destinées aux acteurs judiciaires (les juges et les avocats), initiées par la HALDE depuis 2005, et des observations de la HALDE devant les tribunaux après l'instruction proprement dite.</p> <p>Entre les mois de juin 2005 et de mars 2007, la HALDE a reçu plus de 7.000 plaintes fondées sur tous les motifs et pour tous les domaines de discrimination, elle a résolu 3.256 plaintes et sa Commission a émis 577 recommandations. (source: Latraverse, 2006)</p>		
Cet organe spécialisé est habilité à		
- réaliser de manière aléatoire des enquêtes formelles auprès de sociétés et d'organisations. <b>en pratique</b> , importance de l'activité susmentionnée dans l'ensemble des activités conduites par l'organisme en question	Non ..	Non ..
- effectuer des enquêtes formelles auprès de sociétés et d'organisations lorsque des faits de discrimination ont été avancés. <b>en pratique</b> , importance de l'activité susmentionnée dans l'ensemble des activités conduites par l'organisme en question	Oui Faible	Oui Faible
- obliger une société ou une organisation à modifier ses règles de fonctionnement lorsque des pratiques discriminatoires sont mises en lumière <b>en pratique</b> , importance de l'activité susmentionnée dans l'ensemble des activités conduites par l'organisme en question	Oui Faible	Oui Faible
- engager des poursuites judiciaires contre les sociétés ou organisations qui ont des pratiques discriminatoires <b>en pratique</b> , importance de l'activité susmentionnée dans l'ensemble des activités conduites par l'organisme en question	Oui Faible	Oui Faible
- engager des poursuites judiciaires contre les organisations qui essaient d'encourager la discrimination ou qui ordonnent à d'autres de faire preuve de discrimination. <b>en pratique</b> , importance de l'activité susmentionnée dans l'ensemble des activités conduites par l'organisme en question	Oui Faible	Oui Faible

Note : a) Importante/moyenne/faible signifie supérieure à la moyenne / proche de la moyenne / inférieure à la moyenne, respectivement.

Tableau 2.3 Rôle des organes spécialisés dans les cas individuels de discrimination

	Genre	Ethnicité
Existe t-il un organe spécialisé chargé de fonctions spécifiques en relation avec les cas individuels de discrimination ?	Oui	Oui
La HALDE aide toute personne à identifier les pratiques discriminatoires, et à les combattre. Elle conseille pour les démarches juridiques, et contribue à établir la preuve de la discrimination. Elle peut se saisir elle-même de toute pratique discriminatoire dont elle a connaissance. Elle dispose de pouvoirs d'investigation pour instruire les dossiers. Elle peut exiger des documents et des preuves que la victime n'a pas pu obtenir, aller vérifier sur place et entendre des témoins. La HALDE aide à trouver une réponse adaptée : organiser une médiation pour trouver un accord ou saisir le procureur de la République en cas de discrimination avérée ; obtenir une indemnisation, proposer une amende à celui qui a discriminé et déclencher un procès s'il refuse de les verser (transaction pénale) ; intervenir devant le juge si la victime décide d'aller au tribunal ; rendre publique une pratique de discrimination. (source : <a href="http://www.halde.fr/Presentation.html">http://www.halde.fr/Presentation.html</a> )		
Cet organe a t-il été créé en application de la législation anti-discrimination (ou a t-il été doté d'un mandat spécifique en vertu de cette législation) ?	Oui	Oui
<b>Liaison formelle entre les activités de l'organe spécialisé et celles des tribunaux</b>		
L'organe spécialisé est-il un guichet unique pour le demandeur, où celui-ci peut avoir accès à des informations, déposer plainte et être conseillé ?	Non	Non
Dès que le tribunal est saisi d'une plainte pour discrimination, la plainte est-elle officiellement transmise à l'organe spécialisé ?	Non	Non
Les plaintes pour discrimination doivent être <b>d'abord</b> déposées auprès de l'organe spécialisé, qui est un guichet unique chargé de lancer la procédure.	Non	Non
L'organe spécialisé est habilité à fournir des conseils et des informations aux demandeurs (ou aux deux parties) sur les droits qui leur sont reconnus par la loi et sur les options qui s'offrent à eux.	Oui	Oui
<b>En pratique</b> , l'organe spécialisé engage la procédure décrite ci-dessus dès qu'il reçoit une plainte pour discrimination.	Oui, dans peu de cas	Oui, dans peu de cas
L'organe spécialisé est habilité à fournir aux demandeurs une assistance juridique.	Oui	Oui
<b>En pratique</b> , l'organe spécialisé fournit une assistance juridique aux demandeurs pendant l'instance.	Oui, dans peu de cas	Oui, dans peu de cas
L'organe spécialisé est habilité à assurer une représentation juridique aux demandeurs.	Non	Non
<b>En pratique</b> , l'organe spécialisé assure une représentation juridique aux demandeurs pendant l'instance.	Non	Non
<b>Instruction des plaintes pour discrimination</b>		
L'organe spécialisé est autorisé par la loi à contraindre les personnes (et, en particulier, l'employeur) à fournir toutes les informations dont il a besoin pour instruire une plainte pour discrimination.	Oui	Oui
Le tribunal accepte-t-il les éléments de faits fournis par l'organe spécialisé ?	Oui	Oui
Le tribunal tient-t-il compte de l'évaluation par l'organe spécialisé de la validité de la plainte pour discrimination ?	Oui	Oui
<b>En pratique</b> , l'organe spécialisé instruit officiellement les plaintes pour discrimination.	..	..
Veuillez indiquer ci-dessous les principaux instruments auxquels l'organe spécialisé recourt pour instruire une plainte pour discrimination :		
Tout défaut de communication des informations demandées à l'organe spécialisé de la part de l'employeur :		
- est sans incidence sur la décision du tribunal.	..	..
- peut éventuellement conduire à une présomption de discrimination si l'affaire est portée devant le tribunal.	..	..
Tout manquement de la part de l'employeur à l'application du code de pratiques publié par l'organe spécialisé (ou un autre organe compétent) :		
- est sans incidence sur la décision du tribunal.	..	..

	Genre	Ethnicité
- peut éventuellement conduire à une présomption de discrimination si l'affaire est portée devant le tribunal.	..	..
<b>Procédure de médiation/conciliation</b>		
L'organe spécialisé est habilité à aider les deux parties à régler le différend par le biais d'une procédure de médiation/conciliation.	Oui	Oui
La médiation/conciliation est une procédure gratuite et volontaire pour les deux parties.	Oui	Oui
<b>En pratique</b> , l'organe spécialisé mène des procédures de médiation/conciliation, pour éviter de saisir le tribunal.	Oui	Oui
La procédure de médiation/conciliation est <b>généralement</b> lancée :		
- avant que l'affaire soit portée devant le tribunal	Oui	Oui
- avant le début de toute enquête formelle ou à un stade précoce de la procédure	Non	Non
- après qu'une enquête formelle ait permis de réunir des faits de discrimination (mais avant qu'une décision de justice ait été prise)	Oui	Oui
L'organe spécialisé joue le rôle de tierce partie neutre qui aide les deux parties en présence dans la procédure de médiation/conciliation.	Oui	Oui
La procédure de médiation/conciliation est confidentielle : aucun détail des discussions auxquelles elle donne lieu ne peut être répété devant le tribunal, ni rendu public. La même règle s'applique aux modalités du règlement.	Oui	Oui
Si les parties, y compris l'organe spécialisé, parviennent à un accord, ce dernier est contraignant du point de vue juridique et l'accusation est abandonnée.	Oui	Oui
L'organe spécialisé fait appliquer les accords de règlements conclus avec son aide ou sous sa responsabilité.	Oui	Oui
<b>Notes :</b>		
La Loi sur l'égalité des chances a renforcé les pouvoirs de la Haute autorité de lutte contre les discriminations et pour l'égalité (HALDE). En vertu des articles 11-1, 11-2 et 11-3 de la Loi 2004-1486, telle que modifiée par la Loi 2006-396 sur l'égalité des chances et de l'article D.1-1 du code de procédure pénale tel que modifié par le décret 2006-641 du 1er juin 2006, un nouveau pouvoir a été conféré à la HALDE, lui permettant de proposer ce que l'on appelle une " <b>transaction pénale</b> " – une sorte de sanction pénale négociée – aux auteurs de discrimination directe. Cela permet à la HALDE de proposer, à la suite d'une enquête sur une plainte aboutissant à la constatation de l'existence d'une discrimination intentionnelle directe commise par la personne ou l'entité qui fait l'objet de l'enquête, une sanction pénale spécifique à l'auteur de la discrimination, lequel peut l'accepter ou la refuser. Il peut s'agir de l'imposition d'une amende – d'un montant de 3.000 euros aux personnes physiques et de 15.000 euros aux personnes morales – ou de la publication (par exemple sous forme de communiqué de presse) du fait que la discrimination s'est produite et, le cas échéant, qu'une indemnisation a été accordée à la victime (Latraverse, 2006).		

Partie 3. Statistiques relatives aux procédures de médiation/conciliation et aux cas portés devant les tribunaux

Tableau 3.1 Statistiques

		Genre	Ethnicité
Statistiques générales	Nombre total de plaintes pour discrimination reçues en 2006 Population protégée (nombre de personnes âgées de 15 à 64 ans visées par la loi en question)	203	1422
Procédures de médiation/ conciliation	<p>Note : Statistiques 2006, sur l'ensemble des motifs couverts par la HALDE</p> <p>Nombre de plaintes reçues 4058</p> <p><b>Nombre de dossiers traités 2143</b>  <i>dont :</i>  - <b>mesures ordonnées 344</b>  interventions devant les tribunaux 48  rappels à la loi 42  recommandations 151  cas portés devant les tribunaux (faits graves) 42  médiations 33  transaction pénales (dont 16 acceptées et transmises au parquet pour homologation) 20  réclamations rejetées 8  - <b>règlements à l'amiable, après saisine (i.e. en cours d'instruction) 197</b>  - <b>saisines réorientées 533</b>  - <b>dossiers hors compétence ou non fondés, et retrait simple 1125</b></p> <p>Notes :  En 2007, la Halde a reçu 6 222 réclamations. L'emploi est le premier domaine concerné avec plus de la moitié des réclamations, devant le fonctionnement des services publics (20,35%), les biens et services privés (13,26%), le logement (6,11%) et l'éducation (4,57%). L'origine est le critère le plus souvent invoqué (27,16%) suivi de près par la santé et le handicap (21,68%). La HALDE a reçu 11 689 réclamations depuis sa création.  <a href="http://www.halde.fr/actualite-18/agenda-haute-autorite-38/50-reclamations-10995.html">http://www.halde.fr/actualite-18/agenda-haute-autorite-38/50-reclamations-10995.html</a></p> <p>Durée moyenne de traitement des dossiers :  En 2005, la HALDE avait traité 363 dossiers au 31 décembre ; elle a, en 2006, traité 2 143 dossiers. Le délai moyen de traitement des dossiers est passé de 91 jours, en 2005, à 113 jours fin 2006. (Rapport annuel, 2006)</p> <p>Compensation moyenne accordée au salarié/demandeur dans le cadre des procédures de médiation/conciliation</p>		
Tribunaux	<p>Nombre de cas portés devant les tribunaux  <i>dont :</i>  - nombre de plaintes rejetées par le tribunal pour vice de procédure (ou pour des raisons administratives)  - nombre de plaintes rejetées par le tribunal pour absence de causes/raisons valables  - nombre de plaintes retirées par le(s) demandeur(s)  - nombre de décisions de justice favorables au(x) demandeur(s)  - autres (veuillez préciser)</p> <p>Durée moyenne des instances</p>		

### Principales références complémentaires

**HALDE (2008)**, Missions et pouvoirs, <http://www.halde.fr/haute-autorite-1/missions-pouvoirs-24/missions-pouvoirs-5.html>

**HALDE (2008)**, Mieux agir contre les discriminations au travail: les actions en justice, <http://www.halde.fr/discriminations-10/acces-au-droit-11/fiches-pratiques-63/contre-les-9241.html>

**HALDE (2008)**, Mieux connaître les discriminations, <http://www.halde.fr/discriminations-10/acces-au-droit-11/fiches-pratiques-63/mieux-connaître-les-discriminations-9068.html>

**HALDE (2006)**, *Rapport Annuel*, [http://halte.fr/rapport-annuel/2006/pdf/RA2006\\_HALDE.pdf](http://halte.fr/rapport-annuel/2006/pdf/RA2006_HALDE.pdf)

**Latraverse, S. (2006)**, Résumé du rapport national français sur les mesures de lutte contre la discrimination, [http://www.ec.europa.eu/employment\\_social/fundamental\\_rights/pdf/legnet/frsum07\\_fr.pdf](http://www.ec.europa.eu/employment_social/fundamental_rights/pdf/legnet/frsum07_fr.pdf)

**Latraverse, S. (2007)**, *Report on Measures to Combat Discrimination*, European Commission – Country Report: France, [http://www.ec.europa.eu/employment\\_social/fundamental\\_rights/pdf/legnet/frrep07\\_en.pdf](http://www.ec.europa.eu/employment_social/fundamental_rights/pdf/legnet/frrep07_en.pdf)

## GERMANY

### Part 1. Legal framework for employment discrimination

Main anti-discrimination laws:

- Act on equal treatment/antidiscrimination (AGG, 2006)
- Protection Against Dismissal Act (KSchG)

Also:

- Art. 3 of the Constitutional Law of Germany (GG)
- Works Constitution Act (BetrVG)
- Civil code (BGB) as far as procedures for civil disputes are concerned.

In addition:

- Agreements against discrimination and racism have been also closed between the management and the work committee in numerous companies since the mid-nineties (e.g. at Ford, Opel, VW, Fraport, Thyssen, Jenoptik). These agreements might be stricter than national law (more favourable to disadvantaged groups). Legal action can be taken at a labour court for the observance of these agreements.

Relevant courts:

- Employment tribunal
- Other civil courts
- Administrative courts

Legal scope/definition of the (hereinafter) so-called gender and ethnic grounds:

- Gender: sex, explicitly including: sexual orientation, pregnancy, childbirth or related medical conditions.
- Ethnicity: Race, religion, colour or ethnic origin.

Table 1.1 Prohibited acts, areas of concern, coverage, legal assistance and representation

		Gender	Ethnicity
Type of discrimination	Direct discrimination	Yes	Yes
	Indirect discrimination, i.e. where a provision criterion or practice is applied to all employees but puts one protected group at a particular disadvantage and cannot be shown to be a proportionate means of meeting a legitimate aim.	Yes	Yes
	Pressure and instruction to discriminate	Yes	Yes
	Harassment	Yes	Yes
	Other victimisation (all grounds)		
Areas of concern	Hiring process	Yes	Yes
	Wage	Yes	Yes
	Type of employment contract (permanent vs. fixed term)	Yes	Yes
	Working time (atypical work schedule, part-time vs. full-time)	Yes	Yes
	Promotion	Yes	Yes
	Job and vocational training	Yes	Yes
	Transfer	Yes	Yes
	Redundancy and dismissal	Yes	Yes
	Notes: §2(4) AGG states that only the provisions governing protection against unlawful dismissals in general and specific cases shall apply to dismissal, most importantly those contained in the KSchG. "As there are no prohibitions of discrimination on in these norms, and there seems to be no possibility of interpreting these norms due to their wording in conformity with the [EC] directives, this exception is not in accordance with European		



		Gender	Ethnicity
	Law" (Mahlmann, 2007, p.29, and the literature cited there). "It is highly doubtful whether the said exceptions to the AGG's scope are feasible. [...]In order to avoid unnecessary risks, in particular in dismissal procedures, employers shall avoid any unequal treatment on the reasons mentioned in Sec. 1 AGG" (DLA Piper, 2006, p.1). Given the wording of §2(1) AGG, which explicitly mentions discriminatory dismissals, the exception contained in §2(4) AGG can be taken to apply to procedures and compensations rather to areas of concern.		
Coverage	Private sector Public sector Employment agencies Trade unions (as regards membership) Notes: Main exemptions: for religious bodies and organisations a special reason justifying differential treatment on the grounds of religion of beliefs is explicitly mentioned in § 9(1) AGG	Yes Yes Yes Yes	Yes Yes Yes Yes
Legal assistance other than private lawyer	Specialised body (e.g. equal treatment body) Any relevant public utility institutions and associations: <b>especially</b> nongovernmental organisations specialised in anti-discrimination issues Trade unions (please indicate if it is for their members only) Notes: Under German law, a disadvantaged person being a party in legal proceedings is free to use the support of any organisation before, during and after legal action.	Yes Yes Yes	Yes Yes Yes
Legal representation other than private lawyer	Specialised body (e.g. equal treatment body) Any relevant public utility institutions and associations Trade-unions Notes: Anti-discrimination organisations can legally represent the plaintiffs on his/her behalf in court proceedings in all cases when a lawyer is not explicitly required (§ 23(2) AGG). They have to have at least 75 members or have to be the association of at least 7 other associations concerned with anti-discrimination (§ 23(1) AGG). In cases of gross violations <u>Works Councils</u> can lodge complaints to labour courts (§ 17(2) AGG). In that case, there is no need of complaint by the person(s) suffering discrimination  The state provides financial assistance or free court-appointed lawyer to pursue complaint before courts where victims do not have the necessary means.	No Yes Yes Yes	No Yes Yes Yes

Table 1.2 Burden of proof

	Gender	Ethnicity
Employee/claimant Shift of burden of proof (the employee/claimant provides facts, then the employer/respondent has to provide proofs – see below for a detailed description)	No Yes	No Yes
<b>Direct discrimination</b>  <i>Main steps</i> Can the main steps of the procedure be described as follows? 1. The employee/claimant has to supply prima facie evidence whereby it may be <b>presumed</b> that there has been discrimination. 2. The employer/respondent has the burden of <b>proving</b> that his/her practice is not discriminatory.  In practice, is presumption – as opposed to stronger evidence of discrimination – sufficient to shift the burden of proof?  <i>Typical/standard prima facie evidence</i> admissible in courts (or other relevant bodies), as set by law or established by case law: Direct evidence (i.e. any written or verbal statement by the employer/respondent), <b>only</b> . No clear legal guidance for indirect evidence (e.g. case-by-case basis only) Statistical evidence Situation testing Notes:	Yes  Yes  No No Yes Yes	Yes  Yes  No No Yes Yes

	Gender	Ethnicity
<p>The principles of onus of proof are set out in § 22 AGG. It stipulates that the plaintiff bears the onus of establishing facts. This means that the plaintiff must first provide full proof of the fact that he/she was treated less favourably than another person. Moreover, he/she must submit the facts from which it may be presumed that there has been discrimination on one of the (inadmissible) grounds referred to in Section 1 AGG. The usual standard of proof for civil disputes is required for the establishment of the facts shifting the burden of proof. It is sufficient for the Court to believe that the facts are more probable than not. In this context account must be taken of the principles set out in § 138 of the Code of Civil Procedure stipulating that, on the one hand, unspecified allegations are inadmissible but that the party's degree of access to information must also be kept in mind. Outcomes of statistics or testing procedures may provide factual indications. Where the presumed facts remain in dispute it is for the plaintiff to prove them.</p> <p>Situation testing can be used to establish presumption of discrimination and shift the burden of the proof (Bundestagsdrucksache 16/1780)</p>		
<p><b>Indirect discrimination</b></p> <p><i>Main steps</i>  Can the main steps of the procedure be described as follows?  1. The employee/claimant has to clearly identify and define the employment practice in question.  2. The employee/claimant has to show that the practice <b>has or may have</b> a differentiated impact on one protected group.  3. The employer/respondent has the burden of demonstrating that the policy or practice in question is job related for the position in question and consistent with business necessity.  4. If the employer/respondent satisfies this requirement, evidence can be supplied on the existence/lack of the existence of a less discriminatory practice</p> <p>In step 2 above is the term "has" more accurate than "may have"? In other words, can the potential (possible) impact of the contested employment practice be sufficient for shifting the burden of proof?</p> <p>In step 4 above, if the employer/respondent demonstrates that a practice is consistent with business necessity, then:  - does it fall to the employee/claimant to demonstrate that a less discriminatory alternative exists that meets the business need but that the employer refuses to adopt it? <b>or</b>  - does it fall to the employer/respondent to demonstrate that a less discriminatory alternative that meets the business need does not exist?</p> <p><i>Typical/standard prima facie evidence</i> to be provided to courts or other relevant bodies, as set by law or established by case law:  Direct evidence ( i.e. any written or verbal statement by the employer/respondent), <b>only</b>.  No clear legal guidance for indirect evidence (e.g. case-by-case basis only)  Use of a distinction criteria that appear to be intrinsically suspicious.</p> <p>Statistical evidence</p>	<p>Yes</p> <p>Yes, "has" is more accurate</p> <p>Case-by-case basis Case-by-case basis</p> <p>No No Case-by-case basis Yes</p>	<p>Yes</p> <p>Yes, "has" is more accurate</p> <p>Case-by-case basis Case-by-case basis</p> <p>No No Case-by-case basis Yes</p>
<p><b>Harassment</b>  Analysed on a case-by-case basis, by looking at all the circumstances and the context.</p>	<p>Yes</p>	<p>Yes</p>

Table 1.3 Employee compensation and employer penalties

	Gender	Ethnicity
<p>Employee compensation</p> <p><b>Injunctive relief/reinstatement</b>  - Always made available to the employee/claimant, but the latter can choose monetary compensation in lieu of relief/reinstatement, or  - Always made available to the employee/claimant, without alternative option, or  - Always made available to the employee/claimant, but the employer/respondent can choose monetary compensation in lieu of relief/reinstatement, or  - Never made available to the employee/claimant.</p> <p><b>Monetary compensation</b>  Back pay</p> <p>Reimbursement of lawyer's and attorney's fees and costs</p>	<p>No</p> <p>Yes No</p> <p>No</p> <p>Yes</p> <p>No</p>	<p>No</p> <p>Yes No</p> <p>No</p> <p>Yes</p> <p>No</p>

		Gender	Ethnicity
	<p>In lieu of relief/reinstatement, compensation for future lost earnings (e.g., in case of dismissal, this may correspond to lost earnings until the employee finds a new job):</p> <p>Compensation for psychological injury:</p> <p>Notes:            § 15 AGG grants rights to compensation for material and immaterial damage. Rights also cover potential loss of earnings which would not have occurred if there had been no discrimination.</p> <p>According to § 276 BGB the employer is responsible for its own fault, i.e. intent and negligence. Besides, the employer is liable for the fault of its legal representatives according to § 31 BGB and of its vicarious agents (i.e. its management employees in relation to the general workforce) pursuant to § 278 BGB. Fault is assumed, i.e. the employer has to prove that no fault was on hand. (DLAPiper, 2006)</p> <p>In the case of no hiring there is a compensation cap of three monthly salaries where the discrimination concerned job applicants who were not best qualified for the job § 15 (2) AGG.</p>	<p>No</p> <p>Yes</p>	<p>No</p> <p>Yes</p>
Employer additional penalties and obligations	<p><b>Civil provisions</b>            None            Court may order the publicity of the decision            - Within the firm (e.g. notices to all employees addressing the violations of a specific charge and advising them of their rights under the laws)            - Outside the firm (please indicate: media, trade-unions, etc.)            The employer may be required to take corrective or preventive actions to cure the source of the identified discrimination (§ 12 AGG)</p> <p><b>Penal provisions</b>            None            Fine (please specify amounts)            Prison sentence (please specify lengths, whether it applies only in specific cases and in which cases)</p> <p>Notes:            In general fines for breach of the prohibition to discriminate (in individual cases) are rare (Mahlmann, 2007).            In the case of complaints lodged by Works Councils before labour courts, maximum fine is 10000 Eur (§ 23 (3) BetrVG)            According to MIPEX, due to privacy rules, publicity is likely to be limited to official court documents (MIPEX, 2007a)</p>	<p>No</p> <p>Yes</p> <p>Unlikely</p> <p>Unlikely</p> <p>Yes</p> <p>No</p> <p>Yes</p> <p>No</p>	<p>No</p> <p>Yes</p> <p>Unlikely</p> <p>Unlikely</p> <p>Yes</p> <p>No</p> <p>Yes</p> <p>No</p>

Table 1.4 Protection against victimisation (retaliation)

		Gender	Ethnicity
Protected actions	<p>It is prohibited to treat the employee/protected person less favourably (so-called "adverse action") because s/he has (so-called "protected action"):</p> <ul style="list-style-type: none"> <li>- brought proceedings against discrimination</li> <li>- given evidence or information in connection with any proceedings against discrimination.</li> <li>- participated as a witness in any proceedings against discrimination</li> </ul>	<p>Yes</p> <p>Yes</p> <p>Yes</p>	<p>Yes</p> <p>Yes</p> <p>Yes</p>
Proof of causal connexion	<p><i>Burden of proof:</i></p> <ul style="list-style-type: none"> <li>- i) employee/protected person</li> <li>- ii) employer/respondent within a given lapse of time from the concerned event. Please specify conditions of application and lapse of time.</li> <li>- iii) shift of burden of proof. Please specify main steps.</li> </ul> <p>Same rules as for direct discrimination (§ 16 AGG)</p> <p>In cases (i) and (iii), when the causal connexion shall be first shown or established by the employee/protected person:</p> <ul style="list-style-type: none"> <li>- the link can be demonstrated by evidence that the adverse action occurred shortly after the protected activity (and the employer/respondent was aware of the</li> </ul>	<p>No</p> <p>No</p> <p>Yes</p> <p>Yes,</p> <p>possible, but</p>	<p>No</p> <p>No</p> <p>Yes</p> <p>Yes,</p> <p>possible, but</p>

		Gender	Ethnicity
	complainant's protected activity before taking the action), so that the employment relationship is implicitly or explicitly (please specify) protected during a certain period of time (please specify)  Notes: Rules applying to victimisation cases are the same as those that apply to direct and indirect discrimination cases (§ 16 AGG)	it depends on courts' judgement	it depends on courts' judgement
Employee compensation and employer penalty	Compared to provisions described in Table 1.3: - additional employee/protected person compensation - additional employer/respondent penalties	No No	No No

Table 1.5 Relationship with standard labour laws

		Gender	Ethnicity
Labour law and discrimination	According to standard labour law(s) or code, would dismissal solely based on gender or ethnicity considered to be unjust dismissal? If yes, please specify since when. GG from 1949, KSchG from 1969  Is there a provision requiring equal pay for work of equal value in standard labour law(s) or code. If yes, please specify since when.  Other areas of discrimination covered by standard labour law(s) or code (hiring, promotion, etc...):  General equal treatment principle pertaining to labour law: Part-Time and Fixed-Term Employment Act (TzBfG), Maternity Protection Act (MutterschG) Any termination must not infringe §§ 138 BGB (immorality), 242 BGB (good faith), 611a BGB (gender equality), 612a BGB (prohibition of sanctioning the legitimate exercise of rights - Maßregelungsverbot) or § 9 provisions made in the Maternity Protection Act. § 611a BGB (gender equality) was repealed upon the entry into force of the AGG.	Yes  Yes	Yes  Yes
Complaints	Are discrimination complaints concerning dismissals more often lodged under standard labour law(s) or code, than under specific anti-discrimination laws? Notes: §2(4) AGG states that only the provisions governing protection against unlawful dismissals in general and specific cases shall apply to dismissal, most importantly those contained in the KSchG. In practice, this implies that, although protected by §2(1) AGG, discriminatory dismissal is treated as any other type of unlawful dismissal both as regards procedures and compensations (see DLA Piper, 2006, Mahlmann, 2007, and the literature cited therein).  Are discrimination complaints concerning pay more often lodged under standard labour law(s) or code, than under specific anti-discrimination laws?	Yes	Yes
Evaluations	Please indicate below references to existing evaluations/studies on the effectiveness of anti-discrimination laws with respect to standard labour law(s):		

Table 1.6 Positive action

		Gender	Ethnicity
Compulsory actions	Are employers <b>required</b> by law to take actions to increase diversity/prevent discrimination?  If yes, what actions are required? - make regular public reports on employment composition in terms of gender or ethnicity - process only anonymous job applications	Yes  No No	Yes  No No

		Gender	Ethnicity
	<ul style="list-style-type: none"> <li>- obligation for large employers to have a person in the HRM department in charge of the employer's anti-discrimination policy (please specify the size threshold of application, if any)</li> <li>- quotas (please specify the areas: e.g. executives in firms above a certain size)</li> </ul> <p>Other (and important additional information/comments):            § 12 (1) AGG states that "the employer has the duty to take measures necessary to ensure protection against discrimination [...]. This protection shall also cover preventive measures. For instance, the employees, particularly the executives, have to be trained. Furthermore, a complaints department has to be established in the company (§13 (1) AGG). This duty applies to all social partners (§ 17 Abs 1 AGG).</p>	Yes (see notes)  No	Yes (see notes)  No
Voluntary actions	Are employers <b>allowed</b> to take actions to increase diversity/prevent discrimination?  If yes, what actions are allowed? <ul style="list-style-type: none"> <li>- make regular public reports on employment composition in terms of gender or ethnicity</li> <li>- establish a plan to ensure that the employment composition in terms of gender or ethnicity is balanced</li> <li>- quotas (please specify the areas: e.g. executives)</li> </ul> <p>Notes:            see §§ 5, 17 AGG: Actions must be "suitable and appropriate". No additional guidance is explicitly made in the law.</p> <p>Collective agreements against discrimination typically specifies that "In order to realise equal opportunities, aims and measures shall be fixed for the areas of employment, treatment in the workplace, access to training, further education and training, professional promotion and the allocation of company housing, and their implementation shall be monitored" (Model agreement adopted by German Trade Union Confederation -Deutscher Gewerkschaftsbund; DGB, see Will and Rühl (2004).</p>	Yes  Yes Yes  Yes	Yes  Yes Yes  Yes
Public employers' practices	Do public employers normally take actions to increase diversity/prevent discrimination?  If yes, what actions? <ul style="list-style-type: none"> <li>- make regular public reports on employment composition in terms of gender or ethnicity</li> <li>- establish a plan to ensure that the employment composition in terms of gender or ethnicity is balanced</li> <li>- process only anonymous job applications</li> <li>- have at least one person in the HRM department in charge of the employer's anti-discrimination policy</li> <li>- quotas (please specify the areas: e.g. high-rank officials)</li> </ul> <p>Notes:            Federal Government activities (at the level of the competent Ministries) to implement gender mainstreaming (in public administration); similar initiatives exist at the level of the Laender and communities.            Many administrations at the central and local level have a Women's Representative (<i>Frauenbeauftragte</i>). Although in general not part of the HR department, the representative is part of the central services of these administrations.            According to MIPEX in the case of ethnic origin, "the state does not use positive action measures or mainstream equality into the functions of public bodies" (Niessen et al., 2007, p.78)</p>	Yes  Yes Yes  No Yes, see below No	Yes  Yes No  No No No
Incentives	Is there a policy to increase incentives for employers to increase diversity/prevent discrimination?  Policy instruments used: <ul style="list-style-type: none"> <li>- Delivery of "labels" or certificates stating that the employer has a diversity-friendly business/employment practice.</li> <li>- financial incentives to establish a plan to ensure that the employment composition in terms of gender or ethnicity is balanced</li> <li>- financial incentives for processing only anonymous job applications</li> <li>- financial incentives for having a person in the HRM department in charge of the employer's anti-discrimination policy and/or hiring a consultant to establish a diversity plan.</li> <li>- financial incentives for quotas (please specify the areas: e.g executives)</li> </ul> <p>Other:</p>	Yes  No  No  No  No	Yes  No  No  No  No

		Gender	Ethnicity
	An agreement has been concluded with the business community on the promotion of gender equality in the private sector, and measures to promote diversity have been initiated by the Integration Commissioner.  The Federal Anti-discrimination Office ( <i>Antidiskriminierungsstelle</i> ) provides counselling to firms on how to comply with the requirements of the AGG.		

## Part 2. Institutional framework: specialised bodies (SB) combating discrimination (e.g. equal treatment bodies)

Table 2.1 **Activities of SBs not related to individual discrimination cases: Public information and evaluation<sup>a</sup>**

	Gender	Ethnicity
Is there a specialised body (SB) in charge of carrying out some of all of the following public information and policy evaluation functions?  The Federal Anti-discrimination Office ( <i>Antidiskriminierungsstelle</i> , AGG Part 6), which started operations in August 2006. Established within the Ministry of Family Affairs, Senior Citizens, Women and Youth, it is however independent in the execution of its duties and only subject to the law.	Yes	Yes
This SB has the statutory power to: - run information campaigns to inform the public of their legal rights <b>in practice</b> , importance of the above mentioned activity in the actual overall workload - run campaigns to change public opinion <b>in practice</b> , importance of the above mentioned activity in the actual overall workload - publish statistics on discrimination <b>in practice</b> , importance of the above mentioned activity in the actual overall workload - carry out evaluations of the legal and institutional anti-discrimination framework <b>in practice</b> , importance of the above mentioned activity in the actual overall workload - make policy recommendations <b>in practice</b> , importance of the above mentioned activity in the actual overall workload - produce codes of good practice for employers <b>in practice</b> , importance of the above mentioned activity in the actual overall workload	Yes High Yes Low Yes Low Yes Medium Yes Medium Yes High	Yes High Yes Low Yes Low Yes Medium Yes Medium Yes High
Notes: The Federal Anti-Discrimination Office has been operating since August 2006 and there is little “ex-post” information to assess the importance of each activities mentioned above in the actual overall workload. The information reported above is therefore a tentative assessment based on information available on the <i>Antidiskriminierungsstelle</i> ’s web-site ( <a href="http://www.antidiskriminierungsstelle.de">www.antidiskriminierungsstelle.de</a> )		

Note: a) High/Medium/Low mean above average / close to average / below average, respectively.

Table 2.2 **Activities of SBs not related to individual discrimination cases: Control and correction<sup>a</sup>**

	Gender	Ethnicity
Is there a specialised body (SB) in charge of carrying out some of all of the following control and correction functions?  This SB has the statutory power to - randomly conduct formal investigations of companies and organisations. - conduct formal investigations of companies and organisation where there is evidence of discrimination. - oblige a company or an organisation to change the way it operates when discriminatory practices are found. - take legal action against companies or organisations that apply discriminatory practices - take legal action against organisations that attempt to promote discrimination or to instruct others to discriminate.	No  No No No No No	No  No No No No No
Notes: The Federal anti-discrimination office has no power to force employers or other organisations to change their conduct (§27 AGG)		

Table 2.3 Role of SBs in individual discrimination cases

	Gender	Ethnicity
Is there a specialised body (SB) with specific functions related to individual discrimination cases?	Yes	Yes
Federal Anti-discrimination Office (AGG Part 6); see above Table 2.1	Yes	Yes
Was this body created by anti-discrimination laws (or did anti-discrimination laws establish a specific mandate for it)?		
<b>Formal linkage between equal treatment body activities and complaint lodging and procedures</b>		
Does the SB act as a one-stop shop where claimant can access information, lodge a complaint, receive advice?	Yes	Yes
As soon as, or before, a discrimination complaint is brought to court, is the claim formally transmitted to the SB?	No	No
Discrimination complaints must be lodged with the SB beforehand, which acts as one-stop shop to start the procedure.	No	No
The SB has the statutory power to provide advice and information to claimants (or both parties) on their legal rights and what options they have.	Yes	Yes
<b>In practice</b> , the SB carries on the above mentioned process as soon as it receives a discrimination claim.	..	..
The SB has the statutory power to provide claimants with legal assistance.	No	No
The SB has the statutory power to provide claimants with legal representation.	No	No
<b>Investigation of discrimination claims</b>		
The SB has the legal authority to compel people (and in particular, the employer) to provide all of the information it requires to investigate a discrimination claim.	No	No
Does the court accept evidence from the SB?.	No	No
Does the court accept the SB's evaluation of the validity of the discrimination complaint?	No	No
<b>In practice</b> , the SB formally investigates discrimination claims.	No	No
Any employer's failure to provide the requested information to the SB will:		
- have no implication for the court ruling.	Yes	Yes
- potentially be used to draw inferences on discrimination if the case is brought before court.	No	No
Any employer's failure to comply with the code of practices issued by the SB (or other relevant body) will:		
- have no implication for the court ruling.	Yes	Yes
- potentially be used to draw inferences on discrimination if the case is brought before court.	No	No
Notes: The Federal Anti-discrimination Office acts as a consultant and a mediator, but has no link to courts. The decision and burden of going to court relies entirely on the parties.		
<b>Mediation/conciliation procedure</b>		
The SB has the statutory power to help both parties to resolve the dispute through a mediation/conciliation procedure.	Yes	Yes
Mediation/conciliation is a free and voluntary process for both parties.	Yes	Yes
<b>In practice</b> , the SB carries out mediation/conciliation procedures, so that a court ruling may not be necessary.	Yes	Yes
The mediation/conciliation procedure is <b>usually</b> initiated:		
- before the case is brought to court		
- before any formal investigation starts or at an early stage of the process	Yes	Yes
- after any investigation has produced primary evidence of discrimination (but before a litigation decision has been reached)		
Notes: Private mediation procedures do not result in legally effective settlement agreements that include a waiver of legal action. The AGG itself does not contain provisions on the legal consequences of mediation agreements.		
The SB acts as a neutral third party assisting both opposing parties in the mediation/conciliation procedure.	Yes	Yes
The mediation/conciliation procedure is confidential: no details of the discussion taking place in its course can be repeated to court, nor are made public. The same rule applies to the terms of the settlement.	Yes	Yes
If the parties, including the SB, reach settlement agreement, the latter is legally binding and the charge is dismissed.	No	No
The SB secures the enforcement of settlement agreements reached under its assistance and/or responsibility.	No	No

### Part 3. Statistics on mediation/conciliation procedures and court cases

Average duration of court procedures (according to MIPEX, 2007b): less than one year  
No other statistics available.

#### Main additional references

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## GREECE

### Part 1. Legal framework for employment discrimination

#### *Main anti-discrimination laws*

##### **Gender:**

- The Constitution of Greece: article 4 para2 "Greek men and women have equal rights and equal obligations", article 22 para1 "all workers, irrespective of sex or other distinctions, shall be entitled to equal pay for work of equal value", article 116 para2 "the taking of positive measures for the promotion of equality between men and women does not constitute discrimination on the grounds of sex. The state cares for the abolition of actual discrimination, especially against women".
- Act 46/1975 (Ratification of International Labour Convention 100)(in force since 1975)
- Act 1342/1983, "Ratification of International Convention on the Elimination of all forms of discrimination against women" (CEDAW, in force since 1983)
- Act 1424/1984 "on the ratification of International Labour Convention 111 regarding discrimination at employment and occupation".
- Act 1414/1984 "on the application of the principle of equality of the sexes in working relations"; the said Act was amended by Acts 1835/1989 (article 7) and 2676/1999 (article 81). It was repealed and replaced by Act 3488/2006 - last section of article 1 -, with the exception of: the provisions of paragraphs 4 and 5 of article 4, the first section of para1 and para2 of article 8, the first section of para1 of article 9 and articles 11 and 14.
- Presidential Decree 105/2003 "Adjustment of the internal law to the provisions of the Council Directive 97/80/EC of 15.12.1997 on the burden of proof in cases of discrimination based on sex".
- **Act 3488/2006: Application of the principle of equal treatment of men and women regarding access to employment, vocational training and professional advancement, and working terms and conditions and other relevant provisions**, which entered into force on 11.09.2006; this Act repealed and, almost completely, replaced previous Act 1414/1984 "on the application of the principle of equality of the sexes in working relations and other provisions".

Respecting the application of Act 3488/2006 on working terms and conditions and equal remuneration, as well as, more particularly, on the taking of positive measures to protect maternity, paternity and family life, relevant previous regulations are the following:

- Act 1483/1984 "on the protection and facilitation of workers having family responsibilities", as amended by Act 2639/1998, article 25. Also relevant is the Presidential Decree 193/1988, which extended the application of its provisions to persons employed in any type of working relationship in the public sector, public bodies corporate and local self-government agencies.
- Act 1302/1982 "Ratification of ILC 103/1952 regarding maternity protection".
- Act 2683/1999 on the "Ratification of the Code of Status of Civil Servants and Persons employed in Legal Entities under Public Law", which improved the legislation concerning facilitations provided to persons employed in the public sector, in order for them to reconcile family responsibilities and professional life. By virtue of the recently passed Civil Servants' Code - 3528/2007, article 53 - the right to parental leave, a leave of 9 months duration to raise a child, was also granted to fathers, who are civil servants.
- Article 1 of Act 3258/2004 (O.G.A144/29-7-2004) "Amendment of the provisions of the Code of Organization of Courts and Status of Judges and other provisions" provides for that judges who become mothers shall be granted a nine-month paid leave for the raising of the child.
- Presidential Decree 167/1997 "Measures to improve the health and safety at work of pregnant women, women who have recently given birth and breastfeeding women employees, in compliance with Council Directive 92/85/EEC of 19.10.1992. It was amended by Presidential Decree 41/2003.
- National General Labour Collective Agreements, especially of years 1975, 1989, 1993, 1996, 2002-2004, 2006 and 2007, improve the legislation in force respecting persons employed in the private sector on issues of equality in working relations, parental leaves, paternity leaves and other matters concerning both sexes in employment.
- Act 2956/2001, article 35 on the equality of men and women regarding the preconditions required for the granting of marriage or children or family allowances by employers in the private or public sector to employees bound by a working relationship under private law.

##### **Ethnicity:**

- Greek Constitution art.5 para2, art.25 para1
- Legislative Decree 494/1970 - Ratification of UN's International Convention on the Elimination of all forms of Racial Discrimination
- Act 927/1979- Penalties against religious, racial discrimination
- Act 1424/1984 which ratified International Labour Convention 111 on discrimination on work and employment
- **Act 3304/2005 respecting the "Application of the principle of equal treatment irrespective of racial or national extraction, religious or other beliefs, disability, age or sexual orientation"**.
- National General Labour Collective Agreement 2000-2001
- Act 3528/2007 - Civil Servants' Code

Relevant courts:

**Gender:**

- Civil courts (Courts of First Instance, Courts of Appeal, Supreme Court) for those employed in the private sector and Administrative courts (Courts of First Instance, Courts of Appeal, State Legal Council) for those employed in the public sector/public bodies corporate/local self-government agencies. Specifically:
- Civil Courts (art.663 ff – Civil Procedure Code, Labour disputes):[One member Court of First Instance (in A degree), Court of Appeal (in B degree) and cassation in the Supreme Court]]
- State Legal Council: 1) Cancellation request (promotion, transfer, secondment, remuneration) – 2) Employee’s appeal: article 103 para 4S (decisions of councils of service regarding transfer, demotion or dismissal)
- Penal Courts for hearing the crime of sexual harassment: One member Magistrate’s Court in a degree, three member Magistrate’s Court in B degree and cassation at the Supreme Court.

**Ethnicity:** Administrative Court, Criminal Court, Civil Court.

Legal scope/definition of the (hereinafter) so-called gender and ethnic grounds:

- Gender: sex, explicitly including: pregnancy, childbirth or related medical conditions, breastfeeding, family responsibilities and marital status
- Ethnicity: racial or national extraction, religious or other beliefs, disability, age, sexual orientation. The differentiated treatment on the grounds of nationality is explicitly exempted. Differentiations in treatment are allowed provided those are justified by substantial and decisive professional requirements

Table 1.1 General information

		Gender	Ethnicity
Type of discrimination	Direct discrimination Indirect discrimination, i.e. where a provision criterion or practice is applied to all employees but puts one protected group at a particular disadvantage and cannot be shown to be a proportionate means of meeting a legitimate aim. Pressure and instruction to discriminate Harassment Other	Yes Yes  Yes* Yes Yes**	Yes Yes  Yes Yes
	Notes: * Order containing discrimination, Article 4 para 3 of Act 3488/2006 ** Protection of maternity, Protection due to the use of parental leaves, Sexual harassment		
Areas of concern	Hiring process Wage Type of employment contract (permanent vs. fixed term) Working time (atypical work schedule, part-time vs. full-time) Promotion Job and vocational training Transfer Redundancy and dismissal  Other: <ul style="list-style-type: none"> <li>• Participation in unions and professional associations of employers and employees</li> <li>• According to article 2 of Act 3488/2006 the work contract and paid order in included in the scope of application of the law as well as individuals exercising liberal professions and any form of employment or work relationships.</li> <li>• According to article 8 of Act 3488/2006 discrimination on the grounds of sex is prohibited as far as the planning and implementation of the personnel evaluation systems is concerned.</li> </ul>	Yes Yes Yes Yes Yes Yes Yes Yes  Yes	Yes Yes Yes Yes Yes Yes Yes Yes
Coverage	Private sector → Gender: Act 3488/06, art.2 Public sector → Gender: Act 3488/06, art.2 Employment agencies → Gender: Act 3488/06, art.2 and art.5 Trade unions (as regards membership) → Gender: Act 3488/06, art.10	Yes Yes Yes Yes	Yes Yes Yes Yes

		Gender	Ethnicity
	<p>Notes:</p> <p>Gender: All working relationships or employment forms are covered irrespective of the offered services' nature: dependent labour agreements, contract of employment for the performance of a specific piece of work, working relationships in which workers have the status of employees, liberal professions, candidates for hiring or vocational training, witness protection. Moreover apart from the employment agencies, the temporary employment agencies are also included. In the abovementioned cases the coverage exists irrespective of the labour agreement type and/or the size of the business, including special dependent working relationships, such as work in agriculture and at sea, as well as freelance professionals. Regarding the labour agreement, a working contract is not required as long as there is a real working relationship.</p> <p>Ethnicity: Exemption from the application of the principle of equal treatment on the grounds of national extraction might be made when the aforementioned characteristic constitutes a substantial and decisive professional precondition.</p>		
Legal assistance other than private lawyer	<p>Specialised body (e.g. equal treatment body) Any relevant public utility institutions and associations Trade unions: for their members only</p> <p>Notes: * The Greek Ombudsman (Unified body to monitor the implementation of principle of equal treatment between men and women) ** General Secretariat for Equality, Ministry of Employment and Social Protection (Section for equality of sexes of the Directorate of Working Terms) *** General Confederation of Greek Workers</p>	<p>Yes* Yes** Yes***</p>	<p>Yes Yes Yes</p>
Legal representation other than private lawyer	<p>Specialised body (e.g. equal treatment body) Any relevant public utility institutions and associations Trade-unions: for their members only</p> <p>Notes: * Only for their members Article 12 para 2 of Act 3488/2006 provides that trade union organizations, other legal entities and associations that have similar lawful interest, based on their aim, ran upon consent of the person harmed from the violation of the principle of equal treatment between men and women pursuant to the present act, lodge an appeal in his/her name before the competent administrative or independent authorities as well as intervene to defend the person affected. They can also intervene in his/her favour before the courts. ** The legal representation by the legal entities that ensure the observance of the principle of equal treatment is done with the consent of the discriminated person (notary's document).</p>	<p>No Yes* Yes*</p>	<p>No Yes** Yes**</p>

Table 1.2 Burden of proof

	Gender	Ethnicity
<p>Employee/claimant Shift of burden of proof (the employee/claimant provides facts, then the employer/respondent has to provide proofs – see below for a detailed description)</p> <p>Notes: * Article 17 of Act 3488/2006 enacts the shift of the burden of proof by deviating from the general rule of article 338 of Civil Procedure Code according to which the plaintiff must prove the true facts that support his/her action. Nevertheless <b>such an important provision regarding the distribution of the burden of proof has not yet been accompanied by a relevant amendment of the Civil Procedure Code.</b> ** The burden of proof is not shifted in the penal court procedure.</p>	<p>No* Yes</p>	<p>No** Yes</p>

	Gender	Ethnicity
<p><b>Direct discrimination</b></p> <p><i>Main steps</i>  Can the main steps of the procedure be described as follows?  1. The employee/claimant has to supply prima facie evidence whereby it may be <b>presumed</b> that there has been discrimination.  2. The employer/respondent has the burden of <b>proving</b> that his/her practice is not discriminatory.  If not, please specify the procedures.</p> <p>In practice, is presumption – as opposed to stronger evidence of discrimination – sufficient to shift the burden of proof?</p> <p><i>Typical/standard prima facie evidence admissible in courts (or other relevant bodies), as set by law or established by case law:</i>  Direct evidence (i.e. any written or verbal statement by the employer/respondent), <b>only</b>.  No clear legal guidance for indirect evidence (e.g. case-by-case basis only)  Ethnicity  In the procedure of labour disputes the judge can take into consideration both direct and indirect evidence.  Statistical evidence  Situation testing</p> <p>* Means of proof according to the Greek law (except documents and confession): Experts' opinion, inspection, examination of litigant parties, witnesses, court evidences, affidavits and means of proof that do not meet the terms of the legislation (articles 339 and 671 of the Civil Procedure Code, 147 of the Administrative Procedure Code)</p>	<p>Yes</p> <p>Yes</p> <p>No True*</p> <p>Yes Yes</p>	<p>Yes</p> <p>Yes</p> <p>No True*</p> <p>Yes Yes</p>
<p><b>Indirect discrimination</b></p> <p><i>Main steps</i>  Can the main steps of the procedure be described as follows?  1. The employee/claimant has to clearly identify and define the employment practice in question.  2. The employee/claimant has to show that the practice <b>has or may have</b> a differentiated impact on one protected group.  3. The employer/respondent has the burden of demonstrating that the policy or practice in question is job related for the position in question and consistent with business necessity.  4. If the employer/respondent satisfies this requirement, evidence can be supplied on the existence/lack of the existence of a less discriminatory practice  If not, please specify the differences.</p> <p>In step 2 above is the term "has" more accurate than "may have"? In other words, can the potential (possible) impact of the contested employment practice be sufficient for shifting the burden of proof?</p> <p>In step 4 above, if the employer/respondent demonstrates that a practice is consistent with business necessity, then:  - does it fall to the employee/claimant to demonstrate that a less discriminatory alternative exists that meets the business need but that the employer refuses to adopt it? <b>or</b>  - does it fall to the employer/respondent to demonstrate that a less discriminatory alternative that meets the business need does not exist?</p> <p>Notes:  * article 17 of Act 3488/2006: "is presumed .... indirect discrimination"  ** The indirect discrimination is not contrary to the Act 3488/2006 if it is justified objectively by legal target and the means of the achievement of the said target are appropriate and necessary (principle of proportionality) – Through the combination of articles 34 and 17 of Act 3488/2006 regarding the application to the principle of proportionality, the employer bears the burden of proof.</p> <p><i>Typical/standard prima facie evidence to be provided to courts or other relevant bodies, as set by law or established by case law:</i>  Direct evidence (i.e. any written or verbal statement by the employer/respondent), <b>only</b>.  No clear legal guidance for indirect evidence (e.g. case-by-case basis only)  Use of a distinction criteria that appear to be intrinsically suspicious.  Statistical evidence</p> <p>Notes:  * The burden of proof lies on both the claimant and the respondent. Greek legislation accepts both the direct and indirect evidence. Means of proof according to the Greek law (except documents and confession): Experts' opinion, inspection, examination of litigant parties, witnesses, court evidences, affidavits and means</p>	<p>Yes</p> <p>Yes*</p> <p>No Yes</p> <p>No *</p> <p>Yes</p>	<p>Yes</p> <p>Yes</p> <p>No No Yes</p> <p>No .. Yes Yes</p>

	Gender	Ethnicity
of proof that do not meet the terms of the legislation (articles 339 and 671 of the Civil Procedure Code, 147 of the Administrative Procedure Code) ** They are established through jurisprudence.		
<b>Harassment</b> Analysed on a case-by-case basis, by looking at all the circumstances and the context.	Yes*	Yes
* Definition of "harassment" as well as of "sexual harassment" (art.3 of Act 3488/2006).  Based on our legislation, the following definitions apply: 1. "Harassment": when a person behaves in an undesirable manner linked with another person's sex, aiming at or resulting in offending another person's dignity and creating an intimidating, hostile, humiliating, insulting or aggressive environment. 2. "Sexual harassment": when a person talks or behaves in a sexually offensive manner, aiming at or resulting in offending another person's dignity and creating an intimidating, hostile, humiliating, insulting or aggressive environment. Harassment and sexual harassment constitute discrimination on the grounds of sex of the worker. In this case, civil and administrative sanctions are imposed. In case of sexual harassment penal sanctions are also imposed. In this case the shifting of the burden of proof also applies, before court and competent authorities, except for the case of criminal suit.		

Table 1.3 Employee compensation and employer penalties

	Gender	Ethnicity
<b>Employee compensation</b>		
<b>Injunctive relief/reinstatement</b> - Always made available to the employee/claimant, but the latter can choose monetary compensation in lieu of relief/reinstatement, or - Always made available to the employee/claimant, without alternative option, or - Always made available to the employee/claimant, but the employer/respondent can choose monetary compensation in lieu of relief/reinstatement, or - Never made available to the employee/claimant.	Yes* No No No	Yes No No No
* The injunction and rehabilitation measures are always available in every case where there is a violation of the principle of equal treatment on grounds of sex. Article 12 of Act 3488/2006 stipulates that "any individual considering that he/she has been harmed by the non-application of the principle of equal treatment, even if the relation during which the discrimination seems to have taken place, has terminated, is entitled to judicial protection". The right of judicial protection includes restraining order and rehabilitation in addition to compensation. Therefore, for example it can be asked and achieved through court the cancellation of dismissal due to discrimination on the grounds of sex, by using restraining order under the terms of articles 682 ff of the Civil Procedure Code.		
<b>Monetary compensation</b>  Back pay (please indicate if there is a cap): There is no maximum limit.	Yes	Yes
Reimbursement of lawyer's and attorney's fees and costs	Yes	Yes
In lieu of relief/reinstatement, compensation for future lost earnings (e.g., in case of dismissal, this may correspond to lost earnings until the employee finds a new job): - Floor or minimum (amount): ..... - Cap or maximum (amount): ..... - Average compensation (amount): ..... - Median compensation (amount): .....	No	No
Compensation for psychological injury: - Floor or minimum (amount): ..... - Cap or maximum (amount): ..... - Average compensation (amount): ..... - Median compensation (amount): .....	Yes*	Yes**
Notes:		

		Gender	Ethnicity
	<p>* According to article 16 of Act 3488/2006 “the violation of the prohibition on discriminations on the grounds of sex, according to the present act, brings about, among other things, a claim for full compensation of the victim”. The court is competent to award the victim relevant compensation without legislative predetermination of the compensation’s maximum limit. This compensation according to the general rules on compensation will cover all direct and indirect damages. ** Monetary compensation is set by law.</p>		
Employer additional penalties and obligations	<p><b>Civil provisions</b> None Court may order the publicity of the decision - Within the firm (e.g. notices to all employees addressing the violations of a specific charge and advising them of their rights under the laws) - Outside the firm (please indicate: media, trade-unions, etc.) - The employer may be required to take corrective or preventive actions to cure the source of the identified discrimination</p> <p>* The court judges accordingly. Article 12 of Act 3488/2006 stipulates that “any individual considering that he/she has been harmed by the non-application of the principle of equal treatment, is entitled to judicial protection”. Consequently, the meaning of judicial protection includes the complete civil protection. If the violation of the principle of equality also constitutes violation of the personality of a man or a woman, then the withdrawal of the insult and its non-existence in the future can be claimed, as well as pecuniary compensation for moral damages. Ethnicity</p> <p><b>Penal provisions</b> None Fine (please specify amounts) Prison sentence Other</p> <p>Notes: * Penal provisions apply in general on violations of labour legislation and special penal provisions apply on sexual harassment. Article 16 para 4 of Act 3488/2006 stipulates the special penal offence of sexual harassment taking advantage of the labour position of the victim or the position of a person who is seeking a job. (Act 3488/2006 covers both the direct and indirect discrimination in a unified way) ** <b>Administrative fine:</b> In case of violations of labour legislation in general, fines of 1000 to 30.000 euros are imposed. In case of sexual harassment a fine of 1000 euros is imposed, without setting maximum limit. Gender: no upper limit for administrative, civil and penal fines. *** In case of violations of labour legislation provisions a sentence of imprisonment for at least 6 months is imposed, without defining maximum limit and/or a 900 euros penalty. In case of sexual harassment. From 6 months to 3 years. **** Article 16 of Act 3488/2006 also provides for administrative sanctions.</p>	<p>False Yes* Yes* Yes*</p> <p>False* Yes** Yes*** Yes****</p>	<p>False No No Yes</p> <p>False Yes Yes</p>

Table 1.4 Protection against victimisation (retaliation)

		Gender	Ethnicity
Protected actions	<p>It is prohibited to treat the employee/protected person less favourably (so-called "adverse action") because s/he has (so-called "protected action"): - brought proceedings against discrimination - given evidence or information in connection with any proceedings against discrimination. - participated as a witness in any proceedings against discrimination - Other protected actions</p> <p>Notes: * In the above cases <b>notice of termination of labour contract or termination of the working relationship</b> is prohibited due to the above mentioned reasons of revenge. ** Article 9 of Act 3488/2006 stipulates the “revengeful behaviour on behalf of the employer because the employee does not give way to a sexual or other harassment against him/her”.</p>	<p>Yes* Yes* Yes* Yes**</p>	<p>Yes Yes Yes</p>

		Gender	Ethnicity
Proof of causal connexion	<p>Burden of proof:</p> <ul style="list-style-type: none"> <li>- i) employee/protected person</li> <li>- ii) employer/respondent within a given lapse of time from the concerned event. Please specify conditions of application and lapse of time.</li> <li>- iii) shift of burden of proof. Please specify main steps.</li> </ul> <p>In cases (i) and (iii), when the causal connexion shall be first shown or established by the employee/protected person:</p> <ul style="list-style-type: none"> <li>- the link can be demonstrated by evidence that the adverse action occurred shortly after the protected activity (and the employer/respondent was aware of the complainant's protected activity before taking the action), so that the employment relationship is implicitly or explicitly (please specify) protected during a certain period of time (please specify)</li> </ul> <p>Notes:</p> <p>* When a person who is included in the scope of application of the Act 3488/2006 claims that is treated in a way that incurs discrimination on the grounds of sex [and according to the article 9 provision (revengeful behaviour on behalf of the employer)]: adduces before a court events or evidence through which discrimination is possible on the grounds of sex or sexual or other harassment and b) the defendant bears the burden of proving before a court that there was no violation.</p> <p>** The court judges accordingly.</p>	<p>No</p> <p>No</p> <p>Yes*</p> <p>No**</p>	<p>No</p> <p>Yes</p> <p>Yes</p> <p>..</p> <p>..</p>
Employee compensation and employer penalty	<p>Compared to provisions described in Table 1.3:</p> <ul style="list-style-type: none"> <li>- additional employee/protected person compensation</li> <li>- additional employer/respondent penalties</li> </ul> <p>** Apart from the claim for compensation, one can seek:</p> <ul style="list-style-type: none"> <li>-Full civil protection</li> <li>-Penal sanctions in case of sexual harassment</li> <li>-Imposition of administrative sanctions: penalty for every violation, 1,000 to 30,000 euros; temporary to permanent shut-down of the business.</li> </ul>	<p>No*</p> <p>**</p>	<p>..</p> <p>..</p>

Table 1.5 Relationship with standard labour laws

		Gender	Ethnicity
Labour law and discrimination	<p>According to standard labour law(s) or code, would dismissal solely based on gender or ethnicity considered to be unjust dismissal? If yes, please specify since when.</p> <p><b>* In Greece there is no Code of Labour Law</b>, but the regulations of labour law and more specifically the regulations on equal treatment between men and women in employment can be found among the Constitution, the Civil Code, special laws (on equality which transposed international texts and community Directives into the Greek legislation) as well as Labour Collective Agreements.</p> <p>A large number of appeals are based on the above legal basis regarding equality issues.</p> <p>Since 1920 (article 5 of Act 2274/1920 – prohibition of dismissal during pregnancy)</p> <p>Also Act 1302/1982 (Ratification of International Labour Convention 103)</p> <p>Since 2/2/1984 (article 6 of Act 1414/1984)</p> <p>Since 11/09/2006 (article 9 of Act 3488/2006)</p> <p>** The Constitution of Greece (1975)</p> <p>Act 1424/1984 that ratified the International Labour Convention 111 respecting the "Discrimination in employment and occupation" (the term discrimination concerns the race, colour, religion, sex, political opinion, national extraction and social origin).</p> <p>Is there a provision requiring equal pay for work of equal value in standard labour law(s) or code? If yes, please specify since when.</p> <p>* Article 22 para1 of the Greek Constitution (since 1975)</p> <p>Act 46/1975 – International Labour Convention 100 (since 1975)</p> <p>Article 4 of Act 1414/1984 (since 2/2/1984)</p> <p>Article 7 of Act 3488/2006 (since 11/9/2006)</p>	<p>Yes*</p>         <p>Yes*</p>	<p>Yes**</p>         <p>Yes**</p>

		Gender	Ethnicity
	<p>Article 22 para1 of the Constitution of Greece stipulates that all employees, irrespective of sex or other distinction, are entitled to equal pay for provided work of equal value.</p> <p>Under Act 46/1975 (O.G.105 A) the International Labour Convention 100 was ratified on the equal remuneration between men and women workers for work of equal value. Moreover, with the article 1 of the National General Labour Collective Agreement of 26/2/1975, that became valid under Act 133/1975, welfare measures were taken regarding the total equalization of general minimum wages of men and women workers in order for the principle of equal pay for equal work of men and women (workers) be applied (gradually) by 01/03/1978.</p> <p>Moreover as stated above Act 1414/84 and Act 3488/06 which provide accordingly are also in force.</p> <p>** Art.22 para1 of the Greek Constitution (1975)</p> <p>Other areas of discrimination covered by standard labour law(s) or code (hiring, promotion, etc...); please specify</p> <p>* In Greece there is no Code of Labour Law, but the regulations of labour law and more specifically the regulations on equal treatment between men and women in employment can be found among the Constitution, the Civil Code, special laws (on equality which transposed international texts and community Directives into the Greek legislation) as well as Labour Collective Agreements. A large number of appeals are based on the above legal basis regarding equality issues.</p> <p>Act 3488/2006 and pre-existing Act 1414/84 (since 2.2.84): Recruitment, Vocational training, Working terms, Advancement</p>	See *	
Complaints	<p>Are discrimination complaints concerning dismissals more often lodged under standard labour law(s) or code, than under specific anti-discrimination laws?</p> <p>* From the jurisprudence until now as well as from the SEPE facts, the number of cases concerning the violation of the principle of equality that are communicated to the Labour Inspectorate and end in courts as labour disputes is not large. In any case only the provisions of the Constitution, of the Civil Code, of the Labour Collective Agreements and of the Act 1414/84 are used as legal basis, for lodging complaints regarding equality in employment. – Act 1414/84 was recently replaced by Act 3488/2006.</p> <p>Complaints to the Greek Ombudsman: With the introduction of Act 3488/2006 and within the competence of the Greek Ombudsman it is noted (according to the annual report of 2006) that 11 complaints were made regarding discrimination on the grounds of sex based on Act 3488/2006.</p> <p>The cases concerned:</p> <ul style="list-style-type: none"> <li>- Quotas against women (Merchant Navy Academies, penitentiaries)</li> <li>- Equality in remuneration (special allowance)</li> <li>- Leaves</li> <li>- Sexual harassment</li> </ul> <p>Are discrimination complaints concerning pay more often lodged under standard labour law(s) or code, than under specific anti-discrimination laws?</p> <p>* In Greece there is no Code of Labour Law, but the regulations of labour law can be found among the Constitution, the Civil Code, special laws (on equality which transposed international texts and community Directives into the Greek legislation) as well as Labour Collective Agreements.</p>	See *	Yes
		No	Yes*
Evaluations	Please indicate below references to existing evaluations/studies on the effectiveness of anti-discrimination laws with respect to standard labour law(s):		



Table 1.6 Positive action

		Gender	Ethnicity
Compulsory actions	<p>Are employers <b>required</b> by law to take actions to increase diversity/prevent discrimination?</p> <p>If yes, what actions are required?</p> <ul style="list-style-type: none"> <li>- make regular public reports on employment composition in terms of gender or ethnicity</li> <li>- process only anonymous job applications</li> <li>- obligation for large employers to have a person in the HRM department in charge of the employer's anti-discrimination policy</li> <li>- quotas (please specify the areas: e.g. executives in firms above a certain size)</li> </ul> <p>* According to article 116 para 2 of the Constitution and article 4 para 4 of the Act 3488/2006 there is no discrimination when taking or maintaining special or positive measures aiming at eliminating any existing discriminations against the less represented sex and the achievement of a substantial equality. According to article 11 para 3 "employers ought to promote gender equality at work in a systematic manner. For that reason, they should give regularly the appropriate information to the employees, their representatives and the competent bodies of articles 13 and 15 of the present article, when this is required. This information may contain facts about the proportion of men and women in the different organizational levels of the employment body as well as facts about the measures that they are likely to take in order to improve the situation, in collaboration with the workers' representatives."</p>	<p>Yes*</p> <p>No</p> <p>No</p> <p>No</p> <p>No</p>	<p>No</p> <p>When asked for</p>
Voluntary actions	<p>Are employers <b>allowed</b> to take actions to increase diversity/prevent discrimination?</p> <p>If yes, what actions are allowed?</p> <ul style="list-style-type: none"> <li>- make regular public reports on employment composition in terms of gender or ethnicity</li> <li>- establish a plan to ensure that the employment composition in terms of gender or ethnicity is balanced</li> <li>- quotas (please specify the areas: e.g. executives)</li> </ul> <p>* According to article 4 para 4 of Act 3488/2006 there is no discrimination when taking or maintaining special or positive measures aiming at eliminating any existing discriminations against the less represented sex and the achievement of a substantial equality.</p>	<p>Yes*</p> <p>Yes</p> <p>Yes</p> <p>Yes</p>	<p>Yes</p> <p>Yes</p> <p>Yes</p>
Public employers' practices	<p>Do public employers normally take actions to increase diversity/prevent discrimination?</p> <p>If yes, what actions?</p> <ul style="list-style-type: none"> <li>- make regular public reports on employment composition in terms of gender or ethnicity</li> <li>- establish a plan to ensure that the employment composition in terms of gender or ethnicity is balanced</li> <li>- process only anonymous job applications</li> <li>- have at least one person in the HRM department in charge of the employer's anti-discrimination policy</li> <li>- quotas (please specify the areas: e.g. high-rank officials)</li> </ul> <p>* Act 2839/2000 (O.G. 196/A/2000) provides for quota that establishes the compulsory participation of each sex, by at least 1/3, in councils of service and collective bodies of the public sector, of public organizations and local self-government organizations.</p> <p>With Act 3250/2004 regarding "part time employment in the public sector, the local self-government organizations and the public bodies corporate", the categories of beneficiaries were defined through which the persons hired can be selected, adding those who have more than three children by 10% and expanding the category of mothers with minors without age restrictions also by 10%. The Act also provides for a percentage of up to 60% among the various categories of unemployed (up to thirty years old and over thirty years old, those who will be retired in five years) who benefit from the hiring, will be covered by women, in case relative interest is shown through applications submittal. The supervision of the application of the said act shows that the 73% of the total part time positions announced in the public sector, within the framework of the above mentioned act, are filled by women.</p>	<p>Yes</p> <p>Yes, when asked for</p> <p>No</p> <p>No</p> <p>Yes*</p>	<p>No</p>

		Gender	Ethnicity
Incentives	<p>Is there a policy to increase incentives for employers to increase diversity/prevent discrimination?</p> <p>Policy instruments used:</p> <ul style="list-style-type: none"> <li>- Delivery of "labels" or certificates stating that the employer has a diversity-friendly business/employment practice.</li> <li>- financial incentives to establish a plan to ensure that the employment composition in terms of gender or ethnicity is balanced</li> <li>- financial incentives for having a person in the HRM department in charge of the employer's anti-discrimination policy and/or hiring a consultant to establish a diversity plan.</li> <li>- financial incentives for quotas (please specify the areas: e.g. executives)</li> <li>- other</li> </ul> <p>* The General Secretariat for Equality implements the project "Positive Actions in favour of women in small and medium-sized enterprises and large enterprises" in the context of the operational program "Employment and vocational training 2000-2006". This project aims at helping working women in small and medium-sized as well as large enterprises to acquire extra assets, in order to be able to claim their advancement in the enterprise on better terms. In this context <b>economic incentives are given to the enterprises for continuing retraining and training of women, coverage of expenses for the operation of nursery schools, support of telework, provision of information and awareness raising of all workers about these incentives, expansion of quality certification systems (ISO).</b> Moreover, the General Secretariat for Equality implements, as the final beneficiary, the project: "Integrated interventions in favour of women". 9018 women in total, mainly unemployed women of any age benefited from this project. In cooperation with the OAED, 5.342 unemployed women are promoted directly to employment, through the creation of 2.074 new positions for unemployed women, the provision of subsidy to 2.074 new freelance professionals and the provision of work experience to 1194 unemployed women.</p>	<p>Yes</p> <p>Yes</p> <p>Yes</p> <p>No</p> <p>No</p> <p>Yes*</p>	<p>No</p>

**Part 2. Institutional framework: specialised bodies (SB) combating discrimination (e.g. equal treatment bodies)**

Table 2.1 **Activities of SBs not related to individual discrimination cases:** Public information and evaluation<sup>a</sup>

	Gender	Ethnicity
Is there a specialised body (SB) in charge of carrying out some of all of the following public information and policy evaluation functions?	Yes	Yes
<p>Gender:</p> <ul style="list-style-type: none"> <li>• The <b>Greek Ombudsman</b>, hereinafter <b>GO</b>. Independent body operating since 1997 and dealing with matters of equal treatment between women and men in employment, in the public sector (based on Act 3488/2006, article 13, of 11.09.2007, date of its publication).</li> <li>• <b>General Secretariat for Equality</b> of the Ministry of the Interior, Public Administration and Decentralization, hereinafter <b>GSE</b>.</li> <li>• <b>Regional Committees for Equality</b>, hereinafter <b>RCE</b>: Bodies of each region (since 2001).</li> <li>• <b>Research Centre on Equality Matters</b>, hereinafter <b>RCEM</b>: Legal entity under private law supervised by the General Secretariat for Equality (since 1994).</li> <li>• <b>Labour Inspectorate Body</b>, hereinafter <b>SEPE</b></li> </ul> <p>Ethnicity:</p> <p><b>Economic and Social Council of Greece (OKE)</b>. A constitutionally established body for the promotion of social dialogue. It was founded in 1994 and was established by the Constitution of Greece in 2001. Under <b>Act 3304/2005, article 18, the said body was entrusted with responsibilities regarding the observance of the principle of equal treatment</b>. The Economic and Social Council is fully autonomous in its function and administration from the state, apart from its financing from the state budget.</p>		
<p>This SB has the statutory power to:</p> <ul style="list-style-type: none"> <li>- run information campaigns to inform the public of their legal rights <b>in practice</b>, importance of the above mentioned activity in the actual overall workload</li> <li>- run campaigns to change public opinion <b>in practice</b>, importance of the above mentioned activity in the actual overall workload</li> <li>- publish statistics on discrimination <b>in practice</b>, importance of the above mentioned activity in the actual overall workload</li> <li>- carry out evaluations of the legal and institutional anti-discrimination framework <b>in practice</b>, importance of the above mentioned activity in the actual overall workload</li> <li>- make policy recommendations <b>in practice</b>, importance of the above mentioned activity in the actual overall workload</li> <li>- produce codes of good practice for employers <b>in practice</b>, importance of the above mentioned activity in the actual overall workload</li> </ul>	<p>Yes High: GSE, RCE, SEPE Medium: GO Yes High: GSE, RCE, SEPE Medium: GO Yes Medium: GSE, RCE, SEPE, GO Yes High: GSE, RCE Medium: SEPE Low: GO Yes High: GSE, RCE Medium: SEPE Low: GO Yes High: GSE, RCE Medium: SEPE Low: GO</p>	<p>Yes Medium Yes Medium No Yes High Yes High No</p>

Note: a) High/Medium/Low mean above average / close to average / below average, respectively.

Table 2.2 **Activities of SBs not related to individual discrimination cases:** Control and correction<sup>a</sup>

	Gender	Ethnicity
Is there a specialised body (SB) in charge of carrying out some of all of the following control and correction functions? <b>Labour Inspectorate Body</b> : Administrative body which comes directly under the Minister of Employment and Social Protection (it functions since 1.7.1999, article 6 para 2, 2639/1998, established in 1954)	Yes	No
<p>This SB has the statutory power to</p> <ul style="list-style-type: none"> <li>- randomly conduct formal investigations of companies and organisations. <b>in practice</b>, importance of the above mentioned activity in the actual overall workload</li> <li>- conduct formal investigations of companies and organisation where there is evidence of discrimination.</li> </ul>	<p>Yes High Yes</p>	

	Gender	Ethnicity
<b>in practice</b> , importance of the above mentioned activity in the actual overall workload - oblige a company or an organisation to change the way it operates when discriminatory practices are found.	High No	
<b>in practice</b> , importance of the above mentioned activity in the actual overall workload - take legal action against companies or organisations that apply discriminatory practices	Yes	
<b>in practice</b> , importance of the above mentioned activity in the actual overall workload - take legal action against organisations that attempt to promote discrimination or to instruct others to discriminate.	High Yes	
<b>in practice</b> , importance of the above mentioned activity in the actual overall workload	High	

Note: a) High/Medium/Low mean above average / close to average / below average, respectively.

Table 2.3 **Role of SBs in individual discrimination cases**

	Gender	Ethnicity
Is there a specialised body (SB) with specific functions related to individual discrimination cases?	Yes	Yes
<p>Gender: Labour Inspectorate Body (<b>SEPE</b>): Administrative body which comes directly under the Minister of Employment and Social Protection (it functions since 1.7.1999, article 6 para 2, 2639/1998, established in 1954)). An order of inspection (for both bodies) and penalties infliction (SEPE) has been established, within the framework of the application of the labour legislation.</p> <p>Ethnicity:  <ul style="list-style-type: none"> <li>Labour Inspectorate Body (<b>SEPE</b>): Administrative body which comes directly under the Minister of Employment and Social Protection. It functions since 1.7.1999 (Act 2639/1998), established in 1954.</li> <li>The Greek Ombudsman (<b>GO</b>). Independent Body operating since 1997.</li> </ul>           Act 3304/2005 defines SEPE and the Greek Ombudsman as bodies for the promotion of the principle of equal treatment.</p>		
Was this body created by anti-discrimination laws (or did anti-discrimination laws establish a specific mandate for it)?	Yes	Yes
<b>Formal linkage between equal treatment body activities and complaint lodging and procedures</b>		
Does the SB act as a one-stop shop where claimant can access information, lodge a complaint, receive advice?	Yes (SEPE only)	SEPE: yes GO: not provided by law though in practice it functions in this way
As soon as, or before, a discrimination complaint is brought to court, is the claim formally transmitted to the SB?	No	No
Discrimination complaints must be lodged with the SB beforehand, which acts as one-stop shop to start the procedure.	SEPE; yes, in many case / GO: no	No
The SB has the statutory power to provide advice and information to claimants (or both parties) on their legal rights and what options they have.	Yes	Yes (SEPE only)
<b>In practice</b> , the SB carries on the above mentioned process as soon as it receives a discrimination claim.	Yes, duty	SEPE: yes, duty GO: in many cases
The SB has the statutory power to provide claimants with legal assistance.	Yes (SEPE only)	Yes (SEPE only)
<b>In practice</b> , SB provides legal assistance to claimants during court proceedings.	No	Yes (SEPE only)
The SB has the statutory power to provide claimants with legal representation.	No	No
<b>In practice</b> , the SB provides legal representation to claimants during court proceedings.	No	No
<b>Investigation of discrimination claims</b>		
The SB has the legal authority to compel people (and in particular, the employer) to provide all of the information it requires to investigate a discrimination claim.	Yes	Yes
Does the court accept evidence from the SB?	Yes	Yes
Does the court accept the SB's evaluation of the validity of the discrimination complaint? → The court is not bound by the SB's evaluation, however.	Yes	Yes
<b>In practice</b> , the SB formally investigates discrimination claims.	Yes, duty	Yes, duty

	Gender	Ethnicity
Please indicate below the main tools the SB uses to investigate a discrimination claim:		
Any employer's failure to provide the requested information to the SB will: - have no implication for the court ruling. - potentially be used to draw inferences on discrimination if the case is brought before court.	No Yes	No Yes
Any employer's failure to comply with the code of practices issued by the SB (or other relevant body) will: - have no implication for the court ruling. - potentially be used to draw inferences on discrimination if the case is brought before court.	No Yes	No Yes
<b>Mediation/conciliation procedure</b>		
The SB has the statutory power to help both parties to resolve the dispute through a mediation/conciliation procedure.	Yes	Yes
Mediation/conciliation is a free and voluntary process for both parties. <b>In practice</b> , the SB carries out mediation/conciliation procedures, so that a court ruling may not be necessary.	Yes Yes, duty/ in many cases	Yes SEPE: yes, duty GO: in many cases
The mediation/conciliation procedure is <b>usually</b> initiated: - before the case is brought to court - before any formal investigation starts or at an early stage of the process - after any investigation has produced primary evidence of discrimination (but before a litigation decision has been reached)	Yes GO: yes, SEPE: no Yes	Yes GO: yes, SEPE: no SEPE: yes, GO: no
The SB acts as a neutral third party assisting both opposing parties in the mediation/conciliation procedure.	Yes	Yes
The mediation/conciliation procedure is confidential: no details of the discussion taking place in its course can be repeated to court, nor are made public. The same rule applies to the terms of the settlement.	GO: yes SEPE: yes*	Yes*
*The settlement process followed by the Labour Inspectorate is confidential but the discriminated person may use the mediation conclusions in court		
If the parties, including the SB, reach settlement agreement, the latter is legally binding and the charge is dismissed.	No	No
The SB secures the enforcement of settlement agreements reached under its assistance and/or responsibility.	GO: yes, SEPE: no	No

Part 3. Statistics on mediation conciliation procedures and court cases

Table 3.1 Statistics

		Gender	Ethnicity
General statistics	<p>Total number of discrimination complaints received</p> <p>Protected population (number of persons aged 15-64 covered by the law in question)</p> <p>* Data available up to 30/9/2007  ** As far as the Ombudsman is concerned, the number of complaints filed in the Independent Body up to now is limited and, therefore, does not allow a safe drawing out of statistical data.  *** data for the first semester of 2007: workers of full and part-time employment</p>	<p>GO: 30*  SEPE: 12</p> <p>GO: 4.827,5  SEPE: 583.455***</p>	<p>Very few**</p>
Mediation/ conciliation procedures	<p>Number of received complaints treated by the SB of which:</p> <ul style="list-style-type: none"> <li>- number of complaints dismissed by the SB for no reasonable cause</li> <li>- number of unsuccessful mediations/conciliations although reasonable cause was found</li> <li>- number of successful mediations/conciliations</li> </ul> <p>Due to the fact that it's only this last year that the Greek Ombudsman assumed responsibilities on the discrimination on sexes in employment, namely from September 2006 onwards, a large number of reports are recent and are currently open and in progress. A large number of these reports have the same subject, namely the granting of parental leave to employees of the public sector. Moreover, during this time period, there have been speculations on certain cases, especially with regard to the ability and the limits of our mediation, due to restrictions provided for by Act 3488/2006. A relevant example is the mediation in cases of granting of parental leave for the raising of a child to public servants who are fathers, as well as cases concerning the protection of women employed in working relationship for a definite period or in seasonal employment, due to pregnancy or maternity, especially with regard to pay and recognition of years of service.</p> <p>Average duration of mediation/conciliation procedures  Average employee/claimant compensation under mediation/ conciliation procedures</p> <p>* Until today no relevant question has come up, in order for the Greek Ombudsman be involved in employee's compensation, in cooperation with another body, like SEPE.</p>	<p>SEPE: 12</p> <p>GO: 4  SEPE: 3</p> <p>SEPE: 9  GO:8</p>	
		<p>SEPE: 3 months  GO: 8 months  See (*)</p>	
Court procedures	<p>Number of court cases of which</p> <ul style="list-style-type: none"> <li>- number of complaints dismissed by court for default procedures (or administrative reasons)</li> <li>- number of complaints dismissed by court for no reasonable cause</li> <li>- number of cases withdrawn by the complainant(s)</li> <li>- number of court rulings with favourable outcomes for the complainant(s)</li> </ul> <p>Notes  Gender – General data from a recent jurisprudence of the Greek courts:  The actions: i) based on already existing favourable regulation on the grounds of sex, which should be considered as abolished (e.g. Allowance only for female children) [Decision 1221/2005]; ii) regarding exemption of pregnant women on leave from a benefit given by the employer voluntarily because of increased performance of the workers during a defined time period [Decision 130/2005], <b>have been dismissed.</b>  The actions: i) regarding violation of the principle of equality through separate competition publishing for each sex [Decision 1095/1998]; regarding illegal dismissal of pregnant women due to pregnancy and childbirth [Decision 37/2004] <b>have been accepted.</b></p> <p>Average duration of court procedures</p>		

## ITALY

### Part 1. Legal framework for employment discrimination

Main anti-discrimination laws:

- Legislative decree n. 198 of 2006: covering discrimination on the basis of gender.
- Legislative decree n.215 of 2003: covering discrimination on the basis of race or ethnic origin.

Also:

- Law n.300 of 1970 (Statute of workers), art. 15, making unlawful discriminatory dismissals, including on the basis of gender and ethnicity.
- Legislative decree n.286 of 1998 (Immigration law), art. 44, regulating the simplification of judicial proceedings in the case of discrimination cases on the ground of race or ethnic origin.
- Law n.125 of 1991, regulating positive actions.

Relevant courts:

- Judge on merit
- Cassation judge
- Constitutional Court.

Legal scope/definition of the (hereinafter) so-called gender and ethnic grounds:

- Gender: Sex, explicitly including: pregnancy, childbirth or related medical conditions, family responsibilities and marital status.
- Ethnicity: Race, ethnic origin.

**Table 1.1 Prohibited acts, areas of concern, coverage, legal assistance and representation**

		Gender	Ethnicity
Type of discrimination	Direct discrimination Indirect discrimination, i.e. where a provision criterion or practice is applied to all employees but puts one protected group at a particular disadvantage and cannot be shown to be a proportionate means of meeting a legitimate aim. Pressure and instruction to discriminate Harassment	Yes Yes  Yes Yes	Yes Yes  Yes Yes
Areas of concern	Hiring process Wage Type of employment contract (permanent vs. fixed term) Working time (atypical work schedule, part-time vs. full-time) Promotion Job and vocational training Transfer Redundancy and dismissal	Yes Yes Yes Yes Yes Yes Yes Yes	Yes Yes Yes Yes Yes Yes Yes Yes
Coverage	Private sector Public sector Employment agencies Trade unions (members only)	Yes Yes Yes Yes	Yes Yes Yes Yes
Legal assistance other than private lawyer	Specialised body (e.g. equal treatment body) Any relevant public utility institutions and associations Trade unions (please indicate if it is for their members only)	Yes Yes Yes	Yes Yes Yes
Legal representation other than private lawyer	Specialised body (e.g. equal treatment body) Any relevant public utility institutions and associations Trade-unions (please indicate if it is for their members only)	Yes No No	No No No

		Gender	Ethnicity
	<p>Notes:            Unions and NGOs can bring cases to courts but cannot provide legal representation in lieu of a professional lawyer.            The state provides financial assistance or free court-appointed lawyer to pursue complaint before courts where victims do not have the necessary means. Where necessary an interpreter is provided free of charge (MIPEX, 2007)            Art. 44 of the Immigration law (Legislative decree 286/1998) states that in any civil complaint concerning discrimination on the ground of race, ethnicity, nationality or religion, a simplified procedure (similar to urgent procedures) must be applied by courts. Assistance by a professional lawyer is not required for the complainant.</p>		

Table 1.2 **Burden of proof**

		Gender	Ethnicity
Burden of proof	<p>Employee/claimant            Shift of burden of proof (the employee/claimant provides facts, then the employer/respondent has to provide proofs – see below for a detailed description)</p> <p>Other important additional information/comments:            As regards gender, art.40 legislative decree 198/2006 states that if facts are established on the basis of “multiple, precise and consistent elements suited to assert the presumption of discrimination” then the burden of proving that there is no discrimination is on the respondent. The literature considers that the provision contained in the legislative decree 198/2006 (art.40) does not envisage a shift of the burden of the proof, but only a re-equilibrium between plaintiff and respondent. In practice the effective division of the burden of the proof depends on the court’s appreciation. The limited case law does not allow coming to firm conclusions on the issue.</p> <p>As regards to ethnic origin, according to the Legislative decree 215/2003 (art. 4.3), if the plaintiff submits “serious, exact and consistent factual elements” showing the existence of a direct or indirect discrimination, also on the basis of statistical data, the judge can evaluate such elements on the basis of the rules of the Civil Code (art. 2729). Essentially this implies using the standard of civil disputes (Simoni, 2007). For this reason, Italy is subject to an EC’s procedure for non implementation of the European Directive 43/2000.</p>	No Partly	Yes No
Additional information in the case of burden of proof on the claimant	<p><i>Standard of proof</i>            What is the relevant standard of proof that should be applied, as set by law or established by case law?            - Beyond a reasonable doubt (such as the typical standard for criminal cases)            - On the balance of probabilities (such as the typical standard for civil disputes)</p> <p><i>Typical/standard evidence</i> admissible in courts (or other relevant bodies), as set by law or established by case law:            Direct evidence (i.e. any written or verbal statement by the employer/respondent), <b>only</b>.            No clear legal guidance for indirect evidence (e.g. case-by-case basis only)            Statistical evidence            Situation testing</p> <p>Notes:            The collection of statistics on race is strictly regulated by privacy laws and these are therefore usually not collected by employers. In practice, although admitted, it is unlikely that complainants can easily provide statistical evidence (Simoni, 2007).</p>		No Yes  Yes True Yes No
Additional information in the case of shift of burden of proof	<p><b>Direct discrimination</b></p> <p><i>Main steps</i>            Can the main steps of the procedure be described as follows?            1. The employee/claimant has to supply prima facie evidence whereby it may be <b>presumed</b> that there has been discrimination.            2. The employer/respondent has the burden of <b>proving</b> that his/her practice is not discriminatory.</p> <p>In practice, is presumption – as opposed to stronger evidence of discrimination – sufficient to shift the burden of proof?</p>	Yes  Yes	



		Gender	Ethnicity
	<p><i>Typical/standard prima facie evidence</i> admissible in courts (or other relevant bodies), as set by law or established by case law:  Direct evidence (i.e. any written or verbal statement by the employer/respondent), <b>only</b>.  No clear legal guidance for indirect evidence (e.g. case-by-case basis only)  Statistical evidence  Situation testing</p>	Yes True Yes No	
	<p>Notes:  Facts must be established on the basis of multiple precise and consistent elements</p>		
	<p><b>Indirect discrimination</b></p> <p><i>Main steps</i>  Can the main steps of the procedure be described as follows?  1. The employee/claimant has to clearly identify and define the employment practice in question.  2. The employee/claimant has to show that the practice <b>has or may have</b> a differentiated impact on one protected group.  3. The employer/respondent has the burden of demonstrating that the policy or practice in question is job related for the position in question and consistent with business necessity.  4. If the employer/respondent satisfies this requirement, evidence can be supplied on the existence/lack of the existence of a less discriminatory practice</p>	No, see below	No, see below
	<p>If not, please specify the differences.  Only steps 1-3</p>		
	<p>In step 2 above is the term "has" more accurate than "may have"? In other words, can the potential (possible) impact of the contested employment practice be sufficient for shifting the burden of proof?</p>	Yes	Yes
	<p>Notes:  There have been very few cases to date.</p>		
	<p><i>Typical/standard prima facie evidence</i> to be provided to courts or other relevant bodies, as set by law or established by case law:  Direct evidence ( i.e. any written or verbal statement by the employer/respondent), <b>only</b>.  No clear legal guidance for indirect evidence (e.g. case-by-case basis only)  Use of a distinction criteria that appear to be intrinsically suspicious. Please specify (for example, a requirement to work full-time might be unlawful discrimination against women)  Statistical evidence</p>	No True No Yes	No True No Yes
	<p><b>Harassment</b>  Analysed on a case-by-case basis, by looking at all the circumstances and the context.</p>	Yes	Yes

Table 1.3 Employee compensation and employer penalties

		Gender	Ethnicity
Employee compensation	<p><b>Injunctive relief/reinstatement</b>  - Always made available to the employee/claimant, but the latter can choose monetary compensation in lieu of relief/reinstatement, or  - Always made available to the employee/claimant, without alternative option, or  - Always made available to the employee/claimant, but the employer/respondent can choose monetary compensation in lieu of relief/reinstatement, or  - Never made available to the employee/claimant.</p>	No Yes No No	No Yes No No
	<p>Notes:  Injunctive relief not available in the case of discriminatory hiring</p>		
	<p><b>Monetary compensation</b>  Back pay (please indicate if there is a cap)</p>	Yes	Yes
	<p>Reimbursement of lawyer's and attorney's fees and costs</p>	No	No

		Gender	Ethnicity
	In lieu of relief/reinstatement, compensation for future lost earnings (e.g., in case of dismissal, this may correspond to lost earnings until the employee finds a new job): → Yes, when injunctive relief proves impossible (e.g. hiring)	Yes, see note	Yes, see note
	Compensation for psychological injury:	Yes	Yes
	Notes: Rules to be applied for compensations are the same as for any other civil dispute.		
Employer additional penalties and obligations	<b>Civil provisions</b> None Court may order the publicity of the decision - Within the firm (e.g. notices to all employees addressing the violations of a specific charge and advising them of their rights under the laws) - Outside the firm (please indicate: media, trade-unions, etc.) The employer may be required to take corrective or preventive actions to cure the source of the identified discrimination  Other: Art. 41 of the Legislative decree n. 198 of 2006 implies the withdrawal of any public benefit or public contracts in serious cases of discrimination and the exclusion from any public competition in the subsequent two years in the case of repetition of discriminatory acts (never applied to date)  Notes: According to the legislative decree n.215 of 2003, the judge can order the publicity of the sentence (par.4 and par.5) paid by the respondent, once only, on a national newspaper.	false Yes No  Yes Yes  Yes	false Yes No  Yes Yes  No
	<b>Penal provisions</b> None Fine (please specify amounts) Prison sentence (please specify lengths, whether it applies only in specific cases and in which cases)  Other: The non-respect of court judgements or interim acts from the court (such as the provisional suspension of the employer's action that can be presumed to be discriminatory) is a criminal offence and entails prison sentence of a maximum of three months (Art. 650 of the Penal Code)  Notes: The amount of fines is between 103 and 516 Eur	False Yes No  Yes	False No No  Yes

Table 1.4 **Protection against victimisation (retaliation)**

		Gender	Ethnicity
Protected actions	It is prohibited to treat the employee/protected person less favourably (so-called "adverse action") because s/he has (so-called "protected action"): - brought proceedings against discrimination  - given evidence or information in connection with any proceedings against discrimination. - participated as a witness in any proceedings against discrimination  Notes: Victimisation is mentioned only in Legislative decree n. 215 of 2003 (art. 4.5) as a parameter to evaluate the amount of damage.	No  No  No	Subject to judicial interpretation No No
Proof of causal connexion	<i>Burden of proof:</i> - i) employee/protected person		Yes

		Gender	Ethnicity
	- ii) employer/respondent within a given lapse of time from the concerned event. Please specify conditions of application and lapse of time. - iii) shift of burden of proof. Please specify main steps		No No
Employee compensation and employer penalty	Compared to provisions described in Table 1.3: - additional employee/protected person compensation → See notes above - additional employer/respondent penalties → See notes above		

Table 1.5 Relationship with standard labour laws

		Gender	Ethnicity
Labour law and discrimination	According to standard labour law(s) or code, would dismissal solely based on gender or ethnicity considered to be unjust dismissal? If yes, please specify since when.  Is there a provision requiring equal pay for work of equal value in standard labour law(s) or code? If yes, please specify since when.	Yes, 1963  Yes, since the '60s	Yes, 1963  Yes, since the '60s
Complaints	Are discrimination complaints concerning dismissals more often lodged under standard labour law(s) or code, than under specific anti-discrimination laws?  Are discrimination complaints concerning pay more often lodged under standard labour law(s) or code, than under specific anti-discrimination laws?	Yes  Yes	Yes  No
Evaluations	Existing evaluations/studies on the effectiveness of anti-discrimination laws with respect to standard labour law(s): → At the moment not available.		

Table 1.6 Positive action

		Gender	Ethnicity
Compulsory actions	Are employers <b>required</b> by law to take actions to increase diversity/prevent discrimination?  If yes, what actions are required? - make regular public reports on employment composition in terms of gender or ethnicity - process only anonymous job applications - obligation for large employers to have a person in the HRM department in charge of the employer's anti-discrimination policy - quotas	Yes  Yes Yes Yes  No	No  No No No  No
Voluntary actions	Are employers <b>allowed</b> to take actions to increase diversity/prevent discrimination?  If yes, what actions are allowed? - make regular public reports on employment composition in terms of gender or ethnicity - establish a plan to ensure that the employment composition in terms of gender or ethnicity is balanced - quotas	Yes  Yes Yes  Yes	No  No No  No
Public employers' practices	Do public employers normally take actions to increase diversity/prevent discrimination?  If yes, what actions? - make regular public reports on employment composition in terms of gender or ethnicity - establish a plan to ensure that the employment composition in terms of gender or ethnicity is balanced - process only anonymous job applications	Yes  Yes Yes  Yes	No  No No  No

		<b>Gender</b>	<b>Ethnicity</b>
	<ul style="list-style-type: none"> <li>- have at least one person in the HRM department in charge of the employer's anti-discrimination policy</li> <li>- quotas</li> </ul>	Yes	No
	<p>Notes:</p> <p>Obligation of female presence in recruitment committees.</p>	Yes	No
Incentives	<p>Is there a policy to increase incentives for employers to increase diversity/prevent discrimination?</p> <p>Policy instruments used:</p> <ul style="list-style-type: none"> <li>- Delivery of "labels" or certificates stating that the employer has a diversity-friendly business/employment practice.</li> <li>- financial incentives to establish a plan to ensure that the employment composition in terms of gender or ethnicity is balanced</li> <li>- financial incentives for having a person in the HRM department in charge of the employer's anti-discrimination policy and/or hiring a consultant to establish a diversity plan.</li> <li>- financial incentives for quotas (please specify the areas: e.g executives)</li> </ul>	Yes	No
	<p>Other (or any important additional information/comments):</p> <p>The Law 125 of 1991 establish that firms can ask public subsidies for specific projects aimed at gender mainstreaming. In practice, this provision is still under testing.</p>	No	No

**Part 2. Institutional framework: specialised bodies (SB) combating discrimination (e.g. equal treatment bodies)**

Table 2.1 **Activities of SBs not related to individual discrimination cases: Public information and evaluation**<sup>a</sup>

	Gender	Ethnicity
Is there a specialised body (SB) in charge of carrying out some of all of the following public information and policy evaluation functions?  Ethnicity: Department for Rights and Equal Opportunities of the Presidency of the Council of Ministers since 1997 and since 2004 the National Office against racial discrimination (UNAR); not independent from the government (Simoni, 2007)  Gender: since 2000, national, regional and local network of Equality Advisors , independent (before that date: Department for Rights and Equal Opportunities of the Presidency of the Council of Ministers since 1997, not independent)	Yes	Yes
This SB has the statutory power to: - run information campaigns to inform the public of their legal rights <b>in practice</b> , importance of the above mentioned activity in the actual overall workload of the SB - run campaigns to change public opinion <b>in practice</b> , importance of the above mentioned activity in the actual overall workload of the SB - publish statistics on discrimination - carry out evaluations of the legal and institutional anti-discrimination framework <b>in practice</b> , importance of the above mentioned activity in the actual overall workload of the SB - make policy recommendations <b>in practice</b> , importance of the above mentioned activity in the actual overall workload of the SB - produce codes of good practice for employers	Yes High Yes High No Yes High Yes High No	Yes High Yes High No Yes High Yes High No

Note: a) High/Medium/Low mean above average / close to average / below average, respectively.

Table 2.2 **Activities of SBs not related to individual discrimination cases: Control and correction**<sup>a</sup>

	Gender	Ethnicity
Is there a specialised body (SB) in charge of carrying out some of all of the following control and correction functions?  Ethnicity: Department for Rights and Equal Opportunities of the Presidency of the Council of Ministers since 1997 and since 2004 the National Office against racial discrimination (UNAR); not independent from the government (Simoni, 2007)  Gender: since 2000, national, regional and local network of Equality Advisors , independent (before that date: Department for Rights and Equal Opportunities of the Presidency of the Council of Ministers since 1997, not independent)	Yes	Yes
This SB has the statutory power to - randomly conduct formal investigations of companies and organisations. - conduct formal investigations of companies and organisation where there is evidence of discrimination. - oblige a company or an organisation to change the way it operates when discriminatory practices are found. <b>in practice</b> , importance of the above mentioned activity in the actual overall workload of the SB - take legal action against companies or organisations that apply discriminatory practices <b>in practice</b> , importance of the above mentioned activity in the actual overall workload of the SB - take legal action against organisations that attempt to promote discrimination or to instruct others to discriminate. <b>in practice</b> , importance of the above mentioned activity in the actual overall workload of the SB	No No Yes Low Yes Low Yes Low	No No No Yes Low Yes Low
Other (or any important additional information/comments):		

Note: a) High/Medium/Low mean above average / close to average / below average, respectively.

Table 2.3 Role of SBs in individual discrimination cases

	Gender	Ethnicity
Is there a specialised body (SB) with specific functions related to individual discrimination cases?	Yes	Yes
Name of the SB, date of start of activity and status (e.g. public body or not, independent or not, etc...) Gender: National, regional and local network of Equality Advisors ( <i>Consigliere delle Pari Opportunità</i> , since 2000), independent.  Ethnicity: National Office against racial discrimination (UNAR) (since 2004), <i>de jure</i> not independent from the government (Simoni, 2007), although, in practice, there is no evidence of government interference with its operations.		
Was this body created by anti-discrimination laws (or did anti-discrimination laws establish a specific mandate for it)?	Yes	Yes
<b>Formal linkage between SB activities and court procedures</b>		
Does the SB act as a one-stop shop where claimant can access information, lodge a complaint, receive advice?	No	No
As soon as a discrimination complaint is brought to court, is the claim formally transmitted to the SB?	Yes	No
Discrimination complaints must be lodged with the SB beforehand, which acts as one-stop shop to start the procedure.	No	No
The SB has the statutory power to provide advice and information to claimants (or both parties) on their legal rights and what options they have.	Yes, duty	Yes, duty
<b>In practice</b> , the SB carries on the above mentioned process as soon as it receives a discrimination claim.	Yes, duty	Yes, duty
The SB has the statutory power to provide claimants with legal assistance.	Yes	Yes
<b>In practice</b> , SB provides legal assistance to claimants during court proceedings.	Yes, duty	Yes, duty
The SB has the statutory power to provide claimants with legal representation.	Yes	No
Notes: Art. 44 of the Immigration law (Legislative decree 286/1998) states that in any civil complaint concerning discrimination on the ground of race, ethnicity, nationality or religion, a simplified procedure (similar to urgent procedures) must be applied by courts. Assistance by a professional lawyer is not required for the complainant. In addition, as regards ethnicity, UNAR subsidises professional association that assists plaintiff at no charge (Presidenza del Consiglio dei Ministri, 2006)		
<b>Investigation of discrimination claims</b>		
The SB has the legal authority to compel people (and in particular, the employer) to provide all of the information it requires to investigate a discrimination claim.	No	No
Does the court accept evidence from the SB?.	No	Yes
Does the court accept the SB's evaluation of the validity of the discrimination complaint?	No	No
<b>In practice</b> , the SB formally investigates discrimination claims.	No	Yes
Any employer's failure to provide the requested information to the SB will: - have no implication for the court ruling. - potentially be used to draw inferences on discrimination if the case is brought before court.	- -	No No
Notes: Although judges are not obliged to take into account UNAR's evaluations, these can be produced in courts and considered in the final decision.		
<b>Mediation/conciliation procedure</b>		
The SB has the statutory power to help both parties to resolve the dispute through a mediation/conciliation procedure.	Yes	Yes
Mediation/conciliation is a free and voluntary process for both parties.	Yes	Yes
<b>In practice</b> , the SB carries out mediation/conciliation procedures, so that a court ruling may not be necessary.	Information not available	Yes, very often
The mediation/conciliation procedure is <b>usually</b> initiated: - before the case is brought to court - before any formal investigation starts or at an early stage of the process	Yes -	Yes

	<b>Gender</b>	<b>Ethnicity</b>
- after any investigation has produced primary evidence of discrimination (but before a litigation decision has been reached)	-	
<p>Other (or any important additional information/comments)</p> <p>Mediation is regulated by the Code for Civil Proceedings (Codice di Procedura Civile) and by the corresponding law for disputes with public sector employers. Although, in the case of gender discrimination there is no requirement that the Equality Advisor acts as a mediator, he/she can be requested to do so by the complainant.</p> <p>The same procedure is available in all labour and civil disputes including discrimination by ethnic origin. Usually, there is a strong involvement of the UNAR. Settlement agreements are in any case legally binding. Their non-respect can be considered as a criminal offence (see above, Table 1.3)</p>		
The SB acts as a neutral third party assisting both opposing parties in the mediation/conciliation procedure.	Yes	Yes
The mediation/conciliation procedure is confidential: no details of the discussion taking place in its course can be repeated to court, nor are made public. The same rule applies to the terms of the settlement.	Partly	Partly
If the parties, including the SB, reach settlement agreement, the latter is legally binding and the charge is dismissed.	Yes	Yes
The SB secures the enforcement of settlement agreements reached under its assistance and/or responsibility.	No	No

### Part 3. Statistics on mediation/conciliation procedures and court cases

→ No statistics on discrimination claims on the basis of gender is available.

Table 3.1 **Statistics**

		<b>Ethnicity</b>
General statistics	Total number of discrimination complaints received Protected population (number of persons aged 15-64 covered by the law in question)	Courts' statistics not available Not available
Mediation/ conciliation procedures	Number of received complaints treated by the SB in 2006 (Presidenza del Consiglio dei Ministri, 2006) <i>of which:</i> - number of complaints dismissed by the SB for no reasonable cause - number of unsuccessful mediations/conciliations although reasonable cause was found - number of successful mediations/conciliations  Notes: Figures concern all types of discrimination claims on the ground of race or ethnic origin. Of the 218 complaints for which reasonable cause was found, 69 concerned labour market discrimination. A very large majority of these disputes is solved by mediation (Presidenza del Consiglio dei Ministri, 2006).	351  133 Not available Not available
	Average duration of mediation/conciliation procedures	Not available
	Average employee/claimant compensation under mediation/ conciliation procedures	Not available
Court procedures	Average duration of court procedures (according to MIPEX, 2007) No other statistics available	More than 1 year

#### Main additional references

**MIPEX (2007)**, *Migrant Integration Policy Index* – Full Result Table, British Council and Migration Policy Group, Brussels  
<http://www.integrationindex.eu/multiattachments/2704.html>

**Presidenza del Consiglio dei Ministri (2006)**, *Un anno di attività contro la discriminazione razziale:Rapporto 2006*, Dipartimento Pari Opportunità, Roma.

**Simoni, A. (2007)**, *Report on Measures to Combat Discrimination* – Country Report: Italy, European Commission  
[http://www.ec.europa.eu/employment\\_social/fundamental\\_rights/pdf/legnet/itrep07\\_en.pdf](http://www.ec.europa.eu/employment_social/fundamental_rights/pdf/legnet/itrep07_en.pdf)



## JAPAN

### Part 1. Legal framework for employment discrimination

Main anti-discrimination laws:

Gender:

- The Equal Employment Opportunity Law (EEOL). Implementation date: 1 April 1986; dates of first amendment: 1 April 1999; dates of second amendment: 1 April 2007.
- Article 4 of the Labour Standards Law (equal wages between men and women).

Ethnicity:

no specific domestic law. Art. 14 of the Constitution provides that "all of the people are equal under the law and there shall be no discrimination in political economic or social relations because of race, creed, sex, social status or family origin". (Sources: CERD, 2001, para.10; Economic and Social Council of the United Nations, 2006, para.11). Some anti-discrimination provisions are included in some Acts (e.g. National Public Service Act, Labour Union Act, Employment Security Act), but do not form a unified and comprehensive framework.

As a consequence, most of the questions asked within the framework of this questionnaire are not relevant for, or not applicable to, discrimination against ethnic or racial minorities.

Relevant courts and others bodies:

- Civil Courts (District Courts)
- As regards conciliation procedures: Disputes Adjustment Commissions (directors of each Prefectural Labour Office refer conciliation to the Commissions).

Legal scope/definition of the (hereinafter) so-called gender and ethnicity grounds

- Gender: equal opportunity and treatment between men and women, and prohibition of detrimental treatment due to pregnancy and childbirth.
- Ethnicity: race.

**Table 1.1 Prohibited acts, areas of concern, coverage, legal assistance and representation**

		<b>Gender</b>	<b>Ethnicity</b>
Type of discrimination	<p>Direct discrimination</p> <p>Indirect discrimination, i.e. where a provision criterion or practice is applied to all employees but puts one protected group at a particular disadvantage and cannot be shown to be a proportionate means of meeting a legitimate aim.</p> <p>Pressure and instruction to discriminate</p> <p>Harassment</p> <p>Notes:</p> <p>* The 2007 amendment of the EEOL introduced the concept of indirect discrimination in the law. However, after the passage of the revised EEOL, the Ministry of Health, Labor and Welfare issued an ordinance stipulating that the prohibition of indirect discrimination should apply only to the following three cases, when there is no legitimate reason to take such measures (Art. 2 of the EEOL Enforcement Regulations): (i) applying a criterion concerning body height, weight or physical capacity when recruiting or hiring workers, (ii) in case the employer adopts dual career ladder system, requiring workers to be able to accept future transfers with a change of residence when recruiting or hiring workers for main positions of the core career course, and (iii) requiring workers to have experiences of job relocation when deciding their promotion. These applicable criteria are to be reviewed from time to time on the basis of the trend of court cases and other developments, and new criteria pertaining to indirect discrimination may be added when the Ordinance is revised in the future. Furthermore, if a civil lawsuit pertaining to such a criterion is filed, a bold judge may decide it to be indirect discrimination even under the</p>	<p>Yes</p> <p>Yes, but see notes</p> <p>No</p> <p>Yes</p>	<p>Not applicable</p>

		Gender	Ethnicity
	current law, either by interpreting the EEOL widely or by relying on Article 90 of Civil Code. Finally, wage discrimination between male and female workers is subject to Article 4 of the LSA. The act has not been revised and there is no special provision for indirect discrimination. (source: Nakakubo, 2007, pp. 15-17)		
Areas of concern	Hiring process Wage Type of employment contract (permanent vs. fixed term) Working time (atypical work schedule, part-time vs. full-time) Promotion Job and vocational training Transfer Redundancy and dismissal	Yes Yes Yes Yes Yes Yes Yes Yes	Not applicable
Coverage	Private sector Public sector Employment agencies  Trade unions (as regards membership)  Notes: * Public sector is covered by the National Public Service Act, which includes a general principle of equal treatment (Art. 27: "In the application of this Act, all citizens shall be accorded equal treatment and shall not be discriminated against by reason of race, religious faith, sex, social status, family origin, or political opinions or affiliation"). ** Art. 5, Para. 2(iv) of the Labour Union Act: "no one shall be disqualified from union membership in any case on the basis of race, religion, gender, family origin or status".	Yes No, see (*) Information not available Yes, see (**)	
Legal assistance other than private lawyer	Specialised body → The Equal Employment Office of the Prefectural Labour Bureau offers <b>advice and guidance</b> . Any relevant public utility institutions and associations Trade unions (please indicate if it is for their members only)	Yes  No Information not available	Not applicable
Legal representation other than private lawyer	Specialised body (e.g. equal treatment body) Any relevant public utility institutions and associations Trade-unions (please indicate if it is for their members only)	No No Information not available	Not applicable

Table 1.2 **Burden of proof before the courts**

		Gender	Ethnicity
Burden of proof	Employee/claimant  Shift of burden of proof (the employee/claimant provides facts –as opposed to proofs–, then the employer/respondent has to provide proofs)  Notes: The EEOL mainly involves employers' responsibility or government responsibility, and is not centred on court proceedings. For example, the mediation procedure set by the EEOL basically aims at the settlement of the disputes through the mutual concession of the parties concerned. This is different from civil cases, therefore, and the burden of proof does not matter. In the event of an individual worker lodging a discrimination claim against his/her employer before a court, the EEOL does not contain any general provisions as regards the burden of proof. The latter thus rests on the claimant, as in normal civil law procedures. However, Art. 9, Para. 4 of the EEOL provides that dismissal of women workers who are pregnant or in the first year after childbirth shall be void unless the employers prove that reason of dismissal is not from pregnancy or childbirth. In this particular case, the burden of proof thus rests on the employer."	Yes, but see notes below No, but see notes below	Not applicable

		Gender	Ethnicity
Additional information in the case of burden of proof on the claimant	<p><b>Standard of proof</b> What is the relevant standard of proof that should be applied, as set by law or established by case law?</p> <ul style="list-style-type: none"> <li>- Beyond a reasonable doubt (such as the typical standard for criminal cases)</li> <li>- On the balance of probabilities (such as the typical standard for civil disputes)</li> </ul> <p><i>Typical/standard evidence</i> admissible in courts (or other relevant bodies), as set by law or established by case law: Direct evidence (i.e. any written or verbal statement by the employer/respondent), <b>only</b>. No clear legal guidance for indirect evidence (e.g. case-by-case basis only) Statistical evidence Situation testing</p>	<p>No Yes, but see notes above</p> <p>Information not available</p>	Not applicable
Additional information in the case of shift of burden of proof	<p><b>Direct discrimination</b></p> <p><i>Main steps</i> Can the main steps of the procedure be described as follows?</p> <ol style="list-style-type: none"> <li>1. The employee/claimant has to supply prima facie evidence whereby it may be <b>presumed</b> that there has been discrimination.</li> <li>2. The employer/respondent has the burden of <b>proving</b> that his/her practice is not discriminatory.</li> </ol> <p>In practice, is presumption – as opposed to stronger evidence of discrimination – sufficient to shift the burden of proof?</p> <p><i>Typical/standard prima facie evidence</i> admissible in courts (or other relevant bodies), as set by law or established by case law: Direct evidence (i.e. any written or verbal statement by the employer/respondent), <b>only</b>. No clear legal guidance for indirect evidence (e.g. case-by-case basis only) Statistical evidence Situation testing</p> <p><b>Indirect discrimination</b></p> <p>Note: The prohibition of indirect discrimination applies only to the following three cases (Art. 2 of the EEOL Enforcement Regulations): (i) applying a criterion concerning body height, weight or physical capacity when recruiting or hiring workers, (ii) in case the employer adopts dual career ladder system, requiring workers to be able to accept future transfers with a change of residence when recruiting or hiring workers for main positions of the core career course, and (iii) requiring workers to have experiences of job relocation when deciding their promotion. (source: Nakakubo, 2007, pp. 15-17)</p> <p><i>Main steps</i> Can the main steps of the procedure be described as follows?</p> <ol style="list-style-type: none"> <li>1. The employee/claimant has to clearly identify and define the employment practice in question.</li> <li>2. The employee/claimant has to show that the practice <b>has or may have</b> a differentiated impact on one protected group.</li> <li>3. The employer/respondent has the burden of demonstrating that the policy or practice in question is job related for the position in question and consistent with business necessity.</li> <li>4. If the employer/respondent satisfies this requirement, evidence can be supplied on the existence/lack of the existence of a less discriminatory practice</li> </ol> <p>In step 2 above is the term "has" more accurate than "may have"? In other words, can the potential (possible) impact of the contested employment practice be sufficient for shifting the burden of proof?</p> <p>In step 4 above, if the employer/respondent demonstrates that a practice is consistent with business necessity, then:</p> <ul style="list-style-type: none"> <li>- does it fall to the employee/claimant to demonstrate that a less discriminatory alternative exists that meets the business need but that the employer refuses to adopt it? <b>Or</b></li> <li>- does it fall to the employer/respondent to demonstrate that a less discriminatory alternative that meets the business need does not exist?</li> </ul>	<p>Not applicable</p> <p>Information not available</p> <p>Not applicable</p>	<p>Not applicable</p> <p>Not applicable</p> <p>Not applicable</p>

		Gender	Ethnicity
	<p><i>Typical/standard prima facie evidence</i> to be provided to courts or other relevant bodies, as set by law or established by case law:  Direct evidence (i.e. any written or verbal statement by the employer/respondent), <b>only</b>.  No clear legal guidance for indirect evidence (e.g. case-by-case basis only)  Use of a distinction criteria that appear to be intrinsically suspicious. Please specify (for example, a requirement to work full-time might be unlawful discrimination against women)  Statistical evidence</p> <p><b>Harassment</b>  Analysed on a case-by-case basis, by looking at all the circumstances and the context.</p>	<p>Information not available</p> <p>Information not available</p>	<p>Not applicable</p>

Table 1.3 **Employee compensation and employer penalties available before the courts**

		Gender	Ethnicity
Employee compensation	<p><b>Injunctive relief/reinstatement</b>  - Always made available to the employee/claimant, but the latter can choose monetary compensation in lieu of relief/reinstatement, or  - Always made available to the employee/claimant, without alternative option, or</p> <p>- Always made available to the employee/claimant, but the employer/respondent can choose monetary compensation in lieu of relief/reinstatement, or  - Never made available to the employee/claimant.</p> <p><b>Note:</b>  Set on a case-by-case basis. The EEOL does not contain any general nor specific provisions as regards reinstatement, monetary compensations or other remedies, except in the following case: according to Art. 9, Para. 4 of the EEOL, dismissal of women workers who are pregnant or in the first year after childbirth shall be void unless the employers prove that reason of dismissal is not from pregnancy or childbirth.</p> <p><b>Monetary compensation</b>  Back pay (please indicate if there is a cap)</p> <p>Reimbursement of lawyer's and attorney's fees and costs</p> <p>In lieu of relief/reinstatement, compensation for future lost earnings (e.g., in case of dismissal, this may correspond to lost earnings until the employee finds a new job):  - Floor or minimum (amount): .....  - Cap or maximum (amount): .....  - Average compensation (amount): .....  - Median compensation (amount): .....</p> <p>Compensation for psychological injury:  - Floor or minimum (amount): .....  - Cap or maximum (amount): .....  - Average compensation (amount): .....  - Median compensation (amount): .....</p> <p><b>Notes:</b>  Not specified nor mentioned in the EEOL. Set on a case-by-case basis. Compensatory payments can be substantial, however.</p> <p><b>Some examples of court cases</b> (Source: Barrett, 2004)  In July 1999, a 56-year old woman, won <b>30 million Yen</b> after a judge found that her company failed to treat her as equal to her male co-workers. The judge upheld her claim that the company where she worked for thirty years violated her right to equal pay under the 1997 EEOL. Her lawyers successfully rebutted the company's argument that her lower pay was justified on the basis of shortcomings in her work. This case represented a landmark decision for both its holding and its application of the 1997 EEOL on the issue of wage discrimination.  In the 2000, regarding a case filed in 1987 as the first case filed in the wake of the 1985</p>	<p>See note below  See note below  See note below  See note below</p> <p>Yes, but see notes below  Information not available  Yes, but see notes below</p> <p>Yes, but see notes below</p>	<p>Not applicable</p> <p>Not applicable</p>

		Gender	Ethnicity
	<p>EEOL, the Tokyo District Court recognized for the first time the prevalence of sexual discrimination in corporate promotions. Interestingly, although the company required its employees to pass a test in order to qualify for promotion, the company policy nevertheless permitted the use of personnel evaluations to take the place of objective tests. Thus, the company promotion policy allowed head officials to use their discretion to determine whom to promote. As a result, most male employees were promoted to section head positions, while female employees were not promoted at all. In 2000, the court finally ruled in favour of the thirteen female plaintiffs against their employer, the company, and mandated that the female employees be promoted to the post of section head and be given compensation for damages, including back pay. The fact that the court took fifteen years to decide this case illustrates the extremely lengthy litigation process in Japan which is a major deterrent to the litigation of sexual discrimination suits. In 2001, the Osaka District Court disallowed employers from harassing women for continuing to work after marriage. The company officials continually berated the plaintiffs' work and criticized its quality solely based on the fact that each of the plaintiffs married and continued working. <b>Judge awarded the 20 plaintiffs 90 million Yen</b> and declared that maternity leave is guaranteed by law.</p> <p>In January, 2004, after eight years of litigation, the Osaka District Court mediated a settlement. <b>The judge ordered 10 million Yen to be paid to two women</b> for sexual discrimination in the workplace. Both women were hired as clerical workers in the 1960s but were never given the same training as the men in their company and were repeatedly passed up for promotions. The judge ordered the company to promote both women on the basis that they had not been given the same opportunities or training as similarly situated men despite their equally long work history with the company.</p>		
Employer additional penalties and obligations	<p><b>Civil provisions</b> None Court may order the publicity of the decision - Within the firm (e.g. notices to all employees addressing the violations of a specific charge and advising them of their rights under the laws) - Outside the firm (please indicate: media, trade-unions, etc.)</p> <p>The employer may be required to take corrective or preventive actions to cure the source of the identified discrimination</p> <p>Notes: There is no explicit provision as regards publication of court rulings in the EEOL. However, examples of court decisions as regards discrimination cases can be found in documents written by academics, NGOs, etc. Moreover, art. 30 of the EEOL provides that, if an employer is in violation of the EEOL and the Minister of Health, Labour and Welfare has given a recommendation as regards the enforcement of this law, but the employer has not complied with this recommendation, the Minister of Health, Labour and Welfare may make a public announcement of such violation.</p> <p><b>Penal provisions</b> None Fine (please specify amounts) Prison sentence (please specify lengths, whether it applies only in specific cases and in which cases)</p> <p>Notes: Art. 119 of the Labour Standards Act: "Any person who falls under any of the following items shall be punished by <b>imprisonment with work of not more than 6 months</b> or by a <b>fine of not more than 300,000 yen</b>: (i) A person who has violated the provisions of Art.3 [equal treatment: nationality, creed or social status], Art. 4 [principle of <b>equal wage</b> between men and women], ..." The EEOL itself does not contain any penal sanctions for discriminatory acts as such. Art. 33 however provides that any person who has not made a report required by the Minister of Health, Labour and Welfare (as regards the enforcement of the EEOL) or who has made a false report shall be liable to a <b>civil fine</b> of not more than 200,000 Yen.</p>	<p>False</p> <p>Yes, in some cases Yes, in some cases</p> <p>False Yes, in some cases</p>	<p>Not applicable</p> <p>Not applicable</p>

Table 1.4 Protection against victimisation (retaliation)

		Gender	Ethnicity
Protected actions	<p>It is prohibited to treat the employee/protected person less favourably (so-called "adverse action") because s/he has (so-called "protected action"):</p> <ul style="list-style-type: none"> <li>- brought proceedings against discrimination</li> <li>- given evidence or information in connection with any proceedings against discrimination.</li> <li>- participated as a witness in any proceedings against discrimination</li> </ul> <p>Notes: Art. 17 (Assistance in the Resolution of Dispute), Para. 2 of the EEOL provides that employers shall not dismiss or give disadvantageous treatment to a worker by reason of said worker requesting the assistance in the resolution of a discrimination dispute (see Table 2.3). The same holds in case of application for conciliation procedures (Art. 18, Para. 2). However, there is no explicit provision as regards court proceedings.</p>	<p>Partly</p> <p>No</p> <p>No</p>	Not applicable
Proof of causal connexion	<p><i>Burden of proof:</i></p> <ul style="list-style-type: none"> <li>- i) employee/protected person</li> <li>- ii) employer/respondent within a given lapse of time from the concerned event. Please specify conditions of application and lapse of time.</li> <li>- iii) shift of burden of proof. Please specify main steps.</li> </ul> <p>In cases (i) and (iii), when the causal connexion shall be first shown or established by the employee/protected person:</p> <ul style="list-style-type: none"> <li>- the link can be demonstrated by evidence that the adverse action occurred shortly after the protected activity (and the employer/respondent was aware of the complainant's protected activity before taking the action), so that the employment relationship is implicitly or explicitly (please specify) protected during a certain period of time (please specify)</li> </ul> <p>Notes: The EEOL does not contain any general provisions as regards the burden of proof. The latter thus rests on the claimant, as in normal civil law procedures. Moreover, adverse treatment caused by workers' asking for assistance in the resolution of disputes is <b>not covered by the assistance</b> in the resolution of disputes based on the EEOL.</p>	<p>Yes</p> <p>Information not available</p>	Not applicable
Employee compensation and employer penalty	<p>Compared to provisions described in Table 1.3:</p> <p>Additional employee/protected person compensation</p> <p>Additional employer/respondent penalties</p>	<p>..</p> <p>..</p>	

Table 1.5 Relationship with standard labour laws

		Gender	Ethnicity
Labour law and discrimination	<p>According to standard labour law(s) or code, would dismissal solely based on gender or ethnicity considered to be unjust dismissal? If yes, please specify since when.</p> <p>Since 1947, when the Labour Standards Law was established, article 3 of this law has prohibited discriminating wage, labour hours and condition of work (including dismissal) for the reason of nationality, faith and social status of workers.</p> <p>Is there a provision requiring equal pay for work of equal value in standard labour law(s) or code? If yes, please specify since when.</p> <p>Since 1947, when the labour standards law was established, article 4 of this law has prohibited discriminating wage for the reason of the worker is female.</p> <p>Other areas of discrimination covered by standard labour law(s) or code (hiring, promotion, etc...); please specify</p>	<p>No</p> <p>Yes</p> <p>Information not available</p>	<p>Nationality only</p> <p>Nationality only</p>

		Gender	Ethnicity
Complaints	<p>Are discrimination complaints concerning dismissals more often lodged under standard labour law(s) or code, than under specific anti-discrimination laws?</p> <p>Are discrimination complaints concerning pay more often lodged under standard labour law(s) or code, than under specific anti-discrimination laws?</p>	Information not available	Not applicable
Evaluations	Please indicate below references to existing evaluations/studies on the effectiveness of anti-discrimination laws with respect to standard labour law(s): The Study Group Report on the Issue of Wage Disparity between men and Women (Nov. 2002).		

Table 1.6 **Positive action**

		Gender	Ethnicity
Compulsory actions	<p>Are employers <b>required</b> by law to take actions to increase diversity/prevent discrimination?</p> <p>If yes, what actions are required?</p> <ul style="list-style-type: none"> <li>- make regular public reports on employment composition in terms of gender or ethnicity</li> <li>- process only anonymous job applications</li> <li>- obligation for large employers to have a person in the HRM department in charge of the employer's anti-discrimination policy (please specify the size threshold of application, if any)</li> <li>- quotas (please specify the areas: e.g. executives in firms above a certain size)</li> </ul>	No	Not applicable
Voluntary actions	<p>Are employers <b>allowed</b> to take actions to increase diversity/prevent discrimination?</p> <p>If yes, what actions are allowed?</p> <ul style="list-style-type: none"> <li>- make regular public reports on employment composition in terms of gender or ethnicity</li> <li>- establish a plan to ensure that the employment composition in terms of gender or ethnicity is balanced</li> <li>- quotas (please specify the areas: e.g. executives)</li> </ul> <p>Notes: Quotas are allowed when the number of female workers is below 40% of the total workers in a given employment management sector</p>	<p>Yes</p> <p>Yes</p> <p>Yes</p>	Not applicable
Public employers' practices	<p>Do public employers normally take actions to increase diversity/prevent discrimination?</p> <p>Article 27 of the National Public Service Act stipulates that :“In the application of this Act, all citizens shall be accorded equal treatment and shall not be discriminated against by reason of race, religious faith, sex, social status, family origin, or political opinions or affiliation except as provided for in item 5 of Article 38.”</p> <p>If yes, what actions?</p> <ul style="list-style-type: none"> <li>- make regular public reports on employment composition in terms of gender or ethnicity</li> <li>- establish a plan to ensure that the employment composition in terms of gender or ethnicity is balanced</li> <li>- process only anonymous job applications (with sex and/or ethnic origin not mentioned in the application form)</li> <li>- have at least one person in the HRM department in charge of the employer's anti-discrimination policy</li> <li>- quotas (please specify the areas: e.g. high-rank officials)</li> </ul> <p>Notes: * In May 2001, the National Personnel Authority (NPA) formulated the “Guidelines concerning the Enlargement of the Recruitment and Promotion of Female National Public Employees”, under a framework based on the principles of equal treatment and merit-based evaluations stipulated by the National Public Service Act. On December 20, 2005 the NPA revised the Guidelines and incorporated items related to active efforts to encourage the expansion of promotion in particular. The NPA decided its objectives for the ratio of women constituting successful applicants to the recruitment examinations in</p>	<p>Yes</p> <p>Yes</p> <p>Yes*</p> <p>No**</p> <p>Yes</p> <p>No, numerical targets only</p>	<p>Yes</p> <p>No</p> <p>No</p> <p>Yes</p> <p>Yes</p> <p>No</p>

		Gender	Ethnicity
	<p>December 2005. The aim is to achieve 30% for the clerical categories (administration, law, and economy) of the Level I Examination and 40% for the administrative categories of the Level II Examination by FY2010. In 2006, pursuant to the revised Guidelines, each Office and Ministry formulated a "Plan to Enlarge the Recruitment and Promotion of Female Employees" which sets objectives to be achieved by FY2010. And all Office and Ministries as a whole are comprehensively and systematically facilitating efforts toward enlarging the recruitment and promotion of female public employees based upon the Guidelines.</p> <p>** There is a gender column on the Recruitment Examination application. However, recruitment is based on examination results.</p>		
Incentives	<p>Is there a policy to increase incentives for employers to increase diversity/prevent discrimination?</p> <p>Policy instruments used:  - Delivery of "labels" or certificates stating that the employer has a diversity-friendly business/employment practice.  Since 1999, the Ministry of Health, Labour and Welfare has commended enterprises which have taken positive actions to encourage female workers to exercise their abilities and have made these enterprises' action widely known. There are two categories, the Award from the Ministry of Health, Labour and Welfare (Best company award and Excellent company award) and the Award from the Director-General of the Prefectural Bureau (Excellent firm award and incentive award). (Gender Equality Bureau, 2007, p.38)</p> <p>- financial incentives to establish a plan to ensure that the employment composition in terms of gender or ethnicity is balanced  - financial incentives for having a person in the HRM department in charge of the employer's anti-discrimination policy and/or hiring a consultant to establish a diversity plan  - financial incentives for quotas (please specify the areas: e.g. executives)  - other</p> <p><b>Counselling and other assistance are implemented to promote positive action:</b>  Art. 14 of the EEOL: "In cases where employers take or seek to take any of the following measures for the purpose of improving the circumstances preventing the securing of equal opportunity and treatment between men and women in employment, the State may provide consultation services and other assistance to said employers in order to promote the securing of equal opportunity and treatment between men and women in employment.  (i) Analysis of the assignments and other employment-related circumstances of the employers' workers; (ii) Preparation, based on the analysis referred to in the preceding item, of plans concerning measures necessary in improving circumstances that prevent the securing of equal opportunity and treatment between men and women in employment; (iii) Implementation of the measures provided for in the plans referred to in the preceding item; (iv) Establishment of the system necessary to implement the measures referred to in the preceding three items; and (v) Disclosure of the implementation of measures referred to in the preceding items."  <b>Numerical target set by the Government as regards positive actions:</b>  The ratio of companies engaged in positive action will be raised to 40% by FY2009, compared with 29.5% in FY2003 (Gender Equality Bureau, 2007, p.20).</p>	<p>Yes</p> <p>Yes</p> <p>No</p> <p>No</p> <p>No  Yes, see below</p>	<p>Not applicable</p>



**Part 2. Institutional framework: specialised bodies (SB) combating discrimination (e.g. equal treatment bodies)**

Table 2.1 **Activities of SBs not related to individual discrimination cases:** Public information and evaluation<sup>a</sup>

	Gender	Ethnicity
<p>Is there a specialised body (SB) in charge of carrying out some of all of the following public information and policy evaluation functions?</p> <ul style="list-style-type: none"> <li>• The Equal Employment Office of the Prefectural Labour Bureau, Ministry of Health, Labour and Welfare (Governmental organism)</li> <li>• Section meeting for equal Employment Opportunity, Board of labour policy.</li> </ul>	Yes*	No
<p>This SB has the statutory power to:</p> <ul style="list-style-type: none"> <li>- run information campaigns to inform the public of their legal rights</li> <li><b>in practice</b>, importance of the above mentioned activity in the actual overall workload</li> <li>- run campaigns to change public opinion</li> <li><b>in practice</b>, importance of the above mentioned activity in the actual overall workload</li> <li>- publish statistics on discrimination</li> <li><b>in practice</b>, importance of the above mentioned activity in the actual overall workload</li> <li>- carry out evaluations of the legal and institutional anti-discrimination framework</li> <li><b>in practice</b>, importance of the above mentioned activity in the actual overall workload</li> <li>- make policy recommendations</li> <li><b>in practice</b>, importance of the above mentioned activity in the actual overall workload</li> <li>- produce codes of good practice for employers</li> <li><b>in practice</b>, importance of the above mentioned activity in the actual overall workload</li> </ul>	<p>Yes High Yes High Yes High Yes High Yes High Yes High</p>	
<p>Notes:</p> <p>Art. 3 of the EEOL (Enlightenment Activities): "The national government and local government shall conduct the necessary enlightenment activities to increase public interest and understanding with regard to the securing, etc. of equal opportunity and treatment between men and women in employment, and especially to remove the various factors preventing the securing of equal opportunity and treatment between men and women in employment."</p> <p>Art. 4 of the EEOL (Basic Policy on Measures for Equal Employment Opportunities for Men and Women):                      (1) The Minister of Health, Labor and Welfare shall formulate a basic policy concerning measures in connection with the securing, etc. of equal opportunity and treatment between men and women in employment (hereinafter referred to as the "Basic Policy on Measures for Equal Employment Opportunities for Men and Women").                      (2) The matters to be determined in the Basic Policy on Measures for Equal Employment Opportunities for Men and Women shall be as follows:                      (i) Matters relating to each trend in men and women workers' working lives; and                      (ii) Basic matters concerning the measures to be taken with regard to the securing, etc. of equal opportunity and treatment between men and women in employment.                      (3) The Basic Policy on Measures for Equal Employment Opportunities for Men and Women shall be formulated with due regard to such matters as the working conditions, views, and employment situations of men workers and women workers respectively.                      (4) The Minister of Health, Labor and Welfare, in formulating the Basic Policy on Measures for Equal Employment Opportunities for Men and Women, shall consult the Labor Policy Council and request the opinions of the prefectural governors in advance.                      (5) After having formulated the Basic Policy on Measures for Equal Employment Opportunities for Men and Women, The Minister of Health, Labor and Welfare shall publicize the outline thereof without delay. [...]."</p> <p>Art. 10 of the EEOL, Para. 1 (Guidelines): "The Minister of Health, Labor and Welfare shall formulate guidelines that are necessary for the purpose of ensuring employers deal appropriately with the matters prescribed in the provisions of [the law]".</p> <p>Art. 28 of the EEOL (Investigations, Etc.):                      (1) The Minister of Health, Labor and Welfare shall implement necessary researches and studies concerning working lives of men workers and women workers respectively.                      (2) The Minister of Health, Labor and Welfare may, when he/she finds necessary with regard to the enforcement of this Act, ask the director of each relevant administrative organ for necessary cooperation such as the provision of data.                      (3) The Minister of Health, Labor and Welfare may, with regard to the enforcement of this Act, request needed investigation reports from the prefectural governors.</p>		

Note: a) High/Medium/Low mean above average / close to average / below average, respectively.

Table 2.2 **Activities of SBs not related to individual discrimination cases:** Control and correction<sup>a</sup>

	Gender	Ethnicity
Is there a specialised body (SB) in charge of carrying out some of all of the following control and correction functions? The Equal Employment Office of the Prefectural Labour Bureau, Ministry of Health, Labour and Welfare (Governmental organism)	Yes	No
This SB has the statutory power to - randomly conduct formal investigations of companies and organisations. <b>in practice</b> , importance of the above mentioned activity in the actual overall workload - conduct formal investigations of companies and organisation where there is evidence of discrimination. <b>in practice</b> , importance of the above mentioned activity in the actual overall workload - oblige a company or an organisation to change the way it operates when discriminatory practices are found. <b>in practice</b> , importance of the above mentioned activity in the actual overall workload - take legal action against companies or organisations that apply discriminatory practices <b>in practice</b> , importance of the above mentioned activity in the actual overall workload - take legal action against organisations that attempt to promote discrimination or to instruct others to discriminate. <b>in practice</b> , importance of the above mentioned activity in the actual overall workload	Yes High Yes  High Yes  High Yes High No	
Notes:		
Article 29 (Collection of Reports and Issuing of Advice, Guidance, and Recommendations) of the EEOL: (1) The Minister of Health, Labor and Welfare may, when he/she finds necessary with regard to the enforcement of this Act, request reports of employers and give employers advice, guidance, and recommendations. (2) The authority of The Minister of Health, Labor and Welfare prescribed in the preceding paragraph may be delegated to the directors of Prefectural Labor Offices, based on Ordinance of the Ministry of Health, Labor and Welfare.		
Article 30 (Publication) In the event that an employer is in violation of [this Act], the Minister of Health, Labor and Welfare gave recommendations pursuant to the provisions of paragraph 1 of the preceding Article, but the employer has not complied with it, the Minister of Health, Labor and Welfare may make a public announcement of such violation.		
Article 33 Any person who has not made a report required by Article 29, paragraph 1 or who has made a false report shall be liable to a civil fine of not more than 200,000 yen.		

Note: a) High/Medium/Low mean above average / close to average / below average, respectively.

Table 2.3 **Role of SBs in individual discrimination cases**

	Gender	Ethnicity
Is there a specialised body (SB) with specific functions related to individual discrimination cases?	Yes	No
There are two processes in the Equal Employment Opportunity Law to settle individual discrimination cases: a) <b>Assistance</b> from the director of the Prefectural Labour Bureau. Main steps: i) application for assistance; ii) hearing from both of the interested parties by the Prefectural Labour Bureau; iii) the director of the Prefectural Labour Bureau provides assistance such as guidance and advice; iv) action by the interested parties along with the assistance; b) <b>Conciliation</b> by Equal Employment Opportunity Conciliation Commissioners. Main steps: i) application for conciliation; ii) hearing by the conciliation commissioners; iii) planning and presenting a conciliation plan by the conciliation commissioners; and iv) settlement with an acceptance of the conciliation plan.		
The content of the proposal or the assistance in the resolution disputes are to be determined paying respect to opinions from both of interested parties. Various measures such as a reform or improvement of the employment management, compensation payment or a dialogue setting between both of interested parties can be included. When both of the interested parties agree to the conciliation proposal, the agreement will become a settlement accord under the Civil Code.		

	Gender	Ethnicity
Was this body created by anti-discrimination laws (or did anti-discrimination laws establish a specific mandate for it)?	Yes	
<p><b>Formal linkage between equal treatment body activities and complaint lodging and procedures</b></p> <p>Does the SB act as a one-stop shop where claimant can access information, lodge a complaint, receive advice? Yes</p> <p>As soon as, or before, a discrimination complaint is brought to court, is the claim formally transmitted to the SB? No</p> <p>Discrimination complaints must be lodged with the SB beforehand, which acts as one-stop shop to start the procedure. No</p> <p>The SB has the statutory power to provide advice and information to claimants (or both parties) on their legal rights and what options they have. Yes</p> <p><b>In practice</b>, the SB carries on the above mentioned process as soon as it receives a discrimination claim. Duty</p> <p>The SB has the statutory power to provide claimants with legal assistance. No</p> <p><b>In practice</b>, SB provides legal assistance to claimants during court proceedings. In few cases</p> <p>The SB has the statutory power to provide claimants with legal representation. No</p> <p><b>In practice</b>, the SB provides legal representation to claimants during court proceedings. No</p>		
<p><b>Investigation of discrimination claims</b></p> <p>The SB has the legal authority to compel people (and in particular, the employer) to provide all of the information it requires to investigate a discrimination claim. Yes</p> <p>Does the court accept evidence from the SB? Yes</p> <p>Does the court accept the SB's evaluation of the validity of the discrimination complaint? Information not available</p> <p><b>In practice</b>, the SB formally investigates discrimination claims. In many cases</p> <p>Please indicate below the main tools the SB uses to investigate a discrimination claim: Collecting opinion from the interested parties or relevant parties.</p> <p>Any employer's failure to provide the requested information to the SB will: - have no implication for the court ruling. - potentially be used to draw inferences on discrimination if the case is brought before court. Information not available</p> <p>Any employer's failure to comply with the code of practices issued by the SB (or other relevant body) will: - have no implication for the court ruling. - potentially be used to draw inferences on discrimination if the case is brought before court. Information not available</p>		
<p><b>Mediation/conciliation procedure</b></p> <p>The SB has the statutory power to help both parties to resolve the dispute through a mediation/conciliation procedure. Yes</p> <p>Mediation/conciliation is a free and voluntary process for both parties. Yes</p> <p><b>In practice</b>, the SB carries out mediation/conciliation procedures, so that a court ruling may not be necessary. In many cases</p> <p>The mediation/conciliation procedure is <b>usually</b> initiated: - before the case is brought to court No - before any formal investigation starts or at an early stage of the process Yes - after any investigation has produced primary evidence of discrimination (but before a litigation decision has been reached) No</p> <p>Note: Assistance based on the Equal Employment Opportunity Law is independent from court cases.</p> <p>The SB acts as a neutral third party assisting both opposing parties in the mediation/conciliation procedure. Yes</p> <p>The mediation/conciliation procedure is confidential: no details of the discussion taking place in its course can be repeated to court, nor are made public. The same rule applies to the terms of the settlement. Yes</p> <p>If the parties, including the SB, reach settlement agreement, the latter is legally binding and the charge is dismissed. Mediation: Yes Assistance: No</p>		

	Gender	Ethnicity
The SB secures the enforcement of settlement agreements reached under its assistance and/or responsibility.	No	
<p>Notes:</p> <p>The EEOL provides that:</p> <ul style="list-style-type: none"> <li>- "The directors of Prefectural Labour Offices may, when asked by either party or both parties [...] give any necessary advice or guidance or make any necessary recommendation to the parties to said dispute" (Art.17, Para. 1).</li> <li>- "The director of each Prefectural Labor Office shall refer to the competent Disputes Adjustment Commission [...] for the conciliation of disputes [...] when either party or both parties to said dispute apply for conciliation and the Director finds conciliation necessary to resolve said dispute." (Art. 18, Para. 1)</li> <li>- "The Commission may, when it finds necessary for the Conciliation, request the parties concerned to appear and hear their opinions." (Art. 20, Para. 1)</li> <li>- "The Commission shall, when it finds necessary based on the application of the parties concerned, hear the opinions as to said case in question of the representatives of the workers concerned or the representatives of the employers concerned who are nominated by major organizations of workers or employers in the jurisdictional district of the Prefectural Labor Office where said Commission is established." (Art. 21)</li> <li>- "The Commission may prepare a conciliation proposal and recommend its acceptance to the parties concerned." (Art. 22)</li> </ul>		

### Part 3. Statistics on mediation/conciliation procedures and court case

Table 3.1 **Statistics**

		Gender	Ethnicity
General statistics	Total number of discrimination complaints received  Protected population (number of persons aged 15-64 covered by the law in question)	Discrimination: 10,571 Sexual harassment: 11,102 In 2006 66.57 million In 2006	
Mediation/ conciliation procedures	Number of received complaints treated by the SB <i>of which:</i> - number of complaints dismissed by the SB for no reasonable cause - number of unsuccessful mediations/conciliations although reasonable cause was found - number of successful mediations/conciliations  - other (please specify)  Average duration of mediation/conciliation procedures  Average employee/claimant compensation under mediation/ conciliation procedures	Assistance: 166 Mediation: 5  Assistance: 21 Mediation: 2 Assistance: 145 Mediation: 3  About three months	
Court procedures	Number of court cases <i>of which</i> - number of complaints dismissed by court for default procedures (or administrative reasons) - number of complaints dismissed by court for no reasonable cause - number of cases withdrawn by the complainant(s) - number of court rulings with favourable outcomes for the complainant(s)  Average duration of court procedures	Very few       A few years (statistics of the District Courts)	

## Main additional references

**Barrett, K. (2004)**, "Women In The Workplace: Sexual Discrimination In Japan", *Human Rights Brief*, Vol.11, No.2. <http://www.wcl.american.edu/hrbrief/11/2barrett.cfm>

**CERD (2001)**, Concluding observations of the Committee on the Elimination of Racial Discrimination : Japan, 27/04/2001, United Nations, [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/CERD.C.304.Add.114.En?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/CERD.C.304.Add.114.En?Opendocument)

**Economic and Social Council (2006)**, Commission on Human Rights, Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Doudou Diène, 24 January 2006, United Nations, <http://daccessdds.un.org/doc/UNDOC/GEN/G07/101/89/PDF/G0710189.pdf?OpenElement>

**Gender Equality Bureau (2007)**, "Gender Equality in Japan 2007", Cabinet Office, Government of Japan, [http://www.gender.go.jp/english\\_contents/index.html](http://www.gender.go.jp/english_contents/index.html).

**Nakakubo, H. (2007)**, "Phase III of the Japanese Equal Employment Opportunity Act", *Japan Labor Review*, Vol.4, No.3. [http://www.jil.go.jp/english/documents/JLR15\\_nakakubo.pdf](http://www.jil.go.jp/english/documents/JLR15_nakakubo.pdf)

### Laws:

**Act on Securing, Etc. of Equal Opportunity and Treatment between Men and Women in Employment**, English translation (up to the revision of Act No. 82 of 2006, effective April 1, 2007), available at the Cabinet Secretariat website, <http://www.cas.go.jp/jp/seisaku/hourei/data/MandW.pdf>

**Ordinance for Enforcement of the Act on the Securing, Etc. of Equal Opportunity and Treatment of Men and Women in Employment**, <http://www.mhlw.go.jp/general/seido/koyou/danjokintou/dl/koyou01b.pdf>

**Labor Standards Act** (Act No. 49 of April 7, 1947), English translation (up to the revisions of Act No. 147 of 2004, effective April 1, 2005) available at the Cabinet Secretariat website, <http://www.cas.go.jp/jp/seisaku/hourei/data/LSA.pdf>

**National Public Service Act**, Act No. 120 of 1947, English translation (up to the revisions of Act No. 50 of 2006, effective May 24, 2006) available at the Cabinet Secretariat website, <http://www.cas.go.jp/jp/seisaku/hourei/data/nps.pdf>

**Labour Union Act** (Act No. 174 of 1949), English translation (up to the revisions of Act No.87 of 2005, effective May 1, 2006) available at the Cabinet Secretariat website, <http://www.cas.go.jp/jp/seisaku/hourei/data/lu.pdf>

## KOREA

### Part 1. Legal framework for employment discrimination

#### Main anti-discrimination laws

- Equal employment Act (Enacted on Dec. 4, 1987, Revised on Apr.1, 1989, Feb. 8, 1999, Dec. 30, 2005)
- National Human Rights Commission Act (Enacted on May 24, 2001)
- Labour Standards Act (Enacted on May 10, 1953)

**As for ethnic/racial discrimination, there is no specific law beyond the NHRCA that aims at securing human rights in general.** This can be partly explained by the ethnic homogeneity of the Republic of Korea.

Besides, the National Human Rights Commission (NHRC) of South Korea, which has prepared a draft anti-discrimination law, made a recommendation to the Prime Minister on 24 July 2006 to adopt such a law (HURIGHTS OSAKA, 2006). In the context of various cases of discrimination in Korean society, the NHRC points to the fact that the existing laws on the prevention of discrimination are insufficient in terms of their effectiveness and remedies for victims, who are socially vulnerable in many cases. The NHRC thus finds it necessary to enact a comprehensive anti-discrimination law. The draft prepared by the NHRC includes direct and indirect discrimination as well as harassment in the definitions of discrimination. It covers discrimination on the basis of various grounds, including gender, disability, race, academic background, medical history, place of birth, employment status and social status, in the following four areas: employment; provision of and access to goods and services; education; and the exercise of governmental power in the enforcement of legislation and policies. In order to ensure effective remedies, it provides for a diversity of remedies, including not only mediations and recommendations for redress but also redress orders and aid in litigation in specified cases. In addition, burden of proof will fall on alleged perpetrators of discrimination. However, critics questioned the effectiveness of the law, saying that the bill lacks strict punishments designed to enforce the law (Jin Dae-wong, Korea Herald, 11 Sep 2007).

Relevant courts: criminal court or civil courts.

Legal scope of the (hereinafter) so-called gender and ethnic grounds:

- Equal employment Act: gender only, including sex, marriage, status in family, pregnancy, or childbirth, etc.
- National Human Rights Commission Act (NHRCA): 19 grounds of discrimination, which include gender, marital status, pregnancy or childbirth, family type or conditions; and place of origin, country of origin, ethnicity, race, colour.
- Labour Standards Act: sex, nationality (religion and social status)

**Table 1.1 Prohibited acts, areas of concern, coverage, legal assistance and representation**

		Gender	Ethnicity
Type of discrimination	Direct discrimination Indirect discrimination, i.e. where a provision criterion or practice is applied to all employees but puts one protected group at a particular disadvantage and cannot be shown to be a proportionate means of meeting a legitimate aim. Pressure and instruction to discriminate Harassment	Yes Yes  Yes Yes	Yes No*  No* Yes
	Notes:  * Definition of discrimination <ul style="list-style-type: none"> <li>• NHRCA: Discrimination means the favourable or unfavourable treatment, exclusion, or differentiation without justification based on the 19 above mentioned prohibited grounds. Discrimination includes any acts of sexual harassment. Sexual harassment as provided by the National Human Rights Commission of Korea Act means sexual comments or actions made by those in the public sector, employers or employees in the context of business, employment or other such relationships by taking advantage of his/her position or in connection to work and other matters that cause feelings of sexual humiliation or degradation or that result in unfair employment treatment for refusing to</li> </ul>		

		Gender	Ethnicity
	<p>respond to such sexual comments, actions or other such demands.</p> <ul style="list-style-type: none"> <li>Labour Standards Act, Article 6 (Equal Treatment): An employer shall not discriminate against workers by sex, or take discriminatory treatment in relation to the conditions of employment according to nationality, religion or social status.</li> <li>National Human Rights Commission (NHRCK) passed a recommendation proposal on "Anti-Discrimination Law" through Plenary Committee on July 24, and advised the Prime Minister to pursue its enactment. Anti-Discrimination Law will take on the characteristics of a special law on the provisions regarding discrimination in the current national Human Rights Commission Act and <b>will provide definition of discrimination and basis for a judgment</b> (NHRCK website).</li> </ul>		
Areas of concern	<p>Hiring process Wage Type of employment contract (permanent vs. fixed term) Working time (atypical work schedule, part-time vs. full-time) Promotion Job and vocational training Transfer Redundancy and dismissal</p>	<p>Yes Yes Yes Yes Yes Yes Yes</p>	<p>Yes Yes Yes Yes Yes Yes Yes</p>
Coverage	<p>Private sector Public sector Employment agencies Trade unions (as regards membership)</p> <p>Notes: Does not apply to firms with less than 5 employees.</p>	<p>Yes Yes Yes Yes</p>	<p>Yes Yes Yes Yes</p>
Legal assistance other than private lawyer	<p>Specialised body (e.g. equal treatment body) Any relevant public utility institutions and associations Trade unions (please indicate if it is for their members only)</p> <p>Notes: * As far as the NHRC is concerned. However, the proposal on the establishment of the Discrimination Act, issued by the NHRC, provides that, when the situation is deemed serious, legal aid is permitted. (sources: NHRC website)</p>	<p>No* Yes Yes</p>	<p>No* Yes Yes</p>
Legal representation other than private lawyer	<p>Specialised body (e.g. equal treatment body) Any relevant public utility institutions and associations Trade-unions (please indicate if it is for their members only)</p> <p>Notes: * As far as the NHRC is concerned.</p>	<p>No* Yes Yes</p>	<p>No* Yes Yes</p>

Table 1.2 Burden of proof

		Gender	Ethnicity
Burden of proof	<p>Employee/claimant Shift of burden of proof (the employee/claimant provides facts, then the employer/respondent has to provide proofs – see below for a detailed description)</p> <p>Notes: * Article 30 of the Equal Employment Act: the burden of proof in dispute resolution related to this Act is born by the employer.</p>	<p>No* Yes*</p>	<p>Yes No</p>
Additional information in the case of burden of proof on the claimant	<p><i>Standard of proof</i> What is the relevant standard of proof that should be applied, as set by law or established by case law? - Beyond a reasonable doubt (such as the typical standard for criminal cases) - On the balance of probabilities (such as the typical standard for civil disputes)</p>		<p>Yes No</p>





Table 1.3 Employee compensation and employer penalties

		Gender	Ethnicity
Employee compensation	<b>Injunctive relief/reinstatement</b>		
	- Always made available to the employee/claimant, but the latter can choose monetary compensation in lieu of relief/reinstatement, or → <b>Used generally</b>	Yes*	Yes*
	- Always made available to the employee/claimant, without alternative option, or	No*	No*
	- Always made available to the employee/claimant, but the employer/respondent can choose monetary compensation in lieu of relief/reinstatement, or	No*	No*
	- Never made available to the employee/claimant.	No*	No*
	<b>Monetary compensation</b>		
	Back pay (please indicate if there is a cap)	Yes*	Yes*
	Reimbursement of lawyer's and attorney's fees and costs	Yes*	Yes*
	In lieu of relief/reinstatement, compensation for future lost earnings (e.g., in case of dismissal, this may correspond to lost earnings until the employee finds a new job):	Yes*	Yes*
	- Floor or minimum (amount): ..... - Cap or maximum (amount): ..... - Average compensation (amount): ..... - Median compensation (amount): .....		
Compensation for psychological injury:	Yes*	Yes*	
- Floor or minimum (amount): ..... - Cap or maximum (amount): ..... - Average compensation (amount): ..... - Median compensation (amount): .....			
Notes:			
* <b>The EEA does not explicitly provide for remedies such as reinstatement or monetary compensation, but the Labour Standards Act provide for them. And there are many judicial practices and court rulings regarding dismissals.</b>			
The NHRCA (art. 42) provides that: (1) If, with respect to the relevant petition regarding a human rights violation case or a discriminatory act, the conciliation committee may begin the process of coordinating a petition at the request of the party concerned or at ex officio referral by the Commission. (2) The conciliation shall be completed at the time when, after the procedures are initiated, both parties concerned enter into the compromised matters of the document of conciliation by affixing their signature and seal, after which the committee recognizes it. (3) If both parties concerned fail to reach a compromise during the course of the procedure of conciliation, the conciliation committee may make a decision in lieu of conciliation in order to fairly settle the case. The decision in lieu of conciliation include any of the following: (4) <b>Stoppage</b> of the human rights violation or discriminatory act subject to the investigation (5) <b>Restitution or compensation for damages, or other necessary remedies; or</b> (6) <b>Measures necessary for the prevention of recurrence</b> of the same or similar human rights violation or discriminatory act.			
If the conciliation committee makes a decision in lieu of conciliation, it shall serve both parties concerned with the written decision without delay. If any party concerned fails to raise an objection within 2 weeks after he/she has been served with the written decision under paragraph (5), he/she shall be deemed to accept the conciliation.			
And art.43 provides that the conciliation under the provision of art.42 (2) and the decision in lieu of conciliation shall <b>have the same effect as the settlement in court, provided that there are no objections under the provision</b> of art.42 (6).			
The proposal on the establishment of the Discrimination Act, issued by the NHRC, is aimed at securing various measures to provide effective remedies for discrimination. As a remedial measure provided by the Commission, in addition to general remedial measures such as a recommendation for mediation and correction, it is allowed to give order for			

		Gender	Ethnicity
	<p>correction in a case where the recommendation was not abided by without justifiable reasons and where the discrimination is serious and is acknowledged to have a significant social impact.</p> <p>In addition, if the act of discrimination is deemed intentionally malicious, the Recommendation Proposal provides relief measures for the court to rule payment of additional "reparation" (more than twice and less than five times the damage) (Article 39) aside from the reparation of monetary damage. (sources: NHRCA website)</p>		
Employer additional penalties and obligations	<p><b>Civil provisions</b>  None  Court may order the publicity of the decision  - Within the firm (e.g. notices to all employees addressing the violations of a specific charge and advising them of their rights under the laws)  - Outside the firm (please indicate: media, trade-unions, etc.)  The employer may be required to take corrective or preventive actions to cure the source of the identified discrimination</p> <p>Notes:  * The NHRCA provides that "the investigation of any petition and the conciliation and deliberation conducted by the Commission shall be confidential, provided that they may be made public if the Commission makes a resolution in favour thereof (art.49). The Commission may release the contents and results of any investigation and conciliation, the recommendation to the related entities, and the measures taken by such entities under this Chapter, provided that this shall not apply to any case in which such a release is restrained by any other Act or is likely to infringe on the privacy of any individual.  ** Provisions contained in the NHRCA.</p> <p><b>Penal provisions</b>  None  Fine: <b>5 million won or less</b>  Prison sentence: imprisonment of 5 years or less or a penalty of 30 million won or less in case of violation of art.8(1) of the EEA – equal wage for work of equal value in the same business.</p> <p>Notes:  * But not specified in the NHRCA.</p>	False Yes Yes* Yes	False** Yes** Yes** Yes**
		False Yes Yes	False*

Table 1.4 Protection against victimisation (retaliation)

		Gender	Ethnicity
Protected actions	<p>It is prohibited to treat the employee/protected person less favourably (so-called "adverse action") because s/he has (so-called "protected action"):</p> <ul style="list-style-type: none"> <li>- brought proceedings against discrimination</li> <li>- given evidence or information in connection with any proceedings against discrimination.</li> <li>- participated as a witness in any proceedings against discrimination</li> </ul> <p>Notes:  * Article 55 of the NHRCA.</p>	Yes Yes Yes	Yes* Yes* Yes*
Proof of causal connexion	<p><i>Burden of proof:</i></p> <ul style="list-style-type: none"> <li>- i) employee/protected person</li> <li>- ii) employer/respondent within a given lapse of time from the concerned event. Please specify conditions of application and lapse of time.</li> <li>- iii) shift of burden of proof. Please specify main steps.</li> </ul> <p>In cases (i) and (iii), when the causal connexion shall be first shown or established by the employee/protected person:</p> <ul style="list-style-type: none"> <li>- the link can be demonstrated by evidence that the adverse action occurred shortly after the protected activity (and the employer/respondent was aware of the complainant's protected activity before taking the action), so that the employment relationship is implicitly or explicitly (please specify) protected during a certain period of time (please specify)</li> </ul>	No Yes Yes Yes	Yes No

		Gender	Ethnicity
Employee compensation and employer penalty	Compared to provisions described in Table 1.3: - additional employee/protected person compensation - additional employer/respondent penalties		

Table 1.5 Relationship with standard labour laws

		Gender	Ethnicity
Labour law and discrimination	According to standard labour law(s) or code, would dismissal solely based on gender or ethnicity considered to be unjust dismissal?  Notes: No explicit provisions in the Labour Standards Act, enacted on May 10, 1953. However, art.6 provides that “an employer shall not discriminate against workers by sex, or take discriminatory treatment in relation to the conditions of employment according to nationality, religion or social status”. And art.30 stipulate that “an employer shall not dismiss, lay off, suspend, transfer a worker, or reduce wages, or take other punitive measures against a worker without justifiable reason”, and art.31 provides that “If an employer wants to dismiss a worker for managerial reasons, there shall be urgent managerial needs”.	Yes*, indirectly	Yes*, indirectly
	Is there a provision requiring equal pay for work of equal value in standard labour law(s) or code?  Notes: No equal wage provisions in the Labour Standards Act. The general non discrimination provision of art.6 may still apply for gender wage gap, but as for “ethnicity”, the only ground protected by this article is nationality.  Other areas of discrimination covered by standard labour law(s) or code (hiring, promotion, etc...); please specify	Yes, but weak*	No*
Complaints	Are discrimination complaints concerning dismissals more often lodged under standard labour law(s) or code, than under specific anti-discrimination laws? Are discrimination complaints concerning pay more often lodged under standard labour law(s) or code, than under specific anti-discrimination laws?	.. ..	Yes ..
Evaluations	Please indicate below references to existing evaluations/studies on the effectiveness of anti-discrimination laws with respect to standard labour law(s):		

Table 1.6 Positive action

		Gender	Ethnicity
Compulsory actions	Are employers <b>required</b> by law to take actions to increase diversity/prevent discrimination?  If yes, what actions are required? - make regular public reports on employment composition in terms of gender or ethnicity - process only anonymous job applications - obligation for large employers to have a person in the HRM department in charge of the employer's anti-discrimination policy (please specify the size threshold of application, if any) - quotas (please specify the areas: e.g. executives in firms above a certain size)  Notes: Pursuant to Article 17-2(1) of the Equal Employment Act, government-invested institutions, subsidiary organizations of government, companies with 500 workers or more are required to implement affirmative action (employment improvement measures)	Yes  No No No  Yes	No  .. .. ..  ..

		Gender	Ethnicity
Voluntary actions	Are employers <b>allowed</b> to take actions to increase diversity/prevent discrimination?	Yes	Yes
	<p>If yes, what actions are allowed?</p> <ul style="list-style-type: none"> <li>- make regular public reports on employment composition in terms of gender or ethnicity</li> <li>- establish a plan to ensure that the employment composition in terms of gender or ethnicity is balanced</li> <li>- quotas (please specify the areas: e.g. executives)</li> </ul>	<p>..</p> <p>..</p> <p>Yes</p>	<p>..</p> <p>..</p> <p>..</p>
Notes: Pursuant to Article 17-2(3) of the Equal Employment Act, institutions other than government-invested institutions, subsidiary organizations of government, companies with 500 workers or more are allowed to implement affirmative action (employment improvement measures).			
Public employers' practices	Do public employers normally take actions to increase diversity/prevent discrimination?	Yes*	To some extent, for foreign workers**
	<p>If yes, what actions? <b>Multi-culture festival, events for global citizens, etc.</b></p> <ul style="list-style-type: none"> <li>- make regular public reports on employment composition in terms of gender or ethnicity</li> <li>- establish a plan to ensure that the employment composition in terms of gender or ethnicity is balanced</li> <li>- process only anonymous job applications</li> <li>- have at least one person in the HRM department in charge of the employer's anti-discrimination policy</li> <li>- quotas (please specify the areas: e.g. high-rank officials)</li> </ul>	<p>Yes</p> <p>Yes</p> <p>No</p> <p>No</p> <p>Yes</p>	<p>..</p> <p>..</p> <p>..</p> <p>..</p> <p>..</p>
Notes:			
<p>* Pursuant to Article 17-2(1) of the Equal Employment Act, government-invested institutions, subsidiary organizations of government, companies with 500 workers or more are required to implement affirmative action (employment improvement measures).</p> <p>** The Korean government is operating a general counselling centre under the Ministry of Labour, regional labour offices, job centres and Labour Relations Commissions to ensure that foreign workers who have difficulties in the workplace can receive counselling services and seek a remedy. The Human Resources Development Service of Korea has entrusted private agencies to run private support centres for foreign workers. The private support centres are contributing to the improvement of foreign workers' human rights by actively providing counselling for foreign workers who are suffering from human rights infringements in their workplace, helping them to adapt to life in Korea and providing medical and educational support for them.</p>			
Incentives	Is there a policy to increase incentives for employers to increase diversity/prevent discrimination?	Yes	..
	<p>Policy instruments used:</p> <ul style="list-style-type: none"> <li>- Delivery of "labels" or certificates stating that the employer has a diversity-friendly business/employment practice.</li> <li>- financial incentives to establish a plan to ensure that the employment composition in terms of gender or ethnicity is balanced</li> <li>- financial incentives for having a person in the HRM department in charge of the employer's anti-discrimination policy and/or hiring a consultant to establish a diversity plan.</li> <li>- financial incentives for quotas (please specify the areas: e.g. executives)</li> </ul>	<p>Yes</p> <p>Yes</p> <p>Yes</p> <p>Yes</p>	<p>..</p> <p>..</p> <p>..</p> <p>..</p>
Notes: Pursuant to Article 17-3(4) of the Equal Employment Act, national and local governments can provide administrative and financial incentives to firms with good records in affirmative action (employment improvement measures).			

**Part 2. Institutional framework: specialised bodies (SB) combating discrimination (e.g. equal treatment bodies)**

Table 2.1 **Activities of SBs not related to individual discrimination cases: Public information and evaluation<sup>a</sup>**

	Gender	Ethnicity
Is there a specialised body (SB) in charge of carrying out some of all of the following public information and policy evaluation functions?	Yes	Yes
National Human Rights Commission, Nov. 25, 2001, National and independent institution		
This SB has the statutory power to:	Yes	Yes
- run information campaigns to inform the public of their legal rights	..	..
<b>in practice</b> , importance of the above mentioned activity in the actual overall workload of the SB	Yes	Yes
- run campaigns to change public opinion	..	..
<b>in practice</b> , importance of the above mentioned activity in the actual overall workload of the SB	Yes	Yes
- publish statistics on discrimination	..	..
<b>in practice</b> , importance of the above mentioned activity in the actual overall workload of the SB	Yes	Yes
- carry out evaluations of the legal and institutional anti-discrimination framework	..	..
<b>in practice</b> , importance of the above mentioned activity in the actual overall workload of the SB	Yes	Yes
- make policy recommendations	..	..
<b>in practice</b> , importance of the above mentioned activity in the actual overall workload of the SB	Yes	Yes
- produce codes of good practice for employers	..	..
<b>in practice</b> , importance of the above mentioned activity in the actual overall workload of the SB	Yes	Yes
	..	..

Note: a) High/Medium/Low mean above average / close to average / below average, respectively.

Table 2.2 **Activities of SBs not related to individual discrimination cases: Control and correction<sup>a</sup>**

	Gender	Ethnicity
Is there a specialised body (SB) in charge of carrying out some of all of the following control and correction functions?	Yes	Yes
National Human Rights Commission, Nov. 25, 2001, National and independent institution		
This SB has the statutory power to	Yes	Yes
- randomly conduct formal investigations of companies and organisations.	..	..
<b>in practice</b> , importance of the above mentioned activity in the actual overall workload of the SB	Yes	Yes
- conduct formal investigations of companies and organisation where there is evidence of discrimination.	..	..
<b>in practice</b> , importance of the above mentioned activity in the actual overall workload of the SB	No	No
- oblige a company or an organisation to change the way it operates when discriminatory practices are found.	..	..
<b>in practice</b> , importance of the above mentioned activity in the actual overall workload of the SB	No	No
- take legal action against companies or organisations that apply discriminatory practices	..	..
<b>in practice</b> , importance of the above mentioned activity in the actual overall workload of the SB	No	No
- take legal action against organisations that attempt to promote discrimination or to instruct others to discriminate.	..	..
<b>in practice</b> , importance of the above mentioned activity in the actual overall workload of the SB	..	..
Notes:		
In March 2006, the Equal Employment Commission was abolished.		
Provisions related to the prevention and mediation of disputes, as established by the EEA (and thus, for gender discrimination only):		
<ul style="list-style-type: none"> <li>• <b>Honorary Equal Employment Inspector</b> (art.24): the Minister of Labour may commission a person recommended by both labour and management among the workers in the workplace concerned as an honorary equal employment inspector in order to promote the equal employment at workplace. The latter shall notably: i) provide counselling and advice to a worker who is the victim of discrimination or sexual harassment at work; ii) attend an autonomous check-up of equal employment observance status and provision of guidance at the concerned workplace; iii) recommend an employer to make improvement on the law violations and report the violations to the authorities concerned. An employer shall not take any measure disadvantageous to an</li> </ul>		

	Gender	Ethnicity
<p>honorary inspector for carrying out the rightful activities.</p> <ul style="list-style-type: none"> <li>• <b>Autonomous Settlement of Disputes</b> (art.25): if an employer is informed of a grievance from a worker with respect to gender discrimination, the employer shall make efforts to settle the grievance autonomously by entrusting the grievance handling council established in the workplace concerned and composed of the equal numbers of members, representing employers and workers, respectively.</li> </ul>		

Note: a) High/Medium/Low mean above average / close to average / below average, respectively.

Table 2.3 **Role of SBs in individual discrimination cases**

	Gender	Ethnicity
Is there a specialised body (SB) with specific functions related to individual discrimination cases?	Yes	Yes
National Human Rights Commission, Nov. 25, 2001, National and independent institution		
Was this body created by anti-discrimination laws (or did anti-discrimination laws establish a specific mandate for it)?	No	No
<b>Formal linkage between SB activities and court procedures</b>		
Does the SB act as a one-stop shop where claimant can access information, lodge a complaint, receive advice?	No	No
As soon as a discrimination complaint is brought to court, is the claim formally transmitted to the SB?	No	No
Discrimination complaints must be lodged with the SB beforehand, which acts as one-stop shop to start the procedure.	No	No
The SB has the statutory power to provide advice and information to claimants (or both parties) on their legal rights and what options they have.	No	No
<b>In practice</b> , the SB carries on the above mentioned process as soon as it receives a discrimination claim.		
The SB has the statutory power to provide claimants with legal assistance.	No	No
<b>In practice</b> , SB provides legal assistance to claimants during court proceedings.		
The SB has the statutory power to provide claimants with legal representation.	No	No
<b>In practice</b> , the SB provides legal representation to claimants during court proceedings.		
<b>Investigation of discrimination claims</b>		
The SB has the legal authority to compel people (and in particular, the employer) to provide all of the information it requires to investigate a discrimination claim.	Yes	Yes
Does the court accept evidence from the SB?	Yes	Yes
Does the court accept the SB's evaluation of the validity of the discrimination complaint?	Yes	Yes
<b>In practice</b> , the SB formally investigates discrimination claims.	Yes	Yes, but very few cases
Please indicate below the main tools the SB uses to investigate a discrimination claim:		
Any employer's failure to provide the requested information to the SB will:		
- have no implication for the court ruling.	n.a.*	n.a.*
- potentially be used to draw inferences on discrimination if the case is brought before court.	n.a.*	n.a.*
Any employer's failure to comply with the code of practices issued by the SB (or other relevant body) will:		
- have no implication for the court ruling.	..	..
- potentially be used to draw inferences on discrimination if the case is brought before court.	..	..
Notes:		
* The EEA provides that anyone who refuses to submit a report or relevant documents during the investigation or inspection procedures ordered by the Minister of Labour shall be punished by a fine for negligence of 3 million won or less.		
The NHRCA (art.56) provides that "a person who destroys, forges or alter any evidence related to a case involving a violation of any other person's human rights or any discrimination act subject to the investigation by the Commission or uses any such forged or altered, shall be punished by		

	Gender	Ethnicity
imprisonment for no more than 5 years or by a fine not exceeding 30 million won. The NHRCA (art.63) provides that, in the course of an investigation procedure, a person who fails to comply with the request for submitting a written statement or presenting himself/herself by the Commission without justifiable reason, and a person who fails to comply with the request for submission of relevant materials, shall be punished by a fine for negligence not exceeding 10 million won.		
<b>Mediation/conciliation procedure</b>		
The SB has the statutory power to help both parties to resolve the dispute through a mediation/conciliation procedure.	Yes	Yes
Mediation/conciliation is a free and voluntary process for both parties. <b>In practice</b> , the SB carries out mediation/conciliation procedures, so that a court ruling may not be necessary.	Yes ..	Yes ..
The mediation/conciliation procedure is <b>usually</b> initiated: - before the case is brought to court - before any formal investigation starts or at an early stage of the process - after any investigation has produced primary evidence of discrimination (but before a litigation decision has been reached)	No Yes No	No Yes No
The SB acts as a neutral third party assisting both opposing parties in the mediation/conciliation procedure.	Yes	Yes
The mediation/conciliation procedure is confidential: no details of the discussion taking place in its course can be repeated to court, nor are made public. The same rule applies to the terms of the settlement.	Yes*	Yes*
If the parties, including the SB, reach settlement agreement, the latter is legally binding and the charge is dismissed.	Yes**	Yes**
The SB secures the enforcement of settlement agreements reached under its assistance and/or responsibility.	Yes	Yes
Notes: * Provided that they may be made public if the Commission makes a resolution in favour thereof (NHRCA, art.49) ** But once both parties have accepted the settlement agreement.		

**Part 3. Statistics on mediation/conciliation procedures and court case**

Table 3.1 **Statistics**

		<b>Gender</b>	<b>Ethnicity</b>
General statistics	<p>Total number of discrimination complaints received Protected population (number of persons aged 15-64 covered by the law in question)</p> <p>Notes:</p> <p>* Total : 1435 cases: - National Human Rights Commission(NHRC) : 558 cases(2002-Sept. 2007) - Ministry of Labour's regional offices : 902 cases(2000-2006)</p> <p>** NHRC : 19 cases(2002-2006)</p> <p>As of June 30, 2006, the number of complaints to NHRCK exceeded 20,000 cases in connection with human rights violations and discrimination (i.e. within 4 years and 7 months since its launch on November 25, 2001). There are still an overwhelming number of complaints on "human rights violations by governmental institutions," but they are showing a downward tendency with the lapse of time. Meanwhile, complaints in connection with discrimination continue to increase steadily, with 53 such complaints received in 2001, 135 cases in 2002, 358 cases in 2003, 389 cases in 2004 and 1,081 cases in 2005. The number of complaints on discrimination due to social status is the most frequent, comprising 25% of the total as 582 cases, those on account of disabilities comprising 11.3% with 263 cases, and those because of sex comprising 6.2% with 145 cases. It is interpreted that Korean society is going to establish the concept and standard of discrimination bit by bit through admitting recommendations of NHRCK and there is increasing sensitivity to discrimination and human rights as a whole. (source: NHRC website)</p>	*1460	**19
Mediation/ conciliation procedures	<p>Number of received complaints treated by the SB <i>of which:</i> - number of complaints dismissed by the SB for no reasonable cause - number of unsuccessful mediations/conciliations although reasonable cause was found - number of successful mediations/conciliations</p> <p>NHRC(of 558 cases) :</p> <ul style="list-style-type: none"> <li>- accepted its decision : 57</li> <li>- agreement reached between the parties : 37</li> <li>- mediation successful : 8</li> <li>- cases rejected : 353</li> <li>- pending : 51</li> <li>- others : 52</li> </ul> <p>Ministry of Labour (of 902 cases) :</p> <ul style="list-style-type: none"> <li>- resolved at the Ministry level : 772</li> <li>- Indicted : 44</li> <li>- Non-indicted : 86</li> </ul> <p>Average duration of mediation/conciliation procedures Average employee/claimant compensation under mediation/ conciliation procedures</p>		
Court procedures	<p>Number of court cases <i>of which</i> - number of complaints dismissed by court for default procedures (or administrative reasons) - number of complaints dismissed by court for no reasonable cause - number of cases withdrawn by the complainant(s) - number of court rulings with favourable outcomes for the complainant(s) - other (please specify)</p> <p>Average duration of court procedures</p>		



### **Main additional references**

**Equal Employment Act**, as amended by Act No. 6508, Aug. 14, 2001,  
[http://marksesl.com/Lounge/equal\\_employment\\_act\\_of\\_Korea.html](http://marksesl.com/Lounge/equal_employment_act_of_Korea.html)

**Jin, Dae-woong (2007)**, "Korea serious about enhancing anti-discrimination measures", *Korea Herald*, 11 Sep 2007,  
<http://www.business-humanrights.org/Categories/Sectors/ProfessionalServices/Advertisingmarketing>

**Labor Standards Act**, Law No. 5309, Mar. 13, 1997,  
<http://www.ilo.org/dyn/natlex/docs/WEBTEXT/46401/65062/E97KOR01.htm#a42>

**National Human Rights Commission Act of the Republic of Korea**, 2001,  
[http://www.humanrights.go.kr/english/information/legal\\_materials\\_02.jsp](http://www.humanrights.go.kr/english/information/legal_materials_02.jsp)

**National Human Rights Commission of the Republic of Korea (2005)**, *Annual Report*,  
<http://www.humanrights.go.kr/english>

**Park, Hyo-sook**, "Indirect Discrimination in South Korea", Tokyo University Ph.D.  
<http://comprasec.u-bordeaux4.fr/static/SEMINAIRES/PARK1.pdf>

## MEXICO

### Part 1. Legal framework for employment discrimination

Main anti-discrimination laws:

The institutional fight against discrimination represents a new issue in Mexico. Before the year 2000, this topic was absent from the national public agenda. For a long time, the notion of discrimination was only associated to economic inequality and Mexican society did not look at discrimination as a matter of cancellation of fundamental rights. The first time discrimination was considered as a key public issue in the political debate was in the 2000 presidential campaign. Since then, the topic of discrimination and social exclusion began to be discussed publicly and have been gaining a growing importance in the national political agenda (National Council for the Prevention of Discrimination, 2007).

- In 2001, Article 1 of the Constitution was reformed to include the right to be free from any form of discrimination. This article declares that in Mexico rights shall not be limited based on discrimination because of ethnic origin or nationality, gender, age, different abilities, social condition, health, religion, opinions, preferences, civil status or for any other cause which is against human dignity and has as its purpose the annulment or diminishment of rights and freedoms of the individual (BRC - Basham, Ringe y Correa, 2007).
- On June 12, 2003, the Federal Law for the Prevention and Elimination of Discrimination, which regulated the Constitutional reform, was enforced (LFPED). Indeed, the above mentioned amendment of the constitutions incorporated the Federal Law to Prevent and Eliminate Discrimination, which, in Article 4, defines discrimination as any distinction, exclusion or restriction, based on ethnic or national origin, sex, age, disability, social or economic conditions, health conditions, pregnancy, language, religion, opinions, sexual preferences, civil status or any other reason whose purpose is to impede or annul the recognition or the exercise of rights and real equity for persons' opportunities. This law establishes the powers and duties of the State in promoting the eradication of discrimination in Mexico. Its general scope includes private and public discrimination (National Council for the Prevention of Discrimination, 2007; and BRC, 2007). Even though the law is directed against general discrimination, it also contains special provisions regarding discrimination that takes place in private sector workplaces. The discriminatory labour practices it prohibits include those related to access, permanence and promotion at work. It also prohibits conduct that establishes differences in pay, benefits and general labour conditions for equivalent work, as well as exploitation and degrading or abusive treatment (Commission for Labor Cooperation, 2007).
- The Federal Labour Law (LFT) prohibits discrimination in the workplace. For the same work performed under the same efficiency conditions, the same remuneration shall be granted, without distinction among employees (BRC, 2007). However, it was not until the second LFT, approved in 1970 and still in effect today, that **Article 3 set forth the principle of equality that would become the guiding principle of Mexican labour rights**. In addition to the general principle of equality stipulated in Article 3, the LFT established other specific measures regarding equality. For example, **the right to equal labour conditions for equal work** (art. 56); **equal pay for work of equal value** (art.86); and **the prohibition against not hiring on the basis of sex or age** (art.133, part I). Likewise, there are regulations guaranteeing protection for women workers, such as the express guarantee of work equality for men and women, indicated in Article 164: "Women enjoy the same rights and have the same obligations as men" (Commission for Labor Cooperation, 2007).
- On April 26, 2004, the National Council for the Prevention of Discrimination (CONAPRED) commenced duties.

As provided for in the Constitution, the international treaties signed by the President of the Republic and ratified by the Senate are the source of rights in the Mexican legal system. Article 6 of the LFT establishes that these treaties will be applicable to labour relations and that in cases where there is any question, the most favourable or beneficial interpretation for the worker should prevail. The issue of the hierarchy of international treaties and how they relate to federal laws has been amply discussed. Nonetheless, the National Supreme Court, through definitive case law opinions, determined that international treaties rank immediately below the Constitution and above federal and local laws. In its opinions, the National Supreme Court reasoned that, because international commitments are assumed by the entire country, all of its authorities are therefore obliged to abide by those commitments (Commission for Labour Cooperation, 2007).

Concerning the treaties that Mexico has entered into regarding discrimination and equality in the workplace, among the most important that directly allude to labour are those entered into under the auspices of the International Labour Organization (ILO). Mexico has also signed:

- the Convention on Elimination of All Forms of Discrimination against Women which includes a detailed group of obligations for member states, such as the implementation of measures to eliminate discrimination against women in the workplace. This convention includes labour protection for female workers and prohibits firing for reasons of pregnancy or maternity leave, as well as discrimination on the grounds of marital status.
- the International Convention on the Elimination of all Forms of Racial Discrimination, which establishes the obligation of Member States not to permit, promote, advocate or support any discrimination on the basis of race, colour or ethnic origin, on the part of any group, institution or individual. It makes special mention of discrimination at work on these grounds, and it underlines that States must dedicate themselves to preventing such discrimination.

Finally, legal protection to counteract discrimination in the workplace sometimes exceeds the limits of the labour field and extends into other legal areas. Such is the case of the Criminal Code for the Federal District, which for the first time in 1999 considered labour discrimination on the basis of age, sex, pregnancy, marital status, race, language, religion, ideology, sexual orientation, skin colour, nationality, social origin or position, work or profession, economic position, physical characteristics, disability or state of health as a crime against the dignity of persons. Penalties imposed for this crime range from fines to imprisonment or community service. With the passage of the new code in 2002, discrimination based on ethnic origin was also prohibited (Commission for Labor Cooperation, 2007).

Relevant courts: Conciliation and Arbitration Boards (Juntas de Conciliación y Arbitraje, JCA).

Legal scope/definition of the (hereinafter) so-called gender and ethnic grounds:

- Gender: Sex, explicitly including pregnancy,
- Ethnicity: see above.

Table 1.1 Prohibited acts, areas of concern, coverage, legal assistance and representation

		Gender	Ethnicity
Type of discrimination	<p>Direct discrimination</p> <p>Indirect discrimination, i.e. where a provision criterion or practice is applied to all employees but puts one protected group at a particular disadvantage and cannot be shown to be a proportionate means of meeting a legitimate aim.</p> <p>Pressure and instruction to discriminate</p> <p>Harassment</p> <p>Notes: The manner in which the Constitution and the LFT refer to discrimination and to the principle of equality is in terms of prohibited discriminatory conduct. The LFPED is the first legal standard to define discrimination, and it does so in general terms, such as any <i>distinction, exclusion, or restriction</i> based on ethnic or national origin, sex, age, etc., or anything else that hinders or disallows acknowledgment or exercise of rights and truly equal opportunity. Regarding discrimination in the workplace, the LFPED considers discriminatory practices to be those which prohibit freedom of job choice, or that restrict opportunities to access and retain jobs, and to be promoted. Practices intended to establish differences in pay, benefits and labour conditions for equal work and those which limit access to professional training and education are also considered discriminatory.</p> <p>According to the principle of equality incorporated in the LFT, labour law does not distinguish among different types of discrimination. There is no reference as to which specific practice is considered discriminatory. Nor has Mexican case law developed any opinions regarding employment discrimination and its different connotations. Similarly, the definition contained in the LFPED is formulated in general terms. This lack of a concrete definition of discrimination gives rise to the interpretation that the legislation does not require a demonstration of the intent to discriminate or of the form of the discriminatory practice in order for the practice to qualify as discriminatory; it is sufficient that said practice create distinctions among workers, as stated in Article 3 of the LFT.</p>	<p>Yes</p> <p>Yes*</p> <p>Yes</p> <p>Yes</p>	<p>Yes</p> <p>Yes*</p> <p>No</p> <p>Yes</p>
Areas of concern	<p>Hiring process</p> <p>Wage</p> <p>Type of employment contract (permanent vs. fixed term)</p> <p>Working time (atypical work schedule, part-time vs. full-time)</p> <p>Promotion</p> <p>Job and vocational training</p> <p>Transfer</p> <p>Redundancy and dismissal</p> <p>Notes: * A controversy exists in federal labour legislation over whether a person can be discriminated against in the workplace during the hiring phase. The LFT does not expressly resolve this question because its definition of the principle of equality identifies "workers" as the subjects of protection. On the one hand, the law defines a worker as the person who performs for another person or entity a personal and subordinate job, and it defines the labour relation as the performance of a personal job subordinated to</p>	<p>Yes*</p> <p>Yes</p> <p>Yes</p> <p>Yes</p> <p>Yes</p> <p>Yes</p> <p>Yes</p> <p>Yes</p>	<p>No*</p> <p>Yes</p> <p>Yes</p> <p>Yes</p> <p>Yes**</p> <p>Yes</p> <p>No</p> <p>Yes</p>

		Gender	Ethnicity
	<p>another person via the payment of a wage. Given those definitions, the fact that the applicant is not yet a worker and has no work relationship impedes the provision of protection during the hiring process. On the other hand, however, the LFT prohibits employers from refusing to hire workers based on <b>age or sex</b>, which could be interpreted as an extension of labour protection during the hiring phase.</p> <p>Article 9 of the LFPED also forbids any discriminatory practice aimed at hindering or cancelling the recognition or exercise of the rights to equality of opportunities. For said purposes, part III of Article 9 specifies as discriminatory conduct the prohibition of the free choice of employment or restriction of opportunities of job access, permanence and promotion.</p> <p>In addition, there are "rights of preference" under the LFT. For example, Articles 154 to 157 inclusive establish the obligation of the employer, under equal circumstances, to give preference to Mexican workers over foreign workers, to workers who have worked satisfactorily for the longest time, to those who must support a family and have no other source of income, and to union members over non-members. The LFT clearly categorizes employment preference criteria as worker rights. A federal court has echoed this sentiment in a judicial opinion, stating: "... accordingly, in these cases, in seeking a qualitative advantage in determining which worker or workers to hire, the different points of reference established by law should be considered in the following order of importance: 1st, unionization, 2nd, longevity, and 3rd, nationality; the result of which is to place unionization in first place as grounds for worker preference, because clearly the predominant purpose for this rule is to promote unionization as a goal, the Mexican State considering this to be of public importance." The LFT contains other exceptions to the principle of equality in regards to nationality: Notably, Article 7 requires that at least 90 percent of workers hired be Mexican.</p> <p>** For purposes of promotion, the law allows distinctions to be drawn among workers. But they should only be drawn with respect to nationality, company work history, seniority, and union membership.</p>		
Coverage	Private sector Public sector Employment agencies Trade unions (as regards membership)	Yes Yes Yes Yes*	Yes Yes No Yes*
	Notes: * The principle of equality stipulated in Articles 3 and 56 of the LFT grants protection to the worker or workers against all actions which have the purpose of establishing unequal work conditions. Although there is no explicit mention of who the potential violators of the principle of equality under the law might be, it can be assumed that they include employers and other actors that influence work conditions, such as unions.		
Legal assistance other than private lawyer	Specialised body (e.g. equal treatment body) Any relevant public utility institutions and associations Trade unions (please indicate if it is for their members only)	Yes* Yes* Yes	Yes* Yes* No
	Notes: * All workers have the right to receive free legal assistance from the <b>Federal Public Labour Defender's Office</b> , when needing help to resolve labour disputes, including disputes caused by on-the-job discrimination based on ethnic or national origin, sex, social status, health, religion, political opinions or affiliation, sexual preference, or marital status.		
Legal representation other than private lawyer	Specialised body (e.g. equal treatment body) Any relevant public utility institutions and associations Trade-unions (please indicate if it is for their members only)	Yes* Yes* Yes	Yes* Yes* No
	Notes: * In Mexico, all individual and collective labour disputes are resolved by <b>Conciliation and Arbitration Boards</b> (Juntas de Conciliación y Arbitraje, <b>JCA</b> ). There are Conciliation and Arbitration Boards in every Mexican state. Any worker can ask to be represented before the JCA by the Public Labour Defender.		

Table 1.2 **Burden of proof**

	<b>Gender</b>	<b>Ethnicity</b>
<p>Employee/claimant</p> <p>Shift of burden of proof (the employee/claimant provides facts, then the employer/respondent has to provide proofs – see below for a detailed description)</p> <p>Notes/comments:</p> <p>Mexican labour law is expressly <i>tutelary</i>. In other words, it safeguards worker rights and serves as a guardian for workers' interests in light of their natural disadvantage in the labour relation. For this reason, many procedural protections for workers are established by the LFT. One example is the principle of substitution in a deficient complaint, which says that when a law suit brought by a worker is incomplete or does not contain all of the appropriate benefits accorded by law under the action that is intended or in process, the JCA will correct it upon its acceptance. Likewise, the JCA will warn the worker or his beneficiaries of any irregularity in the petition, or any contradictory actions being undertaken. In addition, the LFT establishes that specific formalities cannot be required as regards petitions or appearances by the parties.</p> <p>Another principle that regulates the labour process refers to <b>burden of proof, which in most cases is the responsibility of the employer, who must submit the appropriate proof to assist his defense</b>. An exception can be found in regards to a worker petition seeking the levelling of wages. In that case, the burden of proof on the worker. Under such an action, the worker demands the payment of equal pay for work of equal value, quantity and quality in the same position and under the same schedule and conditions of efficiency.</p>	<p>Yes, to some extent Yes</p>	<p>Yes, to some extent Yes</p>
<p><b>Direct discrimination</b></p> <p><i>Main steps</i> Can the main steps of the procedure be described as follows? 1. The employee/claimant has to supply prima facie evidence whereby it may be <b>presumed</b> that there has been discrimination. 2. The employer/respondent has the burden of <b>proving</b> that his/her practice is not discriminatory.</p> <p>In practice, is presumption – as opposed to stronger evidence of discrimination – sufficient to shift the burden of proof?</p> <p><i>Typical/standard prima facie evidence</i> admissible in courts (or other relevant bodies), as set by law or established by case law: Direct evidence (i.e. any written or verbal statement by the employer/respondent), <b>only</b>. No clear legal guidance for indirect evidence (e.g. case-by-case basis only) Statistical evidence Situation testing</p> <p>Other indirect evidence (or any important additional information/comments):</p>	<p>Yes</p> <p>No</p> <p>No False No Yes</p>	<p>Yes</p> <p>No</p> <p>No False No Yes</p>
<p><b>Indirect discrimination</b></p> <p><i>Main steps</i> Can the main steps of the procedure be described as follows? 1. The employee/claimant has to clearly identify and define the employment practice in question. 2. The employee/claimant has to show that the practice <b>has or may have</b> a differentiated impact on one protected group. 3. The employer/respondent has the burden of demonstrating that the policy or practice in question is job related for the position in question and consistent with business necessity. 4. If the employer/respondent satisfies this requirement, evidence can be supplied on the existence/lack of the existence of a less discriminatory practice</p> <p>Notes: * Same procedure as in the above case of direct discrimination.</p> <p>In step 2 above is the term "has" more accurate than "may have"? In other words, can the potential (possible) impact of the contested employment practice be sufficient for shifting the burden of proof?</p> <p>In step 4 above, if the employer/respondent demonstrates that a practice is consistent with business</p>	<p>No*</p> <p>n.a.</p>	<p>No*</p> <p>n.a.</p>

	Gender	Ethnicity
necessity, then: - does it fall to the employee/claimant to demonstrate that a less discriminatory alternative exists that meets the business need but that the employer refuses to adopt it? <b>or</b> - does it fall to the employer/respondent to demonstrate that a less discriminatory alternative that meets the business need does not exist?	n.a. n.a.	n.a. n.a.
<i>Typical/standard prima facie evidence</i> to be provided to courts or other relevant bodies, as set by law or established by case law: Direct evidence (i.e. any written or verbal statement by the employer/respondent), <b>only</b> . No clear legal guidance for indirect evidence (e.g. case-by-case basis only) Use of a distinction criteria that appear to be intrinsically suspicious. Please specify (for example, a requirement to work full-time might be unlawful discrimination against women) Statistical evidence	No False Yes  No	No False Yes  No
Other indirect evidence (or any important additional information/comments):		
<b>Harassment</b> Analysed on a case-by-case basis, by looking at all the circumstances and the context.	Yes	Yes

Table 1.3 **Employee compensation and employer penalties**

	Gender	Ethnicity
<b>Injunctive relief/reinstatement</b> - Always available to the employee/claimant, but the latter can choose monetary compensation in lieu of relief/reinstatement, or - Always made available to the employee/claimant, without alternative option, or - Always made available to the employee/claimant, but the employer/respondent can choose monetary compensation in lieu of relief/reinstatement, or - Never made available to the employee/claimant.	Yes No No No	Yes No No No
Notes: <b>In case of dismissal</b> , workers will have the right to appeal to the Conciliation and Arbitration Board (JCA) to be rehired to the post they occupied or to receive compensation.		
<b>Monetary compensation</b>  Back pay (please indicate if there is a cap)	Yes	Yes
Reimbursement of lawyer's and attorney's fees and costs (note: possible in civil or criminal procedures)	No	No
In lieu of relief/reinstatement, compensation for future lost earnings (e.g., in case of dismissal, this may correspond to lost earnings until the employee finds a new job): - Floor or minimum (amount): ..... - Cap or maximum (amount): ..... - Average compensation (amount): ..... - Median compensation (amount): .....	Yes, to some extent	Yes, to some extent
Notes: According to Article 28 of the LFT, a worker's right to <b>compensation on the basis of unjust termination</b> consists of three months' wages, vacation benefits, Christmas bonus, and accumulated seniority benefits. In addition, if the employer does not verify the cause of termination, the worker will have the right to be paid wages earned from the time of termination until the arbitral award is made.		
Compensation for psychological injury: → note: possible in civil or criminal procedures - Floor or minimum (amount): ..... - Cap or maximum (amount): ..... - Average compensation (amount): ..... - Median compensation (amount): .....	No	No

		Gender	Ethnicity
Employer additional penalties and obligations	<p><b>Civil provisions</b> None Court may order the publicity of the decision</p> <ul style="list-style-type: none"> <li>- Within the firm (e.g. notices to all employees addressing the violations of a specific charge and advising them of their rights under the laws)</li> <li>- Outside the firm (please indicate: media, trade-unions, etc.)</li> </ul> <p>The employer may be required to take corrective or preventive actions to cure the source of the identified discrimination</p>	False Yes Yes Yes	False Yes Yes Yes
	<p>Other: <b>Fines:</b> Articles 992 and 1002 of the LFT contain the schedule of fines for violations of the law. Fines are expressed in multiples of the daily minimum wage, <b>from 3 to 315 times the daily minimum wage</b>. For violations of LFT provisions related to the employment of women, Article 995 specifies fines from 3 to 155 times the daily minimum wage. Article 1002 calls for fines of 3 to 315 times the daily minimum wage for violations of other clauses that involve labour discrimination, "taking into consideration the gravity of the violation and the circumstances of the case."</p> <p><b>Penal provisions</b> None Fine (please specify amounts) Prison sentence (please specify lengths, whether it applies only in specific cases and in which cases)</p> <p>Notes: In case of harassment: fines up to 40 times the daily minimum wage; and if the harassment comes from a public servant, the latter can be dismissed. Other Criminal Code provisions: Prison sentence from 3 days to one year, or fines from 180 to 360 times the daily minimum wage, in case of: i) serious damage caused to a worker in his/her person, to his/her goods, honour or rights; or to the beneficiaries of the said worker, in their person, their goods, honour or rights; ii) preventing a person from exercising his/her rights.</p>	False Yes Yes	False Yes Yes

Table 1.4 Protection against victimisation (retaliation)

		Gender	Ethnicity
Protected actions	<p>It is prohibited to treat the employee/protected person less favourably (so-called "adverse action") because s/he has (so-called "protected action"):</p> <ul style="list-style-type: none"> <li>- brought proceedings against discrimination</li> <li>- given evidence or information in connection with any proceedings against discrimination.</li> <li>- participated as a witness in any proceedings against discrimination</li> </ul> <p>Notes: Both the Constitution and the LFT establish specific conditions for <b>labour termination</b> (conditions for justified job termination are set in art.47 of the LFT). <b>Therefore, employers are prohibited from firing workers for simply exercising their rights.</b> In that case, workers will have the right to appeal to the Conciliation and Arbitration Board (Junta de Conciliación y Arbitraje JCA) to be rehired to the post they occupied or to receive compensation. According to Article 28 of the LFT, a worker's right to compensation on the basis of unjust termination consists of three months' wages, vacation benefits, Christmas bonus, and accumulated seniority benefits. In addition, if the employer does not verify the cause of termination, the worker will have the right to be paid wages earned from the time of termination until the arbitral award is made. Likewise, workers will have the right to resign from their jobs if an employer retaliates as a consequence of them exercising their rights (conditions for justified job resignation are set in art. 51 of the LFT). In that case, if the job contract is for an indefinite amount of time, the worker will have the right to compensation worth 20 days' wages per year of employment, in addition to three months' wages and secondary benefits such as vacation, Christmas bonus and payment of wages earned from the time of termination until the appeal is concluded.</p>	Yes Yes Yes	Yes Yes Yes
Proof of causal connexion	<p><i>Burden of proof:</i> - i) employee/protected person</p>	Yes	Yes

		<b>Gender</b>	<b>Ethnicity</b>
	<p>- ii) employer/respondent within a given lapse of time from the concerned event. Please specify conditions of application and lapse of time.</p> <p>- iii) shift of burden of proof. Please specify main steps.</p> <p>In cases (i) and (iii), when the causal connexion shall be first shown or established by the employee/protected person: the link can be demonstrated by evidence that the adverse action occurred shortly after the protected activity (and the employer/respondent was aware of the complainant's protected activity before taking the action), so that the employment relationship is implicitly or explicitly (please specify) protected during a certain period of time (please specify)</p>	<p>No</p> <p>Yes</p> <p>Yes</p>	<p>No</p> <p>Yes</p> <p>Yes</p>
Employee compensation and employer penalty	<p>Compared to provisions described in Table 1.3:</p> <ul style="list-style-type: none"> <li>- additional employee/protected person compensation</li> <li>- additional employer/respondent penalties</li> </ul>	No specific rules	No specific rules

Table 1.5 Relationship with standard labour laws

		<b>Gender</b>	<b>Ethnicity</b>
Labour law and discrimination	<p>According to standard labour law(s) or code, would dismissal solely based on gender or ethnicity considered to be unjust dismissal? If yes, please specify since when.</p> <p>Notes: The Constitution and the LFT protect all workers from being dismissed unfairly. Both legal texts indicate that workers cannot be fired without just cause and that workers have the right to demand being rehired or being paid compensation. For an employer to be able to fire a worker, the grounds for dismissal have to be contained in one of the causes expressly stated in the labour law. The protections of just cause apply to workers and serve to avoid dismissals on discriminatory grounds. Dismissal of a worker for reasons other than those enumerated by the law, including those which denote discrimination, is considered to be an unjust firing.</p> <p>Is there a provision requiring equal pay for work of equal value in standard labour law(s) or code? If yes, please specify since when.</p> <p>Notes: Article 86 of the LFT (1970) has the principle of equal pay, which indicates that "For equal work, performed in an equal position, workday and conditions of efficiency, the corresponding pay must be equal."</p> <p>Other areas of discrimination covered by standard labour law(s) or code (hiring, promotion, etc...); please specify</p> <p>Under Mexican law, discriminatory practices are not allowed in the provision of labour conditions for work of equal value. Labour conditions are stipulated within the Third Title of the LFT, which comprises Articles 56 to 131. This Title regulates a series of benefits which include those related to: length of workday, days off, vacations, wages, and profit sharing. These are included under the principle of equality stipulated in Articles 3 and 56 of the LFT. As such, there should be no discriminatory practices as regards the provision of these benefits.</p>	<p>Yes</p> <p>Yes</p>	<p>Yes</p> <p>Yes</p>
Complaints	<p>Are discrimination complaints concerning dismissals more often lodged under standard labour law(s) or code, than under specific anti-discrimination laws?</p> <p>Are discrimination complaints concerning pay more often lodged under standard labour law(s) or code, than under specific anti-discrimination laws?</p>	<p>Yes</p> <p>Yes</p>	<p>Yes</p> <p>Yes</p>
Evaluations	<p>Please indicate below references to existing evaluations/studies on the effectiveness of anti-discrimination laws with respect to standard labour law(s).</p>		



Table 1.6 Positive action

		Gender	Ethnicity
Compulsory actions	Are employers <b>required</b> by law to take actions to increase diversity/prevent discrimination?	No	No
	If yes, what actions are required?		
	- make regular public reports on employment composition in terms of gender or ethnicity	No	No
	- process only anonymous job applications	No	No
	- obligation for large employers to have a person in the HRM department in charge of the employer's anti-discrimination policy (please specify the size threshold of application, if any)	No	No
- quotas (please specify the areas: e.g. executives in firms above a certain size)	No	No	
Other (or any important additional information/comments):			
Voluntary actions	Are employers <b>allowed</b> to take actions to increase diversity/prevent discrimination?	Yes	Yes
	If yes, what actions are allowed?		
	- make regular public reports on employment composition in terms of gender or ethnicity	No	No
	- establish a plan to ensure that the employment composition in terms of gender or ethnicity is balanced	No	No
	- quotas (please specify the areas: e.g. executives)	No	No
Other (or any important additional information/comments):			
The Secretary of Labour and Social Welfare (Secretaria del Trabajo y Prevision Social, STPS) monitors and enforces Mexico's federal labour laws and conducts the nation's labour policy. It defines Affirmative Action as those measures intended to correct differences in society's treatment of vulnerable groups. <b>Such measures are incorporated in government policies and programs</b> to support, protect and include persons who belong to vulnerable groups. <b>Employers are not primarily responsible for their implementation.</b>			
In its National Labour Policy Program (2001-2006), the STPS underscored the need to promote dignified work and protection for vulnerable groups, including women, disabled or special needs persons, persons with HIV/AIDS, indigenous peoples, youth and the elderly. It proposed a series of programs and official actions that commit authorities and individuals to combat workplace discrimination, including via positive or affirmative actions. These include training, integration and the promotion of employment and self-employment for vulnerable groups. Moreover, the LFPED itself includes the implementation of a series of positive, compensatory measures to promote equal opportunity, in particular those related to job training and access.			
Public employers' practices	Do public employers normally take actions to increase diversity/prevent discrimination?	Yes	Yes
	If yes, what actions?		
	- make regular public reports on employment composition in terms of gender or ethnicity	Yes	Yes
	- establish a plan to ensure that the employment composition in terms of gender or ethnicity is balanced	Yes	Yes
	- process only anonymous job applications	..	..
- have at least one person in the HRM department in charge of the employer's anti-discrimination policy	Yes	Yes	
- quotas (please specify the areas: e.g. high-rank officials)	..	..	
Other (or any important additional information/comments):			
Incentives	Is there a policy to increase incentives for employers to increase diversity/prevent discrimination?	Yes	Yes
	Policy instruments used:		
	- Delivery of "labels" or certificates stating that the employer has a diversity-friendly business/employment practice.	Yes	Yes
	- financial incentives to establish a plan to ensure that the employment composition in terms of gender or ethnicity is balanced	Yes	Yes
	- financial incentives for having a person in the HRM department in charge of the	..	..

		Gender	Ethnicity
	employer's anti-discrimination policy and/or hiring a consultant to establish a diversity plan. - financial incentives for quotas (please specify the areas: e.g. executives)	..	..
	Other (or any important additional information/comments):		

**Part 2. Institutional framework: specialised bodies (SB) combating discrimination (e.g. equal treatment bodies)**

**General enforcement mechanisms**

**Workplace inspection** is the basic tool for enforcing Mexican labour law. According to Article 540 of the LFT, the purpose of workplace inspection is to oversee compliance with labour standards, including providing workers and employers with technical information to assist them in complying with the legislation. Inspectors are responsible for monitoring workplaces and informing authorities of infractions of labour standards that they observe, as well as performing studies and issuing reports requested by authorities. Labour inspectors play an important role in verifying compliance with those legal measures that aim to eliminate workplace discrimination in accordance with the principle of equality. For example, they must monitor compliance with the special legal protections extended to work done by women who are pregnant or lactating, as well as by disabled persons. Likewise, inspectors have the power to obtain information about prevailing labour conditions in the workplace and to verify compliance by employers with their obligations and worker rights.

According to the LFT, inspectors are authorized to visit workplaces at any time, as long as they identify themselves adequately. Inspections may be carried out periodically, or by order of higher authorities upon receiving a complaint of workplace discrimination or regarding an alleged labour law violation. During their visits, inspectors may use their investigatory powers to interview workers and employers privately or before witnesses, regarding any labour standard enforcement matter. They may also demand to see books, records or other documents required by law. In addition, they may make suggestions for correcting violations they find, as well as examine materials and substances that may put workers, including those who are pregnant, at risk. In the first instance, inspectors attempt to achieve voluntary compliance of labour law requirements through satisfactory resolution of infractions or disputes, before there is a need for more severe corrective measures.

Besides, according to the LFT, workers may report any discriminatory conduct to which they have been subjected to labour authorities. Disagreements that cannot be resolved by administrative labour authorities may be presented to the appropriate **Conciliation and Arbitration Board (JCA)**.

The JCAs are labour authorities with judicial powers. They are in charge of interpreting and enforcing labour laws to solve labour disputes between employers and workers, including those related to workplace discrimination (their mandate also includes disputes between workers and their unions). According to the Constitution and the LFT, the JCA has exclusive authority over all matters involving the application and interpretation of labour legislation: a worker, therefore, may not directly bring a labour suit before a judicial court.

JCAs are tripartite bodies, composed of representatives of the workers, the employers and the government, which always presides. In matters of workplace discrimination, the JCA resolves cases of unjust termination and job cancellation without obligation for the worker on the grounds of discrimination, as well as those regarding work conditions and special protections for women and children in the workplace.

The process that is followed by the JCA to resolve a charge of labour discrimination is the same that it uses to resolve individual work disputes. There is a single proceeding, which begins with a conciliation stage among the parties. If this is unsuccessful, the parties usually come before a hearing to present demands and exceptions, testimony and proof. The final decisions of the JCA, called *Arbitral Awards (Laudos)*, should be written and contain a summary of the suit and its response; an indication of disputed acts; an account of proof admitted and treated, as well as an evaluation of proof relating to the facts in the suit; legal reasoning upon which the resolution is based, case law upon which the reasoning is based, legal doctrine, etc; and the decisive points.

JCA awards are immediately applicable judicial mandates. The JCA can make use of the police to enforce an arbitral award. In the event of a breach, the responsible party will face fines or confiscation of goods in order to compensate for damages. The JCA is authorized to order payment of compensation for LFT violations. Among other things, an award grants rehiring or payment of a settlement to a worker who has been unjustly terminated due to workplace discrimination, or obliges the employer to comply with violated labour provisions. According to the LFT, the president of the JCA is authorized to take the necessary measures to guarantee speedy and expeditious enforcement of awards.

Because there is only one proceeding, Arbitral Awards are definitive, and may only be modified through a "constitutional relief proceeding". Appeal for Constitutional Relief may occur when a JCA award violates, does not recognize, or is contrary to what is stipulated by the Constitution or the law; when the legal interpretation of standards made by the Boards is incorrect; when people, exceptions, or things are included that were not the subject or matter of the labour suit, and when everything included in the suit was not included or resolved in the decision. It also applies to cases of acts of authority and procedural violations. The federal courts have

exclusive authority over appeals for constitutional relief. An appeal for constitutional relief must be filed within 15 days after the decree or decision being appealed is issued, and must include the name of the plaintiff; the responsible authority, in this case the JCA; the act being appealed, in other words, the arbitral award; as well as the grievances and violations. When a JCA decision is revoked, the court will identify the legal errors involved, indicate the legal interpretations that must be applied, and order the Board to reopen or resume proceedings upon which a decision can be made in fulfilment of these interpretations.

During the JCA proceeding, parties have the right to be represented by a lawyer. Workers also have the right to legal representation by the **Public Labour Defender's Office**. Both federal and state levels have Labour Defender's Offices (Procuraduría de la defensa del trabajo). These labour authorities have the power to legally represent workers or unions, who so request, regarding labour and social security rights before the JCA and all authorities. The Labour Defender's Office can represent victims of workplace discrimination during the hiring, working, or promotion stages. Different than the JCA, these authorities can continue the legal process even once it has been submitted as an "appeal for constitutional relief" (*juicio de amparo*). In the cases of workplace discrimination, the Labour Defender's Office can even intervene as a conciliator between the worker and the employer, proposing a mutually agreeable solution to the dispute. Any agreement arranged through conciliation between the interested parties can be presented by the Labour Defender's Office to the JCA for final settlement. In the particular case of discriminatory practices, as well as in cases of unjust termination due to workplace discrimination, the Labour Defender's Office can advise and represent the worker regarding his dispute until an arbitral award or relief proceeding decision is obtained. The role of the Labour Defender's Office is very important, as it offers its services free of charge, which benefits workers.

### **Specific enforcement mechanisms**

The LFPED created the **National Council for the Prevention of Discrimination** as a decentralized body under the Secretary of the Interior, with legal entity status and its own budget. The Council is headquartered in Mexico City, Federal District, and has commenced duties on April 26, 2004. While this is currently the only office of the Council, it is empowered to establish delegations and offices in other national states. The purpose of the Council is to formulate and promote public policies for equal opportunity and treatment of people. According to Article 20 of the LFPED, the Council's roles include:

- investigating alleged discriminatory acts and practices within its jurisdiction;
- serving as consultant and guide regarding labour rights for individuals or groups being discriminated against;
- promoting the issuance of employment discrimination complaints; and
- resolving grievance or complaint proceedings.

The LFPED contains two procedures for resolving disputes: demand and complaint. A demand procedure begins when discriminatory conduct is committed by federal public servants in performance of their functions, or because of them. A complaint procedure presupposes discriminatory conduct by individuals. As a result, cases of private-sector workplace discrimination, wherein the employer (an individual) undertakes a discriminatory act that prejudices some worker, can be presented before the Council via a complaint proceeding. The Council will initiate proceedings when petitioned by a party or on its own initiative when deemed necessary by its President. However, it is important to clarify that initiation of any of the previously mentioned proceedings does not prevent the worker from pursuing other jurisdictional actions.

A Conciliation Proceedings between Individuals (LFPED Section 6) is initiated upon notification of the content of the complaint to the individual who allegedly committed the discriminatory conduct. The individual is advised that, if he so chooses, the complaint can be submitted to conciliation. If he accepts, a conciliation hearing will be held in which the parties can present evidence they consider appropriate. When the parties arrive at a solution, an Agreement will be entered into, and no appeal will be allowed by the council from that point on. This Agreement will be definitive and binding, which means it may be enforced before the courts in the event of breach.

The Council has the legal power to apply administrative measures. These measures apply after having signed the conciliation Agreement between both parties. These measures consist of training courses to public and private official in the matter of discrimination and the use of special posters to sensitize the members of the offender organisation, and the publishing of the resolution, which has been reached. The law does not provide the Council with the legal capacity to apply coercitive measures.

If both or either party refuses to submit to conciliation, the Council will provide guidance to the plaintiff to assist him in judicial or administrative petitions. In the labour realm, for example, the Council can recommend that the worker bring the complaint to the offices of the STPS or before the relevant Conciliation and Arbitration Board.

(source: Commission for Labor Cooperation, 2007)

Table 2.1 **Activities of SBs not related to individual discrimination cases: Public information and evaluation<sup>a</sup>**

	<b>Gender</b>	<b>Ethnicity</b>
Is there a specialised body (SB) in charge of carrying out some of all of the following public information and policy evaluation functions?	Yes	Yes
National Council for the Prevention of Discrimination (CONAPRED).		
The core legal capacities of the CONAPRED are (art. 20):		
<ul style="list-style-type: none"> <li>• Designs strategies and instruments, as well as to promote programs, projects and actions to prevent and to eliminate the discrimination;</li> </ul>		

	Gender	Ethnicity
<ul style="list-style-type: none"> <li>To propose and evaluate the execution of the National Program for the Prevention and Elimination of Discrimination, according to the applicable legislation;</li> <li>To verify the adoption of preventive and eliminative measures and programs against discrimination in public and private institutions and organizations, and issue the corresponding certificates;</li> <li>Develop and disseminate studies on discriminatory practices in the political, economic, social and cultural spheres;</li> <li>To carry out studies relating to legal and administrative rulings in this respect, as well as to propose appropriate and relevant legislative reforms in the matter of discrimination;</li> <li>To investigate any presumed discriminatory acts or practice committed by individuals or federal authorities;</li> <li>To apply administrative measures established in the Federal Act for the Prevention and Elimination of Discrimination.</li> </ul> <p>In May 2005, CONAPRED presented to the President of Mexico, the first governmental program aimed at combating discrimination (NPPED). This program is integrated by 5 core stages that will be achieved in different moments (immediate, mid-term or long-term goals) : i) the revision of the national legal framework in order to adjust it according to the LFPED and international human rights standards ; ii) the attention of claims and complaints related to discrimination ; iii) the design of public policies including positive and compensatory measures ; iv) the development of specialised studies about discrimination ; and v) the design of several strategies to influence the culture of discrimination.</p> <p>This National Strategy to Combat discrimination is in collaboration with Federal, State and Municipal Government entities, international organisations, academic and business institutions, as well as civil society NGOs. For this purpose, between April 2004 and September 2007, CONAPRED has signed 118 institutional of collaboration. In all of them, the promotion of the culture on non discrimination is a goal. 57 of these agreements are general, and the rest are agreements regarding specific issues (technical cooperation, compensatory measures, public contests).</p>		
<p>This SB has the statutory power to:</p> <ul style="list-style-type: none"> <li>- run information campaigns to inform the public of their legal rights</li> </ul> <p><b>in practice</b>, importance of the above mentioned activity in the actual overall workload</p> <ul style="list-style-type: none"> <li>- run campaigns to change public opinion</li> </ul> <p><b>in practice</b>, importance of the above mentioned activity in the actual overall workload</p> <ul style="list-style-type: none"> <li>- publish statistics on discrimination</li> </ul> <p><b>in practice</b>, importance of the above mentioned activity in the actual overall workload</p> <ul style="list-style-type: none"> <li>- carry out evaluations of the legal and institutional anti-discrimination framework</li> </ul> <p><b>in practice</b>, importance of the above mentioned activity in the actual overall workload</p> <ul style="list-style-type: none"> <li>- make policy recommendations</li> </ul> <p><b>in practice</b>, importance of the above mentioned activity in the actual overall workload</p> <ul style="list-style-type: none"> <li>- produce codes of good practice for employers</li> </ul> <p><b>in practice</b>, importance of the above mentioned activity in the actual overall workload</p>	<p>Yes</p> <p>High</p> <p>Yes</p> <p>High</p> <p>Yes</p> <p>High</p> <p>Yes</p> <p>High</p> <p>Yes</p> <p>High</p> <p>Yes</p> <p>High</p>	<p>Yes</p> <p>High</p> <p>Yes</p> <p>High</p> <p>Yes</p> <p>High</p> <p>Yes</p> <p>High</p> <p>Yes</p> <p>High</p>
<p>Other (or any Important additional information/comments):</p> <p>In May 2005, the National Council for the Prevention of Discrimination and the Social Development Secretary (Secretaria de Desarrollo Social) jointly published the First National Survey on Discrimination in Mexico. This document provides information on the entry into the labour force and the right to equal pay for the elderly, indigenous peoples, persons with disabilities, religious minorities, women, and people with different sexual preferences.</p>		

Note: a) High/Medium/Low mean above average / close to average / below average, respectively.

Table 2.2 **Activities of SBs not related to individual discrimination cases: Control and correction<sup>a</sup>**

	Gender	Ethnicity
<p>Is there a specialised body (SB) in charge of carrying out some of all of the following control and correction functions?</p> <p>National Council for the Prevention of Discrimination (CONAPRED) See also the above description of general and specific enforcement mechanisms</p>	<p>Yes</p>	<p>Yes</p>
<p>This SB has the statutory power to:</p> <ul style="list-style-type: none"> <li>- randomly conduct formal investigations of companies and organisations.</li> </ul> <p><b>in practice</b>, importance of the above mentioned activity in the actual overall workload</p> <ul style="list-style-type: none"> <li>- conduct formal investigations of companies and organisation where there is evidence of discrimination.</li> </ul> <p><b>in practice</b>, importance of the above mentioned activity in the actual overall workload</p> <ul style="list-style-type: none"> <li>- oblige a company or an organisation to change the way it operates when discriminatory practices are found.</li> </ul> <p><b>in practice</b>, importance of the above mentioned activity in the actual overall workload</p>	<p>Yes</p> <p>High</p> <p>Yes</p> <p>High</p> <p>Yes</p> <p>High</p>	<p>Yes</p> <p>..</p> <p>Yes</p> <p>..</p> <p>Yes</p> <p>..</p>

	Gender	Ethnicity
- take legal action against companies or organisations that apply discriminatory practices <b>in practice</b> , importance of the above mentioned activity in the actual overall workload	Yes High	Yes ..
- take legal action against organisations that attempt to promote discrimination or to instruct others to discriminate. <b>in practice</b> , importance of the above mentioned activity in the actual overall workload	Yes  High	Yes
Other (or any Important additional information/comments):		

Note: a) High/Medium/Low mean above average / close to average / below average, respectively.

Table 2.3 **Role of SBs in individual discrimination cases**

	Gender	Ethnicity
Is there a specialised body (SB) with specific functions related to individual discrimination cases? National Council for the Prevention of Discrimination (CONAPRED) See also the above description of general and specific enforcement mechanisms	Yes	Yes
Was this body created by anti-discrimination laws (or did anti-discrimination laws establish a specific mandate for it)?	Yes	Yes
<b>Formal linkage between equal treatment body activities and complaint lodging and procedures</b>		
Does the SB act as a one-stop shop where claimant can access information, lodge a complaint, receive advice?	Yes	Yes
As soon as, or before, a discrimination complaint is brought to court, is the claim formally transmitted to the SB?	No	No
Discrimination complaints must be lodged with the SB beforehand, which acts as one-stop shop to start the procedure.	No	No
The SB has the statutory power to provide advice and information to claimants (or both parties) on their legal rights and what options they have.	Yes	Yes
<b>In practice</b> , the SB carries on the above mentioned process as soon as it receives a discrimination claim.	in many cases	in many cases
The SB has the statutory power to provide claimants with legal assistance.	Yes	Yes
<b>In practice</b> , SB provides legal assistance to claimants during court proceedings.	in many cases	in many cases
The SB has the statutory power to provide claimants with legal representation.	Yes	Yes
<b>In practice</b> , the SB provides legal representation to claimants during court proceedings.	Yes, duty	Yes, duty
<b>Investigation of discrimination claims</b>		
The SB has the legal authority to compel people (and in particular, the employer) to provide all of the information it requires to investigate a discrimination claim.	Yes	Yes
Does the court accept evidence from the SB?	Yes	Yes
Does the court accept the SB's evaluation of the validity of the discrimination complaint?	Yes	Yes
<b>In practice</b> , the SB formally investigates discrimination claims.	Yes, duty	Yes, duty
Please indicate below the main tools the SB uses to investigate a discrimination claim:		
Any employer's failure to provide the requested information to the SB will: - have no implication for the court ruling. - potentially be used to draw inferences on discrimination if the case is brought before court.	No Yes	No Yes
Any employer's failure to comply with the code of practices issued by the SB (or other relevant body) will: - have no implication for the court ruling. - potentially be used to draw inferences on discrimination if the case is brought before court.	No Yes	No Yes
<b>Mediation/conciliation procedure</b>		
The SB has the statutory power to help both parties to resolve the dispute through a mediation/conciliation procedure.	Yes	Yes

	Gender	Ethnicity
Mediation/conciliation is a free and voluntary process for both parties. <b>In practice</b> , the SB carries out mediation/conciliation procedures, so that a court ruling may not be necessary.	Yes Yes, duty	Yes Yes, duty
The mediation/conciliation procedure is <b>usually</b> initiated: - before the case is brought to court - before any formal investigation starts or at an early stage of the process - after any investigation has produced primary evidence of discrimination (but before a litigation decision has been reached)	Yes Yes Yes	Yes Yes Yes
The SB acts as a neutral third party assisting both opposing parties in the mediation/conciliation procedure.	Yes	Yes
The mediation/conciliation procedure is confidential: no details of the discussion taking place in its course can be repeated to court, nor are made public. The same rule applies to the terms of the settlement.	Yes	Yes
If the parties, including the SB, reach settlement agreement, the latter is legally binding and the charge is dismissed.	Yes	Yes
The SB secures the enforcement of settlement agreements reached under its assistance and/or responsibility.	Yes	Yes

**Part 3. Statistics on mediation/conciliation procedures and court case** → no statistics available

#### Main additional references

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## NETHERLANDS

### Part 1. Legal framework for employment discrimination

Main anti-discrimination laws:

- General Equal Treatment Act (1994) – GETA (amended in 2004). The word “distinction” is used in the GETA, instead of “discrimination” (there is a prohibition of making direct and indirect distinctions). The difference between the two concepts is that “distinction” is a “neutral” and ‘discrimination’ a “pejorative” notion.
- Equal Treatment in Employment (men and women) Act (1980)
- Equal Treatment (working hours) Act
- Equal Treatment (Temporary and Permanent Employees) Act
- Equal Treatment (Disability or Chronic Illness) Act (2003)
- Equal Treatment in Employment (Age Discrimination) Act (2004)

Relevant courts: Civil courts

Legal scope/definition of the (hereinafter) so-called gender and ethnic grounds:

- Gender: sex, explicitly including: pregnancy, childbirth and maternity and marital status.
- Ethnicity: race, implicitly including colour, descent or ethnic origin (definition used by the Dutch Supreme Court and the Equal Treatment Commission)

Other grounds: religion, belief, political orientation, nationality, sexual orientation, civil status, disability or chronic illness, age, duration of employment relation (fulltime or part-time), temporary or permanent employment contract.

**Table 1.1 Prohibited acts, areas of concern, coverage, legal assistance and representation**

		<b>Gender</b>	<b>Ethnicity</b>
Type of discrimination	Direct discrimination Indirect discrimination, i.e. where a provision criterion or practice is applied to all employees but puts one protected group at a particular disadvantage and cannot be shown to be a proportionate means of meeting a legitimate aim. Pressure and instruction to discriminate Harassment  * Definition of indirect discrimination: discrimination on the grounds of characteristics and behaviour other than [prohibited grounds], resulting in direct discrimination.	Yes Yes*  Yes Yes	Yes Yes*  Yes Yes
Areas of concern	Hiring process Wage Type of employment contract (permanent vs. fixed term) Working time (atypical work schedule, part-time vs. full-time) Promotion Job and vocational training Transfer Redundancy and dismissal	Yes Yes Yes Yes Yes Yes Yes Yes	Yes Yes Yes Yes Yes Yes Yes Yes
Coverage	Private sector Public sector Employment agencies Trade unions (as regards membership)	Yes Yes Yes Yes	Yes Yes Yes Yes





	Gender	Ethnicity
<p><b>Indirect discrimination</b></p> <p><i>Main steps</i>            Can the main steps of the procedure be described as follows?            1. The employee/claimant has to clearly identify and define the employment practice in question.            2. The employee/claimant has to show that the practice <b>has or may have</b> a differentiated impact on one protected group.            3. The employer/respondent has the burden of demonstrating that the policy or practice in question is job related for the position in question and consistent with business necessity.            4. If the employer/respondent satisfies this requirement, evidence can be supplied on the existence/lack of the existence of a less discriminatory practice</p> <p>In step 2 above is the term "has" more accurate than "may have"? In other words, can the potential (possible) impact of the contested employment practice be sufficient for shifting the burden of proof?            In step 4 above, if the employer/respondent demonstrates that a practice is consistent with business necessity, then:            - does it fall to the employee/claimant to demonstrate that a less discriminatory alternative exists that meets the business need but that the employer refuses to adopt it? <b>or</b>            - does it fall to the employer/respondent to demonstrate that a less discriminatory alternative that meets the business need does not exist?</p> <p><i>Typical/standard prima facie evidence</i> to be provided to courts or other relevant bodies, as set by law or established by case law:            Direct evidence (i.e. any written or verbal statement by the employer/respondent), <b>only</b>.            No clear legal guidance for indirect evidence (e.g. case-by-case basis only)            Use of a distinction criteria that appear to be intrinsically suspicious. For example, a requirement to work full-time might be unlawful discrimination against women)            Statistical evidence</p> <p>* There are no specific conditions for statistical evidence to be admissible in court. This kind of evidence is used quite often by the CGB, but it is not known to what extent this is done by the courts since judgements on equal treatment cases that are issued by (district) courts are not registered (and therefore cannot be researched) separately. The CGB uses the standard consideration that the contested rule, practice, etc. has to affect a category of persons that is protected by one of the non-discrimination grounds "in overwegende mate", which can be translated as: the rule, etc. has to affect this category <i>predominantly</i>. In this context the CGB always stresses the point that this should not be calculated on the basis of absolute figures, but should be seen relatively (as a percentage). In a number of cases, the CGB has given the standard rule that people in the alleged indirectly discriminated group (e.g. women) should at least be disadvantaged by the apparently neutral rule or practice <i>1.5 times as often</i> as people from the comparator-group (e.g. men). However, since 2004 the CGB has not explicitly mentioned this standard or criterion anymore. (source: Holtmaat 2007)  <b>Facts of common knowledge</b> are taken into account, either in the absence of relevant statistics or, to support such statistics. However, facts of common knowledge are not accepted as an <i>exclusive</i> means of evidence. Only in plainly clear cases does the CGB <i>not</i> require statistical numbers or facts of common knowledge. (source: Holtmaat 2007)</p>	<p>Yes</p> <p>Yes</p> <p>No</p> <p>Yes</p> <p>No</p> <p>True</p> <p>Yes</p> <p>Yes*</p>	<p>Yes</p> <p>Yes</p> <p>No</p> <p>Yes</p> <p>No</p> <p>True</p> <p>Yes</p> <p>Yes*</p>
<p><b>Harassment</b>            Analysed on a case-by-case basis, by looking at all the circumstances and the context.</p> <p>Other: Harassment is conduct related to gender or ethnicity with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment.</p>	<p>No</p>	<p>No</p>

Table 1.3 Employee compensation and employer penalties

	Gender	Ethnicity
<p>Employee compensation</p> <p><b>Injunctive relief/reinstatement</b>            - Always made available to the employee/claimant, but the latter can choose monetary compensation in lieu of relief/reinstatement, or            - Always made available to the employee/claimant, without alternative option, or            - Always made available to the employee/claimant, but the employer/respondent can choose monetary compensation in lieu of relief/reinstatement, or            - Never made available to the employee/claimant.</p>	<p>Yes</p> <p>No</p> <p>No</p> <p>No</p>	<p>Yes</p> <p>No</p> <p>No</p> <p>No</p>

		Gender	Ethnicity
	<p>Notes: The GETA provides that discriminatory dismissals and victimisation dismissals are "voidable". The employee can invoke annulment within two months after the notice of the determination by an announcement to his employer and claim wages. When the employer refuses, the employee can go to the court to claim wages and to be reinstated in the job. Or he can claim compensation for pecuniary damages under the sanctions of <b>the general civil law</b>. Likewise, contractual provisions which are in conflict with the GETA, shall be null and void.</p> <p><b>Monetary compensation</b> Back pay: No cap, but mitigation is possible.</p> <p>Reimbursement of lawyer's and attorney's fees and costs</p> <p>In lieu of relief/reinstatement, compensation for future lost earnings (e.g., in case of dismissal, this may correspond to lost earnings until the employee finds a new job):  - Floor or minimum (amount): .....  - Cap or maximum (amount): .....  - Average compensation (amount): .....  - Median compensation (amount): .....</p> <p>Compensation for psychological injury:  - Floor or minimum (amount): .....  - Cap or maximum (amount): .....  - Average compensation (amount): .....  - Median compensation (amount): .....</p> <p>Notes: According to Holmaat (2007):</p> <ul style="list-style-type: none"> <li>As sanctions and remedies are not specified in the GETA itself, victims have to know which sanctions normal civil law and administrative law contains. It has been proposed to include the sanctions (that are available under civil and administrative law) in the GETA in order to clarify this point for both the victims and perpetrators of discrimination. In addition, a motion has been submitted in parliament in which the government has been asked to extend the possibilities for the Labour Inspectorate to impose sanctions in the case of gender and racial discrimination.</li> <li>Dutch courts tend to be restrictive in granting damages that are not strictly material damages (e.g., wages not paid). Immaterial damages (e.g., hurt feelings) will only minimally be compensated for. Compensation in terms of money only occurs when, for example, the judge agrees to the dismissal since employment relationships have been disturbed, and in that case sets a relatively high sum for compensation because of the termination of the contract. There is no official ceiling for monetary compensation.</li> </ul>	<p>Yes</p> <p>Yes</p> <p>Yes, but not in all cases</p> <p>Yes, but not in all cases</p>	<p>Yes</p> <p>Yes</p> <p>Yes, but not in all cases</p> <p>Yes, but not in all cases</p>
Employer additional penalties and obligations	<p><b>Civil provisions</b> None Court may order the publicity of the decision  - Within the firm (e.g. notices to all employees addressing the violations of a specific charge and advising them of their rights under the laws)  - Outside the firm (please indicate: media, trade-unions, etc.)  The employer may be required to take corrective or preventive actions to cure the source of the identified discrimination  <b>Other:</b> the court may order to rectify discriminatory advertisements</p> <p>Notes: * The GETA mention some additional sanctions that are imposed by the CGB, not by the courts. The CGB may make recommendations when forwarding its findings (in an Opinion) to the party found to have made unlawful distinction and may also forward its findings in an Advise to the Ministers concerned, and to organisations of employers, employees, professionals, public servants, consumers of goods and services and to relevant consultative bodies.</p> <p><b>Penal provisions</b> None Fine: maximum is € 6.700 Prison sentence: maximum is 6 months (ethnicity) and 2 months (gender)</p>	<p>False</p> <p>Yes, ETC</p> <p>Yes, ETC</p> <p>No</p> <p>Yes</p>	<p>False</p> <p>Yes, ETC</p> <p>Yes, ETC</p> <p>No</p> <p>Yes</p>
		<p>False*</p> <p>Yes</p> <p>Yes</p>	<p>False*</p> <p>Yes</p> <p>Yes</p>

		Gender	Ethnicity
	<p>Notes:</p> <p>Art. 137g(1) of the <b>Penal Code</b> provides that “A person who in his official capacity, profession or business, intentionally discriminates against persons on the grounds of their race is liable to a term of imprisonment of no more than six months or a fine of the third category.</p> <p>Art.429 quater provides that “A person who, in the discharge of his office, practice of a profession or in carrying on a business, discriminates against persons on the grounds of their race, religion or personal beliefs, their sex or their hetero- or homosexual orientation, is liable to a term of detention of a period of not more than two months or a fine of the third category.”</p> <p>However, as noted by Holmaat (2007), the criminal law can only be invoked in those instances where there is proof of discrimination, which generally entails intent on the part of the perpetrator. Thus, there are very few court case</p>		

Table 1.4 Protection against victimisation (retaliation)

		Gender	Ethnicity
Protected actions	<p>It is prohibited to treat the employee/protected person less favourably (so-called "adverse action") because s/he has (so-called "protected action"):</p> <ul style="list-style-type: none"> <li>- brought proceedings against discrimination</li> <li>- given evidence or information in connection with any proceedings against discrimination.</li> <li>- participated as a witness in any proceedings against discrimination</li> </ul> <p>Notes:</p> <p>Victimisation was not fully included in the ETA of 1994, there was only protection against victimisation on dismissal. A general clause against victimisation has been included in 2004.</p>	<p>Yes</p> <p>Yes</p> <p>Yes</p>	<p>Yes</p> <p>Yes</p> <p>Yes</p>
Proof of causal connexion	<p><i>Burden of proof:</i></p> <ul style="list-style-type: none"> <li>- i) employee/protected person</li> <li>- ii) employer/respondent within a given lapse of time from the concerned event. Please specify conditions of application and lapse of time.</li> <li>- iii) shift of burden of proof. Please specify main steps.</li> </ul> <p>In cases (i) and (iii), when the causal connexion shall be first shown or established by the employee/protected person:</p> <ul style="list-style-type: none"> <li>- the link can be demonstrated by evidence that the adverse action occurred shortly after the protected activity (and the employer/respondent was aware of the complainant's protected activity before taking the action), so that the employment relationship is implicitly or explicitly (please specify) protected during a certain period of time (please specify)</li> </ul> <p>* No specific provisions. The GETA provides that “If a person who considers that he is a victim of discrimination within the meaning of this Act adduces before a court facts from which it may be presumed that such discrimination has taken place, the other party is required to prove that the action in question was not in breach of this Act.”</p> <p>As noted by van den Brink (2007), the scope of this provision on the shift in the burden of proof is limited to proving discrimination as such. In case of victimisation, the obligation to establish the facts that are necessary to prove the claim, thus rest with the party who asserts, as it is the general rule in civil law procedures (see also Holmaat, 2007).</p>	<p>Yes*</p> <p>No</p> <p>No</p> <p>..</p>	<p>Yes*</p> <p>No</p> <p>No</p> <p>..</p>
Employee compensation and employer penalty	<p>Compared to provisions described in Table 1.3:</p> <ul style="list-style-type: none"> <li>- additional employee/protected person compensation</li> <li>-additional employer/respondent penalties</li> </ul>		

Table 1.5 Relationship with standard labour laws

		Gender	Ethnicity
Labour law and discrimination	Note: Dutch law does not contain a special labour code. Labour law topics are dealt with in various laws. The regulation of individual labour contracts, for example, forms part of the Civil Code, equal treatment and non discrimination at work are dealt with in special statutes.		
	According to standard labour law(s) or code, would dismissal solely based on gender or ethnicity considered to be unjust dismissal? If yes, please specify since when: * Art.1637y of the Civil Code (1938) ** In addition to GETA, general anti-discrimination provisions under the Penal Code and the Constitution apply.	Yes*	See (**)
	Is there a provision requiring equal pay for work of equal value in standard labour law(s) or code? If yes, please specify since when: * A specific paragraph concerning equal pay for work of equal value is included in the Equal Treatment in Employment (men and women) Act (1980). ** In addition to GETA, general anti-discrimination provisions under the Penal Code and the Constitution apply.	Yes*	See (**)
	Other areas of discrimination covered by standard labour law(s) or code (hiring, promotion, etc...); please specify		
Complaints	Are discrimination complaints concerning dismissals more often lodged under standard labour law(s) or code, than under specific anti-discrimination laws?	No*	No*
	Are discrimination complaints concerning pay more often lodged under standard labour law(s) or code, than under specific anti-discrimination laws?  * In practice, the equality norm is in most cases enforced through a special low threshold procedure before the CGB (Holmaat, 2007). In most cases the basis of these complaints are the anti-discrimination laws.	No*	No*
Evaluations	Please indicate below references to existing evaluations/studies on the effectiveness of anti-discrimination laws with respect to standard labour law(s).  Evaluation studies about the effectiveness of the anti-discrimination legislation are: Gelijke behandeling: regels en realiteit, I.P. Asscher-Vonk e.a., 1999. Gelijke behandeling: principes en praktijken, M.L.M. Hertogh e.a., 2006.		

Table 1.6 Positive action

		Gender	Ethnicity
Compulsory actions	Are employers <b>required</b> by law to take actions to increase diversity/prevent discrimination?  If yes, what actions are required? - make regular public reports on employment composition in terms of gender or ethnicity - process only anonymous job applications - obligation for large employers to have a person in the HRM department in charge of the employer's anti-discrimination policy (please specify the size threshold of application, if any) - quotas (please specify the areas: e.g. executives in firms above a certain size)	No	No*
Voluntary actions	Are employers <b>allowed</b> to take actions to increase diversity/prevent discrimination?  If yes, what actions are allowed? - make regular public reports on employment composition in terms of gender or ethnicity - establish a plan to ensure that the employment composition in terms of gender or ethnicity is balanced	Yes*  Yes Yes**	Yes*  Yes Yes**

		Gender	Ethnicity
	<p>- quotas (please specify the areas: e.g. executives) only when in conformity with the rulings of the European Court of Justice concerning preferential treatment</p> <p>Notes:</p> <p>* Article 2(3) of the GETA in its post-implementation format imposes the following conditions on positive action measures and policies: 1. the initiative must be a <i>specific measure</i>; 2. the measure is aimed at the conferral of a preferential position for women or for people belonging to ethnic minorities; 3. the measure is aimed at the <i>removal</i> or the <i>reduction</i> of factual inequalities; and 4. there must be a <i>proportionate</i> relationship between the measure and the objective pursued.</p> <p>Compared with the corresponding provisions under the EU Directives, this definition leaves <i>less scope</i> for affirmative action policies and programmes, since it does not allow measures which aim at <i>preventing</i>, in addition to <i>removing</i> or <i>reducing</i> disadvantages. (Holmaat, 2007)</p> <p>Example of policy initiatives: In 1999, the Taskforce Minderheden en Arbeidsmarkt161 was installed by the Minister of Social Affairs and the Minister of the Interior, to stimulate labour market participation of minorities and abolish possible obstacles. It came with recommendations to adopt policy to unite job seekers from minority groups and potential employers, which led to several projects. Two of those, the small and medium sized company covenant (MKB Covenant) and the Raamconvenant Grote Ondernemingen (RGO), aimed at greater inclusion of ethnic minorities in the labour market. As these initiatives involved multiple parties, covenants were used to put down agreements on objectives and procedures on the matter. The projects have all been evaluated and similar policy projects have been adopted for other unemployed groups such as the covenant to stimulate labour market participation of women who return to work after a career break. (for further details and evaluations, see van den Berge et al., 2004)</p> <p>** According to Perchinig et al. (2003), company-based "Codes of Conduct", which usually contain guidelines for the management and the staff on how to avoid discriminatory practices, are widely found in Dutch companies. They usually focus on recruitment and selection procedures and define proper procedures for staff behaviour and treatment of members of minority groups. The quality of their implementation varies: according to a recent study (KPGM 2001), Codes of Conduct are implemented mainly in larger companies with formal recruitment and promotion procedures. Reflecting the growing diversity of the workforce, larger companies have developed strategies for 'diversity management', which advocate a business case for diversity arguing that a proper management of a culturally diverse staff increases the competitiveness of the company.</p>	Yes	Yes
Public employers' practices	<p>Do public employers normally take actions to increase diversity/prevent discrimination?</p> <p>If yes, what actions?</p> <ul style="list-style-type: none"> <li>- make regular public reports on employment composition in terms of gender or ethnicity</li> <li>- establish a plan to ensure that the employment composition in terms of gender or ethnicity is balanced</li> <li>- process only anonymous job applications</li> <li>- have at least one person in the HRM department in charge of the employer's anti-discrimination policy</li> <li>- quotas (please specify the areas: e.g. high-rank officials) only when in conformity with the rulings of the European Court of Justice concerning preferential treatment</li> </ul>	<p>Yes</p> <p>Yes</p> <p>Sometimes</p> <p>No</p> <p>Yes</p> <p>No</p>	<p>Yes</p> <p>Yes</p> <p>Sometimes</p> <p>No</p> <p>Yes</p> <p>No</p>
Incentives	<p>Is there a policy to increase incentives for employers to increase diversity/prevent discrimination?</p> <p>Policy instruments used:</p> <ul style="list-style-type: none"> <li>- Delivery of "labels" or certificates stating that the employer has a diversity-friendly business/employment practice.</li> <li>- financial incentives to establish a plan to ensure that the employment composition in terms of gender or ethnicity is balanced</li> <li>- financial incentives for having a person in the HRM department in charge of the employer's anti-discrimination policy and/or hiring a consultant to establish a diversity plan.</li> <li>- financial incentives for quotas (please specify the areas: e.g. executives)</li> </ul> <p>Other: A Diversity Expertise Centre that stimulates and informs employers to implement diversity policy.</p>	<p>Yes</p> <p>No</p> <p>No</p> <p>No</p> <p>No</p> <p>Yes</p>	<p>Yes</p> <p>No</p> <p>No</p> <p>No</p> <p>No</p> <p>Yes</p>

**Part 2. Institutional framework: specialised bodies (SB) combating discrimination (e.g. equal treatment bodies)**

Table 2.1 **Activities of SBs not related to individual discrimination cases: Public information and evaluation**<sup>a</sup>

	<b>Gender</b>	<b>Ethnicity</b>
<p>Is there a specialised body (SB) in charge of carrying out some of all of the following public information and policy evaluation functions?</p> <p>The Dutch <b>Equal Treatment Commission (CGB)</b> is an independent organisation that was established in 1994 to promote and monitor compliance with this legislation. The Commission also gives advice and information about the standards that apply. Everyone in the Netherlands can ask the Commission for an opinion or advice about a specific situation concerning unequal treatment. When the Equal Treatment Commission (ETC) receives a request for an opinion about alleged differentiation, it investigates whether the equal treatment law has been violated. The ETC is a semi-judicial body which searches for information itself and renders non-binding Opinions. After it has rendered an Opinion, a complaint may still be lodged before the conventional civil/administrative courts if the applicant wishes to obtain a <i>binding</i> judgment. The ETC is a low threshold body: no legal representation is required. Moreover, the procedure before the Commission does not cost anything. <b>As for civil law and administrative law procedures in court there is a system of free legal aid for people with low incomes.</b></p> <p>The ETC does not necessarily need to receive a petition in order to investigate whether the equal treatment law has been violated. It also conducts so-called 'investigation on its own initiative'.</p>	Yes	Yes
<p>This SB has the statutory power to:</p> <ul style="list-style-type: none"> <li>- run information campaigns to inform the public of their legal rights <b>in practice</b>, importance of the above mentioned activity in the actual overall workload of the SB</li> <li>- run campaigns to change public opinion <b>in practice</b>, importance of the above mentioned activity in the actual overall workload of the SB</li> <li>- publish statistics on discrimination <b>in practice</b>, importance of the above mentioned activity in the actual overall workload of the SB</li> <li>- carry out evaluations of the legal and institutional anti-discrimination framework <b>in practice</b>, importance of the above mentioned activity in the actual overall workload of the SB</li> <li>- make policy recommendations <b>in practice</b>, importance of the above mentioned activity in the actual overall workload of the SB</li> <li>- produce codes of good practice for employers <b>in practice</b>, importance of the above mentioned activity in the actual overall workload of the SB</li> </ul> <p><b>Note: Equal Treatment bodies have no explicit role on information campaigns, publication of statistics or code of good practices for employers, but the government does have these goals and tries to reach them actively.</b></p> <p>Additional information: Art.1 is the national association against discrimination. In this association, local and regional anti-discrimination bureaus (ADB's) and the former National Bureau against Discrimination (LBR) have pooled their powers and expertise. Among the national bureau's main functions are :</p> <ul style="list-style-type: none"> <li>- To record and monitor discrimination in the Netherlands;</li> <li>- To stimulate and maintain a nationwide network to oppose discrimination;</li> <li>- To promote professional expertise in, and the provision of specialist knowledge to, the ADB's.</li> </ul>	<p>Not explicitly Low Not explicitly Low Yes Medium Yes Medium Yes Medium Not explicitly Medium</p>	<p>Not explicitly Low Not explicitly Low Yes Medium Yes Medium Yes Medium Not explicitly Medium</p>

Note: a) High/Medium/Low mean above average / close to average / below average, respectively.

Table 2.2 **Activities of SBs not related to individual discrimination cases: Control and correction**<sup>a</sup>

	<b>Gender</b>	<b>Ethnicity</b>
Is there a specialised body (SB) in charge of carrying out some of all of the following control and correction functions?	Yes	Yes
The Equal Treatment Commission (CGB)		
This SB has the statutory power to - randomly conduct formal investigations of companies and organisations. <b>in practice</b> , importance of the above mentioned activity in the actual overall workload of the SB - conduct formal investigations of companies and organisation where there is evidence of discrimination. <b>in practice</b> , importance of the above mentioned activity in the actual overall workload of the SB - oblige a company or an organisation to change the way it operates when discriminatory practices are found. → <b>opinion is not binding</b> <b>in practice</b> , importance of the above mentioned activity in the actual overall workload of the SB - take legal action against companies or organisations that apply discriminatory practices <b>in practice</b> , importance of the above mentioned activity in the actual overall workload of the SB  - take legal action against organisations that attempt to promote discrimination or to instruct others to discriminate. <b>in practice</b> , importance of the above mentioned activity in the actual overall workload of the SB	Yes Low Yes  Low No  Yes* Power is not used No	Yes Low Yes  Low No  Yes* Power is not used No
* Like the Civil Code, the GETA contains the provision that a foundation, an association or a body, which fulfils (partly) governmental tasks, can institute a legal action to protect the interests of others, as long as the person concerned does not object and the organisation fulfils formal statutory conditions. (Zwamborn, 2004)		

Note: a) High/Medium/Low mean above average / close to average / below average, respectively.

Table 2.3 **Role of SBs in individual discrimination cases**

	<b>Gender</b>	<b>Ethnicity</b>
Is there a specialised body (SB) with specific functions related to individual discrimination cases?	Yes	Yes
Equal Treatment Commission (CGB)		
Was this body created by anti-discrimination laws (or did anti-discrimination laws establish a specific mandate for it)?	Yes	Yes
<b>Formal linkage between SB activities and court procedures</b>		
Does the SB act as a one-stop shop where claimant can access information, lodge a complaint, receive advice?	Yes	Yes
As soon as a discrimination complaint is brought to court, is the claim formally transmitted to the SB?	No	No
Discrimination complaints must be lodged with the SB beforehand, which acts as one-stop shop to start the procedure.	No	No
The SB has the statutory power to provide advice and information to claimants (or both parties) on their legal rights and what options they have.	Yes	Yes
<b>In practice</b> , the SB carries on the above mentioned process as soon as it receives a discrimination claim.	in many cases No	in many cases No
The SB has the statutory power to provide claimants with legal assistance. <b>In practice</b> , SB provides legal assistance to claimants during court proceedings.	No	No
The SB has the statutory power to provide claimants with legal representation. <b>In practice</b> , the SB provides legal representation to claimants during court proceedings.	No	No
<b>Investigation of discrimination claims</b>		
The SB has the legal authority to compel people (and in particular, the employer) to provide all of the information it requires to investigate a discrimination claim.	Yes	Yes
Does the court accept evidence from the SB?	Yes	Yes

	<b>Gender</b>	<b>Ethnicity</b>
<p>Does the court accept the SB's evaluation of the validity of the discrimination complaint?  <b>In practice</b>, the SB formally investigates discrimination claims.</p> <p>Please indicate below the main tools the SB uses to investigate a discrimination claim:</p> <p>After receiving a petition for an opinion, the CGB will decide whether it is authorised to investigate the case. If the CGB is authorised, it will start an investigation. The CGB will question both parties (the person that files the petition and the person or organisation that is accused of unequal treatment) and will give them the opportunity to respond to each other's points of view. The CGB can also obtain information from 'third parties' (witnesses for example).</p> <p>Once the CGB has collected enough information, it will close the investigation and hold a hearing. The hearing usually lasts about one hour. Both parties can testify and bring an expert along. The CGB will ask questions and compare the different points of view.</p> <p>After the hearing, the CGB will discuss the case in a closed meeting. Within eight weeks after the hearing it will decide whether the equal treatment law has been violated. The CGB's opinion is important, but not legally enforceable. That means that the CGB cannot force the party that is guilty of unequal treatment to comply with its opinion. However, in practice, the CGB's opinions are usually complied with.</p> <p>The CGB tries to strengthen the impact of its work by actively following up on its opinions. It may for example talk to representatives of the branch of industry in which the unequal treatment occurred. In this manner, the CGB hopes to prevent similar unequal treatment in the future.</p> <p>Holmaat (2007) underlines that the CGB may bring legal action with a view to obtaining a ruling that conduct contrary to the relevant equal treatment legislation is unlawful, requesting that such conduct be prohibited or eliciting an order that the consequences of such conduct be rectified. This power must be regarded in light of the fact that the CGB's Opinions are not binding. The Commission has never made use of this possibility. In cases brought by interest groups, the sanctions are similar.</p>	<p>Not always Yes, duty</p>	<p>Not always Yes, duty</p>
<p>Any employer's failure to provide the requested information to the SB will:</p> <ul style="list-style-type: none"> <li>- have no implication for the court ruling.</li> <li>- potentially be used to draw inferences on discrimination if the case is brought before court.</li> </ul>	<p>See (*) below</p>	<p>See (*) below</p>
<p>Any employer's failure to comply with the code of practices issued by the SB (or other relevant body) will:</p> <ul style="list-style-type: none"> <li>- have no implication for the court ruling.</li> <li>- potentially be used to draw inferences on discrimination if the case is brought before court.</li> </ul>	<p>No No</p>	<p>No No</p>
<p>* Employers are obliged to give the requested information to the CGB. Any employer's failure to provide the requested information will influence the opinion of the Equal treatment commission. The opinion of the CGB will influence the court ruling.</p>		
<p><b>Mediation/conciliation procedure</b></p> <p>The SB has the statutory power to help both parties to resolve the dispute through a mediation/conciliation procedure.  Mediation/conciliation is a free and voluntary process for both parties.  <b>In practice</b>, the SB carries out mediation/conciliation procedures, so that a court ruling may not be necessary.</p> <p>The mediation/conciliation procedure is <b>usually</b> initiated:</p> <ul style="list-style-type: none"> <li>- before the case is brought to court</li> <li>- before any formal investigation starts or at an early stage of the process</li> <li>- after any investigation has produced primary evidence of discrimination (but before a litigation decision has been reached)</li> </ul>	<p>No, not explicitly Yes in few cases</p> <p>Yes Yes No</p>	<p>No Yes in few cases</p> <p>Yes Yes No</p>
<p>Notes:</p> <p>Since 1 January 2005 the CGB has, in addition to delivering formal opinions, been able to refer applicants on to an external mediator as part of an 18-month trial. The CGB is offering this additional service because it has emerged in practice that a not inconsiderable number of the matters brought before the CGB involve a dispute in an existing relationship (e.g. a working relationship) in which the parties have frequent dealings with each other. In disputes of this kind a formal opinion delivered by the CGB can clarify the legal situation regarding equal treatment, but does not by definition contribute to solving the dispute or improving the relationship. Mediation on the other hand does</p>		



	Gender	Ethnicity
<p>afford this opportunity.</p> <p>Mediation is the joint search for a solution under the guidance of an independent third party (the mediator). The mediator is skilled in overseeing processes of negotiation, with knowledge of equal treatment and labour legislation. He can get movement back into disputes that have reached stalemate, e.g. by separating the emotional from the substantive aspects of the dispute. The mediator does not judge, but helps you find a solution. It goes without saying that for mediation to succeed, both parties need to be willing to solve their dispute.</p> <p>The mediator arranges an appointment with both parties for an initial mediation session. The first session is usually held within two weeks and the mediation process completed within three months at the latest. Both the parties and the mediator have a duty of confidentiality concerning everything that occurs during mediation. The CGB will <i>not</i> pass on the request for a formal opinion to the mediator.</p> <p><b>If</b> Mediation is successful, the mediator will draw up a settlement agreement which both parties sign. This agreement lists what has been agreed between both parties and states that the request filed with the CGB will be withdrawn. The CGB will not consider the content of the agreement, nor will it give an opinion. If Mediation is partially successful, that is both parties agree on a number of matters, but not on the equal treatment aspect, the CGB will – if the applicant does not withdraw their request – further consider the request for a formal opinion on the equal treatment aspect in accordance with its normal procedure. If mediation fails to result in agreement, the CGB procedure will be continued.</p> <p>The CGB evaluates the effect of each mediation process immediately on its completion. After three months both parties are asked to fill in another evaluation form to see how they look back on the process and whether there has been a permanent change in the situation.</p> <p>The entire mediation project will be evaluated after 18 months. A decision will then be taken on whether and, if so, how the CGB will continue after January 2007.</p> <p>Source: CGB (2007)</p>		
<p>The SB acts as a neutral third party assisting both opposing parties in the mediation/conciliation procedure.</p>	Yes	Yes
<p>The mediation/conciliation procedure is confidential: no details of the discussion taking place in its course can be repeated to court, nor are made public. The same rule applies to the terms of the settlement.</p>	Yes	Yes
<p>If the parties, including the SB, reach settlement agreement, the latter is legally binding and the charge is dismissed.</p>	No*	No*
<p>The SB secures the enforcement of settlement agreements reached under its assistance and/or responsibility.</p>	No**	No**
<p>Notes:  * Only the request filed with the CGB will be withdrawn.  ** Follow up only, with no (explicit) legal implication.</p>		

**Part 3. Statistics on mediation/conciliation procedures and court case**

Table 3.1 **Statistics**

		<b>Gender</b>	<b>Ethnicity</b>
General statistics	Total number of discrimination complaints received Protected population (number of persons aged 15-64 covered by the law in question)		
Mediation/ conciliation procedures	Number of received complaints treated by the SB <i>of which:</i> - number of complaints dismissed by the SB for no reasonable cause - number of unsuccessful mediations/conciliations although reasonable cause was found - number of successful mediations/conciliations - other (please specify)  Average duration of mediation/conciliation procedures Average employee/claimant compensation under mediation/ conciliation procedures		
Court procedures	Number of court cases <i>of which</i> - number of complaints dismissed by court for default procedures (or administrative reasons) - number of complaints dismissed by court for no reasonable cause - number of cases withdrawn by the complainant(s) - number of court rulings with favourable outcomes for the complainant(s) - other (please specify)  Average duration of court procedures		
<p><b>Additional information</b></p> <p><b>Gender, CGB (2006):</b> On average, the CGB receives about 100 complaints annually regarding sex discrimination, of which 75% result in an opinion. More than 30% of the complaints and 40% of the opinions relate to discrimination on the grounds of gender. In the period from 1999 to 2004 an average of four times as many women as men submitted a complaint about sex discrimination, about which the CGB issued an opinion. On average, 15% of the opinions concerning sex discrimination related to pregnancy. On average, 20% of the opinions relating to sex discrimination were about unequal pay on the grounds of gender. In 2004, more than 12% of the opinions concerning sex discrimination were directed at pension insurers and pension funds. In 2004, more than 10% of the opinions were about sex discrimination in education. It is striking that, compared with opinions regarding discrimination on other grounds, compliance with opinions concerning sex discrimination is poor. The compliance percentage for sex discrimination is 45%, whereas the average compliance percentage is about 70%.</p> <p><b>So-called ethnicity, CGB (2004):</b> In the period 1998-2002 the Equal Treatment Commission received written 1.588 petitions about alleged unequal treatment. Approximately 25% (404) of these petitions contained complaints about discrimination on grounds of race or nationality, leading to 276 opinions. One of the reasons why not all complaints resulted in an opinion, is the fact that a number of those complaints did not fall within the scope of the jurisdiction of the Commission as laid down in the Equal Treatment Act. According to this Act, plaintiffs shall establish facts from which it may be presumed that unequal treatment has taken place, after which the burden of proof shifts to the defendant to prove that the principle of equal treatment has not been violated. Despite this relatively mild burden of proof for plaintiffs, it generally turns out to be very difficult to provide the necessary facts to conclude that unequal treatment has taken place. In this respect, the Commission is particularly concerned about the fact that key witnesses regularly refuse to testify out of fear for negative repercussion (<i>victimisation</i>), thus unintentionally denying the plaintiff the full protection of equal treatment and non-discrimination law.</p>			



Commissie Gelijke Behandeling

**Dutch Equal Treatment Commission (CGB)  
Fact sheet 1994-2005**

**Work load**

	1994/95	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005
New cases	275	421	509	346	242	232	464	304	238	428	621
File concluded in opinion	100	145	155	167	118	101	150	204	166	186	245
Withdrawals/settlements	23	23	26	56	74	52	62	80	29	64	82
Inadmissible	90	75	380	124	74	74	166	86	81	71	127
File closed									24	48	89
<b>Total output</b>	<b>213</b>	<b>243</b>	<b>561</b>	<b>347</b>	<b>267</b>	<b>227</b>	<b>378</b>	<b>370</b>	<b>289</b>	<b>369</b>	<b>543</b>

**Opinions/findings**

**Discrimination grounds\***

	1994/95	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005
Sex	87	85	72	96	42	51	70	101	86	88	53
Race/Nationality	7	35	48	53	40	63	69	63	45	59	37
Religion	4	14	13	11	12	7	13	18	15	11	17
Sexual orientation	5	5	7	8	7	5	4	1	6	4	2
Civil status	6	9	16	14	6	8	4	10	7	10	11
Political conviction	0	0	3	6	0	0	0	1	0		1
Belief	0	1	1	5	0	0	0	2	0		2
Duration of employment relation (fulltime or part time)		0	11	18	11	11	11	32	18	23	22
Nature of employment relation (permanent or temporary)									1	5	9
Disability or chronic illness										22	36
Age										21	100
<b>Total</b>	<b>109</b>	<b>149</b>	<b>171</b>	<b>211</b>	<b>118</b>	<b>145</b>	<b>171</b>	<b>228</b>	<b>178</b>	<b>259</b>	<b>290</b>

**Nature of the opinions**

	1994/95	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005
Violation of the equal treatment law	62	80	96	94	66	70	91	72	80	131	130
No violation of the equal treatment law	50	57	70	103	52	69	64	114	70	106	132
Other (inadmissible/no Jurisdiction/interlocutory opinion)	10	12	5	14	0	6	16	18	16	28	28

\* An opinion can relate to several grounds of discrimination. Therefore, the number of opinions does not correspond to the total number of grounds.

## Main additional references

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## NORWAY

### Part 1. Legal framework for employment discrimination

Main anti-discrimination laws:

- The Gender Equality Act (1978), last major amendment 2005.
- Anti Discrimination Act (2006)

Other laws provide further protection against discrimination:

- Working Environment Act,
- The Tenancy Act, Right of Occupancy Act,
- Housing Cooperative Act and Home Building Association Act (This is the civil law. Add to that is the penal code sections 135a and 349a protection against discrimination)

Relevant courts:

- The Equality and Anti-Discrimination Ombud.
- The Equality and Anti-Discrimination Tribunal (appeal body).

Section 14 of the Anti-discrimination Act and Section 17 of the Gender Equality Act stipulate that, as far as the complainant claims compensation for damages and financial loss, either the normal procedure for civil litigations applies (e.g. as stated in the Dispute Act and the new Civil Procedure Act), and the relevant courts are normal Courts of Justice, or procedures stated in the Working Environment Act (Chapter 17) applies, and the relevant court is a special panel of lay judges appointed by the Court of Justice Administration. Compensation for damages or financial loss can be claimed in a separate lawsuit after having succeeded in obtaining recognition of discrimination by the Ombud or the Tribunal. Yet, decisions by the Ombud have no bearing on decisions by Courts of Justice.

In case of serious breach of the prohibition of discrimination, the general Civil Penal Code applies.

Administrative decisions made by the Tribunal may be brought before a Court of Justice for a full review of the case. Administrative decisions made by the Ombud, first paragraph, may not be brought before a Court of Justice unless the right to appeal has been exercised, and the appeal has been decided by the Tribunal (Anti-discrimination Ombud Act, Section 12).

Legal scope/definition of the (hereinafter) so-called gender and ethnic grounds:

The objective of the Gender Equality Act is to promote gender equality, in particular to improve the position of women. The Anti Discrimination Act states that its purpose is to promote equality, ensure equal opportunities and rights and prevent discrimination based on ethnicity, national origin, descent, skin colour, language and religion or belief. Discrimination on the basis of holding Norwegian citizenship is not unlawful. (Can be relevant in some cases of indirect discrimination) Discrimination by association (e.g. on the basis of ethnic origin of a partner) is explicitly stated as unlawful

In addition, it is forbidden with discrimination in working life because of age, sexual orientation, disability, political opinion and trade union membership. The housing law protects against discrimination because of sexual orientation.

**Table 1.1 Prohibited acts, areas of concern, coverage, legal assistance and representation**

		<b>Gender</b>	<b>Ethnicity</b>
Type of discrimination	Direct discrimination	Yes	Yes
	Indirect discrimination, i.e. where a provision criterion or practice is applied to all employees but puts one protected group at a particular disadvantage and cannot be shown to be a proportionate means of meeting a legitimate aim.	Yes	Yes
	Pressure and instruction to discriminate	Yes	Yes
	Harassment	Yes	Yes
	Other:		

		Gender	Ethnicity
	Sexual harassment Participating in discrimination (instructions to discriminate)	Yes Yes	Yes Yes
Areas of concern	Hiring process Wage Type of employment contract (permanent vs. fixed term) Working time (atypical work schedule, part-time vs. full-time) Promotion Job and vocational training Transfer Redundancy and dismissal	Yes Yes Yes Yes Yes Yes Yes	Yes Yes Yes Yes Yes Yes Yes
Coverage	Private sector Public sector Employment agencies → Not explicitly stated Trade unions (as regards membership)  Other (please indicate also exemptions – e.g. firms below a certain threshold – as well any important additional information/comments):  Art 349a Criminal law criminalizes refusal of provision of goods and services in an occupational or similar activity, and refusal of admission to a public gathering, on grounds of religion, race, colour or national or ethnic origin. (Includes also sexual orientation). As a consequence, although not explicitly stated, coverage also extends to services provided by Employment Agencies (this covers other reasons than under civil code and it is the police to decide on any prosecution. Of little importance) Art. 135a Criminal law criminalizes discriminatory or hateful expressions. However in practice the Norwegian supreme court has been restrictive in its interpretation of the prohibition, and Norway has recently been criticised by the UN CERD in the so-called Sjølie-case for failing to enforce the prohibition against denigrator, public statements about protected ethnic groups in breach of the convention (Communication No. 30/2003 : Norway. 22/08/2005). According to MIPEX, the majority of supreme court for the time being seems to hold that section 135a only covers "hate speech" which includes some form of direct threats against a protected group. That is e.g. public incitement to violence, hatred or discrimination on basis of race/ethnicity; religion/belief/nationality (as mention in alternative a). Aiding to such activity is also covered by 135a. (The Tvedt-case is under trial. A principle case.) The Gender Equality act applies to all areas of society, but includes a general exemption for the internal affairs of religious communities.	Yes Yes  Yes	Yes Yes  Yes
Legal assistance other than private lawyer	Specialised body (e.g. equal treatment body) Any relevant public utility institutions and associations Trade unions: for their members only  Other (or any important additional information/comments):  Several organisations are working on this area, both public and NGOs: JUSSBUSS, KIM, OMOD etc. The law, however, does not provide such organisations to bring cases with no victim referred to. Under such circumstances the organisation is not regarded to have proper legal interest (as is the general principle in Norwegian law on civil proceedings). Organisations may inform the Ombud about such discrimination, progressing or imminent, even if no actual victim is referred to and the Ombud may choose to investigate the case if it wishes. However, an organisation will not have the legal position of an individual plaintiff who has a formal right to have the complaint investigated and determined.	Yes Yes Yes	Yes Yes Yes
Legal representation other than private lawyer	Specialised body (e.g. equal treatment body) Any relevant public utility institutions and associations Trade-unions: for their members only	No Yes Yes	No Yes Yes

		Gender	Ethnicity
	Other (or any important additional information/comments):  A system of public coverage of the cost of legal assistance to low income groups Norway has a general law on financial aid to legal assistance (Free Legal Aid Act, 1980, Rettshjelpsloven). However discrimination complaints are not among the kind of cases explicitly mentioned by the law. The Ombud own treatment of discrimination complaints is both free of charge and offers free interpretation, but is limited to procedures administered by the Ombud. This implies that in discrimination complaints, which have to be lodged as civil lawsuits, like all cases of economic reparation and compensation for damage suffered as a result of discrimination, the plaintiff has few chances to get public, financial aid to cover expenses concerning a lawyer or interpreter, and has often to carry the expenses of action as well as the risk all by him/herself.		

Table 1.2 **Burden of proof**

	Gender	Ethnicity
Employee/claimant Shift of burden of proof (the employee/claimant provides facts, then the employer/respondent has to provide proofs – see below for a detailed description)	No Yes	No Yes
Other important additional information/comments: The burden of the proof is not shifted in cases where the Civil Penal Code applies. Yet, these usually do not concern labour relations but rather cases of racial violence.		
<b>Direct discrimination</b>  <i>Main steps</i> Can the main steps of the procedure be described as follows? 1. The employee/claimant has to supply prima facie evidence whereby it may be <b>presumed</b> that there has been discrimination. 2. The employer/respondent has the burden of <b>proving</b> that his/her practice is not discriminatory.  In practice, is presumption – as opposed to stronger evidence of discrimination – sufficient to shift the burden of proof? The wording of Section 16 is; "If there are circumstances that give reason to believe that...".  <i>Typical/standard prima facie evidence</i> admissible in courts (or other relevant bodies), as set by law or established by case law: Direct evidence (i.e. any written or verbal statement by the employer/respondent), <b>only</b> . No clear legal guidance for indirect evidence (e.g. case-by-case basis only) Statistical evidence Situation testing (No cases for Norwegian court)	Yes   Yes  No True Yes No case law available	Yes   Yes  No True Yes No case law available
Other indirect evidence (or any important additional information/comments): As a general rule, Norwegian courts are usually not bound by intricate rules concerning the admissibility of evidence; the basic rule is typically that all evidence is admissible. The Equality and Anti-Discrimination Ombud may of own initiative take up cases of discrimination		
<b>Indirect discrimination</b>  <i>Main steps</i> Can the main steps of the procedure be described as follows? 1. The employee/claimant has to clearly identify and define the employment practice in question. 2. The employee/claimant has to show that the practice <b>has or may have</b> a differentiated impact on one protected group. 3. The employer/respondent has the burden of demonstrating that the policy or practice in question is job related for the position in question and consistent with business necessity. 4. If the employer/respondent satisfies this requirement, evidence can be supplied on the existence/lack of the existence of a less discriminatory practice  In step 2 above is the term "has" more accurate than "may have"? In other words, can the potential (possible) impact of the contested employment practice be sufficient for shifting the burden of proof? → "Has" is more accurate	Yes   Yes	Yes   Yes

	Gender	Ethnicity
<p>In step 4 above, if the employer/respondent demonstrates that a practice is consistent with business necessity, then:</p> <p>- does it fall to the employee/claimant to demonstrate that a less discriminatory alternative exists that meets the business need but that the employer refuses to adopt it? <b>or</b></p> <p>- does it fall to the employer/respondent to demonstrate that a less discriminatory alternative that meets the business need does not exist?</p> <p>Other (or any important additional information/comments): The Equality and Anti-Discrimination Ombud may of own initiative take up cases of discrimination</p> <p><i>Typical/standard prima facie evidence</i> to be provided to courts or other relevant bodies, as set by law or established by case law: Direct evidence ( i.e. any written or verbal statement by the employer/respondent), <b>only</b>. No clear legal guidance for indirect evidence (e.g. case-by-case basis only) Use of a distinction criteria that appear to be intrinsically suspicious. Please specify (for example, a requirement to work full-time might be unlawful discrimination against women) Statistical evidence</p> <p>Other indirect evidence (or any important additional information/comments): As a general rule, Norwegian courts are usually not bound by intricate rules concerning the admissibility of evidence; the basic rule is typically that all evidence is admissible.</p>	<p>No guidance in the law</p> <p>No guidance in the law</p> <p>No guidance in the law</p> <p>No</p> <p>True</p> <p>Yes</p> <p>Yes</p>	<p>No guidance in the law</p> <p>No guidance in the law</p> <p>No guidance in the law</p> <p>No</p> <p>True</p> <p>Yes</p> <p>Yes</p>
<p><b>Harassment</b> Analysed on a case-by-case basis, by looking at all the circumstances and the context.</p>	Yes	Yes

Table 1.3 **Employee compensation and employer penalties**

	Gender	Ethnicity
<p>Employee compensation</p> <p><b>Injunctive relief/reinstatement</b></p> <ul style="list-style-type: none"> <li>- Always made available to the employee/claimant, but the latter can choose monetary compensation in lieu of relief/reinstatement, or</li> <li>- Always made available to the employee/claimant, without alternative option, or</li> <li>- Always made available to the employee/claimant, but the employer/respondent can choose monetary compensation in lieu of relief/reinstatement, or</li> <li>- Never made available to the employee/claimant.</li> </ul> <p>Notes: * The court decides on a case-by-case basis.</p> <p>The Working Environment Act regulates the possibility of reinstatement in cases of unfair dismissal. In the case of unfair dismissal, the court shall, if so demanded by the employee, rule the dismissal invalid, which implies that the employee receives back pay in full. In special cases, if so demanded by the employer, the court may decide that the employment shall be terminated if, after weighing the interests of the parties, the court finds it clearly unreasonable that employment should continue. Compensation can be claimed by the employee (Section 15-12, Working Environment Act). Discrimination is not explicitly mentioned as unfair dismissal in the Act. Yet, discrimination solely based on discrimination is prohibited in Section 13-1 and 13-2, while Section 15-7 defines as unfair a dismissal that is not “objectively justified on the basis of circumstances relating to the undertaking, the employer or the employee”. Linking the latter statement with the prohibition in Chapter 13 suggests that discriminatory dismissal should be regarded as unfair and therefore be conducive to compensation and remedies mentioned in Section 15-12).</p> <p>Section 17 in the Gender Equality Act establishes the principle of objective liability for damages in cases of infringement of the law in the workplace. This means that wilful or negligent violation is not a condition for proof of liability for damages. Nor is financial loss a condition. Thus, any job seeker or employee who has been subject to conduct contrary to the Act is entitled to compensation, even where the employer did not know of such conduct. The principle is restated in the Work Environment Act. The corresponding expression is less explicit in the Anti-Discrimination Act (Section 14), which states that compensation might be sought even “without regard of the fault of the employer”.</p>	<p>No*</p> <p>No*</p> <p>No*</p> <p>No*</p>	<p>No*</p> <p>No*</p> <p>No*</p> <p>No*</p>



		Gender	Ethnicity
	<p><b>Monetary compensation</b> Back pay (please indicate if there is a cap) → see comment above</p> <p>Reimbursement of lawyer's and attorney's fees and costs → Reimbursement by the losing party can be ordered only in civil lawsuits</p> <p>In lieu of relief/reinstatement, compensation for future lost earnings (e.g., in case of dismissal, this may correspond to lost earnings until the employee finds a new job):  - Floor or minimum (amount): .....  - Cap or maximum (amount): .....  - Average compensation (amount): .....  - Median compensation (amount): .....</p> <p>Compensation for psychological injury:  - Floor or minimum (amount): .....  - Cap or maximum (amount): .....  - Average compensation (amount): .....  - Median compensation (amount): .....</p> <p>Notes: Except in the case of back pay, <b>monetary compensation can be ordered only in civil lawsuits</b></p>	Yes Yes Yes Yes	Yes Yes Yes Yes
Employer additional penalties and obligations	<p><b>Civil provisions</b> None Court may order the publicity of the decision  - Within the firm (e.g. notices to all employees addressing the violations of a specific charge and advising them of their rights under the laws)  - Outside the firm (please indicate: media, trade-unions, etc.)  The employer may be required to take corrective or preventive actions to cure the source of the identified discrimination</p> <p>Other important additional information/comments: The Tribunal has the authority to impose a coercive fine on the discriminating party until the discriminating act ceases.</p> <p><b>Penal provisions</b> None Fine (please specify amounts) Prison sentence: max 3 years, but prison sentences are allowed <b>only when the Civil Penal Code applies</b> (see above).</p> <p>Other important additional information/comments: <b>Coercive fines can be imposed by the Ombud and the anti-discrimination Tribunal (see also comment in the previous box). Although, strictly speaking, this should be viewed as an administrative decision. Fines can be imposed also in the case of refusal to provide information or testifying.</b></p>	false No No Yes  false Yes No	false No No Yes  false Yes Yes

Table 1.4 Protection against victimisation (retaliation)

		Gender	Ethnicity
Protected actions	<p>It is prohibited to treat the employee/protected person less favourably (so-called "adverse action") because s/he has (so-called "protected action"):  - brought proceedings against discrimination  - given evidence or information in connection with any proceedings against discrimination.  - participated as a witness in any proceedings against discrimination</p> <p>- Other protected actions (or any important additional information/comments): If gross negligence, the employee will not be protected (Anti discrimination Act section 9 first subsection, second sentence, The gender Equality Act section 3 fifth subsection, second sentence)</p>	Yes Yes Yes	Yes Yes Yes

		Gender	Ethnicity
Proof of causal connexion	<p><i>Burden of proof:</i></p> <ul style="list-style-type: none"> <li>- i) employee/protected person</li> <li>- ii) employer/respondent within a given lapse of time from the concerned event. Please specify conditions of application and lapse of time.</li> <li>- iii) shift of burden of proof. Please specify main steps.</li> </ul> <p>In cases (i) and (iii), when the causal connexion shall be first shown or established by the employee/protected person:</p> <ul style="list-style-type: none"> <li>- the link can be demonstrated by evidence that the adverse action occurred shortly after the protected activity (and the employer/respondent was aware of the complainant's protected activity before taking the action), so that the employment relationship is implicitly or explicitly (please specify) protected during a certain period of time (please specify)</li> <li>- other (please specify):</li> </ul> <p>It is not a requirement that the adverse action occurred shortly after the protected activity, however the longer time period between the two incidents, the more difficult it is to fulfil the requirement of casual connexion.</p> <p>Section 16 in the Gender Equality Act about the shift of the burden of proof also applies to the prohibition against retaliation in the Gender Equality Act section 3.</p>	<p>No</p> <p>No</p> <p>Yes</p> <p>Yes</p> <p>Yes</p> <p>Yes</p>	<p>No</p> <p>No</p> <p>Yes</p> <p>Yes</p> <p>Yes</p> <p>Yes</p>
Employee compensation and employer penalty	<p>Compared to provisions described in Table 1.3:</p> <ul style="list-style-type: none"> <li>- additional employee/protected person compensation</li> <li>- additional employer/respondent penalties</li> </ul>	<p>None</p> <p>None</p>	<p>None</p> <p>None</p>

Table 1.5 Relationship with standard labour laws

		Gender	Ethnicity
Labour law and discrimination	<p>According to standard labour law(s) or code, would dismissal solely based on gender or ethnicity considered to be unjust dismissal? If yes, please specify since when.</p> <p>Is there a provision requiring equal pay for work of equal value in standard labour law(s) or code? If yes, please specify since when.</p> <p>According to section 5 in the Gender Equality Act, men and women have the same right to equal pay for work of equal value. The Working Environment Act now extends this principle to all cases, including trade-union membership, age, disability, etc...</p> <p>Other areas of discrimination covered by standard labour law(s) or code (hiring, promotion, etc...); please specify → Labour law covers all sides of a labour relation</p>	<p>Yes</p> <p>1978</p> <p>Yes</p>	<p>Yes</p> <p>2004</p> <p>Yes</p>
Complaints	<p>Are discrimination complaints concerning dismissals more often lodged under standard labour law(s) or code, than under specific anti-discrimination laws?</p> <p>Are discrimination complaints concerning pay more often lodged under standard labour law(s) or code, than under specific anti-discrimination laws?</p> <p>Other important additional information/comments: In principle, even complaints concerning hiring can be lodged under standard labour law (Chapter 17 of the Working Environment Act).</p>	<p>Yes</p> <p>No</p>	<p>Yes</p> <p>No</p>
Evaluations	<p>Please indicate below references to existing evaluations/studies on the effectiveness of anti-discrimination laws with respect to standard labour law(s):</p>		

Table 1.6 Positive action

		Gender	Ethnicity
Compulsory actions	<p>Are employers <b>required</b> by law to take actions to increase diversity/prevent discrimination?</p> <p>If yes, what actions are required?</p> <ul style="list-style-type: none"> <li>- make regular public reports on employment composition in terms of gender or ethnicity</li> <li>- process only anonymous job applications</li> <li>- obligation for large employers to have a person in the HRM department in charge of the employer's anti-discrimination policy (please specify the size threshold of application, if any)</li> <li>- quotas (please specify the areas: e.g. executives in firms above a certain size)</li> </ul> <p>Other (or any important additional information/comments):</p> <p>Gender quota applies to publicly appointed committees and boards (Section 21 of the Gender Equality Act) as well as to company board members in public- and private-owned public-limited companies, (Act of 19 December 2003 No. 120, which amended the Private Limited Companies Act of 13 June 1997).</p> <p>However, company board members are not seen by Norwegian company law as employees of the company. Company board membership in Norwegian company law, however, is an ownership function, in the sense that the board is supervising the company's operations on behalf of the ownership interests. If the owners are not satisfied with the way the board functions, they will elect a new board. Without the necessity of an election at the general assembly, a board member can be removed at any time, with no previous notice and no reason being given, by the owner (or owners) who has elected that board member, (Section 6-7 (2) of the Private Limited Companies act and the Public Limited Companies Act). Unlike in some other European countries, in Norway the executive management of the company or the general manager are usually not members of the board. In addition, board members do not receive a salary in the ordinary sense of the word.</p> <p>However, in some companies, depending on the number of employees, a certain number of employee-representatives must also be on the board, and these are elected by the employees. Gender quota applies to the board in these companies if both sexes have at least a 20% share in the company's total employment.</p>	<p>Yes</p> <p>Yes no No</p> <p>No</p>	<p>No</p>
Voluntary actions	<p>Are employers <b>allowed</b> to take actions to increase diversity/prevent discrimination?</p> <p>If yes, what actions are allowed?</p> <ul style="list-style-type: none"> <li>- make regular public reports on employment composition in terms of gender or ethnicity</li> <li>- establish a plan to ensure that the employment composition in terms of gender or ethnicity is balanced</li> <li>- quotas (please specify the areas: e.g. executives)</li> </ul> <p>Notes:</p> <p>Section 3 of the Gender Equality Act also authorises differential treatment of one of the sexes, if this can help to promote gender equality. However, differential treatment of men or women is seldom used. In working life, a moderate form of positive differential treatment is primarily the norm. All other conditions being equal, the under-represented sex may be preferred. In the education sector, there have been sporadic cases of more radical differential treatment, such as when girls are given extra points when seeking admission to fields of study where they are heavily under-represented.</p> <p>The Anti-discrimination Act (Section 8) states "Specific measures that contribute to promote the purpose of the Act shall not be regarded as discrimination pursuant to this Act. <u>Such measures shall cease when the purpose of it has been achieved</u>"</p>	<p>Yes</p> <p>Yes Yes</p> <p>No</p>	<p>Yes</p> <p>Yes Yes</p> <p>No</p>
Public employers' practices	<p>Do public employers normally take actions to increase diversity/prevent discrimination?</p> <p>If yes, what actions?</p> <ul style="list-style-type: none"> <li>- make regular public reports on employment composition in terms of gender or ethnicity</li> <li>- establish a plan to ensure that the employment composition in terms of gender or ethnicity is balanced</li> <li>- process only anonymous job applications</li> <li>- have at least one person in the HRM department in charge of the employer's anti-discrimination policy</li> <li>- quotas (please specify the areas: e.g. high-rank officials)</li> </ul>	<p>Yes</p> <p>Yes Yes</p> <p>No No</p> <p>Yes</p>	<p>Yes</p> <p>No Yes</p> <p>No No</p> <p>No</p>

		Gender	Ethnicity
	Notes: Section 1a of the Gender Equality Act requires that public authorities advance gender equality in all areas of society. Yet, Section 1a does not explicitly impose quotas. By contrast, Section 21 imposes quotas “when a public body appoints or elects committees, governing boards, councils, boards etc...”		
Incentives	Is there a policy to increase incentives for employers to increase diversity/prevent discrimination?  Policy instruments used: - Delivery of "labels" or certificates stating that the employer has a diversity-friendly business/employment practice. - financial incentives to establish a plan to ensure that the employment composition in terms of gender or ethnicity is balanced - financial incentives for processing only anonymous job applications - financial incentives for having a person in the HRM department in charge of the employer's anti-discrimination policy and/or hiring a consultant to establish a diversity plan. - financial incentives for quotas (please specify the areas: e.g executives)	No  No No No No	No  No No No No
	Other (or any important additional information/comments): Among the lack of public incentives it can also be noticed that public bodies cannot demand public contractors to implement positive measures in addition to the prohibitions provided in the in the law against discrimination (contract compliance exceeding the demand of the law). Neither can they demand that public contractors provide proofs of compliance with the law (simple contract compliance)		

**Part 2. Institutional framework: specialised bodies (SB) combating discrimination (e.g. equal treatment bodies)**

Table 2.1 **Activities of SBs not related to individual discrimination cases: Public information and evaluation<sup>a</sup>**

	Gender	Ethnicity
Is there a specialised body (SB) in charge of carrying out some of all of the following public information and policy evaluation functions?	Yes	Yes
1 January 2006, The Equality and Anti-Discrimination Ombud. The Ombud is professionally independent, but is administratively placed under the Ministry of Children and Equality. 1 January 2006, the Directorate of Integration and Diversity (IMDi) was established to act as a competence centre and a driving force for integration and diversity. The directorate cooperates with immigrant organisations/ groups, municipalities, government agencies and the private sector. It provides advice and implements government policy concerning integration of immigrants.		
This SB has the statutory power to: - run information campaigns to inform the public of their legal rights <b>in practice</b> , importance of the above mentioned activity in the actual overall workload - run campaigns to change public opinion <b>in practice</b> , importance of the above mentioned activity in the actual overall workload - publish statistics on discrimination <b>in practice</b> , importance of the above mentioned activity in the actual overall workload - carry out evaluations of the legal and institutional anti-discrimination framework <b>in practice</b> , importance of the above mentioned activity in the actual overall workload - make policy recommendations <b>in practice</b> , importance of the above mentioned activity in the actual overall workload - produce codes of good practice for employers <b>in practice</b> , importance of the above mentioned activity in the actual overall workload	Yes Yes Yes Yes Yes Yes	Yes Yes Yes Yes Yes Yes
Other (or any Important additional information/comments): The Ombud has the duty to overlook that Norwegian legislation and administrative practices are in accordance with the anti-discrimination principle (Regulations regarding the organisation and activities of the Equality and anti-discrimination Ombud and the Equality and anti-discrimination Tribunal, Section 2)		

Note: a) High/Medium/Low mean above average / close to average / below average, respectively.

Table 2.2 **Activities of SBs not related to individual discrimination cases: Control and correction<sup>a</sup>**

	Gender	Ethnicity
Is there a specialised body (SB) in charge of carrying out some of all of the following control and correction functions?	Yes	Yes
1 January 2006, The Equality and Anti-Discrimination Ombud. The Ombud is professionally independent, but is administratively placed under the Ministry of Children and Equality.		
This SB has the statutory power to - randomly conduct formal investigations of companies and organisations. <b>in practice</b> , importance of the above mentioned activity in the actual overall workload - conduct formal investigations of companies and organisation where there is evidence of discrimination. <b>in practice</b> , importance of the above mentioned activity in the actual overall workload - oblige a company or an organisation to change the way it operates when discriminatory practices are found. <b>in practice</b> , importance of the above mentioned activity in the actual overall workload - take legal action against companies or organisations that apply discriminatory practices <b>in practice</b> , importance of the above mentioned activity in the actual overall workload - take legal action against organisations that attempt to promote discrimination or to instruct others to discriminate. <b>in practice</b> , importance of the above mentioned activity in the actual overall workload	Yes Yes Yes Yes No	No Yes Yes Yes No
Other (or any Important additional information/comments): Under certain circumstances, organisation that attempt to promote discrimination are prosecuted under criminal law.		

Note: a) High/Medium/Low mean above average / close to average / below average, respectively.

Table 2.3 Role of SBs in individual discrimination cases

	Gender	Ethnicity
Is there a specialised body (SB) with specific functions related to individual discrimination cases?	Yes	Yes
1 January 2006: The Equality and Anti Discrimination Ombud		
Was this body created by anti-discrimination laws (or did anti-discrimination laws establish a specific mandate for it)?	Yes	Yes
<b>Formal linkage between equal treatment body activities and complaint lodging and procedures</b>		
Does the SB act as a one-stop shop where claimant can access information, lodge a complaint, receive advice?	Yes	Yes
As soon as, or before, a discrimination complaint is brought to court, is the claim formally transmitted to the SB?	No	No
Discrimination complaints must be lodged with the SB beforehand, which acts as one-stop shop to start the procedure.	No	No
The SB has the statutory power to provide advice and information to claimants (or both parties) on their legal rights and what options they have.	Yes	Yes
<b>In practice</b> , the SB carries on the above mentioned process as soon as it receives a discrimination claim.	Yes, duty	Yes, duty
The SB has the statutory power to provide claimants with legal assistance.	Yes, but limited*	Yes, but limited*
The Ombud can and has a duty to provide legal advice to the complainant only at the beginning of the case, before starting investigations		
<b>In practice</b> , SB provides legal assistance to claimants during court proceedings.	No	No
The SB has the statutory power to provide claimants with legal representation.	No	No
<b>In practice</b> , the SB provides legal representation to claimants during court proceedings.	No	No
<b>Investigation of discrimination claims</b>		
The SB has the legal authority to compel people (and in particular, the employer) to provide all of the information it requires to investigate a discrimination claim.	Yes	Yes
Does the court accept evidence from the SB?.	Yes	Yes
Does the court accept the SB's evaluation of the validity of the discrimination complaint?	No	No
<b>In practice</b> , the SB formally investigates discrimination claims.	Yes	Yes
Please indicate below the main tools the SB uses to investigate a discrimination claim: Investigation and assessment The Ombud has extensive investigative powers and may ultimately request the assistance of the police		
Any employer's failure to provide the requested information to the SB will: - have no implication for the court ruling. - potentially be used to draw inferences on discrimination if the case is brought before court.	Not relevant	Not relevant
Any employer's failure to comply with the code of practices issued by the SB (or other relevant body) will: - have no implication for the court ruling. - potentially be used to draw inferences on discrimination if the case is brought before court.		
Important additional information/comments on the investigation procedure: According to MIPEX, although the Ombud on equality and discrimination initiates its treatment of complaints speedily, some cases may take many months to resolve if the opponent does not cooperate.		
<b>Mediation/conciliation procedure</b>		
The SB has the statutory power to help both parties to resolve the dispute through a mediation/conciliation procedure. Mediation/conciliation is a free and voluntary process for both parties. <b>In practice</b> , the SB carries out mediation/conciliation procedures, so that a court ruling may not be necessary.	No, but see comment	No, but see comment
The mediation/conciliation procedure is <b>usually</b> initiated: - before the case is brought to court - before any formal investigation starts or at an early stage of the process		

	Gender	Ethnicity
<p>- after any investigation has produced primary evidence of discrimination (but before a litigation decision has been reached)</p> <p>Other (or any important additional information/comments)</p> <p>The Ombud has the authority to make administrative decisions, which may be appealed to the Tribunal. Section 3 of the Anti-discrimination Ombud Act states that “The Ombud may give an opinion as to whether a matter is in contravention of provisions mentioned in section 1, second paragraph. The Ombud shall seek to secure the parties’ <u>voluntary compliance</u> with this opinion. If a voluntary arrangement cannot be reached, the Ombud may bring the case before the Tribunal to be dealt with” (Section 3). In addition it states also that “If the parties do not voluntarily comply with the opinion of the Ombud [...] and it must be assumed that waiting for an administrative decision by the Tribunal will cause inconvenience or have a harmful effect, the Ombud may make such administrative decision. [...] The Ombud’s administrative decision may be appealed to the Tribunal (Section 4).  <b>Therefore, the Ombud, in comparative law terms, lies in between a conciliation organisation and a tribunal with, in addition, investigation power.</b></p> <p>The SB acts as a neutral third party assisting both opposing parties in the mediation/conciliation procedure.  The mediation/conciliation procedure is confidential: no details of the discussion taking place in its course can be repeated to court, nor are made public. The same rule applies to the terms of the settlement.  If the parties, including the SB, reach settlement agreement, the latter is legally binding and the charge is dismissed.  The SB secures the enforcement of settlement agreements reached under its assistance and/or responsibility.</p>		

**Part 3. Statistics on mediation/conciliation procedures and court case**

**Table 3.1** Statistics

		<b>Gender (2006)</b>	<b>Ethnicity (2006)</b>
General statistics	Total number of discrimination complaints received Protected population (number of persons aged 15-64 covered by the law in question)	148 3,1 millions	61 0,3 millions
Mediation/ conciliation procedures	Number of received complaints treated by the SB <i>of which:</i> - number of complaints dismissed by the SB for no reasonable cause - number of unsuccessful mediations/conciliations although reasonable cause was found - number of successful mediations/conciliations - other (please specify)  Average duration of mediation/conciliation procedures  Average employee/claimant compensation under mediation/ conciliation procedures	148	61
Court procedures	Number of court cases <i>of which</i> - number of complaints dismissed by court for default procedures (or administrative reasons) - number of complaints dismissed by court for no reasonable cause - number of cases withdrawn by the complainant(s) - number of court rulings with favourable outcomes for the complainant(s) - other (please specify)  Average duration of court procedures The Ombud on equality and discrimination initiates its treatment of complaints speedily. According to MIPEX, however some cases may take many months to resolve if the opponent does not cooperate. The Ombud has only been in function since January 2006 and statistics on the average duration of cases has not been published. According to MIPEX, "judicial civil procedures takes longer from the initiation until judgment is passed, the average not being less than six months and most probably close to or more than a year" (MIPEX, 2007, annex documentation).	very few  See comment	very few  See comment



## POLAND

### Part 1. Legal framework for employment discrimination

Main anti-discrimination laws:

- Labour Code (as amended in 2001 and 2003)
- Act of 20 April 2004 on the Promotion of Employment and Labour Market Institutions.

Also important: Act on National Labour Inspectorate

Relevant courts: employment tribunal (but also civil, administrative or criminal court).

Legal scope/definition of the (hereinafter) so-called gender and ethnic grounds:

- Gender: sex, explicitly including: pregnancy, childbirth or related medical conditions, breastfeeding, family responsibilities and marital status
- Ethnicity: race, colour, descent, national or ethnic origin

Note: other grounds – in particular: age, disability, religion, nationality, political views, trade union membership, belief, sexual orientation, employment for a definite or indefinite period of time, employment on a full or part-time basis.

In the provisions of the Labour Code there are several grounds listed as examples only, and the list remains open because of the wording of the Article: “any discrimination (...) *in particular* on the grounds of ...” This means that other grounds of discrimination could be equally taken into consideration by courts when applying this provision. The latter remains only a postulate so far only, since no such case law was noticed. The courts in Poland have not yet developed practice to invoke EU legislation and analyze in what manner it influences domestic legislation. (Mazur-Rafal and Pajak, 2007)

**Table 1.1 Prohibited acts, areas of concern, coverage, legal assistance and representation**

		<b>Gender</b>	<b>Ethnicity</b>
Type of discrimination	Direct discrimination	Yes	Yes
	Indirect discrimination, i.e. where a provision criterion or practice is applied to all employees but puts one protected group at a particular disadvantage and cannot be shown to be a proportionate means of meeting a legitimate aim.	Yes	Yes
	Pressure and instruction to discriminate	Yes	Yes
	Harassment	Yes	Yes
	Other: Sexual harassment		
Areas of concern	Hiring process	Yes	Yes
	Wage	Yes	Yes
	Type of employment contract (permanent vs. fixed term)	Yes	Yes
	Working time (atypical work schedule, part-time vs. full-time)	Yes	Yes
	Promotion	Yes	Yes
	Job and vocational training	Yes	Yes
	Transfer	Yes	Yes
	Redundancy and dismissal	Yes	Yes
Coverage	Private sector	Yes	Yes
	Public sector	Yes	Yes
	Employment agencies	Yes*	Yes*
	Trade unions (as regards membership)	No	No

		Gender	Ethnicity
	<p>Notes:</p> <p>* The institutions of the labour market such as employment agencies are also obliged to behave in a non-discriminatory manner. According to the Act on the Promotion of Employment and the Institutions of Labour Market, an employment agency cannot discriminate persons, for whom it seek employment or paid work (including self-employment), on the grounds of gender, age, disability, race, ethnic origin, nationality, sexual orientation, political opinions, religious beliefs, (non)membership in a trade union (Art. 18a.4 Act on Employment). Similarly, other institutions of labour market – employment services for the unemployed and those seeking work – also have to operate in a non-discriminatory manner specified by law. The Act on Employment clearly determines that such services should be provided free of charge to everyone in accordance with the principle of equality, that means, they should be provided irrespective of person's gender, age, disability, race, ethnic origin, nationality, sexual orientation, political opinions, religious beliefs, (non)membership in a trade union (Art. 36.4 item 3, Act on Employment). Source: Mazur-Rafal and Pajak (2007)</p>		
Legal assistance other than private lawyer	<p>Specialised body (e.g. equal treatment body)</p> <p>Any relevant public utility institutions and associations: Ministry of Labour and Social Policy (Department of Women, Family and Counteracting Discrimination) is the "equality body" according to the directive 72/2002 EC</p> <p>Trade unions (please indicate if it is for their members only)</p> <p>Notes:</p> <p>* The Commissioner for Civil Rights Protection may provide legal advice by indicating possible legal measures but cannot act directly on a behalf of the complainant (Weyss, 2004).</p> <p>** In Poland, in principle, legal representation may be provided only by an advocate (attorney-at-law) or legal counsellor, some preferential treatment is allowed in labour and discrimination cases. In August 2004, the government adopted an amendment to the Code of Civil Procedure which allows certain NGOs to lodge a complaint on behalf of an alleged victim of discrimination (Article 61 of the Code of Civil Procedure). A precondition of such claim is that the person concerned consents on the claim and that the organisation's statute includes the protection of equality and non-discrimination. Under these preconditions such organisations may initiate such claims or join the proceedings at any stage.</p> <p>*** With regard to problems in relation to the Labour Code, a <b>labour inspector</b> can launch court proceedings on behalf of citizens or join pending proceedings (but only in cases when existence of an employment relationship should be acknowledged or is disputed). The inspector can bring the case before the labour court even without the knowledge or even more without the agreement of the person concerned. According to Article 465.1 Code of Civil Procedure, besides the labour inspector, also a <b>representative of a trade union</b> or another employee of the enterprise can legally represent an employee in proceedings before the labour law. According to Article 465.1 of the Code of Civil Procedure, <b>a trade union representative or a labour inspector may be plenipotentiaries of an employee or of a person insured in the proceedings before the court of labour and social insurance</b>. The participation of a labour inspector in proceedings concerning employment related is of particular importance, as he or she is vested with legal instruments (determined by the Law of March 6th 1981 on the state's labour inspectorate) appropriate for the supervision and control of employers' compliance with labour law regulations. (Liegl, Perchinig and Weyss, 2004)</p>	<p>Yes*</p> <p>Yes**</p> <p>Yes***</p>	<p>Yes*</p> <p>Yes**</p> <p>Yes***</p>
Legal representation other than private lawyer	<p>Specialised body (e.g. equal treatment body) → see above</p> <p>Any relevant public utility institutions and associations → see above</p> <p>Trade-unions (please indicate if it is for their members only) → see above</p>	<p>No</p> <p>Yes</p> <p>Yes</p>	<p>No</p> <p>Yes</p> <p>Yes</p>

Table 1.2 Burden of proof

	Gender	Ethnicity
Employee/claimant Shift of burden of proof (the employee/claimant provides facts, then the employer/respondent has to provide proofs – see below for a detailed description)	No Yes	No Yes
<b>Direct discrimination</b>  <i>Main steps</i> Can the main steps of the procedure be described as follows? 1. The employee/claimant has to supply prima facie evidence whereby it may be <b>presumed</b> that there has been discrimination. 2. The employer/respondent has the burden of <b>proving</b> that his/her practice is not discriminatory.  In practice, is presumption – as opposed to stronger evidence of discrimination – sufficient to shift the burden of proof?  <i>Typical/standard prima facie evidence</i> admissible in courts (or other relevant bodies), as set by law or established by case law: Direct evidence (i.e. any written or verbal statement by the employer/respondent), <b>only</b> . No clear legal guidance for indirect evidence (e.g. case-by-case basis only) Statistical evidence Situation testing  Other indirect evidence: In principle all material facts to resolve the case may be adduced and considered by court as evidence.  Notes: * Although in the Polish law there is no explicit mention of use of statistical evidence to establish indirect discrimination, it does not mean that it is not possible. Under the Code of Civil Proceedings there are no restrictions regarding the evidence sources or means. There have not been any cases involving either direct or indirect discrimination, when statistics was used in order to prove discrimination. (Mazur-Rafal and Pajak, 2007) ** In the Polish law there is no explicit mention of “situational testing”. The most commonly used means of evidence in civil law proceedings are: documents, witness testimonies, expert opinions, or hearing of parties. According to Art. 308 of the Code of Civil Proceedings, the court may admit the evidence in a form of a movie, television program, photocopy, photography, plans, drawings, phone records or tapes as well as other means recording the picture or sound. This rule may have a significant value for evidences collected during situational testing, as implementation of various scenarios requires use of video cameras, tape recorders or even witnesses serving as comparators to the victims of discrimination. (Mazur-Rafal and Pajak, 2007)	Yes  Yes  No True Yes* Yes**	Yes  Yes  No True Yes* Yes**
<b>Indirect discrimination</b>  <i>Main steps</i> Can the main steps of the procedure be described as follows? 1. The employee/claimant has to clearly identify and define the employment practice in question. 2. The employee/claimant has to show that the practice <b>has or may have</b> a differentiated impact on one protected group. 3. The employer/respondent has the burden of demonstrating that the policy or practice in question is job related for the position in question and consistent with business necessity. 4. If the employer/respondent satisfies this requirement, evidence can be supplied on the existence/lack of the existence of a less discriminatory practice  In step 2 above is the term "has" more accurate than "may have"? In other words, can the potential (possible) impact of the contested employment practice be sufficient for shifting the burden of proof?  In step 4 above, if the employer/respondent demonstrates that a practice is consistent with business necessity, then: - does it fall to the employee/claimant to demonstrate that a less discriminatory alternative exists that meets the business need but that the employer refuses to adopt it? <b>or</b> - does it fall to the employer/respondent to demonstrate that a less discriminatory alternative that meets the business need does not exist?  Notes: Regarding “step 4”: The labour law does not stipulate this situation directly. In principle the law imposes on the employer the obligation to prove that he was guided by objective criteria e.g. business necessity (Art.18 <sup>3b</sup> §1of the Labour Code). No obligation is stipulated for proving the non existence of a less discriminatory	Yes  Yes  Yes  Yes No	Yes  Yes  Yes  Yes No

	Gender	Ethnicity
<p>practice. Therefore the potential burden of proof should rather be considered in accordance with general evidentiary principles (Art. 6 of the Civil Code) where the burden of proof relating to a fact rests on the party which attributes legal effect to that fact.</p> <p><i>Typical/standard prima facie evidence</i> to be provided to courts or other relevant bodies, as set by law or established by case law: Direct evidence ( i.e. any written or verbal statement by the employer/respondent), <b>only</b>. No clear legal guidance for indirect evidence (e.g. case-by-case basis only) Use of a distinction criteria that appear to be intrinsically suspicious. Please specify (for example, a requirement to work full-time might be unlawful discrimination against women) Statistical evidence</p>	<p>No True Yes  Yes*</p>	<p>No True Yes  Yes*</p>
<p>Other indirect evidence: In principle all material facts to resolve the case may be adduced and considered by court as evidence.</p> <p>* Although in the Polish law there is no explicit mention of use of statistical evidence to establish indirect discrimination, it does not mean that it is not possible. Under the Code of Civil Proceedings there are no restrictions regarding the evidence sources or means. There have not been any cases involving either direct or indirect discrimination, when statistics was used in order to prove discrimination. (Mazur-Rafal and Pajak, 2007)</p>		
<p><b>Harassment</b> Analysed on a case-by-case basis, by looking at all the circumstances and the context.</p>	Yes	Yes

Table 1.3 Employee compensation and employer penalties

	Gender	Ethnicity
<p>Employee compensation</p> <p><b>Injunctive relief/reinstatement</b> - Always made available to the employee/claimant, but the latter can choose monetary compensation in lieu of relief/reinstatement, or - Always made available to the employee/claimant, without alternative option, or - Always made available to the employee/claimant, but the employer/respondent can choose monetary compensation in lieu of relief/reinstatement, or - Never made available to the employee/claimant.</p> <p>Notes: Under the provisions of the Labour Code, an employee whose contract was terminated without notice in violation of the regulations for dissolving labour contracts has the right to seek reinstatement on the same terms as before, or monetary compensation. The choice of solutions lies with the employee, but the labour court rules on the advisability or possibility of returning to work. An employee is entitled to terminate his labour contract without prior denunciation on the basis of grave infringement by the employer of the fundamental obligations towards the employee (Art. 55 para 1). In such a case, the employee is entitled to compensation equal to his/her salary for the period of notice. (Mazur-Rafal and Pajak, 2007)</p> <p><b>Monetary compensation</b> Back pay (please indicate if there is a cap)  Reimbursement of lawyer's and attorney's fees and costs  In lieu of relief/reinstatement, compensation for future lost earnings (e.g., in case of dismissal, this may correspond to lost earnings until the employee finds a new job): - Floor or minimum (amount): ..... - Cap or maximum (amount): ..... - Average compensation (amount): ..... - Median compensation (amount): .....</p> <p>Compensation for psychological injury: - Floor or minimum (amount): ..... - Cap or maximum (amount): .....</p>	<p>Yes  No No  No</p> <p>Yes  ..  Yes</p> <p>Yes</p>	<p>Yes  No No  No</p> <p>Yes  ..  Yes</p> <p>Yes</p>

		Gender	Ethnicity
	<p>- Average compensation (amount): .....</p> <p>- Median compensation (amount): .....</p> <p>Notes: There is a monetary compensation introduced to the Labour Code for victim of discrimination (effective as of 1 January 2004, Art. 183d). There is <b>no maximum threshold</b> for this compensation, and the court can award it according to its assessment of the type and gravity of the discriminatory treatment in a specific case. There is however a <b>minimum of compensation which is at least equal to the monthly minimum wage</b> (€241 in 2007). A labour court that determines the compensation will take into consideration the type and gravity of the discriminatory measures used in respect of the complainant. (Mazur-Rafal and Pajak, 2007)</p>		
Employer additional penalties and obligations	<p><b>Civil provisions</b> None Court may order the publicity of the decision - Within the firm (e.g. notices to all employees addressing the violations of a specific charge and advising them of their rights under the laws) - Outside the firm (please indicate: media, trade-unions, etc.) The employer may be required to take corrective or preventive actions to cure the source of the identified discrimination Other (please specify): In accordance with art. 474 of the Code of Civil Procedure when in the course of court proceedings a serious breach of the provisions of law by an employer or a pension authority has been found, the court shall bring that to the attention of the competent authority, and - when required – notify the prosecutor.</p> <p>Notes: There are no administrative remedies laid down specifically to deal with discrimination issues, though such issues can sometimes be present at administrative proceedings. In addition, certain remedies could be applied by labour inspectors who are to supervise and control the observance of labour law (including anti-discrimination provisions). According to the Act on National Labour Inspectorate, a labour inspector may issue orders, lay protests, make submissions or bring claims to the labour court when the existence of labour relation is at stake. (Mazur-Rafal and Pajak, 2007)</p> <p><b>Penal provisions</b> None Fine (please specify amounts) Please see article 33 of the Penal Code quoted below: "§ 1. A fine shall be imposed in terms of daily rates defining the number of daily rates to be levied and the amount of each rate; unless otherwise provided by law, the lowest number of daily rates shall be 10, and the highest shall be 360. § 2. The court may also impose a fine also in addition to the penalty of deprivation of liberty as specified in Article 32 subsection 3, if the perpetrator has committed the act in order to gain material benefit or when he has gained such benefit. § 3. In setting the daily rate, the court shall consider the income of the perpetrator, his personal situation, family situation, property relationships and his earning capacity; the daily rate may not be lower than 10 Polish zlotys (about €2.8) or higher than 2000 Polish zlotys (about €565)."</p> <p>Prison sentence (please specify lengths, whether it applies only in specific cases and in which cases) Please see article 218 of the Penal Code quoted below: "§ 1. Whoever, when performing activities in the field of labour law and social insurance, maliciously or persistently infringes on the rights of the employee resulting from a work-contract relationship or social insurance, shall be subject to a fine, the penalty of restriction of liberty or the penalty of deprivation of liberty for up to 2 years. § 2. The person specified in § 1, who refuses to reinstate in work although ordered to do so by an appropriate authority shall be subject to a fine, the penalty of restriction of liberty or the penalty of deprivation of liberty for up to one year. § 3. The person specified in § 1, who does not fulfil the obligation to pay remuneration or other benefit resulting from the work-contract relationship although ordered to do so by the verdict of the court shall be subject to a fine, the penalty of restriction of liberty or the penalty of deprivation of liberty for up to 3 years. "</p> <p>Other (please specify): - The penalty of restriction of liberty (please see above). - Recently introduced, the Act on the Promotion of Employment and the Institutions of</p>	<p>false</p> <p>No</p> <p>No</p> <p>No</p> <p>Yes</p> <p>false</p> <p>Yes</p> <p>Yes</p> <p>Yes</p> <p>Yes</p>	<p>false</p> <p>No</p> <p>No</p> <p>No</p> <p>Yes</p> <p>false</p> <p>Yes</p> <p>Yes</p> <p>Yes</p> <p>Yes</p>

		Gender	Ethnicity
	<p>Labour Market provides 2 sanctions for conduct contrary to the Act. Firstly, everyone who while running an employment agency does not obey the prohibition of discrimination based on gender, age, disability, race, ethnic origin, nationality, sexual orientation, political opinion, religious beliefs or membership in a trade union is liable to fine not lower than about 700 Euro. Secondly, everyone who – on the same grounds – refuses to employ a candidate on a vacant work position or vocational training is liable to the same fine. Such cases are decided by municipal courts. (Mazur-Rafal and Pajak, 2007)</p> <p><b>Note:</b> The Polish anti-discrimination law does not entail any specific system of sanctions and it refers only to penalties and punishments set out by the Penal Code and the Code of Minor Offences. Obviously, as far as criminal proceedings are concerned, the burden of proof remains not shifted, and – in accordance with the presumption of innocence – it is for the public prosecutor to prove the charge. The accused may provide evidence and has the rights to defence but cannot be obliged to do so. (Mazur-Rafal and Pajak, 2007)</p>		

Table 1.4 Protection against victimisation (retaliation)

		Gender	Ethnicity
Protected actions	<p>It is prohibited to treat the employee/protected person less favourably (so-called "adverse action") because s/he has (so-called "protected action"):</p> <ul style="list-style-type: none"> <li>- brought proceedings against discrimination</li> <li>- given evidence or information in connection with any proceedings against discrimination.</li> <li>- participated as a witness in any proceedings against discrimination</li> </ul> <p>In relation to the two last points – <b>the answer is not obvious and there is a proposal of the amendment to the Labour Code</b></p> <p>Notes: The above information was provided by the Ministry of Justice but according to some specialists for the two last points. In the first case above a direct prohibition (of dissolution of a work–contract relationship) is stipulated in article 18<sup>3e</sup> of the Labour Code. In the two other cases the legal basis can be found in the general prohibition of less favourable/discriminatory treatment in article 18<sup>3a</sup> of the Labour Code.</p> <p>According to Mazur-Rafal and Pajak (2007), a definition of victimisation with regard to discrimination does not exist in Polish legal system. Thus, there is no general legal protection of victims against the risk of retaliation as a result of claiming his or her right not to be discriminated. Nevertheless, the Labour Code prohibits <b>renunciation and dissolution</b> of a labour contract as a result of an employee having used his rights to defend against unequal treatment (Art. 18<sup>3e</sup> of the Labour Code). This provision refers to complainants only, and does not cover witnesses or other people. Furthermore, <b>this provision does not prohibit other possible measures that can be implemented by the employer</b>, like down-grading, imposing a fine, etc. However, such adverse measures can be subjected to judicial control in respect of their justifiability, on the basis of general principles of judicial scrutiny in labour relations.</p>	Partly Partly Partly	Partly Partly Partly
Proof of causal connexion	<p><i>Burden of proof:</i></p> <ul style="list-style-type: none"> <li>- i) employee/protected person</li> <li>- ii) employer/respondent within a given lapse of time from the concerned event. Please specify conditions of application and lapse of time.</li> </ul> <p>Specific provisions exist with respect to the prohibition of dissolution of a work–contract relationship for the reason of availing himself by the employee of his equal treatment rights (article 18<sup>3e</sup> in conjunction with article 18<sup>3b</sup> §1 ,1) of the Labour Code). <b>In such a case the burden of proof would rest on the employer</b> in accordance with the general rule of article 18<sup>3b</sup>. No specific provisions concerning the lapse of time.</p> <ul style="list-style-type: none"> <li>- iii) shift of burden of proof. Please specify main steps.</li> </ul> <p>In cases (i) and (iii), when the causal connexion shall be first shown or established by the employee/protected person:</p>	No Yes	No Yes

		Gender	Ethnicity
	- the link can be demonstrated by evidence that the adverse action occurred shortly after the protected activity (and the employer/respondent was aware of the complainant's protected activity before taking the action), so that the employment relationship is implicitly or explicitly (please specify) protected during a certain period of time (please specify)		
Employee compensation and employer penalty	Compared to provisions described in Table 1.3: - additional employee/protected person compensation: Art. 18 <sup>3d</sup> of the Labour Code: A person who has been subject to discrimination as a result of violation of the principle of equal treatment in employment by the employer is entitled to compensation equal to at least the minimum remuneration for work, specified under separate regulation.  - additional employer/respondent penalties:		

Table 1.5 Relationship with standard labour laws

		Gender	Ethnicity
Labour law and discrimination	According to standard labour law(s) or code, would dismissal solely based on gender or ethnicity considered to be unjust dismissal? If yes, please specify since when.  Is there a provision requiring equal pay for work of equal value in standard labour law(s) or code? If yes, please specify since when.  Other areas of discrimination covered by standard labour law(s) or code (hiring, promotion, etc...); please specify Such issues as establishment and termination of employment relationships, terms and conditions of employment, promotion and access to vocational training in order to improve one's occupational qualifications	Yes, 2002  Yes, 2002	Yes, 2002  Yes, 2004
Complaints	Are discrimination complaints concerning dismissals more often lodged under standard labour law(s) or code, than under specific anti-discrimination laws? Are discrimination complaints concerning pay more often lodged under standard labour law(s) or code, than under specific anti-discrimination laws? Other important additional information/comments:	Yes  Yes	Yes  Yes
Evaluations	Please indicate below references to existing evaluations/studies on the effectiveness of anti-discrimination laws with respect to standard labour law(s):		

Table 1.6 Positive action

		Gender	Ethnicity
Compulsory actions	Are employers <b>required</b> by law to take actions to increase diversity/prevent discrimination?  If yes, what actions are required? - make regular public reports on employment composition in terms of gender or ethnicity - process only anonymous job applications - obligation for large employers to have a person in the HRM department in charge of the employer's anti-discrimination policy (please specify the size threshold of application, if any) - quotas (please specify the areas: e.g. executives in firms above a certain size)  Other (or any important additional information/comments):	No	No

		Gender	Ethnicity
Voluntary actions	Are employers <b>allowed</b> to take actions to increase diversity/prevent discrimination?	Yes	Yes
	If yes, what actions are allowed?	Yes	Yes
	- make regular public reports on employment composition in terms of gender or ethnicity	Yes	Yes
	- establish a plan to ensure that the employment composition in terms of gender or ethnicity is balanced	Yes	Yes
	- quotas (please specify the areas: e.g. executives)	Yes	Yes
	Notes: The 2003 Amendment of the Labour Code that took effect on 1 January 2004 introduced a clear and general stipulation allowing for positive action. This provision (Art. 18 <sup>3b</sup> para. 3 of the Labour Code) covers positive action not only for racial or ethnic origin, religion or belief, disability, age, and sexual orientation but equally for some additional grounds: gender, political opinion and membership in a trade union. Positive action can take form of specific measures introduced for a limited period of time in order to equalize opportunities of all or a significant number of employees who are distinguished by at least one of the grounds named above. These measures must be aimed at compensating disadvantages of such employees. (Mazur-Rafal and Pajak, 2007)		
Public employers' practices	Do public employers normally take actions to increase diversity/prevent discrimination?	..	..
	If yes, what actions?	..	..
	- make regular public reports on employment composition in terms of gender or ethnicity	..	..
	- establish a plan to ensure that the employment composition in terms of gender or ethnicity is balanced	..	..
	- process only anonymous job applications	..	..
	- have at least one person in the HRM department in charge of the employer's anti-discrimination policy	..	..
	- quotas (please specify the areas: e.g. high-rank officials)	..	..
	Other (or any important additional information/comments):		
Incentives	Is there a policy to increase incentives for employers to increase diversity/prevent discrimination?	Yes	..
	Policy instruments used:	Yes	..
	- Delivery of "labels" or certificates stating that the employer has a diversity-friendly business/employment practice.	Yes	..
	- financial incentives to establish a plan to ensure that the employment composition in terms of gender or ethnicity is balanced	Yes	..
	- financial incentives for having a person in the HRM department in charge of the employer's anti-discrimination policy and/or hiring a consultant to establish a diversity plan.	Yes	..
	- financial incentives for quotas (please specify the areas: e.g. executives)	Yes	..
	→ Ministry of Labour and Social Policy is a partner in the international project Gender Index which promotes equality on the labour market		
	Other (or any important additional information/comments):		



**Part 2. Institutional framework: specialised bodies (SB) combating discrimination (e.g. equal treatment bodies)**

Table 2.1 **Activities of SBs not related to individual discrimination cases: Public information and evaluation**<sup>a</sup>

	Gender	Ethnicity
Is there a specialised body (SB) in charge of carrying out some of all of the following public information and policy evaluation functions?	Yes	Yes
<ul style="list-style-type: none"> <li>National Labour Inspectorate</li> <li>Ministry of Labour and Social Policy - Department of Women, Family and Counteracting Discrimination, January 2005</li> </ul>		
<p>This SB has the statutory power to:</p> <ul style="list-style-type: none"> <li>run information campaigns to inform the public of their legal rights</li> </ul> <p><b>in practice</b>, importance of the above mentioned activity in the actual overall workload of the SB</p> <p>→ National Labour Inspectorate → Ministry of Labour and Social Policy - Department of Women, Family and Counteracting Discrimination</p>	Yes  Low High	Yes  Low High
<ul style="list-style-type: none"> <li>run campaigns to change public opinion</li> </ul> <p><b>in practice</b>, importance of the above mentioned activity in the actual overall workload of the SB</p> <p>→ National Labour Inspectorate → Ministry of Labour and Social Policy - Department of Women, Family and Counteracting Discrimination</p>	Yes  Low High	Yes  Low High
<ul style="list-style-type: none"> <li>publish statistics on discrimination</li> </ul> <p><b>in practice</b>, importance of the above mentioned activity in the actual overall workload of the SB</p> <ul style="list-style-type: none"> <li>carry out evaluations of the legal and institutional anti-discrimination framework</li> </ul> <p><b>in practice</b>, importance of the above mentioned activity in the actual overall workload of the SB</p> <ul style="list-style-type: none"> <li>make policy recommendations</li> </ul> <p><b>in practice</b>, importance of the above mentioned activity in the actual overall workload of the SB</p> <ul style="list-style-type: none"> <li>produce codes of good practice for employers</li> </ul> <p><b>in practice</b>, importance of the above mentioned activity in the actual overall workload of the SB</p>	Yes Low No  No  No	Yes Low No  No  No
Other (or any important additional information/comments):		

Note: a) High/Medium/Low mean above average / close to average / below average, respectively.

Table 2.2 **Activities of SBs not related to individual discrimination cases: Control and correction**<sup>a</sup>

	Gender	Ethnicity
Is there a specialised body (SB) in charge of carrying out some of all of the following control and correction functions?	Yes	Yes
<p>National Labour Inspectorate</p> <p>The institution created to supervise and control the implementation of labour law in Poland is the National Labour Inspectorate established still in the early 80s. It is formally subordinate to the Sejm (lower Chamber of the Parliament). This body has a wide mandate and deal with a whole variety of labour law and employment issues. In 2003 the Inspectorate run a pilot programme of monitoring the compliance with the principle of equal treatment of men and women in the workplace.</p> <p>Moreover, according to the Act on National Labour Inspectorate, a labour inspector may issue orders, lay protests, make submissions or bring claims to the labour court when the existence of labour relation is at stake. (Mazur-Rafal and Pajak, 2007). A labour inspector <b>can launch court proceedings on behalf of citizens or join pending proceedings</b> (but only in cases when existence of an employment relationship should be acknowledged or is disputed). <b>The inspector can bring the case before the labour court even without the knowledge or even more without the agreement of the person concerned.</b> According to Article 465.1 of the Code of Civil Procedure, <b>a labour inspector may be plenipotentiaries of an employee insured in the proceedings before the court of labour and social insurance.</b> (Liegl, Perchinig and Weyss, 2004)</p>		

	Gender	Ethnicity
This SB has the statutory power to	Yes	Yes
- randomly conduct formal investigations of companies and organisations.	High	High
<b>in practice</b> , importance of the above mentioned activity in the actual overall workload of the SB	Yes	Yes
- conduct formal investigations of companies and organisation where there is evidence of discrimination.	High	High
<b>in practice</b> , importance of the above mentioned activity in the actual overall workload of the SB	Yes	Yes
- oblige a company or an organisation to change the way it operates when discriminatory practices are found.	High	High
<b>in practice</b> , importance of the above mentioned activity in the actual overall workload of the SB	Yes	Yes
- take legal action against companies or organisations that apply discriminatory practices	High	High
<b>in practice</b> , importance of the above mentioned activity in the actual overall workload of the SB	Yes	Yes
- take legal action against organisations that attempt to promote discrimination or to instruct others to discriminate.	No	No
<b>in practice</b> , importance of the above mentioned activity in the actual overall workload of the SB		
Other (or any Important additional information/comments):		

Note: a) High/Medium/Low mean above average / close to average / below average, respectively.

Table 2.3 Role of SBs in individual discrimination cases

	Gender	Ethnicity
Is there a specialised body (SB) with specific functions related to individual discrimination cases?	Yes	Yes
<p>There is no single equality body. Several bodies dealing with several aspects of equal treatment exist in Poland:</p> <ul style="list-style-type: none"> <li>- <i>Ministry of Labour and Social Policy- Department of Women, Family and Counteracting Discrimination</i> (January 2005)</li> <li>- <i>National Labour Inspectorate</i>: see Table 2.2</li> <li>- <i>Commissioner for Civil Rights Protection</i>: The Commissioner for Civil Rights Protection (Ombudsperson) is an office which is independent from other organs of state administration and which performs its duties in an independent way, according to the subsidiary principle. According to the 1997 Constitution, everyone has a right to apply to the Ombudsperson for <b>assistance in protection of his freedoms or rights infringed by organs of public authority</b>. However, the Commissioner may also become involved in cases involving non-state actors, in which he or she may either conduct the explanatory procedure him/herself, or refer the investigation of the matter in whole or in part to the appropriate bodies. Disputes arising from contractual relationships between natural persons do not fall under the Ombudsperson's powers.</li> </ul> <p>The Commissioner for Civil Rights Protection is not obliged to take up a complaint and can choose freely which case he or she wants to take up. The Commissioner may provide legal advice by indicating possible legal measures but cannot act directly on behalf of the complainant. According to Article 393 of the Code of Civil Procedure, the Ombudsperson for Civil Rights is authorised to claim the given case before the Supreme Court. Substantial powers of the Ombudsperson for Civil Rights are provided in the Article 14 of Act on the Ombudsperson for Civil Rights: demand that proceedings be instituted in civil cases, and participate in any ongoing proceedings with the rights enjoyed by the prosecutor; demand that preparatory proceedings be instituted by a competent prosecutor in cases involving offences prosecuted <i>ex officio</i>; ask for instituting administration proceedings, lodge complaints against decisions to administrative court and participate in such proceedings with the rights enjoyed by the prosecutor; move for punishment as well as for reversal of a valid decision in proceedings involving misdemeanour, under rules and procedures set forth elsewhere; lodge cassation or extraordinary appeal against each final and valid sentence, under rules and procedures set forth elsewhere. The Commissioner may initiate a civil procedure in all the situations a public prosecutor can do (Liegl, Perchning and Weyss, 2004).</p>		
Was this body created by anti-discrimination laws (or did anti-discrimination laws establish a specific mandate for it)?	Yes	Yes
<b>Formal linkage between SB activities and court procedures</b>		
Does the SB act as a one-stop shop where claimant can access information, lodge a complaint, receive advice?	Yes	Yes
As soon as a discrimination complaint is brought to court, is the claim formally transmitted to the SB?	No	No
Discrimination complaints must be lodged with the SB beforehand, which acts as one-stop shop to start the procedure.	No	No
The SB has the statutory power to provide advice and information to claimants (or both parties) on their legal rights and what options they have.	Yes	Yes
<b>In practice</b> , the SB carries on the above mentioned process as soon as it receives a discrimination claim.	No	..

	<b>Gender</b>	<b>Ethnicity</b>
The SB has the statutory power to provide claimants with legal assistance. <b>In practice</b> , SB provides legal assistance to claimants during court proceedings. The SB has the statutory power to provide claimants with legal representation. <b>In practice</b> , the SB provides legal representation to claimants during court proceedings.	Yes (NLI) .. Yes (NLI) ..	Yes (NLI) .. Yes (NLI) ..
<b>Investigation of discrimination claims → National Labour Inspectorate (NLI)</b>		
The SB has the legal authority to compel people (and in particular, the employer) to provide all of the information it requires to investigate a discrimination claim.	Yes (NLI)	Yes (NLI)
Does the court accept evidence from the SB?	Yes	Yes
Does the court accept the SB's evaluation of the validity of the discrimination complaint?	..	..
<b>In practice</b> , the SB formally investigates discrimination claims.	..	..
Please indicate below the main tools the SB uses to investigate a discrimination claim:		
Any employer's failure to provide the requested information to the SB will: - have no implication for the court ruling. - potentially be used to draw inferences on discrimination if the case is brought before court.	No No	No No
Any employer's failure to comply with the code of practices issued by the SB (or other relevant body) will: - have no implication for the court ruling. - potentially be used to draw inferences on discrimination if the case is brought before court.	No No	No No
Important additional information/comments on the investigation procedure:		
<b>Mediation/conciliation procedure</b>		
The SB has the statutory power to help both parties to resolve the dispute through a mediation/conciliation procedure.	No	No
Mediation/conciliation is a free and voluntary process for both parties.	No	No
<b>In practice</b> , the SB carries out mediation/conciliation procedures, so that a court ruling may not be necessary.	No	No
The mediation/conciliation procedure is <b>usually</b> initiated:		
- before the case is brought to court	No	No
- before any formal investigation starts or at an early stage of the process	No	No
- after any investigation has produced primary evidence of discrimination (but before a litigation decision has been reached)	No	No
The SB acts as a neutral third party assisting both opposing parties in the mediation/conciliation procedure.	No	No
The mediation/conciliation procedure is confidential: no details of the discussion taking place in its course can be repeated to court, nor are made public. The same rule applies to the terms of the settlement.	No	No
If the parties, including the SB, reach settlement agreement, the latter is legally binding and the charge is dismissed.	No	No
The SB secures the enforcement of settlement agreements reached under its assistance and/or responsibility.	No	No

**Part 3. Statistics on mediation/conciliation procedures and court cases**

Table 3.1 **Statistics**

		<b>Gender</b>	<b>Ethnicity</b>
General statistics	Total number of discrimination complaints received Protected population (number of persons aged 15-64 covered by the law in question)		
Mediation/ conciliation procedures	Number of received complaints treated by the SB <i>of which:</i> - number of complaints dismissed by the SB for no reasonable cause - number of unsuccessful mediations/conciliations although reasonable cause was found - number of successful mediations/conciliations - other (please specify)  Average duration of mediation/conciliation procedures  Average employee/claimant compensation under mediation/ conciliation procedures		901 Total number of complaints treated by National Labour Inspectorate concerning discrimination cases.
Court procedures	Number of court cases <i>of which</i> - number of complaints dismissed by court for default procedures (or administrative reasons) - number of complaints dismissed by court for no reasonable cause - number of cases withdrawn by the complainant(s) - number of court rulings with favourable outcomes for the complainant(s) - other (please specify): settlements  Average duration of court procedures  Comment: The above statistical data concerns cases considered by district courts (courts of first instance) in the years 2005-2006 based on article 18 <sup>3d</sup> of the Labour Code (claims for compensation for infringement of the principle of equal treatment in employment). The data concerning discrimination cases on the grounds of ethnicity (among the total number of discrimination cases) is not available	277  1  93 Not available 35 8  7,2 months	Not available

**Main additional references**

**Liegl, B., Perchinig, B. and B. Weyss (2004)**, *Brochure on Anti-Discrimination Legislation and Policies in Poland*, conducted in the framework of the Twinning Project Poland – Austria “Strengthening Anti-discrimination Policies”, Ludwig Boltzmann Institute for Human Rights,  
<http://www.univie.ac.at/bim/php/bim/get.php?id=146>

**Mazur-Rafal, M. and M. Pajak (2007)**, *Report on Measures to Combat Discrimination – Country Report: Poland*, European Commission,  
[http://www.ec.europa.eu/employment\\_social/fundamental\\_rights/pdf/legnet/plrep07\\_en.pdf](http://www.ec.europa.eu/employment_social/fundamental_rights/pdf/legnet/plrep07_en.pdf)

## PORTUGAL

### Part 1. Legal framework for employment discrimination

Main anti-discrimination laws:

- The Constitution of the Portuguese Republic of 2 April 1976: All citizens shall have the same social dignity and shall be equal before the law. No one shall be privileged, favoured, injured, deprived of any right or exempt from any duty because of his ancestry, sex, race, language, territory of origin, religion, political or ideological convictions, education, economic situation, social condition or sexual orientation (art.13). Article 59(1) forbids discrimination at work of any worker on the grounds of age, sex, race, citizenship, country of origin, religion, political or ideological convictions etc.,
- Labour code: Article 23 of the Code deals with anti-discrimination and forbids the practice of any discrimination, direct or indirect, based namely on ancestry, age, sex, sexual orientation, civil status, family situation, genetic patrimony, reduced capacity to work, disability or chronic disease, nationality, ethnic origin, religion, political or ideological convictions and membership of a trade union (the Code is further developed in the Labour Relation Act, Law 35/2004). Equality between men and women in access to employment ant at work were formerly covered by the Equality Act of 1979 (for private workers) and by the Equality Act of 1988 (for civil servants).
- Regarding discrimination on the ground of sex, Portugal ratified the International Convention on the Elimination of All forms of Discrimination Against Women (CEDAW) in 1980, without any reservation. In accordance with the Constitution, the CEDAW is integrated into national law (as all International conventions or treaties ratified by the Government). On the 8<sup>th</sup> of March 2002, the President of the Republic, by Decree 15/2002, ratified the Optional Protocol to the CEDAW.
- Law 134/99 of 28 August 1999 forbidding discrimination in the exercise of rights based on race, colour, nationality or ethnic origin covering fundamental rights, refusal or conditioning of economic, social or cultural rights.
- Law 18/2004 of 11 May 2004 transposing Council Directive 2000/43 of 29 June 2000 into Portuguese law, and establishing the principle of equality of treatment between persons irrespective of racial or ethnic origin and a legal framework to combat discrimination on the grounds of racial or ethnic origin, on nationality and colour. Article 3(1) provides that "For the purpose of this law the principle of equality of treatment means the absence of any discrimination, direct or indirect, based on racial or ethnic origin". Article 3(2) states that "All actions or omissions affecting persons on the grounds of race, colour, nationality or ethnic origin, which violate the principle of equality, are considered as discriminatory practices." Law 134/99 remains in force and can be applied subsidiarily whenever it gives more benefits to the discriminated.

Relevant courts: Labour courts, for discrimination cases in the sphere of employment (but criminal court, other civil court, or administrative court).

Legal scope of the (hereinafter) so-called gender and ethnic grounds:

- Gender: sex, including civil status, family situation, pregnancy, childbirth and early motherhood.
- Ethnicity: racial, colour, nationality or ethnic origin.

**Table 1.1 Prohibited acts, areas of concern, coverage, legal assistance and representation**

		Gender	Ethnicity
Type of discrimination	Direct discrimination	Yes	Yes
	Indirect discrimination, i.e. where a provision criterion or practice is applied to all employees but puts one protected group at a particular disadvantage and cannot be shown to be a proportionate means of meeting a legitimate aim.	Yes	Yes
	Pressure and instruction to discriminate	Yes	Yes
	Harassment	Yes	Yes
Areas of concern	Hiring process	Yes	Yes
	Wage	Yes	Yes
	Type of employment contract (permanent vs. fixed term)	*	*
	Working time (atypical work schedule, part-time vs. full-time)	*	*
	Promotion	Yes	Yes
	Job and vocational training	Yes	Yes

		Gender	Ethnicity
	Transfer Redundancy and dismissal Notes: * Not explicitly mentioned in the Law, that instead refers to working conditions in general.	Yes Yes	Yes Yes
Coverage	Private sector Public sector Employment agencies Trade unions (as regards membership)	Yes Yes .. Yes	Yes Yes .. Yes
Legal assistance other than private lawyer	Specialised body (e.g. equal treatment body) Any relevant public utility institutions and associations Trade unions (for their members only)	No Yes Yes	No Yes Yes
Legal representation other than private lawyer	Specialised body (e.g. equal treatment body) Any relevant public utility institutions and associations: to check Trade-unions (for their members only) Notes: Trade Unions and NGOs have the right to act on behalf of one or more complainants. Class actions, in the sense of collective actions, i.e. actions with several complaints are possible in civil, criminal and labour procedures under Article 5(2)(c) of the Labour Procedure Code (the Code containing rules of procedure for labour actions in accordance with Decree-law 480/99 of 9 November 1999) states that trade unions may file actions, in representation of their members who authorise them to do so in cases related to the general violation of individual rights of identical nature. Article 5(3) states that the authorisation is presumed if the member does not manifest any opposition after being informed by the trade union of its intention to file the action. (Malheiros, 2007)	No Yes Yes	No Yes Yes

Table 1.2 Burden of proof

	Gender	Ethnicity
Employee/claimant Shift of burden of proof (the employee/claimant provides facts, then the employer/respondent has to provide proofs – see below for a detailed description)	No Yes	No Yes
<b>Direct discrimination</b>  <i>Main steps</i> Can the main steps of the procedure be described as follows? 1. The employee/claimant has to supply prima facie evidence whereby it may be <b>presumed</b> that there has been discrimination. 2. The employer/respondent has the burden of <b>proving</b> that his/her practice is not discriminatory. If not, please specify the procedures.  In practice, is presumption – as opposed to stronger evidence of discrimination – sufficient to shift the burden of proof?	Yes      Yes*	Yes      Yes*
Notes: * According to Article 23(3) of the Labour Code, it is for the claimant to substantiate the existence of the alleged discrimination, by naming the worker or workers he or she feels are, have been or would be treated more favourably; it shall be for the employer to prove that differences in treatment are not due to any of the prohibited grounds of discrimination. Article 35 of Law 35/2004 states that “whenever the existence of a discriminatory practice concerning access to employment, professional training, or working conditions is alleged, Article 23(3) of the Labour Code regarding the burden of proof shall apply”. A presumption of discrimination is created once the employee can demonstrate the existence of facts that allow for such a presumption to be established. It is up to the employer to prove that his or her actions are not to be considered discriminatory. (Malheiros, 2007)  <i>Typical/standard prima facie evidence</i> admissible in courts (or other relevant bodies), as set by law or established by case law: Direct evidence (i.e. any written or verbal statement by the employer/respondent), <b>only</b> . No clear legal guidance for indirect evidence (e.g. case-by-case basis only) Statistical evidence Situation testing	No True Yes* Yes*	No True Yes* Yes*

	Gender	Ethnicity
<p>Notes:  * Under the general principles of the administration of evidence (as established in the Civil and Criminal Procedure Code), "situational testing" can be admitted as evidence, but is not defined by law. Likewise, statistics, if available, can be used as evidence. They are considered as documents and can also be subject to analysis by experts named by the parties or appointed by the court.  A priori, there is no reluctance to use situation testing or statistics as evidence in Court, on the basis of ethical or methodology issues. The Courts will evaluate the evidence resulting from eventual situational tests or statistics according to their own evaluation on the credibility of the persons involved. It is quite common in Portuguese Courts to use as arguments legislation, court precedents and doctrine of other countries, mainly of European countries.  However, situation testing is not being used in practice and there is no (significant) case law on this issue. Likewise, there have been no cases in Portugal involving direct or indirect discrimination where statistics have played a major role. (Malheiros, 2007)</p>		
<p><b>Indirect discrimination</b></p> <p><i>Main steps</i>  Can the main steps of the procedure be described as follows?  1. The employee/claimant has to clearly identify and define the employment practice in question.  2. The employee/claimant has to show that the practice <b>has or may have</b> a differentiated impact on one protected group.  3. The employer/respondent has the burden of demonstrating that the policy or practice in question is job related for the position in question and consistent with business necessity.  4. If the employer/respondent satisfies this requirement, evidence can be supplied on the existence/lack of the existence of a less discriminatory practice  If not, please specify the differences.</p> <p>In step 2 above is the term "has" more accurate than "may have"? In other words, can the potential (possible) impact of the contested employment practice be sufficient for shifting the burden of proof?</p> <p>In step 4 above, if the employer/respondent demonstrates that a practice is consistent with business necessity, then:  - does it fall to the employee/claimant to demonstrate that a less discriminatory alternative exists that meets the business need but that the employer refuses to adopt it? <b>or</b>  - does it fall to the employer/respondent to demonstrate that a less discriminatory alternative that meets the business need does not exist?  Other (or any important additional information/comments):</p> <p><i>Typical/standard prima facie evidence</i> to be provided to courts or other relevant bodies, as set by law or established by case law:  Direct evidence (i.e. any written or verbal statement by the employer/respondent), <b>only</b>.  No clear legal guidance for indirect evidence (e.g. case-by-case basis only)  Use of a distinction criteria that appear to be intrinsically suspicious. Please specify (for example, a requirement to work full-time might be unlawful discrimination against women)  Statistical evidence  Other indirect evidence (or any important additional information/comments)</p>	<p>..</p> <p>..</p> <p>..</p> <p>..</p> <p>No True Yes* Yes*</p>	<p>..</p> <p>..</p> <p>..</p> <p>No True Yes* Yes*</p>
<p>Notes:  * Same as in direct discrimination cases.</p>		
<p><b>Harassment</b>  Analysed on a case-by-case basis, by looking at all the circumstances and the context.</p>	Yes	Yes

Table 1.3 Employee compensation and employer penalties

		Gender	Ethnicity
Employee compensation	<p><b>Injunctive relief/reinstatement</b></p> <ul style="list-style-type: none"> <li>- Always made available to the employee/claimant, but the latter can choose monetary compensation in lieu of relief/reinstatement, or</li> <li>- Always made available to the employee/claimant, without alternative option, or</li> <li>- Always made available to the employee/claimant, but the employer/respondent can choose monetary compensation in lieu of relief/reinstatement, or</li> <li>- Never made available to the employee/claimant.</li> </ul>	Yes*	Yes*
	<p>Notes:</p> <p>The Labour Code provides that if the discriminatory treatment occurs during the recruitment process, the victim cannot request the court to order the employer to hire him or her. He or she is only entitled to damages. However, if discrimination takes place in the context of actual employment, the victim of discrimination can ask the court to order the employer to put an end to any discriminatory treatment and to be reinstated if he or she was unfairly dismissed.</p> <p>In addition, any discriminatory provisions included in an employment contract are considered null and void (art.294 of the Civil Code and art.114 of the Labour Code) and can be declared so by the Labour Courts. (Malheiros, 2007)</p>	No*	No*
Employee compensation	<p><b>Monetary compensation</b></p> <p>Back pay (please indicate if there is a cap)</p>	Yes*	Yes*
	<p>Reimbursement of lawyer's and attorney's fees and costs</p>	..	..
	<p>In lieu of relief/reinstatement, compensation for future lost earnings (e.g., in case of dismissal, this may correspond to lost earnings until the employee finds a new job):</p> <ul style="list-style-type: none"> <li>- Floor or minimum (amount): .....</li> <li>- Cap or maximum (amount): .....</li> <li>- Average compensation (amount): .....</li> <li>- Median compensation (amount): .....</li> </ul>	..	..
	<p>Compensation for psychological injury:</p> <ul style="list-style-type: none"> <li>- Floor or minimum (amount): .....</li> <li>- Cap or maximum (amount): .....</li> <li>- Average compensation (amount): .....</li> <li>- Median compensation (amount): .....</li> </ul>	Yes*	Yes*
	<p>Notes:</p> <p>* The Labour Code expressly states that the occurrence of any discriminatory act gives the worker or job applicant the right to be compensated for pecuniary or non-pecuniary damages in accordance with the general provisions of civil law (art.26).</p> <p>There is no ceiling on the amount of compensation that can be awarded as civil damages. There is no information available on the compensation amount available to victims. No court cases on this issue have been reported. (Malheiros, 2007)</p>		
Employer additional penalties and obligations	<p><b>Civil provisions</b></p> <p>None</p>	True	True
	<p>Court may order the publicity of the decision</p> <ul style="list-style-type: none"> <li>- Within the firm (e.g. notices to all employees addressing the violations of a specific charge and advising them of their rights under the laws)</li> <li>- Outside the firm (please indicate: media, trade-unions, etc.)</li> </ul>	Yes	Yes
	<p>The employer may be required to take corrective or preventive actions to cure the source of the identified discrimination</p>	Yes	Yes
		..	..



		<b>Gender</b>	<b>Ethnicity</b>
	<p>Other: Law 35/2004 of 29 July 2004 imposes the duty on the employer to display in appropriate area information related to the worker's rights and duties according to the principles of equality and non-discrimination (Article 31). The violation of this disposition is considered as a minor offence according to Article 473 of this law, and is punishable with a fine that may vary from 178 to 1,335€. (Malheiros, 2007)</p> <p>* In addition, the High Commissioner for Immigration and Ethnic Minorities may apply the following ancillary sanctions (Malheiros, 2007):</p> <ul style="list-style-type: none"> <li>- publication of the decision;</li> <li>- public reprehension (admonition) of the perpetrators of discriminatory practices;</li> <li>- confiscation of property;</li> <li>- prohibition of the exercise of a profession or activity which involves a public capacity or depends on authorisation or official approval by public authorities;</li> <li>- removal of the right to the benefits granted by public bodies or services;</li> <li>- removal of the right to participate in trade fairs;</li> <li>- removal of the right to participate in public markets;</li> <li>- compulsory closing of premises owned by the perpetrators;</li> <li>- suspension of licences and other permits.</li> </ul>	Yes	Yes*
	<p><b>Penal provisions</b></p> <p>None</p> <p>Fine</p> <p>Prison sentence (please specify lengths, whether it applies only in specific cases and in which cases)</p>	True* Yes* No	True* Yes No
	<p><b>Notes:</b></p> <p>The Labour Code does not consider discrimination a crime, but only a summary administrative offence. It expressly states that these offences are also punishable in the case of negligence (art.620).</p> <p>The amount of the corresponding fines varies according to several parameters, namely the degree of fault (intent or negligence), seriousness of the offence, and turnover of the employer. Offences related to discrimination at work are considered very serious offences (art.642) and are punishable as follows:</p> <ul style="list-style-type: none"> <li>- less than 500,000€ of turnover: fines from 1,780 to 3,560€ for negligence and from 4,005 to 8,455€ for intent;</li> <li>- turnover from 500,00 to 2,500,000€: fines from 2,848 to 7,120€ for negligence and from 7,565 to 16,910€ for intent;</li> <li>- turnover from 2,500,000 to 5,000,000€: fines from 3,738 to 10,680€ for negligence and from 10,680 to 24,920€ for intent;</li> <li>- turnover from 5,000,000 to 10,000,000€: fines from 4,895 to 12,460€ for negligence and from 12,950 to 35,600€ for intent;</li> <li>- more than 10,000,000€ of turnover: fines from 8,010 to 26,700€ for negligence and from 26,700 to 53,400€ for intent.</li> </ul> <p>If the employer responsible for the violation of the rules is not an enterprise, fines can vary from 890 to 2,225€ in the case of negligence and from 2,225 to 4,450€ in the case of intent.</p> <p>The Labour Code also provides that a decision imposing an administrative fine for a violation of the provisions on equality and non-discrimination can also be published. (Malheiros, 2007)</p>		

Table 1.4 Protection against victimisation (retaliation)

		Gender	Ethnicity
Protected actions	<p>It is prohibited to treat the employee/protected person less favourably (so-called "adverse action") because s/he has (so-called "protected action"):</p> <ul style="list-style-type: none"> <li>- brought proceedings against discrimination</li> <li>- given evidence or information in connection with any proceedings against discrimination.</li> <li>- participated as a witness in any proceedings against discrimination</li> </ul> <p>Notes:</p> <p>* Article 122(a) of the Labour Code prohibits the employer from "opposing, in any way whatsoever, the exercise by the worker of his/her rights, as well as from dismissing an employee or imposing any sanctions on him or her or subjecting him or her to any adverse treatment because of that same exercise." Article 374(1)(a)(d) considers that any disciplinary measure taken against a worker is to be considered abusive (and therefore illegal) if it is in retaliation to a complaint against working conditions or to the (present) exercise, the past exercise or the intention to exercise or invoke rights and guarantees on the part of the employee. Based on these provisions (and also on the provisions set forth in Articles 396(1)(2) and 429(c) of the Labour Code), any kind of victimisation is considered illegal under the labour law.</p> <p>There is no specific mention of protection of witnesses and of people that help a victim of retaliation, but if retaliation is proven the above rules should be applicable, considering the comprehensive wording of the law.</p> <p>According to Article 34 of Law 35/2004 acts of retaliation are null and void. (Malheiros, 2007)</p>	<p>Yes*</p> <p>Yes*</p> <p>Yes*</p>	<p>Yes*</p> <p>Yes*</p> <p>Yes*</p>
Proof of causal connexion	<p><i>Burden of proof:</i></p> <ul style="list-style-type: none"> <li>- i) employee/protected person</li> <li>- ii) employer/respondent within a given lapse of time from the concerned event. Please specify conditions of application and lapse of time.</li> <li>- iii) shift of burden of proof. Please specify main steps.</li> </ul> <p>In cases (i) and (iii), when the causal connexion shall be first shown or established by the employee/protected person:</p> <ul style="list-style-type: none"> <li>- the link can be demonstrated by evidence that the adverse action occurred shortly after the protected activity (and the employer/respondent was aware of the complainant's protected activity before taking the action), so that the employment relationship is implicitly or explicitly (please specify) protected during a certain period of time (please specify)</li> <li>- other (please specify):</li> </ul>	<p>..</p> <p>..</p> <p>..</p> <p>..</p> <p>..</p>	<p>..</p> <p>..</p> <p>..</p> <p>..</p> <p>..</p>
Employee compensation and employer penalty	<p>Compared to provisions described in Table 1.3:</p> <ul style="list-style-type: none"> <li>- additional employee/protected person compensation</li> <li>- additional employer/respondent penalties</li> </ul>	<p>No</p> <p>No</p>	<p>No</p> <p>No</p>

Table 1.5 **Positive action**

		<b>Gender</b>	<b>Ethnicity</b>
Compulsory actions	<p>Are employers required by law to take actions to increase diversity/prevent discrimination?</p> <p>If yes, what actions are required?</p> <ul style="list-style-type: none"> <li>- make regular public reports on employment composition in terms of gender or ethnicity</li> <li>- process only anonymous job applications.</li> <li>- obligation for large employers to have a person in the HRM department in charge of the employers anti-discrimination policy</li> <li>- quotas (please specify the areas; e.g. executives in firms above a certain size)</li> </ul>	No	No
Voluntary actions	<p>Are employers allowed to take actions to increase diversity/prevent discrimination?</p> <p>If yes, what actions are allowed?</p> <ul style="list-style-type: none"> <li>- make regular public reports on employment composition in terms of gender or ethnicity</li> <li>- establish a plan to ensure that the employment composition in terms of gender or ethnicity is balanced</li> <li>- quotas (please specify the areas: e.g. executives)</li> </ul> <p>Notes:</p> <p>According to Article 25 of the Labour Code, "legislative measures of a specifically defined temporary nature, benefiting certain disadvantaged groups, including groups defined by reference to sex, reduced working capability, disability or chronic illness, nationality or ethnic origin, enacted with the aim of guaranteeing the exercise, in conditions of equality, of the rights provided for in this Code and of correcting a situation of factual inequality persisting in social life, shall not be considered discriminatory".</p> <p>So far this article has not been implemented (Malheiros, 2007).</p>	<p>Yes*</p> <p>..</p> <p>..</p> <p>..</p>	<p>Yes*</p> <p>..</p> <p>..</p> <p>..</p>
Public employers' practices	<p>Do public employers normally take actions to increase diversity/prevent discrimination?</p> <p>If yes, what actions?</p> <ul style="list-style-type: none"> <li>- make regular public reports on employment composition in terms of gender or ethnicity</li> <li>establish a plan to ensure that the employment composition in terms of gender or ethnicity is balanced</li> <li>- process only anonymous job applications</li> <li>- have at least one person in the HRM department in charge of the employer's anti-discrimination policy</li> <li>- quotas (please specify the areas: e.g. high-rank officials)</li> </ul> <p>Notes:</p> <p>* A Council of Ministers Resolution 49/2007 of 28 March was adopted, approving the principles of good governance in State-owned enterprises and requiring them to adopt equality plans designed to achieve real equality of treatment and opportunities for men and women, eliminate gender-based discrimination and allow a balance between private, family and working life.</p>	<p>Yes*</p> <p>Yes</p> <p>No</p> <p>No</p> <p>No</p>	<p>..</p> <p>..</p> <p>..</p> <p>..</p> <p>..</p>
Incentives	<p>Is there a policy to increase incentives for employers to increase diversity/prevent discrimination?</p> <p>Policy instruments used:</p> <ul style="list-style-type: none"> <li>- Delivery of "labels" or certificates stating that the employer has a diversity-friendly business/employment practice.</li> <li>- financial incentives to establish a plan to ensure that the employment composition in terms of gender or ethnicity is balanced</li> <li>-financial incentives for having a person in the HRM department in charge of the employer's anti-discrimination policy and/or hiring a consultant to establish a diversity plan.</li> <li>- financial incentives for quotas (please specify the areas: e.g. executives)</li> </ul> <p>Notes:</p> <p>* Since 2000, the Ministry of Labour and Social Solidarity, through the Commission of Equality in Labour and Employment, has distinguished public and private sector Companies, Co-operatives or Associations and other non-profit entities, with Exemplary Policies in the area of Equal Opportunities for Women and Men, with the "Equality Is Quality" Award. That award It is a prestigious award the strategic objective of which is to combat discrimination and promote equality between Women and Men at work, in employment and vocational training and the conciliation of work and family life.</p>	<p>Yes</p> <p>Yes*</p> <p>No</p> <p>No</p> <p>No</p>	<p>..</p> <p>..</p> <p>..</p> <p>..</p> <p>..</p>

		Gender	Ethnicity
	<p>The main priorities, objectives and aims of the "Equality Is Quality" award are:</p> <p>a) To combat segregation in the employment market;  b) To reduce inequalities between the average monthly earnings of women and men;  c) To reduce the gap between male and female unemployment rates;  d) To improve the quality of working conditions;  e) To create conditions for progress in collective bargaining;  f) To increase women's participation in qualifying vocational training;  g) To support the employment of women;  h) To recognise the value of skills acquired in the professional, family and social contexts;  i) To introduce the idea that conciliation of working and family life is a right and duty of male and female workers, into organisational and company cultures;  j) To promote awareness regarding equal opportunities.</p> <p>(See Annual Progress Report on Equal Opportunities for Men and Women at Work, in Employment and Vocational Training. Established by Law n. ° 10/2001, of 21st May, page 80.)</p>		

*Additional information:*

**European Year of Equal Opportunities for All (EYEOA) also contributed to combat discrimination in the Labour Market on the grounds of sex and ethnicity among others.**

The structure of the European Year of Equal Opportunities for All - 2007 was set up to prepare and guarantee the implementation of a programme of action under the supervision of the chairperson of the Commission for Citizenship and Gender Equality.

The national strategy for implementing the National Action Plan for the European Year of Equal Opportunities for All was based on the territorialisation of activities and the involvement of organised civil society in order to raise the population's awareness of discriminatory attitudes and change behaviours.

The fact that gender-based discrimination is transversal to different discriminations, making the phenomenon more serious and complex and creating dual or even multiple discrimination, is one of aspects found in the work, carrying a message that it is only by eliminating gender stereotypes that society can take a proactive attitude in the fight against other types of discrimination.

As these issues were addressed at a local level, it was possible to raise people's awareness of the problem and help them understand how it can affect society and how they can change their blocking attitudes.

In the first half of 2007, many information and awareness campaigns were waged all over the country to encourage a change in behaviour and in forms of organising society, research into gender stereotypes and discrimination and the involvement of political powers, civil society and the public. The following are examples:

- 23 municipal assemblies where statements of intent were presented by the parties involved in combating stereotyped and discriminatory behaviour were presented
- A mobile exhibition in a large trailer truck containing computers, a plasma TV, a sound system and publicity material went to 15 of the country's 18 district capitals
- Decentralised regional awards for companies and civil society organisations demonstrating good practices in the area, in which gender equality (gender mainstreaming) was one of the criteria considered by the judges
- Theme discussion groups to debate these issues and suggest good practices. The discussion group on gender stereotypes focused on culture and addressed stereotypes in the different dimensions of culture, including literature, music, the arts and folk culture.
- Survey of research into gender resulting in the collection of 120 titles after responses came from 26 universities, 15 polytechnics and 52 research centres all over the country
- Involvement of the media in the problem of discrimination in general and gender discrimination in particular in order to raise public awareness and help change behaviours. There were programmes and interviews (press, radio and television) and advertising campaigns (leaflets, posters, billboards, banners, etc)
- Participation in around 70 events of the European Year of Equal Opportunities for All, including discussion groups, seminars, exhibitions, fairs, cinema and theatre, etc

**Part 2. Institutional framework: specialised bodies (SB) combating discrimination (e.g. equal treatment bodies)**

Table 2.1 **Activities of SBs not related to individual discrimination cases:** Public information and evaluation

	Gender	Ethnicity
Is there a specialized body (SB) in charge of carrying out some of all the following public information and policy evaluation functions?	Yes	Yes
<p><b>Gender:</b> Portugal has two mechanisms for gender equality:</p> <ul style="list-style-type: none"> <li>the <i>Commission for Equality in Labour and Employment</i>, operates only in the area of work and employment. It has tripartite composition and, in that sense, one may say it is an independent (and not private) body. It was established in 1999 in order to promote the application of the provisions of Decree-Law 329/99, of 20th September, that guaranteed equal opportunities and treatment for women and men at work and in employment, as a consequence of the right to work enshrined in the Constitution of the Portuguese Republic (see Annual Progress Report on Equal Opportunities for Men and Women at Work, in Employment and Vocational Training. Established by Law n.º 10/2001, of 21st May, page 75 and following).</li> <li>the <i>Commission for Citizenship and Gender Equality</i> [created in 2007, prior Commission for Equality and Women's Rights (1992) and Commission for Women's Status (around 1975)] depends on the Prime-Minister (not independent).</li> </ul> <p>Up to June 2007, the Commission for Equality in Labour and Employment could:</p> <ul style="list-style-type: none"> <li>recommend the adoption of legislative and administrative measures to the minister responsible for employment and to the minister responsible for the Public Administration, with a view to improve the application of the legal provisions regarding equality and non-discrimination between men and women at work, in employment and vocational training, protection of maternity and paternity and reconciliation of work and family life;</li> <li>promote the conduct of studies and investigation with a view to the elimination of discrimination against women at work and employment;</li> <li>encourage and promote measures to publicise the legislation on equality and non-discrimination, protection of maternity and paternity and reconciliation of work and family life (see Annual Progress Report on Equal Opportunities for Men and Women at Work, in Employment and Vocational Training. Established by Law n.º 10/2001, of 21st May, page. 77/8),</li> <li>receive complaints, issue legal opinions and cooperate with the Inspector-General of Labour (IGT) in the application of legislation on equality and non discrimination in labour, employment and vocational training.</li> </ul> <p>After June 2007, its competences on promotion of gender equality were transferred to the Commission for Citizenship and Gender Equality, which may, <i>inter alia</i>, keep the public informed of their legal rights, propose changes of the legal framework and make policy recommendations. For general information purposes, the Commission for Equality in Labour and Employment keeps on publishing some statistical data on gender discrimination in the labour market.</p> <p>Main activities the Commission for Citizenship and Gender Equality (see CIG, 2007): The mandate of the Commission includes the promotion of research in the areas related to its objectives to obtain the fundamental statistical data that will allow for a proper evaluation on the status of women; the organisation of training programs (seminars, conferences, meetings, courses and others) on citizenship and gender equality issues. <b>On the legal front, the Commission provides free legal counselling</b> and psychosocial support in the fields of gender violence and discrimination, prepares reports, memorandums and position papers and evaluates the application of European Union Directives and jurisprudence.</p> <p><b>Ethnicity:</b> There is a Commission for Equality and Against Racial Discrimination (CEARD, created in 1999), presided by the High Commissariat for Immigration and Ethnic Minorities (HCIEM), and composed of a majority of members representing civil society associations, immigrants associations, trade unions, employers associations, human rights and anti-racist organisations. The CEARD has the following mandate (Malheiros, 2007):</p> <ul style="list-style-type: none"> <li>To collect information on discriminatory acts, collect complaints and provide legal assistance to victims of discrimination and decide about corresponding fines</li> <li>To recommend the adoption of legal measures that are adequate to prevent discriminatory practices</li> <li>To promote the implementation of studies and research on racial discrimination</li> <li>To publicise through any means of communication actual cases of violations of the antidiscrimination law.</li> </ul>		
This SB has the statutory power to:		
- run information campaigns to inform the public of their legal rights	Yes	Yes
in practice, importance of the above mentioned activity in the actual overall workload of the SB <sup>a</sup>	..	..
- run campaigns to change public opinion	Yes	Yes
in practice, importance of the above mentioned activity in the actual overall workload of the SB <sup>a</sup>	..	..
- publish statistics on discrimination	Yes	Yes
in practice, importance of the above mentioned activity in the actual overall workload of the SB <sup>a</sup>	..	..
- carry out evaluations of the legal and institutional anti-discrimination framework	Yes	Yes
in practice importance of the above mentioned activity in the actual overall workload of the SB <sup>a</sup>	..	..
- make policy recommendations	Yes	Yes
in practice, importance of the above mentioned activity in the actual overall workload of the SB <sup>a</sup>	..	..
- produce codes of good practice for employers	No	No
in practice, importance of the above mentioned activity in the actual overall workload of the SB <sup>a</sup>	..	..

Note: a) High/Medium/Low mean above average / close to average / below average, respectively.

Table 2.2 **Activities of SBs not related to individual discrimination cases:** Control and correction

	Gender	Ethnicity
Is there a specialised body (SB) in charge of carrying out some of all of the following control and correction functions? → See Table 2.1	Yes	Yes
This SB has the statutory power to: - randomly conduct formal investigations of companies and organisations. in practice, importance of the above mentioned activity in the actual overall workload of the SB <sup>a</sup>	No	No
- conduct formal investigations of companies and organisation where there is evidence of discrimination in practice, importance of the above mentioned activity in the actual overall workload of the SB <sup>a</sup>	Yes* Low	No**
<b>Notes:</b> * The Commission for Equality in Labour and Employment may visit workplaces or request the General-Inspectorate of Labour to visit workplaces with a view to proving the existence of discriminatory practices. Generally, it is asked to the General-Inspectorate of Labour to do it. ** The CEARD and the High Commissioner have no powers of investigation. They are authorised to only receive complaints and must send the file for investigation to the General Labour Inspectorate. (Malheiros, 2007)		
- oblige a company or an organisation to change the way it operates when discriminatory practices are found. in practice, importance of the above mentioned activity in the actual overall workload of the SB <sup>a</sup>	No	No
- take legal action against companies or organisations that apply discriminatory practices in practice, importance of the above mentioned activity in the actual overall workload of the SB <sup>a</sup>	Yes*	No and Yes**
<b>Notes:</b> * The Commission for Equality in Labour and Employment acted as a general advisor in all matters related to equality, but also as a compulsory advisor in certain issues concerning gender equality. The Commission for Equality in Labour and Employment could issue legal opinions concerning equality and non-discrimination, whenever it so requested by the General-Inspectorate of Labour, courts, ministries, trade unions and employers associations or by any interested party. In 2005 alone the Commission was asked to give 20 opinions concerning the following issues on which its advice was compulsory: the procedure for the dismissal of pregnant workers or workers who have recently given birth, refusal of an employer to transfer a worker from a full-time to a part-time job when the request is based on reasons related to maternity/paternity, and refusal of the employer to renew the fixed-term employment contract of pregnant workers or workers who have recently given birth (Legal Issues in Gender Equality, Bulletin No.1/2007, European Commission). In addition, according to its statutory law, the Commission for Citizenship and Gender Equality may receive complains and issue recommendations whenever discrimination is reported. ** The High Commissioner for Immigration and Ethnic Minorities has the authority to impose penalties. He initiates an administrative procedure and after having heard the parties and the CEARD, decides whether a fine should be imposed and how much that should be. The respondent has the right to appeal to the courts against the fines imposed by the HCIEM. (Malheiros, 2007)		
- take legal action against organisations that attempt to promote discrimination or to instruct others to discriminate. in practice, importance of the above mentioned activity in the actual overall workload of the SB <sup>a</sup>	See above	..
<b>Other (or any Important additional information/comments):</b>		

Note: a) High/Medium/Low mean above average / close to average / below average, respectively.

Table 2.3 Role of SBs in individual discrimination cases

	Gender	Ethnicity
Is there a specialized body (SB) with functions related to individual discrimination cases? → see Table 2.1	Yes	Yes
Was this body created by anti-discrimination laws (or did anti-discrimination laws establish a specific mandate for it)?	Yes	Yes
<b>Formal linkage between SB activities and court procedures</b>		
Does the SB act as a one-stop shop where claimant can access information, lodge a complaint, and receive advice?	..	Yes
As soon as a discrimination complaint is brought to court, is the claim formally transmitted to the SB?	No	No
Discrimination complaints must be lodged with the SB beforehand, which acts as one-stop shop to start the procedure.	No	No
The SB has the statutory power to provide advice and information to claimants (or both parties) on their legal rights and what options they have.	Yes.	Yes
In practice, the SB carries on the above mentioned process as soon as it receives a discrimination claim. (Yes, duty/ in many cases/ in few cases/ No)	Yes, duty	Yes, duty*
The SB has the statutory power to provide claimants with legal assistance.	No	To some extent*
In practice SB provides legal assistance to claimants during court proceedings. (Yes, duty/ in many cases/ in few cases/ No)		
The SB has the statutory power to provide claimants with legal representation.	No	No
In practice the SB provides legal representation to claimants during court proceedings. (Yes, duty/ in many cases/ in few cases/ No)		
<b>Notes:</b>		
<p>* Complainants benefit from the support of High Commissariat staff, who receives the complaints and pass the file to the Commission for Equality or to the High Commissioner (complaints can be filed to both bodies by individual citizens, NGOs, employees' organisations, etc.). They provide legal assistance to the victims, <b>in their offices</b>. The assistance consists in (Malheiros, 2007):</p> <ul style="list-style-type: none"> <li>- providing information on anti-discrimination legislation and possible legal action against discrimination;</li> <li>- helping the victim to formulate an official complaint (to be issued by the Equality Body itself or to initiate court proceedings);</li> <li>- providing opportunities to come to an amicable settlement (mediation) between the victim and the (alleged) perpetrator;</li> <li>- hearing the complaint made by the victim and deciding whether a fine should be imposed and how much that should be. The respondent has the right to appeal to the courts against the fines imposed by the HCIEM. Neither the victim nor associations have the right to appeal or to intervene in the appeal procedure. The victims have the right to sue for damages in court.</li> </ul> <p>All in all, the legal situation in Portugal as concerns equality bodies is very complex from the legal point of view. The procedure for hearing and investigating cases is very complex. The complaint is filed either with the Commission for Equality or the High Commissioner. After a preliminary examination the complaint is sent to the General Inspectorate deemed to be competent. Sometimes conflicts of competence arise between two General Inspectorates and have to be solved by the Ministry of Presidency. The Inspectorates take long time to conduct investigations. The file returns to the Commission for Equality for the opinion of its Permanent Commission and only after that is a binding decision issued by the High Commissioner the fine is imposed (Malheiros, 2007).</p>		
<b>Investigation of discrimination claims</b>		
The SB has the legal authority to compel people (and in particular, the employer) to provide all of the information it requires to investigate a discrimination claim.	Yes*	No***
Does the court accept evidence from the SB?	..	..
Does the court accept the SBs evaluation of the validity of the discrimination complaint?	..	..
In practice, the SB formally investigates discrimination claims. (Yes, duty/ in many cases/ in few cases/ No)	**	
Please indicate below the main tools the SB uses to investigate a discrimination claim:		
Not relevant		
Any employer's failure to provide the requested information to the SB will:		
- have no implication for the court ruling.	..	..
- potentially be used to draw inferences on discrimination if the case is brought before court.	..	..

	Gender	Ethnicity
<p>Any employer's failure to comply with the code of practices issued by the SB (or other relevant body) will:</p> <ul style="list-style-type: none"> <li>- have no implication for the court ruling.</li> <li>- potentially be used to draw inferences on discrimination if the case is brought before court</li> </ul>	..	..
<p>Notes:</p> <p>* When issuing opinions with regard to equality at work and employment, the Commission for Equality in Labour and Employment may ask all the information needed to the parties involved, which is usually provided without any problems.</p> <p>** Not really, regarding Commission for Equality in Labour and Employment, for it only issues opinions. As for Commission for Citizenship and Gender Equality, there isn't yet any information available on that.</p> <p>*** The CEARD and the High Commissioner have no powers of investigation. They are authorised to only receive complaints and must send the file for investigation to the General Labour Inspectorate. The latter is responsible for monitoring the enforcement of the Labour Code's provisions on equality and non-discrimination, for investigating any complaints arising from the infringement of such provisions and for imposing the administrative sanctions set out in the Code for such violations (Malheiros, 2007).</p>		
<p><b>Mediation/conciliation procedure</b></p> <p>The SB has the statutory power to help both parties to resolve the dispute through a mediation/conciliation procedure</p> <p>Mediation/conciliation is a free and voluntary process for both parties.</p> <p>In practice, the SB carries out mediation/conciliation procedures so that a court ruling may not be necessary. (Yes, duty/ in many cases/ in few cases/ No)</p> <p>The mediation/conciliation procedure is usually initiated:</p> <ul style="list-style-type: none"> <li>- before the case is brought to court</li> <li>- before any formal investigation starts or at an early stage of the process</li> <li>- after any investigation has produced primary evidence of discrimination (but before a litigation decision has been reached)</li> </ul> <p>The SB acts as a neutral third party assisting both opposing parties in the mediation/conciliation procedure.</p> <p>The mediation/conciliation procedure s confidential: no details of the discussion taking place in its course can be repeated to court, nor are made public. The same rule applies to the terms of the settlement.</p> <p>If the parties, including the SB, reach settlement agreement, the latter is legally binding and the charge is dismissed.</p> <p>The SB secures the enforcement of settlement agreements reached under its assistance and/or responsibility.</p>	<p>No*</p> <p>No</p> <p>No</p> <p>No</p> <p>No</p> <p>No</p> <p>No</p> <p>No</p>	<p>Yes**</p> <p>..</p> <p>Yes</p> <p>..</p> <p>..</p> <p>No</p> <p>Yes</p> <p>No</p> <p>No</p>
<p>Notes:</p> <p>* No specific procedures for mediation in relation to discrimination are provided for in the Labour Code. However, the rules for the Labour Courts make it mandatory for the judge presiding over a case to hold at least one conciliation conference between the parties before trial and require him/her to try and mediate in any labour dispute (Code of Procedure in Labour Courts). Mediation by Labour Courts is binding.</p> <p>In addition, the Labour Code also states that collective agreements should include mechanisms for conciliation, mediation and arbitration regarding labour disputes (Malheiros, 2007).</p> <p>** The High Commissioner for Immigration and Ethnic Minorities acts in many cases as a (<i>de facto</i>) mediator to try to solve conflicts and avoid formal legal procedures. Mediation by the High Commissioner of Immigration and Ethnic Minorities is not binding. The CEARD and the High Commissioner do not have the power to refer the case to a court if mediation is unsuccessful. The claimant has to seek judicial redress in employment cases him or herself. According to the High Commissioner's Office, most of the cases are solved by mediation which in some way satisfies the victims (Malheiros, 2007).</p>		



**Part 3. Statistics on mediation/conciliation procedures and court case**

Table 3.1 **Statistics**

		<b>Gender</b>	<b>Ethnicity</b>
General statistics	<p>Total number of discrimination complaints received</p> <p>Protected population (number of persons aged 15-64 covered by the law in question)</p> <p>Notes:                      * Almost no cases regarding gender equality were brought before the Courts and no relevant decisions in this area have been published. (Legal Issues in Gender Equality, Bulletin No.1/2007, European Commission)                      ** According to Malheiros (2007).</p> <p>The only information available regards 2005. Check pages 64/73 of Annual Progress Report on Equal Opportunities for Men and Women at Work, in Employment and Vocational Training. Established by Law n. ° 10/2001, of 21st May</p>	Almost no cases reported*	Almost no cases reported*
Mediation/ conciliation procedures	<p>Number of received complaints treated by the SB of which:</p> <ul style="list-style-type: none"> <li>- number of complaints dismissed by the SB for no reasonable cause</li> <li>- number of unsuccessful mediations/conciliations although reasonable cause was found</li> <li>- number of successful mediations/conciliations</li> <li>- other (please specify)</li> </ul> <p>Average duration of mediation/conciliation procedures Average employee/claimant compensation under mediation/ conciliation procedures</p> <p>Notes:                      * According to CEARD hundred and ninety complaints have been received by this Commission in the last six years. Complaints were presented by individuals and NGOs. Most of them were related with discrimination in access to work and work conditions as well as discriminatory way of attending people in hospitals and schools. Fines have been imposed in only two cases: one concerning the refusal to rent a house and another related to discrimination at work. The other cases have been closed without any decision due to lack of evidence. There are still sixty cases pending. The difficulties rely on obtaining evidence of the discriminatory attitudes and the length of time taken by the investigations.</p>	..	See *
Court procedures	<p>Number of court cases of which</p> <ul style="list-style-type: none"> <li>- number of complaints dismissed by court for default procedures (or administrative reasons)</li> <li>- number of complaints dismissed by court for no reasonable cause</li> <li>- number of cases withdrawn by the complainant(s)</li> <li>- number of court rulings with favourable outcomes for the complainant(s)</li> <li>- other (please specify)</li> </ul> <p>Average duration of court procedures</p> <p>Notes:                      * The Commission for Equality in Labour and Employment must organise a register of the court decisions sent to it by the courts, with regard to equality and non-discrimination between men in women at work, employment and vocational training, and to provide information regarding any final decision: so far, that register contains only one court decision (on sexual harassment), sent in 2006.                      ** The biggest problem in Portugal is the gap between legislation and its practical implementation. It is necessary to ensure the effective application of existing legislation and improve the functioning of administrative and law enforcement bodies such as the High Commissariat for Immigration and Ethnic Minorities and the General Labour Inspectorate which deal with anti-discrimination matters. The manner in which the Directives have been transposed is very problematic; it causes difficulties concerning procedures and raises many doubts regarding interpretation. The main practical difficulties in enforcing legislation relate to the coordination between the Commission for Equality and Against Racial Discrimination, the High Commissioner and the General Inspectorates responsible for investigations as well as the offices of the Public Prosecutor. It is very difficult to obtain evidence on discriminatory acts and the procedures tend to be very protracted.                      There is a multitude of laws and Decree-laws, which makes it hard for people who are affected by discrimination and even for lawyers and judges to understand which norm actually applies to the case in hand. There is little academic writing on non-discrimination laws in Portugal and very few court cases have been reported, which makes it even more probable that the existing laws are not known to all legal experts, lawyers and agencies which have responsibility for enforcing them.</p>	See *	See **

#### **Main additional references**

**CGI – Commission for Citizenship and Gender Equality (2007)**, *Women and Men in Portugal*, <http://www.cig.gov.pt>

**CGI – Commission for Citizenship and Gender Equality (2007)**, *Who Are We?*, <http://www.cig.gov.pt>

**Malheiros, M. (2007)**, *Report on Measures to Combat Discrimination – Country report: Portugal*, European Commission  
[http://www.ec.europa.eu/employment\\_social/fundamental\\_rights/pdf/legnet/ptrep07\\_en.pdf](http://www.ec.europa.eu/employment_social/fundamental_rights/pdf/legnet/ptrep07_en.pdf)

**Palma-Carlos, L. (2002)**, *Anti-discrimination Legislation in EU Member States – Portugal*,  
[http://www.eumc.at/fra/material/pub/Art13/ART13\\_Portugal-en.pdf](http://www.eumc.at/fra/material/pub/Art13/ART13_Portugal-en.pdf)

**Palma-Ramalho, M.R.**, *Bulletin on Legal Issues on Gender Equality – Chapter on Portugal, No.1/2003 to No.1/2007*, European Commission  
[http://ec.europa.eu/employment\\_social/gender\\_equality/legislation/bulletin\\_en.html](http://ec.europa.eu/employment_social/gender_equality/legislation/bulletin_en.html)

## SPAIN

### Part 1. Legal framework for employment discrimination

Main anti-discrimination laws:

**No specific anti-discrimination laws:** instead, anti-discrimination provisions are included in the various laws geared at securing working and employment conditions more generally, or aimed at ensuring equality between individuals in general.

The main provisions regarding employment discrimination are included in:

- Spanish Constitution of 1978, Workers' Statute (law 8/1980, Royal Decree 1/1995); Law on Employment (56/2003); Law on Labour procedures (Royal Decree 2/1995); Law on Procedure in Industrial Disputes Royal Decree 7/1995); Law on Infringements and Penalties in the Social Sphere (legislative decree 5/2000);
- Law 62/2003 on fiscal, administrative and social measures (Title II, Chapter III), which transposes the EU Directives 2000/48 and 2000/78 (geared to combating discrimination on the ground of ethnicity – notably) and amends various labour laws as to adapt them to the directives.
- Law 3/2007 for Effective Equality Between Men and Women, which transposes the EU Directives 2002/73 and 2004/113 (geared to combating discrimination on the ground of sex). Most of the provisions contained in this law are geared to amend other labour laws as to explicitly introduce gender equal treatment considerations.

Relevant courts: Labour court

The Constitution provides that all fundamental rights –including equality and nondiscrimination– are protected by the ordinary courts of law. Moreover, appeals may be lodged at the Constitutional Court (CC) once ordinary proceedings have been exhausted. Additionally, when discrimination comes from an act performed by the Public Administration, victims can also appeal to the Ombudsmen (national or regional) or to the Labour Inspectorate in matters of employment (Puente Alcubilla, 2004; Cachon, 2007).

Legal scope/definition of the (hereinafter) so-called gender and ethnicity grounds:

- Gender: sex, explicitly including: pregnancy, childbirth or related medical conditions, breastfeeding, family responsibilities and marital status
- Ethnicity: Origin, racial or ethnic. National laws do not define the term racial or ethnic origin (Cachon, 2007).

Table 1.1 Prohibited acts, areas of concern, coverage, legal assistance and representation

		Gender	Ethnicity
Type of discrimination	Direct discrimination Indirect discrimination, i.e. where a provision criterion or practice is applied to all employees but puts one protected group at a particular disadvantage and cannot be shown to be a proportionate means of meeting a legitimate aim. Pressure and instruction to discriminate Harassment  Notes: *Indirect discrimination on the ground of ethnicity: Law 62/2003 refers to a “legal or administrative provision, a clause of a convention or contract, an individual agreement or a unilateral decision”. All these situations are referred to as “provision”, and the words “criterion or practice” are not included (Cachon, 2007). As regard gender, Law 3/2007 defines indirect discrimination as “a situation where an apparently neutral <b>provision, criterion or practice</b> would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary.”	Yes Yes  Yes Yes	Yes* Yes  Yes Yes
Areas of concern	Hiring process Wage Type of employment contract (permanent vs. fixed term) Working time (atypical work schedule, part-time vs. full-time) Promotion Job and vocational training	Yes Yes Yes* Yes** Yes Yes	Yes Yes Yes* Yes Yes Yes

		Gender	Ethnicity
	Transfer Redundancy and dismissal  Notes: * Not explicitly mentioned in the Law. Working and employment conditions in general. ** Law 3/2007 recognises "the right to reconcile personal, family and working life will be acknowledged to workers in ways that foster the balanced sharing of family responsibilities; the exercise of such right must not occasion any form of discrimination whatsoever.	Yes Yes	Yes Yes
Coverage	Private sector Public sector Employment agencies Trade unions (as regards membership)  Notes: * Explicitly mentioned in the Law.	Yes Yes Yes* Yes*	Yes Yes Yes* Yes*
Legal assistance other than private lawyer	Specialised body (e.g. equal treatment body) Any relevant public utility institutions and associations Trade unions	Yes Yes Yes	Yes Yes Yes
Legal representation other than private lawyer	Specialised body (e.g. equal treatment body) Any relevant public utility institutions and associations Trade-unions, for their members only.  Notes:  * No equal treatment bodies.  ** The Constitution entitles any physical or legal person invoking a legitimate interest to be party to proceedings relating to the violation of fundamental rights and freedoms. Claims in respect of discrimination are normally supported by various organisations, such as NGOs, which are entitled to be party to legal proceedings (Cachon, 2007). Law 62/2003 provides that legal entities authorized for the defence of legitimate collective rights and interests, may engage on behalf of the complainant, with his or her approval, in any judicial procedure in order to make effective the principle of equal treatment based on racial or ethnic origin. <i>However, this provision is not applicable in the employment field.</i> In this regard, the Procedural Labour Law –which has not been modified in this particular case–, in its regulation of capacity and procedural legitimation, mentions workers or their legitimate representatives if they are incompetent or if the plaintiff is a legal entity. Furthermore, this law provides that Trade Unions might appear in Court in the name and interest of the member workers that authorize them to do so, defending their individual rights (Puente Alcubilla, 2004; Cachon, 2007). Law 3/2007 provides that "trade unions and legally constituted associations whose primary aim is the defence of equal treatment for women and men will be lawfully capacitated to defend their respective members' right to equal treatment for women and men. When the parties affected constitute an indeterminate number of people or a number difficult to determine, lawful capacity to bring suit to defend these dispersed interests will be incumbent exclusively upon the public bodies with competence in the area, the most representative trade unions and nation-wide associations whose primary aim is equality between women and men, without prejudice to the legal capacity of the parties affected, if identified."	n.a.* Yes** Yes**	n.a.* Yes** Yes**

Table 1.2 Burden of proof

	Gender	Ethnicity
Employee/claimant Shift of burden of proof (the employee/claimant provides facts, then the employer/respondent has to provide proofs – see below for a detailed description)	No Yes	No Yes
<b>Direct discrimination</b>  <i>Main steps</i> Can the main steps of the procedure be described as follows? 1. The employee/claimant has to supply prima facie evidence whereby it may be <b>presumed</b> that there has been discrimination. 2. The employer/respondent has the burden of <b>proving</b> that his/her practice is not discriminatory.  In practice, is presumption – as opposed to stronger evidence of discrimination – sufficient to shift the burden of proof?  <i>Typical/standard prima facie evidence</i> admissible in courts (or other relevant bodies), as set by law or established by case law: Direct evidence (i.e. any written or verbal statement by the employer/respondent), <b>only</b> . No clear legal guidance for indirect evidence (e.g. case-by-case basis only) Statistical evidence Situation testing  Notes:  * The legislation refers to well-founded evidence. The Constitutional Court has been establishing case-law on the burden of proof. In order to use the rule of distribution for the burden of proof, it is necessary, that the actor accredit “the existence of an indication that generates a reasonable suspicion, appearance or presumption in favour of similar affirmation; it is necessary on the part of the actor to contribute “realistic proof” (STC 207/2001); and in another judgment (STC 308/2000) it indicates the “requirement for a principle of proof revealing the existence of a general discriminatory panorama or of facts that the vehement suspicion appears of discrimination ...” (Cachon 2007).  ** Though statistical evidence are not expressly provided for in law, the complainants have a right to require or request that respondents provide data that may be necessary for them to determine whether there is a prima facie case of discrimination. However, there are no agencies or authorities that can conduct formal investigations, and to date, statistical evidence has not been used in any judgments (Cachon, 2007).  *** Situation testing is not expressly provided for in Spanish law, but nor is it forbidden. To date, no judgments have made use of situation testing (Cachon, 2007).	Yes     No*   No True Yes** Yes***	Yes     No*   No True Yes** Yes***
<b>Indirect discrimination</b>  <i>Main steps</i> Can the main steps of the procedure be described as follows? 1. The employee/claimant has to clearly identify and define the employment practice in question. 2. The employee/claimant has to show that the practice <b>has or may have</b> a differentiated impact on one protected group. 3. The employer/respondent has the burden of demonstrating that the policy or practice in question is job related for the position in question and consistent with business necessity. 4. If the employer/respondent satisfies this requirement, evidence can be supplied on the existence/lack of the existence of a less discriminatory practice  Notes:  * The legislation does not provide any guidance in addition to the general principle of shift of burden of proof. It does not specify how indirect discrimination is to be justified, apart from the general provision: “unless [the indirect discrimination] is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary.”  In step 2 above is the term "has" more accurate than "may have"? In other words, can the potential (possible) impact of the contested employment practice be sufficient for shifting the burden of proof?  In step 4 above, if the employer/respondent demonstrates that a practice is consistent with business necessity, then:	No*           n.a.  n.a.	No*           n.a.  n.a.

	Gender	Ethnicity
<p>- does it fall to the employee/claimant to demonstrate that a less discriminatory alternative exists that meets the business need but that the employer refuses to adopt it? <b>or</b></p> <p>- does it fall to the employer/respondent to demonstrate that a less discriminatory alternative that meets the business need does not exist?</p> <p><i>Typical/standard prima facie evidence</i> to be provided to courts or other relevant bodies, as set by law or established by case law:  Direct evidence (i.e. any written or verbal statement by the employer/respondent), <b>only</b>.  No clear legal guidance for indirect evidence (e.g. case-by-case basis only)  Use of a distinction criteria that appear to be intrinsically suspicious. Please specify (for example, a requirement to work full-time might be unlawful discrimination against women)  Statistical evidence</p> <p>Notes:  * Same as in the case of direct discrimination.  ** Same as in the case of direct discrimination.</p>	<p>No  True  Yes*</p> <p>Yes**</p>	<p>No  True  Yes*</p> <p>Yes**</p>
<p><b>Harassment</b></p> <p>Analysed on a case-by-case basis, by looking at all the circumstances and the context.</p>	<p>Yes</p>	<p>Yes</p>

Table 1.3 Employee compensation and employer penalties

	Gender	Ethnicity
<p>Employee compensation</p> <p><b>Injunctive relief/reinstatement</b></p> <p>- Always made available to the employee/claimant, but the latter can choose monetary compensation in lieu of relief/reinstatement, or  - Always made available to the employee/claimant, without alternative option, or  - Always made available to the employee/claimant, but the employer/respondent can choose monetary compensation in lieu of relief/reinstatement, or  - Never made available to the employee/claimant.</p> <p>Notes:  * The legislation provides that any discriminatory act or clause will be considered to be null and void. The employer shall reinstate the employee immediately, no matter what the parties want, and pay the salary that has not been paid in the interim period (González Biedma, 2003).</p> <p><b>Monetary compensation</b></p> <p>Back pay (please indicate if there is a cap)</p> <p>Reimbursement of lawyer's and attorney's fees and costs</p> <p>In lieu of relief/reinstatement, compensation for future lost earnings (e.g., in case of dismissal, this may correspond to lost earnings until the employee finds a new job):  - Floor or minimum (amount): .....  - Cap or maximum (amount): .....  - Average compensation (amount): .....  - Median compensation (amount): .....</p> <p>Compensation for psychological injury:  - Floor or minimum (amount): .....  - Cap or maximum (amount): .....  - Average compensation (amount): .....  - Median compensation (amount): .....</p> <p>Notes:  * The litigants must have a lawyer and, if they win the action, the judge may require the respondent to pay that lawyer's costs. If they cannot afford a lawyer, they may request a free duty lawyer (Cachon, 2007).  ** The Law on Procedure in Industrial Disputes, amended by Law 62/2003, lays down a special procedure for violations of fundamental rights and civil liberties enshrined in the Constitution. With the amendment introduced by Law 62/2003, this procedure covers the</p>	<p>No  Yes*  No  No</p> <p>Yes  Yes*  n.a.  Yes**</p>	<p>No  Yes*  No  No</p> <p>Yes  Yes*  n.a.  Yes**</p>

		Gender	Ethnicity
	acts of discrimination or harassment specified in the EU directives. If the court judgment rules in favour of the complainant in respect of acts of discrimination or discriminatory harassment, the court will declare that act void, require the previous state of affairs to be restored, and provide for "reparation of the consequences of the act, including any appropriate compensation." That is, the Law requires compensation (reparation and money damages) for the victims of discriminatory acts, the amount of which is to be set by the court. There is no information available concerning the average amount of compensation available to victims (Cachon, 2007).		
Employer additional penalties and obligations	<p><b>Civil provisions</b> None Court may order the publicity of the decision - Within the firm (e.g. notices to all employees addressing the violations of a specific charge and advising them of their rights under the laws) - Outside the firm (please indicate: media, trade-unions, etc.) The employer may be required to take corrective or preventive actions to cure the source of the identified discrimination</p> <p><b>Other penalties:</b></p> <p>The Law on Infringements and Sanctions in the Social Order has been modified through Law 62/2003. According to it, unilateral decisions of the employer meaning unfavourable direct or indirect discriminations on the ground of age or disability, or favourable or adverse relating to remuneration, working time, training, promotion, and other working conditions, on the grounds of sex, racial or ethnic origin, civil status, social condition, religion or belief, political ideas, sexual orientation, membership or nonmembership of a trade union, adherence to trade union agreements, family ties with other employees, or language within the Spanish State, as well as decisions of the employer meaning unfavourable treatment of the workers as a reaction to a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment and non-discrimination are very serious infringements. <b>The sanction for these infringements is a fine:</b> in its minimum degree, of 3.005,07 Euro to 12.020,24 Euro; in its medium degree, of 12.050,25 Euro to 48.080,97 Euro; in its maximum degree, of 48.080,98 Euro to 90.151,82 Euro. <b>There is no information concerning the extent to which the available sanctions have been shown to be effective, proportionate and dissuasive</b> (as is required by the Directives; Cachon, 2007).</p> <p>Additionally, these sanctions will be made public, once they are no longer subject to appeal (Puente Alcubilla, 2004; Cachon, 2007).</p> <p>The Law on Infringements and Sanctions in the Social Order has been modified through Law 3/2007. According to it, employers who have committed the above mentioned very serious infringements will be penalized with the following <b>supplementary penalties:</b> a) automatic loss of the subsidies, tax relief and, in general, the benefits resulting from the application of employment programmes, effective as from the date on which the infringement was committed; and b) automatic exclusion from access to the said benefits for the term of six months.</p> <p>In the case of the above mentioned very serious infringements with reference to the cases of direct or indirect discrimination on the grounds of sex, <b>the supplementary penalties may be replaced by the preparation and application of an equality plan</b> in the company, if so determined by the competent labour authority at the request of the company and after an official report issued by the Social Security and Employment Inspection Service. Should the equality plan not be prepared or applied or should it be carried out in manifest breach of the terms laid down in the ruling of the labour authority, at the proposal of the Social Security and Employment Inspection Service, the said authority will remove the effect of the substitution of the supplementary penalties.</p> <p><b>Penal provisions</b> None Fine (please specify amounts) Prison sentence (please specify lengths, whether it applies only in specific cases and in which cases)</p>	<p>false</p> <p>Yes</p> <p>Yes</p> <p>Yes</p> <p>Yes</p> <p>Yes</p> <p>False</p> <p>Yes*</p> <p>Yes*</p>	<p>false</p> <p>Yes</p> <p>Yes</p> <p>No</p> <p>Yes</p> <p>Yes</p> <p>False</p> <p>Yes*</p> <p>Yes*</p>

		Gender	Ethnicity
	Notes: * Art. 314 of the Criminal Code is applicable. This provides <b>imprisonment from 6 months to 2 years or a fine of 12 to 24 months</b> for those "that do not restore the situation of equality before the Law when required to do so or following an administrative penalty, making good any corresponding economic damages" when employers have been convicted of "serious discrimination in the workplace, public or private, against a person for reason of their ideology, religion, beliefs, ethnicity, race or nation, gender, sexual orientation, family situation, illness or disability, the retaining legal or workers' union representation, relationship with other company workers, or for use of any official languages within the state of Spain..." (Cachon, 2007).		

Table 1.4 **Protection against victimisation (retaliation)**

		Gender	Ethnicity
Protected actions	It is prohibited to treat the employee/protected person less favourably (so-called "adverse action") because s/he has (so-called "protected action"): - brought proceedings against discrimination - given evidence or information in connection with any proceedings against discrimination. - participated as a witness in any proceedings against discrimination  Notes * There are no legal provisions concerning the victimisation of persons other than the complainant (as might be the case of witnesses), but judges should also apply victimisation protection to them (Cachon, 2007).	Yes No* No*	Yes* No* No*
Proof of causal connexion	<i>Burden of proof:</i> - i) employee/protected person - ii) employer/respondent within a given lapse of time from the concerned event. Please specify conditions of application and lapse of time. - iii) shift of burden of proof. Please specify main steps.  In cases (i) and (iii), when the causal connexion shall be first shown or established by the employee/protected person: - the link can be demonstrated by evidence that the adverse action occurred shortly after the protected activity (and the employer/respondent was aware of the complainant's protected activity before taking the action), so that the employment relationship is implicitly or explicitly (please specify) protected during a certain period of time (please specify)	No Yes  No  n.a.	No Yes  No  n.a.
Employee compensation and employer penalty	Compared to provisions described in Table 1.3: - additional employee/protected person compensation, - additional employer/respondent penalties	None None	None None

Table 1.5 **Relationship with standard labour laws**

		Gender	Ethnicity
Labour law and discrimination	According to standard labour law(s) or code, would dismissal solely based on gender or ethnicity considered to be unjust dismissal? Law on Labour procedures (RDL 2/1995, art. 108.2 et 122.2c; as from 1980), among others. See also Table 1.1 – Main anti-discrimination laws.  Is there a provision requiring equal pay for work of equal value in standard labour law(s) or code? Workers' Statute (art. 28, as from 1980), among others. See also Table 1.1 – Main anti-discrimination laws.	Yes  Yes	Yes  Yes



		Gender	Ethnicity
	Other areas of discrimination covered by standard labour law(s) or code:  All employment areas are covered: access to employment (and notably access to employment through nonprofit employment agencies) membership of or involvement in organisations of workers or employers, remuneration, working time, training, promotion, and other employment conditions.		
Complaints	Are discrimination complaints concerning dismissals more often lodged under standard labour law(s) or code, than under specific anti-discrimination laws? Are discrimination complaints concerning pay more often lodged under standard labour law(s) or code, than under specific anti-discrimination laws?  Notes: * By “construction” of the anti-discrimination legal framework, to the extent that most of anti-discrimination provisions are included in standard labour laws.	Yes*  Yes*	Yes*  Yes
Evaluations	Please indicate below references to existing evaluations/studies on the effectiveness of anti-discrimination laws with respect to standard labour law(s):  Law 3/2007 provides for the implementation of an evaluation framework regarding “the effectiveness of the principle of [gender] equality”, notably including the requirement to formulate periodic gender impact report. In this respect, the Government will formulate the regulations for the Gender Impact Act, specifying the indicators to be taken into account when preparing the respective reports.		

Table 1.6 **Positive action**

		Gender	Ethnicity
Compulsory actions	Are employers <b>required</b> by law to take actions to increase diversity/prevent discrimination?  If yes, what actions are required? - make regular public reports on employment composition in terms of gender or ethnicity - process only anonymous job applications - obligation for large employers to have a person in the HRM department in charge of the employer's anti-discrimination – <b>more precisely, obligation for large employers (more than 250 employees) to draw up and implement an equality plan.</b> - quotas  Notes:  * Law 3/2007 provides that employers are obliged to honour equal treatment and opportunities principles and to this end must adopt measures geared to preventing any manner of occupational discrimination between women and men; such measures <b>must be negotiated</b> , and as appropriate agreed to, with workers' legal representatives in the manner provided in the applicable labour legislation.  **In companies with over 250 employees, the above mentioned provision must lead to the formulation and implementation of an equality plan. And independently of company's size, employers must draw up and implement such a plan when mandated in the applicable collective bargaining agreement. Corporate equality plans comprise an orderly series of measures adopted after a diagnosis of the situation and designed to attain equal treatment and opportunities for women and men in the company and to eliminate discrimination on the grounds of sex. Equality plans will stipulate the specific equality objectives to be reached, the strategies and practices to be adopted to attain them and the establishment of effective monitoring and assessment systems. They may cover different issues to achieve the objectives set, including <i>inter alia</i> access to employment, occupational classification, promotion and training, remuneration, organization of working hours to favour reconciliation of working, personal and family life on equal terms for women and men, and the prevention of sexual harassment and harassment on the grounds of sex. Finally, the law guarantees access by workers' legal representatives or, as appropriate, by the workers themselves, to the information on equality plan content and the achievement of its objectives.  *** Law 3/2007 provides that companies who are obliged to file ordinary annual accounts	Yes*  Yes No Yes**  Yes***	No  n.a. n.a. n.a.  n.a.

		Gender	Ethnicity
	<p>must <i>try</i> to include enough women in their board of directors to allow it to achieve a balanced membership of men and women within an eight year period. Any appointments made from the date of entry into force of the Law must take this into account. For the purposes of the Law, "balanced membership" means not more than 60% and not less than 40% of individuals of either sex. Public procurement bodies will consider this issue when deciding who is granted a public contract (Freshfields Bruckhaus Deringer, April 2007). Moreover, the same Law provides that "for one year after returning to active service from maternity or paternity leave, employees will be given preference in the award of places to participate in training courses designed to update public employees' skills. At least 40% of the places for training courses will be reserved to women employees qualifying for such courses."</p>		
Voluntary actions	<p>Are employers <b>allowed</b> to take actions to increase diversity/prevent discrimination?</p> <p>If yes, what actions are allowed?</p> <ul style="list-style-type: none"> <li>- make regular public reports on employment composition in terms of gender or ethnicity</li> <li>- establish a plan to ensure that the employment composition in terms of gender or ethnicity is balanced</li> <li>- quotas (please specify the areas: e.g. executives)</li> </ul> <p>Notes:</p> <p>The principle of "positive action" is rooted in the Spanish Constitution, which formally recognizes equality before the law, without discrimination on any of the grounds listed in the Constitution, and requires the public authorities to promote "the conditions to ensure that the freedom and equality of individuals and of the groups that they form are real and effective". The positive action required should not be regarded only as a "legitimate exception" but as a guarantee that the principle of equality is to be made effective. In this connection, the Constitutional Court has repeatedly held that affirmative action measures are not to be seen as discriminatory. Rather, the Court has interpreted that actions of the public authorities to remedy the employment disadvantage of certain socially marginalized groups is actually required by a commitment to equality properly understood.</p> <p>And the legal framework provides that, in order to guarantee full equality, the principle of equal treatment shall not prevent the maintenance or adoption of special measures benefiting or favouring certain groups and designed to prevent or to offset any disadvantages that they suffer. It also provides that collective agreements may include measures directed to fight against every form of employment discrimination and to encourage equality of opportunities.</p>	<p>Yes*</p> <p>Yes</p> <p>Yes</p> <p>Yes</p>	<p>Yes*</p> <p>Yes</p> <p>Yes</p> <p>Yes</p>
Public employers' practices	<p>Do public employers normally take actions to increase diversity/prevent discrimination?</p> <p>If yes, what actions?</p> <ul style="list-style-type: none"> <li>- make regular public reports on employment composition in terms of gender or ethnicity</li> <li>- establish a plan to ensure that the employment composition in terms of gender or ethnicity is balanced</li> <li>- process only anonymous job applications</li> <li>- have at least one person in the HRM department in charge of the employer's anti-discrimination policy</li> <li>- quotas (please specify the areas: e.g. high-rank officials)</li> </ul> <p>Notes:</p> <p>* No specific provisions/actions (that is, beyond the general anti-discrimination framework) as regards public employers.</p> <p>** Law 3/2007 provides that all examinations for accessing public employment with the Central Government and its associated or subordinate bodies will include items on the study and implementation of the principle of equality between women and men. All ministries and public bodies will submit information to the Ministry of Labour and Social Affairs and the Ministry of Governmental Affairs at least yearly on their effective implementation of the principle of equality between women and men. Such information must specify staff distribution, occupational category, position bonuses and average remuneration, all disaggregated by sex.</p> <p>*** Law 3/2007 provides that the central, regional and local governments, within their respective areas of competence and in application of the principle of equality between women and men, must: a) remove the obstacles that entail the subsistence of any manner of discrimination, to be able to offer effectively equal access by women and men to public employment and career development in civil service; b) facilitate the reconciliation of</p>	<p>Yes</p> <p>Yes**</p> <p>Yes***</p> <p>No</p> <p>..</p> <p>Yes****</p>	<p>No*</p> <p>n.a.</p> <p>n.a.</p> <p>n.a.</p> <p>n.a.</p> <p>n.a.</p>

		Gender	Ethnicity
	<p>personal, family and working life, without jeopardizing career promotion; c) further training on an equal footing both for accessing public employment and throughout employees' careers; d) foster the balanced presence of women and men in selection and evaluation bodies; e) establish effective protection measures against sexual harassment and harassment on the grounds of sex; f) establish effective measures to eliminate any manner of direct or indirect gender wage discrimination; g) periodically evaluate the effectiveness of the principle of equality in their respective scopes of action.</p> <p>**** Law 3/2007 provides that the principle of balanced presence of women and men (defined as: not more than 60% and not less than 40% of individuals of either sex) shall be applied to appointments to Central Government management bodies, to personnel selection and evaluation bodies and to appointment to professional bodies, committees and boards of directors of companies in which the State holds an interest.</p>		
Incentives	<p>Is there a policy to increase incentives for employers to increase diversity/prevent discrimination?</p> <p>Policy instruments used:</p> <ul style="list-style-type: none"> <li>- Delivery of "labels" or certificates stating that the employer has a diversity-friendly business/employment practice.</li> <li>- financial incentives to establish a plan to ensure that the employment composition in terms of gender or ethnicity is balanced – <b>more precisely, technical support</b></li> <li>- financial incentives for having a person in the HRM department in charge of the employer's anti-discrimination policy and/or hiring a consultant to establish a diversity plan.</li> <li>- financial incentives for quotas (please specify the areas: e.g executives)</li> </ul> <p>Other/notes:</p> <p><b>Publicity regarding corporate social responsibility action in connection with equality:</b> Law 3/2007 provides that employers may use their equality action for advertising purposes in accordance with the conditions laid down in the general legislation on advertising. The Women's Institute or equivalent regional bodies will be authorized to interrupt advertising in this respect if found to be misleading.</p> <p><b>Employer's Social Security tax relief:</b> Reduction of the employer's social security contributions for permanent contracts concluded with women in sectors where they are underrepresented: on a general basis, tax relief of 35% in the first two years of the contract, and if the women are more than 45 years of age or have been registered as job seekers on an uninterrupted basis for a period of six months, tax relief of 70% for the first year and 60% the second year. Tax relief of 100% of the employer's Social Security tax for temporary contracts concluded with unemployed individuals to replace workers whose employment contract has been suspended: a) due to risk during pregnancy or risk during breastfeeding and until the respective suspension of employment for biological childbirth begins or until the baby being breastfed reaches the age of nine months, respectively, or, in both cases, when the worker is no longer unable to return to her former position or to one compatible with her condition; b) during the periods of rest due to maternity, adoption and pre-adoptive or permanent fosterage or whose contract has been suspended due to paternity leave.</p> <p>* The Ministry of Labour and Social Affairs will create a mark to distinguish employers for outstanding achievement in the implementation of equal treatment and opportunities policies for their workers, which may be used in the <b>company's commercial dealings and for advertising purposes</b>. The criteria to be taken into account for the award of this mark will include, among others, the balanced presence of women and men in the company's management bodies and occupational groups and categories, the adoption of equality plans or other innovative measures to further equality, and non-sexist advertising of company goods and services. The Ministry of Labour and Social Affairs will monitor the companies awarded the mark to ensure they implement equal treatment and opportunities policies for their workers on an ongoing basis, withdrawing the mark from non-compliant organizations.</p> <p>** Law 3/2007 provides that the Government <b>will</b> establish measures, geared particularly to small and medium-sized companies, to foster the voluntary adoption of equality plans, which will include the necessary technical support.</p>	<p>Yes</p> <p>Yes*</p> <p>Yes **</p> <p>No</p> <p>No</p>	<p>No</p> <p>n.a.</p> <p>n.a.</p> <p>n.a.</p> <p>n.a.</p>

**Part 2. Institutional framework: specialised bodies (SB) combating discrimination (e.g. equal treatment bodies)**

Table 2.1 **Activities of SBs not related to individual discrimination cases: Public information and evaluation<sup>a</sup>**

	Gender	Ethnicity
Is there a specialised body (SB) in charge of carrying out some of all of the following public information and policy evaluation functions?	No*	No**
<p><b>* Women’s Participation Council: not yet operational</b>            Law 3/2007 lays down a series of organizational provisions, creating:</p> <ul style="list-style-type: none"> <li>the Inter-ministerial Committee on Equality between Women and Men, which is as a professional body responsible for coordinating the policies and measures adopted by ministries to guarantee the right to and further the effectiveness of equality between women and men. Its membership and operation will be established in the respective regulations.</li> <li>Equality units in each ministry, which will have, in the scope of their areas of competence, the following function: a) securing the statistical information formulated by the ministry bodies and advising them accordingly; b) conducting surveys to further equality between women and men in the respective areas of activity; c) advising the ministry’s competent bodies on the formulation of the gender impact report; d) furthering ministry personnel’s understanding of the scope and significance of the principle of equality, putting forward training proposals; and e) overseeing compliance of the Law 3/2007 and the effective implementation of the principle of equality.</li> <li>The Women’s Participation Council, which is a professional counselling and advisory body, essentially providing a channel for women’s participation in the effective achievement of the principle of equal treatment and opportunities for women and men and in the struggle against discrimination on the grounds of sex. The Council’s <i>modus operandi</i>, competencies and membership will be established in the respective regulations, with the guaranteed participation of central, regional and local governments as a whole, as well as nation-wide women’s associations and organizations.</li> </ul> <p><b>** Council for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin: not yet operational</b>            Law 62/2003 (art. 33) establishes a “Council for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin”. This Council has the following the functions (in line with the EU Directive 2000/42): i) providing assistance to victims of discrimination in pursuing their complaints about discrimination; ii) conducting surveys concerning discrimination; and iii) publishing reports and making recommendations on any issue relating to such discrimination. The Council is attached to the Ministry of Labour and Social Affairs, and it is to be formed by all the ministries with responsibilities in the areas of employment, education and social protection in general, with the participation of the Autonomous Regions, the local authorities, the employers’ organisations and trade unions, and other organizations representing interests related to the racial or ethnic origin of persons.            Its independence is uncertain because its composition is of an essentially governmental nature, so it appears to be a typical internal consultative body within the Spanish government, albeit with a (minority) presence of the social partners and NGOs. Its effectiveness is questionable because the body will not have a budget of its own; instead it will receive “the necessary support for the performance of its functions” from the Ministry of Labour (a budget of 200,000€ has been approved for 2007). Law 62/2003 provides that composition, competences and specific rules of the Council will be regulated by a royal decree.</p> <p>In any case, the Ombudsmen (national or regional, whenever they exist) are not deprived of their competences. The national Ombudsman acts as the High Commissioner of the Parliament for the defence of the rights contained in Title 1 of the Constitution –<i>inter alia</i> equality and non-discrimination on account of birth, race, sex, religion, opinion or any other condition or personal or social circumstance–, supervising the <b>Administration’s activity</b> and reporting to the Parliament. The Ombudsman, according to Law 62/2003, may establish cooperation and collaboration mechanisms with the aforementioned Council.            (Source: Cachon, 2007)</p>		
This SB has the statutory power to: - run information campaigns to inform the public of their legal rights <b>in practice</b> , importance of the above mentioned activity in the actual overall workload of the SB - run campaigns to change public opinion <b>in practice</b> , importance of the above mentioned activity in the actual overall workload of the SB - publish statistics on discrimination <b>in practice</b> , importance of the above mentioned activity in the actual overall workload of the SB - carry out evaluations of the legal and institutional anti-discrimination framework <b>in practice</b> , importance of the above mentioned activity in the actual overall workload of the SB - make policy recommendations <b>in practice</b> , importance of the above mentioned activity in the actual overall workload of the SB - produce codes of good practice for employers <b>in practice</b> , importance of the above mentioned activity in the actual overall workload of the SB	n.a.	n.a.

Note: a) High/Medium/Low mean above average / close to average / below average, respectively.

Table 2.2 **Activities of SBs not related to individual discrimination cases:** Control and correction<sup>a</sup>

	Gender	Ethnicity
Is there a specialised body (SB) in charge of carrying out some of all of the following control and correction functions? → see Table 2.1	No	No
This SB has the statutory power to: - randomly conduct formal investigations of companies and organisations. <b>in practice</b> , importance of the above mentioned activity in the actual overall workload of the SB - conduct formal investigations of companies and organisation where there is evidence of discrimination. <b>in practice</b> , importance of the above mentioned activity in the actual overall workload of the SB - oblige a company or an organisation to change the way it operates when discriminatory practices are found. <b>in practice</b> , importance of the above mentioned activity in the actual overall workload of the SB - take legal action against companies or organisations that apply discriminatory practices <b>in practice</b> , importance of the above mentioned activity in the actual overall workload of the SB - take legal action against organisations that attempt to promote discrimination or to instruct others to discriminate. <b>in practice</b> , importance of the above mentioned activity in the actual overall workload of the SB	n.a.	n.a.

Note: a) High/Medium/Low mean above average / close to average / below average, respectively.

Table 2.3 **Role of SBs in individual discrimination cases**

	Gender	Ethnicity
Is there a specialised body (SB) with specific functions related to individual discrimination cases? → see Table 2.1	No	No
Was this body created by anti-discrimination laws (or did anti-discrimination laws establish a specific mandate for it)?	n.a.	n.a.
<b>Formal linkage between SB activities and court procedures</b>	n.a.	n.a.
Does the SB act as a one-stop shop where claimant can access information, lodge a complaint, receive advice? As soon as a discrimination complaint is brought to court, is the claim formally transmitted to the SB? Discrimination complaints must be lodged with the SB beforehand, which acts as one-stop shop to start the procedure.		
The SB has the statutory power to provide advice and information to claimants (or both parties) on their legal rights and what options they have. <b>In practice</b> , the SB carries on the above mentioned process as soon as it receives a discrimination claim. (Yes, duty/ in many cases/ in few cases/ No) The SB has the statutory power to provide claimants with legal assistance. <b>In practice</b> , SB provides legal assistance to claimants during court proceedings. (Yes, duty/ in many cases/ in few cases/ No) The SB has the statutory power to provide claimants with legal representation. <b>In practice</b> , the SB provides legal representation to claimants during court proceedings. (Yes, duty/ in many cases/ in few cases/ No)		
<b>Investigation of discrimination claims</b>	n.a.	n.a.
The SB has the legal authority to compel people (and in particular, the employer) to provide all of the information it requires to investigate a discrimination claim. Does the court accept evidence from the SB? Does the court accept the SB's evaluation of the validity of the discrimination complaint? <b>In practice</b> , the SB formally investigates discrimination claims. (Yes, duty/ in many cases/ in few cases/ No)		
Please indicate below the main tools the SB uses to investigate a discrimination claim:		

	Gender	Ethnicity
<p>Any employer's failure to provide the requested information to the SB will:</p> <ul style="list-style-type: none"> <li>- have no implication for the court ruling.</li> <li>- potentially be used to draw inferences on discrimination if the case is brought before court.</li> </ul> <p>Any employer's failure to comply with the code of practices issued by the SB (or other relevant body) will:</p> <ul style="list-style-type: none"> <li>- have no implication for the court ruling.</li> <li>- potentially be used to draw inferences on discrimination if the case is brought before court.</li> </ul>		
<p><b>Mediation/conciliation procedure</b></p> <p>The SB has the statutory power to help both parties to resolve the dispute through a mediation/conciliation procedure. Mediation/conciliation is a free and voluntary process for both parties. <b>In practice</b>, the SB carries out mediation/conciliation procedures, so that a court ruling may not be necessary. (Yes, duty/ in many cases/ in few cases/ No)</p> <p>The mediation/conciliation procedure is <b>usually</b> initiated:</p> <ul style="list-style-type: none"> <li>- before the case is brought to court</li> <li>- before any formal investigation starts or at an early stage of the process</li> <li>- after any investigation has produced primary evidence of discrimination (but before a litigation decision has been reached)</li> </ul> <p>The SB acts as a neutral third party assisting both opposing parties in the mediation/conciliation procedure. The mediation/conciliation procedure is confidential: no details of the discussion taking place in its course can be repeated to court, nor are made public. The same rule applies to the terms of the settlement. If the parties, including the SB, reach settlement agreement, the latter is legally binding and the charge is dismissed. The SB secures the enforcement of settlement agreements reached under its assistance and/or responsibility.</p>	n.a.	n.a.

**Part 3. Statistics on mediation/conciliation procedures and court case** → no statistics available

**Main additional references**

**Cachon (2007)**, *Report on Measures to Combat Discrimination* – Country Report: Spain, European Commission, [http://www.ec.europa.eu/employment\\_social/fundamental\\_rights/pdf/legnet/esrep07\\_en.pdf](http://www.ec.europa.eu/employment_social/fundamental_rights/pdf/legnet/esrep07_en.pdf)

**González Biedma (2003)**. Dismissal under Spanish Legislation: Disiplinary Dismissal, <http://www.bna.com/bnabooks/ababna/intl/2003/spain.pdf>

**Puente Alcubilla (2004)**, Discrimination on the grounds of religion and belief: Executive Summary, Spain, European Commission, [http://www.ec.europa.eu/employment\\_social/fundamental\\_rights/pdf/aneval/religion\\_es.pdf](http://www.ec.europa.eu/employment_social/fundamental_rights/pdf/aneval/religion_es.pdf)

## SWEDEN

### Part 1. Legal framework for employment discrimination

Main anti-discrimination laws:

- 1991:433 The Equal Opportunities Act – Into force: 1992-01-01 (Men and Women, only)
- 1999:130 Measures to Counteract Ethnic Discrimination in Working Life Act – Into force: 1999-05-01

Relevant courts:

- Civil court: individuals not represented by their union or an ombudsman, and
- Employment tribunal

Legal scope/definition the (hereinafter) so-called gender and ethnic grounds:

- Gender: Sex is not defined by the legislation, so whether discrimination related to, for example, childbirth or breastfeeding, would be considered as discrimination on grounds of sex is for the courts to decide in each specific case. The Parental Leave Act contains a prohibition of unfair treatment related to a person's parental leave. An employer may not subject a job applicant or employee to unfair treatment for reasons connected with parental leave.
- Ethnicity: ethnic background.

**Table 1.1 Prohibited acts, areas of concern, coverage, legal assistance and representation**

		Gender	Ethnicity
Type of discrimination	Direct discrimination Indirect discrimination, i.e. where a provision criterion or practice is applied to all employees but puts one protected group at a particular disadvantage and cannot be shown to be a proportionate means of meeting a legitimate aim. Pressure and instruction to discriminate Harassment	Yes Yes  Yes Yes	Yes Yes  Yes Yes
Areas of concern	Hiring process Wage Type of employment contract (permanent vs. fixed term) Working time (atypical work schedule, part-time vs. full-time) Promotion Job and vocational training Transfer Redundancy and dismissal	Yes Yes Yes Yes Yes Yes Yes Yes	Yes Yes Yes Yes Yes Yes Yes Yes
Coverage	Private sector Public sector Employment agencies Trade unions (as regards membership)	Yes Yes Yes Yes	Yes Yes Yes Yes
Legal assistance other than private lawyer	Specialised body (e.g. equal treatment body) Any relevant public utility institutions and associations Trade unions: for their members only	Yes Yes Yes - mo	Yes Yes Yes - mo
Legal representation other than private lawyer	Specialised body (e.g. equal treatment body) Any relevant public utility institutions and associations Trade-unions: for their members only	Yes Yes Yes-mo	Yes Yes Yes-mo
	Notes: So far only the unions and the ombudsmen have represented individuals before the courts.		

Table 1.2 Burden of proof

	Gender	Ethnicity
Employee/claimant Shift of burden of proof (the employee/claimant provides facts, then the employer/respondent has to provide proofs – see below for a detailed description)	No Yes	No Yes
<p><b>Direct discrimination</b></p> <p><i>Main steps</i> Can the main steps of the procedure be described as follows? 1. The employee/claimant has to supply prima facie evidence whereby it may be <b>presumed</b> that there has been discrimination. 2. The employer/respondent has the burden of <b>proving</b> that his/her practice is not discriminatory.</p> <p>In practice, is presumption – as opposed to stronger evidence of discrimination – sufficient to shift the burden of proof?</p> <p><i>Typical/standard prima facie evidence admissible in courts (or other relevant bodies), as set by law or established by case law:</i> Direct evidence (i.e. any written or verbal statement by the employer/respondent), <b>only</b>. No clear legal guidance for indirect evidence (e.g. case-by-case basis only) Statistical evidence Situation testing</p>	Yes  Yes  No True Yes Yes	Yes  Yes  No True Yes Yes
<p><b>Indirect discrimination</b></p> <p><i>Main steps</i> Can the main steps of the procedure be described as follows? 1. The employee/claimant has to clearly identify and define the employment practice in question. 2. The employee/claimant has to show that the practice <b>has or may have</b> a differentiated impact on one protected group. 3. The employer/respondent has the burden of demonstrating that the policy or practice in question is job related for the position in question and consistent with business necessity. 4. If the employer/respondent satisfies this requirement, evidence can be supplied on the existence/lack of the existence of a less discriminatory practice If not, please specify the differences.</p> <p>In step 2 above is the term "has" more accurate than "may have"? In other words, can the potential (possible) impact of the contested employment practice be sufficient for shifting the burden of proof?</p> <p>In step 4 above, if the employer/respondent demonstrates that a practice is consistent with business necessity, then: - does it fall to the employee/claimant to demonstrate that a less discriminatory alternative exists that meets the business need but that the employer refuses to adopt it? <b>or</b> - does it fall to the employer/respondent to demonstrate that a less discriminatory alternative that meets the business need does not exist?</p> <p><b>Notes:</b> The burden of proof in this case is not clearly defined by the legislation or it's preparatory works and will have to be decided by the courts. So far this has not been an issue.</p> <p><i>Typical/standard prima facie evidence to be provided to courts or other relevant bodies, as set by law or established by case law:</i> Direct evidence (i.e. any written or verbal statement by the employer/respondent), <b>only</b>. No clear legal guidance for indirect evidence (e.g. case-by-case basis only) Use of a distinction criteria that appear to be intrinsically suspicious. Please specify (for example, a requirement to work full-time might be unlawful discrimination against women) Statistical evidence</p>	Yes  Yes  See below  No True No Yes	Yes  Yes  See below  No True No Yes
<p><b>Harassment</b> Analysed on a case-by-case basis, by looking at all the circumstances and the context.</p>	Yes	Yes



Table 1.3 Employee compensation and employer penalties

		Gender	Ethnicity
Employee compensation	<b>Injunctive relief/reinstatement</b> - Always made available to the employee/claimant, but the latter can choose monetary compensation in lieu of relief/reinstatement, or - Always made available to the employee/claimant, without alternative option, or - Always made available to the employee/claimant, but the employer/respondent can choose monetary compensation in lieu of relief/reinstatement, or - Never made available to the employee/claimant.	No No Yes No	No No Yes No
	Notes: Injunctive relief is not available in cases of discrimination during recruitment. However, a public office is obliged to offer a vacant position to the most qualified applicant. An applicant can appeal an employment decision to a special board that will examine the merits of the two applicants and give the position to the complainant if he or she appears better qualified. This way injunctive relief can be found in cases of discrimination during the recruitment procedure, at least in the public sector. Pending the decision by the board a discrimination case cannot be initiated in court. However after the decision a civil process can be initiated, regardless of the decision by the board.		
	<b>Monetary compensation</b>  Back pay (please indicate if there is a cap)  Reimbursement of lawyer's and attorney's fees and costs  In lieu of relief/reinstatement, compensation for future lost earnings (e.g., in case of dismissal, this may correspond to lost earnings until the employee finds a new job): - Floor or minimum (amount): a total of 6 months salary - Cap or maximum (amount): 32 months salary, no maximum amount - Average compensation (amount): See comment below - Median compensation (amount): See comment below  Compensation for psychological injury: - Floor or minimum (amount): no minimum - Cap or maximum (amount): no maximum - Average compensation (amount): 6 000 € - Median compensation (amount): 6 000 €	No Yes Yes Yes Yes	No Yes Yes Yes Yes
	Notes: The compensation for a refusal to reinstate an employee despite a ruling that the dismissal is discriminatory (or otherwise not based on a legal ground) is depending on how long the employee was hired and the persons salary; - Up to six months employment = six months salary - 6 to 16 months = as many months salary as months employed - 16 months to five years = 16 months salary - Five to ten years = 24 months salary - Ten years or more = 32 months salary		
Employer additional penalties and obligations	<b>Civil provisions</b> None Court may order the publicity of the decision - Within the firm (e.g. notices to all employees addressing the violations of a specific charge and advising them of their rights under the laws) - Outside the firm (please indicate: media, trade-unions, etc.) The employer may be required to take corrective or preventive actions to cure the source of the identified discrimination	True No No No	True No No No
	<b>Penal provisions</b> None Fine (please specify amounts) Prison sentence (please specify lengths, whether it applies only in specific cases and in which cases)	True No No	True No No
	Notes: There is a penal provision concerning unlawful discrimination which however does not apply to the relation between employer and employee. Of course most crimes that an employee can be victim of can also include an element of discrimination, such as harassment or acts of violence, but the sentences in these cases should be of little interest in this context.		

Table 1.4 Protection against victimisation (retaliation)

		Gender	Ethnicity
Protected actions	It is prohibited to treat the employee/protected person less favourably (so-called "adverse action") because s/he has (so-called "protected action"): - brought proceedings against discrimination - given evidence or information in connection with any proceedings against discrimination. - participated as a witness in any proceedings against discrimination	Yes Yes Yes	Yes Yes Yes
Proof of causal connexion	<i>Burden of proof:</i> - i) employee/protected person - ii) employer/respondent within a given lapse of time from the concerned event. Please specify conditions of application and lapse of time. - iii) shift of burden of proof. Please specify main steps.  Notes: In theory the same steps as direct discrimination.  In cases (i) and (iii), when the causal connexion shall be first shown or established by the employee/protected person: - the link can be demonstrated by evidence that the adverse action occurred shortly after the protected activity (and the employer/respondent was aware of the complainant's protected activity before taking the action), so that the employment relationship is implicitly or explicitly (please specify) protected during a certain period of time (please specify)  Notes: The legislation does not specify facts that can shift the burden of proof and so far no victimization cases have been brought before the courts, so the question of how the casual connexion is established is still to be answered by the courts.	No No  Yes   See comment	No No  Yes   See comment
Employee compensation and employer penalty	compared to provisions described in Table 1.3: - additional employee/protected person compensation, - additional employer/respondent penalties	No No	No No

Table 1.5 Relationship with standard labour laws

		Gender	Ethnicity
Labour law and discrimination	According to standard labour law(s) or code, would dismissal solely based on gender or ethnicity considered to be unjust dismissal? If yes, please specify since when: 1974  Is there a provision requiring equal pay for work of equal value in standard labour law(s) or code? If yes, please specify since when:  Other areas of discrimination covered by standard labour law(s) or code (hiring, promotion, etc...); please specify	Yes  No	Yes  No
Complaints	Are discrimination complaints concerning dismissals more often lodged under standard labour law(s) or code, than under specific anti-discrimination laws?  Are discrimination complaints concerning pay more often lodged under standard labour law(s) or code, than under specific anti-discrimination laws? Other important additional information/comments:	No  No	No  No
Evaluations	Please indicate below references to existing evaluations/studies on the effectiveness of anti-discrimination laws with respect to standard labour law(s): <i>No references available</i>		

Table 1.6 Positive action

		Gender	Ethnicity
Compulsory actions	Are employers <b>required</b> by law to take actions to increase diversity/prevent discrimination?	Yes	Yes
	If yes, what actions are required?	No	No
	- make regular public reports on employment composition in terms of gender or ethnicity	No	No
	- process only anonymous job applications	No	No
	- obligation for large employers to have a person in the HRM department in charge of the employer's anti-discrimination policy	No	No
	- quotas (please specify the areas: e.g. executives in firms above a certain size)	No	No
	Other/notes: Employers are obliged under penalty of a fine to work for diversity and to prevent discrimination on grounds of gender as well as ethnicity through targeted and proactive measures. The ombudsmen against discrimination are supervising how the employers fulfil this obligation and has the power to enforce the work by bringing the case before a board that can decide whether the employer has done enough or not. When it comes to gender some actions are mandatory. The employer must for instance every year examine the salaries of the employees from a gender perspective in order to ensure equal pay for equal work.		
Voluntary actions	Are employers <b>allowed</b> to take actions to increase diversity/prevent discrimination?	Yes	Yes
	If yes, what actions are allowed?	Yes	Yes
	- make regular public reports on employment composition in terms of gender or ethnicity	Yes	Yes
	- establish a plan to ensure that the employment composition in terms of gender or ethnicity is balanced	No	No
	- quotas (please specify the areas: e.g. executives)	No	No
	Other (or any important additional information/comments):		
Public employers' practices	Do public employers normally take actions to increase diversity/prevent discrimination?	Yes	Yes
	If yes, what actions?	Yes	No
	- make regular public reports on employment composition in terms of gender or ethnicity	Yes	Yes
	- establish a plan to ensure that the employment composition in terms of gender or ethnicity is balanced	No	No
	- process only anonymous job applications	Yes	Yes
	- have at least one person in the HRM department in charge of the employer's anti-discrimination policy	No	No
	- quotas (please specify the areas: e.g. high-rank officials)	No	No
	Other (or any important additional information/comments):		
Incentives	Is there a policy to increase incentives for employers to increase diversity/prevent discrimination?	No	No
	Policy instruments used:	No	No
	- Delivery of "labels" or certificates stating that the employer has a diversity-friendly business/employment practice.	No	No
	- financial incentives to establish a plan to ensure that the employment composition in terms of gender or ethnicity is balanced	No	No
	- financial incentives for having a person in the HRM department in charge of the employer's anti-discrimination policy and/or hiring a consultant to establish a diversity plan.	No	No
	- financial incentives for quotas (please specify the areas: e.g. executives)	No	No
	Other (or any important additional information/comments): The threat of a penalty order from the ombudsmen might be considered a financial incentive.		

**Part 2. Institutional framework: specialised bodies (SB) combating discrimination (e.g. equal treatment bodies)**

Table 2.1 **Activities of SBs not related to individual discrimination cases:** Public information and evaluation<sup>a</sup>

	<b>Gender</b>	<b>Ethnicity</b>
Is there a specialised body (SB) in charge of carrying out some of all of the following public information and policy evaluation functions?	Yes	Yes
The Equal Opportunities Ombudsman (formed 1980) and the Ombudsman against ethnic discrimination (formed 1986) are appointed by the Government and are heads of the agencies bearing the same name. As with other public authorities, the Ombudsman has independent status, meaning that the office reaches its own decisions in all individual matters.		
This SB has the statutory power to: - run information campaigns to inform the public of their legal rights <b>in practice</b> , importance of the above mentioned activity in the actual overall workload of the SB	Yes High	Yes High
- run campaigns to change public opinion <b>in practice</b> , importance of the above mentioned activity in the actual overall workload of the SB	Yes Low	Yes Low
- publish statistics on discrimination <b>in practice</b> , importance of the above mentioned activity in the actual overall workload of the SB	Yes Low	Yes Low
- carry out evaluations of the legal and institutional anti-discrimination framework <b>in practice</b> , importance of the above mentioned activity in the actual overall workload of the SB	Yes Low	Yes Low
- make policy recommendations <b>in practice</b> , importance of the above mentioned activity in the actual overall workload of the SB	Yes Low	Yes Low
- produce codes of good practice for employers <b>in practice</b> , importance of the above mentioned activity in the actual overall workload of the SB	Yes Medium	Yes Medium
Other (or any Important additional information/comments):		

Table 2.2 **Activities of SBs not related to individual discrimination cases:** Control and correction<sup>a</sup>

	<b>Gender</b>	<b>Ethnicity</b>
Is there a specialised body (SB) in charge of carrying out some of all of the following control and correction functions?	Yes	Yes
<i>Same as above</i>		
This SB has the statutory power to - randomly conduct formal investigations of companies and organisations. <b>in practice</b> , importance of the above mentioned activity in the actual overall workload of the SB	Yes Low	Yes Low
- conduct formal investigations of companies and organisation where there is evidence of discrimination. <b>in practice</b> , importance of the above mentioned activity in the actual overall workload of the SB	Yes Low	Yes Low
- oblige a company or an organisation to change the way it operates when discriminatory practices are found. <b>in practice</b> , importance of the above mentioned activity in the actual overall workload of the SB	Yes Low	Yes Low
- take legal action against companies or organisations that apply discriminatory practices <b>in practice</b> , importance of the above mentioned activity in the actual overall workload of the SB	Yes Low	Yes Low
- take legal action against organisations that attempt to promote discrimination or to instruct others to discriminate. <b>in practice</b> , importance of the above mentioned activity in the actual overall workload of the SB	Yes Low	Yes Low
Other (or any Important additional information/comments):		

Note: a) High/Medium/Low mean above average / close to average / below average, respectively.

Table 2.3 Role of SBs in individual discrimination cases

	Gender	Ethnicity
Is there a specialised body (SB) with specific functions related to individual discrimination cases?  The ombudsmen as mentioned above. Trade unions have a primary litigation right for their members. Consequently the ombudsman transmits complaints from union members. If the union should decide not to litigate (or try to reach a conciliation) the ombudsman can make their own investigation and decision.	Yes	Yes
Was this body created by anti-discrimination laws (or did anti-discrimination laws establish a specific mandate for it)?	Yes	Yes
<b>Formal linkage between SB activities and court procedures</b>  Does the SB act as a one-stop shop where claimant can access information, lodge a complaint, receive advice? As soon as a discrimination complaint is brought to court, is the claim formally transmitted to the SB? Discrimination complaints must be lodged with the SB beforehand, which acts as one-stop shop to start the procedure. The SB has the statutory power to provide advice and information to claimants (or both parties) on their legal rights and what options they have. <b>In practice</b> , the SB carries on the above mentioned process as soon as it receives a discrimination claim. The SB has the statutory power to provide claimants with legal assistance. <b>In practice</b> , SB provides legal assistance to claimants during court proceedings.  The SB has the statutory power to provide claimants with legal representation. <b>In practice</b> , the SB provides legal representation to claimants during court proceedings.	Yes No No Yes Yes in many cases Yes Yes in many cases Yes Yes in many cases	Yes No No Yes Yes in many cases Yes Yes in many cases Yes Yes in many cases
<b>Investigation of discrimination claims</b>  The SB has the legal authority to compel people (and in particular, the employer) to provide all of the information it requires to investigate a discrimination claim. Does the court accept evidence from the SB? Does the court accept the SB's evaluation of the validity of the discrimination complaint? <b>In practice</b> , the SB formally investigates discrimination claims.  Please indicate below the main tools the SB uses to investigate a discrimination claim: - <i>Written testimonies and meetings/interviews with both parties as well as witnesses or other relevant third parties.</i> - <i>In cases of discrimination during recruitment procedure, comparisons of applications and lists of qualifications are important tools.</i>  Any employer's failure to provide the requested information to the SB will: - have no implication for the court ruling. - potentially be used to draw inferences on discrimination if the case is brought before court.  Any employer's failure to comply with the code of practices issued by the SB (or other relevant body) will: - have no implication for the court ruling. - potentially be used to draw inferences on discrimination if the case is brought before court.  Notes: <i>These questions is yet to be ruled upon by the courts</i>	Yes Yes Yes/No Yes in many cases  See comment below	Yes Yes Yes/No Yes in many cases  See comment below
<b>Mediation/conciliation procedure</b>  The SB has the statutory power to help both parties to resolve the dispute through a mediation/conciliation procedure. Mediation/conciliation is a free and voluntary process for both parties. <b>In practice</b> , the SB carries out mediation/conciliation procedures, so that a court ruling may not be necessary.  The mediation/conciliation procedure is <b>usually</b> initiated: - before the case is brought to court - before any formal investigation starts or at an early stage of the process	Yes Yes Yes duty  Yes No	Yes Yes Yes duty  Yes No

	<b>Gender</b>	<b>Ethnicity</b>
- after any investigation has produced primary evidence of discrimination (but before a litigation decision has been reached)	No	No
The SB acts as a neutral third party assisting both opposing parties in the mediation/conciliation procedure.	No	No
The mediation/conciliation procedure is confidential: no details of the discussion taking place in its course can be repeated to court, nor are made public. The same rule applies to the terms of the settlement.	No	No
If the parties, including the SB, reach settlement agreement, the latter is legally binding and the charge is dismissed.	Yes	Yes
The SB secures the enforcement of settlement agreements reached under its assistance and/or responsibility.	Yes	Yes

**Part 3. Statistics on mediation/conciliation procedures and court cases**

Table 3.1 **Statistics**

		<b>Gender</b>	<b>Ethnicity</b>
General statistics	Total number of discrimination complaints received Protected population: 4,6 millions (labour force, 16-64 years, in 2006)	135	273
Mediation/ conciliation procedures	Number of complaints treated (and closed)during 2006 (includes previously made complaints) <i>of which:</i> - number of complaints dismissed by the SB for no reasonable cause - number of unsuccessful mediations/conciliations although reasonable cause was found - number of successful mediations/conciliations  Average duration of mediation/conciliation procedures  Average employee/claimant compensation under mediation/ conciliation procedures  Notes: The figures above only includes cases where the mediation/conciliation procedure has led to a monetary compensation for the claimant. The conciliation has at least in one case also resulted in the complainant being offered a position at the employer, which has affected the compensation that has been agreed upon. 18 of the successful conciliations were made by the union, 10 by the ombudsman and 4 were made without either the ombudsmans or the unions involvement. No statistics is available in cases where the Ombudsman has not been involved.	152  52  16  no statistic  4 000 €	247  164  16  no statistic  5 000 €
Court procedures	Number of court cases during 2006 <i>of which</i> - number of complaints dismissed by court for default procedures (or administrative reasons) - number of complaints dismissed by court for no reasonable cause - number of cases withdrawn by the complainant(s) - number of court rulings with favourable outcomes for the complainant(s) - other (please specify)  Average duration of court procedures No statistics available, but the duration of the procedure in the cases above where all less than 12 months.	3  0  3  0  0	1  0  1  0  0

## SWITZERLAND

### Partie 1. Cadre juridique prévu pour la discrimination dans l'emploi

Principales lois anti-discrimination :

#### Remarque préliminaire

Il n'existe pas de loi sur l'égalité en ce qui concerne la discrimination ethnique (resp. de loi sur l'égalité de traitement, de loi contre les discriminations). Dans les rapports de travail relevant du droit public sont appliquées en règle générale subsidiairement les interdictions de discrimination inscrites dans la constitution fédérale, resp. de manière isolée dans les constitutions cantonales. Cependant, avant tout sont appliquées des interdictions de discrimination implicites découlant des lois sur le personnel. En ce qui concerne les rapports de travail relevant du droit privé les interdictions de discrimination implicites relatives à la protection de la personnalité et à d'autres normes prévalent. **En conséquence, la majorité des questions contenues dans les tableaux ci-dessous ne sont pas applicables au cas de discrimination sur la base de l'origine ethnique ou raciale, dans la mesure où il n'existe pas de cadre juridique explicite.**

*Dispositions générales couvrant à la fois la discrimination fondée sur le genre et la discrimination fondée sur l'origine ethnique ou raciale*

Protection explicite :

- Constitution fédérale: art. 8 al. 2 (rapports de travail relevant du droit public)  
« Nul ne doit subir de discrimination du fait notamment de son origine, de sa race, de son sexe, de son âge, de sa langue, de sa situation sociale, de son mode de vie, de ses convictions religieuses, philosophiques ou politiques ni du fait d'une déficience corporelle, mentale ou psychique. » ;
- Interdictions de discrimination occasionnelles dans des constitutions cantonales (rapports de travail relevant du droit public)

Protection implicite, i.e. règles de « bonne conduite » dans les relations de travail ou règles plus générales invoquant par exemple la protection et le respect de la personnalité du travailleur, l'interdiction de déroger à des dispositions contraire aux mœurs, à l'ordre public ou aux droits attachés à la personnalité et pouvant être violées en cas de discrimination ou inégalité de traitement :

- Loi sur le personnel de la Confédération : art. 4 (sauf al. 4.d), art. 12, art. 14, art. 27 (rapports de travail relevant du droit public)
- Lois cantonales et communales sur le personnel
- Code suisse des obligations : art. 19, art. 20, art. 328, art. 328b, art. 336 (rapports de travail relevant du droit privé)
- Code civil suisse : art. 2 al. 1, art. 27ss et art. 28 (rapports de travail relevant du droit public et privé).
- Loi fédérale du 13 mars 1964 sur le travail dans l'industrie, l'artisanat et le commerce (Loi sur le travail) : art. 6 (rapports de travail relevant du droit privé)

*Dispositions couvrant spécifiquement la discrimination fondée sur l'origine ethnique ou raciale*

- Code Pénal : art. 261bis, al. 4, 1<sup>ère</sup> partie de la phrase (rapports de travail relevant du droit public et privé)  
« celui qui aura publiquement, par la parole, l'écriture [...] abaissé ou discriminé d'une façon qui porte atteinte à la dignité humaine une personne ou un groupe de personnes en raison de leur race, de leur appartenance ethnique [...] sera puni d'une peine privative de liberté de trois ans au plus ou d'une peine pécuniaire. »
- Note : le terme « publiquement » rend cette disposition difficilement applicable dans la sphère privée d'une entreprise, sauf dans le cas d'annonces d'offre d'emploi comportant une mention discriminatoire.

*Dispositions couvrant spécifiquement la discrimination fondée sur le genre*

- **Loi fédérale du 24 mars 1995 sur l'égalité entre femmes et hommes, LEg ci-après** (contrat de travail de droit public et privé)
- Code Pénal : art. 189 (rapports de travail relevant du droit public et privé), applicable notamment en cas de harcèlement sexuel
- Loi fédérale sur les marchés publics, art. 8 al. 1(c), al. 2 (rapports de travail relevant du droit privé)  
« 1 Les principes ci-après doivent être observés lors de la passation de marchés publics: [...l'adjudicateur] n'adjudge le marché qu'à un soumissionnaire garantissant à ses salariés l'égalité de traitement entre femmes et hommes, sur le plan salarial, pour les prestations fournies en Suisse;  
2 L'adjudicateur est en droit de contrôler ou de faire contrôler l'observation des dispositions relatives à la protection des travailleurs, aux conditions de travail et de l'égalité de traitement entre femmes et hommes. Sur demande, le soumissionnaire doit apporter la preuve qu'il les a respectées. »
- Constitution fédérale : art. 8 al. 3 (rapports de travail relevant du droit privé)  
« L'homme et la femme sont égaux en droit. La loi pourvoit à l'égalité de droit et de fait, en particulier dans les domaines de la famille, de la formation et du travail. L'homme et la femme ont droit à un salaire égal pour un travail de valeur égale. »
- Loi sur le personnel de la Confédération : art. 4(d) (rapports de travail relevant du droit public)



Voir aussi :

- Convention OIT No. 100 sur l'égalité de rémunération
- Convention OIT No. 111 concernant la discrimination (emploi et profession)
- Pacte international relatif aux droits économiques, sociaux et culturels, art. 7
- ...

Tribunaux compétents : tribunal du travail, tribunal civil, tribunal administratif, dernière instance : tribunal fédéral

Définition légale des caractéristiques protégées, ci-après notées genre et ethnicité :

Genre : discrimination fondée sur le sexe, incluant explicitement les motifs suivants : **grossesse, situation familiale et état civil**

Ethnicité : voir ci-dessus

Tableau 1.1 **Type de discrimination, domaines concernés, acteurs visés, assistance et représentation légales**

		<b>Genre</b>	<b>Ethnicité</b>
Type de discrimination	Discrimination directe Discrimination indirecte, autrement dit dans les cas où une disposition ou une pratique vise tous les salariés mais affecte particulièrement un groupe protégé et ne peut être considérée comme un moyen approprié pour atteindre un objectif légitime. Pressions et consignes en vue d'exercer une discrimination Harcèlement * La LEg interdit la discrimination indirecte, sans toutefois définir la notion de discrimination indirecte.	Oui Oui*  Non Oui	Non applicable
Domaines concernés	Processus de recrutement Salaires Type de contrat de travail (permanent ou de durée déterminée) Durée du travail (horaire atypique, temps partiel ou temps plein) Promotion Emploi et formation professionnelle Transfert Licenciement et renvoi Autres: attribution des tâches	Oui Oui Oui Oui Oui Oui Oui Oui Oui	Non applicable
Acteurs visés	Secteur privé Secteur public Agences pour l'emploi Syndicats (adhérents) Autres (veuillez également indiquer les employeurs exemptés – par ex. les entreprises en dessous d'un certain seuil – et fournir toute autre information/observation complémentaire importante) : → Tous les rapports de travail, sans exceptions.	Oui Oui Oui Oui Oui	Non applicable
Assistance juridique autre que les services d'un avocat indépendant	Organe spécialisé (par ex. organe chargé de faire respecter l'égalité de traitement) Toute institution ou association d'utilité publique compétente Syndicats → pour leurs membres * Bureaux de l'égalité et organes de consultation cantonaux, et Bureau fédéral de l'égalité entre femmes et hommes → fournissent informations et conseils	Oui* Non Oui	Voir Partie 2
Représentation juridique autre que celle assurée par un avocat indépendant	Organe spécialisé (par ex. organe chargé de faire respecter l'égalité de traitement) Toute institution ou association d'utilité publique compétente → <b>sous certaines conditions</b> , voir notes ci-dessous Syndicats (veuillez indiquer si seuls les membres en bénéficient) Notes : * Les organisations qui ont pour tâche de promouvoir l'égalité (syndicats, organisations professionnelles, associations féministes), constituées depuis deux ans, peuvent agir en justice lorsqu'il paraît vraisemblable que l'issue du procès affectera un nombre considérable de rapports de travail (Art. 7 LEg) - il y a eu des cas en pratique	Non Oui*  Oui*	Voir Partie 2



	Genre	Ethnicité
- Utilisation d'un critère de distinction qui semble intrinsèquement suspect. Veuillez préciser (demander des compétences et expériences qui ne sont pas indispensables pour un poste peut être discriminatoire à l'égard des femmes) - Données statistiques - Autres preuves indirectes : expertises salariales	Oui  Oui Oui	
<b>Harcèlement</b> Analysé au cas par cas, en examinant toutes les circonstances et le contexte.	Oui	

Tableau 1.3 **Compensation accordée au salarié et pénalités imposées à l'employeur**

	Genre	Ethnicité
Compensation accordée au salarié		
<p><b>Réhabilitation/réintégration</b></p> <ul style="list-style-type: none"> <li>- Toujours accessible au salarié/demandeur, mais ce dernier peut opter pour une compensation financière à la place de la réhabilitation/réintégration, ou</li> <li>Jamais accessible dans les cas de refus d'embauche et licenciement discriminatoire dans les rapports de droit privé</li> <li>- Toujours accessible au salarié/demandeur, sans autre option, ou</li> <li>- Toujours accessible au salarié/demandeur, mais l'employeur/défendeur peut choisir de verser une compensation financière au lieu d'accepter la réhabilitation/réintégration, ou</li> <li>- Jamais accessible au salarié/demandeur.</li> <li>En cas de refus d'embauche et licenciement discriminatoire dans les rapports de droit privé.</li> </ul> <p><b>Compensation financière</b></p> <p>Paiement des arriérés de salaire (veuillez indiquer s'il y a un plafond) : <b>jusqu'à 5 ans en arrière, sans plafond</b></p> <p>Remboursement des honoraires et frais d'avocat</p> <p>A la place de la réhabilitation/réintégration, versement d'indemnités pour les futurs salaires perdus (par exemple, en cas de licenciement, ceci peut correspondre aux salaires perdus jusqu'à ce que le salarié retrouve un nouvel emploi) :</p> <ul style="list-style-type: none"> <li>- Indemnisation plancher ou minimum (montant) : .....</li> <li>- Indemnisation plafond ou maximum (montant) : .....</li> <li>- Indemnisation moyenne (montant) : .....</li> <li>- Indemnisation médiane (montant) : .....</li> </ul> <p>Discrimination à l'embauche : <b>maximum 3 mois</b> de salaire (du poste en cause) Licenciement discriminatoire : <b>maximum 6 mois</b> de salaire (du poste en cause); Harcèlement sexuel : maximum 6 mois de salaire moyen suisse.</p> <p>Indemnisation du dommage psychologique :</p> <ul style="list-style-type: none"> <li>- Indemnisation plancher ou minimum (montant) : .....</li> <li>- Indemnisation plafond ou maximum (montant) : .....</li> <li>- Indemnisation moyenne (montant) : .....</li> <li>- Indemnisation médiane (montant) : .....</li> </ul> <p>→ <b>sans limites, mais il faut un dommage important.</b></p>	<p>Oui, dans certains cas</p> <p>Non Non</p> <p>Oui, dans certains cas</p> <p>Oui</p> <p>Oui</p> <p>Oui</p> <p>Oui</p>	<p>Non applicable</p>
Sanctions et obligations supplémentaires imposées à l'employeur		
<p><b>Dispositions prises en matière civile</b></p> <p>Aucune Le tribunal peut ordonner que la décision soit rendue publique</p> <ul style="list-style-type: none"> <li>- Au sein de l'entreprise (par exemple des avis sont adressés à tous les salariés pour les informer des violations d'une charge spécifique et leur indiquer quels sont les droits qui leur sont reconnus par la législation) → <b>surtout en cas de harcèlement sexuel</b></li> <li>- En dehors de l'entreprise (veuillez préciser : médias, syndicats, etc.)</li> </ul> <p>L'employeur peut être tenu de prendre des mesures correctives ou préventives pour remédier à la discrimination identifiée.</p>	<p>Faux Elle l'est de toute façon Oui</p> <p>Non Oui</p>	

		Genre	Ethnicité
	Autres (veuillez préciser) :	Non	
	Autres informations/observations complémentaires importantes : La Loi fédérale sur les marchés publics n'autorise l'adjudication d'un marché qu'à une entreprise garantissant à ses salariés l'égalité de traitement entre femmes et hommes, sur le plan salarial, pour les prestations fournies en Suisse.		
	<b>Dispositions en matière pénale</b> Aucune Amende (veuillez préciser les montants) Peine d'emprisonnement (veuillez préciser la durée, si elle ne s'applique qu'à des cas spécifiques et lesquels)	Vrai Non Non	
	Autres (veuillez préciser) :	Non	

Tableau 1.4 Protection contre la victimisation (représailles)

		Genre	Ethnicité
Actions protégées	Il est interdit de traiter le salarié/la personne protégée moins favorablement parce qu'il ou elle a (« action protégée ») : - engagé des poursuites pour discrimination - fourni des preuves ou des informations en relation avec des poursuites pour discrimination. - participé en tant que témoin à des poursuites pour discrimination	Oui Oui Oui	Non applicable
	<b>Note : La salariée et les témoins ne sont protégés que contre le licenciement de rétorsion</b>		
Preuve de la relation causale	<i>Charge de la preuve :</i> - i) salarié/personne protégée - ii) employeur/défendeur pendant un certains laps de temps, à compter du moment où l'action protégée a été engagée par le salarié. Veuillez préciser les conditions d'application et la durée de cette période. <b>Note : La protection contre le congé vaut <b>durant toute la durée des démarches effectuées jusqu'à 6 mois après clôture de la procédure.</b></b>  - iii) renversement de la charge de la preuve. Veuillez préciser les principales étapes.  Dans les cas i) et iii), i.e. lorsque la relation causale doit au départ être établie par le salarié/personne protégée : - La relation causale peut être établie au moyen d'éléments prouvant que l'employeur a engagé une action pénalisant le salarié (ou autre personne protégée) peu de temps après que ce dernier se soit engagé dans une activité protégée (dont l'employeur avait connaissance). En d'autres termes, la relation d'emploi est implicitement ou explicitement (veuillez préciser) protégée pendant un certain laps de temps à compter du début de l'action protégée (veuillez préciser). - Autres (veuillez préciser) :	Non Oui  Non  Oui, voir note ci-dessus  Non	
Compensation accordée au salarié et sanctions imposées à l'employeur	Dispositions supplémentaires, par rapport à celles décrites dans le tableau 1.3. - compensations accordées au salarié/à la personne protégée → <b>autres dommages-intérêts.</b> - sanctions imposées à l'employeur/au défendeur	Oui	

Tableau 1.5 Relation avec la législation standard/générale du travail

		Genre	Ethnicité
Législation du travail et discrimination	<p>Selon la législation (ou code) du travail standard/générale, un licenciement motivé uniquement par le sexisme ou la discrimination ethnique serait-il considéré comme un licenciement abusif ? Dans l'affirmative, veuillez préciser depuis quelle date.</p> <p>Dans le 2 cas : art. 336 Code des obligations (CO), en vigueur depuis 1.1.1989. La charge de la preuve repose sur le plaignant.</p>	Oui	Oui
	<p>La législation (ou code) du travail standard/générale contient-elle une disposition imposant l'égalité de rémunération pour un travail égal ? Dans l'affirmative, veuillez préciser depuis quelle date.</p> <p>Genre : Constitution fédérale, art. 8 al. 3, entrée en vigueur: 1981                      Ethnicité : la discrimination salariale sur la base de la race ou de l'appartenance ethnique est contraire à la protection de la personnalité définie par les articles 27 et 28 du Code Civil (Tarek Naguib, Manuel pour la consultation des victimes de discrimination raciale)</p>	Oui	Oui
	<p>Autres domaines de discrimination couverts par la législation (ou code) du travail standard/générale (embauche, promotion, etc...) ; veuillez préciser</p> <p>Genre :</p> <ul style="list-style-type: none"> <li>- protection contre le harcèlement sexuel, article 328 CO</li> <li>- protection contre le congé en cas de grossesse et maternité (16 semaines après naissance), article 336c CO</li> </ul> <p>Ethnicité → protection implicite, essentiellement : sauf dans la constitution, les termes discrimination et ethnique/race ne sont pas mentionnés dans les articles de loi cités ci-dessous.</p> <p><i>Rapport de travail relevant du droit privé :</i></p> <ul style="list-style-type: none"> <li>- Refus de conclure un contrat (Code civil art. 28, CO art. 328)</li> <li>- Protection des données (CO art. 328b)</li> <li>- Protection contre les propos racistes et les atteintes discriminatoires à la personnalité par des tiers (Code civil suisse art. 28)</li> <li>- Discrimination par l'objet du contrat (CO art. 19, 20)</li> </ul> <p>Protection contre le mobbing à caractère raciste (CO art. 328, Loi sur le travail art. 6)</p> <ul style="list-style-type: none"> <li>- Discrimination pendant les rapports de travail (CO art. 328)</li> </ul> <p><i>Rapports de travail relevant du droit public :</i></p> <ul style="list-style-type: none"> <li>- En cas de discrimination, protection subsidiaire par le biais de l'art. 8 al. 2 de la Constitution fédérale, partiellement interdictions de discrimination dans les constitutions cantonales</li> <li>- Protection contre le licenciement discriminatoire par la loi sur le personnel de la Confédération</li> <li>- Protection contre la discrimination par des lois cantonales sur le personnel et avant tout lors de licenciement</li> </ul>	Oui	Oui
Plaintes	<p>Les plaintes pour discrimination en cas de licenciement sont-elles déposées plus souvent en vertu de la législation (ou code) du travail standard/générale qu'en vertu de lois anti-discrimination spécifiques ?</p>	Oui*	
	<p>Les plaintes pour discrimination portant sur la rémunération sont-elles déposées plus souvent en vertu de la législation (ou code) du travail standard/générale qu'en vertu de lois anti-discrimination spécifiques ?</p> <p>Autre information/observation complémentaire importante :</p> <p><b>* Les avocats et les juges ne connaissent pas suffisamment la loi sur l'égalité.</b></p>	Non*	

		Genre	Ethnicité
Évaluations	<p>Veillez indiquer ci-dessous les références aux évaluations/études existantes portant sur l'efficacité des lois anti-discrimination par rapport à la législation du travail standard/générale :</p> <p>Genre :</p> <p>Rapport du Conseil fédéral relatif à l'évaluation de l'efficacité de la loi sur l'égalité, Feuille Fédérale 2006 3061  Évaluation portant sur l'efficacité de la loi sur l'égalité, voir page internet :  <a href="http://www.bj.admin.ch/bj/fr/home/dokumentation/medieninformationen/2006/2006-02-16.html">http://www.bj.admin.ch/bj/fr/home/dokumentation/medieninformationen/2006/2006-02-16.html</a>  Rapport sur la mise en œuvre de la Convention No. 100 de l'OIT sur l'égalité de rémunération du 5 octobre 2006.</p> <p>Ethnicité : Rapport sur la mise en œuvre de la Convention No. 111 de l'OIT sur la discrimination (emploi et profession) du 5 octobre 2006.</p>		

Tableau 1.6 **Action positive**

		Genre	Ethnicité
Mesures obligatoires	<p>Les employeurs sont-ils <b>tenus</b> par la législation de prendre des mesures pour accroître la diversité/prévenir la discrimination ?</p> <p>Dans l'affirmative, quelles mesures sont obligatoires ?</p> <ul style="list-style-type: none"> <li>- publier régulièrement des rapports sur la composition de la population employée indiquant la proportion d'hommes et de femmes ou l'origine ethnique</li> <li>- ne traiter que les demandes d'emploi anonymes</li> <li>- obliger les gros employeurs à désigner au sein du service de la gestion des ressources humaines une personne chargée de la politique anti-discrimination de l'entreprise (indiquer, le cas échéant, la taille minimale de cette dernière)</li> <li>- fixer des quotas</li> </ul>	Non (sauf mesures pour prévenir le harcèlement sexuel)	Non
Mesures volontaires	<p>Les employeurs sont-ils <b>autorisés</b> à prendre des mesures pour accroître la diversité/prévenir la discrimination ?</p> <p>Dans l'affirmative, quelles mesures sont autorisées ?</p> <ul style="list-style-type: none"> <li>- publier régulièrement des rapports sur la composition de la population employée indiquant la proportion d'hommes et de femmes ou l'origine ethnique</li> <li>- établir un plan pour s'assurer que la composition de la population active est équilibrée du point de vue de la proportion d'hommes et de femmes ou de l'origine ethnique</li> <li>- fixer des quotas (veuillez préciser dans quels domaines : par exemple les cadres supérieurs)</li> <li>- autres (ou toute autre information/observation complémentaire importante) :</li> </ul>	<p>Oui</p> <p>Oui</p> <p>Oui</p> <p>Oui, mais il faut prévoir une base légale suffisante</p>	<p>Oui</p> <p>Oui, mais seulement avec la participation volontaire des travailleurs Oui</p> <p>Oui, mais uniquement statistiques non significatives</p>
Pratiques des employeurs publics	<p>Les employeurs publics prennent-ils normalement des mesures pour accroître la diversité/prévenir la discrimination ?</p> <p>Dans l'affirmative, quelles sont ces mesures ?</p> <ul style="list-style-type: none"> <li>- publier régulièrement des rapports sur la composition de la population employée indiquant la proportion d'hommes et de femmes ou l'origine ethnique</li> <li>- établir un plan pour s'assurer que la composition de la population active est équilibrée du point de vue de la proportion d'hommes et de femmes ou de l'origine ethnique</li> <li>- ne traiter que les demandes d'emploi anonymes</li> <li>- nommer au sein du département de la gestion des ressources humaines au moins une personne responsable de la politique anti-discrimination de l'employeur</li> <li>- fixer des quotas (veuillez préciser dans quels domaines : par exemple les fonctionnaires de haut rang)</li> <li>- autres (ou toute autre information/observation complémentaire importante) :</li> </ul>	<p>Administration fédérale : Oui</p> <p>Oui</p> <p>Oui</p> <p>Non Oui, en principe</p> <p>Non</p>	Non

		Genre	Ethnicité
Mesures d'incitation	<p>La politique suivie consiste-t-elle à développer les incitations pour les employeurs à accroître la diversité/prévenir la discrimination ?</p> <p>Moyens utilisés :</p> <ul style="list-style-type: none"> <li>- Octroi de « labels » ou de certificats attestant que les pratiques de l'employeur favorisent la diversité dans l'activité et sur le plan de l'emploi.</li> <li>- Incitations financières pour établir un plan qui garantisse que la composition de la population active est équilibrée du point de vue de la proportion d'hommes et de femmes ou de l'origine ethnique.</li> <li>- Incitations financières pour que l'employeur désigne au sein du service de la gestion des ressources humaines une personne responsable de sa politique anti-discrimination et/ou recrute un consultant pour établir un plan en matière de diversité.</li> <li>- Incitations financières à fixer des quotas (veuillez préciser les domaines, par exemple cadres supérieurs).</li> <li>- autres : <b>Aides financières prévues par la loi pour des projets d'égalité réalisés en collaboration avec des organisations privées (LEg, section 5)</b></li> </ul>	<p>Oui</p> <p>Non, pas au niveau national Non</p> <p>Non</p> <p>Non</p> <p>Oui</p>	<p>Non</p>

**Partie 2. Cadre institutionnel : organes spécialisés dans la lutte contre la discrimination (par exemple organes chargés de garantir l'égalité de traitement)**

Tableau 2.1 **Activités des organes spécialisés non liées au traitement des cas individuels de discrimination :**  
Information du public et évaluation<sup>a</sup>

	Genre	Ethnicité
Existe-t-il un organe spécialisé auquel ont été confiées certaines des fonctions d'information du public et d'évaluation des politiques ci-après?	Oui	Oui
<p>Genre :</p> <p>Bureau fédéral de l'égalité entre femmes et hommes (BFEG) : organe public (office fédéral) Délégués cantonaux à l'égalité, et Conférence des délégués à l'égalité. Commission fédérale pour les questions féminines (CFQF) : Commission extra-parlementaire indépendante</p> <p>Ethnicité :</p> <p>Niveau fédéral : Commission fédérale contre le racisme et Service de lutte contre le racisme. Niveaux cantonales : Organes cantonaux pour les questions de racisme : cantons de Bâle ville, Lucerne, Neuchâtel, Soleure, Tessin, Zoug, <b>couvrant seulement 18,5% de la population résidente totale en 2006 (Office fédéral de la statistique, ESPOP)</b></p>		
<p>L'organe spécialisé est habilité à :</p> <ul style="list-style-type: none"> <li>- mener des campagnes d'information pour informer le public des droits qui lui sont reconnus par la loi</li> <li><b>en pratique</b>, importance de l'activité susmentionnée dans l'ensemble des activités conduites par l'organisme en question</li> <li>- mener des campagnes pour faire évoluer l'opinion publique</li> <li><b>en pratique</b>, importance de l'activité susmentionnée dans l'ensemble des activités conduites par l'organisme en question</li> <li>- publier des statistiques sur la discrimination</li> <li><b>en pratique</b>, importance de l'activité susmentionnée dans l'ensemble des activités conduites par l'organisme en question</li> <li>- réaliser des évaluations du cadre juridique et institutionnel anti-discrimination</li> <li><b>en pratique</b>, importance de l'activité susmentionnée dans l'ensemble des activités conduites par l'organisme en question</li> <li>- formuler des recommandations sur les actions à mener</li> <li><b>en pratique</b>, importance de l'activité susmentionnée dans l'ensemble des activités conduites par l'organisme en question</li> <li>- élaborer des codes de bonne pratique pour les employeurs</li> <li><b>en pratique</b>, importance de l'activité susmentionnée dans l'ensemble des activités conduites par l'organisme en question</li> </ul> <p>Autres (ou toute autre information/observation complémentaire importante) :</p>	<p>Oui</p> <p>BFEG : moyenne CFQF : faible Oui</p> <p>BFEG : faible CFQF : moyenne Oui</p> <p>BFEG : importante CFQF : importante Oui</p> <p>BFEG : moyenne CFQF : importante Oui</p> <p>BFEG : moyenne CFQF : importante Oui</p> <p>BFEG : importante CFQF : faible</p>	<p>Oui</p> <p>..</p> <p>..</p> <p>..</p> <p>..</p> <p>..</p> <p>..</p>

Note : a) Importante/moyenne/faible signifie supérieure à la moyenne / proche de la moyenne / inférieure à la moyenne, respectivement.

Tableau 2.2 **Activités des organes spécialisés non liées au traitement des cas individuels de discrimination :**  
mesures de contrôle et correctives<sup>a</sup>

	Genre	Ethnicité
Existe-t-il un organe spécialisé chargé de certaines des fonctions de contrôle et correctives ci-après ?	Non	Non
<p>Cet organe spécialisé est habilité à :</p> <ul style="list-style-type: none"> <li>- réaliser de manière aléatoire des enquêtes formelles auprès de sociétés et d'organisations.</li> <li><b>en pratique</b>, importance de l'activité susmentionnée dans l'ensemble des activités conduites par l'organisme en question</li> <li>- effectuer des enquêtes formelles auprès de sociétés et d'organisations lorsque des faits de discrimination ont été avancés.</li> <li><b>en pratique</b>, importance de l'activité susmentionnée dans l'ensemble des activités conduites par l'organisme en question</li> </ul>		



	Genre	Ethnicité
l'organisme en question - obliger une société ou une organisation à modifier ses règles de fonctionnement lorsque des pratiques discriminatoires sont mises en lumière <b>en pratique</b> , importance de l'activité susmentionnée dans l'ensemble des activités conduites par l'organisme en question - engager des poursuites judiciaires contre les sociétés ou organisations qui ont des pratiques discriminatoires <b>en pratique</b> , importance de l'activité susmentionnée dans l'ensemble des activités conduites par l'organisme en question - engager des poursuites judiciaires contre les organisations qui essaient d'encourager la discrimination ou qui ordonnent à d'autres de faire preuve de discrimination. <b>en pratique</b> , importance de l'activité susmentionnée dans l'ensemble des activités conduites par l'organisme en question Autres (ou toute autre information/observation complémentaire importante) :		

Note : a) Importante/moyenne/faible signifie supérieure à la moyenne / proche de la moyenne / inférieure à la moyenne, respectivement.

Tableau 2.3 Rôle des organes spécialisés dans les cas individuels de discrimination

	Genre	Ethnicité
Existe-t-il un organe spécialisé chargé de fonctions spécifiques en relation avec les cas individuels de discrimination ?  Genre : Offices (commissions) de conciliation sur le niveau cantonal, et aussi pour les employé(e)s de la Confédération  Ethnicité : Organes de médiation dans certains cantons ou certaines villes Cantons de Bâle campagne, Bâle ville, Zürich, et villes de Berne, St-Gall, Winterthur, Zürich, comptant au total environ le quart de la population résidente totale en 2006 (Office fédéral de la statistique, ESPOP). <b>Les informations ci-dessous ne sont donc pas représentatives de la situation nationale</b> (par ailleurs, ces informations ne sont valables que pour les rapports de travail relevant du droit privé).	Oui	Oui, mais dans <b>très peu de cantons</b>
Cet organe a-t-il été créé en application de la législation anti-discrimination (ou a-t-il été doté d'un mandat spécifique en vertu de cette législation) ?	Oui	Non
<b>Liaison formelle entre les activités de l'organe spécialisé et celles des tribunaux</b>		
L'organe spécialisé est-il un guichet unique pour le demandeur, où celui-ci peut avoir accès à des informations, déposer plainte et être conseillé ?	Oui	Oui
Dès que le tribunal est saisi d'une plainte pour discrimination, la plainte est-elle officiellement transmise à l'organe spécialisé ?	Non	Non
Les plaintes pour discrimination doivent être <b>d'abord</b> déposées auprès de l'organe spécialisé, qui est un guichet unique chargé de lancer la procédure.	Voir (*)	Non
* dépend de la procédure cantonale - mais elle entre en action avant la procédure juridique.		
L'organe spécialisé est habilité à fournir des conseils et des informations aux demandeurs (ou aux deux parties) sur les droits qui leur sont reconnus par la loi et sur les options qui s'offrent à eux. <b>En pratique</b> , l'organe spécialisé engage la procédure décrite ci-dessus dès qu'il reçoit une plainte pour discrimination.	Oui	Oui
L'organe spécialisé est habilité à fournir aux demandeurs une assistance juridique. <b>En pratique</b> , l'organe spécialisé fournit une assistance juridique aux demandeurs pendant l'instance.	Oui, il en a l'obligation Non	Non  Oui Dans de nombreux cas Non
L'organe spécialisé est habilité à assurer une représentation juridique aux demandeurs. <b>En pratique</b> , l'organe spécialisé assure une représentation juridique aux demandeurs pendant l'instance.	Non	Non

	Genre	Ethnicité
<p><b>Instruction des plaintes pour discrimination</b></p> <p>L'organe spécialisé est autorisé par la loi à contraindre les personnes (et, en particulier, l'employeur) à fournir toutes les informations dont il a besoin pour instruire une plainte pour discrimination.</p> <p>Le tribunal accepte-t-il les éléments de faits fournis par l'organe spécialisé ? Le tribunal tient-t-il compte de l'évaluation par l'organe spécialisé de la validité de la plainte pour discrimination ? <b>En pratique</b>, l'organe spécialisé instruit officiellement les plaintes pour discrimination.</p> <p>Veuillez indiquer ci-dessous les principaux instruments auxquels l'organe spécialisé recourt pour instruire une plainte pour discrimination :</p> <p>Genre : dépend du canton. En règle générale: interrogatoire des parties, simple échange d'écritures et témoins. Ethnicité : examen</p> <p>Tout défaut de communication des informations demandées à l'organe spécialisé de la part de l'employeur : - est sans incidence sur la décision du tribunal. - peut éventuellement conduire à une présomption de discrimination si l'affaire est portée devant le tribunal.</p> <p>Tout manquement de la part de l'employeur à l'application du code de pratiques publié par l'organe spécialisé (ou un autre organe compétent) : - est sans incidence sur la décision du tribunal. - peut éventuellement conduire à une présomption de discrimination si l'affaire est portée devant le tribunal. Information/observation complémentaire importante sur la procédure d'instruction :</p>	<p>Non - sauf dans un canton Non Non Non</p>	<p>Oui Oui Non Non</p>
<p><b>Procédure de médiation/conciliation</b></p> <p>L'organe spécialisé est habilité à aider les deux parties à régler le différend par le biais d'une procédure de médiation/conciliation. La médiation/conciliation est une procédure gratuite et volontaire pour les deux parties. <b>En pratique</b>, l'organe spécialisé mène des procédures de médiation/conciliation, pour éviter de saisir le tribunal.</p> <p>La procédure de médiation/conciliation est <b>généralement</b> lancée : - avant que l'affaire soit portée devant le tribunal - avant le début de toute enquête formelle ou à un stade précoce de la procédure - après qu'une enquête formelle ait permis de réunir des faits de discrimination (mais avant qu'une décision de justice ait été prise)</p> <p>Autres (ou toute autre information/observation complémentaire importante)</p> <p>L'organe spécialisé joue le rôle de tierce partie neutre qui aide les deux parties en présence dans la procédure de médiation/conciliation. La procédure de médiation/conciliation est confidentielle : aucun détail des discussions auxquelles elle donne lieu ne peut être répété devant le tribunal, ni rendu public. La même règle s'applique aux modalités du règlement. Si les parties, y compris l'organe spécialisé, parviennent à un accord, ce dernier est contraignant du point de vue juridique et l'accusation est abandonnée. L'organe spécialisé fait appliquer les accords de règlements conclus avec son aide ou sous sa responsabilité.</p>	<p>Oui Oui Oui, obligatoirement Oui Non Non</p>	<p>Oui Oui Non Oui Non Oui Oui Oui Non</p>

**Partie 3. Statistiques sur les procédures de médiation/conciliation et les cas portés devant les tribunaux**

Tableau 3.1 **Statistiques**

		Genre	Ethnicité
Statistiques générales	Nombre total de plaintes pour discrimination reçues	environ 438	
	Population protégée (nombre de personnes âgées de 15 à 64 ans visées par la loi en question)		
	personnes actives occupées	4.272.000	
	chômeurs inscrits	122.800	
	total des personnes actives	4.394.800	
	toutes les personnes entre 15 - 64	5.412.315	
Procédures de médiation/conciliation	Nombre de plaintes reçues traitées par les <b>offices de conciliation</b> (il y en a 33)	355	
	<i>dont</i> :		
	- nombre de plaintes écartées par l'organe spécialisé pour absence de causes/raisons valables	pas d'indications	
	- nombre de médiations/conciliations ayant échoué, alors que des causes/raisons valables avaient été reconnues	84	
	- nombre de médiations/conciliations ayant réussi	120	
	- autres (veuillez préciser)		
	retrait	24	
simple constat de désaccord	75		
	Durée moyenne des procédures de médiation/conciliation	4.8 mois	
	Compensation moyenne accordée au salarié/demandeur dans le cadre des procédures de médiation/conciliation	pas d'indications	
Tribunaux	Nombre de cas portés devant les tribunaux (172 cas devant plusieurs instances)	266	
	<i>dont</i> :		
	- nombre de plaintes rejetées par le tribunal pour vice de procédure (ou pour des raisons administratives)	36	
	- nombre de plaintes rejetées par le tribunal pour absence de causes/raisons valables	107	
	- nombre de plaintes retirées par le(s) demandeur(s)	21	
	- nombre de décisions de justice favorables au(x) demandeur(s)	102	
	- autres (veuillez préciser)		
	Durée moyenne des instances	15 mois médiane: 7.3 mois	

## Principales références complémentaires

**Stutz, H., Schär Moser, M. et E. Freivogel (2005)**, *Evaluation portant sur l'efficacité de la loi sur l'égalité : Rapport de Synthèse*, Bureau d'études de politique du travail et de politique sociale BASS, sur mandat de l'Office fédéral de la justice.  
<http://www.buerobass.ch/pdf/2006/Synthesebericht%20F1.pdf>

**Humanrights.ch (2008)**, *Manuel pour la consultation des victimes de discrimination raciale*, Guide juridique – Travail, par Tarek Naguib.  
[http://d102352.u28.netvs.ch/bfr/izr/izr\\_index.asp?lang=f&num=22&subnum=25](http://d102352.u28.netvs.ch/bfr/izr/izr_index.asp?lang=f&num=22&subnum=25)

**Loi fédérale du 24 mars 1995 sur l'égalité entre femmes et hommes** (Loi sur l'égalité, LEg),  
<http://www.admin.ch/ch/f/rs/1/151.1.fr.pdf>

**Constitution fédérale de la Confédération suisse** du 18 avril 1999, <http://www.admin.ch/ch/f/rs/101/a8.html>

**Loi sur le personnel de la Confédération** (LPers) du 24 mars 2000, <http://www.admin.ch/ch/f/rs/1/172.220.1.fr.pdf>

**Code des Obligations**, <http://www.admin.ch/ch/f/rs/2/220.fr.pdf>

**Code Civil**, <http://www.admin.ch/ch/f/rs/2/210.fr.pdf>

**Code pénal**, [http://www.admin.ch/ch/f/rs/311\\_0/a261bis.html](http://www.admin.ch/ch/f/rs/311_0/a261bis.html)

**Loi fédérale du 13 mars 1964 sur le travail dans l'industrie, l'artisanat et le commerce** (Loi sur le travail),  
<http://www.admin.ch/ch/f/rs/8/822.11.fr.pdf>

**Loi fédérale sur les marchés publics** du 16 décembre 1994, <http://www.admin.ch/ch/f/rs/1/172.056.1.fr.pdf>





	Gender	Ethnicity
<p>Notes:</p> <p><b>The SD74 (gender) and RR65 (race) questionnaire procedures</b></p> <p>These procedures allow the claimant to ask the respondent relevant questions in connection with his/her alleged discriminatory treatment in order to gather evidence for his/her case or indeed to decide whether or not to run a case before an Employment Tribunal. The SD74 and RR65 questionnaire procedures are a method to apply pressure to the respondent due to the rules about responding correctly to the request and may mean that an early settlement is agreed. In the event that the respondent does not reply to the Questionnaire or responds in an evasive or ambiguous way without reasonable excuse, it is open to the ET at the hearing to draw an adverse inference from this failure/insufficient response.</p> <p>The information, statistics and documents gathered from the SD74 or the RR65 can be used as evidence in the ET proceedings, in particular for cross-examination of witnesses. This evidence may influence the ET's final decision.</p> <p>Sources:</p> <p>EHRC, Legal resource for sex discrimination and equal pay, Step by step guide to sex discrimination claims: using the questionnaire procedure form SD74, <a href="http://83.137.212.42/sitearchive/eoc/Defaultebc5.html?page=15505">http://83.137.212.42/sitearchive/eoc/Defaultebc5.html?page=15505</a></p> <p>EHRC, Taking a race case, Case management and preparation, The RR65 Questionnaire Procedure, <a href="http://www.equalityhumanrights.com/en/foradvisers/race/Pages/Casemanagement.aspx#The%20RR65%20questionnaire%20procedure">http://www.equalityhumanrights.com/en/foradvisers/race/Pages/Casemanagement.aspx#The%20RR65%20questionnaire%20procedure</a></p> <p><b>Gender:</b> The Sex Discrimination (Indirect Discrimination &amp; Burden of Proof) Regulations 2001 implemented the EU Burden of Proof Directive in domestic law by inserting s.63A in to the SDA. In summary, s.63A says that if, in a claim under the SDA, the claimant proves facts from which the ET could in the absence of an adequate explanation from the respondent decide that there has been unlawful sex discrimination, the ET should uphold the claim unless the respondent proves that it did not discriminate. In <i>Barton v Investec Henderson Crosthwaite Securities Ltd</i> [2003] IRLR 332 the Employment Appeal Tribunal (EAT) set out guidance on how ETs should approach the burden of proof in SDA cases. The Court of Appeal considered and approved the Barton guidance in the case of <i>Igen v Wong</i> [2005] EWCA Civ 142, subject to some amendments and minor corrections. The Court of Appeal warned that the guidance is only that and is not a substitute for the statutory language. The revised Barton guidance is as follows:</p> <ol style="list-style-type: none"> <li>1. Pursuant to s.63A SDA, it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the ET could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful by virtue of Part II or which by virtue of s.41 or s.42 SDA is to be treated as having been committed against the claimant. These are referred to below as "such facts".</li> <li>2. If the claimant does not prove such facts he or she will fail.</li> <li>3. It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that "he or she would not have fitted in".</li> <li>4. In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the ET will therefore usually depend on what inferences it is proper to draw from the primary facts found by the ET.</li> <li>5. It is important to note the word "could" in s.63A(2). At this stage the ET does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage an ET is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.</li> <li>6. In considering what inferences or conclusions can be drawn from the primary facts, the ET must assume that there is no adequate explanation for those facts.</li> <li>7. These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with s.74(2)(b) SDA from an evasive or equivocal reply to a questionnaire or any other questions that fall within s.74(2) SDA.</li> <li>8. Likewise, the ET must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts pursuant to s.56A(10) SDA. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.</li> <li>9. Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.</li> <li>10. It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.</li> <li>11. To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since "no discrimination whatsoever" is compatible with the Burden of Proof Directive.</li> <li>12. That requires an ET to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of</li> </ol>		

	Gender	Ethnicity
<p>proof on the balance of probabilities that sex was not a ground for the treatment in question.</p> <p>13. Since the facts necessary to prove an explanation would normally be in the possession of the respondent, an ET would normally expect cogent evidence to discharge that burden of proof. In particular, the ET will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.</p> <p>Source: EHRC, The scope of the Sex Discrimination Act 1975, Proving liability for discrimination  <a href="http://www.equalityhumanrights.com/en/foradvisers/EocLaw/eoclawnenglandwales/Legalframeworkandprocedure/TheScopeoftheSexDiscriminationAct1975/Pages/Provingliabilityfordiscrimination.aspx">http://www.equalityhumanrights.com/en/foradvisers/EocLaw/eoclawnenglandwales/Legalframeworkandprocedure/TheScopeoftheSexDiscriminationAct1975/Pages/Provingliabilityfordiscrimination.aspx</a></p> <p><b>Ethnicity:</b> As a result of the amendments required by the EC Race Directive, the burden of proof used by employment tribunals and courts will vary according to the grounds of the discrimination.</p> <p>Grounds of race or ethnic or national origins [section 54A of the RRA] : If a complainant can establish the facts from which an employment tribunal can conclude that an act of racial discrimination or harassment on grounds of race or ethnic or national origins has occurred, the employer will have to prove that any difference in treatment was not due in any way to discrimination or harassment. If the explanation is inadequate or unsatisfactory, the tribunal must find that unlawful discrimination or harassment has occurred.</p> <p>Source: HREC, Statutory Code of Practice on Racial Equality in Employment, p.25,  <a href="http://www.equalityhumanrights.com/Documents/Race/Employment/Code%20of%20practice%20on%20racial%20equality%20in%20employment.pdf">http://www.equalityhumanrights.com/Documents/Race/Employment/Code%20of%20practice%20on%20racial%20equality%20in%20employment.pdf</a></p>		
<p><b>Indirect discrimination</b></p> <p><i>Main steps</i></p> <p>Can the main steps of the procedure be described as follows?</p> <ol style="list-style-type: none"> <li>1. The employee/claimant has to clearly identify and define the employment practice in question.</li> <li>2. The employee/claimant has to show that the practice <b>has or may have</b> a differentiated impact on one protected group.</li> <li>3. The employer/respondent has the burden of demonstrating that the policy or practice in question is job related for the position in question and consistent with business necessity.</li> <li>4. If the employer/respondent satisfies this requirement, evidence can be supplied on the existence/lack of the existence of a less discriminatory practice</li> </ol> <p>If not, please specify the differences.</p> <p>The wording of the relevant provision is (for race – similar provisions apply in relation to gender): "A person also discriminates against another if ... he applies to that other a provision, criterion or practice which he applies or would apply equally to persons not of the same race or ethnic or national origins as that other, but</p> <ol style="list-style-type: none"> <li>(a) which puts or would put persons of the same race or ethnic or national origin as that other at a particular disadvantage when compared with other persons,</li> <li>(b) which puts that other at that disadvantage, and</li> <li>(c) which he cannot show to be a proportionate means of achieving a legitimate aim.</li> </ol> <p>In step 2 above is the term "has" more accurate than "may have"? In other words, can the potential (possible) impact of the contested employment practice be sufficient for shifting the burden of proof?</p> <p>In step 4 above, if the employer/respondent demonstrates that a practice is consistent with business necessity, then:</p> <ul style="list-style-type: none"> <li>- does it fall to the employee/claimant to demonstrate that a less discriminatory alternative exists that meets the business need but that the employer refuses to adopt it? <b>or</b></li> <li>- does it fall to the employer/respondent to demonstrate that a less discriminatory alternative that meets the business need does not exist?</li> </ul> <p>Other (or any important additional information/comments):</p> <p><i>Typical/standard prima facie evidence</i> to be provided to courts or other relevant bodies, as set by law or established by case law:</p> <p>Direct evidence ( i.e. any written or verbal statement by the employer/respondent), <b>only</b>.</p> <p>No clear legal guidance for indirect evidence (e.g. case-by-case basis only)</p> <p>Use of a distinction criteria that appear to be intrinsically suspicious. Please specify (for example, a requirement to work full-time might be unlawful discrimination against women)</p> <p>Statistical evidence</p> <p>Note: It will be for the tribunal to determine according to the relevant procedural rules what evidence is appropriate in each particular case.</p>	<p>No</p> <p>See above</p> <p>See above</p> <p>See note below</p>	<p>No</p> <p>See above</p> <p>See above</p> <p>See note below</p>



	Gender	Ethnicity
<p><b>Harassment</b> Analysed on a case-by-case basis, by looking at all the circumstances and the context.</p> <p>Other (or any important additional information/comments): The tribunal will consider whether harassment has occurred by reference to the definition e.g. from the Sex Discrimination Act 1975 (as amended): “(1) For the purposes of this Act, a person subjects a woman to harassment if: (a) on the ground of her sex, he engages in unwanted conduct that has the purpose or effect: (i) of violating her dignity, or (ii) of creating an intimidating, hostile, degrading, humiliating or offensive environment for her, (b) he engages in any form of unwanted verbal, non-verbal or physical conduct of a sexual nature that has the purpose or effect: (i) of violating her dignity, or (ii) of creating an intimidating, hostile, degrading, humiliating or offensive environment for her, or (c) on the ground of her rejection of or submission to unwanted conduct of a kind mentioned in paragraph (a) or (b), he treats her less favourably than he would treat her had she not rejected, or submitted to, the conduct. (2) Conduct shall be regarded as having the effect mentioned in sub-paragraph (i) or (ii) of subsection (1)(a) or (b) only if, having regard to all the circumstances, including in particular the perception of the woman, it should reasonably be regarded as having that effect.”</p>		

Table 1.3 Employee compensation and employer penalties

	Gender	Ethnicity
<p>Employee compensation</p> <p><b>Injunctive relief/reinstatement</b> - Always made available to the employee/claimant, but the latter can choose monetary compensation in lieu of relief/reinstatement, or - Always made available to the employee/claimant, without alternative option, or - Always made available to the employee/claimant, but the employer/respondent can choose monetary compensation in lieu of relief/reinstatement, or - Never made available to the employee/claimant.</p> <p>Notes: Set on a case-by-case basis. Sources: EHRC, Taking a race case, Case management and preparation, Completing and submitting the ET1, <a href="http://www.equalityhumanrights.com/en/foradvisers/race/Pages/Casemanagement.aspx#Completing%20and%20submitting%20the%20ET1">http://www.equalityhumanrights.com/en/foradvisers/race/Pages/Casemanagement.aspx#Completing%20and%20submitting%20the%20ET1</a></p> <p><b>Monetary compensation</b> Back pay (please indicate if there is a cap) Reimbursement of lawyer's and attorney's fees and costs In lieu of relief/reinstatement, compensation for future lost earnings (e.g., in case of dismissal, this may correspond to lost earnings until the employee finds a new job): - Floor or minimum (amount): ..... - Cap or maximum (amount): ..... - Average compensation (amount): ..... - Median compensation (amount): .....</p> <p>Compensation for psychological injury: - Floor or minimum (amount): ..... - Cap or maximum (amount): ..... - Average compensation (amount): ..... - Median compensation (amount): .....</p>	See notes below	See notes below

		Gender	Ethnicity
	<p>Notes:</p> <p><b>Statistics from the Employment Tribunals Service on compensation awarded by tribunals, 2005-06</b>  Cases with sex discrimination jurisdictions: median award of £5,546, average award of \$10,807.  Cases with race discrimination jurisdictions: median award of £6,640, average award of \$30,361.  (source: Employment Tribunals Service, Annual Report 2005-06, p.31, <a href="http://www.employmenttribunals.gov.uk/publications/documents/annual_reports/ETSAR_05-06.pdf">http://www.employmenttribunals.gov.uk/publications/documents/annual_reports/ETSAR_05-06.pdf</a>)</p> <p>Under the Sex Discrimination Act 1975,  (1) Where an employment tribunal finds that a complaint presented to it under section 63 is well-founded the tribunal shall make such of the following as it considers just and equitable:  (a) an order declaring the rights of the complainant and the respondent in relation to the act to which the complaint relates;  (b) an order requiring the respondent to pay to the complainant compensation of an amount corresponding to any damages he could have been ordered by a county court or by a sheriff court to pay to the complainant if the complaint had fallen to be dealt with under section 66;  (c) a recommendation that the respondent take within a specified period action appearing to the tribunal to be practicable for the purpose of obviating or reducing the adverse effect on the complainant of any act of discrimination to which the complaint relates.</p> <p>Similar provisions apply in the equivalent race discrimination legislation.</p> <p>The following further provisions apply in respect of successful claims of indirect sex discrimination:  (1B) As respects an unlawful act of discrimination falling within section 1(2)(b) or section 3(1) (b) [indirect discrimination], if the respondent proves that the provision, criterion or practice in question was not applied with the intention of treating the complainant unfavourably on the ground of his sex[or (as the case may be) fulfilment of the condition in section 3(2), an order may be made under subsection (1)(b) only if the employment tribunal:  (a) makes such order under subsection (1)(a) and such recommendation under subsection (1)(c) (if any) as it would have made if it had no power to make an order under subsection (1)(b); and  (b) where it makes an order under subsection (1)(a) or a recommendation under subsection (1)(c) or both, considers that it is just and equitable to make an order under subsection (1)(b) as well.</p> <p>There is no equivalent provision in the race discrimination legislation.</p> <p>The compensation in both sex and race discrimination claims may consist of damages for any expenses, and other losses sustained by the complainant, such as loss of earnings that can be precisely calculated, and also damages for prospective loss of earnings or injury to feelings. <b>There is no statutory maximum on the amount of damages which may be awarded</b> and the tribunal may award interest on the compensation. The tribunal may increase the amount of compensation as follows:  (3) If without reasonable justification the respondent to a complaint fails to comply with a recommendation made by an employment tribunal under subsection (1)(c), then, if they think it just and equitable to do so:  (a) the tribunal may increase the amount of compensation required to be paid to the complainant in respect of the complaint by an order made under subsection (1)(b), or  (b) if an order under subsection (1)(b) was not made, the tribunal may make such an order.</p> <p>The Equal Pay Act 1970 (equal pay between men and women) makes provision for the payment of arrears of remuneration or damages. In England and Wales, a successful claimant is entitled for such payment for up to six years, and in Scotland for up to five years.</p>		

		Gender	Ethnicity
Employer additional penalties and obligations	<b>Civil provisions</b> None Court may order the publicity of the decision - Within the firm (e.g. notices to all employees addressing the violations of a specific charge and advising them of their rights under the laws) - Outside the firm (please indicate: media, trade-unions, etc.) The employer may be required to take corrective or preventive actions to cure the source of the identified discrimination Other (please specify):	False No, but court rulings are publicly available Yes	False No, but court rulings are publicly available Yes
	<b>Penal provisions</b> None Fine (please specify amounts) Prison sentence (please specify lengths, whether it applies only in specific cases and in which cases) Other (please specify):	True No No No	True No No No

Table 1.4 Protection against victimisation (retaliation)

		Gender	Ethnicity
Protected actions	It is prohibited to treat the employee/protected person less favourably (so-called "adverse action") because s/he has (so-called "protected action"): - brought proceedings against discrimination - given evidence or information in connection with any proceedings against discrimination. - participated as a witness in any proceedings against discrimination - Other protected actions (or any important additional information/comments): Under the SDA 1975: Otherwise done anything under or by reference to this Act or the Equal Pay Act 1970 [or sections 62 to 65 of the Pensions Act 1995] in relation to the discriminator or any other person, or alleged that the discriminator or any other person has committed an act which (whether or not the allegation so states) would amount to a contravention of this Act or give rise to a claim under the Equal Pay Act 1970 [or under sections 62 to 65 of the Pensions Act 1995]. Similar provisions (but excluding references to the Equal Pay Act or Pensions Act) are contained in the RRA 1976.	Yes Yes Yes	Yes Yes Yes
Proof of causal connexion	<i>Burden of proof:</i> - i) employee/protected person - ii) employer/respondent within a given lapse of time from the concerned event. Please specify conditions of application and lapse of time. - iii) shift of burden of proof. Please specify main steps. 1. The employee/claimant has to supply prima facie evidence whereby it may be <b>presumed</b> that there has been discrimination. 2. The employer/respondent has the burden of <b>proving</b> that his/her practice is not discriminatory. In cases (i) and (iii), when the causal connexion shall be first shown or established by the employee/protected person: - the link can be demonstrated by evidence that the adverse action occurred shortly after the protected activity (and the employer/respondent was aware of the complainant's protected activity before taking the action), so that the employment relationship is implicitly or explicitly (please specify) protected during a certain period of time (please specify) - other (please specify):	No No Yes	No No Yes
Employee compensation and employer penalty	Compared to provisions described in Table 1.3: - additional employee/protected person compensation - additional employer/respondent penalties	No No	No No

Table 1.5 Relationship with standard labour laws

		Gender	Ethnicity
Labour law and discrimination	According to standard labour law(s) or code, would dismissal solely based on gender or ethnicity considered to be unjust dismissal? If yes, please specify since when. The Employment Rights Act 1996 was amended by the Employment Relations Act 1999 so that it is automatic unfair dismissal for an employer to dismiss a woman for the following reasons: pregnancy, childbirth, maternity or exercising her right to statutory maternity leave. A further amendment made to the Act by the Paternity and Adoption Leave Regulations dismissal for a reason related to paternity leave automatically unfair.	Yes	..
	Is there a provision requiring equal pay for work of equal value in standard labour law(s) or code? If yes, please specify since when. There is such a provision in the Equal Pay Act 1970. There is no such thing as "standard labour law(s) or code".	Yes	..
	Other areas of discrimination covered by standard labour law(s) or code (hiring, promotion, etc...); please specify → Discrimination is covered in the SDA and RRA as indicated above.		
Complaints	Are discrimination complaints concerning dismissals more often lodged under standard labour law(s) or code, than under specific anti-discrimination laws?	No	No
	Are discrimination complaints concerning pay more often lodged under standard labour law(s) or code, than under specific anti-discrimination laws? Discrimination complaints are by definition brought under discrimination law. Complaints about unfair dismissal, on non-discrimination grounds, are brought under relevant employment law provisions.	No	No
Evaluations	Please indicate below references to existing evaluations/studies on the effectiveness of anti-discrimination laws with respect to standard labour law(s):	..	..

Table 1.6 Positive action

		Gender	Ethnicity
Compulsory actions	Are employers <b>required</b> by law to take actions to increase diversity/prevent discrimination?  If yes, what actions are required? - make regular public reports on employment composition in terms of gender or ethnicity - process only anonymous job applications - obligation for large employers to have a person in the HRM department in charge of the employer's anti-discrimination policy (please specify the size threshold of application, if any) - quotas (please specify the areas: e.g. executives in firms above a certain size)  Note: Public authorities in carrying out their functions are required to have due regard to the need to eliminate unlawful discrimination and harassment and to promote equality of opportunity between men and women; and to eliminate unlawful racial discrimination and to promote equality of opportunity and good relations between persons of different racial groups.	No	No
Voluntary actions	Are employers <b>allowed</b> to take actions to increase diversity/prevent discrimination?	Yes	Yes
	If yes, what actions are allowed? - make regular public reports on employment composition in terms of gender or ethnicity	..	..
	- establish a plan to ensure that the employment composition in terms of gender or ethnicity is balanced - quotas (please specify the areas: e.g. executives)	.. No	.. No

		Gender	Ethnicity
	Note: The legislation in this area is very finely balanced and has been subject to interpretation by the courts including the European Court of Justice. <b>Very broadly speaking, in GB domestic legislation an employer may provide training and encouragement for certain groups, provided certain conditions are met</b> (e.g. that such groups are under-represented in the national, regional, local economy or in the employer's workforce).		
Public employers' practices	<p>Do public employers normally take actions to increase diversity/prevent discrimination?</p> <p>If yes, what actions?</p> <ul style="list-style-type: none"> <li>- make regular public reports on employment composition in terms of gender or ethnicity</li> <li>- establish a plan to ensure that the employment composition in terms of gender or ethnicity is balanced</li> <li>- process only anonymous job applications</li> <li>- have at least one person in the HRM department in charge of the employer's anti-discrimination policy</li> <li>- quotas (please specify the areas: e.g. high-rank officials)</li> </ul> <p>Other (or any important additional information/comments):</p>	Information not available	Information not available
Incentives	<p>Is there a policy to increase incentives for employers to increase diversity/prevent discrimination?</p> <p>Policy instruments used:</p> <ul style="list-style-type: none"> <li>- Delivery of "labels" or certificates stating that the employer has a diversity-friendly business/employment practice.</li> <li>- financial incentives to establish a plan to ensure that the employment composition in terms of gender or ethnicity is balanced</li> <li>- financial incentives for having a person in the HRM department in charge of the employer's anti-discrimination policy and/or hiring a consultant to establish a diversity plan.</li> <li>- financial incentives for quotas (please specify the areas: e.g. executives)</li> </ul> <p>Note: The policy is as set out in the law. Employers must take care to ensure that whatever actions they take equate to (lawful) positive action and not (unlawful) positive discrimination.</p>		

**Part 2. Institutional framework: specialised bodies (SB) combating discrimination (e.g. equal treatment bodies)**

Table 2.1 **Activities of SBs not related to individual discrimination cases: Public information and evaluation**<sup>a</sup>

	Gender	Ethnicity
Is there a specialised body (SB) in charge of carrying out some of all of the following public information and policy evaluation functions?	Yes	Yes
The Equality and Human Rights Commission (EHRC) - 1st October 2007 - Non-departmental public body		
This SB has the statutory power to:	Yes	Yes
- run information campaigns to inform the public of their legal rights	Low	Low
<b>in practice</b> , importance of the above mentioned activity in the actual overall workload of the SB	Yes	Yes
- run campaigns to change public opinion	High	High
<b>in practice</b> , importance of the above mentioned activity in the actual overall workload of the SB	Yes	Yes
- publish statistics on discrimination	Low	Low
<b>in practice</b> , importance of the above mentioned activity in the actual overall workload of the SB	Yes	Yes
- carry out evaluations of the legal and institutional anti-discrimination framework	High	High
<b>in practice</b> , importance of the above mentioned activity in the actual overall workload of the SB	Yes	Yes
- make policy recommendations	High	High
<b>in practice</b> , importance of the above mentioned activity in the actual overall workload of the SB	Yes	Yes
- produce codes of good practice for employers	High	High
<b>in practice</b> , importance of the above mentioned activity in the actual overall workload of the SB	Yes	Yes
Other (or any Important additional information/comments):	High	High

Note: a) High/Medium/Low mean above average / close to average / below average, respectively.

Table 2.2 **Activities of SBs not related to individual discrimination cases: Control and correction**<sup>a</sup>

	Gender	Ethnicity
Is there a specialised body (SB) in charge of carrying out some of all of the following control and correction functions?	Yes	Yes
The Equality and Human Rights Commission (EHRC) - 1st October 2007 - Non-departmental public body		
This SB has the statutory power to	Yes	Yes
- randomly conduct formal investigations of companies and organisations.	High	High
<b>in practice</b> , importance of the above mentioned activity in the actual overall workload of the SB	Yes	Yes
- conduct formal investigations of companies and organisation where there is evidence of discrimination.	High	High
<b>in practice</b> , importance of the above mentioned activity in the actual overall workload of the SB	Yes	Yes
- oblige a company or an organisation to change the way it operates when discriminatory practices are found.	High	High
<b>in practice</b> , importance of the above mentioned activity in the actual overall workload of the SB	Yes	Yes
- take legal action against companies or organisations that apply discriminatory practices	Medium	Medium
<b>in practice</b> , importance of the above mentioned activity in the actual overall workload of the SB	Yes	Yes
- take legal action against organisations that attempt to promote discrimination or to instruct others to discriminate.	Medium/Low	Medium/Low
<b>in practice</b> , importance of the above mentioned activity in the actual overall workload of the SB		
Other (or any Important additional information/comments):		

Note: a) High/Medium/Low mean above average / close to average / below average, respectively.

Table 2.3 **Role of SBs in individual discrimination cases**

	<b>Gender</b>	<b>Ethnicity</b>
<p>Is there a specialised body (SB) with specific functions related to individual discrimination cases?</p> <p>- The Equality and Human Rights Commission (EHRC) - 1st October 2007 - Non-departmental public body - The Arbitration, Conciliatory and Advisory Service (ACAS)</p> <p>The EHRC can make arrangements to provide conciliation services but cannot participate in the process. Presently, the EHRC only provides conciliation services in disability cases</p> <p>ACAS is an organisation independent of the ET that has a statutory duty to attempt to resolve (and prevent) industrial disputes between employee and employer, at any stage of the dispute, and in particular, before an ET claim has been made. While operating independently of the Tribunal system, ACAS is normally sent a copy of all claims brought before the Tribunals. Claims are then allocated to a local Conciliation Officers, who will contact both parties and will offer to conciliate, or attempt to negotiate a settlement between parties.</p> <p>If both parties are willing to accept conciliation the Officer will attempt to provide both the claimant and the respondent with impartial advice and assistance in an attempt to find another equitable way to settle the case, other than going to the ET hearing. Conciliation is voluntary so both parties are free to decline or discontinue ACAS assistance at any stage. The Officer has a duty to be impartial and independent. A vital feature of ACAS's service is that of confidentiality. Nothing said by either party to an ACAS officer about the case can be repeated to the ET that eventually deals with the claim without the permission of the party that gave the information. In other words, everything said to the ACAS conciliation officer in connection with the case is treated as "without prejudice" (although this principle will not enable a party to hide genuinely relevant information about a case from the scrutiny of the ET).</p> <p>If ACAS is involved in negotiations, the officer will usually draw up an agreement, with help of parties on issues such as wording. ACAS will contact the ET, providing a copy of the settlement document. The ET will cancel the hearing of the case and record the settlement in the public register. The settlement will be binding on both parties. However, if one of the parties is in breach of the settlement, for example, if its terms are not fulfilled by the respondent and no payment is made, the claimant will be able to continue the case as if the negotiation had not taken place.</p> <p>Sources: EHRC, Legal resource for sex discrimination and equal pay, Step by step guide to sex discrimination claims: alternatives to tribunal, <a href="http://83.137.212.42/sitearchive/eoc/Defaulta4d5.html?page=15503">http://83.137.212.42/sitearchive/eoc/Defaulta4d5.html?page=15503</a> EHRC, Taking a race case, Case management and preparation, Negotiating a settlement with ACAS, <a href="http://www.equalityhumanrights.com/en/foradvisers/race/Pages/Casemanagement.aspx#Negotiating%20a%20settlement%20with%20ACAS">http://www.equalityhumanrights.com/en/foradvisers/race/Pages/Casemanagement.aspx#Negotiating%20a%20settlement%20with%20ACAS</a></p>	Yes	Yes
<p>Was this body created by anti-discrimination laws (or did anti-discrimination laws establish a specific mandate for it)?</p>	EHRC: yes	EHRC: yes
<p><b>Formal linkage between SB activities and court procedures</b></p> <p>Does the SB act as a one-stop shop where claimant can access information, lodge a complaint, receive advice?</p> <p>As soon as a discrimination complaint is brought to court, is the claim formally transmitted to the SB?</p> <p>Discrimination complaints must be lodged with the SB beforehand, which acts as one-stop shop to start the procedure.</p> <p>The SB has the statutory power to provide advice and information to claimants (or both parties) on their legal rights and what options they have.</p> <p><b>In practice</b>, the SB carries on the above mentioned process as soon as it receives a discrimination claim.</p> <p>The SB has the statutory power to provide claimants with legal assistance.</p> <p><b>In practice</b>, SB provides legal assistance to claimants during court proceedings.</p> <p>The SB has the statutory power to provide claimants with legal representation.</p> <p><b>In practice</b>, the SB provides legal representation to claimants during court proceedings.</p> <p><b>Investigation of discrimination claims → EHRC</b></p> <p>The SB has the legal authority to compel people (and in particular, the employer) to provide all of the information it requires to investigate a discrimination claim.</p> <p>Does the court accept evidence from the SB?</p> <p>Does the court accept the SB's evaluation of the validity of the discrimination complaint?</p>	<p>Yes</p> <p>EHRC: no ACAS: yes No</p> <p>Yes</p> <p>Yes, power (duty)/ in many cases Yes</p> <p>Yes, power (duty)/ in many cases Yes</p> <p>EHRC: yes, duty/ in few cases</p> <p>No</p> <p>No</p> <p>No</p>	<p>Yes</p> <p>EHRC: no ACAS: yes No</p> <p>Yes</p> <p>Yes, power (duty)/ in many cases Yes</p> <p>Yes, power (duty)/ in many cases Yes</p> <p>EHRC: yes, duty/ in few cases</p> <p>No</p> <p>No</p> <p>No</p>

	<b>Gender</b>	<b>Ethnicity</b>
<b>In practice</b> , the SB formally investigates discrimination claims.	Yes, power (duty)/ in many cases	Yes, power (duty)/ in many cases
Please indicate below the main tools the SB uses to investigate a discrimination claim: See also Table 1.2, questionnaire procedures		
Any employer's failure to provide the requested information to the SB will: - have no implication for the court ruling. - potentially be used to draw inferences on discrimination if the case is brought before court.	No Yes	No Yes
Any employer's failure to comply with the code of practices issued by the SB (or other relevant body) will: - have no implication for the court ruling. - potentially be used to draw inferences on discrimination if the case is brought before court.	No Yes	No Yes
Important additional information/comments on the investigation procedure: Courts can take into account the recommendations in statutory Codes of Practice in any matter relevant to the proceedings.		
<b>Mediation/conciliation procedure → Conciliation through ACAS</b>		
The SB has the statutory power to help both parties to resolve the dispute through a mediation/conciliation procedure.	Yes	Yes
Mediation/conciliation is a free and voluntary process for both parties.	Yes	Yes
<b>In practice</b> , the SB carries out mediation/conciliation procedures, so that a court ruling may not be necessary.	Yes	Yes
The mediation/conciliation procedure is <b>usually</b> initiated: - before the case is brought to court - before any formal investigation starts or at an early stage of the process Note: Formal investigation has a particular meaning under the legislation and would not usually focus on an individual incident of discrimination - after any investigation has produced primary evidence of discrimination (but before a litigation decision has been reached) Note: It may be necessary to commence litigation to protect the individual's legal rights.	At any stage of the dispute	At any stage of the dispute
The SB acts as a neutral third party assisting both opposing parties in the mediation/conciliation procedure.	Yes	Yes
The mediation/conciliation procedure is confidential: no details of the discussion taking place in its course can be repeated to court, nor are made public. The same rule applies to the terms of the settlement.	Yes	Yes
If the parties, including the SB, reach settlement agreement, the latter is legally binding and the charge is dismissed.	Yes	Yes
The SB secures the enforcement of settlement agreements reached under its assistance and/or responsibility.	No	No



### Part 3. Statistics on mediation/conciliation procedures and court cases

→ see Annual Reports of the Employment Tribunals Service

#### Main additional references

**Equality and Human Rights Commission website**, and in particular:

What we do? – Enforcing the law,

<http://www.equalityhumanrights.com/en/aboutus/whatwedo/pages/whatwedo.aspx#Enforcing%20the%20law>

Your Rights – In what settings does racial discrimination occur?

<http://www.equalityhumanrights.com/en/yourrights/equalityanddiscrimination/race/Pages/Inwhatsettingsdoesracialdiscriminationoccur.aspx>

Taking a race case, Employment: who is protected?

<http://www.equalityhumanrights.com/en/foradvisers/race/Pages/employmentwhoisprotected.aspx>

Taking a race case, Case management and preparation, The RR65 Questionnaire Procedure,

<http://www.equalityhumanrights.com/en/foradvisers/race/Pages/Casemanagement.aspx#The%20RR65%20questionnaire%20procedure>

Taking a race case, Case management and preparation, Completing and submitting the ET1,

<http://www.equalityhumanrights.com/en/foradvisers/race/Pages/Casemanagement.aspx#Completing%20and%20submitting%20the%20ET1>

Taking a race case, Case management and preparation, Negotiating a settlement with ACAS,

<http://www.equalityhumanrights.com/en/foradvisers/race/Pages/Casemanagement.aspx#Negotiating%20a%20settlement%20with%20ACAS>

Statutory Code of Practice on Racial Equality in Employment

<http://www.equalityhumanrights.com/Documents/Race/Employment/Code%20of%20practice%20on%20racial%20equality%20in%20employment.pdf>

The scope of the Sex Discrimination Act 1975, Proving liability for discrimination

<http://www.equalityhumanrights.com/en/foradvisers/EocLaw/eoclawenglandwales/Legalframeworkandprocedure/ThescopeoftheSexDiscriminationAct1975/Pages/Provingliabilityfordiscrimination.aspx>

Legal resource for sex discrimination and equal pay, Step by step guide to sex discrimination claims: using the questionnaire procedure form SD74, <http://83.137.212.42/sitearchive/eoc/Defaultebc5.html?page=15505>

Legal resource for sex discrimination and equal pay, Step by step guide to sex discrimination claims: alternatives to tribunal, <http://83.137.212.42/sitearchive/eoc/Defaulta4d5.html?page=15503>

**Employment Tribunals Service**, Annual Report 2005-06,

[http://www.employmenttribunals.gov.uk/publications/documents/annual\\_reports/ETSAR05-06.pdf](http://www.employmenttribunals.gov.uk/publications/documents/annual_reports/ETSAR05-06.pdf)

## UNITED STATES

### Part 1. Legal framework for employment discrimination

#### Main anti-discrimination laws

- Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* (major amendments include the Pregnancy Discrimination Act of 1978 and the Civil Rights Act of 1991). Note: most states and many other political jurisdictions (counties, cities, towns, etc.) have separate laws addressing employment discrimination.
- Federal Executive Order 11246, 30 Fed. Reg. 12319, as amended, and the regulations promulgated at 41 C.F.R. Part 60-1 through 60-50, which prohibit all non-exempt Government contractors and subcontractors from discriminating in employment, and requires them to take affirmative action to ensure that employees and applicants for employment are treated without regard to race, color, religion, sex, or national origin.

For the purposes of this document, references to “contractors” would include “subcontractors” as provided in the definition of “contractor” at 41 C.F.R. 60-1.3.

#### Relevant courts

- Administrative processing following a charge filed with either the US Equal Employment Opportunity Commission (EEOC) or state/local fair employment practice agency. Thereafter, jurisdiction is in US Federal District Courts or state courts, followed by appeals to intermediate and final appellate courts, including the US Supreme Court.
- The Office of Federal Contract Compliance Programs (OFCCP) within the U.S. Department of Labor is charged with enforcing Executive Order 11246. OFCCP initiates compliance reviews and also investigates complaints filed by individuals that raise “class” or “pattern or practice” allegations. OFCCP refers individual complaints filed under the Executive Order to EEOC for handling under Title VII. If OFCCP finds deficiencies in a contractor’s compliance, OFCCP attempts to secure compliance through conciliation. If OFCCP is unable to reach an agreement with the contractor, the Office of the Solicitor may file a complaint with DOL’s Office of Administrative Law Judges. After the Administrative Law Judge issues a recommended decision, the parties may appeal to the Administrative Review Board for a final Administrative Order. The contractor may seek judicial review of an adverse final agency decision in Federal district court.

#### Legal scope/definition of the (hereinafter) so-called gender and ethnicity grounds:

- Gender: Sex, explicitly including: pregnancy, childbirth or related medical conditions, breastfeeding, family responsibilities and marital status.
- Ethnicity: Race, colour, descent, national or ethnic origin

#### Other (or any important additional information/comments):

- Allegations of discrimination based on breastfeeding, family responsibilities, and marital status not expressly covered in Title VII. State or local laws may expressly address and disallow these bases for making employment decisions.
- Under Title VII and Executive Order 11246, allegations of sex discrimination may also pertain to sexual harassment.
- Title VII also prohibits religious discrimination.

**Note: the following responses reflect federal law. Each of the 50 states, the District of Columbia, and Puerto Rico have separate laws addressing many of these same matters. Some of these laws are similar to the federal law and some are different. Moreover, even where the laws are similar, state and local courts may interpret them differently from their federal counterpart.**

Table 1.1 General information

		Gender	Ethnicity
Type of discrimination	<p>Direct discrimination</p> <p>Indirect discrimination, i.e. where a provision criterion or practice is applied to all employees but puts one protected group at a particular disadvantage and cannot be shown to be a proportionate means of meeting a legitimate aim.</p> <p>Pressure and instruction to discriminate</p> <p>Harassment</p> <p>Other/comments: Retaliation</p>	<p>Yes</p> <p>Yes</p> <p>Yes</p> <p>Yes</p> <p>Yes</p>	<p>Yes</p> <p>Yes</p> <p>Yes</p> <p>Yes</p> <p>Yes</p>
Areas of concern	<p>Hiring process</p> <p>Wage</p> <p>Type of employment contract (permanent vs. fixed term)</p> <p>Working time (atypical work schedule, part-time vs. full-time)</p> <p>Promotion</p> <p>Job and vocational training</p> <p>Transfer</p> <p>Redundancy and dismissal</p> <p>Other/comments: Title VII and Executive Order 11246 generally bar discrimination in the "terms, conditions, or privileges of employment."</p>	<p>Yes</p> <p>Yes</p> <p>Yes</p> <p>Yes</p> <p>Yes</p> <p>Yes</p> <p>Yes</p> <p>Yes</p>	<p>Yes</p> <p>Yes</p> <p>Yes</p> <p>Yes</p> <p>Yes</p> <p>Yes</p> <p>Yes</p> <p>Yes</p>
Coverage	<p>Private sector</p> <p>Public sector</p> <p>Employment agencies</p> <p>Trade unions (as regards membership)</p> <p>Other (please indicate also exemptions – e.g. firms below a certain threshold – as well any important additional information/comments):</p> <p>Title VII covers employers with 15 or more employees; most state/local laws cover smaller employers.</p> <p>Executive Order 11246's prohibition against discrimination applies to Government contracts or subcontracts that exceed \$10,000.00. The Executive Order and its regulations exempt from coverage certain contractors, such as those that perform work outside the US by employees who were not recruited within the US. However, Government bills of lading, contracts with depositories of Federal funds, and contracts with financial institutions which are both issuing and paying agents of U.S. saving bonds and savings notes are covered regardless of the amount.</p> <p>Executive Order 11246 also requires that a non-construction contractor or subcontractor with 50 or more employees develop and update annually a written affirmative action program within 120 days of entering into a contract of \$50,000 or more with the Government. The Executive Order covers employment agencies and trade unions only if they hold covered Government contracts or subcontracts.</p> <p>Regarding trade unions, Title VII also prohibits discrimination on job referrals from hiring halls or through other mechanisms.</p> <p>Title VII prohibits discrimination by joint labour-management apprentice training programs.</p>	<p>Yes</p> <p>Yes</p> <p>Yes</p> <p>Yes</p>	<p>Yes</p> <p>Yes</p> <p>Yes</p> <p>Yes</p>
Legal assistance other than private lawyer	<p>Specialised body (e.g. equal treatment body)</p> <p>Any relevant public utility institutions and associations</p> <p>Trade unions (please indicate if it is for their members only)</p> <p>Other (or any important additional information/comments):</p> <p>EEOC investigates charges filed against covered entities. If it finds "reasonable cause" to believe discrimination occurred, it will attempt conciliation between the parties.</p> <p>Some union contracts or employment handbooks provide for mediation, arbitration, or other alternate form of dispute resolution. These agreements <u>may</u> permit subsequent review by a state/federal court.</p> <p>There also are many private NGOs that provide assistance to individuals who allege discrimination. Many of these are gender- or ethnic-based, in that they were established to promote and defend the rights and interests of specific groups.</p>	<p>Yes</p> <p>Yes/No</p> <p>Yes</p>	<p>Yes</p> <p>Yes/No</p> <p>Yes</p>

		Gender	Ethnicity
	OFCCP conducts compliance reviews and class complaint investigations to determine whether Federal contractors and subcontractors are complying with their non-discrimination and affirmative action obligations. If OFCCP finds that a violation exists, it will attempt conciliation directly with the contractor. If conciliation cannot be reached, the Office of the Solicitor may file a complaint with the Office of Administrative Law Judges.		
Legal representation other than private lawyer	<p>Specialised body (e.g. equal treatment body)</p> <p>Any relevant public utility institutions and associations</p> <p>Trade-unions (please indicate if it is for their members only)</p> <p>Other (or any important additional information/comments):</p> <p>The EEOC has the right to file suit in federal district court on behalf of a charging party alleging discrimination after it finds reasonable cause to believe discrimination occurred and after efforts to conciliate the dispute have failed. The EEOC files approximately 400 such law suits/year, representing about 40 percents of charges as to which the EEOC has found reasonable cause to find discrimination and following unsuccessful conciliation of the charge.</p> <p>Trade unions and other NGOs also are permitted to represent individuals alleging discrimination, though they file few such lawsuits.</p> <p>Title VII permits recovery of attorney's fees by the individual if he or she prevails in the lawsuit. For this reason, most litigants are represented by private counsel.</p> <p>There is no private right of action under Executive Order 11246. If OFCCP cannot secure voluntary compliance, the agency may refer the case to the Office of Solicitor for enforcement. The Office of the Solicitor represents OFCCP, not the victims, in the administrative enforcement action. Victims may intervene in the administrative proceeding and may retain private counsel.</p>	<p>Yes</p> <p>Yes</p> <p>Yes</p>	<p>Yes</p> <p>Yes</p> <p>Yes</p>

Table 1.2 Burden of proof

		Gender	Ethnicity
Burden of proof	Employee/claimant Shift of burden of proof (the employee/claimant provides facts, then the employer/respondent has to provide proofs – see below for a detailed description)	<p>Yes</p> <p>Yes</p>	<p>Yes</p> <p>Yes</p>
Additional information in the case of burden of proof on the claimant	<p><i>Standard of proof</i></p> <p>What is the relevant standard of proof that should be applied, as set by law or established by case law? <b>Case law</b></p> <ul style="list-style-type: none"> <li>- Beyond a reasonable doubt (such as the typical standard for criminal cases)</li> <li>- On the balance of probabilities (such as the typical standard for civil disputes)</li> <li>- Other (please specify): In US, the standard is articulated as "preponderance of the evidence."</li> </ul> <p><i>Typical/standard evidence</i> admissible in courts (or other relevant bodies), as set by law or established by case law: <b>Case law</b></p> <ul style="list-style-type: none"> <li>- Direct evidence (i.e. any written or verbal statement by the employer/respondent), <b>only</b>.</li> <li>- No clear legal guidance for indirect evidence (e.g. case-by-case basis only)</li> </ul> <p><b>Note: To clarify, the Courts have established a standard for use of indirect evidence, but each case is decided on its own merits.</b></p> <ul style="list-style-type: none"> <li>- Statistical evidence</li> <li>- Situation testing</li> <li>- Other indirect evidence (or any important additional information/comments): Use of testers is permitted. Use of testers is rare; government agencies do not engage testers in employment discrimination cases. Rather, to the extent testers are used, it is done by NGOs.</li> </ul>	<p>No</p> <p>Yes</p> <p>Yes</p> <p>Yes/No</p> <p>False</p> <p>Yes</p> <p>Yes</p>	<p>No</p> <p>Yes</p> <p>Yes</p> <p>Yes/No</p> <p>False</p> <p>Yes</p> <p>Yes</p>

		Gender	Ethnicity
Additional information in the case of shift of burden of proof	<p><b>Direct discrimination</b></p> <p><i>Main steps</i></p> <p>Can the main steps of the procedure be described as follows?</p> <p>1. The employee/claimant has to supply prima facie evidence whereby it may be <b>presumed</b> that there has been discrimination.</p> <p>2. The employer/respondent has the burden of <b>proving</b> that his/her practice is not discriminatory.</p>	No	No
	<p>If not, please specify the procedures.</p> <p><b>Note:</b> While the above steps generally describe the procedures, the federal procedures are as follows. Direct evidence is evidence that establishes a specific link between the alleged discriminatory animus and the challenged decision, sufficient to support a finding by a reasonable fact finder that an illegitimate criterion actually motivated the employment decision. It includes evidence of conduct or statements by persons involved in the decision making process that may be viewed as directly reflecting the alleged discriminatory attitude, where it is sufficient to support an inference that discriminatory attitude more likely than not was a motivating factor. The employer's burden is to present sufficient evidence that rebuts the evidence the claimant has presented.</p>		
	<p>In practice, is presumption – as opposed to stronger evidence of discrimination – sufficient to shift the burden of proof? <b>Preponderance is a greater burden of proof than mere presumption.</b></p> <p><i>Typical/standard prima facie evidence</i> admissible in courts (or other relevant bodies), as set by law or established by case law:</p> <ul style="list-style-type: none"> <li>- Direct evidence (i.e. any written or verbal statement by the employer/respondent), <b>only.</b></li> <li>- No clear legal guidance for indirect evidence (e.g. case-by-case basis only)</li> </ul> <p><b>Note: To clarify, the Courts have established a standard for use of indirect evidence, but each case is decided on its own merits.</b></p> <ul style="list-style-type: none"> <li>- Statistical evidence</li> <li>- Situation testing</li> </ul>	No False	No False
	<ul style="list-style-type: none"> <li>- Other indirect evidence (or any important additional information/comments):</li> </ul> <p>Although statutes do not specify the legal standards used to determine whether discrimination occurred, it would not be correct to state that “legal guidance” is determined case-by-case. Rather, case law has established the standards that the parties and courts use to make this determination.</p> <p>The claimant has the initial burden of establishing membership in the protected group; qualification for the position or adequate performance in the job; an adverse employment action; replacement by someone belonging to a different group.</p> <p>Once the claimant establishes a “prima facie” case of discrimination, the burden of production – of presenting reasons for its actions – shifts to the employer. Once the employer articulates a defense, the claimant must show that the employer's reason is not worthy of belief: that it is not credible or is a pretext for discrimination.</p> <p>In class disparate treatment discrimination cases, the plaintiff (EEOC or individuals in a Title VII case, OFCCP in an Executive Order case) has the initial burden of establishing “discriminatory intent” i.e., that discrimination was the company's standard operating procedure, the regular rather than the unusual practice. OFCCP (and plaintiffs in general) may show a pattern and practice of disparate treatment through statistics or a combination of statistical evidence and evidence of general policies, specific instances of discrimination, or other anecdotal evidence. Typically, the statistical disparity establishes a prima facie case if it is statistically significant at two or more standard deviations. If the plaintiff establishes its “prima facie” case of disparate treatment, the burden of production shifts to the defendant for rebuttal. The defendant may rebut by attacking the statistical evidence presented by the claimant or provide a legitimate non-discriminatory reason for the observed disparity. The plaintiff then is given an opportunity to prove that the articulated reason is merely a pretext for discrimination.</p>	Yes Yes	Yes Yes

		Gender	Ethnicity
	<p><b>Indirect discrimination</b></p> <p><i>Main steps</i>            Can the main steps of the procedure be described as follows?            1. The employee/claimant has to clearly identify and define the employment practice in question.            2. The employee/claimant has to show that the practice <b>has or may have</b> a differentiated impact on one protected group.            3. The employer/respondent has the burden of demonstrating that the policy or practice in question is job related for the position in question and consistent with business necessity.            4. If the employer/respondent satisfies this requirement, evidence can be supplied on the existence/lack of the existence of a less discriminatory practice</p> <p>Note: While the above steps generally describe the procedures, the federal procedures are as follows. Under disparate impact discrimination cases, OFCCP (or another plaintiff) has the initial burden of establishing that a facially neutral practice has an adverse impact on a protected class with respect to hiring, promotion, compensation, or termination OFCCP (or another plaintiff) is not required to show "discriminatory intent" by the contractor. OFCCP (or another plaintiff) may show a pattern and practice of disparate impact through statistical evidence. If OFCCP (or another plaintiff) establishes its "prima facie" case of disparate impact, the burden of production shifts to the defendant to rebut by attacking the statistical evidence presented by OFCCP (or another plaintiff) or by providing evidence that the challenged practice has a business necessity that bears a demonstrable relationship to successful performance of the jobs for which it was used. OFCCP (or another plaintiff) is then given an opportunity to show that other selection procedures exist that would serve the defendant's legitimate business interests without causing an adverse impact.</p> <p>In step 2 above is the term "has" more accurate than "may have"? In other words, can the potential (possible) impact of the contested employment practice be sufficient for shifting the burden of proof? <b>Note: "may have" would be inaccurate.</b></p> <p>In step 4 above, if the employer/respondent demonstrates that a practice is consistent with business necessity, then:            - does it fall to the employee/claimant to demonstrate that a less discriminatory alternative exists that meets the business need but that the employer refuses to adopt it? <b>Or</b>            - does it fall to the employer/respondent to demonstrate that a less discriminatory alternative that meets the business need does not exist?</p> <p>Other (or any important additional information/comments):            As long as the practice at issue is "neutral" on its face, the claimant will have to show that it has a disparate impact. If the practice clearly was not neutral (e.g., only men or only women would qualify), then it would constitute disparate treatment and the burden might be with the employer once the claimant presented evidence regarding the existence of the policy.</p> <p><i>Typical/standard prima facie evidence</i> to be provided to courts or other relevant bodies, as set by law or established by case law: <b>Case law</b></p> <ul style="list-style-type: none"> <li>- Direct evidence (i.e. any written or verbal statement by the employer/respondent), <b>only.</b></li> <li>- No clear legal guidance for indirect evidence (e.g. case-by-case basis only)</li> <li>- Use of a distinction criteria that appear to be intrinsically suspicious. Please specify (for example, a requirement to work full-time might be unlawful discrimination against women)</li> <li>- Statistical evidence</li> <li>- Other indirect evidence (or any important additional information/comments):            Courts have found that in certain situations requirements such as having completed high school may be discriminatory because of their disparate or adverse impact. Other neutral criteria that may fit the category of "intrinsically suspicious" include use of arrest and conviction information, credit history information, height and weight requirements, physical fitness requirements, language abilities and levels of fluency in English, and various types of tests used in the hiring or promotion process.</li> </ul>	Yes	Yes
		Yes	Yes
		Yes	Yes
		No	No
		No	No
		False	False
		Yes	Yes
		Yes	Yes
		Yes	Yes
	<p><b>Harassment</b></p> <p>Analysed on a case-by-case basis, by looking at all the circumstances and the context.</p>	Yes	Yes

Table 1.3 Employee compensation and employer penalties

		Gender	Ethnicity
Employee compensation	<p><b>Injunctive relief/reinstatement</b></p> <ul style="list-style-type: none"> <li>- Always made available to the employee/claimant, but the latter can choose monetary compensation in lieu of relief/reinstatement, or</li> <li>- Always made available to the employee/claimant, without alternative option, or</li> <li>- Always made available to the employee/claimant, but the employer/respondent can choose monetary compensation in lieu of relief/reinstatement, or</li> <li>- Never made available to the employee/claimant.</li> </ul>	No	No
	<p>Notes:</p> <p>In rare cases, a court might award “front pay” in lieu of reinstatement where the employment relationship is irretrievably broken between the parties. As a general rule, a claimant cannot reject reinstatement and receive compensation in its place. An unreasonable rejection of reinstatement will operate to cut off the back pay entitlement period.</p> <p>The use of the word “always” in these questions requires that we answer “no.” Title VII requires that relief provided to a prevailing complainant be structured specifically to the facts of the case. A court <u>may</u> enjoin the employer from engaging in a practice found discriminatory; provide back pay; order hiring, promotion, reinstatement or other job-specific relief; or any other relief that the court deems appropriate. The same applies under Executive Order 11246.</p>	No	No
	<p><b>Monetary compensation</b></p> <p>Back pay (please indicate if there is a cap)</p> <p>General rule: no cap on back pay, except that a claimant cannot receive back pay for the period that falls outside of the statute of limitations. Also note that a claimant is entitled to interest on back pay. OFCCP does not have a statute of limitations for enforcement actions that arise from compliance reviews. In those cases, OFCCP will only seek back pay along with interest for the two-year period that precedes the letter advising that the contractor has been scheduled for review.</p>	Yes	Yes
	<p>Reimbursement of lawyer’s and attorney’s fees and costs. Yes, prevailing claimant only</p> <p>In lieu of relief/reinstatement, compensation for future lost earnings (e.g., in case of dismissal, this may correspond to lost earnings until the employee finds a new job):</p> <ul style="list-style-type: none"> <li>- Floor or minimum (amount): ...no floor.....</li> <li>- Cap or maximum (amount): .....no cap.....</li> <li>- Average compensation (amount): .....</li> <li>- Median compensation (amount): .....</li> </ul> <p>See comment above on “front pay.” Courts usually impose a time limit on front pay, although there are a few cases where front pay extended to the claimant’s normal retirement date (age 65).</p> <p>Compensation for psychological injury:</p> <ul style="list-style-type: none"> <li>- Floor or minimum (amount): .....</li> <li>- Cap or maximum (amount): ...see note below .....</li> <li>- Average compensation (amount): .....</li> <li>- Median compensation (amount): .....</li> </ul> <p>Note: total compensation for psychological damages (in the US this falls into the category of “compensatory damages”) plus punitive damages is capped by law at different levels, depending on the size of the employer (as measured by number of employees): 15-100 employees – \$50,000; 101-200 employees – \$100,000; 201-500 employees – \$200,000; more than 500 employees – \$300,000. A separate statute, 42 USC § 1981, which covers ethnicity discrimination (as a form of race discrimination) does not have caps on damages. OFCCP is not authorized to seek compensatory damages for psychological injury.</p>	Yes	Yes

		Gender	Ethnicity
Employer additional penalties and obligations	<b>Civil provisions</b>		
	None	False	False
	Court may order the publicity of the decision:		
	- Within the firm (e.g. notices to all employees addressing the violations of a specific charge and advising them of their rights under the laws) → <b>Posting of a notice regarding the action and the relief provided is commonly part of the resolution of the case.</b>	Yes	Yes
	- Outside the firm (please indicate: media, trade-unions, etc.)	Yes	Yes
	The employer may be required to take corrective or preventive actions to cure the source of the identified discrimination	Yes	Yes
	Other (please specify):	No	No
	Other important additional information/comments:		
	<b>The EEOC and OFCCP generally issue a press release when they file a lawsuit and when the lawsuit is completed, either by favourable court decision or settlement.</b> Note: Court decisions are available for free in law and other libraries and for a fee through subscription services or on-line services.		
	<b>Penal provisions</b>		
None	True	True	
Fine (please specify amounts)	No	No	
Prison sentence (please specify lengths, whether it applies only in specific cases and in which cases)	No	No	
Other (please specify):	No	No	
	<b>Under Executive Order 11246, OFCCP may seek contract cancellation, the debarment of the contractor from receiving future Government contracts and/or modification or extension of existing contracts. Debarment may be imposed for an indefinite term or for a fixed minimum period of at least six months.</b>		

Table 1.4 Protection against victimisation (retaliation)

		Gender	Ethnicity
Protected actions	It is prohibited to treat the employee/protected person less favourably (so-called "adverse action") because s/he has (so-called "protected action"):		
	- brought proceedings against discrimination	Yes	Yes
	- given evidence or information in connection with any proceedings against discrimination.	Yes	Yes
	- participated as a witness in any proceedings against discrimination	Yes	Yes
	- Other protected actions (or any important additional information/comments):		
	<b>Prohibits adverse employment action against an employee who <u>opposes</u> an action or conduct the individual reasonably believes is discriminatory.</b>		
Proof of causal connexion	<i>Burden of proof:</i>		
	- i) employee/protected person	Yes	Yes
	- ii) employer/respondent within a given lapse of time from the concerned event. Please specify conditions of application and lapse of time.	No	No
	- iii) shift of burden of proof. Please specify main steps.	No	No
	In cases (i) and (iii), when the causal connexion shall be first shown or established by the employee/protected person:		
	- the link can be demonstrated by evidence that the adverse action occurred shortly after the protected activity (and the employer/respondent was aware of the complainant's protected activity before taking the action), so that the employment relationship is implicitly or explicitly (please specify) protected during a certain period of time (please specify)	No	No
	- other (please specify):		
	<b>Time is an element in the proof of a causal connection between the employee's action and the employer's reaction.</b> But under Title VII, there is no automatic finding of discriminatory conduct based solely on time. Rather, the claimant retains the burden of proving the connection. The closer the temporal proximity, the stronger the inference of discrimination. Once the claimant establishes a prima facie case of retaliation, the burden	Yes	Yes



		Gender	Ethnicity
	of presenting evidence to the contrary shifts to the employer. If the employer articulates a reason for its actions, the claimant must show that the reason is a pretext for discrimination.		
Employee compensation and employer penalty	Compared to provisions described in Table 1.3: - Additional employee/protected person compensation → <b>A prevailing claimant may receive retroactive seniority, in addition to other remedies noted elsewhere.</b> - Additional employer/respondent penalties		

Table 1.5 Relationship with standard labour laws

		Gender	Ethnicity
Labour law and discrimination	According to standard labour law(s) or code, would dismissal solely based on gender or ethnicity considered to be unjust dismissal?  Is there a provision requiring equal pay for work of equal value in standard labour law(s) or code? If yes, please specify since when: <b>Since June 10, 1963.</b>  Other areas of discrimination covered by standard labour law(s) or code (hiring, promotion, etc...); please specify  There are also non-discrimination laws that prohibit discrimination on the basis of race, color, religion, sex, disability, or national origin in programs or activities financially assisted or conducted by federal executive agencies. Examples of such laws include: Title VI of the Civil Rights Act of 1964, Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, Section 188 of the Workforce Investment Act of 1988, Title II, Subtitle A, of the Americans with Disabilities Act, and Executive Order 13160.	N/A  Yes	N/A  No
Complaints	Are discrimination complaints concerning dismissals more often lodged under standard labour law(s) or code, than under specific anti-discrimination laws?  Are discrimination complaints concerning pay more often lodged under standard labour law(s) or code, than under specific anti-discrimination laws?  Other important additional information/comments: The Equal Pay Act ("EPA") only applies to compensation differences between male and female workers. Most complaints alleging discrimination in compensation are lodged under Title VII and not under the EPA. The elements of proof differ (under the EPA, the claimant must show that the jobs are substantially equal and that they are performed in substantially similar working conditions), and different defences also apply.	No  No	No  No
Evaluations	Please indicate below references to existing evaluations/studies on the effectiveness of anti-discrimination laws with respect to standard labour law(s):	N/A	N/A

Table 1.6 **Positive action**

		<b>Gender</b>	<b>Ethnicity</b>
Compulsory actions	Are employers <b>required</b> by law to take actions to increase diversity/prevent discrimination?	Yes	Yes
	If yes, what actions are required? - make regular public reports on employment composition in terms of gender or ethnicity - process only anonymous job applications - obligation for large employers to have a person in the HRM department in charge of the employer's anti-discrimination policy (please specify the size threshold of application, if any)	No No No	No No No
	Executive Order 11246 requires that contractors that meet the threshold requirements for written affirmative action programs must assign responsibility and accountability to an official of the organization to ensure that equal employment opportunity and the program are being implemented.  - quotas (please specify the areas: e.g. executives in firms above a certain size)	No	No
	Other (or any important additional information/comments): Employers are required by law to prevent discrimination. Federal Executive Order 11246 and its implementing regulations requires businesses that contract with the government for goods, services, or construction services to engage in affirmative efforts to recruit, hire, train, and promote women and members of minority groups that may be underrepresented in a particular area of in the employer's workforce when that workforce is compared with the workforce with requisite skills in the relevant hiring area. These affirmative action obligations differ from quotas in that they do not establish mandatory targets but rather set goals and timetables for achieving a better balanced workforce. Employers must engage in good faith efforts to achieve the goals that these plans establish.		
Voluntary actions	Are employers <b>allowed</b> to take actions to increase diversity/prevent discrimination?	Yes	Yes
	If yes, what actions are allowed? - make regular public reports on employment composition in terms of gender or ethnicity - establish a plan to ensure that the employment composition in terms of gender or ethnicity is balanced - quotas (please specify the areas: e.g. executives)	Yes Yes No	Yes Yes No
	Other (or any important additional information/comments): Employers must be careful when implementing voluntary affirmative action plans that they not engage in discrimination against White or male applicants or employees in an effort to achieve ethnic or gender balance. Federal law protects White and male employees on the same bases as it protects women and ethnic minorities.		
Public employers' practices	Do public employers normally take actions to increase diversity/prevent discrimination?	Yes	Yes
	If yes, what actions? - make regular public reports on employment composition in terms of gender or ethnicity - establish a plan to ensure that the employment composition in terms of gender or ethnicity is balanced - process only anonymous job applications - have at least one person in the HRM department in charge of the employer's anti-discrimination policy - quotas (please specify the areas: e.g. high-rank officials)	Yes Yes No Yes No	Yes Yes No Yes No
	Other (or any important additional information/comments): The goal of US federal government is to act as a "model employer" in the area of nondiscrimination. The EEOC collects information from federal departments and agencies and annually publishes data concerning the employment of minorities and women. The departments and agencies also develop affirmative action plans designed to identify areas of underutilization and establish hiring and promotion goals, but they do not create quotas.		

		<b>Gender</b>	<b>Ethnicity</b>
Incentives	Is there a policy to increase incentives for employers to increase diversity/prevent discrimination?	No	No
	Policy instruments used:		
	- Delivery of "labels" or certificates stating that the employer has a diversity-friendly business/employment practice.	No	No
	- financial incentives to establish a plan to ensure that the employment composition in terms of gender or ethnicity is balanced	No	No
	- financial incentives for processing only anonymous job applications	No	No
- financial incentives for having a person in the HRM department in charge of the employer's anti-discrimination policy and/or hiring a consultant to establish a diversity plan.	No	No	
- financial incentives for quotas (please specify the areas: e.g. executives)	No	No	
Other (or any important additional information/comments):	Federal departments and agencies present "awards" to employers for best practices or other specific achievements. Some awards are given annually; others are given on an as merited basis. But no employer would be deemed "diversity-friendly" by the government.		

**Part 2. Institutional framework: specialised bodies (SB) combating discrimination (e.g. equal treatment bodies)**

Table 2.1 **Activities of SBs not related to individual discrimination cases: Public information and evaluation**<sup>a</sup>

	<b>Gender</b>	<b>Ethnicity</b>
Is there a specialised body (SB) in charge of carrying out some of all of the following public information and policy evaluation functions?	Yes	Yes
<b>Equal Employment Opportunity Commission</b> , a federal executive agency, led by a bi-partisan commission including a Chair, Vice-Chair, and three Commissioners. By law, no more than 3 members of the EEOC may belong to the same party as the President and the other 2 must be members of the other party. The Commission began operations on July 2, 1965.		
<b>The Office of Federal Contract Compliance Programs (OFCCP)</b> was formed in 1965 as the Office of Federal Contract Compliance. Shortly after it became part of the DOL's Employment Standards Administration in 1971, the word "Programs" was added to the title. In 1978 all government contract compliance functions were consolidated into the Department of Labor under OFCCP. The Deputy Assistant Secretary for Federal Contract Compliance Programs serves as the director of OFCCP, and is appointed by the President.		
This SB has the statutory power to:		
- run information campaigns to inform the public of their legal rights <b>in practice</b> , importance of the above mentioned activity in the actual overall workload	Yes High	Yes High
- run campaigns to change public opinion <b>in practice</b> , importance of the above mentioned activity in the actual overall workload	No n/a	No n/a
- publish statistics on discrimination <b>in practice</b> , importance of the above mentioned activity in the actual overall workload	Yes Medium	Yes Medium
- carry out evaluations of the legal and institutional anti-discrimination framework <b>in practice</b> , importance of the above mentioned activity in the actual overall workload	Yes Medium	Yes Medium
- make policy recommendations <b>in practice</b> , importance of the above mentioned activity in the actual overall workload	Yes High	Yes High
- produce codes of good practice for employers <b>in practice</b> , importance of the above mentioned activity in the actual overall workload	No n/a	No n/a
Other (or any Important additional information/comments):		
Regarding "good practices," the EEOC does not issue a "code" but does publish "best practice" guides from time-to-time. These guides are informative and do not establish any enforceable rights. EEOC also issues Policy Directives, Guidance Documents, Technical Assistance Manuals, Compliance Manuals to assist employers compliance with the laws it enforces.		
OFCCP issues Policy Directives, Guidance Documents, and provides compliance assistance to contractors and subcontractors on how to comply with its programs.		

Note: a) High/Medium/Low mean above average / close to average / below average, respectively.

Table 2.2 **Activities of SBs not related to individual discrimination cases:** Control and correction<sup>a</sup>

	<b>Gender</b>	<b>Ethnicity</b>
<p>Is there a specialised body (SB) in charge of carrying out some of all of the following control and correction functions?</p> <p><b>Equal Employment Opportunity Commission</b>, a federal executive agency, which became operative July 2, 1965. As a general rule, most EEOC investigations begin with the filing of a charge by an individual alleging employment discrimination. The EEOC has authority to conduct independent investigations of employers even in the absence of a charge of discrimination, but does so rarely. On occasion, the EEOC will expand its investigation beyond the particulars of an individual charge where there is evidence of more wide-spread discrimination.</p> <p><b>The Office of Federal Contract Compliance Programs</b> in the US Department of Labor also has the right to initiate compliance reviews of government contractors to determine whether they are meeting their contractual obligation not to discriminate and have implemented properly affirmative action plans that examine for underutilization of minorities and women and establish goals and timetables for redressing such underutilization. The OFCCP derives its authority from Executive Order 11246, which became effective on October 24, 1965.</p>	Yes	Yes
<p>This SB has the statutory power to:</p> <ul style="list-style-type: none"> <li>- randomly conduct formal investigations of companies and organisations. <b>in practice</b>, importance of the above mentioned activity in the actual overall workload</li> <li>- conduct formal investigations of companies and organisation where there is evidence of discrimination. <b>in practice</b>, importance of the above mentioned activity in the actual overall workload</li> <li>- oblige a company or an organisation to change the way it operates when discriminatory practices are found. <b>in practice</b>, importance of the above mentioned activity in the actual overall workload</li> <li>- take legal action against companies or organisations that apply discriminatory practices <b>in practice</b>, importance of the above mentioned activity in the actual overall workload</li> <li>- take legal action against organisations that attempt to promote discrimination or to instruct others to discriminate. <b>in practice</b>, importance of the above mentioned activity in the actual overall workload</li> </ul>	<p>Yes Medium for EEOC High for OFCCP Yes</p> <p>High Yes</p> <p>High Yes Medium Yes</p> <p>High</p>	<p>Yes Medium for EEOC High for OFCCP Yes</p> <p>High Yes</p> <p>High Yes Medium Yes</p> <p>High</p>

Note: a) High/Medium/Low mean above average / close to average / below average, respectively.

Table 2.3 Role of SBs in individual discrimination cases

	Gender	Ethnicity
Is there a specialised body (SB) with specific functions related to individual discrimination cases?	Yes	Yes
<b>Equal Employment Opportunity Commission</b> , a federal executive agency, which began operations on July 2, 1965. <b>The Office of Federal Contract Compliance Programs (OFCCP)</b> was formed in 1965 as the Office of Federal Contract Compliance. Shortly after it became part of the DOL's Employment Standards Administration in 1971 the word "Programs" was added to the title. In 1978 all government contract compliance functions were consolidated into the Department of Labor under OFCCP.		
Was this body created by anti-discrimination laws (or did anti-discrimination laws establish a specific mandate for it)?	Yes	Yes
<b>Formal linkage between equal treatment body activities and complaint lodging and procedures</b>		
Does the SB act as a one-stop shop where claimant can access information, lodge a complaint, receive advice?	Yes	Yes
As soon as, or before, a discrimination complaint is brought to court, is the claim formally transmitted to the SB?	Yes	Yes
Discrimination complaints must be lodged with the SB beforehand, which acts as one-stop shop to start the procedure.	Yes	Yes
The SB has the statutory power to provide advice and information to claimants (or both parties) on their legal rights and what options they have.	Yes	Yes
<b>In practice</b> , the SB carries on the above mentioned process as soon as it receives a discrimination claim.	Yes, duty	Yes, duty
The SB has the statutory power to provide claimants with legal assistance.	No	No
<b>In practice</b> , SB provides legal assistance to claimants during court proceedings.	No	No
The SB has the statutory power to provide claimants with legal representation.	Yes for EEOC No for OFCCP	Yes for EEOC No for OFCCP
<b>In practice</b> , the SB provides legal representation to claimants during court proceedings.	Yes in few cases	Yes in few cases
Note: EEOC litigates on behalf of the public interest, which in effect provides legal representation to claimants. Claimants may also hire their own legal counsel to represent their legal interests.		
<b>Investigation of discrimination claims</b>		
The SB has the legal authority to compel people (and in particular, the employer) to provide all of the information it requires to investigate a discrimination claim.	Yes	Yes
Does the court accept evidence from the SB?	Yes	Yes
If the EEOC represents the claimant in court, it may submit evidence developed during its investigation for court consideration.		
OFCCP presents evidence in its enforcement proceedings.		
Does the court accept the SB's evaluation of the validity of the discrimination complaint?	No	No
Courts accept EEOC findings of reasonable cause to believe discrimination occurred, but usually give such findings little weight.		
The ALJs and the Administrative Review Board accept the fact that OFCCP found a violation but give little weight to those findings.		
<b>In practice</b> , the SB formally investigates discrimination claims.	Yes, duty	Yes, duty
Please indicate below the main tools the SB uses to investigate a discrimination claim: On-site investigation; interviews of witnesses; and receipt and review of documents, including employer and employee files. The EEOC and OFCCP will also review relevant reports filed with it and with other federal agencies.		
Any employer's failure to provide the requested information to the SB will: - have no implication for the court ruling. - potentially be used to draw inferences on discrimination if the case is brought before court.	See note Yes	See note Yes

	Gender	Ethnicity
<p>Any employer's failure to comply with the code of practices issued by the SB (or other relevant body) will: Neither <b>EEOC</b> nor <b>OFCCP</b> issue "code of practices"</p> <ul style="list-style-type: none"> <li>- have no implication for the court ruling.</li> <li>- potentially be used to draw inferences on discrimination if the case is brought before court.</li> </ul> <p>Note:  <b>EEOC has subpoena power to compel enforcement of a request for information.</b> That said, an employer's failure to keep or destruction of relevant evidence permits the drawing of an adverse inference during a Commission investigation. A failure to provide available information permits issuance of a cause finding if there is sufficient probative information.</p> <p>OFCCP does not have subpoena power to compel enforcement of a request for information. However, OFCCP can seek to obtain access to a contractor's facility or records by proceeding before an administrative law judge. Like the EEOC, OFCCP is permitted to draw an adverse inference from a contractor's failure to retain records or destruction of such records (a presumption that the information destroyed or not preserved would have been unfavourable to the contractor), unless the contractor shows that the destruction or failure to preserve results from circumstances outside its control.</p>	<p>N/A N/A</p>	<p>N/A N/A</p>
<p><b>Mediation/conciliation procedure</b></p> <p>The SB has the statutory power to help both parties to resolve the dispute through a mediation/conciliation procedure.  Mediation/conciliation is a free and voluntary process for both parties.  <b>In practice</b>, the SB carries out mediation/conciliation procedures, so that a court ruling may not be necessary.</p> <p>The mediation/conciliation procedure is <b>usually</b> initiated:</p> <ul style="list-style-type: none"> <li>- before the case is brought to court</li> <li>- before any formal investigation starts or at an early stage of the process</li> <li>- after any investigation has produced primary evidence of discrimination (but before a litigation decision has been reached)</li> </ul> <p>Other (or any important additional information/comments)  EEOC has discretion to conduct mediation prior to an investigation of a charge. Parties are invited to participate, but may decline. After a finding of reasonable cause to believe discrimination occurred, the EEOC engages in mandatory conciliation; that is, the EEOC works with the parties in an effort to resolve the matter. If the employer declines to participate or the conciliation otherwise is unsuccessful, the EEOC issues a right to sue letter to the claimant entitling him/her to go to court. In some cases, the EEOC will file a lawsuit on behalf of the claimant.</p> <p>OFCCP has a regulatory obligation to attempt to secure compliance through conciliation after it has issued its finding that there is a violation. OFCCP conciliates directly with the contractor as a party to secure relief on behalf of the victims. If the contractor declines to participate or the conciliation is otherwise unsuccessful, OFCCP may refer the matter to the Department's Office of the Solicitor. The Office of the Solicitor may file an administrative complaint.</p>	<p>Yes</p> <p>Yes Yes, duty/ in many cases</p> <p>Yes Yes/No Yes</p>	<p>Yes</p> <p>Yes Yes, duty/ in many cases</p> <p>Yes Yes/No Yes</p>
<p>The SB acts as a neutral third party assisting both opposing parties in the mediation/conciliation procedure.  EEOC operates as a neutral during mediation; seeks remedial action on behalf of the claimant during conciliation.  OFCCP is a party to the conciliation and negotiates directly with the contractor. The victims usually are not involved in the pre-complaint conciliation process.</p>	<p>Yes &amp; No</p>	<p>Yes &amp; No</p>
<p>The mediation/conciliation procedure is confidential: no details of the discussion taking place in its course can be repeated to court, nor are made public. The same rule applies to the terms of the settlement.  If the parties, including the SB, reach settlement agreement, the latter is legally binding and the charge is dismissed.  The SB secures the enforcement of settlement agreements reached under its assistance and/or responsibility.</p>	<p>Yes</p> <p>Yes</p> <p>Yes</p>	<p>Yes</p> <p>Yes</p> <p>Yes</p>

**Part 3. Statistics on mediation/conciliation procedures and court cases**

Table 3.1 **Statistics**

		<b>Gender</b>	<b>Ethnicity</b>
General statistics	Total number of discrimination complaints received <b>FY2006</b>	23,247*	35,565**
	Protected population (number of persons aged 15-64 covered by the law in question)  Note: In 2006, in the United States, the number of employed persons aged 16 to 64 in the U.S. was 139,102,000 and the number unemployed was 6,842,000. These figures are slightly different from those usually published by the Bureau of Labor Statistics as there is no upper age limit for U.S. concepts.	Information unavailable	Information unavailable
Mediation/ conciliation procedures	Number of received complaints treated by the SB	23,247*	3 5,565**
	<i>of which:</i>		
	- number of complaints dismissed by the SB for no reasonable cause	13,191	22,268
	- number of unsuccessful mediations/conciliations although reasonable cause was found	1,039	1,130
	- number of successful mediations/conciliations	437	398
	- other (please specify)		
	Settlements	2,828	3,817
Withdrawal with benefits	1,460	1,553	
Administrative closures	4,409	4,593	
	Average duration of mediation/conciliation procedures	Information unavailable	Information unavailable
	Average employee/claimant compensation under mediation/ conciliation procedures	Information unavailable	Information unavailable
Court procedures	Number of court cases	Information unavailable	Information unavailable
	<i>of which</i>		
	- number of complaints dismissed by court for default procedures (or administrative reasons)		
	- number of complaints dismissed by court for no reasonable cause		
	- number of cases withdrawn by the complainant(s)		
	- number of court rulings with favourable outcomes for the complainant(s)		
	- other (please specify)		
	Average duration of court procedures	Information unavailable	Information unavailable

\* In FY2006 (October 2005 – September 2006), the EEOC and state & local fair employment practice agencies received 12,025 charges alleging sexual harassment. Some of these charges – perhaps most of them – also alleged sex discrimination and thus are reflected in the 23,247 charges noted above.

In FY2006, The EEOC also received 4,901 charges alleging pregnancy discrimination, many of which also would be counted in the number of sex discrimination charges.

\*\* The category of “ethnicity” encompasses discrimination based on race and national origin. In FY2006, the EEOC received 27,238 charges alleging race discrimination and 8,327 charges alleging national origin discrimination.

In FY2005 (October 2004 – September 2005), OFCCP conducted 2,730 compliance evaluations and obtained \$45,156,462 in financial remedies for 14,761 workers. In 12.4% of OFCCP’s completed evaluations, OFCCP was able reach a conciliation agreement with the contractor or subcontractor.

In the sixteen cases referred to the Office of Solicitor for enforcement, OFCCP obtained over \$6,389,582 million in financial remedies for more than 2,000 workers.