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Submission by the Swedish Equality Ombudsman to the Report on Anti-Muslim Hatred and Discrimination by the UN Special Rapporteur on Freedom of Religion and Belief

The Swedish Equality Ombudsman (the Ombudsman) would like to submit the following information to the March 2021 HRC46 report by the Special Rapporteur on Anti-Muslim hatred and discrimination and the right to freedom of thought, conscience religion or belief.

The submission has been prepared solely from the view-point of the mandate of the Ombudsman, which in short is to promote non-discrimination and to carry out supervision under the Swedish Discrimination Act (the Act). In this context, the Ombudsman receives, analyses and decides upon complaints from the public, which includes bringing cases for compensation. Some important issues, such as hate crime or hate speech, are not covered by the mandate and are thus not addressed in this memorandum.

The text is divided into two sections: “Discrimination in law and practice” and “A selection of recent relevant case-law”.

## Discrimination in law and practice

### Background: The Discrimination Act

The purpose of the Act is to combat discrimination and to promote equal rights and opportunities regardless of sex, transgender identity or expression, ethnicity, religion or belief, disability, sexual orientation or age by other means. The Act covers many different spheres of activity and applies to both public and private activities. The law was drafted having regard to the various prohibitions of discrimination in UN and Council of Europe Conventions and to various EU instruments, including relevant EU directives. The Act is mandatory. Contracts which restrict a person’s rights or obligations under the Act are therefore without effect in that regard.

Forms of discrimination, as set out in the Act, comprise direct and indirect discrimination and harassment when connected to the person’s sex, transgender identity or expression, ethnicity, religion or belief, disability, sexual orientation or age, sexual harassment and also inadequate accessibility and instruction to discriminate. Discrimination is prohibited, *inter alia*, on the part of a person who, outside the sphere of private and family life, supplies goods, services or housing to the general public. The prohibition does not encompass disadvantaging resulting from the merits of decisions by public authorities or the judiciary.

### Discrimination experienced by Muslims or persons perceived of as Muslims as transpiring from complaints to the Ombudsman and observations by civil society

A general picture based on research, complaints to the Ombudsman and the Ombudsman’s exchange with organisations representing Muslims clearly shows a situation in which discrimination against Muslims is an important problem in today’s Sweden.

In a report commissioned by the Ombudsman in which complaints submitted to the Ombudsman by Muslims and persons perceived of as Muslims are analysed concludes that there are is a great over-lap between ethnicity and religion in the complaints.

It may well be a sentiment that is unique for Muslims and persons perceived of as Muslims to exposed to suspicion for terrorist crimes and so-called honour crimes in domestic relations. Complainants report that they feel discriminated against in the context of shorter, less personal contacts with representatives of various institutions in society and of private organisations, as well as in more durable relations, such as in places of work or education. In the latter context, discrimination is most often experienced as a continuous process or as a chain of events such as being judged unfairly, met with suspicion, ignored, being denied resources or services, work or access or as not having one’s religion met with respect.

Organisations in civil society working against Islamophobia and against discrimination of Muslims report that they are being demonised and exposed to suspicion and persecution in media and by members of Parliament. Public authorities can sometimes contribute to legitimising such sentiments of suspicion when the implementation of anti-terrorist legislation leads to feelings of racial or religious profiling or when Muslims are erroneously viewed as one homogenous group in the context of the fight against violent extremism.

In recent years, both scholars and civil society have criticised the way in which violent extremism is being tackled, for example when it comes to discriminatory ethnic profiling and the risks it implies. In a number of formal comments submitted by the Ombudsman with regard to reports commissioned by the government on extending anti-terrorism legislation, the Ombudsman has drawn attention to risks connected with ethnic profiling.

## A selection of recent case-law

Under the Discrimination Act, the Ombudsman carries out supervision of various actors with a view to assess whether they abide by the said Act. Supervision can either be concluded with a decision in which the Ombudsman expresses whether discrimination has occurred or not, or it can continue in the form of an action for compensation submitted to court. The following are summaries of some of the latest and – in the context of the Special Rapporteur’s report – most relevant such decisions by the Ombudsman and judgments in cases initiated by the Ombudsman with regard to discrimination linked to religion.

### Decision by the Ombudsman of November 2020 – A City Council’s decision to prohibit certain clothing considered direct discrimination

A municipality in Southern Sweden decided to put in place a policy which in a general fashion banned pupils and school personnel from wearing attire “aimed at concealment” in the municipality’s primary, secondary and pre-schools. On its own motion, the Swedish Equality Ombudsman launched an investigation into the ban. In its decision following the investigation, the Ombudsman concluded – using the CHEZ RB ruling from the Court of Justice – that although the policy was formulated in a neutral fashion, there was evidence that the municipality’s purpose behind the ban was specifically to restrict religious dress. While noting that may be situations in which the wearer of religious dress would not be in a comparable situation with other pupils or employees – for instance, should the garment in question prevent an employee or pupil from performing a given pedagogic exercise – the Ombudsman considered the presence of a discriminatory purpose behind the ban would inevitably lead to direct discrimination when applied in other situations. The Ombudsman thus determined that the ban was not in conformity with the Swedish Discrimination Act.

### Judgment by the Labour Court of August 2018 – hand-shaking policy in the workplace deemed indirectly discriminatory

A woman applied for a job with a company providing interpretation services through video and telephone. She was invited to and attended an interview which was however interrupted by the company as it became aware that the woman did not greet others by shaking their hand. As a result of her religious conviction, the woman did not greet men through any physical act, but instead by putting her hand on her heart. The company referred to a ”policy of neutrality” which excluded any expression of religious belief in the work place, in the form, for example, of greetings. It followed from the Ombudsman’s inquiry that the position for which the woman had applied implied few or no contacts with customers in the form of physical meetings. Moreover, the company permitted other forms of greetings than hand-shaking provided the reason was not a religious one, but for example as a result of a wish to avoid contracting a disease. The Labour Court found that the woman had been indirectly discriminated by the company.

### Decision by the Ombudsman of June 2017 – Refusal to grant a student regular leave for prayer

In a decision from June 2017, the Ombudsman investigated whether it was discriminatory to refuse a student regular leave for a couple of hours each Friday. The student, who also served as a lay imam at the local mosque, wished to attend the Friday prayer. In the Ombudsman’s decision, the Ombudsman noted that even though upper secondary school is voluntary, there’s still an obligation to attend classes once a person has chosen to continue his/her education. During the investigation, the School submitted that all requests concerning regular leave by students were turned down, no matter the reason for such requests. The Ombudsman concluded that the student had not been treated in a less favourable way than someone else would have been in a comparable situation. The decision of the School was not connected to the religious belief of the student. The student had therefore not been directly discriminated against. Furthermore, the rule of compulsory attendance seeks to guarantee that the students should attain the knowledge requirements for upper secondary school. This is a legitimate aim and the decision of the School to turn down requests for regular leave constituted an appropriate and necessary mean of achieving that aim. The Ombudsman also considered whether these conclusions could contravene the freedom of religion, article 9 of the European Convention on Human Rights, and decided that this was not the case. The Ombudsman noted the student’s great interest of being able to abide by his religion. The decision of the School did have a negative impact on the student’s possibility to exercise his religion, however, that impact was not disproportionate.

### Judgment by the District Court of December 2017 – A dentist apprentice who was not allowed to wear disposable sleeves to cover her arms was discriminated against

A woman studied to become a dentist at a university. The university’s hygiene routines stipulated that short-sleeved work clothes must be worn during activities that involved physical contact with patients. The student, a practising Muslim, didn’t want to show her bare arms due to religious beliefs. She asked the university for permission to wear disposable sleeves in addition to her short-sleeved work clothes. The university turned her request down, basing the decision mainly upon hygiene criteria and the security of patients. The university stated that the use of disposable sleeves would increase the risk of infections. After investigating the student’s complaint, the Equality Ombudsman considered that the university had discriminated her and decided to bring the case to court. The district court of Stockholm held that the student had been a victim of indirect discrimination. In its reasoning, the court made the following assessments. The aim of the hygiene routines (the rule about short-sleeved work clothes) is to prevent contamination. This is a legitimate aim. During the proceedings, the Ombudsman had presented evidence indicating that correctly handled disposable sleeves constitute a safe alternative to bare underarms in view of hygiene demands and patient security. This led the district court to conclude that the university couldn’t fulfil the burden of proof, once it was reversed, and the student had therefore been discriminated against.