



Eerste Kamer *der Staten-Generaal*

Gelijk recht doen

Do equal justice

a summary

June 2022



Research design

In its research report *Gelijk recht doen* ('Do Equal Justice'), the Senate's parliamentary committee of inquiry on the effectiveness of anti-discrimination legislation (hereafter: the committee) answers the question of what the legislature can do to combat discrimination. The Senate notes that the prohibition of discrimination has been prominently laid down in treaties and legislation – it is even included in Article 1 of the Dutch Constitution – but that there is nevertheless a gap between the law and practice. After all, discrimination is common in practice, as also shown by this study. What is the reason for this gap, what mechanisms lead to discrimination and what measures help to combat discrimination? These are key questions in this report. The committee looked primarily at the role of legislators. It sought to identify the causes of the gap between legislation on paper and in practice, as well as possible solutions, particularly with regard to the role parliament plays or can play in this respect. While this legislative study focuses mainly on parliament's co-legislative role, its other two roles (representing the people and scrutinising government policy) are also addressed indirectly.

Laws are not created in a vacuum and their effect depends partly on those who put the law into practice: policy makers, implementers and, especially, the social or institutional field or domain in which the laws are intended to work. All of these actors influence one another. Therefore, the study into the causes of the gap also looked at these actors and, of course, first and foremost at the people concerned: those who experience discrimination. They form the first criterion for whether legislation, policy-making and implementation are effective or could even be discriminatory. In addition, the experiences of citizens provide input for the ongoing evaluation of legislation, policy and implementation and for its possible adjustment, renewal or repeal. The study did not assess whether all of these experiences of discrimination meet the legal definition of discrimination. The key questions were what causes these experiences, how the causes can be removed, and what the legislature's tasks are in this respect.

Research into the gap referred to was carried out by means of a literature review and interviews conducted on four sub-areas: the labour market, education, social security and the police. Based on this, the committee conducted public consultations. Separate reports were drawn up on the four sub-studies and have been added to this main report as appendices. These four domains were chosen because they differ in the degree of government interference in implementation, so that the selected domains can be arranged on a scale from high to low levels of government interference: police – social security – education – labour market. This allows more general statements to be made, also about other sectors, such as the housing market and the health care sector

The same applies to the grounds for discrimination. The study was limited to the grounds of race/ethnicity, gender, age and disability. Although sexual orientation and religious beliefs were not explicitly investigated, the results of the study are likely to be relevant to these and other grounds as well. In order to make the domains comparable, the committee chose to include the grounds of ethnicity in all four domains.

Mechanisms that cause discrimination

Discrimination has many causes, as also shown by this study. It may arise from a deeply rooted aversion to groups of people with certain identity characteristics. It may arise from prejudices that people are not even aware of. It may arise from the idea that people with certain identity characteristics carry certain risks, for example, that older workers are more likely to be absent from work or that people with disabilities require expensive accommodations in the workplace. It may arise from practices or procedures (usually unintentional) that systematically work to the

disadvantage of certain groups. In that case, no obvious perpetrator of discrimination can be identified. The discrimination is the result of a certain system, of seemingly neutral processes or a combination of intrinsically neutral factors, or of an existing structure, organisational culture or other traditionally grown practices. This is called institutional discrimination. The committee also focused on this and examined what causes and, especially, mechanisms lead to discrimination, because that is likely to be where legislators have the greatest opportunities to take effective measures.

The following mechanisms were identified:

- The persistence of organisational and other cultures. It is difficult for ‘cultural newcomers’ to step into an existing culture. Their arrival can lead to tension if veterans in an organisation or company want to hold on to their culture, customs and position.
- Insufficient consideration of the vulnerability of certain citizens in legislation and policy. This vulnerability can consist of a lack of self-reliance (ability to do things) or a weak socio-economic position. On the one hand, legislators’ decisions are based too heavily on the assumption of the rational citizen, while on the other hand, there is not enough faith in the morality of citizens.
- They often use the unconscious assumption of the so-called ‘standard citizen’. This generally concerns the somewhat older, non-religious, heterosexual, western male without disabilities.
- Neutrality seems an innocent and even welcome concept. It suggests that everyone gets the same treatment. But when neutrality is used to express that everyone must conform to the same dominant standard, people who are unable to conform are disadvantaged. Neutrality then leads to discrimination. The same applies to uniformity. In the case of excessive uniformity, there is not enough room for individual cases.
- The use of algorithms can also lead to discrimination. This can happen, for example, when algorithms are fed with sensitive personal data such as ‘country of birth’ or ‘postcode’. What comes out of the system can then unintentionally select people by ethnic origin, for example, and can indirectly have a discriminatory effect. Self-learning algorithms pose a particular risk. It is then unclear, for example, on the basis of which data certain groups of people are designated as risk groups that require additional monitoring.
- The discretionary power of implementing organisations can also lead to discrimination if there is insufficient accountability yet, at the same time, this latitude for decision-making is needed in order to be able to provide customisation.
- The use of language can be perceived as discriminatory. Consider terms for people with a migration background. The Dutch word *allochtoon* (meaning ‘immigrant’ or ‘ethnic minority’) was originally intended as a neutral term, but it has acquired a negative connotation and is no longer used. The designation of skin colour also continues to be complicated. ‘White’ and ‘black’ are problematic.
- A possible side effect of the increased attention for discrimination on the one hand and the strict legal definition on the other could be an increase in unfounded reports, i.e. reports based on negative experiences that do not constitute discrimination in a legal sense.

In order to be effective, anti-discrimination measures must be consistent with the underlying mechanisms.

The gap between law and practice

The gap between law and practice is not unique to discrimination legislation but is probably particularly deep for a variety of reasons. After all, it is very difficult to use legislation to change the attitudes and morals that often underlie discrimination. Discrimination is also often based on prejudices and fears that are difficult to eliminate through legislation. Social pressure and (organisational) culture also play a decisive role when it comes to discrimination, and culture is also difficult to change through legislation and regulations.

In addition, it is not sufficiently clear to employers and educational institutions what the prohibition of discrimination requires of them in practice. Moreover, they usually have other priorities or receive mixed messages from the government. This also applies to implementing government organisations such as the police and social security agencies. There is too little attention for and insight into structural and institutional discrimination. This is also because discrimination is often thought of in terms of psychological aspects and interpersonal relationships between individuals.

Furthermore, there are all kinds of problems that make it difficult to apply the discrimination standard. One such problem is the tension between legal equality and the need to provide customisation. In addition, concepts such as neutrality, uniformity, traditions, normality and reasonable job requirements can unintentionally lead to discrimination.

Leaving the task of tackling discrimination solely to those who experience it is not effective. They face many obstacles on the road to justice. Complaints procedures are complex, and even when people do complain, the effect is often small because discrimination is difficult to prove and the consequences are often irreversible.

Restricting the discretion of implementing officials is not successful either. After all, implementing officials must always interpret rules in context and need decision space to be able to provide customisation, but they must be equipped and held accountable for this.

An assessment framework

The research into the underlying mechanisms of and solutions for discrimination in the four domains has resulted in an assessment framework consisting of questions that legislators should ask themselves during the legislative process in order to prevent or combat discrimination. For parliament, these questions are therefore important criteria for assessing legislative proposals. The questions are grouped into six main themes: trust, attention, standards and use of language, simplicity, responsibility and leadership, and clear and effective procedures and complaints procedures. These are not new themes, but this study confirms the need to work on these key issues.

When assessing legislative proposals, this assessment framework will enable parliament to better take into consideration whether an unintended discriminatory effect may occur.

- **Trust**

Trust between the government and citizens is the basis of a just society. It is important that laws are written in the confidence that citizens are well-intentioned and virtuous, and with the knowledge that their self-reliance (their ability to think and act) differs per person. Legislators must enable everyone to develop and use their capacities as much as possible and prevent groups of citizens from structurally failing to participate fully in society. Legislators must also have confidence in the good intentions of employers, educational institutions and implementing officials, but at the same time must not blindly trust that self-regulation will sufficiently counteract discrimination. This is also because they do not always know exactly what the equal treatment standard and legislation require of them in practice. Of course, sanctions are necessary in some cases, but they must be proportionate and not undermine the faith of well-intentioned citizens.

- **Attention**

Discrimination and the people who suffer from it deserve the constant attention of legislators. The unintended discriminatory effects of legislation also require attention. Equal treatment

could be defined as a subject of ongoing government concern. It became clear during the study how much those whom the committee and the researchers spoke with appreciated the attention they received. It is important to be seen and heard, with empathy and acknowledgement of discrimination experiences and problems. Therefore, legislators must ensure that the voices of those affected are also heard in the legislative process. Internet consultations are not enough. It is necessary to proactively involve affected groups in the legislative process and to schedule time for this during the legislative process. It is also important that citizens who experience discrimination are considered during the implementation of legislation. Citizens need a human point of contact.

- **Standards and use of language**

It is important that an explicit reference to the prohibition of discrimination is included in every law that lends itself to it. The study shows that the standard is not sufficiently concrete and prioritised in implementation practice, among employers and educational organisations. The Explanatory Memoranda to laws could clarify how the anti-discrimination standard works in practice within the domain for which a particular law is intended. Provide sufficient room for experimentation and time for adjustment.

Do not assume the standard citizen or the standard employee. Categorise as little as possible; do not translate group characteristics to the individual level and individual characteristics to the group level. Standards are not only found in formal rules but also in the use of language. As legislators, set a good example in discourse, use of language and framing. Beware of stigmatising language and prejudice in legislative texts. Consider terms such as non-learners, dropouts, people unfit for work, less educated people and non-Western immigrants. Pay attention to sensitivities without being forced; be respectful and clear.

- **Simplicity**

The complexity of anti-discrimination and other legislation leads, among other things, to the non-use of rights and makes it difficult for individuals to lodge complaints about discrimination. People also fall through the cracks, and there are several vulnerable groups that suffer the most from this. Legislators must provide clarity and make access to the law as simple as possible. The connection between legislation, policy and implementation is also important. Information must be readily accessible and the legislative text must be translated into rules that citizens (and also, for example, employers and educational institutions) can understand. There must also be clear coherence between measures.

- **Responsibility and leadership**

It is crucial that legislators give implementing organisations, employers' organisations and educational institutions explicit responsibility for combating discrimination and ensure that responsibility structures are properly organised. To this end, legislators can impose targets and require discrimination impact reports, for example.

In the legislative process, attention should be paid to whether enough is done in terms of preconditions to equip those who are responsible for direct contact with citizens in practice. Strengthen the professionalism of supervisors and middle management and explicitly instruct implementing officials to interpret the review of lawfulness not according to the letter but to the spirit of the law and to carry out a review of proportionality. Ensure periodic accountability for the use of discretionary powers. To enable organisations to do so, they must be given sufficient resources to carry out these responsibilities; this includes training, time, space and manpower.

- **Clear and effective procedures/complaints procedures**

It is important to consider whether the current internal and external options for lodging complaints are adequate. Is it sufficiently clear where individuals affected by discrimination can seek justice, how they can obtain an appropriate remedy and what burden of proof they have internally and externally? In addition, legislators should encourage organisations to which the standards apply to establish clear and effective procedures, for example, with regard to recruitment, selection and promotion. Reporting (annual or otherwise) on this could be required.

Combating discrimination is not only a matter of legislation. But when assessing legislative proposals, parliament could pay closer attention to whether they do not unintentionally lead to more discrimination. This way we can contribute to a society in which everyone is treated equally.

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