

ANNUAL REPORT  
**2020**  
BY THE OMBUDSMAN  
FOR EQUALITY





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PUBLICATIONS FOR EQUALITY 2021: 3

ISSN-L 1236-9977

ISSN 1797-9862 (online publication)

ISBN 978-952-7156-22-3 (pdf)

URN:ISBN 978-952-7156-22-3

Photos: Keksi Agency Oy

PunaMusta Oy

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# I DUTIES OF THE OMBUDSMAN FOR EQUALITY

The Ombudsman for Equality is an independent authority whose domain is the promotion of gender equality. The duties of the Ombudsman for Equality:

- Monitoring compliance with the Act on Equality between Women and Men, particularly its prohibitions of discrimination
- Providing information about the Equality Act and its application
- Promoting the purpose of the Act by means of initiatives, advice and guidance
- Monitoring the implementation of equality between women and men in different sectors of society
- Taking measures to pursue reconciliation in matters concerning discrimination referred to in the Equality Act

## What are the impacts of the statements by the Ombudsman for Equality?

The Equality Act prohibits discrimination based on gender, gender identity and gender expression. If someone suspects that he or she has been discriminated against in a manner referred to in the Equality Act, he or she may appeal to the Ombudsman for Equality. The Office of the Ombudsman for Equality provides advice and instructions on rights and the application of the Equality Act and, if necessary, investigates suspected cases of discrimination through a written procedure. If the Ombudsman finds that a violation of the Equality Act has been committed, he will issue instructions and guidance on discontinuing the unlawful practice. In certain cases, the Ombudsman may refer the case to the National Non-Discrimination and Equality Tribunal of Finland, which has the power to impose a conditional fine to prevent discrimination.

Statements issued by the Ombudsman for Equality are not legally binding. Anyone who suspects that he or she has been a victim of discrimination can take the case to a district court and claim compensation.

Jukka Maarianvaara, Master of Laws,  
serves as Ombudsman for Equality for the term 2017–2022.

The Ombudsman for Equality often makes a request for an employer to change its actions or recommends the employer to re-evaluate its policies from the perspective of equality. In some cases, the statement has led to negotiations at the workplace, resulting in a solution equally satisfying to both parties. Similarly, after receiving the statement from the Ombudsman for Equality, for example suppliers of goods or services have reported having changed their pricing in compliance with the Equality Act.

The Ombudsman for Equality may facilitate reconciliation in discrimination matters provided for in the Act on Equality between Women and Men. The Act prohibits discrimination based on gender, gender identity and gender expression. The statutory possibility of reconciliation improves the legal protection of discrimination victims and the effective realisation of their rights.

# 2 A WORD FROM THE OMBUDSMAN FOR EQUALITY

## THE YEAR 2020 WAS CHARACTERISED BY THE CORONAVIRUS

The coronavirus pandemic affected all of Finnish society in 2020. It is already clear that the pandemic's effects were not equal on all population groups. Those who were the most vulnerable to begin with have probably suffered the worst. The pandemic and the measures taken to curb it have also affected different genders in different ways. Most recessions strike the male-dominated sectors of industry first and cascade into the female-dominated service industry and public sector from there, but this time, the private service sector has taken the brunt of the blow. In the public sector, on the other hand, there has been no shortage of work, but stress has increased in both the social welfare and health care services and the education sector. Localised coronavirus outbreaks have occurred in many male-dominated sectors, such as the construction industry. The reasons behind these outbreaks include factors related to working conditions, subcontracting chains and the vulnerable position of foreign labourers.

The coronavirus pandemic is thought to have increased domestic violence and violence against women both in Finland and globally. Possible reasons for this phenomenon include increased financial problems, restrictions on social contact, and families spending more time together — as well as the downscaling of support services, especially in the early stage of the pandemic. The pandemic has also compounded health inequality, the uneven distribution of unpaid care work and — as we will probably see in a few years — learning inequalities.

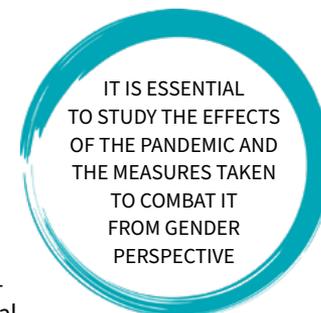
It is unlikely that the COVID-19 pandemic will be the last pandemic to be inflicted on us. A careful study of effects of the pandemic and the measures taken to combat it also from a gender perspective is thus essential. A project titled “The impact of the COVID-19 crisis on gender equality in Finland” has accordingly been launched under the direction of the Finnish Institute for Health and Welfare (THL). The study will be concluded at the end

of May 2022. At the European level, the European Institute for Gender Equality (EIGE) is studying the coronavirus pandemic's effects on violence against women.

The pandemic has also affected the daily work of the Office of the Ombudsman for Equality. Like everyone else who had the possibility, we switched almost completely to working from home in the middle of March 2020. Our move to remote work has probably had little noticeable effect for our customers. Our helpline operated on a call-back basis for a few months, but normal telephone service resumed after the summer. We conducted our customer communications electronically before the pandemic as well, and have continued working with our stakeholders through electronic channels.

There was a sharp increase in the messages received by the Ombudsman for Equality in 2020 regardless of the coronavirus pandemic. The number of enquiries related to discrimination grew by approximately 35 %. Some messages, particularly among those involving working life, were related to the COVID-19 pandemic, but they do not fully explain the increase in messages. At the time of writing, it would seem that this growth will continue in 2021 as well. The most common topic of messages and calls was again discrimination due to pregnancy and family leave, and recruitment and pay discrimination also stood out in among the concerns expressed to the Ombudsman.

The Ombudsman for Equality's new website was launched in September. The new site is more accessible than before, is available in more languages and also contains video material on the Ombudsman's work. We welcome ideas for the site's further development!

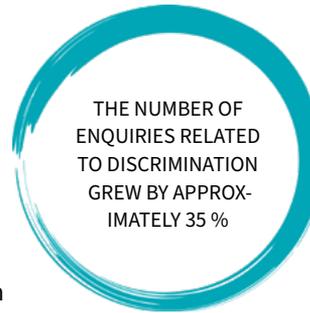


## EQUALITY IMPROVED

Gender equality is a cross-cutting theme of Prime Minister Sanna Marin's Government Programme and the subject of a number of special measures. These measures were compiled in the Government Action Plan for Gender Equality "Making Finland a global leader in gender equality" (Publications of the Ministry of Social Affairs and Health 2020:35) published in December 2020. Several of the measures recommended by the Ombudsman for Equality in his 2018 report to Parliament were adopted in the Action Plan for Gender Equality via the Government Programme: increasing pay transparency, curbing pregnancy discrimination, preventing violence against women and developing legislation. Many of the measures are already on the desks of legislators at the time of writing, while others are still being processed by the working groups. It is nevertheless important to maintain the promotion of equality as a policy priority regardless of the problems caused by the COVID-19 pandemic.

The family leave reform prepared by a tripartite working group is being circulated for comments at the time of writing. Even though the reform is not perfect from the perspective of gender equality, it is still a major step forward. The amount of leave earmarked for fathers will increase significantly, benefits will be raised somewhat, and the flexibility of timing the leave will increase. This will create a solid foundation for the more even distribution of family leaves. There is certainly room for improvement: women currently use about 90% of family leaves, which affects their labour market position, pay and career development, and discrimination encountered in the labour market.

However, the new family leave system will only create a legislative framework for the more extensive use of family leaves by fathers. The deciding factor will be how fathers, mothers and employers feel about the new distribution of family leaves. Until now, the attitude at many workplaces has been that fathers are only "supposed" to take the paternal leave earmarked for them, even though dividing the parental and child-care leave freely between the parents has been possible under the current system too. Changes in the attitudes of fathers and mothers are also required: one in four fathers does not take any parental leave, and surveys have shown that mothers take a more negative attitude to increasing paternal family leave quotas than fathers do. In other words, there is still a lot of work to be done in this area.



The Government and labour market organisations came to an agreement on a new Tripartite Equal Pay Programme for the years 2020–2023. The programme's principal benefit will most likely be in its demonstration of the parties' joint appreciation of promoting equal pay and decreasing the average pay gap between men and women. The measures outlined in the programme cannot be called ambitious, however, nor were the parties able to formulate a clear target for decreasing differences in pay — the current goal is to "narrow the average pay gap between the genders more quickly than before".

Achieving equal pay will not be easy in the absence of measures from labour unions and employers' associations, because they are the ones who negotiate the wages and could, should they wish, jointly promote gender equality through collective agreements and workplace-specific agreements more effectively than the central organisations. It would thus be vital for the unions to commit to the promotion of equal pay as well as gender equality in general.

## A REFORM OF THE TRANS ACT IS NEEDED URGENTLY

The Ombudsman for Equality has noted on several occasions that Finland's legislation on transsexuals — and its infertility requirement in particular — violates the human rights of trans people. The report of the working group instituted by the Ministry of Social Affairs and Health on the reform of transsexuality legislation was completed in February 2020. The coronavirus pandemic put the work on hold, however. In his statement addressed to Minister of Social Services Krista Kiuru, the Ombudsman for Equality expressed his concern regarding the progress of the transsexual law reform. It currently appears that the reform will proceed in March 2021 and should be finished during this parliamentary term. The reform is already long overdue from the perspective of the human rights of trans people, so the law should be drafted and passed as quickly as possible.

Helsinki, 5 March 2021

Jukka Maarianvaara  
*Ombudsman for Equality*



# 3 STATEMENTS ISSUED TO THE PARLIAMENT OF FINLAND AND OTHER AUTHORITIES



The Ombudsman for Equality issued a number of statements to Parliament and the authorities in 2020. A few examples of such statements requested from the Ombudsman are provided below.

### Statement by the Ombudsman for Equality on the family leave reform

The objectives of the family leave reform include a more even distribution of family leaves and care responsibilities between the parents and the realisation of the child's best interests. The reform is aimed especially at encouraging fathers to use a larger proportion of family leaves. The uneven sharing of family leaves has a significant impact on the realisation of gender equality in working life. For this reason, the Ombudsman for Equality finds it vital that the family leave system be reformed by considerably increasing the leave earmarked for fathers. In the Ombudsman's view, a more even distribution of family leaves and care responsibilities between the parents and between women and men in general promotes gender equality and the wellbeing of families.

The Ombudsman for Equality also considers it important that the diversity of families be taken into account. Paying equal attention to all forms of families, which was set as an objective of the family leave reform, can therefore be supported.

With regard to further preparation, the Ombudsman for Equality emphasises especially the importance of assessing the impacts of the reform from the perspective of equal pay. Special attention should be paid to how the gender-neutral language used in the compensation system would affect the paid periods of maternity and paternity leave secured in collective agreements. The paid periods of leave are currently longer for women, so the potential impacts will affect women, in particular.

Different kinds of flexibility are mentioned as one of the objectives of the reform. In further preparation, it is important to pay attention to when and how the parents want to schedule and share their leave periods. Different kinds of flexibility help to balance the distribution of family leave between the parents. Flexibility also offers solutions to the everyday practical challenges of families.

The Ombudsman for Equality was heard by the Ministry of Social Affairs and Health on the Government's family leave reform on 25 February 2020. (TAS 32/2020)

### New grounds for determining the parental allowances and gender equality

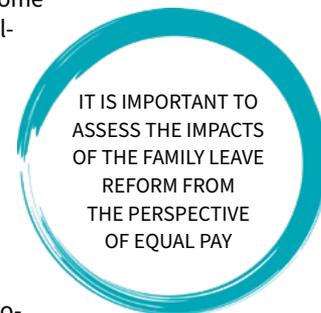
The new grounds for determining parental allowances have raised much discussion recently. Their effects have started to become visible in the financial situation of women in practice. The Ombudsman for Equality has also received complaints on the issue.

Since the start of 2020, parental allowances have been determined based on annual income. The annual income is calculated based on a reference period of 12 calendar months prior to the month that precedes the start of the entitlement to a parental allowance. Even after the change, the parental allowance could be determined based on the income used as the basis for the previous parental allowance, if the due date of the new child was before the previous child turned 3 years old.

Some of the complaints came from women laid off due to the current situation, meaning the coronavirus epidemic. However, it has been thought that even during normal circumstances the situation of women working as freelancers or in fixed-term employment relationships as well as those experiencing health problems during pregnancy has worsened compared to the previous grounds for determining parental allowances.

There are also many women working in Finland as salespersons, in the health care sector and in other duties, in which a significant portion of the pay comes from shift work bonuses or various kinds of additional compensation for the inconvenience of work.

In practice, men and women are in a different position with regard to the determination of parental allowance, because women cannot do shift work or night and weekend work during pregnancy as easily as at other times.



If a man works in the same field and receives the same pay for the same work, he can continue working as usual. The compensation a man receives for parental leave is considerably better than a woman's, because the previous taxation period is no longer taken into account in determining the allowance, and there is no compensation for the loss of income due to the reduced ability to work during pregnancy.

The Ombudsman for Equality is not competent to change the provisions of the Health Insurance Act (1224/2004) prescribing how parental allowances are determined. The legislative power is held by the Parliament. The provisions of the Health Insurance Act are drafted by the Ministry of Social Affairs and Health.

According to the Act on Equality between Women and Men, however, the authorities must promote equality between women and men purposefully and systematically in all their activities. Equality must be advanced in the preparatory work undertaken on different matters and in decision-making. This means, among other things, that the gender impact of legislation should be assessed at the drafting stage.

The Ombudsman for Equality stated that the problem in the drafting of legislation is that the gender impact assessment is often insufficient. This also appeared to have been the case in the preparation of the amendments to the Health Insurance Act, in which sufficient attention had not been paid to pregnancy and family leave. However, pregnancy and family leave are intrinsically linked to gender, and the impact of the grounds on which parental allowances are determined may be different for men and women in practice.

According to the Ombudsman for Equality, it was important to find out how the regulations of the Health Insurance Act could take better into account the fact that pregnancy and family leave reduce the career and employment opportunities of women in particular. One potential option is that a woman could choose either the income of the 12 months preceding pregnancy or the 12 months preceding family leave as the grounds for payment.

The Ombudsman for Equality submitted the statement for the information of the Ministry of Social Affairs and Health for possible measures. (TAS 324/2020)

## Statement by the Ombudsman for Equality on preparing the Government of Finland Human Rights Report

The Ministry for Foreign Affairs requested a statement from the Ombudsman for Equality on issues to be taken into account in preparing the Government of Finland Human Rights Report. In addition, the Ministry for Foreign Affairs asked the Ombudsman to comment on the preliminary phenomena collected in the report and provide concrete development suggestions with justifications related to these phenomena.

A phenomenon-based approach was selected for the report being prepared, without a division between national, international and EU-level fundamental and human rights issues. The four groups of phenomena selected as the basis of the report were rules-based international cooperation and the development of the rule of law, human rights and sustainable development, digitalisation, information and human rights, as well as the promotion of non-discrimination and equality.

In the opinion of the Ombudsman for Equality, the phenomenon-based approach to the processing of human rights issues was sound. The Ombudsman for Equality also considered it positive that issues related to equality and non-discrimination had been separated into their own group.

The statement of the Ombudsman for Equality highlighted the themes that the Ombudsman thought should be discussed in the human rights report. These themes included

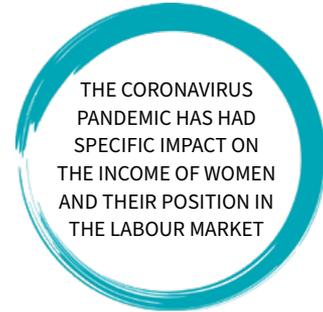
- equality issues in working life, such as discrimination based on pregnancy, birth and family leave, pay discrimination, gender pay gap as well as men rarely taking parental leave;
- rights of gender minorities related especially to the requirement on sterilisation or infertility of the current Trans Act (the Act on legal recognition of the gender of transsexuals), the connection between the legal and medical gender reassessment process as well as unnecessary genital surgery on intersex children;
- violence against women and the implementation of the Istanbul Convention;

- hate crimes related to gender, gender identity and gender expression;
- availability of low-threshold legal protection measures on the national level; as well as
- the risks related to the use of algorithms and artificial intelligence in connection with gender-based discrimination.

The Ombudsman for Equality also proposed several development measures that should be included in the human rights report. Among other things, the Ombudsman for Equality proposed that

- the employment security of those working in fixed-term employment relationships should be strengthened in the context of pregnancy and family leave;
- it should be ensured that the share of family leave reserved for fathers would be increased in connection with the family leave reform;
- the right to receive information on the wages of private sector employees in case of suspected discrimination should be extended to also apply to the information on the pay of a so-called reference person or persons;
- the legislation development needs related to the protection of hired labour against discrimination should be investigated;
- the changes to the Act on legal recognition of the gender of transsexuals recorded in the Government Programme should be implemented as soon as possible;
- the unnecessary genital surgeries of intersex children should be stopped;
- the implementation of the Istanbul Convention should be promoted by means such as safeguarding resources for services for victims of violence against women and victims of intimate partner violence, developing and maintaining the competence of police officers and prosecutors on the subject, as well as assessing the need for criminal and procedural law reforms;

- sufficient resources should be ensured for the national authorities controlling legality, including the Ombudsman for Equality;
- hate crimes related to gender, gender identity and gender expression should be recognised on the legislative level, such as by adding gender as a motive of an offence as an aggravated factor in sentencing in the Criminal Code, and it should be investigated whether gender, gender identity and gender expression should be included in the statutory definition of ethnic agitation.



The Ombudsman for Equality also assessed in the statement how the coronavirus pandemic affected the realisation of fundamental and human rights. In the statement, the Ombudsman for Equality highlighted the impact of the coronavirus crisis especially on the income of women and their position in the labour market, as well as the suspicion that the crisis has increased intimate partner and domestic violence. (TAS 233/2020)

## Health and social services: Statement on the Government proposal on legislation concerning the establishment of counties and the reform of health, social and rescue services

The Ombudsman for Equality has issued a statement on the Government proposal on legislation concerning the establishment of counties and the reform of health, social and rescue services in [lausuntopalvelu.fi](https://www.lausuntopalvelu.fi).

The Ombudsman for Equality considers it important that the reform will not reduce the openness of salary information with regard to the personnel transferred to the health and social services counties. The openness of salary information is extremely important with regard to the legal protection of a person suspecting pay discrimination. Currently, the total amount of the salaries paid to the officeholders and employees of municipalities and joint municipal authorities as well as the parts of salary determined based on personal performance, the pay grade related to placement or pay corresponding to a requirement group are public. However, the bill does

not appear to include an extension of the requirement on the publicity of salary information to cover the salaries of health and social services counties and joint municipal authorities. The Ombudsman for Equality proposes that the provisions on the publicity of salaries in the Personal Data Files in the Administration Act be extended also to cover the salaries of health and social services counties and joint municipal authorities.

The Ombudsman for Equality considers it important that women and men can participate equally in social planning and decision-making in accordance with section 4a of the Act on Equality between Women and Men. In the preparation and implementation of the reform, it must be ensured that both women and men are selected for the different bodies of the future health and social services counties and joint municipal authorities. The same requirement also applies to the composition of the bodies of the Local Government Employers KT that is to be established. It would be good to refer to the Act on Equality between Women and Men in the provisions on the composition of various bodies in the bill.

The Ombudsman for Equality considers it unfortunate that the effects of the bill have hardly been assessed at all from the perspective of genders. For example, it remains unclear how the reform would affect the realisa-

tion of equality or the social position of women. The gender impact assessment does not include an assessment on what kind of potential discriminatory gender impacts the reform could have or how they could be prevented. It would be especially important to examine the problems involved in the production and provision of services from the point of view of gender-based discrimination prohibited by section 8e of the Act on Equality between Women and Men, which has not been examined at all in the bill. The factors related to balancing work and family life have also received less attention. The Ombudsman for Equality proposes that the gender impact assessment would be specified more during further preparation.

For promoting equality, it would be important that the new health and social services counties and joint municipal authorities would start drawing up equality plans at as early a stage as possible. When transferring personnel under a new employer, health and social services county or joint municipal authority, differences in pay will be created between employees of different genders doing the same or equal work, which the employer is obliged to correct based on the Act on Equality between Women and Men. Systematic work to harmonise salaries should be started as quickly as possible. (TAS 257/2020)

## Government Programme entry on the obligation to prepare gender equality plans in early childhood education and care

In the view of the Ombudsman for Equality, it is important that gender equality is also promoted in early childhood education and care. Gender roles and stereotypes start to develop early and they will later influence the choice of subjects and fields of education as well as segregation in the labour market. It is therefore important that gender-sensitive interaction with children promoting gender equality is made an established part of early childhood education and care. This issue is emphasised in section 3 of the Act on Early Childhood Education and Care (540/2018) and in the National Core Curriculum for Early Childhood Education and Care approved by the Finnish National Agency for Education (OPH-2791-2018).

Under the Programme of Prime Minister Sanna Marin's Government, provisions on binding gender equality and non-discrimination plans will also be laid down for early childhood education and care. According to the draft proposals of the Ministry of Social Affairs and Health presented on 13 February 2020, the existing obligation to prepare gender equality plans in education institutions (section 5 a of the Act on Equality between Women and Men) would be extended to cover early childhood education and care. This would be done by means of a separate provision or by broadening the scope of section 5 a. The Ombudsman for Equality is critical of this proposal.

If the aim is to strengthen gender equality work in early childhood education and care, consideration should be given to the most effective means of achieving it, taking into account the ways in which early childhood education and care is provided and the existing steering methods. Extending the obligation to prepare gender equality plans is not necessarily the most effective approach, and the existing provisions on gender equality planning in education institutions are rather poorly suited for early childhood education and care. Instead, legislative drafting should be based on the needs arising from early childhood education and care, and therefore the focus should be on measures that ensure the implementation of gender-sensitive early childhood education and care and the inclusion of gender-sensitive early childhood education and care in the basic education of all those working in early childhood education and care.

## How can the work to promote gender equality in early childhood education and care be made more effective?

Gender equality in early childhood education and care can be promoted in a number of different ways. The goal of promoting gender equality set out in the Act on Early Childhood Education and Care can be concretised by adding provisions to the same act. Likewise, the National Core Curriculum for Early Childhood Education and Care approved by the Finnish National Agency for Education could provide a stronger basis for promoting gender equality as part of early childhood education and care plans at local level and steer the work in practice. The Finnish Education Evaluation Centre could incorporate the promotion of gender equality in its quality indicators for early childhood education and care so that the gender equality work can also make practical progress.

If the provisions are incorporated into the Act on Early Childhood Education and Care and in the National Core Curriculum for Early Childhood Education and Care, we can also avoid the problems that arise when different provisions on promoting gender equality and non-discrimination in early childhood education and care are entered in the Act on Equality between Women and Men and the Non-discrimination Act (as is now the case with the provisions on education institutions, for example). The differences might cause problems for early childhood education and care units applying them.

It can be assumed that the gender equality measures and objectives integrated into the actual guidance system for early childhood education and care steer gender equality work in early childhood education and care more effectively than the planning obligations laid down in the Act on Equality between Women and Men. The providers and units of early childhood education and care should also be offered sufficient instructions to support them in gender equality work.

Personnel competence plays a key role in the promotion of gender equality in early childhood education and care. In fact, gender equality and gender-sensitive interaction with children should be taken into account in the basic and continuing education of early childhood education and care personnel. In the opinion of the Ombudsman for Equality, there is now a great

deal of variation in gender equality competence in early childhood education and care, which is partly due to differing educational backgrounds of the personnel.

### **Adding the planning obligation to the Act on Equality between Women and Men**

If the obligation to prepare gender equality plans in early childhood education and care is added to the Act on Equality between Women and Men, adequate consideration should be given to the special features of early childhood education and care. Early childhood education and care can be provided in a wide range of different ways, and the chances to involve the children in the planning process depend on their age and level of development. For this reason, the Ombudsman for Equality does not support either of the proposed legislative changes (extension of the scope of section 5 a of the Act on Equality between Women and Men, or the introduction of a new section 5 b) in their current form.

The Ombudsman for Equality also notes that in education institutions, the plans required under section 5 a of the Act on Equality between Women and Men and the non-discrimination plans required under the Non-discrimination Act are usually prepared together. There are slight differences between the obligations set out in the two acts, which may lead to problems in such cases.

### **Supervising compliance with the planning obligation**

The planning obligation also creates expectations on supervision. However, supervising the implementation of the obligation to prepare gender equality plans is not an effective way to ensure equality-sensitive interaction with children in early childhood education and care on a daily basis. Individual day care centres do not need to prepare official gender equality plans in order to ensure that promoting gender equality in early childhood education and care is on a binding and systematic basis.

Under the proposed legislation, an official gender equality plan must be prepared to ensure that the interaction with children in early childhood education and care is on a gender-sensitive basis. In the view of the Om-

budsman for Equality, it is not appropriate to focus supervision on a document that is primarily intended to serve as a tool for those working in early childhood education and care.

In order to systematically promote gender equality in early childhood education and care, the training and instruction needs of the parties organising and providing early childhood education and care services should be given priority. These should primarily be the responsibility of the government agencies steering and supervising early childhood education and care, such as the Ministry of Education and Culture, the Finnish National Agency for Education, and the Regional State Administrative Agencies. (TAS 58/2020)

## **Statement on the comprehensive reform of sexual offence legislation**

The Ministry of Justice asked the Ombudsman for Equality to comment on a working group report proposing amendments to the provisions on sexual offences of the Criminal Code of Finland (Reports and Statements 2020: 9). In its statement, the Ombudsman for Equality commented in particular on the amendment of rape legislation to be based on consent and on the broadening of the criminalisation of sexual harassment to also include acts other than those involving physical contact.

The Ombudsman for Equality is in favour of reforming Chapter 20 of the Criminal Code of Finland and, in particular, changing the defining characteristics of rape to include consent. Changing the defining characteristics of rape is an important and long-awaited reform in line with Finland's human rights obligations and increasing gender equality.

On the other hand, the Ombudsman for Equality noted that the report should take clearer account of the situation regarding gender minorities and the sexual violence they face, as well as situations of multiple discrimination in which, for example, gender intersects with other personal characteristics such as disability, age or ethnicity.









The Ombudsman for Equality is in favour of extending the scope of application of sexual harassment legislation, but stresses the need to look at the legal protection of victims of sexual harassment and sexual or gender-based harassment in a comprehensive manner. The extension currently under consideration brings the description of sexual harassment closer to the forms of harassment prohibited under the Equality Act. As the same act can be both harassment prohibited under the Equality Act and an act criminalised by the Criminal Code of Finland, clarification is required regarding the potential inconsistencies and gaps in both the legal protection afforded to victims and the assigning of culpability to perpetrators.

Attention should be paid to a more diverse gender impact assessment and gender diversity issues during continued drafting of the legislation. The report's gender impact assessment remains quite narrow in scope, despite the issue being one of a major reform intended to improve gender equality and the fact that sexual violence is a highly gendered phenomenon.

The vulnerability of a victim and the risk of becoming a victim of sexual violence are influenced by various factors, which may also affect a victim's willingness and ability to bring the sexual offence to the attention of the authorities. In addition to gender, factors such as a victim's disability, age, and immigrant background may also be relevant. This consideration is not presented in the gender impact assessment.

With regard to crimes against children, the significance of the proposed age limits and new provisions has not been assessed separately for girls and boys. It may, however, be assumed that gender-specific data exists on the sexual relations and maturity of minors.

### **Taking gender minorities into account**

With regard to the gender impact assessment, the report refers to Section 4 of the Equality Act and the obligation of public authorities to promote equality between women and men. In addition, Section 6 c of the Equality Act provides that authorities must purposefully and systematically prevent discrimination based on gender identity or gender expression.

The current report raises an example of overt sexual harassment in a situation in which a person “unlawfully enters the dressing or bathing facilities of the opposite sex at a swimming pool” (p. 176). Organisations representing gender minorities have expressed their concern to the Ombudsman for Equality about the wording of this excerpt. The Ombudsman for Equality notes that the chosen example can be difficult to interpret and may further complicate the situation for people belonging to a gender minority in dressing and bathing areas designed for only two genders in swimming pools.

A person’s legal gender does not always correspond to their gender identity and/or gender expression. The physical and expressed gender characteristics of a person belonging to a gender minority may differ from the average. This can sometimes cause problems in dressing and bathing situations. Legal gender is not always the decisive factor in assessing the right to enter dressing and bathing areas. In practice, members of a gender minority do not always have access to a separate dressing room or other such area that would protect their modesty while dressing and/or bathing area when needed. The intention is certainly not to criminalise the use of dressing and bathing facilities by people belonging to a gender minority under the auspices of overt sexual harassment. The Ombudsman for Equality suggests that this perspective be taken into account in the continued drafting of the grounds for the provision. People belonging to a gender minority must have access to safe dressing and washing facilities.

In order to prevent discrimination in the provision of public services, consideration must also be given to the provision of such services for those belonging to a gender minority. This obligation applies, for example, to the organisation of municipal sports services. The Ombudsman for Equality has recommended the provision of gender-neutral spaces in addition to those designated for male and female users as one means of taking gender diversity into account and preventing discrimination. Unfortunately, measures to ensure privacy in dressing and washing facilities are not yet realised in all public sports services. Problems resulting from this shortcoming should not, however, lead to the actions of a gender minority being misinterpreted as sexual harassment. (TAS 370/2020)

## Statement on taking gender into account as grounds for increasing the punishment in the Criminal Code

The Ministry of Justice asked the Ombudsman for Equality to issue a statement on a draft proposal for an amendment of the Criminal Code. The proposal suggests providing for increasing the punishment under chapter 6, section 5 of the Criminal Code if the motive of the offence was gender-based. The aim of the proposal is to emphasise the reprehensibility of acts based on gender-related hatred.

The Ombudsman for Equality gave a favourable statement of the proposal, but found certain shortcomings in it. The aim of the proposal is to emphasise the reprehensibility of acts motivated by gender-related hatred. According to the proposal, the special nature of domestic violence could still be taken into account under the general principles for determining the sentence as set out in chapter 6, section 4 of the Criminal Code. In this regard, the proposal refers to Supreme Court precedent KKO 2020:20 and the legislative materials of the act on the national implementation of the Istanbul Convention in particular.

In the Ombudsman for Equality’s opinion, however, international human rights obligations require a more systematic approach to the prevention of violence against women and taking gender into account as grounds for increasing the sentence.

The proposal should look at gender more broadly than as a mainly external personal attribute. For example, according to the definition given in Article 3 of the Istanbul Convention, “gender” means the socially constructed roles, behaviours, activities and attributes that a given society considers appropriate for women and men (Article 3, point c). This conception of gender makes it easier to understand the concepts of violence against women and gender-based violence. According to the Istanbul Convention, for example, “gender-based violence against women” means violence that is directed against a woman because she is a woman or that affects women disproportionately (Article 3, point d). The CEDAW Committee monitoring compliance with the Convention on the Elimination of All Forms of Discrimination against Women has also issued two general recommendations related to governmental obligations for preventing violence against women (General Recommendation No. 19 and No. 35).

Taking domestic violence into account as grounds for increasing the punishment should be examined in the further preparation of the amendment. For example, Article 46 of the Istanbul Convention requires the Parties to take the necessary legislative or other measures to ensure that, if the offence was committed by a family member against a former or current spouse or partner as recognised by internal law, this may, in conformity with the relevant provisions of internal law, be taken into consideration as aggravating circumstances in the determination of the sentence.

The Ombudsman for Equality considers that specifically providing for domestic violence as grounds for increasing the punishment in the Criminal Code would send a clearer message that Finland takes violence against women and the related international human rights obligations seriously. The principle of legality in criminal law and legal security also support this view. The Ombudsman for Equality thus proposed that the drafters consider amending chapter 6, section 5 of the Criminal Code also in this regard.

### **Gender identity and gender expression**

Motives based on sexual orientation were added to the Criminal Code's provision on grounds for increasing the punishment for offences motivated by hatred in 2011. It was noted in the legislative materials for the amendment at the time that groups such as gender minorities could be deemed equivalent to the groups listed in the provision as in need of special protection (HE 317/2010 vp). This is also stated in the proposal. A specific provision has since been added to the Act on Equality Between Women and Men as section 6c, stating that authorities are obliged to take pre-emptive action in a purposeful and systematic manner against all discrimination based on gender identity or gender expression. In view of this, the Ombudsman for Equality finds it problematic that the proposed amendment of gender-based motives would only refer to men and women, while hatred against gender minorities would be grouped under "other" equivalent motives. Those belonging to gender minorities are nevertheless particularly vulnerable to, for example, harassment precisely because of their status as members of a gender minority. The Ombudsman for Equality accordingly considers it important to specifically mention gender identity and gender expression in the provision. (TAS 340/2020)

The Ombudsman was called for hearings on the following matters:

- Hearing on the Government Action Plan for Equality, 12 February 2020 (TAS 57/2020), Ministry of Social Affairs and Health
- Hearing on the family leave reform (TAS 32/2020), 25 February 2020, Ministry of Social Affairs and Health
- Hearing on the Government Programme entry on an equality planning obligation for early childhood education (TAS 58/2020), 2 March 2020, Ministry of Social Affairs and Health
- Hearing on the Ombudsman for the Elderly, 29 April 2020 (TAS 184/2020), Ministry of Justice
- Hearing on the rapporteur on violence against women, 5 November 2020 (TAS 451/2020), Ministry of Justice

# 4 MONITORING THE PROHIBITIONS OF DISCRIMINATION



The Equality Act prohibits discrimination based on gender, gender identity and gender expression. The Equality Act generally applies to all societal activities and all areas of life. The Act does not apply to relationships between family members, other private relationships or activities relating to religious practice.

There are three types of regulations in the Equality Act: regulations promoting equality, prohibitions on discrimination and regulations on legal protection and monitoring. The Act defines and prohibits gender-based discrimination. This prohibition applies to the entire field covered by the Act, meaning as a general rule all areas of social life and all situations in which discrimination may arise.

Special prohibitions define discriminative actions in working life, at educational institutions, in organisations representing labour market interests, and regarding provision of goods and services. The employer and educational institution are under the obligation to provide a written report on their actions to anyone suspecting that such discrimination has taken place.

However, all discrimination is still not within the scope of the special prohibitions. Discrimination is in some cases only prohibited on the basis of the general prohibition in the Equality Act.

## 4.1 Discrimination on the basis of pregnancy and family leaves

Gender equality legislation prohibits discrimination related to pregnancy and parenthood in no uncertain terms. Prohibited discrimination includes treating someone differently for reasons of pregnancy or childbirth, or on the basis of parenthood or family responsibilities.

Workplace discrimination based on pregnancy and parenthood, including taking family leaves, has continued for decades in Finnish society. It affects the position of women, in particular, in many different ways. Women in fertile age who have no children may also experience discrimination related to maternity in working life, as employers may presume that they will go on a family leave. Up to one half of the clients contacting the Ombudsman about working life issues report discrimination due to pregnancy or family leave.

Typical situations associated with discrimination include inappropriate questions related to family status or family-related plans during the recruitment process, discontinuation of a fixed-term contract after learning about the employee's pregnancy or plan to go on family leave, and an employee's return to work after family leave (an employee returning to work after family leave may have been replaced by a substitute, or the employee's work tasks have "disappeared").

### EXAMPLES OF SUSPECTED DISCRIMINATION ON THE BASIS OF PREGNANCY AND FAMILY LEAVES

#### Suspected discrimination on the basis of pregnancy in temporary agency work in the construction sector

Painter A suspected that she had been discriminated against because of her pregnancy. She had not received any fixed-term painting work from employment agency X Ltd. after having told the agency about her pregnancy. According to A, she had been informed that it was not possible for the agency to offer her work that was suitable for her and that she had been removed from the agency's lists.

A had been working for X Ltd. since 2016. Since 28 May 2018, her employment contracts had been almost continuous, with only a couple of days between different employment contracts. The most recent fixed-term contract had been concluded for the period 19 September 2018-27 January 2019.

#### Assessment of the case

The point of view from which the Ombudsman assessed the case was whether A had been discriminated against in violation of the Equality Act on the basis of pregnancy when her fixed-term employment relationship

had not been renewed after 27 January 2019. Under the Equality Act, the action of an employer constitutes discrimination if the employer, upon deciding on the continuation of the employment relationship, acts in such a way that the person finds themselves in a less favourable position on the basis of pregnancy.

A fixed-term employment relationship is terminated normally without giving notice at the end of the fixed period. In principle, the employer is not obliged to extend the fixed-term employment relationship. However, the decision not to extend a fixed-term employment relationship must not be made on a discriminatory basis such as pregnancy.

The employer had justified its action by claiming it was based on concern about the occupational safety and health of A, who was pregnant. According to the employer, no requests for workers had been received from construction sites using materials that were safe for pregnant employees. The employer could therefore not offer A such painting work that would not have endangered her health and the health of the foetus. According to A, the majority of the sites where she had been working had used materials that were safe for pregnant employees.

Under the Employment Contracts Act, if the working duties or conditions of a pregnant employee endanger the health of the employee or the foetus and if the hazard cannot be eliminated from the work or working conditions, the employee shall, if possible, be transferred to other duties suitable in terms of her working capacity and skills for the period of pregnancy. If it is not possible to transfer the employee to other duties suitable for her for the duration of the pregnancy, the employee may be entitled to special maternity leave.

The Ombudsman for Equality examined the situation both from the point of view that the employer could have offered work suitable for a pregnant employee and from the point of view that work suitable for a pregnant employee had not been available.

If there had been suitable work to offer to a pregnant employee, there was no acceptable reason not to renew the fixed-term employment contract under the Equality Act. If that had been the case, the employer had discriminated against A in a manner prohibited by the Equality Act on the basis of pregnancy.

If painting work using safe materials was truly not available, it had to be assessed whether the protection of pregnant employees could be considered an acceptable reason not to renew the fixed-term employment relationship.

The Equality Act has been applied in a way that prohibits discrimination as a result of special protection of employees on the basis of pregnancy. A failure to extend a fixed-term employment contract in a situation where the employment relationship has previously been renewed puts a pregnant employee in a less favourable position and, as a rule, the protection of a pregnant employees cannot be considered an acceptable reason not to extend a fixed-term employment relationship.

However, the question whether there are some situations in which a person can be excluded from recruitment on the basis of pregnancy remains open. Based on legal literature and case law, if certain conditions are met, it may be possible for the employer not to select an employee for a fixed-term position because of her pregnancy. The preconditions for this are that the assignment is of a limited and short duration and cannot be expected to continue or recur and, because of the quality of the work, it is necessary that the same person does it without interruption from the beginning to the end.

According to the Ombudsman's assessment, A's situation was not the limited situation described above, in which she would not have had to be considered for an extension of the fixed-term employment relationship because of her pregnancy. The nature of construction work is such that there may be short breaks between the completion of a site and the beginning of work at a new site. However, on the basis of the fixed-term employment relationships A had completed at X Ltd., it could be assumed that the work would continue or recur.

The Ombudsman for Equality stated that, on the basis of the report submitted in connection with the matter, it seemed likely that, had A not become pregnant, her fixed-term employment relationship with X Ltd. would have been extended. The employer had not claimed that painting work was no longer available at all, but had justified the decision by saying that the work would have endangered A's health because of her pregnancy and, in practice, she could therefore not have done the work. Concern about A's occupational safety and health could not be considered an acceptable reason under the Equality Act not to extend the fixed term employment relationship. A could have been entitled to special maternity leave and the

employer could have recruited a substitute for her. According to the Ombudsman's assessment, A had been discriminated against in violation of the Equality Act on the basis of pregnancy.

However, the review of the evidence and the final resolution of the discrimination matter will usually take place in a district court in a possible compensation claim case against the employer, if the parties are unable to settle the matter by other means. (TAS 158/2019)

### Suspected discrimination on the basis of pregnancy in recruitment

Company X was in the process of recruiting person A, which was why person A and the representative of the company had discussed the job offer and the relevant details. During the discussion, A also informed the company about her pregnancy. A suspected that she had been discriminated against in recruitment on the basis of her pregnancy, because after having told about the pregnancy, the company did not offer her the job after all but announced that they would continue searching for new applicants. In the recruitment process, the company X used the services of the recruitment company Y, which was also aware of the job offer.

From the perspective of assessing suspected discrimination, the essential question was why the employer had decided not to select the person to the job at a stage where they had already been willing to offer her the task. The fact that the position had been reopened for application later and another person had been selected to it did not affect the assessment of the previous situation. In the case, it was also assessed how the responsibility for potential discrimination is divided between the employer and the recruitment company.

#### Discrimination in recruitment prohibited by the Act on Equality between Women and Men

According to the Act on Equality between Women and Men (Equality Act), a pregnant person or a person taking family leave should be treated in the same way as they would be treated if they were not pregnant or taking family leave. They should not be placed in a less favourable position on the basis of pregnancy or family leave. If the employer were aware of the

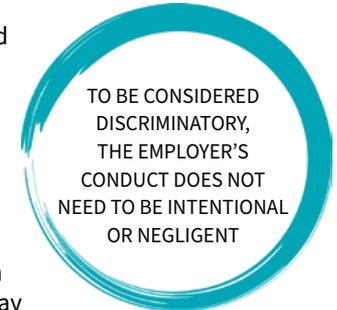
applicant's pregnancy, the employer might have to prove that pregnancy did not affect the decision why the applicant was not selected to the job, but that there were other acceptable reasons for this. If no such reason is presented, the choice is considered to be in violation of the Equality Act. To be considered discriminatory, the employer's conduct does not need to be intentional or negligent or to have been carried out with a discriminatory intent.

As such, the prohibition of discrimination based on gender as referred to in the Equality Act applies to both the employer and the recruitment company used by it. However, the responsibilities of the employer and the recruitment company differ from one another in that only the employer can be responsible for the selection decision and the discrimination referred to in section 8 of the Equality Act (special prohibition on discrimination in working life) and liable to pay compensation to the discriminated person in accordance with the Equality Act.

However, the actions taken by the employer or the recruitment company used by it before the selection decision may violate the general prohibition of discrimination of the Equality Act. If the person suspecting discrimination has suffered damage, she or he may be entitled to claim compensation for it on the basis of the Tort Liability Act.

#### Assessment of the case

The job was held open for applications twice. The applicant A came first in the recruitment process, and the company wanted to offer her the job. After A had informed the company X and the representative of the recruitment company about her pregnancy, the job was reopened for application in a few months' time. Since the employer and the recruitment company had knowledge of the applicant's pregnancy, a suspicion of discrimination arose in the matter. The employer and the recruitment company had a burden of proof that the pregnancy did not contribute to A not being chosen to the job.



## Evaluation of an acceptable reason

The company X needed to find a suitable person to the job quickly because of some urgent tasks. The company also stated that it believed that it would be possible to find another candidate for the job who would be equal or even superior to A. In its statements, the company did not refer to, for example, grounds related to A's merits or suitability or any other grounds that could be of relevance for assessing why the position had been reopened for application. This did not support the company's claim that they were in a hurry to fill the vacancy.

The fact that the job was reopened for application and another person was eventually selected to it does not affect the assessment of the previous recruitment situation. The Ombudsman for Equality considered that in this case the employer cannot clear itself of the suspicion of discrimination by referring to the better merits or suitability of the selected person in relation to A. A's pregnancy was considered to have influenced the company X's conduct of not employing A to the job. The company's conduct in recruitment had to be regarded as discrimination prohibited by the Equality Act.

On the other hand, in the light of the statement presented in the matter, the recruitment company was not considered to have discriminated against a person in violation of the Equality Act on the basis of pregnancy, because the representative of the recruitment company had not told the company X about A's pregnancy. Furthermore, the representative of the recruitment company had not urged A to inform the company about her pregnancy.

The review of evidence and the final resolution of the discrimination matter will take place in the district court if the parties are unable to settle the matter by other means. (TAS 338/2019)

## Recruitment discrimination based on family leave in the position of coordinator

The Ombudsman for Equality was contacted by a person referred to as A who suspected that she was discriminated against during recruitment on the basis of family leave. A had worked as a coordinator of international affairs, in a fixed-term employment relationship as a family leave substitute. Less than six months after the expiry of A's employment relationship, the same position she had managed as a substitute was opened for appli-

cation as a permanent post. A applied for the vacant position. A was on maternity leave and unable to start in the position immediately, so she said she would be available for work less than one year later, in September. A was not invited to an interview or selected for the position. When A asked for the reason, she was told that the employer needed for the position a suitable individual who could start right away.

The Ombudsman for Equality asked the employer for a clarification of the matter. The employer stated that one criterion in filling the position was the date when the applicant could start the work. The company needed to find a suitable person who could start at the beginning of January the following year. This is why the job advertisement mentioned that the position would be filled once a suitable individual was found. A stated in her application that she would be available for the position beginning in September the following year. The employer admitted being aware of A's family leave but denied that the family leave affected the decision on recruitment. As the reason why A was not selected for said position, the employer stated that it had chosen the person it deemed most suitable for the position who could fill the position in line with the employer's need, i.e. as soon as possible.

## Prohibition of discrimination upon hiring of employees in the Act on Equality between Women and Men

Pursuant to section 8(1)(2) of the Act on Equality between Women and Men, the action of an employer shall be deemed to constitute discrimination prohibited under the Act on Equality between Women and Men if the employer upon employing a person, selecting someone for a particular task or training, or deciding on the duration or continuation of an employment relationship or the pay or other terms of employment acts in such a way that the person finds themselves in a less favourable position on the basis of pregnancy or childbirth or for some other gender-related reason.

In principle, when hiring employees, a person who is pregnant or on family leave should be treated in the same way as the other applicants. Failing to select a person for a position due to pregnancy or family leave, for example, is not allowed. Extra costs incurred by the employer from ma-



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APPLICANTS

ternity leave or from acquiring a substitute are not acceptable reasons under the Act on Equality between Women and Men for bypassing a person upon hiring of employees. The fact that a person cannot, in practice, manage their own duties due to pregnancy or family leave but a substitute is needed for that person usually cannot be regarded as an acceptable reason. A substitute can be hired for an employee for the duration of family leave, and only extremely exceptional situations require the same individual to carry out the work from start to finish.

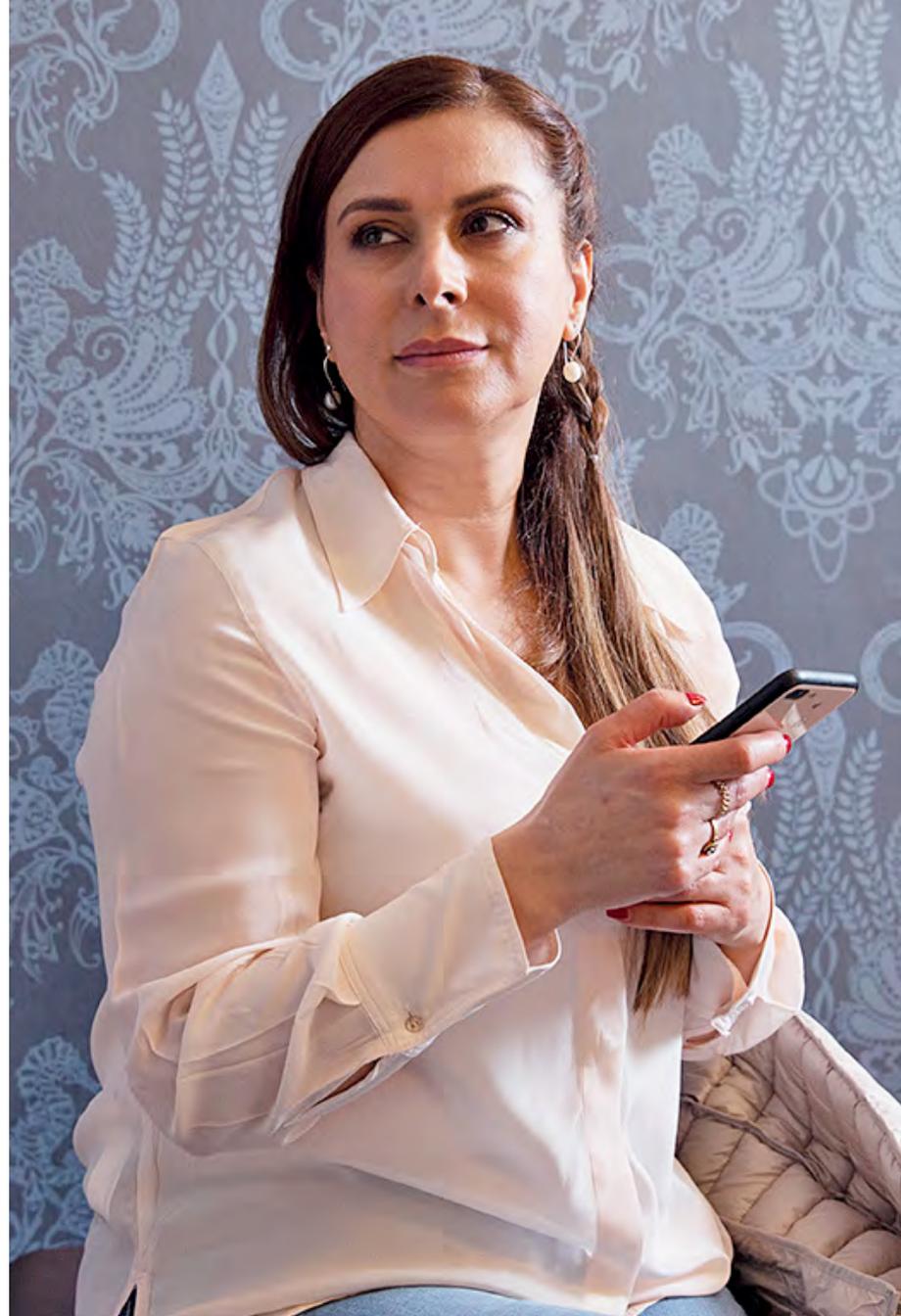
In practice, an evaluation of a discrimination matter upon hiring of employees requires making a comparison of merits between the person selected for the position and the individual suspecting discrimination. If a job applicant who suspects discrimination can demonstrate that he or she was more qualified for the position than the person of opposite gender selected for it, an assumption of discrimination emerges. If the applicant was pregnant or on family leave at the time in question, the person of comparison can be a person of the same gender. The emergence of an assumption of discrimination in cases of pregnancy and family leave also requires that the employer knew of the employee's pregnancy or family leave.

### **Assessment of the case**

In the case, the first step was to assess whether A could be regarded as more qualified for the position than B, the successful applicant. The Ombudsman for Equality reviewed the merits of A and B. Although the Ombudsman for Equality did not make an actual comparison of merits, the information obtained suggested that A was more qualified for said position than B on the basis of her work experience.

The employer decided not to select A, the more qualified applicant, for the position, knowing that she was on family leave. Thus an assumption of discrimination emerged in the case. In order to disprove the assumption of discrimination, the employer should demonstrate that deciding not to select A was based on some other, acceptable reason than her family leave.

As the reason why A was not selected for the position, the employer stated that it had chosen the most suitable person who could fill the position in line with the employer's need, as soon as possible. In the view of the Ombudsman for Equality, the employer justified the decision not to select A primarily with the fact she was unable to start at work in January the fol-





lowing year, but only in September. In the assessment of the Ombudsman for Equality, the position at hand did not involve an extremely exceptional situation that would require the same individual to carry out the work from start to finish. The employer's reason not to select A for the work because she was unable to start in January could not be regarded as acceptable grounds referred to in the Act on Equality between Women and Men for bypassing her in hiring of employees.

The employer did not present any other reason for deciding not to select A for the position, such as one related to her suitability or applicability. Hence The Ombudsman for Equality found that the employer had discriminated against A in violation of the Act on Equality between Women and Men on the basis of her family leave.

A comparison of merits between the applicants, evaluation of proof and the final decision on the matter of discrimination are ultimately made by a district court, during the processing of any compensation action brought by the employee against the employer, if the parties cannot otherwise reach a settlement in the case. (TAS 11/2020)

### Layoff and dismissal of an employee after paternity leave

Mr. A asked the Ombudsman for Equality to determine whether he had been discriminated against in a manner prohibited in the Act on Equality between Women and Men (609/1986, hereinafter the Equality Act) when he was laid off after the end of paternity leave and dismissed at the end of the layoff.

A went on paternity leave from the position of designer. The employer gave him a layoff notice during the paternity leave. The layoff began immediately after the end of A's paternity leave. At the end of the layoff, the employer terminated A's employment relationship. A was the only employee laid off at the company. In addition to A, one employee who did design work during A's layoff was dismissed slightly before A.

### Provisions on discrimination in the Equality Act

Section 7 of the Equality Act prohibits direct and indirect discrimination based on gender. In the Equality Act, indirect gender-based discrimination means, for instance, treating someone differently on the basis of parenthood or family responsibilities.

Pursuant to section 8(1)(4) of the Equality Act, the employer may not manage the work, distribute tasks or otherwise arrange the working conditions in such a way that one or more employees find themselves in a less favourable position than other employees on the basis of gender.

On the basis of section 8(1)(4) of the Equality Act, the employee has, in principle, the right to return to the former or a similar position after the end of family leave. According to section 8(1)(5) of the Equality Act, the employer's actions must be regarded as discrimination prohibited in the Equality Act if the employer gives notice on, terminates or otherwise discontinues an employment relationship, or transfers or lays off one or more employees on the basis of gender.

### Assessment of the case

An assessment of whether the employer had grounds under the Employment Contracts Act to lay off and dismiss A do not fall within the competence of the Ombudsman for Equality. From the perspective of the Equality Act, the case involved evaluating whether the decision to lay off and dismiss A must be regarded as discrimination on the basis of parenthood or family responsibilities prohibited in the Equality Act.

When a case involves suspected discrimination on the basis of family responsibilities, the burden of proof is transferred to the employer immediately after the person suspecting discrimination has demonstrated that he or she has family responsibilities. It must also be demonstrated that the employer knew of the employee's family responsibilities.

It was undisputed in the case that the employer knew of A's family responsibilities when it laid him off. A was dismissed at the end of the layoff. Considering the time-based connection between the layoff and dismissal with A's paternity leave, an assumption of discrimination emerged in the case. In order to disprove the assumption of discrimination, the employer should be able to demonstrate that the action was caused by some other, acceptable grounds than A's paternity leave.

The premise is that a person who is or will be on family leave should be treated in the same way as they would be treated if they were not on family leave. In an assessment of whether selecting a person to be dismissed

or laid off constitutes discrimination, the starting point is whether the same criteria and practices have been applied to the employee as would have been applied without family leave. Their situation must be compared with the grounds the company usually observes in similar situations and when choosing people to be dismissed or laid off. These grounds may not be in conflict with labour legislation or the prohibition of discrimination in the Equality Act.

The employer had declared that it applies the principle according to which employees who are important for the company or who demonstrate special competence are the last ones to be laid off or dismissed. The selection of persons to be laid off or dismissed also includes a review of the contents of the duties; the duration of the employment relationship; the competence, knowledge and skills of the employees; and their suitability. These principles reported by the employer in allocating the layoff and dismissal were acceptable as such.

The next step was to assess whether the employer could justifiably regard other employees as more important for the company's operation than A when the decisions on A's layoff and subsequent dismissal were made. This assessment can be influenced by, for example, the merits of the employees for the position of designer.

The Ombudsman for Equality compared the education and work experience of A and employees B, C and D who had carried out similar duties. Based on mere documentary evidence, however, the Ombudsman for Equality was unable to make a final evaluation of what kind of education and work experience provide sufficient conditions for the position of designer, or what kind of education or experience is an asset in such duties.

The Ombudsman for Equality assessed that B was more qualified for the position of designer than A. Therefore, the employer had acceptable grounds for deciding to lay off A instead of B. Furthermore, B had been dismissed before A, so this could not have been an option in the situation where A was dismissed.

C was assessed to be at least as qualified as A. C was on family leave when the decision was made to lay off A, so C could not be regarded as an alternative to A in the layoff situation. During the dismissal, the employer acted within its power in choosing its long-term employee C to continue at

work instead of A. Consequently, selecting A to be dismissed instead of C could not be regarded as discrimination.

With regard to education, D could be deemed to be as qualified as or more qualified than A for the position of designer, but D was less qualified for the position in terms of work experience. However, the employer had said that D was an important employee for its operation and, on the other hand, reported that A did not possess the kind of special competence which would warrant laying off or dismissing another employee. D's importance for the employer was, as such, an acceptable reason for the employer to lay off and dismiss A instead of D.

The employer justified D's importance for the company with, for instance, a customer project in which no one else than D could act as the client company's project leader. However, deciding to lay off A instead of D could not be acceptably justified with this customer project alone since, according to the employer's account, the decision to lay off A was made several months before the customer requested an offer for the project. To find that the employer had acceptable grounds for deciding to lay off A instead of D, the employer should be able to demonstrate that D could justifiably be regarded as an employee who was more important for the employer's operation than A when the decision to lay off A was made.

D's significance in the customer project that began in the autumn could be regarded as an acceptable reason to select A to be dismissed instead of D the same autumn. If the employer proved this claim to be true, choosing A to be dismissed instead of D should not be regarded as discrimination.

In the documentary procedure, the Ombudsman for Equality was unable to make a final assessment of whether the employer could justifiably regard D as a more important employee than A when the decisions on layoff and dismissal were made. For this reason, the Ombudsman for Equality was also unable to take a final stand on whether A had been discriminated due to the use of family leave.

The Ombudsman for Equality primarily comments on legal questions concerning the interpretation of the Equality Act. Evaluation of proof, comparison of merits and the final decision on the matter of discrimination are ultimately made by a district court, during the processing of any compensation action brought against the employer. (TAS 72/2019)

## 4.2 Discrimination in recruitment

The Equality Act does not restrict employers' right to choose the candidate they consider the best for a particular job. The Act aims to prevent situations where a person is appointed unjustly on the basis of gender when another candidate would have been more qualified. This also applies to situations where employees are selected from within the workplace for training programmes or new roles. Applicants must not be discriminated against on the grounds of pregnancy, childbirth, parenthood or family responsibilities.

Further, the employer must not act in a way that results in a person being in an unfavourable position in these situations due to gender identity or gender expression. A finding of discrimination does not require intentionality or negligence by the employer.

To establish discrimination relating to recruitment, there needs to be a comparison made of the education/training, work experience and other merits of a jobseeker who suspects discrimination and of the person who is actually selected for the job. A presumption of discrimination arises if the person suspecting discrimination can prove that they were more qualified for the job than the person of the opposite gender who was selected. In order to disprove the presumption, the employer must demonstrate that their actions were due to another acceptable reason, and not the applicant's gender.

Acceptable reasons include issues such as personal suitability for the job. Ultimately it is the district court that rules on cases of suspected discrimination relating to recruitment.

The nature of the job or task may be an acceptable reason to select a person for the position on the basis of their gender. According to the legislative materials of the Equality Act, the personal nature of the employment relationship can be regarded as a weighty reason that justifies selection on the basis of gender when selecting a personal assistant.

## AN EXAMPLE OF SUSPECTED DISCRIMINATION IN RECRUITMENT

### Suspected case of recruitment discrimination

A male referred to as A asked the Ombudsman for Equality to investigate whether the City of X had acted in a manner prohibited by the Act on Equality between Women and Men (609/1986, hereinafter the Equality Act) in a recruitment process, when he had not been selected for one of 13 “duuniagentti” positions, but a female referred to as B was selected.

### **Discrimination in recruitment prohibited by the Act on Equality between Women and Men**

In its statement, the Ombudsman for Equality primarily gives an opinion on legal questions concerning the interpretation of the Equality Act. As a rule, the Ombudsman for Equality does not compare merits in cases of suspected discrimination concerning recruitment.

According to section 8, subsection 1, paragraph 1 of the Equality Act, the action of an employer shall be deemed to constitute discrimination prohibited under the Equality Act if the employer, upon employing a person or selecting someone for a particular task or training, bypasses a more qualified person of the opposite gender in favour of the person chosen, unless the employer's action was for an acceptable reason and not due to gender, or unless the action was based on weighty and acceptable grounds related to the nature of the job or the task. The procedure does not need to be deliberate or negligent in order to be discriminatory and it does not need to have been motivated by discriminatory intent.

The Equality Act obligates employers to perform a qualification-oriented comparison when the pool of applicants includes both women and men. The Equality Act obligates employers to assess, for the purposes of their recruitment decision, the merits of an applicant or at least provide the applicant with the opportunity to present them. The obligation to carry out a comparison of merits applies to all applicants, not only to those selected for an interview.

Merits must be assessed in the light of the position in question and on the basis of the selection criteria that the employer has established before advertising each position (Government Bill 57/1985). The comparison of qualifications must pay attention to the applicants' educational background, previous work experience as well as any qualities, knowledge and skills that could be of use in the job and that could therefore be considered to constitute additional merits.

Even though the selection criteria set in advance by the employer plays a key role in the comparison of merits in accordance with the Equality Act, when making the selection, the employer can appeal to matters relevant to the management of the action, even if these have not been mentioned in the application notice. In this case, the burden of proof to justify that the criterion was significant with regard to the performance of the duties included in the position lies with the employer.

When comparing education, the most important factor is the suitability of the content of education for the performance of the position for which the individual is applying. If the person meets with formal qualifications, higher education may not be considered an additional merit. The position taken in case-law regarding work experience has been that even large differences in the amount of years of service do not necessarily mean that the person who has been employed longer is considered to be more qualified. Only significant differences in the number of years of service have been seen as important.

A certain length of experience is required to acquire familiarity with each task. The length of experience that is seen as sufficient varies from task to task. Regarding the contents of the work experience it is not only relevant whether or not the person has gained their experience in a similar position to the one they are applying for, as experience that is suitable for the position may also have been acquired in other types of work.

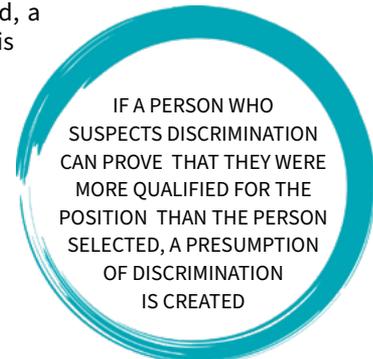
The Equality Act's objective is not to restrict the employers' right to choose the candidate they consider the best for a particular job, but to ensure that the choice is not based on gender. The employer has the right to assess and assign weighting factors to applicants' merits in a way that they deem best for ensuring the successful performance of the employee's duties without being guilty of discrimination as prohibited by the Equality

Act. However, the employer's emphasis must not be arbitrary, but it must be objectively justified in terms of the tasks to be performed.

Suitability for the position and aptitude are not merits referred to in section 8, subsection 1, paragraph 1 of the Equality Act. Even so, these can be used as selection criteria for an employee, in which case they can be taken into consideration as potential Equality Act-compliant justifications for choosing a less qualified applicant. The burden of proof for proving the existence of this justification lies with the employer. If a presumption of discrimination arises in the recruitment process, in order to rebut this presumption, the employer is required to provide evidence that the person selected for the position was better suited for it than the person who claims to have been discriminated against and that this was the real and acceptable reason for the selection. An aptitude assessment can be based on e.g. tests and interviews, but also on accounts of how the applicants have performed previous duties.

Cases concerning the violation of the Equality Act in recruitment are resolved in two phases. First, there will be a comparison of merits between applicants, including education, work experience and skills and knowledge that can be clearly and objectively demonstrated. When assessing the merits of applicants, it is ultimately a question of which applicants have the best professional and other prerequisites for the appropriate and successful performance of the tasks included in the position.

If a person who suspects discrimination can prove that they were more qualified for the position than the person selected, a presumption of discrimination is created. To rebut this assumption the employer must be able to prove that the person selected for the position was more apt for it than the person who was not selected, and that this was the real and acceptable reason for the choice.





## Assessment of the case

In its comparison of merits, the City of X had not commented in any way on A's merits making it difficult for the Ombudsman for Equality to assess the extent to which his merits were considered lesser than those of B.

The Ombudsman for Equality has had access to both A's and B's applications and CV's, the employer's report and A's response. On the basis of these documents, the Ombudsman for Equality determined that there was a presumption of discrimination in the matter. The Ombudsman for Equality found that A could be regarded as a more qualified applicant than B.

In order to disprove the presumption, the employer must demonstrate that actions were due to an acceptable reason other than the applicant's gender. If no such reason can be demonstrated, the selection will be considered to be in violation of the Equality Act.

The Ombudsman for Equality emphasised that they formulate their statements solely on the basis of documentary evidence and, thus, cannot provide any detailed opinions when it comes to evidential matters. The presentation of actual evidence of the merits of the involved parties for the position in question and a detailed comparison of merits and aptitude will be carried out in the district court in connection with the processing of any redress action against the employer. In such a case, the person who suspects discrimination has a duty to demonstrate that he or she was more qualified than the person selected for the position. If a presumption of discrimination arises, the employer must demonstrate that there was an acceptable reason other than gender for a recruitment selection to disprove this presumption of discrimination. Such a reason could be for example the better aptitude of the selected individual. Bringing a compensation action will not require an opinion or other contributing action from the Ombudsman for Equality. (TAS 335/2019)

## 4.3 Discriminatory job advertisements

The Ombudsman for Equality is also regularly contacted with regard to job advertisements, where either only men or only women are able to apply. Under the Equality Act, a job may not be advertised just for women or men unless there is a pressing and acceptable reason for doing so giv-

en the nature of the work or task. The prohibition of discriminatory vacancy announcements is an attempt to promote equal opportunities for women and men in working life. Advertisements contrary to the Equality Act are often based on stereotypical notions of what jobs are suitable for women and for men.

## EXAMPLES OF DISCRIMINATORY JOB ADVERTISEMENTS

### Discriminatory nature of job advertisements limited to a specific gender

The Ombudsman for Equality has issued three statements concerning announcements of job vacancies and the selection procedure of job applicants.

In the first case, a company stated in an announcement published in a job application service that it was looking for two sales representatives (TAS 279/2020, issued on 10.11.2020). According to the announcement, the job applicant had to be male. In the second case, a male or transgender person was sought as a content provider on a Facebook page (TAS 323/2020, issued on 26.11.2020). In the third case, an employment service announcement for appointment booking tasks at a beauty salon was formulated in a gender neutral manner but a male applicant was told on the phone that the client wished for a female job applicant (TAS 319/2020, issued on 26.11.2020).

According to section 14 of the Act on Equality between Women and Men, an announcement of job vacancy may be directed at a certain gender only in exceptional cases, if a weighty and acceptable reason requires a certain gender due to the nature of the job. For the role of an actor, for instance, it is acceptable to select the person of the gender represented by the character. It is also possible to select as a personal care assistant a person of the gender wished by the person assisted, due to the personal nature of the employment relationship.

Another possible exception permitted by section 9(4) of the Act on Equality between Women and Men in employment is that a job announcement directed at a certain gender is part of the employer's temporary, special actions based on a plan which are for the purpose of promoting gender equality. It is important to state this in the job advertisement.

On the other hand, according to section 6 of the Act on Equality between Women and Men, the employer must promote equality between women and men and, for example, act in such a way that job vacancies attract applications from both women and men.

The company seeking male sales representatives justified its announcement by saying that the work would include physically arduous tasks. In this regard, the Ombudsman for Equality stated that it is acceptable to pay attention to job applicants' personal characteristics in hiring, but an evaluation may not be based on stereotypical views of gender. The Ombudsman for Equality found that the job announcement was contrary to the Act on Equality between Women and Men. The company changed the announcement after the statement.

In the second case, a male or transgender content provider was justified with the objective of a more even gender division and diversity of perspectives, among of group of employees who were mostly female. The Ombudsman for Equality regarded the objective as understandable but found that, instead of directing the announcement only at men and transgender persons, the job announcement can wish for applications from all genders.

In the third case, the company brokering employment for appointment booking tasks stated that there was an error in the procedure, and that all applicants would be taken into consideration, irrespective of gender. No person had been recruited for the position in any of these cases. In the statements, the Ombudsman for Equality advised employers to ensure that their procedures comply with the provisions of the Act on Equality between Women and Men in the future. (TAS 279/2020; TAS 323/2020 ja TAS 319/2020)

## 4.4 Pay discrimination

The Equality Act prohibits gender-based discrimination regarding pay. In general, the Equality Act concerns differences in pay between employees of the same employer.

Applying pay terms in a way that places an employee or employees in a less favourable position because of their gender than one or several other employees doing the same or same level of work for the same employer constitutes discrimination, unless there is an acceptable reason for this.



Some cases concerning pay discrimination involve a suspicion that a person is paid a lower role-specific pay (basic pay) than another person working in an identical or equivalent role. Some others concern possible discrimination in the form of different bonuses. The following cases are examples of enquiries related to pay discrimination.

Many of the pay discrimination suspicions reported to the Ombudsman for Equality were related to family leave. The wage structure of universities of applied sciences and the related suspicions of discrimination were another recurring theme in customer contacts.

## EXAMPLES OF SUSPECTED PAY DISCRIMINATION

### In the view of Ombudsman for Equality, the performance-based lump sum agreed for the municipal sector is discriminatory

A collective agreement on a local performance-based lump sum was concluded in the municipal sector in February 2018. The lump sum was paid to most employees of municipalities and joint municipal authorities in January 2019. However, it was not paid to the local government employees that did not receive any pay for the period between 3 September and 18 November 2018.

In the view of the Ombudsman for Equality, the criteria for the lump sum are in violation of the Act on Equality between Women and Men in so far as the lump sum was not made available to employees that did not receive any pay on account of maternity leave, parental leave or child care leave during the period in review.

Based on the information received by the Ombudsman for Equality, the purpose of the lump sum has been to reward local government personnel for the work performed in municipalities to achieve performance and productivity targets. Employees are eligible for the lump sum even if they have not contributed to the achievement of the performance and productivity targets. The requirement has been that the measures set out in the regulation on the lump sum must have been implemented in 2018 and 2019 even though they may have started earlier or ended later.

Thus, in order to qualify for the lump sum, it has not been necessary for individual employees to contribute in any way to the achievement of the performance or productivity targets. Thus, concrete work is not the distinction between the employees who have received the lump sum and those left outside the scheme. As a rule, all employees who have been in an employment relationship with a municipality when the measures referred to in the regulation on the lump sum are required to have been implemented seem to be in the same position concerning the purpose of paying the lump sum. This applies to employees on unpaid maternity leave as well as employees on parental leave or childcare leave.

This gave rise to a suspicion of discrimination on grounds of maternity leave and an assumption of discrimination on grounds of parenthood and family obligations. In the view of the Ombudsman for Equality, no matters emerged in the case on the basis of which the demand for one paid day between 3 September and 18 November 2018 could have been justified in an acceptable manner.

The argument that the parties have agreed on the benefit in a manner that inevitably excluded specific groups of employees is not an acceptable justification. The essential factor in the assessment of the discrimination was whether equal treatment, taking into account the purpose of the benefit, also required that it should be paid to employees who were absent at the time of the payment.

Moreover, the fact that an employee became eligible for the lump sum by working for at least one day during the period in review did not render the criteria for the lump sum non-discriminatory. This option was not available to all employees. The requirement was that the employer allowed the employee to come to work. Moreover, not all employees on unpaid family leave can come to work because they are unable to make the necessary childcare or other arrangements.

It was emphasised in the information received by the Ombudsman for Equality that all employees on unpaid leave were treated in the same manner. However, the fact that some other employees were also left outside the lump sum scheme is not a justification for treating employees on unpaid family leave less favourably than employees who received the lump sum who can be considered to have been in the same position regarding

the purpose of paying the lump sum. Furthermore, the employees on unpaid family leave have not necessarily been in the same position as those who were absent for other reasons as regards whether they could come to work for one day.

Based on the Ombudsman for Equality's statement, the parties to the collective agreement amended the lump-sum payment clause in March 2020 so that the lump-sum instalment will be paid if the employee has been on maternal, parental or child-care leave for part or all of the period 3 September to 18 November 2018. It was agreed that the lump-sum instalment would be paid on the next payday. (TAS 408/2018)

### Right of a university of applied sciences language teacher in the technology field to an availability supplement

The Ombudsman for Equality was contacted by language teacher A, who teaches in the technology field at a university of applied sciences and who suspected pay discrimination. The reason for the suspicion of discrimination was that the university of applied sciences does not pay availability supplement to language teachers in the technology field, as it does to other teachers in the technology field.

The university of applied sciences began to adopt the general collective agreement for the private teaching sector at the beginning of 2020. According to the collective agreement, the salaries of language teachers are determined according to the field of education to which they are assigned. The collective agreement automatically secures teachers assigned to the field of education of technology and transport an availability supplement as part of a personal supplement. For other teachers, the availability supplement is not a fixed part of the salary in the same way.

The entry concerning the availability supplement in the collective agreement meant that the university of applied sciences established a unit called Languages and communication. The university of applied sciences transferred to this unit, for instance, the teachers of languages and communication in the technology field, all of whom were women. It was noted that the unit's field of teaching was other than technology. The establishment of the unit had no effects on operations.

The regulations of the collective agreement described above are relevant for the determination of A's salary. A and the university of applied sciences disagreed on how the regulations of the collective agreement should be interpreted. The Ombudsman for Equality has no powers to interpret the contents of collective agreements. Thus the Ombudsman could not comment on how to interpret the regulation concerning the salaries of language and communication teachers, in particular, or which teachers the expression "teacher assigned to the field of education of technology and transport" in the agreement refers to. In principle, a dispute concerning the interpretation and application of a collective agreement is settled in negotiations between the labour market parties, and ultimately by the Labour Court.

With regard to the Act on Equality between Women and Men, the relevant aspect in the matter was whether the transfer of language teachers made by the employer led to a state of affairs contrary to the prohibition of pay discrimination in the Act on Equality between Women and Men. The Ombudsman for Equality looked at the matter on a general level because no individual teachers as persons of comparison was named.

If A could be deemed to do the same or equal work as one or several teachers of a different gender at the same university of applied sciences, who receive an availability supplement as a fixed part of their personal salary, an assumption of pay discrimination would be created in the case. However, an employer is not deemed to violate the prohibition of discrimination if the employer can provide a justification for the pay differences.

According to the university of applied sciences, the availability supplement was recorded in the collective agreement in the past because it has been difficult to acquire personnel for the technology field. Problems in the availability of labour can be an acceptable explanation for pay differences. Whether this is true must be evaluated specifically in each case. Mere general presumptions of availability of labour are not sufficient. Being able to cite the availability supplement as a justification for pay differences requires proof that recruiting teachers who receive an availability supplement is more difficult than recruitment of teachers in subjects who do not receive it, and this requires paying them a higher salary. (TAS 183/2020)

## Performance bonus was denied due to parental leave at the time of payment

The performance bonus paid for 2019 to which Employee A would otherwise have been entitled was denied on the grounds that they had been on parental leave in March 2020 at the time the performance bonus was paid. The employee had been told that if they had returned to work before the payment date for the performance bonus, they would have received the performance bonus in full.

According to the employer's statement, performance bonuses were only paid to persons who were normally employed by the employer on the payment date of the performance bonus. Otherwise, the employee was not entitled to a performance bonus. This practice applied to persons on study leave and maternity, family or rotation leave, among others.

On the basis of the reports received, the Ombudsman for Equality noted that the performance bonus in question could be considered as a salary for the previous year's work. In denying the performance bonus to which the employee would have otherwise been entitled on the grounds that they were on parental leave on the date the performance bonus was paid, the employer treated them differently on the basis of parental or family care obligations as provided for under the Equality Act. This gave rise to a presumption of indirect discrimination.

Under the Equality Act, a presumption of discrimination is rebutted if the employer proves an acceptable reason for their conduct. The employer denied that the procedure was discriminatory on the grounds that all employees on unpaid leave were treated equally. However, the fact that other employees were also denied the performance bonus did not justify the less favourable treatment of Employee A, who was on parental leave, compared to those employees who received the performance bonus. Employee A could have been considered to be treated the same as those in receipt of the bonus in relation to the purpose of paying the bonus. The Ombudsman for Equality considered the discrimination of Employee A to have been in breach of the Equality Act.

The Ombudsman for Equality also drew attention to the fact that losing out on the performance bonus for the period prior to an employee commencing parental leave precisely because of their having done so may affect an employee's willingness to use parental leave. The Court of Justice of the European Union has ruled that if a worker loses her maternity pay under a collective agreement as a result of taking maternity leave directly after unpaid parental leave, this may affect her decision to exercise her right to parental leave (Cases C-512/11 and C-513/11). This, in turn, undermines the effectiveness of Directive 96/34 on parental leave. (TAS 108/2020)

## 4.5 Discrimination in schools and educational institutions

The Equality Act prohibits discrimination in educational institutions based on gender, gender identity or gender expression. The prohibition of discrimination also applies to the education providers and schools as referred to in the Basic Education Act.

The Equality Act prohibits educational institutions and other communities offering education and training from treating a person less favourably than others on the basis of gender, gender identity or gender expression in

- student selections
- the organisation of teaching
- the evaluation of study performance
- any other regular activity of the educational institution or community

a manner that is referred to in the regulation regarding the general prohibition of discrimination.

The actions of an educational institution will be considered prohibited discrimination if a person is subjected to

- sexual or gender-based harassment and the educational institution or community neglect to take the steps available to prevent continued harassment. However, the educational institution or other community's responsibility only begins when a responsible representative of the institution has been informed of the harassment.
- discrimination in a manner that is referred to in the Equality Act based on orders or instructions to discriminate.

The enquiries concerning schools and educational institutions received by the Ombudsman for Equality in 2020 concerned issues such as accepting pupils to a swimming class in secondary school, the Police University College's entrance examination requirements, organising student events, and an upper secondary school interpreting attending conscription as unauthorised absence.

## AN EXAMPLE OF SUSPECTED DISCRIMINATION IN SCHOOLS AND EDUCATIONAL INSTITUTIONS

### Gender quotas in student selection

The Ombudsman for Equality was called upon to assess whether the student admission criteria applied by the Faculty of Sport and Health Sciences at the University of Jyväskylä comply with the Act on Equality between Women and Men (609/1986). According to the student admissions practice, gender quotas are applied when inviting candidates to the second stage of the entrance examination for the group majoring in Sport Pedagogy as well as in the final selection at the University of Jyväskylä.

During the examination, the Ombudsman for Equality heard the University of Jyväskylä Faculty of Sport and Health Sciences, the Ministry of Education and Culture and the Association of Physical and Health Educators in Finland. In addition, the University of Jyväskylä was provided with the opportunity to issue a statement on the examination concerning the Faculty of Sport and Health Sciences.

The Ombudsman for Equality considered that there is no sufficient justification for the practice of applying gender quotas in student admissions at the University of Jyväskylä. Thus, the practice is in violation of the Equality Act. The University of Jyväskylä was requested to inform the Ombudsman of Equality within six months about the actions it has taken after receiving the statement. (TAS 217/2017)

## 4.6 Discrimination in pricing and in the availability of services

The Equality Act prohibits discrimination on the basis of gender, gender identity or gender expression in the availability and offering of goods and services available to the public. The pricing system used by a trader cannot thus be based on the customer's gender.

The purpose of the Equality Act is not to prevent all different treatment of men and women. It aims to prevent any different treatment based on gender that is clearly unfair. For example, offers related to Mother's Day, Father's Day or the International Women's Day and aimed exclusively at one gender are possible if they are available only very seldom and their financial value is relatively low.

The Equality Act also does not prohibit offering goods or services exclusively or mainly to one gender on the grounds of a legitimate objective. In addition, the restrictions must be appropriate and necessary in terms of the objective.

The Ombudsman for Equality received 50 communications concerning pricing and the availability of services in 2020. Most of these concerned gym services and unisex hair salons.

### AN EXAMPLE OF SUSPECTED DISCRIMINATION IN PRICING AND IN AVAILAILITY OF GOODS AND SERVICES

#### Beauty care services offered solely to women

The Ombudsman for Equality was notified that an offer on intense pulsed light therapy by Beauty Salon A was only intended for women.

The Ombudsman for Equality requested a report on the matter. The private entrepreneur who owns Beauty Salon A replied that she only provides beauty care services to women. She justified this by stating that she is a Muslim and cannot touch men who are not a part of her family for reasons of decency. According to the religious interpretation of some Muslims, it is not appropriate to touch people of the opposite gender if they are not a part of your family or close relatives.



The Ombudsman for Equality found that the issue was not that services were offered to men with disadvantageous terms compared to women. Instead, the case concerned providing services solely to women. Therefore, the situation was assessed on the basis of section 8e(2) of the Equality Act.

The section states that provision of goods and services exclusively or mainly to representatives of one gender is allowed if it is justified in order to achieve a legitimate objective and this objective is sought to be achieved by appropriate and necessary means.

Section 8e of the Equality Act and the Government Proposal for the Act are based on the Council Directive on implementing the principle of equal treatment between men and women in the access to and supply of goods and services (2004/113/EC).

Council Directive 2004/113/EC and the Government Proposal for section 8e of the Equality Act list examples of legitimate objectives that are acceptable reasons for diverging from the principle of equal treatment. Even though the list cannot be considered to be comprehensive, any exceptions not mentioned in the Directive or the Government Proposal for the Equality Act must be similarly justifiable based on the purpose of the Directive. The purpose of the Directive is to combat discrimination based on gender in access to and supply of goods and services.

When assessing the acceptability of the conduct of the self-employed person, factors related to her basic rights, such as freedom to conduct business and religious freedom, must also be taken into consideration. If the self-employed person would be required to provide beauty care services to men, she would have to end her business or abandon a principle that is part of her religion.

However, reasons related to religion, conviction or culture do not automatically and necessarily constitute an acceptable reason for diverging from the principle of equal treatment between genders. The same applies to the freedom to conduct business and the principle of equality. The assessment involves considering what is the significance of equality between genders compared to other basic rights in the individual case if the rights are in contradiction. The Ombudsman for Equality is not aware of any established legal practice related to section 8e of the Equality Act or any interpretation of the Directive 2004/113/EC that have addressed this issue.

The Government Proposal for section 8e of the Equality Act and Directive 2004/113/EC both state that in access to and supply of goods and services reasons of decency may constitute a legitimate reason for differences in treatment.





Touching a person of the opposite gender is a key aspect of the concept of decency. People have varying views on where to draw the line of decency when it comes to touching a person of another gender. In the assessment of the current case, it was not decisive whether the views are based on religious beliefs or other reasons. The principle of decency, that it is not acceptable to touch a member of the opposite gender, can be taken into consideration as justifying grounds for the provision of beauty care services solely to one gender by a self-employed person. This interpretation does not jeopardize the objectives of Directive 2004/113/EC. The case does not concern public healthcare services, for example, where the interpretation of acceptable reasons of decency is stricter.

The Ombudsman for Equality found that the reasons of decency presented by the self-employed person in the case are considered to be a legitimate objective, pursuant to section 8e(2) of the Equality Act, for offering beauty care services solely to women. Offering beauty care services solely to women has been an appropriate and necessary means for achieving this objective. Therefore, the case does not involve discrimination in violation of section 8e of the Equality Act. (TAS 37/2020)

## 4.7 Gender identity and gender expression

The Act on Equality between Women and Men prohibits discrimination based on gender identity and gender expression. Furthermore, the Act obliges authorities, education providers and employers to take pre-emptive action against discrimination based on gender identity or gender expression.

The Ombudsman for Equality investigated a broad range of issues related to gender identity and gender expression in 2020. Citizens turned to the Ombudsman in issues such as asking a person's gender in various surveys and recruitment situations, the use of gendered facilities, displaying the initials of the former names of individuals who have gone through a gender reassignment process in their usernames, obtaining study certificates with a new name, and the eligibility of hormone treatments for compensation under private medical insurance.

The Ombudsman was also contacted about difficulties in receiving the gender correction treatments the individual would have wanted. However, the Ombudsman for Equality does not have the power to affect diagnoses or treatment decisions made by physicians. Addressing possible cases of medical malpractice falls within the competence of the authorities tasked with the supervision of health care.

The Ombudsman for Equality cooperated with organisations that promote the rights of gender minorities, for example in the Government network for cooperation on LGBTI issues. The network includes representatives from various ministries, the Offices of the Non-Discrimination Ombudsman and Ombudsman for Equality, and NGOs.

ISIO ry, an association for the human rights of intersex people, was established in early 2020. The Ombudsman for Equality continued the cooperation begun with the Intersukupuolisuus.fi community with the new association.

The Ombudsman for Equality participated in Pride Week and the Pride parade in 2020. The events were held online due to the coronavirus. The Ombudsman's representative also attended the "Building bridges between equality bodies and trans and intersex activists" event organised by Equinet, the European Network of Equality Bodies.

### Gender minorities and development of legislation

Prime Minister Sanna Marin's Government Programme includes entries that directly or indirectly concern gender minorities. The recommendations concerning gender minorities made in the Ombudsman for Equality's report to Parliament in 2018 have been taken into account in the Government Programme.

The working group instituted by the Ministry of Social Affairs and Health to prepare the amendment of transsexual legislation gave its report in early 2020, and the intention was to continue the work on the basis of the report. Further preparations were put on hold, however, and the Ombudsman for Equality expressed his serious concern over the progress of the transsexual legislation reform to Social Services Minister Krista Kiuru in November 2020. Many organisations also gave a statement urging the Ministry to hasten the reform. The Ministry of Social Affairs and Health has announced that it will institute a broad-based working group in March 2021 to prepare a Government Proposal based on the preliminary preparations made by the Ministry's officials. The Proposal is scheduled to be issued in December 2021.

In his statements concerning the initiatives to amend the Criminal Code, the Ombudsman for Equality noted that they must also address the diversity of genders.

In his statement on the preparation of the Government Report on Human Rights Policy, the Ombudsman proposed including the rights of gender minorities in the report.

## 4.8 Promoting reconciliation

The Ombudsman for Equality may facilitate reconciliation in discrimination matters provided for in the Act on Equality between Women and Men. The Act prohibits discrimination based on gender, gender identity and gender expression. The statutory possibility of reconciliation improves the legal protection of discrimination victims and the effective realisation of their rights.

The possibility for reconciliation is important for both parties of the dispute. The process can be a good alternative to a trial that can be expensive and protracted and uncertain in terms of results.

The Ombudsman for Equality seeks to help parties to disputes reach an understanding over their issues.

Use of the reconciliation procedure is voluntary and based on the parties' consent. The reconciliation can also include a monetary compensation, for example. Confirmation of the reconciliation can be applied from the National Non-Discrimination and Equality Tribunal, and a confirmed reconciliation is equally enforceable as a final court judgment.



THE STATUTORY  
POSSIBILITY OF  
RECONCILIATION IMPROVES  
THE LEGAL PROTECTION OF  
DISCRIMINATION VICTIMS  
AND THE EFFECTIVE  
REALISATION OF  
THEIR RIGHTS

### AN EXAMPLE OF A RECONCILIATION REACHED IN 2020

An employee and their employer were reconciled with the help of the Ombudsman for Equality. The case involved the treatment of a fixed-term employee who went on family leave. The fixed term of Employee A's employment contract was based on substituting for Employee C. Substitute B was hired to stand in for Employee A when Employee A went on family leave. During Employee A's family leave, the permanent holder of the position, Employee C, resigned and the position of Employee B was made permanent. The employer had not considered Employee A at all when filling the position. Rather, Employee A was notified of the resignation of Employee C and permanent hiring of Employee B in retrospect, after having asked the employer about the situation. The employer paid a monetary compensation to Employee A, and negotiations for discussing the events were held for the parties. Both parties to the reconciliation considered the reconciliation procedure mediated by the authorities to have been a success.





## 5 PROMOTING EQUALITY

The Equality Act obliges every employer to promote gender equality purposefully and systematically. This affects both public- and private-sector employers, regardless of the number of employees involved. Schools and educational institutions also have the obligation to promote gender equality. The Equality Act contains provisions on the equality planning obligation which applies to employers employing more than 30 people and educational institutions.

The Equality Act also obliges authorities to promote gender equality in all their activities and contains provisions on the composition of public administration bodies and bodies exercising public authority.

## 5.1 Equality planning

The Equality Act obliges the employer to draw up a gender equality plan regarding personnel policy annually if the employer regularly employs more than 30 people. The plan must be drawn up in cooperation with the employees and must contain a report on the gender equality situation in the workplace.

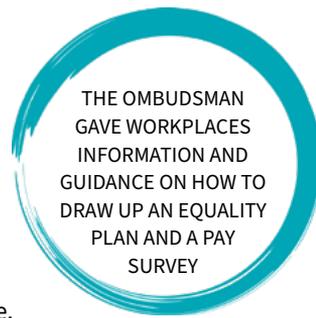
A compulsory section of the equality plan is a survey of the grade of jobs performed by women and men, the pay for those jobs and the differences in pay. The equality plan must also indicate the measures that have been decided on to promote gender equality at the workplace and an estimate of how successful those measures have been.

The Ombudsman for Equality has for a long time followed a practice according to which the Ombudsman requests those workplaces that have had suspected cases of discrimination to submit their gender equality plans for assessment. Equality plans were also requested if the employee representative reported that a plan had not been drawn up or did not meet the statutory requirements.

Inkeri Tanhua's report on equality planning in institutes of higher education and a study of workplace equality plans and pay surveys, commissioned by the Ministry of Social Affairs and Health and conducted by Statistics Finland, were published in 2020. These reports also provide important information to the Ombudsman for Equality on the state of equality planning in general and the measures required.

## 5.2 Quotas

Section 4a of the Act on Equality between Women and Men requires that all Government committees, advisory boards and other similar administrative bodies have at least 40 per cent of both women and men, unless there are special reasons to the contrary. In established use, the quota provision has also been deemed to apply to bodies appointed by ministries, such as working groups. Likewise, municipal and inter-municipal co-operation bodies, municipal councils excluded, must have at least 40 per cent of both women and men, unless otherwise dictated by exceptional circumstances.



According to the same section of law, the executive or administrative organs of bodies and institutions exercising public authority and companies in which the government or a municipality is the majority shareholder must include an equitable proportion of women and men, unless there are special reasons to the contrary. This provision obligates all parties proposing members to the bodies mentioned above to put forward the nomination of both a man and a woman for every membership position.

The concept of special reason shall be interpreted restrictively. This kind of reason may be, for example, that a body will be working in a very specialized area where the experts are only either women or men. A special reason always requires justification, and such a reason must exist by the time the body is being appointed.

## EXAMPLE OF ENQUIRIES RELATED TO QUOTAS

### Composition of the city planning working group

The Ombudsman for Equality was asked to investigate whether the composition of the city planning working group of city X complies with the quota provision laid down on equality between women and men. Only one of the seven members of the planning group is a woman.

According to section 4a(1) of the Act on Equality between Women and Men (Equality Act), the proportion of both women and men in government committees, advisory boards and other corresponding bodies, and in municipal bodies and bodies established for the purpose of inter-municipal co-operation, but excluding municipal councils, must be at least 40 per cent, unless there are special reasons to the contrary.

The quota provision of the Equality Act does not specify in more detail which municipal bodies it is applied to, except that the municipal council has been excluded from the application of the quota provision. The Supreme Administrative Court has stated that in some cases the bodies referred to in the quota provision may also include bodies other than those referred to in section 17 of the Local Government Act (365/1995), such as working groups. The interpretation is influenced by the role and tasks of the body concerned in municipal decision-making. In the assessment, attention may also be paid to the composition of the body and the duration of the term or frequency of meetings set for the body.

The quota provision is applied separately to both ordinary members and deputy members. Exceptions to the quota requirement may be made for special reasons, for example when the experts in a particular special field represent one gender only. In the view of the Ombudsman for Equality, the concept of a special reason must be interpreted narrowly and the party invoking a special reason must justify its decision. It is the responsibility of the authority preparing the establishment of a body to ensure that the quota provision is complied with.

In legal practice, the local governments have had the right to deviate from the gender quota of the Equality Act mainly when members are appointed to municipal bodies based on their position as public servants or elected officials. In most cases, these are committees for which officials can also be appointed on the basis of their public servant status. The position of a public servant or elected official cannot automatically be considered a special reason referred to in the Equality Act. In practice, however, there may be situations where, taking into account the role of the body, it is objectively justified to compose the municipal body of elected officials and public servants acting at a certain level. However, this should always be carefully considered and justified on a case-by-case basis. Special reasons should not be invoked retrospectively if they were not taken into account when the body was being set up.

### **Assessment of the case**

The members appointed to the planning working group on the basis of their public servant status were the city manager, technical director and city architect. In addition, as elected official members in the working group the City Board appointed the first vice-chair of the City Board, the second vice-chair of the City Council, a member of the City Board and the vice-chair of the community committee. The working group consists of seven members, one of whom is a woman.

In the office holder's decision, the quota provision of the Equality Act was not taken into account, because, considering the purpose and working methods of the working group, it was not considered necessary. Furthermore, in its statement, the city referred to the fact that the planning working group in question is not a body as referred to in the Local Government Act.

According to the statement, the city is continuously running or setting up projects related to zoning and other land use. It has been discovered that a working group supporting the work of the planners brings benefits mainly to the brainstorming, planning and other preparation of zoning as well as the evaluation of the results and other implementation of zoning.

As stated above, the purpose of the working group concerned was to prepare land use planning and thus influence societal decision-making. The Ombudsman for Equality considered that, taking account of its task, the planning working group can be considered a municipal body that must be appointed in accordance with the 40 percent quota provision laid down in the Act on the Equality between Women and Men.

Based on their public servant status, the city manager had appointed the city manager, the technical director and the city architect as members of the planning working group. The Ombudsman for Equality considered that the task of the working group was of such a nature that it was possible to appoint the aforementioned persons as members based on their public servant status. The elected official members appointed to the working group were the first vice-chair of the City Board, the second vice-chair of the City Council, a member of the City Board and the vice-chair of the Urban Committee. Therefore, the membership of the elected officials does not seem to be tied to holding an elected official status at a particular level as required above.

In other words, three members of the planning working group were appointed based on their public servant status. Two of them were men and one was a woman. The four elected official members were all men. In order for the composition of the planning working group to comply with section 4a(1) of the Act on Equality between Women and Men, two women should have been appointed as elected official members.

The Ombudsman for Equality considered that, when preparing the matter, the city manager and the City Board had not taken sufficient measures to ensure the implementation of the quota provision. The Ombudsman for Equality reminded the city X that compliance with the quota provision of the Equality Act is an official duty and called on the city to pay closer attention to the requirements of section 4a of the Equality Act in the future when setting up bodies referred to in the provision. (TAS 318/2019)

## 5.3 Equality in schools and educational institutions

In addition to prohibiting discrimination, the Equality Act obliges that instruction and education providers must ensure that educational institutions carry out institution-specific, systematic and structured work to promote gender equality. In connection with gender equality work, educational institutions have to compose an equality plan. Aimed at developing the educational institution's operations, the equality plan is a tool for supporting the promotion of gender equality in all school activities. Special attention must be given to pupil or student selections, the organisation of teaching, learning differences and the evaluation of study performance, to measures ensuring the prevention and elimination of sexual harassment and gender-based harassment, and measures preventing discrimination based on gender identity or expression of gender.

The tasks of the Ombudsman for Equality include supervising compliance with the obligation to promote gender equality plans at educational institutions, and the Ombudsman participates actively in developing the contents of this requirement. This has been one of the priorities of the Ombudsman's activities in recent years.

### Meetings with basic education providers continued

The supervision activities targeting basic education providers begun in 2019 were continued in 2020. During his visits, the Ombudsman for Equality stressed to education providers that the effective implementation of equality within individual educational institutions requires the education provider to actively encourage, supervise and steer the promotion efforts carried out in the primary schools managed by it.

The Ombudsman for Equality had only visited Kouvola and Mikkeli before the restrictions caused by the coronavirus prevented him from carrying out the remaining scheduled visits in the spring.



# 6 STATISTICS

For the most part, enquiries received by the Ombudsman for Equality are submitted by individual clients, and they consist of cases of suspected discrimination and different requests for information on the content of the Equality Act, or the operations of the Ombudsman for Equality. The issues discussed also concern the monitoring of equality plans, or consist, for instance, of statements made by the Ombudsman for Equality to other authorities. In addition to the statistics described here, the Ombudsman for Equality deals with matters relating to communications, the economy and administration.

In 2020, the details of 577 new cases were logged in the Ombudsman's register, and decisions were reached on a total of 538 cases. The majority of cases entered into the register were related to performing the statutory duties of the Ombudsman for Equality.

In 2020, the Ombudsman for Equality received a total of 900 enquiries. Of these, 64 % (577) were submitted in writing and 36 % (323) were telephone enquiries. The decrease in the number of calls was probably affected by the adoption of call-back service from March 2020 to August 2020. Normal helpline operations were resumed in September.

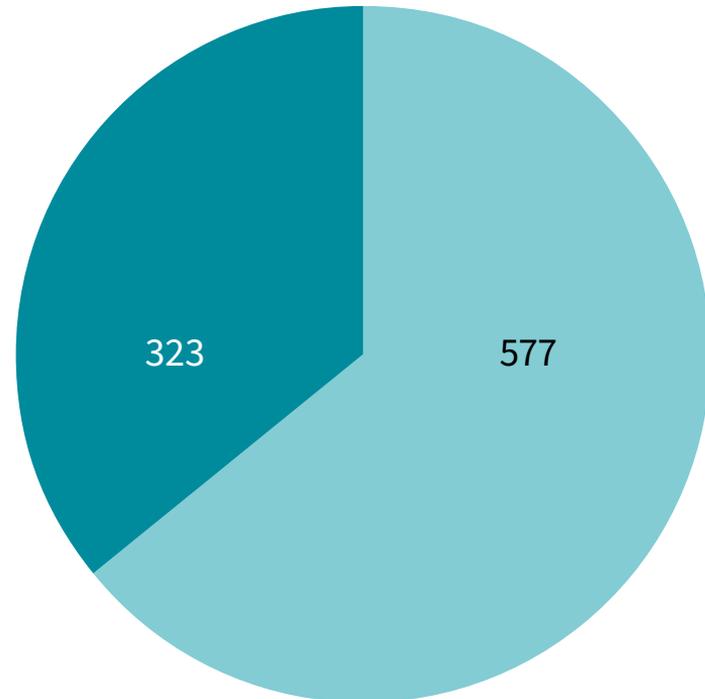
44 % of the written enquiries (252 cases) concerned questions of discrimination, and half of these cases were related to discrimination in employment.

Half (165 enquiries) of the telephone enquiries concerned discrimination. 90 % of telephone enquiries concerning discrimination were related to employment. Of these, 50 % concerned discrimination on the basis of pregnancy and family leave.

Other phone calls related to the powers of the Ombudsman for Equality concerned discrimination in fields other than the world of work or gender equality planning.

## WRITTEN AND TELEPHONE ENQUIRIES 2020 (900 in total)

● Telephone enquiries      ● Written enquiries

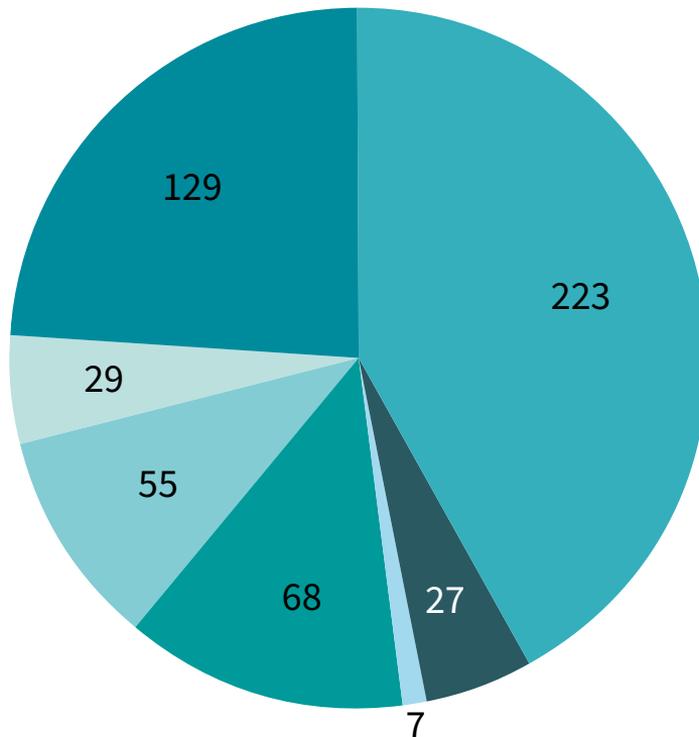


## Cases handled in writing in 2020

In 2020, 538 written cases that had been ongoing during the year were concluded. 40 % (223 cases) handled in writing concerned the prohibition of discrimination under the Equality Act. 60 % of these cases (131 cases) concerned gender-based discrimination in employment. In most cases, they were related to suspected discrimination in recruitment or discrimination on the basis of pregnancy or parenthood, discrimination in recruitment or pay discrimination. The rest of the enquiries were related to discrimination outside the world of work: 5 cases concerned suspected discrimination in educational institutions, and 28 enquiries dealt with discriminatory pricing and availability of services and goods. Of all the cases dealing with discrimination, 59 were covered by the general prohibition of discrimination.

The monitoring of equality plans and promotion of gender equality, such as municipal equality plans, were under discussion in 27 cases, and 7 cases were related to the composition of institutional bodies. The Ombudsman provided 55 replies to different requests for information on the Equality Act and the Ombudsman's operations. The Ombudsman for Equality issued 68 statements to other authorities and international actors.

In addition, the Ombudsman for Equality received a total of 129 enquiries not concerning the Equality Act, where the Ombudsman for Equality has no authority. If necessary, the client was redirected to a competent authority. The remainder of the cases handled in writing during the year were related to administration and communications.



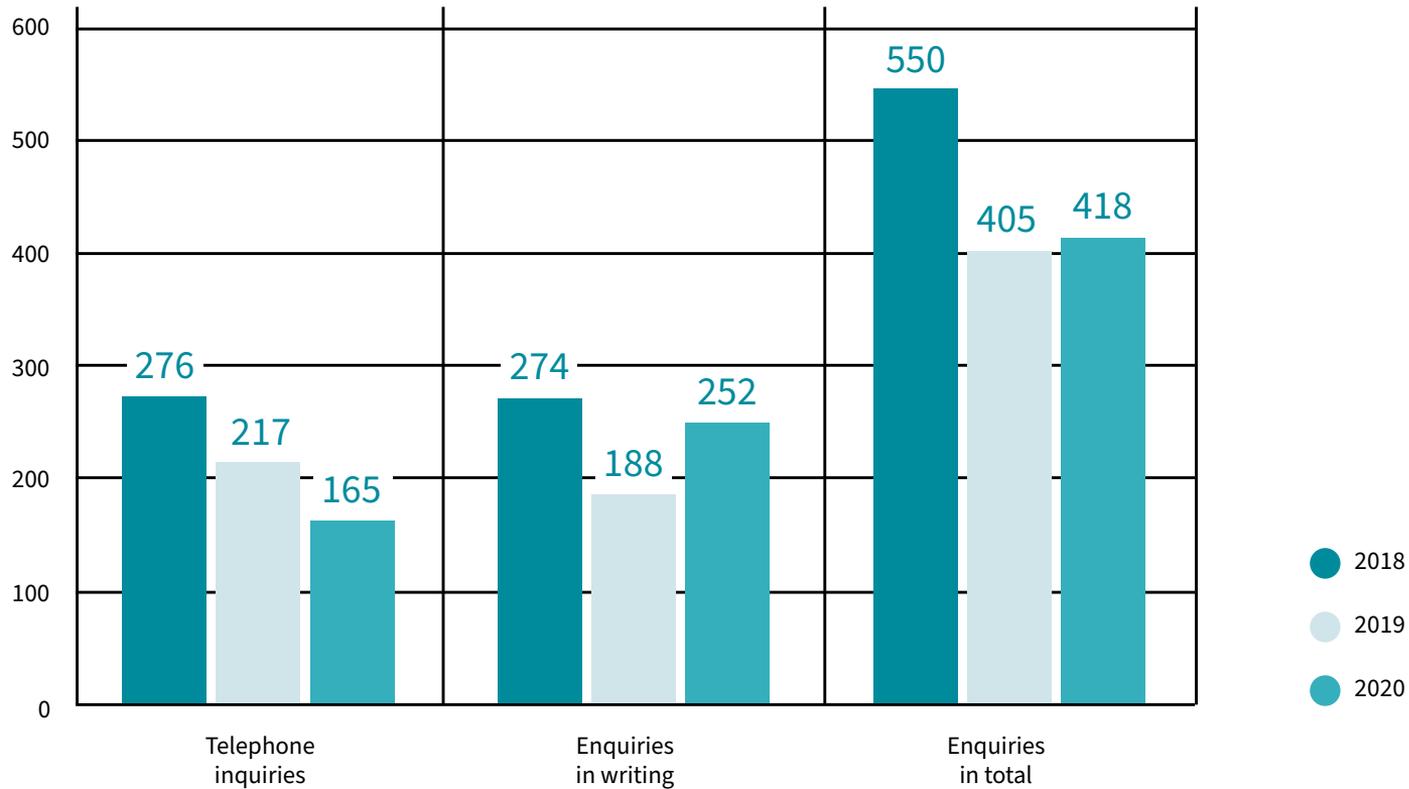
### CASES HANDLED IN WRITING 2020 (538 in total)

- Discrimination 223 cases
- Supervision and promotion of gender equality plans 27 cases
- Quotas 7 cases
- Statements issued to other authorities 68 cases
- Requests for information and enquiries concerning Equality Act 55 cases
- Administration, communications and other matters 29 cases
- Not within the Ombudsman's authority 129 cases

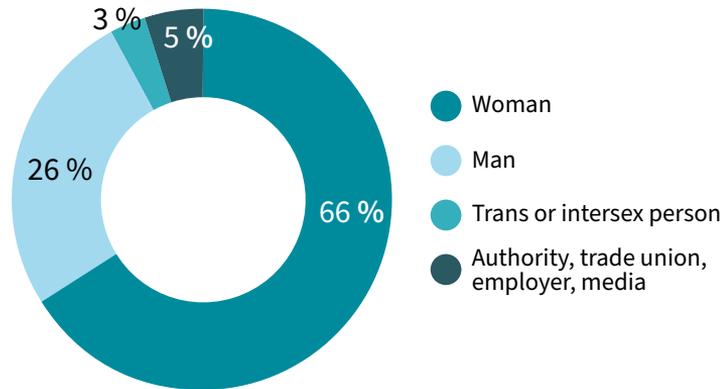
## Client enquiries concerning discrimination 2018-2020

In 2020, the Ombudsman for Equality received slightly more client enquiries related to discrimination than in 2019. In 2020, there were a total of 418 written and telephone enquiries, whereas in 2019 there were a total of 405 written and telephone enquiries. In 2018 there were 550 enquiries in total.

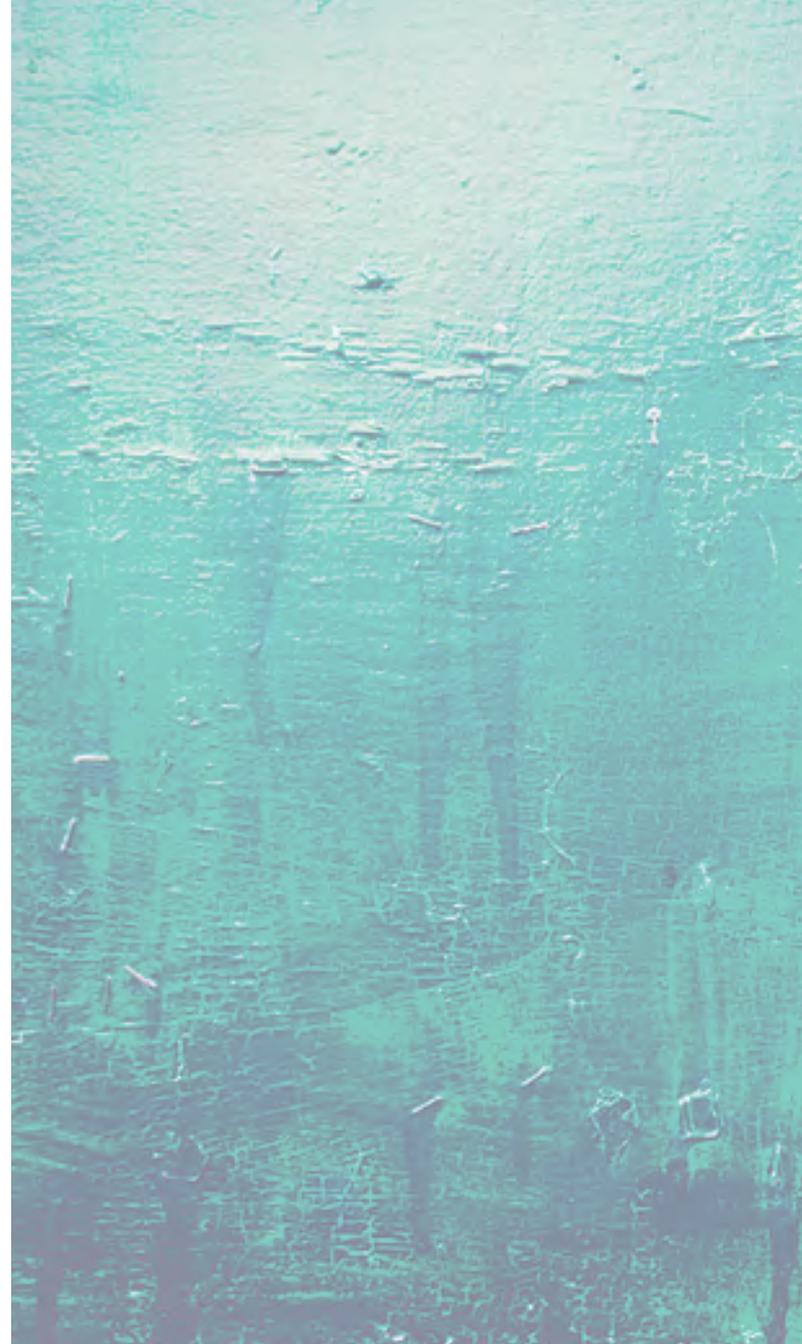
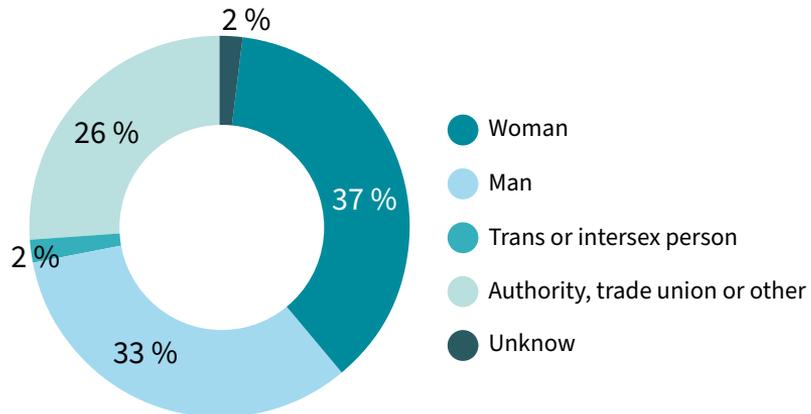
### CLIENT CONTACTS RELATED TO DISCRIMINATION 2018-2020



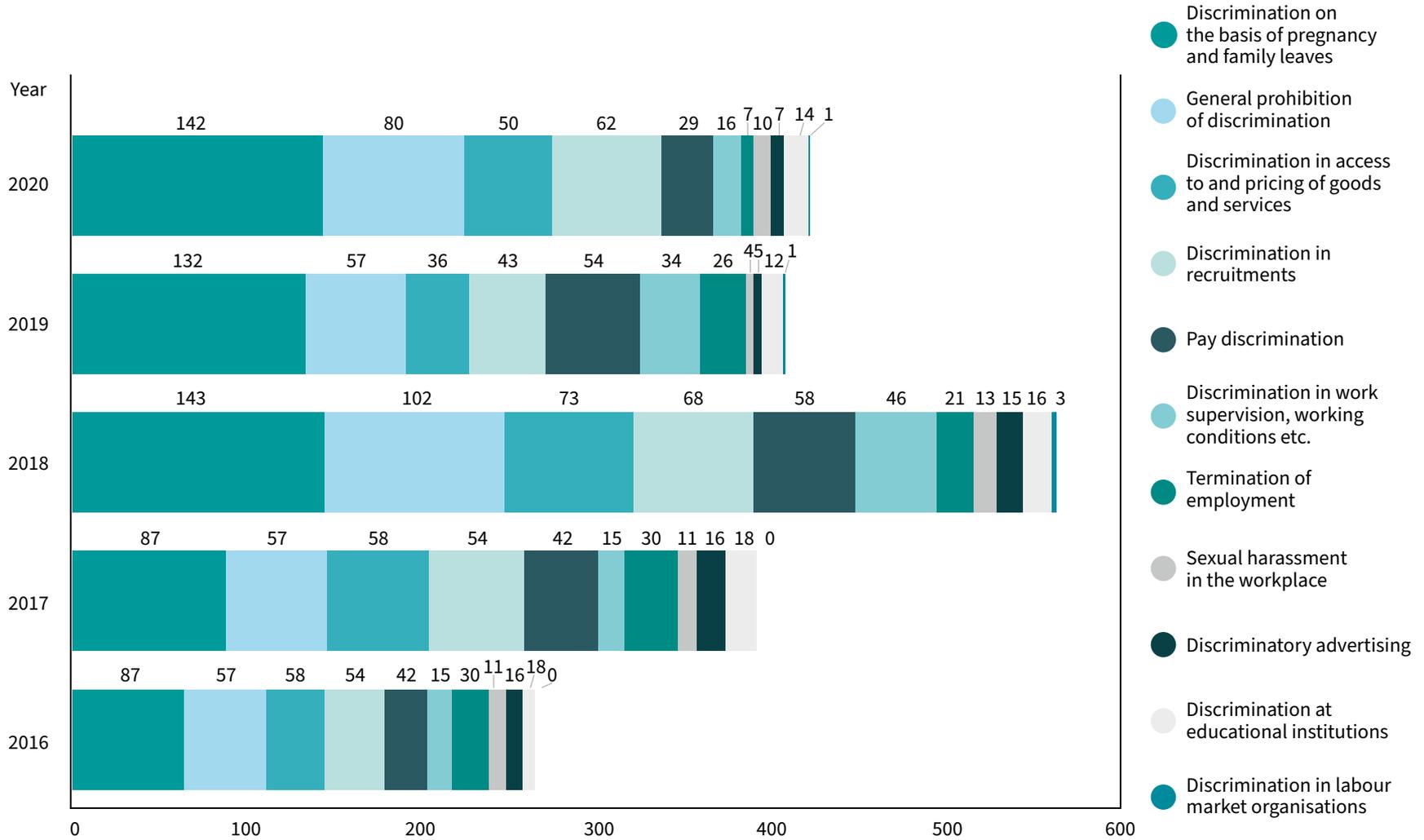
## TELEPHONE ENQUIRIES 2020 BY THE CLIENT (EST., %)



## CONCLUDED WRITTEN CASES RELATED TO DISCRIMINATION IN 2020 BY THE CLIENT (EST., %)



# CLIENT CONTACTS RELATED TO DISCRIMINATION MADE IN WRITING AND ON TELEPHONE IN 2016-2020



## Client contacts related to discrimination made in writing and on telephone in 2016-2020:

- 142 concerning discrimination on the basis of pregnancy and family leaves (10 more than in 2019)
- 80 concerning general prohibition of discrimination (23 more than in 2019)
- 62 concerning discrimination in recruitment (19 more than in 2019)
- 50 concerning discrimination in access to and pricing of goods and services (14 more than in 2019)
- 29 concerning pay discrimination (25 less than in 2019)
- 16 concerning discrimination work supervision, work conditions etc. (18 less than in 2019)
- 7 concerning termination of employment (19 less than in 2019)
- 10 concerning sexual harassment in the workplace (6 more than in 2019)
- 7 concerning discriminatory job advertisements (2 more than in 2019)
- 14 concerning discrimination at educational institutions (2 more than in 2019)
- 1 concerning discrimination in labour market organisations (same as in 2019)

Client contacts concerning discrimination on the basis of pregnancy and family leaves were also often related to pay discrimination, discrimination in recruitments, discrimination in work supervision and work conditions or termination of employment relationship.

## Personnel and appropriations

In 2020, the Office of the Ombudsman for Equality had on average 11,7 man-years at its disposal. In addition to the Ombudsman for Equality, a temporary Senior Officer, Communications Planner and Project Planner also worked at the Office.

During the year of the review, the appropriation for the Ombudsman for Equality was EUR 970,000. In addition to an operational appropriation, this amount includes the employees' salary costs and other administrative expenditures. Almost 90% of the appropriation is used for employees' salary costs and office facilities.

# 7 COMMUNICATION AND COOPERATION

The Ombudsman for Equality engages in active cooperation both nationally and internationally.

## PRESENTATION OF THE OMBUDSMAN FOR EQUALITY IN DIFFERENT BODIES

- Expert group for monitoring of discrimination / Ministry of Justice
- Gender Equality network of the Centre for Gender Equality Information / National Institute for Health and Welfare
- Government network for cooperation on LGBTI issues
- Human Rights Delegation / Human Rights Centre
- Statistics Finland's working group Equality and Statistics / Statistics Finland
- Steering network of the Ministry of Justice's administrative branch / Ministry of Justice
- Working group for the preparation of pay equality legislation / Ministry of Social Affairs and Health

## INTERNATIONAL COOPERATION

The Ombudsman for Equality is a member of the European Network of Equality Bodies (Equinet). As in previous years, representatives of the Office of the Ombudsman for Equality participated in activities of Equinet's Communication Strategies and Practices and Gender Equality working groups, and the Annual General Meeting. All the meetings were held online due to the Covid-19 situation in Europe.

The annual meeting of the Nordic Ombudsmen for Equality and Discrimination was not held in 2020 due to the Covid-19 situation.

## COMMUNICATIONS

The Ombudsman for Equality's website was extensively reworked in 2020. The new website went live on 23 September 2020. The update was carried out in cooperation with the Ombudsman for Children and Non-Discrimination Ombudsman. The new site aims to be more accessible to users.

In January 2020, the Ombudsman for Equality, Non-Discrimination Ombudsman and Ombudsman for Children held a joint background event for the media on discrimination in working life. Ombudsman for Equality Jukka Maarianvaara gave several interviews concerning equality.

**TASA-ARVO.FI WEBSITE**  
59 521 VISITORS

**TWITTER: TASAARVO\_NEWS**  
4876 FOLLOWERS

**FACEBOOK: WWW.FACEBOOK.COM**  
**/TASAARVOVALTUUTETTU**  
2871 FOLLOWERS

**INSTAGRAM: @TASAARVOVALTUUTETTU**  
2756 FOLLOWERS

**LINKEDIN: TASA-ARVOVALTUUTETTU**  
A NEW CHANNEL WAS LAUNCHED IN 2020.

**PUBLICATIONS**  
TASA-ARVOVALTUUTETUN  
VUOSIKERTOMUS 2019.

JÄMSTÄLLDHETSOMBUDSMANNENS  
ÅRSBERÄTTELSE 2019.



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