



Preadvies 3

# Positive action and effective adjustment

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## Abstract

Positive action and effective adjustment are important tools to address historical, systemic and individual inequality. This pre-advisory paper recommends expanding the current legal framework for positive action beyond women, persons with disabilities and members of ethnic minorities as well as introducing more lenient requirements for positive action in the area of access to goods and services. Within the field of employment and occupation, certain employers should be under a legal obligation to engage in positive action to diversify their labour force and implement inclusive workplace policies. With respect to effective adjustment, it is recommended that the duty should be reconceptualised from being reactive and individualised to also include an anticipatory duty. It should also be considered whether the effective adjustment duty could be applied beyond disability, to more or all grounds protected under non-discrimination legislation.

## 1. Introduction

It is well recognised that formal equality, treating like cases alike, does not result in de facto or substantive equality<sup>1</sup> for members of groups subjected to historical or systemic inequality.<sup>2</sup> To address this, legal concepts such as indirect discrimination, positive action and reasonable accommodation (referred to as ‘effective adjustment’ in the Netherlands) have been developed to capture antecedent disadvantage and thereby contribute to substantive equality.<sup>3</sup> In this pre-advisory paper, we review the legal framework in the equal treatment legislation with respect to positive action and effective adjustment based on an analysis of the legal provisions, case law and Opinions of the Netherlands Institute for Human Rights (NIHR) and its predecessor, the Equal Treatment Commission (ETC), as well as ‘outsider perspectives’ obtained from other jurisdictions. We make suggestions for how Dutch law could be amended to better protect members of disadvantaged groups through positive action and the effective accommodation duty.

1. See for a comprehensive treatment of this term S. Fredman, ‘Substantive equality revisited’, 14(3) *International Journal of Constitutional Law* (2016) 712, p. 718.
2. C. MacKinnon, ‘Equality’, 149(1) *Daedalus: Women & Equality* (2020) 213, p. 215.
3. L. Senden et al., A Review of Concepts of Gendered Power Hierarchies and their Taxonomy, (RE-WIRING, 2023), p. 43, available at: [A-Review-of-Concepts-of-Gendered-Power-Hierarchies-and-their-Taxonomy.300923\\_compressed.pdf](#).

**Legal concepts like indirect discrimination, positive action and reasonable accommodation translate antecedent disadvantage into substantive equality.**

This pre-advisory paper is the result of a collaboration between Lisa Waddington, an academic working on (comparative) equality law, with a particular focus on disability, and Alexander Hoogenboom, formerly legal counsel at the NIHR and now a judge at the Central Appeals Tribunal. The authors discussed the content and structure of the pre-advisory paper before starting to write, and provided frequent feedback on each other's sections, including suggesting the inclusion of relevant case law, NIHR Opinions and literature. Both authors have worked on the sections 1, 2 and 5. Alexander Hoogenboom took the lead in writing the section on positive action (section 3), while Lisa Waddington took the lead in writing the section on effective adjustment (section 4). The authors have endeavoured to ensure that this pre-advisory paper adopts a consistent approach across the two main sections; however, some divergence is inevitable in light of the authors' background, knowledge and previous research on positive action and effective adjustment respectively. The authors have discussed the feedback from the reviewers and decided on a common approach to implement their valuable input.

## 2. Distinguishing Positive Action from Effective Adjustment<sup>4</sup>

This pre-advisory paper addresses two related but distinct concepts: positive action and effective adjustment. They are related in the sense that they are both instruments meant to promote substantive equality. It is, however, important to distinguish them from each other as they are conceptually and procedurally different. Simply put, positive action involves targeted assistance to members of marginalised or disadvantaged groups, such as women, members of ethnic minority groups and people with disabilities, so that they can take full and equal advantage of particular opportunities. It can be intended to remedy a previous situation of discrimination against the covered group or intended to prevent such discrimination arising in the future. Effective adjustment involves a legal duty to provide modifications or adjustments in order to enable a person with a disability<sup>5</sup> to benefit from an opportunity in the same way that other persons can, in order to prevent a situation of discrimination arising.

At first glance, it may seem that the obligation to make an effective adjustment is a particular form of positive action in that it provides for 'advantages' to individuals who fall within the group of persons with a disability.<sup>6</sup> Nevertheless, it is submitted the obligation to provide for effective adjustments can best be characterised as a particular kind of non-discrimination legislative provision, related to, but not synonymous with, direct and indirect discrimination. The effective adjustment requirement in Dutch law obliges duty holders not to ignore disability, as is the case with regard to most elements of non-discrimination law, but specifically to take disability into account. The effective adjustment requirement therefore prohibits a duty bearer from denying an individual with a disability an opportunity, such as taking up employment or enjoying a meal in a restaurant, by failing to take account of the protected characteristic, if taking account of it would enable the individual to undertake the activity in question. In contrast, a failure to provide positive

4. Text in this section draws on Mark Bell and Lisa Waddington, 'Similar, Yet Different: The Work-life Balance Directive and the Expanding Frontiers of EU Non-Discrimination Law', 58(5) *Common Market Law Review* (2021) 1401, p. 1401-1432.

5. As will be noted on section 4 of this pre-advisory paper, in some jurisdictions the effective adjustment / reasonable accommodation duty is extended to members of other protected groups, such as followers of a religion or, in some cases, all individuals protected by non-discrimination law.

6. As will be noted on section 4 of this pre-advisory paper, in some jurisdictions the effective adjustment / reasonable accommodation duty is extended to members of other protected groups.

7. See below, however, for certain 'positive duties'.

8. See for instance NIHR 2 juli 2020, 2020-53, available at <https://oor-delen.mensenrechten.nl/oordeel/2020-53/>.
9. This pre-advisory paper also argues in favour of an anticipatory approach to effective adjustment which involves making adjustments or accommodations to meet the 'predictable' needs of members of the group of persons with disabilities, such as persons who use a wheelchair or persons who have auditory or visual impairments.
10. See below for the distinction with policies to promote social inclusion which are in place permanently. See also the distinction made in article 3(1) WGBH/CZ between such measures (under b) and positive action (under c).
11. Wet van 29 september 2021 tot wijziging van Boek 2 van het Burgerlijk Wetboek in verband met het evenwichtiger maken van de verhouding tussen het aantal mannen en vrouwen in het bestuur en de raad van commissarissen van grote naamloze en besloten vennootschappen.
12. Wet van 23 april 2025, houdende vereenvoudiging van de banenafpraak en de quotumregeling voor mensen met een arbeidsbeperking (Wet banenafpraak), Stb. 2025, 121.
13. Directive 2022/2381 of 23 November 2022 on improving the gender balance among directors of listed companies and related measures, OJ [2022] L 315/44.
14. Directive 2023/970 of 10 May 2023 to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms, OJ [2023] L 132/21.

action is not normally regarded as a form of discrimination under Dutch law.<sup>7</sup> Indeed, such action is often challenged successfully on the grounds that it discriminates against members of the groups which are not favoured, such as men.<sup>8</sup>

The obligation to provide for an effective adjustment can be distinguished from positive action from a procedural perspective as well. Individuals with a disability are entitled to require that an adjustment is made which takes account of their specific needs, subject to the requirement that the adjustment does not amount to a disproportionate burden for the duty bearer. In contrast, individuals who feel that a positive action should be put into place, or who did not benefit from an existing positive action programme, have no individualised claim which entitles them to access a benefit or opportunity which is available to others under Dutch law. See table 3.1.

Table 3.1. The differences between positive action and effective adjustment

	Positive action	Reasonable accommodation / effective adjustment
<b>For whom?</b>	Typically benefits an open-ended group suffering historical or systemic disadvantage. (Showing) individual disadvantage is not necessary to benefit from positive action.	Typically benefits persons who face being individually disadvantaged. <sup>9</sup>
<b>By whom?</b>	Typically an actor who is not (directly) responsible or only has indirect control over the situation causing disadvantage.	Typically an actor who is responsible for or has direct control over the situation causing the disadvantage.
<b>For how long?</b>	In place until group disadvantage is redressed, and assumes this to be possible. <sup>10</sup>	Temporary or permanent, depending on need.
<b>Procedural characteristics</b>	Typically no duty to perform, non-justiciable.	Duty to perform, justiciable.

### 3. Positive action

#### 3.1 The legal framework

The focus of this contribution is on the equal treatment legislation and the provisions therein that allow and enable actors falling within its scope to engage in various forms of positive action. As such, specific forms of positive action in specialised legislation, such as the Wet ingroeiquotum en streefcijfers<sup>11</sup> and the Wet banenafpraak,<sup>12</sup> or EU initiatives such as the Gender Balance on Corporate Boards Directive<sup>13</sup> and Pay Transparency Directive<sup>14</sup> are not the focus, although they do inspire some of the proposed adjustments set out below.

The General Equal Treatment Act (AWGB) contains the following provision relating to positive action: Het in deze wet neergelegde verbod van onderscheid geldt niet, indien het onderscheid een specifieke maatregel betreft die tot doel heeft vrouwen of personen behorende tot een bepaalde etnische of culturele minderheidsgroep een bevoorrechte positie toe te kennen ten einde feitelijke nadelen verband houdende met de gronden ras of geslacht op te heffen of te verminderen en het onderscheid in een redelijke verhouding staat tot dat doel.<sup>15</sup>

Similar clauses exist in the Act on the Equal Treatment of Men and Women (WGB) and the Act on the Equal Treatment of Persons with a Disability or Chronic Illness (WGBH/CZ).

From the formulation, it follows that the legislation considers positive action to be a *prima facie* violation of the non-discrimination provisions, which can be justified where such action addresses systemic or historic disadvantages. The component parts as set out in the various legislative acts are as follows: (1) specific measure, (2) legitimate group, (3) legitimate aim, (4) proportionality.

There is no inherent limitation in the types of (specific) measures that may be adopted. The equal treatment legislation applies, broadly, to access to employment and occupation, as well as access to goods and services, and with respect to one ground of discrimination, social protection. The provisions enabling positive action are thus directed towards actors in that field, such as employers, professional organisations and providers of goods and services (and, where it concerns race/ethnicity, providers of social protection). Moreover, the legislation is enabling rather than obligatory: the aforementioned actors are in principle not, as a matter of non-discrimination law, required to engage in positive action to address antecedent disadvantage.<sup>16</sup>

## Under Dutch law, positive action measures are regarded as exceptions to the principle of non-discrimination.

Positive action is limited, however, in terms of to whom it may be directed: only women, persons belonging to an ethnic minority and persons with a disability are specified as legitimate groups. The legislator based this limitative enumeration on the fact that these groups had a recognised general disadvantage in various areas of societal life.<sup>17</sup> Recent Opinions of the NIHR have challenged this limitative enumeration, however. In a case concerning preferential treatment in the form of a tie-break policy for persons under 40 years of age, the NIHR reasoned that the organisation had shown that the impugned measure was an effective means to address structural underrepresentation and that it did not go

15. Article 2(3) AWGB.

16. Cfr. *Kamerstukken II* 2004/05, 28 770, nr. 11, p. 6 (Nota voorkeursbehandeling).

17. *Kamerstukken II* 1990/91, 22 014, nr. 3 (MvT), p. 14. See also *Kamerstukken II* 2001/02, 28 169, nr. 3 (MvT), p. 11 (relating to disability).

18. See NIHR 30 augustus 2023, 2023-94 <https://oordelen.mensenrechten.nl/oordeel/2023-94>.

19. ETC 3 juli 2006, 2006-134, para. 3.17, available at: <https://oordelen.mensenrechten.nl/oordeel/2006-134>.

20. *Kamerstukken II* 2001/02, 28 170, nr. 3 (MvT), p. 8.

21. For the sake of completeness it should also be noted that the Dutch Penal Code does not criminalise age discrimination in the area of access to goods and services. See article 429quater. See also [Overheid.nl | Consultatie Strafbaarstelling Leeftijdscriminatie](https://overheid.nl/Con-sultatie-Strafbaarstelling-leeftijdscriminatie).

22. See in particular NIHR 2 juli 2020, 2020-53, para. 6.22, available at: <https://oordelen.mensenrechten.nl/oordeel/2020-53>.
23. See article 3(1)(c) of the WGBH/CZ, which provides that the prohibition of discrimination shall not apply to 'rules, standards or practices aimed at creating or maintaining specific facilities and amenities for the benefit of persons with disabilities or chronic illnesses'. See also *Kamerstukken II 2001/02, 28 169, nr. 3 (MvT)*, p. 31-32. For an academic discussion of this distinction, see M. Bell and L. Waddington, 'Exploring the boundaries of positive action under EU law: a search for conceptual clarity', 48(5) *Common Market Law Review* (2011) 1503, p. 1523ff.
24. CJEU 22 January 2019, C-193/17, ECLI:EU:C:2019:43 (Achatzi), para. 65.
25. See CJEU 30 september 2004, C-319/03, ECLI:EU:C:2004:574 (Briheche), para. 24 and e.g. ETC 1 januari 2005, 2005-225, para. 5.15, available at: <https://oordelen.mensenrechten.nl/oordeel/2005-225/>.
26. See C. Thijs, 'To meet or to compete? The effect of ethnic and gender workforce diversity on ingroup preferences in the workplace', (diss. Universiteit van Amsterdam), Vianen: Digiforce 2018, chapter 5 and 7. This finding is consistent with the results of studies using Eurobarometer data across 26 countries: L. Blommaert and M. Coenders, 'Understanding public support for workplace diversity and antidiscrimination policies in Europe', 9(1256751) *Frontiers in Sociology* (2024), p. 1-22.
27. H. Konings, 'Voorkeursbehandeling' vrouwen leidt tot storm van kritiek, *Cursor* 19 June 2019.
28. K. Voskuil, 'Politieagenten woedend door voorkeursbeleid in Rotterdam', *Algemeen Dagblad* 19 May 2017.

beyond what was necessary to achieve these aims. The measure was thus considered legitimate under the Act on Equal Treatment on Grounds of Age in the area of Employment (WGBL).<sup>18</sup> Upholding this form of positive action is a departure from the NIHR's earlier position<sup>19</sup> and, strictly seen, contrary to the intention of the legislator, which expressly left out a provision on positive action in the WGBL, holding that no (particular) age group could be said to suffer systemic and/or historic disadvantage.<sup>20</sup> It should furthermore be noted that since the WGBL lacks a prohibition of discrimination on grounds of age in the area of access to goods and services, there are no restrictions on positive action in that area.<sup>21</sup>

In terms of the legitimate aim, positive action must address an antecedent disadvantage, which must be current and is relative to the context in which it is applied. That is to say: those engaging in positive action cannot, for instance, by reference to the societal position of women on the labour market, employ positive action to hire women if there is no gender imbalance in their (part of the) organisation.<sup>22</sup> In addition, the legislator considers positive action by its nature to be temporary, meaning that it should only be in place until it has successfully addressed disadvantages related to systemic and historic inequality. This distinguishes positive action from general policies to promote social inclusion where the disadvantages faced are permanent, or at least not assumed to be temporary, such as certain permanent facilities addressing the needs of persons with disabilities (e.g. Aanvullend Openbaar Vervoer (Supplementary Public Transport)).<sup>23</sup>

Finally, the proportionality requirement is meant to ensure that the pursuit of the goals of positive action measures are adequately balanced with the overall prohibition of discrimination.<sup>24</sup> After all, some forms of positive action create a preferential position for certain groups that can lead to exclusion of others. Classically, this is tested by requiring the positive action measures employed to 'remain within the limits of what is appropriate and necessary in order to achieve the aim'.<sup>25</sup>

### Summary:

- In the Dutch legal framework, positive action measures are considered an exception to the principle of non-discrimination.
- Positive action is only legitimate if it addresses systemic and historic disadvantages faced by women, persons with disabilities or persons from an ethnic minority through temporary measures, proportional to the aim(s).

## 3.2 Problematic aspects of the positive action framework

### Trends in positive action case law

Research shows that positive action is considered controversial in the Netherlands, particularly among groups that are not normally beneficiaries of such policies, such as men or those who identify as (native) Dutch.<sup>26</sup> Reactions to high-profile forms of positive action, such as enacted by TU Eindhoven<sup>27</sup> (in favour of women) and by the police (in favour of persons with a migrant background) confirm this.<sup>28</sup> In addition, legal scholars

29. See for instance N.E. Ramos Martín, 'Positive action in EU gender equality law: promoting women in corporate decision-making positions', 3(1-2) Spanish Labour Law and Employment Relations Journal (2014) 20.

30. Excluding opinions of advocates general.

31. Excluding e.g. rb. Rotterdam 16 mei 2012, ECLI:NL:R-BROT:2012:BW5513 which involved data protection: an organisation used sensitive information for its relief work targeted, as matter of positive action, to at risk persons with a non-Dutch background.

32. This excludes cases such as Gerechtshof Den Haag 14 februari 2023, ECLI:NL:GHDHA:2023:173 where the state argued that it needed to engage in ethnic profiling when engaging in border control activities in order to properly be able to address and prevent human trafficking as a matter of positive action, see paragraph 8.23.

33. This excludes cases such as Gerechtshof Arnhem-Leeuwarden 19 november 2019, ECLI:NL:GHARL:2019:9876, in which the appeal court dismissed an appeal against a lower court ruling which assessed a policy of lower rent for persons from a specific ethnic background on procedural grounds. Similarly, it excludes rb. Maastricht 11 augustus 2010, ECLI:NL:RBMAA:2010:BN9219 in which positive action was purely listed as a possible defence to a finding of discrimination but was not invoked or otherwise substantively discussed.

34. For instance CRvB 18 februari 2010, ECLI:NL:CRVB:2010:BL6094.

35. Results obtained on 1 June 2025.

generally consider that the overall framework, which to a large part is determined by judgments of the Court of Justice of the European Union, imposes stringent requirements on the adoption of positive action measures.<sup>29</sup> For that reason, the authors of this pre-advisory paper were interested to investigate whether such controversy also translates to legal challenges to positive action and if so, what the outcome of the judgment or Opinion was where compliance with the positive action exception was assessed. To that end the authors searched the publicly available database for judgments, <https://uitspraken.rechtspraak.nl>, as well as the database of the NIHR (<https://oordelen.mensenrechten.nl>) for judgments and Opinions relating to positive action with various keywords for the period 01-01-2000 to 31-12-2024.

For [rechtspraak.nl](https://uitspraken.rechtspraak.nl), only the judgments<sup>30</sup> were selected that dealt with positive action related to non-discrimination principles<sup>31</sup> in the area of employment, goods and services and/or social protection relating to ethnicity<sup>32</sup> and which included a substantive treatment of a positive action measure.<sup>33</sup> Judgments where applicants simply alleged they were the victims of positive action but could not begin to substantiate that claim (i.e. that such a policy was in place and that they were excluded from employment or a service as a result of it) were also excluded.<sup>34</sup> See table 3.2.

Table 3.2. Data from [Rechtspraak.nl](https://uitspraken.rechtspraak.nl)<sup>35</sup>

Keyword	Results	Included judgments based on selection criteria
Voorkeursbeleid	44	0
'positieve discriminatie'	17	2 <sup>36</sup>
'positieve actie' onderscheid <sup>37</sup>	15	0
~'feitelijke nadelen' ~ 'feitelijke ongelijkheid' ~ 'feitelijke nadeel' ~ 'feitelijke ongelijkheden' <sup>38</sup>	28	1 <sup>39</sup>

The high number of excluded judgments can be explained by the exclusion criteria used set out above, and the overinclusiveness of some of the keywords,<sup>40</sup> necessary due to the lack of an agreed 'term of art' for positive action.<sup>41</sup> In short: [rechtspraak.nl](https://uitspraken.rechtspraak.nl) only features a few judgments in which positive action is treated substantially relating to employment and occupation or access to goods and services.

Since the NIHR can only rule on issues that fall within the equal treatment acts, a search was conducted with the keyword 'voorkeursbeleid' using the search engine of the NIHR. Opinions where the positive action exception was only mentioned in passing (e.g. as a possible defence) with no substantive treatment were again excluded. Of a total of 4194 Opinions over that time period, 109 contained the keyword 'voorkeursbeleid', of which 50 were included based on the criteria above (amounting to ~1,19% of cases).<sup>42</sup>

36. HR 21 februari 2025, ECLI:N-L:HR:2025:321, <https://uitspraken.rechtspraak.nl/details?id=ECLI:NL:HR:2025:321> and Gerechtshof Den Haag 12 september 2023, ECLI:N-L:GHDHA:2023:1758, <https://uitspraken.rechtspraak.nl/details?id=ECLI:NL:GHDHA:2023:1758>.
37. Rechtspraak.nl uses space as an 'AND' operator.
38. The tilde functions as an 'OR'.
39. CRvB 23 januari 2003, ECLI:NL:CRVB:2003:AF3473, <https://uitspraken.rechtspraak.nl/details?id=ECLI:NL:CRVB:2003:AF3473>.
40. For instance, "Voorkeursbeleid" results in many judgments concerning challenges against health insurers designating a certain drug as preferential among drugs with the same active ingredient. 'Positieve actie' has other meanings than referring to positive action in the sense of this pre-advisory paper.
41. See also the Afdeling advisering van de Raad van State 31 oktober 2016 W04.16.0229/1 (Voorstel van wet van het lid Van Klaveren betreffende het beëindigen van positieve discriminatie).
42. Results obtained on 1 June 2025.
43. It is possible that courts deal with positive action more often than the number of judgments found suggest. Rechtspraak.nl is not a complete database and only publishes a selection of judgments.
44. Counting both the 'violation' (70%) and 'mixed' (4%) categories. In the latter situation, part of the measure(s) examined were considered to violate the equal treatment legislation.
45. See the Monitor Discriminatiezaken 2019, (NIHR, 2020), p. 25 and the Monitor Discriminatiezaken 2024 (digital only): <https://www.mensenrechten.nl/monitor-discriminatiezaken-2024/oordelen-2024>.

A first point of note is the relatively small number of cases dealing with positive action. The authors expected, given the controversy of the topic, to find more cases.<sup>43</sup> Even at the NIHR, whose procedures are free of charge, require no professional representation and whose database covers all Opinions, the number of cases are limited.

Looking more closely at the Opinions, we can see in Figure 3.1 that they exclusively concern cases in which positive action measures are challenged by or on behalf of a potentially excluded group or where an organisation itself submitted a (planned) measure to the NIHR for evaluation. In terms of the subject matter, most Opinions evaluated measures meant to promote gender equality.

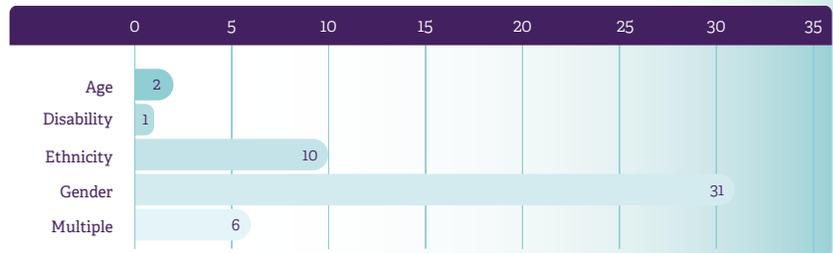


Figure 3.1. Grounds of discrimination at issue in NIHR positive action cases. Data retrieved from NIHR.

In terms of the sector, Figure 3.2 shows that most Opinions concerned positive action in employment and occupation.

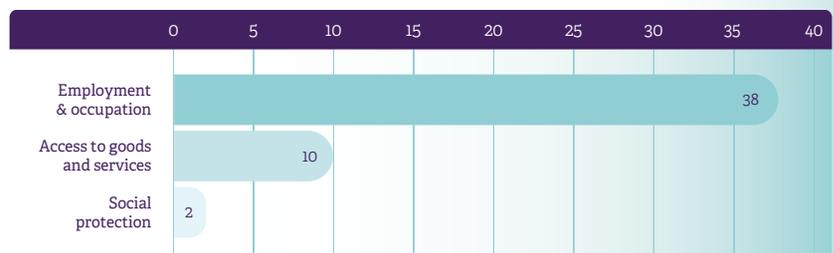


Figure 3.2. Domains in which the NIHR examined positive action measures. Data retrieved from NIHR.

Finally, in terms of outcome, we can see in Figure 3.3 that in the great majority of the Opinions (74%),<sup>44</sup> the NIHR held that the requirements of the positive action exception were not fulfilled, and thus concluded that the measure violated the non-discrimination principles. This is significantly higher than the average rate: looking at all cases over the period 2015-2024, the proportion of cases in which the NIHR found that the measure examined constituted prohibited discrimination hovers around 40-50%.<sup>45</sup>

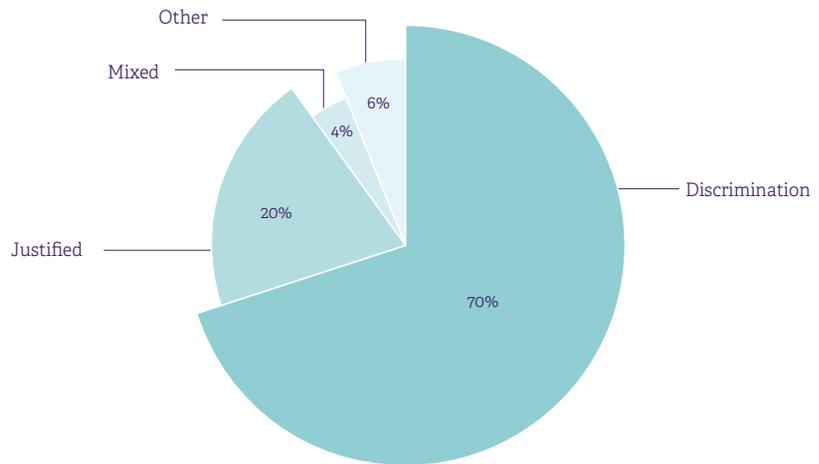


Figure 3.3. Outcome of NIHR positive action cases. Data retrieved from NIHR.

#### Summary:

- An analysis of the Opinions of the NIHR over 2000-2024 concerning positive action shows that the NIHR was most often called to evaluate positive action directed at women. In terms of sector, most Opinions concerned measures with respect to employment and occupation. In 74% of the Opinions the NIHR found the impugned measure to violate the non-discrimination principles.

**In 74% of its Opinions, the NIHR found that the positive action criteria were not met, resulting in a violation of non-discrimination.**

#### Analysis of the positive action case law

This pre-advisory paper is not the place to engage in a detailed analysis of the case law/Opinions. Rather, the authors have chosen to pick out some trends in the cases selected for inclusion.

First, in a test case initiated by Bureau Clara Wichmann it was argued that the state has a duty to combat indirect discrimination and therefore should be obliged to provide free contraceptives, since the costs of contraceptives are primarily borne by women. The Hague Court of Appeal<sup>46</sup> pointed out that contraceptives were provided by private parties and even if the costs thereof are disproportionately borne by women, this situation is not caused by the state but is the result of inequalities (in power) in horizontal relationships between women and men. There is no

46. Gerechtshof Den Haag  
12 september 2023,  
ECLI:NL:GHDHA:2023:1758,  
6.39-6.41.

47. HR 21 februari 2025,  
ECLI:NL:HR:2025:321.

48. With some small exceptions, see below.
49. NIHR 24 oktober 2013, 2013-133, para. 3.9, available at: <https://oordelen.mensenrechten.nl/oordeel/2013-133/>.
50. T. Khaitan, *A Theory of Discrimination Law*, (OUP, 2016), p. 83.
51. On the crucial importance of gathering data in order to pursue substantive equality, see C. D'Ignazio and L. Klein, *Data Feminism*, (MIT Press, 2020). See however NIHR 20 maart 2019, 2019-23, available at: <https://oordelen.mensenrechten.nl/oordeel/2019-23/>, para. 6.5 for GDPR related concerns.
52. The view espoused in *Kamerstukken II 2004/05, 28 770, nr. 11, p. 6* (Nota voorkeursbehandeling).
53. There is a right to request (but not necessarily to receive) such arrangements on the basis of the *Wet flexibel werken*. However, investing and providing the facilities that enable, for instance, working from home could be a positive action measure.
54. NIHR 24 april 2012, 2012-72, available at <https://oordelen.mensenrechten.nl/oordeel/2012-72>. Exclusionary statements are prohibited however: See for instance CJEU 23 April 2020, C-507/18, ECLI:EU:C:2020:289 (NH v Associazione Avvocatura per i diritti LGBTI - Rete Lenford) and *Commissie gelijke behandeling* 10 juli 2008, 2008-87, available at <https://oordelen.mensenrechten.nl/oordeel/2008-87>.
55. Article 3(3) and 3(4) of the Act on the Equal Treatment of Men and Women.
56. NIHR 28 december 2021, 2021-158, para. 6.6-6.7, available at: <https://oordelen.mensenrechten.nl/oordeel/2021-158/>.
57. NIHR 24 juni 2025, 2025-58, para. 5.3.
58. See T. Khaitan, *A Theory of Discrimination Law*, (OUP, 2016), p. 83.

general obligation on the part of the state to intervene and to correct for such factual inequalities. The Hoge Raad upheld this judgment.<sup>47</sup> This case confirms the position taken by the legislator that engaging in positive action, at least as a rule, is currently not obligatory as a matter of non-discrimination law.<sup>48</sup> This is also the position of the NIHR.<sup>49</sup>

## Engaging in positive action is currently not obligatory as a matter of non-discrimination law.

Secondly, based on the academic literature, several forms of positive action and concomitant need for justification can be distinguished:

1. Facilitative measures are measures which create conditions or an environment beneficial to certain disadvantaged groups.<sup>50</sup> In many instances, these measures are not considered to breach the prohibition of discrimination at all, meaning that they need not be justified as 'positive action' under the Equal Treatment Acts. These measures are simply held to promote or enable inclusion. Examples are the collection of statistics on the composition of the workforce,<sup>51</sup> the provision of Dutch language courses by employers,<sup>52</sup> and providing for flexible work arrangements.<sup>53</sup> In terms of selection, invitations in job advertisements directed at an underrepresented group (e.g. we particularly invite persons with background X to apply), so long as it is stressed that the job is open to all applicants, are equally not considered discriminatory and thus need not be justified under the positive action framework.<sup>54</sup> A related category are what can be termed 'positive duties', such as the requirement that vacancies must be worded in neutral gender terms,<sup>55</sup> the requirement that selection procedures need to be transparent, verifiable and systematic,<sup>56</sup> and the requirement that employers must combat workplace discrimination and ensure that discrimination complaints are dealt with carefully and diligently.<sup>57</sup> These duties are considered to derive from the prohibition of discrimination rather than from the provisions dedicated to positive action, despite being of particular benefit to disadvantaged groups.
2. Distributive measures differ from facilitative measures in that the benefit provided is at the (direct) expense of the non-disadvantaged group.<sup>58</sup> These types of measures need justification under the positive action exception(s). Examples of these measures are clearest where it concerns access to employment, where they can take the form of a tie-break (if equally qualified, preference may be given to the candidate of the underrepresented group), relative preferential treatment (if a minimum threshold is reached, preference is given to the candidate from the underrepresented group even if

59. Currently in place for recruitment of new police officers: <https://kombijde.politie.nl/agent-woorden/selectie/intro>, last visited 1 June 2025.
60. See e.g. CJEU 6 July 2000, C-407/98, ECLI:EU:C:2000:367 (Abrahamsson). See also the EFTA Court 24 January 2003, E-1/02 (EFTA Surveillance Authority v Kingdom of Norway), para. 45 available at: <https://eftacourt.int/cases/e-01-02/>.
61. The NIHR distinguishes five criteria based on CJEU 6 July 2000, C-407/98, ECLI:EU:C:2000:367 (Abrahamsson), CJEU 11 November 1997, C-409/95, ECLI:EU:C:1997:533 (Marschall) and CJEU 17 October 1995, C-450/93, ECLI:EU:C:1995:322 (Kalanke): legitimate aim/group, the requirement of underrepresentation of that group, the requirement to announce publicly that a tie-break policy is in place, the requirement to conduct an objective assessment and give priority only in case of two candidates being equally qualified and the requirement of proportionality. See NIHR 28 april 2022, 2022-40, available at: <https://oordelen.mensenrechten.nl/oordeel/2022-40>.
62. See NIHR 2 juli 2020, 2020-53, available at <https://oordelen.mensenrechten.nl/oordeel/2020-53/>, NIHR 1 maart 2021, 2021-19, available at: <https://oordelen.mensenrechten.nl/oordeel/2021-19/> and NIHR 28 april 2022, 2022-40, available at: <https://oordelen.mensenrechten.nl/oordeel/2022-40/>.
63. CJEU 19 maart 2002, C-476/99, ECLI:EU:C:2002:183 (H. Lommers and Minister van Landbouw, Natuurbeheer en Visserij) and CRvB 23 januari 2003, ECLI:NL:CRVB:2003:AF3473. See for example not tied to employment: NIHR 14 september 2012, 2012-151, available at: <https://oordelen.mensenrechten.nl/oordeel/2012-151>, although the NIHR held in that case that the measure did not constitute positive action.

the other candidate is more qualified)<sup>59</sup> and absolute preferential treatment (only candidates from the underrepresented group are considered). The Court of Justice has insisted, at least where it concerns equal treatment on grounds of gender, that only tie-break policies can be justified,<sup>60</sup> and only subject to stringent criteria.<sup>61</sup> The NIHR has however upheld policies that are a mix of relative and absolute preferential treatment, invoking the need to comply with the Convention on the Elimination of all Forms of Discrimination Against Women and the International Convention on the Elimination of All Forms of Racial Discrimination.<sup>62</sup> This requires that:

- the underrepresentation be particularly severe;
  - previous measures (such as tie-break policies) have been unsuccessful in addressing this underrepresentation;
  - the preferential treatment is embedded in a broader set of measures meant to support the underrepresented group; and
  - the measure addresses the underrepresentation directly and proportionally.
3. A third type of measure straddles facilitative and distributive measures. The classic example is where priority is given to women for employer-provided childcare facilities.<sup>63</sup> It has clear facilitative aspects, but includes an exclusionary (distributive) element. The NIHR has argued, based on a reading of the case law of the Court of Justice, that while such measures breach the prohibition of discrimination in principle, the intensity of the scrutiny under the proportionality test within the positive action exception is lower than that applied to distributive measures which directly apply to access to employment.<sup>64</sup>

Finally, it is instructive to look at why (distributive or mixed forms of) positive action measures fall foul of the positive action exception. The main reasons may be grouped as follows:

- The measure is directed at a group not mentioned in the legislation. There have been a few cases where the organisation sought to correct a gender imbalance by giving preference to men<sup>65</sup> or to persons from a specific religious or LGBTI group.<sup>66</sup>
- The requirements for a preference policy are not fulfilled. This constitutes a diffuse group of cases ranging from formal issues (e.g. the policy was not publicly announced<sup>67</sup> or the measure was not sufficiently substantiated as to the underrepresentation<sup>68</sup>) to more substantive issues, such as a lack of objective assessment of candidates,<sup>69</sup> or employing a preference policy going beyond the tie-break without sufficient justification.<sup>70</sup>
- The measures are well-meaning but insufficiently thought out legally. This applies particularly to organisations seeking to justify positive action measures with respect to access to goods and services, none of which succeeded in the examined period.<sup>71</sup> For instance, the NIHR considered a discount for women booking an international train in honour of International Women's Day to be insufficiently related to and effective in addressing factual inequalities between men and women.<sup>72</sup>

64. Most clearly articulated in a non-employment case: NIHR 1 januari 2005, 2005-225, available at: <https://oordelen.mensenrechten.nl/oordeel/2005-225>, para. 5.12-5.13. See also E.g. CJEU 28 March 2000, C-158/97, ECLI:EU:C:2000:163 (Georg Badeck and Others).
65. NIHR 21 mei 2013, 2013-63, available at: <https://oordelen.mensenrechten.nl/oordeel/2013-63>.
66. ETC 6 april 2006, 2006-61, available at: <https://oordelen.mensenrechten.nl/oordeel/2006-61>.
67. NIHR 28 april 2022, 2022-40, available at: <https://oordelen.mensenrechten.nl/oordeel/2022-40/>.
68. ETC 2 december 2008, 2008-143, available at: <https://oordelen.mensenrechten.nl/oordeel/2008-143>.
69. NIHR 15 juni 2021, 2021-77, available at: <https://oordelen.mensenrechten.nl/oordeel/2021-77>.
70. See e.g. NIHR 24 januari 2023, 2023-8, available at: <https://oordelen.mensenrechten.nl/oordeel/2023-8> and NIHR 22 juni 2012, 2012-113, available at: <https://oordelen.mensenrechten.nl/oordeel/2012-113>.
71. A possible exception is NIHR 14 september 2012, 2012-151, available at: <https://oordelen.mensenrechten.nl/oordeel/2012-151>, but in that case the College decided, after some analysis, that the provisions on positive action where not applicable, possibly to be able to apply a more lenient test.
72. NIHR 4 november 2013, 2013-138, available at: <https://oordelen.mensenrechten.nl/oordeel/2013-138>.
73. ETC 22 maart 2010, 2010-46, available at: <https://oordelen.mensenrechten.nl/oordeel/2010-46>.

In another case, an organisation sought to reserve a part of the sports activities it organised to women from an ethnic minority over 35 with specific medical issues. The organisation argued that this group was hard to reach, and required a safe space to be convinced to participate in the programme. The NIHR nevertheless held that the organisation had attempted insufficiently to convince the women in question to participate in mixed groups, nor periodically evaluated whether the measure was still needed, which meant that the exclusion of others from these activities went beyond what was necessary.<sup>73</sup>

### Summary:

- There is in principle no duty to engage in positive action.
- Three types of positive action can be distinguished: facilitative (creating conditions that apply to all but are particularly beneficial to disadvantaged groups), distributive (preferential treatment of a disadvantaged group at the expense of the non-disadvantaged group) and a mix thereof.
- A qualitative analysis of the case law and Opinions shows that organisations engaging in positive action, where such action had distributive elements, struggle with fulfilling the requirements of the positive action exception.

### 3.3 Gaps and solutions

The examination of the legal framework and case law trends set out above shows that the legal framework relating to positive action is limited in scope, and its requirements strict. Given the importance of positive action as a tool to further substantive equality,<sup>74</sup> this pre-advisory paper makes the following recommendations with a view to update the framework in place.

#### Broadening the scope of positive action

As seen above, positive action is currently only allowed as a matter of law for three groups: women, persons with a disability and persons from an ethnic minority. This is problematic for several reasons. First, by fixing in law the categories for which positive action is allowed, inequality is treated as immutable rather than continuous and relational. The factual inequalities positive action is supposed to address can occur in any situation in which there is a social hierarchy or power differential – as implicitly acknowledged by The Hague Court of Appeal in the contraceptive case. By limiting positive action to these three groups, actors are prohibited from engaging in positive action addressing systemic and historic disadvantage suffered by other groups such as those defined by age, religion and belief or sexual orientation, as well as addressing situations where protected characteristics overlap and reinforce and/or generate unique disadvantages (intersectionality).<sup>75</sup>

Secondly, as regards positive action for women in particular, the current framework risks essentialising women and reinforcing a binary dichotomy between men and women. Men are excluded as legitimate group for positive action, women are included. But what does that mean for (positive

74. L. Senden et al., *A Review of Concepts of Gendered Power Hierarchies and their Taxonomy*, (RE-WIRING, 2023), p. 43, available at: [A-Review-of-Concepts-of-Gendered-Power-Hierarchies-and-their-Taxonomy.300923\\_compressed.pdf](#).
75. See in particular ETC 22 maart 2010, 2010-46, available at: <https://oor-delen.mensenrechten.nl/oordeel/2010-46>.
76. The consequences of not updating the language have been illustrated in the UK with the recent ruling of the United Kingdom Supreme Court 16 April 2025, *For Women Scotland Ltd v The Scottish Ministers* [2025] USCK 16, in which the Supreme Court ruled that the terms 'man' and 'woman' in the Equality Act 2010 refer to biological sex, thereby excluding transgender persons.
77. Article 1(2) AWGB. This also applies to article 3(3) and 3(4) of the WGB, which only requires that vacancies be worded in neutral terms in the sense of not excluding men or women (as opposed to other genders).
78. See also A. Terlouw, 'Hebben vrouwelijke rechters de rechtspraak veranderd?', *NJB* 2021/2066, afl. 28, in which she documents on the basis of a series of interviews that due to the (perceived) gender imbalance in the courts, male candidates in hiring procedures are given (informal) preferential treatment.
79. Consider that the *Wet ingroeiquotum en streefcijfers* is symmetrical, seeking to address imbalanced supervisory boards composed of primarily men or women.
80. See for an overview: R. Pantić, L. Ozoráková and L. Zuzčáková, 'International and European legislative framework', in *Exploring Positive Action as a Means to Fight Structural Discrimination in Europe* (Equinet, 2021),

action measures directed at) other gender identities?<sup>76</sup> There is moreover strong tension between these provisions and the recent amendment of the AWGB which explicitly defines discrimination on grounds of 'sex' as including discrimination on ground of sexual characteristics, gender identity and gender expression.<sup>77</sup>

Thirdly, as seen above, there are certain sectors in which men are underrepresented and in which organisations have attempted to engage in positive action, despite the legal risks this entails.<sup>78</sup> Such action is unlawful under the current legislation, despite the fact that it may be desirable to address this underrepresentation.<sup>79</sup>

## Positive action provisions should cover the full spectrum of gender.

An important first step would be to broaden the positive action provisions to include the full spectrum of gender. This would address some of the more glaring omissions in the current legal framework. The more ambitious option would be to consider expanding the positive action provisions to other groups, including at the very least recognising and codifying the case law of the NIHR with respect to positive action directed at age groups, as well as religion and belief and sexual orientation. Extended in this manner, positive action would be allowed for all grounds most frequently explicitly enumerated in various international and EU non-discrimination provisions and instruments.<sup>80</sup> It should moreover be clarified that it is legitimate for positive action measures to have an intersectional approach.

### Broadening the toolbox for actors within the sphere of goods and services

A second option is to increase the possibilities of actors to engage in positive action. Given that an analysis of the Opinions found that all of the positive action measures in the area of goods and services scrutinised by the NIHR for compliance with the positive action exception were considered unlawful, the framework may hamper genuine attempts at addressing antecedent disadvantage. An option that could be usefully considered is an adjusted proportionality test for positive action measures in the sphere of access to goods and services. Given a legitimate aim (addressing antecedent disadvantage for a specific group), the prevailing interpretation of the positive action provisions requires the satisfaction of a full-blown version of the proportionality test: 'Vervolgens moet worden onderzocht of het middel dat verweerster hanteert om haar doel (...) te bereiken proportioneel is, dat wil zeggen geschikt is om het doel te bereiken, en of het noodzakelijk is in die zin dat hetzelfde effect niet kan worden bereikt met een minder onderscheidmakend middel.'<sup>81</sup>

There is, however, to the knowledge of the authors, nothing at the EU level that requires the application of a (strict) proportionality test where

it concerns positive action in the area of access to goods and services.<sup>82</sup> Moreover, the provisions themselves do not explicitly prescribe a twostep proportionality test (assessing appropriateness and necessity) but simply require a reasonable relationship (“redelijke verhouding”) between the measure and the goal. The legislator intended a proportionality test to be included, but did not specify the intensity of the scrutiny.<sup>83</sup>

In the adjusted variant, the proportionality test could be limited to an investigation of whether the measure is reasonable and suited to achieve the legitimate aim, well substantiated and clearly defined, rather than judging the necessity and examining whether other measures could be equally effective in achieving the stated aims.<sup>84</sup> This would allow actors within the sphere of access to goods and services a greater degree of freedom and confidence in designing positive action measures, while respecting the overall legislative choice of positive action as an exception to the principle of non-discrimination. In the examples given above, the discount for women travelling on International Women’s Day would still be prohibited because it is insufficiently linked to addressing antecedent disadvantage, but the sports activities organised for women of certain ethnic minorities could be upheld, as the main issue there was that the NIHR disagreed with the way the policy was implemented.

### Duties to engage in positive action where it concerns employment and occupation

Labour market discrimination is a well-documented phenomenon in the Netherlands.<sup>85</sup> Positive action could address this issue proactively. However, research indicates that only a minority of employers have a diversity and inclusion plan in place to promote equal opportunities (40% of employers interviewed), and where employers engage in positive action, these are focussed on facilitative measures (e.g. ensuring neutral and objective hiring processes). Distributive measures such as formal diversity benchmarks/quotas are only considered by 7% of employers with a DEI-plan and 3% of employers who do not have a DEI-plan.<sup>86</sup> Introducing a duty to undertake positive action in the field of employment and occupation could address the existing lack of engagement.

## Introducing a duty to take positive action in employment and occupation could help address the current lack of engagement.

McCrudden advances a so-called reflexive model in this respect: actors should be required to reflect on how best to achieve a specified result (e.g. address underrepresentation), leaving these actors to consider the means and methods to achieve those goals.<sup>87</sup> A prototype of such legislation already existed in the form of the Wet stimulerend arbeidsdeelname minderheden (Wet SAMEN).<sup>88</sup> Similarly, piecemeal legislation exists, as

available at <https://equine-teurope.org/wp-content/uploads/2022/04/Exploring-positive-action-as-a-means-to-fight-structural-discrimination-in-Europe.pdf>.

81. ETC 1 januari 2005, 2005-225, para. 5.15, available at: <https://oordelen.mensenrechten.nl/oordeel/2005-225>.
82. Admitted in *Kamerstukken II 2004/05*, 28 770, nr. 11, p. 26-27 (Nota voorkeursbehandeling).
83. *Ibid.*
84. Compare the test employed by the ECtHR in Article 14 ECHR cases where the state is afforded a wide margin of appreciation: *Europees Hof voor de Rechten van de Mens 26 januari 2022*, ECLI:CE:ECHR:2021:026JUD003293419 (Šaltinytė tegen Litouwen), punt 77.
85. See H. Felten and M. Coenders, *Zeven feiten over discriminatie in werving en selectie*, (Ken-nisplatform Inclusief Samenleven, 2025), available at: <https://www.kis.nl/artikel/zeven-feiten-over-discriminatie-werving-en-selectie> as well as *Kamerstukken II 2024/25*, 29 544, nr. 1272.
86. J. Thielecke et al., *Werkgevers Enquête Arbeid 2024: Resultaten in Vogelvlucht*, (TNO, 2024), p. 14-16.
87. C. McCrudden, *Gender-based positive action in employment in Europe: A comparative analysis of legal and policy approaches in the EU and EEA*, (Luxembourg: Publications Office of the European Union, 2019), chapter 11, in particular 11.2.
88. *Stb.* 1994, 423.

89. A quota system applied to the supervisory boards of 100 publicly traded companies combined with gender balance targets for the executive and supervisory boards, and concomitant reporting obligations, for some 5500 large companies (including the 100).
90. A system in which employers are obligated to employ certain groups of disabled persons, defined in article 2 of the law, registered by a third party (UWV), and where failing to reach the goals set can lead to the imposition of an 'inclusivity tax'.
91. See for the importance of pursuing inclusivity through non-discrimination legislation: L. Waddington, 'Reassessing the Employment of People with Disabilities in Europe: from Quotas to Anti Discrimination laws', 18(1) *Comparative Labor Law Journal* (1996) 62. See also T. Khaitan, *A Theory of Discrimination Law*, (OUP, 2016), p. 222-225.
92. See also the points made in *Kamerstukken II 2003/04, 27 223 nr. 48-B1*, (M. Essafi et al., *Evaluatie Wet SAMEN: Feiten, ervaringen en visies*).
93. See H. Felten and R. Broekroelofs, *Wat werkt bij het verminderen van discriminatie*, (Kennisplatform inclusief samenleven, 2023) and R. Broekroelofs et al., *Onderzoek naar aanpak van arbeidsdiscriminatie in het mkb: 'je moet het gewoon doen'*, (Kennisplatform inclusief samenleven, 2020).
94. A modification of the suggestions found in C. McCrudden, *Gender-based positive action in employment in Europe: A comparative analysis of legal and policy approaches in the EU and EEA*, (Luxembourg: Publications Office of the European Union, 2019), chapter 11.
95. See C. D'Ignazio and L. Klein, *Data Feminism*, (MIT Press, 2020), chapter 2 and chapter 4. See also the views of the ETC in the context of the evaluation of the Wet SAMEN: <https://publicaties.mensenrechten.nl/publicatie/6256203c-2650-47d3-9844-5119c2e970d5>.

noted above, in the form of the *Wet ingroeiquotum en streefcijfers*<sup>89</sup> and the *Wet banenafpraak*.<sup>90</sup> By reintroducing a modernised and generalised version of the *Wet SAMEN*, significant results could be attained in promoting a more diverse and inclusive labour market. This requires embedding it in the equal treatment legislation,<sup>91</sup> with manageable administrative requirements<sup>92</sup> and focussing on (supporting) deployment of effective strategies,<sup>93</sup> with an active role of the NIHR. The 'duty to reflect' could be focussed on employers of a certain size in terms of the number of employees and have the following elements:<sup>94</sup> See table 3.3.

Table 3.3: Positive action duty types in the field of employment and occupation

<p><b>1. Duty to identify underrepresentation</b></p>	<p>Gathering data is crucial in order to assess underrepresentation and in order to challenge systemic power structures undermining equality and representation.<sup>95</sup> Academic research points out, however, that the data protection framework limits the gathering of such data, at least where it concerns special categories of data, such as ethnicity and disability.<sup>96</sup> As such, a duty in this area would have to be combined with enabling legislation in that context. Alternatively, such data need not be gathered by the employer itself, but could be requested in anonymised form from the Central Bureau of Statistics. Such a possibility already exists for employers with over 250 employees (<i>Barometer Culturele Diversiteit</i>).<sup>97</sup> This could then be extended to cover other diversity markers and be made available also to smaller employers.</p>
<p><b>2. A duty to set targets and timelines</b></p>	<p>Employers should be required to commit themselves to specific goals in positive action plans, the lower bounds of which are set at the level of (implementing) legislation.</p>
<p><b>3. A duty to identify positive action measures</b></p>	<p>Employers should be required to identify comprehensively the positive action measures that are available to them and to detail how they will be used to achieve the goals set out.</p>
<p><b>4. A duty of 'comply or explain'</b></p>	<p>The final duty is modelled on the reporting obligation in Directive 2022/2381:<sup>98</sup> employers should be required to report on their progress towards the goals in the positive action plans and, where progress is lacking, to give reasons why the objectives have not been met.</p>
<p><b>5. Safe haven and enforcement</b></p>	<p>A possible addition to this could be to have these plans evaluated by the NIHR or some other body on a systematic basis.<sup>99</sup> If the NIHR concludes that the plans submitted, including the positive action measures identified therein, comply with the non-discrimination legislation, the law could explicitly provide that such plans enjoy a presumption of legality.<sup>100</sup> This would help reduce uncertainty of employers as regards possible legal risks of implementing the positive action measures.<sup>101</sup></p>

96. M. Kullmann and L. Oosterveld, 'De AVG-rechtelijke grenzen aan voorkeursbeleid', 15(10) Tijdschrift voor Recht en Arbeid (2023) 17.
97. See <https://www.cbs.nl/barometerculturelediversiteit>, last visited 1 June 2025.
98. Directive (EU) 2022/2381 on improving the gender balance among directors of listed companies and related measures, OJ [2022] L 315/44.
99. Extending the already existing possibility an organisation requesting an ad hoc evaluation of its plans: Article 10(2)(b) Wet NIHR.
100. Such a system exists for instance in Belgium: Koninklijk besluit tot bepaling van de voorwaarden inzake positieve acties van 11 februari 2019, Belgisch Staatsblad 2019200431. See article 7 thereof. For an evaluation, see S. Vancleef, 'Vijf jaar KB Positieve Actie. Lessen trekken uit de (buitenlandse) praktijk', 500 Nieuw juridisch weekblad (2024) 382.
101. Echoed by the municipalities in W. Boonstra, 'Gemeenten nog huiverig voor voorkeursbeleid', Binnenlands Bestuur 14 september 2022, available at: <https://www.binnenlandsbestuur.nl/carriere/weinig-gemeenten-hante-ren-voorkeursbeleid>.
102. See Part VII of The Fair Employment and Treatment (Northern Ireland) Order 1998, no. 3162 (N.I. 21), as amended.
103. See M. Kitson and A. Fitzpatrick, 'Chapter 6: The Northern Ireland Experience of Positive Action Measures in the areas of Religious and/or Political Discrimination', in Positive action measures. The experience of equality bodies, (Equinet, 2014), available at: <https://equineteurope.org/wp-content/uploads/2018/01/positive-action-measures-final-with-cover.pdf>. See also: C. McCrudden et al., Affirmative Action without Quotas in Northern Ireland, 4 The Equal Rights Review (2009) 7.

A second feature could be enforcement of the plans by the NIHR in the form of negotiated agreements. In Northern Ireland, a system is in place which shares the features 1-4 and in which the Equality Commission for Northern Ireland can enter into legally binding agreements with underperforming employers, whereby the latter commit to improve the situation in specific ways. If upon review it is found the situation has not improved, the Equality Commission has various enforcement tools at its disposal, including seeking injunctions at the High Court.<sup>102</sup> This system has been found to be an effective means to address underrepresentation.<sup>103</sup>

### Summary:

- The scope of the positive action provisions should be extended beyond women, persons with disabilities and persons from ethnic minorities in order to address systemic and historic disadvantage suffered by other groups such as those defined by age, religion and belief or sexual orientation. It should furthermore be clarified that it is legitimate for positive action measures to have an intersectional approach.
- Actors engaging in positive action in the sphere of access to goods and services should be accorded greater freedom in designing positive action measures by engaging in a more deferential review of the proportionality of such measures.
- In the sphere of employment and occupation, actors should be required to engage in positive action by requiring them to reflect on how best to achieve a specified result (e.g. address underrepresentation), leaving these actors to consider the means and methods to achieve those goals.

## 4. Effective Adjustment

### 4.1 The legal framework

The obligation to provide an effective adjustment ('doeltreffende aanpassing') is found in Article 2 WGBH/CZ, which provides: Het verbod van onderscheid houdt mede in dat degene, tot wie dit verbod zich richt, gehouden is naar gelang de behoefte doeltreffende aanpassingen te verrichten, tenzij deze voor hem een onevenredige belasting vormen.

The prohibition of making a distinction therefore also includes the duty to make effective adjustments in accordance with the need for this, unless doing so would constitute a disproportionate burden upon the duty-bearer.

While the term 'reasonable' ('redelijke') is often used when establishing the duty in other jurisdictions, Dutch legislation instead refers to 'effective' ('doeltreffend') when defining the adjustment duty. This helpfully separates the issue of the effectiveness of the adjustment from the question of undue or disproportionate burden. The Government adopted this approach because it felt that the latter term better reflects the

fact that an adjustment must have the desired effect.<sup>104</sup> This is judged according to the ‘suitability’ or ‘appropriateness’ (‘geschiktheid’) and ‘necessity’ (‘noodzakelijkheid’) of a specific adjustment. The requirement of appropriateness means that the adjustment must actually have the effect of removing the limitation experienced by a person with a disability, and contribute to their full and autonomous participation. The requirement of necessity means that the same effect cannot be achieved by means of another (cheaper or simpler) adjustment.<sup>105</sup>

## The prohibition of distinction entails a duty to make effective adjustments – unless the burden is disproportionate.

In Opinion 2018-119, the NIHR stated that the phrase ‘in accordance to the need’ (‘naar gelang de behoefte’) found in the legislation meant that the need for the adjustment must result directly from the barriers faced by an individual as a result of his or her disability or chronic illness.<sup>106</sup> The NIHR has occasionally emphasized the individual nature of this duty, and stressed that it is not a generic (or anticipatory) obligation. In Opinions 2018-55 and 2018-56, which both concerned a claim that a failure to provide a video with subtitles amounted to a breach of the effective adjustment duty, the NIHR held: Bij de beoordeling van een doeltreffende aanpassing is het van belang dat met de omschrijving ‘naar gelang de behoefte’ in artikel 2, eerste lid, WGBH/CZ tot uitdrukking wordt gebracht dat de verplichting tot het verrichten van een aanpassing niet generiek is, maar afhankelijk van de situatie moet worden ingevuld.<sup>107</sup>

This was stated even more explicitly in Opinion 2008-30, which concerned a challenge to a college’s decision to deregister a student on the grounds that the college had made insufficient efforts to accommodate the student. The ETC found that the college had implemented all the requested adjustments, and that the student was still unable to successfully complete his studies. The Commission stated that: ‘(...) onderwijsinstellingen niet bij voorbaat rekening hoeven te houden met alle mogelijke beperkingen die het gevolg zijn van handicaps en chronische ziekten bij studenten. De wet gaat uit van een aanpassing in een concrete individuele situatie, waarbij het initiatief ligt bij de (aspirant) student dan wel zijn vertegenwoordigers. Deze moet tijdig aan de onderwijsinstelling duidelijk maken welke aanpassing hij nodig heeft (CGB 31 januari 2005, oordeel 2005-11). Doeltreffende aanpassingen veronderstellen derhalve dat verzoeker hierom heeft gevraagd. Voor zover de klacht van verzoeker inhoudt dat verweerder uit zichzelf het initiatief had moeten nemen hem de juiste begeleiding te bieden, treft deze derhalve geen doel.’<sup>108</sup>

If a specific adjustment would be effective in removing a barrier faced by a person with a disability, the second, and separate, stage of the assessment

104. *Kamerstukken II 2001/02*, 28 169, nr. 3, p. 8-9, 25.

105. *Ibid.*, pp. 25-26. See for an application of these principles NIHR 16 augustus 2019, 2019-83, <https://oordelen.mensenrechten.nl/oordeel/2019-83/>.

106. NIHR, 15 november 2018, 2018-119, para. 4.11, available at: <https://oordelen.mensenrechten.nl/oordeel/2018-119/>.

107. NIHR, 29 mei 2018, 2018-55, para. 6.4, available at: <https://oordelen.mensenrechten.nl/oordeel/2018-55/>.

108. ETC, 20 maart 2008, para 3.16, available at: <https://oordelen.mensenrechten.nl/oordeel/2008-30/>.

109. *Kamerstukken II 2001/02, 28* 169, nr. 3, p. 27-30; A. Hendriks, *Gelijke Toegang tot de Arbeid voor Gehandicapten* (PhD Universiteit van Amsterdam, 2000), 185-7.
110. See however ABRvS 31 october 2018, ECLI:NL:RVS:2018:3557 in which the court found that the prohibition of discrimination required a *de facto* adjustment concerning the time allowed for a research grant applicant who was pregnant to respond to the reviews of her application for funding.
111. For a discussion of Opinions of the ETC / NHRI which evidence this approach in the context of further and higher education see L. Waddington, 'Dutch disability discrimination law and further and higher education: A case study based on the Opinions of the Netherlands Institute for Human Rights', 23(1) *International Journal of Discrimination and the Law* (2023), Special Issue: Inclusive Post-Secondary Education and Persons with Disabilities, 29-59.
112. The search terms used were '-doeltreffende aanpassing' - 'doeltreffende aanpassingen', and 'handicap'. Search carried out on 20 June 2025.
113. Search carried out on 20 June 2025.
114. This and the following numbers were obtained by using the filter system in the search engine of the NIHR on 30 juni 2025.
115. It is unclear why these Opinions add up to a total which is slightly less than the 484 Opinions which include a reference to 'doeltreffende aanpassing' in the general search. Moreover, the findings of discrimination on each subtopic (employment, goods and services) add up to 240 rather than 239. This may be due to one of the cases being counted twice (classified as dealing with both employment and goods and services).

to determine whether a duty bearer must provide the adjustment involves a consideration of whether it would amount to a disproportionate burden (meaning it would not be 'reasonable'). This involves a balancing of the interests of the duty bearer and the person with a disability, *inter alia*, through the application of standard 'open norms' of Dutch civil law (i.e. in the case of employment, the duty to act as a good employer and the notion of 'reasonableness').<sup>109</sup>

The effective adjustment duty applies to all parties who are prohibited from discriminating under the WGBH/CZ, and, following various amendments to the Act, now covers employers and providers of vocational education, housing, primary and secondary education, goods and services. Article 2(2) WGBH/CZ also provides that the provision of an effective adjustment always covers the admission of assistance dogs to premises. However, the duty to provide an effective adjustment does in principle<sup>110</sup> not extend beyond persons with disabilities and chronic illnesses.

In terms of Opinions, the NIHR has consistently held that, once a sufficiently clear request for an adjustment has been made by a claimant, responsibility passes to the duty bearer to investigate the need for, feasibility and appropriateness of an adjustment, and, on occasions, the NIHR has held that this requires consultation with the claimant.<sup>111</sup>

A search of *rechtspraak.nl* over the period 01-01-2000 to 31-12-2024 revealed 25 judgments which referred to effective adjustment and disability.<sup>112</sup> Of the 4194 Opinions decided by the NIHR in the same time period, 484 referred to 'doeltreffende aanpassing', amounting to approximately 11,5%.<sup>113</sup> 239 of these cases resulted in a finding of discrimination;<sup>114</sup> however, since some cases involved claims involving different kinds of discrimination, this does not necessarily mean that a breach of the adjustment duty was found in every single case. Of the 484 cases, 202 concerned employment (112 resulted in a finding of discrimination) and 275 concerned goods and services (128 resulted in a finding of discrimination) and one was out of scope.<sup>115</sup> Approximately 50% of the Opinions involve a finding of discrimination, which is in line with the average success rate of applicants before the NHRI, as noted above. The cases concerning effective adjustment before the NIHR are summarised in Figure 3.4 below.



Figure 3.4: Overview of cases concerning effective adjustment 2000-2024. Data retrieved from NIHR.

### Summary:

- Dutch law establishes a duty to provide an effective adjustment for a person with a disability or chronic illness, unless this would amount to a disproportionate burden.
- The effectiveness of an adjustment is judged according to its ‘suitability’ or ‘appropriateness’ and ‘necessity’.
- If an adjustment would remove successfully a barrier an individual is facing, the duty bearer is required to make the adjustment, unless this would result in a disproportionate burden.
- The law requires an individualised adjustment, whereby the initiative for requesting an adjustment lies with the person with a disability or his / her representatives.
- Once a duty bearer becomes aware that an individual needs an adjustment, responsibility passes to the duty bearer to investigate the need for, and possibility for providing, an adjustment.
- The material scope of the duty is broad.

### 4.2 Problematic aspects of the effective adjustment duty

This section explores some of the limitations and challenges linked to the effective adjustment duty in Dutch law.

#### A reactive duty

As established in the previous section, the effective adjustment duty under the WGBH/CZ is a duty owed to an individual. It is a reactive duty or ex post duty.

The duty is only triggered when a duty bearer knows that the claimant has a disability or chronic illness. This is illustrated in Opinion 2012-123, in which the ETC found that a complete incapacity for work, which the employer was aware of, did not necessarily equate to a disability or chronic illness. As a result, the employer could not be regarded as knowing that a claimant had a chronic illness, and was therefore not in breach of the duty to provide an effective adjustment when it failed to take the chronic illness of the claimant into account, when reorganising the workforce.<sup>116</sup> Effective adjustments claims can therefore fail if the duty bearer is not aware that a claimant has a disability or chronic illness, and sometimes this requires a very clear and explicit communication on the part of the claimant..

**Under Dutch law, the effective adjustment duty is a reactive duty, owed to an individual.**

The ETC has sometimes stressed that it is the responsibility of the claimant to inform the duty bearer about the need for an adjustment in a timely way<sup>117</sup> and, in the absence of the claimant doing this, as well as in the

116. ETC, 18 juli 2012, 2012-123, para. 3.11, available at: <https://oordelen.mensenrechten.nl/oordeel/2012-123>.

117. ETC, 27 januari 2010, 2010-11, para. 3.5, available at: <https://oordelen.mensenrechten.nl/oordeel/2010-11/>.

118. For example, ETC, 12 maart 2007, 2007-37, available at: <https://oordelen.mensenrechten.nl/oordeel/2007-37/>. For a more extensive discussion of this finding, see L. Waddington, ‘Dutch disability discrimination law and further and higher education: A case study based on the Opinions of the Netherlands Institute for Human Rights’, 23(1) International Journal of Discrimination and the Law (2023) 29.

119. For example, Rb. Oost-Brabant 14 februari 2008, ECLI:NL:R-BOBR:2018:592, para. 4.14.

120. For example, NIHR, 8 oktober 2019, 2019-102 para. 6.4, available at: <https://oordelen.mensenrechten.nl/oordeel/2019-102/>.
121. In the context of employment, this has been identified as an issue by inter alia J. Olsen, 'Employers: Influencing Disabled People's Employment through responses to Reasonable Adjustment' 39(3) *Disability & Society* (2024) 791-810. In the context of higher education, this has been identified as an issue by A. Moríña, 'Inclusive education in higher education: challenges and opportunities', 32(1) *European Journal of Special Needs Education* (2017) 3, at 10. A. Collins, F. Azmat and R. Rentschler, 'Bringing everyone on the same journey': revisiting inclusion in higher education', 44(8) *Studies in Higher Education* (2019) 1475, at 1483. M. Koca-Atabey, 'Re-visiting the role of disability coordinators: the changing needs of disabled students and current support strategies from a UK university', 32(1) *European Journal of Special Needs Education* (2017) 137, at 138; L. Kendall, 'Higher education and disability: Exploring student experiences', 3(1) *Cogent Education* (2016) 1, at 5-6.
122. D. Jansen et al, 'Functioning and participation problems of students with ADHD in higher education: which reasonable adjustments are effective?', 32(1) *European Journal of Special Needs Education* (2017) 35, at 50.
123. ETC, 12 maart 2007, 2007-37, available at: <https://oordelen.mensenrechten.nl/oordeel/2007-37/>.
124. For examples of other Opinions adopting this approach see ETC, 12 mars 2007, 2007-37, available at: <https://oordelen.mensenrechten.nl/oordeel/2007-37/> (higher education) and NIHR, 25 januari 2024, 2024-6, para. 4.6-4.10, available at: <https://oordelen.mensenrechten.nl/oordeel/2024-6/> (employment).

case where the claimant is insufficiently clear regarding the nature of the adjustment, claims have failed.<sup>118</sup> However, the duty can also be triggered if another party, such as a parent, teacher<sup>119</sup> or medical professional,<sup>120</sup> informs the duty bearer of the need for an adjustment

In some cases a significant burden of notification is placed on individuals which they are unable to meet, meaning that they are not entitled under the WGBH/CZ to benefit from an adjustment. Individuals may, for example, not communicate that they have a disability or a chronic illness, and consequently need an adjustment, because of a fear of negative consequences or repercussions, including being stigmatised and labelled;<sup>121</sup> because they do not wish to ask for what they (wrongly) regard as undeserved favourable treatment; because they wish to succeed without such additional support;<sup>122</sup> because they do not know what specific adjustment is needed; because they know that no suitable adjustment, such as installing a ramp to allow access to a building, could be provided at short notice, and therefore allow them to carry out the activity in question, such as entering a shop, at the moment they need it; or simply because they do not wish to engage in such a dialogue and can easily avoid the barrier, for example by purchasing a good or service from another provider where they do not experience barriers. In all such cases, the reactive effective adjustment duty will not be triggered, leaving the barrier in place. Alternatively, an individual may indicate that they are facing disability-related barriers and require additional support, but are unable to tell the duty bearer what form that support, or adjustment, should take. Again, this may be insufficient to trigger the effective adjustment duty. This is because the reactive approach allows duty bearers to ignore the needs of persons with disabilities up until the point that an adjustment request is made, and not to consider in advance the impact of their policies, even on broad groups of persons with disabilities who have predictable and readily foreseeable needs, such as people who are blind or who use wheelchairs.

## A reactive approach allows duty bearers to wait for complaints instead of preventing predictable barriers.

The consequence of strictly adhering to a reactive approach can be illustrated through various Opinions of the ETC/NIHR. For example, in Opinion 2007-37<sup>123</sup> a claim of discrimination resulting from the inaccessibility of an exam location failed because the claimant had only informed the relevant organisation that he used a wheelchair after the exams had taken place. Given that the organisation was not previously aware of the need for an effective adjustment, the ETC found that there was no breach of the duty to provide an effective adjustment.<sup>124</sup>

125. ETC, 10 mei 2012, 2012-88, para. 3.14, available at: <https://oordelen.mensenrechten.nl/oordeel/2012-88/>.

126. ETC, 10 mei 2012, 2012-88, paras. 3.14 and 3.16, available at: <https://oordelen.mensenrechten.nl/oordeel/2012-88/>. However, in NIHR, 21 januari 2016, 2016-6, available at: <https://oordelen.mensenrechten.nl/oordeel/2016-6/>, the NIHR seemed to take a different position by finding that a school should have known about heart problems and related adjustment needs of the pupil in question, despite him starting a new schoolyear and interacting with a new group of staff, see para 3.11 onwards.

127. A. Lawson and L. Waddington, 'Disability in Times of Emergency: Exponential Inequality and the Role of Reasonable Adjustment Duties', in S. Atrey and S. Fredman, *Exponential Inequalities, Equality Law in Times of Crisis*, (Oxford University Press, 2023), p. 264.

128. A. Blackham, 'Extending Reasonable Adjustments: A Renewed Tool for Creating Inclusive Workplaces?', 49(2) *Melbourne University Law review* (2026) (forthcoming).

129. See for example ETC, 12 juli 2006, 2006-147 available at <https://oordelen.mensenrechten.nl/oordeel/2006-147>, where the rejection of a job applicant on the grounds that he was not willing to work on a Sunday was found to be indirect religious discrimination.

Effective adjustment claims can also fail because the claimant has not explicitly asked for a specific adjustment. In Opinion 2012-88, the ETC found that a student with dyslexia had failed to request specific adjustments with regard to reformulating exam questions in certain subjects and that educational institutions 'cannot be expected to make adjustments independently when these have not been specifically requested'.<sup>125</sup> An expert report had advised reformulating exam questions for biology exams, but had not explicitly referred to any other subjects. The ETC found that the claimant should have explicitly requested the same adjustment for other exams in order to trigger the duty.<sup>126</sup>

The reactive effective adjustment duty therefore allows for the creation and maintenance of barriers before the duty to remove them is triggered. Lawson and Waddington have described this situation as follows: *'(...) an individual must first experience a barrier or disadvantage before requesting an adjustment, and the type of adjustment which can be required of a duty-bearer will be assessed in the light of the circumstances applying at that time. The fact that the duty-bearer could have avoided creating the barrier by choosing a different system, or adapting the design, will not be relevant, thus reducing the potential impact and value of the duty (...)*'.<sup>127</sup>

## The reactive duty to make effective adjustments allows barriers to persist.

A further issue with the reactive duty is that it can result in a focus on the needs of a specific individual, whose particular needs must be accommodated, rather than considering and addressing the systemic nature of barriers which can affect broad groups of persons with disabilities and, indeed, other persons. In general, a reactive duty is 'inadequate for addressing systemic issues and barriers to participation, and is unlikely to lead to transformative change'.<sup>128</sup>

### A duty only owed to a person with a disability or chronic illness

While the adjustment duty is only owed to a person with a disability or chronic illness under the WGBH/CZ, it is clear that other individuals, such as followers of certain religions, people who carry out caring tasks, (single) parents and persons who are pregnant, could also benefit from the provision of effective adjustments. The present Dutch law allows for such claims to be addressed through the prism of indirect discrimination in some cases.<sup>129</sup> However, the definition of indirect discrimination does not clearly establish that the law requires adjustments to be made in some cases, thereby arguably creating a lack of legal certainty by failing to indicate clearly the situations in which an adjustment is required in order to avoid indirectly discriminating against an individual.

130. A. Lawson and L. Waddington, 'Disability in Times of Emergency: Exponential Inequality and the Role of Reasonable Adjustment Duties', in S. Atrey and S. Fredman, *Exponential Inequalities, Equality Law in Times of Crisis*, (Oxford University Press, 2023), p. 263; A. Lawson and M. Orchard, *The Anticipatory Reasonable Adjustment Duty: Removing the Blockages?*, 80(2) *Cambridge Law Journal* (2021) 308, p. 316.

131. In addition to the Equality Act, there are similar duties in other legislative instruments. See, for example the duty to make reasonable modifications set out in the Americans with Disabilities Act 1990 - 42 USC s 12131(2) (for public bodies) and 42 USC s 12182(b)(2)(A)(ii) (for private bodies providing services to the public). The Commission proposal for a Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation COM 2008/426 final also included a provision (Article 4(1)) which would have required duty bearers to take 'measures ... provided by anticipation to enable persons with disabilities to have effective non-discriminatory access to ... services which are available to the public...' as long as these measures did not result in a disproportionate burden. This provision has been deleted from the current draft.

132. R. Kayess and P. French. 'Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities', 8(1) *Human Rights Law Review* (2008) 1, p. 11.

133. Sections 20-22 and Schedule 2 and 3 Equality Act.

134. Equality and Human Rights Commission, *Equality Act 2010 Code of Practice: Services, Public Functions and Associations. Statutory Code of Practice*, 1 January 2011 at 7.22.

### Summary:

- The effective adjustment duty is a reactive duty, meaning it is only triggered when the duty bearer becomes aware of the need for an adjustment.
- There are many reasons why an individual may not indicate that they require an adjustment, meaning the duty is not triggered.
- The current law allows for the creation and maintenance of barriers without the need to consider how they may impact on persons with disabilities or chronic illnesses.
- The effective adjustment duty is only owed to a person with a disability or chronic illness.

### 4.3 Gaps and Solutions

This section explores measures which could be taken to address the problematic aspects of the effective adjustment duty discussed above, namely the reactive nature of the duty and the fact that it is only owed to a person with a disability or chronic illness. This section draws inspiration from other jurisdictions. The recommendations focus on expanding the right to claim an effective adjustment in various ways, rather than on addressing the operation of the NIHR in this context.

The measures and recommendations discussed in this section go beyond what is required under Public International Law, such as the UN Convention on the Rights of Persons with Disabilities (CRPD). For this reason, this chapter does not consider how compliance with international treaties could promote or require the adoption of a more extensive effective adjustment duty.

#### Moving from a reactive to an anticipatory effective adjustment duty

While the reactive reasonable or effective adjustment duty as found in the WGBH/CZ is the standard approach adopted in other domestic jurisdictions, and is envisaged in the Articles 2 and 5 of the CRPD,<sup>130</sup> an anticipatory or ex-ante reasonable or effective adjustment duty has been established in some jurisdictions.<sup>131</sup> An anticipatory approach to the effective adjustment duty reflects a universalist approach to equality which 'is about expecting difference'.<sup>132</sup>

The Equality Act 2010, which applies in England, Scotland and Wales, adopts an anticipatory approach to reasonable adjustment in the context of services and discharge of public functions.<sup>133</sup> This requires duty bearers to consider and address the needs of persons with disabilities, to the extent that they are reasonably foreseeable, in advance of an individual request being made.

The statutory code of practice linked to the Act provides clarification as to the nature of the anticipatory duty. It stresses that the duty 'applies regardless of whether the service provider knows that a particular person is disabled or whether it currently has disabled customers, members et cetera'.<sup>134</sup> It 'requires consideration of, and action in relation to, barriers that impede people with one or more kinds of disability prior to an individual disabled person seeking to use the service [or] avail themselves of a

function ...<sup>135</sup> and service providers ‘should anticipate the requirements of disabled people and the adjustments that may have to be made for them’.<sup>136</sup> While providers are not expected to anticipate the need of every potential user with a disability, ‘they are required to think about and take reasonable steps to overcome [...] barriers that may impede people with different kinds of disability’,<sup>137</sup> meaning that they should think about the needs of people with different kinds of impairments. The Code also makes clear that the duty is ‘continuing’ and ‘evolving’, and is ‘not something that needs simply to be considered once only, and then forgotten’.<sup>138</sup> Duty bearers are therefore required to anticipate the needs of groups of persons with disabilities who could potentially be expected to want to use their services and provide reasonable adjustments, such as rendering buildings accessible to wheelchair users and providing basic information in Braille and easy to read text, as part of delivering their services or public functions and in advance of receiving a specific request for such changes.

135. *Ibid.*, at 7.20.

136. *Ibid.*, at 7.21.

137. *Ibid.*, at 7.24.

138. *Ibid.*, at 7.27.

139. Equality Act 2010, s 21(2).

140. A. Lawson and M. Orchard, *The Anticipatory Reasonable Adjustment Duty: Removing the Blockages?*, 80(2) *Cambridge Law Journal* (2021) 308, p. 315.

141. See, for example, *Abrahart v University of Bristol* [2022] 5 WLUK 260, [2022] PIQR 17 (CC).

142. While the first area did involve a successful legal challenge to the way in which information was provided (*R (on the application of Rowley) v Minister for the Cabinet Office*, [2021] EWHC 2108 (Admin)), changes were made in the other two areas before a challenge reached court. A. Lawson and L. Waddington, ‘Disability in Times of Emergency: Exponential Inequality and the Role of Reasonable Adjustment Duties’, in S. Atrey and S. Fredman, *Exponential Inequalities, Equality Law in Times of Crisis*, (Oxford University Press, 2023), p. 266-267.

143. A. Lawson and M. Orchard, *The Anticipatory Reasonable Adjustment Duty: Removing the Blockages?*, 80(2) *Cambridge Law Journal* (2021) 308, p. 308.

## Duty bearers must anticipate and meet the reasonably foreseeable needs of persons with disabilities.

While the duty is anticipatory, liability is only triggered when a person with a disability experiences an actual detriment resulting from a breach.<sup>139</sup>

Lawson and Orchard have argued that the duty ‘does much of the same work as indirect discrimination’. However, they also distinguish the anticipatory duty under the Equality Act by noting that it ‘is more overtly proactive and solution-oriented and is free of the statistical complexity which has historically bedevilled indirect discrimination law’.<sup>140</sup> In addition, in cases where a service provider could not have been expected to foresee the particular needs of a specific person with a disability, the reactive duty to provide a reasonable adjustment still applies once the duty bearer becomes aware that an individual with a disability requires an adjustment.<sup>141</sup> The reactive duty therefore exists alongside the anticipatory duty.

The anticipatory reasonable adjustment duty has generated a limited amount of case law, and the judgments which have addressed this obligation have often resulted from cases supported by the Equality and Human Rights Commission. However, the potential of the anticipatory reasonable adjustment duty in practice was evidenced during the pandemic, when it was used successfully to ‘challenge’ inaccessibility and barriers experienced by persons with disabilities in three different areas: COVID-related government information; COVID-related guidance on access to healthcare and hospital visits; and access to the services of supermarkets for purposes of buying food and other basic necessities.<sup>142</sup> Nevertheless, the duty, as currently formulated in the Equality Act, has been subject to criticism because it ‘has struggled to fulfil its practical potential’.<sup>143</sup> Lawson and Orchard identify several factors which hamper the

effectiveness of the duty, including a lack of visibility in the legislation and uncertainty regarding the duty. In addition, they highlight the importance of allowing for injunctive relief in anticipatory effective adjustment cases, whereby courts have the power to order the duty bearer to take appropriate action to remove the barrier.<sup>144</sup>

A key recommendation of this pre-advisory paper is to amend the WGBH/CZ to establish an anticipatory duty to make an effective adjustment. Given the significant impact such an extension could have, implementing this recommendation should be regarded as a priority in the context of effective adjustment.

This new duty should extend to all areas currently covered by the WGBH/CZ with respect to access to goods and services. However, the duty should also cover employment to some degree, resulting in a proactive duty to ensure that the workplace and related (digital) infrastructure are accessible and that relevant policies concerning staff with disabilities, including policies setting out processes relating to the reactive adjustment duty, are in place.<sup>145</sup>

In addition, in order to ensure full effectiveness of the duty, it should be possible to bring a complaint where there are plans to take action which would create such a barrier, for example resulting from the design of a building which will be open to the public. In this sense, there should be a pre-emptive enforcement mechanism which allows for actions which would result in the creation of barriers to be challenged.<sup>146</sup>

### Summary:

- The Equality Act 2010 in the UK establishes an anticipatory reasonable adjustment duty in the context of services and discharge of public functions.
- The duty requires duty bearers to identify and anticipate ways in which disabled persons generally, or broad groups of disabled persons, may be disadvantaged, and take reasonable steps to prevent or mitigate the disadvantage.
- The provision has resulted in a small number of important cases but, generally, there is a limited amount of case law.
- The effectiveness of the duty has been hampered by a lack of visibility in the legislation and uncertainty regarding the duty.

### Recommendations:

- The WGBH/CZ should be amended to establish clearly an anticipatory duty to make an effective adjustment.
- This duty should be applicable to the full scope of the WGBH/CZ.
- This anticipatory duty should exist alongside the existing reactive effective adjustment duty.
- A pre-emptive enforcement mechanism should exist, allowing complaints to prevent action which would result in the establishment of barriers.

144. *Ibid.*, 331-332.

145. For a similar argument regarding the extension of the anticipatory duty to employment see A. Blackham, 'Extending Reasonable Adjustments: A Renewed Tool for Creating Inclusive Workplaces?', 49(2) *Melbourne University Law review* (2026).

146. I am grateful to Professor Anna Lawson of Leeds University for making this point.

### Linking the effective adjustment duty to regulations on accessibility

In some European jurisdictions a link is made between disability discrimination, including the reasonable accommodation duty, and compliance with regulations or standards addressing universal design or accessibility.

The Norwegian Equality and Anti-Discrimination Act establishes a duty to provide universal design,<sup>147</sup> as long as this does not result in a disproportionate burden. 'Universal design' is defined in the statute as meaning 'designing or accommodating the main solution with respect to the physical conditions, such that the general functions of the undertaking can be used by as many people as possible, regardless of disability'. The legislation places a significant weight on compliance with universal design laws or regulations, and the relevant duty is deemed to be met if such provisions have been complied with. The legislation covers buildings open to the general public. The Norwegian government is currently investigating how to expand the duty to cover universal design of ICT at the workplace.

The issue of universal design has generated a considerable number of complaints to the quasi-judicial Discrimination Tribunal; a Government Action Plan for Universal Design has been adopted,<sup>148</sup> and substantial research has been carried out relating to universal design in different fields of life.<sup>149</sup> A search of the Tribunal's homepage reveals that decisions on a large number of cases concerning universal design are pending.<sup>150</sup> However, one potential problem with the complaints procedure before the Tribunal is that the complainant is required to produce substantial evidence to support their argument that the universal design obligation has been breached. Less contested means of resolving complaints, including through professional mediation, might result in quicker resolutions which provide for mutually agreed solutions.<sup>151</sup>

In Austria, disability discrimination legislation explicitly provides that a failure to comply with (accessibility) legislation or standards is relevant for a discrimination claim. Both the Act on the Employment of Persons with Disabilities<sup>152</sup> and the Federal Disability Equality Act,<sup>153</sup> which covers areas beyond employment, establish obligations to make a reasonable adjustment, and define a breach of that obligation as a form of indirect discrimination. Both Acts also state: When assessing whether certain circumstances constitute indirect discrimination it has to be taken into account whether relevant legislation exists in regard to accessibility and to what extent it has been complied with.

This means that when assessing whether the provision of accessibility would amount to a disproportionate burden, the duty bearer's (lack of) compliance with legislation setting accessibility standards is taken into account. It would seem to be impossible for a duty bearer to argue that a specific adjustment would amount to a disproportionate burden, and therefore not be required, if the relevant action is mandated under accessibility legislation. Given that the legislations' reference to 'relevant legislation' regarding accessibility is generic, it can cover a range of instruments.

147. Act of 1 January 2008 Equality and Anti-Discrimination Act, sections 17-19a.

148. <https://www.regjeringen.no/no/no/dokumenter/barekraft-og-like-muligheter-et-universelt-utformet-norge/id2867676/>.

149. <https://www.bufdir.no/rapporter/?pagesize=20&query=universell%20utforming>.

150. <https://www.diskrimineringsnemnda.no/klagesaker-og-statistikk>.

151. The authors are grateful to Lene Løvdal for providing this information.

152. § 6 and § 7.

153. § 7.

154. A. Hoogenboom, De gelijke-behandelingsrechten van kinderen met een beperking in het onderwijs: een analyse van recente oordelen van het College Rechten van de Mens, NTOR 2020/3 discussing College voor de Rechten van de Mens, 7 mei 2018, 2018-44, available at: <https://oordelen.mensenrechten.nl/oordeel/2018-44/>.
155. Directive (EU) 2016/2101 on the accessibility of the websites and mobile applications of public sector bodies OJ L 327/1 2016. This Directive is implemented in the Netherlands as the Besluit digitale toegankelijkheid overheid, Stb. 2018, 141.
156. Directive (EU) No 2019/881 OJ L 151/70 2019. Transposed into Dutch law by Wijziging van diverse wetten ter implementatie van Richtlijn (EU) 2019/882 van het Europees Parlement en de Raad van 17 april 2019 betreffende de toegankelijkheidsvoorschriften voor producten en diensten (Implementatiewet toegankelijkheidsvoorschriften producten en diensten), Stb. 2024, 87.
157. Besluit toegankelijkheid van het Openbaar Vervoer, Stb. 2011, 225. See also Besluit algemene toegankelijkheid voor personen met een handicap of chronische ziekte of 2017, Stb. 2017, 256.
158. Article 8 in conjunction with Article 2 WGBH/CZ. See also NIHR, 7 juli 2025, 2025-63, para 4.5 available at: <https://oordelen.mensenrechten.nl/oordeel/2025-63/>.
159. Information on the Decree on public transport accessibility is based on K. de Vries, Country report for the Netherlands on the non-discrimination directives covering 1 January 2023-1 January 2024, European network of legal experts in gender equality and non-discrimination.

## In parts of Europe, disability discrimination law ties reasonable accommodation to universal design and accessibility standards.

In the Dutch context, Article 2a of the WGBH/CZ establishes an obligation on duty holders to achieve general accessibility gradually unless this amounts to a disproportionate burden, but, aside from public transport, this is not linked to specific accessibility standards or regulations, and Hoogenboom has criticised the NIHR for not addressing the accessibility obligations in some of its Opinions.<sup>154</sup>

It is recommended that links are made between a (newly established anticipatory) adjustment duty in the WGBH/CZ and accessibility legislation and standards, such as legislation which transposes EU instruments concerning accessibility, including notably the Public Sector Web Accessibility Directive<sup>155</sup> and the European Accessibility Act.<sup>156</sup> This would mean that a breach of the requirements of these instruments would be linked to a breach to provide (anticipatory) adjustments. This approach would not be unprecedented, and the effective adjustment duty in the WGBH/CZ is already linked to the Decree on public transport accessibility which specifies the adjustments that must be made in the field of public transport.<sup>157</sup> These adjustments are classified in the WGBH/CZ as a form of effective adjustment, although they are not individualised or reactive measures.<sup>158</sup> They include adjustments to vehicles and stations/stops as well as to the provision of travel information.<sup>159</sup>

In addition, it is recommended that a disproportionate burden should never be established where a barrier results from a failure to comply with accessibility standards or regulations.

Any new duty in Dutch law should not consist purely of establishing that various regulations or standards concerning accessibility have been complied with. The duty should be more extensive and, as under the British legislation, still allow for reactive effective adjustment claims where an individual experiences a barrier, even if relevant provisions on standards have been complied with.

### Summary:

- Legislation and practice from other European jurisdictions makes a link between disability discrimination and compliance with regulations or standards addressing accessibility or universal design.

### Recommendations:

- Link the WGBH/CZ explicitly with accessibility legislation or standards beyond public transport and provide that non-compliance constitutes a form of discrimination.

- Clarify that a measure which is required under accessibility legislation or standards can never be regarded as a disproportionate burden under the WGBH/CZ.

160. Civil Rights Act 1964, Definitions, Section 701.

161. Rehabilitation Act, 1973.

162. Central Okanagan School District No 23 v Renaud, [1992] 2 SCR 970.

163. Article L3122-26 LC provides for a right to request an adjustment of working hours by family members and carers of persons with disabilities.

164. Equal Opportunity Act 2010 (Vic), s 17 re caring responsibilities.

165. B. Swannie, 'Reasonable Accommodation of Employees' Parenting and Carer Responsibilities: A Human Rights Perspective', 48(2) Monash University Law Review (2022) 208-237 and A. Blackham, 'Extending Reasonable Adjustments: A Renewed Tool for Creating Inclusive Workplaces?', 49(2) Melbourne University Law Review (2026) (forthcoming).

166. British Columbia (Public Service Employee Relations Commission) v British Columbia Government Services Employees' Union [1999] (Meiorin) 3 SCR 3, 1999 ECC 48. For commentary see T. Witelson, 'From Here to Equality: Meiorin, TD Bank, and the Problems with Human Rights Law', 25 Queen's Law Journal (1999) 347, p. 348-385.

167. A. Blackham, 'Extending Reasonable Adjustments: A Renewed Tool for Creating Inclusive Workplaces?', 49(2) Melbourne University Law Review (2026) (forthcoming).

168. S 19 contains the full list of protected grounds of discrimination.

169. S 24(1).

170. A. Blackham, 'Extending Reasonable Adjustments: A Renewed Tool for Creating Inclusive Workplaces?', 49(2) Melbourne University Law Review (2026) (forthcoming).

### Extending the personal scope of the effective adjustment duty

In terms of extending the personal scope of the duty, it is worth noting that the reasonable accommodation duty was originally applied in the context of religion in the United States,<sup>160</sup> and only later extended to cover persons with disabilities.<sup>161</sup> Similarly, the Canadian Supreme Court has held that employers are under a duty to accommodate the religious beliefs of employees up to the point of undue hardship.<sup>162</sup> Adjustment duties have also been extended to protect persons with caring responsibility in other jurisdictions, and both the French Labour Code<sup>163</sup> and the Equal Opportunity Act 2010 (Vic)<sup>164</sup> in the Australian state of Victoria create duties for employers to make reasonable adjustments for persons with caring responsibilities.<sup>165</sup>

The concept has also been applied even more broadly in Canadian jurisprudence in the 1999 judgment of *Meiorin*.<sup>166</sup> It is not possible to explore all elements of the 'Meiorin test' here, but it is important to note that the Supreme Court held that, in order to avoid a finding of discrimination, an employer has to show that any impugned standard is reasonably necessary, meaning it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.

Two Australian jurisdictions, the Northern Territory (NT) and the Australian Capital Territory (ACT), have extended the reasonable adjustment duty to cover all grounds covered by non-discrimination legislation.<sup>167</sup> Under s 24 of the Anti-Discrimination Act 1992 (NT), the duty to accommodate applies to all 24 protected grounds<sup>168</sup> under the statute and amounts to an obligation to 'reasonably accommodate a special need that another person has because of an attribute'.<sup>169</sup> Blackham criticises this framing of the duty because it frames an individual's 'needs and the adjustment as exceptional'.<sup>170</sup>

Moreover, following the Anti-Discrimination Amendment Act 2022 (NT), the duty to eliminate discrimination has been amended to become a positive obligation.<sup>171</sup> The duty therefore requires duty bearers to 'take reasonable and proportionate measures to eliminate ... discrimination', meaning that they are required to be proactive in identifying and addressing potential risks of discrimination, including with regard to reasonable adjustment duty. The NT Anti-Discrimination Commissioner is empowered to investigate compliance with the positive duty.<sup>172</sup>

In ACT, following changes introduced by the Discrimination Amendment Act 2023 (ACT), the duty to make 'reasonable adjustments' now also encompasses all 24 protected grounds or attributes and involves an obligation 'to accommodate another person's particular needs arising from a protected attribute'.<sup>173</sup> Blackham summarises the duty in the following way: 'it creates a positive duty, as a stand-alone right, which relates to all

protected characteristics, and creates a presumption that an adjustment is reasonable unless it creates unjustifiable hardship'.<sup>174</sup>

Blackham, referring to the work of Gaze and Smith, argues that extending the reasonable adjustment duty to all grounds covered in non-discrimination legislation could 'be transformative ... so long as the individual requesting the adjustments is not seen as 'merely different and deficient', but instead entitled to equality'.<sup>175</sup> She notes that this 'might help to shift norms in the workplace, and to de-stigmatise requests for reasonable accommodations'.<sup>176</sup> Such an expansion of the duty would therefore potentially not only benefit members of groups who are currently excluded from claiming an adjustment, but also benefit persons with a disability or chronic illness, who already have this right, in that it could help to 'normalise' the requesting of an adjustment and no longer render the provision of an adjustment 'special' treatment confined to persons with disabilities.

## Extending the reasonable adjustment duty to all grounds could be transformative – if claimants are seen not as deficient, but as entitled to equality.

Blackham also argues that the extension of the protected grounds must go hand in hand with the establishment of a 'proactive' – or anticipatory – reasonable adjustment duty. She argues:

Extending the duty to make reasonable adjustments to all grounds is (...) only desirable if the duty advances substantive equality, and embeds a positive and proactive approach to advancing equality. These two reforms – to extend the relevant grounds, and to reframe the duty as a positive means of advancing substantive equality – should go hand in hand.<sup>177</sup>

This overview reveals there is clearly precedent for extending the duty to cover more, or indeed, all groups / grounds which are protected under non-discrimination law and also indicates different ways of achieving this, and it is recommended that the duty under Dutch equality law is similarly extended. A modest extension of the effective adjustment duty would involve covering persons with caring responsibilities (in the context of employment) and religious believers, but more radical approaches, including extending the duty to all groups or grounds covered by Dutch anti-discrimination law, are also possible. Even in the case of a broad extension of personal scope, the effective adjustment duty could still usefully be complimented by specific measures, for example regarding working time, which give enumerated rights to specific groups, such as single parents or carers in specific situations.

- 171. S 18B. Inserted by s 9 of the Anti-Discrimination Amendment Act 2022 (NT). Dominique Allen, *A New Approach to Australia's Sex Discrimination and Labour Laws is Designed to Improve Equality for Women at Work*, *Industrial Law Journal*, Vol. 52, No. 4, December 2023, 956 at 965.
- 172. S 18C(1).
- 173. Discrimination Act 1991 (ACT) s 74(1). Inserted by s 30 of the Discrimination Amendment Act 2023 (ACT).
- 174. A. Blackham, 'Extending Reasonable Adjustments: A Renewed Tool for Creating Inclusive Workplaces?', 49(2) *Melbourne University Law review* (2026) (forthcoming).
- 175. A. Blackham, 'Extending Reasonable Adjustments: A Renewed Tool for Creating Inclusive Workplaces?', 49(2) *Melbourne University Law review* (2026) (forthcoming), referring to Beth Gaze and Belinda Smith, *Equality and Discrimination Law in Australia: An Introduction* (Cambridge University Press, 2017) at 168.
- 176. A. Blackham, 'Extending Reasonable Adjustments: A Renewed Tool for Creating Inclusive Workplaces?', 49(2) *Melbourne University Law review* (2026) (forthcoming).
- 177. A. Blackham, 'Extending Reasonable Adjustments: A Renewed Tool for Creating Inclusive Workplaces?', 49(2) *Melbourne University Law review* (2026) (forthcoming).

**Summary:**

- Other jurisdictions extend the right to a reasonable accommodation to specific groups, e.g. followers of religions, persons with caring responsibilities, or all groups / grounds protected under equality law.

**Recommendation:**

- Amend Dutch equality law to extend the personal scope of the effective adjustment duty.

**5. Recommendations**

This section summarises the key recommendations made in this pre-advisory paper.

**5.1 Recommendations which can be implemented within the current Legal Framework****Positive Action**

Interpret the existing provisions on positive action, and in particular the proportionality requirement, more leniently so that actors have more freedom to engage in positive action in the area of access to goods and services.

**Effective Adjustment**

Maintain the reactive effective adjustment duty alongside the newly established anticipatory duty (see below) for those cases in which the required adjustments could not have been foreseen and put in place in advance, or where the anticipatory duty was not complied with.

Courts and the NIHR find a failure to comply with the effective adjustment obligation duty in cases in which a barrier results from a failure by the duty bearer to comply with accessibility legislation or standards. This would be done as a matter of interpretation.

**5.2 Recommendations which require small change to the current legal framework****Positive Action**

Priority recommendation: Amend the positive action provisions with a view to allow positive action directed at all genders rather than only women.

Amend the positive action provisions to enable positive action directed at groups defined by age, religion and belief or sexual orientation. The legislator should moreover clarify that intersectional approaches in addressing systemic disadvantages of these groups are legitimate.

**Effective Adjustment**

Amend the WGBH/CZ to establish that non-compliance with accessibility legislation or standards beyond public transport constitutes a form of discrimination.

Amend the WGBH/CZ to confirm that a failure to comply with the existing effective adjustment obligation and the anticipatory effective adjustment duty (see below) exists in cases in which the barrier results from a failure to comply with accessibility legislation or standards.

### 5.3 Recommendations which require systematic change / legal reform

#### Positive Action

Introduce a duty to engage in positive action in the area of employment and occupation for employers of a certain size.

#### Effective Adjustment

Priority Recommendation: Establish an anticipatory effective adjustment duty which requires duty bearers to anticipate commonly required adjustments and make these in advance of receiving a specific request for the adjustment from an individual. This should apply to the full scope of the WGBH/CZ.

In order to ensure that extended duty is effective:

- The duty must be clearly formulated in the legislation.
- Steps must be taken to raise awareness of the new duty.
- Practical guidance must be issued on how to comply with the new duty.
- The (proposed anticipatory) effective adjustment duty should be expanded to cover more, or all, groups protected under Dutch non-discrimination law.

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