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# Country report

## Non-discrimination

Norway

2017

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# **Country report**

# **Non-discrimination**

# **Norway**

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Reporting period 1 January 2016 – 31 December 2016

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## EXECUTIVE SUMMARY

### 1. Introduction

Norway is a relatively homogenous country with approximately 5.2 million inhabitants. There are 698 550 immigrants in Norway and 149 600 people born in Norway with immigrant parents. These two groups constitute approximately 16.3 % of the total population. There are 538 000 persons with non-Norwegian citizenship living in Norway.<sup>1</sup> The Sami people are the largest indigenous group of people in Norway, and constitute between 50 000 and 65 000 people. Other national minorities include Jews (approximately 1 100 people), Kvens/ people with Finnish descent (approximately 10 000-15 000 people). There are approximately 700 persons who belong to the traditional group of Roma people. No exact figure is available for *Romani* (travellers) in Norway, but estimates put the number at around a few thousand people.<sup>2</sup>

About 72.9 % Norwegians are members of the Norwegian protestant church,<sup>3</sup> the other religions groups of a certain size are Islamic associations, the Roman Catholic church and the Pentecostal church.<sup>4</sup> Figures found in official statistics include 148 189 people belonging to Islam, 349 083 'other' Christians (that is Christians not belonging to the Norwegian Church), 18 817 Buddhists, and 89 758 people belonging to a belief organisation.<sup>5</sup>

Correct and reliable figures for the number of disabled people in Norway are difficult to find. The National Health Survey of 1985 estimated that 479 000 people between 16 and 67 years were disabled. Additionally there are 41 000 disabled people under 16 years, and 292 000 people over 67 years. The estimate corresponds to a percentage of disabled at 18.8 % of the population and working age (16-66 years).<sup>6</sup> A recent survey assumes that there are approximately 700 000 people over 16 years (that is 15.5 % of the population), who have some kind of reduced functional, psychological or cognitive ability.<sup>7</sup> The official employment statistics give a figure of 636 000 employable persons with a disability (i.e. approximately 10 % of the total population), although only about 282 000 are in fact employed.<sup>8</sup>

Out of a population of 5 213 985, 744 696 persons are 66 years or older.<sup>9</sup> No reliable official figures on sexual orientation exist, although it is assumed that about 3-5 % of the

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<sup>1</sup> As of 20 October 2016, see Statistics Norway at <http://ssb.no/innvandring-og-innvandrere/nokkeltall/innvandring-og-innvandrere> (In Norwegian, accessed 19.01.2017).

<sup>2</sup> Statistics from Statistics Norway and the Government action plan to promote equality and prevent ethnic discrimination 2009-2012.

<sup>3</sup> See [https://www.ssb.no/kultur-og-fritid/statistikker/kirke\\_kostra/aar/2016-05-04](https://www.ssb.no/kultur-og-fritid/statistikker/kirke_kostra/aar/2016-05-04) as per 4 May 2016 (in Norwegian, accessed 19.01.2017).

<sup>4</sup> See <http://www.ssb.no/kultur-og-fritid/artikler-og-publikasjoner/norge-et-sekulaert-samfunn> (In Norwegian accessed on 19.01.2017). Religious affiliation is not registered officially through national statistics, thus the numbers are based on information about membership given by each religious group themselves.

<sup>5</sup> According to figures from Statistics Norway stating members of religious and belief associations outside the Norwegian (protestant) church according to membership funding by the State as of 25.11.2016, see <http://www.ssb.no/kultur-og-fritid/statistikker/trosamf> (In Norwegian accessed on 19.01.2017). A complete membership list for each organisation outside the Norwegian church according to the State membership funding annually is found on the webpage of the Ministry of Culture, <https://www.regjeringen.no/no/tema/religion-og-livssyn/tros-og-livssynssamfunn/innsiktsartikler/antall-tilskuddsberettigede-medlemmer-i-/id631507/> (accessed 19.01.2017).

<sup>6</sup> See Norwegian Official Report NOU 1998:18 'Det er bruk for alle' (*All are useful*) chapter 9.6.5.

<sup>7</sup> See report from Statistics Norway 'På like vilkår? Helse og levekår blant personer med nedsatt funksjonsevne' (*On equal terms? Health and life conditions among people with reduced ability*), at [http://www.ssb.no/emner/03/01/10/rapp\\_201020/rapp\\_201020.pdf](http://www.ssb.no/emner/03/01/10/rapp_201020/rapp_201020.pdf) (accessed 19.01.2017).

<sup>8</sup> As per statistics from 2nd quarter, 2016 at <http://www.ssb.no/arbeid-og-lonn/statistikker/akutu> (in Norwegian, accessed on 19.01.2017).

<sup>9</sup> See annual statistics by 15.12.2016 from Statistics Norway on population, at <http://www.ssb.no/befolkning/statistikker/folkemengde> (In Norwegian, accessed on 19.01.2017).

population has a sexual orientation other than the normative heterosexual. This corresponds to roughly 240 000 persons in Norway.<sup>10</sup>

The legal system is inspired by the roman legal system, and has a three-level court system which handles both criminal and civil law. Statutory provisions (formal legislation through acts and their regulations) interpreted through the legal preparatory works and case law are the primary sources of law invoked in Norwegian courts of law and in respect of Norwegian administrative agencies—although international legislation, especially EU law, is increasingly being invoked in specific cases, including in discrimination cases.

## 2. Main legislation

Norway has ratified most of the major international instruments combating discrimination, with the notable exception of Protocol No. 12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

Since June 2014, article 98 of the Constitution reads: 'All people are equal under the law. No human being must be subject to unfair or disproportional differential treatment'.<sup>11</sup>

The Human Rights Act<sup>12</sup> incorporates a number of treaties on human rights into the domestic legal system on a general basis in which the conventions prevail over any other conflicting statutory provision.<sup>13</sup> The International Convention on Elimination of All Forms of Racial Discrimination (ICERD) is not incorporated into the Human Rights Act, but into the Anti-discrimination Act (ADA), the legal consequence being that ICERD does not prevail over other statutory provisions in case of conflict, but has to be decided through an interpretation. The UN CRPD (the Disability Convention) was ratified on 3 July 2013.<sup>14</sup> It is not incorporated into the Anti-Discrimination and Accessibility Act (AAA), and will as such be enforced 'at the same level that it is incorporated in law'.<sup>15</sup> which gives doubts as to the legal standing of the convention in national law. The Equality and Discrimination Ombudsman is responsible for the supervision of the national implementation of the convention, similar to the national supervisory system of the ICERD and the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW).

These provisions apply to all areas covered by the directives. Their material scope is broader than those of the directives. The constitutional anti-discrimination provisions are directly applicable. The constitutional equality clauses can be enforced both against State actors and private actors.

The legislative framework for anti-discrimination legislation is otherwise well developed, however difficult to access as its legislative base is derived from five general main different legislative acts, as well as found in specialised legislation.

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<sup>10</sup> According to figures given in an e-mail to the author dated 07.01.2013 from LLH - The Norwegian Lesbian, Gay, Bisexual and Transgender organisation.

<sup>11</sup> See <https://www.stortinget.no/globalassets/pdf/english/constitutionenglish.pdf> (Accessed 19.01.2017). The preparatory works to the constitutional clause: Dok 16 (2011-2012), Report on Human Rights in the Constitution from the Constitutional Committee to the *Storting* (Parliament), Chapter 6 see <http://www.stortinget.no/Global/pdf/Dokumentserien/2011-2012/dok16-201112.pdf> (Accessed 19.01.2017).

<sup>12</sup> Act Relating to the Status of Human Rights in Norwegian Law of 21.05.1999 no 30 (*Menneskerettsloven*).

<sup>13</sup> The International Convention on Racial Discrimination is incorporated in the Anti-discrimination Act (ADA), but the convention will in conflicting cases not automatically prevail. The lack of including the ICERD in the Human Rights Act has been repeatedly criticised by the NGOs working on anti-discrimination.

<sup>14</sup> See Prop. 106 S (2011–2012) Proposition to the *Stortinget* (proposal for Parliamentary resolution) on Consent to ratification of the UN Convention of 13 December 2006 on the rights of Persons with Disabilities and Prop 105 L 2011-2012 on Changes to the Anti-Discrimination Ombud's Act on the supervision of implementation of the UN Convention on the Rights of Persons with Disabilities.

<sup>15</sup> See judgment of 20 December 2016 of the Supreme Court in case number HR-2016-2591-A.



The key pieces of anti-discrimination legislation consist of the Gender Equality Act (GEA),<sup>16</sup> the Anti-Discrimination Act (ADA) covering ethnicity, religion and belief<sup>17</sup> the Anti-discrimination and Accessibility Act (AAA) covering disability,<sup>18</sup> and the Working Environment Act (WEA) covering age, political views, membership in trade unions, part-time and temporary work,<sup>19</sup> as well as specialised legislation (the Seamen's Act and housing acts). These acts were revised and aligned on 21 June 2013 upon the enactment of the Sexual Orientation Anti-Discrimination Act (SOA) covering sexual orientation, gender identity and gender expression, which came into force as of 1 January 2014.<sup>20</sup>

Sections 185 and 186 of the General Civil Penal Code (2005) contain criminal law protection against discrimination.

It is presumed that Norwegian anti-discrimination legislation is in line with the EU *acquis*. The government has committed to having as high - or higher - standards in its work against discrimination as the requirements of the EU.<sup>21</sup> However, as the non-discrimination directives (2000/78 and 2000/43) are not incorporated in the EEA agreement, the specific exceptions allowed under the directives have not been clearly articulated. This protection has been reinforced by the Supreme Court in recent judgments. In Rt-2012-424 paragraph 30, the Supreme Court underlined that 'although there is no legal commitment to incorporate the Employment Equality Directive in national law, it is according to established practice from the Supreme Court that the regulations of the Working Environment Act is to be interpreted and implemented in accordance with the Employment Equality Directive' [author's translation]. Supreme Court case Rt-2012-219 was in its content similar to the facts in the ECJ case C-447/09 (*Prigge*). The Supreme Court underlined in paragraph 46 that the standards of the Working Environment Act must be interpreted to be compatible with the Employment Equality Directive.<sup>22</sup>

The 2013 revision of the discrimination legislation aimed to harmonise and clarify the key definitions and ensure a similar protection for all discrimination grounds. However, as key elements are taken out of the actual legal texts, and the preparatory works state that no change is intended, this is worrisome, as this might indicate that new interpretation develops over time, especially in relation to the exceptions allowed for direct discrimination.

There is a question mark regarding the Norwegian implementation in relation to the requirements of Directive 2000/43 regarding independent assistance to victims of discrimination because of racial or ethnic origin, as the Ombud's mandate is only to provide guidance to victims of discrimination, not assistance, and free legal aid is not granted in discrimination cases.

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<sup>16</sup> The Gender Equality Act (GEA) of 21.06.2013 No 59, in force as of 01.01.2014, at <http://www.ub.uio.no/ujur/ulovdata/lov-20130621-059-eng.pdf>. This act replaces the previous Gender Equality Act (GEA) of 09.06.1978 No 45 (*Likestilling*). Key concepts remain similar in the previous and current version.

<sup>17</sup> The Anti-Discrimination Act (ADA) of 21.06.2013 No 60, in force as of 01.01.2014, at <http://www.ub.uio.no/ujur/ulovdata/lov-20130621-060-eng.pdf>. This act replaces the Anti-Discrimination Act of 03.06.2005 No 33 on Prohibition of discrimination based on ethnicity, religion etc. (*Diskrimineringsloven*). Key concepts remain similar in the previous and current version.

<sup>18</sup> The Anti-Discrimination and Accessibility Act – (AAA) of 21.06.2013 No 61, in force as of 01.01.2014 at <http://www.ub.uio.no/ujur/ulovdata/lov-20130621-061-eng.pdf>. This act replaces the previous Act of 20.06.2008 No 42 relating to a prohibition against discrimination on the basis of disability (*tilgjengelighetsloven*). Key concepts remain similar in the previous and current version.

<sup>19</sup> Working Environment Act (WEA) of 17.06.2005 No 62, last amended by law of 21.06.2013 No 61, in force as of 01.01.2014. Recent amendments are not included in the translation at: <http://www.arbeidstilsynet.no/binfil/download2.php?tid=92156>.

<sup>20</sup> The Sexual Orientation Anti-Discrimination Act (SOA) of 21.06.2013 No 59, in force as of 01.01.2014. Translation at: <http://www.ub.uio.no/ujur/ulovdata/lov-20130621-058-eng.pdf>.

<sup>21</sup> Government white paper on 'Strengthened protection against discrimination in working life', NOU 2003:2 *Skjerpet vern mot diskriminering i arbeidslivet*, p. 7.

<sup>22</sup> See Rt 2012-424 paragraph 30, and Rt 2012-219. Similar statements were expressed in the other key Supreme Court decisions regarding age discrimination: Rt 2011-964, Rt 2011-609 and Rt 2010-202.

### 3. Main principles and definitions

Norwegian anti-discrimination legislation addresses the following grounds of discrimination within all sectors: gender, ethnicity, national origin, descent, skin colour, language, religion or belief, sexual orientation and disability. Discrimination based on political views, membership of a trade union and age is covered within working life.

Direct and indirect discrimination, harassment, and instructions to discriminate are defined in line with Directives 2000/43 and 2000/78. Discrimination is defined in ADA section 6, AAA section 5,<sup>23</sup> SOA section 5 and WEA section 13-1. In WEA section 13-1, the concepts of direct and indirect discrimination are not defined, but are discussed in the preparatory works.<sup>24</sup> Harassment is prohibited by ADA section 9, AAA section 8, SOA section 8 and WEA section 13-1(2). Instructions to discriminate are prohibited in ADA section 11, AAA section 10, SOA section 10 and WEA section 13-1(2).

Reasonable accommodation duties as well as provisions on sheltered/ semi-sheltered accommodation are provided for in the AAA.

Discrimination by association is covered through the ADA section 6 for ethnicity, religion and belief, AAA section 5 for disability, and SOA section 5 for sexual orientation.

Perceived or assumed discrimination is covered by national discrimination legislation if the perception or assumption has actually resulted in a less favourable treatment of the person.

There are no legal rules per se in the field of anti-discrimination dealing with a situation of multiple discrimination. 'Multiple discrimination' is not explicitly prohibited in (non-discrimination) statutory legislation or statutory legal instruments. Both the Equality Ombud and Equality Tribunal have a mandate to handle cases relating to cross grounds/ multiple grounds discrimination, mainly in relation to gender and age, as well as gender and religion (hijab).

Protection against victimisation is found in AAA section 9, ADA section 10, SOA section 9 and WEA section 2-5.

In all different pieces of anti-discrimination legislation - the AAA, ADA, SOA and the WEA - a general exception for genuine and determining occupational requirements is accepted under the general framework for lawful discrimination. In working life, exceptions for employers with an ethos based on religion or belief is as a general rule not accepted. However, employers with an ethos based on religion or belief may require that employees follow this religion or belief, provided that this is a genuine and determining occupational requirement in line with the general exception to the act.

### 4. Material scope

National legislation applies in principle to all sectors of public and private employment and occupation, including contract work, self-employment, military service, and holding statutory office.

The scope of discrimination protection in the GEA, ADA, SOA and AAA applies to all sectors, and covers each of the specific grounds covered by the directives. The ADA, SOA and the AAA apply to all areas of society except for family life and personal relationships.

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<sup>23</sup> The prohibition against discrimination relates to discrimination on the grounds of a present disability, assumed disability, past disability, possible future disability as well as discrimination against a person due to their relationship with a person with a disability.

<sup>24</sup> Ot.prp nr 49 (2004-2005), chapter 25 (in Norwegian): <http://www.regjeringen.no/nb/dep/aid/dok/regpubl/otprp/20042005/otprp-nr-49-2004-2005-/25.html?id=397026> (accessed 19.01.2017).

The WEA covers only employment: it applies to undertakings that engage employees, unless otherwise explicitly provided by the act. The provisions also cover the employer's selection and treatment of self-employed and contract workers. Age is thus not protected outside the employment field.

All aspects of employment, from the initial advertisements of posts until the termination of the work contract, are covered by existing legislation. National law does not explicitly provide for an exception for the armed forces or the police, prison or emergency services in relation to age or disability discrimination. There are no exceptions in relation to disability for health and safety.

## **5. Enforcing the law**

Cases alleging instances of discrimination may either be brought before an ordinary court or be brought to the national machinery set up to assess cases of discrimination: The Equality and Anti-Discrimination Ombud (the Equality Ombud) and the Equality and Anti-Discrimination Tribunal (the Equality Tribunal).

As a general rule, the procedures for addressing discrimination issues are the same for employment in the private and public sectors. Sanctions according to the ADA, AAA, SOA and WEA that are enforced by the civil courts consist of liability for damages/compensation/redress awarded to the claimant of discrimination. There are no upper limits for compensation, nor are there rules for calculation provided in the national legal framework. Sanctions according to criminal law consist of penalties.

The key procedural principle in Norwegian civil courts is the free evaluation of evidence by the courts in the course of the case as presented in courts. All kinds of evidence may be used, however, evidence may only be presented on facts that may be of importance for the ruling to be made. The scale and the scope of the presentation need to be proportionate in relation to the importance of the dispute. In civil cases before the courts, the procedural rules for evidence are the same in discrimination cases as in other cases.

Situation testing is not defined specifically in the law, as the law is silent on this issue. However, based on the principle of free evaluation of evidence by the courts, national law permits the use of situation testing in court for all discrimination grounds.

National law permits the use of statistical evidence to establish indirect discrimination, however, it is not necessary to prove if indirect discrimination has happened or not, as the assessment that has to be made according to national legislation is whether or not an action or non-action has had a negative result for the individual or the group.

The rule of shared burden of proof applies for all grounds of discrimination, including reasonable accommodation, harassment, victimisations and instructions to discriminate.

Associations may be used as agents in administrative proceedings and act on behalf of victims. The requirement is that the organisation must have a 'purpose, wholly or partly, to oppose discrimination' according to the grounds as prohibited by law, see ADA section 27, AAA section 32, SOA section 25 and WEA section 13-10. Actions by associations are discretionary.

More than 95 % of all cases on discrimination are handled by the Equality Ombud and the Equality Tribunal. They cannot award compensation and only in very specific circumstances impose fines. Few cases are handled annually by normal courts. This low rate of court litigation is, among other factors, due to the risks and costs involved in litigation, and the difficulties in obtaining free legal aid in discrimination cases. A key case handled by Supreme Court in 2015 is Rt-2015-1313, regarding the coverage of the Anti-Discrimination

Ombud Act (AOT) section 12.<sup>25</sup> The Supreme Court concluded that a decision by the Equality Tribunal that finds that the case before it is not a breach of the discrimination acts cannot be brought before the courts relying on the AOT section 12. The Supreme Court pointed out that a decision by the Equality Tribunal does not have legal effects to the extent that the Equality Tribunal can be sued to change its decision. However, the AOT does not preclude the employee from establishing a lawsuit against the employer, alleging discrimination, for the full examination by the court.

## **6. Equality bodies**

The Equality Ombud and its appeal body the Equality Tribunal constitute the administrative independent equality bodies set up to hear individual complaints to possible breaches of the non-discrimination legislation. The Ombud and Tribunal are a free low-threshold complaint system, and are alternative dispute mechanisms outside the judicial system, addressing cases of discrimination.

The appointment, method of organisation, responsibilities and authority of these bodies are regulated in the Anti-Discrimination Ombud Act (AOT). The independence of the bodies is stipulated in law, and they are independent in their functions. The Equality Ombud has a dual role in working for equality, by enforcing the laws as well as proactively promoting equality and combating discrimination. As a law enforcer, the Equality Ombud issue opinions on complaints concerning breaches of statutes and provisions within the Ombud's sphere of activity, and provides advice and guidance with regard to the legislation within its mandate. The statements of opinions are not legally binding and may not be subject of enforcement, however it is assumed that they should be adhered to by public bodies. The Equality Ombud will seek to secure the parties' voluntary compliance with this opinion.

The Ombud conducts independent surveys, publishes independent reports and makes recommendations on issues relating to discrimination. Every year the Ombud publishes annual reports and relevant reports on the status of equality.

The Equality Ombud is funded by annual grants financed by the Ministry of Children and Equality. Although the Ombud is nominated by the ministry and her staff are public officials, her independence is not questioned in Norway, as her mandate is clarified by law and she is not to be instructed by the ministry. The funds allocated through the State budget for 2016 as income for the Ombud were NOK 52,856,000 (approximately EUR 5 745 217), which is similar to previous budgets, the currency rate slide aside.

The Equality Tribunal is the appeal body of the Equality Ombud. Its members are appointed by the Ministry of Children and Equality for a term of four years, with the possibility for reappointment. The chairperson and deputy chairperson must fulfil the requirements prescribed for judges. The members are chosen because of their skills on discrimination issues. The Equality Tribunal has a secretariat, whose staff are public employees.

The Equality Ombud provides independent guidance and counselling to victims within the framework of providing information. The Ombud is impartial when dealing with complaints. According to the AOT, the Ombud shall not represent the party in external proceedings. Therefore, the Ombud does not act as a legal representative or legal practitioner for victims. Neither the Ombud nor the Tribunal is entitled to take cases to court independently of a person individually complaining. It is a weakness of the Equality Ombud in relation to the task listed in Directive 2000/43: neither she, nor anyone else, has the specific role of providing independent assistance to victims of discrimination. Until 2006, the Centre against Ethnic Discrimination (SMED) provided legal aid to victims of ethnic discrimination, but when the centre became a part of the 'new' Equality Ombud, the legal aid scheme was

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<sup>25</sup> See AOT - Act on the Equality and Anti-Discrimination Ombud and the Equality and Anti-Discrimination Tribunal (The Anti-Discrimination Ombud Act), of 10.06.2005 No 40, <http://www.regjeringen.no/en/doc/Laws/Acts/The-Act-on-the-Equality-and-Anti-Discrim.html?id=451952>.

revoked. The fact that there is no legal aid scheme offered specifically to provide independent assistance to victims and to address discrimination because of ethnicity is a flaw with the current system with one holistic Equality Ombud covering all grounds.

Although there are very few Roma and Travellers in Norway, the Equality Ombud has repeatedly addressed some of the key issues seen in relation to Roma and Travellers. In her report to the UN CERD Committee, the Equality Ombud addressed the areas of critical concern: that the Roma's access to basic rights is denied unless the traditional way of life is discontinued.<sup>26</sup> In relation to schooling, the Ombud is concerned that the Travellers are being made responsible for the consequences of the failure to adjust Norwegian school policy to the traditional manner of travelling. The Roma are furthermore systematically denied access to campsites and restaurants on the grounds that they belong to a national minority.<sup>27</sup> At the policy level, the Ombud has thus been a voice in the Norwegian public speaking for the Roma.

## 7. Key issues

In Norway, the key legal issues on measures to combat discrimination based on race/ ethnic origin, religion/ belief, sexual orientation, disability and age include:

- A new act covering sexual orientation and transgender in all areas was enacted in 2013 and is in force as of 1 January 2014. The amendment to harmonise and ensure a similar protection for all grounds might lead to a lack of clarity in the legal coverage, as the former very narrow exception to the definition of direct discrimination might be widened and not interpreted as narrow as before.
- Although a full overhaul of the anti-discrimination legislation was done in 2013, and is in force as of 1 January 2014, a new proposal for a single comprehensive new law was sent for public hearing in October 2015.<sup>28</sup> A government proposal for the re-organisation of the equality bodies was sent for public hearing on 19 October 2016, suggesting the transfer of the individual complaint mechanism from the Equality Ombud to the Equality Tribunal, and to give the Equality Tribunal power to award non-monetary damages in cases concerning working life.<sup>29</sup> These two proposals are expected to be forwarded to Parliament during 2017.
- It might be questioned whether victims of discrimination in reality have the necessary access to justice/efficient sanctions and remedies. Statistics on discrimination cases in Norway show that although the courts do handle discrimination cases, and although the number of cases handled by courts is increasing, by far the overwhelming number of discrimination cases in Norway are channelled through the administrative bodies, the Equality Ombud and the Equality Tribunal. This has in particular consequences in relation to an assessment of compliance with EU law in terms of sanctions, as the Equality Ombud/Tribunal does not enforce the clauses relating to sanctions in the form of liability for damages/ redress/ compensations. A proposal that the Equality Tribunal be given powers to award damages for non-economic loss in cases where a breach of the principle against discrimination has been stated was forwarded in 2016, and may mitigate this.
- Norwegian implementation regarding the requirements of Directive 2000/43 on legal aid to victims of discrimination because of ethnicity might be questioned, as there is

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<sup>26</sup> See Ombud's Input to the Committee on the Elimination of Racial Discrimination (CERD) 2010, at [http://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/NOR/INT\\_CERD\\_NGO\\_NOR\\_78\\_9791\\_E.p df](http://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/NOR/INT_CERD_NGO_NOR_78_9791_E.p df).

<sup>27</sup> See for example the Ombud's case number 15/1512.

<sup>28</sup> See <https://www.regjeringen.no/no/dokumenter/horing---forslag-til-felles-likestillings--og-diskrimineringslov/id2458435/> (Accessed on 19.01.2017) (in Norwegian).

<sup>29</sup> See <https://www.regjeringen.no/contentassets/14dd1daa159348c88de5dbe043feb0a4/horingsnotat.pdf> (accessed on 19.01.2017). This proposal builds on an assessment of the structure and mandate of the equality bodies finalised in March 2016, see <https://www.regjeringen.no/contentassets/04bd6c545ae74c4e4bea246f44dcf4942/utredning-av-handhevings--og-virkemiddelapparatet-pa-likestillings--og-diskrimineringsfeltet.pdf> (accessed 19.01.2017).

no scheme under the legal aid act to afford victims of discrimination because of ethnicity legal aid. Although the Equality- and Discrimination Ombud has a duty to provide guidance and counselling to victims of discrimination, the role of the Equality Ombud is not to provide individual assistance to victims of discrimination nor legal aid to individuals, but to assess the case in order to establish whether discrimination has occurred or not. A proposal to include discrimination as an area through which to obtain free legal aid has been in process since 2009.

- The continuous updating of the regulations on sheltered and semi-sheltered accommodation/ universal access.

## RÉSUMÉ

### 1. Introduction

La Norvège a une population relativement homogène de 5,2 millions d'habitants. Le pays compte approximativement 698 550 immigrés et 149 600 personnes nées dans le pays de parents immigrés. Ces deux groupes forment ensemble environ 16,3 % de la population totale. Le pays compte également 538 000 personnes vivant sur son territoire sans avoir la citoyenneté norvégienne.<sup>30</sup> Le groupe autochtone le plus important de Norvège est le peuple sami (entre 50 et 65 000 personnes). Les autres minorités nationales sont notamment les Juifs (1 100 personnes environ) et les Kvènes/personnes d'ascendance finlandaise (10 à 15 000 personnes environ). Plus ou moins 700 personnes appartiennent au groupe traditionnel des Roms. On ne dispose pas de chiffre précis en ce qui concerne les gens du voyage mais ils seraient quelques milliers en Norvège.<sup>31</sup>

L'Église protestante norvégienne rassemble 72,9 % environ des Norvégiens<sup>32</sup> – les autres groupes religieux d'une certaine importance étant des associations islamiques, l'Église catholique romaine et l'Église pentecôtiste.<sup>33</sup> Les chiffres figurant dans les statistiques officielles font état de 148 189 personnes affirmant leur appartenance à l'islam, de 349 083 «autres» chrétiens (c'est-à-dire des chrétiens n'appartenant pas à l'Église de Norvège), de 18 817 bouddhistes et de 89 758 personnes appartenant à une organisation confessionnelle.<sup>34</sup>

Il est difficile de trouver des chiffres précis et fiables quant au nombre de personnes handicapées en Norvège. L'enquête nationale de 1985 sur la santé a estimé que 479 000 personnes âgées de 16 à 67 ans étaient handicapées. Il convient d'y ajouter 41 000 personnes handicapées de moins de 16 ans et 292 000 personnes de plus de 67 ans. Cette estimation correspond à un taux de 18,8 % de personnes au sein de la population en âge de travailler (16-66 ans).<sup>35</sup> Une récente étude suppose que le pays compte 700 000 personnes environ de plus de 16 ans, soit 15,5 % de la population, souffrant d'une forme ou d'une autre de déficience fonctionnelle, psychologique ou cognitive.<sup>36</sup> Les statistiques officielles de l'emploi font état de 636 000 personnes handicapées aptes au travail (soit 10 % environ de l'ensemble de la population), bien que 282 000 seulement d'entre elles occupent effectivement un emploi.<sup>37</sup>

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<sup>30</sup> Au 20 octobre 2016, voir l'Office statistique de Norvège sur <http://ssb.no/innvandring-og-innvandrere/nokkeltall/innvandring-og-innvandrere> (en norvégien, consulté le 19 janvier 2017).

<sup>31</sup> Chiffres en provenance de l'Office statistique de Norvège et du Plan d'action du gouvernement 2009-2012 pour la promotion de l'égalité et la prévention de la discrimination ethnique.

<sup>32</sup> Voir [https://www.ssb.no/kultur-og-fritid/statistikker/kirke\\_kostraaar/2016-05-04](https://www.ssb.no/kultur-og-fritid/statistikker/kirke_kostraaar/2016-05-04) au 4 mai 2016 (en norvégien, consulté le 19 janvier 2017).

<sup>33</sup> Voir <http://www.ssb.no/kultur-og-fritid/artikler-og-publikasjoner/norge-et-sekulaert-samfunn> (en norvégien, consulté le 19 janvier 2017). L'affiliation religieuse n'étant pas officiellement enregistrée dans les statistiques nationales, les chiffres se basent sur les informations communiquées par les différents groupes confessionnels eux-mêmes concernant le nombre de leurs membres.

<sup>34</sup> Selon les chiffres de l'Office statistique de Norvège établissant les membres d'organisations religieuses et confessionnelles en dehors de l'Église (protestante) de Norvège sur la base du financement par l'État (fixé en fonction du nombre de membres) à compter du 25 novembre 2016, voir <http://www.ssb.no/kultur-og-fritid/statistikker/trosamf> (en norvégien, consulté le 19 janvier 2017). Une liste complète des effectifs de chaque organisation en dehors de l'église de Norvège en fonction du financement public (calculé sur la base du nombre de membres) annuel peut être consultée sur la page web du ministère de la Culture, <https://www.regjeringen.no/no/tema/religion-og-livssyn/tros-og-livssynssamfunn/innsiktsartikler/antall-tilskuddsberettigede-medlemmer-i-/id631507/> (consulté le 19 janvier 2017).

<sup>35</sup> Voir le chapitre 9.6.5 du rapport officiel norvégien NOU 1998: 18 «*Det er bruk for alle*» (Tous sont utiles).

<sup>36</sup> Voir le rapport de l'Office statistique de Norvège *På like vilkår? Helse og levekår blant personer med nedsatt funksjonsevne* (À égalité? Santé et conditions de vie des personnes moins valides) sur [http://www.ssb.no/emner/03/01/10/rapp\\_201020/rapp\\_201020.pdf](http://www.ssb.no/emner/03/01/10/rapp_201020/rapp_201020.pdf) (consulté le 19 janvier 2017).

<sup>37</sup> Selon les statistiques du 2<sup>e</sup> trimestre 2016 sur <http://www.ssb.no/arbeid-og-lonn/statistikker/akutu> (en norvégien, consulté le 19 janvier 2017).



Le pays compte 744 696 personnes de 66 ans et plus sur une population de 5 213 985 habitants.<sup>38</sup> Il n'existe aucune statistique officielle fiable concernant l'orientation sexuelle, mais on suppose que 3 à 5 % environ de la population a une orientation sexuelle autre que l'hétérosexualité normative – ce qui correspond approximativement à 240 000 personnes en Norvège.<sup>39</sup>

L'ordre juridique s'inspire du droit romain et comporte un système judiciaire à trois niveaux qui traite à la fois les affaires relevant du droit pénal et celles relevant du droit civil. Les dispositions légales (législation formellement adoptée sous la forme de lois et de règlements d'application) sont les sources de droit prioritairement invoquées devant les juridictions norvégiennes et vis-à-vis des instances administratives nationales – même si la législation internationale, et celle de l'UE en particulier, est de plus en plus souvent invoquée dans des cas spécifiques, en ce compris dans des affaires de discrimination.

## 2. Législation principale

La Norvège a ratifié la plupart des grands instruments internationaux de lutte contre la discrimination à l'exception notoire du Protocole n° 12 à la Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales.

Depuis juin 2014, l'article 98 de la Constitution dispose que «Toutes les personnes sont égales devant la loi. Aucun être humain ne peut faire l'objet d'un traitement inéquitable ou d'une différence de traitement disproportionnée».<sup>40</sup> [Traduction libre]

La loi sur les droits de l'homme<sup>41</sup> incorpore dans l'ordre juridique interne une série de traités relatifs aux droits de l'homme avec pour base générale que les conventions prévalent sur toute autre disposition réglementaire contraire.<sup>42</sup> La Convention internationale sur l'élimination de toutes les formes de discrimination raciale n'a pas été incorporée dans la loi sur les droits de l'homme, mais dans la loi antidiscrimination, avec pour effet juridique que la Convention ne prévaut pas sur les autres dispositions réglementaires en cas de conflit, lequel doit dès lors être résolu en procédant à une interprétation. La Convention des Nations unies relative aux droits des personnes handicapées (Convention sur le handicap) a été ratifiée le 3 juillet 2013.<sup>43</sup> Elle n'a pas été intégrée dans la loi sur la non-discrimination et l'accessibilité et, comme telle, sera appliquée «au même niveau que si elle était incorporée dans la loi»<sup>44</sup> – ce qui pose question quant à la valeur juridique de la Convention en droit national. Il incombe au Médiateur en charge de l'égalité et de la lutte contre la discrimination de surveiller la mise en œuvre de cette Convention en Norvège, de façon analogue au système national de surveillance de la Convention internationale sur l'élimination de toutes les formes de discrimination raciale

<sup>38</sup> Voir les statistiques annuelles de population au 15 décembre 2016 (Office statistique de Norvège) sur <http://www.ssb.no/befolkning/statistikker/folkemengde> (en norvégien, consulté le 19 janvier 2017).

<sup>39</sup> Selon les chiffres communiqués à l'auteure par l'organisation norvégienne LGBT dans un courriel daté du 7 janvier 2013.

<sup>40</sup> Voir <https://www.stortinget.no/globalassets/pdf/english/constitutionenglish.pdf> (consulté le 19 janvier 2017). Les travaux préparatoires en vue de la clause constitutionnelle portent la référence Dok 16 (2011-2012) (Chapitre 6 du rapport sur les droits de l'homme dans la Constitution présenté par la commission constitutionnelle au *Storting* (Parlement)) – voir <http://www.stortinget.no/Global/pdf/Dokumentserien/2011-2012/dok16-201112.pdf> (consulté le 19 janvier 2017).

<sup>41</sup> Loi n° 30 du 21 mai 1999 sur les droits de l'homme (*Menneskerettsloven*).

<sup>42</sup> La Convention internationale sur l'élimination de toutes les formes de discrimination raciale a été intégrée à la loi antidiscrimination, mais la Convention ne prévaut pas automatiquement s'il y a un conflit. La non-inclusion de cette Convention dans la loi sur les droits de l'homme a été critiquée à de multiples reprises par les ONG engagées dans la lutte contre la discrimination.

<sup>43</sup> Voir la proposition de résolution parlementaire soumise au *Stortinget* (Prop. 106 S (2011–2012)) concernant l'approbation de la ratification de la Convention des Nations unies du 13 décembre 2006 relative aux droits des personnes handicapées ainsi que la proposition de résolution parlementaire Prop 105 L 2011-2012 concernant la modification de la loi sur le Médiateur antidiscrimination portant sur la surveillance de la mise en œuvre de la Convention des Nations unies relative aux droits des personnes handicapées.

<sup>44</sup> Voir l'arrêt du 20 décembre de la Cour suprême dans l'affaire n° HR-2016-2591-A.



et de la Convention des Nations unies sur l'élimination de toutes les formes de discrimination à l'égard des femmes.

Ces dispositions s'appliquent à tous les domaines couverts par les directives avec un champ d'application matériel plus large que celles-ci. Les dispositions constitutionnelles antidiscrimination sont directement applicables. Les clauses constitutionnelles relatives à l'égalité peuvent être invoquées à la fois contre des agents de l'État et contre des acteurs privés.

Le cadre législatif antidiscrimination est par ailleurs bien développé, même si son accès s'avère difficile en raison de l'ancrage de sa base législative dans cinq grandes lois générales différentes ainsi que dans une législation spécialisée.

Les composantes clés de la législation antidiscrimination sont la loi sur l'égalité entre les hommes et les femmes,<sup>45</sup> la loi antidiscrimination couvrant l'origine ethnique, la religion et les convictions,<sup>46</sup> la loi sur la non-discrimination et l'accessibilité couvrant le handicap<sup>47</sup> et la loi sur l'environnement de travail couvrant l'âge, les opinions politiques, l'appartenance à des organisations syndicales, le travail à temps partiel et le travail temporaire,<sup>48</sup> ainsi que des actes législatifs spécialisés (loi sur les gens de mer et loi sur le logement). Ces différentes lois ont été révisées et harmonisées le 21 juin 2013 lors de l'adoption de la loi antidiscrimination relative à l'orientation sexuelle couvrant l'orientation sexuelle, l'identité de genre et l'expression de genre, et sont entrées en vigueur le 1<sup>er</sup> janvier 2014.<sup>49</sup>

Les articles 185 et 186 du Code général civil et pénal (2005) prévoient une protection pénale contre les discriminations.

La législation antidiscrimination norvégienne est présumée conforme à l'acquis de l'UE. Le gouvernement s'est engagé à appliquer, dans le cadre de sa lutte contre les discriminations, des normes aussi élevées – voire plus élevées – que celles imposées par l'UE.<sup>50</sup> Étant donné toutefois que les directives antidiscrimination (2000/78 et 2000/43) n'ont pas été incorporées dans l'Accord sur l'Espace économique européen (EEE), les dérogations spécifiquement admises par les directives n'ont pas été clairement formulées. La protection à cet égard a été renforcée par de récents arrêts de la Cour suprême. Ainsi cette dernière souligne-t-elle dans son arrêt Rt-2012-424, point 30, que «même en l'absence d'engagement juridique de transposer la directive relative à l'égalité en matière d'emploi en droit interne, la pratique constante de la Cour suprême veut que les réglementations de la loi sur l'environnement de travail soient interprétées et appliquées conformément à ladite directive» [traduction libre]. L'affaire Rt-2012-219 devant la Cour suprême était, en termes de contenu, similaire aux faits de l'affaire C-447/09 devant la CJUE (*Prigge*). La Cour suprême a souligné au point 46 de son arrêt qu'il convenait

<sup>45</sup> Loi n° 59 du 21 juin 2013 sur l'égalité entre les hommes et les femmes, en vigueur depuis le 1<sup>er</sup> janvier 2014 (<http://www.ub.uio.no/ujur/ulovdata/lov-20130621-059-eng.pdf> – en anglais). Cette loi remplace la loi n° 45 du 9 juin 1978 (*Likestilling*). Les principaux concepts sont similaires dans l'ancienne et la nouvelle version.

<sup>46</sup> Loi antidiscrimination n° 60 du 21 juin 2013, en vigueur depuis le 1<sup>er</sup> janvier 2014 (<http://www.ub.uio.no/ujur/ulovdata/lov-20130621-060-eng.pdf> – en anglais). Cette loi remplace la loi antidiscrimination n° 33 du 3 juin 2005 relative à l'interdiction de discrimination fondée sur l'origine ethnique, la religion etc. (*Diskrimineringsloven*). Les principaux concepts sont similaires dans l'ancienne et la nouvelle version.

<sup>47</sup> Loi n° 61 du 21 juin 2013 sur la non-discrimination et l'accessibilité, en vigueur depuis le 1<sup>er</sup> janvier 2014 (<http://www.ub.uio.no/ujur/ulovdata/lov-20130621-061-eng.pdf> – en anglais). Cette loi remplace la loi n° 42 du 20 juin 2008 relative à l'interdiction de discrimination fondée sur le handicap (*tilgjengelighetsloven*). Les principaux concepts sont similaires dans l'ancienne et la nouvelle version.

<sup>48</sup> Loi n° 62 du 17 juin 2005 sur l'environnement de travail, modifiée en dernier lieu par la loi n° 61 du 21 juin 2013, en vigueur depuis le 1<sup>er</sup> janvier 2014. Les récents amendements ne figurent pas dans la traduction anglaise sur <http://www.arbeidstilsynet.no/binfil/download2.php?tid=92156>.

<sup>49</sup> Loi antidiscrimination n° 59 du 21 juin 2013 relative à l'orientation sexuelle, en vigueur depuis le 1<sup>er</sup> janvier 2014. Traduction anglaise sur <http://www.ub.uio.no/ujur/ulovdata/lov-20130621-058-eng.pdf>.

<sup>50</sup> Livre blanc du gouvernement sur le renforcement de la protection contre la discrimination dans la vie professionnelle, NOU 2003:2 *Skjerpet vern mot diskriminering i arbeidslivet*, p. 7.

d'interpréter les normes énoncées dans la loi sur l'environnement de travail comme compatibles avec la directive relative à l'égalité en matière d'emploi.<sup>51</sup>

La révision de la législation antidiscrimination effectuée en 2013 visait à harmoniser et à préciser les principales définitions, et à assurer une protection similaire pour tous les motifs de discrimination. Certaines inquiétudes sont cependant suscitées du fait que des éléments essentiels sont retirés des textes proprement juridiques et qu'il a été annoncé dans le cadre des travaux préparatoires qu'aucun changement n'était envisagé: ceci pourrait indiquer qu'une nouvelle interprétation se développe au fil du temps, en ce qui concerne les dérogations autorisées en matière de discrimination directe plus particulièrement.

Une interrogation subsiste quant à la mise en œuvre par la Norvège des exigences de la directive 2000/43 concernant l'assistance indépendante aux victimes de discrimination fondée sur l'origine raciale ou ethnique, étant donné que le mandat du Médiateur consiste uniquement à fournir des conseils – et non pas une assistance – aux victimes de discrimination, et qu'une aide juridique gratuite n'est pas allouée dans le cadre d'affaires de discrimination.

### **3. Principes généraux et définitions**

La législation antidiscrimination norvégienne couvre les motifs de discrimination ci-après dans tous les secteurs: genre, origine ethnique, origine nationale, ascendance, couleur de la peau, langue, religion ou convictions, orientation sexuelle et handicap. La discrimination fondée sur les opinions politiques, l'appartenance à un syndicat et l'âge est couverte dans le cadre de la vie professionnelle.

La discrimination directe et indirecte, le harcèlement et l'injonction de discriminer sont définis conformément aux directives 2000/43 et 2000/78. La discrimination est définie à l'article 6 de la loi antidiscrimination, à l'article 5 de la loi sur la non-discrimination et l'accessibilité<sup>52</sup>, à l'article 5 de la loi sur l'orientation sexuelle et à l'article 13-1 de la loi sur l'environnement de travail. Dans ce dernier cas, les concepts de discrimination directe et indirecte ne sont pas définis, mais sont examinés dans les travaux préparatoires.<sup>53</sup> Le harcèlement est interdit par l'article 9 de la loi antidiscrimination, par l'article 8 de la loi sur la non-discrimination et l'accessibilité, par l'article 8 de la loi relative à l'orientation sexuelle et par l'article 13-1(2) de la loi sur l'environnement de travail. L'injonction de discriminer est respectivement interdite par l'article 11, l'article 10, l'article 10 et l'article 13-1(2) de ces mêmes lois.

Des obligations d'aménagement raisonnable et des dispositions en matière de logement protégé/semi-protégé sont prévues par la loi sur la non-discrimination et l'accessibilité. La discrimination par association est couverte par l'article 6 de la loi antidiscrimination pour ce qui concerne l'origine ethnique, la religion et les convictions; par l'article 5 de la loi sur la non-discrimination et l'accessibilité pour ce qui concerne le handicap; et par l'article 5 de la loi relative à l'orientation sexuelle pour ce qui concerne ce motif.

La discrimination perçue ou présumée est couverte par la législation nationale pour autant que la perception ou la présomption se soient effectivement traduites par un traitement moins favorable de la personne visée.

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<sup>51</sup> Voir Rt 2012-424, point 30, et Rt 2012-219. Des affirmations analogues figurent dans d'autres décisions importantes de la Cour suprême concernant la discrimination fondée sur l'âge: Rt 2011-964, Rt 2011-609 et Rt 2010-202.

<sup>52</sup> L'interdiction de discrimination couvre la discrimination fondée sur un handicap actuel, un handicap supposé, un handicap passé et un handicap futur éventuel, ainsi que la discrimination à l'égard d'une personne en raison de sa relation avec une personne handicapée.

<sup>53</sup> Ot.prp n° 49 (2004-2005) chapitre 25: <http://www.regjeringen.no/nb/dep/aid/dok/regpubl/otprp/20042005/otprp-nr-49-2004-2005-/25.html?id=397026> (en norvégien, consulté le 19 janvier 2017).

Aucune règle juridique antidiscrimination ne traite en soi d'une situation de discrimination multiple et ce type de discrimination n'est expressément interdit ni par la législation antidiscrimination ni par d'autres instruments réglementaires. Le Médiateur pour l'égalité et le Tribunal pour l'égalité sont l'un et l'autre habilités à traiter d'affaires de discriminations «croisées»/de discrimination fondée sur plusieurs motifs, le plus souvent le genre et l'âge, mais aussi le genre et la religion (hidjab).

La protection contre les rétorsions est prévue à l'article 9 de la loi sur la non-discrimination et l'accessibilité, à l'article 10 de la loi antidiscrimination, à l'article 9 de la loi relative à l'orientation sexuelle et à l'article 2-5 de la loi sur l'environnement de travail.

Les différentes lois relevant de la législation antidiscrimination – la loi sur la non-discrimination et l'accessibilité, la loi antidiscrimination, la loi relative à l'orientation sexuelle et la loi sur l'environnement de travail – prévoient toutes une dérogation pour ce qui concerne les exigences professionnelles véritables et déterminantes dans le cadre général de la discrimination légitime. En ce qui concerne la vie professionnelle, la dérogation pour les employeurs ayant une éthique religieuse ou autre n'est pas admise en règle générale, mais les employeurs concernés peuvent exiger que leur personnel adhère à la religion ou la conviction en question pour autant qu'il s'agisse d'une exigence professionnelle véritable et déterminante conforme à la dérogation générale aux dispositions de la loi.

#### **4. Champ d'application matériel**

La législation nationale s'applique en principe à tous les secteurs d'emploi et de travail publics et privés, y compris le travail contractuel, le travail indépendant, le service militaire et l'occupation d'un poste statutaire.

La protection contre la discrimination prévue par la loi sur l'égalité entre les hommes et les femmes, la loi antidiscrimination, la loi relative à l'orientation sexuelle et la loi sur la non-discrimination et l'accessibilité s'applique à tous les secteurs, et couvre chacun des motifs spécifiquement visés par les directives. La loi antidiscrimination, la loi relative à l'orientation sexuelle et la loi sur la non-discrimination et l'accessibilité s'appliquent à tous les domaines de la vie en société hormis la vie familiale et les relations personnelles.

La loi sur l'environnement de travail vise uniquement l'emploi: elle s'applique aux entreprises qui engagent du personnel, sauf disposition contraire qu'elle contiendrait explicitement. Les dispositions couvrent également la sélection et le traitement réservé par l'employeur aux travailleurs indépendants et contractuels. L'âge n'est pas protégé en dehors du domaine de l'emploi.

La législation en vigueur couvre tous les aspects de l'emploi depuis l'annonce initiale indiquant la vacance de poste jusqu'à la résiliation du contrat de travail. La législation nationale ne contient pas de dérogation explicite pour les forces armées ou la police, l'encadrement pénitentiaire ou les services d'urgence en rapport avec la discrimination fondée sur l'âge ou le handicap. Aucune exception n'est prévue en rapport avec le handicap pour ce qui concerne la santé et la sécurité.

#### **5. Mise en application de la loi**

Les plaintes alléguant une discrimination peuvent être introduites auprès d'une juridiction ordinaire ou d'un mécanisme national spécifiquement institué pour les cas de discrimination: le Médiateur en charge de l'égalité et de la lutte contre la discrimination (Médiateur pour l'égalité) et le Tribunal antidiscrimination (Tribunal pour l'égalité).

En règle générale, les mêmes procédures sont appliquées dans le secteur privé et dans le secteur public en cas de discrimination en matière d'emploi. Les sanctions prévues par la

loi antidiscrimination, la loi sur la non-discrimination et l'accessibilité, la loi relative à l'orientation sexuelle et la loi sur l'environnement de travail et appliquées par les juridictions civiles consistent principalement à octroyer des dommages-intérêts/une indemnisation/une réparation à la victime. L'indemnisation n'est pas plafonnée et le cadre législatif national ne fixe aucune règle pour la calculer. Les sanctions relevant du droit pénal consistent en amendes.

Le principe de procédure fondamental des juridictions civiles norvégiennes est leur libre appréciation des preuves qui leur sont soumises pendant le déroulement de l'affaire. Tous les types de preuve sont admis à condition que les éléments probants présentés portent sur des faits susceptibles d'être importants pour la décision à prononcer. L'ampleur et la portée de la présentation doivent être proportionnées à l'importance du litige. Dans les affaires relevant des juridictions civiles, les règles de procédure en matière de preuve sont les mêmes qu'il s'agisse d'une affaire de discrimination ou d'une affaire de toute autre nature.

Le test de situation n'est pas spécifiquement défini par la loi, qui reste muette à ce sujet. En vertu toutefois du principe de la libre appréciation des preuves par les cours et tribunaux, la législation nationale permet le recours au test de situation en justice pour tous les motifs de discrimination.

La législation nationale autorise l'utilisation de preuves statistiques pour établir une discrimination indirecte; ceci dit, il n'est pas nécessaire de démontrer l'existence ou l'inexistence d'une discrimination indirecte, étant donné qu'il s'agit, en vertu de la législation nationale, d'établir si une action ou une inaction a eu ou non un impact négatif sur la personne ou le groupe en question.

La règle du partage de la charge de la preuve s'applique à tous les motifs de discrimination, y compris l'aménagement raisonnable, le harcèlement, les rétorsions et l'injonction de discriminer.

Des associations peuvent servir d'intermédiaires dans des procédures administratives et agir au nom des victimes pour autant que leur activité ait pour finalité unique ou partielle de lutter contre «les discriminations fondées sur les motifs interdits par la loi» (voir l'article 27 de la loi antidiscrimination, l'article 32 de la loi sur la non-discrimination et l'accessibilité, l'article 25 de la loi relative à l'orientation sexuelle et l'article 13-10 de la loi sur l'environnement de travail). Les poursuites engagées par des associations ont un caractère discrétionnaire.

Plus de 95 % de l'ensemble des affaires de discrimination sont traitées par le Médiateur pour l'égalité et le Tribunal pour l'égalité. Ils ne sont pas habilités à accorder d'indemnisation, et peuvent uniquement imposer des amendes dans des cas très spécifiques. Les juridictions ordinaires sont saisies de quelques cas seulement chaque année – ce contentieux très peu abondant s'expliquant, entre autres, par les risques et les coûts liés aux poursuites en justice ainsi que par la difficulté d'obtenir une assistance juridique gratuite dans le cadre d'une affaire de discrimination. La Cour suprême a prononcé en 2015 un arrêt majeur (Rt-2015-1313) concernant le champ d'application de l'article 12 de la loi sur le Médiateur antidiscrimination.<sup>54</sup> Elle a conclu en l'espèce qu'une décision du Tribunal pour l'égalité établissant que l'affaire dont il est saisi n'enfreint pas les lois antidiscrimination ne peut être portée en justice en invoquant le dit article 12. La Cour suprême rappelle qu'une décision du Tribunal pour l'égalité n'a pas d'effets juridiques dans la mesure où le Tribunal ne peut être poursuivi en vue de faire modifier sa décision. La loi sur le Médiateur antidiscrimination n'empêche cependant pas le salarié de poursuivre

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<sup>54</sup> Voir la loi n° 40 du 10 juin 2005 sur le Médiateur pour l'égalité et la non-discrimination et le Tribunal pour l'égalité et la non-discrimination (loi sur le Médiateur antidiscrimination), <http://www.regjeringen.no/en/doc/Laws/Acts/The-Act-on-the-Equality-and-Anti-Discrim.html?id=451952>.

l'employeur en justice pour discrimination, afin que cette allégation fasse l'objet d'un examen complet par la juridiction compétente.

## **6. Organismes de promotion de l'égalité de traitement**

Le Médiateur pour l'égalité et son instance d'appel, le Tribunal pour l'égalité, sont les organes administratifs indépendants institués pour entendre les plaintes de citoyens alléguant une présomption de non-respect de la législation antidiscrimination. Le Médiateur et le Tribunal forment un système de recours gratuit à seuil peu élevé qui offre une voie alternative de règlement des litiges en dehors du système judiciaire, et qui peut être saisi en cas de discrimination.

Leur désignation, leur mode d'organisation, leurs compétences et leur autorité sont régis par la loi sur le Médiateur antidiscrimination. L'indépendance de ces instances dans l'exercice de leurs fonctions est consacrée par la loi. Le Médiateur a un double rôle dans la mesure où il œuvre à l'égalité en faisant appliquer les lois, mais également en menant une campagne proactive de promotion de l'égalité et de lutte contre la discrimination. En sa qualité de responsable de l'application des lois, le Médiateur pour l'égalité donne des avis sur des plaintes relatives à des violations de lois et de dispositions relevant de sa compétence, et fournit des conseils et des orientations concernant la législation dans les limites de son mandat. Les opinions formulées ne sont pas juridiquement contraignantes et ne peuvent faire l'objet de mesures d'exécution, mais il est supposé qu'elles seront prises en compte par les instances publiques. Le Médiateur pour l'égalité s'efforce d'obtenir le respect volontaire de son opinion par les parties concernées.

Le Médiateur procède à des études indépendantes, publie des rapports indépendants et formule des recommandations sur toutes les questions liées aux discriminations. Il publie un rapport annuel ainsi que des rapports faisant chaque année un état des lieux de la situation en matière d'égalité.

Le Médiateur pour l'égalité est financé par des subventions annuelles allouées par le ministère de l'Enfance et de l'égalité. Bien que le médiateur/la médiatrice soit nommé(e) par le ministère et que son personnel soit composé de fonctionnaires, son indépendance n'est pas mise en question, étant donné que son mandat est défini par la loi et qu'il/elle ne peut recevoir d'instructions du ministère. Les ressources allouées au Médiateur par le budget de l'État se sont élevées en 2016 à 52 856 000 NOK (5 745 217 euros environ), soit un montant similaire aux budgets antérieurs, la dépréciation monétaire n'étant pas prise en compte.

Le Tribunal pour l'égalité est l'instance d'appel des décisions du Médiateur. Ses membres sont nommés par le ministère de l'Enfance et de l'égalité pour un mandat renouvelable de quatre ans. Le président et le vice-président doivent répondre aux mêmes exigences que celles imposées aux juges. Les membres sont choisis en raison de leurs compétences en matière de discrimination. Le Tribunal pour l'égalité a un secrétariat, dont le personnel est constitué de fonctionnaires.

Le Médiateur pour l'égalité fournit, dans le cadre de l'apport d'informations, des orientations et conseils indépendants aux victimes. Il traite les plaintes en toute impartialité. En vertu de la loi qui l'institue, le Médiateur ne représente pas une partie requérante dans le cadre de procédures extérieures. Il n'agit donc pas en qualité de représentant légal ou d'avocat des victimes. Ni le Médiateur ni le Tribunal ne sont habilités à intenter une action en justice indépendamment du dépôt d'une plainte par un particulier. Il s'agit d'une lacune au niveau du Médiateur pour l'égalité par rapport à la mission spécifiée dans la directive 2000/43 dans la mesure où ni lui ni personne d'autre n'est spécifiquement chargé d'apporter une assistance aux victimes de discrimination. Jusqu'en 2006, le Centre de lutte contre la discrimination ethnique (SMED) apportait une aide juridique aux victimes de discrimination ethnique mais cette fonction a été supprimée au moment de l'intégration

du Centre dans le «nouveau» Médiateur pour l'égalité. L'absence de système prévoyant une aide juridique spécifiquement offerte aux victimes et axée sur la discrimination fondée sur l'origine ethnique est un défaut du régime actuel basé sur un Médiateur général pour l'égalité en charge de tous les motifs.

Bien que les Roms et les gens du voyage soient peu nombreux en Norvège, le Médiateur pour l'égalité s'est penché à plusieurs reprises sur certaines problématiques clés les concernant. Dans son rapport au CERD, la médiatrice pour l'égalité aborde des préoccupations majeures, tel le refus aux Roms d'accéder aux droits fondamentaux s'ils n'abandonnent pas leur mode de vie traditionnel.<sup>55</sup> En ce qui concerne la scolarité, elle s'inquiète de ce que les gens du voyage soient rendus responsables des conséquences d'une incapacité d'adapter la politique scolaire norvégienne au mode de vie traditionnel itinérant. L'accès à des sites de campement et à des restaurants est en outre systématiquement refusé aux Roms parce qu'ils appartiennent à une minorité nationale.<sup>56</sup> Au niveau des politiques, le Médiateur fait donc entendre la voix des Roms dans le public norvégien.

## 7. Points essentiels

Les principales questions juridiques concernant les mesures de lutte contre la discrimination fondée sur la race/l'origine ethnique, la religion/les convictions, l'orientation sexuelle, le handicap et l'âge portent en Norvège sur les points suivants:

- Une nouvelle loi couvrant l'orientation sexuelle et la transsexualité dans tous les domaines a été adoptée en 2013 et a pris ses effets au 1<sup>er</sup> janvier 2014. L'amendement destiné à harmoniser et à assurer une protection similaire pour tous les motifs pourrait être cause d'un manque de clarté en termes de couverture juridique, étant donné que l'exception antérieure, très étroite, à la définition de la discrimination directe pourrait se trouver élargie et ne plus être interprétée de manière aussi restrictive qu'auparavant.
- Bien que la législation ait fait l'objet d'une refonte complète en 2013 avec entrée en vigueur au 1<sup>er</sup> janvier 2014, une nouvelle proposition de loi-cadre unique totalement remaniée a été transmise pour audience publique en octobre 2015.<sup>57</sup> Une proposition gouvernementale visant à la réorganisation des organismes pour l'égalité a été adressée pour audience publique le 19 octobre 2016: elle suggère que le mécanisme de plainte individuel passe du Médiateur au Tribunal pour l'égalité, et que ce dernier soit habilité à attribuer une réparation morale dans des affaires relative à la vie professionnelle.<sup>58</sup> Ces deux propositions devraient être transmises au Parlement dans le courant de l'année 2017.
- On peut s'interroger sur le point de savoir si les victimes de discrimination bénéficient effectivement de l'accès voulu à la justice/à des sanctions et réparations efficaces. Les statistiques concernant les affaires de discrimination en Norvège montrent que, même si les juridictions sont de plus en plus fréquemment saisies d'affaires de ce type, l'immense majorité des affaires de discrimination sont gérées via des instances administratives, le Médiateur pour l'égalité et le Tribunal pour l'égalité. Cette situation a des répercussions particulières sur l'évaluation de la conformité au droit de l'UE en

<sup>55</sup> Voir la contribution de la médiatrice au comité des Nations unies pour l'élimination de la discrimination raciale (CERD), 2010, sur [http://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/NOR/INT\\_CERD\\_NGO\\_NOR\\_78\\_9791\\_E.p df](http://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/NOR/INT_CERD_NGO_NOR_78_9791_E.p df).

<sup>56</sup> Voir notamment le dossier n° 15/1512 du Médiateur.

<sup>57</sup> Voir <https://www.regjeringen.no/no/dokumenter/horing---forslag-til-felles-likestillings--og-diskrimineringslov/id2458435/> (en norvégien, consulté le 19 janvier 2017).

<sup>58</sup> Voir <https://www.regjeringen.no/contentassets/14dd1daa159348c88de5d8e043feb0a4/horingsnotat.pdf> (consulté le 19 janvier 2017). Cette proposition se fonde sur une évaluation de la structure et du mandat des organismes pour l'égalité parachevée en mars 2016; voir <https://www.regjeringen.no/contentassets/04bd6c545ae74c4e8ea246f44dcf4942/utredning-av-handhevings--og-virkemiddelapparatet-pa-likestillings--og-diskrimineringsfeltet.pdf> (consulté le 19 janvier 2017).

termes de sanctions, étant donné que le Médiateur/Tribunal pour l'égalité n'applique pas les clauses relatives aux sanctions en octroyant des dommages-intérêts/réparations/indemnités. Une proposition visant à ce que le Tribunal pour l'égalité soit habilité à attribuer des dommages-intérêts pour préjudice moral en cas de violation établie du principe antidiscrimination a été présentée en 2016, et pourrait pallier cette difficulté.

- La mise en œuvre par la Norvège des exigences de la directive 2000/43 pour ce qui concerne l'aide juridique aux victimes de discrimination fondée sur l'origine ethnique pourrait poser question dans la mesure où rien n'est prévu par la loi sur l'aide juridique concernant l'octroi de ce type d'aide aux victimes de cette forme de discrimination. Si le Médiateur en charge de l'égalité et de la lutte contre la discrimination a l'obligation de fournir des orientations et des conseils aux victimes de discrimination, son rôle ne consiste pas à apporter une assistance individuelle à des victimes de discrimination ni une aide juridique à des particuliers, mais à évaluer les cas dont il est saisi pour déterminer s'il y a eu discrimination ou non. Une proposition visant à inclure la discrimination en tant que domaine pouvant donner à droit à une aide juridique gratuite est en cours depuis 2009.
- La mise à jour permanente des réglementations relatives aux logements protégés et semi-protégés /l'accès universel.



## ZUSAMMENFASSUNG

### 1. Einleitung

Norwegen ist ein relativ homogenes Land mit rund 5,2 Millionen Einwohnern. In Norwegen leben ungefähr 698 550 Immigranten und 149 600 Menschen, die in Norwegen geboren wurden, deren Eltern aber Immigranten sind. Diese beiden Gruppen machen zusammen rund 16,3 % der Gesamtbevölkerung aus. In Norwegen leben 538 000 Menschen, die nicht die norwegische Staatsbürgerschaft besitzen.<sup>59</sup> Die Samen stellen die größte indigene Bevölkerungsgruppe Norwegens, zu der 50 000 bis 65 000 Personen gehören. Weitere nationale Minderheiten sind Juden (rund 1100) und Kvenen bzw. finnischstämmige Personen (ungefähr 10 000–15 000). Rund 700 Personen gehören zur traditionellen Bevölkerungsgruppe der Roma. Zur Anzahl der *Romani* (Fahrenden) in Norwegen liegen keine Zahlen vor, sie wird jedoch auf wenige Tausend geschätzt.<sup>60</sup>

Rund 72,9 % der Norweger gehören der protestantischen norwegischen Kirche an,<sup>61</sup> weitere wichtige religiöse Gruppen sind Islamverbände, die römisch-katholische Kirche und die Pfingstkirche.<sup>62</sup> Nach offiziellen Zahlen gehören 148 189 Menschen dem Islam an, 349 083 „anderen“ christlichen Kirchen (d. h. nicht der norwegischen Kirche), 18 817 sind Buddhisten und 89 758 Mitglieder anderer Glaubensgemeinschaften.<sup>63</sup>

Korrekte und zuverlässige Zahlen zur Anzahl der behinderten Menschen in Norwegen sind schwer zu erhalten. Laut der Nationalen Gesundheitsstudie von 1985 waren damals schätzungsweise 479 000 Menschen zwischen 16 und 67 Jahren behindert. Außerdem gab es 41 000 behinderte Personen unter 16 Jahren und 292 000 über 67 Jahren. Dies entspricht einem Anteil von 18,8 % der Bevölkerung im arbeitsfähigen Alter (16-66 Jahre).<sup>64</sup> Eine jüngere Untersuchung geht davon aus, dass rund 700 000 Personen über 16 Jahren (15,5 % der Bevölkerung) eine körperliche, psychische oder geistige Einschränkung haben.<sup>65</sup> Laut offizieller Beschäftigungsstatistik gibt es 636 000 erwerbsfähige Personen mit Behinderung (etwa 10 % der Bevölkerung), von denen jedoch nur rund 282 000 tatsächlich erwerbstätig sind.<sup>66</sup>

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<sup>59</sup> Stand vom 20. Oktober 2016, siehe norwegisches Statistikamt unter <http://ssb.no/innvandring-og-innvandrerer/nokkeltall/innvandring-og-innvandrerer> (in norwegischer Sprache, letzter Zugriff am 19.01.2017).

<sup>60</sup> Zahlen des norwegischen Statistikamts und aus dem Aktionsplan der Regierung zur Förderung der Gleichstellung und zum Kampf gegen ethnische Diskriminierung 2009-2012.

<sup>61</sup> Siehe [https://www.ssb.no/kultur-og-fritid/statistikker/kirke\\_kostraaar/2016-05-04](https://www.ssb.no/kultur-og-fritid/statistikker/kirke_kostraaar/2016-05-04), Stand: 4. Mai 2016 (in norwegischer Sprache, letzter Zugriff am 19.01.2017).

<sup>62</sup> Siehe <http://www.ssb.no/kultur-og-fritid/artikler-og-publikasjoner/norge-et-sekulaert-samfunn> (in norwegischer Sprache, letzter Zugriff am 19.01.2017). Die Religionszugehörigkeit wird von offiziellen staatlichen Statistiken nicht erfasst, daher basieren die Mitgliederzahlen auf den Angaben der religiösen Gemeinschaften.

<sup>63</sup> Zahlen des norwegischen Statistikamts zur Mitgliedschaft in anderen Religions- und Weltanschauungsgemeinschaften als der norwegischen (protestantischen) Kirche auf Basis der staatlichen Mittel, die der Staat pro Mitglied bereitstellt (Stand: 25.11.2016), siehe <http://www.ssb.no/kultur-og-fritid/statistikker/trosamf> (in norwegischer Sprache, letzter Zugriff am 19.01.2017). Ein vollständiges Mitgliederverzeichnis aller Organisationen außerhalb der norwegischen Kirche auf der Grundlage der jährlichen staatlichen Mitgliedszuschüsse ist auf der Webseite des Kultusministeriums zu finden: <https://www.regjeringen.no/no/tema/religion-og-livssyn/tros-og-livssynssamfunn/innsiktsartikler/antall-tilskuddsberettigede-medlemmer-i-/id631507/> (letzter Zugriff am 19.01.2017).

<sup>64</sup> Siehe den offiziellen norwegischen Bericht NOU 1998:18 „*Det er bruk for alle*“ (Alle sind nützlich), Kapitel 9.6.5.

<sup>65</sup> Siehe den Bericht des norwegischen Statistikamts „*På like vilkår? Helse og levekår blant personer med nedsatt funksjonsevne*“ (Gleichberechtigt? Gesundheit und Lebensbedingungen von Menschen mit Behinderung) unter [http://www.ssb.no/emner/03/01/10/rapp\\_201020/rapp\\_201020.pdf](http://www.ssb.no/emner/03/01/10/rapp_201020/rapp_201020.pdf) (letzter Zugriff am 19.01.2017).

<sup>66</sup> Laut statistischer Angaben für das 2. Quartal 2016 unter <http://www.ssb.no/arbeid-og-lonn/statistikker/akutu> (in norwegischer Sprache, letzter Zugriff am 19.01.2017).



Bei einer Gesamtbevölkerung von 5 213 985 sind 744 696 Personen 66 Jahre oder älter.<sup>67</sup> Zur sexuellen Ausrichtung liegen keine offiziellen Zahlen vor, es wird jedoch geschätzt, dass etwa 3-5 % der Bevölkerung von der normativen heterosexuellen Ausrichtung abweichen. Das entspricht rund 240 000 Menschen.<sup>68</sup>

Das Rechtssystem ist vom römischen Recht inspiriert und verfügt über ein dreistufiges Gerichtssystem, das für das Straf- und Zivilrecht zuständig ist. Rechtsakte (formelle Gesetzgebung durch Gesetze und Verordnungen), die durch die gesetzgeberischen Vorarbeiten und die Rechtsprechung ausgelegt werden, sind die wichtigste Rechtsquelle vor norwegischen Gerichten und in norwegischen Behörden – in konkreten Fällen wird jedoch immer stärker internationales Recht und speziell EU-Recht geltend gemacht, auch in Diskriminierungsfällen.

## 2. Wichtigste Gesetze

Norwegen hat die meisten wichtigen internationalen Rechtsinstrumente ratifiziert, mit denen Diskriminierung bekämpft wird. Eine bemerkenswerte Ausnahme ist jedoch das 12. Protokoll zur Europäischen Konvention zum Schutz der Menschenrechte und Grundfreiheiten.

Seit Juni 2014 hat Artikel 98 der norwegischen Verfassung folgenden Wortlaut: „Vor dem Gesetz sind alle Menschen gleich. Kein Mensch darf ungerecht behandelt oder unverhältnismäßig benachteiligt werden.“<sup>69</sup>

Das Gesetz über den Status der Menschenrechte im norwegischen Recht<sup>70</sup> überführt mehrere Menschenrechtsabkommen in norwegisches Recht und verleiht diesen Abkommen Vorrang vor jeder anderen rechtlichen Bestimmung.<sup>71</sup> Das Internationale Übereinkommen zur Beseitigung jeder Form von Rassendiskriminierung (ICERD) ist nicht im Gesetz über den Status der Menschenrechte im norwegischen Recht enthalten, sondern wird durch das Antidiskriminierungsgesetz (ADG) eingeführt. Deshalb hat das ICERD bei Konflikten nicht automatisch Vorrang vor anderen Bestimmungen, sondern die Rangfolge muss jeweils im Einzelfall entschieden werden. Die UN-Behindertenrechtskonvention wurde am 3. Juli 2013 ratifiziert.<sup>72</sup> Sie ist nicht Teil des Antidiskriminierungs- und Barrierefreiheitsgesetzes (ABG) und wird von daher „auf der gleichen Ebene, auf der sie rechtlich verankert ist,“ umgesetzt,<sup>73</sup> was Zweifel bezüglich des Status dieses Übereinkommens im nationalen Recht aufwirft. Die Ombudsstelle für Gleichbehandlung und Antidiskriminierung ist dafür zuständig, die Umsetzung des Übereinkommens auf nationaler Ebene zu überwachen. Für

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<sup>67</sup> Siehe die jährliche Bevölkerungsstatistik des norwegischen Statistikamts zum 15.12.2016 unter <http://www.ssb.no/befolkning/statistikker/folkemengde> (in norwegischer Sprache, letzter Zugriff am 19.01.2017).

<sup>68</sup> Nach Angaben von LLH, dem Norwegischen Verband von LGBT-Personen, in einer E-Mail an die Verfasserin vom 07.01.2013.

<sup>69</sup> Siehe <https://www.stortinget.no/globalassets/pdf/english/constitutionenglish.pdf> (letzter Zugriff am 19.01.2017). Vorarbeiten zu diesem Verfassungsartikel in: Dokument 16 (2011-2012), Bericht des Verfassungsausschusses des *Storting* (Parlament) über Menschenrechte in der Verfassung, Kapitel 6, siehe <http://www.stortinget.no/Global/pdf/Dokumentserien/2011-2012/dok16-201112.pdf> (letzter Zugriff am 19.01.2017).

<sup>70</sup> Gesetz über den Status der Menschenrechte im norwegischen Recht vom 21.05.1999 Nr. 30 (*Menneskerettsloven*).

<sup>71</sup> Das Internationale Übereinkommen zur Beseitigung jeder Form von Rassendiskriminierung ist Teil des Antidiskriminierungsgesetzes (ADG), hat aber im Konfliktfall nicht automatisch Vorrang vor anderen Rechtsakten. Die Tatsache, dass das ICERD keinen Teil des Menschenrechtsgesetzes bildet, wurde wiederholt von NRO kritisiert, die sich gegen Diskriminierung engagieren.

<sup>72</sup> Siehe Prop. 106 S (2011-2012), Antrag an das *Storting* (Antrag auf Entschliebung durch das Parlament) auf Beschluss der Ratifizierung des UN-Übereinkommens vom 13. Dezember 2006 über die Rechte von Menschen mit Behinderungen, und Prop. 105 L 2011-2012 auf Änderung des Gesetzes über eine Ombudsstelle für Antidiskriminierung bezüglich der Überwachung der Umsetzung des UN-Übereinkommens über die Rechte von Menschen mit Behinderungen.

<sup>73</sup> Oberster Gerichtshof, Rechtssache HR-2016-2591-A, Urteil vom 20. Dezember 2016.

das ICERD und das Übereinkommen zur Beseitigung jeder Form der Diskriminierung der Frau (CEDAW) gibt es ähnliche Überwachungssysteme.

Unter diese Bestimmungen fallen alle durch die Richtlinien vorgegebenen Bereiche. Ihr sachlicher Geltungsbereich geht über den Geltungsbereich der Richtlinien hinaus. Die Antidiskriminierungsbestimmungen der Verfassung sind direkt anwendbar. Die Gleichbehandlungsbestimmungen der Verfassung können sowohl gegen staatliche als auch gegen private Akteure geltend gemacht werden.

Der Rechtsrahmen im Bereich Antidiskriminierung ist im Übrigen gut entwickelt, jedoch nur schwer zu erfassen, weil seine gesetzliche Grundlage aus fünf unterschiedlichen allgemeinen Rechtsakten und Spezialgesetzen besteht.

Die wichtigsten Elemente des Antidiskriminierungsrechts sind das Geschlechtergleichstellungsgesetz (GG),<sup>74</sup> das Antidiskriminierungsgesetz (ADG), das ethnische Herkunft, Religion und Weltanschauung abdeckt,<sup>75</sup> das Antidiskriminierungs- und Barrierefreiheitsgesetz (ABG), das Behinderung abdeckt,<sup>76</sup> das Arbeitsschutzgesetz (ASG), das Alter, politische Überzeugung, Mitgliedschaft in Gewerkschaften sowie Teilzeit- und Leiharbeit abdeckt,<sup>77</sup> sowie weitere Spezialgesetze (Seefahrtsgesetz und Wohnraumgesetze). Diese Gesetze wurden am 21. Juni 2013 nach Erlass des Gesetzes über sexuelle Ausrichtung und Antidiskriminierung (GSA), das sich mit sexueller Ausrichtung, Geschlechteridentität und dem Ausdruck von Geschlechtlichkeit befasst und am 1. Januar 2014 in Kraft trat, überarbeitet und vereinheitlicht.<sup>78</sup>

Artikel 185 und 186 des Strafgesetzbuchs (2005) gewähren strafrechtlichen Schutz vor Diskriminierung.

Es wird davon ausgegangen, dass das norwegische Antidiskriminierungsrecht dem Besitzstand der EU entspricht. Die Regierung hat sich verpflichtet, in ihrer Arbeit gegen Diskriminierung mindestens die Anforderungen der EU zu erfüllen oder sogar darüber hinaus zu gehen.<sup>79</sup> Da die Gleichbehandlungsrichtlinien (2000/78 und 2000/43) jedoch nicht Teil des EWR-Abkommens sind, wurden die in den Richtlinien vorgesehenen Ausnahmeregelungen nicht klar formuliert. Der Oberste Gerichtshof hat den Schutz vor Diskriminierung in aktuellen Urteilen gestärkt. In der Rechtssache Rt-2012-424, Ziffer 30, betonte der Oberste Gerichtshof, dass „obwohl keine rechtliche Verpflichtung zur Integrierung der Gleichbehandlungsrahmenrichtlinie in nationales Recht besteht, die Bestimmungen des Arbeitsschutzgesetzes entsprechend der üblichen Vorgehensweise des Obersten Gerichtshofs in Übereinstimmung mit der Gleichbehandlungsrahmenrichtlinie auszulegen und umzusetzen sind“ [Zitat auf Englisch: Übersetzung der Verfasserin]. Die Rechtssache Rt-2012-219 des Obersten Gerichtshofs ähnelt inhaltlich der Rechtssache

<sup>74</sup> Geschlechtergleichstellungsgesetz (GG) vom 21.06.2013 Nr. 59, in Kraft seit 01.01.2014, unter <http://www.ub.uio.no/ujur/ulovdata/lov-20130621-059-eng.pdf>. Dieses Gesetz trat an die Stelle des vorherigen Geschlechtergleichstellungsgesetzes Nr. 45 vom 9.06.1978 (*Likestilling*). Die wichtigsten Begriffe sind in beiden Fassungen ähnlich definiert.

<sup>75</sup> Antidiskriminierungsgesetz (ADG) Nr. 60 vom 21.06.2013, in Kraft seit 01.01.2014, unter <http://www.ub.uio.no/ujur/ulovdata/lov-20130621-060-eng.pdf>. Dieses Gesetz trat an die Stelle des Antidiskriminierungsgesetzes Nr. 33 vom 03.06.2005 über das Verbot von Diskriminierung aufgrund der ethnischen Herkunft, Religion usw. (*Diskrimineringsloven*). Die wichtigsten Begriffe sind in beiden Fassungen ähnlich definiert.

<sup>76</sup> Antidiskriminierungs- und Barrierefreiheitsgesetz (ABG) Nr. 61 vom 21.06.2013, in Kraft seit dem 01.01.2014 unter <http://www.ub.uio.no/ujur/ulovdata/lov-20130621-061-eng.pdf>. Dieses Gesetz trat an die Stelle des Gesetzes Nr. 42 vom 20.06.2008 über das Verbot von Diskriminierung aufgrund von Behinderungen (*tilgjengelighetsloven*). Die wichtigsten Begriffe sind in beiden Fassungen ähnlich definiert.

<sup>77</sup> Arbeitsschutzgesetz (ASG) Nr. 62 vom 17.06.2005, aktuelle Fassung Nr. 61 vom 21.06.2013, in Kraft seit dem 01.01.2014. Die neuesten Änderungen sind in der englischen Übersetzung unter <http://www.arbeidstilsynet.no/binfil/download2.php?tid=92156> noch nicht berücksichtigt.

<sup>78</sup> Gesetz über sexuelle Ausrichtung und Antidiskriminierung (GSA) Nr. 59 vom 21.06.2013, in Kraft seit 01.01.2014. Englische Übersetzung unter: <http://www.ub.uio.no/ujur/ulovdata/lov-20130621-058-eng.pdf>.

<sup>79</sup> Weißbuch der Regierung über einen stärkeren Schutz vor Diskriminierung im Arbeitsleben, NOU 2003:2 *Skjerpet vern mot diskriminering i arbeidslivet*, S. 7.

C-447/09 (*Prigge*) des EuGH. Der Oberste Gerichtshof betonte in Ziffer 46, dass die Normen des Arbeitsschutzgesetzes so ausgelegt werden müssten, dass sie mit der Gleichbehandlungsrahmenrichtlinie vereinbar seien.<sup>80</sup>

Durch die Überarbeitung der Antidiskriminierungsgesetze im Jahr 2013 sollten die wichtigsten Begriffsbestimmungen harmonisiert und verdeutlicht werden, um bei sämtlichen Diskriminierungsgründen ein ähnliches Schutzniveau zu gewährleisten. Allerdings wurden wichtige Elemente aus den Rechtstexten entfernt, obwohl laut den Vorarbeiten keine inhaltliche Änderung beabsichtigt ist. Dies ist ein Problem, weil es darauf hinweist, dass sich nach und nach eine neue Auslegungspraxis entwickelt, insbesondere in Bezug auf die erlaubten Ausnahmen bei unmittelbarer Diskriminierung.

Es ist fraglich, ob Norwegen den Opfern von Diskriminierung aufgrund der Rasse oder ethnischen Herkunft die in der Richtlinie 2000/43 geforderte unabhängige Unterstützung gewährt, weil die Ombudsstelle lediglich die Aufgabe hat, Opfer von Diskriminierung zu beraten und nicht zu unterstützen und weil in Diskriminierungsfällen keine kostenlose Verfahrenshilfe gewährt wird.

### **3. Wichtige Grundsätze und Begriffe**

Das norwegische Antidiskriminierungsrecht deckt in allen sozialen Bereichen die folgenden Diskriminierungsgründe ab: Geschlecht, ethnische und nationale Herkunft, Abstammung, Hautfarbe, Sprache, Religion oder Weltanschauung, sexuelle Ausrichtung und Behinderung. Diskriminierung aufgrund der politischen Überzeugung, Mitgliedschaft in einer Gewerkschaft und des Alters ist im Arbeitsleben verboten.

Die Begriffsbestimmungen von unmittelbarer und mittelbarer Diskriminierung, Belästigung und Anweisung zur Diskriminierung entsprechen den Richtlinien 2000/43 und 2000/78. Der Begriff Diskriminierung wird im ADG Art. 6, ABG Art. 5<sup>81</sup>, GSA Art. 5 und ASG Art. 13-1 definiert. In Art. 13-1 ASG werden unmittelbare und mittelbare Diskriminierung nicht näher bestimmt, die Begriffe werden jedoch in den Vorarbeiten behandelt.<sup>82</sup> Belästigung wird durch ADG Art. 9, ABG Art. 8, GSA Art. 8 und ASG Art. 13-1(2) verboten. Anweisung zur Diskriminierung wird durch ADG Art. 11, ABG Art. 10, GSA Art. 10 und ASG Art. 13-1(2) verboten.

Die Pflicht zu angemessenen Vorkehrungen sowie Bestimmungen zu geschützten bzw. halbgeschützten Beschäftigungsformen sind im ABG geregelt.

Diskriminierung durch Assoziierung ist in Bezug auf ethnische Herkunft, Religion und Weltanschauung durch Art. 6 des ADG abgedeckt, in Bezug auf Behinderungen durch Art. 5 des ABG und in Bezug auf sexuelle Ausrichtung durch Art. 5 des GSA.

Gefühlte oder vermutete Diskriminierung ist im norwegischen Recht verboten, wenn diese Gefühle oder Vermutungen dazu geführt haben, dass eine Person tatsächlich weniger günstiger behandelt wurde.

Für Fälle, in denen eine Mehrfachdiskriminierung vorliegt, gibt es keine eigene Regelung. „Mehrfachdiskriminierung“ ist in den Gesetzen (zur Nichtdiskriminierung) oder Rechtsinstrumenten nicht ausdrücklich verboten. Die Ombudsstelle für Gleichbehandlung

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<sup>80</sup> Siehe Rechtssache Rt 2012-424 Ziffer 30 und Rechtssache Rt 2012-219. Ähnlich äußerte sich der Oberste Gerichtshof in Rechtssachen, in denen es um Altersdiskriminierung ging: Rt 2011-964, Rt 2011-609 und Rt 2010-202.

<sup>81</sup> Das Verbot von Diskriminierung bezieht sich auf Diskriminierung aufgrund einer bestehenden, vermuteten, früheren und möglichen Behinderung sowie auf Diskriminierung von Personen aufgrund deren Beziehung zu einem Menschen mit Behinderung.

<sup>82</sup> Ot.prp Nr. 49 (2004-2005), Kapitel 25 (in norwegischer Sprache): <http://www.regjeringen.no/nb/dep/aid/dok/regpubl/otprp/20042005/otprp-nr-49-2004-2005-/25.html?id=397026> (letzter Zugriff am 19.01.2017).

und das Schiedsgericht für Gleichbehandlungsfragen sind beide berechtigt, Fälle von Diskriminierung aus mehreren Gründen zu prüfen, vor allem in Bezug auf Geschlecht und Alter sowie Geschlecht und Religion (Hidschab).

Schutz vor Viktimisierung gewähren ABG Art. 9, ADG Art. 10, GSA Art. 9 und ASG Art. 2-5.

In allen Antidiskriminierungsgesetzen – ABG, ADG, GSA und ASG – ist eine Ausnahme vom Diskriminierungsverbot vorgesehen, wenn die Ungleichbehandlung in wesentlichen und entscheidenden beruflichen Anforderungen begründet ist. Im Arbeitsleben ist im Allgemeinen keine Ausnahmeregelung für Arbeitgeber vorgesehen, deren Ethik sich auf einer Religion oder Weltanschauung gründet. Diese Arbeitgeber können jedoch verlangen, dass ihre Mitarbeiter dieser Religion oder Weltanschauung angehören, sofern dies gemäß der allgemeinen Ausnahmebestimmung aufgrund wesentlicher und entscheidender beruflicher Anforderungen erfolgt.

#### **4. Sachlicher Geltungsbereich**

Die nationale Gesetzgebung gilt grundsätzlich für jedes Beschäftigungs- und Auftragsverhältnis in der Privatwirtschaft und der öffentlichen Hand, einschließlich Vertragsarbeit, selbständiger Beschäftigung, Militärdienst und gesetzlichen Ämtern.

Der Geltungsbereich der Gesetze GG, ADG, GSA und ABG umfasst sämtliche Sektoren und deckt alle in den Richtlinien genannten Diskriminierungsgründe ab. ADG, GSA und ABG gelten für alle Bereiche des gesellschaftlichen Lebens mit Ausnahme des Familienlebens und persönlicher Beziehungen.

Das ASG betrifft nur das Arbeitsleben: Es gilt für alle Maßnahmen, die durch Mitarbeiter durchgeführt werden, sofern diese im Gesetz nicht ausdrücklich ausgeschlossen sind. Außerdem fällt auch die Auswahl und Behandlung von selbständig Beschäftigten und Leiharbeitern unter die Bestimmungen des Gesetzes. Alter ist nur im Arbeitsleben ein Schutzgrund.

Das bestehende Recht regelt alle Aspekte von Beschäftigungsverhältnissen, von der Stellenausschreibung bis zur Kündigung. Das norwegische Recht nimmt die Streitkräfte, die Polizei, den Strafvollzug oder die Rettungsdienste nicht ausdrücklich vom Verbot der Diskriminierung aufgrund des Alters oder einer Behinderung aus. Auch beim Arbeitsschutz gibt es keine Ausnahmen in Bezug auf Behinderungen.

#### **5. Rechtsdurchsetzung**

Klagen wegen mutmaßlicher Diskriminierung können entweder vor ein ordentliches Gericht oder vor eine der Stellen gebracht werden, die Norwegen zur Überprüfung von Diskriminierungsfällen eingerichtet hat: die Ombudsstelle für Gleichbehandlung und Antidiskriminierung (die Ombudsstelle für Gleichbehandlung) und das Schiedsgericht für Gleichbehandlung und Antidiskriminierung (das Schiedsgericht für Gleichbehandlungsfragen).

Im Allgemeinen werden Diskriminierungsklagen in der Privatwirtschaft und im öffentlichen Sektor nach demselben Verfahren geprüft. Zivilgerichte können dem Geschädigten gemäß dem ADG, ABG, GSA und AG Schadensersatz bzw. Entschädigungen zuerkennen. Die norwegischen Gesetze legen keine Obergrenze für die Höhe der Entschädigung und keine Regeln zur deren Berechnung fest. Bei einer strafrechtlichen Behandlung können Geldstrafen verhängt werden.

Ein wichtiger Verfahrensgrundsatz bei norwegischen Zivilgerichten ist die freie Beweiswürdigung des Gerichts während des Verfahrens. Es können alle möglichen Beweise verwendet werden, jedoch nur für Tatsachen, die für die Entscheidung des Gerichts von

Bedeutung sein können. Der Umfang der Beweisaufnahme muss der Bedeutung des Rechtsstreits entsprechen. Für Diskriminierungsfälle gelten dieselben Regeln wie für jedes andere Verfahren vor einem Zivilgericht.

Testing-Verfahren sind in den Gesetzen nicht ausdrücklich zugelassen, weil die Gesetze sich zu diesem Thema nicht äußern. Nach dem Grundsatz der freien Beweiswürdigung der Gerichte sind Testing-Verfahren jedoch in allen Fällen von Diskriminierung vor Gericht zulässig.

Das norwegische Recht erlaubt auch die Nutzung von statistischen Daten zum Nachweis von mittelbarer Diskriminierung. Allerdings muss nach norwegischem Recht nicht nachgewiesen werden, dass eine mittelbare Diskriminierung stattgefunden hat, sondern es wird geprüft, ob sich eine Handlung oder Unterlassung auf einen Einzelnen oder eine Gruppe nachteilig auswirkt.

Für alle Diskriminierungsgründe und auch für die Prüfung, ob angemessene Vorkehrungen getroffen wurden oder ob eine Belästigung, Viktimisierung oder Anweisung zur Diskriminierung vorliegt, gilt die Regel der geteilten Beweislast.

Verbände können sich an Verwaltungsverfahren beteiligen und im Namen des Opfers tätig werden. Voraussetzung ist, dass die Organisation „ganz oder teilweise dem Zweck dient, Diskriminierung zu bekämpfen“, die aufgrund der gesetzlich verbotenen Gründe erfolgt, siehe Artikel 27 ADG, Art. 32 ABG, Art. 25 GSA und Art. 13-10 AG. Die Verbände können dabei nach eigenem Ermessen handeln.

Über 95 % aller Diskriminierungsfälle werden von der Ombudsstelle für Gleichbehandlung und vom Schiedsgericht für Gleichbehandlungsfragen behandelt. Diese Stellen können keine Entschädigung zuerkennen und nur unter ganz bestimmten Umständen Geldbußen verhängen. Pro Jahr werden nur wenige Fälle vor einem ordentlichen Gericht verhandelt. Die geringe Zahl der Gerichtsverfahren lässt sich unter anderem mit den Risiken und Kosten von Gerichtsprozessen erklären und damit, dass in Diskriminierungsfällen nur selten Prozesskostenhilfe gewährt wird. Ein besonders wichtiger Fall, mit dem sich der Oberste Gerichtshof im Jahr 2015 befusste, war Rt-2015-1313, in dem es um den Geltungsbereich von Artikel 12 des Gesetzes über die Ombudsstelle für Antidiskriminierung (GOA) ging.<sup>83</sup> Der Gerichtshof kam zu dem Schluss, dass eine Entscheidung des Schiedsgerichts für Gleichbehandlungsfragen, in der festgestellt wird, dass in dem jeweiligen Fall kein Verstoß gegen die Antidiskriminierungsgesetze vorliegt, nicht unter Berufung auf Artikel 12 GOA gerichtlich angefochten werden kann. Die Entscheidungen des Schiedsgerichts für Gleichbehandlungsfragen, so der Gerichtshof, haben nicht in dem Maße Rechtswirkung, dass gegen das Schiedsgericht auf Änderung seiner Entscheidung geklagt werden kann. Das GOA schließt jedoch nicht aus, dass der Arbeitnehmer/die Arbeitnehmerin den Arbeitgeber/die Arbeitgeberin wegen Diskriminierung verklagt, um den Fall von einem Gericht umfassend prüfen zu lassen.

## **6. Gleichbehandlungsstellen**

Die Ombudsstelle für Gleichbehandlung und ihre Berufungsinstanz, das Schiedsgericht für Gleichbehandlungsfragen, sind verwaltungstechnisch unabhängige Gleichbehandlungsstellen, die eingerichtet wurden, um die Klagen von Einzelpersonen wegen mutmaßlicher Verstöße gegen das Diskriminierungsverbot zu prüfen. Ombudsstelle und Schiedsgericht sind kostenlose und leicht zugängliche Beschwerdestellen, bei denen Diskriminierungsfälle außergerichtlich behandelt werden.

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<sup>83</sup> Siehe Gesetz über die Ombudsstelle für Gleichbehandlung und Antidiskriminierung und das Schiedsgericht für Gleichbehandlung und Antidiskriminierung (Gesetz über die Ombudsstelle für Antidiskriminierung, GOA) Nr. 40 vom 10.06.2005, <http://www.regjeringen.no/en/doc/Laws/Acts/The-Act-on-the-Equality-and-Anti-Discrim.html?id=451952>.

Ernennung, Organisation, Zuständigkeiten und Rechte dieser Stellen sind im Gesetz über die Ombudsstelle für Antidiskriminierung (GOA) geregelt. Die Stellen agieren unabhängig und diese Unabhängigkeit ist auch gesetzlich festgelegt. Die Ombudsstelle für Gleichbehandlung hat eine Doppelfunktion. Sie überwacht die Einhaltung der Gesetze und setzt sich aktiv für die Förderung der Gleichstellung und den Kampf gegen Diskriminierung ein. Als Hüterin der Gesetze bezieht die Ombudsstelle für Gleichbehandlung zu Beschwerden wegen Verstößen gegen Gesetze und Vorschriften, die ihren Tätigkeitsbereich betreffen, Stellung und erteilt Ratschläge und Empfehlungen in Bezug auf diese Rechtsvorschriften. Ihre Stellungnahmen sind nicht rechtsverbindlich und können nicht durchgesetzt werden, allerdings wird vorausgesetzt, dass öffentliche Stellen sich an ihre Empfehlungen halten. Ziel der Ombudsstelle für Gleichbehandlung ist es, dafür zu sorgen, dass die Parteien sich ihrem Urteil freiwillig anschließen.

Die Ombudsstelle führt unabhängige Untersuchungen durch, veröffentlicht Berichte und spricht Empfehlungen zum Thema Diskriminierung aus. Jedes Jahr veröffentlicht die Ombudsstelle einen Jahresbericht und andere Berichte über den Stand der Gleichstellung.

Die Ombudsperson für Gleichbehandlung wird durch jährliche Mittelzuweisungen aus dem Ministerium für Kinder und Gleichstellung finanziert. Obwohl die Ombudsperson vom Ministerium ernannt wird und ihre Mitarbeiter Beamte sind, wird ihre Unabhängigkeit in Norwegen nicht bezweifelt, weil ihr Mandat rechtlich klar geregelt und sie gegenüber dem Ministerium nicht weisungsgebunden ist. Im Staatshaushalt für 2016 waren für die Ombudsstelle 52 856 000 NOK (ca. 5 745 217 Euro) veranschlagt, was – abgesehen von der Veränderung des Wechselkurses – den früheren Budgets gleicht.

Das Schiedsgericht für Gleichbehandlungsfragen ist die Berufungsinstanz der Ombudsstelle für Gleichbehandlung. Seine Mitglieder werden vom Ministerium für Kinder und Gleichstellung für eine Amtszeit von vier Jahren ernannt, die später verlängert werden kann. Vorsitzende/r und stellvertretende/r Vorsitzende/r des Schiedsgerichts müssen die für Richter/innen geltenden Anforderungen erfüllen. Die Mitglieder werden aufgrund ihrer Erfahrungen im Bereich Diskriminierung ausgewählt. Das Schiedsgericht für Gleichbehandlungsfragen hat ein Sekretariat, das mit Angestellten des öffentlichen Dienstes besetzt ist.

Die Ombudsstelle für Gleichbehandlung berät Opfer von Diskriminierung und stellt ihnen sachdienliche Informationen zur Verfügung. Die Ombudsstelle ist bei der Prüfung von Klagen unparteiisch. Gemäß dem GOA darf die Ombudsstelle keine Partei bei externen Verfahren vertreten. Deshalb fungiert die Ombudsstelle nicht als Rechtsbeistand oder Anwalt der Opfer. Weder die Ombudsstelle noch das Schiedsgericht dürfen Fälle eigenständig vor Gericht bringen, wenn niemand Klage eingereicht hat. Hier erfüllt die Ombudsperson für Gleichbehandlung nicht alle Aufgaben, die in der Richtlinie 2000/43 genannt sind; weder sie noch eine andere Stelle gewähren Opfern von Diskriminierung eine unabhängige Unterstützung. Bis 2006 bot die Zentralstelle gegen ethnische Diskriminierung (SMED) Rechtsbeistand für Opfer von ethnischer Diskriminierung. Als die Zentralstelle jedoch in die „neue“ Ombudsstelle für Gleichbehandlung integriert wurde, wurde das Rechtshilfesystem abgeschafft. Das Fehlen eines Rechtshilfesystems, das Opfern von Diskriminierung unabhängige Unterstützung anbietet und gezielt Diskriminierung aufgrund der ethnischen Herkunft bekämpft, ist ein Fehler im aktuellen System, in dem eine umfassende Ombudsstelle für Gleichbehandlung für alle Diskriminierungsgründe zuständig ist.

Obwohl in Norwegen nur sehr wenige Roma und Reisende leben, hat die Ombudsperson für Gleichbehandlung wiederholt auf Probleme im Zusammenhang mit Roma und Reisenden hingewiesen. In ihrem Bericht an den UN-Ausschuss für die Beseitigung der Rassendiskriminierung hat die Ombudsperson das wichtigste Problem angesprochen: dass den Roma zahlreiche Grundrechte verweigert werden, wenn sie ihren traditionellen



Lebensstil nicht aufgeben.<sup>84</sup> Die Ombudsperson befürchtet, dass die Reisenden dafür verantwortlich gemacht werden, wenn es der norwegischen Schulpolitik nicht gelingt, sich an eine traditionell mobile Lebensweise anzupassen. Die Roma werden außerdem systematisch von Campingplätzen und aus Restaurants verwiesen, weil sie einer nationalen Minderheit angehören.<sup>85</sup> Auf politischer Ebene war die Ombudsstelle daher eine Stimme für die Roma in der norwegischen Öffentlichkeit.

## 7. Schlüsselprobleme

Die wichtigsten rechtlichen Themen bei der Bekämpfung von Diskriminierung aufgrund von Rasse bzw. ethnischer Herkunft, Religion oder Weltanschauung, sexueller Ausrichtung, Behinderung und Alter in Norwegen sind:

- Ein neues Gesetz zum Schutz vor Diskriminierung aufgrund der sexuellen Ausrichtung und der sexuellen Identität in allen Lebensbereichen, es wurde 2013 verabschiedet und trat zum 1. Januar 2014 in Kraft. Die Neufassung, durch die die Antidiskriminierungsgesetze harmonisiert und für alle Diskriminierungsgründe derselbe Schutz eingeführt wurde, könnte zu einem Mangel an Klarheit über den rechtlichen Geltungsbereich führen, weil die frühere, sehr eng gefasste Ausnahmeregel vom Verbot der unmittelbaren Diskriminierung nun möglicherweise großzügiger ausgelegt wird.
- Obwohl 2013 eine vollständige Überarbeitung der Antidiskriminierungsgesetzgebung erfolgte, die seit 1. Januar 2014 in Kraft ist, wurde im Oktober 2015 ein neuer Entwurf für ein einziges, umfassendes Gesetz vorgelegt und eine öffentliche Anhörung durchgeführt.<sup>86</sup> Am 19. Oktober 2016 wurde ein Regierungsentwurf zur Neuorganisation der Gleichbehandlungsstellen zur öffentlichen Anhörung vorgelegt; in dem Entwurf wird vorgeschlagen, den individuellen Beschwerdemechanismus von der Ombudsstelle für Gleichbehandlung auf das Schiedsgericht für Gleichbehandlungsfragen zu übertragen und letzteres zu ermächtigen, in Fällen, die das Arbeitsleben betreffen, Ersatz für immaterielle Schäden zuzusprechen.<sup>87</sup> Beide Vorschläge werden dem Parlament voraussichtlich im Laufe des Jahres 2017 übermittelt.
- Es ist fraglich, ob Opfer von Diskriminierung wirklich den notwendigen Zugang zu Gerechtigkeit bzw. wirksamen Sanktionen und Rechtsmitteln haben. Statistische Daten über Diskriminierungsfälle in Norwegen zeigen, dass die Gerichte zwar Diskriminierungsfälle verhandeln und immer mehr Fälle vor Gericht kommen. Dennoch wird der weitaus überwiegende Teil der Diskriminierungsfälle in Norwegen über die zuständigen Verwaltungsstellen, die Ombudsstelle für Gleichbehandlung und das Schiedsgericht für Gleichbehandlungsfragen kanalisiert. Dies wirft insbesondere die Frage auf, ob Norwegen bei den Sanktionen dem EU-Recht folgt, weil die Ombudsstelle und das Schiedsgericht Opfern nicht wie vorgegeben Schadenersatzleistungen bzw. Entschädigungen zusprechen können. Ein Vorschlag, das Schiedsgericht für Gleichbehandlungsfragen zu ermächtigen, in Fällen, in denen ein Verstoß gegen den Nichtdiskriminierungsgrundsatz festgestellt wird, Ersatz für immaterielle Schäden zuzusprechen, wurde 2016 vorgelegt und könnte dieses Problem entschärfen.

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<sup>84</sup> Siehe den Bericht der Ombudsperson an den UN-Ausschuss für die Beseitigung der Rassendiskriminierung (CERD) von 2010 unter [http://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/NOR/INT\\_CERD\\_NGO\\_NOR\\_78\\_9791\\_E.pdf](http://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/NOR/INT_CERD_NGO_NOR_78_9791_E.pdf).

<sup>85</sup> Siehe zum Beispiel das Ombudsverfahren 15/1512.

<sup>86</sup> Siehe <https://www.regjeringen.no/no/dokumenter/horing---forslag-til-felles-likestillings--og-diskrimineringslov/id2458435/> (in norwegischer Sprache, letzter Zugriff am 19.01.2017).

<sup>87</sup> Siehe <https://www.regjeringen.no/contentassets/14dd1daa159348c88de5d8e043feb0a4/horingsnotat.pdf> (letzter Zugriff am 19.01.2017). Dieser Vorschlag basiert auf einer im März 2016 abgeschlossenen Bewertung der Struktur und des Mandats der Gleichbehandlungsstellen, siehe <https://www.regjeringen.no/contentassets/04bd6c545ae74c4e8ea246f44dcf4942/utredning-av-handhevings--og-virkemiddelapparatet-pa-likestillings--og-diskrimineringsfeltet.pdf> (letzter Zugriff am 19.01.2017).

- Es ist fraglich, ob Norwegen Opfern von Diskriminierung aufgrund der ethnischen Herkunft den in Richtlinie 2000/43 vorgeschriebenen Rechtsschutz gewährt, weil es nach dem Rechtsbeihilfegesetz kein System gibt, das Opfern von Diskriminierung aufgrund der ethnischen Herkunft Rechtshilfe gewährt. Obwohl die Ombudsstelle für Gleichbehandlung und das Schiedsgericht für Gleichbehandlungsfragen Opfern von Diskriminierung Beratung und Informationen bereitstellen, ist es nicht Aufgabe der Ombudsstelle, Opfer individuell zu unterstützen oder ihnen Rechtsbeistand zu gewähren. Die Stelle prüft nur, ob das Opfer diskriminiert wurde oder nicht. Seit 2009 wird an einer Gesetzesänderung gearbeitet, durch die auch in Diskriminierungsfällen eine kostenlose Rechtshilfe gewährt wird.
- Laufende Überarbeitung der Regeln über geschützte und halbgeschützte Beschäftigungsformen bzw. Barrierefreiheit.



## INTRODUCTION

### The national legal system

The Norwegian legal system is inspired by the roman legal system, and has a three-level court system that handles both criminal and civil law. Statutory provisions (formal legislation through acts and their regulations) interpreted through the legal preparatory works and case law are the primary sources of law invoked in Norwegian courts of law and in respect of Norwegian administrative agencies – although international legislation, both EU and ECHR law, is increasingly being invoked in specific cases.

Discrimination cases may be brought before the ordinary courts.

The key administrative procedure to handle discrimination cases is however the Equality and Anti-Discrimination Ombud (the Equality Ombud)<sup>88</sup> with its appeal body the Equality and Anti-Discrimination Tribunal<sup>89</sup> (hereinafter referred to as the Equality Tribunal). The appointment, method of organisation and authority of these bodies are regulated in the Anti-Discrimination Ombud Act (AOT).<sup>90</sup>

Of some relevance to anti-discrimination law is also the Labour Court, which deals with disputes between trade unions that include the interpretation, validity and existence of collective agreements and cases of breach of collective agreements – to the extent that anti-discrimination provisions are included in the collective agreements.<sup>91</sup>

### List of main legislation transposing and implementing the directives

The legislative framework for anti-discrimination legislation is well developed, however it is difficult to access as its legislative base is derived from five main different legislative acts as well as found in specialised legislation. The key pieces of anti-discrimination legislation consist of the Gender Equality Act (GEA),<sup>92</sup> the Anti-Discrimination Act (ADA) on ethnicity, religion and belief,<sup>93</sup> the Anti-discrimination and Accessibility Act (AAA) on disability,<sup>94</sup> and the Working Environment Act (WEA) on age,<sup>95</sup> as well as specialised legislation (such as the seamen's act and housing acts). These acts were revised and

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<sup>88</sup> See <http://www.ido.no/en/> (accessed 6 January 2017).

<sup>89</sup> See <http://www.diskrimineringsnemnda.no/en/innhold/side/forside> (accessed 6 January 2017).

<sup>90</sup> As per the Act on the Equality and Anti-Discrimination Ombud and the Equality and Anti-Discrimination Tribunal of 10 June 2005 No. 40 (*Diskrimineringsombudsloven*). (AOT) The act came into force in 1979, and has been amended several times, most recently by law 2015-06-19-65 in force as of 10 October 2015. The recent amendments are not included in the translated version of the act, see: <http://www.regjeringen.no/en/doc/Laws/Acts/The-Act-on-the-Equality-and-Anti-Discrim.html?id=451952> (accessed 6 January 2017).

<sup>91</sup> See <http://www.arbeidsretten.no/engelsk.php> (accessed 6 January 2017).

<sup>92</sup> The Gender Equality Act (GEA) of 21 June 2013 No. 59, in force as of 1 January 2014, at <http://www.ub.uio.no/ujur/ulovdata/lov-20130621-059-eng.pdf>. This act replaces the previous Gender Equality Act (GEA) of 9 June 1978 No. 45 (*Likestilling*). Key concepts remain similar in the previous and current version (accessed 6 January 2017).

<sup>93</sup> The Anti-Discrimination Act (ADA) of 21 June 2013 No 60, in force as of 1 January 2014, at <http://www.ub.uio.no/ujur/ulovdata/lov-20130621-060-eng.pdf> (accessed 6 January 2017). This act replaces the Anti-Discrimination Act of 3 June 2005 No. 33 on prohibition of discrimination based on ethnicity, religion etc (*Diskrimineringsloven*). Key concepts remain similar in the previous and current version.

<sup>94</sup> The Anti-Discrimination and Accessibility Act – (AAA) of 21 June 2013 No. 61, in force as of 1 January 2014 at <http://www.ub.uio.no/ujur/ulovdata/lov-20130621-061-eng.pdf> (accessed 6 January 2017). This act replaces the previous Act of 20 June 2008 No 42 relating to a prohibition against discrimination on the basis of disability (*tilgjengelighetsloven*). Key concepts remain similar in the previous and current version.

<sup>95</sup> Working Environment Act (WEA) of 17 June 2005 No. 62, chapter 13. The WEA as a whole was last amended by law on 18 December 2015, in force 1 January 2016. Chapter 13 is a stand-alone chapter containing the anti-discrimination legislation. Chapter 13 was last amended by law of 21 June 2013 No. 61, in force as of 01.01.2014. Recent amendments are not included in the translation at: <http://www.arbeidstilsynet.no/binfil/download2.php?tid=92156> (accessed 6 January 2017).

aligned on 21 June 2013 upon the enactment of the Sexual Orientation Anti-Discrimination Act (SOA) on sexual orientation, gender identity and gender expression.<sup>96</sup>

In terms of specialised legislation, the Ship Labour Act chapter 10 provides protection against discrimination in the employment relationship of seamen on the basis of political views, membership of a trade union, sexual orientation, disability or age.<sup>97</sup> Specialised legislation also includes prohibiting discrimination on the grounds of ethnicity, sexual orientation or disability in four different acts regarding housing legislation (see paragraph 3.2.10 below).

Sections 185 and 186 of the General Civil Penal Code<sup>98</sup> contain criminal law protection against discrimination. Section 185 concerns hateful expressions emphasising more clearly that racist expressions with insulting effects are punished by law. Section 186 penalises the refusal to provide goods and services as well as admission to public performance/exhibition/gathering. The provisions in the penal code are only applicable in relation to discrimination because of skin colour or national or ethnic origin, religion or life stance or sexual orientation or lifestyle and disability.<sup>99</sup>

A proposal for a single piece of comprehensive anti-discrimination legislation was presented by the Ministry of Children and Equality for the public in October 2015 and sent on a public hearing.<sup>100</sup> This proposal builds upon the work of the Government-appointed Discrimination Commission, using the Government's white paper on comprehensive protection against discrimination (NOU 2009:14) as its starting point. A Government proposal for the re-organisation of the equality bodies was sent on public hearing on 19 October 2016, suggesting the transfer of the individual complaint mechanism from the Equality Ombud to the Equality Tribunal, and giving the Equality Tribunal power to award non-monetary damages in cases concerning working life.<sup>101</sup> These two proposals are expected to be forwarded to Parliament during 2017. It is unclear whether or not the proposed changes in the AOT will be incorporated into the forthcoming anti-discrimination act, or if the AOT will continue to exist in addition to the new act.

It is presumed that Norwegian anti-discrimination legislation is in line with the EU *acquis*, although the Non-discrimination Directives (2000/78 and 2000/43) are not incorporated in the EEA agreement. However, the Government has committed to having as high - or higher - standards in its work against discrimination as the requirements of the EU.<sup>102</sup> This protection has been reinforced by the Supreme Court in relevant judgments. In Rt 2012-424 paragraph 30, the Supreme Court underlined that 'although there is no legal

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<sup>96</sup> The Sexual Orientation Anti-Discrimination Act (SOA) of 21 June 2013 No 59, in force as of 1 January 2014. Translation at: <http://www.ub.uio.no/ujur/ulovdata/lov-20130621-058-eng.pdf> (accessed 6 January 2017).

<sup>97</sup> The Act of 21 June 2013 No. 102 relating to employment protection etc. for employees on board ships (<https://www.sjofartsdir.no/contentassets/e2109922eca44281ade9ffcb891e37/ship-labour-act.pdf> the Ship Labour Act) chapter 10, in force as of 1 January 2014. See <https://www.sjofartsdir.no/en/legislation/laws/ship-labour-act/> (accessed 6 January 2017).

<sup>98</sup> See the Penal Act of 20 May 2005 no. 28 in force as of 1 October 2015. No English version exists as of 6 January 2017.

<sup>99</sup> An assessment regarding the anti-discrimination protection in the penal law has been carried out and published on 16 November 2016, see <https://www.regjeringen.no/no/dokumenter/utredning-om-det-strafferettslige-diskrimineringsvernet/id2520561/> (accessed on 6 January 2017). The suggested legal amendments will be to include protection against sexual orientation, gender identity and gender expression as well as gender in both sections 185 and 186.

<sup>100</sup> See <https://www.regjeringen.no/no/dokumenter/horing---forslag-til-felles-likestillings--og-diskrimineringslov/id2458435/> (accessed 6 January 2017).

<sup>101</sup> See <https://www.regjeringen.no/contentassets/14dd1daa159348c88de5dbe043feb0a4/horingsnotat.pdf> (accessed on 6 January 2017). This proposal builds on an assessment of the structure and mandate of the equality bodies finalised in March 2016, see <https://www.regjeringen.no/contentassets/04bd6c545ae74c4e8ea246f44dcf4942/utredning-av-handhevings--og-virkemiddelapparatet-pa-likestillings--og-diskrimineringsfeltet.pdf> (accessed 6 January 2017).

<sup>102</sup> Government white paper on 'Strengthened protection against discrimination in working life', NOU 2003:2 *Skjerpet vern mot diskriminering i arbeidslivet*, p. 7.

commitment to incorporate the Employment Equality Directive in national law, it is according to practice from the Supreme Court established that the regulations of the Working Environment Act are to be interpreted and implemented in accordance with the Employment Equality Directive' [authors' translation]. Supreme Court case Rt 2012-219<sup>103</sup> was in its content similar to the facts in the ECJ case C-447/09 (*Prigge*). The Supreme Court underlined in paragraph 46 that the standards of the Working Environment Act should be interpreted to be compatible with the Employment Equality Directive.<sup>104</sup>

Directive 2000/78 is thus implemented through the Working Environment Act (WEA)<sup>105</sup> chapter 13 on political views, membership of a trade union, sexual orientation and age,<sup>106</sup> and in the Anti-discrimination and Accessibility Act (AAA) originally in force as of 1 January 2009 covering disability.<sup>107</sup> Protection against discrimination because of disability is found in the AAA, although requirements to adapt the environment to meet the physical and psychological working environment of people with reduced functional ability is also found in the Working Environment Act (WEA) chapter 4, imposing general accommodation duties.<sup>108</sup> Directive 2000/78 is also implemented through the Sexual Orientation Anti-Discrimination Act (SOA).<sup>109</sup> Directive 2000/43 was originally implemented by the Act on the prohibition of discrimination based on ethnicity, religion and belief (the Anti-Discrimination Act - ADA) covering ethnicity, national origin, descent, skin colour, language, religion or belief, in force as of 1 January 2006.<sup>110</sup> The latter acts were all assessed against the Directives 2000/78 and 2000/43 before enactment. Upon the revision and harmonisation of the anti-discrimination legislation enacted in June 2013, the relationship with the directives was also assessed.<sup>111</sup> However, as the Non-discrimination Directives (2000/78 and 2000/43) are not incorporated in the EEA agreement, the specific exceptions allowed under the Employment Equality Directive Articles 4(1), 4(2) and 6(1) have not been clearly articulated.

The 2013 revision of the discrimination legislation aimed to harmonise and clarify the key definitions and ensure a similar protection for all discrimination grounds. However, as key elements are taken out of the actual legal texts, and the preparatory works state that no change is intended, this is worrisome, as this might indicate that new interpretation develops over time, especially in relation to the exceptions allowed for direct discrimination. As the preparatory works to the acts in Norway are key to the definitions in the legal text, having many, and partly contradictory preparatory works to each act, may dilute the prohibitions of the legal texts.

There is a question mark regarding the Norwegian implementation in relation to the requirements of Directive 2000/43 regarding independent assistance to victims of discrimination because of racial or ethnic origin. The Ombud's mandate is only to provide guidance to victims of discrimination, not assistance. Free legal aid is not granted in discrimination cases (see paragraph 7 (e) below).

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<sup>103</sup> A new case concerning the compensation awarded to these pilots for the discriminatory behaviour established by the Supreme Court in the helicopter-pilot-case, Rt.2012-219, is in the process of being handled by the court system, see LG-2013-167255-1, and will be heard by the Supreme Court in January 2017. (See chapter 4.7.1(b) below).

<sup>104</sup> See Rt. 2012-424 paragraph 30, and Rt. 2012-219.

<sup>105</sup> Act relating to working environment, working hours and employment protection, etc. (Working Environment Act) (WEA) of 17 June 2005 no 62, see <http://www.arbeidstilsynet.no/binfil/download2.php?tid=92156> as amended 18 December 2015 (accessed 21 March 2017).

<sup>106</sup> The discrimination clauses in force as of 2004 in the previous WEA.

<sup>107</sup> Act relating to working environment, working hours and employment protection, etc. (Working Environment Act) (WEA) of 17 June 2005 no. 62, see <http://www.arbeidstilsynet.no/binfil/download2.php?tid=92156> as amended 18 December 2015 (accessed 6. January 2017).

<sup>108</sup> Anti-Discrimination and Accessibility Act (AAA) of 21 June 2013 No 61, in force as of 1 January 2014.

<sup>109</sup> The Sexual Orientation Anti-Discrimination Act (SOA) of 21 June 2013 No 59, in force as of 1 January 2014.

<sup>110</sup> The Anti-Discrimination Act (ADA) of 21 June 2013 No 60, in force as of 1 January 2014.

<sup>111</sup> See the legal preparatory works; Proposition to Parliament, Prop. 88 L (2012-2013) *Diskrimineringslovgivningen*.

## 1 GENERAL LEGAL FRAMEWORK

### Constitutional provisions on protection against discrimination and the promotion of equality

The Norwegian Constitution has a specific clause protecting against discrimination, section 98, and a general human rights clause, section 92.

Section 98 of the Constitution reads: 'All people are equal under the law. No human being must be subject to unfair or disproportional differential treatment.'<sup>112</sup>

Section 92 of the Constitution proclaims that:

'The authorities of the State shall respect and ensure the human rights as they are expressed in this Constitution and in the treaties concerning human rights that are binding for Norway.'

A Supreme Court judgement clarifies that section 92 of the Constitution is not a clause that incorporates human rights conventions in Norwegian law, but obliges authorities to enforce human rights conventions at the level they are implemented in Norwegian law.<sup>113</sup> The Human Rights Act<sup>114</sup> incorporates a number of important treaties on human rights - including the International Convention on Elimination of All Forms of Discrimination of Women (CEDAW) - into the domestic legal system on a general basis in which the conventions prevail over any other conflicting statutory provision.<sup>115</sup> The International Convention on Elimination of All Forms of Racial Discrimination (ICERD) is not incorporated into the Human Rights Act, but into the Anti-discrimination Act (ADA), the legal consequence being that ICERD does not prevail over other statutory provisions in case of conflict, but has to be decided through an interpretation. The UN CRPD (the Disability Convention) was ratified on 3 July 2013.<sup>116</sup> It is not incorporated into the Anti-Discrimination and Accessibility Act – (AAA), however, the Equality and Discrimination Ombudsman is responsible for the supervision of the national implementation of the convention, similar to the national supervisory system of the ICERD and CEDAW.

These provisions apply to all areas covered by the directives. Their material scope is broader than those of the directives.

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<sup>112</sup> See <https://www.stortinget.no/globalassets/pdf/english/constitutionenglish.pdf> (accessed 6 January 2017). The preparatory works to the constitutional clause is found in Dok 16 (2011-2012) Report on Human Rights in the Constitution from the Constitutional Committee to the Storting (Parliament), Chapter 6, see <http://www.stortinget.no/Global/pdf/Dokumentserien/2011-2012/dok16-201112.pdf> (accessed 6 January 2017).

<sup>113</sup> See HR-2016-2554-P and HR-2016-2591-A of 20 December 2016, para 47. The latter case concerned the question whether a woman with a psychosocial disability (diagnosed paranoid schizophrenia) should be deprived of her legal capacity relating to her economy if the conditions for this were fulfilled in accordance with the Guardianship Act, section 22. The Supreme Court found that the conditions to deprive the woman of a capacity to handle her own economy were fulfilled, even though this might be contrary to Article 12 of the CRPD. This is because of the Norwegian 'interpretative declaration' in relation to CRPD Article 12 (judgment, para 58), and also because the CRPD is not incorporated into Norwegian law. An interesting observation is made in para 63, in which it is stated that as long as the declaration made by Norway in relation to Article 12 is upheld by the legislature, the courts must abide by this even if it is in breach of international law.

<sup>114</sup> Act relating to the status of human rights in Norwegian law of 21 May 1999 no 30 (*Menneskerettsloven*).

<sup>115</sup> The International Convention on Racial Discrimination is incorporated in the Anti-discrimination Act (ADA), but the convention will in conflicting cases not automatically prevail. The failure to include the ICERD in the Human Rights Act has been repeatedly criticised by the NGOs working on anti-discrimination.

<sup>116</sup> See Prop. 106 S (2011-2012) Proposition to the *Stortinget* (proposal for Parliamentary resolution) on Consent to ratification of the UN Convention of 13 December 2006 on the rights of Persons with Disabilities and Prop 105 L 2011-2012 on Changes to the Anti-Discrimination Ombud's Act on the supervision of implementation of the UN Convention on the Rights of Persons with Disabilities.

The constitutional anti-discrimination provisions are directly applicable.<sup>117</sup>

The constitutional equality clauses can be enforced both against State actors and private actors.

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<sup>117</sup> Section 98 of the Constitution has only been assessed in one case, in a verdict by the National Insurance Court in case number TRR-2015-1542, of 29 January 2016 regarding gender discrimination. The case concerned a father who had been denied paid parental leave as the mother of the child did not fulfil the terms for paid parental leave according to the National Insurance Act, section 14-13. The father claimed a right to paid leave based on reasoning of the EU court judgement C-222/14 *Maistrellis*, and claimed that as such, section 98 would be interpreted in accordance with the understanding of the European Court of Justice. The National Insurance Court did not agree with this, as it did not find that section 98 provided the basis for setting aside a clause in the National Insurance Act. The verdict has not been appealed to the ordinary courts according to information given to the author, and is thus final.

## 2 THE DEFINITION OF DISCRIMINATION

### 2.1 Grounds of unlawful discrimination explicitly covered

Norwegian anti-discrimination legislation provides a basis to address the following grounds of discrimination within all sectors: gender, ethnicity (including national origin, descent, skin colour, and language), religion or belief, sexual orientation and disability under the GEA, ADA, SOA and AAA.

Discrimination based on age, political views, membership of a trade union, as well as part-time and temporary work is covered within working life under the WEA.

#### 2.1.1 Definition of the grounds of unlawful discrimination within the directives

National law on discrimination has the following definitions:

i) Racial origin

The grounds for discrimination in the ADA cover ethnicity, religion and belief.<sup>118</sup> This does not imply a change in the understanding of the main concepts and definitions.<sup>119</sup> Race or racial origin is not specified as a separate distinction in the ADA, as the starting point for combating racism is to eliminate the idea that people can be divided into different races, in line with preamble no. 6 of Directive 2000/43. Discrimination based on perceptions of a person's race is regarded as discrimination based on ethnicity.<sup>120</sup>

ii) Ethnic origin

The content of the term 'ethnicity' is vague, and provision is made for some exercise of discretion by the enforcing agencies in defining the reach of the term's boundary zone. According to the ADA original preparatory works, the term has both a subjective and objective content, and it is pointed out that the terms culture and ethnicity are closely linked:<sup>121</sup>

'The term culture describes certain characteristics common to people belonging to a defined group that are not possessed by other groups, or not to the same extent. Such characteristics may be a shared language, shared values, shared religion, shared moral codex and shared basis of experience. Where the term ethnicity is concerned about relations, and the individual's or group's sense of being different from other individuals or groups, are at centre stage.

...

In addition, the term ethnicity could encompass objective differences which can be verified such as place of birth, place of upbringing, language, religion etc. The

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<sup>118</sup> Until 1 January 2014, the ADA specifically covered the following grounds: ethnicity, national origin, descent, skin colour, language, religion or belief. These are still covered, but not spelled out in the legal text, as the ADA now expressly covers ethnicity, religion and belief. In relation to language, setting demands for language testing without a specific individual assessment related to the actual position constitutes discrimination as per the Ombud's case no 14/153 of 14 May 2014. In its case 63/2015 of 14 September 2016, the Tribunal found that language constitutes an element of the pedagogical skills of a piano teacher, and thus found that the non-hiring of a non-Norwegian piano teacher was justified. The interview panel had problems understanding what the applicant said, not because her Norwegian language skills were lacking, but because of her nasal and indistinct way of speaking. The Tribunal thus found that the applicant had not been discriminated against. The decision states initially that both direct and indirect discrimination because of language (ethnicity) is prohibited according to ADA article 6, but does not state which was used, as the assessment was made regarding the justification to the exception of the rule, thus not stating whether the discrimination is seen as direct or indirect.

<sup>119</sup> See the legal preparatory works; Proposition to Parliament, Prop. 88 L (2012-2013) *Diskrimineringslovgivningen*.

<sup>120</sup> According to the preparatory works to the ADA, Proposition No 33 (2004-2005) to the *Odelsting*, page 89.

<sup>121</sup> See the preparatory works to the ADA: Proposition to the *Storting* No. 33 (2004-2005) page 87-88.



objective differences mentioned may incidentally also underlie the subjective experience of being different or alike.’

Thus skin colour and language are closely linked to and subsumed under the concept ethnicity. The preparatory works also make it clear that *national origin* and *descent*, as grounds for discrimination, are closely associated with the term ethnicity: these grounds could include place of birth, non-Norwegian country background, the place where one was brought up or from which one has one’s background, and relationships in the broad sense. Nationality as a ground is subsumed under the ground ‘ethnicity’, and as such protected under ethnicity (see below paragraph 4.4). Statelessness is also covered.<sup>122</sup>

### iii) Religion or belief

The ADA covers discrimination because of religion or belief. The legal preparatory works specify that the wording follows the wording of Directive 2000/78, and that both having and not having a religion or belief is covered.<sup>123</sup> ‘Religion’ is not defined in the preparatory works, but it is specified that the word ‘belief’ is specifically chosen to underline that all kinds of life-stance beliefs are covered, not only those linked to a specific line of religious thinking. Political opinion is not protected as a ‘belief’, but is specifically protected in the Working Environment Act.

### iv) Disability

The Norwegian definition of disability in the AAA is not limited to professional life, but formulated in the legislative preparatory works as ‘reduced functional ability either regarding physical, mental or cognitive abilities’.<sup>124</sup> This definition is not specifically included in the act. The definition of disability in the AAA in relation to professional life is understood as referring to a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life, in line with the judgment of the European Court in the *Joined Cases C-335/11 and C-337/11 Skouboe Werge and Ring*, Paragraph 38. The social element of the reduced functional ability and the interaction with the environment in working life is also covered by the employer’s general duty of accommodation in the WEA section 4-6. The Norwegian definition of disability is much wider than the definition of disability developed by the CJEU’s case law on Directive 2000/78.<sup>125</sup> Although neither the AAA nor the WEA specifically recognise the social model of disability fully in line with the CPRD, the Norwegian definition is more in line with a social model than the CJEU case law on Directive 2000/78.

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<sup>122</sup> See decision of the Equality Ombud in case no 09/892 of 3 May 2012. In its case 28/2015 of 29 September 2015, the Equality Tribunal found that demanding a Norwegian or Swedish criminal record from 18 years of age to follow job applications to a security company constituted indirect discrimination because of nationality in breach of ADA section 6. In reality, the demand from the security company signified that the company only accepted applicants that had been Norwegian or Swedish citizens since 18 years of age. The practice was seen as discriminatory vis-à-vis both EU citizens and third country nationals, that is everyone who is not a Norwegian or Swedish citizen.

<sup>123</sup> See the preparatory works to the WEA, NOU 2003:2 *Skjerpet vern mot Diskriminering i arbeidslivet* page 36.

<sup>124</sup> See the preparatory works to the AAA, NOU 2005:8 *Likeverd og tilgjengelighet* (Equal worth and accessibility) page 162-163.

<sup>125</sup> For more information on the concept of disability, see ‘Forbudet mot diskriminering på grunn av nedsatt funksjonsevne. Rett til individuell tilrettelegging for arbeidstakere og arbeidssøkere med nedsatt funksjonsevne – en oppsummering’ (Report on the right to reasonable accommodation – a summary) from the Equality and Anti-Discrimination Ombud, published in Norwegian in April 2014, available at <http://www.ido.no/globalassets/brosjyrer-handboker-rapporter/diverse-pdf1/diverse-pdf/oppsummering-individuell-tilrettelegging-270314.pdf> (accessed 6 January 2017) On page 33 it states: ‘it is important to note that the ECJ in the judgment of 2013 interprets the definition of disability much wider than previously in light of the CPRD, in line with the dynamic interpretation of the definition that the Convention asks for in its preamble. This is as such more in line with Norwegian case law, which may make further case law [from the ECJ] more adapted to and relevant for Norwegian conditions’. (Translated into English by the author).

v) Age

The definition of age does not have limits upwards or downwards. Discrimination based on age will thus encompass discrimination because of high age and because of low age.<sup>126</sup>

vi) Sexual orientation

The SOA prohibits discrimination on the basis of sexual orientation, gender identity and gender expression. The SOA retains the definition of sexual orientation that was previously included in the WEA, an overarching concept that covers heterosexual, homosexual and bisexual orientation. Upon the enactment of the SOA in 2013, gender identity and gender expression were included as protected grounds.<sup>127</sup> This is defined in the SOA by reference to the preparatory works to the act. The SOA gives protection against discrimination to homosexual, lesbian, bisexual and transpersons (LHBT-persons). 'Sexual orientation' includes persons that are homosexual, lesbian, bisexual and heterosexual. The definition includes both sexual orientation and sexual practice. The definition does not include specific sexual preferences or activities such as for example fetishism or sadomasochism. 'Gender identity' refers to the identity each person feels or perceives that they belong to. 'Gender expression' refers to how each person expresses their gender identity, which sometimes, but not always, challenges gender stereotypes. Transsexual and intersex is also covered.

### 2.1.2 Multiple discrimination

In Norway, prohibition of multiple discrimination is not included in the law.

There are no legal rules per se in the field of anti-discrimination that deal with situations of multiple discrimination. 'Multiple discrimination' is not explicitly prohibited in (non-discrimination) statutory legislation or statutory legal instruments, but it is clear from the preparatory works that multiple discrimination is covered.<sup>128</sup>

An official report from 2011 on the structure for (gender) equality suggested that a specific national provision be included in the GEA to cover multiple discrimination in relation to gender.<sup>129</sup> This was not carried through in the recent revision of the discrimination legislation. The Government thought it unnecessary to have a specific rule regarding multiple discrimination, as multiple discrimination is already prohibited through practice, in the case law detailed below. They also pointed to the mandate of the Equality Ombud as stated in the AOT regulations, which states the Ombud's duty to secure a multidimensional approach or dimension to be considered.<sup>130</sup> The current proposal sent for public hearing in 2015 suggests in point 6.6 that a specific provision be included in the new comprehensive legislation that covers complex (in Norwegian: *sammensatt*) discrimination.<sup>131</sup> The definition of 'complex' discrimination encompass both multiple discrimination and intersectional discrimination.

Both the courts, the Equality Ombud and the Equality Tribunal have handled a number of cases relating to intersectional/ multiple grounds discrimination, mainly in relation to

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<sup>126</sup> See the preparatory works to the WEA, NOU 2003:2 *Skjerpet vern mot Diskriminering i arbeidslivet* page 16.

<sup>127</sup> See the SOA legal preparatory works; Proposition to Parliament, Prop. 88 L (2012-2013) chapter 16.

<sup>128</sup> See the legal preparatory works; Proposition to Parliament, Prop. 88 L (2012-2013). *Diskrimineringslovgivningen*, chapter 13.5, page 92.

<sup>129</sup> See NOU 2011:18 Structure for equality (in English) accessible at [https://www.regjeringen.no/globalassets/upload/bld/nou18\\_ts.pdf](https://www.regjeringen.no/globalassets/upload/bld/nou18_ts.pdf) (accessed 6. January 2017).

<sup>130</sup> See the legal preparatory works; Proposition to Parliament, Prop. 88 L (2012-2013). *Diskrimineringslovgivningen*, page 93.

<sup>131</sup> See <https://www.regjeringen.no/no/dokumenter/horing---forslag-til-felles-liestillings--og-diskrimineringslov/id2458435/> (accessed 6 January 2017).



gender and age,<sup>132</sup> age and ethnicity,<sup>133</sup> as well as gender and religion (hijab).<sup>134</sup> There are few cases involving three or more grounds of discrimination.<sup>135</sup> The Ombud handled 15 cases in 2012 that involved cases of multiple discrimination.<sup>136</sup> Since then, neither the annual reports nor the Ombud's webpage contain statistics on the number of cases concerning multiple discrimination handled each year, although it is apparent that multiple discrimination is assessed by the Ombud and Tribunal in a number of cases.<sup>137</sup>

The national court system has handled only two cases where multiple discrimination has been claimed. Both cases concerned gender and age. Both had been handled by the Equality Ombud before being brought to court. In the most recent case, a 61-year-old male social worker claimed to be subject to discrimination because of gender and age, as he was not selected to participate in an interview for a position at the local welfare office on a small island called Smøla. The applicant was well known by the employers. The Equality Ombud agreed that he had been subject to discrimination because of age, as did the court of first instance. Neither found discrimination because of gender. Both the Court of Appeal and the Supreme Court found that he was not selected for interview because the employer sought to recruit someone with a different professional profile than social work. Thus, age was not the reason for his non-selection to participate in an interview.<sup>138</sup>

The other case was brought to the court of first instance because of the employer's non-compliance with the statement of the Equality Tribunal.<sup>139</sup> A county that was recruiting new staff was alleged to have discriminated against a female worker in the fire brigade because of her age and gender, in contravention of the GEA and the WEA. The case concerned a female worker aged 41, employed on a part-time basis in the fire brigade. She subsequently applied for a longer, full-time vacancy, and then a full-time position with a fixed term. A male worker aged 27 who was less qualified was employed in the position

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<sup>132</sup> See for example the Tribunal's case 18/2015 in which the Tribunal found that the claimant was discriminated against because of age, but not gender. In the Tribunal's case 34/2015, the Tribunal found that the claimant was neither discriminated against because of age nor gender by an age limit for retirement set by the employer at 67 years, at which she had to stop working. In the Tribunal's case 20/2015, the Tribunal found that the claimant was neither discriminated against because of age nor gender by her employer, the Norwegian Tax Authority.

<sup>133</sup> See for example the Tribunal's case 35/2015 in which the Tribunal found that the claimant was discriminated against both because of age and ethnicity as he was passed over for a position as a glass-maker. The decision does not state which ethnicity or nationality the glass-maker is, but only stated that he is of 'foreign origin', and that he was born in 1962, and thus was 52 years at the time of application.

<sup>134</sup> See the Ombud's cases nos 07/627, 08/1528, 08/01351, 09/526, 13/1307 and 16/2271. The Tribunal's cases on hijab and gender are nos 26/2009, 08/2010 and 2/2014. The latter case signals a new line of reasoning within the Tribunal, which runs counter to the previous legal understanding of the Ombud and the Tribunal regarding direct discrimination because of religion. The exception for direct discrimination is broadened regarding religion, as the Tribunal accepted in this case that the secular and value-neutral orientation of the needs of the employer should be given priority before the right of Muslim women to be able to wear their religious symbols within employment. There has been no case tried before the ordinary courts yet on this issue. The Ombud and Tribunal assess all cases regarding hijab as multiple discrimination, both on the grounds of religion (direct discrimination) and gender (indirect discrimination). The previous Gender Equality Board of Appeals handled a case on gender and hijab, case no 8/2001, assessing indirect discrimination because of gender, as religion was not a protected ground by law in 2001. The Tribunal handled a case on religious symbols in 2014, case 46/2014, concerning a prohibition on wearing religious, political or ideological symbols during TV broadcasts by the Norwegian Broadcasting service (NRK). This prohibition was accepted by the Tribunal due to the need for the national broadcasting service to appear value-neutral.

<sup>135</sup> But they do exist: the Tribunal case number 31/2015 concerned a woman who claimed to be bypassed for a position as associate professor in physics: materials research with transmission electron microscopy (TEM). She claimed to be bypassed because of her gender, age and ethnicity. The Tribunal did not find that she had been discriminated against.

<sup>136</sup> See the Ombud's annual report for 2012 (in Norwegian) at [http://www.ldo.no/globalassets/brosjyrer-handboker-rapporter/rapporter\\_analyser/rapporter\\_diverse/ldo-arsrapport-2012.pdf](http://www.ldo.no/globalassets/brosjyrer-handboker-rapporter/rapporter_analyser/rapporter_diverse/ldo-arsrapport-2012.pdf) (accessed 6 January 2017).

<sup>137</sup> See the Ombud's internet page which contains statistics for all inquiries received by the Ombud between 2007 and 2015 at <http://www.ldo.no/nyheter-og-fag/ldos-statistikk/> (accessed 6 January 2017).

<sup>138</sup> Rt-2012-424.

<sup>139</sup> Øst-Finnmark court of first instance. Judgment of 17 March 2010 in case no 09-136827TVI-OSFI. The case had already been handled by the Equality Ombud and the Equality and Anti-Discrimination Tribunal, in its case number 8/2008.

that the woman had applied for. The ads announcing the position had the following formulation: 'applicants should be between 27 and 35 years of age.' The Tribunal and the Court found that the woman was discriminated against both on the grounds of gender and age, and compensation of EUR 37 500 (NOK 300 000) for economic loss as well as EUR 18 759 (NOK 150 000) for non-pecuniary damage was awarded. The employer (the county) did not take the case to the appellate court, and the judgment is final.

The Equality Tribunal Case no 1/2008 was the first case to explicitly address multiple discrimination, and is, as such, a landmark case. Two women with an Asian background tried to book a hotel room in Oslo. The women were refused a room at the hotel, as the women's home address was in the Oslo area, based on written guidelines permitting staff to refuse access to people domiciled in Oslo and its environs. When assessing the case, the Tribunal found circumstances that gave grounds to believe that the hotel had attached negative importance to the women's gender and ethnic background, and that the hotel was unable to substantiate that there were other circumstances than gender and ethnicity behind the two women being refused a room. Damages were not awarded, as the Ombud/Equality Tribunal are not empowered to award damages.

### 2.1.3 Assumed and associated discrimination

#### a) Discrimination by assumption

In Norway, the following national laws (including case law) prohibit discrimination based on perception or assumption of what a person is, in the following categories:

1. disabled, as per the AAA section 5(1)2;
2. of another ethnicity or religion, as per the ADA section 6(1)3;
3. has a certain sexual orientation, as per SOA section 5(1)2;
4. a certain age, as per the WEA section 13-1;

— if the perception or assumption has actually resulted in a worse/ less favourable treatment of the person (if the perception or assumption has had no (negative) impact on the person concerned, discrimination has not occurred).

#### b) Discrimination by association

In Norway, the following national law (including case law) prohibits discrimination based on association with persons with particular characteristics:

Discrimination by association (discrimination of a person due to their relationship with a person) with a disability, ethnicity, religion or belief and sexual orientation is explicitly covered in the ADA section 6(1),<sup>140</sup> SOA section 5(1) and AAA section 5(1)3, the latter of which reads:

'The prohibition shall also apply to discrimination on the basis of the disability of a person with whom the person who is discriminated against has a connection.'

Norwegian national legislation is in line with the European Court judgment in case C-303/06 *Coleman*.

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<sup>140</sup> In the original legal preparatory works to the ADA: proposition no 33 (2004-2005) to the *Odelsting* on new legislation on discrimination on ethnicity, chapter 19 p. 205 and point 9.2.8.2 p 92, proposed that the ADA would also cover discrimination by association, but this was not included by Parliament in the enacted legislation in force 2006. However, based on the recommendation in the NOU 2009:24 pp 186-188, the proposal was again included, and this time enacted, see legal preparatory works; Proposition to Parliament, Prop. 88 L (2012-2013) *Diskrimineringslovgivningen* page 85.

Discrimination by association is covered for the grounds of disability, ethnicity, religion or belief as well as sexual orientation, but not covered in the WEA, for the discrimination ground age.

## **2.2 Direct discrimination (Article 2(2)(a))**

### **a) Prohibition and definition of direct discrimination**

In Norway, direct discrimination is prohibited in national law. It is defined.

Direct discrimination is defined similarly for all legal grounds except age. See the ADA section 6(2), AAA section 5(2) and SOA section 5(2).<sup>141</sup> The current general rule regarding the prohibition against discrimination reads as follows in the AAA section 5(2): “Direct differential treatment” shall mean an act or omission that has the purpose or effect that a person is treated worse than others in the same situation, and that is due to disability.’ The complainant may rely on a hypothetical comparator.

In WEA section 13-1, the concepts of direct and indirect discrimination are not defined, but the concepts are discussed and defined in the preparatory works.<sup>142</sup>

It is not problematic that direct discrimination is defined more broadly for age, rather it is of concern that the former very strict prohibition on direct discrimination in Norway is being widened because of the widening scope of accepted direct discrimination because of age.

### **b) Justification of direct discrimination**

In Norway, as a starting point, neither the ADA, AAA, SOA nor WEA permits justification of direct discrimination, neither generally, nor in relation to particular grounds, except with regard to genuine and determining occupational requirements (see paragraph 4.1 below). However, the wording of the legal texts after the 2013 revision has created an uncertainty in relation to the extent of possible exceptions that were not an issue earlier, as described above.<sup>143</sup>

## **2.2.1 Situation testing**

### **a) Legal framework**

In Norway, situation testing is permitted in national law.

It is assumed that national law permits the use of situation testing in court for all discrimination grounds. Situation testing is not defined specifically, as the law is silent on this issue.

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<sup>141</sup> Direct discrimination was previously defined in Norwegian law as ‘when a person is treated less favourably than another has been or would be treated in a comparable situation’. Direct discrimination was thus defined in such a way to cover a situation where the purpose/ objective or effect of an act or omission is such that persons or enterprises are treated less favourably than others are, have been or would have been treated in a corresponding situation on such grounds as are covered by the actual legislation. In the current legal preparatory works, it is stated that the purpose of the current revision of the legal text is not to make significant changes in the understanding of the law, see Proposition to Parliament, Prop. 88 L (2012-2013) page 82, and as such, it must be assumed that the current definition also complies with those given in the directives.

<sup>142</sup> The definitions are not specified in the WEA chapter 13 but are discussed in its preparatory works, Ot. Prp. Nr. 49 (2004-2005) chapter 25.

<sup>143</sup> Researchers are worried that the former very clear and narrow exceptions for direct discrimination will be undermined by not having clear definitions of direct discrimination in the legal acts themselves, see Strand, Vibeke Blaker (2014). Likestillingsloven 2013 og forenklingssjuss – en trussel mot individvernet? Kvinnerettslig skriftserie/ Studies in Women's Law at <http://www.jus.uio.no/ior/forskning/omrader/kvinnerett/publikasjoner/skriftserien/dokumenter/nr-96-vibeke-blaker-strand.pdf> (accessed on 6 January 2017).

The key procedural principle in Norwegian civil courts is the free evaluation of evidence by the courts in the course of the case as presented in courts. The provisions on evidence apply to the factual basis for the ruling in the case, see section 21-2(1) of the Act of 17 June 2005 no. 90 relating to mediation and procedure in civil disputes (the Dispute Act).<sup>144</sup> Evidence consists according to Norwegian law both of oral presentations, witness declarations and written statements made for the purpose of the case. Evidence may be presented on facts that may be of importance for the ruling to be made. The scale and the scope of the presentation need to be proportionate in relation to the importance of the dispute. In civil cases before the courts, the procedural rules for evidence are the same in discrimination cases as in other cases. If a relevant and grounded study on situation testing exists, a claimant would normally use this as evidence in court. Evidence brought that expands the case in an unnecessary manner may have adverse consequences for the costs of litigation.

b) Practice

In Norway, situation testing is used in practice.

Both public institutions and NGOs such as the National Association for the Disabled, and the Norwegian Centre against Racism have carried out various small examples of situation testing regarding accessibility to publicly available clubs and bars etc. on the grounds of ethnicity and disability, and forwarded these to the Ombud for complaints and further study. An example of this is the Ombud's case no 13/1874 of 14 April 2014, in which a bar in Oslo was found to discriminate on the basis of ethnicity when they treated control groups from the municipal business board (*næringsetaten*) differently. The two control groups consisted of one group in which the three persons were ethnic Norwegians, the other group consisted of three persons with ethnic origin from Togo and Algeria. Both groups were equally well dressed. The group with non-Norwegian ethnicity was refused entrance.

An academic comprehensive study was released in 2012, in which situation testing was used as a research method.<sup>145</sup> The study showed that job seekers with Norwegian names have a better chance of actually being called for an interview and thus securing employment than applicants with more unfamiliar names. Applicants with Pakistani names stand a 25 % lesser chance of getting called to an interview. The researchers sought to examine discrimination in the workplace by sending out 1 800 fictitious job applications in response to real job ads in six different lines of business. For each ad, the researchers replied with one application using a Norwegian name and another using a Pakistani-sounding name. The fictitious applicants were given near-identical profiles in terms of age, skills and work experience. All of the would-be applicants fulfilled the minimum criteria for the job and had perfect, native-level Norwegian language skills. The report found that men with Pakistani names are more often discriminated against than any women. Private sector employers are more likely than their public sector counterparts to reject an applicant with a Pakistani name.

## 2.3 Indirect discrimination (Article 2(2)(b))

a) Prohibition and definition of indirect discrimination

In Norway, indirect discrimination is prohibited in national law. It is defined.

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<sup>144</sup> Official translation at <http://www.ub.uio.no/ujur/ulovdata/lov-20050617-090-eng.pdf> (accessed 6 January 2017).

<sup>145</sup> *Diskrimineringens omfang og årsaker. Etniske minoriteters tilgang til norsk arbeidsliv* (The reasons and extent of discrimination. Ethnic minorities' access to the Norwegian employment sector), ISF Report 2012:1. The study was carried out jointly by Arnfinn H. Midtbøen from the Institute for Social Research (ISF) and Jon Rogstad from the Institute for Labour and Social Research (Fafo), financed by the Ministry of Children, Equality and Family affairs. Available at (in Norwegian): [http://www.samfunnsforskning.no/samfunnsforskning.no/Publikasjoner/Rapporter/2012/2012-001/\(language\)/nor-NO](http://www.samfunnsforskning.no/samfunnsforskning.no/Publikasjoner/Rapporter/2012/2012-001/(language)/nor-NO) (accessed on 6 January 2017).

The ADA section 6(2), AAA section 5(2) and SOA section 5(2) prohibits indirect discrimination. These clauses have a similar definition (wording) regarding their protected grounds. The definition is similar to the directives.

The prohibitions read as follows:

‘Discrimination shall mean direct and indirect differential treatment that is not lawful pursuant to section 6 or section 7 (...) Indirect differential treatment shall mean any apparently neutral provision, condition, practice, act or omission that results in persons being put in a worse position than others, and that occurs on the basis of sexual orientation, gender identity or gender expression’ (SOA section 5(2)).’

The WEA section 13-1(1) reads:

‘Direct and indirect discrimination on the basis of political views, membership of a trade union and age is prohibited.’

Indirect discrimination is not defined in the WEA itself, but it is discussed and specified in the legal preparatory works that the definitions follow Directive 2000/78, Article (2)(b).<sup>146</sup>

b) Justification test for indirect discrimination

The test to be satisfied to justify indirect discrimination is similar in all the different pieces of anti-discrimination legislation. See the ADA section 7, SOA section 6 and AAA section 6 on ‘lawful differential treatment’:

‘Differential treatment shall not breach the prohibition against discrimination if it has an objective purpose, it is necessary to achieve the purpose, and the negative impact of the differential treatment on the person or persons whose position will worsen is reasonably proportionate in view of the intended result.’

Thus, differential treatment that is necessary in order to achieve a legitimate aim, and which does not involve a disproportionate intervention in relation to the person or persons so treated is not regarded as discrimination.

In the WEA, the test is found in section 13-3(2):

‘Discrimination that is necessary to the achievement of a just cause, and does not involve disproportionate intervention in relation to the person or persons so treated is not in contravention of the prohibition against indirect discrimination, discrimination on the basis of age or discrimination against an employee who works part-time or on a temporary basis.’

What constitutes a legitimate aim is based on an evaluation of the justification of the aim assessed in each specific case. The action chosen must be relevant, true, necessary and proportionate in relation to the aim in order for indirect discrimination to be justified.

The legitimate aims as accepted by courts have the same value as the general principle of equality, from a human rights perspective as prescribed in domestic law.

The legal preparatory works to the ADA, AAA and SOA state that the possibility for differential treatment in working life is in particular narrow and limited.<sup>147</sup>

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<sup>146</sup> See the legal preparatory works to the WEA, Proposition to the *Odelsting* no 104 (2002-2003), section 8.3.5.4, p. 36.

<sup>147</sup> See Proposition to Parliament, Prop. 88 L (2012-2013) p. 87.

The test used to justify indirect discrimination is derived from the *Bilka* case,<sup>148</sup> and thus is compatible with the origins of the directives. The legal preparatory works to the acts all point directly to the understanding of the directives.

c) Comparison in relation to age discrimination

The WEA does not specify how a comparison in relation to age discrimination is to be made. This was explicitly omitted by the lawmakers, as they stated that each case will have to be assessed on its own merits, and thus, they did not want to specify how the comparison should be made, as this is left to the courts to decide.<sup>149</sup>

### 2.3.1 Statistical evidence

a) Legal framework

In Norway, there are no national rules permitting data collection. However, there is a general prohibition against the collection of sensitive personal information in Norwegian law, which classifies information regarding ethnic background, religious or political views, health information, sexual relationships and membership in trade unions as sensitive information according to the Personal Data Act (PDA) section 2(8).<sup>150</sup> The purpose of the PDA is to protect natural persons from violation of their right to privacy through the processing of personal data. Once data is classified as sensitive according to the PDA, there are rules on how to process these data in section 9. One of the items articulated is that the processing is necessary for the establishment, exercise of defence of a legal claim (section 9(1)(e)). There is a clear exception in section 9(2) for non-profit associations and foundation to process sensitive personal data in the course of their activities relating to members or persons who voluntarily have regular contact with the association. These have to consent to the handling of their data.

In Norway, statistical evidence is permitted in courts by national law in order to establish indirect discrimination.

National law permits the use of statistical evidence to establish indirect discrimination, however, it is not necessary to prove if indirect discrimination has happened or not, as the assessment that has to be made according to national legislation is whether or not an action or non-action has had a negative result for the individual or the group.<sup>151</sup> The use of statistical evidence is however often a practical necessity, as the prohibition on indirect discrimination attempts to protect individuals against a systemic group identification that leads to unintended negative results for the individual or the group. In order to prove indirect discrimination at an individual level, the use of statistical data will often constitute a practical necessity in order to prove that discrimination has occurred. The law does not have a specific provision regarding statistical evidence – it is considered as all other forms of evidence.

There are no specific conditions for statistical evidence to be admissible in court.

b) Practice

In Norway, statistical evidence in order to establish indirect discrimination is used in practice, but its use is not widespread, as there are few discrimination cases brought before ordinary courts.

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<sup>148</sup> See CJEU case number C-170/84.

<sup>149</sup> See the preparatory works to the WEA, Proposition to the *Odelsting* no 104 (2002-2003), section 8.3.5.4, p. 37.

<sup>150</sup> Personal Data Act of 14 April 2000 no 31. See <http://www.ub.uio.no/ujur/ulovdata/lov-20000414-031-eng.pdf> (accessed 6 January 2017).

<sup>151</sup> See the preparatory works to the AAA, Proposition to the *Odelsting* no 44 (2007-2008) p. 101.

There is no current debate on ethical or methodology issues on statistical data as evidence in court. This is probably because there are so few court cases concerning discrimination, and in the few cases where statistical data have been used, this has not caused problems or been debated. To the author's knowledge there has not been a discussion on European strategic litigation issue in public discussion forums.

The case law as yet in this area is sparse. There are examples where statistical data was used in a Supreme Court case on age and retirement,<sup>152</sup> as well as on gender and work-related pensions.<sup>153</sup> The significance attributed to this data by the Supreme Court in its judgment was low.

## 2.4 Harassment (Article 2(3))

### a) Prohibition and definition of harassment

In Norway, harassment is prohibited in national law. It is defined.

The various acts on anti-discrimination prohibit harassment within the grounds covered by the particular act, see the ADA section 9, AAA section 8, SOA section 8 and WEA section 13-1(2).<sup>154</sup> The full material scope of the directives are covered in the various acts.

The general definitions are similar in the various bits of legislation: harassment means acts, omissions or statements that seem or aim to seem offensive, frightening, hostile, degrading or humiliating. The subjective view of the person is an element in determining if the act is seen to constitute harassment, as well as a more 'objective' standard assessing if a reasonable person would view the action as 'seeming' offensive. In terms of disability the prohibition against harassment covers harassment on the basis of a present disability, assumed disability, past disability or possible future disability, as well as the harassment of a person on the basis of this person's relationship with a person with a disability. It is also prohibited to be an accessory to any breach of the prohibition against discrimination. The acts all provide a specific duty on employers and the managements of organisations and educational institutions to, within their areas of responsibility, prevent and seek to prevent harassment occurring. The definitions are equivalent to those of the directives as stated in the tables below.

Section 185 of the General Civil Penal Code<sup>155</sup> contains criminal law protection against discrimination, and concerns hateful expressions, emphasising more clearly that racist expressions with insulting effects are punishable by law. The provisions in the Penal Code are applicable in relation to discrimination because of skin colour or national or ethnic origin, religion or life stance, sexual orientation, and disability. Disability was included upon the enforcement of the 2005 Penal Act on 1 October 2015.

The legal preparatory works to the prohibition emphasise that the concept of harassment must be construed in accordance with the general concept of harassment in the WEA (third paragraph of section 4-3).<sup>156</sup> This provision contains a general requirement that workers

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<sup>152</sup> Supreme Court judgment of 29 June 2011 (Rt-2011-964 *Gjensidige*).

<sup>153</sup> Supreme Court judgment of 27 November 2003 (Rt-2003-1657 *Braathens*).

<sup>154</sup> Specific for sexual harassment is that it also covered by the GEA, but not enforced by the Equality Ombud and Tribunal. Sexual harassment shall be enforced by the courts of law.

<sup>155</sup> See Penal Act of 20 May 2005 no. 28. The text of the Penal Code is not translated to English, but reads (author translation): 'Any person who wilfully or through gross negligence publicly utters a discriminatory or hateful expression shall be liable to fines or imprisonment for a term not exceeding three years. The use of symbols shall also be deemed to be an expression. Any person who aids and abets such an offence shall be liable to the same penalty. A discriminatory or hateful expression here means threatening or insulting anyone, or inciting hatred or persecution of or contempt for anyone because of his or her a) skin colour or national or ethnic origin, b) religion or life stance, c) homosexuality, lifestyle or orientation or d) disability'.

<sup>156</sup> See Ot.prp. no 88L (2012-2013) page 162 which refers to the previous preparatory works, in particular Ot.prp no 35 (2004-2005) page 38 on gender equality and Ot.prp no 104 (2002-2003 pp 34-35) on the WEA.



should not 'be subject to harassment or other improper conduct.' Harassment protection pursuant to section 4-3 thus also includes harassment related to factors other than the grounds protected by discrimination rules. The provision is part of the requirements of the psychosocial work environment and is a continuation of the now obsolete Working Environment Act (1977) section 12. Case law regarding the provision related to general harassment (previously WEA section 12 and current WEA section 4-3) is thus of relevance for the understanding of the concept of discriminatory harassment.<sup>157</sup>

#### b) Scope of liability for harassment

Where harassment is perpetrated by an employee, in Norway, the employer and/or the employee is liable.

The scope of liability for discrimination (including harassment) is wide. Employers and service providers such as landlords, schools and hospitals may be held liable for the actions of employees. Service providers cannot be directly held liable for actions of third parties such as tenants, clients or customers, as long as the service provider has not been directly involved in the incident or instruction.

The individual harasser or discriminator may also be held liable for discrimination. If an employee harasses co-workers, the harassment may according to the circumstances constitute grounds for dismissal or summary dismissal. In a Supreme Court judgment of 18 March 2002, Rt-2002-273, a professor had (sexually) harassed co-workers and students. This behaviour constituted a justified reason for summary dismissal.<sup>158</sup>

Trade unions or other general trade/ professional associations can be held liable for actions of their members only if the member operates in the name of the union or if key members of the union have been responsible for the instruction.

## 2.5 Instructions to discriminate (Article 2(4))

#### a) Prohibition of instructions to discriminate

In Norway, instructions to discriminate are prohibited in national law. Instructions are defined. Definitions are equivalent to those of the directive.

Instructions relating to discrimination or harassment are prohibited (see the ADA section 11, AAA section 10, SOA section 10 and WEA section 13-1(2)). It is also prohibited to instruct anyone to carry out an act of reprisal. It is furthermore prohibited to be an accessory to instructions to discriminate, that is to assist or support instructions to discriminate. The full material scope of the directives are covered in the various acts.

To consider an action to be an instruction, a relationship of subordination, obedience or dependency must exist between the instructor and the person receiving it.<sup>159</sup> In a workplace, it will therefore be a case of instruction if a manager asks a subordinate to discriminate against another employee at the same level as the subordinate. However, if an employee asks another employee to discriminate, this demand will normally not be considered as an instruction in the legal sense, however inappropriate. The instructions must contain a specific order that one or more persons shall be discriminated. For example, if a manager asks a middle manager to ensure that the unionised employees are assigned to the unpopular shifts this would constitute an illegal instruction. Another example is

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<sup>157</sup> See the preparatory works' special notes to the actual provision (section 13-1) in the Proposition to the *Odelsting*. No. 49 (2004-2005) on the WEA.

<sup>158</sup> Although at that time in accordance with the Act on Public Employees (1983) section 15 first paragraph, but the arguments of the case remain valid.

<sup>159</sup> See the preparatory works to the previous WEA, Proposition to the *Odelsting* No. 104 (2002-2003) section 8.3.5.6.

where a manager at a club instructs gatekeepers that people with disabilities, wheelchair users or people with a particular skin colour should not be allowed in.

In Norway, instructions do explicitly constitute a form of discrimination.

b) Scope of liability for instructions to discriminate

In Norway, the instructor and/or the discriminator are/is liable.

Legal persons/employers are liable for the actions and omissions of their employees according to the specific sanctions imposed in each of the acts as well as by general tort law.

## **2.6 Reasonable accommodation duties (Article 2(2)(b)(ii) and Article 5 Directive 2000/78)**

a) Implementation of the duty to provide reasonable accommodation for people with disabilities in the area of employment

In Norway, the duty to provide reasonable accommodation in the field of employment is included in the law.

The duty to provide reasonable accommodation for people with disabilities is specified in AAA section 26, which provides a right of individual accommodation in employment relationships. The AAA refers to a right of 'individual accommodation' and does not mention the word 'reasonable'. The previous legal text referred to 'reasonable' accommodation (WEA section 13-5). The wording in the AAA is meant to have the same content as in the WEA.<sup>160</sup>

The text of section 26(1) reads:

'Workers and job applicants with disabilities shall have a right to suitable individual accommodation of their workplaces and work tasks to ensure that they can obtain or retain a job, have access to training and other skills development, and perform and have the opportunity to advance in their work in the same way as other people.'

Any breach of the obligation to ensure individual accommodation is to be regarded as discrimination.

Employers are expected to individually accommodate workplaces and tasks in order to ensure that employees or job-seekers<sup>161</sup> with disabilities can obtain or retain a job, have access to training and other measures to develop their competence and can carry out and have an opportunity to advance in their work in the same way as other people. The law states that the requirement is a 'suitable' accommodation. The specific accommodation measures shall be assessed in relation to the individual person with the disability. The wording is intended to show that the assessment of the required accommodation measures needs to be assessed specifically against the situation, the need for the accommodation and the benefit for those who have needs for accommodation.<sup>162</sup>

In addition to the specific protection afforded to disabled workers according to the AAA, the WEA contains a general duty for employers to provide reasonable accommodation for

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<sup>160</sup> Ot.prp. no. 44 (2007-2008) page 183.

<sup>161</sup> See Tribunal case number 48/2015 where a hearing-impaired woman was not called for a second interview. The employer had not discussed her need for individual accommodation, which was seen as a breach of the duty of individual accommodation. See also Tribunal cases 56/2014 and 69/2014.

<sup>162</sup> See Ot.prp. no. 88L (2012-2013) page 182 which refers to the previous preparatory works, in particular Ot.prp. no. 44 (2007-2008) chapter 10.6.4 on pages 180 and following, and chapter 18 page 263.

workers who due to 'accident, sickness, fatigue or the like' need this (see WEA section 4-6 concerning adaptation for employees with reduced capacity to work). In practice, WEA section 4-6 is often used in conjunction with AAA section 26 before the courts, as they have an overlapping application.

#### b) Practice

Reasonable accommodation is only framed as an obligation where the accommodation will not entail a 'disproportionate burden'. When considering whether the accommodation leads to a disproportionate burden, particular importance is to be attached to the effect of the accommodation on the dismantling of disabling barriers, the necessary costs of the accommodation and the undertaking's resources.<sup>163</sup> There is beyond these elements to be assessed not a single test of what constitutes a 'disproportionate burden'.

*'Reasonable'*: What the duty is to provide reasonable individual accommodation must be considered in relation to each person with a disability. In this assessment, relevant factors are the planned duration of the relationship between the responsible party and the individual disabled person, as well as the kind of/degree of disability and the timeframe of the accommodation. Other factors that may be used in the legal assessment are to what extent the arena for adaptation is an essential part of that person's life, as well as the benefit for the person with disabilities.<sup>164</sup>

*'Undue/ disproportionate burden'*: In assessing whether the arrangement involves an undue burden, factors to be assessed include what effect the dismantling of disabling barriers will have, the costs of the actual accommodation and the resources of the enterprise. The cost is a fundamental factor in determining whether the measure should be considered as an undue burden or not. The extent to which public support is available is another factor. The requirements – and expectations - for accommodation imposed on a large and resourceful enterprise are stricter than the requirements imposed on a smaller firm. The same applies in relation to municipalities of different sizes and different economic situations.

What may be regarded as a disproportionate/ undue burden must be seen in the context of what a reasonable accommodation entails. The cost should not be viewed in isolation from the resources of the enterprise, but also seen in relation to the individual beneficiaries of such accommodation arrangements. Another factor to be taken into consideration is whether others can benefit from the measure. A measure that only marginally improves the situation for one person is more easily perceived as an undue burden, if the measure cannot be used for others.

The assessment factors referred to above are not limited to cover only the person's working life, as the right to individual accommodation covers also municipal services as per the AAA section 16 and schools and educational institutions according to the AAA section 17 (see paragraph 2.6(d) below).

#### c) Definition of disability and non-discrimination protection

Under Norwegian law, the definition of disability for the purposes of claiming reasonable accommodation is equal to the one for claiming protection from non-discrimination in

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<sup>163</sup> See the preparatory works to the AAA, Proposition to the *Odelsting* No. 44 (2007-2008) p 263-265. Relevant cases from the Equality Tribunal that give guidance on a possible 'norm' for individual accommodation are cases 21/2007, 40/2009, 22/2011 and 74/2014. The latter case did not find a breach of the AAA.

<sup>164</sup> See the preparatory works to the AAA, Proposition to the *Odelsting* No. 44 (2007-2008) p 263-265.

general, as a breach of the duty to provide reasonable accommodation is defined as discrimination.<sup>165</sup>

- d) Duties to provide reasonable accommodation in areas other than employment for people with disabilities

Norwegian legislation provides for a duty to provide a reasonable accommodation for people with disabilities also in select areas outside of employment. Section 17 of the AAA provides the right of individual accommodation in schools and educational institutions. This right is given to 'pupils and students with disabilities who attend a school or educational institution' and states that they will 'have a right to suitable individual accommodation of the place of learning, teaching, teaching aids and examinations to ensure equal training and education opportunities'.

Similarly, the municipalities provide individual accommodation for children at kindergartens in order to ensure that children with disabilities obtain equal opportunities for development and activity.

The municipality must provide individual accommodations with regard to a range of services pursuant to the Health and Care Services Act in a way that is permanent for the individual in order to ensure that persons with disabilities obtain an equal service, as per the AAA section 16.

These duties are imposed if they do not cause a 'disproportionate burden'. The definition of 'disproportionate burden' in this context, as contained in legislation and developed in case law does not differ from the definition used with regard to employment.

Outside the areas mentioned above, there are no other duties to accommodate at an individual level.

- e) Failure to meet the duty of reasonable accommodation for people with disabilities

In Norway, failure to meet the duty of reasonable accommodation counts as discrimination, as per the AAA section 12:

'Breach of the duty to ensure universal design pursuant to section 13 or the duty to ensure individual accommodation in section 16, 17 and 26 shall constitute discrimination.'

The justification defence is related only to the standard of 'reasonable' as described above. The potential sanction in relation to individual accommodation is within working life economic compensation and compensation for non-monetary damage to the person discriminated against. The burden of proof is shifted to the employer/ person responsible upon showing that there are reasons to believe that discrimination has occurred, as per the AAA section 30 on the burden of proof, which reads:

'Discrimination shall be assumed to have occurred if: circumstances apply that provide grounds for believing that discrimination has occurred, and the person responsible fails to substantiate that discrimination did not in fact occur. This shall apply in the case of alleged breaches of...c) the rules on individual accommodation in sections 16, 17 and 26.'

- f) Duties to provide reasonable accommodation in respect of other grounds

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<sup>165</sup> As per the legal preparatory works; Proposition to Parliament, Prop. 88 L (2012-2013) *Diskrimineringslovgivningen*, page 62.

In Norway, there is no duty to provide reasonable accommodation in respect of other grounds in the public and/or the private sector.

g) Accessibility of services, buildings and infrastructure

In Norway, national law requires require services available to the public, buildings and infrastructure to be designed and built in a disability-accessible way.

The AAA section 13 contains a general duty to provide accessibility for people with disabilities by anticipation (in Norway this is called 'universal design'). A breach of the obligation to ensure universal design is regarded as discrimination under the law. Public undertakings must make active, targeted efforts to promote universal design within the undertaking. The same applies to private undertakings that offer goods or services to the general public. The term 'universal design' means to design the main solution regarding physical conditions so that it may be used by as many people as possible irrespective of their physical functioning. Public and private undertakings that offer goods or services to the general public are obliged to ensure the universal design of the undertaking's normal function, provided this does not entail an undue burden for the undertaking. When assessing whether the design or accommodation entails an undue burden, particular importance must be attached to the effect of the accommodation on the dismantling of disabling barriers, if the main business function is of a public nature, the necessary costs associated with providing the accommodation, the undertaking's resources, whether the normal function of the undertaking is of a public nature, safety considerations and cultural heritage considerations. The list of elements does not exclude that they may be attached to other relevant considerations.<sup>166</sup>

It is not to be regarded as discrimination if the undertaking meets specific provisions laid down in statutes or regulations concerning the content of the obligation to implement universal design.

The AAA has a general rule that 'the King in Council' may issue regulations concerning the content of the obligation to ensure universal design in areas that are not covered by the requirements of, or pursuant to, other legislation. The regulations are developed by the relevant ministry, and after subsequent public hearings and preparation of legislative preparatory works, sanctioned by the King in Council (i.e. the Ministers and the King in Council). Such regulations have not yet been issued, seven years after the act came into force.

A failure to comply with such legislation can and has been relied upon in discrimination cases assessed by the Equality Ombud based on the legislation transposing Directive 2000/78.<sup>167</sup>

No cases have been tried before the courts as of yet.

h) Accessibility of public documents

National law does not require public services to translate some or all of their documents into braille. People with sight impairments have a right to assistance from an interpreter for reading and writing, as per the Act on Social Services of 28 February 1997 No 19 section

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<sup>166</sup> See Proposition No. 44 to the *Storting* on the law prohibiting discrimination on the basis of disability (2007-2008) pp. 261.

<sup>167</sup> See for example the following cases of the Equality Ombud: cases 10/2005, 10/2006, 10/2008 (all concerning access to fitting rooms in stores selling clothes), case 10/2224 (lack of technical hearing aids in the reception of a division within the public hospital dealing with deaf patients), case 11/62 (a blind person was refused access to a café with his dog), case 10/1930 (lack of universal access to an electrical appliances store), case 09/169 (lack of universal access to a public cinema), 09/473 (lack of access to the first floor of the county town hall). Case 10/1158 (lack of universal access to a restaurant).

10-7 and its Regulation on support to reading and writing assistance of 14 April 1997 No 319 (FOR-1997-04-15-319).

Translation in sign languages is provided in all public services when so requested. People with hearing impairments have a right to demand their expenses in relation to a sign-language interpreter be covered, to be able to function optimally both in working life and in their every-day chores. They have a right to free sign language services in relation to higher education at universities, at the workplace and in relation to medical appointments and social and cultural activities (see the Act on Social Services of 28 February 1997 No 19 section 10-7 and its specific Regulation on support for sign language assistance for the hearing impaired of 15 April 1997 No 320 (FOR-1997-04-15-320)).

The regulations on universal design of information and communications technology solutions of 21 June 2013 (FOR-2013-06-21-732) demands that the main solution to be used by the public must have an interface that may be used by as many users as possible, at the minimum in accordance with the standard Web Content Accessibility Guidelines 2.0, which also include non-text content.

### **3 PERSONAL AND MATERIAL SCOPE**

#### **3.1 Personal scope**

##### **3.1.1 EU and non-EU nationals (Recital 13 and Article 3(2) Directive 2000/43 and Recital 12 and Article 3(2) Directive 2000/78)**

In Norway, there are no residence or citizenship/nationality requirements for protection under the relevant national laws transposing the directives. However, citizenship/nationality requirements are also not a ground for protection, but nationality often will fall under the scope of ethnicity, if negative value is placed on non-Norwegian citizenship.

This has been specifically raised as an issue in relation to the protection of the Anti-Discrimination Act (ADA): Citizenship is not explicitly mentioned as a basis for discrimination under the Anti-Discrimination Act. Hence requiring Norwegian citizenship does not fall within the prohibition of direct discrimination in the ADA section 4(1). Discrimination based on citizenship is however discussed in the act's preparatory works, which state that discrimination based on citizenship may be subject to the prohibition against indirect discrimination based on ethnicity.<sup>168</sup> It is left to the enforcement agencies to determine the point at which discriminatory treatment based on citizenship comes under the prohibition of indirect discrimination based on ethnicity etc. The Tribunal or the courts must assess each case on its own merits. A case involving the requirement of Norwegian citizenship was handled by the Equality Tribunal in case no. 18/2006 (as described below, see paragraph 3.2.10).

##### **3.1.2 Natural and legal persons (Recital 16 Directive 2000/43)**

###### **a) Protection against discrimination**

In Norway, the personal scope of anti-discrimination law covers (certain) natural and/or legal persons for the purpose of protection against discrimination.

Norwegian law on non-discrimination covers as starting point only human beings, see ADA section 6(2), WEA section 13-2, AAA section 5(2) and SOA section 5(2). The acts do not formally distinguish between natural persons and legal persons, except for ethnicity, religion and belief, where both physical and legal entities are specifically covered.<sup>169</sup>

Legal persons are protected against discrimination through the ADA section 6(2), but not through the other acts.

###### **b) Liability for discrimination**

Legal persons are liable for discrimination under the ADA section 6(2), WEA section 13-2, AAA section 5(2) and SOA section 5(2). The Ombud has accepted complaints from legal entities, in which it has been clear that the reason for possible discrimination is the discrimination ground related to the members of the entities.

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<sup>168</sup> See the preparatory works to the ADA, Proposition to the *Odelsting* No. 33 (2004-2005) page 88.

<sup>169</sup> This as a result of an intervention in Parliament when the law was enacted, see the deliberations of the *Odelsting* 19 April 2005 and Besl. O. No 67 (2004-2005). This proposal was not explained or substantiated further. The current preparatory works, Proposition to Parliament, Prop. 88 L (2012-2013) discuss the issues relating to physical and legal entities in chapter 8.



### **3.1.3 Private and public sector including public bodies (Article 3(1))**

#### **a) Protection against discrimination**

In Norway, the personal scope of national law covers private and public sector including public bodies for the purpose of protection against discrimination (see the ADA section 2, WEA section 13-2, AAA section 2 and the SOA section 2).

#### **b) Liability for discrimination**

In Norway, the personal scope of national law covers private and public sector including public bodies for the purpose of liability for discrimination (see the ADA section 2, WEA section 13-2, AAA section 2 and the SOA section 2).

### **3.2 Material scope**

#### **3.2.1 Employment, self-employment and occupation**

In Norway, national legislation applies to all sectors of private and public employment, self-employment and occupation, including contract work, self-employment, military service and holding statutory office, for the five grounds.

The scope of discrimination protection in the ADA, AAA and SOA applies to all sectors, also all sectors of public and private employment and occupation, including contract work, self-employment, military service and holding statutory office (see the ADA section 2, AAA section 2 and SOA section 2) and covers each of the specific grounds covered by the directives. The WEA applies to undertakings that engage employees, unless otherwise explicitly provided by the act, see WEA section 13-2(1). The provisions of the anti-discrimination chapter of the WEA also cover the employer's selection and treatment of self-employed and contract workers, see WEA section 1-2(1).

#### **3.2.2 Conditions for access to employment, to self-employment or to occupation, including selection criteria, recruitment conditions and promotion, whatever the branch of activity and at all levels of the professional hierarchy (Article 3(1)(a))**

In Norway, national legislation prohibits discrimination in the following areas: conditions for access to employment, to self-employment or to occupation, including selection criteria, recruitment conditions and promotion, whatever the branch of activity and at all levels of the professional hierarchy for the five grounds in both private and public sectors as described in the directives.

The scope of discrimination in employment under all the different acts (ADA section 16; AAA section 21, SOA section 15 and WEA section 13-2) covers all aspects of employment from the initial advertisement of posts until the termination of the work contract, such as pay and working conditions, training and other forms of competence development, appointment, relocation and promotion.

Given the full factual scope of the ADA, AAA and SOA (AAA section 2, ADA section 2, SOA section 2), the acts cover access to occupation. The WEA – that is age - covers specifically training and other forms of competence development (see WEA section 13-2(1)b), but does not specifically cover access to occupation.

### **3.2.3 Employment and working conditions, including pay and dismissals (Article 3(1)(c))**

In Norway, national legislation prohibits discrimination in the following areas: working conditions including pay and dismissals, for all five grounds and for both private and public employment.

National law on discrimination include working conditions including pay and dismissals (see ADA section 16; AAA section 21, SOA section 15 and WEA section 13-2).

#### **3.2.3.1 Occupational pensions constituting part of pay**

Occupational pensions are covered by the provisions of both the AAA, SOA and the WEA, as the different acts applies to all aspects of employment including pay and working conditions (see AAA section 21, SOA section 15 and WEA section 13-1(c)).

There is no case law pertaining to the access to occupational pensions because of alleged discrimination based on sexual orientation, age or disability. This does not mean that challenges do not exist. As an overhaul of the pensions system is in the process of taking place, it is probable that cases will arise concerning the accrual of pension credits between 67 and 70 years. Currently, a number of systems stop the accrual of pension credits at 67, which used to be the general retirement age (as opposed to maximum limits) (see paragraph 4.7.1(c) below). The legality of some of these systems in relation to Directive 2000/78 is at present thus unclear, as this aspect has not been assessed in preparatory works to the author's knowledge.

### **3.2.4 Access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience (Article 3(1)(b))**

In Norway, national legislation applies to vocational training outside the employment relationship, such as that provided by technical schools or universities, or such as adult lifelong learning courses.

Given the full factual scope of the ADA, AAA and SOA (AAA section 2, ADA section 2, SOA section 2) as described above, the acts cover all types and all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience. The WEA – that is age - covers specifically training and other forms of competence development (see WEA section 13-2(1)b).

### **3.2.5 Membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations (Article 3(1)(d))**

In Norway, national legislation prohibits discrimination in the following areas: membership of, and involvement in workers or employers' organisations as formulated in the directives for all five grounds and for both private and public employment.

Membership in an organisation of workers or employers, or any organisation whose members carry on a particular profession, is covered as a separate ground for discrimination in relation to employment and covered in the WEA, see WEA section 13-2(3).

Access to membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations, cannot be refused based on ethnicity or disability or

the other grounds, however, there is a specific right in the WEA that the benefits offered by the organisation cannot be claimed by non-members (see WEA section 13-2(4)).

### **3.2.6 Social protection, including social security and healthcare (Article 3(1)(e) Directive 2000/43)**

In Norway, national legislation prohibits discrimination in the following areas: social protection, including social security and healthcare as formulated in the Racial Equality Directive.

The ADA section 2, AAA section 2 and SOA section 2 cover social protection, including social security and health care. This means that disability, religion or belief and sexual orientation are also covered. Age is not covered. Age discrimination is only covered within employment.

Most legislation, including that on social security, is neutral in terms of the existing grounds for discrimination. This is a challenge in contexts where for example men and women's choices in reality are different because of stereotypical gender roles in society, or where choices made by the minority population of specific ethnic or religious groups makes it difficult for the individuals of this group to access the protection afforded to the majority population. The result of these kinds of neutral systems without proactive measures might thus lead to differences in results because of individual choices. A system of neutral legislation leaves little room for compensating results of stereotypical individual choices based on gender, ethnicity, religion, disability etc. A challenge in terms of addressing discrimination in social security thus becomes an issue of defining what is meant by 'discrimination' and 'equality' in the intersection of anti-discrimination legislation and social security.

#### **3.2.6.1 Article 3.3 exception (Directive 2000/78)**

The WEA – age – does not extend to social security, and as such is in line with the exception in Directive 2000/78, article 3(3). As the Non-discrimination Directives (2000/78 and 2000/43) are not incorporated in the EEA agreement, the specific exceptions allowed under the directives have not been clearly articulated.

### **3.2.7 Social advantages (Article 3(1)(f) Directive 2000/43)**

In Norway, national legislation prohibits discrimination in the following areas: social advantages as formulated in the Racial Equality Directive.

The ADA section 2, AAA section 2 and SOA section 2 cover all sectors of society, thus also all forms of social advantages, meaning benefits that may be provided by either public or private actors to people because of their employment or residence status. Discrimination in this area will be unlawful. Age as a discrimination ground is only covered in employment and benefits deriving from employment.

There are a number of benefits in Norway that are needs-based under the social security scheme, for example funeral-support, family allowances etc. To the author's knowledge there is little indication that any of these are either discriminatory or have a discriminatory effect.

Prohibition of discrimination because of age is limited to discrimination in working life, and does not cover social advantages. Discrimination in relation to social advantages outside working life will thus not be unlawful on the grounds of age.

In Norway, the lack of definition of social advantages does not raise problems, given that the protection against discrimination covers any discrimination that may arise.

### 3.2.8 Education (Article 3(1)(g) Directive 2000/43)

In Norway, national legislation prohibits discrimination in the following area: education as formulated in the Racial Equality Directive.

The anti-discrimination legislation on ethnicity, religion or belief, disability and sexual orientation (see the ADA section 2, AAA section 2 and SOA section 2), also covers all aspects of education including all types of schools, both public and private, given the full factual scope of these acts as described above. Age is not covered.

Migrant minors with residency rights in Norway have a right to enrol in the Norwegian educational system, which is free of charge. Adult migrants who do not have basic elementary school are entitled to enrol into the Norwegian primary school system free of charge. Immigrants residing in Norway with no legal residency permit do not have a right to education, neither in accordance with the general Education Act, nor with the Act on an introduction programme for refugees and immigrants. To the author's knowledge, there are no cases in either the equality bodies or in the courts that specifically address discrimination against migrants in relation to education.

#### a) Pupils with disabilities

In Norway, the general approach to education for pupils with disabilities does not raise problems.

The general approach to education for children with disabilities in Norway attempts to handle the needs of disabled children within the mainstream public education system, but also has a network of segregated 'special' education for those children unable to benefit from a more 'mainstream' approach.

All children have a right to free education in Norway, as stated in the Education Act.<sup>170</sup> Formal compulsory education normally starts the calendar year that the child turns six years, and lasts until the child has completed the tenth school year (section 2-1 of the act). Children have the right to go to school in the community where they live (section 8-1) and to belong to a group (section 8-2). One exception is made for deaf students with sign language as their first language, as they are given the right to special instruction and education, under section 2-6.

The school has a general duty to adapt all education and instruction for each student, depending on the individual's abilities and aptitudes. If this special adaptation is not enough, and does not give each individual pupil sufficient educational training, the pupil will be entitled to special education (section 5-1). The act contains specific rules for the assessment and allocation of special education. The parents may request that the school carries out sufficient surveys and tests to determine whether the student needs special education. Involved in this assessment is the Educational Psychology Service (PP) established by local authorities. The PP-service (or DPI) is an expert and advisory body for nurseries and schools. Their tasks are to provide psychology services to help municipalities and counties to ensure tailor-made options for pupils with special needs, and provide for the preparation of expert evaluation of the child. National guidelines form the basis for the assessment to be made.

An individual education plan (IEP) is prepared for each pupil who receives special education (section 5-5). This plan should describe the objectives for the education, its content and scope. The IEP should both specify how the pupil's training differs from the normal curriculum, as well as how the education should be conducted.

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<sup>170</sup> See the Act on Education of primary and secondary education of 17 July 1998 No 61, see <http://www.ub.uio.no/ujur/ulovdata/lov-19980717-061-eng.pdf> (accessed on 6 January 2017).

The State has also developed special expertise about educational provision for children, adolescents and adults with major special needs through a National Support System for Special Needs Education (Statped).<sup>171</sup>

The challenge in Norway is practical aspects related to giving disabled children an equal education. Despite well-developed legislation in the field of education, the practical implementation is not always optimal for disabled children. This is partly because well-intended administrative decisions are not always complied with, as well as a lack of necessary resources and qualified personnel.<sup>172</sup>

#### b) Trends and patterns regarding Roma pupils

In Norway, there are no specific patterns existing in education regarding Roma pupils such as segregation. There is no segregated schooling for Roma children, as they are registered in the school district to go to school where their registered address is. There is however a scheme enabling net-based education (long-distance learning) for Roma students to enable them to study while travelling with their families during the school year.

The governmental action plan to improve the situation of the Roma in Oslo also includes elements related to schooling.<sup>173</sup> This includes both specific education in Norwegian as well as mother-language training according to the Education Act section 2-8 and the Private Education Act section 3-5. However, data from the education information system shows that no Roma children use this right, as mentioned in the action plan. These figures might be misleading, as the count takes place annually on 1 October, when many Roma still are travelling. A project on the right to adult education for Roma in Oslo is referred to in the action plan as a positive initiative. The initiatives in schools include giving children computers for remote-distance education, home education and production of relevant educational material. There are 71 registered Roma pupils in 22 schools in Oslo, out of a total Roma population in Norway of about 700 persons. These services extend in principle to immigrant Roma children as well. However, a key issue in Norway in relation to Romanian Roma is that they visit Norway on a tourist visa and leave the country when their tourist visa expires.

### **3.2.9 Access to and supply of goods and services which are available to the public (Article 3(1)(h) Directive 2000/43)**

In Norway, national legislation prohibits discrimination in the following area: access to and supply of goods and services as formulated in the Racial Equality Directive.

The anti-discrimination legislation on ethnicity, religion or belief, disability and sexual orientation also covers access to and supply of goods and services, given the full factual

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<sup>171</sup> See <http://www.statped.no/Spraksider/In-English/> (accessed on 6 January 2017).

<sup>172</sup> See Wendelborg, C. og Tøssebro, J. (2010), 'Marginalisation processes in inclusive education in Norway – a longitudinal study of classroom participation', *Disability and Society*, 25 (6), 701-714. See also a number of reports in Norwegian: 'Rett til spesialundervisning i praksis? En rapport om spesialundervisning i grunnskolen og videregående skole', The Norwegian Federation of Organisation of Disabled People (FFO) FFOs rettighetssenter 2008 at [http://ffo.no/globalassets/rapporter/rapport\\_spesialundervisning.pdf](http://ffo.no/globalassets/rapporter/rapport_spesialundervisning.pdf) (accessed 6 January 2017), Else Leona McClimans (in Norwegian) 'Utviklingen av funksjonshemmedes rettssituasjon de siste 10 år', FFO politisk notat 2/2013 at: <http://ffo.no/globalassets/ffo-mener/politiske-notat/utviklingen-av-funksjonshemmedes-rettigheter-politisk-notat.pdf> (accessed 6 January 2017), Thomas Nordahl og Rune Sarroma Hausstätter (2009) *Spesialundervisningens forutsetninger, innsatser og resultater. Situasjonen til elever med særskilte behov for opplæring i grunnskolen under Kunnskapsløftet, Høgskolen i Hedmark*. The report: 'Hvorfor blir det sånn? Kartlegging av hvordan kommuner organiserer opplæring for elever med funksjonsnedsettelse og lærevansker', Norges Handikapforbund Oslo, November 2013.

<sup>173</sup> See (in Norwegian) [http://www.regjeringen.no/nb/dep/fad/dok/rapporter\\_planer/planer/2009/Handlingsplan-for-a-bedre-levekarene-for-rom-i-Oslo.html?id=594315](http://www.regjeringen.no/nb/dep/fad/dok/rapporter_planer/planer/2009/Handlingsplan-for-a-bedre-levekarene-for-rom-i-Oslo.html?id=594315) (accessed 6 January 2017).

scope of these acts as described above (see ADA section 2, AAA section 2, and SOA section 2). Age is not covered.

The first court case in which a provider of goods and services was penalised in accordance with the Penal Act section 186 on discriminatory services because of religion was handled by the court of first instance in 2016.<sup>174</sup>

#### 3.2.9.1 Distinction between goods and services available publicly or privately

In Norway, national law distinguishes between goods and services available to the public (e.g. in shops, restaurants, banks) and those only available privately (e.g. limited to members of a private association). There have been a number of cases on this before the Ombud and Equality Tribunal.<sup>175</sup>

There is a general exception in the ADA, AAA and SOA, such that they do not cover family life and personal relationships. In the legal preparatory works to the legislation, it was specified that small local clubs and associations that are not directed towards the public, but only directed toward limited groups of people are assumed to fall under the exception of 'purely personal relationships'.<sup>176</sup> These include poker games, a reading circle or small closed friendship-clubs. If the goods and services are directed towards the public in general, the prohibition against discrimination exists.

#### 3.2.10 Housing (Article 3(1)(h) Directive 2000/43)

In Norway, national legislation prohibits discrimination in the following area: housing as formulated in the Racial Equality Directive.

In Norway, Directive 2000/43 article 3(1)h has been implemented by including specific provisions in four different acts on housing: the Tenancy Act (*husleieloven*) section 1-8, the Housing Cooperative Act (*burettslagslova*) section 1-5, the Property Ownership Act (*eierseksjonsloven*) section 3a and the Act relating to housing cooperatives (*bustadbyggjelagslova*) section 1-4. Through these acts, discrimination based on gender, ethnicity, religion or belief, sexual orientation or disability is prohibited. Age is not covered.

The Tenancy Act states that the above-mentioned grounds cannot be considered just cause for refusing to accept a lease, sub-lease, or a member of a household, and for transferring a lease to another person. Furthermore, these grounds cannot be invoked for terminating a lease. The act covers rentals for private, public and business purposes. The prohibition

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<sup>174</sup> In its judgment of 9 September 2016, the *Jæren tingrett* in its case number TJARE-2016-96260 The public prosecutor vs A, a hairdresser had refused a hijab-dressed woman her services. What was said in the situation is disputed, but the parties agree that two hijab-clad young women came to the hairdresser's salon. As they entered the hair salon, they asked the price of a hair colouring. The hairdresser said either: 'I do not take on people like you, go to another hairdresser' or 'Get out, I do not want to touch someone like you'. The women then walked away and reported the incident to the police, who fined the hairdresser NOK 8 000 (approx. EUR 963). As the hairdresser refused to pay the fine, the case was taken to court by the public prosecutor. The hairdresser was sentenced to pay a fine of NOK 10 000 (approx. EUR 1 250) and NOK 5 000 (approx. EUR 500) in legal costs to the State for refusing a hijab-clad woman access to her store, as this was found to constitute discrimination on the ground of religion. The case has been appealed and is not final at the time of writing (10 January 2017).

<sup>175</sup> According to the annual report of the Equality Ombud for 2015, out of a total of 1 793 inquiries, 282 were related to goods and services. Out of 181 complaints (cases), 40 (22 %) concerned goods and services. In Norwegian at <http://www.ldr.no/nyheter-og-fag/brosjyrer-og-publikasjoner/Arssrapporter/arsmelding-2015/kapittel-3-arets-aktiviteter-og-resultat/> (accessed 18 January 2017). Figures for 2016 are not published as of 18 January 2017.

<sup>176</sup> As per the preparatory works to the ADA, Proposition to the *Odelsting* No. 33 (2004-2005) p. 204, and the preparatory works to the AAA, Proposition to the *Odelsting* Ot. Prp. Nr 44 (2007-2008) p. 78 and the preparatory works to the SOA, Proposition to Parliament, Prop. 88 L (2012-2013) p. 59.

against discrimination does not apply to letting a room in one's own home. This is linked to the general scope of the ADA, as it does not cover private and personal relations.<sup>177</sup>

The Housing Cooperative Act, the Property Ownership Act and the Act relating to housing cooperatives prohibit conditions being set for becoming a unit owner that may function as discriminatory based on the abovementioned grounds.

In its case 5/2013, the Tribunal found that a female couple had been discriminated against as a landlord cancelled a viewing of a farm house that was for rental on his farm.

The prohibition against discrimination according to the housing acts does not include selling a dwelling, that is, the relationship between the vendor and the buyer. The selling of dwellings is covered by the ADA, and is in practice the area in which a small number of cases have been assessed: No cases regarding housing discrimination has yet been taken to court, but the Equality Ombud and Equality Tribunal have heard some cases.

The Equality Tribunal case no. 18/2006 concerned a housing advert posted by a private landlord on the national webpage used for selling and letting houses ([www.FINN.no](http://www.FINN.no)), which stated; 'only Norwegian citizens need apply'. The advert was for a two-bedroom flat in a four-family house. The flat had a private entrance. The landlord did not live in the flat himself. The landlord stated that he had not previously made Norwegian citizenship a requirement in his housing adverts, but wished to do so provided it was not unlawful. The landlord stated that his key concern is that his flats are properly looked after, that rent is paid punctually and that requisite guarantees are provided. He emphasised that his interests were purely financial, as where Norwegian citizens are concerned he can seek assistance from the enforcement officer to recover rental arrears, and that it is far simpler to obtain enforceable eviction and to collect money owed in the wake of a tenancy, for example by execution charge, attachment of earnings etc., and that he can claim compensation from Norwegian citizens for any damage they have caused. Furthermore, he argued that the requirement of Norwegian citizenship falls outside the scope of the Anti-Discrimination Act's prohibition of discrimination. The Tribunal found that although citizenship is not explicitly mentioned as a basis for discrimination under the Anti-Discrimination Act, the preparatory works left the enforcement agencies to determine the point at which discriminatory treatment based on citizenship comes under the prohibition of indirect discrimination based on ethnicity etc. As the right to housing is a key welfare good, and the Norwegian housing rental market features a substantial element of private letting, a possible exclusion of persons from the rental market is a heavy burden for those affected. Thus, the Tribunal found that the requirement of Norwegian citizenship leads, or can lead, to persons of non-Norwegian descent, origin or ethnic background being put at a particular disadvantage compared with ethnic Norwegians. Hence the requirement entailed indirect discrimination in breach of the ADA on grounds of ethnicity, nationality and descent. The Tribunal also ordered the landlord to halt his discriminatory advertising and letting practice. The landlord was ordered to confirm in writing, within 14 days of receiving notification of the decision of the Tribunal, that the discriminatory letting practice would cease and that future housing adverts would be formulated in accordance with the rules of the Tenancy Act and the ADA.

The Equality Tribunal has furthermore handled two cases of discrimination because of ethnicity, in which the vendor of the real estate sold the property to a (Norwegian) bidder even though a higher bid from a non-ethnic Norwegian was received. In one of the cases, no 7/2007, the Equality Tribunal found it proved that the sale was not related to the

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<sup>177</sup> It follows from the Anti-Discrimination Act's preparatory works – Proposition to the *Odelsting* no. 33 (2004-2005) – that the exception in regard to family life and personal relationships is to be interpreted narrowly. Letting a room in one's own house is excluded from the scope of the act, whereas the letting of independent flats not occupied by the owner himself falls within the scope of the act. This is reiterated in Proposition to Parliament, Prop. 88 L (2012-2013) p. 59.



bidders' ethnicity, whilst it found a breach of the ADA in case no 22/2007. No sanction was imposed.

Regulations have been approved under the Act on Planning and Building<sup>178</sup> regarding housing accessible to people with disabilities and older people.

Migrants have a right to rent publicly-owned subsidised housing in the municipality or county they live. These houses are few. The UN Committee on Economic, Social and Cultural rights noted in its concluding observations on the fifth periodic report to Norway<sup>179</sup> that it was 'concerned that persons with an immigrant background face incidents of discrimination with regard to access to housing, employment, education and public health-care services'. To the author's knowledge, there are no cases in either the equality bodies or in the courts that address discrimination of migrants in housing, apart from the cases described above concerning non-Norwegians.

#### 3.2.10.1 Trends and patterns regarding housing segregation for Roma

In Norway, there are no patterns of housing segregation and discrimination against the Roma.

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<sup>178</sup> Act relating to planning and the processing of building application/ building of 27 June 2008 no. 71, at (translation date as of January 2010) <https://www.regjeringen.no/en/dokumenter/planning-building-act/id570450/> (accessed 6 January 2017).

<sup>179</sup> See E/c.12/NOR/Co/5 page 3, point 7.

## **4 EXCEPTIONS**

As the Non-discrimination Directives (2000/78 and 2000/43) are not incorporated in the EEA agreement, the specific exceptions allowed under the directives have not been clearly articulated in national law as such in relation to the directives.

### **4.1 Genuine and determining occupational requirements (Article 4)**

In Norway, national legislation provides for an exception for genuine and determining occupational requirements.

The ADA section 17, SOA section 17 and the WEA section 13-3(1) provide a general exception that includes genuine and determining occupational requirements. This exception is in general in compliance with Article 4 of Directive 2000/43 and Article 4(1) of Directive 2000/78. There is no such exception in the AAA, that is, there is no exception for genuine and determining occupational requirements for disability.

### **4.2 Employers with an ethos based on religion or belief (Article 4(2) Directive 2000/78)**

In Norway, national law provides for an exception for employers with an ethos based on religion or belief, which is not specific in the revised current legal text, but follows from the legal preparatory works.

Before the revision of the ADA in force as of 1 January 2014, there was a general specific exception to the scope of the ADA relating to:

‘actions and activities carried out under the auspices of religious and belief communities and enterprises with a religious or belief-related purpose, if the actions or activities are significant for the accomplishment of the community’s or the enterprise’s religious or belief-related purpose.’

In the 2013 revision of the ADA, this specific exception was discontinued, so that the exception for employers with an ethos based on religion or belief now follows the general rule found in the ADA section 7 on lawful differential treatment. In the legal preparatory works before the revision, it was specified that this does not imply a change. The right of religious organisations to set their own teachings, religious rituals, religious education and choice of religious leaders will still be accepted as a part of the lawful differential treatment under the ADA.<sup>180</sup>

In working life, as a general rule, exceptions for employers with an ethos based on religion or belief are not accepted. However, employers with an ethos based on religion or belief may require that employees follow this religion or belief, provided that this is a genuine and determining occupational requirement in line with the general exception to the act. This would be the case for religious/confessional positions, as per the ADA section 17.

The scope of this exception is specified in relation to the advertisements of such positions, as it is specified that employers may ask information regarding the applicant’s stance on religious or cultural issues if the nature of the position so requires, or if it is part of the purpose of the enterprise concerned to promote specific religious or cultural views and the stance of the employee will be significant for the accomplishment of the said purpose, see ADA section 17(2). For the Norwegian church, it follows from the Church Act that the Norwegian church as an employer has the right to require that its employees are members of the church for confessional/ religious positions, as per the Church Act section 29.<sup>181</sup>

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<sup>180</sup> See Proposition to Parliament, Prop. 88 L (2012-2013) chapter 12.4.2.2 page 88.

<sup>181</sup> See the Church Act of 7 June 1996 No. 31.

For general employment in positions in religious organisations that have no bearing on the organisation itself, it is not allowed to either ask or emphasise religious affiliation. This is the case for positions such as caretakers or cleaners in churches/religious organisations. There is no case law from courts on this, but that approach has been specified by the cases brought before the Equality Ombud in several cases.<sup>182</sup>

As the Non-discrimination Directives (2000/78 and 2000/43) are not incorporated in the EEA agreement, the specific exceptions allowed under the directives have not been clearly articulated in national law as such in relation to the directives.

- Conflicts between rights of organisations with an ethos based on religion or belief and other rights to non-discrimination

In Norway, there are no specific provisions or case law in this area relating to conflicts between the rights of organisations with an ethos based on religion or belief and other rights to non-discrimination. (e.g. organisations with an ethos based on religion versus sexual orientation or other ground), although the Equality Ombud in her handbook on religion at work<sup>183</sup> has a specific page devoted to the interface between religion and sexual orientation.

A comprehensive white paper was published in September 2016 regarding the consequences of conscience-based refusal by employees to carry out tasks in their work, which are contrary to their beliefs.<sup>184</sup> The white paper has been sent for public hearing.

Running parallel to the political process, but with no influence on its process, a Catholic general practitioner was dismissed from her practice by the municipality in which she worked because she refused to administer abortifacient IUDs (intrauterine devices). She has challenged this dismissal. The case will be handled by the court in January 2017.

- Religious institutions affecting employment in state funded entities

In Norway, religious institutions are permitted to select people (on the basis of their religion) to hire or to dismiss from a job, both when that job is in a state entity, or in an entity financed by the State. It is accepted that all churches, including the (previously state) Lutheran church<sup>185</sup> may require a particular religious belief when hiring priests and religious leaders, but cannot demand a particular religious affiliation related to positions that do not have a religious content. The assessment used is similar to that used for exceptions to the protections against discrimination in general.

The Equality Ombud has issued a statement concerning kitchen work in a religious boarding school.<sup>186</sup> The school is a private evangelical school, and requires that all staff at the school share the same view. The Equality Ombud found that this requirement was a breach of the ADA, as people with a view other than Christianity were placed in a worse position as the advertisement for the position stated that only Christians would be considered for the position. The Equality Ombud assessed whether having a Christian belief was necessary to

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<sup>182</sup> See Ombud's case no 08/1023 on a cleaner in an evangelical Lutheran church (not accepted), case no 10/779 on a gymnastics teacher in a religious (Christian/ Lutheran) boarding school (accepted), case no 10/761 on teachers in Spanish/ maths/ computer science in a private Christian (Lutheran) high school (accepted).

<sup>183</sup> See <http://www.ldo.no/nyheiter-og-fag/brosjyrar-og-publikasjonar/brosjyrer/Religion-og-arbeid/> (accessed 6 January 2017).

<sup>184</sup> See the Government white paper NOU 2016:13 *Samvittighetsfrihet i arbeidslivet* (in Norwegian) at <https://www.regjeringen.no/no/aktuelt/samvittighetsutvalget-overleverte-utredning-om-samvittighetsfrihet-i-arbeidslivet/id2510546/> (Accessed 18 January 2017).

<sup>185</sup> The Norwegian Lutheran church was the Norwegian State church until a constitutional change in 2012. The publicly (State) appointed Church Board ('*Statens særskilte kirkestyre*') was abolished on 21 May 2012, however the State sees it as its responsibility to support the Lutheran church as a religious organisation, and to support other religious organisations and belief-organisations equally.

<sup>186</sup> See case no 10/761, statement of 4 January 2012.

achieve a legitimate aim. The school argued that all staff at the school must have a Christian belief, as they might act as discussion partners or 'counsellors' for its pupils. The Equality Ombud found that although it was possible that such a function may be part of the position, this was not the key part of the job, and not relevant in terms of this particular job, thus the school could not demand a specific faith for positions working in the kitchen. The Ombud came to the opposite conclusion in relation to teachers. Assessing a different school, the Equality Ombud found that a religious boarding school was allowed to ask its teachers to have a Christian belief, as this was seen as a requirement for fulfilling the positions.<sup>187</sup>

There is no case law from national courts on this.

This option to select people on the basis of their religion is provided for by national law as described above. This legislation has to the author's knowledge only been influenced by Directives 2000/78 and 2000/43 and not been influenced by international agreements such as agreements with the Holy See or other religious institutions such as the (previous) Norwegian Lutheran State church.

#### **4.3 Armed forces and other specific occupations (Article 3(4) and Recital 18 Directive 2000/78)**

In Norway, national legislation provides an exception for the armed forces in relation to age (Article 3(4), Directive 2000/78).

National law provides an exception for the armed forces in relation to age discrimination as the Armed Forces Employment Act of 2 July 2004 no 59 section 4(2) states that 'Officers and enlisted crew are exempt from the prohibition on age discrimination according to WEA section 13-1.' In the legal preparatory works to the WEA, it was stated that:

'the directive gives an opportunity for national legislation to provide for an exception for the armed forces in relation to age or disability discrimination. This gives an opportunity to, but not a duty to except the armed forces. The context of directive 3 no 3 and 4 is not explicitly included in the legislative proposal. The reason for this is that these provisions contain rules that are not a natural part of the provisions of the WEA.'<sup>188</sup>

The AAA on disability discrimination does not contain a specific exception for the armed forces, nor is this addressed in the legal preparatory works. To be admitted into the armed forces requires the applicant to undergo a number of tests, including health tests, which results in persons with disabilities being barred from these positions if they are not able to fulfil these tests. The general health requirement excludes disabled recruits from being allowed entry into the armed forces, even though the duty of individual accommodation will apply also within these sectors.

The question of disability discrimination in the armed forces has never been tried before the courts, although an attempt was made by an association for people with ADHD. This was not successful, as current recruits with ADHD are not given an individual assessment for being able to enter military service, but are categorised as being unfit for war-time service by virtue of their diagnosis. The Equality Tribunal had found that the guidelines governing the introduction scheme for military recruits in the armed forces were not discriminatory for recruits with ADHD. The Tribunal presumed in its decision that all recruits – including those with a disability – would be subject to an individual assessment of their merits. As recruits with a disability are excluded from further assessment because of their disability, the organisation challenged the presumption that the Tribunal's decision built

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<sup>187</sup> See case no. 10/779.

<sup>188</sup> See the preparatory works to the previous WEA on equality in employment, Proposition to the *Odelsting* No. 104 (2002-2003), section 8.1.2 s 23.

on, and asked that the decision be found invalid. The association ADHD Norway initiated a case against the State/the Equality and Anti-Discrimination Tribunal for the Oslo City court, claiming that the Tribunal's decision in its case number 25/2011 on the assessment of the introduction course for military recruits in the armed forces was invalid. As the introduction scheme was marginally changed after the decision of the Tribunal, the Appellate court in case number LB-2013-142603 rejected the case, as it found that the decision of the Tribunal was not a live controversy: the facts upon which the decision of the Tribunal was based were historic, and not relevant for the current situation. The dispute was by verdict rejected from court assessment based on a lack of a genuine need to have the case determined, as per the RDA section 1-3. This verdict was appealed to the Supreme Court, which in case Rt. 2014-480 found that the Tribunal did not have a mandate to make a decision in the case, and that the Tribunal – erroneously – had made a decision where it should have issued an opinion. It is not possible to refer an opinion to the courts.

As the Non-discrimination Directives (2000/78 and 2000/43) are not incorporated in the EEA agreement, the specific exceptions allowed under the directives have not been clearly articulated in national law as such in relation to the directives.

#### **4.4 Nationality discrimination (Article 3(2))**

As the Non-discrimination Directives (2000/78 and 2000/43) are not incorporated in the EEA agreement, the specific exceptions allowed under the directives have not been clearly articulated as such in relation to the directives.

##### **a) Discrimination on the ground of nationality**

In Norway, national law does not include exceptions relating to difference of treatment based on nationality.

In Norway, nationality (as in citizenship) is not explicitly mentioned as a protected ground in national anti-discrimination law.

Nationality, in the sense of citizenship, is not included in the definitions of discrimination grounds of the ADA.<sup>189</sup>

As explained above (paragraph 2.1.1. ii), the legal preparatory works make it clear that 'national origin', as grounds for discrimination, is closely associated with the term ethnicity, and as such, nationality as a ground is protected under ethnicity. Statelessness is also covered.<sup>190</sup>

##### **b) Relationship between nationality and 'race or ethnic origin'**

National law through the ADA section 1 protected 'national origin' as a ground for discrimination, not nationality. Nationality – other than Norwegian – is in reality thus a protected ground through judicial interpretation, within the frame of 'national origin' or 'ethnicity' as the protected ground.

Similarly, people who lack a nationality- the stateless - can also have their case heard. The Equality Ombud assessed the question of indirect discrimination against a stateless

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<sup>189</sup> See Government white paper NOU 2002:12 Legal protection against ethnic discrimination page 34.

<sup>190</sup> See decision of the Equality Ombud in case no 09/892 of 3 May 2012. In its case 28/2015 of 29 September 2015, the Equality Tribunal found that demanding a Norwegian or Swedish criminal record check from 18 years of age to follow job-applications to a security company constituted indirect discrimination because of nationality in breach of ADA section 6. In reality, the demand from the security company signified that the company only accepted applicants that had been Norwegian or Swedish citizens since 18 years of age. The practice was seen as discriminatory vis-à-vis both EU citizens and third country nationals, that is everyone who is not a Norwegian or Swedish citizen.

employee on the basis of ethnicity.<sup>191</sup> As the employee was not entitled to a Norwegian personal id-number, he was refused a permanent access card for working in a business leasing employees to other employers, thus he was fired. The employer (the leasing company) claimed that the dismissal/ rejection was based on the fact that the employee as an asylum-seeker did not have a personal id-number, and thus could not be registered in the internal tax and salary systems of the firm. The Ombud considered that the requirement to have a personal id-number/ social security number was an apparently neutral rule. Nevertheless, the lack of a personal id-number led to the person being put in a worse position than others. There was a clear connection between his lack of personal identity number and his national origin. The company later changed its practice so that people who lack personal id-number/ social security number, but hold a DUF number (a registration number issued by the immigration board) and work permit can take up employment in the company.

#### **4.5 Work-related family benefits (Recital 22 Directive 2000/78)**

##### **a) Benefits for married employees**

In Norway, it would constitute unlawful discrimination in national law if an employer only provides benefits to those employees who are married. This is based on the fundamental principle of fairness/ just cause developed by case law and now also found in the general equality clause in the Constitution, section 98. Section 98 of the Constitution reads: 'All people are equal under the law. No human being must be subject to unfair or disproportional differential treatment'.

##### **b) Benefits for employees with opposite-sex partners**

In Norway, it would constitute unlawful discrimination in national law if an employer only provides benefits to those employees with opposite-sex partners (see SOA section 2).

#### **4.6 Health and safety (Article 7(2) Directive 2000/78)**

##### **a) Exceptions in relation to disability and health/safety**

In Norway, there are no specific exceptions in relation to disability and health and safety (Article 7(2), Directive 2000/78), other than the general justifications in relation to direct and indirect discrimination as described above (paragraphs 2.2 (b) and 2.3 (b)).

As the Non-discrimination Directives (2000/78 and 2000/43) are not incorporated in the EEA agreement, the specific exceptions allowed under the directives have not been clearly articulated as such in relation to the directives.

#### **4.7 Exceptions related to discrimination on the ground of age (Article 6 Directive 2000/78)**

##### **4.7.1 Direct discrimination**

In Norway, national law provides an exception for direct discrimination on age, as per the WEA 13-3(1).

##### **a) Justification of direct discrimination on the ground of age**

In Norway, it is possible, both generally, and in specified circumstances, to justify direct discrimination on the ground of age.

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<sup>191</sup> Equality Ombud case no 09/892, statement of 3 May 2012.

The general exception in the WEA states that discrimination that has a just cause, does not involve disproportionate intervention in relation to the person or persons so treated and that is necessary for the performance of work or profession, shall not be regarded as discrimination, as per the WEA section 13-3(1).

The test is in principle compliant with the test used by the Court of Justice in the *Mangold* case,<sup>192</sup> as the Norwegian Supreme Court referred explicitly to the test of the *Mangold* case in its first judgment on age discrimination.<sup>193</sup>

b) Permitted differences of treatment based on age

In Norway, national law permits differences of treatment based on age for any activities within the material scope of Directive 2000/78, as per the WEA section 13-3. In practice, the most contested section has been WEA section 15-13a, which allows for the possibility of terminating employment on account of age (see paragraph 4.7.4 (d) below).

There have been a number of court cases regarding the legality of age limits, including the Supreme Court judgment of 14 February 2012, Rt-2012-219, the 'helicopter' judgment. Could the employer based on collective agreement require that its helicopter pilots retire at age 60? Ten helicopter pilots sued the employer claiming to continue their employment relationship after age 60, even though an obligation to retire at age 60 followed from the interpretation of their collective agreement. The Supreme Court referred to its earlier case law in which it is stated that the national Working Environment Act shall be interpreted so as to be compatible with Directive 2000/78/EU on equal treatment in employment, even though this directive is not a part of the EEA agreement. The court found that following the *Prigge* judgment, safety or health reasons cannot justify the 60-year age limit for helicopter pilots. The Supreme Court did not assess whether the other purposes of the age limit that were highlighted - the interests of a dignified retirement, the rapid career advancement of younger pilots and protecting a good pension scheme - were justifiable in this context, as these other purposes were not sufficiently weighty to require that pilots stopped working at the age of 60.

This is in contrast to a previous Supreme Court judgment of 5 May 2011 Rt-2011-609, HR-2011-910-A (*SAS-pilotene*) described below in paragraph 4.7.5(a).

Protection against age-discrimination is currently provided in Norway within working life, in line with Directive 2000/78. A legal study carried out during autumn 2014 assessed whether age as a discrimination ground should be expanded beyond the field of employment, as previously proposed by the European Commission in its document COM 2008(426) final proposing a new non-discrimination directive. The report concludes that it should. The report makes an analysis of a variety of different age-limits outside the field of employment. One of the findings was that there were many more minimum age requirements than maximum age requirements.<sup>194</sup> A subsequent report presented in January 2016 assessing the costs linked to such a proposal recommended that age as a discrimination ground should follow the limitations proposed in the proposed EU directive.<sup>195</sup>

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<sup>192</sup> CJEU case C-144/04 *Mangold v Helm* (2005).

<sup>193</sup> See Supreme Court judgment of 18 February 2010, Rt-2010-202 (*Nye Kystlink*).

<sup>194</sup> See Else Leona McClimans, Helga Aune og Malin Ranheim: Utredning av behovet for et utvidet vern mot diskriminering på grunn av alder, (in Norwegian) at <https://www.regjeringen.no/contentassets/7378a753b77d4b3b8a50151b5b3d35bb/aldersutredning.pdf>. (accessed on 6 January 2017).

<sup>195</sup> See Oslo Economics: Utredning av kostnader og nytte av et vern mot aldersdiskriminering utenfor arbeidslivet, (in Norwegian) at <https://www.regjeringen.no/contentassets/aa98957f50dd4343a408396d34c7bf58/samfunnsokonomisk-analyse-aldersdiskriminering.pdf> (accessed 6 January 2017).

- c) Fixing of ages for admission or entitlements to benefits of occupational pension schemes

In Norway, national law allows occupational pension schemes to fixed ages for admission to the scheme or entitlement to benefits, taking up the possibility provided for by article 6(2).

#### **4.7.2 Special conditions for young people, older workers and persons with caring responsibilities**

In Norway, there are no special conditions set by law for older or younger workers in order to promote their vocational integration, or for persons with caring responsibilities to ensure their protection.

#### **4.7.3 Minimum and maximum age requirements**

In Norway, there are exceptions permitting minimum and/or maximum age requirements in relation to access to employment (notably in the public sector) and training.

The maximum age requirement in the public sector is at 70 years, as per the Act on age limits for public officials of 21 December 1956 no 1 section 2. In private sector employment there is no maximum age requirement by law, but the protection against 'just cause' in dismissals is lifted at the age of 72 years, as per the WEA section 15-13a.

There are in general no minimum age limits in Norway regarding access to employment, however a number of positions or access to training positions require that the employee be a major (i.e. above 18 years) in order to handle money. There is no minimum age of entry into public sector employment, as employment in this sector to a large degree is governed by qualification requirements. There are some select positions in public employment with minimum age requirements: Supreme Court judges must be at least 30 years old, judges of the appellate courts must be at least 25 and assistant/deputy judges at least 21 years, as per the Act on Courts of 13 August 1915 no 5 section 54. There is an age minimum of 20 years to work as a lawyer, as per the Act on Courts of 13 August 1915 no 5, section 218 b.

#### **4.7.4 Retirement**

- a) State pension age

In Norway, there is a state pension age, at which individuals must begin to collect their state pensions.<sup>196</sup> This can be deferred if an individual wishes to work longer. Also, a person can collect part of a pension and still work.

In theory, if pensioners have a full right to pension, pensioners may start to collect state pensions when they are between 62 and 75 years. The general state pension age is set at 67 years. In order to start collecting pension earlier than 67 years, the pensioner must have had sufficiently high pension credits.

The collection of state pensions can be deferred until 70 years for employment in the state. The pensioner can choose to work part-time and get a part-time pension.

There is no relevant case law linked to state pension age and the accrual of pensions.

- b) Occupational pension schemes

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<sup>196</sup> See National Insurance Act of 28 February 1997 no. 19, section 19-4.



In Norway, there used to be a 'normal' age when people can begin to receive payments from occupational pension schemes and other employer-funded pension arrangements.

The 'normal' pension age is 67 years, based on the previous regulations in the Act on National Social Insurance, in which this was the age when the state pensions were available. Amendments to the National Insurance have made it possible to start an advance pension at 62 years, and to defer payment until 75 years. If an individual wishes to work longer, payments from the occupational pension schemes can be deferred. The individual can collect a part-time pension and still work partly or fully.

c) State imposed mandatory retirement ages

In Norway, there is a state-imposed mandatory retirement age at 70 years for state workers according to the Act on Age Limits for Public Officials of 21 December 1956 no 1 section 2. This is generally applicable, but there are also exceptions, such as for the armed forces and other sectors with a lower mandatory retirement age.<sup>197</sup>

These lower mandatory retirement ages are in the process of being evaluated, as the ages differ. Furthermore, the justification for the lower mandatory retirement ages are neither similar, nor always clear. The legitimacy of these lower mandatory retirement ages have not been scrutinised against the justification required by Directive 2000/78 Article 6(1), but this will – hopefully - be carried out in the current evaluation.

Two key judgements were passed in 2015 concerning state-imposed mandatory retirement ages, both of which related to health workers.<sup>198</sup> In both cases, the appellate court found the lower mandatory retirement ages acceptable, relying heavily on the criteria set out in Directive 2000/78 Article 4(1) and the cases by the ECJ.

d) Retirement ages imposed by employers

In Norway, national law permits employers to set retirement ages (or ages at which the termination of an employment contract is possible) by contract and/or collective bargaining and/or unilaterally through limits set by the firm itself, if they are within the limits of Directive 2000/78.

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<sup>197</sup> Most age limits for state employees were approved by the Parliament in 1995, see St.prp nr 38 (1994-1995 *Om aldersgrenser for offentlige tjenestemenn m.fl.*, and Innst. S nr 77 (1995-1996).

<sup>198</sup> LB-2014-29065 and LG-2014-189475. LB-2014-29065 addressed whether or not the termination of employment as a result of a lower mandatory retirement age, set at 65 years for subordinate nurses in the Nurses Pension Act section 6, was in violation of the prohibition against age discrimination in the WEA section 13-1, cf. section 13-3 and section 15-13a and Directive 2000/78/EC, articles 4 and 6. The age limit for supervisors or nurses in administrative positions is 70 years according to the act. The appellate court took as a starting point that the requirements of the WEA are the same as those of the directive. Although the aim of the act is not specified either in the act itself or in the preparatory works to the act, the court said that seen in context, the central purpose of the specific age limit is related to the physical and psychological strain of the job that the regular physical contact with patients and clients entails. The age limit also has an aspect related to the safety of patients, as the nurses need to keep abreast of professional developments and keep a sharp vigilance in each case. The latter aspect is not seen as being a legitimate aim in accordance with the directive, article 6(1) but in line with article 4(1). Also the strain of the profession is seen to fall under article 4(1), as the possession of certain physical and mental capabilities, capabilities that deteriorate with age, is a regular professional requirement for subordinate nurses who have extensive contact with patients and clients. LG-2014-189475 addressed the termination of employment as a result of a lower mandatory retirement age, extended pursuant to a collective agreement until 67 years if the employee is not entitled to a full pension. The appellate court explicitly referred to the decision of February 2015 as cited above, and pointed out that this age limit was established by law contrary to the case in February 2015 where the age limit was established by collective agreement. It is thus up to the legislature to change the law. The appeal to Supreme Court was not accepted, see HR-2015-2505-U of 15 December 2015.

WEA section 15-13a gives a possibility for the employer to terminate an employment contract when the employee turns 72 years old.<sup>199</sup> Dismissal before 72 years because of having reached the right to a pension according to the National Insurance Act cannot be objectively justified. It is thus implicitly accepted by the WEA section 15-13a that a person may be dismissed because of age at 72 years.<sup>200</sup> In reality this means that it is acceptable to dismiss a person on the ground of age alone from 72 years and onwards. In reality, this is applicable only for employees in the private sector, as public officials have a retirement age of 70 years.<sup>201</sup>

Lower age limits may be accepted on the basis of law, contract or collective bargaining if the limit is objectively justified and not disproportionate as per WEA section 13-3(2).

An age limit of 67 years decided by a firm, practiced consistently and laid down in the internal regulations, was accepted by the Supreme Court in its judgment Rt-2011-964 (*Gjensidige*). The opposite was found in a judgment of 5 March 2014 of the Borgarting appellate court (case LB-2013-144423), where a similar, mandatory retirement age imposed by the employer at 67 years was found invalid. The latter case concerned the validity of the employer's termination of the employee's employment at age 67 in accordance with the age limit established unilaterally in the firm stating a retirement age at 67 years. The appellate court found that the age limit of 67 years was not widely known among the employees. One of the conditions that jurisprudence has lined up to accept a lower mandatory retirement age limit than 70 years, was thus not met. The employer termination of the employment contract was thus invalid, and the employee was awarded compensation for economic losses sustained under WEA section 15-13a.

The mandatory imposed age limits set by employers cannot be lower than 70 years.

e) Employment rights applicable to all workers irrespective of age

Legislation on protection against unjustified dismissal applies to workers under 70 years, see WEA section 15-13a(1)1. This general age limit was extended to 72 years as per 1 July 2015 (see Prop 48L (2014-2015)).

f) Compliance of national law with CJEU case law

In Norway, national legislation is in line with CJEU case law on age regarding compulsory retirement.

National legislation is in general in line with the CJEU case law, as demonstrated by the Supreme Court judgment of 14 February 2012 *Bjørn Nybø and others vs CHC Helicopter*

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<sup>199</sup> This age limit was extended as per 1 July 2015 from 70 to 72 years. Preparatory works to the change is Prop. 48L (2014-2015) Endringer i arbeidsmiljøloven og allmenngjøringsloven (arbeidstid, aldersgrenser, skatt, mv).

<sup>200</sup> A tripartite commission set up to assess the age limit of 72 years in the WEA handed in its report to the Government on 1 December 2016. The commission did not agree upon whether or not to expand or abolish the age limit of 72 years, see (in Norwegian) [https://www.regjeringen.no/contentassets/44d25e06d416405e823ce79ef83e8238/a-0042\\_b\\_seniorer\\_og\\_arbeidslivet\\_uu.pdf](https://www.regjeringen.no/contentassets/44d25e06d416405e823ce79ef83e8238/a-0042_b_seniorer_og_arbeidslivet_uu.pdf) (accessed 18 January 2017) This report draws on the research done by FAFO in report 2016:22: Svalund J and G Veland (2016) 'Aldersgrenser for oppsigelse og særordninger for eldre i arbeidslivet' (in Norwegian) at <http://www.faf.no/index.php/nb/zoo-publikasjoner/faf-rapporter/item/aldersgrenser-for-oppsigelse-og-saerordninger-for-eldre-i-arbeidslivet> (accessed 18 January 2017). Although the latter report states that it assess the age limit for dismissals, the content of the report is an assessment of three special arrangements for seniors: the right to an extra paid week of holidays from 60 years, the rights to reduced working time from 62 years and the right to flexible working hours based on age.

<sup>201</sup> According to the Act on Age Limits for Public Officials of 21 December 1956 no. 1 section 2.

*Service AS*, Rt-2012-219, which fully built on the CJEU judgment in case C-447/09 *Prigge*.<sup>202</sup>

It may however be pointed out as areas of concern that the lower mandatory retirement ages for certain professions, as well as the acceptance of the right of employers to mandate and unilaterally impose retirement ages for company employees may not always be in line with the justification required by Directive 2000/78/EC and the practice of the CJEU.

#### **4.7.5 Redundancy**

##### **a) Age and seniority taken into account for redundancy selection**

In Norway, national law does not permit age or seniority to be taken into account in selecting workers for redundancy

National law does not explicitly permit age or seniority to be taken into account when selecting workers for redundancy, as this must be assessed in each case against the limitations set by Directive 2000/78. Traditionally, in trade union agreements, seniority is often used as one of the criteria to select those to be continued in employment.

However, an important element to be included in the employer's assessment of whom to make redundant is the social consequences of a possible redundancy. The right of an employee to receive a full pension may be used as an argument for selection for redundancy, thus a number of employees have found themselves redundant at an early age, for example 62 years, which is when it is possible to ask for agreement-based retirement packages.

A Supreme Court judgment from 2011 accepted that 10 airline pilots were lawfully dismissed when turning 60 years, as part of a selection process for redundancy. The Supreme Court concluded that the selection of the dismissed pilots was based on considerations that were justifiable under the WEA section 15-7, that is, an economic need for dismissals and the use of specified criteria – here – that the pilots were eligible for pension. The Supreme Court found that if one in a particular situation chooses to base the selection process for redundancies on criteria other than tenure, this cannot in itself lead to the decision being ill founded. In this specific setting, age was seen as a justifiable consideration, and thus, the pilots were not subject to age-based discrimination when chosen for redundancy.<sup>203</sup> This judgment is, in the author's view, not in accordance with Directive 2000/78. In similar cases in Sweden and Denmark concerning the same airline, the conclusion was the opposite: that the pilots were subject to discrimination, and entitled to compensation.<sup>204</sup>

##### **b) Age taken into account for redundancy compensation**

In Norway, national law does not in principle provide for compensation for redundancy. However, national legislation concerning the paid periods of notice according to the law give longer periods of notice based on seniority, thus an element of compensation for age is given, see WEA section 15-3.

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<sup>202</sup> The claimants of this case have based on the reasoning of Supreme Court in Rt-2012-219 claimed compensation, see LG-167255-1. The case regarding compensation will be handled by Supreme Court in 2017.

<sup>203</sup> See Rt-2010-609 of 5 May 2011.

<sup>204</sup> See judgment of the Swedish Labour Court in cases [AD-2011-37](#) and judgment B-1271-11 of the Østre Landsrett court of second instance in Denmark.

#### **4.8 Public security, public order, criminal offences, protection of health, protection of the rights and freedoms of others (Article 2(5), Directive 2000/78)**

National law includes no exceptions that seek to rely on Article 2(5) of the Employment Equality Directive. However, it is important to keep in mind that as the Non-discrimination Directives (2000/78 and 2000/43) are not incorporated in the EEA agreement, the specific exceptions allowed under the directives have not been clearly articulated as such in relation to the directives.

#### **4.9 Any other exceptions**

In Norway, there are no other exceptions to the prohibition of discrimination (on any ground) provided in national law.

## **5 POSITIVE ACTION (Article 5 Directive 2000/43, Article 7 Directive 2000/78)**

### **a) Scope for positive action measures**

In Norway, positive action in respect of racial or ethnic origin, religion or belief, disability, age or sexual orientation is permitted in national law.

Positive differential treatment is permitted both in the ADA section 8, AAA section 7, SOA section 7 and WEA section 13-6 on preferential treatment, which means that positive action is permitted for all discrimination grounds. The 2013 legal revision changed the wording of the legal text from positive action to 'positive differential treatment', but no changes to the substantial content was intended. Although the wording in the different acts is somewhat different, it is assumed that it covers the area of the EU *acquis*. Positive differential treatment will not breach the prohibition against differential treatment if the differential treatment is suited to promote the purpose of the act, the negative impact of the differential treatment on the person whose position will worsen is reasonably proportionate in view of the intended result, and the differential treatment will cease when its purpose has been achieved. In the WEA, the term used is 'preferential/ special treatment', but the content is intended to be the same.

The legislative scope for positive action in Norway has been interpreted as very narrow, based on the ECJ court rulings on gender as well as the EFTA court case against Norway (E-1/02). It may be questioned whether article 5 of the Racial Equality Directive is fulfilled as the directive itself does not suggest the narrow scope that the EFTA court has interpreted in relation to gender.

### **b) Main positive action measures in place on national level**

A number of measures for positive action exist in Norway, as described and defined in the various national action plans referred to in chapter 9 below. The most frequently used measure in working life is the introduction of quotas.

A pilot project undertaken by the Ministry of Local Government and Modernisation and the Directorate for Public Management and eGovernment involves a moderate quota system in favour of non-ethnic Norwegians when hiring into 12 state enterprises.

The State may give priority to applicants with disabilities according to the Civil Service Act, which gives persons with disabilities rights to positive action in employment. When recruiting to positions in the State, the employer must take into account the special rules in the Civil Service Act in addition to the provisions of the Working Environment Act. If there are qualified disabled applicants for a position, at least one of the applicants with a disability must always be called for interview. The disabled applicant seeking to rely on the right to being called for an interview must disclose his disability in the application. The employer may also choose to hire an applicant with disabilities, even if there are better qualified applicants for the position. This is often called 'radical positive action', and increases the possibilities of persons with disabilities to be hired. A new trainee-programme will be introduced in January 2017 for persons with disabilities applying for positions in the civil service, in which it is possible to apply for trainee-positions lasting up to 1.5 years in order to get relevant work experience.<sup>205</sup>

Only two cases regarding positive action have been handled in the court system, both concerning the appointment of women.<sup>206</sup>

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<sup>205</sup> See PM-2016-14.

<sup>206</sup> Case no Rt-2014-831, LB-2011-198142 Borgarting appellate court judgment of 7 July 2011, Oslo city court case TOSLO-2010-152539, Equality Tribunal case 33/2009, and Oslo municipal court of 8 July 2010 (TOSLO-2010-7432) (court of first instance) case and Equality Tribunal's decision case 23/2009.

One of the few cases with the Equality Ombud concerning positive action measures in an area other than gender is case no 10/508. A large state directorate established in 2010 a trainee programme aiming to recruit more employees with a non-Western background. The trainee programme was a part of a strategy to increase staff diversity to around 5 % non-Westerners before 2012. The trainee programme was tailored for eight persons over 18 months. As the positions were not open for applications to persons with a Western background, the Ombud found that the requirements as found in the ECJ court cases on gender discrimination must be used as a guide for the assessment under Directive 2000/43 and Norwegian legislation. The Ombud found that the requirement of proportionality was not fulfilled, and the programme thus did not qualify as positive action/ a temporary special measure under the ADA, section 8.

The Tribunal came to the opposite conclusion in its case 8/2014, in which a trainee programme by the National Broadcasting Service (NRK) that includes positive action for ethnic minorities, in which five positions are reserved for multi-cultural journalists, was found to be within the remit of the ADA, section 8.

There are to the author's knowledge no positive action measures in relation to religion, age or sexual orientation.

There are no explicit positive action measures in favour of the Roma, but a number of initiatives and projects have been initiated according to the national plan of action.

There are also no specific positive action measures per se under the anti-discrimination legal framework related to migrants, although there are a number of measures aimed at promoting migrants' participation in the labour market and in education through different programmes in the welfare system.

## 6 REMEDIES AND ENFORCEMENT

### 6.1 Judicial and/or administrative procedures (Article 7 Directive 2000/43, Article 9 Directive 2000/78)

In Norway, as a general rule, the procedures for addressing discrimination issues are the same for employment in the private and public sectors.

#### a) Available procedures for enforcing the principle of equal treatment

In Norway, there are no special procedures for enforcing the principle of equal treatment, as this follows general legal principles.

For matters within the scope of the WEA, the law itself has a special procedure to be followed (WEA chapter 17), which gives a number of clear timelines.

For the enforcement of the ADA and AAA within the ordinary civil courts, discrimination cases follow the 'normal' procedural rules for civil cases as stated in the Dispute Act.<sup>207</sup>

There are no specific procedural rules when forwarding a case to the administrative/alternative dispute mechanism, the Equality Ombud and the Equality Tribunal, other than those posed in the AOT, described below in chapter 7.

The only existing criminal procedures that exist are those linked to the Penal Code sections 185 and 186 on hateful expressions and refusal to provide goods and services. These are applicable in relation to discrimination because of skin colour or national or ethnic origin, religion or life stance, sexual orientation or lifestyle and disability, not age or gender.

#### b) Barriers and other deterrents faced by litigants seeking redress

The low rate of court litigation in Norway is among other factors due to the risks and costs involved in litigation, and the difficulties in obtaining free legal aid in discrimination cases.

It is not a procedural requirement to be represented by a lawyer or legal practitioner in court, as it is given as a right – but not a duty - to use counsel. The key costs of the judicial proceedings in civil cases are, however, the fees linked to legal counsel – that is, the fee of the lawyer. Where a claimant/ victim is not represented by legal counsel, the judge has an extended/ specific duty to advise the complainant/ victim of procedural matters that might be of relevance to the case. The court also has a duty to assist the complainant/ victim in setting up a proper writ summons to start the case, and to assist in making an appeal, as long as the complainant/ victim appears in court and asks for assistance.

There is furthermore a large economic risk linked to costs of proceedings. The general rules on costs of proceedings in discrimination cases before the ordinary courts are found in the Dispute Act chapter 20, and are applicable also in discrimination cases. The general rule is that the successful party is entitled to full compensation for his legal costs from the opposite party, as per the Dispute Act section 20-2(1). The court can exempt the opposite party from liability for legal costs in whole or in part if the court finds that 'weighty grounds' justify exemptions, see section 20-2(3). There is also a possibility, in exceptional cases, to share the cost of litigation between the parties even if the main case is lost. This has only happened in very few discrimination cases: in a case of March 2012, the Supreme Court found that the losing party to a case did not have to pay due to the uneven level between the parties, irregularities in the handling of the case during the hiring process and the importance of the case for the claimant.<sup>208</sup> In an unpublished case from the Oslo municipal

<sup>207</sup> See Act of 17 June 2005 no 90 relating to mediation and procedure in civil disputes (The Dispute Act), see <http://app.uio.no/ub/ujur/oversatte-lover/data/lov-20050617-090-eng.pdf> (accessed 6 January 2017).

<sup>208</sup> See HR-2012-580-A, Supreme Court judgment of 5 March 2012.

court (first instance) the judge found that the claimant who claimed to be discriminated against based on age – despite losing the case - had a due reason to have the case tried in court, as she considered herself the victim of discrimination. The court stated that ‘there must be a possible option to have the case tried in court even though this belief was unfounded’.<sup>209</sup> Similar views were expressed in another case in the appellate court regarding discrimination on the basis of disability (blindness) in which the claimant lost the case but where the employer was partly to blame for the events that led to the dispute.<sup>210</sup> A claimant who was led to believe by trade union representatives that he might be subject to discrimination because of his non-Norwegian background lost his case. He was in the court of first instance ordered to pay the full costs of the opposite party. He appealed the case to the appellate court. He lost the case there as well, and the appellate court ordered him to pay the costs of the opposite party in relation to the case in the appellate court. He was however acquitted of paying the cost of litigation for the opposite party in the court of first instance, as the opposite party could be reproached for bringing action, and was thus partly to blame for the action sought.<sup>211</sup>

c) Number of discrimination cases brought to justice

In Norway, there are neither official statistics on the number of cases related to discrimination brought to justice, that is a court, nor are there to the author’s knowledge statistics kept by others on court cases.

All Supreme Court cases, most Court of Appeal cases and select cases from the courts of first instance are published electronically on the website [www.lovdata.no](http://www.lovdata.no), and accessible through a subscription. The Supreme Court cases are posted on the publicly accessible part of the website (not requiring subscription) for 30 days after judgment. The published cases are tagged – among other things – based on the legislative act. It is thus possible to find and register discrimination cases that have been handled by the appellate court and the Supreme Court. As [www.lovdata.no](http://www.lovdata.no) only publishes select cases from the court of first instance, Lovdata does not give a full accurate picture of the total of discrimination cases. The selection of judgments published from the courts of first instance is carried out partly by the court itself, which forwards the judgments to Lovdata, and in part by staff at Lovdata.

A significant increase in discrimination cases before the lower instance courts has taken place since 2008, as key legislation in this area has only come into force the last decade (ADA in 2006 and AAA in 2009).<sup>212</sup> Since 2008, only eight discrimination cases have been considered by the Supreme Court, all on age discrimination. There has been only one case according to the AAA before the ordinary courts that have been published, and one case that was dismissed.

The total number of court cases on discrimination cases remains sparse, especially compared with the volume of cases brought before the Equality Ombud. The Equality Ombud and the Equality Tribunal have detailed annual statistics for their work and more than 95 % of all cases on discrimination are handled by them (see paragraph 7(g) below).

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<sup>209</sup> Judgment of 29 June 2007 in case 07-036427 TVI/OTIR/10.

<sup>210</sup> See the Eidsivating appellate court/ court of second instance, judgment of 6 July 2007 (Case LE-2006-189239), the ‘music teacher judgment’. This judgment was passed before the enactment of the AAA, thus the merits of the case was assessed according to the WEA, where disability was included as a ground of discrimination before the AAA was enacted in 2009.

<sup>211</sup> Borgarting appellate court/ court of second instance, judgment of 27 January 2003 (Case LB-2002-44) (*Sporveissaken*).

<sup>212</sup> A study carried out in 2008 for the publicly appointed committee that prepared the Government white paper on ‘Comprehensive protection against discrimination’ NOU 2009: 14, gathered both published and previously non-published court material on discrimination cases. Between 1978 and 2008, approximately 51 legal disputes in the area of discrimination issues – mainly on gender - were handled by the civil courts. See Else Leona McClimans (2008), ‘Rettspraksis om diskrimineringslovgivning’, (Court cases concerning discrimination legislation), Diskrimineringslovutvalget.



Statistics thus show that although the courts do handle discrimination cases, and although the number of cases handled by courts is slowly increasing, the overwhelming number of discrimination cases in Norway are channelled through the administrative bodies, the Ombud and the Tribunal. This has in particular consequences in relation to an assessment of compliance with EU law in terms of sanctions, as the Equality Ombud and the Tribunal do not have the power to enforce the clauses relating to sanctions in the form of liability for damages/ redress/ compensations (see below).

d) Registration of discrimination cases by national courts

In Norway, discrimination cases are not registered as such by national courts, but may be found on the subscription-service [www.lovdata.no](http://www.lovdata.no) categorised among other things according to the act invoked in the judgment. The judgments are available to the general public on [www.lovdata.no](http://www.lovdata.no) for free the first month after publication, but after this period are only available by subscription.

Court cases are all published in Norwegian. There is no systematic translation of cases in Lovdata, although a fair number of criminal cases are in fact translated into English (or another language) if the claimant does not understand Norwegian. This translation is in most cases arranged by the lawyers of either the defence or the victim, and paid for by the Court Administration. An attempt to translate several key opinions and decisions by the Equality Ombud and the Equality Tribunal was made some years ago, however this practice was abandoned.

Discrimination cases brought before the Equality Ombud and the Equality Tribunal are anonymised and published for public perusal for free on their webpages (as described in paragraph 7(g) below).

## **6.2 Legal standing and associations (Article 7(2) Directive 2000/43, Article 9(2) Directive 2000/78)**

a) Engaging on behalf of victims of discrimination (representing them)

In Norway, non-governmental organisations (NGOs), that is associations/organisations/trade unions, are entitled to act on behalf of victims of discrimination. The right of organisations to act, including acting on behalf of their members, is given in section 1-4 of the Dispute Act. Section 1-4 states that 'if the conditions in section 1-3 otherwise are fulfilled, an organisation or association may bring an action in its own name in relation to matters that fall within its purpose and normal scope'.

A key issue for bringing a case to court is that the claimant – including associations - must show a genuine need to have the claim determined against the defendant, which is a legal interest.<sup>213</sup> The 'genuine need' shall be determined based on a total assessment of the relevance of the claim and the parties' connection to the claim (see the Dispute Act section 1-3(2)). This is in reality a criterion for direct interest in a case in order to be a party to the case. An element of having 'direct interest' in a case is that the case is a live controversy and should not be based on a historical fact.<sup>214</sup> The procedural rules before the court are not different in civil discrimination cases.

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<sup>213</sup> According to a legal dictionary (Ronald Craig: Norsk Engelsk ordbok, Universitetsforlaget 2010 (3 utg)) the concept of legal interest according to Norwegian law has two aspects: 1) a requirement that the claimant and defendant have a sufficient connection to the subject matter in dispute and 2) a requirement that the dispute be a live controversy, it neither moot nor hypothetical.

<sup>214</sup> The verdict of the Supreme Court in the ADHD case illustrates the procedural complications of taking a case to court, Rt. 2014-480. The association ADHD Norway initiated a case against the State/ the Equality and Anti-Discrimination Tribunal for the Oslo city court, claiming that the Tribunal's decision in its case number 25/2011 on the assessment of the introduction course for military recruits in the armed forces was invalid. The Tribunal had found that the guidelines governing the introduction scheme for military recruits in the

In general, persons of legal age (18 years) have procedural capacity and can act on their own in court (see the Dispute Act, section 2-2). Both physical persons, and legal entities, including the State, municipal and county authorities have the capacity to sue and be sued (see section 2-1(1)). Organisations that are not legal entities in the form of a foundation etc. have the capacity to sue and be sued to the extent justified by an overall assessment where the court assesses issues such as whether the organisation has a permanent organisational structure, whether there are formalised membership arrangements, the purpose of the organisation and the subject matter of the action (see section 2-1(2)).

NGOs are, through their legal counsels, entitled to act on behalf of victims of discrimination with a specific power of attorney from the person or company or organisation in court. However, the actual victim (the party to the case) must be present in court to give testimony during the main hearing as per the Dispute Act section 9-15. A key principle in Norwegian courtrooms is the oral hearing and the immediate presentation of evidence.

In discrimination cases, the right of associations to be used as agents in administrative proceedings and act on behalf of victims is expressly stated. The requirement is that the organisation must have a “purpose, wholly or partly, to oppose discrimination” according to the grounds as prohibited by law’ (see the ADA section 27, AAA section 32, SOA section 25 and WEA section 13-10). This rule supplements the rules concerning the individual rights of associations to act on their own (see paragraph c below on *actio popularis*) and the right of organisations to act on behalf of their members as per the Dispute Act, section 1-4. The dispute act governs the rights to stand on behalf of and in support of in courts. The right of organisations to act as legal representatives under the anti-discrimination acts is limited to representation before the Ombud and Tribunal.

A person appointed by and with links to an organisation the purpose of which is, wholly or partially, to work to prevent discrimination on the basis of disability or religion/ ethnicity may be used as a legal representative in cases heard by the courts. This does however not apply in relation to the Supreme Court. The court may refuse to accept the authorisation of a legal representative if the court believes there is a danger that the legal representative does not have sufficient qualifications to safeguard the party’s interests satisfactorily. A legal representative shall, along with an authorisation as stated in section 3-4 of the Dispute Act, at the same time submit written information from the organisation regarding the legal representative’s qualifications (see the AAA section 32(2), ADA section 32(2) and SOA 25(2)).

There are no special rules on the shifting burden of proof where associations are engaged in proceedings – the rules are the same no matter who the claimant is.

Action by NGOs is discretionary. There are no rules establishing that associations have a legal duty to act under specific circumstances, unless they themselves have taken on a particular assignment on behalf of specific victim(s) to act on their behalf.

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armed forces were not discriminatory for recruits with ADHD. The Tribunal presumed in its decision that all recruits – including those with a disability – would be subject to an individual assessment of their merits. As recruits with a disability are excluded from further assessment because of their disability, the organisation challenged the presumption that the Tribunal’s decision built on, and asked that the decision be found invalid. As the introduction scheme was marginally changed after the decision of the Tribunal, the appellate court in case number LB-2013-142603 rejected the case, as it found that the decision of the Tribunal was not a live controversy: the facts upon which the decision of the Tribunal was based were historic, and not relevant for the situation today. The dispute was by verdict rejected from court assessment based on a lack of a genuine need to have the case determined, as per the RDA section 1-3. This verdict was appealed to the Supreme Court, which found that the Tribunal did not have a mandate to make a decision in the case, and that the Tribunal – erroneously – had made a decision where it should have issued an opinion. It is not possible to refer an opinion to the courts, and the case was rejected.

NGOs may engage in both civil and administrative proceedings according to the general rules of the Public Administration Act, section 12,<sup>215</sup> and the Dispute Act.

Where entities act on behalf of or in support of victims, they need a written specific power of attorney to legitimate them and authorise them in relation to the court/ the Equality Ombud/the Equality Tribunal. There are no specific requirements regarding the form or content of this power of attorney.

There are special provisions on victim consent in cases where obtaining formal authorisation is problematic, such as by minors (i.e. persons under 18 years) and persons under guardianship. The Act on guardianship of 26 March 2010 no 9 gives the possibility to legally incapacitate a person, but never to a greater extent than absolutely necessary and always tailored to the person's circumstance.

As a rule, associations have no legal standing alone within criminal law but have in some limited manner a right to raise a private criminal case against someone. This is seldom used in general, and the author has never heard of a discrimination case in which this possibility has been used.

b) Engaging in support of victims of discrimination

In Norway, associations, organisations and trade unions, as well as foundations and public bodies charged with promoting specific interests in cases that fall within the purpose and normal scope of the organisation pursuant to the Dispute Act section 1-4, are entitled to act in support of victims of discrimination, as per the Dispute Act section 15-7 in the form of co-counsel/ third party intervention.

c) Actio popularis

In Norway, national law allows NGOs in the forms of associations/ organisations/ trade unions to act in the public interest on their own behalf, without a specific victim to support or represent (actio popularis).

NGOs have a right of action in their own name in relation to matters that fall within their purpose and normal scope, on the condition that they have a 'genuine need' to have the claim determined, see the Dispute Act section 1-4(1). These have an action right both in their own name as well as are entitled to act on behalf or in support of victims. As described above, the right of the organisation to bring a case to court does not depend on the organisation being registered or not, but on an overall assessment as to whether or not the organisation has a 'genuine need' to have the claim determined, in which the court assesses issues such as whether the organisation has a permanent organisational structure, whether there are formalised membership arrangements, the purpose of the organisation and the subject matter of the action (see the Dispute Resolution Act, section 2-1(2)).

There is thus no need to have a specific victim to support or represent, although it is necessary to prove some kind of membership. The fact that a formalised membership structure exists will more easily demonstrate and classify the organisation as one with legal capacity to sue and be sued according to the law. 'Ad- hoc' organisations, that is organisations established in order to forward a particular case of litigation, or other organisations that may be termed 'mayfly organisations' will not in themselves have the legal capacity to sue and be sued. Case law has widely accepted associations and cooperatives acting under one common name.<sup>216</sup>

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<sup>215</sup> Act relating to procedure concerning the public administration (Public Administration Act) of 10 February 1967.

<sup>216</sup> See the preparatory works to the Dispute Act, Norwegian Official Report NOU 2001:32 Rett på sak point 2.2.2.1.

The organisations that have a right of action in their own name may use all proceedings under the Dispute Act. The rules on the shifting burden of proof under the anti-discrimination legislation are also applicable to organisations and associations.

d) Class action

In Norway, national law allows associations/ organisations/ trade unions to act in the interest of more than one individual victim (class action) for claims arising from the same event.

National law allows associations to act in the interest of more than one individual victim. Since 2008, with the implementation of the new Dispute Act, there is a possibility to collectively take cases to court, in so-called class actions, with specific procedural rules according to the Dispute Act, chapter 35.

A class action may be brought by any person who fulfils the conditions for class membership or by an organisation, an association or a public body charged with promoting a specific interest. In the preparatory works to the Dispute Resolution Act, discrimination cases are given as an example of the kind of cases where class action might be suitable.<sup>217</sup> A class action may be brought by an organisation or an association or a public body charged with promoting specific interests, provided that the action falls within its purpose and normal scope pursuant to the Dispute Act sections 1-4 as per the Dispute Act section 35-3(1)b. Official documents and legal preparatory works have assumed that the Ombud is also able to bring a class action suit concerning discrimination to courts, however she has not made use of that possibility so far.<sup>218</sup>

As a general rule, victims must be identified, both in general civil and criminal cases. This is similar in class actions, where a specific victim of discrimination must be identified in most instances. The exception may be in the kind of class action where not all members of the class are required to be made known by name, see section 35-2.

### **6.3 Burden of proof (Article 8 Directive 2000/43, Article 10 Directive 2000/78)**

In Norway, national law permits a partial shift of the burden of proof from the complainant to the respondent

The rule of shared burden of proof applies for all grounds of discrimination, including reasonable accommodation, harassment, victimisation and instructions to discriminate (see the ADA section 24, AAA section 30, SOA section 23 and WEA section 13-8).

In cases concerning dismissals according to labour law procedural rules, it is a general principle that the employer must substantiate that the dismissal is based upon the correct facts. Other than this, in civil cases - as a general rule - the burden of proof is on the claimant. This is why the shifting burden of proof as implemented in the discrimination legislation is so important. In all discrimination cases, if there are circumstances that give 'reason to believe' that there has been direct or indirect differential treatment in contravention with the said legislation, such differential treatment will be assumed to have taken place unless the person responsible proves on a balance of probabilities that such differential treatment nonetheless did not take place. The revised Norwegian legal texts as found in the ADA, AAA and SOA now state that:

'discrimination shall be assumed to have occurred if circumstances apply that provide grounds for believing that discrimination has occurred, and the person responsible fails to substantiate that discrimination did not in fact occur.'

<sup>217</sup> See Ot.prp nr 51 (2004-2005) s 322.

<sup>218</sup> See the Government white paper on 'Gender and Pay. Facts, analysis and measures', NOU 2008:6 *Kjønn og lønn*, p 114.

What is meant by 'reason to believe' for the burden of proof to be reversed is interpreted by the Equality Tribunal to mean that the allegation must be 'supported by the chain of events and the external circumstances of the case which necessitates an assessment of the specifics of the case'.<sup>219</sup>

In an article by the previous head of the Equality Tribunal and the head of its secretariat, the conclusion is that the current rules on reversal on the burden of proof are useful and fulfil the EU requirements.<sup>220</sup> That conclusion is shared by the author of this report. As the practice of the Ombud and Tribunal has not changed based on the new wording of the legislation, the revised text is also in line with the EU requirements.

#### **6.4 Victimisation (Article 9 Directive 2000/43, Article 11 Directive 2000/78)**

In Norway, there are legal measures of protection against victimisation.

Protection against retaliation/ acts of reprisals/ victimisation is implemented through the ADA section 10, AAA section 9, SOA section 9 and WEA section 2-5. The shift of burden of proof also applies to situations of reprisals and victimisation. In all discrimination cases, if there are circumstances that give reason to believe that there has been direct or indirect differential treatment in contravention of the discrimination legislation, such differential treatment shall be assumed to have taken place unless the person responsible proves on a balance of probabilities that such differential treatment nonetheless did not take place. It is not permitted to retaliate against any person who has submitted a complaint regarding a breach of provisions of the discrimination legislation, or who has stated that a complaint may be submitted. There is a limitation to this right, and that is in instances where the complainant has acted with gross negligence. The protection against victimisation applies correspondingly to witnesses or someone who helps the victim of discrimination to bring a complaint, for example a workers' representative.

Both the Ombud and Equality Tribunal have dealt with a limited number of cases in which victimisation is alleged. The Equality Tribunal has handled a total of nine cases where victimisation was one of the issues raised.<sup>221</sup> The Tribunal case 27/2008 was subsequently taken to the Oslo municipal court by the accused of the reprisal, the municipality of Oslo, where the decision of the Tribunal in its case 27/2008 was overruled by the court. The court found that the refusal to employ a male nurse was due to his personal abilities, and that he was not subject to reprisals or victimisation from the former employer, as the decision to refuse to use his services as a nurse was taken before he brought the case to the Ombud and Tribunal.<sup>222</sup> In a case on discrimination because of age and gender, the female complainant was subject to victimisation in breach of the GEA and WEA section 2-5 and 13-8.<sup>223</sup> The Ombud handled in 2013 a case in which a witness to harassment claimed that he was subject to reprisals from his employer for having supported a victim of harassment. Immediately afterwards he was deprived of his position as shift supervisor. The Ombud found that there was a causal link between the deprivation and his support to

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<sup>219</sup> See the Equality Tribunal case 26/2006, in which the said quote was used by the dissenting member of the Tribunal. Although the rest of the Tribunal in this particular case did not agree with the dissenting member, the quote was later referred to by the Ombud and Tribunal in a number of subsequent cases.

<sup>220</sup> See Syse, Aslak, og Geir Helgeland (2009), 'Reglene om delt bevisbyrde i norsk diskrimineringsrett' (The rules on the shared burden of proof in Norwegian discrimination law), in Aune, Fauchald, Lilleholt og Michalsen (red): *Arbeid og Rett*, Festskrift til Henning Jakhellns 70-årsdag, Cappelen DAMM.

<sup>221</sup> See Tribunal cases 27/2008 (gender), 30/2009 (disability and ethnicity), 43/2010 (ethnicity), 20/2011 (ethnicity), 48/2011 (disability), 29/2012 (disability) and 50/2012 (disability), 21/2013 (gender) 34/2014 (gender).

<sup>222</sup> Oslo municipal court, first instance judgment of 27 October 2009 (TOSLO-2009-72697).

<sup>223</sup> See judgment from the Øst-Finnmark *tingrett* of 17 March 2010, case number TOSFI-2009-136827.

the harassed victim.<sup>224</sup> The Ombud has furthermore handled an interesting case concerning reprisal regarding an instance of notification about sexual harassment.<sup>225</sup>

## **6.5 Sanctions and remedies (Article 15 Directive 2000/43, Article 17 Directive 2000/78)**

### **a) Applicable sanctions in cases of discrimination – in law and in practice**

Sanctions according to the ADA, AAA, SOA and WEA that are enforced by the civil courts consist of liability for damages/ compensation/ redress awarded to the claimant of discrimination.<sup>226</sup> Sanctions according to criminal law consist of penalties. Sanctions are in general equally applicable in private and public employment. Sanctions cover in general all discrimination grounds in all fields, except age, which is only covered in the field of employment. The regulations on sanctions are found in the ADA section 25, WEA section 13-9, AAA section 31 and SOA section 25.

There are a number of general rules on compensation in Norwegian legislation that are applicable in discrimination cases. Compensation in Norwegian law is awarded either for fault-based liability (*culpa*) or for liability without fault. These ordinary rules are the rules on compensation set mainly by the Act relating to Compensation,<sup>227</sup> as well as by the non-statutory customary rules on compensatory damages. These also include a number of general rules to limit liability.

The rules on compensation in discrimination cases were revised and harmonized in 2013 so that liability is similar in all legislative acts.<sup>228</sup> The reason for these changes were to make Norwegian legislation more in line with the requirements of the EU directives in relation to compensation irrespective of whether the employer can be blamed for the discrimination in employment.

Access to compensation differs slightly in the various acts depending on whether the discrimination takes place inside or outside employment: According to the ADA section 25(1) and (2), a person who is discriminated against may claim compensation for non-economic loss and compensation for economic loss upon being discriminated against. In an employment relationship, liability exists irrespective of whether the employer can be blamed for the discrimination (see the WEA, section 13-9). The liability is with the employer. In other sectors of society, liability exists only if the person who has committed the discriminatory act can be blamed for it. This is similarly stated in the AAA section 31(2) and SOA section 25(1) and (2).

According to section 25(1) of the AAA, a job applicant or employee may demand redress for non-economic loss for a contravention of the general rule on prohibition of discrimination irrespective of the employer's culpability. This is also the case for breaches of the rules on reasonable accommodation in AAA sections 16, 17 and 26. There is no right to demand redress for non-economic loss for a contravention of the right to universal design in AAA sections 13-15.

Regarding non-economic loss damages, all acts contain the general rule that compensation will be set at an amount that is reasonable in view of the scope and nature of the harm,

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<sup>224</sup> Case no 12/314 of 6 May 2013 (in Norwegian) at <http://www.ldo.no/no/Klagesaker/Arkiv/2013/12314-Vitne-utsatt-for-gjengjeldelse-grunnet-bistand-i-en-trakasseringssak-/>. (Accessed 6 January 2017).

<sup>225</sup> Case no 08/1177 of 6 January 2009 as referred to in the annual report of the Ombud, (in Norwegian), Praxis 2008.

<sup>226</sup> In a proposal sent for public hearing in October 2016, the Ministry of Children and Equality proposes giving the Equality Tribunal power to award non-monetary damages in cases concerning working life <https://www.regjeringen.no/contentassets/14dd1daa159348c88de5dbe043feb0a4/horingsnotat.pdf> (accessed 18 January 2017) (In Norwegian only).

<sup>227</sup> Act relating to compensation of 13 June 1969 No 26.

<sup>228</sup> See Proposition to Parliament, Prop. 88 L (2012-2013) p. 97.

the relationship between the parties and the circumstances otherwise (see the ADA section 25(3), AAA section 31(3), SOA section 24 and WEA section 13-9).

The acts contain a right to claim compensation for non-economic loss and compensation for economic loss under the general principles of the law of damages (see the ADA section 25(4), AAA section 31(4) and SOA section 25(4)).

Preliminary injunction on the right to remain in position: A practical form of 'sanction' often claimed by victims of discrimination in employment is the right to remain in the position until the case has been finally decided in court. This has been granted on one occasion related to age discrimination in the context of interlocutory judgments,<sup>229</sup> but refused by Supreme Court,<sup>230</sup> and in later cases by the appellate court.<sup>231</sup>

Section 26 of the ADA provides penalties in the form of fines or imprisonment for up to three years for the perpetrators of a gross discrimination that has been committed jointly by several persons.<sup>232</sup> This is in relation to discrimination on the following grounds: ethnicity, religion or belief. Any person who wilfully and jointly with at least two other persons commits a serious contravention or is an accessory to a serious contravention of parts of the ADA is liable to fines or imprisonment for a term not exceeding three years. Furthermore, there is a specific clause on repeated behaviour, such that any person who has previously been sentenced to a penalty for contravention of the current provision may be liable to a penalty even if the contravention is not serious. When assessing whether a contravention is serious, particular importance is attached to the degree of manifest fault, whether the contravention was racially motivated, whether it is in the nature of harassment, whether it constitutes an offence against the person or serious violation of a person's mental integrity, whether it is liable to create fear and whether it was committed against a person under the age of 18. Before instituting a prosecution for such offences, an assessment must be made of whether it will be sufficient to impose an administrative sanction in the form of an order or fine. In the ADA, the limit for imprisonment is three years. To the author's knowledge, this sanction has not been used. Given that it is never used, this might be an indication that as a sanction it does not comply with the criteria set by the ECJ of being sufficiently dissuasive.

The crime statistics do not tag information regarding whether 'hate motivation' is an aggravating circumstance, and therefore there is no way of knowing the usage, or extent of the usage, of this provision in the Norwegian courtrooms. However, there have been several cases brought before the courts in 2016 based on sections 185<sup>233</sup> and 186<sup>234</sup> of the Penal Act, all on the protected ground religion, which at least shows that hate crime is being taken seriously.

Sanctions according to the ADA, AAA, SOA and WEA that are enforced by the Equality Ombud and Equality Tribunal:

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<sup>229</sup> For example, verdict of 19 November 2009 by the Oslo municipal first instance court in case no 09-143503TVI-OTIR/02.

<sup>230</sup> In its decision Rt 2011-974/ HR-2011-1294-A of 29 June 2011, the Supreme Court did not give the claimant the right to continue her position when addressing the possible discriminatory aspects of a retirement age of 67 set unilaterally by the company. The Supreme Court stated that allowing the claimant the preliminary right to remain in position in these kinds of litigation would reduce the content of these age limits.

<sup>231</sup> Borgarting appellate court verdict of 18 June 2014 in case number LB-2014-56188 (*Mediaas-saken*).

<sup>232</sup> In an assessment of the penal protection against discrimination on behalf of the Ministry of Children and Equality, professor Kjetil Mujezinovic Larsen assessed the current ADA section 26 and suggested that it be continued in the upcoming legislation, and that it should be extended to cover all grounds in a holistic new law. He furthermore proposed that gender, gender identity and gender expressions should be included in the penal protection; see <https://www.regjeringen.no/no/dokumenter/utredning-om-det-straafferettslige-diskrimineringsvernet/id2520561/> (accessed 18 January 2017) (In Norwegian only).

<sup>233</sup> See case numbers TBRON/2016/125647 (hate towards a Muslim politician) and TJARE/2016/72797 (hate towards Muslims as a group).

<sup>234</sup> See case number TJARE/2016/96260 (refusal of a hairdresser's services to a woman wearing a hijab).

The Equality Tribunal has a limited competence to make an administrative order - that is to order an act to be stopped or remedied or other measures that are necessary to ensure that discrimination, harassment, instructions or reprisals cease and to prevent their repetition (see AOT section 7).<sup>235</sup> Breaches to the duty of accommodation (individual accommodation/ universal design) are regarded as discrimination, and may be ordered to be stopped or remedied. The Equality Tribunal may set a time limit for compliance with the order. The Tribunal will state the grounds for an administrative decision at the time the decision is made. Furthermore, the Equality Tribunal may make an administrative decision to impose a coercive fine to ensure implementation of orders pursuant to section 7, if the time limit for complying with the order is exceeded (see AOT section 8(1)). The coercive fine begins to run if a new time limit for complying with the order is exceeded, and will normally run until the order has been complied with. The Tribunal may reduce or waive a fine that has been imposed when special reasons warrant doing so. The coercive fine accrues to the State. An administrative decision to impose a coercive fine constitutes grounds for enforcement. The Tribunal must state the grounds for an administrative decision to impose a coercive fine at the time the decision is made. So far, the Tribunal has made use of its mandate to impose a coercive fine only once,<sup>236</sup> although it has been discussed in two instances of illegal employment announcements made by the same company. As of 31 December 2016, a coercive fine has a yet to be issued, even in cases of repeated offences.

The Tribunal's decision in its case 44/2009 of 12 March 2010, which was a follow-up to its case 10/2006 is an illustration of this. In the latter case, a position at a dry-cleaners in Oslo was announced vacant in the Norwegian national newspaper *Aftenposten* asking for 'Mature female aged 30-50 years is encouraged to apply for the vacancy in our Dry-Cleaners at Røa'. Both the Ombud and the Tribunal found the announcement to be a breach on the grounds of age and gender. As the company had used a similar announcement previously, and the firm is a large, professional employer with 17 branch offices in the Oslo area, the Tribunal ordered that similar advertisements should be stopped. The Tribunal issued an order with a specific time limit for compliance to ensure that a similar advertisement would not be used again. Thereafter the Tribunal received a notice from the firm confirming that the advertisement would not be used again. In its recent case, the dry-cleaners' announcement in 2009 was for a 'mature woman'. The case was brought to the Tribunal from the Ombud on her own initiative, asking whether or not the current announcement was a breach of the 2006 order of the Tribunal. The Tribunal also discussed whether a breach of the order should result in a fine in accordance with the Anti-discrimination Ombuds' Act section 13, or another form of reaction. The Tribunal again ordered the announcement stopped, and that the company collaborate with the Ombud in the wording of future announcements, but did not issue a fine.

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<sup>235</sup> The Tribunal referred in its case no 47/2013 to its decision in case 58/2010 in September 2011 that the failure of the local public transport company in Oslo to properly mark its stairways and steps in contrasting colours to assist the sight-impaired in line with the Anti-Discrimination and Accessibility Act, section 9, on universal design/ universal accommodation, constituted discrimination. An order to remedy the situation was not given, although the secretariat of the Tribunal followed this case closely. Given that, by autumn 2013, the company had still not fulfilled its duty to properly mark all its steps at its stations, the Ombud brought the case before the Tribunal (again). The Tribunal ordered remedies within a given time limit (31 December 2014) to comply with the AAA requirement on universal design/ universal accommodation. The Tribunal furthermore warned the company that a failure to fulfil the orders remedy might lead the Tribunal to issue a coercive fine to ensure the implementation of its order.

<sup>236</sup> The Tribunal case 2014-40-2 of 15 June 2016 is a follow-up to the Tribunal's case number 2014-40 of 15 January 2015, in which the Tribunal ordered that city buses should be subject to 'universal design', that is, designed and built in a disability-accessible way, by equipping the buses with a system inside the bus that announces the upcoming stops, and that the stops be equipped with an outdoor system that announces where the bus is headed. In its decision of 15 June 2016, the Tribunal gave the bus company a new deadline for implementing the 2015 order until 28 February 2017, and ordered a daily fine of NOK 5 000 (approx. EUR 550) per business day, including Saturdays, that the order is not complied with.



In practice thus, the mandate to make use of fines is more a coercive tool, as this sanction never has been used.<sup>237</sup> The lack of use is a problem. The efficiency of this sanction may thus be questioned.

b) Ceiling and amount of compensation

There are no upper limits for compensation, nor are there rules for calculation provided in the national legal framework. The compensation must as a rule give compensation for actual loss.

In the sparse court cases that exist, compensation has only been awarded in two Supreme Court cases, both of which concern discrimination because of membership of trade unions.<sup>238</sup>

In its judgment of 28 March 2014, the Eidsivating appellate court awarded in case number LE-2013-113570 *Gate Gourmet 2* compensation amounting to real economic loss because of discrimination due to membership of a trade union. The Supreme Court had in its case Rt-2011-1755 *Gate Gourmet*, found that these employees had been discriminated against in violation of the general rule in the Working Environment Act section 13-1 first paragraph because jobseekers who were members of another union got preferential hiring. The 50 complainants were awarded NOK 5 000 (EUR 625) in non-monetary damage for discrimination incurred. In subsequent cases for the Øvre Romerike district court (12-073184TVI-OVRO of 23 April 2013) and the Eidsivating appellate court, the claimants were awarded compensation for incurred loss. The compensation to all claimants totalled more than NOK 8 million (approximately EUR 1 million).

In the other case where compensation was awarded, Rt 2001-248 *Olderdalen*, NOK 100 000, (approximately EUR 12 000) was awarded to the claimants as economic loss because of discrimination due to political affiliation. The WEA of the time did not contain a clause specifically on liability for economic loss, thus the comparable sanctions used for gender discrimination were referred to.

In the other cases before the Supreme Court, compensation has either not been claimed, or the case was lost and compensation thus not awarded.

Apart from these judgments, compensation has been awarded in only four lower court cases: three concerning discrimination because of gender/ pregnancy,<sup>239</sup> one concerning age and gender. All concern employment relations.<sup>240</sup> Interestingly, the non-pecuniary compensation for the discrimination has been set above NOK 100 000 (approximately EUR 12 000) in the three recent cases. This is considered to be high compensation when compared with, for example, the level of compensation in cases of unjustified dismissals within employment.

There is no statistical information available concerning the average amount of compensation available to victims.

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<sup>237</sup> In its case 7/2012, the Tribunal warned the hotel that if it did not follow up the order given by the deadline of 1 January 2014, a coercive fine might be issued.

<sup>238</sup> In its case LG/2013/167255/1 the helicopter pilots who were found to have been discriminated against by their employer through the Supreme Court judgement RT-2012-219, were awarded their real loss due to their dismissal. The new case to determine compensation will be handled by the Supreme Court in January 2017.

<sup>239</sup> These are: Court of second instance/ Hålogaland appellate court, judgment of 21 January 2009 LH-2008-99829 (*Bang-saken*), Oslo municipal court judgment of 17 November 2006 case no TOSLO-2006-52718 and court of second instance/ Eidsivating appellate court 12 December 1994, case no LE 1994-892 (*Lufthansa*).

<sup>240</sup> Judgment of Øst-Finnmark court of first instance - judgment of 17 March 2010 in case no 09-136827TVI-OSFI (age and gender).

The fact that the Equality Ombud and the Equality Tribunal cannot award compensation has been criticised. In an in-depth study, in which victims of discrimination were interviewed, the victims expressed disappointment that despite the Ombud's assessment that discrimination had taken place, the Ombud had no powers to award compensation. The victims themselves had the impression that the sanctions enforced by the Ombud would be more encompassing than they are in reality.<sup>241</sup>

A state-appointed committee proposed in 2011 that the Equality Tribunal be given powers to award damages for non-economic loss in cases concerning a breach of the prohibition against discrimination.<sup>242</sup> This was not followed through in the 2013 revision of the anti-discrimination legislation,<sup>243</sup> however, it has been proposed again, this time by the Ministry of Children and Equality.<sup>244</sup>

#### c) Assessment of the sanctions

The sanctions as formulated in the legislation and adopted in Norway are formally satisfactory in relation to EU directives per se to address problems of discrimination. A challenge with the Norwegian system as described above is not the sanctions alone, but the enforcement system. As more than 90 % of all discrimination cases each year are handled by the Ombud alone, with the inherent limitation that she is not able to award damages for breaches to the act, persons who are discriminated against are not awarded compensation for discriminatory treatment unless they take their case to the ordinary court system. This is both very expensive and cumbersome. Access to legal aid is sparse for this group, thus not giving them efficient access to justice in discrimination cases.

The oral hearing in court may also give a different result, as the court will hear the case again in full, and not use the findings of the Ombud and Tribunal alone.<sup>245</sup>

Furthermore, current legislation contains sanctions - liability for damages/ compensation/ redress, penalties and administrative orders (that is an order for an act to be stopped or remedied or other measures that are necessary to ensure that discrimination, harassment, instructions or reprisals cease and to prevent their repetition) - that are seldom used. This makes sanctions in practice less effective than their legislative potential.

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<sup>241</sup> Fjordholm, Fin Skre: '– Er det meg, er det han, eller hva er det? – Opplevelse og rettsregler i diskriminertes møte med Ligestillingsombudet' (Is it me, is it him, or what's the problem? Rules and experiences from encounters with the Equality Ombud). *Kvinnerettslig skriftserie* nr. 69/2007, Universitetet i Oslo. Accessible at [http://www.jus.uio.no/ior/forskning/omrader/kvinnerett/publikasjoner/skriftserien/dokumenter/69\\_Fjordholm.pdf](http://www.jus.uio.no/ior/forskning/omrader/kvinnerett/publikasjoner/skriftserien/dokumenter/69_Fjordholm.pdf) (accessed 6 January 2017).

<sup>242</sup> See (in Norwegian) NOU 2011:18 Structure for Equality <http://www.regjeringen.no/nb/dep/bld/dok/nouer/2011/nou-2011-18.html?id=663064> (accessed 6 January 2017).

<sup>243</sup> See Innst. 441 L (2012-2013) to the Parliament from the Parliamentary Committee on family and culture, page 21 (In Norwegian).

<sup>244</sup> See <https://www.regjeringen.no/contentassets/14dd1daa159348c88de5dbe043feb0a4/horingsnotat.pdf> (accessed 18 January 2017) (In Norwegian only).

<sup>245</sup> The judgment of Hålogaland appellate court in case number LH-2014-27941 of 27 June 2014 underscores this point. A man (A) claimed to have been subject to discrimination because of disability when he was not offered a position as a handling agent in the Norwegian National Collection Agency, and claimed compensation according to the (previous) AAA section 17. His complaint had previously been handled both by the Ombud and by the Equality Tribunal, who both found that there was reason to believe that the employer had placed weight on his disability to his disadvantage when he was not considered for the position he had applied for (see Tribunal case no. 8/2012 of 25 October 2012). The court found that he was not discriminated because of his disability. The court found, based on the witnesses and other evidence provided in court, that A's personal abilities were decisive when he was not hired for the job. The court found that there was no evidence in the case that his disability was decisive. The court points in this context especially to two conditions. First, that it was not necessary to make adaptations to the work situation, as both an elevating table and chair are standard at all workstations. Secondly, that the collection agency at the time of the appointment also offered two people positions who were, at the time of the application, on sick leave. Furthermore, the employer had a relatively high number of employees with disabilities, some of whom had considerably greater disabilities than A.

## **7 BODIES FOR THE PROMOTION OF EQUAL TREATMENT (Article 13 Directive 2000/43)**

- a) Body/bodies designated for the promotion of equal treatment irrespective of racial/ethnic origin according to Article 13 of the Racial Equality Directive

A specialised body exists for the promotion of equal treatment irrespective of racial or ethnic origin: the Equality and Anti-discrimination Ombud<sup>246</sup> with its appeal instance the Equality Tribunal.<sup>247</sup> The Ombud enforces prohibition of discrimination in Norway based on gender, ethnicity, religion and belief, disability, age, sexual orientation, gender identity and gender expression as regulated by the anti-discrimination acts. Both the Ombud and the Tribunal are independent, public administrative agencies, administratively subordinate to the King and the Ministry of Children and Equality. Neither the King nor the ministry may give instructions to the Ombud or the Tribunal regarding the way in which individual cases are to be dealt with, nor can they give instruction regarding any other aspect of the professional activities of the Ombud or the Tribunal. Similarly, neither the King nor the Ministry may reverse any administrative decision made by the Ombud or the Tribunal.<sup>248</sup>

The appointment, method of organisation and authority of these bodies are regulated in the Anti-Discrimination Ombud Act - AOT.<sup>249</sup> A proposal for the revision of this act was sent on hearing in October 2016.<sup>250</sup> A key feature of the revised act is the reorganisation of the roles of the Equality Ombud and the Equality Tribunal. The proposal suggests the transfer of the individual complaint mechanism from the Equality Ombud to the Equality Tribunal, so that individual complaints will be handled by the Tribunal only. The current role of the Ombud as proactively promoting equality and combating discrimination will continue as before, by carrying out independent surveys and making reports and recommendations. The Ombud will also continue to monitor that Norwegian law and administrative practice are in accordance with Norway's obligations pursuant to the CEDAW, CERD and CRPD. The Ombud will also continue to have legal standing to bring discrimination complaints to court on behalf of identified victim(s) or to intervene in legal cases concerning discrimination, as co-counsel or *amicus curiae*. The Equality Tribunal will continue to handle individual complaints, but will in the new structure be the only administrative complaint mechanism. As is currently the case, the complainant at any point transfer the case to the ordinary courts, at which point the case will be rejected from administrative proceedings, that is, proceedings before the Equality Ombud or the Equality Tribunal.

- b) Status of the designated body/bodies – general independence

The Equality Ombud and the Equality Tribunal are alternative dispute mechanisms outside the judicial system, addressing cases of discrimination. The Ombud and Tribunal offer a free low-threshold complaint system.

The Equality Ombud and Equality Tribunal are professionally independent central government bodies. The competencies of the Ombud and the Tribunal are derived from the AOT. The independence of the bodies is stipulated in law and they are independent in their functions.<sup>251</sup>

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<sup>246</sup> <http://www.ldo.no/en/> (accessed 6 January 2017).

<sup>247</sup> <http://diskrimineringsnemnda.no/en/innhold/side/forside> (and click on 'språk' to access information in English (accessed 6 January 2017)).

<sup>248</sup> As per the AOT section 2(2) regarding the Ombud and AOT section 5(3) regarding the Tribunal.

<sup>249</sup> The AOT - Act on the Equality and Anti-Discrimination Ombud and the Equality and Anti-Discrimination Tribunal of 10 June 2005 No 40 (*Diskrimineringsombudsløven*).

<sup>250</sup> See <https://www.regjeringen.no/contentassets/14dd1daa159348c88de5dbe043feb0a4/horingsnotat.pdf> (accessed 18 January 2017) (In Norwegian only).

<sup>251</sup> See AOT - Act on the Equality and Anti-Discrimination Ombud and the Equality and Anti-Discrimination Tribunal (The Anti-Discrimination Ombud Act), of 10 June 2005 No 40, <http://www.regjeringen.no/en/doc/Laws/Acts/The-Act-on-the-Equality-and-Anti-Discrim.html?id=451952> (accessed 6 January 2017).

The Equality Ombud has a dual role in working for equality, by enforcing the law as well as proactively promoting equality and combating discrimination. As a law enforcer, the Equality Ombud issues opinions on complaints concerning breaches of statutes and provisions within the Ombud's sphere of activity, and provides advice and guidance with regard to the legislation within its mandate. The Equality Ombud is funded by annual grants financed by the Ministry of Children and Equality, but cannot be instructed by the ministry. The Equality Ombud herself is appointed by the ministry. The employees of the Equality Ombud are public officials. Although the Ombud is nominated by the ministry and her staff are public officials, her independence is not questioned in Norway, as her mandate is clarified by law, and she is not to be instructed by the ministry.

The funds allocated through the State budget for 2016 as income for the Ombud were NOK 52 856 000 (approximately EUR 5 745 217, at an exchange rate where EUR 1 = NOK 9.2).<sup>252</sup> Sixty-two people work at the Ombud's office, including the Ombud herself.

The Equality Tribunal is the appeal body of the Equality Ombud. Its members are appointed by the Ministry of Children and Equality for a term of four years, with the possibility for reappointment. When the members and deputy members are appointed for the first time, half of them are appointed for a term of two years. The chairperson and deputy chairperson must fulfil the requirements prescribed for judges. The members are appointed after suggestions from different stakeholders, and chosen because of their academic skills on discrimination issues. When handling the cases, the members are divided into two divisions with five members each. The chair and the deputy chair of the tribunal participate in both divisions to ensure a consistency of the Tribunal's practice in law. The Equality Tribunal has a secretariat of four persons. The secretariat staff are public employees, as per the AOT regulations, section 9.

#### c) Grounds covered by the designated body/bodies

The Equality Ombud and the Tribunal monitor and contribute to ensure compliance with the provisions in the anti-discrimination legislation. The Ombud's mandate covers all legislative discrimination grounds covered by the ADA (ethnicity, religion and belief), AAA (disability), SOA (sexual orientation), WEA (age and political view), (gender), the relevant rules in the select housing legislation and the Ship Labour Act chapter 10 (see AOT section 1(2)). The mandate of the Ombud also involves ensuring that Norwegian legislation and administration practice is in accordance with Norway's obligations according to the UN Convention on the Elimination of All Forms of Discrimination against Women, the UN Convention on the Elimination of Racial Discrimination and UN Convention on the Rights of People with Disabilities (see AOT section 1(3)).

Both the Equality Ombud and the Tribunal deal with the discrimination against migrants through the ground 'ethnicity'. Migrants as a topic was not a priority issue for 2016, although the Ombud was strongly against a proposal forwarded by the Government that would weaken the rights to care and protection of asylum-seekers who are minors.<sup>253</sup>

#### d) Competences of the designated body/bodies – and their independent exercise

<sup>252</sup> As per the letter dated 14. January 2016 from the ministry informing about the allocation, published (in Norwegian) at: <https://www.regjeringen.no/contentassets/57b05f800bb6491b9952e6e89152d09f/tildelingsbrev-2016---likestillings--og-diskrimineringsombudet.pdf>

<https://www.regjeringen.no/contentassets/11d82e8f80db44d78be1c0b5b451f003/tildelingsbrev-til-likestillings--og-diskrimineringsombudet-2015.pdf> The amount in euros is lower in 2016 than in 2015, because of the currency exchange rate. (Accessed 18 January 2017).

<sup>253</sup> See <http://www.ido.no/nyheiter-og-fag/nyheiter/nyheiter-i-2016/sterkt-kritisk-til-asylbarn-forslag/> (In Norwegian), (accessed on 21 March 2017).

The Ombud's function of promoting equality and developing expertise entails the following tasks in accordance with the AOT regulations, section 1:<sup>254</sup>

- a. *A proactive role*: The Ombud shall play a proactive role in promoting equality and combating discrimination, and shall monitor developments in society with a view to exposing and calling attention to matters that counteract equality and equal treatment.
- b. *Influencing attitudes and behaviour*: The Ombud shall help to raise awareness of equality and equal treatment and actively promote changes in attitudes and behaviour. The Ombud shall play an active part in giving the general public information about status and challenges.
- c. *Support and guidance*: The Ombud shall provide information, support and guidance in efforts to promote equality and counteract discrimination in the public, private and voluntary sectors.
- d. *Advisory service on ethnic diversity in working life*: The Ombud shall provide advice and guidance on ethnic diversity in working life to employers in the public and private sectors. The service shall be provided free of charge and be adapted to the needs of the individual employer. Furthermore, the Ombud shall help to disseminate examples of good practices and to increase knowledge of methods for promoting ethnic diversity in working life.
- e. *Expertise*: The Ombud shall have an overview of and provide knowledge and help to develop expertise on and documentation of equality and equal treatment, as well as monitor the nature and extent of discrimination.
- f. *Forum*: The Ombud shall serve as a meeting place and information centre for a broad public and facilitate collaboration between actors who work to combat discrimination and promote equality.

The key characteristic of the Ombud is her independent and impartial role as a law enforcer: she provides free legal advice on equality and anti-discrimination legislation to victims of discrimination and anyone else who contacts the Ombud, such as employers, employee organisations, interest groups, Government agencies and the general public. This function implies that the Ombud conducts independent surveys, publishes independent reports and makes recommendations on issues relating to discrimination. Every year the Ombud publishes annual reports and relevant reports on the status of equality. The function of 'guidance' includes information about how the legislation should be interpreted and what options victims have if they experience discrimination, according to the AOT regulations, section 2, and the Public Administration Act.<sup>255</sup> The duty to provide guidance encompasses all relevant matters related to the case, including guidance about the current statutes and regulations and common practice in the administrative sphere in question, and rules of procedure, especially those concerning rights and duties pursuant to the Public Administration Act. If possible, the Ombud should also draw attention to circumstances that may be of particular importance for the result in the specific case. In addition, the Ombud also has the duty to provide guidance in discrimination cases that are not within the Ombud's scope (see AOT, section 3).

A person who claims to be a victim of discrimination because of any of the discrimination grounds covered by law may bring the complaint to the Equality Ombud, who will investigate the complaint by demanding information and documentation from the responsible party (see the AOT section 3(4)). The Ombud will give counsel and guidance to the victim, but not independent assistance in the sense of being the spokesperson of the victim. The Ombud will undertake a legal assessment of whether or not discrimination has occurred if the victim brings a complaint forward. The work of the Equality Ombud is based on written statements, and on the principle of contradiction between the parties

<sup>254</sup> Forskrift om organisasjon og virksomhet for Likestillings- og diskrimineringsombudet og Likestillings- og diskrimineringsnemnda, FOR-2013-12-18-1613 (in Norwegian), in force 1 January 2014.

<sup>255</sup> The Public Administration Act is available in English at: <http://www.ub.uio.no/ujur/ulovdata/lov-19670210-000-eng.pdf>. (Accessed 6 January 2017).

involved in the case, in which each party is allowed to hear the arguments of the other party and be given the opportunity to refute the information. In addition to handling complaints, the Ombud may take up cases on her own initiative, or on the basis of an application from other persons. 'Anyone' may bring a case before the Ombud. Trade unions, NGOs or other similar bodies are regarded as 'anyone'. These parties may also file claims in class actions, as mentioned above.

The great weakness of the Equality Ombud in relation to the task listed in Directive 2000/43 is that neither she, nor anyone else, has the specific role of providing independent assistance to victims of discrimination that will enable them to have access to remedies in accordance with Article 15 of Directive 2000/43. As the Equality Ombud has the role as a law enforcer, she will not provide individual independent assistance to each victim – she will decide on the merits of the case. Until 2006, the Centre against Ethnic Discrimination (SMED) provided legal aid to victims of ethnic discrimination, but when the centre became part of the new Equality Ombud, the legal aid scheme was revoked. The Ombud is impartial when dealing with complaints and is an alternative to filing a lawsuit in discrimination cases. According to the Anti-Discrimination Ombud Act, the Ombud cannot represent the party in external proceedings. Therefore, the Ombud does not act as a legal representative or legal practitioner for victims. Neither the Ombud nor the Tribunal is entitled to take cases to court independently of a person individually complaining. The fact that there is no legal aid scheme offered specifically to address discrimination because of ethnicity is a flaw with the current system in which one holistic Equality Ombud covers all grounds. This has been reported previously, and the author agrees with this observation.<sup>256</sup>

e) Legal standing of the designated body/bodies

In Norway, the designated body in theory has legal standing to bring discrimination complaints on behalf of identified victim(s) or to intervene in legal cases concerning discrimination.

According to the general Dispute Act section 1-4(2), public bodies charged with promoting specific interests may in the same manner bring an action in order to safeguard the interests that fall within their purpose and normal scope. This should, in theory, allow the Equality Ombud and the Equality Tribunal to bring cases to court, although this has never been done in practice, as the Equality Ombud considers her role to be that of an impartial legal enforcer, not as an agent for litigation.

The Equality Ombud has however provided co-counsel in court on two occasions, in accordance with the mandate given in the Dispute Act, section 3-7, to provide co-counsel.<sup>257</sup> There are no fixed rules or regulations deciding when the Equality Ombud may provide co-counsel in court – this is decided on a case-by-case basis.

f) Quasi-judicial competences

In Norway, the Equality Ombud and Tribunal are quasi-judicial institutions.

In individual complaints to the Equality Ombud, a victim must be identified. However, complaints can also be handled where no individual is identified. Cases brought before the Ombud by a person who is not a party to the case may only be dealt with by the Ombud with the consent of the party whose rights were infringed. If special considerations warrant

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<sup>256</sup> Anne Therese Sortebekk, 'Country Fiche Norway for Study on Equality Bodies set up under Directives 2000/43/EC, 2004/113/EC and 2006/54/EC', Human European Consultancy in partnership with the Ludwig Boltzmann Institute of Human Rights, August 2010, point 55.

<sup>257</sup> Co-counsel by the Ombudsman was carried out in the case of the Hålogaland appellate court LH-2008-99829 (*Bang-saken* – non-employment because of pregnancy) and the judgment of Øst-Finnmark court of first instance - judgment of 17 March 2010 in case no 09-136827TVI-OSFI (age and gender).

doing so, the Ombud may nonetheless deal with such a case, even if consent has not been given.

Following written investigations, the Equality Ombud will evaluate whether or not the prohibition against discrimination has been violated after having received the parties' arguments in writing and will conclude whether a breach is found. Where a breach of legislation is found, the Ombud will often recommend the party who has been in breach of the law to correct the wrong, for example by making a recommendation to the employer/ person responsible to pay compensation. In many cases, the employers will follow the Ombud's recommendation and obey her suggestion for redress to avoid the case being taken to the Equality Tribunal or court. As agreements on compensation following such procedures are private, there are no statistics as to the level of compensation nor the number of agreements.

The decision of the Equality Ombud is not a legal binding administrative decision, but is a statement as to how the Ombud evaluates the case seen in relation to the discrimination legislation. However, a party not satisfied with the Ombud's statement may appeal it to the Equality Tribunal.<sup>258</sup> Also, if one of the parties does not comply with the Ombud's recommendation, the dispute may be referred to the Equality Tribunal by either of the parties or by the Ombud herself. This is a mechanism/ sanction being increasingly applied by the Ombud to ensure fulfilment of her statement. The Equality Tribunal may also demand that certain cases that have been handled by the Ombud be brought before the Tribunal (see AOT section 6(2)). This opportunity has almost never been used.

The Equality Tribunal is a permanent body that has been entrusted by law to exercise its functions and its composition is defined by law (see AOT, section 5). It must apply the law and is an independent body, as its members are external appointees, selected on personal merit. Furthermore, its procedure is adversarial and similar to procedure in court in that, *inter alia*, there is normally both a written procedure and an oral hearing before a decision is made. Finally, its decisions are binding upon the private parties before it, as per the AOT, section 7.

Neither the Equality Ombud, nor the Tribunal has the right according to the law to award damages or financial compensation. Where a party does not pay compensation voluntarily, the victim may bring an ordinary complaint before the courts, as described above.

The Ombud and the Tribunal may not bring cases before the courts, with the exceptions provided below. The equality bodies' powers of investigation are wide. Public authorities are under obligation to provide all necessary information to fulfil their obligation to ensure the fulfilment of the discrimination legislation (see AOT, section 11). The obligation of public authorities to provide information overrides their obligation to secrecy. Both the Ombud and the Tribunal are entitled to make the necessary investigations to fulfil their obligations in ensuring the fulfilment of the acts. If necessary they may also require assistance from the police, and meeting of evidence at the courts may also be ordered.

Sanctions may be imposed, as described above, but are seldom used. The decision of the Tribunal may not be appealed, but the case may be taken to court for a full hearing of the case, in which the statements/ decisions of the Ombud/Tribunal are used. The decision of the Ombud/Tribunal are in general well respected, however, it is only recently that the Ombud systematically started to monitor her own work in terms of the parties' compliance with her decisions. This monitoring is not publicly available.

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<sup>258</sup> The Parliamentary Ombud stated in a landmark decision of 1993 that public authorities that do not wish to comply with the statements of the Ombud have a duty to appeal the case to the Tribunal for a final decision. A non-appeal to the Tribunal by public authorities is seen as an implicit acceptance of the Ombud's conclusions.



A specific issue for Norway as an EEA country is that Norway can only refer prejudicial questions regarding cases on equal treatment and discrimination to the EFTA court, and not to the CJEU. A question that has arisen – but not yet tried in practice - is to what extent national anti-discrimination bodies/ equality bodies can be seen as a ‘court or tribunal’ and thus be able to request advisory opinions/ preliminary rulings regarding cases on equal treatment and discrimination from the EFTA court. There has been an assumption that the Equality Tribunal would be considered a ‘court’ according Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice. Both the Norwegian Labour Court<sup>259</sup> and the Norwegian Market Council<sup>260</sup> have been accepted by the EFTA court as requesting parties.

g) Registration by the body/bodies of complaints and decisions

In Norway, both the Ombud and the Tribunal register the number of complaints and decisions (by ground, field, type of discrimination, etc). These data are available to the public. The Tribunal publishes all its cases – anonymised - on its webpage ([www.diskrimineringsnemnda.no](http://www.diskrimineringsnemnda.no)). The Ombud publishes all cases in which she gives a reasoned opinion. These opinions are published on her webpage in an anonymous form (see [www.ldo.no](http://www.ldo.no)). The opinions are all published in Norwegian.

In 2015, the Equality Ombud received a total of 1 793 inquiries.<sup>261</sup> Of these, 181 were registered as complaint-based case work. Of those 181 cases, 17 were related to age, 21 to ethnicity (including language), 60 to disability, 50 to gender, 5 to gender identities and gender expressions, 3 to religion, 1 to sexual orientation and 24 to ‘other’.

h) Roma and Travellers

In Norway, the Roma population is very small. Every year an influx of Roma people, mainly from Romania, come to Norway on tourist visas to beg in the streets of the larger cities, although not all Roma people coming on tourist visa come for the purpose of begging.<sup>262</sup> The Ombud has in recent years been a voice in the public sphere warning against proposals that are neutral in form, but that aim to target Roma tourists in Norway adversely. This is done mainly within the framework of her mandate to ensure that Norwegian legislation and administration practice is in accordance with Norway's obligations according to the UN Convention on the Elimination of all forms of Racial Discrimination.

In terms of specific complaints, there are in general few complaints from the Roma, and the few that have been made have not always resulted in a statement confirming that discrimination in fact has happened. As the cases have often been situations based on oral and contradictory evidence, it has been difficult to establish the facts of the case.<sup>263</sup>

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<sup>259</sup> See EFTA court case E 02/2000.

<sup>260</sup> See EFTA court case E-8/94 and 9/94.

<sup>261</sup> See the Equality Ombud's annual report for 2015 (in Norwegian) at <http://www.ldo.no/nyheiter-og-fag/brosjyrar-og-publikasjonar/Arsrapporter/arsmelding-2015/kapittel-3-arets-aktivitetar-og-resultat/> (accessed 18 January 2017).

<sup>262</sup> See the project of the Norwegian research institution FAFO: ‘When poverty meets affluence. Migrants from Romania on the streets of the Scandinavian capitals’, spanning the period 2015-2018, at <http://www.fafo.no/index.php/nb/forskningstema/prosjekter/migrasjon-integrasjon-og-kompetanse/item/when-poverty-meets-affluence-migrant-street-workers-in-scandinavia> (accessed 21 March 2017).

<sup>263</sup> This may be illustrated by the Tribunal's case 19/2009, in which a Roma family had complained about being denied access to a camping site. The Equality Ombud found that they had been subject to discriminatory treatment, but the Equality Tribunal found that discrimination had not taken place. The complainants belong to the Roma (Gypsies/ Travellers). In summer 2008 he tried with his wife and adult son to check in at a campground. They arrived at the campsite with two large cars: a Chevrolet Tahoe and a Chevrolet pick-up, as well as two large caravans. The family was offered the choice to stay within the campsite, however they were asked to park their cars outside the campsite. The complainant and his family regarded the request to park outside the site as a rejection, and thus decided not to stay at the campsite. The complainant claimed that the family was given limited access to the campsite because of their ethnic background as Travellers. The campsite claims that all guests with big cars are asked to park their cars outside the campsite due to



A case from the Equality Ombud in 2016, case number 15/1512 may reflect some of the prejudices against Roma in relation to camping sites. During summer 2015, a campsite in Oslo organised under the Norwegian Automobile Association (NAF) had put up a note in its reception stating 'We are fully booked if gypsies ask'. NAF explained to the Ombud that the note was put up during the Norway Cup, which is an annual large soccer tournament for children in Oslo, and that the campsite gave priority to guests participating in the tournament. In relation to this, long-term guests at the campsite are asked to move to another campsite outside Oslo for this particular week. NAF explained that normally it is only guests with a Roma background who do not respect this way of organising the campsites, and try to move from one site to the other internally in Oslo, and not out of Oslo. One of the campsites had previously had bad experiences with guests from a Roma background, including threats to employees, internal fighting, late payments, driving inside the campsite, unattended small children etc. NAF stated that the content of the note was incorrect, and that the note, set up by a summer substitute did not reflect NAF's policies. The Ombud found the note to be direct discrimination based on ethnic origin in violation of the ADA, section 6, as there was no justification to exclude a whole group based on negative experiences with individuals from that group. The Ombud did not impose a sanction.

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reconstruction, and that the complainant was not treated differently than others. The Tribunal did not find indications that the person was treated differently because he was a Roma, and found that there had not been a breach of the act.

## 8 IMPLEMENTATION ISSUES

### 8.1 Dissemination of information, dialogue with NGOs and between social partners

- a) Dissemination of information about legal protection against discrimination (Article 10 Directive 2000/43 and Article 12 Directive 2000/78)

The Ombud has a specific duty to disseminate information about legal protection against discrimination (see AOT regulations, section 1). Additionally, public authorities have a general proactive duty according to the ADA sections 13-15, AAA sections 18-20 and SOA sections 12-14, to make active, targeted and systematic efforts to promote non-discrimination policies and measures regarding ethnicity, sexual orientation and disability in all sectors of society. This includes dissemination of information. A similar proactive duty is also required from employers with more than 50 employees.

A general proactive duty is not imposed on public authorities in relation to age as found in the WEA, of relevance for Directive 2000/78.

- b) Measures to encourage dialogue with NGOs with a view to promoting the principle of equal treatment (Article 12 Directive 2000/43 and Article 14 Directive 2000/78)

Although there are no formal rules in the anti-discrimination legislation on dissemination of information, social dialogue or dialogue with NGOs by the authorities, there is a wide tradition in Norway to regularly undertake public consultations with NGOs and social partners. NGOs and social partners are in general invited to participate in referee groups when new legal proposals are being drafted, and are also recipients of white papers and law proposals for consultative purposes before legislation is enacted. The various action plans initiated (see below chapter 9) are in general drafted and implemented in close collaboration with NGOs and social partners.

- c) Measures to promote dialogue between social partners to give effect to the principle of equal treatment within workplace practices, codes of practice, workforce monitoring (Article 11 Directive 2000/43 and Article 13 Directive 2000/78)

There are a number of initiatives made in relation to promoting dialogue between social partners to give effect to the principle of equal treatment through workplace practices, codes of practice and workforce monitoring. This is done through initiatives by the ministry and the Equality Ombud, as well as by trade unions (the latter has been described in previous EU reports).<sup>264</sup> Its real effect in relation to the principle of equal treatment has been questioned.<sup>265</sup>

- d) Addressing the situation of Roma and Travellers

Although there are very few Roma and Travellers in Norway, the Equality Ombud has repeatedly addressed some of the key issues seen in relation to Roma and Travellers, and has been praised for her role in fighting discrimination against the Roma. In her 2010 report to the UN CERD committee, the Equality Ombud addressed the areas of critical concern: that the Roma's access to basic rights is denied unless the traditional way of life is discontinued. In relation to schooling, the Ombud is concerned that the Travellers are

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<sup>264</sup> See for example, 'Trade union practices on anti-discrimination and diversity', report for the EC DG 4 (2010) at <http://ec.europa.eu/social/main.jsp?catId=738&langId=en&pubId=580&type=2&furtherPubs=no> (accessed 6 January 2017).

<sup>265</sup> For example in the official report NOU 2011:18 Structure for Equality chapter 7. See <http://www.regjeringen.no/nb/dep/bld/dok/nouer/2011/nou-2011-18.html?id=663064> (in Norwegian). For an English summary of the report, see [https://www.regjeringen.no/globalassets/upload/bld/nou18\\_ts.pdf](https://www.regjeringen.no/globalassets/upload/bld/nou18_ts.pdf) (accessed 6 January 2017).

being made responsible for the consequences of the failure to adjust Norwegian school policy to the traditional manner of travelling. The Roma people are furthermore systematically denied access to campsites and restaurants on the grounds that they belong to a national minority. In her 2014 report to the UN CERD committee, the Ombud reiterated her previous concerns related to schooling and housing, but also included warnings about increased negative media stereotyping on Roma tourists coming to Norway, leading to defamation of the group as a whole.<sup>266</sup> At a policy level, the Ombud has thus been a voice in the Norwegian public speaking out against the discrimination of the Roma.

The Roma National Association in Norway (*Taternes Landsforening*)<sup>267</sup> is used as a dialogue point for organised interaction between the Equality Ombud as well as with different ministries. This includes, among others, the Ministry of Children and Equality, the Ministry of Labour and Social Affairs, the Ministry of Education and Research, the Ministry of Local Government and Modernisation, and the Ministry of Health and Care Services.

A key challenge in the Norwegian setting in relation to Roma is that they are very few (approximately 700 persons nationwide), and that little knowledge exists about the discrimination that they face both at an individual and structural level. The previous governmental action plan to improve the situation of the Roma is limited to Oslo, as this is where most Roma have a connection or reside for a larger share of their time.<sup>268</sup>

The Government aimed through this action plan to develop measures to allow real opportunities for the Roma to use already established welfare systems, within education, employment, health and housing. An evaluation of the action plan carried out by the Norwegian research institution FAFO in 2014 showed that the action points had not resulted in less discrimination for the individuals of the group. FAFO found that the action plan had to little extent led to improved livelihood for the group as a whole, but that the work with the action points had led to a more precise understanding of relevant upcoming action points.<sup>269</sup> A new action plan has not been presented.

## 8.2 Compliance (Article 14 Directive 2000/43, Article 16 Directive 2000/78)

### a) Mechanisms

Before implementing international legislation in Norway, the national legislation was reviewed to ensure compliance. Furthermore, the legislation contains a specific clause that provisions laid down in collective agreements, regulations, bylaws etc. will be declared null and void if in breach of the WEA, section 13-9(2). An agreement in breach of the ADA or the GEA was also assumed to be void by the Tribunal in a case.<sup>270</sup>

For collective agreements, if a provision is found to be against the law, it will be declared null and void by the Labour Court so that the compensation that is paid dates back to the moment the invalid provision was put in force.<sup>271</sup>

A challenge is posed in relation to the 'normal' principles of interpretation in law, where the traditional principles of interpretation are used, such as *lex specialis* etc. This was demonstrated in the Supreme Court judgment of 18 February 2010, where the Seaman's

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<sup>266</sup> See [http://www.ido.no/globalassets/brosjyrer-handboker-rapporter/rapporter\\_analyser/rapporter\\_diverse/cerdreport\\_pdf.pdf](http://www.ido.no/globalassets/brosjyrer-handboker-rapporter/rapporter_analyser/rapporter_diverse/cerdreport_pdf.pdf) (accessed 6 January 2017).

<sup>267</sup> See <http://www.taterne.com/> (in Norwegian) (accessed on 6 January 2017).

<sup>268</sup> See [http://www.regjeringen.no/nb/dep/fad/dok/rapporter\\_planer/planer/2009/Handlingsplan-for-a-bedre-levekarene-for-rom-i-Oslo.html?id=594315](http://www.regjeringen.no/nb/dep/fad/dok/rapporter_planer/planer/2009/Handlingsplan-for-a-bedre-levekarene-for-rom-i-Oslo.html?id=594315). (In Norwegian, accessed 6 January 2017).

<sup>269</sup> Guri Tyldum og Jon Horgen Friberg: 'Et skritt på veien. Evaluering av Handlingsplan for å bedre levekårene blant rom i Oslo', FAFO-rapport 2014: 50 (in Norwegian) at <http://www.faf.no/images/pub/2014/20397.pdf> (accessed 18 January 2017).

<sup>270</sup> See the Equality Tribunal case number 26/2009.

<sup>271</sup> See for instance the Labour Court judgment ARD-1990-148 – Bio Engineers.

Act was referred to as *lex specialis* in relation to non-discriminatory clauses, and a 62-year retirement age for seamen was thus accepted.<sup>272</sup>

b) Rules contrary to the principle of equality

There are no known laws or regulations or rules that are contrary to the principle of equality still in force, as in theory all legislative areas are assessed before the implementation of new directives and acts. However, the case work of the Equality Ombud shows a number of breaches to the acts, so full compliance cannot be claimed.

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<sup>272</sup> Supreme Court Judgment Rt 2010 s 202, (HR-2010-00303-A) (*Kystlink*).

## 9 COORDINATION AT NATIONAL LEVEL

The Ministry of Children and Equality is responsible for dealing with anti-discrimination in relation to the grounds covered by the ADA, SOA and AAA. The Ministry for Labour and Social Affairs is responsible for dealing with the anti-discrimination provisions of the WEA, which relate to age. Additionally, the ministry is responsible for the work on an inclusive working life, which is targeted at employees temporarily or permanently disabled and measures to promote their return to paid employment. A job strategy for young people with disabilities was presented in January 2012.<sup>273</sup>

The Ministry of Local Government and Modernisation is responsible for Samis and national minorities.

The Ministry of Justice and Public Security is responsible for immigration and integration.

There was a Government plan of action to promote equality and prevent ethnic discrimination (2009–2012), which has not been replaced by a new plan.<sup>274</sup>

The Government plan of action for improving the quality of life for lesbians, gays, bisexuals and trans persons 2009-2012, has been replaced by a new action plan against discrimination because of sexual orientation, gender identity and gender expressions. The action plan covers the period 2017-2020, and contains 43 specific measures to be implemented over the next three years. The title of the action plan is: 'Safety, openness and diversity: the Government plan of action against discrimination because of sexual orientation, gender identity and gender expressions'. The title aptly describes the key focus of the action plan, which is to ensure safe neighbourhoods and public spaces, equal public services and livelihoods for particularly vulnerable groups. The plan will, in addition to combating discrimination, help ensure the rights of lesbians, gays, bisexuals, transgender and intersex persons. The action plan includes, for the first time in Norway, several initiatives that deal with the rights of intersex persons.<sup>275</sup> The measures linked to employment in the action plan are few, but increased attention to the SOA and support for the implementation of the act in working life is among the measures.

There is no holistic Government plan of action for improving the quality of life of people with disabilities. The action plan for improved accessibility and promoting universal design for people with disabilities, called 'Norway Universally accessible 2025: on accessibility and universal design 2009-2013'<sup>276</sup> was followed up with a new action plan for universal design 2015-2019.<sup>277</sup> In a decision of December 2016, universal access of ICT is made a condition within education by 1 January 2021.<sup>278</sup>

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<sup>273</sup> See, <https://www.regjeringen.no/en/dokumenter/jobstrategy/id657116/> in English (accessed 6 January 2017).

<sup>274</sup> For the action plan (in Norwegian), see [https://www.regjeringen.no/globalassets/upload/bld/planer/2009/hpl\\_etnisk\\_diskriminering.pdf](https://www.regjeringen.no/globalassets/upload/bld/planer/2009/hpl_etnisk_diskriminering.pdf) (accessed 6 January 2017). This action plan was evaluated in 2013, see Kristian Rose Tronstad, Marit Ekne Ruud and Siri Nørve, *Evaluering av handlingsplanen for å fremme likestilling og hindre etnisk diskriminering*, NIBR-rapport 2013:11.

<sup>275</sup> See the action plan titled (in Norwegian) *Trygghet, mangfold, åpenhet. Regjeringens handlingsplan mot diskriminering på grunn av seksuell orientering, kjønnsidentitet og kjønnsuttrykk 2017-2020* at [https://www.regjeringen.no/contentassets/6e1a2af163274201978270d48bf4dfbe/lhbt\\_handlingsplan\\_web.pdf](https://www.regjeringen.no/contentassets/6e1a2af163274201978270d48bf4dfbe/lhbt_handlingsplan_web.pdf) (accessed 19 January 2017).

<sup>276</sup> See [https://www.regjeringen.no/globalassets/upload/bld/homofile20og20lesbiske/universell\\_utforming.pdf](https://www.regjeringen.no/globalassets/upload/bld/homofile20og20lesbiske/universell_utforming.pdf) (in Norwegian, accessed 19 January 2017).

<sup>277</sup> See the Government's 'Action Plan for Universal Design 2015-2019' at [https://www.regjeringen.no/contentassets/565cb331b0ee4bb4b997157a543a51d4/the-governments-action-plan-for-universal-design-20152019\\_q-1233-e.pdf](https://www.regjeringen.no/contentassets/565cb331b0ee4bb4b997157a543a51d4/the-governments-action-plan-for-universal-design-20152019_q-1233-e.pdf) (in English, accessed 6 January 2017).

<sup>278</sup> See (in Norwegian) <https://www.regjeringen.no/no/aktuelt/innforer-krav-om-universell-utforming-av-ikt-i-utdanningen/id2521801/> (accessed 19 January 2017).

## **10 CURRENT BEST PRACTICES**

- The scope of the anti-discrimination legislation. Most discrimination grounds cover all areas except family life. Age is currently only covered in employment.
- The active equality efforts of the ADA, AAA and SOA give a duty for public authorities, employers and educational institutions to make active, targeted and systematic efforts to promote equality within the different grounds.
- There are rules on employers' disclosure duty regarding pay, to try to minimise pay gaps because of ethnicity, disability or sexual orientation.

## 11 SENSITIVE OR CONTROVERSIAL ISSUES

### 11.1 Potential breaches of the directives (if any)

It is presumed that Norwegian anti-discrimination legislation is in line with the EU *acquis*, although the Non-discrimination Directives (2000/78 and 2000/43) are not incorporated in the EEA agreement. However, the Government has committed to having as high - or higher - standards in its work against discrimination as the requirements of the EU. This protection has been underlined by Supreme Court judgments. The legal consequence of the anti-discrimination directives not being incorporated into the EEA agreement is that the directives will not prevail in conflict, as the gender directives do.

The 2014 amendment to all discrimination legislation to harmonise and ensure a similar protection for all grounds might lead to a lack of clarity in the legal coverage, as the former very narrow exception to the definition of direct discrimination might be widened and not interpreted as narrowly as before, as the exception to the definition of direct discrimination under the WEA on age is interpreted to be much wider than that of the GEA and the AAA (see paragraph 2.2(b) above). The existing proposal for one comprehensive act is of concern, as it narrows the focus of the aim of both the GEA and the AAA in relation to its material scope.

Norwegian implementation regarding the requirements of Directive 2000/43 on legal aid to victims of discrimination because of ethnicity might be questioned, as there is no scheme under the Legal Aid Act to afford legal aid to victims of discrimination because of ethnicity. Although the Equality and Discrimination Ombud has a duty to provide guidance and counselling to victims of discrimination, the role of the Equality Ombud is not to provide individual assistance to victims of discrimination nor legal aid to individuals, but to assess the case in order to establish whether discrimination has occurred or not.

An area in which case law may arise relates to the access to occupational pensions because of alleged discrimination based on sexual orientation, age or disability. An overhaul of the pensions system may lead to cases concerning the accrual of pension credits between 67 and 70 years, as currently, a number of systems stop the accrual of pension credits at 67, which is the general retirement age (as opposed to a maximum limit). The legality of some of these systems in relation to Directive 2000/78 is at present unclear.

Since the adoption of the ADA and SOA, the courts have not handled any cases concerning discrimination because of religion/ belief or sexual orientation. The first case of discrimination because of race/ ethnic origin was handled in 2016. However, it is not very representative for the challenges in Norway linked to discrimination because of ethnicity, as the case concerned the possible bypassing of a non-Sami speaker for a position in which knowledge of the Sami language was a genuine occupational requirement.<sup>279</sup>

Finally, it might be questioned whether victims of discrimination in reality have the necessary access to justice / efficient sanctions and remedies. Statistics on discrimination cases in Norway show that although the courts do handle discrimination cases, and although the number of cases handled by courts is increasing, by far the overwhelming number of discrimination cases in Norway are channelled through the administrative bodies, the Equality Ombud and the Equality Tribunal. For example, in 2015, the Ombud handled 181 cases and gave individual counseling in 1 793 instances<sup>280</sup> and the Tribunal

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<sup>279</sup> See case number TINFI-2015-113573 judgment of 1. March 2016 by the *Sis-Finnmárkku diggegoddí* - Indre Finnmark court of first instance.

<sup>280</sup> See the Annual Report of the Ombud 2015 (in Norwegian) at <http://www.ldo.no/nyheiter-og-fag/brosjyrar-og-publikasjonar/Arsrapporter/arsmelding-2015/kapittel-3-arets-aktivitetar-og-resultat/> (accessed 19 January 2017).

assessed 54 cases,<sup>281</sup> whereas the total number of cases according to the GEA, AAA, ADA, SOA, AOT and WEA chapter 13 handled by the Court of Appeal and Supreme Court were 11.<sup>282</sup>

The fact that most discrimination cases are handled through the administrative bodies has particular consequences in relation to an assessment of compliance with EU law in terms of sanctions, as the Equality Ombud/ Tribunal does not enforce the clauses relating to sanctions in the form of liability for damages/ redress/ compensations. The fact that the Equality Ombud and the Equality Tribunal cannot award compensation has been criticised, and it has been proposed that the Equality Tribunal be given powers to award damages for non-economic loss in cases concerning a breach of the prohibition against discrimination. This will lead to a more efficient sanctioning of breaches of the non-discrimination legislation.

## 11.2 Other issues of concern

The barriers in getting access to justice for discrimination consist mainly of the expense related to forwarding a case – the cost of bringing a case and the lack of a legal aid scheme that covers discrimination is a practical barrier for most discrimination grounds, with the possible exception of age. The Government proposal sent on public hearing on 19 October 2016, suggesting giving the Equality Tribunal the power to award non-monetary damage in cases concerning employment might partly overcome this barrier.<sup>283</sup>

- Age is protected only within employment, and thus in line with Directive 2000/78, but has a much narrower scope than the other discrimination grounds in Norway.
- 2016 has underlined the tendency of the Equality Tribunal shown in 2015 in either rejecting or dismissing cases that are brought before it regarding the assessment of possible conflicts between the anti-discrimination legislation and other legislation.<sup>284</sup>

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<sup>281</sup> See the annual report of the Tribunal for 2015 at (in Norwegian) <http://www.diskrimineringsnemnda.no/media/1909/aarsrapport-2015-rettet-versjon-17-mars-16-retteing-av-note-b-side-21.docx> (accessed 19 January 2017).

<sup>282</sup> As cases brought before the court of first instance are not necessarily sent for publication, it is hard to know to what extent a search at [www.lovdato.no](http://www.lovdato.no) is fully correct regarding how many cases are actually handled by the courts each year. For 2015, a search in [www.lovdato.no](http://www.lovdato.no) shows 11 hits in judgments and verdicts based on searches in GEA, ADA; AAA; SOA, WEA chapter 13 and AOT.

<sup>283</sup> See <https://www.regjeringen.no/contentassets/14dd1daa159348c88de5dbe043feb0a4/horingsnotat.pdf> (accessed on 6 January 2017). This proposal builds on an assessment of the structure and mandate of the equality bodies finalised in March 2016, see: <https://www.regjeringen.no/contentassets/04bd6c545ae74c4e8ea246f44dcf4942/utredning-av-handhevings--og-virkemiddelapparatet-pa-likestillings--og-diskrimineringsfeltet.pdf> (accessed 6 January 2017).

<sup>284</sup> See for example LDN case numbers 86/2015 and 69/2015.



## 12 LATEST DEVELOPMENTS IN 2016

### 12.1 Legislative amendments

There have been no legislative amendments to anti-discrimination legislation in 2016.

Although a full overhaul of the anti-discrimination legislation was done in 2013, and in force as of 1 January 2014, a new proposal for a single, comprehensive piece of new legislation was sent on public hearing in October 2015.<sup>285</sup> A Government proposal for the re-organisation of the equality bodies was sent on public hearing on 19 October 2016, suggesting the transfer of the individual complaint mechanism from the Equality Ombud to the Equality Tribunal, and giving the Equality Tribunal power to award non-monetary damages in cases concerning working life.<sup>286</sup> These two proposals are expected to be forwarded to Parliament during 2017.

The legislation on hate crime in the penal code of 2005 (in force as of 1 October 2015) explicitly covers disability as well as ethnicity, religion and sexual orientation. This has led to increased awareness in the media on hate crime, and has also led to several hate crime cases being brought before the courts in 2016, which is a welcome development.

Although there are a number of migrant workers in Norway, the lack of employment rights for these people has, up to now, not been addressed as a discrimination issue, but has been considered in relation to social dumping. There was a court case in the Court of Appeal in 2016 in which seasonal import of cheap labour from India was penalised as human trafficking.<sup>287</sup> A gender-specific issue is the Norwegian au pair scheme, which formally is a scheme for cultural exchange, whereas in reality such au pairs work as domestic workers, but without the rights afforded to domestic workers since they are considered not as workers per se but as participants in a cultural exchange programme.<sup>288</sup>

### 12.2 Case law

**Name of the court:** Bergen tingrett (court of first instance) - judgment

**Date of decision:** 7 November 2016

**Name of the parties:** Christian Knutsen and Andreas Bowitz - Schibsted Trykk Bergen AS

**Reference number:** Case No TBERG-2016-19405-2

**Address of the webpage:** (in Norwegian only)

<https://lovdata.no/TRSIV/avgjorelse/tberg-2016-19405-2>

**Brief summary:** The case concerned a dismissal in a publishing house, in which 11 typographers were singled out for dismissal based on seniority. Two young employees claimed that the periods that they had been employed in the company as apprentices must be taken into consideration when calculating their seniority, in line with the WEA, section 13-1 and section 13-3. The court found that the employer should have included all continuous service in the company when calculating the seniority of the employee, and found that the dismissals were not justified and thus invalid/ void. The court did not

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<sup>285</sup> See <https://www.regjeringen.no/no/dokumenter/horing---forslag-til-felles-likestillings--og-diskrimineringslov/id2458435/> (accessed 6 January 2017) (in Norwegian).

<sup>286</sup> See <https://www.regjeringen.no/contentassets/14dd1daa159348c88de5dbe043feb0a4/horingsnotat.pdf> (accessed on 6 January 2017). This proposal builds on an assessment of the structure and mandate of the equality bodies finalised in March 2016, see: <https://www.regjeringen.no/contentassets/04bd6c545ae74c4e246f44dcf4942/utredning-av-handhevings--og-virkemiddelapparatet-pa-likestillings--og-diskrimineringsfeltet.pdf> (accessed 6 January 2017).

<sup>287</sup> See case number LB-2015-137689, where two employers of Indian origin were condemned to prison for having imported a number of Indian workers to Norway on seasonal contracts in their nurseries. The victims had worked long days with almost no salary and no leisure-time. The employers were also found guilty of gross infringements of the WEA chapter 10 on working time.

<sup>288</sup> See <https://www.udi.no/en/want-to-apply/au-pair/> and <http://www.skatteetaten.no/en/person/Tax-deduction-card-and-advance-tax/Foreign-employees/Au-pair-in-Norway/?chapter=3526#kapitteltekst> (accessed 19 January).

specifically assess the question of whether this was discriminatory on the ground of age according to the WEA, chapter 13. Section 13-9 of the WEA was discussed in relation to the compensation awarded to the employees for non-pecuniary damage. The case was not appealed, and is thus final.

**Name of the court:** Brønnøy tingrett (court of first instance) - judgment

**Date of decision:** 2 November 2016

**Name of the parties:** The public prosecutor vs A

**Reference number:** TBRON-2016-125647

**Address of the webpage:** *(in Norwegian and by subscription only)*

[www.lovdata.no](http://www.lovdata.no)

**Brief summary:** A 64-year-old man was sentenced to a suspended prison sentence of 16 days in addition to being fined NOK 10 000 (approximately EUR 1 086) for having posted hateful speech in a debate group on Facebook towards a Norwegian politician of Muslim background, as per the Penal Code (2005), section 185. His illegal expression came as a response to a newspaper article entitled 'Hadia Tajik wants republic introduced in Norway'. The defendant wrote on Facebook: 'I want her shot. I will pay a bounty of NOK 50 [EUR 5] if I receive her pig ears. I will be making Muslim soup on her ears.' The court found that the defendant's speech implied a gross disparagement of human dignity for Muslims as a group, as well as the specific politician who was featured in the article. The defendant acknowledged the remark on Facebook, but claimed that it was made as a joke. The court did not agree that this was a joke.

**Name of the court:** Jæren tingrett (court of first instance) - judgment

**Date of decision:** 9 September 2016

**Name of the parties:** The public prosecutor vs A

**Reference number:** TJARE-2016-96260

**Address of the webpage:** *(in Norwegian only)*

<https://lovdata.no/TRSTR/avgjorelse/tjare-2016-96260>

**Brief summary:** A hairdresser had refused a hijab-dressed woman her services in October 2015. What was said in the situation is disputed, but the parties agree that two hijab-clad young women came to the hairdresser's salon. As they entered the hair salon, they asked the price of a hair colouring. The hairdresser said either: 'I do not take on people like you, go to another hairdresser' or 'Get out, I do not want to touch someone like you'. The women then walked away and reported the incident to the police, who fined the hairdresser NOK 8 000 (approximately EUR 963). As the hairdresser refused to pay the fine, the case was taken to court by the public prosecutor. The hairdresser was sentenced to pay a fine of NOK 10 000 (approximately EUR 1 250) and NOK 5 000 (approximately EUR 500) in legal costs to the State for refusing a hijab-clad woman access to her store, as this was found to constitute discrimination on the ground of religion. This is the first court case in which a penalty has been given for discriminatory denial of services because of religion. The case has been appealed and is not final at the time of writing (10 January 2017).

**Name of the court:** Jæren tingrett (court of first instance) - judgment

**Date of decision:** 24 June 2016

**Name of the parties:** The public prosecutor vs A

**Reference number:** TJARE-2016-72797

**Address of the webpage:** *(in Norwegian and by subscription only)*

<https://lovdata.no/pro/TRSTR/avgjorelse/tjare-2016-72797>

**Brief summary:** A 52-year-old man was sentenced to NOK 15 000 (approximately EUR 1 700) in fines for hate speech, as well as for storing firearms without a valid licence. The hateful remarks were made as a comment on a post on an open Facebook profile, linked to a newspaper article. In the court's view the defendant's utterances were on the one hand a critique against Norwegian politicians and Norwegian law, and on the other hand showed hatred against Muslims as a group. Statements he had made within the former category were within the acceptable limits of the freedom of speech. However, the defendant's statements against Muslims entailed a rough disparagement of human dignity

for Muslims as a group, and the statements were thus objectively regarded as punishable under the Penal Code (2005), section 185. The defendant argued that his expression was lawful based on his freedom of speech. He was not given a prison sentence as his remarks were not directed towards a specific person. The case was appealed, but appeal was denied, see HR-2016-1999-U.

**Name of the court:** Sis-Finnmárkku diggegodd/ Indre Finnmark tingrett (court of first instance) - judgment

**Date of decision:** 1 March 2017

**Name of the parties:** A vs a municipality

**Reference number:** Case No TINFI-2015-113573

**Address of the webpage:** *(in Norwegian and by subscription only)*

<https://lovdata.no/pro/#document/TRSIV/avgjorelse/tinfi-2015-113573>

**Brief summary:** A two-year temporary position as a project manager at the department of technical services in a municipality was announced in June 2014. Sami is an official language in the municipality. Knowledge of the Sami language, both spoken and with written presentation skills was a qualification for the position. Six candidates applied. The municipality conducted interviews with three of the applicants. The claimant, A, was one of these. He was 60 years old. A 31-year-old applicant was ranked number one for the position and then hired, based on his command of the Sami language. The candidate ranked in second place was 41 years old and had a good command of spoken Sami. A was ranked as number three. In his application he had stated that he understands Sami and can make himself understood verbally. The municipality's ranking of the candidates was based on the assumption that A did not know Sami at all. A found the recruitment to be discriminatory, both because of his age, and the requirement of Sami language knowledge discriminatory to non-Sami speakers. He filed a complaint with the Gender Equality and Anti-Discrimination Ombud. The Ombud concluded that A had been subject to direct discrimination because of his age and because the municipality illegally had weighted knowledge of Sami as a qualification for the position. Language is an element of possible ethnic discrimination. (The Ombud's Opinion of 16 December 2014 in case number 14/1450). The Ombud found that as A appeared to be better qualified than the person who had been offered the position, the burden of proof shifted to the employer. Based on the shifted burden of proof, the Ombud found that the municipality had not sufficiently explained the language requirement for the position. Subsequently, the Ombudsman found reason to believe that the applicant's age was considered in the application process. The claimant subsequently brought the case before the court to claim compensation, as the Ombud does not award compensation. The decision of the court did not follow the opinion of the Ombud. Sami is an official language in Norway. As such, the court concluded that the Sami language requirement in this case had a legitimate aim and that it was necessary to fulfil the requirement of the position. The language requirement was not disproportionately emphasised in the recruitment process. Age was not seen as the reason for choosing the other applicant, as this was related to the language requirement. No discrimination had taken place, and thus, no compensation was awarded.

### Select cases from the Equality and Anti-Discrimination Tribunal

**Name of the court:** Equality and Anti-Discrimination Tribunal

**Date of decision:** 14 September 2016

**Name of the parties:** not available

**Reference number:** Case No 68/2015 / LDN-2015-68

**Address of the webpage:** *(in Norwegian only)*

<http://www.diskrimineringsnemnda.no/nb/innhold/side/vedtak>

**Brief summary:** The temporary contract of an employee on sick leave was not extended with a temporary contract in a 100 % position, but only extended with a temporary contract in a 50 % position. She claimed this was due to her sick leave due to rheumatism, which is legally a disability, and that the employer had assumed that she was able to work only in a 50 % position. The employer was the public dental health care office. The Tribunal

found that the burden of proof shifted to the employer, based on an e-mail from the employer, in which the employee's previous sick leave is referred to. Based on this e-mail and the lack of other evidence provided by the employer, the Tribunal found that the employer was not able to substantiate that the employee was not qualified for the position or that there were reasons other than her disability that led to her non-inclusion in the written priority list for the position. The claimant was thus discriminated against in breach of the AAA, section 5.

**Name of the court:** Equality and Anti-discrimination Tribunal

**Date of decision:** 25 June 2016

**Name of the parties:** not available

**Reference number:** Case number LDN-2015-54

**Address of the webpage:** *(in Norwegian only)*

<http://www.diskrimineringsnemnda.no/nb/innhold/side/vedtak>

**Brief summary:** A man claimed to be subject to discrimination because of ethnicity when he was refused the hiring of a car from a rental company. The Ombud found that the burden of proof did not shift in the case, and that no discrimination could be proved. In its decision, the majority of the Tribunal (3-2) concluded that there was 'reason to believe' that the man's ethnicity was one of the factors behind the decision to refuse to rent him a car, and that the burden of proof shifted to the rental company. The element that made the burden of proof shift was the complainant's long-term relationship with the rental company that was terminated by the rental company, without giving the claimant a plausible explanation as to why. These were sufficient facts to provide 'reason to believe' that discrimination might have occurred, and that the burden of proof shifted from the complainant to the car rental company. The Tribunal found that the rental company was not able to substantiate that discrimination had not occurred: the claimant was given a rental car a number of times in 2014, without there being noted any remarks about him in the company rental log. Ending the client relationship could not be found in the written material provided by the company. The rental company had also argued that the claimant was a demanding customer. The Tribunal found that the claimant's alleged 'demanding' behaviour was neither specified nor documented by the car rental company to such an extent that this explained the sudden termination of the customer relationship. The claimant was discriminated against because of his ethnicity.

**Name of the court:** Equality and Anti-discrimination Tribunal

**Date of decision:** 17 March 2016

**Name of the parties:** not available

**Reference number:** Case number LDN-2015-35

**Address of the webpage:** *(in Norwegian only)*

<http://www.diskrimineringsnemnda.no/nb/innhold/side/vedtak>

**Brief summary:** A company announced a vacant position as a glass-maker in June 2014. A person applied for the position, but was not called for an interview. He is of non-Norwegian origin (his specific origin is not stated in the decision). The applicant was born in 1962, and was 52 years when applying for the position. Upon applying, he contacted the company, and was told that the recruitment would commence after the summer holidays. He sent a follow-up in August, and was told in an e-mail the following day that 'The position is already filled'. He then asked the company information about who got the post, and the qualifications and experience of the person recruited. The company did not respond to the claimant, nor did they respond to the subsequent communications from the Ombud and the Tribunal. As the company had not fulfilled its duty of disclosure, and because the claimant had substantiated that he was qualified for the position, the Tribunal found that the claimant was discriminated against both because of age and ethnicity because the employer had not fulfilled its burden of proof.

**Name of the court:** Equality and Anti-discrimination Tribunal

**Date of decision:** 26 July 2016

**Name of the parties:** not available

**Reference number:** Case numbers LDN-2015-50, LDN-2015-50-1 and LDN-2015-50-2

**Address of the webpage:** *(in Norwegian only)*

<http://www.diskrimineringsnemnda.no/nb/innhold/side/vedtak>

**Brief summary:** In 2016, the Tribunal handled a complex case, which it split into three statements/ decisions based on the same case with the same parties to the case. A and B are both men, and implemented a wedding-like ceremony in X country in 2011. It is not possible in that country for same-sex couples to enter into legal marriage or partnership. B moved to Y country in August 2011. A arrived in Norway as a refugee, alone, in 2012. B applied for family reunion based on marriage to A (reference person) in January 2013. Family reunion was denied, as he was neither married to, nor had been cohabitating for two years with the reference person. The Norwegian legislation is neutral regarding sexual orientation, as the legislation in principle gives same rights to same-sex and opposite-sex couples. The claimant argued before the Ombud and Tribunal that he was subject to discrimination in breach of the SOA, as he, as a refugee with a same-sex partner, was treated differently to refugees with opposite-sex partners. This was because opposite-sex partners may qualify for family reunion without a requirement to subsistence/ maintenance-requirements, whereas he, in order to be granted family reunion, must apply for an engagement visa under the immigration regulations, subject to subsistence/ maintenance requirements.

The Tribunal handled the issue of his individual case in its case LDN-2015-51. As it would be possible for the couple to marry, and as such be eligible for family reunion in the same manner as opposite-sex-partners, the Tribunal found that they had not been discriminated against. However, the Tribunal specified that:

‘The Immigration Appeals Board has until now not processed applications where it has been necessary to evaluate whether same-sex couples get exemptions from the subsistence or four-year requirement in the law. The Tribunal assumes that it will be possible for same-sex couples on an equal basis with opposite-sex partners, to get exemptions for the maintenance/subsistence requirement. If it turns out that it is not possible for same-sex couples to obtain exemptions from the subsistence-requirement, the practice of the Immigration Regulations could be contrary to the prohibition of discrimination on grounds of sexual orientation. The threshold for getting exemptions from subsistence should not be so high that it establishes a discriminatory practice.’

The Tribunal then assessed whether the regulations concerning immigration/ family reunion has a discriminatory effect, so that same-sex couples are placed in a worse situation than opposite-sex-couples, as per the SOA, section 5. Before the Tribunal discussed the merits, it first assessed whether it had a mandate to handle the case (see case LDN-2015-50-1). The parts of the case that related to the Immigration Act were rejected, as the Tribunal found that it would not be in line with the Norwegian constitutional system if the Tribunal were to criticise the legislature. The Tribunal found that the part of the case relating to the regulations under the Immigration Act was admissible, as it is within the mandate of the Tribunal to give a statement (not a decision) on whether or not regulations are in line with the protection afforded in the SOA. In its subsequent statement, the Tribunal discussed whether the current regulations linked to subsistence/ maintenance of the family reunion requirements were discriminatory. It concluded that they were not, as there is a possibility for exceptions from this rule that needs to be applied, and referred to the same statement as quoted above.

**Name of the court:** Equality and Anti-Discrimination Tribunal

**Date of decision:** 15 June 2016

**Name of the parties:** not available

**Reference number:** Case No 40-2/2014/ LDN-2014-40-2

**Address of the webpage:** *(in Norwegian only)*

<http://www.diskrimineringsnemnda.no/nb/innhold/side/vedtak>



**Brief summary:** The case is a follow-up to the Tribunal's case number 2014-40 in which the Tribunal ordered that city buses should be subject to 'universal design', that is, designed and built in a disability-accessible way. The order of 15 January 2015 was that the buses should be equipped with a system inside the bus that announces the upcoming stops, and that the stops be equipped with an outdoor system that announces where the bus is headed. In its decision of 15 June 2016, the Tribunal gave the bus company a new deadline for implementing the 2015 order until 28 February 2017, and ordered a daily fine of NOK 5 000 (approximately EUR 550) per business day, including Saturdays, that the order is not complied with.

**Name of the court:** Equality and Anti-Discrimination Tribunal

**Date of decision:** 2 May 2016

**Name of the parties:** not available

**Reference number:** Case No 48/2015/ LDN-2015-48

**Address of the webpage:** *(in Norwegian only)*

<http://www.diskrimineringsnemnda.no/nb/innhold/side/vedtak>

**Brief summary:** A job-seeker was called for an interview and after the first interview received an e-mail from the interview panel inviting her for a second round of interviews. She had neither in her application, nor in the first interview, informed the company that she had reduced hearing ability. Her reduced hearing became an item in a conversation between the potential employer and one of her referees. Thus, the planned second interview with her was cancelled after this conversation. The Tribunal found that the lack of discussing an appropriate individual accommodation with and for the job-seeker represented a violation of the employer's duty to provide individual accommodation in line with the AAA, section 26. The job-seeker was not invited for a second interview nor contacted in any other way to clarify any needs. The employer's assumptions about the job-seekers restrictions were the reason why she did not get the opportunity to present herself during a second interview. The Tribunal noted that such a situation is precisely within the core area of the protection of persons with disabilities in a job process. The purpose of this duty is not to give special rights, but to ensure equal opportunities for job-seekers with disabilities.

**Name of the court:** Equality and Anti-Discrimination Tribunal

**Date of decision:** 17 March 2016

**Name of the parties:** not available

**Reference number:** Case No 35/2015/ LDN-2015-35

**Address of the webpage:** *(in Norwegian only)*

<http://www.diskrimineringsnemnda.no/nb/innhold/side/vedtak>

**Brief summary:** The Tribunal found that the claimant was discriminated against both because of age and ethnicity as he was passed over for a position as a craftsman in glass art. The claimant fulfilled the skill-set as asked in the vacancy announcement. He asked the employer for information about the other applicants and their qualifications, but did not receive a reply. The employer did not respond to inquiries from either the Ombud or from the Tribunal. Based on the rules on the burden of proof, both the Ombud and the Tribunal found that the claimant had been discriminated against, and that his right to receive information according to the WEA, section 13-7 and ADA, section 18 had been breached. As neither the Ombud nor the Tribunal has a right to award compensation, it is unclear whether the case had results for the claimant other than just ascertaining the legislative breaches.

**Name of the court:** Equality and Anti-Discrimination Tribunal

**Date of decision:** 12 January 2016

**Name of the parties:** not available

**Reference number:** Case No 18/2015/ LDN-2015-18

**Address of the webpage:** *(In Norwegian only)*

<http://www.diskrimineringsnemnda.no/nb/innhold/side/vedtak>

**Brief summary:** A fixed 50 % position as Associate Professor / Senior Lecturer / Assistant Professor at the Institute for Occupational Therapy, Physiotherapy and Radiography in its department of health and social care was announced in a college. The two applicants to the position were A male (born in 1954) and B female (born in 1981). B was hired. A claimed to have been bypassed because of his age and gender. The college claimed that both candidates were formally qualified, but that the personal abilities of the woman made her the preferred candidate. The college did not in its recommendation for the position state in what way A was less personally suitable than the chosen candidate. As the college did not substantiate through sufficient documentation why the much younger candidate was chosen before the older, the college did not fulfil its burden of proof regarding discrimination because of age, and the Tribunal found that A had been discriminated against as per the WEA, section 13-1. The Tribunal did not find any facts that gave reason to believe that the gender of the candidates were a theme in the hiring process, and did not find a breach of the GEA.

### Select cases from the Equality and Anti-Discrimination Ombud

**Name of the court:** Equality and Anti-Discrimination Ombud

**Date of decision:** 1 December 2016

**Name of the parties:** not available

**Reference number:** Case No 16/2271

**Address of the webpage:** *(in Norwegian only)*

<http://www.ldo.no/nyheiter-og-fag/klagesaker/religion/hijab-nekt-er-lovstridig/>

**Brief summary:** A board in a private nursing home for the elderly decided in September 2016 that religious clothing, including the hijab, should be prohibited among the employees, when establishing new clothing regulations. One of the employees, who had worked in the nursing home for the past six years, was thus prohibited from wearing her hijab at work. The Ombud assessed the case based on the prohibition against indirect discrimination because of religion, and found a possible exception not justified. The board of the nursing home argued that the use of religious clothing that is unfamiliar to the patients might create insecurity and confusion among dementia patients. As the board did not provide information that might substantiate this assertion, nor provide documentation that the use of hijab hinders the employees in carrying out their work in an effective manner, the Ombud thus found the decision of the board unlawful as per the ADA, section 6(2)2.

There was one case brought by Roma and Travellers in 2016, to the author's knowledge:

**Name of the court:** Equality and Anti-Discrimination Ombud

**Date of decision:** 22 March 2016

**Name of the parties:** not available

**Reference number:** Case No 15/1512

**Address of the webpage:** *(in Norwegian only)*

<http://www.ldo.no/nyheiter-og-fag/klagesaker/etnisitet/151512-campingplass-eier-brot-diskrimineringsloven/>

**Brief summary:** A camping site in Oslo organised under the Norwegian Automobile Association (NAF) had during summer 2015 put up a note in its reception stating 'We are fully booked if gypsies ask'. NAF explained to the Ombud that the note was put up during the Norway Cup, which is an annual large soccer tournament for children in Oslo, and that the camping site gave priority to guests participating in the tournament. In relation to this, long-term guests at the campsite are asked to move to another campsite outside Oslo for this particular week. NAF explained that normally it is only guests with a Roma background that do not respect this approach, and try to move from one site to the other internally in Oslo, and not out of Oslo. One of the campsites has previously had bad experiences with guests from a Roma background, including threats to employees, internal fighting, late payments, driving inside the campsite and unattended small children etc. NAF stated that the content of the note was incorrect, and that the note, set up by a summer substitute,

did not reflect NAF's policies. The Ombud found the note to be direct discrimination in violation of the ADA, section 6, as there was no justification to exclude a whole group based on negative experiences with individuals of that group.



## ANNEX 1: TABLE OF KEY NATIONAL ANTI-DISCRIMINATION LEGISLATION

The **main transposition and anti-discrimination legislation** at both federal and federated/provincial level.

**Country:** Norway  
**Date:** 1 January 2017

<b>Title of legislation (including amending legislation)</b>	Title of the Law: The Anti-Discrimination Act on Prohibition of discrimination based on ethnicity, religion etc ( <i>Diskrimineringsloven</i> ) Abbreviation: ADA Date of adoption: 21 June 2013 No 60 Latest amendments: 1 October 2015 Entry into force: 1 January 2014 Web link: <a href="http://www.ub.uio.no/ujur/ulovdata/lov-20130621-060-eng.pdf">http://www.ub.uio.no/ujur/ulovdata/lov-20130621-060-eng.pdf</a> Grounds covered: ethnicity, religion or belief.
	Civil law
	Material scope: Cover all areas except personal and family affairs
	Principal content: prohibition of direct and indirect discrimination, harassment, instruction to discriminate within select grounds.
<b>Title of legislation (including amending legislation)</b>	Title of the Law: The Working Environment Act (WEA) on Working environment, working hours and employment protection, etc. ( <i>Arbeidsmiljøloven</i> ), Chapter 13 Abbreviation: WEA Date of adoption: 17 June 2005 Latest amendments: in force 1 January 2014 for Chapter 13 Entry into force: 1 January 2006 Web link: <a href="http://www.arbeidstilsynet.no/binfil/download2.php?tid=92156">http://www.arbeidstilsynet.no/binfil/download2.php?tid=92156</a> (English version as per December 2012, not updated) Grounds protected: Age (covers also part-time/ temporary work, political affiliation and membership in trade unions)
	Civil law
	Material scope: Public and private employment.
	Principal content: prohibition of direct and indirect discrimination, harassment, instruction to discriminate within select grounds.
<b>Title of legislation (including amending legislation)</b>	Title of the Law: The Anti-Discrimination and Accessibility Act on Prohibition against discrimination on the basis of disability ( <i>Tilgjengelighetsloven</i> ) Abbreviation: AAA Date of adoption: 21 June 2013 No. 61 Latest amendments: - Entry into force: 1 January 2014 Web link: <a href="http://www.ub.uio.no/ujur/ulovdata/lov-20130621-061-eng.pdf">http://www.ub.uio.no/ujur/ulovdata/lov-20130621-061-eng.pdf</a> Grounds protected: Disability
	Civil law
	Material scope: Cover all areas except personal and family affairs
	Principal content: prohibition of direct and indirect discrimination, harassment, instruction to discriminate within select grounds.
	Principal content: prohibition of direct and indirect discrimination, harassment, instruction to discriminate within select grounds.
<b>Title of legislation</b>	Title of the Law: Sexual Orientation Anti-Discrimination Act Abbreviation: SOA Date of adoption: 21 June 2013 No 59

<b>(including amending legislation)</b>	Latest amendments: - Entry into force: 1 January 2014 Web link: <a href="http://www.ub.uio.no/ujur/ulovdata/lov-20130621-058-eng.pdf">http://www.ub.uio.no/ujur/ulovdata/lov-20130621-058-eng.pdf</a> Grounds protected: Sexual orientation
	Civil law
	Material scope: Cover all areas except personal and family affairs
	Principal content: prohibition of direct and indirect discrimination, harassment, instruction to discriminate within select grounds.
<b>Title of legislation (including amending legislation)</b>	Title of the law: Act on the Equality and Anti-Discrimination Ombud and the Equality and Anti-Discrimination Tribunal Abbreviation: AOT Date of adoption: 10 June 2005 No 40 Latest amendments: 19 June 2015 Entry into force: 1 January 2006 Web link: <a href="https://www.regjeringen.no/en/dokumenter/The-Act-on-the-Equality-and-Anti-Discrim/id451952/">https://www.regjeringen.no/en/dokumenter/The-Act-on-the-Equality-and-Anti-Discrim/id451952/</a> (English version as per 2007) Grounds covered: -
	Civil/administrative law
	Material scope: Rules on the organisation and activities of the Equality and Anti-Discrimination Ombud and the Equality and Anti-Discrimination Tribunal
	Principal content: Creation of a specialised body
<b>Title of legislation (including amending legislation)</b>	Title of the law: Act relating to the strengthening of the status of human rights in Norwegian law (The Human Rights Act) Abbreviation: HRA Date of adoption: 21 May 1999 No. 30 Latest amendments: 9 May 2014 No. 9 Entry into force: 21 May 1999 Web link: <a href="http://www.ub.uio.no/ujur/ulovdata/lov-19990521-030-eng.pdf">http://www.ub.uio.no/ujur/ulovdata/lov-19990521-030-eng.pdf</a> Grounds covered: -
	Civil law
	Material scope: Incorporates select human rights instrument into Norwegian law
	Principal content: Strengthening the status of human rights

## ANNEX 2: TABLE OF INTERNATIONAL INSTRUMENTS

Country: Norway  
Date: 1 January 2017

Instrument	Date of signature (if not signed please indicate) Dd/mm/yyyy	Date of ratification (if not ratified please indicate) Dd/mm/yyyy	Derogations / reservations relevant to equality and non-discrimination	Right of individual petition accepted?	Can this instrument be directly relied upon in domestic courts by individuals?
European Convention on Human Rights (ECHR)	04.11.1950	15.01.1952	No	Yes	Yes, through Human Rights Act
Protocol 12, ECHR	Not signed	Not ratified	N/A	N/A	N/A
Revised European Social Charter	Yes	07.05.2001	Has accepted 80 of the revised charter's 98 paragraphs	Collective complaints protocol ratifies 20.03.1997	No
International Covenant on Civil and Political Rights	20.03.1968	13.09.1972	No	Yes	Yes, through Human Rights Act
Framework Convention for the Protection of National Minorities	Yes	17.09.1999	No	N/A	No
International Covenant on Economic, Social and Cultural Rights	20.03.1968	13.09.1972	No	No	Yes, through Human Rights Act
Convention on the Elimination of All Forms of Racial Discrimination	21.11.1969	06.08.1970	No	No	Yes, through the Anti-Discrimination Act
Convention on the Elimination of Discrimination	17.07.1980	21.05.1981	No	Yes	Yes, directly through Human Rights Act

<b>Instrument</b>	<b>Date of signature (if not signed please indicate) Dd/mm/yyyy</b>	<b>Date of ratification (if not ratified please indicate) Dd/mm/yyyy</b>	<b>Derogations / reservations relevant to equality and non-discrimination</b>	<b>Right of individual petition accepted?</b>	<b>Can this instrument be directly relied upon in domestic courts by individuals?</b>
Convention Against Women					
ILO Convention No. 111 on Discrimination	Yes	24.09.1959	No	N/a	No
Convention on the Rights of the Child	26.01.1990	08.01.1991	No	Yes	Yes, through Human Rights Act
Convention on the Rights of Persons with Disabilities	30.03.2007	01.07.2013	No derogation or reservation made, but 'interpretative declarations' to articles 12 and 14 on fully supported decision-making arrangements and compulsory treatment are made by the Norwegian government (similar to those of Australia) which are especially relevant to people with psycho-social disabilities	No	No

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