



## **DISCRIMINATION AND ANTI-DISCRIMINATION IN DENMARK – ANALYSIS OF THE LEGAL CHALLENGES**

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EMILIE - A European approach to multicultural citizenship: Legal, political and educational challenges.

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## Abbreviations

BEE	Board for Ethnic Equality
CCEET	Complaints Committee on Ethnic Equal Treatment (part of DIHR)
CD	Centre Democrats (Centrum Demokraterne)
CET	Committee on Equal Treatment
CP	Conservative Party (Konservativt Folkeparti)
DA	The Confederation of Danish Employers
DCHR	Danish Centre for Human Rights
DIHR	Danish Institute for Human Rights
DPP	Danish People Party (Dansk Folkeparti)
DRC	Documentation and Counselling Centre on Race Discrimination (Dokumentations- og Rådgivningscentret om Racediskrimination)
ECRI	European Commission Against Racism and Intolerance
EU	European Union
ICERD	UN Convention on the Elimination of All Forms of Racial Discrimination
LO	The Danish Confederation of Trade Unions
LP	Liberal Party (Venstre)
PP	Progress Party (Fremskridtspartiet)
SD	Social Democrats (Socialdemokraterne)
SL	Social Liberals (Det Radikale Venstre)
SPP	Socialist People Party (Socialistisk Folkeparti)
UL	Unity List (Enhedslisten)

## **0 Introduction**

The purpose of this report is to describe and analyse Danish anti-discrimination legislation and the debate about discrimination in Denmark in order to identify present and future legal challenges. The main focus is the implementation of the EU anti-discrimination directives in Danish law, but the report also addresses recent developments in the field.

The progression of the report is as follows. Section 1 describes the anti-discrimination legislation in place in Denmark before the implementation of the EU anti-discrimination directives. The section is mainly based on report of a special committee reviewing the legislation in order to come up with a proposal for the national implementation of race and ethnicity equality directive. Section 2 looks at this proposal and the disagreements within the committee which gave the basis for the further debate about the implementation of the anti-discrimination directives. Section 3 gives a short historical view over the different positions in the Danish political debate about discrimination and anti-discrimination measures and demonstrates how these positions as well as the legal state of affairs predating the implementation of the anti-discrimination directives were influencing their implementation. Section 4 looks at various studies of real and perceived discrimination in Denmark in order to get an idea about the actual size of the problem and where it is most prevalent. Section 5 summarises and elaborates on the challenges to the Danish anti-discrimination legislation and policy found in the legal and political debate regarding the implementation of the EU directives and those arising from the studies of discrimination in Denmark. It draws on recent policy statements by actors concerned with discrimination in Denmark and compares them with the latest government initiatives in the field. The conclusion draws the many threads together and points to the legal challenges that Denmark is facing with regard to anti-discrimination. The underlying idea behind the structure of the report is that the positions in the political debate and the (legal) institutionalisation (or lack thereof) of the fight against discrimination are part of the legal challenges and that they enable and constrain the possibilities for solving them.

The report is based on documents pertaining to the legislative implementation of the EU directives and new anti-discrimination initiatives, official reports, news paper articles and academic studies of discrimination and anti-discrimination legislation. The report also draws on interviews with a number of differently placed observers of the policy field. These observers cannot be said to be representative in the strict sense. Nor are any of their views treated as the

final authority about the state and development of anti-discrimination policies in Denmark. They have, however, been selected with the aim of informing the report from different perspectives, thus enhancing the likelihood that most relevant points of view are included in it (see appendix 1). The report furthermore benefits from the fact that the EU antidiscrimination directives were discussed in a special committee consisting of some of the main stakeholders in the policy field and from the fact that these stakeholders have come with hearing responses in connection with the legislative process. This gives us a good insight into what a number of relevant actors see as the legal challenges in the area of anti-discrimination.

## **1 Anti-discrimination in Danish law**

The Danish legislation on anti-discrimination was reviewed in a report by a special Committee on Equal Treatment (CET) in connection with the implementation of the ethnic and racial equality directive (i.e. directive 2000/43/EC). The CET consisted of some of the main stakeholders in Danish anti-discrimination policy.<sup>1</sup>

### *Fundamental principles*

*The Danish constitution* does not entail a general prohibition against discrimination and it is unclear in theory as well as in practice whether there is a general principle of equality implicit in the constitution that could be evoked against discrimination.<sup>2</sup> The lack of general prohibition against discrimination suggests that the state is allowed to promote majority culture in certain areas, for example with regard to example religion.<sup>3</sup> There are, however, articles on the full enjoyment of civil and political rights irrespective of faith and descent (art. 70); personal liberty

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<sup>1</sup> The committee was chaired by a professor of law from University of Copenhagen and consisted of representatives from seven ministries (of labour, housing/urban development, industry, the interior, justice, social affairs and education), the social partners (Danish Confederation of Trade Unions (LO) and the Confederation of Danish Employers (DA)), the association of municipalities in Denmark (Local Government Denmark, KL), the Danish Bar and Law Society (Advokatrådet), and representatives from three publicly sponsored bodies working with discrimination and minority rights/interests as well as one national organisation of ethnic minorities (Etniske minoritetes landsorganisation, ELO). The three public sponsored bodies were the Council for Ethnic Minorities, the Board for Ethnic Equality and the Danish Centre for Human Rights (DCHR) (later re-baptized as The Danish Institute for Human Rights (DIHR)).

<sup>2</sup> LBU 2002: 50; Justesen 2003: 94.

<sup>3</sup> Article 4 of the constitution thus stipulates that: "The Evangelical Lutheran Church shall be the Established Church of Denmark, and, as such, it shall be supported by the State", thereby underlining that the Danish state supports one specific religion, that of the majority, at the expense of others. It is often stated that while the Danish state ensures freedom of religion it does not endorse equality of religion.

(art. 71); free and equal access to employment/business (art. 74 and 75) which to a larger and lesser extent would rule out discrimination in certain areas.

*Danish administrative law* protects against discrimination to the extent that it is ruled by the principle that equal treatment should be given equal/identical cases and by the principle of proportionality. Differences of treatment can only take place in a limited number of instances and only if they are based on objective reasons ('saglige grunde'), and if they are proportional to these reasons.<sup>4</sup>

#### *Criminal law*

*The Danish penalty code* contains a provision (art. 266b) against racist statements and racist propaganda, stating

Sec. 1. Whoever publicly, or with intention to disseminating in a larger circle makes statements or other pronouncement, by which a group of persons is threatened, derided or degraded because of their race, colour of skin, national or ethnic background, faith or sexual orientation, will be punished by fine or imprisonment for up to 2 years.

Sec. 2. When meting out the punishment it shall be considered an especially aggravating circumstance, if the count has the character of propaganda.<sup>5</sup>

The provisions against racism are weighted against the freedom of expression. The CET's report does not give any overall evaluation of the level of protection against racism, contained in the provision. Justesen (2003) claims that it relatively difficult to make the provision apply and concludes that legal practice in Denmark indicates a reluctant intervention with regard to racism, while the freedom of expression enjoys rather wide reaching legal protection.<sup>6</sup> Thereby Denmark fails to live up to the obligations contained in the UN's Convention on the Elimination of All Forms of Racial Discrimination (ICERD).<sup>7</sup> The Danish penal code also contains provisions on libel which would apply to racist statements oriented towards individual persons. According to the penal code, it is in the end the public prosecutor (and initially the police) who decides

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<sup>4</sup> LBU 2002: 52-3.

<sup>5</sup> English translation taken from

[http://en.wikipedia.org/wiki/Freedom\\_of\\_speech\\_and\\_freedom\\_of\\_the\\_press\\_in\\_Denmark](http://en.wikipedia.org/wiki/Freedom_of_speech_and_freedom_of_the_press_in_Denmark)

<sup>6</sup> Justesen 2003: 149.

<sup>7</sup> Justesen 2003: 148.

whether legal proceedings should take place according to article 266b of the penal code, while the article on libel can be initiated by an individual complainant.

As part of Denmark's ratification of the ICERD, the Danish state introduced in 1971 the *law on prohibition of difference of treatment on the basis of race etc.* The law stipulates that it is punishable by up till 6 months prison to deny to service anyone on the same conditions as others based the person's race, colour of skin, national or ethnic background, faith or sexual orientation. The law is usually known as the 'discotheque law' because it has been evoked in cases where people with minority backgrounds have been denied access to discotheques, clubs and restaurants.<sup>8</sup> The 1971 law on prohibition of difference of treatment does not cover the labour market. The Danish model for the regulation of the labour market through general labour market agreements had delegated this task to the social partners. However, the social partners had not implemented anti-discrimination regulation in the general agreements. In 1995 a statement by the Ombudsman finally made it clear that Denmark did not live up to international obligations (specifically ILO Convention no. 111) with regard to regulating discrimination on the labour market.

#### *Civil law*

As a consequence, a new *law on prohibition against difference of treatment on the labour market* came in to force in 1996. The law outlawed direct or indirect difference of treatment on the grounds of race, colour of skin, religion, political conviction, sexual orientation as well as national, social and ethnic origin. The law does not apply however when similar protection is given by way of general labour market agreements.<sup>9</sup> The law allows certain exemptions where specific characteristics are objectively required in order to fill certain job functions (for example in political organisations or with regard to religious teaching). Also, it is possible to obtain

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<sup>8</sup> The law applies to private business as well as all services made available to the public, including housing. The law also applies to the denial of access to shows, exhibitions, gathering and the like, open to the general public. The law applies to services from shops, workshops, clinics, medical and dentist treatment, lawyers and architects, public and publicly available transportation, access to service in restaurants, hotels, pensions. It applies to sale and renting of private property and housing. It also applies to access to cinemas, discotheques, restaurants, bars, circuses, parks, beaches, sport arenas, and other places where the public normally or actually has access.

<sup>9</sup> The law applies to hiring, firing, transfer, promotion as well as the salary and working conditions of employees (including harassment). It also applies to vocational training, training in connection with the job, to anyone who supervises and offers training courses, to employment placement services as well as to those who regulate and make decisions with regard to the establishment of businesses ('selvstændigt erhverv'). The law also forbids the registration of the grounds of discrimination (i.e. race, ethnicity etc) and advertising indicating that persons with the characteristics mentioned in the law are either preferred or not wanted.



exemptions by administrative decision in cases where specific characteristics can be justified as necessary for a specific kind of job.<sup>10</sup> The law generally allows special measures introduced by public initiatives or by way of legislation with the aim of improving the chances of employment of persons with the characteristics mentioned in the law. There is however, no general license to introduce special measures, nor is there any obligation to initiate ‘positive action’ (‘positiv særbehandling’). Except in cases of discrimination with regard to remuneration, the burden of proof rested with the complainant. With regard to remuneration, there was a shared burden of proof. The prohibition against the registration of the characteristics of employees (paradoxically) made it difficult to lift the burden of proof.<sup>11</sup> Before the law was established, race discrimination on the private labour market was fully legal.<sup>12</sup> From the legal practice it transpires that the law does not protect against indirect discrimination of women who wants to wear headscarf in job-functions where the only ‘objective reason’ for banning headscarfs is that the company in question wants their staff to appear politically and religiously neutral towards costumers, where neutrality here is defined in terms of the majority culture.<sup>13</sup> The law thus apparently allowed indirect discrimination of persons who do not share the cultural views and practice of the majority so long as the rules were clearly stipulated and categorically implemented.<sup>14</sup>

Justesen concludes with regard to the 1996 law that 1) in Danish legislation the main focus is on removing violations against the formal equality of all persons rather than on positive action which would ensure *de facto* equality of opportunity; 2) that both the concepts of direct and indirect discrimination is imprecisely defined in the law; 3) that the rules on the burden of proof and the ban on ‘background statistics’ makes it difficult to prove indirect discrimination; and finally 4) that experience indicates that it is quite difficult to obtain redress in the court

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<sup>10</sup> Administrative decision means that the relevant ministry/minister should give the permission by individual decisions. Exemption has for example been given with regard to the hiring of a project research leader, who had to investigate racially motivated harassment and violence in certain housing areas.

<sup>11</sup> LBU 2002: 74-5.

<sup>12</sup> Justesen 2003: 95. As mentioned above the principles of treating equal cases equally in Danish administrative law and only making differences of treatment on the basis of ‘objective reasons’ is thought to be a general barrier against discrimination in the public sector labour market.

<sup>13</sup> As Roseberry (2004: 196) comments “when [the shops] claim that they only want employees to appear ‘neutral’ to customers, what [they] really are saying is that the employees should adapt their dressing style to the views of the majority, including its religious views.” translated from Danish.

<sup>14</sup> Roseberry 2004: 193. In two cases, however, employers were convicted for discrimination because the internal firm policies banning headscarfs had not been clearly stipulated and implemented. Roseberry argues that the new rules introduced as an effect of directive 2000/43/EC would mean that it would be more difficult for the employers to justify such rules and thus that the prohibition against wearing headscarfs would be deemed illegal under the legislation in place after 2004.

system, which seems to be inadequate for the solution of race discrimination conflicts.<sup>15</sup> In addition to the laws mentioned, the laws on advertising, responsibility in the media and on torts and some of the regulations of access to education, including access to private schools, provide some protection against discrimination.<sup>16</sup> Similarly, Denmark has incorporated the ECHR as part of Danish law, including its article 14 which provides some protection against race discrimination.<sup>17</sup>

#### *Equality bodies and organisations working with anti-discrimination*

Prior to the implementation of the EU anti-discrimination directives, Denmark had three public or semi-public / publicly supported bodies working with race and ethnic equality. *The Board for Ethnic Equality* (BEE) had first been established in 1993. In 1997 the legislative basis for its work was changed in order to enhance its capacity, to improve the representation of ethnic minorities on the board as well as to reinforce its independence from the government. The BEE had as its tasks to counsel state and societal institutions and organisations with regard to questions concerning ethnic equality. The BEE was to participate 'actively' in the promotion of ethnic equality and fight all aspects of difference of treatment. The BEE could not process complaints in individual cases of (alleged) discrimination. It could however, make non-binding statements with regard to all incidents of discrimination. The minister of the interior (and later of integration) did not have any authority to instruct the board with regard to its core tasks.<sup>18</sup> The board worked towards its objective by gathering and disseminating information, commenting developments, participating in political debate as well as through publications, lectures, courses and seminars and regular contacts with decision makers, authorities, organisations and interest groups. However, the board was closed down in 2002 as a result of a political deal between the new centre-right government and its main supporter in parliament, the Danish Peoples Party (DPP).<sup>19</sup>

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<sup>15</sup> Justesen 2003: 116-7.

<sup>16</sup> LBU 2002: 82-6.

<sup>17</sup> LBU 2002: 86.

<sup>18</sup> The board consisted of 17 members appointed by the minister of the interior/integration on the basis of nominations from the Council of Ethnic minorities, Local Government Denmark, The Regions in Denmark (Amtsrådsforeningen), the social partners (individually) and the Danish Centre for Human Rights.

<sup>19</sup> The Social Democrats and the Social Liberals were in government from 1993 to 2001. In November 2001 the centre-right government consisting of the Liberal Party and the Conservative Party took over the government after having won the election.

*The Council of Ethnic Minorities* consists of persons from the local Integration Councils established in a number of municipalities. The Council gives advice to the minister of the interior/integration with regard to questions concerning refugees and immigrants. It cannot make statements with regard to individual cases, but only with regard to general issues and principles. It can on its own initiative work out proposals for new policies directed towards refugees and immigrants. *The Documentation and Counselling Centre on Race Discrimination (DRC)* is an independent institution that maps race discrimination and gives counsel and legal support to victims of and witnesses to race discrimination.

## **2 The implementation of directive 2000/43/EC**

The CET proposed that the directive be implemented in Danish law by introducing a new law on ethnic equality. The law should implement the non-labour market aspects of prohibition against discrimination contained in the directive. The reason for this was that it would be technically difficult to combine the content of the directive which forbids discrimination on the grounds of race and ethnicity with laws from 1971 and 1996 which bans discrimination on areas similar to those contained in the directive, but on additional grounds. In regard to the 1971 law, which covers some of the same areas, there was also a problem concerning the fact that this law is connected with penalty sanctions while the CET wanted to maintain civil sanctions in the implementation of the directive. The CET pointed out that where the new proposed law on ethnic equality and the 1971 law overlapped, it would be an advantage for a complainant who could not get the public prosecutor to raise a case before the courts that he or she in stead could seek redress through a civil procedure.<sup>20</sup>

### *Disagreements within the CET*

The CET report demonstrated disagreement among its members on a number of points. Most importantly they disagreed about whether race and ethnicity should be supplemented with further grounds for discrimination. A minority argued that legal practice demonstrated that it is difficult to separate between race, ethnicity and other criteria such as national origin (not nationality) and faith/religion. The majority wanted to stick to the two criteria contained in the directive on the

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<sup>20</sup> The importance of a criminal vs. a civil law procedure can be seen by comparing the race discrimination paradigms in France and Britain respectively (Bleich 2003).

grounds that discrimination on the grounds of race/ethnicity would to some extent include discrimination on other grounds (sic!); that there would be a higher symbolic value in limiting the law to race/ethnicity (the legislation would be more ‘targeted’), but - perhaps most substantially - that there could be more legitimate ‘objective’ grounds for discriminating on the basis of faith/religion than on the basis of race/ethnicity.

Another disagreement pertained to whether in contrast to the 1996 law there should be a general license for employers to introduce ‘specific measures’ in order to improve the opportunities of people with minority race/ethnicity. The employers association (DA) argued against while the rest of the committee agreed. The committee, except the ministry of education, agreed, however, that ‘specific measures’ should only be maintained until the objective of the measures had been obtained (and that this should be added to the law).<sup>21</sup>

A last point of discussion regarded the establishment of the body for the promotion of equal treatment mentioned in article 13 of the directive. The committee found it important that the body in question contributed to the promotion of tolerance and appreciation of cultural and ethnic diversity in society. The committee furthermore agreed that it followed from the directive that the Danish Institute for Human Rights (DIHR), which had been given the task of processing individual cases according to the directive’s articles 7 and 13,<sup>22</sup> as a minimum should be able to supervise and help victims of discrimination with complaints (including with regard to the legal system) and suggest solutions to conflicts by mediation between the parties, where participation

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<sup>21</sup> LBU: 204. The ministry of education was against this, arguing – in manner not very characteristic for the report (and as we shall see in the following, the political debate) – that sometimes specific measures have been established in order to compensate minorities for the fact that they live in a majority society where it is difficult, without specific measures, to maintain and develop their own language and culture. The ministry of education here cited international obligations, including UN charter on childrens’ rights, European Pact from 5 February 1992 regarding regional and minority languages, the European framework Convention on the protection of national minorities as well as UNESCO’s Convention from 14 December 1960 on prohibition against difference of treatment in education.

<sup>22</sup> The work of the committee was here in fact somewhat pre-empted by a new legislation establishing the Danish Institute on Human Rights (DIHR) which had been given the tasks stipulated in article 13.2 using the exact formulation contained in the directive. (See Law establishing the Danish Centre for International Studies and Human Rights, of 6 June 2002, article 2.2, no 4) Indeed, the fact that the Danish Institute on Human Rights was already in existence was used by a majority of the committee members as one of the arguments against proposing a body with more wide reaching powers with regard to making decisions in individual cases of discrimination. The Danish Centre for Human Rights (DCHR) had been criticized heavily by the right side of Danish politics, in particular Danish Peoples Party, and it had been reorganized in connection with the change of government. The DPP had in budget negotiations demanded that the DCHR should be closed, but accepted in the end that the government in stead closed the BEE and reorganised the DCHR in to the new Danish Institute for Human Rights (DIHR). The whole reorganisation spurred discussion of whether the new institute would be independent of the government, if it were under the constant ‘threat’ of being ‘reorganised.’

would be voluntary. The body, more precisely the Complaints Committee for Ethnic Equal Treatment (CCEET) under the DIHR, should be able to decide on its own whether a particular case should be suited for processing. Its independence were to be ensured through its composition and function.

With regard to any additional competences of the equality body, a majority of the CET members either found it sufficient to stick to the formulation in article 13 of the directive or thought that the decision about any further competences was too political for the committee to get involved in.<sup>23</sup> A minority on the other hand argued for a more forceful ethnic equality board, modelled on the Danish Gender Equality Board. This board should be able to make decisions applying to both parties, which again could be appealed within the general court system. And the minister of integration should initiate legal procedures in the court system if the violator did not voluntarily follow the decision of the board. The minority's main arguments in favour of this board of ethnic equality were that there was a substantial need to improve the access to complaint for persons exposed to discrimination and that there will be situations in which the violating part is unwilling to participate in conflict resolution.<sup>24</sup> The minority also pointed to the fact that such a board had been established in connection with gender equality and that while gender equality was a widely accepted norm in society, ethnic equality and those subject to ethnic discrimination were placed in a much more marginal position. The response from the majority was that there was no evidence that the DIHR would not be able to do the job. And further, that the general court system is better suited for solving conflicts where mediation is impossible, because of its superior protection of procedural rights.

Summing up, the report revealed some differences of opinion in the policy community with regard to the implementation of the EU directive. They regarded the extension of the grounds of illegal discrimination, the use of specific measures (or positive action) in furthering

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<sup>23</sup> LBU 2002: 230-1.

<sup>24</sup> The procedure would be written in format in order to increase the speed of the process, and it would be free of cost to any of the parties (excluding lawyers assistance). Complainants would be able to seek counsel and supervision at the DIHR with regard to their complaints. The board would only be able to treat cases of discrimination, excluding, however, questions concerning the legality of administrative decisions and whether not laws or proposed legislation are in violation of the prohibition of discrimination. The board should be staffed by persons possessing legal expertise including a judge as chairman, in order to raise the confidence that its decisions were in accordance with the legislation. The minority members of the committee, except one (Local Government Denmark), also suggested that the board should be able to process cases concerning discrimination on the labour market, if the professional organisation of the person in question did not intend to pursue the case within the framework of the labour market conflict resolution system.

equal opportunity and not least the competences of the body for the promotion of equal treatment. The CET's report and the discussion in it set out the basis for the parliamentary debate along with hearing responses which for the most part originated from organisations which had been participating in the CET's work. Another basis for the discussion was of course the general and established positions of the public debate on discrimination and anti-discrimination in Denmark.

### **3 The debate concerning discrimination and anti-discrimination legislation**

#### **The debate in the 90s and the early 00s**

Throughout the 1990s it had been debated in whether discrimination really was a problem in Denmark and, if so, what to do about it.<sup>25</sup> The centre-left acknowledged the existence of a problem and saw legislation and public institutions as a way of changing attitudes and practices. Perhaps in their attempt to distinguish themselves from the centre-left government in power till November 2001, the centre-right parties seem to have become more and more sceptical about the existence of the problem and in particular the use of legislation and public institutions in producing change. The far right, the Progress Party (PP) and the DPP, emphasises, first, that Danish culture is based on a deep sense of equality that excludes the possibility of any serious discrimination against foreigners and, second, that the Danish state and nation is legitimately based on a discrimination between Danish culture and other cultures. This means that a) the claims on part of foreigners that they are being discriminated against are implausible and/or b) that working for 'ethnic equality' is a form of treason against the Danish nation.

These basic positions in the debate also implied that the centre-left was open for the possibility that apparently 'neutral' rules had an indirectly discriminatory effect and the some sort of (temporary) positive action to improve the possibility of disfavoured groups were in order. The centre-right and the extreme right on the other hand argued against using institutions such as the BEE to change attitudes in society. One argument was that (implicitly) depicting people as racist, who perhaps were apprehensive about the high number of foreigners in the country, would

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<sup>25</sup> The basis for the following summary of the debate is four parliamentary debates on discrimination and a reading of the news paper debate concerning the Board for Ethnic Equality (BEE). This Board was, as mentioned, originally established in 1993 with a view to expose and counteract all kinds of difference of treatment between Danes and people with another ethnic background than Danish. Of the four parliament debates three concerned the establishment (in 1993 and 1997) and the closure of the BEE (2002). The fourth debate concerned the passing of the 1996 law of prohibition against direct and indirect difference of treatment on the labour market. For reasons of space references are omitted.

backfire and in fact produce racism. Such reactions would furthermore be stimulated by ‘positive action’ towards immigrants, because this amounts to ‘negative discrimination’ against the majority population. Furthermore, efforts by public institutions to influence the terms used in public debate, for example in order to avoid pejorative expressions about immigrants and ethnic minorities, was by the extreme right seen as a form of repressive political correctness stifling the democratic debate and silencing the voice of the concerned ordinary citizen (the common man) at the expense of that of the expert. Specifically with regard to the labour market, some right wing politicians cited the fundamental labour agreement in Denmark (dating from September 1899) according to which employers have the right to ‘hire and fire’ who they want as well as the right to organise and manage the work in each individual company: anti-discrimination legislation on the labour market is an encroachment on the ‘fundamental right’ that employers have according to this agreement.

People concerned about discrimination in Denmark have made the observation that discrimination is a blind spot in Danish public debate and policy. First, the debate about immigrants has predominantly been organised around concept of integration and has focused most on what the immigrants need (to do) in order to become integrated into Danish society. The focus on integration simply moves attention away from the problem of discrimination. Secondly, in Denmark the claim that discrimination is taking place is often seen as equivalent to an accusation against the Danes for being racist. This functions as a brake on the discussion in a Danish society firmly convinced about its commitment to equality, openness and tolerance. The accusation of racism it is perceived to be relevant only in connection with extremist groups, like Nazis, but not with regard to society in general.

### **The debate about implementation of anti-discrimination directives**

The parliamentary debate about the legislative implementation of the EU directives in Denmark reflected the debate in the 1990s and early 00s as well as it drew on the work of the CET and the positions in the wider policy community. However, the centre-right parties (LP and CP) were now in government and had to defend the anti-discrimination legislation. Allegedly both the LP and the CP had as opposition parties originally been against the content of the directives when they were discussed in the Danish Parliament’s European Committee in 2000 prior to their

approval in the Council of Ministers.<sup>26</sup> The government cited the principle of minimum implementation of EU directives and the respect for the Danish model for regulation of the labour market as the basis for a relatively minimalist interpretation of what was required to implement the directives. Initially, the government was only ready to give access to an administrative complaint procedure with regard to the areas outside the labour market mentioned in the race and ethnicity directive (2000/43/EC).

The DPP, EU sceptic and generally against anti-discrimination legislation, did not at any point support the directives nor their implementation in Danish law. At the same time, the DPP was (and is) the parliamentary basis for the centre-right government. On their side the SD, the SL, the SPP and the left wing Unity List (UL) wanted to improve the administrative complaint procedure with regard to discrimination on the labour market, because they saw it as facilitating complaints from 'weak' complainants. They therefore refused to back one of the government's legislative proposals implementing the directives. This meant that the government failed to win support for its legislative proposals to ensure implementation in 2003 and that the Danish state then technically ended in breach of treaty obligations with regard to implementation of the directives. In the Autumn 2003 the government agreed in connection with new parliamentary negotiations to introduce a non-court complaint procedure for discrimination on the grounds of race and ethnicity (cf. directive 2000/43/EC), but not on the grounds of religion or belief, disability, age or sexual orientation (cf. directive 2000/78/EC). This meant that the left wing opposition finally agreed to approve the law, even though some of them (all?) thought that this was not quite enough.<sup>27</sup>

#### *The position of the centre-left*

In the parliamentary debate many of the arguments of the previous debates were repeated. The centre-left generally agreed that discrimination was a real barrier for the participation of minorities in society and in particular with regard to the labour market. The social democratic spokeswoman also underlined the benign effects of being able to obtain monetary compensation

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<sup>26</sup> In 2000 the centre-left government consisting of S and SL was still in power.

<sup>27</sup> Labour Market Committee report 10 March 2004 (L 40). The report contains a compromise in which the Social Democrats and the Social Liberals confirm the principles of minimum implementation of directives relating to the labour market in return for government support for extending the access for complaints to the DIHR in include discrimination on the labour market on the grounds of race and ethnicity. The Social Peoples Party and the Unity List accepted the L 40 because they saw it as an improvement on the current situation with regard to non-court complaint procedures.



for the violation of one's dignity. She claimed that the law gave basis for convicting/condemning ('fordømme') those who discriminated and that it improved the possibility of those who had experienced discrimination "to a live a life like everybody else."<sup>28</sup> Parties to the left of the Social democrats (and possibly the Social Liberals) wanted to add the criteria of sexual orientation, religion and belief into the law implementing the non-labour market parts of directive 2000/43/EC (race/ethnicity) as they could not see any particular reason why this had not been included.<sup>29</sup> Hereby they followed the minority in the CET as well as hearing responses from NGOs concerned with anti-discrimination pointing out the difficulty of distinguishing between ethnicity and religion/belief as grounds for discrimination.<sup>30</sup> DRC argued along with other organisations for the inclusion of 'nationality' or national origin as an illegal ground of discrimination. The argument was that while it was legitimate for the *state* to distinguish between citizens and non-citizens, it would be illegitimate for number of other actors, including public authorities and private businesses and that experience showed that nationality had been used as a ground for discrimination.<sup>31</sup>

The left wing, including the Social Liberals, criticized the government for not making sure that there were sufficient complaint possibilities outside the normal court system and for those who are not covered by the labour market conflict resolution system.<sup>32</sup> They pointed to the fact that those who were not members of a trade union, or who worked at a company not party to the general labour market agreements would have nowhere to go, except to the normal court system. The legislation thus paradoxically introduced discrimination between those covered by

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<sup>28</sup> S.H. Andersen, L 155 FR 13.15.

<sup>29</sup> K. Quireshi, L 155 FR 13.20; S. Søndergaard, L 155 FR 13.50; E.G. Nielsen from the Social Liberal Party stated that she would have liked to have grounds of sexual orientation and belief included, but that she preferred to be able to reach a compromise leading to a general non-court complaint procedure established also for the labour market, L 155 FR 13.45.

<sup>30</sup> Hearings responses regarding the Special Committee report on Equal treatment from Board of Ethnic Equality 27 September 2002, DRC (Dokumentations og Rådgivningscentret om Racediskrimination) 17 October 2002, Danish Refugee Council 30 September 2002; Danish Association for International Cooperation 10 October 2002; Council for Ethnic Minorities (Rådet for Etniske Minoriteter) 1 October 2002.

<sup>31</sup> DRC (Dokumentations og Rådgivningscentret om Racediskrimination) 17 October 2002.

<sup>32</sup> In legislative proposal L 155 implementing the non-labour market elements of directive 2000/43/EC (i.e. the provisions in article 3.3 e-h and second part of d), the DIHR was given the task of assisting people with their complaints on the basis of race and ethnicity by undertaking independent investigation of the cases in question and by issuing statements regarding whether or not the Institute has found that discrimination has taken place. The Centre can furthermore recommend that the plaintiff be granted 'free process' in the court system. In legislative proposal L 152 implementing the labour market elements of directive 2000/43/EC (i.e. article 3.3 a-c plus first part of d) and directive 2000/78/EC, the Institute was not given the same tasks. The reason given for this was that matters relating to the labour market is usually decided within a special labour market conflict resolution system, established by the social partners.

labour market agreements and those who are not.<sup>33</sup> And the court system was, as stressed by the minority of the CET and a number of hearing responses, a very 'costly' means of pursuing conflict resolution by victims of discrimination as they are often in a relatively unfavourable socio-economic position. Not introducing alternatives to the normal court system would mean the law against discrimination would be less effective. Also the independence of the DIHR and the CCEET under the DIHR was questioned. The DRC argued that the government's recent closure of the BEE and its restructuring of the former Danish Centre for Human Rights (DCHR), now the DIHR, indicated that the DIHR would not be safe from political intervention and therefore only with difficulty could obtain the necessary level of trust.<sup>34</sup>

When the law later was approved by parliament, it gave the DIHR the tasks of receiving complaints based on grounds of race and ethnicity (but not other grounds) related to the labour market also, if the complainant's organization did not intend to pursue the case within the labour market conflict resolution system. Besides the above mentioned disagreements, the left wing opposition was generally positive towards the two anti-discrimination proposals, including the rules on indirect discrimination, the definition of harassment, the possibility of positive discrimination and the shared burden of proof between plaintiff and defendant. The latter was known already in the Danish legal system from the laws on sexual harassment and gender equality.

#### *The position of the right-wing Danish Peoples Party*

The anti-discrimination legislation was predictably criticized by the Danish Peoples Party (DPP) for undermining the fundamental principles of the rule of law, for introducing totalitarian 'mind control' and for reverse discrimination. First, the rule about the 'shared burden of proof' was construed as a breach of the fundamental principle that one is innocent till otherwise proven and thus a violation of a fundamental legal principle. The fact that the legislation did not foresee this sharing of the burden of proof in regard to criminal procedures did not impress the DPP, nor did the fact that the shared burden of proof is known from other Danish legislation. Secondly, the provisions regarding 'harassment' (i.e. article 2.3 in both directives), was seen as an attempt to legislate on people's opinions rather than on their action, thus breaking another fundamental legal

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<sup>33</sup> A-M Meldgaard, L 40 FR 16.00 (L 40 put forward in the parliamentary year 2003/4 was identical to L 152 which was rejected by a majority in the parliamentary year 2002/3).

<sup>34</sup> DRC (Dokumentations og Rådgivningscentret om Racediskrimination) 17 October 2002, pp. 5-6.

principle.<sup>35</sup> Another criticism was directed against the provisions on positive action (or ‘positive discrimination’) in directive 2000/43/EC. This was by the DPP seen as a discrimination against Danes, the majority.<sup>36</sup> Also, the legislation would prevent Danes from practicing Danish culture. It was therefore disloyal to the Danish people and another example of reverse discrimination and racism against Danes:

*What is happening is that it is made more difficult for the Danes to live in their own country. With the law in hand the Danes are a persecuted (forfulgt) human race if we are not wearing velvet gloves when we are dealing with immigrants and refugees [...] This law, along with others like it, is contributing to the creation of reverse racism.*<sup>37</sup>

A specific criticism related to the right of Muslim women to wear headscarf at their work place. By allowing this – by way of the legislation – the government was by the DPP seen as succumbing to Muslim pressure (thereby apparently going hand in hand with political correctness) and allowing a religious and cultural gesture that in fact signals that Danish women without headscarf are impure.<sup>38</sup> An underlying theme here is the intolerance of immigrants: immigrants do not respect the principle of the equality between the sexes and the dignity of Danish women. In contrast to conspicuous Christian symbols, the headscarfs cause serious conflicts in the Danish context.<sup>39</sup>

In regards to the effect of the legislation, DPP repeated the argument that the anti-discrimination legislation would have the reverse effect, namely that employers would be reluctant to call immigrants to job interviews in the first place, because of the trouble that they might end up in if they are accused of discrimination.<sup>40</sup> They also repeated the view that many immigrants would see the legislation as a disservice to them, because they would want to apply for jobs and succeed in their work life on the same conditions as everybody else.<sup>41</sup>

In regards to these two latter points, the DPP’s argumentation mirrored that of the major employers organization DA who argued that the new rules would give problems in regard to applications procedures. They expected that it would incur costs on the employers because they would be drawn in to a number of law suits in which applicants (unjustified) would accuse them

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<sup>35</sup> S. Krarup, L 155 FR, 13.35.

<sup>36</sup> J. Langballe, L 155 FR, 14.00. See also S. Krarup L 155 FR, 13.50, S. Krarup L 155 FR, 14.00.

<sup>37</sup> B. Bøgsted, L 40 FR, 16.15.

<sup>38</sup> P. Dalgaard, L 40 FR 16.35.

<sup>39</sup> P. Dalgaard, L 40 FR 16.40.

<sup>40</sup> B. Bøgsted, L 152, FR, 10.55; L 40 FR, 16.15.

<sup>41</sup> B. Bøgsted, L 152 FR, 10.55; 11.00.

of discrimination. Furthermore, the DA questioned whether the law would lead to more politicization to the disadvantage of integration of immigrants, and in particular whether ‘positive action’ in regards to minorities would undermine the purpose of the legislation, namely to avoid differential or non-equal treatment and to ensure the majority population’s acceptance of minorities and their integration into society.<sup>42</sup>

#### *The response from the government*

In the motivation for the legislation the two government parties, the LP and the CP, claimed that an effective action against discrimination on the labour market “is a important precondition for the integration of foreigners into Danish society.”<sup>43</sup> However, in line with government parties’ general position on discrimination neither the two involved ministers nor the parliamentary spokespersons from the government parties insisted on an extensive need for an anti-discrimination legislation in Denmark.<sup>44</sup> The arguments in favour of the new antidiscrimination legislation was based on the necessity of transposition of EU directives to national law in a manner that respected the Danish model and the autonomy of the social partners. Additional arguments in favour seemed based on the assumption that the legislation in question had the character of a clarification of the principles, if the not the rules, already in place in Danish society.<sup>45</sup> This also meant that the ministers and the government party spokespersons did not think that the legislation would lead to any major change in the labour market, the workplaces and elsewhere.

In regard to the non-court complaint procedure, the LP’s and the CP’s spokespersons in general insisted that the courts were the relevant institutions for the treatment of discrimination cases.<sup>46</sup> The positions taken here were similar to those of the DA which consistently argued

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<sup>42</sup> Hearing response from the The Confederation of Danish Employers (DA) regarding the legislative proposal L 155, dated 28 January 2003.

<sup>43</sup> Parliamentary committee reports regarding legislative proposals L 155 og L 152, dated respectively 13 and 14 May 2003.

<sup>44</sup> From the parliamentary reading, it transpires that the two government parties did not support the directive in the Folketing’s Euoepan committee.

<sup>45</sup> L. Barfoed, L 152 FR, 11.00 (Conservative Party). U. Kragh, L 152, FR, 11.10 (Liberal Party). See also E.T. Sørensen L 155 FR, 13.35 and C. Antonsen L 40 FR, 16.00. One exception may be the Liberal Party’s spokeswoman on L 155, who in a debate with DPP representatives about the role of the DIHR stated that everyday life unfortunately demonstrated a need for a conflict preventing and conflict resolution agency, B.R. Hornbech, 155 FR, 13.05.

<sup>46</sup> B.R. Hornbech, L 155 FR, 12.50. L. Barfoed, L 40 FR, 16.20.

against the establishing of special complaint procedures.<sup>47</sup> It was also in line with the argument from The Danish Bar and Law Society (Advokatrådet) which preferred the courts system to special complaint procedures. The Society, however, argued for improved access and publicly sponsored legal aid (advokatbeskikkelse) to victims of discrimination within the framework of the normal court system.<sup>48</sup>

As regards the demands for the inclusion of sexual orientation, religion and belief as illegitimate grounds for discrimination *in the spheres outside of the labour market* forwarded by the parties to the left of the Social Democrats, the minister of integration stated that this could result in conflict with the privileged status of the Danish State Church and the privileged position of Christianity in the primary school law.<sup>49</sup> This is the only statement that directly confronts the reluctance to include the grounds of religion and belief in the general anti-discrimination legislation applying to the spheres outside the labour market. The statement, however, clearly underlines the purported right of the Danish state to make collective choices that privileges the religion and belief of the majority at the expense of those of minorities. The reference is to the general principle or idea that Denmark ensures *freedom* of religion and belief, but not *equality* of religion and belief. The question regarding religion and belief also touches upon the right of private so-called 'Free Schools' to select their pupils according to their belief or religion, as was pointed out by the Ministry of Education and by the Integration Minister (in a news paper intervention).<sup>50</sup>

Most of the remaining arguments of the government and the government spokespersons were directed towards the criticisms of the anti-discrimination by the DPP. First, it was pointed out that the shared burden of proof was known from Danish legislation and did not apply to criminal procedure.<sup>51</sup> Secondly, the government party spokespersons and the minister for integration underlined, cf. above, that the laws contained precise definitions of 'harassments' which meant that actions could be separated from 'opinions' or utterances.<sup>52</sup> In regard to the

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<sup>47</sup> Hearing response from the The Confederation of Danish Employers (DA) regarding the legislative proposal L 155, dated 28 January 2003.

<sup>48</sup> Hearing response from The Danish Bar and Law Society regarding Special Committee report on Equal treatment, dated 16 October 2002.

<sup>49</sup> B. Haarder (Minister for Integration, Liberal Party) L 155 FR 14.15.

<sup>50</sup> Hearing response from the Ministry of Education regarding Special Committee report on Equal treatment, dated 2 October 2002; B. Haarder (Minister for Integration) interviewed by Kristeligt Dagblad 22 January 2003.

<sup>51</sup> B.R. Hornbech 155 FR, 12.50. 12.55.

<sup>52</sup> B. Haarder (Minister for Integration, Liberal Party), 155 FR, 14.35.

DDP's claim about reverse discrimination, the Liberal Party's speaker underlined that the legislation also applied to members of the majority,<sup>53</sup> and that it was a fundamental principle that the legislation was directed towards individuals and not towards groups.<sup>54</sup>

### *The wider policy community*

In the wider policy community only a few issues were raised that were not included in the parliamentary debate. One of these issues concerned culture and the change of attitudes. In the parliamentary debate this was mostly negatively present in the form of the DPP's criticism of the legislation as embodying repressive political correctness. The organizations concerned with discrimination conversely pointed to the need, not only to focus narrowly on legislation, but also to change the culture and to signal – by way of legislation – that discrimination on the grounds mentioned in the legislation (plus a few not included) is illegitimate. They saw the law and the work of the DIHR as an essential part of this. It is here also interesting that while the DA thought that parts of the legislation would undermine the acceptance of immigrants and minorities by the majority population, these organizations thought that it in the end would have the opposite effect.<sup>55</sup>

In addition, the Council of Ethnic Minorities, who most explicitly took the perspective of immigrants and ethnic minorities in Denmark, argued that it was important that the legislation ensured that the expectations of well-integrated persons with minority background were not disappointed. They argued in line with a scientific study of discrimination<sup>56</sup> that it is these well-integrated persons who are most likely to feel/experience discrimination and that if integration is to succeed it is important that their expectations of equal treatment are not disappointed. They thought that an independent body processing individual complaints about discrimination could produce confidence in the Danish system.<sup>57</sup>

Other problems and issues included the need to gain knowledge about instances of discrimination as well as statistics that would serve as the basis for the evaluation of the degree of

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<sup>53</sup> B.R. Hornbech, L 155, 12.50

<sup>54</sup> B.R. Hornbech, L 155, 14.40.

<sup>55</sup> See hearing responses to L155, Udvalget for Udlændinge- og Integrationspolitik, L 155 - bilag 2, Url: [http://www.ft.dk/img20021/udvlibilag/lib6/20021\\_9986.pdf](http://www.ft.dk/img20021/udvlibilag/lib6/20021_9986.pdf)

<sup>56</sup> Møller & Togeby 1999, see below.

<sup>57</sup> Hearing response from the Council of Ethnic Minorities regarding the Special Committee report on Equal Treatment, dated 1 October 2002.

indirect discrimination without having to register the race/ethnicity etc of applicants to different jobs. Further, the Danish Bar and Law Society pointed to problems in regard to making employers responsible for discriminatory behaviour by employees because Danish law operates with a concept of 'abnormal' behaviour of employees for which employers cannot be made responsible.<sup>58</sup> Finally, it was also pointed out that there was no specification of what might amount to 'facts from which it may be presumed that there has been direct or indirect discrimination' which the plaintiff would have to establish in order to initiate an anti-discrimination procedure.

#### *The debate in the news papers*

The anti-discrimination legislation was relatively scarcely debated in the news papers and the debate did not add other aspects to the discussion. In one intervention it was claimed that the legislation would have no real effect on the conditions of minorities because the competences given to the DIHR/CCEET intentionally were watered down as much as possible. Therefore the new legislation was only a formal trick and not a real improvement.<sup>59</sup> The chairman of the CET brought forward similar criticisms.<sup>60</sup> It was for example argued that a young woman wearing a headscarf who had been turned away by a shop owner in connection with a traineeship, would not have had her position improved, because the new legislation did not enhance her access to filing complaints. Another case, in which an insurance firm had rejected a customer allegedly because of ethnic background led to a short discussion about who had the responsibility for making sure that customers were able to express their preferences vis-à-vis insurance companies. Was it the responsibility of the customer to make themselves understood by the insurance companies or should the latter provide translation for customers who do not speak sufficiently Danish?

Together the parliamentary debate, the debate within the policy community as well as the public debate concerning the implementation the EU antidiscrimination directives reflected positions in the earlier political and public debates. The issues are how serious the problem of discrimination is, what the proper cure is and whether the cure is worse than the (alleged) disease. Especially to the right of the political spectrum, the problem of discrimination is more or less

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<sup>58</sup> See hearing responses to L155, Udvalget for Udlændinge- og Integrationspolitik, L 155 - bilag 2, Url: [http://www.ft.dk/img20021/udvtilag/lib6/20021\\_9986.pdf](http://www.ft.dk/img20021/udvtilag/lib6/20021_9986.pdf).

<sup>59</sup> H. Koch (Law Professor and board member of the DCHR, now DIHR) interviewed by Kristeligt Dagblad, 22 January 2003.

<sup>60</sup> E. Smith, Kristeligt Dagblad, interviewed 22 January 2003.

denied and the debate is soon turned into a debate about paternalism and reverse discrimination against the majority population. But how big is the problem of discrimination really? The next section reviews some of the studies which have been dealing with this question.

#### **4 Analyses of discrimination against immigrants in Denmark**

The analyses of discrimination in Denmark are scarce. Studies make a distinction between perceived and real discrimination. The real discrimination is measured in terms of instances where discrimination 'objectively' has taken place, for example legal cases, while perceived discrimination refers to instances where people feel that they have been discriminated against.

##### *Real discrimination*

In the period from 2000 to 2006, there were 29 convictions based on the violation of the prohibition against racist statements in the penalty code. The Danish Civil Security Service (PET) reported 85 incidents with suspected racial/religious motive in 2006.<sup>61</sup> The CCEET under the DIHR which is a result of the EU directives has treated a total of 311 cases in the period June 2003 to December 2007 and have deemed that illegal discrimination has taken place in 15 cases.<sup>62</sup> Table 4.1 shows the total number of complaints per year from 2003/4 to 2007 as well as the distribution of cases in different spheres of society for 2003/4 and 2005.

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<sup>61</sup> FRA 2008: 28. For 2000 the number was 28, for 2001 116, for 2002 68, for 2003 52, for 2004 36 and for 2005 85, FRA 2008: 33.

<sup>62</sup> Source: Annual reports from The Complaints Committee for Ethnic Equal Treatment 2005: 39; 2006: 50-51 and email correspondence with the CCEET as regards 2006 and 2007.



**Table 4.1 Complaints to the CCEET<sup>63</sup>**

	2004*	2005	2006	2007
Total number of complaints	70	81	75	32
CCEET's own initiative	11	16	23	3
Total	81	97	98	35
<b>Distribution of complaints in different areas in 2003-2005**</b>				
Labour market	21	12%		
Labour Market, Committee's own initiative	10	6%		
Social Services	18	10%		
Social Goods	43	24%		
Health	6	3%		
Education	15	8%		
Goods and Services	13	7%		
Housing	11	6%		
Other	13	7%		
Committee's Own initiative	17	10%		
Outside of committee's jurisdiction	11	6%		
Total	178	100%		

\* Including 15 cases from 2003. \*\*There are no available statistics on the distribution of complaints in 2006 and 2007.

The numbers do not in themselves reflect an alarming high level of 'real' discrimination in Denmark. Nor do they seem to indicate any clear cut developments over time. However, as some observers remark, a major problem in Denmark is that people simply do not know the law and the legal rights in connection with discrimination (see below). Since this applies to victims of discrimination and to some extent to public authorities, the number of cases will necessarily be low. The distribution of complaints from the CCEET indicates that discrimination takes place in all spheres of society, with more on the labour market and within social services and goods. However, the total of 15 cases of discrimination that the CCEET has found gives little basis for making wide-reaching conclusions in this regard.

As regards the labour market, OECD data indicate some level of discrimination. In Denmark the unemployment rate is twice as high for foreign born (8.2 %) than for native born (3.5 %) and this tendency increases with the level of education.<sup>64</sup> Comparing the employment rate of second generation immigrants between 20 to 29 years of with that of native born in the same age group without migration background, the OECD in a recent report finds that at least one

<sup>63</sup> Source: Annual reports from The Complaints Committee for Ethnic Equal Treatment 2005: 39; 2006: 50-51 and email correspondence with the CCEET as regards 2006 and 2007.

<sup>64</sup> OECD 2008: 120, 123. So while the difference is 10.7 vs. 5.1 percent for people with primary education it is 6.0 vs. 2.2 for people with tertiary education.

quarter of the employment gap between these two groups (in Denmark between 21 % and 22.4 %) cannot be explained by educational factors or factors such as personal traits, expectations and motivations.<sup>65</sup> This indicates that there is some discrimination at work. Furthermore, calculations of the overqualification of immigrants demonstrate that almost 25 % of foreign born holding an intermediate or higher education are overqualified for the job they have and that this percentage is more than twice as high as for native born.<sup>66</sup> The data also shows that foreign born are underrepresented in managerial positions while overrepresented in elementary positions.<sup>67</sup> The OECD explains this overqualification by the fact that immigrants in the Nordic countries are mainly refugees, who are relatively highly skilled, but who face “special problems arising from their status”.<sup>68</sup> The OECD report does, however, also hint at the possibility that employers lack knowledge about the immigrants’ qualifications as they are acquired abroad.<sup>69</sup> In a recent report, the OECD connects this lack of knowledge with the concept of statistical discrimination whereby the *ascribed identities* of different ethnic groups is used by employers as a basis for evaluating the abilities of workers under conditions of uncertainty. If the stereotypes thus used by employers are false, statistical discrimination will explain for example employment and wage gaps at the aggregate level.<sup>70</sup> Also, statistical discrimination can be self-confirming because workers who are aware of it will not make the relevant ‘investment’ in improving their competences.<sup>71</sup>

In Denmark discrimination was sought documented in connection with studies of immigrant’s access to the labour market. A study from 1997 documented a discriminatory tendency around 40 % in connection with hiring processes, meaning that in 40 % of the cases the person with immigrant background would be rejected as job applicants in 40 out of 100 job openings solely because of discrimination.<sup>72</sup> Discrimination appeared to be worse in smaller firms operating in a local market. Discrimination was higher within cleaning (sic) and retail and

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<sup>65</sup> OECD 2008a: 149. The employment gap is defined as the difference between the native-born and second-generation employment rates as a percentage of the native-born employment rate.

<sup>66</sup> OECD 2008: 139.

<sup>67</sup> OECD 2008: 140.

<sup>68</sup> OECD 2008: 140. The report thus lists “sudden and fortuitous migration, no official certification of their education level and occupational qualifications, uncertainty as to the length of their stay, psychological complications, etc., which may be compounded by significant language problems.” (Ibid. 140).

<sup>69</sup> OECD 2008: 140.

<sup>70</sup> OECD 2008a: 150-2. If the stereotypes are true, the gaps would be explained by differences in abilities.

<sup>71</sup> OECD 2008a: 152.

<sup>72</sup> Hjernø & Jensen 1997: 18-9.

appeared to be slightly higher in rural areas than inner city Copenhagen (albeit the difference is small).<sup>73</sup>

Discrimination has also been studied as a possible cause for the disproportional unemployment and lower wage average of immigrants.<sup>74</sup> In relation to this, it is discussed whether discrimination against immigrants is a cause for their disproportional unemployment or income (as opposed to for example their lack of qualifications). Contrary to what the recent report from the OECD suggests, the studies did not demonstrate discrimination as a very strong explanatory factor. This may contribute to a lesser emphasis on discrimination as a serious problem.<sup>75</sup> Traditionally there has been a strong emphasis on the labour market as the essential channel for societal integration of immigrants and if discrimination is not perceived to be a serious problem on the labour market, it is less likely to appear as a problem within a political discourse dominated by the concern about integration.

#### *Perceived discrimination*

A study from 1999 based on questionnaires (telephone interviews) analysed the perceived discrimination of immigrants themselves. The analysis focused on four groups: Turks, Palestinians, Somalis and people originating from the former Yugoslavia. The study concluded among other things that many have experienced discrimination on the labour market, when shopping, when walking in the streets and when using public transportation. And there were many who experienced discriminatory treatment by the municipal services and in connection with pass port control.<sup>76</sup> The study demonstrated that the ethnic (or national) background of these groups is as strong an explanatory factor as all other possible explanatory factors combined (multiple regression analysis).<sup>77</sup> It also showed that people with most outwards directed activity, the young, unmarried men, experience most discrimination. People with low 'social capital' (i.e.

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<sup>73</sup> Hjarnø & Jensen 1997: 22-4.

<sup>74</sup> Mogensen & Matthiesen 2000; Nielsen et al 2004.

<sup>75</sup> Nielsen et al (2004: 876) thus write in connection with 'wage gaps' between native Danes and immigrants "Policy implications are fairly clear. Efforts towards reducing the income inequalities between certain immigrant groups and native Danes should not be directed at legislation against wage discrimination, but rather at improving the formal qualifications of immigrants, particularly in terms of education and work experience." It is important to note however, that Nielsen et al (ibid) also state "the miserable employment experience of most Danish immigrants [partly explaining the wage gap] may be an indication of discriminatory forces in the employment process."

<sup>76</sup> Møller & Togeby 1999: 57.

<sup>77</sup> Møller & Togeby 1999: 89. The Somalis experienced most discrimination and the Ex-Yugoslavs least. The Turks and Lebanese placed in between with, however, big intra-group differences in the levels of felt discrimination.

their level of trust in other people) experience more discrimination than people with high social capital. On the labour market, people with few 'personal resources' experience most discrimination. In general however, the interesting finding was that those with most 'personal resources' and those who feel most integrated in Danish society also report the highest level of discrimination (as cited in the CET report and in the parliamentary debate). This is explained as a result of 'relative deprivation', meaning that this group of people has the legitimate expectation of being treated just like everybody else, i.e. like native Danes.<sup>78</sup> The study had two other interesting findings. One was that those with a low level of trust in the Danish authorities report a higher level of discrimination. The other perhaps more surprising finding was that there is no correlation between the level felt discrimination and the feeling of belonging to the Danish society. Or in other words, the fact that one is discriminated against, does not necessarily have the effect that one feels less attached to Denmark.<sup>79</sup>

**Table 4.2 Percentage of immigrants from non-western countries experiencing discrimination in different contexts<sup>80</sup>**

	2000	2005
On the job	34	45
In connection with job application	23	13
In educational institutions	22	28
Spare time activities/sport	4	4
At cafes / clubs	21	12
As client in public service office	13	12
In public transport	20	22
From the politicians	5	5
In the media	11	11
Number of persons	430	330

After the 1999 study surveys about perceived discrimination have been carried on a half year basis. These surveys show that those who experience more discrimination than Danes have fallen from 43 % in 2002 to 30 % in 2006. If this is the good news, the bad news is that more people

<sup>78</sup> Møller & Togeby 1999: 91.

<sup>79</sup> Møller & Togeby 1999: 101. This of course is in line with the thesis about relative deprivation.

<sup>80</sup> Reproduced from The Ministry of Integration 2006: 103.

experience discrimination on the labour market and in connection with education in 2005 than they did in 2000.

The Ministry for Integration does not on the basis of these surveys reach the same conclusion as the 1999 study that those who feel more integrated in Danish society also feel more discriminated against. It writes: "It is a clear tendency that those people who feel least integrated, experience most discrimination. It is difficult to tell whether it is the experience of discrimination that leads to the feeling of not being integrated or whether it is a low degree of integration which is the cause of the experience of discrimination."<sup>81</sup> The studies of perceived discrimination indicate that there is a relatively high percentage of immigrants who feel discriminated against and that the discrimination takes place on the labour market, in educational institutions and in public places.

A recent survey, carried out in the Municipality of Copenhagen, found that 27 % of immigrants had felt discriminated against on various occasions, but that only 5 % of these 27 % had taken the case any further.<sup>82</sup> Or in other words, there seem to be a large gap between the number of cases of felt discrimination and the number of cases concerning discrimination that would turn up in the official statistics. One explanation is that people are not aware of their rights or they feel it is not worth the effort.<sup>83</sup>

The studies of perceived discrimination can be supplemented with studies of the attitudes of Danes towards immigrants, their perception of whether discrimination is a problem and their ideas about what should be done about it. Studies of this kind reveal that the picture of Danish intolerance and ethnocentrism is very mixed. 22.3 % Danes resist multicultural society and 55.4 % thinks that it has reached its limits.<sup>84</sup> Compared to other European countries, this is not a very high percentage and slightly below the EU15 average. Denmark follow the European mean when 50 % demonstrate resistance to immigrants, but is, however, well below the mean when only 19 % resist refugees.<sup>85</sup> 41.4 % oppose civil rights<sup>86</sup> to legal immigrants and 86 % insist that

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<sup>81</sup> The Ministry of Integration 2006: 102.

<sup>82</sup> Rene Skov, Municipality of Copenhagen, Interview 17<sup>th</sup> of June 2008.

<sup>83</sup> The Municipality of Copenhagen recently created a web page where one can 'report' instances where one feels discriminated against in order to get a better idea about the phenomenon and to signal to the public that the problem is taken seriously by the Municipality. The 'registration' on the website does not lead to any initialization of real complaint procedure, legal or administrative. Rene Skov, Interview 17<sup>th</sup> of June 2008.

<sup>84</sup> EUMC 2005a: 84.

<sup>85</sup> EUMC 2005b: 88.

<sup>86</sup> I.e. social rights, right to family reunification and easy access to naturalisation.

immigrant should conform to national laws and conventions.<sup>87</sup> On the positive side, few Danes support repatriation of legal immigrants (6.7 %), unless they have committed crimes (43.8 %).<sup>88</sup> Time series (1997 – 2003) show that the support to most ‘negative’ attitudes towards multicultural society has decreased except when it comes to the requirement of conforming to the law.<sup>89</sup> Also on the positive side, a large majority of Danes (74%) think that cultural life is enriched by cultural diversity and it appears that Danes are the most ‘cosmopolitan minded’ in the EU27 when comparing the benefits of intercultural dialogue and the value of retaining one’s own cultural traditions (which of course could result in incomprehension of the less cosmopolitan minded).<sup>90</sup>

Sadly, many Danes – and more than on average in EU25 – think that it is of disadvantage to be of a different ethnic (79%) and religious (55%) background and between 79 % and 62 % find that discrimination on the basis of ethnic origin or religion is widespread and has become even more widespread in the last 5 years.<sup>91</sup> The majority of the population (60 %) thinks that not enough is done to fight all forms of discrimination, and they primarily look to the educational system, the parents, the media, the political system (i.e. government, political parties and parliament) and the employers to rectify this situation, while trade unions, religious authorities and NGOs are ascribed a less important role in this regard.<sup>92</sup> Three out of five Danes state that they do not know their rights if they are exposed to discrimination or harassment. This is slightly above the EU25 average (56 %). 64 percent think that more MPs with ethnic minority background are needed.<sup>93</sup> On the labour market, however, the Danes are generally much less in favour of the introduction of ‘specific measures’ in order to ‘provide equal opportunities for everyone’ than the EU25 average if these measures are depending on gender (47% Danes in favour vs. 79% on average in the EU25), ethnic origin (48% vs. 70%), religion/beliefs (35% vs. 70%) or sexual orientation (25% vs. 66%).<sup>94</sup>

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<sup>87</sup> EUMC 2005a: 85-6.

<sup>88</sup> EUMC 2005a: 85; EUMC 2005b: 90.

<sup>89</sup> EUMC 2005a: 87-91. In the time series only the question about conformity to the law is included, so it does not contain a measure of the view that immigrants should conform to social conventions. There is no time series for ‘resistance to immigrants’ and ‘resistance to immigrants’ measured in EUMC 2005b, cf. note 85

<sup>90</sup> Eurobarometer 2007b: 6-9.

<sup>91</sup> Eurobarometer 2007: 1-2.

<sup>92</sup> Eurobarometer 2007: 3, 5.

<sup>93</sup> Eurobarometer 2007: 4.

<sup>94</sup> Eurobarometer 2007: 4. Much higher level of support is demonstrated towards specific measures based on age and disability.

The studies of real and perceived discrimination indicate that Denmark has a problem with discrimination. Both on the labour market and outside the labour market. However the size of the problem varies according to the applied measurement criteria. In particular the studies of perceived discrimination suggest that is a significant problem in a number of areas, and this is confirmed by the perception of the majority of the Danish population. The numbers indicating 'real' discrimination are lower and with the possible exception of the labour market they do not in themselves indicate that discrimination is a very widespread problem. However, this may be due to the fact that people do not initiate discrimination suits either because they do not know their rights or because they do not think that it is worth the effort. This is at least what some observers concerned with discrimination in Denmark think is the explanation. And 60 % of Danes do indeed state that they do not know their rights in case of discrimination. Studies of the Danish population's attitudes towards immigrants show a mixed picture. On the positive side, however, many Danes find life enriched by cultural diversity and there seem to be general support for making a greater effort in fighting discrimination (unless this effort consists in the introduction of specific measures). The next section sums up and elaborates on challenges that people concerned with discrimination in Denmark raise against Danish anti-discrimination policies. It also looks at the government's recent initiatives in the field and the reactions to them.

## **5 Legal challenges - and recent responses**

In the political and legal debate about discrimination and the implementation of the EU directives we found the following challenges to Danish legislation and policy from those concerned with discrimination as a problem. One regards the general change in attitude and the need to acknowledge that discrimination is a serious and unacceptable problem in society at large that needs to be dealt with by a consistent policy. The strong emphasis on integration is seen as taking the focus away from discrimination. Clear legislation in the area would signal that discrimination is a problem and perhaps also help with regard to those (well-integrated) minorities who feel discriminated against in Danish society. A related problem is the lack of trust in the independence of public bodies promoting anti-discrimination (the DIHR) and the underfunding of independent organisations fighting discrimination (e.g. DRC). It is also claimed that Danish legislation and (legal) practice has been too focused on the negative duties of removing formal barriers to equal treatment while not using specific measures (positive action) to create *de facto* equal

opportunities. At a more technical level, it is pointed out that the provisions against racism in the penalty code are very narrowly construed and thus difficult to apply. As concerns the areas outside the labour market, the criticisms regard the lack of protection against discrimination on other grounds than sex, race and ethnicity, in particular on a civil law basis as well as the consideration of multiple discrimination where these three grounds are bound up with nationality, faith/religion and sexual orientation. It has also been criticised that victims of direct and indirect discrimination would have a very hard time making it likely that discrimination has taken place because of the absence of a useful factual basis, for example statistics on the ethnic background of job applicants. This along with the burdens of proof makes it very difficult to prove that discrimination has taken place.<sup>95</sup> In addition, the equality body, the CCEET, is criticised having to narrowly defined competences and thus for not providing sufficient protection for complainants with few resources.

These various challenges are further elaborated in two larger policy statements. One dates from 2003 and is an alternative 'action plan' for fighting racism, ethnic discrimination and xenophobia from 2003 published by DRC and POEM.<sup>96</sup> The other is a report issued by the DIHR in 2007 on 'effective protection against discrimination'. The report was based on input from the Institute's Equality of Treatment Committee, consisting of a number of NGOs representing minority groups concerned about discrimination.<sup>97</sup>

The 2003 action plan is based on the Durban Declaration (2001) and it is presented as a criticism of the lack of an official Danish action plan at the time. It consists of 48 different proposals for improving the legislation and for fighting discrimination. A number them are general and contains suggestions that the government should acknowledge discrimination as a serious societal problem, incorporate human rights and anti-discrimination conventions in to Danish law and invite minority organisations to participate in the formulation of a manifesto for a 'intercultural and inclusive Denmark in the 21<sup>st</sup> century' and for further policies in the area. It

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<sup>95</sup> According to Justesen, independent legal adviser, the new rules concerning 'shared burden of proof' has not had much effect, interview 26<sup>th</sup> of June 2008.

<sup>96</sup> Parize 2003. POEM does not exist anymore. It was an 'Umbrella (DA: Parably) Organisation for the Ethnic Minorities'.

<sup>97</sup> Danish-Russian Association, The Cooperating Organisations for the Disabled, DRC, ENAR, Islamic-Christian Study-Centre, The Women's Council, The Organisation of Gays and Lesbians, The Organisation for the Mobilizing of the Elderly, and as observer, the Centre for the Equal Treatment of the Disabled.



also suggests that Danish political parties should develop and sign an ethical code of conduct banning pejorative expressions about ethnic minorities and immigrants in public debate.

Regarding the law and its administration the alternative action plan suggests that the clauses in the Danish penalty code regarding racist statements should be strengthened and that the police should be instructed in applying the rules regarding 'racially motivated' violence in the penalty code much more than they do today. The report furthermore repeats the suggestion that an administrative equality body be modelled on Board on Gender Equality. Moreover, the Danish rules on naturalisation, family reunification, integration requirements for immigrants should be re-evaluated both in order to do away with the negative image of immigrants that they entail and in order to remove all instances of direct and indirect discrimination contained in them. Finally, the plan proposes to fight racism on the internet, to introduce a rule of receipts from the police stating the reason for stopping people (minority members) on the street and in general to train people in the rules of the anti-discrimination laws including the possibilities of complaining about discrimination. Local counselling facilities should be established.

With regard to the labour market, the schools, the (public) media, and the housing the plan urges the state to induce the social partners and NGOs to fight discrimination, and to fund the NGOs' work. The media should ensure proper representation of ethnic minorities (on the screen) and in the selection of programmes. The educational system should have as its purpose to train staff and pupils in the awareness of racism/discrimination, human rights and in intercultural competences. This also involves the right to be taught in mother tongue and in receiving instruction in Danish as a second language.

Finally, the action plan proposes that the Danish research on discrimination should be strengthened by establishing a national research centre and by developing a data base adequate for the study of discrimination. This entails inter alia the somewhat odd suggestion that it should be possible to register the ethnic background of people on the labour market thus improving the facts from which a discrimination case could be established and with a view to evaluating their degree of inclusion, while on the other hand removing the possibility in the national statistics (Danmarks Statistik) of registering naturalised citizens according to their (previous) national (ethnic) background.

The 2007 DIHR report on 'effective protection against discrimination' addresses the recent government initiative to establish Equal Treatment Board taken in 2006 and finally

approved by the parliament in May 2008 (see below). The report lists a number of ‘legal and factual initiatives’ to advance the fight against discrimination. Among the legal initiatives is a proposal for a general ban on discrimination containing all grounds of discrimination and covering all areas of society as well as the introduction of mandatory fulfilment requirements. The latter include obligatory equality of treatment policies in all companies and public organisations, legal obligations to issue yearly reports on equal treatment initiatives and mainstreaming of equal treatment in public policy and legislation.

The general ban on discrimination is based on “a principle of equality and the general character of the prohibition against discrimination”.<sup>98</sup> The report argues that the logical consequence of this is that all grounds of discrimination should be seen as of equal importance and that all exposed to discrimination should be able to claim their rights irrespectively of sector or the sphere of society in which it takes place.<sup>99</sup> This would also imply a uniform treatment of all forms of discrimination and a so-called horizontal approach to discrimination. The horizontal approach would stand in contrast to the current ‘hierarchical’ approach to discrimination according to which some grounds of discrimination (sex, race and ethnicity) are better protected (outside the labour market) than other grounds.<sup>100</sup> The horizontal approach is furthermore seen as a lever for transferring experience from one area/ground of discrimination to others and as a tool for mainstreaming anti-discrimination efforts.<sup>101</sup> At the same time, a general ban on discrimination would make the legislation more transparent both for the victims of discrimination and for those who apply legislation on a daily basis, public employees and private employers etc. It would in other words enhance legal certainty.<sup>102</sup>

The purpose of the mandatory fulfilment requirements is to change the practice ‘on the ground’. According to one observer and main author of the DIHR report, Mandana Zarrehparvar, Denmark has despite the mosaic nature of its legislation covered most areas in which discrimination takes place, but the practice on the ground, at workplaces, in schools etc, is, however, not influenced by the legislation and its purpose.<sup>103</sup> The fulfilment requirements would raise the awareness about what discrimination entails and thereby change the practice. The report

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<sup>98</sup> DIHR 2007: 66.

<sup>99</sup> DIHR 2007: 66.

<sup>100</sup> DIHR 2007: 67.

<sup>101</sup> DIHR 2007: 67-8.

<sup>102</sup> DIHR 2007: 67-8.

<sup>103</sup> Zarrehparvar, DIHR, Interview 17th June 2008.

here appeals to a change in attitudes but also to the introduction of concrete guidelines and procedures for action which would make sure that non-discriminatory professionalism reigns in all relevant spheres. As Zarrehparvar states:

*The point is not that you have to become 'house trained'. The point is that as a professional you should not let your prejudices and your negative stereotypes influence the manner in which you act.*<sup>104</sup>

By taking this approach the report reflects research indicating that it is usually more effective to act directly on the practice than trying to change people's attitudes.<sup>105</sup>

The DIHR report has a number of proposals with regard to the new Board for Equal treatment and with regard to the DIHR's future role in fighting discrimination. They include:

1. The ability to counsel victims of discrimination on all grounds and represent these victims in cases before the Board of Equal Treatment and before the courts as well as to ensure that counselling is available locally and not just in the Copenhagen area.
2. The further development of the possibility of mediation in cases of discrimination. The point of mediation is, according to the report, that going to the courts or using court like procedures is not always the most appropriate means of solving conflicts when they are based on fear and/or ignorance. This is because they do not always result in enhanced understanding and accept of differences and therefore do not provide basis for an inclusive society.
3. More research in the causes, forms, patterns and extent of discrimination through cooperation between established research institutions in the area. Here the report reflects the NGO action plan.
4. Also reflecting the NGO action plan, a massive information and education campaign concerning discrimination targeting the population at large, actors in the labour market and in companies (including knowledge about diversity management), public officials, the formal and informal educational sector, the curricula and the teachers.

The following elaborates on some of these challenges to the Danish anti-discrimination efforts and the proposals for improvements as well as it addresses the most recent government initiatives in the field.

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<sup>104</sup> Zarrehparvar, interview 17th June 2008. 12.12-12.36. The former PM Poul Nyrup Rasmussen said in the late 90s that the DPP would never become 'house trained' implying that they could not be part of the decent political life in Denmark. Since then 'house trained' in this context means something similar to 'politically correct'.

<sup>105</sup> Wrench 2007: 34-5.

*Lack of knowledge about discrimination, rights and concept*

For people concerned with discrimination of minorities as a societal problem, it is a general claim that there is a substantial lack of knowledge about what discrimination entails among possible discriminators, victims of discrimination as well about those who are supposed to adjudicate in cases of about discrimination. Less cumbersome procedures through civil law cases, reverse or shared burden of proof, as well as administrative complaint procedures including (local) counselling services is seen as improving matters. However, the main explanation about the relatively low level of cases of discrimination in Danish legal practice (also compared with the number of instances of felt discrimination) is simply that the level of knowledge about discrimination is too low.<sup>106</sup> A further problem is that the concept of discrimination is a concept that for many people are is too harsh a concept that does not have any relevance to their concrete experiences:

*Generally people do not acknowledge that discrimination takes place. And I think that many ordinary people perceive the concept of discrimination as a very square concept ('et hårdt begreb'). If you ask people whether they have been discriminated against, then they will often tell you no. But if you ask them if they have been looked upon negatively by the shop steward or that the shop steward has not told them the same thing as he has told the others, then here will possibly be more who think that they have been discriminated against. So you have to make discrimination and what it means more concrete.<sup>107</sup>*

According to some observers, the difficulty is also that the concept of discrimination fails to engage people because it sits badly with the self-understanding of Danish society:

*We are allergic to the word discrimination, because we have a self-understanding that is rooted in 'equal', equal rights etc. That means if somebody claims to have been discriminated against, then is felt as a very hard attack on the Danish self-understanding....You can see this on the politicians' the reactions on the reports*

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<sup>106</sup> "Personally I think, firstly, that you develop a 'thick skin' when you have experienced discrimination a number times and continue your life thinking 'oh well nothing can be done about it' and perhaps you lose the faith in trying to do anything about it. Secondly, I think that people simply lack the knowledge about the fact that this [i.e. discriminatory acts] ought not take place... . You have to look at reporting of incidents of discrimination positively. Reporting discrimination raises the awareness about it, also the discrimination which takes place without the intention of discriminating." L. Munk, Member of the Council of Ethnic Minorities, interview 20<sup>th</sup> of June 2008, 32.00-33.30. Møller-Hansen, Association for the Integration of New Danes on the Labour Market, Interview 17<sup>th</sup> of June 2008, and Leidersdorph-Ernst, and Maltesen, LO, Interview 7<sup>th</sup> of July 2008, make the same observation.

<sup>107</sup> Justesen, Independent legal adviser, interview 26<sup>th</sup> of June 2008, 3.00-4.20

from Amnesty International and other international bodies who have criticised Denmark in this regard.<sup>108</sup>

*There is a denial with regard to talking about discrimination in Denmark. Most people don't want to hear about it taking place. Because we have an 'equality culture': we are and should all be equal. So if you acknowledge that there are some who are not equal and are being discriminated against, then the basis of our self-understanding disappears. And in addition: we have a perception of 'them' and 'us', so if we acknowledge discrimination, then there is something wrong with 'us'. Our whole approach is that is 'them' who need to change. In Denmark, integration means assimilation.<sup>109</sup>*

As Zarrehparvar explains, the equality culture somehow leads to 'sameness' rather than equality. And this has also consequences for the ability to address institutional discrimination:

*For example at the hospitals, many don't know the legislation at all. They say 'we give everybody the same treatment'...The difference between 'alike' and 'equal' is not understood, and people experience that they are not recognized as the persons they are and with the rights they have...The system is not inclusive ('rummeligt') enough to take into consideration the needs we have and the background conditions ('forudsætninger') that we have. I call it the institutional discrimination and this the substantial, positive obligation we have to look at the institutional level, at the police, the healthcare system, the school system, the social service administration: what to we have to do in order to ensure that all are treated equally? That question we do not ask ourselves.<sup>110</sup>*

For Zarrehparvar, the lack of understanding of what discrimination entails is connected with the favourite term for discrimination in Danish law, namely 'difference of treatment':

*Discrimination is illegal **difference** of treatment on the basis of an illegal criteria, i.e. ethnic origin, which is not based on objective reasons and is disproportional. In Danish legislation we always use the concept of difference of treatment. However, differential treatment is necessary in order to avoid discrimination, because by differentiating you ensure equality and not just conformity. The starting point, though, is not different colours, but different individual needs.<sup>111</sup>*

Kommentar [m1]: Differential

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<sup>108</sup> Møller-Hansen interview on 17th June 2008, 1.03.15-1.04.15.

<sup>109</sup> Justesen, interview on the 26th of June, 8.30-9.30.

<sup>110</sup> Zarrehparvar, Interview 17th June 2008, 6.00-7.00

<sup>111</sup> Zarrehparvar, Interview 17th June 2008, 9.00-11.00

Here Zarrehtarvar probably takes the remedies for discrimination (and thus the concept of discrimination) a step further than most people are willing to concede. The general impression from the interviews is that the remedies advocated in by critical observers in Denmark is an approach to ‘special measures’ and rules for institutional practices that upgrades people with minority background so that they can participate on an equal footing in institutional practices based on genuinely neutral rules, rather than an approach which based on differentiation as such. Or in other words, the dominant approach is very much based on the ‘equality culture’ that its exponents tend to criticise for its assimilatory consequences. It does not imply differentiation in rights. But of course, the thrust of Zarrehtarvar’s argument may also well be that all by right are equally entitled to a differentiated treatment that meets their individual needs.

It is also in the context of the lack of knowledge about discrimination that the proposal for more counselling services and the *ex officio* role for the Equality body should be seen. In a system where cases are driven solely by individual complainants who may find even civil and administrative procedures costly, the awareness of discriminatory actions and practices can be raised by having the equality body starting investigations, both of practices for example in individual companies, but also of entire sectors, such as the housing sector, writing reports and arranging conferences.<sup>112</sup> Not only does this make discrimination less safe for discriminators who rely on the relative ‘weakness’ of their victims, it also has the benefit that no concrete person is involved in the process.<sup>113</sup> In addition, sector analyses would engage a whole number of relevant actors whose contribution is crucial if something is to be done about the problem.

#### *Employers and trade unions, and the Danish model*

As regards some of the potential discriminators, the impression among critical observers is that many employers, in particular among the smaller and middle sized companies, do not know very much about the part of the anti-discrimination legislation that is not related to gender.<sup>114</sup> However, there has been an increasing interest in the field and the impression is also that

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<sup>112</sup> Justesen, interview 26<sup>th</sup> of June 2008, Justesen refers to positive experiences from the US with general investigations of this sort.

<sup>113</sup> Zarrehtarvar, Interview 17th June 2008

<sup>114</sup> Torben Møller-Hansen, Interview 17th June 2008, Zarrehtarvar, Interview 17th June 2008. Conversely, it is impression of Greisen, DA, that firms have a good deal of knowledge from the 1996 law against difference of treatment on the labour market, interview 17<sup>th</sup> June 2008.

discriminatory behaviour is somewhat been decreasing,<sup>115</sup> not least under the influence of labour shortage in the booming Danish economy.<sup>116</sup> The employers are interested in concepts such as CSR and diversity management and they tend, according to one close observer, to be much more flexible than the ‘black and white’ debaters in polarized political debate in Denmark when it comes to hiring and working with people with different cultural backgrounds and physical appearances.<sup>117</sup> New requirements for big firms to report on their CSR efforts may also further efforts in this field as will the increase over time of people who have been educated in these matters.<sup>118</sup> However, the diversity management efforts of Danish firms is also met with some criticism:

*The problem is that many times the concept of diversity management has been misunderstood. It is not based on rights or on the idea that minorities are resources because of their differences. It is mostly about attracting and recruiting them and then afterwards making them conform.*<sup>119</sup>

Møller-Hansen also observes that Danish HR-managers faces the problem that they are not legally required to keep diversity management efforts on the agenda, for example by being obligated to measure statistically the degree of representation by ethnic minorities. Diversity management therefore compete with too many other agendas.<sup>120</sup> On their side, the employer organisations have done some work to support individual employers’ efforts in anti-discrimination and diversity management policies.<sup>121</sup> Their efforts are, however, naturally based on voluntarism and ‘the good examples’ rather than on rules obligating their members.<sup>122</sup>

The trade unions are mentioned among those actors who could be expected to do more to fight discrimination and making their members aware about their rights. As one observer comments:

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<sup>115</sup> Torben Møller-Hansen Interview 17th June 2008.

<sup>116</sup> Torben Møller-Hansen Interview 17th June 2008, Greisen, DA, Interview 17th June 2008.

<sup>117</sup> Møller-Hansen, Interview 17th June 2008, commenting on the recent Danish debate on whether judges should be able to wear veils in the courtroom.

<sup>118</sup> Justesen Interview 26th June 2008.

<sup>119</sup> Zarrehparvar, Interview 17th June 2008, 41.45 – 42.15. See also Boxenbaum 2006 for a case study of the ‘translation’ the concept of diversity management into Danish firms.

<sup>120</sup> Møller-Hansen Interview 17th June 2008.

<sup>121</sup> Justesen, Interview 26th of June 2008, Mandana, Interview 17th June 2008, Greisen, Interview 17th June 2008.

<sup>122</sup> Møller-Hansen, Interview 17th June 2008. Greisen, Interview 17th June 2008.

*There are some organisations which traditionally have been pro-active [in other areas of discrimination, i.e. based on gender] which are less proactive in this area. This is not a question of blocking of cases [because the victims of discrimination do not know their rights]. However, one could expect a more proactive role.<sup>123</sup>*

Thus while the trade unions are seen as having been crucial the creation of legal practice and awareness on the question of gender discrimination, they have not yet had the same level of activity in the question about ethnic or religious discrimination.<sup>124</sup> Trade unions are also by some observers been deemed lacking with regard to another way of fighting discrimination, namely through training shop stewards in pursuing the agenda at workplaces: towards the employers and towards other trade union members who are harassing co-workers with minority background.<sup>125</sup> Critical observers ascribe this to a number of factors. These include cross pressure between union members who belong to the right wing of the political spectrum and who may even have a 'Danes first' attitude and efforts to attract and protect members of ethnic minorities as well as a general preference of trade unions to keep the Danish system based on general agreements and compromises between the social partners. This in turn pushes members of minorities away from the traditional trade unions:

*Because they always have been seeking the compromise and have been too all-embracing, they cannot take the rights of individual human beings into account. The individual has paid a price for the sake of solidarity... And this is where you start losing people – because people cannot see themselves in trade unions who do not recognize their rights as individual human beings and demand conformity for the sake of the trade union. Not only because of their ethnicity or because of discrimination, but simply because they cannot see themselves as legitimate members – they are not recognised as the individuals they are.<sup>126</sup>*

It is also mentioned that efforts such as diversity management at times are seen as contradicting traditional trade union values in particular the collective fight for equal rights for all.<sup>127</sup>

At the LO, it is admitted that the Danish model puts a brake on the development in the area of non-discrimination. The explanation is, however, rather straightforward:

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<sup>123</sup> Møller-Hansen Interview 17th June 2008, 9.15-10.30.

<sup>124</sup> Møller-Hansen Interview 17th June 2008.

<sup>125</sup> Zarrehparvar, Interview 17th June 2008, Justesen, interview 26th of June 2008.

<sup>126</sup> Zarrehparvar, Interview 17th June 2008.

<sup>127</sup> Møller-Hansen, Interview 17th June 2008, Maltesen, LO, Interview 7<sup>th</sup> of July 2008.



*With regard to the general labour market agreements [the anti-discrimination provisions] are close to non-existent for the simple reason that the DA has not wanted to implement provisions in these areas. It has not been possible to get them [DA] to the negotiation table.<sup>128</sup>*

DA is thus seen as the main reason for the lack of development. Because of the lack of implementation of anti-discrimination in general agreements the cases about discrimination fall outside the labour market conflict resolution system and are referred to the civil court system. However, there are very few, if any cases pursued by civil law suits.<sup>129</sup> The general agreements do contain statement of intent and encouragements to the formally established ‘cooperation committees’ at the level of the individual companies consisting of both workers and employers to address the issue about discrimination and implement measures in the company’s personnel (HR) policy. It is not clear how widely the issues in fact are raised and policies have been developed at the individual firms.<sup>130</sup> For their own part, trade unions have started or participated in a number of programmes both in order to improve the labour market access of people with minority background and to counter discrimination.<sup>131</sup> One major trade union has for example begun a campaign to monitor the representation of minorities among its members and recruit ethnic minorities as shop stewards etc.<sup>132</sup> At the LO, it is conceded that some concepts such as diversity management could be in conflict with a very collectivistic approach according to which all should be given identical working conditions.<sup>133</sup> But it is also underlined that another important value of the trade union movement has been to work against marginalisation, an effort that cannot be pursued in this area if all are to be given the exact same treatment:

*Equal treatment becomes the enemy of integration, in the sense that everybody should be given the same. Then you cannot solve problems for special groups with special problems. There you have to be goal-oriented – otherwise it does not make any sense. If it is equal treatment with the same flat layer of liver pate to all, then*

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<sup>128</sup> Leidersdorff-Ernst, Interview 7<sup>th</sup> of July 2008, 0.30-1.00. Greisen, DA, admits that few provisions about discrimination on the basis of ethnicity, race, religion etc has made it into the general agreements, Interview 17<sup>th</sup> June 2008.

<sup>129</sup> “as far as I know there are no such cases”, Leidersdorff-Ernst, Interview 7<sup>th</sup> of July 2008, 9.30-9.45. Greisen confirms the low level of cases, Interview 17<sup>th</sup> June 2008.

<sup>130</sup> Leidersdorff-Ernst, Interview 7<sup>th</sup> of July 2008. Greisen is more confident that the individual companies take the issues up in the the cooperation committees.

<sup>131</sup> Maltesen, Interview 7<sup>th</sup> of July 2008.

<sup>132</sup> Maltesen, Interview 7<sup>th</sup> of July 2008.

<sup>133</sup> “You get a split between collectivism and individualism”, Maltesen, Interview 7<sup>th</sup> of July, 32.30-32.45.

*you cannot help the weak groups on the labour market. If there is one thing that the trade union movement has been standing for, it is not only to help those who are members, but also to show solidarity and support the weak groups on the labour market.*<sup>134</sup>

The criticism for not doing enough and not being able to work with a differentiated approach with regard to ethnic minorities is thus partly countered by Maltesen and Leidersdorff-Ernst at the LO. But only partly, since it is conceded that the general agreements lack provisions on anti-discrimination and that certain parts of the trade union value basis could serve as a barrier to anti-discrimination work. Still the conviction is that the system is basically the right one and that it would be able to do the job under more ideal conditions, especially if the employers were willing to implement anti-discrimination in the general agreements. It seems to be a general belief that efforts based on dialog (and agreement) between the partners, both locally and centrally, are more effective than a legalistic approach. The system works because - or when - the various parties on the labour market are not forced to implement rules, but rather have been able to work out the problems themselves in a practical manner adjusted to the local circumstances:

*Using public authority to implement rules is not the solution. At least not the whole solution. The area concerning work environment demonstrates this. .. I don't think that the using the public authority approach would help anything. The only thing that works is good trade union pressure by the shop stewards... If it is based on agreements it is a bit easier. If it is based on legislation it is a bit more difficult. In particular when we are in areas where the burden of proof is difficult to lift because of a lack of tangible evidence.*<sup>135</sup>

The view that the public authority approach is inappropriate also seems to be shared on the other side of the negotiation table:

*Perhaps it is something especially Danish. You don't want people to tell you what you should think about things. You like to have the framework within which you can generate your own point of view.....Both the trade unions and the employer organisations have the direct dialogue [with their members and each other]...The Danish model is at work up and down these hallways, where representatives from both sides meet to solve cases. It is a lot about talking with each other and finding*

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<sup>134</sup> Maltesen, Interview 7<sup>th</sup> of July 2008, 33.00-33.45. Liver pate is a very common topping on the typical open rye bread sandwiches (smørrebrød) in Denmark and often used as a slightly negative picture of Danish everyday culture.

<sup>135</sup> Maltesen, Interview 7<sup>th</sup> of July 2008, 1.05.00-1.07.30.

*a solution that accommodates both sides, rather than having some clever person telling you that 'this is not acceptable'.<sup>136</sup>*

Also the government appears to be reluctant to go beyond the definition of discrimination contained in the current legislation (taken over from the EU directives) and specify in even further detail what should be considered to be discrimination. It wants to maintain a certain measure of flexibility for the creation of local solutions based on agreements between the involved parties, for example when it comes the question whether veils should be allowed at the individual workplace or not:

*As long as it is within the framework of the law, the Government's general position is that these kinds of conflicts [e.g. about wearing veils] must be solved locally, in the municipality or at the workplace – it is not something the government should interfere with<sup>137</sup>*

But for one critical observer the problem with the Danish model is not only that the social partners defend their autonomy without using it positively and constructively (enough) to fight discrimination. The problem lies with the misconceived notion that this is an area in which the rules can be agreed and decided upon by *private parties*. Instead the approach should be to place a higher emphasis on the law and its primary message that discrimination is wrong and something that *society* cannot accept.<sup>138</sup> But also with regard to the legal system, the Danish efforts at anti-discrimination are found lacking. One aspect of this is the lack of legal expertise in the field.

#### *Lack of knowledge among lawyers*

P. Justesen thus criticises the decision in the one case that has made it to the Danish Supreme Court. The case concerned a Muslim girl who was fired because her employer Føtex, a super market chain, decided that her wearing of a veil was in conflict with the company's dress regulations. According to Justesen, the judges had not really understood the legal concept of discrimination, in particular of indirect discrimination:

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<sup>136</sup> Greisen Interview 17<sup>th</sup> June 2008, 58.30-59.30. Greisen underlines in the interview that the work necessarily will have to take place within the framework of the legal rules in place.

<sup>137</sup> Gammeltoft, Ministry of Integration, Interview 16<sup>th</sup> of June 2008, 52.00-54.00

<sup>138</sup> Justesen, Interview on 26<sup>th</sup> of June 2008.

*To put it a bit crudely, I am not sure that the judges have understood the concept of indirect discrimination. In the Føtex case they argue that Føtex has hired so many members of ethnic minorities, and that Føtex therefore has done something good. However, this has nothing to do with indirect discrimination. If you have to make the classic test about indirect discrimination, then you have to test whether the dress requirement in question primarily goes against a particular group – in this case Muslim women – and put them in a less favourable situation... You have to test if this completely neutral requirement is based on objective reasons and whether it is proportional to these reasons.<sup>139</sup>*

Justesen points out that few lawyers in Denmark know anything about discrimination, partly due to the low number of cases, but also partly due to the fact that there are no references in the law to the international legal practice. If Danish Supreme Court judges had been looking at the international legal practice, they would have known that the objective reasons for introducing e.g. dress requirements are much more narrowly construed and limited to concerns about hygiene and safety.<sup>140</sup> For Justesen this does not mean that those who should be adjudicating question about discrimination – concretely on the new Equality Board – should be lay people or experts with a non-legal background. For her most respect is won by legal expertise and the fact that it is a legal decision that is made and not a moral or a political one. Other critics of the legal profession's knowledge in this area would prefer to have people on the board who know about discrimination in the various spheres of society.<sup>141</sup> A particular point is made by the social partners, namely that the legal experts may not have sufficient knowledge about the content of labour market agreements and the customs in different trades.<sup>142</sup> But of course, the question here is again whether it is the law or the general agreements and the customs within different trades that should determine what is to be considered discrimination.

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<sup>139</sup> Justesen, Interview on 26th of June 2008, 46.45-47.45

<sup>140</sup> Justesen, Interview on 26th of June 2008.

<sup>141</sup> Zarreparvar, Interview, 17th of June 2008.

<sup>142</sup> "An example from the gender equality area is a case where a new owner of a restaurant wants to employ only people with gastronomy diplomas because he wants to turn it into a high end restaurant. He therefore dismisses all persons who are self-taught cooks. There is a clear clause in the general agreement that he is allowed to make such requirements of his employees that they have a certified diploma. But a pregnant woman files a complaint on the basis of gender discrimination which her trade union refuses to take further action on with reference to this rule. She therefore takes it to the Gender Equality Board which decides against the employer because of the rule about reverse burden of proof. In the labour market conflict resolution system ('arbejdsretten') she would never have obtained a decision of this kind because it is a lawful requirement that people have a certification within their profession. And this is not indirect discrimination because this requirement is not made with the aim of harming women" Leidersdorff-Ernst, 7<sup>th</sup> of July 2008, 40.45-42.30

*Mixed messages from the politicians and lack of ethnic representation*

The criticism of the Danish anti-discrimination efforts is mainly directed towards the government and the political system. The criticism is that more could be done. But another concern, repeated in a number of interviews, is that the political debate in Denmark is undermining anti-discrimination efforts, in particular efforts to eliminate indirect discrimination. A recent example is that judges have now been prohibited from wearing veils in the courtroom, because they have to appear 'neutral' to the public. According to some observers, this sends a signal contrary the intention and purpose of anti-discrimination efforts, demonstrating that non-objective reasons such as the political majority's idiosyncratic preferences and fears can serve as basis for setting rules which inevitably exclude some groups:

*if it became politically correct and acceptable that you discriminate against people then this trend will continue and it will start a process where other groups will also become victims of discrimination. You start with Muslims, then (the naïve) Muslim sympathisers then all other foreigners/immigrants or even other groups such as homosexuals. I consider the discourse about veils as -if not directly discriminating- then a long step on the way. The law that bans judges from wearing a veil confuses the needed religious neutrality of state institutions with the religiosity of the individuals within such institutions. It is a first step towards institutionalised discrimination since the direct and concrete consequence of this is that a specific group of people will be denied what is part of their constitutional rights because of their religion or religious practice. It also sends the signal that it is OK that Muslims work as check out personnel at the supermarkets or as cleaners, but not as lawyers, doctors or judges.<sup>143</sup>*

The recommendation is that politicians become more aware of the signals that they are sending in order not to push minorities away and create distrust in public authorities' commitment to anti-discrimination and, concretely, that the 'objective grounds' for keeping or introducing certain rules that disfavour certain groups be much more narrowly construed in the future.<sup>144</sup> A general recommendation is also that the elimination of rules which are not based on 'objective reasons' should be accompanied with a more wide spread use of 'specific measures' in order to improve

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<sup>143</sup> Safwat, Board Member of the Association of Democratic Muslims, Interview 24<sup>th</sup> of June, 3.00-7.30. Contrary to other interviewees, Safwat underlined that he did not see that discrimination as widespread practice in Danish society today, at least not outside the political sphere and the media, but that it could become so if further actions are taken similar to the prohibition of judges to wear veils.

<sup>144</sup> Mohamed, Council of Ethnic Minorities, Interview 20th of June 2008, Munk, Council of Ethnic Minorities, Interview 20th of June 2008 and Justesen, Interview 26th of June 2008.

the *de facto* equal opportunities. It is admitted that the (EU) legal practice in the area, which is often cited as a limitation of the establishment of equal opportunities,<sup>145</sup> sets narrow limits on what can be done. However, the special measures should be aimed at ‘up grading’ members of ethnic minorities so that they can apply on an equal footing with others. Good examples include preschools for the Police Academy, The Danish School of Journalism and special training courses in order to acquire jobs on normal conditions as well as targeted initiatives to select and train management talent among women and ethnic minorities.<sup>146</sup>

Among the observers of Danish anti-discrimination policy it is noted that there is a lack of organisations which represent ethnic minorities and which able the relevant input in to the policy process. This is by one observer ascribed to the lack of state funding. Without state funding the organisation are not able to establish a professional organisation with paid staff that can develop consistent policy input.<sup>147</sup> Other observers ascribe it to an inability among the organisations with an ethnic minority base to be specific enough in their political targets. They too often want to represent too many different groups with regard to too many issues.<sup>148</sup> Increased ethnic representation within the policy field could enhance the awareness about discrimination, both in concrete cases and with regard to the things taking place at the more symbolic level, such as in the recent case of prohibiting judges from wearing veils.

#### *Recent developments*

The government has taken some initiatives on the anti-discrimination area since the implementation of the EU-directives. In November 2003 it published an action plan for the promotion of equal treatment and diversity and the fight against racism, based on the 2001 UN Durban Conference against Racism etc. And in 2006 before the European year for equal opportunities it proposed the creation of a new administrative Equality Board, modelled on the existing Gender Equality Board. This Equality Board was finally approved by parliament in May 2008 and comes in to force in 2009.

The 2003 action plan was seen as an integrated part of the Government’s plan for integration. The plan contains 14 rather loosely formulated initiatives relating to improving

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<sup>145</sup> E.g. Hougaard, Ministry of Employment, Interview 18<sup>th</sup> of June 2008.

<sup>146</sup> Justesen, Interview 26<sup>th</sup> of June 2008, Møller-Hansen, Interview 17<sup>th</sup> of June 2008, Maltesen, Interview 7<sup>th</sup> of July 2008.

<sup>147</sup> Zarreparvar, Interview 17<sup>th</sup> of June 2008.

<sup>148</sup> Møller-Hansen, Interview 17<sup>th</sup> of June 2008.

secondary education of persons with immigrant background, certifying home country educational credentials of immigrants, breaking the 'negative social heritage' of immigrants, furthering debate and understanding of the values of diversity, democracy and citizenship, engaging the social partners in campaigns and programmes for fighting exclusion and intolerance and creating diversity at the workplace as well as avoiding ghettos and enhancing the inclusion of immigrants in local associations in order to increase their so-called civic participation. The main focus of the plan was apparently discrimination against minorities. However, it also stated that "it is clear that persons with ethnic minority background can be racist and intolerant towards groups other than their own" and that "[s]everal of the initiatives of the action plan should be seen in this light."<sup>149</sup> The action plan did not include any further legislation in the area and also seem to disappoint many of the aspirations of the 2003 NGO action plan cited above. The Ministry of Integration has not as of yet made a comprehensive evaluation of the action plan and its effects. Among the interviewed observers of the policy field, one identified a number of initiatives springing from the plan, enhancing the labour market access of minorities (up grading training),<sup>150</sup> while another described it as 'very thin' and criticises the government for not having taken a lot of the original suggestions from the NGOs on board in the plan.<sup>151</sup> It is beyond the scope of this report to evaluate the government's action plan, but statements from observers in the field at least suggest that it has not been met with undivided attention and approval for its intentions and effects.

By modelling its new Equality Board on the existing Gender Equality Board, the government seems to have taken on a suggestion from the CET minority, the centre-left in parliament and a number of NGOs that it originally rejected in connection with the implementation of the EU directives in 2003. In the motivation for the legislation concerning the new board it is stated that it is

*"inappropriate (uhensigtsmæssigt) that there [in the existing legislation] are such differences in the access for the individual to complain about difference of treatment...[and] appropriate to ensure a more effective legal protection of those groups who are protected against difference of treatment in the legislation, but do not have access to an administrative complaint procedure."*<sup>152</sup>

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<sup>149</sup> Ministry of Integration 2003: 5, translated from Danish.

<sup>150</sup> Maltesen, Interview 7th of July 2008.

<sup>151</sup> Zarrehparvar, Interview 17th of June 2008.

<sup>152</sup> "Efter regeringens opfattelse er det uhensigtsmæssigt, at der er en sådan uensartet adgang for den enkelte til at få behandlet en klage over forskelsbehandling. Derudover er det regeringens opfattelse, at det er hensigtsmæssigt at sikre en mere effektiv retsbeskyttelse af de grupper, der er beskyttet mod forskelsbehandling i lovgivningen, men

The Board will deal with difference of treatment on the grounds of sex, race, ethnic origin, religion, belief, sexual orientation, political observation, social and national origin as well as on age and handicap on a number of areas, specified in the existing anti-discrimination legislation. The Complaint board will therefore be able to handle cases where there are several different grounds of discrimination at work at the same time. It thus represents a move towards mainstreaming in the fight against discrimination. Arguably, the new Board will improve access to filing complaints, and reinforce ability of obtaining administrative decisions in cases of discrimination. It will be able to make decisions and assign compensations (if warranted in existing law) based on a written procedure. The decisions of the Board can be appealed in the court system, and if the defendant decides not to comply with the Board's decision, the Board is responsible for opening a court case on behalf of the plaintiff on the plaintiff's request. It is important to note, however, that the material legal basis for the board's work is unaltered. There is no introduction of a general ban on discrimination and provisions on mandatory fulfilment requirements. This means that the grounds of nationality, religion/belief, and sexual orientation is still largely unprotected in the spheres outside the labour market. And the protection of and compensation to victims still vary according to the grounds of discrimination.

The legislation concerning the new Board is thus saluted as a step in the right direction, but as an insufficient solution to the problem as a whole. It has been criticised for not being given the ability to initiate its own investigations, for not having gained enough independence from the government and for being underfunded.<sup>153</sup> It is criticised for not allowing for oral procedures and introduction of witnesses.<sup>154</sup> It has also been criticised for being staffed with only legal experts who do not necessarily have any insight into the discrimination taking place in different spheres of society. Some claim that lay representation or other kinds of expertise on the board could counterbalance this.<sup>155</sup> The social partners have on their side habitually criticised the

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hvor der ikke er administrative klagemuligheder i dag." General motivations for the legislative proposal L41, 2<sup>nd</sup> Parliamentary Assembly 2007/2008, URL: <http://www.ft.dk/doc.aspx?samling/20072/MENU/00000002.htm>

<sup>153</sup> Justesen interview 26<sup>th</sup> of June 2008, Zarrehparvar, interview 17<sup>th</sup> of June 2008, Leidersdorff-Ernst, interview 7<sup>th</sup> of July 2008 and the LO's hearing response regarding the new legislation, see Arbejdsmarkedsudvalget, L 41 - Bilag 1, URL: <http://www.ft.dk/doc.aspx?samling/20072/MENU/00000002.htm>. Leidersdorff-Ernst explains that one of the reasons why the Equality Board may well be hugely underfunded is that it will have to establish a legal practice within the area ethnic discrimination where there currently isn't any such practice.

<sup>154</sup> Hearing response by Amnesty International to the legislation on the new Equality Board, see Arbejdsmarkedsudvalget, L 41 - Bilag 1, URL: <http://www.ft.dk/doc.aspx?samling/20072/MENU/00000002.htm>.

<sup>155</sup> Zarrehparvar, Interview 17<sup>th</sup> of June 2008, Møller-Hansen, Interview 17<sup>th</sup> of June 2008.



Board's ability to deal with cases related to the labour market, thereby defending their autonomy in this area.<sup>156</sup>

The response to the criticism of the Board has been that the independence of the board is ensured by the Board's legal expertise and the fact that it does not both initiate cases of discrimination and adjudicate them.<sup>157</sup> Oral procedures and the introduction of witnesses in the process would require a whole new set of rules regarding the interrogation of witnesses, introduction of legal representation by both parties etc that would slow down the procedure and in practical terms turn it into a court procedure.<sup>158</sup> The government has stated that the funding of the Board will be improved if it turns out that it cannot fulfil its function with the current budget.<sup>159</sup> It is also pointed out that the DIHR has the ability to take a lot of initiatives with regard to enhancing the knowledge about discrimination and initiating their own investigations concerning discrimination.<sup>160</sup> As regards the possibility of extending the prohibition against difference of treatment to spheres outside the labour and establish a general ban on discrimination, the interviews made in connection with this report gave no indication that the government has such intentions. Probably concerns such as the special status of the Danish state church, Christianity in the primary school and the rights of free schools to choose their pupils on the basis of religion are still thought to sit uneasily with a general ban on discrimination on all grounds. At the same time however, it is important to note that the government most likely considers Denmark to be relatively progressive in the area of anti-discrimination. As Gammeltoft emphasises:

*When Denmark implemented this directive, we implemented it correctly. And we went a step further than almost all other countries did at the time. DIHR was as equal treatment body given the task of promoting equal treatment of all as required by the directives. But in addition the CCEET was established in order to handle individual complaints. Of course there was a discussion about whether it had received enough powers in this regard, but you have to acknowledge that we went a step further – that made it easier for the individual to file a complaint. Now*

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<sup>156</sup> See the LO's and the DA's hearing responses to new legislation concerning the Equality Board, Arbejdsmarkedsudvalget, L 41 - Bilag 1, URL: <http://www.ft.dk/doc.aspx?samling/20072/MENU/00000002.htm>.

<sup>157</sup> Hougaard, Interview 18<sup>th</sup> of June 2008

<sup>158</sup> Hougaard, Interview 18<sup>th</sup> of June 2008, Gammeltoft, Interview 16<sup>th</sup> of June 2008, also Justesen makes this point in the interview on the 26<sup>th</sup> of June 2008..

<sup>159</sup> Hougaard, Interview 18<sup>th</sup> of June 2008

<sup>160</sup> Gammeltoft, Interview 16<sup>th</sup> of June 2008, See also the Minister of Employment's response in connection with the parliamentary committee's discussion of the legislative proposal regarding the new Equality Board, 2<sup>nd</sup> Parliamentary Assembly 2007/2008, URL: <http://www.ft.dk/doc.aspx?samling/20072/MENU/00000002.htm>

*[with the new Equality Board] we have taken yet another step further and created an even stronger body. The fact that you collect all the grounds of discrimination will make it an even stronger body and you emphasise its independence by placing it on its own ....<sup>161</sup>*

The government's response to the criticism is unlikely to satisfy all the critics of Danish anti-discrimination policy and it will continue to be met with a number of challenges. And if the statements by Gammeltoft are anything to go by, it also appears that there is quite a difference of opinion between those in charge of extending Danish anti-discrimination policy and those who are criticising it as to how progressive it actually is and can be. Or in other words, there continue to be a lack of agreement on the extent of the problem and on what and how much should be done to solve it.

## **6 Conclusion**

The analysis in this report points to several challenges with regard to discrimination and anti-discrimination in Denmark. One springs from the fact that there is or has not been a consensus in Danish politics that discrimination is a serious and widespread problem. Nor has there been any agreement as to what are the best means of solving it. In the 90s and 00s the question of discrimination became politicised along with the general discussion of immigrants and ethnic minorities and thus became a part of one of the most salient issues on the basis of which political parties were trying to create a distinct electoral profile for themselves. The current parties in government do however seem to take the problem more seriously after having come to power and acquired the responsibility for implementing international and European obligations in Danish law. On the other hand, the fact that the DPP has been the parliamentary basis for the centre-right government has no doubt put a brake on legislative initiatives in the field.

According to some critical observers, another brake on the developments in the anti-discrimination policies is that the concept of discrimination sits badly with the Danish self-understanding and the firm conviction that Danish society and culture is based on equality. That along with a strong political emphasis on integration pushes the concern about discrimination of minorities to the background. A third barrier to the development in Danish legislation – at least as concerns the labour market – appears to be the Danish model of regulating the labour market

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<sup>161</sup> Gammeltoft, Interview 16<sup>th</sup> of June 2008, 15.30-17.30.

through labour market agreements rather than through legislation. Concretely, the social partners have defended their autonomy without using it constructively to implement anti-discrimination provisions in the labour market agreements. More generally, even though the social partners have not been able to block legislative developments completely and the new Equality Board testifies to that, the Danish model does seem to imply certain scepticism towards formulating detailed legislation in this area. It is thought that these issues are better dealt with through dialogue and agreements among the involved parties, either locally or centrally. For critics it is unacceptable that the specific determination of what amounts to discrimination is something which can be decided by private parties and not by society's formal representatives through legislation and law based procedures.

Together this paradoxically means that the main developments in Danish anti-discrimination legislation can be referred back to international and European obligations taken on by the Danish governments most likely on the basis of the perception that such obligations were without any real significance for the Danish state because of the absence of any serious problem with discrimination in Danish society. A possible exception to this rule is the new Equality Board. However, even this initiative was influenced by the 2007 EU Year of Equal Opportunities for All and the need for the Danish government to improve its international image.

The firmly rooted notion that Danish society and culture is based on equality and treats all people equally seems to lead to blindness towards institutional rules and practices that entail institutional and indirect discrimination. The difference between 'alike' and 'equal' is not understood, as one observer has put it. At the same time, the politicians are seen as sending mixed messages concerning discrimination, for example in connection with the recent prohibition of judges to wear veils in the courtroom. This creates confusion about how strong the commitment to fighting discrimination actually is, especially among ethnic minorities whose confidence in the Danish public authorities may not be all that high to begin with.

These are not insubstantial problems if critics are right in their claim that the main problem in Denmark is a lack of knowledge about what discrimination means and what rights people actually have if they are harassed or discriminated against. The lack of knowledge leads to a low number of cases concerning discrimination, the virtual absence of a legal practice (case law) within the area and this again means that awareness about discrimination remains low. The

lack of knowledge is claimed to apply not only to victims and possible discriminators, but also to those people who could be expected to investigate and adjudicate cases of discrimination.

On this basis it is claimed that more efforts should be put into raising the awareness about discrimination and anti-discrimination legislation, through funding public and private organisations. Of crucial significance are equality bodies which are able to initiate investigations on their own initiative, not only of individual cases and practices, but of whole sectors of society. It is here debated whether the DIHR is adequately equipped for such a task. Also, general public and educational campaigns are seen as central to the task. Better funding of NGOs would not only give victims of discrimination more support, it would also give a better qualified and consistent input into a policy process with currently is deemed to be lacking in effective representation of ethnic minorities. Local counselling services should be established in order to help individual complainants in furthering their cases. Specific measures should be used to a higher degree in order to create *de facto* equal opportunities of all. And research on discrimination and on how to counteract it should be expanded and coordinated better.

With regard to material legal changes, the claim is that the fight against discrimination could be improved by a general ban on discrimination according to which discrimination on all relevant grounds are treated in the same manner. This would remedy the current legal state of affairs in Denmark in which discrimination on the grounds of nationality, religion/belief and sexual orientation is still largely unprotected in the spheres outside the labour market and in which the protection of and compensations to victims vary according to the grounds of discrimination. The general ban on discrimination should be complemented by the introduction of mandatory fulfilment requirements, such as the obligation to address discrimination in personnel policies at individual companies. Such fulfilment requirements would arguably push practices 'on the ground' in the right direction. The general ban and the horizontal approach that it entails entail would not only improve legal certainty, but would also be useful with regard to cases of discrimination on multiple grounds and in efforts to mainstream all public policies.

The establishment of civil law procedures (from 1996) and administrative complaint procedures are seen as real improvements in the ability of 'weak complainants' to initiate suits concerning discrimination. The governments new Equality Board, starting its work in January 2009, is thus saluted as an improvement, even if it has not been greeted with full approval. It is criticised for not being able to initiate own investigations, for being underfunded and for not

necessarily having enough expertise to deal with the complexities of discrimination on multiple grounds and in different areas of society.

The rather scarce research on discrimination in Denmark suggests that discrimination is a problem in particular on the labour market, in the educational system and with regard to public goods and services, access to public places and on public transportation. It is difficult to ascertain the exact size of the problem and there appears to be a large gap between the level of perceived discrimination and the number of instances that in one way or another make into the official statistics. However, the majority of the Danish population think that discrimination on the basis of ethnicity and religion is a widespread problem and that more should be done to counteract it. They primarily look to the educational system, the parents, the media, the political system (i.e. government, political parties and parliament) and the employers to rectify the situation.

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## Appendix 1 Interviews and interviewees

10 interviews have been carried out with a total of 13 persons. Three interviews were thus group interviews. One interview was made by telephone. The interviewees have been selected with the purpose of achieving as many different views on Danish anti-discrimination legislation and policy as possible, while ensuring that interviewees were informed observers of the policy field. The table below lists the interviewees. All interviews have all been semi structured interviews based on an interview guide. All interviews have been recorded. Interviewees have agreed to being quoted on the condition that direct quotes were approved by them. Quotes in the text have been transcribed from the verbal version and adjusted to written language and translated from Danish to English. This also means missing words have been filled in and implicit references in quotes in a few instances have been made explicit and more precise.

Date of interview	Interviewee(s)
16 <sup>th</sup> of June 2008	<b>Frederik Gammeltoft</b> , Lawyer, Head of Office, Ministry of Integration. Involved in the legislative process concerning of new Equality Board (2008) and legal secretary/adviser to the CET discussing the implementation of the EU Directives (2003).
17 <sup>th</sup> of June 2008	<b>Linda Greisen</b> , Lawyer and legal expert at DA (The Confederation of Danish Employers) on anti-discrimination legislation and practice.
17 <sup>th</sup> of June 2008	<b>Torben Møller-Hansen</b> , Director, The Association for the Integration of New Danes into the Labour Market. The association works with public and private employers in order to promote diversity management in Denmark.
17 <sup>th</sup> of June 2008	<b>Mandana Zarrehparvar</b> , Head of Section, DIHR, Board Member of the CCEET and former Head of Secretariat of the BEE.
17 <sup>th</sup> of June 2008	<b>Rene Skov</b> , Consultant in the Municipality of Copenhagen, Department for Employment and Integration, working with the municipality's anti-discrimination efforts.
18 <sup>th</sup> of June 2008	<b>Trine Hougaard</b> , Lawyer, Chief Consultant, and <b>Birgitte Jørgensen</b> , Lawyer, Civil Servant, both Ministry of Employment, administratively responsible for the legislation concerning the establishment of the new Equality Board (2008). Trine Hougaard has extensive experience with Danish anti-discrimination legislation.
20 <sup>th</sup> of June 2008	<b>Lynette Munk</b> , nurse assistant and member of the Integration Council in the City of Kalundborg, and <b>Issmat Mohamed</b> , Freelance interpreter and integration consultant, chairman of Integration Council in the Municipality of Norddjurs, both members of the Council of Ethnic Minorities.
24 <sup>th</sup> of June 2008 (by telephone)	<b>Akmal Safwat</b> , Board member of the Association of Democratic Muslims in Denmark. Active debater in Denmark concerning policies towards immigrants and minorities.
26 <sup>th</sup> of June 2008	<b>Pia Justesen</b> , Lawyer, PhD, Independent consultant and legal adviser on discrimination and diversity management. Former board member of the CCEET.



7 <sup>th</sup> of July 2008	<b>Pernille Leidersdorff-Ernst</b> , Lawyer and Legal Expert regarding anti-discrimination legislation and practice, and <b>Ib Maltesen</b> , Consultant, working with the trade union integration initiatives and CSR, both at LO (Danish Confederation of Trade Unions).
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