

# Executive summary

## Research goals and design

This research was initiated in response to questions by the Dutch Permanent Parliamentary Committee on Justice in February 2006, on the use of criminal law in combating discrimination. The Committee was concerned on the one hand with those forms of discrimination which constitute specific criminal offences in the Criminal Code (articles 137c ff, penalising certain utterances and expressions considered discriminatory), and on the other with any crime (penalised under the general provisions of the Criminal Code, such as assault) for which the motivation is rooted in bias towards the victim. In this report, these two types of criminal discrimination are referred to as *specific discrimination* and *common criminal discrimination* respectively. Such crimes take place on an incidental basis. The other form of discrimination criminalised under Dutch law is structural, and occurs in the context of professions and businesses (e.g. a discotheque that systematically refuses entry to coloured people or a firm that advertises for men only); it was included in this research, but not treated as a separate problem.

The research covers the years 2000-2005 and is aimed at examining the way in which the Public Prosecution Service and the courts deal with discrimination under the criminal law, and whether their actions have any effect on recidivism. At the same time it looks at what insights can be gained from literature from abroad. The primary research questions were the following:

- 1 How often, in the years 2000-2005, did the Prosecution Service take a decision and did the courts pronounce a conviction regarding specific discrimination?
- 2 How often, in the years 2000-2005, did the Prosecution Service take a decision and did the courts pronounce a conviction regarding common criminal discrimination?
- 3 Which sanctions – of which type and severity – did the courts impose in criminal cases and what were their reasons for so doing?

- 4 If a community service order was imposed, did it bear any relationship to the discriminatory offence?
- 5 Are there directives, guidelines or written considerations upon which prosecutors base their demand for sentence and courts the sentences they pass?
- 6 Do prosecutors settle discrimination cases out of court, and for what reason?
- 7 What can be said about the characteristics of the perpetrators of discriminatory offences?
- 8 What is the degree of recidivism after conviction for a discriminatory offence?
- 9 What is the relationship between the type and severity of imposed sanctions, offender characteristics and repeat offending?
- 10 What can be learned from literature from other countries regarding (the effectiveness of) sanctions in cases of hate crime/discrimination?

Early on during this research, it became obvious that discriminatory crime is not an unambiguous concept. This applies especially to common criminal discrimination for which there are no separate and specific provisions in the Criminal Code, while the definition of what constitutes a crime motivated by bias towards the victim is a much debated and contested matter. Decisions taken by the Prosecution Service and by the courts cannot be understood unless there is a clear idea of what discriminatory crime means in the practice of criminal justice. For that reason, the research also came to focus on the conceptualization of discriminatory crime. Moreover, our study of the literature showed that the police play an essential role in the definition (and therefore registration) of discriminatory crime, and we decided to include decision-making by the police before cases reach the Prosecution Service and the courts. This led to three extra research questions:

- 11 How do the police see their role in combating discriminatory crime and on the basis of which considerations do they decide to officially record a discriminatory offence?
- 12 Which criteria do police officers, prosecutors and judges apply in determining whether a criminal offence has been committed with a discriminatory background or while motivated by bias towards the victim?
- 13 How do these professionals in the criminal justice system regard the role of criminal law as a means of combating discrimination?

## Sources and methods

Discriminatory crime is not an easy subject to research, not only because of a lack of common understanding as to what the concept means, but also because sources of information are scattered and incomplete or even lacking altogether, especially with regard to common criminal discrimination which is not recorded separately as such. Consequently, the results of this research, obtained from disparate sources, had to be continually compared and the methodology refined in order to achieve a coherent picture of discriminatory crime and how it is dealt with under criminal law.

This is not without its consequences for the representativity of both sources and results. As far as specific discrimination is concerned, the results are based on statistics kept by the Prosecution Service and can be said to be representative of the general situation in the Netherlands with regard to decision-making by the prosecution and the courts, and the sanctions imposed. Other data, including that concerning the more qualitative research questions, were derived from the examination of court cases in five district courts, the results of which reinforce the general picture.

The lack of relevant data means that it is impossible to present an overall and representative picture of common criminal discrimination. There are no national statistics, and our examination of court files on these offences was, of necessity, highly selective. The results are therefore merely indicative of the extent and nature of the problem, although our conclusions are supported by data obtained by other methods, including a questionnaire sent to the prosecution service and individual interviews and group-conferences with police officers, prosecutors and judges (36 persons in total). We would emphasise that the results obtained by these methods are based on ideas voiced during these interviews and conferences which are the personal opinions of the participants, but that they are nevertheless mutually reinforcing and are also supported by other results of this research.

On the basis of the available sources, we were unable to find an answer to our questions (8 and 9) as to the degree of recidivism after a conviction for a discriminatory offence on an individualised basis.<sup>1</sup> It was however possible to examine the general national picture at an aggregate level and to record previous convictions from the court files.

The results of this research concerning *specific discrimination* are based on the following sources:

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<sup>1</sup> Processing the necessary statistical data turned out to be so time-consuming that we were forced to forego this part of the research.

- Prosecution statistics, with the addition of so-called discrimination registration codes (DRC-codes) as used by the National Centre of Expertise in Discrimination of the Dutch Public Prosecution Service (LECD: *Landelijk Expertise Centrum Discriminatie*);
- Reports by the LECD;
- A national survey on recidivism (1997-2003) after conviction for specific discrimination by the *Recidive Monitor* of the Research and Documentation Centre (RDC) of the Dutch ministry of justice;
- Examination of 229 court cases at five district courts (Amsterdam, Arnhem, Breda, Rotterdam, The Hague);
- Interviews and group conferences with police officers (14), specialised prosecutors (15) and judges (7);
- The ‘Discrimination Handbook’ written by the LECD to assist prosecutors in dealing with discrimination;
- (Inter)national literature;
- Case law.

The results concerning common criminal discrimination are based on:

- Prosecution statistics on 91 cases that had originally been earmarked as discriminatory by a member of the Prosecution Service;
- Examination of the court files on these 91 cases in five district courts (Amsterdam, Arnhem, Breda, Rotterdam and The Hague);
- LECD-newsletters;
- A questionnaire sent to prosecutors and prosecution clerks in 19 districts;
- Interviews and group conferences with police officers (14), specialised prosecutors (15) and judges (7);
- (Inter)national literature.

### **Insights from the literature**

In contrast to the Netherlands, there has been much work on discriminatory offences in other countries, both theoretical and empirical, and this provided an important source of knowledge for this research. One of the questions repeatedly asked in literature from abroad is what the concept discriminatory crime, often referred to as hate crime, actually means. The latter term was coined in the United States, but is increasingly used in European countries, including the Netherlands. Adopting this terminology, however, should be avoided. The concept of ‘hate crime’ differs from what the Dutch understand by ‘discriminatory crime’. In the United States, criminalisation of specific discrimination as occurs in the articles 137c ff of the Dutch Criminal Code is impossible, due to the overriding values of free speech embodied in the US Constitution. Common criminal discrimination

does overlap with hate crime, to the extent that both concepts refer to the subjective, discriminatory motives of the offender as the basis for criminalisation and not to (the subversive effects of) an objective and discriminatory public discourse. But that is precisely one of the reasons why we should avoid the term hate crime.

It is associated, first and foremost, with serious and often spectacular incidents of violent crime. This however diverts attention from the far greater number of everyday offences that are committed from discriminatory motives, and from their impact on a peaceful pluriform society. Authors from the US have suggested that bias crime is a more neutral and therefore better concept. But that too refers to criminalisation on the basis of the offender's subjective motives. Not only is there the practical question of how we are to know what those motives are, there is also a more fundamental consideration: does a discriminatory motive justify extra blameworthiness? During our group conferences doubts were expressed on this very issue.

### **Nature and extent of specific discrimination in the Netherlands and the official reaction under criminal law**

The quantitative aspects of specific discrimination are of a different order. It should be noted that there is no way of knowing from our research how much criminal discrimination actually takes place: data regarding the prosecution and sentencing of discriminatory offences says nothing about how many never reached the prosecution stage at all. The results of this part of the research project concern the way in which the prosecution service and the courts deal with specific discrimination.

#### *National data for the years 2000-2005*

In the period between 2000 and 2005, the Public Prosecution Service issued 803 summonses – on average 58% of the 1453 specific discrimination offences that came to the attention of the prosecutors. On average, the prosecution was dropped in a good 20% of cases, and 16% were settled out of court by means of a prosecutor's fine (so-called 'transaction'). Overall, the number of transactions rose considerably (though inconsistently) over the years from 9% in 2000 to 15% in 2005. The reverse is true for the number of prosecutions dropped (in a great majority of cases for lack of proof): 30% in 2000 and 20% in 2005.

Each year, the courts convicted in between 93 and 118 cases of specific discrimination, with on average about 9% overall acquittals. Community service orders seem to be gaining in popularity, somewhat at the expense of fines and custodial sentences.

*Cases from five districts in the years 2000-2004<sup>2</sup>*

The sentences demanded by the prosecutors are discussed here in connection with sentences imposed. We can however note that prosecutors requested that a community service order be imposed in 29% of the cases, but that no recommendation was made for community service that bore any relationship to the discriminatory aspects of the offence.

About three quarters of all cases end in convictions, and 15% in acquittals – either overall or partial acquittals for the discriminatory offence.<sup>3</sup> Sanctions include fines in 40% of the cases; these are relatively light: 70% of all fines were less than € 500.<sup>4</sup> Almost a quarter were imposed conditionally.

A similar picture arises for custodial sentences. Here too we see about 40% relatively short custodial sentences: in almost half of the cases less than 30 days and in more than a quarter between 30 and 90 days. Almost two thirds of all custodial sentences were imposed conditionally (or as partially conditional sentences).

Community service orders (sometimes in combination with other sanctions) were imposed in 32% of the cases, slightly more frequently than requested by the prosecutor.<sup>5</sup> None of these bore any relation to the discriminatory aspects of the offence. It should be noted with regard to the type and severity of the sanction, that more than half of all cases concerned specific discrimination in combination with other criminal offences, so that sanctions do not necessarily reflect a reaction to the discriminatory offence. Sanctions imposed by the court by no means always conformed to the prosecutor's demand. Conformity was found in 40% of the cases, although this includes acquittals demanded by the prosecutor. The courts imposed less severe sanctions than demanded in 33% of cases, and were more severe in 14%. Other deviations concern *i.a.* acquittals when the prosecution considered the case proved.

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2 The research period was shortened to accommodate for files that were unobtainable due to appeal proceedings or other administrative matters.

3 This is much higher than the percentage found nationally by the LECD. The discrepancy is explained by different means of registration (see Chapter 4, § 4.1.4 of the full report).

4 Compared with the national survey by the Recidive Monitor: between 1997 and 2003 fines were imposed in more than half of all cases of specific discrimination; see Appendix 1, table 2.

5 The Recidive Monitor found about community service orders imposed in about 15% of all cases nationally. The discrepancy is due to the difference in research period (1997-2003); see Appendix 1, table 2.

*Offender, offence and context characteristics of specific discrimination*<sup>6</sup>*Offence characteristics*

The great majority of offences concerned discriminatory utterances or other expressions (articles 137c ff CC), with only 6 cases involving other forms of discrimination. Written material occurred in only 4% of all cases. A possible explanation for the low frequency of discrimination in professions and business – especially exclusion from cafes, restaurants, discotheques etc. – is underreporting by victims and/or a policy of dealing with such offences though administrative rather than criminal law.

In 70% of specific discrimination cases, the prosecution was founded on the discriminatory offence only – mostly verbal discrimination. The other cases also involved violence or threats of violence, usually directly connected to the discriminatory offence and prosecuted in combination.

The most frequent context (slightly less than one third of all cases) in which specific discrimination occurs is a conflict between citizens. This is followed by a conflict with authority (24%): the victim – the representative of authority – uses his or her powers against the offender who, in frustration, resorts to verbal abuse. It usually goes no further, and 70% of conflicts with authority concern verbal discrimination only. Specific discrimination rooted in ideological conviction was found in 14% of all cases, as were offences committed ‘out of the blue’, therefore for no apparent reason. Specific discriminatory language was also found to occur during football matches: in 7% of cases, 70% of which concerned anti-Semitic utterances. A small number of offenders (2%) were substance addicts or psychologically disturbed and, often under the influence of alcohol, simply ran amuck in public by using offensive discriminatory language.

The most salient characteristic of specific discrimination is its racist nature. In more than half of the cases studied, skin colour or ethnic origins formed the grounds for the offence. Anti-Semitism occurred in 22% of cases, and homophobic utterances in 3%. The latter may not, however, be taken to mean that homophobia is unusual in the Netherlands, because homosexuals form a group of victims noted for their reluctance to report incidents to the police.<sup>7</sup>

In relation to the most frequent context-category, conflict, there is a strong relationship with the victim’s Turkish or Arab origins, or skin colour (approximately two thirds of all cases in the conflict category). The same

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6 Although we use the term offender, this includes those acquitted of the offence.

7 Discrimination against homosexuals is often disguised as common crime (assault, robbery) and is therefore a form of common criminal discrimination. Whether or not it can be treated as such depends on the victim’s willingness to reveal his/her sexual preference when reporting the crime to the police.

applies to conflicts with authority: here too the background to the offence was the 'different' appearance of the victim – more often than not a police officer.

More than half of all specific discriminatory offences take place in the street or in other public venues. This is followed by offences in the neighbourhood of private houses, for example the doorway or stairwell (15%); in these cases violence is significantly more frequent, and the same applies in situations of conflict. This could indicate that conflicts between neighbours are more likely to end in violence. Substance use, usually alcohol, was a factor in almost half of all offences, while a quarter were committed in a group-setting; here too there is a relationship with violence and substance use. And finally, victims played a part in the offence in only 10% of cases.

#### *Offender characteristics*

The perpetrators of specific discrimination are predominantly young, with more than half 25 years of age or younger and the largest group being formed by those between 18 and 25. Men formed 90% of the offender population in the cases studied. More than 80% were of Dutch ethnic origin and more than 90% were born in the Netherlands.

The type of offence that these perpetrators commit varies with their age. There is significantly more variation in the context of offences committed by young people and they are also more likely to commit offences from ideological conviction or simply out of the blue. Older offenders seem less likely to be 'bent on discrimination', and more likely to react angrily to conflicts by using offensive discriminatory language. There is also a significant relationship between young offenders and the great variety of grounds on which the discrimination is based, and between older offenders and discrimination against victims of Turkish or Arab nationality/origin. The latter is linked to the relationship between older offenders and situations of conflict in which the (ethnic) appearance of the victim is used as a means of causing him or her offence.

Offenders with a criminal record were found in 65% of cases, but there was rarely a history of specific discriminatory offences (6%). The latter appears to occur only in cases of ideological offending. This picture of an offender population with a criminal history not related to discrimination is reinforced by the results of the recidivism survey by the *Recidive monitor*. In offences committed in the context of a conflict with authority, the offender was most likely to have a criminal history of specific discrimination. And finally, none of the offenders were police officers.

To sum up: the typical offender in cases of specific discrimination is young, male and of Dutch origin and has a criminal history. He is slightly more likely to re-offend than the general offender population but differs in

no other respect.

### **Nature and extent of common criminal discrimination in the Netherlands and the official reaction under criminal law**

We have already noted that the lack of data make it impossible to paint an overall picture of the nature and extent of common criminal discrimination in the Netherlands, or of the official reaction to it under the criminal law. The following is based on a study of 91 cases in five district courts, in which a member of the Prosecution Service (usually a prosecution clerk) originally earmarked the case, using an electronic system, as being one in which discrimination played some part. Common criminal discrimination most frequently takes the form of a common criminal insult. Offenders of specific discrimination are often charged simultaneously with criminal insult in order to avoid possible problems of proof, and insult is often an accompanying offence to other common offences such as assault, as it frequently forms proof of their discriminatory nature. As a result, we found criminal insult in many of the cases we studied anyway. We therefore concentrated on the next most frequent types of common criminal discrimination: public violence (article 141 CC), threatening violence (article 285 CC) and simple assault (article 300 ff CC). All in all this selection concerns less serious offences, although their effect on the victim may be severe. The available data does not contain any registration of serious common criminal discrimination such as manslaughter, murder or arson; as far as such offences are concerned, our conclusions are based on secondary sources.

Before we present our results, we would emphasise again that there are no legal criteria for the determination of the discriminatory nature of a common criminal offence. This is a matter that depends on the (subjective) definition of the incident by others: the police, the prosecution and the courts. During this research, representatives of these bodies stressed that they do not simply go by their 'gut feeling', even though the discriminatory nature of an offence does not need to be proved and is a matter of conviction that plays a part in sentencing. The case file itself must contain sufficient indications to justify labelling an offence as common criminal discrimination. Such indications are found in offensive discriminatory language, sometimes in combination with gestures or other signs, the victim's characteristics (skin colour, mode of dress) or offender characteristics (mode of dress, criminal past). A good deal of importance is attached to whether discrimination arises from 'ignorance or stupidity', or from 'ideological motives'. However, all of this is not to say that such indications are always interpreted in the same way. On the contrary, in practice there are real differences of opinion.

### *Offence, offender and context characteristics of common criminal discrimination*

#### *Offence characteristics*

Much of what has already been said on specific discrimination also applies to common criminal discrimination. Here too we see most common offences with discriminatory aspects in conflict situations (72%), with two thirds of these involving incidental arguments or conflicts of some duration between citizens, and one third conflicts with authority. However, only one case pertained to discrimination based on ideological conviction.

Common criminal discrimination is also most likely to be racially motivated, with discrimination because of skin colour (more than a third of all cases) or ethnic origin (Turkish/Arab: a quarter of all cases). If we include discrimination on religious grounds (usually Islam, often coinciding with race: 22%), then we see that three quarters of common criminal discrimination is racially motivated. Only a few cases were concerned with anti-Semitism or homophobia (4 in each category).

Common criminal discrimination usually occurs in the street (59%), with one in five cases in the neighbourhood of private housing and one in eight in a restaurant, bar or discotheque, etc..

Such cases also resemble specific discrimination in their violent aspects, although the offences studied mean that violence was present always a factor: however, in 40% it was restricted to the threat of violence. In the category of conflicts with authority, 75% of the cases went no further than a threat. In two thirds of the cases studied the offender was under the influence, usually of alcohol, and was part of a group in 40%.<sup>8</sup> And again, only in one in ten cases could the victim be said to have played a part.

#### *Offender characteristics*

We found no offenders from the age category 12-18, a group that does occur among perpetrators of specific discrimination. Common criminal discrimination offenders are predominantly between 18 and 25, and 26 and 35 (both categories 35%), which makes the typical offender for this type of offence slightly older than offenders in specific discrimination cases.

Other offender characteristics however are very similar: the majority of offenders are male, of ethnic Dutch origin, with the great majority (75%) having a criminal history of minor offences, often for the same type of (violent) offence, although it was impossible to determine whether these had involved discriminatory factors in the past. Neither had any of the

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<sup>8</sup> In a quarter of the cases in which the offender was part of a group, he/she was charged with public violence, an offence that can only be committed by a group.

offenders been convicted of specific discrimination in the past. And finally, here too none of the offenders were police officers.

#### *Serious common criminal discrimination*

Our study of court cases concerned relatively minor offences. Serious offences such as (attempted) arson, manslaughter, murder and assault resulting in serious injury, are not assessed and registered through the electronic system and did not therefore occur in our sample. The LECD however regularly issues a newsletter that includes case law pertaining to discriminatory crime. Of the 174 cases published in this way, approximately 7.5% concerned serious violence: attempted manslaughter, serious assaults and (attempted) arson.<sup>9</sup> The foreign literature also indicates that the number of serious cases that are defined and prosecuted as common criminal discrimination (serious violent hate crime) is small compared to more minor offences. It may well be that the dark number here is smaller too. During our group conferences prosecutors remarked that there is a risk that, in cases of serious crime, the discriminatory background may well be overshadowed by the seriousness of the violence so that the case is no longer recognised as discrimination. However, published case law shows that in those cases in which discrimination is seen to have played a part, both prosecutors and judges take that factor extremely seriously.

#### **The criminal law and discrimination<sup>10</sup>**

On what legal framework, including guidelines and directives, do prosecutors and courts base their considerations in dealing with discriminatory offences? Here we must distinguish between specific discrimination and common criminal discrimination. The former is governed by the law (articles 1 and 90*quater* of the Dutch Constitution and articles 137 ff and 429*quater* of the Criminal Code). In addition, the board of procurators-general (heads of the Prosecution Service) has produced a Discrimination Directive and guidelines for sentencing. There are no other regulations.

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9 We disregarded twelve cases that occurred more or less immediately after the murder of the Dutch journalist and film director Theo van Gogh, which seem to have been exceptional and therefore distort the overall frequency of such serious offences. The LECD Newsletter 2005-2 contains an extensive discussion of the anti-Muslim violence after the murder (p.17-20). Reports by the Monitor Racism and Extremism and periodic reports by other organisations also contain data on serious forms of common criminal discrimination, but their definition of the phenomenon differs from ours and we were unable to use those results in this research (see Research report Chapter 5, § 1.2). It may however be noted that these sources also seem to point to serious offences being the great minority.

10 See for an extensive description: Chapter 3 of the Research report.

There is no specific legal framework for common criminal discrimination, at least not for its discriminatory aspects. It is simply dealt with under the relevant articles of the Criminal Code that govern the offence through which it manifests itself. For these cases, at least as far as the relatively minor offences are concerned, there are also sentencing guidelines from the procurators-general that require a prosecutor to demand a 25% enhancement of sentence if discriminatory factors play role in the offence. Although not specifically stipulated anywhere, whether that is the case depends on whether the offence was committed for one the reasons that determine specific discrimination in articles 137 ff and 429*quater* CC (race, religion, sexual preference, physical or mental handicap). There are no other regulations or written considerations.

Finally, the national legal framework is influenced by international regulations.<sup>11</sup> In the Netherlands, national regulations meet the international standard, although until recently overall registration of discriminatory offences has been sorely lacking. At the end of 2005, the government announced measures concerning electronic police registration and monitoring systems; together with prioritisation of police activities, these are aimed at improving the registration of discriminatory crime.

### **Opinions in the field**

We have already pointed to problems in the definition of common criminal discrimination, and also remarked that, despite an apparently unambiguous legal framework, specific discrimination is not entirely free of such definitional complications. In order to gain more insight into the definition of criminal discrimination – most especially the common variant – we organised a number of group discussions with the police (two groups), the prosecution service (two groups) and judges (one group). In preparation, we also conducted six individual interviews with representatives from each organisation. Although we would stress again that the results reflect the opinions of the individual participants and cannot be regarded as representative of ‘the’ police, ‘the’ prosecution service or ‘the’ courts, they are not only mutually reinforcing but are also supported by results obtained from other sources.

The participants contend that criminal discrimination is not a clearly delineated concept and that the burden of proof is complex, a problem that also relates to lack of expertise in the different organisations. They confirm the impression that the way in which discriminatory crime is dealt with

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11 See for an extensive description: Chapter 3, § 3.1 of the research report.

under the criminal law, strongly depends on the perspective of the law-enforcement official regarding the blameworthiness of the behaviour and on his/her expertise.

The picture of common criminal discrimination painted by these participants corresponds to the findings from our study of court cases. They see racism as the most common characteristic, prompted by the visible characteristics of the victim. At the same time they warn that this is relative, given the coarsening nature of everyday language and behaviour, especially among and between young people. This need not point to the type of ideological mindset required for the label 'discrimination'.

The research distinguishes between three different perspectives in determining the blameworthiness of discriminatory behaviour: the moral perspective (blameworthiness derives from the baseness of the offender's discriminatory motive), the victim perspective (blameworthiness derives from the damage done to the victim) and the communitarian perspective (blameworthiness is based on the desire to protect a pluralistic society from the undermining aspects of discrimination). During the group conferences only the latter two perspectives were acknowledged; there was little or no support for the moral perspective. However, as well as the perspective of the individual police officer, prosecutor or judge in assessing the blameworthiness of certain behaviour, the discretionary scope in dealing with criminal discrimination that law enforcement officials believe they have, also plays a part.

Here opinions among police officers and prosecutors diverge, with the police – despite the rules of the Discrimination Directive that require them to record and pass on to the prosecutor any suspected case of discrimination – claiming room to deal with discrimination by other means than the criminal law; this applies especially to cases in which 'people will have to get on with each other in future'. A number of prosecutors disapproved of this type of autonomous police action, or rather, they thought it necessary to have some sort of control over what the police do in discrimination cases. At the same time, prosecutors disagreed among themselves on the interpretation of the Discrimination Directive that requires them to prosecute discrimination as a matter of principle, and to diverge from prosecution in very minor or exceptional cases only. Some specialised prosecutors were of the opinion that they must be able to weigh the expediency of prosecution against other factors, while for others that expediency is a given considering the principles set out by the procurators-general.

Both the police and the prosecution recognise the lack of expertise within their own organisation, but also stress that a heavy caseload – in combination with the complex nature of discrimination cases – contributes to a lack of recognition of discriminatory crime.

In addition, judges do not appear to have much experience in dealing with common criminal discrimination. Like the prosecutors, they do not go by gut feelings and require sufficient indications in the case file. The only thing a judge can do, is take discriminatory aspects into consideration at sentencing (discrimination does not have to be proved as part of the offence). Where this occurs, it is translated into a certain type of sanction, for example a community service order or an enhanced but conditional 'extra' component of the sentence. This is not fuelled by any moral consideration: judges attempt to assess whether the offender seems 'slow to learn' the offensive nature of his actions, and whether there is a danger of re-offending.

In general, the participants at the group conferences were inclined to doubt whether criminal law is effective in combating criminal discrimination. While they all recognised a symbolic effect in (enforcing) the criminal law they questioned the strength of the signals it sends out in times in which generally offensive language and behaviour seem to be accepted. They did express a need for community service orders specifically geared towards the discriminatory aspects of an offence, but stressed that the discriminatory motive must be clear and unambiguous; otherwise such sanctions could have a contrary effect.

### **In conclusion**

In the above, we stressed the exploratory nature of this research. We were able to answer many, but not all, of our research questions. Nevertheless, the results obtained from the different sources are mutually reinforcing, and combine to produce a picture of the nature and extent of criminal discrimination in the Netherlands and of the way in which the criminal law is used to deal with it. Further research is clearly necessary and the research report contains a number of suggestions on what that could entail.<sup>12</sup>

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<sup>12</sup> See Chapter 7, § 7.7.