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Country report

Gender equality

How are EU rules transposed into
national law?

Norway

Marte Bauge

Reporting period 1 January 2018 – 31 December 2018

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1 Introduction¹

1.1 Basic structure of the national legal system

Norway is based on a civil law system, where the Constitution tops the hierarchy and national laws and regulations define the system in more detail. The interpretation of laws is based on both preparatory works and interpretations by the courts. The court system is based on three levels: the municipal courts, the courts of appeal and the Supreme Court. In addition, there is the Court of Labour Disputes (Labour Court) which interprets collective agreements. Judgments of the Labour Court may be appealed to the Supreme Court.

Discrimination cases may be brought before the ordinary courts. However, the key administrative procedure to handle discrimination cases is to bring them before the Equality and Anti-Discrimination Ombud (hereafter the Equality Ombud) for advice² and the Equality and Anti-Discrimination Tribunal³ (hereinafter the Equality Tribunal) for decisions regarding complaints.

The Labour Court is also of some relevance to anti-discrimination law. It 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.⁴

The Ministry of Children and Equality has usually been responsible for dealing with anti-discrimination in relation to the grounds covered by the Equality and Anti-Discrimination Act (GEADA), but late in 2018 equality and anti-discrimination issues were moved to the Ministry for Culture, with effect from 2019. This is due to the Christian Democrats entering the Government and obtaining the Minister for Children and Family Affairs. The Ministry has delegated the Norwegian Directorate for Children, Youth and Family Affairs as also being responsible for equality and non-discrimination issues.⁵

The Ministry for Labour and Social Affairs is responsible for dealing with the anti-discrimination provisions of the Working Environment Act (WEA) (*Lov om arbeidsmiljø, arbeidstid og stillingsvern. mv.* (LOV-2005-06-17-62)).

1.2 List of main legislation transposing and implementing the directives

Several attempts have been made to harmonise the anti-discrimination legislation in Norway. The existing acts on discrimination were revised and aligned on 21 June 2013 upon the enactment of 'Lov om forbud mot diskriminering på grunn av seksuell orientering, kjønnsidentitet og kjønnsuttrykk'. Sexual Orientation Anti-Discrimination Act (SOA) covering sexual orientation, gender identity and gender expression, which came into force as of 1 January 2014.⁶ These four acts were almost identical and were in force until 31 December 2017. These key pieces of anti-discrimination legislation consisted of the Gender Equality Act (GEA),⁷ the Anti-Discrimination Act (ADA) covering ethnicity, religion

¹ This report was written on the basis of the Gender Equality country report o 2018 written by Helga Aune.

² See <http://www.ldo.no/en/>.

³ See <http://www.diskrimineringsnemnda.no/en/innhold/side/forside>.

⁴ See <http://www.arbeidsretten.no/engelsk.php>.

⁵ http://www.bufdir.no/en/English_start_page/.

⁶ Norway, 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>.

⁷ Norway, Gender Equality Act (GEA) of 21 June 2013 No 59, in force as of 1 January 2014, available 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 versions.

and belief⁸ the Anti-discrimination and Accessibility Act (AAA) covering disability,⁹ and the Working Environment Act (WEA) covering age, political views, membership of trade unions, part-time and temporary work,¹⁰ as well as specialised legislation (such as the Seamen's Act and housing acts).

In 2018 the GEA, AAA, ADA and SOA were replaced by a new comprehensive act on Gender Equality and Anti-Discrimination Act (GEADA) of 16 June 2017 no 51, in force as of 1 January 2018.¹¹ The protected grounds in the GEADA are: gender, pregnancy, leave in connection with childbirth or adoption, care responsibilities, ethnicity, religion, belief, disability, sexual orientation, gender identity, gender expression, age or combinations of these factors. The new act thus also covers protection against age discrimination outside working life, whereas the protection against age discrimination within working life continues to be covered by the WEA.

The GEADA has no age limits and applies to all areas of society, both in the labour market as well as in all other areas of society.

In addition, the Working Environment Act (WEA) (*Lov om arbeidsmiljø, arbeidstid og stillingsvern. mv.* (LOV-2005-06-17-62) specifically refers to the GEADA in its chapter 13. All major Collective Agreements contain gender equality and non-discrimination clauses.

The relevant EU directives have been transposed in national legislation, but the actual text of the directives is not included in the text of the law as such. All the Directives in the area of gender equality are implemented and are assumed to be covered by the GEADA, according to statements from the Government Ministries following the decisions by the EEA Committee. After the Directives are approved by the EFTA Committee, Norway will provide an evaluation whereupon it will state that the relevant national legislation either already meets the requirements or that amendments will be required.

Pregnancy, maternity and leave related to work-life balance for workers (Directive 92/85/EEC, relevant provisions of the Directives 2006/54/EC and 2010/18/EU are covered by the provisions in the GEADA, WEA and the National Insurance Act (NIA).

Article 157 TFEU and Recast Directive 2006/54/EC are mainly covered by the provisions in the GEADA and WEA.

Chapter 2 of Directive 2006/54/EC is covered by the GEADA and the provisions in the NIA and WEA. Directive 79/7/EEC is also covered by the GEADA, but mostly by the provisions in the NIA and WEA. Furthermore, Directive 2010/41/EU and some relevant provisions of the Recast Directive are also covered by provisions in the GEADA and WEA.

Goods and services (Directive 2004/113/EC) are covered by the provisions in the GEADA.

⁸ Norway, Anti-Discrimination Act (ADA) of 21 June 2013 No 60, in force as of 1 January 2014, available at: <http://www.ub.uio.no/ujur/ulovdata/lov-20130621-060-eng.pdf>. 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 versions.

⁹ Norway, Anti-Discrimination and Accessibility Act (AAA) of 21 June 2013 No 61, in force as of 1 January 2014, available at: <http://www.ub.uio.no/ujur/ulovdata/lov-20130621-061-eng.pdf>. 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.

¹⁰ Norway, Working Environment Act (WEA) of 17 June 2005 No 62, last amended by law of 21 June 2013 No 61, in force as of 1 January 2014. Recent amendments are not included in the translation at: <https://www.arbeidstilsynet.no/>.

¹¹ See LOV-2017-06-16-51 *Lov om likestilling og forbud mot diskriminering* (Equality and Anti-Discrimination Act) <https://lovdata.no/dokument/NLE/lov/2017-06-16-51> for an English version of the act.

1.3 Sources of law

The main sources when it comes to gender equality law in Norway are international treaties, such as the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), and national legislation, such as the GEADA and the WEA. EU law also plays an important role when it comes to interpreting the national legislation.

Case-law from the Equality Ombud and the Equality Tribunal is also an important source when it comes to gender equality law in Norway. There is now only one Equality Tribunal that treats cases regarding discrimination on all grounds protected in the GEADA. Opinions given by the Equality Tribunal of course play an important role because they are binding.

Authoritative scholarly interpretations are also considered a source of law in Norway, but these kinds of interpretations are not considered the most important sources in this field.

2 General legal framework

2.1 Constitution

2.1.1 Constitutional ban on sex discrimination

Article 98 of Norway's Constitution prohibits sex discrimination. This article is general in its wording and is assumed to cover sex discrimination according to the preparatory documents to the amendments to the Constitution. Article 98 was new to the Constitution from 27 May 2014 and has the following wording:

'All persons are equal under the law. No person must be subject to unjust or unreasonable differential treatment.'¹²

Norway has ratified most of the major international instruments combating discrimination, with the 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'.¹³

The Human Rights Act¹⁴ 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. The Equality Ombud is responsible for the supervision of the national implementation of 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 against both State actors and private actors.

2.1.2 Other constitutional protection of equality between men and women

The Norwegian Constitution does not contain other articles pertaining to equality between men and women besides Article 98.

2.2 Equal treatment legislation

Norway has one specific piece of equal treatment legislation that prohibits sex discrimination, the Gender Equality and Anti-Discrimination Act (GEADA).

In addition to sex discrimination, Article 6 of the GEADA also explicitly covers the following discrimination grounds:

- pregnancy, leave in connection with childbirth or adoption;
- care responsibilities;
- ethnicity;
- religion, belief;

¹² Norway, Constitution, available (in Norwegian) at: <https://lovdata.no/dokument/NL/lov/1814-05-17?q=Grunnloven>.

¹³ See <https://www.stortinget.no/globalassets/pdf/english/constitutionenglish.pdf>. The preparatory works to the constitutional clause: Human Rights Committee (2011) *Dokument 16 (2011-2012) Rapport til Stortingets presidentskap fra Menneskerettighetsutvalget om menneskerettigheter i Grunnloven* (Report on human rights in the Constitution from the Human Rights Committee to the Storting (Parliament), Chapter 6, see <http://www.stortinget.no/Global/pdf/Dokumentserien/2011-2012/dok16-201112.pdf>.

¹⁴ Norway, Act Relating to the Status of Human Rights in Norwegian Law of 21 May 1999 no 30 (*Menneskerettsloven*).

- disability;
- sexual orientation;
- gender identity and gender expression;
- age;
- or a combination of these factors.

In addition to the discrimination Act, the Working Environment Act (WEA) Chapter 13 covers age, political views and union membership, (*lov* no. 62, 2005 (2004)).¹⁵

¹⁵ Norway, Act relating to working environment, working hours and employment protection, etc. (Working Environment Act) (*Lov om arbeidsmiljø, arbeidstid og stillingsvern mv. (arbeidsmiljøloven)*), LOV-2005-06-17-62, English translation available at: <https://lovdata.no/dokument/NLE/lov/2005-06-17-62>.

3 Implementation of central concepts

3.1 General (legal) context

3.1.1 Surveys/reports on the definition, implementation and limits of central concepts of gender equality law

Several reports have been published in the last five years that provide insights into legal definitions, implementation and limits in Norway when it comes to central concepts of gender equality law.

Sex/transgender

Transgender, sex and gender identity are explicitly listed as discrimination grounds in the GEADA, Article 6. Sex characteristics are not explicitly covered in the GEADA. However, according to the GEADA preparatory work,¹⁶ sex characteristics /intersex are said to be covered by the law through the grounds of gender identity and gender expression or sex (depending on the concrete case) in Article 6 and Article 2.

In the report entitled *Law and intersex in Norway; Challenges and opportunities* from 2018¹⁷ written by Fae Garland, Nina Lem Samuelsen and Mitchell Travis on behalf of the Division for Equality and Inclusion, the Norwegian Directorate for Children, Youth and Family Affairs (Bufdir), the authors conclude that Norway's legal and political framework does not offer real, substantive protections for this group of individuals. Consequently, according to the authors, intersex people do not have sufficient protection against discrimination and hate crime and, most pressingly, are vulnerable to non-therapeutic medical interventions happening before they are able to give their informed consent.

The authors of the report suggest that a model of best practice in this area contains a couple of main elements, and that states should seek to implement the following recommendations in order to better protect intersex people in the manner best suited to their jurisdiction:

1. Defer non-therapeutic medical interventions on intersex children until the individual concerned is old enough to participate in the decision.
2. Meaningful incorporation of intersex within anti-discrimination, hate crime and hate speech legislation by including references to 'sex characteristics'.

The authors' action plan contains a number of specific actions necessary to provide intersex people with sufficient legal protections. This included broader recommendations to legally defer non-therapeutic interventions on children before the child can participate in the decision. This also applies to non-therapeutic medical interventions on intersex children, (preferring the terminology 'treatment that can be deferred' instead of 'medically unnecessary'). In addition, broader amendments to medical and ethical guidelines within Norway are suggested, as well as more specific amendments to include 'sex characteristics' (*kjønnskarakteristika*) as a protected ground within Norway's anti-discrimination legislation. This also applies to hate speech legislation and crimes that could be categorised as 'hate crimes'. These reforms are substantive, but the authors state that they believe the reforms are of fundamental importance to redressing the issues faced by intersex people.

¹⁶ Preparatory works for the Gender Equality and Anti-Discrimination Act, available at: <https://www.regjeringen.no/no/dokumenter/prop.-81-l-20162017/id2547420/>.

¹⁷ Fae Garland, Nina Lem Samuelsen and Mitchell Travis; *Law and Intersex in Norway; Challenges and opportunities*; A report from 2018 commissioned by the Division for Equality and Inclusion, The Norwegian Directorate for Children, Youth and Family Affairs <https://bufdir.no/globalassets/global/law-and-intersex---final.pdf>.

The authors of the report also point out that meaningful reform within Norway requires effective communication between the State, intersex people and the medical profession.

A recent report from Department for Social Research in Norway 2019¹⁸ presents results from a survey of experiences of hate speech by LGBT people and the rest of the population. The report assumes a definition of hate speech as deliberately stigmatising, discriminating, degrading or threatening statements directed at an individual or group based on particular (perceived) group characteristics. The results show that LGBT people, transgender people and other minority groups have been exposed to hate speech to a greater extent than the rest of the population.

Sexual harassment

Several reports have highlighted limitations when it comes to the enforcement of the prohibition on sexual harassment. In its report to the CEDAW committee from 2017¹⁹ the Equality Ombud highlights the fact that many cases of sexual harassment are not reported on. In the report the Equality Ombud also expressed concern about the Government's lack of initiative to establish a low-threshold complaint system in cases of sexual harassment.

In a report from the Norwegian research foundation, FAFO, from 2018²⁰ the authors address how workplace sexual harassment in the Scandinavian hotel industry is understood, dealt with and prevented. The main focus in the report is on how employers, i.e. senior and middle management in the hotel industry, understand sexual harassment and how various cases are dealt with. The interview data in the report show that sexual harassment in this sector in general is a challenging area for the working environment field. Cases of guests perpetrating harassment are viewed as easier to deal with than cases in which co-workers or managers are the perpetrators of harassment. Managers find that such cases are difficult to assess due to a lack of clear definitions of what constitutes sexual harassment and situations that fall into a 'grey area'. The interview data from the three hotels show that sexual harassment cases are addressed at the lowest level of management and that upper-level management is called in when necessary.

In another report, *Seksuell trakassering i arbeidslivet* ('Sexual harassment in working life') by the FAFO, published in 2017,²¹ the authors also investigate the occurrence of sexual harassment in the hotel and restaurant industry in Norway.

The main question in the report focused on the extent to which employees in the hotel/restaurant and healthcare sectors are exposed to sexual harassment at work and how employers follow up such cases. The report is based on findings from an online survey among members of the Norwegian United Federation of Trade Unions (*Fellesforbundet*) in the hotel and restaurant industry and members of the Norwegian Union of Municipal and General Employees (*Fagforbundet*) in the healthcare sector.

In total, 19 % of the respondents reported having been exposed to sexual harassment at work in the course of the last three years. The proportion was somewhat higher in the hotel and restaurant industry, at 21 %, with 18 % in the health and care sector. Members of both unions report having experienced physical, verbal and non-verbal sexual harassment, and a considerable proportion reports that this has happened on more than ten occasions over the last three years.

¹⁸ See <https://samfunnsforskning.brage.unit.no/samfunnsforskning-xmlui/bitstream/handle/11250/2584665/Erfaringer%2bmed%2bhatytringer.pdf?sequence=2&isAllowed=y>.

¹⁹ https://www.ldo.no/globalassets/brosjyrer-handboker-rapporter/rapporter_analyser/rapporter_diverse/cedaw2017.pdf.

²⁰ <https://www.fafo.no/index.php/zoo-publikasjoner/fafo-rapporter/item/seksuell-trakassering-i-hotellbransjen-i-skandinavia>.

²¹ <https://www.fafo.no/images/pub/2017/20617.pdf>.

The report also showed that members of the hotel and restaurant union are exposed to sexual harassment from customers as well as from colleagues and superiors. Members of the healthcare union are primarily exposed to sexual harassment from users and patients, and often underscore that it is a result of the patients' diagnosis or a manifestation of their illness. The proportion who have been exposed to sexual harassment from colleagues is also fairly substantial among members of Fagforbundet, while sexual harassment on the part of superiors occurs rarely. As regards the consequences for the individuals concerned, job dissatisfaction and a desire to quit the job were reported by a significant proportion in both unions. Among members of Fellesforbundet, a relatively significant proportion (16 %) also reported that the harassment had caused them psychological problems.

In both unions the authors found members who report having been absent from work for reasons partly or fully attributable to sexual harassment in their workplace.

Article 13 of the GEADA prohibits sexual harassment and the WEA stipulates clear requirements for the working environment when it comes to the health and safety of employees. Employers are responsible for ensuring an appropriate working environment that helps promote the mental health and welfare of their employees. Employers are obliged to prevent and protect against sexual harassment. Employees for their part have a duty to notify the employer if they become aware of harassment or discrimination in their workplace.

These reports highlight the fact that sexual harassment is a working environment problem that attracts little attention in companies. As regards the employers, they feel relatively confident that employees will report any sexual harassment to which they are exposed but have placed little emphasis on sexual harassment as a separate topic in their own Health, Safety and Environment (HSE) reporting systems. These are management systems that define the principles by which an employer conducts its operations regarding health, safety and the environment. Safety management systems normally have six elements that involve a safety plan, policies, procedures and processes, training and induction, monitoring, supervision and reporting.

The survey among trade union members and the interviews with employers also leave the impression that most of the cases of sexual harassment are reported and a solution attempted to be found at the lowest appropriate level. Few cases are also brought to court as this is expensive and time-consuming for the employee. This clearly limits the prohibition of sexual harassment. The reports also show that several members believed that they would lose their jobs if they reported being exposed to sexual harassment. In especially serious cases, the company health services, the HR department or the safety delegate/trade union representative may be included in the process.

However, the Government has recently proposed to transfer the individual complaint mechanism in cases of sexual harassment from the courts to the Equality Tribunal. This suggestion clearly came as a result of the worldwide '#metoo' movement and the media focus on this subject during the past year.²²

If this change in the Equality and Anti-Discrimination Ombud Act (EAOA) goes through, the Equality Tribunal will be the only administrative complaints mechanism to deal with individual complaints of sexual harassment. However, it is still possible to bring cases on sexual harassment to court, either after the Tribunal has treated the case or without bringing the cases to the Tribunal. In the proposal the Equality Tribunal is given the authority to enforce the ban on sexual harassment and to impose redress on sexual harassment cases in employment. The Equality Tribunal is also given authority to impose compensation for economic losses in cases regarding breaches of the GEADA and the

²² <https://www.aftenposten.no/norge/i/MR78oM/Fremmer-lovendring-i-kjolvannet-av-metoo>.

Working Environment Act and the other acts mentioned in Section 1 of the EAOA.²³

In cases of sexual harassment and where claims for redress have been made, the parties are entitled to oral negotiations.

3.1.2 Other issues

There are no other issues to be reported on.

3.1.3 General overview of national acts

Article 98 of Norway's Constitution prohibits sex discrimination. Besides this, the legal framework on gender equality/sex discrimination is also defined by the GEADA. The GEADA has no age limits and applies to all areas of society, both in the labour market as well as in all other areas of society. In addition, the Working Environment Act (WEA) specifically refers to the GEADA in its Chapter 13. Furthermore, all major collective agreements contain gender equality and non-discrimination clauses.

3.1.4 Political and societal debate and pending legislative proposals

In Norway there are a few pending legislative proposals when it comes to gender equality.

Hate speech based on gender identity is not yet protected in the Norwegian Criminal Code, but the Government is likely to propose it in May 2019.²⁴

3.2 Sex/gender/transgender

3.2.1 Definition of 'gender' and 'sex'

The terms gender/sex are not explicitly defined in national legislation or in case law.

3.2.2 Protection of transgender, intersex and non-binary persons

Non-binary people are not listed as being explicitly protected in the GEADA but are still covered by the act because discrimination on the grounds of gender identity or sexual expression is covered directly in the GEADA (Article 6).

Sex characteristics/intersex does not yet have explicit coverage in the GEADA. However, according to the GEADA preparatory work²⁵ sex characteristics /intersex are said to be covered by the law through the grounds of gender identity and gender expression or sex (depending on the concrete case) in the GEADA Article 6 and Article 2.

Some cases relating to gender identity and gender expression have been rejected or dismissed, many of them on the basis of the recently added justification of being 'clearly not in breach' of Article 1 of the Act. For example, the Equality Tribunal's Case 18/4²⁶ concerned discrimination on grounds of gender identity. The complainant argued that birth certificates containing information on previous names and social security numbers were discriminatory. The same was true of the National Register in relation to the storing of social security numbers and name history. The leader of the Tribunal decided to close the

²³ <https://www.stortinget.no/no/Saker-og-publikasjoner/Vedtak/Beslutninger/Lovvedtak/2018-2019/vedtak-201819-085/>.

²⁴ <https://www.stortinget.no/no/Saker-og-publikasjoner/Publikasjoner/Referater/Stortinget/2017-2018/refs-201718-05-07?m=9>.

²⁵ <https://www.regjeringen.no/no/dokumenter/prop.-81-l-20162017/id2547420/>.

²⁶ Statement from the Equality Tribunal of 29 January 2019, available at: <https://www.diskrimineringsnemnda.no/media/2194/anonymisert-henleggelsesbeslutning.pdf>.

case in accordance with Article 10 of the Discrimination Ombudsman Act, as he found that this was obviously not in conflict with the discrimination regulations.

Another example is the Equality Tribunal Case 19/103²⁷ on gender identity where the complainant alleged that the defendant discriminated against him when he was referred to another healthcare company to receive assisted conception. This case was also closed because the Equality Tribunal's leader concluded that the matter was obviously not in conflict with the discrimination regulations.

However, in 2018 the Equality Tribunal accepted and dealt with a few cases relating to gender identity and gender expression.

In Case 67/2018²⁸ the Equality Tribunal discussed whether a bank violated the prohibition against discrimination and harassment because of gender identity and gender expression in its treatment of a female customer using the bank's telephone customer service. The customer had undergone gender confirmation surgery and the client manager perceived her to be a man because of her voice. The Equality Tribunal did not dismiss the case and concluded that the bank had not discriminated against or harassed the woman on the grounds of gender identity and gender expression.

Case 68/2018²⁹ concerns whether the complainant (B) was harassed on the ground of gender identity/ gender expression in the changing room at a fitness centre. Since the incident took place before the GEADA entered into force, the Equality Tribunal assessed the case according to the law in force at the time on prohibition of discrimination based on sexual orientation, gender identity and gender expression (Act of 21.06.2013). The complainant was born male but identified as female and had also changed their legal gender. Another woman (A) had approached the complainant in the changing room at the fitness centre and told her that she was provoked to see 'a person with a penis in a women's changing room'. When it came to assessing whether harassment had occurred, the Equality Tribunal was divided. The conclusion was that the complainant had not been harassed on the ground of gender identity/gender expression. The Equality Tribunal made a majority finding that the phrase 'she is provoked by seeing a penis in the changing room' is a statement that may seem offensive. The majority of the Equality Tribunal nevertheless found that it was necessary to emphasise the situation in which the statement was given, in which the parties are in an intimate situation in a public changing room. As long as the question of use of changing rooms for transgender people is unresolved, transgender people will have to expect reactions when they use traditionally gendered changing rooms.

A minority of the Equality Tribunal found that the complainant had been harassed and found that it was necessary to assess A's general conduct. They also found that A was aware of the issue of transgender use of gender-segregated changing rooms. She was also aware that B had changed legal gender and that B had had a negative experience at their first meeting in the changing room. A therefore did not need to react again and ask questions about B's use of the women's changing room.

In Case 23/2018 the Equality Tribunal dismissed a case where a health trust had decided not to refer the complainant for gender-confirming treatment at the National Hospital. The Equality Tribunal found that the matter was clearly not contrary to the anti-discrimination acts.

²⁷ Statement from the Equality Tribunal of 30 September 2019, available at: <https://www.diskrimineringsnemnda.no/media/2189/anonymisert-versjon-av-henleggelsesbeslutning.pdf>.

²⁸ <http://www.diskrimineringsnemnda.no/media/2260/67-2018-14-anonymisert-uttalelse.pdf>.

²⁹ <http://www.diskrimineringsnemnda.no/media/2218/68-2018-uttalelse-anonymisert.pdf>.

3.2.3 Specific requirements

There are no specific requirements listed in the GEADA that have to be fulfilled in order for a transgender person to be protected by the act. Protection against discrimination based on gender identity and / or gender expression applies irrespective of diagnosis and surgical treatment, or whether a person has changed legal gender. Moreover, it is not a requirement that the person identifies themselves as being transgender. However, the protection does not include a person's experience of not being male/female where it is not visible to others or is not known or otherwise manifested.³⁰ The grounds of gender identity and gender expressions differ from the other grounds of discrimination, because they are largely based on the individual's subjective experiences of themselves.³¹

3.3 Direct sex discrimination

3.3.1 Explicit prohibition

Sex discrimination is explicitly prohibited in national legislation by Article 7 of the GEADA:

'Direct differential treatment means treatment of a person that is worse than the treatment that is, has been or would have been afforded to other persons in a corresponding situation, on the basis of factors specified in section 6, first paragraph'.

The author of this report finds this definition to comply with the EU definition.

3.3.2 Prohibition of pregnancy and maternity discrimination

Pregnancy and maternity discrimination are both explicitly prohibited discrimination grounds in the legislation. Article 6 of the GEADA refers to pregnancy discrimination:

'Discrimination because of pregnancy and leave in connection with childbirth and care responsibilities is prohibited'.

Discrimination because of pregnancy and leave related to birth or adoption was regarded as gender discrimination according to the former GEA but is now listed as an explicit ground in Article 6 of the GEADA. The prohibition also covers discrimination because of someone's actual, presumed, previous or possible future pregnancy or leave. The prohibition also covers discrimination because of 'association with a person in the aforementioned conditions'.

The provision complies with Article 2(2) (c) of Directive 2006/54/EC. However, there remains one concern as the wording in Article 6 of the GEADA appears to be covered, but on the other hand Norway has still not implemented the Pregnant Workers Directive 92/85/EEC correctly. Women are not guaranteed 14 weeks' maternity leave reserved for themselves. Instead, this leave is blurred within the 'big bag' of parental leave.

Case law on pregnancy and maternity discrimination concerns, for instance, the refusal by employers to hire pregnant workers and issues regarding changes in pregnant workers' working conditions and employment contracts (see more about this in Section 5.2) These cases relating to pregnancy and maternity discrimination are regarded as direct discrimination.³²

³⁰ See the former discrimination Acts preparatory work in Prop. 88 L (2012-2013) s. 119. <https://www.regjeringen.no/no/dokumenter/prop-88-l-20122013/id718741/?ch=1>.

³¹ See the GEADAS preparatory work in Prop. 81 L (2016-2017). <https://www.regjeringen.no/no/dokumenter/prop.-81-l-20162017/id2547420/>.

³² See Equality and Anti-Discrimination Tribunal cases 126/2018 and LDN 2015 62.

3.3.3 Specific difficulties

There are no other specific difficulties in Norway in applying the concept of direct sex discrimination.

3.4 Indirect sex discrimination

3.4.1 Explicit prohibition

Indirect sex discrimination based on gender is explicitly prohibited in Norwegian legislation, according to the GEADA, Article 6 and Article 8.

Indirect discrimination is also defined in the legislation. Article 8 of the GEADA (third sentence) defines indirect discrimination as taking place where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary.

The Norwegian text of the article is not identical to the text of the Directive, but the content of the exemption is the same as in the EU Directive. The Norwegian Supreme Court has in several cases stated that it will interpret the law in line with the EU directives as interpreted by the ECJ.³³

3.4.2 Statistical evidence

In Norway, there is legislation regulating the collection of personal data. Statistical evidence is permitted by national law in order to establish indirect discrimination.

Statistical evidence is permitted in courts by national law in order to establish indirect discrimination. 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 court, see the Dispute Act (DA),³⁴ chapter 21, for further details. Chapter 25 of the DA also allows for expert witnesses, i.e. 'an expert assessment of factual issues in the case', for which statistical evidence is particularly relevant.

National law permits the use of statistical evidence to establish indirect discrimination, however, it is not necessary to prove whether or not indirect discrimination has happened, as the assessment that has to be made according to national legislation is whether or not an action or failure to act has had a negative result for the individual or group. The use of statistical evidence is, in fact, often a practical necessity, as the prohibition of 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 in the same way as all other forms of evidence.

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

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 the ordinary courts.

³³ See, for instance Decision from the Norwegian Supreme court of 2012-02.14 Rt 2012-219 *Helikopterpilotes*. This is a case with similarities to that of C-447/09 *Prigge* with regard to age discrimination.

³⁴ Official translation available at: <http://www.ub.uio.no/ujur/ulovdata/lov-20050617-090-eng.pdf>.

There is no current debate on ethical or methodology issues regarding 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 been no discussion about European strategic litigation issues.

The case law as yet in this area is sparse. There are examples where statistical data were used in a Supreme Court case on age and retirement,³⁵ as well as on gender and work-related pensions.³⁶ The significance attributed to this data by the Supreme Court in its judgment was minimal.

3.4.3 Application of the objective justification test

There is little case law from the Norwegian courts in general and especially on indirect discrimination regarding the former Gender Equality Act (GEA) and the GEADA. However, when used, the courts do apply the justification test correctly.

As of 1 January 2018, the justification for indirect discrimination is found in the GEADA (Article 9, first paragraph). The new wording of Article 9 on lawful differential treatment is similar to the previous texts, and is as follows:

'Differential treatment does not breach the prohibition in Article 6 if it: a) has an objective purpose, b) is necessary to achieve the purpose, and c) does not have a disproportionate negative impact on the person or persons subject to the differential treatment.'

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 Article 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.

Legitimate aims, as accepted by the 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 former laws ADA, AAA and SOA state that the possibility for differential treatment in working life is in particular narrow and limited.³⁷ Nothing in the GEADA or preparatory works changes this, on the contrary they state that regarding the definitions of direct and indirect discrimination there are no changes in the way the law should be understood.³⁸

³⁵ Supreme Court judgment of 29 June 2011 (Rt-2011-964 *Gjensidige*).

³⁶ Supreme Court judgment of 27 November 2003 (Rt-2003-1657 *Braathens*).

³⁷ See Proposal to Parliament; Prop. 88 L (2012-2013), p. 87.

³⁸ See Proposal to Parliament 81 L (2016/2017), Chapter 12.9.1.

The test used to justify indirect discrimination is derived from the *Bilka* case,³⁹ 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.

In its judgments the Labour Court has traditionally rarely used the GEA and protection against indirect sex discrimination. Yet the employees' union still argues its case both on the basis of protection against indirect sex discrimination (GEA) and according to traditional contract interpretation (i.e. what the parties have good reason to believe is the correct interpretation based on the evidence in the case).

One example is a case from the Labour Court⁴⁰ where the parties disagreed on whether part-time employees should be promoted at the same time as employees working full-time. The wording of the provisions did not give clear indications but was interpreted in the context of the development process of the collective agreements and other provisions. On this basis, the right to promotion was given at the same time for part-time employees as employees working full-time. One judge had a different view on the question of interpretation. According to the majority decision of the Court, it was not necessary to decide whether the unequal treatment of part-time and full-time employees was necessary, and not disproportionate, in order to achieve a legitimate aim. The Court ruled that it was also unnecessary to decide whether it was indirect discrimination in violation of Article 3, second paragraph, second sentence, of the Equality Act and the nature of the EEA Agreement.

However, in the majority of cases the Court has issued a decision based on the facts and a reasonable interpretation of the agreement, reaching the same result as the proper use of indirect sex discrimination legislation would have provided.

3.4.4 Specific difficulties

The relatively low number of cases on gender equality and indirect discrimination may be explained by a variety of reasons, but one explanation may be that not many lawyers are familiar with the discrimination legislation, especially when it comes to indirect discrimination. Discrimination law is not part of the compulsory curriculum in law schools.

Protection from discrimination against part-time workers (the Part-Time Work Directive) seems to be efficient. However, protection against indirect sex discrimination in relation to part-time work is strong on paper but weak in practice. This is a serious point, as gender equality legislation is the only legislation addressing the structural level that recreates and strengthens the gender-stereotypical patterns in society. The author considers the following to be possible solutions to this problem: 1) establishing a connection between the WEA and the GEADA to ensure a gender perspective in employment law, which is segregated from gender equality concerns, and 2) strengthening the legislation on the activity and reporting duty regarding gender equality at the company level.⁴¹

3.5 Multiple discrimination and intersectional discrimination⁴²

3.5.1 Definition and explicit prohibition

As of 1 January 2018, multiple discrimination is explicitly covered in the GEADA and refers to any combination of the protected grounds covered by Article 6 of the GEADA:

³⁹ See CJEU case number C-170/84.

⁴⁰ See case from the Norwegian Labour Court ARD-1997-253.

⁴¹ See Aune, H. (2018) *Country report gender equality. Norway 2018*.

⁴² For more information, see Fredman, S. (2016) *Intersectional discrimination in EU gender equality and non-discrimination law*, European network of legal experts in gender equality and non-discrimination, available at: <https://www.equalitylaw.eu/downloads/3850-intersectional-discrimination-in-eu-gender-equality-and-non-discrimination-law-pdf-731-kb>.

'Discrimination on the basis of gender, pregnancy, leave in connection with childbirth or adoption, care responsibilities, ethnicity, religion, belief, disability, sexual orientation, gender identity, gender expression, age or combinations of these factors is prohibited.'

3.5.2 Case law and judicial recognition

There are a few older cases addressing multiple discrimination in Norway. In the *Opera Hotel* case (Tribunal Case 1/2008), two women had been denied the right to book a room in a hotel.⁴³ The Equality Tribunal found that the women had both been discriminated against because of their sex as well as their ethnic background and therefore both Section 3 of the GEA and Section 4 of the Discrimination Act had been violated. As well as recognising that both grounds had been violated, the Equality Tribunal also recognised the existence of multiple discrimination as such. The Equality Tribunal cannot grant compensation and consequently no compensation was awarded. This case reveals that the equality bodies are well aware that in some cases more than one ground may exist in relation to the same case. So far, this has not resulted in any additional compensation.

The Equality Tribunal's decision in its Case 44/2009 of 12 March 2010, which was a follow-up to Case 10/2006, is an example of multiple discrimination. In the 2006 case, a position at a dry-cleaners in Oslo was advertised in the Norwegian national newspaper, *Aftenposten*, stating: 'Mature female aged 30-50 years is encouraged to apply for the vacancy in our Dry-Cleaners at Røa'. Both the Equality Ombud and the Equality Tribunal found the advertisement to be a breach of equality legislation on the grounds of age and gender. As the company had used a similar advertisement previously, and the firm is a large, professional employer with 17 branch offices in the Oslo area, the Equality Tribunal ordered that similar advertisements should be stopped. The Equality Tribunal issued an order with a specific time limit for compliance, to ensure that a similar advertisement would not be used again. Thereafter the Equality Tribunal received a notice from the firm confirming that the advertisement would not be used again.

In the most recent case, the dry-cleaner's advertisement in 2009 was for a 'mature woman'. The case was brought to the Equality Tribunal by the Equality Ombud on her own initiative, asking whether or not the current advertisement was a breach of the 2006 order from the Equality Tribunal. The Equality Tribunal also discussed whether a breach of the order should result in a fine in accordance with Article 13 of the Anti-Discrimination Ombud Act or another form of reaction. The Equality Tribunal again ordered that the advertisement be stopped and that the company collaborate with the Equality Ombud in the wording of future advertisements but did not issue a fine.

In Case 73/2018 the Equality Tribunal discussed harassment based on ethnicity and gender in the same case.⁴⁴ The complainant was a woman originally from Palestine who worked as an advisor in a municipality in Norway. This case was originally dealt with by the Equality Ombud, but since the Equality Ombud did not finish the case before the new GEADA entered into force, the Equality Tribunal took over the case. The Equality Tribunal considered the case on the basis of Article 8 of the GEA on harassment based on gender, since the case occurred before the GEADA entered into force. The Equality Tribunal concluded that the municipality had not fulfilled its duty to prevent harassment against the woman. The Equality Tribunal argued that the employer did not provide its employees with proper training when it came to important Health, environment and safety (HES) programmes in the workplace. However, the Equality Tribunal concluded that the employer had tried to prevent harassment against the woman in an adequate way. The Equality Tribunal stated that the employer had investigated the case and started measures to deal with it.

⁴³ <http://www.diskrimineringsnemnda.no/nb/innhold/side/forside>.

⁴⁴ <http://www.diskrimineringsnemnda.no/media/2288/sak-73-2018-anonymisert-vedtak-og-uttalelse.pdf>.

To the author's knowledge there has not been any case law from equality bodies or from courts addressing multiple discrimination on the basis of Article 6 of the GEADA. The Tribunal reports that in 2018 it received one case concerning a combination of ethnicity and gender. However, the Tribunal has not yet dealt with this case and no further information is publicly available.

3.6 Positive action

3.6.1 Definition and explicit prohibition

Positive action is allowed in Norwegian national law. Article 11 of the GEADA states that positive action measures in favour of one gender is not in violation of Article 6 if a) the differential treatment is suitable to enhance the aim of the GEADA (to improve equality), b) it is a fair balance between the aim pursued viewed in proportion to how negatively the measures affect the individual or the group affected by the measure, and c) the differential treatment comes to an end when the objective is achieved. Article 11 introduces the possibility for the Ministry (now Ministry of Culture), by means of delegation from the King (i.e. the Government), to issue regulations providing further details of possible affirmative actions.

It is important to note that the former regulation 1998-07-17-622 (*Forskrift om særbehandling av menn – Regulation on positive action in favour of men*), which explicitly allowed differential treatment in favour of men concerning recruitment for positions within education, was repealed in 2017. However, positive action measures to employ men in certain positions still have to be suitable for eliminating the disadvantages and barriers to applying for positions that are strongly dominated by women. An employer's wish to improve the gender balance in a workplace will not be enough to justify differential treatment of women and men.

The Norwegian definition also complies with the EU definition.

3.6.2 Conceptual distinctions between 'equal opportunities' and 'positive action' in national law

'Equal opportunities' is not regarded as a separate concept to positive action in national law. Article 11 of the GEADA states that positive action in favour of one gender is not in violation of Article 6. In Article 1 it is stated that the purpose of the law is to promote equality and that equality means equal status, equal opportunities and equal rights.

3.6.3 Specific difficulties

There are no difficulties in the legislation regarding positive action. However, as boys on average achieve lower grades than girls at school, female students are increasingly enrolling in previously male-dominated higher education courses at the universities and thus the request is more and more frequently made for 'gender points' to be used in order to assist the under-represented gender's access to these courses.⁴⁵ Practically speaking, this means that the under-represented gender is awarded a specific number of points if its members apply to study courses where it is under-represented. For example, a male applicant is awarded two gender points if he applies to nursing school.⁴⁶ This might lead to possible conflicts with the GEADA.⁴⁷

⁴⁵ See the university newspaper of Oslo University: <http://universitas.no/nyheter/60404/krever-kjonnspoeng-pa-uo>.

⁴⁶ <https://www.samordnaopptak.no/info/opptak/poengberegning/legge-til-poeng/kjonnspoeng/>.

⁴⁷ See Aune, H. (2018) *Country report gender equality*; Norway 2018.

The Gender Equality and Anti-discrimination Ombud (the Equality Ombud) released a report in May 2015 on the use of positive action and explaining the legal boundaries of the affirmative action measures.⁴⁸

Norway has also seen one EFTA court case brought against it regarding the use of positive action (E-1/02).⁴⁹ The Court stated that by retaining a rule which permits the reservation of a number of academic posts exclusively for members of the under-represented gender, Norway has failed to fulfil its obligations under Articles 7 and 70 of the EEA Agreement and Articles 2(1), 2(4) and 3(1) of Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions as referred to in point 18 of Annex XVIII to the EEA Agreement. This is problematic since it sets certain limits for Norway in its implementation of positive action measures.

3.6.4 Measures to improve the gender balance on company boards

The legislative technique of quotas, in the sense of demanding the representation of members of both sexes, has been successfully in use since 1981 when the rule was introduced in the Gender Equality Act of 9 June 1978, No. 45 regarding public boards and committees. Examples are public-appointed boards of any kind, such as the Board of the National Museum, official delegations representing Norway at the UN, for example, and committees preparing legal reforms.

It is this rule in the Gender Equality Act which has been the model for the introduction of the requirement for balanced gender representation on company boards in company legislation.

Rules applying to public limited liability companies were put into force by Norway on 1 January 2006 in the Public Limited Liability Companies Act of 13 June 1997 (Articles 6-11a). Similar rules are implemented in all the other company acts where there is partial public ownership.⁵⁰ Private companies have no quota requirements as there are many small companies which are owned by between just one and three people and the boards are made up of only three people.

The Public Limited Liability Companies Act of 13 June 1997 No. 45 Section 6-11a states that:

'1. On boards consisting of two or three members, both men and women shall be represented. 2. On boards consisting of four or five members, both genders shall be represented by at least two members. 3. On boards consisting of six to eight members, both genders shall be represented by at least three members. 4. On boards consisting of nine members, both genders shall be represented by at least four members, and if the board consists of more than nine members each gender shall be represented by at least 40 %. 5. The rules as stated in no. 1 – no. 4 equally apply to the election of deputy members. The rules as stated in the first paragraph do not apply to board members elected by and amongst the employee representatives as stated in Section 6-4 or 6-37 first paragraph. When two or three members of the board are to be elected as prescribed in this first sentence, both men and women shall be represented. The same applies to the election of deputy members. The rules as prescribed in this Section (1) nos. 1 and 2 do not apply in

⁴⁸ For more information, see the Equality Ombud's report, *Positive action*, of May 2015. The report is not available online.

⁴⁹ <https://www.timeshighereducation.com/news/efta-court-judgment-in-case-e-1/02-failure-of-a-contracting-party-to-fulfil-its-obligations-equal-rights-directive-reservation-of-academic-positions-for-women/174225.article>.

⁵⁰ Teigen, M. (2015), 'Virkningen av kjønnskvoltering i norsk næringsliv' (The effects of the quota rule/affirmative action in the Norwegian employment market), *Gyldendal Akademisk*.

cases where one gender accounts for less than 20 % of the total number of employees in the enterprise at the time of the election...'

Company legislation in Norway provides general provisions for the enforcement of the rules regarding the composition of the board. The rules on gender representation in these general provisions regarding companies are on an equal footing with other requirements, such as for book-keeping, accounting etc. Thus, no special rules have been adopted for the enforcement of gender representation and this requirement is enforced through the normal monitoring routines followed by the Register of Business Enterprises. Under these rules, the Register of Business Enterprises will refuse to register a company board, if its composition does not meet the statutory requirements, just as it refuses registration if the chief executive officer or auditor does not fulfil the legal conditions. A company which does not have a board that fulfils the statutory requirements may be dissolved by order of the Court of Probate and Bankruptcy.

Article 28 of the GEADA (previously Article 21 of the Gender Equality Act of 9 June 1978 No. 45, and Article 13 of the former GEA) also lays down the rules regarding the representation of both men and women on all public boards and committees. If a public board or committee has two or three members, members of both sexes must be represented. If a board has four or five members, each gender must be represented by a minimum of two people. If a board has between six and eight members, each gender must be represented by a minimum of three people. If a board has nine members, each gender must be represented by a minimum of four members. If a board has more than nine members, each gender must be represented by a minimum of 40 % of all board members.

The rules accordingly apply to the appointment or election of substitutes. The rule is binding, and exceptions to the rules may only be made as far as special circumstances make it obviously unreasonable to fulfil the requirements. However, there is no supervision to ensure that the provision is complied with. Nevertheless, committees which want to be exempted from the requirement for gender balance must apply to the Ministry of Children and Equality for exemption from the rule on quotas.

3.6.5 Positive action measures to improve the gender balance in other areas

The rule on quotas has also inspired most of the political parties to introduce a similar rule in their work and has provided a near equal representation of men and women in national politics. However, this is not made binding by legislation.

3.7 Harassment and sexual harassment

3.7.1 Definition and explicit prohibition of harassment

Harassment is explicitly prohibited in Norwegian national legislation. In Article 13 of the GEADA, the prohibition of harassment is defined:

'Harassment on the basis of factors specified in section 6, first paragraph, and sexual harassment, are prohibited.

Harassment means acts, omissions or statements that have the purpose or effect of being offensive, frightening, hostile, degrading or humiliating.

The prohibition in article 13 covers harassment on the basis of actual, assumed, former or future factors specified in section 6, first paragraph.'

Article 4-3(3) and Article 13-1(2) of the WEA also prohibit harassment.

This definition complies with the EU definition found in Article 2(1) (c) of Directive 2006/54/EC.

3.7.2 Scope of the prohibition of harassment

The GEADA applies to all areas of society and is not limited to employment and access to goods and services.

3.7.3 Definition and explicit prohibition of sexual harassment

Sexual harassment is explicitly prohibited in Norwegian legislation. See Article 13 of the GEADA quoted above under 3.7.1 Sexual harassment is defined in Article 13, third paragraph:

'Sexual harassment means any form of unwanted sexual attention that has the purpose or effect of being offensive, frightening, hostile, degrading, humiliating or troublesome.'

In the author's view the definition in Article 8 of the GEADA complies with the EU definition in Article 2(1)(d) of Directive 2006/54/EC.

3.7.4 Scope of the prohibition of sexual harassment

The GEADA applies to all areas of society.

3.7.5 Understanding of (sexual) harassment as discrimination

Norwegian law covers Article 2(2)(a) of Directive 2006/54/EC in Article 13 of the GEADA and Section 13-1(7) of the WEA, as well as Sections 298 and 305 of the Criminal Code. In national law harassment is also understood as discrimination.

In Case 13/2083 of 7 October 2014 from⁵¹ the Equality Ombud was regarding a complaint from a woman who had accompanied her spouse to a Christmas party at his workplace. One of her husband's colleagues grabbed the woman by her breasts. She defended herself. The following day she complained to the company where her spouse worked as well as reporting it to the police as a sexual offence. The police investigated the case, but the result of the investigation is unclear. She also brought a complaint of sexual harassment to the Equality Ombud. The Equality Ombud did not have a mandate to state that the woman had been sexually harassed. However, it concluded that the company had not undertaken sufficient measures to prevent sexual harassment in the company. The Equality Ombud found that the company had not fulfilled its duties according to Article 25 of the former GEA.

In Case 114/2018⁵² the Equality Tribunal chose to dismiss a complaint of harassment based on gender. It is stated in the Anti-Discrimination Ombud Act (EAOA) Article 10, second and third paragraphs:

'The Equality Tribunal may refer a case if the case is of a trivial matter, or is obviously not contrary to the provisions mentioned in section 1, second paragraph, or the case according to the position of the evidence cannot be sufficiently stated. The decision to rescind must be justified.'

In this case the Equality Tribunal concluded that the complainant had not provided it with enough evidence that harassment had occurred. The case was therefore dismissed.

⁵¹ See the Equality Ombud's decision <https://www.ldo.no/arkiv/klagesaker/2014/132083/>.

⁵² See the Equality Tribunal's decision of 20 December 2018: <https://www.diskrimineringsnemnda.no/showoldcase/2229>.

3.7.6 Specific difficulties

There are some difficulties in applying the prohibition of sexual harassment. As of 2018, the Equality Tribunal enforces the prohibition of harassment, but not in cases of sexual harassment. However, the Equality Tribunal can decide whether an employer has carried out its duties to prevent sexual harassment in a workplace, in accordance with Article 26 of the GEADA. In Case 162/2018⁵³ the Equality Tribunal concluded that the employer had complied with its obligations to prevent sexual harassment in the workplace and that the employee was not subjected to retaliation.

As mentioned in Section 3.1.1, several reports have highlighted limitations when it comes to the enforcement of the prohibition of sexual harassment. As of today, the legislation on sexual harassment is not sufficient. For example, in order to get a case of sexual harassment assessed in court, it is necessary for the complainant to have a legal claim such as a compensation or redress claim, cf. Act relating to mediation and procedure in civil disputes (the Dispute Act), Article 1-3.

The Government's lack of initiative until recently to establish a low threshold complaint system in cases of sexual harassment has also been a concern. In cases of sexual harassment where the complainant does not make a claim for compensation or redress, they will not be able to get an assessment of the case. For some people, the most important thing in a case of harassment is to stop the harassment and to obtain a statement that harassment has been established. This can be assessed by the Equality Tribunal if it is given the competence to hear cases of sexual harassment, as it has the competence to assess, for example, whether or not racial harassment has occurred and to demand punishment, rectification and other measures to ensure that the harassment ends.⁵⁴ The Government has recently suggested that cases of sexual harassment may be treated by the Equality Tribunal and it is expected that this proposal will enter into force during 2019.

3.8 Instruction to discriminate

3.8.1 Explicit prohibition

Instruction to discriminate is explicitly prohibited in national legislation. Article 15 of the GEADA and Section 13-1(2) of the WEA prohibit this and the GEADA now has the following wording:

'It is prohibited to instruct any person to discriminate in breach of section 6, harass in breach of section 13 or retaliate in breach of section 14.'

Section 13-1(2) of the WEA also has the following wording: 'Harassment and an instruction to discriminate against persons on the basis of the various protected grounds listed in the act are defined as discrimination.'

3.8.2 Specific difficulties

The author is not familiar with any specific difficulties in relation to the concept of an instruction to discriminate.

⁵³ <http://www.diskrimineringsnemnda.no/media/2284/162-2018-uttalelse-offentlig-version.pdf> accessed on 19.

⁵⁴ See https://www.idunn.no/kritisk_juss/2018/02/seksuell_trakassering_plagsom_uoensket_seksuell_oppmerksomhet.

3.9 Other forms of discrimination

Discrimination by association or assumed discrimination is prohibited. This is explicitly stated in Article 6(2) and (3) of the GEADA:

‘The prohibition on discrimination also applies if a person is discriminated against on the basis of his or her connection with another person, when such discrimination is based on factors specified in the first paragraph.’

For harassment this is regulated in Article 13(4) and this act also applies to employment, see Section 13-1(4) of the WEA.

3.10 Evaluation of implementation

The national law that implements the EU law concepts discussed in this chapter is in general satisfactory. However, in the author’s opinion it is necessary to establish a low threshold complaint system for cases of sexual harassment. See Section 3.11 below.

3.11 Remaining issues

The Government’s lack of initiative to establish a low threshold complaint system in cases of sexual harassment has been a concern. In cases of sexual harassment where the complainant does not make a claim for compensation or redress, they will not be able to get an assessment of the case.

Very few cases of sexual harassment have been brought to court, mainly because it is expensive and time-consuming. Also, in the cases of sexual harassment where the complainant does not make a claim for compensation or redress, the victim in reality is not able to get an assessment of the case in court. A low threshold complaint system in these cases now makes it possible to obtain such an assessment by the Tribunal. For some victims of sexual harassment, the most important thing is to stop the harassment and to obtain a statement that harassment has been established. This will obviously be easier if a low threshold complaint system is established, for example if the Tribunal had a mandate to deal with complaints of sexual harassment.

4 Equal pay and equal treatment at work (Article 157 of the Treaty on the Functioning of the European Union (TFEU) and Recast Directive 2006/54)

4.1 General (legal) context

4.1.1 Surveys on the gender pay gap and the difficulties of realising equal pay

Several surveys have been published over the last five years that provide insights into specific factors that explain the gender pay gap.

In 2017 Statistics Norway published a report that shows that the pay gap between men and women most definitely still exists in Norway.⁵⁵ The numbers provided in the survey shows that in 2016, women's average monthly salaries were only 86 % of men's salaries. The pay differences are greatest for full-time employees and for those with higher education.

This survey shows that when it comes to people with upper secondary education and university and college education, men earn about 20 % more than women. However, there is great variation depending on the field of study. The overall picture is that the smallest pay difference between men and women is within female-dominated job areas such as health and social care and teacher training, and greatest in the field of economics and administration.

In professions dominated by female workers, the salaries are lower on average, but in these professions women's and men's salaries are also more equal. In male-dominated professions, such as crafts and trades, there are higher wage levels and larger wage differences.

The difference in wages between male and female-dominated occupations is significant for all age groups, but it is by far the largest for those under the age of 35. In that age group, employees in the male-dominated occupations earn around 20 % more than employees in the female-dominated professions.

The survey also shows that although women's increasing level of education overall contributes to reduced wage differences, there are still large pay differences within each level of education. For employees with university or college education at a higher level (master's degree), the wage differences are greater than for employees with a lower level of education (bachelor's degree). This can be related to generally greater wage variations in groups with higher education, or to the fact that at this level there are differences in career choices for women and men.

When it comes to part-time work, the survey states that there is no indication that part-time work in itself creates wage differences between women and men, but the survey shows that there are higher wages among full-time employees than among part-time employees. This is primarily due to the fact that in some female-dominated professions more part-time employees are found than full-time employees. Comparing salaries for full-time and part-time employees in the same occupational group, there are only small differences.

The survey shows that wage differences can primarily be explained by the fact that more women than men undertake education and choose jobs in low-paid professions. In addition, we see that there are quite large differences in wages for women and men with almost equal education and occupation, especially in the private sector where most men work. The survey states that is not possible to explain the entire wage difference based

⁵⁵ <https://www.ssb.no/arbeid-og-lonn/artikler-og-publikasjoner/lonnsforskjellene-mellom-kvinner-og-menn-vedvarer--331542>.

on education, occupation, age or working hours. This means that there are also other factors that we do not have information about in the wage statistics, such as gender stereotypes and structural gender inequality, which may also be significant for wage differences.

However, a survey published on 8 March 2018 by Statistics Norway shows that the pay gap between men and women has to some extent stabilised in the last couple of years.⁵⁶ The survey states that working hours clearly affect wages. Part-time work is still far more common among women, and wage levels are generally lower for part-time jobs than for full-time positions. Well-paid occupations, such as management professions and professions that require higher education at university / university level, have a significantly lower proportion of part-time positions compared to other professions.

Another important factor is seniority. Longer working hours within a profession will normally provide a basis for a higher salary level. However, the survey states that the fact that more women today undertake higher education clearly contributes to a reduction in the difference between monthly wages for women and men.

4.1.2 Surveys on the difficulties of realising equal treatment at work

Several surveys from Statistics Norway⁵⁷ show that there are almost as many women as men in the labour market in Norway. However, the Norwegian labour market is clearly gender-divided when it comes to which sectors men and women choose to work in and which occupations they have. There is a predominance of women in the health and social services and education sectors, while there are most men in industry and construction. There are also gender differences when it comes to working hours. Women work more part-time than men. The survey shows that the proportion of employed women who work part-time is twice as large as the proportion of men who work part-time.

In addition, only one in three managers are women and less than one quarter of top executives in Norway are women. The proportion of female managers is, however, greater than the proportion of male managers in public administration. However, there are fewer management positions in public administration than in the private sector, where the proportion of male managers is clearly the highest.

4.1.3 Other issues

There are no other important issues or cases to be reported.

4.1.4 Political and societal debate and pending legislative proposals

There have been no particular political or societal debates or pending legislative proposals on the principles of equal pay and equal treatment at work.

4.2 Equal pay

4.2.1 Implementation in national law

The principle of equal pay for equal work or work of equal value is implemented by Article 34 of the GEADA and in Section 13-2, 1, paragraph c of the WEA.

⁵⁶ <https://www.ssb.no/arbeid-og-lonn/artikler-og-publikasjoner/lonnsforskjellene-mellom-kvinner-og-menn-fortsetter>.

⁵⁷ <https://www.ssb.no/befolkning/faktaside/likestilling>.

4.2.2 Definition in national law

The concept of pay itself is defined in the GEADA (Article 34, paragraph 4):

The term pay means 'ordinary remuneration for work plus all other supplements, advantages and other benefits provided by the employer'.

The WEA does not define pay, but the concept is further defined by the case law.

In the author's opinion the definition of pay complies with Article 157(2) TFEU.

There has not been any leading national case law on the definition of pay in 2018 to the author's knowledge. However, there are some relevant older cases from the Equality Ombud. In Case 07/406 a woman who was employed by the school leisure scheme in a municipality complained that she received less salary than male supervisors at another department in the municipality. The Equality Ombud concluded that the complainant performed work of equal value to the supervisors and that the lower remuneration was in violation of Article 5 of the GEA, cf. Article 3. The Equality Ombud stated that:

'Equal pay means that the salary shall be determined in the same way for women and men irrespective of gender. This does not mean that everyone who performs work of equal value shall have the same amount of money. The statutory requirements are that wages are determined according to gender-neutral principles and norms. The Gender Equality Act (GEA) does not preclude differences in pay due to differences in seniority, job creation, education, experience or the like, as long as women and men are assessed in the same way according to these criteria'.

This statement from the Equality Ombud is also relevant when it comes to Article 34 of the GEADA.

4.2.3 Explicit implementation of Article 4 of Recast Directive 2006/54

Article 6 of the GEADA, in connection with Section 13-2 of the WEA, implements Article 4 of Recast Directive 2006/54/EC. Article 6 of the GEADA states that discrimination based on gender, amongst other grounds, is prohibited. Any action or lack of action which has as its purpose or effect that a person is treated in a lesser way than any other person would have been treated in an equivalent position, and that this is due to gender, is prohibited. This covers all aspects of society.

4.2.4 Related case law

A landmark case came from the Labour Court, ARD-1990-148, regarding an equal pay claim by female bioengineers as compared to other types of engineers who were all male. The bioengineers were paid less per hour than the other engineers. The court found, after a thorough and specific evaluation of the various elements of the job tasks, that it was indeed work of equal value and that the equal pay rule had been violated. The Court found that the clause collectively negotiated was invalid, while the remaining part of the collective agreement remained valid. Another landmark case is Tribunal Case 42/2009 where a municipality was ordered to remedy the error of not paying equal pay to women working in afterschool care compared to men in equivalent positions as 'work leaders'.⁵⁸ The Equality Tribunal undertook a specific evaluation of the job tasks at the two workplaces.

⁵⁸ <http://www.diskrimineringsnemnda.no/nb/innhold/side/vedtak>.

4.2.5 Permissibility of pay differences

According to Article 9 of the GEADA, differential treatment may be allowed in cases where that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and proportionate. This provision applies to all areas of society, including pay.

However, it is stated in Article 9(2) that:

'In employment relationships and in connection with the selection and treatment of self-employed persons and hired workers, direct differential treatment on the basis of gender, ethnicity, religion, belief, disability, sexual orientation, gender identity or gender expression is only permitted if the characteristic in question is of decisive significance for the performance of the work or the pursuit of the occupation and the conditions in the first paragraph are met.'

4.2.6 Requirement for comparators

A concrete comparator is not required according to the law (GEADA, Article 34). However, a comparator of the other sex is very often referred to, but this may be a hypothetical comparator, which is accepted. This is not perceived as problematic in practice and may be regarded as a necessity, as the Norwegian employment market is highly gender-segregated. If there was a requirement that there should be a concrete comparator of the opposite sex in every case, it would be almost impossible to bring an equal pay claim.⁵⁹

4.2.7 Existence of parameters for establishing the equal value of the work performed

The GEADA (Article 34, third paragraph) establishes that the decision as to whether or not the work/positions are of equal value is made after an overall evaluation where relevant factors such as effort, responsibility and working conditions in the workplace are assessed.

For example, the need for the necessary competence/qualifications to perform the job is relevant as well as other factors such as effort, responsibility and other working conditions. The parties can in principle raise all aspects/parameters that they consider relevant.

4.2.8 Other relevant rules or policies

The author is not familiar with other relevant rules or policies.

4.2.9 Wage transparency

National law addresses wage transparency. Article 32 of the GEADA lays down the employer's duty to provide information regarding pay:

- 1) 'An employee who suspects pay discrimination may demand that the employer provides in writing: information about the pay level and the criteria for defining the pay level for those person(s) with whom the employee is comparing herself/himself.'
- 2) 'The person who receives information about pay according to this provision has an obligation of secrecy and shall sign a statement of secrecy. This does not cover situations covered by the Act regarding Public Information (*offentleglova*).'
- 3) 'The person who is the subject of a comparison and the pay information, as revealed by the colleague, shall be informed that such information is being shared.'

⁵⁹ For more on proving unequal pay and the use of a comparator or a hypothetical comparator see the Equal Pay Commission's discussion in NOU 2008: 6 *Kjønn og lønn*, Chapter 7.1.2.

In addition to Article 32 of the GEADA, one may also mention Article 26, which states that the employer is obliged to actively try to fulfil the purpose of the act. Article 26a states that the employer shall account for how and whether it is fulfilling these obligations.

4.2.10 Implementation of the transparency measures set out by European Commission's Recommendation of 7 March 2014 on strengthening the principle of equal pay between men and women

National law addresses wage transparency. Article 32 of the GEADA lays down the employer's duty to provide information regarding pay as mentioned above in Section 4.2.9. There is no information about any actions in response to the Recommendation on the Government's website.

4.2.11 Other measures, tools or procedures

The World Economic Forum's report⁶⁰ on the gap between women and men shows that Norway is in second place out of 149 countries on equal opportunities, the same position as last year. The gender gap in Norway in 2018 is lower than in 2017.

The Government plans to initiate measures that contribute to a more even gender balance in education programmes and will prioritise recruiting men to primary and lower secondary education and to education in the health and social care sector.⁶¹ This may be a measure that can affect the gender pay gap between women and men in the long term.

4.3 Access to work, working conditions and dismissal

4.3.1 Definition of the personal scope (Article 14 of Recast Directive 2006/54)

Article 2 of the GEADA states that the law applies to all areas of society.

A worker is not defined as such in the WEA but is defined by analysing the characteristics of the relationship between an employer and an employee as laid down in Sections 1-8 and 1-9 of the WEA. However, it follows from the EEA and the Norwegian Supreme Court's decisions in other areas of employment law that Norwegian law seeks to be compliant with the rulings of the CJEU.⁶² This includes the fact that the term employee includes everyone active in the labour market.

4.3.2 Definition of the material scope (Article 14(1) of Recast Directive 2006/54)

The material scope is not directly defined as in the Directive. However, Article 2 of the GEADA states that the law applies to all areas of society and the definition as such may be described as being even broader.

4.3.3 Implementation of the exception on occupational activities (Article 14(2) of Recast Directive 2006/54)

Norway has not implemented an exception based on occupational activities and there is no case law to refer to. Article 11 of the GEADA provides a general opportunity for the use of positive action, but Norway has not made use of the opportunity provided by Article 14(2) of Recast Directive 2006/54/EC. Article 11 states that positive action in favour of one gender does not violate the prohibition of sex discrimination if the terms in a) to c) are fulfilled.

⁶⁰ See the website; <http://reports.weforum.org/global-gender-gap-report-2018/measuring-the-global-gender-gap/>.

⁶¹ See the Government page in Norwegian; <https://www.regjeringen.no/no/aktuelt/nummer-to-i-verden-pa-likestilling/id2623472/>.

⁶² See for instance the following cases relating to age discrimination: Rt-2011-609 and Rt-2012-219.

4.3.4 Protection against the non-hiring, non-renewal of a fixed-term contract, non-continuation of a contract and dismissal of women connected to their state of pregnancy and/or maternity

In national law protection for women, in particular as regards pregnancy and maternity, follows from Article 6 of the GEADA where it is stated explicitly that discrimination on the basis of gender, pregnancy, leave in connection with childbirth or adoption, or care responsibilities is forbidden. It is stated in Article 29 of the GEADA that the prohibitions in Chapter 2 apply to all aspects of an employment relationship.

4.3.5 Implementation of the exception on the protection for women in relation to pregnancy and maternity (Article 28(1) of Recast Directive 2006/54)

According to Article 9 of the GEADA, differential treatment may be allowed in cases where that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and proportionate. This provision applies to all areas of society. Article 9 (first paragraph) applies to differential treatment on the basis of leave in connection with childbirth or adoption during periods not covered by the first paragraph. Differential treatment on the basis of pregnancy, childbirth, breastfeeding or leave in connection with childbirth or adoption is never permitted in connection with recruitment and dismissal. This also applies in connection with extension of a temporary position.

In addition, according to Article 10 of the GEADA, differential treatment is only permitted on the basis of:

- a) pregnancy, childbirth or breastfeeding, including leave pursuant to sections 12-1, 12-2, 12-3(1), first sentence, 12-4 or 12-8 in the WEA, or;
- b) leave reserved for each of the parents; see section 14-12, first paragraph, of the National Insurance Act

if the differential treatment is necessary to protect the woman, the foetus or the child in connection with pregnancy, childbirth or breastfeeding, or if other obvious grounds apply. The differential treatment may not have a disproportionate negative impact on the person subject to the differential treatment.

4.3.6 Particular difficulties

There are no difficulties related to the personal and/or material scope of national law in relation to access to work, vocational training, employment and working conditions.

4.3.7 Positive action measures (Article 3 of Recast Directive 2006/54)

According to Article 28 of the GEADA on positive action, both the Equality Ombud⁶³ and the Equality Tribunal in Case 8/2014 from 10th June 201⁶⁴ regarding ethnicity have assumed that the legal situation has not changed and that the principles derived from the former EU judgments on positive action are still relevant.⁶⁵ This means that earmarking of positions is not permitted by law, including for temporary positions. Rigid quotas for under-represented groups is therefore still prohibited in Norway.

4.4 Evaluation of implementation

The national law fulfils the requirements of EU law discussed in this chapter.

⁶³ Report from the Equality Ombud on Positive Action from 28. May 2015.

⁶⁴ <https://www.diskrimineringsnemnda.no/showoldcase/1914>.

⁶⁵ CJEU, C-450/93 Kalanke, C-409/95 Marschall and C-407/98 Abrahamsson.

4.5 Remaining issues

There are no remaining issues regarding national law on equal pay/and or equal treatment at work that have not been discussed so far.

5 Pregnancy, maternity, and leave related to work-life balance for workers (Directive 92/85, relevant provisions of Directives 2006/54 and 2010/18)⁶⁶

5.1 General (legal) context

5.1.1 Surveys and reports on the practical difficulties linked to work-life balance

The practical difficulties linked to work-life balance are discussed in a report from the Equality Ombud from 2015 regarding the former GEA. The report shows that 55 % of all women have experienced discrimination because of pregnancy or the use of parental leave and 22 % of men who have been on parental leave report experience of discrimination because of taking leave.⁶⁷ A large proportion of the cases concern pregnant women being bypassed in hiring processes, including non-renewed temporary contracts which would otherwise have been renewed.

5.1.2 Other issues

The link between female employees and part-time work is an important issue in Norway in relation to work-life balance, especially after having children. It seems that more women with children than women who do not have children work part-time. For men, part-time work is the exception, something someone does in addition to studies or on their way out of working life.

Part-time work is highest in female-dominated professions such as shop assistants, auxiliary nurses, care workers, waiters and canteen workers. The proportion of full-time employees is around 30 % in occupations such as care work, shop work, etc., while the proportion of full-time employees is significantly higher among nurses and among pedagogical staff within kindergartens and primary schools. While only every third shop assistant is working full-time (and the proportion is even lower among caregivers), this applies to 55 % of nurses in healthcare and just over two thirds of teachers and preschool teachers.⁶⁸

5.1.3 Overview of national acts on work-life balance issues

The most important acts on work-life balance issues in Norway are:

The WEA, Chapters 4 and Chapters 13, especially Article 13-1,4-3, and Chapter 12

The National Insurance Act, Chapters 14 and 15.

The GEADA, Articles 6, 9 and 10 and Chapter 5.

5.1.4 Political and societal debate and pending legislative proposals

The GEADA entered into force on 1 January 2018. The author is not familiar with any pending legislative proposals on work-life balance after this.

⁶⁶ See Masselot, A. (2018) *Family leave: enforcement of the protection against dismissal and unfavourable treatment*, European network of legal experts in gender equality and non-discrimination, available at: <https://www.equalitylaw.eu/downloads/4808-family-leave-enforcement-of-the-protection-against-dismissal-and-unfavourable-treatment-pdf-962-kb> and McColgan, A. (2015) *Measures to address the challenges of work-life balance in the EU Member States, Iceland, Liechtenstein and Norway*, European network of legal experts in gender equality and non-discrimination, available at: <https://www.equalitylaw.eu/downloads/3631-reconciliation>.

⁶⁷ See the Ombuds report; <https://www.ldo.no/arkiv/nyheitsarkiv/nyheiter-2015/gravide-diskrimineres/>. The LDO's report confirms the findings in the report from 2008 by the AFI: *Erfaringer med og konsekvenser av graviditet og uttak av foreldrepermisjon i norsk arbeidsliv* (Experience of and consequences of pregnancy and use of parental leave in working life in Norway), available at: http://www.hioa.no/var/ezflow_site/storage/afi/files/r%202008-2.pdf.

⁶⁸ See the Ombuds page; https://www.ldo.no/diskriminert_oldstart/forebygg/i-arbeidslivet/Lonn-og-arbeidsvilkar/Arbeidstid/Deltid-kvinner/.

5.2 Pregnancy and maternity protection

5.2.1 Definition in national law

Norwegian protection of pregnant employees applies to any employee who is pregnant, not only to employees who have informed their employer about their condition. Article 6 (2) of the GEADA states: 'The prohibition includes discrimination on the basis of actual, assumed, former or future factors specified in the first paragraph', in this case pregnancy.

Article 30 of the GEADA states that it is illegal for an employer in a recruitment situation to collect information about a person's plans regarding pregnancy or family plans. In this respect Norwegian law appears to be broader than the wording of Article 2 of Directive 92/85/EEC.

5.2.2 Obligation to inform employer

In Norway a pregnant worker is not obliged to inform her employer about the pregnancy, neither in a process of recruitment nor as an employee in a workplace.

However, Article 12-7 of the WEA states that leave related to pregnancy shall be notified to the employer as soon as possible and no later than one week in advance in case of absence of more than two weeks, no later than four weeks in advance in case of absence of over twelve weeks and no later than twelve weeks in advance in case of absence of over one year.

5.2.3 Case law on the definition of a pregnant worker, a worker who has recently given birth and/or a worker who is breastfeeding

One case concerning discrimination because of pregnancy is from the Equality Tribunal in 2018 (Case 126/2018).⁶⁹ Since the matter happened before the GEADA entered into force, the Equality Tribunal considered the case in light of the former Equality Act (GEA). In the case a real estate agent was awarded fewer internal assignments after the employer found out that she was pregnant. The Equality Tribunal discussed whether the woman had been treated less favourably when she did not receive the same amount of internal assignment as before. The answer to this was that she had been treated less favourably and the Equality Tribunal also found that there was no doubt that this happened due to her pregnancy. The Equality Tribunal also stated that protection against discrimination due to pregnancy and maternity leave is absolute and is not covered by the exemption clause in Article 6 of the GEA.

Another older case heard by the Equality Tribunal is equally illustrative: a travel agency announced an open position and a woman applied.⁷⁰ When the applicant informed her intended employer that she was pregnant, she was only offered a substitute position during certain weeks in the summer and with direct reference to the fact that her pregnancy had made it impossible for her to receive a permanent position. The travel agency failed to present evidence of other reasons than the pregnancy as to why she had been disqualified from even being considered as an applicant. The Equality Tribunal found, unanimously, that she had been the victim of direct discrimination in violation of Section 3 of the Gender Equality Act (1978) because of pregnancy. The Equality Tribunal found no evidence of other reasons than the pregnancy as to why the employee's application was not even considered. There was therefore no doubt that the woman had been put in a less favourable position than she otherwise would have been had she not been pregnant, see Section 3 of the Gender Equality Act.

⁶⁹ <http://www.diskrimineringsnemnda.no/nb/innhold/sider/vedtak/3912>.

⁷⁰ <http://www.diskrimineringsnemnda.no/nb/innhold/sider/vedtak/3200>.

Yet another older Tribunal case from 2015 is Case LDN-2015-6-2. An employee on an 'expat' contract was 'compelled' to change to a Norwegian permanent contract when she became pregnant.⁷¹ The employee had been employed by a Norwegian company (belonging to a large multinational group) in June 2007 working abroad on an 'expat' contract. She returned after her first parental leave in June 2010. In December 2010 she informed her employer that she was again pregnant and her 'due date' was at the end of June 2011. In February 2011, she received a notice of the termination of her 'expat' contract and at the same time she received a job offer for a permanent position in Norway and under Norwegian employment terms starting from 1 May 2011. The employee suffered an economic loss due to the change of contract. A unanimous Tribunal found that she had been the victim of direct discrimination in violation of the Gender Equality Act (1978) Section 3 because of pregnancy. The Equality Tribunal found no evidence of other reasons than the pregnancy as to why her 'expat' contract had been withdrawn. There was therefore no doubt that the woman had been put in a less favourable position than she would otherwise have been in had she not been pregnant, see Section 3 of the Gender Equality Act.

The Equality Ombud has also dealt with some cases of discrimination affecting women who were breastfeeding on the basis of the former GEA. To the author's knowledge there has not been any case law on this matter in 2018 after the GEADA entered into force.

In Case 07/1706, the Equality Ombud stated that a woman was discriminated against as a result of lack of facilitation during breastfeeding. In the opinion of the defendant, the Directorate of Health, there was no discrimination, as the process was governed by gender-neutral rules. However, the Directorate admitted that the rules did not sufficiently take into account the needs of young children and nursing mothers. The Equality Ombud assumed that discrimination based on breastfeeding is covered by the prohibition of direct discrimination on the basis of gender in the former GEA. Failures are equated with actions in the GEA. Failure to facilitate, so that someone is disadvantaged by breastfeeding, was a violation of the GEA's prohibition of direct discrimination on the grounds of gender. In this case the Directorate of Health did not sufficiently prove that it could justify exemptions from the prohibition of discrimination. The Equality Ombud therefore concluded that the lack of facilitation during the nursing period was discriminatory.

In Case 2005/219 a woman approached the Equality Ombud after having been refused a job interview. The woman had applied for a temporary appointment through an agency. In the application she stated that she was on parental leave at the time of the application. She was then contacted by a case officer from the agency, who allegedly stated that if she gave up the right to breastfeeding, she would be interviewed for the position. The Equality Ombud concluded that, during the process of finding suitable candidates for the position, the temporary employment agency had acted in violation of the GEA by placing negative pressure on the woman wishing to avail herself of the right to breastfeed. The Equality Ombud noted that the temporary employment agency had not complied with its request for comment on whether or not breastfeeding was a topic in the conversation with the woman, but instead had emphasised that the customer needed a person who could work 100 % throughout the substitution period. The Equality Ombud concluded that the agency had discriminated against the woman.

5.2.4 Implementation of protective measures (Article 4-6 of Directive 92/85)

The protective measures mentioned in Articles 4-7 of Directive 92/85/EEC are not explicitly implemented in national law, but the legislation provides broad protection against health hazards for all employees in relation to the rules on the general working environment, working hours, the information and consultation obligation and the entitlement to leave.

⁷¹ <http://www.diskrimineringsnemnda.no/media/1794/endelig-vedtak-i-sak-6-2015-2.pdf>.

Pregnant workers are protected under the general provisions of the WEA (Articles 8-1, 4-6(1), 10-2(1) and 12-8).

Article 8-1 of the WEA has the following wording: 'In undertakings that regularly employ at least 50 employees, the employer shall provide information concerning issues which are of importance to the employees' working conditions and discuss such issues with the employees' elected representatives.'

Article 4-6(1) of the WEA applies to employees with reduced capacity for work because of an accident, sickness, fatigue or the like. This is a general provision, which can also apply to some pregnant workers. It obliges the employer to make adjustments in the working environment in these situations. The wording is as follows: 'If an employee suffers from a reduced capacity for work as a result of an accident, sickness, fatigue or the like, the employer shall implement, as far as possible, the necessary measures to enable the employee to retain his or her work or to be given suitable work. The employee shall preferably be given the opportunity to continue his or her normal work...'

Article 10-2(1) of the WEA on 'working time arrangements' is general in its wording: 'Working hours shall be arranged in such a way that employees are not exposed to adverse physical or mental strain, and that they shall be able to observe safety considerations.'

Article 12-8 has the following wording: 'A nursing mother is entitled to request the amount of time off which is necessary for breastfeeding. At least 30 minutes' time off may for example be taken twice daily or as a reduction in working hours by up to one hour per day.'

All the provisions are general in their wording and do not protect pregnant workers in particular. The provisions cover all workers in relation to the articles in Directive 92/85/EEC (4-7). Because the robust protection of pregnant workers and the prohibition of discrimination against pregnant workers and workers who are on maternity leave or are breastfeeding is so clearly stated in the GEADA, the Norwegian law implements the EU provisions in a sufficient manner.

5.2.5 Case law on issues addressed in Article 4 and 5 of Directive 92/85

For breastfeeding women see the case law from the equality bodies mentioned in Section 5.2.3.

5.2.6 Prohibition of night work

National law does not directly prohibit night work by workers during pregnancy and for a period following childbirth. However, Article 4-6(1) of the WEA applies to employees in general with reduced capacity for work because of an accident, sickness, fatigue or the like. This is a general provision, which can also apply to some pregnant workers. It obliges the employer to make adjustments in the working environment in these situations. The article has the following wording:

'If an employee suffers from a reduced capacity for work as a result of an accident, sickness, fatigue or the like, the employer shall implement, as far as possible, the necessary measures to enable the employee to retain his or her work or to be given suitable work. The employee shall preferably be given the opportunity to continue his or her normal work...'

5.2.7 Case law on the prohibition of night work

The author is not familiar with any case law relating to the prohibition of night work.

5.2.8 Prohibition of dismissal

Dismissal from work is prohibited in national law from the beginning of the pregnancy until the end of the maternity leave according to Article 15-9 of the WEA and this is in line with the requirements of Article 10(1) of Directive 92/85/EEC.

Article 15-9(1) of the WEA states: 'An employee who is pregnant may not be dismissed on grounds of pregnancy. Pregnancy shall be deemed to be the reason for the dismissal of a pregnant employee unless other grounds are shown to be highly probable.'

A dismissal is thus permitted in exceptional cases as defined in the Directive's Article 10(1). This is if the employer can show that it is highly probable that the dismissal during pregnancy is grounded on general terms, which justify a dismissal according to the Norwegian WEA. This will typically be instances where an enterprise is forced to downsize due to economic conditions and insufficient level of activity to maintain the business.

When an employee is made redundant during her maternity leave, the paid maternity leave does not cease. Article 15-9(2) of the WEA states that if the employee is lawfully dismissed during her maternity leave, the notice is still valid but is extended by a corresponding period.

5.2.9 Redundancy and payment during maternity leave

If an employee is made redundant during her maternity leave this doesn't mean that maternity leave payments cease.

According to the National Insurance Act⁷² (NIA) Article 14-6 the right to parental benefit (the payment for maternity leave) is earned through work activity. Both the mother and the father can earn the right to parental benefit by being active in employment with pensionable income (Article 3-15) for at least six of the last ten months before they begin to draw parental benefit, see Articles 14-10 first and second paragraph and 14-14(2).

However, some employers provide for pay superseding the salary level provided by the NIA. This may occur in some work relations. In this case it will follow from the contract of employment as a benefit in the agreement between the employer and employee or it may be described as a right in the Employee Handbook, which is common in most companies in Norway. The Handbook provides employees with all the rules and regulations, internal procedures and practical information that may be useful for them, for example if the employee is made redundant during her maternity leave.

5.2.10 Employer's obligation to substantiate a dismissal

Article 15-4(1) of the WEA states that a dismissal must be given in writing. Furthermore, Article 15-4(3) states that when the dismissed worker so requests, the employer must state the circumstances claimed as the grounds for dismissal. The employee may demand that such information be provided in writing.

In the case of an illegal dismissal/notice of termination because of pregnancy /parental leave, the employee/job seeker may receive full compensation for his or her economic loss in addition to punitive damages.⁷³

⁷² <https://lovdata.no/dokument/NL/lov/1997-02-28-19?q=lov%20om%20folketrygd>.

⁷³ See verdict from Oslo District Court from 2006-11-17 in TOSLO-2006-52718 and verdict from Alta District Court from 2008-04-07 in TALTA-2007-74733.

5.2.11 Case law on the protection against dismissal

In Section 5.2.3 above it was shown through case law that discrimination because of pregnancy is still regarded as a problem in Norway. The Equality Ombud and the Equality Tribunal have dealt with several cases with questions about discrimination relating to dismissal.

Some cases have appeared before the courts with questions about the dismissal of pregnant workers, based on Article 15-9 of the WEA. One case at the Supreme Court relating to discrimination on the basis of Article 15-9 of the WEA (19 June 2018, Case HR-2018-1189-A) concerned a pregnant worker who was partially on sick leave and was dismissed with reference to the company's staffing needs a few weeks into the leave. The Supreme Court treated the case as a discrimination issue based on Article 15-9 of the WEA. The Supreme Court unanimously concluded that, according to Article 15-9 of the WEA, the termination of a pregnant employee's contract requires a clear likelihood that the dismissal is not due to the pregnancy. The Supreme Court concluded that clear likelihood ('predominantly probable') means that the employer must provide clear proof that the termination is not due to the pregnancy. Based on the evidence presented in the case, the court found that the company had not fulfilled its duties and had discriminated against the woman.

This judgment clarifies the requirement of proof for dismissal in accordance with the special employment protection rules in the working environment legislation. It revoked the earlier decision by the Court of Appeal (*Borgarting lagmannsrett*), which was divided on whether the dismissal of A was objectively justified and in which the majority, consisting of three judges, concluded that the dismissal was justified in the circumstances of this company and did not have any connection with A's pregnancy. The Court of Appeal had thus acquitted the employer.⁷⁴

In another recent Court of Appeal case (Case LB-2018-159246)⁷⁵ a woman who was employed as an economist inspector had her employment contract terminated while she was on parental leave. The Court of Appeal found that her dismissal was not justified, if it was due to her pregnancy or parental leave. The court was divided but the majority found that the dismissal did not have a substantive basis in her work performance, based on the WEA. Two judges found the dismissal to be justified. The woman was awarded EUR 78 000 (NOK 700 000) in redress and the company also had to pay her court expenses of EUR 53 163 (NOK 478 467).

5.3 Maternity leave

5.3.1 Length

The minimum maternity leave is six weeks, as prescribed by Article 12-4 and 12-5 of the WEA (which prescribes the right to leave) and Article 14-9 of the NIA (which prescribes pay while on leave). According to the Article 12-5 of the WEA, the total parental leave is 12 months. However, under Norwegian law, maternity leave is counted as part of parental leave and is not treated differently from parental leave.

5.3.2 Obligatory maternity leave

The obligatory period of maternity leave before and/or after birth consists of three weeks before the birth and six weeks after the birth, as per Article 14-9 of the National Insurance Act.⁷⁶ Section 12-4 of the WEA states: 'After giving birth, the mother shall have a leave of

⁷⁴ See verdict from Borgarting Court of appeal of 2017-09-11 in LB-2016-147369. The verdict in Norwegian.

⁷⁵ See verdict from Borgarting Court of Appeal of 2019-03-13 in LB-2018-159246.

⁷⁶ See NIA, Section 14-9, fifth paragraph: https://lovdata.no/dokument/NL/lov/1997-02-28-19/KAPITTEL_6-1#KAPITTEL_6-1. As of 1 July 2018, the parental quotas have been extended from 10 to 15 weeks

absence for the first six weeks unless she produces a medical certificate stating that it is better for her to resume work'. In total, the maternity leave is therefore for nine weeks.

Maternity leave is specifically defined as being included in and a part of parental leave. The Norwegian solution thus blurs the two different types of leave.

As of 1 July 2018, the parental quotas have been extended from 10 to 15 weeks reserved for each of the parents and the remaining period of the parental leave may be shared between both parents as they wish. The maternity leave period is still included in the quota reserved for the mother, which might be a violation of Directive 92/86/EEC since the mother is not entitled to a separate maternity leave and the maternity leave is treated as part of the paternal leave.

5.3.3 Legal protection of employment rights (Article 5, 6 and 7 of Directive 92/85)

Articles 1-1, 4-9, 10-12 and 12-8 of the WEA ensure that all employees, including pregnant workers, are entitled to the rights referred to in Articles 5, 6 and 7 of Directive 92/85/EEC.

Article 1-1 of the WEA describes 'the purpose of the act', including the fact that its objectives are to secure a healthy and meaningful working situation, to ensure equality of treatment at work, and to facilitate adaptations of the individual employee's working situation in relation to her capabilities and circumstances.

5.3.4 Legal protection of rights ensuing from the employment contract

Articles 14-4 and 14-5 of the National Insurance Act (NIA) establish the rights to maternity benefits and parental benefits paid by National Insurance.

5.3.5 Level of pay or allowance

Pay during maternity/parental leave is the same level as sick pay, which is based on the employee's normal full pay. Full pay as well as the maternity leave pay cannot exceed six times the social security base amount, which is subject to an annual regulation. Six times the social security base amount is EUR 58 807.28 per year. Section 14-7 of the NIA states that pay during pregnancy and maternity leave shall be based on the same rules as sick leave.

5.3.6 Additional statutory maternity benefits

When it comes to maternity benefits some employers provide for pay superseding the salary level provided by the NIA. In such cases it will follow from the contract of employment as a benefit in the agreement between the employer and employee or it may be described as a right in the Employee Handbook, which is common in most companies in Norway. The Handbook provides employees with all the rules and regulations, internal procedures and practical information that may be useful for them.

5.3.7 Conditions for eligibility (Article 11(4) of Directive 92/85)

The conditions for being eligible for the applicable benefits follow from Article 14-6 of the National Insurance Act which meet the requirements of Article 11(4) of Directive 92/85/EEC. Article 14-6 states that parental benefits are paid on the basis of the individual being engaged in work-related activity and having had paid work for six of the last ten months before the birth. However, if the parents are receiving other benefits from the

reserved for each of the parents and the remaining period of the parental leave may be shared between both parents as they wish. The length of the parental leave as such remains unchanged. Just as before, the maternity leave period is included in the quota reserved for the mother, which in the author's opinion is in violation of Directive 92/86/EEC.

National Insurance fund instead of a salary at the time of the birth, they are still entitled to parental benefits from the National Insurance fund. The amount of parental benefits received depends on the income of the person in question.

5.3.8 Right to return to the same or an equivalent job (Article 15 of Directive 2006/54)

Article 33 of the GEADA ensures that the requirements in Article 15 of Directive 2006/54/EC are fulfilled. Article 33 a-c states that a person who has had maternity/parental leave is entitled to return to his or her job or to an equivalent job on terms and conditions that are the same or better than before the maternity/parental leave and to demand wages and to be considered in collective bargaining in the same manner as the other workers in the company.

5.3.9 Legal right to share maternity leave

Maternity leave is specifically defined as being included in and a part of parental leave. The Norwegian solution thus blurs the two different types of leave. As of 1 July 2018, the parental quotas have been extended from 10 to 15 weeks reserved for each of the parents and the remaining period of the parental leave may be shared between both parents as they wish.

5.3.10 Case law

Most cases concern female workers and parental leave. The issues most frequently addressed in case law on this matter are women who are given other work tasks due to maternity leave or are not given the same wages as colleagues when they are on maternity leave. Issues which are less commonly addressed in the case law in this area are termination of contract following their maternity leave.

Case 26/2018 from the Equality Tribunal concerned alleged discrimination against a female employee because of gender (pregnancy and imminent parental leave), in that she was no longer allocated / assignments by the employer and / or was put on a lower wage due to the company's commission pay scheme.⁷⁷ The Equality Tribunal concluded that the employer had discriminated against the applicant due to gender. The Equality Tribunal stated that:

'In this case, B (the employer), in the opinion of the Equality Tribunal, has deprived A (the complainant) of the opportunity to profit from a larger portfolio because she no longer received internal assignments. This happened without prior dialogue with A about her capacity to follow up both existing and new assignments during the relevant period. The change was also implemented despite immediate objections from A...

The employer had continued to allocate her assignments to the office, as well as to work on assignments she had already had and possibly acquired on her own. It is not disputed that in this case there is a causal relationship between A's pregnancy / impending leave and the fact that the allocation of internal assignments ceased...'⁷⁸

In addition, Case 11/2018 concerned the question of whether the employer acted in contravention of the prohibition of discrimination in Article 5 and 20 of the GEA, by giving the complainant other work tasks after her return from parental leave. The Equality Tribunal concluded that the employer discriminated against the complainant.

⁷⁷ <http://www.diskrimineringsnemnda.no/media/2276/sak-126-2018-vedtak-offentlig-versjon.pdf>.

⁷⁸ Translated by the author.

5.4 Adoption leave

5.4.1 Existence of adoption leave in national law

National legislation provides for adoption leave in Article 12-5(4) of the WEA. In connection with adoption, the adoptive parents are entitled to paid leave for a period of 46 weeks (at the full daily rate) or 56 weeks (at a reduced daily rate) if the child is under 15 years of age.

5.4.2 Protection against dismissal (Article 16 of Directive 2006/54)

When it comes to protection against dismissal, Article 15-9 of the WEA provides for protection for workers who take adoption leave and secures their rights after the end of adoption leave. Article 15-9 states that:

'An employee who has leave of absence pursuant to section(s) ... 12-5, first paragraph, for up to one year shall not be given a notice of dismissal that becomes effective during the period of absence if the employer is aware that the absence is due to such reasons or the employee notifies the employer without undue delay that the absence is due to such reasons. If the employee is lawfully dismissed at a time falling within this period, the notice is valid but shall be extended by a corresponding period.'

5.4.3 Case law

The author is not familiar with cases relating to adoption leave from 2018 or before.

5.5 Parental leave

5.5.1 Implementation of Directive 2010/18

Directive 2010/18/EU has been explicitly implemented through a decision by Parliament's EEA Committee. The existing legislation in Articles 6 and 10 of the GEADA and in the WEA is in line with the requirements of the Directive. The requirements of the Directive follow from provisions in the GEADA, WEA and NIA.

5.5.2 Applicability to public and private sectors (Clause 1 of Directive 2010/18)

The legislation applies equally to the public and the private sectors.

5.5.3 Scope of the transposing legislation

National legislation applies equally to all types of employment contracts.

5.5.4 Length of parental leave

The provisions regarding the duration of parental leave do not differ between the public and private sectors.

The framework for parental leave is laid down in Article 12-5 of the WEA. Parents are entitled to 12 months of leave, see WEA, Article 12-5, 1. Pay is regulated by the National Insurance Act. An employee who has been gainfully employed for at least six of the last 10 months prior to the birth of a child is entitled to paid leave for 46 weeks (at the full daily rate) or 56 weeks (at a reduced daily rate) in connection with the birth of a child.

In addition to the first year of paid leave, each of the parents has a right to 12 months of leave, see Article 12-5, 2 of the WEA. This makes the total period of leave three years altogether, but the last two years are not linked to any right to be paid.

5.5.5 Age limits

Workers are entitled to paid parental leave until the child is three years old or until the workers have another child (see the National Insurance Act, Article 14-10(3)).

5.5.6 Individual nature of the right to parental leave

The Norwegian Government has introduced a three-part parental leave scheme with part to mother, part to father and an optional part. This may lead to fathers taking a higher percentage of the parental leave, and in that way make it easier for women to return to work after the birth of a child.

Both parents have an individual right to parental leave according to the WEA. However, the pay awarded during parental leave for both parents together is limited to the 49/59 weeks, in accordance with Section 14-9 of the NIA.

With regard to this paid leave, both parents have a right to their 'quota': 15 weeks of the leave is reserved for each of the parents if they choose the full rate. If they choose the reduced rate, 19 weeks are reserved for each of the parents. The remaining part of the leave may be shared between the parents as they deem fit.

5.5.7 Transferability of the right to parental leave

It is not possible for one parent to transfer part of the parental leave to the other parent as regards the mother's or the father's quota. The remaining third part of the leave may be shared between the parents as they see fit.

5.5.8 Form of parental leave

According to Sections 14-9 and 14-16 of the NIA, parental leave can be full-time (at the full daily rate) or part-time (at a reduced daily rate), see Section 12-6 of the WEA. An employee may also apply to his/her employer to be allowed to combine parental leave with reduced working hours ('time account') and employees may also use the right to a period of extended care leave. These are provisions in the WEA entitling the employee to a leave of absence from work, but not to paid leave.

5.5.9 Work and/or length of service requirements (Clause 3(b) of Directive 2010/18)

According to Article 14-6(1), the required period of service is at least six of the last ten months before starting the parental leave. In the case of successive fixed-term contracts with the same employer (as defined in Council Directive 1999/70/EC on fixed-term work), the sum of these contracts is taken into account for the purpose of calculating the qualifying period.

5.5.10 Notice period

According to Article 12-7 of the WEA, the employee is under an obligation to notify the employer about the leave as soon as possible and no later than one week in advance in the case of leave lasting for more than two weeks, at least four weeks in advance in the case of leave lasting for more than twelve weeks and no later than twelve weeks in advance for leave lasting for more than one year. If an employee does not meet these periods of notice, the consequence may be that the leave may be postponed so that the

notice period is met. This is not the case for instances when the leave is necessary for reasons of which the employee had no knowledge at the end of the notice period.

5.5.11 Postponement of parental leave (Clause 3(c) of Directive 2010/18)

Parental leave may never be postponed for justifiable reasons related to the operation of the organisation.

5.5.12 Special arrangements for small firms (Clause 3(d) of Directive 2010/18)

In national law there are no special arrangements for small firms.

5.5.13 Special rules and exceptional conditions for parents of children with a disability or long-term illness (Clause 3(3) of Directive 2010/18)

Article 12-9(3) of the WEA states that, 'If the child has a chronic or long-term illness or disability and there is therefore a markedly greater risk of the employee being absent from work, the employee is entitled to a maximum of 20 days' leave of absence ... per calendar year.'

5.5.14 Measures addressing the specific needs of adoptive parents (Clause 4 of Directive 2010/18)

The needs of adoptive parents mentioned in Clause 4 of Directive 2010/18/EU are met, as they are provided with the same rights as other parents under the rights as described in the WEA and GEADA. The rights of adoptive parents start from the day that they take over the care of the child who is adopted. The right to leave does not apply if the child is older than 15 years of age, see Article 12-5(4) of the WEA.

5.5.15 Provisions protecting workers against less favourable treatment or dismissal (Clause 5(4) of Directive 2010/18)

The provisions to protect workers against less favourable treatment or dismissal on the grounds of an application for, or the taking of, parental leave are laid down in Article 15-9(2) of the WEA and Article 33 of the GEADA. It is stated that a person who has taken parental leave is entitled to return to his or her job or to an equivalent job, on terms and conditions that are the same or better than before the maternity/parental leave and to demand wages and to be considered in collective bargaining in the same manner as the other workers in the company. Article 33 of the GEADA includes both maternity leave and parental leave.

Article 15-9(2) of the WEA states that, 'an employee who has leave of absence ... for up to one year, shall not be given notice of dismissal that becomes effective during the period of absence ...'

5.5.16 Right to return to the same or an equivalent job (Clause 5(1) of Directive 2010/18)

Workers benefitting from parental leave have the right to return to the same job, or if this is not possible to an equivalent or similar job consistent with their employment. This is stated in Article 33 of the GEADA.

5.5.17 Maintenance of rights acquired or in the process of being acquired by the worker (Clause 5(2) of Directive 2010/18)

In national law rights acquired or in the process of being acquired by the worker on the date on which parental leave starts are maintained as they stand until the end of the parental leave.

5.5.18 Status of the employment contract or relationship during parental leave

The employment relationship is maintained during parental leave.

5.5.19 Continuity of entitlement to social security benefits

There is continuity between the entitlements to social security cover under the different schemes, in particular healthcare, during the period of parental leave.

5.5.20 Remuneration

Parental leave is not remunerated by the employer. Parental leave benefits are paid by the Norwegian Labour and Welfare Service (NAV). If the employment contract entitles the employee to their full salary during the leave, and this exceeds the maximum amount of six times the social security base, the employer is obliged to cover the difference if this is stated in the individual employment contract or as part of a company's Employee Handbook.

5.5.21 Social security allowance

The social security system in Norway does not provide for an allowance during parental leave in addition to the parental leave benefits. For people who have had no connection with the employment market (never been employed or self-employed) the NAV grants an allowance of one lump-sum payment upon the birth of a child, see Section 14-17 of the NIA.

5.5.22 More favourable provisions (Clause 8 of Directive 2010/18)

When it comes to Clause 8 of Directive 2010/18/EU the paid father's quota has had positive consequences regarding the rate of fathers taking parental leave. Statistics show that most fathers take up exactly the number of days of parental allowance in the quota.⁷⁹ As the length of the paternity quota changes, the length of paternity leave taken by fathers also changes almost immediately.

The quota has also stimulated both men and employers to accept parental leave as something that is natural for both men and women. In addition, the quota system has taught women that the leave is not theirs alone but is a joint project between the parents.

5.5.23 Case law

There have been some cases from the Equality Tribunal in 2018 concerning unfavourable treatment related to parental leave. Because the cases were from before the GEADA entered into force, the Equality Tribunal reviewed the cases in light of the former GEA.

For example, Case 11/2018⁸⁰ concerned the question of whether a company acted in contravention of the prohibition on discrimination in Article 5 of the former GEA. The Equality Tribunal concluded that the company had discriminated against the complainant (a man) due to his take-up of parental leave. The Equality Tribunal argued that the complainant had been allocated tasks in the workplace that were less favourable to him than the tasks he had before the leave began and that the main cause of the job change was the complainant's parental leave.

⁷⁹ <https://www.infotjenester.no/artikler/fedre-tar-noytaktig-ut-fedrekvoten/> (Norwegian text).

⁸⁰ <http://www.diskrimineringsnemnda.no/media/2191/11-2018-vedtak-anonymisert.pdf>.

5.6 Paternity leave

5.6.1 Existence of paternity leave in national law

Norwegian legislation provides for paternity leave in Section 12-3 of the WEA, which prescribes a right to two weeks 'care' leave for the father in relation to a spouse or co-habiting partner giving birth. This right to leave is unpaid, but some employers offer pay during the leave on a voluntary basis. Pay can also be a right due to collective agreements. A 'father's quota', a part of the parental leave which is reserved for fathers, exists in addition to the paternity leave, as laid out in Section 12-5(2) of the WEA. Parents are entitled to a leave of absence with pay of 12 months in total. Fifteen weeks of this benefit period are now reserved for the father if the parents choose the full rate. This is the father's quota as set out in Article 14-9(5) of the National Insurance Act. Similarly, 19 weeks are now reserved for each parent if they choose the reduced rate of 80 %. The father can use the quota from week 7 or wait until the child is a bit older.

If the father wholly or partly refrains from taking the father's quota, the benefit period will be correspondingly shorter. The parental benefit is paid by the national insurance (NAV) fund.

5.6.2 Protection against unfavourable treatment and/or dismissal (Article 16 of Directive 2006/54)

Article 15-9(2) of the WEA and Article 33 of the GEADA provide for protection against dismissal for workers who take paternity leave. Article 15-9(2) of the WEA states that, 'an employee who has a leave of absence ... for up to one year, shall not be given notice of dismissal that becomes effective during the period of absence ...'

Article 33 of the GEADA states that a person who has taken parental leave is entitled to return to his or her job or to an equivalent job, on terms and conditions that are the same or better than before the parental leave and to demand wages and to be considered in collective bargaining in the same manner as the other workers in the company.

5.6.3 Case law

There are some older cases from the Equality Tribunal concerning unfavourable treatment related to paternity leave.

In Case 41/2009 a municipality in Norway wanted to employ a lawyer to lead the municipality's property tax office. Five applicants were called for the first interview. Three of the candidates went on to a second interview. One of the candidates who did not go further in the interview process expressed a wish during the first interview to take parental leave (the father's quota) in May/June 2009.

The Equality Tribunal found that there were circumstances which gave reason to believe that the question of parental leave had contributed to the applicant not being considered relevant in the further employment process. The burden of proof was thus transferred to the employer. The municipality had neither presented any documentation that showed which criteria were emphasised in the further hiring process and how these were emphasised. Nor did the municipality prove or document matters that may justify exceptions pursuant to Article 3, fourth paragraph of the GEA. The municipality thus acted in contravention of Article 4, second paragraph, of the GE, Article 3.

5.7 Time off/care leave

5.7.1 Existence of care leave in national law (Clause 7 of Directive 2010/18)

Norwegian legislation entitles workers to time off from work on grounds of force majeure for urgent family reasons in case of sickness or an accident. Article 12-9(2) of the WEA provides for a right to paid leave in the case of the sickness of a child below the age of 12 years; this is 10 days per calendar year and a maximum of 15 days if the employee has more than two children. Single parents are entitled to double the amount of leave, as per Section 12-9(5). In case of a hospital stay or rehabilitation where the child is at home after such a hospital stay or the child has a life-threatening condition, the parent is entitled to leave as per Section 12-9(4). In this latter case the parent will receive pay from the NAV and thus the employer does not pay anything.

Article 12-10(2) has the following wording: 'Employees shall be entitled to a maximum of 10 days' leave of absence per calendar year to care for parents, a spouse, a cohabitant or a registered partner...'

5.7.2 Case law

In Section 5.6.3 above there are examples of national case law concerning unfavourable treatment related to the taking up of paternity leave.

5.8 Leave in relation to surrogacy

Surrogacy is illegal in Norway, so there is no leave in relation to surrogacy.

5.9 Flexible working time arrangements

5.9.1 Right to reduce or extend working time

Pursuant to Article 10-2(3) and (4) of the WEA, an employee may be entitled to flexible working time arrangements with reduced or extended working time.

In Article 10-2(3) it is stated that an employee shall be entitled to flexible working hours if this can be arranged without major inconvenience to the employer.

It is stated in Article 10-2(4) that an employee who has reached the age of 62, or who for health, social or other weighty welfare reasons so requires, shall have the right to a reduction of their normal working hours if the reduction of working hours can be arranged without major inconvenience to the employer.

5.9.2 Right to adjust working time patterns

National law provides workers with a legal right to adjust working time patterns on request under certain conditions. Article 10-2(3) of the WEA states that the worker is entitled to flexible working hours if this can be done without major disadvantages for the employer. Article 10-2(4) of the WEA states that employees aged 62 or over, or who need it for health, social or other important welfare reasons, have the right to reduce their working hours if the reduction in working hours can be done without any significant disadvantage for the employer.

According to Article 10-2(4) second paragraph, the employee, when the agreed period of reducing working hours has expired, has the right to resume their previous working hours.

There are no measures in place specifically to encourage men to make use of this legal right.

5.9.3 Right to work from home or remotely

National law does not give employees a legal right to work from home or remotely on request. This has to be arranged in the employment contract or by making an arrangement with the employer.

Article 10-2(3) and (4) of the WEA apply to 'the employee'. According to Article 10-2(3), the employee shall be entitled to flexible working hours if this can be arranged without any major inconvenience for the company.

5.9.4 Other legal rights to flexible working arrangements

Article 10-6(12) of the WEA provides for some legal rights to flexible working arrangements whereby workers can 'bank' hours to take time off in the future. These rights are in connection with the overtime rules. Article 10-6(12) states that the employer and the employee may agree in writing that overtime hours shall be wholly or partly taken as off-duty time on agreed dates. Some Collective Basic Agreements provide for time banking accounts where overtime may be taken as time off instead.

The right to flexible working hours can be exercised for any purpose, as long as it can be arranged without any major inconvenience for the company.

5.9.5 Case law

The author is not familiar with recent cases from the courts or equality bodies concerning flexible working time arrangements.

5.10 Evaluation of implementation

The Norwegian legislation is generally in line with the EU gender rules discussed in this chapter.

However, one area that is still not satisfactory is in relation to the Pregnant Workers Directive 92/85/EEC, which is, in the author's opinion, not correctly implemented in Norway, as mothers are not guaranteed a specific 14 weeks of independent maternity leave.⁸¹ In Norway, women are entitled to three weeks' leave before the birth and six weeks afterwards as leave which is specifically for women who are pregnant or have recently given birth. However, these weeks are deemed to be part of the parental leave under what is called a 'mother's quota'.

With reference to the two very different purposes of the two types of leave, the Norwegian solution is problematic. The Ministry of Children, Equality and Inclusion (the former 'BLD') has interpreted EU law on the right to maternity leave so that it can be fulfilled with leave both before and after the birth. This understanding provides for a total of 18 maternity leave weeks in the Norwegian model. However, as the author sees it, leave before the birth should not be a part of the fulfilment of the maternity directive requirement. The right to maternity leave of 14 weeks in accordance with the maternity directive should, in the author's opinion, be compared with the right to the six compulsory weeks of leave after the birth set out in Article 12-4 of the WEA.

It is also worth mentioning that in Norway, certain limits on the granting of paid parental leave are only applicable to fathers. The result is that mothers are explicitly granted more comprehensive rights to paid leave.

⁸¹ See the article where this situation is described: Aune, H., Nylander, G. (2015), 'Barseltid et faktum. Barseltid en rettslig sannhet', *Nordisk tidsskrift for Sosialrett*, 20 September. See CJEU cases C-519/03 para. 32 and C-342/01 para. 41 and the Maternity Leave Directive 92/85/EEC.

According to the Norwegian system, the father's right to paid parental leave is dependent upon the mother's work and income situation. The same does not apply in reverse and in the view of the EFTA Surveillance Authority (ESA), this constitutes a breach of the Equal Treatment Directive (Directive 2006/54/EC). ESA brought the case to the EFTA court and the verdict is expected before the end of 2019.⁸²

5.11 Remaining issues

The most relevant issues on this matter have been discussed above.

⁸² <http://www.eftasurv.int/press--publications/press-releases/internal-market/internal-market-norway-s-rules-on-paid-parental-leave-prevent-equal-treatment>.

6 Occupational social security schemes (Chapter 2 of Directive 2006/54)

6.1 General (legal) context

6.1.1 Surveys and reports on the practical difficulties linked to occupational and/or statutory social security issues

Surveys from Statistics Norway show that gender equality has increased in several areas of working life over the years.⁸³ Nevertheless, Statistics Norway's gender equality indicators show that the labour market in Norway is still gender-divided, and this affects the occupational social security schemes. The proportion of women who work part-time is still large, compared to men. In addition, women and men work to a large extent within different sectors and industries, which contributes to different salaries among women and men.

6.1.2 Other issues related to gender equality and social security

There are no other issues related to gender equality and social security to be reported, except for what is mentioned in this chapter.

6.1.3 Political and societal debate and pending legislative proposals

There have not been any particular political/societal debate or pending legislative proposals on this topic in 2018.

6.2 Direct and indirect discrimination

Direct and indirect discrimination on grounds of sex in occupational social security schemes are prohibited in national law. This is not explicitly stated with regard to occupational pension schemes, but Article 2 of the GEADA states that the law applies to all areas of society and case law has interpreted this as applying to occupational social security schemes.

6.3 Personal scope

The personal scope of Norwegian law relating to occupational social security schemes is the same as that specified in Article 6 of Directive 2006/54.

6.4 Material scope

The material scope of Norwegian law relating to occupational social security schemes is the same as that specified in Article 7 of Directive 2006/54/EC.

6.5 Exclusions

Norway has not implemented exclusions from the material scope as specified in Article 8 of Directive 2006/54/EC in national law. This may be explained by the fact that the GEADA is generally applicable to all areas of society and is not limited to the employment market. In addition, there has not been any tradition of providing men and women with different age limits or different services in the social security system.

⁸³ <https://www.ssb.no/befolkning/artikler-og-publikasjoner/attachment/341883>.

6.6 Laws and case law falling under the examples of sex discrimination mentioned in Article 9 of Directive 2006/54

There are no laws or case law which would fall under the examples of sex discrimination as mentioned in Article 9 of Directive 2006/54/EC.

6.7 Actuarial factors

In national law, sex is not used as an actuarial factor in occupational social security schemes to the author's knowledge.

6.8 Difficulties

As far as the author is aware, there are no difficulties when it comes to occupational security schemes in Norway.

6.9 Evaluation of implementation

In the author's view the Norwegian legislation is generally in line with the EU law discussed in this chapter.

6.10 Remaining issues

The most relevant issues regarding social security have been discussed above.

7 Statutory schemes of social security (Directive 79/7)

7.1 General (legal) context

7.1.1 Surveys and reports on the practical difficulties linked to statutory schemes of social security (Directive 79/7)

Statistics show that there is a higher sickness absence among women than among men. In 2018, absence due to sickness was 7.0 % among women and 4.0 % among men. Women also have a higher rate of sick leave than men in almost all age groups. Absence from work due to sickness has also been higher among women than among men since the 1970s (SSB 2016). The situation and developments in Norway are similar to those in other countries with high labour force participation by women.⁸⁴

Furthermore, the statistics/survey from the Norwegian Directorate for Children, Youth and Family affairs (Bufdir)⁸⁵ show that the reasons for the gender difference in sick leave are complex. PROBA societal analysis (2015) has reported in an analysis of international research on sickness absence that they find support for the fact that pregnancy-related sickness absence accounts for some, but not all, of the difference between women and men's sick leave. In the analysis, differences in occupation, working hours and care responsibilities cannot explain the gender differences. Furthermore, the connection between absence and children living at home appears weak and partly obscure. The researchers emphasise that the working environment is important for the level of absence, but it is still not clear which aspects of the working environment are most important. The research also shows that absence from work due to sickness varies by industry and sector.

The risk of sickness absence certified by a doctor for 21 days or more was 42 % higher among women working in health and social care than among women in other occupations.⁸⁶ The results also showed that this can mainly be explained by working environment factors, such as part-time work, work with violence and threats of violence, emotional demands, and heavy lifting of patients as the most significant factors. In the study, psychosocial factors proved to be more significant than mechanical factors as an explanation for the increased risk of sickness absence in health and social care work. However, the higher sickness absence in these kinds of jobs does not affect the right to sickness benefits.

7.1.2 Other relevant issues

There have not been any recent changes concerning social security schemes in national law that are worth mentioning here.

7.1.3 Overview of national acts

Folketrygdloven LOV-1997-02-28-19 (The National Insurance Act (NIA) of 1 May 1997,⁸⁷ *Sosialtjenesteloven LOV 2009-12-18-131* and (the Act on Social Services in the Work and Welfare Administration (Social Services Act) of 1 January 2010),⁸⁸ *Lov om Statens Pensjonskasse LOV 1949-07-28-26* (the Act on the State Pension Fund) of 1 August 1949⁸⁹ and the WEA contain provisions on statutory security schemes.

⁸⁴ https://bufdir.no/Statistikk_og_analyse/Kjonnslukestilling/Helse_og_kjonn/Sykefravar_og_uforhet/.

⁸⁵ https://bufdir.no/en/English_start_page/ page in English.

⁸⁶ Agestad et al. 2016.

⁸⁷ <https://lovdata.no/dokument/NL/lov/1997-02-28-19?q=folketrygdloven>.

⁸⁸ <https://lovdata.no/dokument/NL/lov/2009-12-18-131?q=sosialtjenesteloven>.

⁸⁹ <https://lovdata.no/dokument/NL/lov/1949-07-28-26>.

7.1.4 Political and societal debate and pending legislative proposals

There have not been any pending legislative proposals on this topic during 2018.

7.2 Implementation of the principle of equal treatment for men and women in matters of social security

The principle of equal treatment for men and women in matters of social security is implemented in national law. Article 2 of the GEADA states that the law applies to all areas of society. This includes matters of social security.

7.3 Personal scope

The personal scope of national law relating to statutory social security schemes is the same as that in Article 2 of Directive 79/7/EEC.

7.4 Material scope

The material scope of national law relating to statutory social security schemes is the same as that in Article 3 paras. 1 and 2 of Directive 79/7/EEC.

7.5 Exclusions

Norway has not implemented any exclusions from the material scope as specified in Article 7 of Directive 79/7/EEC.

7.6 Actuarial factors

Case C-318/13 (*Korkein hallinto-oikeus v. Finland*) concerning the prohibition of the use of gender-based actuarial factors in statutory pension schemes has no direct implication, as the use of gender-based actuarial factors is illegal according to the GEADA.

7.7 Difficulties

To the author's knowledge there are no specific difficulties in Norway in relation to implementing Directive 79/7/EEC.

7.8 Evaluation of implementation

The Norwegian legislation is generally in line with the EU law discussed in this chapter.

7.9 Remaining issues

The author does not have remaining issues to discuss in this chapter.

8 Self-employed workers (Directive 2010/41/EU and some relevant provisions of the Recast Directive)

8.1 General (legal) context

8.1.1 Surveys and reports on the specific difficulties of self-employed workers

There are no reports or surveys from the last five years that provide insights into the specific difficulties that self-employed workers face. However, research from 2013 shows that the under-representation of women in entrepreneurship is consistent over cultures and countries, and is even higher in Norway than in most other industrialised societies.⁹⁰ The research explores an area that has been little researched so far – the family and household situation. The researchers studied the presence of children and their ages, the role of the partner and the household's financial resources. Surprisingly, the results show that women are more likely to choose self-employment over wage-work when their children are small, indicating that children are no barrier to entrepreneurship, at least not when defined as self-employment as in this report. The self-employment propensity of both women and men is negatively related to their partner's working hours and positively related to him (or her) being self-employed himself (herself). The causal direction of these relationships cannot be established in the present analysis and needs to be investigated closer in future research.

8.1.2 Other issues

As mentioned in Section 8.1.1 it might seem that women with small children are under-represented in self-employment, but research from 2013 indicates otherwise. However, the research has also pointed out the high and persisting sex-segregation in education and in the labour market as one reason for the low number of female entrepreneurs. Girls tend to choose an education that qualifies them for jobs in the public and private service sectors, whereas boys choose fields that more often qualify them for jobs in private industry and commerce.

8.1.3 Overview of national acts

The NIA, WEA and GEADA cover provisions for self-employed workers relevant which are for this chapter in the report. The provisions in the acts will be discussed further in this chapter.

8.1.4 Political and societal debate and pending legislative proposals

There have been no political/societal debate or pending legislative proposals on this topic in 2018.

8.2 Implementation of Directive 2010/41/EU

The National Insurance Act and the GEADA contain the rights established in Directive 2010/41/EU.

8.3 Personal scope

8.3.1 Scope

Self-employment is defined in Section 1-10 of the National Insurance Act. Whether or not a person is self-employed will depend on an overall evaluation of various factors such as: does the person run an activity at their own cost and risk and is this activity likely to create

⁹⁰ <https://www.ssb.no/a/publikasjoner/pdf/DP/dp727.pdf>.

an income, does the activity have a certain turnover, does the person employ freelancers or employees, does the business have its own office/workshop, and does the person own their own tools and are they economically responsible for the entity?

8.3.2 Definitions

Self-employment is defined in Article 1-10 of the National Insurance Act. Whether or not a person is self-employed depends on an overall evaluation of various factors, as explained in Section 8.3.1 above.

8.3.3 Categorisation and coverage

All self-employed workers are considered to be part of the same category, including agricultural workers.

8.3.4 Recognition of life partners

In national law the personal scope does not include the spouses and life partners of self-employed workers. National legislation recognises life partners but only as regards the possibility to purchase additional insurance from the NIA, for instance for someone employed on their partner's company. In this regard, life partners are registered as employees. Life partners do not automatically receive any status as such.

8.4 Material scope

8.4.1 Implementation of Article 4 of Directive 2010/41/EU

The principle of equal treatment under Article 4 of Directive 2010/41/EU is implemented in the equal treatment legislation in Articles 1 and 6 of the GEADA.

8.4.2 Material scope

Norwegian legislation is more restrictive than specified in Article 4 of Directive 2010/41/EU, as it does not include spouses and life partners and does not ensure that they have the same rights as employees. However, it is possible to purchase additional insurance from the NAV when life spouses work, for instance, in an agricultural business.

8.5 Positive action

Norway has not taken advantage of the power to take positive action.

8.6 Social protection

Norway has a system of social protection for self-employed workers.

The National Insurance Act covers self-employed workers. According to Sections 23-6 and 8-35, self-employed people may receive sickness benefit of up to 65 % of the sickness allowance scheme. The Norwegian system relies on the National Insurance Act as a base platform for all residents. In addition, people are free to purchase additional insurance in the NI system as a supplement. The requirement to ensure that spouses and life partners can benefit from social protection in accordance with national law has been implemented in a voluntary system where it is possible to buy social protection (health/sickness or a pension), on the basis of Sections 3-13 and 23-6 of the NIA and under a specific

regulation.⁹¹ Working spouses of self-employed workers thus need to purchase specific insurance.

8.7 Maternity benefits

Article 8 of Directive 2010/41/EU regarding maternity benefits for the self-employed has been implemented into Norwegian law, see the National Insurance Act (Section 14-4(5)).

The maternity allowance is the same for employees and the self-employed: the payment is either 80 % or 100 % of the salary level, depending on the length of the leave to be taken. The maximum pay is 6 G, one G corresponding to the base amount for calculations for the NI, subject to annual regulations.⁹²

Female self-employed workers and female spouses and life partners are entitled to maternity benefits if they have fulfilled the base requirement of having been at work during six of the last ten months before the birth of the child, see Sections 14-6 and 14-7 of the NIA. The amount of the benefit is calculated according to the average income during the last three years.⁹³ Spouses or any person who does not work will receive a cash benefit in relation to the birth; see Section 14-17 of the NIA.

8.8 Occupational social security

8.8.1 Implementation of provisions regarding occupational social security

Article 10 of Directive 2006/54/EC regarding occupational social security for self-employed people is implemented in the NIA. It is a voluntary system where it is possible to buy social protection (health/sickness or a pension) according to Sections 3-13 and 23-6 of the NIA and under a specific regulation.⁹⁴

8.8.2 Application of exceptions for self-employed persons regarding matters of occupational social security (Article 11 of Recast Directive 2006/54)

Norway has not made use of the exceptions for self-employed people regarding matters of occupational social security under Article 11 of Directive 2006/54/EC.

8.9 Prohibition of discrimination

Article 14(1)(a) of Recast Directive 2006/54/EC is implemented in national law as regards self-employment, both through the general wording of the GEADA as well as specific declarations in sections of the WEA, see for instance Section 13-2(2). This states that the rules as described in Chapter 13 of the WEA apply equally for an employer's selection of and treatment of independent/self-employed workers and employees hired by a company.

8.10 Evaluation of implementation

All in all, the Norwegian legislation is generally in line with the EU law discussed in this chapter.

⁹¹ See Regulation F11.03.1997 No. 210 *Forskrift om frivillig yrkesskadetrygd for selvstendig næringsdrivende og frilansere*.

⁹² In 2017 the G (*grunnbeløp*) was NOK 93 634 (EUR 9 801.63), at an exchange rate of EUR 0.1047 to 1 NOK (DNB BANK exchange rate on 18 May 2018). The G is a calculation figure for the NAV calculating every person's right to benefits from the National Insurance system (*Folketrygden*).

⁹³ See the information about maternity/parental leave benefits on the NAV website; <https://familie.nav.no/>.

⁹⁴ See Regulation F11.03.1997 No. 210 *Forskrift om frivillig yrkesskadetrygd for selvstendig næringsdrivende og frilansere*.

8.11 Remaining issues

The most important topics on this matter have been discussed.

9 Goods and services (Directive 2004/113)⁹⁵

9.1 General (legal) context

9.1.1 Surveys and reports about the difficulties linked to equal access to and supply of goods and services

The author is not familiar with any surveys or reports from the last five years concerning equal access to and supply of goods and services.

9.1.2 Specific problems of discrimination in the online environment/digital market/collaborative economy

There are no specific problems regarding discrimination concerning access to goods and services in the online environment/digital market.

9.1.3 Political and societal debate

There has been no particular political or societal debate on this topic in Norway since the GEADA entered into force on 1 January 2018.

9.2 Prohibition of direct and indirect discrimination

National law does not prohibit direct and indirect discrimination on grounds of sex in access to, and the supply of, goods and services directly but Article 2 of the GEADA states that the law applies to all areas of society. This includes access to goods and services.

9.3 Material scope

The material scope of the national law relating to access to goods and services fulfils the requirements according to Article 3 of Directive 2004/113/EC. As far as the Directive's Article 3 (3)s concerned, the GEADA (Article 27) prescribes that all teaching materials in schools and education shall be in accordance with the aim of the Act, thereby emphasising gender equality and non-discrimination on the ground of gender. The GEADA is in this respect broader than the Directive.

9.4 Exceptions

As far as the Directive's Article 3(3) is concerned, Article 27 of the GEADA prescribes that all teaching materials in schools and education shall be in accordance with the purpose of the Act, emphasising gender equality and non-discrimination on the ground of gender. The GEADA is in this respect broader than the Directive. When it comes to media and advertising, Norwegian law appears to be broader than the Directive as well. There is protection against discrimination on the ground of gender in the Marketing Act (Article 2)⁹⁶ as follows:

'Advertisements and the person producing a commercial/advertisement shall ensure that the advertisement is not in violation of the principle of equality between men and women, and ensure that the advertisement does not take advantage of either gender's body or image or provide a representation of one of the sexes in an offensive or degrading manner.'⁹⁷

⁹⁵ See e.g. Caracciolo di Torella, E. and McLellan, B. (2018) *Gender equality and the collaborative economy*, European network of legal experts in gender equality and non-discrimination, available at: <https://www.equalitylaw.eu/downloads/4573-gender-equality-and-the-collaborative-economy-pdf-721-kb>.

⁹⁶ See the Marketing Act (*Lov om markedsføring og avtalevilkår m.v.* LOV -2009-01-09-2).

⁹⁷ Unofficial translation.

9.5 Justification of differences in treatment

The author is not aware of any examples of justified differences in treatment in line with Article 4(5).

9.6 Actuarial factors

The GEADA, with the general prohibition on discrimination, ensures that the use of sex/gender as a factor in the calculation of premiums and benefits for the purposes of insurance and related financial services does not result in differences in individual premiums and benefits, see Article 5(1) of Directive 2004/113. There are a few older cases from the Equality Tribunal regarding the former GEA.

In a case 11/2001 from 2004-01-21 the former Equality Tribunal (*Klagenemnda for likestilling* LKN-2004-1) the issue at stake was sex as an actuary calculation factor for the premium for insurance against accidents and sickness. The Equality Tribunal found this to be direct discrimination on the ground of sex and that it violated Section 3 of the GEA (1978). The Tribunal granted the insurance companies a two-year limit to correct their practice.

Another case from the former Equality Tribunal from 2001-10-29 (*Klagenemnda for likestilling* LKN-2001-11) concerned banks/money-lending institutions which used sex as a calculation factor in people's credit rating. This practice was found to be illegal and in violation of the prohibition against direct discrimination on the ground of gender in the former GEA (1978) (Section 3).

9.7 Interpretation of exception contained in Article 5(2) of Directive 2004/113

Norway has not made any exceptions according to Article 5(2) of Directive 2004/113/EC. Even though it is clear, according to the Equality Tribunal's early practice and the text of the law, that sex discrimination is not legal in collective pensions, the judgment of the Court of Labour Disputes (2013-01-014 ARD-2013-1)⁹⁸ implies that sex may still be used as an actuarial factor in some cases. The *Test-Achats* ruling has therefore not resulted in any changes to national legislation, as Norway presumes that national law is in compliance.

9.8 Positive action measures (Article 6 of Directive 2004/113)

Norway has not adopted positive action measures in relation to access to and the supply of goods and services.

9.9 Specific problems related to pregnancy, maternity or parenthood

There are no specific problems of discrimination on the grounds of pregnancy, maternity or parenthood in Norway in relation to access to and the supply of goods and services.

9.10 Evaluation of implementation

The national law relating to access to goods and services fulfils the requirements of Directive 2004/113/EC. As mentioned under Section 9.4, as far as the Directive's Article 3(3) is concerned, Article 27 of the GEADA prescribes that all teaching materials in schools and education shall be in accordance with the aim of the Act. It could be said that the GEADA is in this respect broader than the Directive.

⁹⁸ Verdict from the Norwegian Court of Labour Disputes 'Arbeidsretten', dated 14 January 2013.

9.11 Remaining issues

The author does not know of any remaining issues regarding goods and services that have not been discussed so far.

10 Violence against women and domestic violence in relation to the Istanbul Convention

10.1 General (legal) context

10.1.1 Surveys and reports on issues of violence against women and domestic violence

There are several important surveys and reports that provide insight into issues of violence against women and domestic violence in Norway. The first worth mentioning is a study by Siri Thoresen and Ole Kristian Hjemdal (2014), on violence and rape in Norway.⁹⁹

This survey on the extent of violence (including domestic violence) and sexual violence was conducted in 2013 and a report on the findings was issued in February 2014 by the Norwegian Centre for Violence and Traumatic Stress Studies (NKVTS). It showed that approximately 9 % of women over 15 years of age in Norway have been victims of severe violence (life-threatening violence; attempted strangulation, use of weapons, beating of head against an object or wall) by their current or former partner one or more times in the course of their lives. The lifetime prevalence of rape was 9.4 % for women and 1.1 % for men. Additional surveys based on the data provided by the 2013 survey will be conducted among particular groups such as people from immigrant background, LGBT people and people with disabilities. The survey data form the basis for further research and interventions from the Government, the municipalities and NGOs.

In addition, the NKVTS found that women and men are equally subject to violence, but that the abuse of women tends to be more serious and more often of a sexual nature. In total, 33.6 % of women and 11.3 % of men had experienced some form of sexual assault during their lifetime. 8.2 % of women and 1.9 % of men reported serious partner violence, and 14.4 % of women and 16.3 % of men reported less serious partner violence during their lifetime. 25-30 % of all homicides are committed by an intimate partner.

Another important study was produced by Mia Myhre, Siri Thoresen and Ole Kristian Hjemdal (2015) on violence and rape during childhood.¹⁰⁰ A survey on the extent of violence and sexual abuse in childhood was published in March 2015. The investigation revealed that violence and sexual abuse affect a significant proportion of children and adolescents in Norway, that violence and abuse for many starts in early childhood and that the victims have often experienced several types of violence and abuse. Women are far more exposed to sexual abuse than are men, and women also seem to have a heavier total burden of violence and sexual abuse. The results indicate a reduction over time in physical violence against children. However, the data did not indicate any reduction over time in rape against young women. Physical violence and rape varied with socio-economic factors, and perpetrators of sexual abuse were almost exclusively men.

The third study worth mentioning is by Svein Mossige and Kari Stefansen (2016) on violence and abuse against children and young people.¹⁰¹ The report shows that a significant number of young people and adults are subject to violence. It shows that less serious violence has been reduced between 2007 and 2015, while serious violence is stable. A substantial amount of the sexual violence is carried out between peers. The report compares the results from two comparable research projects by NOVA called Ung Vold ('Youth violence') 2007 and Ung Vold 2015. The respondents were 18-19 years old.

⁹⁹ Thoresen, S., & Hjemdal, O. K. (Red.) (2014) *Vold og voldtekt i Norge. En nasjonal forekomststudie av vold i et livsløpsperspektiv* [Violence and rape in Norway. A national prevalence study with a life course perspective.] Norwegian only. Oslo: Nasjonalt kunnskapssenter om vold og traumatisk stress.

¹⁰⁰ Myhre, M. C., Thoresen, S., & Hjemdal, O. K. (2015). *Vold og voldtekt i oppveksten: En nasjonal intervjuundersøkelse av 16- og 17-åringer* [Violence and rape during childhood: A national interview survey of 16 and 17-year-olds.] Norwegian only. Oslo: Nasjonalt kunnskapssenter om vold og traumatisk stress. (Rapport 1/2015).

¹⁰¹ <http://www.hioa.no/Om-OsloMet/Senter-for-velferds-og-arbeidslivsforskning/NOVA/Publikasjoner/Rapporter/2016/Vold-og-overgrep-mot-barn-og-unge>.

21 % of the young people reported having experienced serious violence perpetrated by at least one parent during their childhood. 8 % had witnessed violence between their own parents. 23 % reported having experienced some form of sexual abuse during their lives, and girls were significantly more likely to have experienced it than boys. The report highlights risk factors, including poverty and alcohol abuse, but these risk factors are mainly valid for the more serious forms of violence.

The Norwegian Directorate for Youth and Family Affairs (Bufdir) has also produced an online resource providing an overview of current statistics and quantitative and qualitative research on gender equality in Norway.¹⁰² The resource is available to the general public, but specifically targeted at decision-makers at the national and local levels, as well as civil society actors with an interest in advancing gender equality. The website outlines current challenges to gender equality in Norway, including domestic and gender-based violence, and contextualises research with the aim of highlighting particular areas of concern, with the purpose of eliciting political (re)action.

As to ongoing research, the Ministry of Justice is financing a five-year Domestic Violence Research Programme (2014-2019). The research is being conducted by two Norwegian research institutions: the Norwegian Centre for Violence and Traumatic Stress Studies (NKVTS)¹⁰³ and Norwegian Social Research NOVA at OsloMet.¹⁰⁴

As a result of the obligations in the Istanbul Convention, gender equality and women's rights are and will be affected and strengthened in many ways in Norway. For example, related to the Articles 13 and 14 of the Convention, on awareness-raising and education: in February 2016, the Ministry of Justice and Public Security launched a web portal on domestic violence and rape. It is named Dinutvei.no ('your way out') and has a Q&A service where users can be anonymous. It also guides its users to the organisations that can provide further help, such as crisis shelters and family services. Dinutvei.no provides national guidelines on assistance, information and knowledge available on rape and violence, both violence within the family and violence between previous or current spouses or partners. The webpage is operated by the NKVTS on behalf of the Ministry of Justice and Public Security. Dinutvei.no makes it easier to get an overview of support services available, locally and nationally, and to gain access to knowledge about one's own or others' situation. Parts of the content of the webpage are translated into Arabic, Kurdish, Somali, Thai, Turkish, Urdu, Farsi, Russian, Sami, Spanish, English, French and Polish.¹⁰⁵

Article 15 of the Convention highlights relevant training for professionals dealing with victims or perpetrators who need knowledge about prevention, detection, equality, rights of victims, and the prevention of secondary victimisation. In Norway this has led to the result that building capacity and competence are two central issues in the national action plan on intimate partner violence.¹⁰⁶

10.1.2 Overview of national acts on violence against women, domestic violence and issues related to the Istanbul Convention

Article 13 of the GEADA prohibits harassment based on gender and sexual harassment.

In Norwegian, the term consistently used is 'vold i nære relasjoner', which can be literally translated as 'violence in close relationships'. The term is translated variously as 'domestic violence', 'family violence', 'partner abuse', 'battering', etc, mainly to distinguish this

¹⁰² See www.kjonnslikestilling.no.

¹⁰³ <https://www.nkvts.no/>.

¹⁰⁴ <http://www.hioa.no/Om-OsloMet/Senter-for-velferds-og-arbeidslivsforskning/NOVA>.

¹⁰⁵ http://kriminalitetsforebygging.no/wp-content/uploads/2018/03/stubberud_hovde_and_aarbakke_-_the_istanbul_convention_the_nordic_way_2018.pdf, page 64.

¹⁰⁶ Stubberud, E., Hovde, K. and Aarbakke, M. H. (2018). *The Istanbul Convention the Nordic way*, available at: http://kriminalitetsforebygging.no/wp-content/uploads/2018/03/stubberud_hovde_and_aarbakke_-_the_istanbul_convention_the_nordic_way_2018.pdf.

violence from more random violence perpetrated by attackers with whom the abused has no established or lasting relationship.

In 2005, the Parliament adopted a penal provision regarding 'vold i nære relasjoner' (Article 219 of the Penal Code; current Article 282). In the new provision, it is the perpetrator's long-term terrorisation and abuse of the next-of-kin (current or ex-spouse or partner, their own or their partner's relatives, household members or others for whom the perpetrator plays a caring role) that constitutes the criminal aspect of the act. The expression 'domestic violence' (also referred to as 'family violence', 'partner abuse', 'battering', etc.) covers all forms of physical and emotional abuse of current or former family members, and its victims include child witnesses. The term also covers the crimes of genital mutilation and forced marriage.

Article 291 also covers sexual assault/rape as follows:

- 'A penalty of imprisonment for a term not exceeding 10 years shall be applied to any person who
- c) obtains sexual activity through violence or threatening conduct;
 - d) engages in sexual activity with a person who is unconscious or for other reasons incapable of resisting the act; or
 - e) through violence or threatening conduct makes a person engage in sexual activity with another person, or perform acts corresponding to sexual activity on himself/herself.'

Article 293 covers aggravated sexual assault and Article 294 covers grossly negligent sexual assault. The article on grossly negligent sexual assault is not used much in Norwegian criminal law. However, it is used when it cannot be proved that the person committed a sexual assault on purpose, but the person has obviously been grossly negligent in his or her actions. The courts take an objective view of this.

The Act relating to Municipal Crisis Centre Services (Crisis Centres Act) entered into force on 1 January 2010. The purpose of the Crisis Centres Act is to ensure the provision of a good, comprehensive crisis centre service for women, men and children who are subjected to domestic violence or threats of such violence.

10.1.3 National provisions on online violence and online harassment

There is no specific regulation regarding online violence and harassment of women and girls in the national legislation. Threats and serious threats are prohibited in Article 263 of the Penal Code. Article 264 covers online threats towards women and girls. According to Article 266, the dissemination of intimate images online is also a crime.

Article 13 of the GEADA prohibits harassment based on gender, gender identity and gender expression amongst other grounds. This also includes online harassment.

10.1.4 Political and societal debate

Women's vulnerability to hate speech and other forms of written violence, intimidation and abuse on the internet has received increased attention in Norway over the last couple of years.¹⁰⁷ It has been debated how female journalists, together with prominent female politicians and contributors to public debate, suffer from trolling, misogyny and sexual harassment online. Concern has been voiced about how this can negatively affect women journalists' reporting and, in general, women's freedom of expression and contribution to public debate and democracy. In a recent study commissioned by the Nordic Council of

¹⁰⁷ <https://www.samfunnsforskning.no/aktuelt/nyheter/2018/hvor-vanlig-er-hatytringer-pa-nett.html>.

Ministers on gender representation in news content and the media industry in the Nordic countries, it is pointed out that authorities need to do more to tackle the issue.

In November 2016, the Government launched a strategy aimed at combating hate speech in Norwegian society. The strategy outlines measures and priorities in different sectors and arenas, such as the workplace, schools, academia, law enforcement and the media.¹⁰⁸

In 2016, the Norwegian Government also presented Prop 12 S (2016-2017) – a plan to prevent violence and abuse, particularly against women and children.¹⁰⁹ The plan highlights the main challenges associated with violence and abuse, especially against children, and suggests measures and strategies to meet these challenges. It addresses how to better prevent violence and abuse. This applies to both efforts aimed at the general population and measures aimed at individuals or groups living under a known increased risk of being subjected to violence. In this area knowledge is crucial. Increased expertise is needed in all sectors and services to ensure that violence is detected and stopped. The plan refers to the public sector's special responsibility for combating violence and abuse and for establishing good cooperation structures across services and sectors.

There are no direct pending legislative proposals in relation to online violence and harassment, but since the introduction of Article 266 of the Penal Code, serious stalking has become a crime in Norway.¹¹⁰ However, the provision on stalking has been debated after the Supreme Court concluded in a recent case (HR-2019-563-A¹¹¹) that serious stalking is not illegal as long as the victim does not know they have been stalked. This means that stalking is not a crime according to Norwegian law as long as the victim doesn't know they are being stalked. After this ruling from the Supreme Court several political parties initiated a campaign to change the article in the Penal Code so that stalking that is hidden, where the victim does not know they are being stalked, will be a crime according to Norwegian legislation.¹¹²

10.2 Ratification of the Istanbul Convention

The Istanbul Convention was ratified by the Norwegian Parliament in July 2017 and entered into force on 1 November the same year. Norway's first report to GREVIO has not yet been scheduled.¹¹³ Norway has not issued any reservations to the Convention.

Prior to 2016 Norway lacked a penal provision on stalking, which the Convention requires, and this had to be amended through legislation before Norway could ratify it. The amendments to the Penal Code were implemented by law on 17 June 2016 (cf. 42 L (2015-2016)), and this means that Norwegian law mainly fulfils its obligations to the Istanbul Convention. However, as mentioned under Section 10.1.1, following a recent ruling by the Supreme Court, several political parties have initiated a campaign to change the law on stalking so that hidden stalking will also be a crime according to Norwegian legislation. The public prosecutor has already drafted a new bill on this matter and sent it to the Director of Public Prosecutions.¹¹⁴

¹⁰⁸ https://www.regjeringen.no/contentassets/72293ca5195642249029bf6905ff08be/hatefulleytringer_uu.pdf.

¹⁰⁹ <https://www.regjeringen.no/no/dokumenter/prop.-12-s-20162017/id2517407/>.

¹¹⁰ See Article 266 a: https://lovdata.no/dokument/NLE/lov/2005-05-20-28/KAPITTEL_2#KAPITTEL_2.

¹¹¹ Verdict from the Norwegian Supreme Court of 2019-03-21 in HR-2019-563-A.

¹¹² <https://www.dagbladet.no/nyheter/rystet-etter-stalking-frifinnelse---slik-skal-det-ikke-vaere/70918064>.

¹¹³ See <https://www.nhri.no/2018/ett-ar-med-istanbulkonvensjonen/>.

¹¹⁴ See article in Norwegian newspaper VG from 26 May 2019; «Smutthull» tillater skjult stalking: Riksadvokaten fraråder hastebehandling av loven (Hidden stalking is not a crime. The Director of Public Prosecutions doesn't want to deal with the bill proposal quickly); <https://www.vg.no/nyheter/innenriks/i/Opzdk1/smutthull-tillater-skjult-stalking-riksadvokaten-fraraader-hastebehandling-av-loven>.

11 Compliance and enforcement aspects (horizontal provisions of all directives)

11.1 General (legal) context

11.1.1 Surveys and reports about the particular difficulties related to obtaining legal redress

The author is not familiar with any surveys or reports about difficulties related to obtaining legal redress.

11.1.2 Other issues related to the pursuit of a discrimination claim

The author is not familiar with other issues relevant to this report on this matter.

11.1.3 Political and societal debate and pending legislative proposals

As of 1 January 2018, the Equality Tribunal has a mandate to give administrative decisions, including redress and compensation, under Article 12 of the EAOA. In cases that do not concern employment only compensation may be given. Following this change, there has not been any particular public debate on this matter and there are no relevant pending legislative proposals.

However, the Government has suggested that the Equality Tribunal may also be given power to treat cases concerning sexual harassment and to give redress to victims of sexual harassment.¹¹⁵ It has been expected that this proposal will enter into force in 2019. On 11 June 2019, Parliament approved the amendments of the Act on the Equality and Anti-Discrimination Ombud and the Equality and Anti-Discrimination Tribunal (EAOA) and Gender Equality- and Anti-Discrimination Act (GEADA).

The Norwegian Parliament has through amendment of the EAOA given the Equality- and Anti-Discrimination Tribunal the authority to enforce article 13 regarding the prohibition against sexual harassment in the Gender Equality and Discrimination Act (GEADA), and to impose redress in cases of sexual harassment in the workplace and compensation in less complicated cases.

11.2 Victimisation

In national law the directives' provisions on victimisation are implemented through Article 14 of the GEADA and Article 2 A-2 of the WEA. 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 the balance of probabilities, that such differential treatment did not take place. This applies equally to situations of reprisals and victimisation. In addition, 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.

As the regulation on victimisation is relatively new, both the Equality Ombud and Equality Tribunal have dealt with a limited number of cases in which victimisation has been alleged.

¹¹⁵ <https://www.regjeringen.no/no/aktuelt/foreslar-lavterskeltilbud-for-behandling-av-saker-om-seksuell-trakassering/id2606584/>.

The Equality Tribunal dealt with some cases in 2018 where victimisation was one of the issues raised in cases concerning gender equality. These were primarily been cases where harassment was one of the claims.

Examples include Case 20/2018 from the Equality and Anti-Discrimination Tribunal¹¹⁶ concerning the question of whether a municipality acted in breach of the prohibition against discrimination and harassment on the grounds of gender in connection with the complainant's appointment and training as a fire fighter. The case also raised questions about whether the employer had exposed the complainant to retaliation and fulfilled its duty to prevent and seek to prevent sexual harassment in the workplace.

The Equality Tribunal concluded that the municipality had not discriminated against or harassed the complainant on the ground of gender in connection with their appointment and training to become a fire-fighter, and that the municipality had not acted in violation of the prohibition against retaliation/victimisation.

In Case 14/1434, the Equality Ombud found that a police district had proper and sufficient procedures in place to prevent sexual harassment as well as procedures for handling such complaints. The police district, regardless of its proper procedures, had nonetheless not succeeded in protecting a female police officer from retaliation as a result of her complaints of sexual harassment. The police district had thus violated Section 9 of the Gender Equality Act (2013).

Case 80/2018 from the Equality Tribunal¹¹⁷ concerns discrimination on the grounds of gender and/ or religious beliefs. The complainant argued that the Norwegian employment and welfare service (NAV) did not invite her to an interview and did not give her equal pay. Furthermore, the question was raised as to whether NAV had exposed the complainant to retaliation/victimisation when she notified and complained of discriminatory conditions. The Equality Tribunal concluded that NAV had not discriminated against the complainant and that she was not subjected to retaliation.

11.3 Access to courts

11.3.1 Difficulties and barriers related to access to courts

Access to the courts is in theory legally guaranteed for alleged victims of sex discrimination. However, an important and significant challenge is that, in practice, too few cases make it to the courts as it seems that most cases end with the Equality Tribunal system. This is a problem because the Equality Tribunal cannot award compensation and redress in all types of cases. The barriers to getting access to justice for discrimination cases before the courts consist mainly of the expense related to bringing a case. These costs, together with the risk of losing and having to pay the costs for the other party as well and the lack of a legal aid scheme that covers discrimination are practical barriers for most discrimination grounds.

Statistics on discrimination cases in Norway also show that although the courts do handle discrimination cases, and although the number of cases handled by the courts is increasing, the overwhelming number of discrimination cases in Norway are channelled through the administrative bodies, the Equality Ombud and the Equality Tribunal. For example, in 2017, the Equality Ombud received a total of 2 009 enquiries.¹¹⁸ Of these, 106 were registered as complaint-based case work. The other complaints received were enquiries regarding guidance in discrimination cases and political work that the Equality

¹¹⁶ <https://www.diskrimineringsnemnda.no/showoldcase/2223>.

¹¹⁷ <https://www.diskrimineringsnemnda.no/showoldcase/2189>.

¹¹⁸ Equality Ombud (2017) *Årsmelding 2017* (Annual Report for 2017) (in Norwegian), available at: <https://www.ldo.no/link/b7c4ac39ad00414bac517f28c6e31f2b.aspx?id=12770>.

Ombud also works on. The Equality Tribunal assessed 58 cases.¹¹⁹ In contrast, the total number of cases based on the GEADA, GEA, AAA, ADA, SOA, AOT and WEA (Chapter 13) handled by the Court of Appeal and the Supreme Court was eight.¹²⁰ There are still very few court cases, but as quite a few unfinished cases were transferred from the Equality Ombud to the Equality Tribunal in January 2018, representative numbers will only be available at the end of 2019.

This means that, until recently, there were few consequences for breaches of the anti-discrimination legislation. The changes in the EAOA as of 1 January 2018 giving the Equality Tribunal the power to award non-monetary damage in cases concerning employment might partly overcome this barrier.¹²¹ In 2018 the Equality Tribunal did not award any damages or redress.

With the reorganisation of the anti-discrimination institutions, on 1 January 2018 the Equality Tribunal was moved from Oslo to Bergen, with the result that almost the entire secretariat staff for the Equality Tribunal are new to the job. This creates concerns regarding both the quality and the efficiency of the Tribunal's work. In 2018, 33 out of 109 cases were dismissed, seven were rejected and two were partly rejected, partly dismissed. The widespread use of the exception, 'clearly not a breach of the prohibition against discrimination', in Section 10 of the EAOA is of particular concern.

So far, no research has been carried out to analyse the case work of the Equality Tribunal over the last few years.

Thus, the question may still be raised as to whether, in reality, victims of sex discrimination have the necessary access to justice / efficient sanctions and remedies.

11.3.2 Availability of legal aid

Legal aid is offered to individuals whose income is below a certain level.¹²² In 2018 the eligibility thresholds for free legal aid were NOK 246 000 for single households (EUR 28 000) and NOK 369 000 (EUR 41 000) for spouses/co-habiting partners. Discrimination as a ground for eligibility for free legal aid does not exist.

However, some organisations do offer free legal support in discrimination cases, for example Juridisk rådgivning for kvinner (JURK), Jussbuss and Jussformidlingen. These organisations are linked to the law faculties at the largest universities in Norway, such as Oslo, Bergen and Trondheim, and are so-called 'legal clinics'.

The Equality and Anti-Discrimination Ombud also offers free guidance on discrimination law to some extent.

¹¹⁹ Equality Ombud (2017) (Annual Report for 2017) (in Norwegian), available at <http://diskrimineringsnemnda.no/media/2173/aarsrapport-2017-oppdatert-med-regnskap.pdf>.

¹²⁰ As cases brought before the court of first instance are not necessarily published, it is hard to know to how accurate a search at www.lovdata.no is regarding how many cases are actually handled by the courts each year. From the Supreme Court (HR) and Courts of Appeal (LG and LA) the cases are: Disability: LG-2017-202531; Ethnicity/religion: LG-2017-79666-2, HR-2018-1958-U, HR-2018-1958-A, HR-2018-872-A; Gender: HR-2018-1189-A; and Age: LA-2017-196536 and LG-2018-59094.

¹²¹ See the legal preparatory works: Proposition to Parliament, Prop 80 L (2016-2017) *Lov om likestillings- og diskrimineringsombudet og Diskrimineringsnemnda (diskrimineringsombudsloven)*, (The Equality and Anti-Discrimination Ombud Act) developing the paper sent for public hearing in 2016: www.regjeringen.no/contentassets/14dd1daa159348c88de5dbe043feb0a4/horingsnotat.pdf. 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>.

¹²² See Regulation concerning free legal aid FOR-2005-12-12-1443 (*Forskrift til lov om fri rettshjelp*), available at: https://lovdata.no/dokument/SF/forskrift/2005-12-12-1443?q=fri_rettshjelp.

In addition, until recently the Equality Ombud had a specific duty to disseminate information and give advice about legal protection against discrimination,¹²³ but this was removed from its mandate. The mandate of the Equality Ombud is, however:

- to promote equality and prevent discrimination on the basis of sex and gender, pregnancy and parental leave, care work, ethnicity, religion, belief, disability, sexual orientation, gender identity, gender expression and age, in all areas of society;
- provide advice about discrimination law; and
- monitor the implementation of the UN conventions CEDAW, CERD and CRPD.¹²⁴

11.4 Horizontal effect of the applicable law

11.4.1 Horizontal effect of relevant gender equality law

The gender differences in the education system largely reflect the horizontal gender division in the labour market.

People's choice of education affects what jobs women and men choose and can also contribute to (re)producing a gender-divided labour market. On the other hand, a gender-divided labour market can also affect people's educational choices. When occupations are dominated by one gender it can help to (re)produce gendered stereotypes. Gender-divided educational choices and a gender-divided labour market can help to create, reinforce and maintain each other.

However, when it comes to education, boys on average achieve lower grades than girls at school, female students increasingly undertake previously male-dominated higher studies at universities, and this may reflect on the jobs women and men choose in the future. In order to ensure that men and women have equal rights to a successful outcome to their education it is important to focus on what happens to boys and girls early on in the education system and to ensure their equal opportunities regardless of sex.

11.4.2 Impact of horizontal direct effects of the charter after *Bauer*

The recognition of horizontal direct effects of the Charter provisions has not yet had specific relevance for better enforcement of gender equality in Norway, but due to an increased focus on this matter, it is expected to affect gender equality law and the development of practice in discrimination cases.

11.5 Burden of proof

Norwegian national law permits a shift of the burden of proof from the complainant to the respondent. The rule of a shared burden of proof applies to all grounds of discrimination, including harassment, victimisation and instructions to discriminate, see Article 37 of the GEADA and Article 13-8 of the WEA.

In cases concerning dismissals according to the 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 rests with the claimant. This is why the shifting of the burden of proof as, implemented in the discrimination legislation, is 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 of the said legislation, such differential treatment shall be assumed to have taken place, unless the person responsible proves, on the balance of

¹²³ *Diskrimineringsombudsloven LOV-2005-06-10-40* (Norway, Anti-Discrimination Ombud Act) (AOT), Article 1.

¹²⁴ EAOA, Article 5.

probabilities, that such differential treatment nevertheless did not take place. The GEA states:

‘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.’

If the claimant provides a ‘reason to believe’ that discrimination has occurred, the burden of proof shifts to the employer/ discriminator. If the employer/ discriminator fails to fulfil the burden of proof, discrimination is assumed to have occurred.

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 necessitate an assessment of the specifics of that case.’¹²⁵

In an article by the previous head of the Equality Tribunal and the head of its Secretariat, the conclusion was drawn that the current rules on the reversal of the burden of proof are useful and fulfil the EU requirements.¹²⁶ As the practice of the Equality Ombud and the Equality Tribunal has not changed based on the new wording of the legislation, the revised text is also in line with the EU requirements, including the CJEU judgement of 21 July 2011 (C-104/10 *Patrick Kelly vs National University of Ireland*) and CJEU judgment of 19 April 2012 (Case C-45/10 *Galina Meister vs Speech Design Carrier Systems*).

11.6 Remedies and sanctions

11.6.1 Types of remedies and sanctions

Applicable sanctions in EU gender equality law.

Sanctions according to the GEADA and the WEA that are enforced by the civil courts consist of liability for damages/ compensation/ redress awarded to the discrimination claimant. Sanctions according to criminal law consist of penalties such as fines or imprisonment. Sanctions are largely equally applicable in private and public employment. In general, they cover all discrimination grounds in all fields, except age, which is only covered in the field of employment. The provisions on sanctions are found in Article 38 of the GEADA and Article 13-9 of the WEA.

There are several general rules on compensation in Norwegian legislation that are applicable when it comes to gender equality law. 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,¹²⁷ as well as by the non-statutory customary rules on compensatory damages. These also include a number of general rules to limit liability.

Article 38 of the GEADA regulates compensation and damages as of 1 January 2018. In employment relationships and in connection with an employer’s selection and treatment of self-employed people and hired workers, the employer’s liability exists irrespective of whether the employer can be blamed. The responsibility for damages is objective, not

¹²⁵ See Equality Tribunal Case 26/2006, in which this quote was used by the dissenting member of the Equality Tribunal. Although the remainder of the Equality Tribunal in this particular case did not agree with the dissenting member, the quote was later referred to by the Equality Ombud and the Equality Tribunal in a number of subsequent cases.

¹²⁶ See Syse, A. (2009), ‘Og Geir Helgeland: Reglene om delt bevisbyrde i norsk diskrimineringsrett’ (‘The rules on the shared burden of proof in Norwegian discrimination law’), in Aune, H. Fauchald, O. K., Lilleholt, K. and Michalsen, D. (eds), *Arbeid og Rett, Festskrift til Henning Jakhellns 70-årsdag*, Cappelen DAMM.

¹²⁷ Lov om Skadeerstatning LOV-1969—06-13-26of1. Juli 1967 (Act relating to Compensation of 13 June 1969, No 26).

based on the intention or fault (*culpa*) of the employer. In other sectors of society, fault-based liability exists.

Regarding damages for non-economic loss, 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, the relationship between the parties and other circumstances (see Article 38(3) of the GEADA and Article 13-9 of the WEA).

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 their 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,¹²⁸ but refused by the Supreme Court¹²⁹ and in later cases by the appellate court.¹³⁰

Article 39 of the GEADA provides penalties in the form of fines or imprisonment for up to three years for the perpetrators of a serious case of discrimination. that has been committed jointly by several persons.¹³¹ However, this is only in relation to discrimination based on ethnicity, religion or belief.¹³²

As of 1 January 2018, the Equality Tribunal also has a mandate to give an administrative decision including redress and compensation under Article 12 of the EAOA. In cases that do not concern employment only compensation may be given.

The Equality Tribunal also has limited authority 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, Article 7).

The Equality Tribunal may set a time limit for compliance with the order. The Equality 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 Article 7, if the time limit for complying with the order is exceeded (see EAOA, Article 13). 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 Equality 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 Equality Tribunal must state the grounds for an administrative decision to impose a coercive fine at the time the decision is made. So far, the Equality Tribunal has made use of its mandate to impose a coercive fine only once, in a case concerning universal design.

¹²⁸ For example, verdict of 19 November 2009 by the Oslo municipal first instance court in Case no. 09-143503TVI-OTIR/02.

¹²⁹ 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 in her position when addressing the possible discriminatory aspects of a retirement age of 67 set unilaterally by the company.

¹³⁰ Borgarting appellate court verdict of 18 June 2014 in Case no. LB-2014-56188 (*Mediaas-saken*).

¹³¹ In an assessment of the penal protection against discrimination on behalf of the Ministry of Children and Equality, Professor Kjetil Mujezinovic Larsen assessed the former ADA Article 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 expression should be included in the penal protection: see <https://www.regjeringen.no/no/dokumenter/utredning-om-det-strafferettslige-diskrimineringsvernet/id2520561/> (in Norwegian only). It was upheld, but not extended to other grounds.

¹³² See the legal preparatory works: Proposition to Parliament, Prop 81 L (2016-2017) *Lov om likestilling og forbud mot diskriminering (likestillings- og diskrimineringsloven)* (GEADA), Chapter 28.6.

Level of remedies and sanctions

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 compensate for actual loss.

In the courts compensation has only been awarded in two Supreme Court cases, both of which concern discrimination on the ground of membership of trade unions.

In its judgment of 28 March 2014, in the case *Gate Gourmet 2*, the Eidsivating¹³³ appellate court awarded compensation amounting to real economic loss because of discrimination due to membership of a trade union. In Case Rt-2011-1755 *Gate Gourmet* the Supreme Court found that the employees had been discriminated against in violation of the general rule in the Working Environment Act (Article 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 damages for discrimination incurred. In subsequent cases at the Øvre Romerike district court (12-073184TVI-OVRO of 23 April 2013) and the Eidsivating appellate court, the claimants were awarded compensation for loss incurred. The compensation to all the 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 to compensate for economic loss because of discrimination due to political affiliation. The WEA at 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. Noteworthy is the lack of compensation awarded in Supreme Court judgment of 30 January, Case HR-2017-219-A. This case was a direct follow-up to the Supreme Court Case Rt 2012-219, where the Supreme Court found that the pilots had been discriminated against (see Section 12.2 below for a description of the case). The same court subsequently found that the discrimination did not merit compensation.

Apart from these judgments, compensation has been awarded in some lower court cases: three concerning discrimination because of gender/ pregnancy¹³⁴ and one concerning age and gender. These cases all concern employment relations.¹³⁵ The non-pecuniary compensation for the discrimination was set above NOK 100 000 (approximately EUR 12 000) in the three recent cases. This is considered to be a high level of compensation when compared with, for example, the level of compensation in cases of unjustified dismissals within employment. In cases concerning Article 15-2 of the WEA and dismissals the courts have also rewarded compensation. In the verdict in Case LB-2018-159246 the compensation was set at NOK 705 000, about EUR 78 000 (see Section 5.2.11).

To the author's knowledge there is no statistical information available concerning the average amount and level of compensation available to victims.

¹³³ Judgment of 28 March 2014 from Eidsivating appellate court, Case no. LE-2013-113570.

¹³⁴ 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*).

¹³⁵ Judgment of Øst-Finnmark court of first instance, judgment of 17 March 2010, Case no. 09-136827TVI-OSFI (age and gender).

As of 1 January 2018, the Equality Tribunal has power to award damages for non-economic loss in cases concerning a breach of the prohibition against discrimination in employment relationships, under Article 12 of the EAOA. However, this option has not yet been used. A proposal to include sexual harassment cases will also be voted on in the Parliament in 2019.

11.6.2 Effectiveness, proportionality and dissuasiveness

The remedies and sanctions in national law to some extent meet the EU law standards. The existing sanctions are effective, proportionate and dissuasive when they are used. However, as mentioned several times already in this report, it is a challenge with the Norwegian system that only a very limited number of cases are brought before the ordinary courts.

As of 1 January 2018, the Equality Tribunal can award non-monetary damage in cases concerning employment, and this might partly overcome the barrier mentioned above.¹³⁶ However, a lot of cases will remain without efficient remedies, for example various types of harassment outside employment relationships. In such cases the Equality Tribunal can only award compensation for economic losses, not redress (EAOA Article 12). In 2018 the Equality Tribunal did not award any damages or redress.

As for remedies regarding the public sector except for employment relationships, the Equality Tribunal can evaluate the decisions of other parts of the public administration, even if they can't overrule them, see Article 14(2) of the EAOA. For the most part, the Equality Tribunal appears to have been reluctant to use this possibility in 2018.

When it comes to the Equality Tribunal's power to issue fines, the mandate to make use of fines is more a coercive tool, as this sanction has been used so rarely.¹³⁷ The lack of use is a problem. The effectiveness of this sanction may thus be questioned.

In addition, in Norwegian courts, the procedure is oral, with direct presentation of proof and witnesses. Few complainants are represented by lawyers specialising in discrimination cases, instead they are often represented by either NGOs, 'legal clinics' or barristers, or they choose to represent themselves in court. The Equality Tribunal is an administrative body and, from 1 January 2018, with written procedures instead of oral. Presenting a case in writing is difficult for complainants when they do not know the law, have little experience with presenting such matters, and have little idea what type of proof is needed. Lack of legal aid is thus an issue not only before the courts but also before the Equality Tribunal. An 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 Equality Ombud and Tribunal alone.

By April 2019, the Equality Ombud had assisted complainants in a few cases before the Equality Tribunal and this might, in the author's view, to some degree remedy this problem.

Furthermore, current legislation contains sanctions that are seldom used: 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

¹³⁶ See the legal preparatory works: Proposition to Parliament, Prop 80 L (2016-2017) *Lov om likestillings- og diskrimineringsombudet og Diskrimineringsnemnda (diskrimineringsombudsloven)*, developing the paper sent for public hearing in 2016, available at: www.regjeringen.no/contentassets/14dd1daa159348c88de5dbe043feb0a4/horingsnotat.pdf. 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/04bd6c545ae74c4ebea246f44dcf4942/utredning-av-handhevings--og-virkemiddelapparatet-pa-likestillings--og-diskrimineringsfeltet.pdf>.

¹³⁷ In Case 7/2012, the Equality Tribunal warned the hotel that if it did not follow the order given by the deadline of 1 January 2014, a coercive fine might be issued.

discrimination, harassment, instructions or reprisals cease and to prevent their repetition). This makes sanctions in practice less effective than their legislative potential.

11.7 Equality body

The Equality and Anti-Discrimination Ombud¹³⁸ and its previous appeal body the Equality and Anti-Discrimination Tribunal¹³⁹ constitute the independent administrative equality bodies when it comes to non-discrimination legislation.

The organisation, structure and mandate of these bodies were changed by the adoption of the new Act on the Equality and Anti-Discrimination Ombud and the Anti-Discrimination Tribunal as of 16 June 2017 no 50, in force as of 1 January 2018 (the Equality and Anti-Discrimination Ombud Act – EAOA).¹⁴⁰ The key change to the system is that, as of 2018, the Equality Ombud no longer has the authority to make decisions regarding individual complaints, only the Equality Tribunal does. However, the Equality Ombud does still advise people regarding discrimination issues, including on an individual basis.

Until 31 December 2017, the appointment, method of organisation, responsibilities and authority of these bodies were regulated in the Anti-Discrimination Ombud Act (AOT). The AOT and EAOA have a number of similar features: the independence of the bodies is stipulated in law and they are independent in their functions. Until 31 December 2017 the Equality Ombud had a dual role in working for gender equality issues, by enforcing the laws as well as proactively promoting equality and combating discrimination.

As of 1 January 2018, the Equality Ombud no longer handles individual complaints, but may counsel complainants before they complain to the Equality Tribunal. The Equality Ombud seeks to secure the parties' voluntary compliance with its opinion. It still provides advice and guidance with regard to the legislation within its mandate.

The main reasons for this change in the Equality Ombud / Equality Tribunal system is the need for a faster and more effective system for handling complaints on discrimination whereby the cases are now only dealt with by the Equality Tribunal. The Equality Tribunal is given the power to award redress and/or compensation. In the act's preparatory work, Prop. 80 L (2016–2017) Section 1.2,¹⁴¹ it is also stated that:

'This model will provide quick and efficient treatment of the complaints in discrimination cases. The current processing of a case by two instances takes on average twice as long. The change outlined here could result in a total time saving of up to one year per case. The possibility of bringing the case to the courts for full review, at any stage of the administrative proceedings, will still apply.'

The Equality Ombud is funded by annual grants financed until late 2018 by the Ministry for Children and Equality, then by the Ministry for Culture after the Christian Democrats entered the Government and took over the former ministry. Although the Equality Ombud is nominated by the ministry and the staff are public officials, the body's independence is not questioned in Norway, as its mandate is clarified by law and it may not be instructed by the ministry. The funds allocated through the State budget for 2018 as income for the Equality Ombud were NOK 42 929 000, (approximately EUR 4 470 000) while the budget in 2017 was NOK 54 065 000 (approximately EUR 5 631 770).

¹³⁸ See the Equality Ombud website in English; <http://www.ldo.no/en/>.

¹³⁹ See the Equality Tribunal website in Norwegian; <http://www.diskrimineringsnemnda.no/nb/innhold/side/forside>.

¹⁴⁰ See <https://lovdata.no/dokument/NLE/lov/2017-06-16-50> for an English version of the act.

¹⁴¹ <https://www.regjeringen.no/no/dokumenter/prop.-80-l-20162017/id2545683/sec1#kap1-2>, translation by the author of this report.

As of 1 January 2018, the Equality Tribunal is the only equality body in Norway that investigates complaints. Its members are appointed by the Ministry of Children and Equality for a term of four years, with the possibility of reappointment. The chair must fulfil the requirements prescribed for judges. The Equality Tribunal has a secretariat, whose staff are public employees. The budget for the secretariat was NOK 18 611 000 (approx. EUR 1 939 000) in 2018 and in 2017 NOK 6 431 000 (approx. EUR 670 000).

Purpose and competence of the bodies:

The Equality Ombud's primary responsibilities are to:

- a) provide advice and information;
- b) monitor the implementation of the UN conventions CEDAW, CERD and CRPD;
- c) be a driving force regarding anti-discrimination and equality issues.¹⁴²

The Equality Ombud also provides courses and presentations on discrimination issues and participates in campaigns with both civil sector and public agencies. It has also recently started to provide legal assistance in a few cases before the Equality Tribunal and in 2018 it also acted as *amicus curiae* at the request of a lawyer in a discrimination case before the courts.¹⁴³

Furthermore, the Equality Ombud provides independent assistance to victims through counselling (EAOA, Article 5(2)). The victim submits a complaint to the Tribunal, where guidance is also provided on how to submit a formal complaint.¹⁴⁴ Until 31 December 2017, the Ombud and Tribunal provided a service for victims to assess whether or not their case constituted a breach of the law. As of 1 January 2018, only the Tribunal continues to have this competence. The Ombud has not yet used its potential power to support victims in forwarding claims to the courts. Many victims have found the mandate of the Ombud to be too narrow, in that the Ombud is more of a neutral body that assesses whether or not breaches of the law have happened, rather than one that supports alleged victims of discrimination to claim their rights.

Until 2017, the Ombud prioritised providing assistance to victims of discrimination, not the defendants. This resulted in the Ombud not being seen as neutral by those accused of discrimination, which was one of the reasons behind the recent changes. According to its 2017 strategy, the Ombud will also provide advice to employers and others accused of discrimination. From 1 January 2018 the mandate is to provide advice to anybody who contacts it (EAOA, Article 5(2)).

The Ombud has recently also started to assist victims in cases before the Tribunal, but only a selected few. In its strategy, it states that it gives priority to cases that will have an effect for many people,¹⁴⁵ which may prove a problem for small groups such as LGBT groups and minorities within minorities.

The Equality Tribunal has been given the competence to issue independent recommendations on discrimination issues in relation to private parties, but does not have a mandate to issue binding recommendations in relation to other public agencies, according to Article 14 of the EAOA. The decision of the Tribunal is a legally binding administrative decision if the case is against a private party as per Article 11 of the EAOA. However, the Tribunal may not make an administrative decision establishing that an administrative decision of another public administrative agency breaches provisions in the anti-discrimination acts, but may issue a statement as to how the Tribunal evaluates the case in relation to the anti-discrimination legislation (see Article 14 of the EAOA). The

¹⁴² <http://www.ldo.no/link/e7b12b5b0de341599adfc954c64bb562.aspx?id=12271>.

¹⁴³ Email from the Equality Ombud, 5 April 2019.

¹⁴⁴ Email from the Equality Tribunal, 16 April 2019.

¹⁴⁵ <https://www.ldo.no/ombudet-og-samfunnet/om-ombudet/arsmeldinger/arsmelding-2016/>.

Tribunal does not have the competence to evaluate the actions of the Parliament or courts and their administrative branches, according to Article 1(3) of the EAOA. This also means that it cannot evaluate laws or judgments. However, regulations made by the ministries do fall under its jurisdiction.

According to the Article 10 of the EAOA, the Equality Tribunal has the power to reject or dismiss a case if the case has been decided by a court or been brought before a court for adjudication. The Equality Tribunal also dismisses a case if the conditions for processing it are not met. Furthermore, the Tribunal may dismiss a case if the matter is more than three years old.

Administrative decisions and decisions pursuant to the first and second paragraphs may be made by the Tribunal chair.

The Equality Tribunal may also close a case if the matter is trivial in nature, the subject matter of the complaint is obviously not contrary to the provisions specified in the EAOA (Article 1, second paragraph) or the submitted evidence fails to elucidate the case sufficiently. Reasons must be given for any decision to close a case.

Grounds covered by the designated bodies

The mandates of the Equality Ombud and the Equality Tribunal cover all legislative discrimination grounds covered by Article 6 of the GEADA. The mandate of the Equality Ombud also involves ensuring that Norwegian legislation and administrative practice are in accordance with Norway's obligations according to CEDAW and the other UN conventions.¹⁴⁶

Impact on addressing gender inequality problems

Both the Equality Ombud and the Equality Tribunal have a certain impact when it comes to addressing gender inequality problems in Norway, but in different ways.

The Equality Ombud provides courses and presentations on discrimination issues and participates in campaigns with both the civil society sector and public agencies. As mentioned before, it has also recently started to provide legal assistance in a few cases before the Equality Tribunal, and in 2018 it also acted as *amicus curiae* at the request of a lawyer in a discrimination case before the courts.¹⁴⁷

In both 2017 and in 2018, the Equality Ombud conducted independent surveys, published independent reports and made recommendations on issues relating to discrimination. Every year the Equality Ombud publishes annual reports and relevant reports on the status of equality.

At the policy level, the Equality Ombud has been an important voice in the Norwegian public arena when it comes to gender equality issues.

The Equality Ombud also provides independent guidance and counselling to victims within the framework of providing information. Until 31 December 2017, the Equality Ombud was impartial when dealing with complaints. According to the AOT, the Equality Ombud should not represent the party in external proceedings. This has now changed, as the AOT was replaced by the EAOA. While the Equality Ombud provides advice for any party to a discrimination case, by the end of 2018 the decision had been taken that it would act as a legal representative in some cases before the Equality Tribunal.

¹⁴⁶ Convention on the Rights of People with Disabilities (CRPD) and the Convention on the Elimination of All Forms of Racial Discrimination (CERD).

¹⁴⁷ Email from the Equality Ombud, 5 April 2019.

However, it has been a weakness of the Equality Ombud that neither it, nor anyone else, has the specific role of providing independent assistance to victims of discrimination. The fact that there is no legal aid scheme offered specifically to provide independent assistance to victims and to address discrimination based on gender is a flaw with the current system, with one holistic Equality Ombud covering all grounds. It remains to be seen to what extent this option will be used.

The Equality Tribunal is now the only low threshold complaints system for discrimination cases and the parties do not need the assistance of lawyers. It is not a precondition for filing a discrimination case with the courts that the issue at stake has already been through the Equality Tribunal system. The Tribunal's opinions are binding. It may also impose stoppages, remedial measures or other measures in order to bring an end to the discrimination, harassment, instructions or retaliation, and to prevent it from happening again. If the defendant does not comply with the instruction within the given deadline, the Equality Tribunal may decide to impose a coercive fine.

If a party disagrees with the Equality Tribunal's decision, the case may be brought to the Court system for a full trial of the case.¹⁴⁸ The parties can also bring a case to court without going through the Equality Tribunal system first, but this is not common.

However, the Equality Tribunal may only provide redress for non-monetary loss in connection with employment and can only make decisions about compensation for concrete financial losses in simple cases.¹⁴⁹ Redress and compensation claims must otherwise be filed before the ordinary courts. When the Equality Tribunal handles matters concerning regulations or administrative decisions made by a public administrative body, the Equality Tribunal can only issue a 'statement' on contravention of the GEADA, not a 'decision'.¹⁵⁰ It is not mandatory to lodge complaints with the Equality Tribunal before going to the ordinary courts. However, very few discrimination cases are brought before the courts.¹⁵¹ Few cases of gender discrimination are taken further to the courts and the Equality Tribunal's statements are important sources of law in the gender equality field in Norway.

A political decision was taken to relocate the Equality Tribunals secretariat staff to Bergen, which has led to some resignations among the caseworkers with a law degree from the Equality Ombud that were offered to be transferred to Bergen as it was a need for new recruitment of staff members to work in Bergen

For several reasons, the effectiveness of the recommendations still leaves a lot to be desired. Firstly, the Equality Tribunal still hasn't used its increased powers to award sanctions. Secondly, 30 of the 157 cases from 2018 were rejected or dismissed, many of them with the recently added justification of being 'clearly not in breach' of Article 1 of the GEADA. As few of the members of the Equality Tribunal seem to have experience in the anti-discrimination field,¹⁵² there is an increased risk of overlooking widespread stereotypes using this justification, and several of the dismissals appear debatable, especially those using the ground 'clearly not in breach of' the anti-discrimination legislation in Article 10(2) of the EAOA.¹⁵³ Thirdly, many of the cases brought before the

¹⁴⁸ <https://www.domstol.no/om-domstolene/de-alminnelige-domstolene/> (Norwegian text only).

¹⁴⁹ 'Simple cases' means cases when the complainant is not asserting anything but the inability to pay or other obvious unsustainable objections.

¹⁵⁰ Norway, Equality and Anti-Discrimination Ombud Act, LOV-2017-06-16-50, Article 14, The authority of the Equality Tribunal relative to other public administrative agencies. Norwegian version: <https://lovdata.no/lov/2017-06-16-50/§14>; English version: <https://lovdata.no/NLE/lov/2017-06-16-50/§article14>.

¹⁵¹ McClimans, E. (2008) *Rettspraksis om diskrimineringslovgivning* (Legal practice on anti-discrimination law (NB: the author's own translation)). Submitted to the Anti-Discrimination Law Committee, 2008 (We are not aware of newer reports on this topic).

¹⁵² <http://diskrimineringsnemnda.no/nb/innhold/sider/1215>.

¹⁵³ See, for example, Case no. 239/2018, which is at best too brief to justify the dismissal.

Equality Tribunal concern discrimination in various parts of the public administration. It is a cause for concern that the Equality Tribunal rarely chooses to provide 'opinions' in such cases, when it has a mandate to do so. However, the Equality Tribunal does follow up the cases where they issue an order.

Besides the Equality Ombud and the Equality Tribunal, the Directorate for Children, Youth and Family Affairs (Bufdir) also has a department responsible for obtaining and disseminating knowledge about most of the protected grounds of discrimination both within the public sector and to the general public (gender, sexual orientation, gender identity, people with disabilities and ethnicity).¹⁵⁴ However, the department is not independent and also serves as an advisory body for the ministries and implements Government policies.¹⁵⁵

11.8 Social partners

The Equality Ombud has a specific duty to disseminate information about legal protection against discrimination. The Equality Ombud has also recently started to provide legal assistance in a few cases before the Equality Tribunal and in 2018 it also acted as amicus curiae at the request of a lawyer in a discrimination case before the courts.¹⁵⁶

In addition, a number of initiatives have been taken in relation to promoting dialogue between the 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, the Equality Ombud and trade unions. The real effect of these in terms of effectiveness in relation to the principle of equal treatment has, however, been questioned, most recently in the official report entitled 'Structure for equality'.¹⁵⁷ While it is acknowledged that Norwegian working life has a long tradition of institutionalised cooperation between the labour market organisations, this established cooperation is limited when it comes to gender equality, thus the establishment of a forum to discuss equality in working life is proposed. One of the forum's main goals will be to help follow up the duty to make active efforts and the report stipulated in the anti-discrimination legislation.¹⁵⁸

Collective agreements are binding for the parties to the agreement. Only eight collective agreements have been made nationally applicable to secure equal pay in certain sectors. Gender equality has not been an issue in these instances. All the main agreements and collective agreements make reference to gender equality as a specific target.

Good practice by social partners in addressing the gender inequality problem

Although there are no formal rules in the anti-discrimination legislation on the dissemination of information, social dialogue or dialogue with NGOs by the authorities, there is a long tradition in Norway of regularly undertaking public consultations with NGOs and the social partners. NGOs and the social partners are in general invited to participate in reference groups when new legal proposals are being drafted and are recipients of White Papers and legislative proposals for consultative purposes before an Act is enacted. The

¹⁵⁴ See the Bufdir strategy for 2017-2020 at https://bufdir.no/globalassets/global/bufdir_strategi_2017-2020_digital.pdf and its website <https://www.bufdir.no/Inkludering/>.

¹⁵⁵ Email from Bufdir, 16 April 2019.

¹⁵⁶ Information provided in an email from the Equality Ombud, 5 April 2019.

¹⁵⁷ See <http://www.regjeringen.no/nb/dep/bld/dok/nouer/2011/nou-2011-18.html?id=663064> (in Norwegian). NOU 2011:18 *Structure for equality*, Chapter 7. For an English summary of the report, see: https://www.regjeringen.no/globalassets/upload/bld/nou18_ts.pdf.

¹⁵⁸ See the Committee on working life and pension policy issues, where members of the largest unions and the employers' organisations meet with the Minister of Labour as well as the Minister for Children and Equality and Social Inclusion and where the topic of gender equality is on the agenda: <https://www.regjeringen.no/no/dep/asd/org/nemnder-styrer-rad-og-utvalg/permanente-nemnder-rad-og-utvalg/arbeidslivs--og-pensjonspolitisk-rad/id574613/>.

various action plans initiated are usually drafted and implemented in close collaboration with NGOs and the social partners.

11.9 Other relevant bodies

Several NGOs in Norway are engaged in enforcement of gender equality law.

When it comes to strategic litigation it is relevant to mention NGOs and gender equality groups related to gender identity and gender expression and trans issues. Examples of organisations that are engaged in the enforcement of gender equality law are: *Landsforeningen for lesbiske, homofile, bifile og transpersoner* (Association of Lesbian, Gay, Bisexual and Transgender People)¹⁵⁹ and *Foreningen for kjønns-og seksualitetsmangfold (FRI)* (Gender and Sexual Diversity Association)¹⁶⁰ which in 2019 assisted at least one complainant in bringing their case to Oslo district court.

The case was brought to the court as a strategic litigation case and FRI assisted the complainants in court.

In Case 17-146470 TVI-OTIR/04 from Oslo district court the complainant, who was represented by lawyers and assisted by FRI, argued for compensation from the State in the form of the Ministry of Finance and the Ministry of Health and Care Services for financial loss and non-financial damage for not receiving a registered change of legal gender in the Norwegian People's Register until after 1 July 2016. The complainant also requested a judgment that it was a violation of the terms of the Constitution and the European Convention on Human Rights (ECHR). The court found that the complainant was discriminated against when he could not change his legal gender, and therefore had the right to compensation for financial loss pursuant to the Anti-Discrimination Act on sexual orientation (Article 24, first paragraph). However, the court concluded that the employees of the tax administration who had dealt with the complainant's legal gender change case had not acted negligently, and that the terms for compensation for discrimination were not fulfilled. The court acquitted the State. To the author's knowledge the court's decision has not been appealed.

The Government's action plan on discrimination on the ground of sexual orientation, gender identity and gender expression 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 on the ground of sexual orientation, gender identity and gender expression'.¹⁶¹ The title aptly describes the key focus of the action plan, which is to ensure safe neighbourhoods and public spaces and equal public services for particularly vulnerable groups. The plan will, in addition to combating discrimination, help ensure the rights of lesbian, gay, bisexual, transgender and intersex people. The action plan includes, for the first time in Norway, several initiatives that deal with the rights of intersex people. There are few measures linked to employment in the action plan, but increased attention to the SOA and GEADA and support for the implementation of the acts in working life are among the measures outlined.

¹⁵⁹ <https://skeivtarkiv.no/skeivopedia/landsforeningen-lesbiske-homofile-bifile-og-transpersoner-llh>.

¹⁶⁰ <https://www.foreningenfri.no/>.

¹⁶¹ See the action plan titled (in Norwegian) *Trygghet, mangfold, åpenhet. Regjeringens handlingsplan mot diskriminering på grunn av seksuell orientering, kjønnsidentitet og kjønnsuttrykk 2017-2020*, available at: https://www.regjeringen.no/contentassets/6e1a2af163274201978270d48bf4dfbe/lhbt_handlingsplan_web.pdf.

11.10 Evaluation of implementation

As mentioned earlier in the report, it may be a grave sign that the GEADA itself is relied upon in so very few cases before the courts. This may be a result of a combination of reasons:

- 1) most discrimination cases are brought to the Equality Tribunal system and not the courts as it has a low threshold and is free of charge;
- 2) lawyers in the country are not particularly trained in discrimination law;
- 3) there is no extraordinary support such as free legal aid in discrimination cases.

11.11 Remaining issues

The most relevant topics concerning enforcement and compliance have been discussed already.

12 Overall assessment

As concluded in the various sections in the report, the author finds that Norwegian legislation is generally in line with the EU gender equality *acquis*. There are, however, some areas of concern, as was also the case last year, and it is mainly the same recurring concerns.

Firstly, an important question is whether or not the Norwegian Ombud / Tribunal system is sufficiently efficient.

Secondly, it is concerning that the GEADA itself is relied upon in so very few cases before the courts in relation to gender equality and trans issues. This may be a result of a combination of reasons:

- Most discrimination cases are brought to the Equality Ombud / Tribunal system (from 1 January 2018 the Equality Tribunal) as it has a low threshold and is free of charge.
- Lawyers and barristers are not particularly trained in discrimination law.
- With the reorganisation of the anti-discrimination institutions, on 1 January 2018 the Equality Tribunal was moved from Oslo to Bergen, with the result that almost the entire secretariat staff for the Equality Tribunal are new to the job. This creates concerns regarding both the quality and the efficiency of the work of the Equality Tribunal. In 2018, 33 out of 109 cases were dismissed, seven were rejected and two were partly rejected, partly dismissed. The widespread use of the exception 'clearly not a breach of the prohibition against discrimination' in Section 10 of the EAOA is of particular concern.
- So far, no legal research has been carried out to analyse the case work of the Equality Tribunal over the last few years. Thus, the question still remains as to whether victims of discrimination in reality have the necessary access to justice / efficient sanctions and remedies.
- Another area that is still not satisfactory is the Pregnant Workers Directive 92/85/EEC, which is not correctly implemented, as mothers are not guaranteed a specific 14 weeks of independent maternity leave.¹⁶² In Norway, women are entitled to three weeks' leave before the birth and six weeks thereafter as leave which is specifically for women who are pregnant or have recently given birth. However, these weeks are deemed to be part of the parental leave under what is called the 'mother's quota'. With reference to the two very different purposes of the two types of leave, the Norwegian solution is problematic.

However, it is promising that the Government has suggested that cases of sexual harassment should be treated by the Equality Tribunal. On 11 June 2019, Parliament approved the amendments to the Act on the Equality and Anti-Discrimination Ombud and the Equality and Anti-Discrimination Tribunal (EAOA) and Gender Equality and Anti-Discrimination Act (GEADA).

Through its amendments to the EAOA, the Norwegian Parliament has given the Equality and Anti-Discrimination Tribunal the authority to enforce Article 13 regarding the prohibition against sexual harassment in the Gender Equality and Discrimination Act (GEADA).¹⁶³

The author believes this will make it easier for victims of sexual harassment to report sexual harassment and go further with their cases than is happening today. However, it is

¹⁶² See the article where this situation is described: Aune, H., Nylander, G. (2015), 'Barseltid et faktum. Barseltid en rettslig sannhet', *Nordisk tidsskrift for Sosialrett*, 20 September. See CJEU cases C-519/03 para. 32 and C-342/01 para. 41 and the Pregnant Workers Directive 92/85/EEC.

¹⁶³ See link to the decision: <https://www.stortinget.no/no/Saker-og-publikasjoner/Vedtak/Beslutninger/Lovvedtak/2018-2019/vedtak-201819-085/>.

to some extent still worrying that so few cases of sexual harassment are brought to the court system.

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