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# Country report

## Non-discrimination

Norway

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including summary



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# **Country report**

## **Non-discrimination**

Transposition and implementation at national level of  
Council Directives 2000/43 and 2000/78

## **Norway**

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Reporting period 1 January 2019 – 31 December 2019

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## EXECUTIVE SUMMARY

### 1. Introduction

Norway is a relatively homogenous country with 5.37 million inhabitants.<sup>1</sup> There are 790 497 immigrants in Norway and 188 757 people who were born in Norway with immigrant parents. These two groups constitute approximately 18.2 % of the total population.<sup>2</sup> Of these, 386 294 people (or both their parents) are from EU or EEC countries, and 84 223 people are from other European countries. The remainder include: 328 339 people from Asia including Turkey; 137 411 from Africa; 27 983 people from Latin America; 12 458 people from the United States or Canada; and 2 546 people from Oceania.<sup>3</sup>

The Sami people are the largest indigenous group of people in Norway, and number between 50 000 and 65 000 people. Other national minorities include Jews (approximately 1 100 people) and Kvens/people of Finnish descent (approximately 10 000-15 000 people). No exact figures are available for the number of Roma people. There are approximately 700 people belonging to a traditional group of Roma who live mainly in the Oslo area, while estimates put the number of Travellers at around a few thousand people.<sup>4</sup>

About 70 % of Norwegians are members of the Norwegian Protestant church,<sup>5</sup> while other religious groups of a significant size are Islamic associations, the Roman Catholic church and the Pentecostal church.<sup>6</sup> Official statistics suggest that there are 175 507 Muslims, 365 851 'other' Christians (that is Christians not belonging to the Norwegian church), 21 044 Buddhists, 11 405 Hindus, and 104 636 people belonging to other belief or life-stance (i.e. non-religious convictions as fundamental as religious ones) organisations.<sup>7</sup>

Correct and reliable figures for the number of disabled people in Norway are difficult to find. A recent survey assumes that there are approximately 627 000 people between 15 and 66 years (that is 17 % of the population of the same age range), who have some kind of reduced functional, psychological or cognitive ability.<sup>8</sup> The official employment statistics give a figure of about 274 000 disabled people in employment, which would equate to 43.8 % of disabled people of working age.<sup>9</sup>

Of a population of just over 5.3 million, 805 694 people are aged 67 years or older.<sup>10</sup>

There are no reliable official figures on sexual orientation. In 2008, 2013 and 2017, the question, 'Are you attracted to people of the same sex?' was asked in three reports on attitudes towards lesbian, gay, and bisexual people. The responses have changed over time: the percentage of the population who answered that they were attracted to people

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<sup>1</sup> See front page of Statistics Norway on [www.ssb.no](http://www.ssb.no).

<sup>2</sup> See Statistics Norway at <https://www.ssb.no/befolkning/statistikker/innvbef>.

<sup>3</sup> Statistics Norway, <https://www.ssb.no/befolkning/statistikker/innvbef>.

<sup>4</sup> Statistics Norway, <https://www.ssb.no/befolkning/statistikker/innvbef>, Norwegian Government (2009) *Action plan to promote equality and prevent ethnic discrimination 2009-2012*, [https://www.regjeringen.no/globalassets/upload/bld/planer/2009/hpl\\_etnisk\\_diskriminering.pdf](https://www.regjeringen.no/globalassets/upload/bld/planer/2009/hpl_etnisk_diskriminering.pdf), and Norwegian Government (2009) *Action plan for improving the living conditions of Roma in Oslo* [https://www.regjeringen.no/globalassets/upload/fad/vedlegg/sami/handlingsplan\\_2009\\_rom\\_oslo.pdf](https://www.regjeringen.no/globalassets/upload/fad/vedlegg/sami/handlingsplan_2009_rom_oslo.pdf).

<sup>5</sup> See Statistics Norway: [https://www.ssb.no/kultur-og-fritid/statistikker/kirke\\_kostraaar](https://www.ssb.no/kultur-og-fritid/statistikker/kirke_kostraaar).

<sup>6</sup> See Statistics Norway: <http://www.ssb.no/kultur-og-fritid/artikler-og-publikasjoner/norge-et-sekulaert-samfunn> (in Norwegian). Religious affiliation is not registered officially through national statistics, thus the numbers are based on information about membership given by each religious group themselves.

<sup>7</sup> See Statistics Norway: <https://www.ssb.no/trosamf>.

<sup>8</sup> Norwegian Directorate for Children, Youth and Family Affairs: [https://www.bufdir.no/Statistikk\\_og\\_analyse/Nedsatt\\_funksjonsevne/Antall/](https://www.bufdir.no/Statistikk_og_analyse/Nedsatt_funksjonsevne/Antall/).

<sup>9</sup> As per statistics from the end of, 2019 at <http://www.ssb.no/arbeid-og-lonn/statistikker/akutu>.

<sup>10</sup> See annual statistics from Statistics Norway on population, at <https://www.ssb.no/statbank/table/05196/>.

of the same sex 'to some degree' or 'to a great degree' in 2008 was 1.8 %, while in 2017 it was around 10 %. Based on a scale from 1 (heterosexual) to 7 (homosexual), 25 % of the 2017 respondents placed themselves between numbers 2 to 7, (in other words, they do not consider themselves to be entirely heterosexual).<sup>11</sup>

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

As for trends regarding discrimination issues, there is an increasing level of hate speech, especially towards Muslims and other immigrants. However, there is also increased awareness in the police and courts of justice, which has led to an increase in the number of sanctions as well. Islamophobia is ever more present in the public debate. Since 2019, the Liberal Party has been in charge of the Ministry for Culture, which is responsible for anti-discrimination and equality issues, and more measures have been taken. The current Minister for Culture, from the Liberal Party, is Muslim, and openly LGBTIQ friendly.

Although hate speech against and harassment of people with disabilities has previously not been on the agenda, more people with disabilities are reporting harassment by strangers.

## 2. Main legislation

Norway has ratified most of the major international instruments combating discrimination, with the notable exception of Protocol No. 12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms. The optional protocols no 11 and 14 to the European Convention on Human Rights have been ratified. The European Social Charter has been ratified, with some reservations.<sup>12</sup>

As of June 2014, Article 98 of the Constitution reads: 'All people are equal under the law. No human being must be subject to unfair or disproportional differential treatment'.<sup>13</sup>

The Human Rights Act<sup>14</sup> incorporates a number of treaties on human rights into the domestic legal system on a general basis in which the conventions prevail over any other conflicting statutory provision.<sup>15</sup> The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) was not incorporated into the Human Rights Act, but was included in the Anti-Discrimination Act (ADA), the legal consequence being that ICERD does not prevail over other statutory provisions in case of conflict, but has to be

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<sup>11</sup> All three reports were commissioned by the Directorate for Children, Youth and Family Affairs (Bufdir) and these statistics are published on their website [https://www.bufdir.no/Statistikk\\_og\\_analyse/lhbtq/Hvor\\_mange/](https://www.bufdir.no/Statistikk_og_analyse/lhbtq/Hvor_mange/).

<sup>12</sup> See [https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/163/declarations?p\\_auth=7UxA6Btg&coeconventions\\_WAR\\_coeconventionsportlet\\_enVigueur=false&coeconventions\\_WAR\\_coeconventionsportlet\\_searchBy=state&coeconventions\\_WAR\\_coeconventionsportlet\\_codePays=NOR&coeconventions\\_WAR\\_coeconventionsportlet\\_codeNature=10](https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/163/declarations?p_auth=7UxA6Btg&coeconventions_WAR_coeconventionsportlet_enVigueur=false&coeconventions_WAR_coeconventionsportlet_searchBy=state&coeconventions_WAR_coeconventionsportlet_codePays=NOR&coeconventions_WAR_coeconventionsportlet_codeNature=10).

<sup>13</sup> See <https://www.stortinget.no/globalassets/pdf/english/constitutionenglish.pdf>. The preparatory works to the constitutional clause: Dok 16 (2011-2012), Report on Human Rights in the Constitution from the Constitutional Committee to the *Storting* (Parliament), Chapter 6 see <http://www.stortinget.no/Global/pdf/Dokumentserien/2011-2012/dok16-201112.pdf>.

<sup>14</sup> Act relating to the status of human rights in Norwegian law of 21.05.1999 No. 30 (*Menneskerettsloven*).

<sup>15</sup> The International Convention on Racial Discrimination is incorporated in the Anti-Discrimination Act (ADA), but in conflicting cases the convention will not automatically prevail. The failure to include the ICERD in the Human Rights Act has been repeatedly criticised by NGOs working on anti-discrimination.



decided through interpretation. The UN CRPD was ratified on 3 July 2013.<sup>16</sup> It was not incorporated into the Anti-Discrimination and Accessibility Act (AAA), and, as such would be enforced 'at the same level that it is incorporated in law',<sup>17</sup> which gives doubts as to the legal standing of the convention in national law. The Equality and Anti-discrimination Ombud (the Ombud) is responsible for the supervision of the national implementation of the convention, similar to the national supervisory system of the ICERD and the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW).

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

Over the last decade, several attempts have been made to harmonise the anti-discrimination legislation. First, on 21 June 2013 upon the enactment of the Sexual Orientation Anti-Discrimination Act (SOA), covering sexual orientation, gender identity and gender expression, the other existing acts were revised and aligned. Four almost identical acts, the Gender Equality Act (GEA), the Anti-Discrimination Act (ADA) covering ethnicity, religion and belief, the Anti-discrimination and Accessibility Act (AAA) covering disability, and the Sexual Orientation Act (SOA) were in force until 31 December 2017, when they were replaced by the General Anti-Discrimination and Equality Act (GEADA). The Working Environment Act (WEA) covers age, political views, membership in trade unions, and part-time and temporary work, but only in employment or similar situations. There is also specialised legislation, such as housing acts, which now refer to the new comprehensive Equality and Anti-Discrimination Act (GEADA) regarding discrimination issues.<sup>18</sup>

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. 'Ethnicity' includes national origin, descent, skin colour and language. 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. In the GEADA, a few elements that had not been explicitly mentioned in the four 2013 acts, such as discrimination by association and multiple discrimination, were reintroduced for the sake of clarity and accordance with EU law. However, the new GEADA still raises some issues of concern, because, for example, the exceptions allowed for direct discrimination are not clearly articulated.

Articles 185 and 186 of the Penal Code (2005) contain criminal law protection against discrimination, regarding hate speech and access to goods and services respectively.

It is presumed that Norwegian anti-discrimination legislation is in line with the EU *acquis*. The Government has committed to having as high - or higher - standards in its work against discrimination as the requirements of the EU.<sup>19</sup> However, as the non-discrimination directives (2000/78 and 2000/43) are not incorporated in the EEA agreement, the specific exceptions allowed under the directives have not been clearly articulated. The protection of the directives has been reinforced by the Supreme Court in its judgments. For example, in a case from 2012, the Supreme Court emphasised that

<sup>16</sup> See Prop. 106 S (2011–2012) Proposition to the *Stortinget* (proposal for Parliamentary resolution) on Consent to ratification of the UN Convention of 13.12.2006 on the rights of Persons with Disabilities and Prop 105 L 2011-2012 on Changes to the Anti-Discrimination Ombud's Act on the supervision of implementation of the UN Convention on the Rights of Persons with Disabilities.

<sup>17</sup> Supreme Court, Case No. HR-2016-2591-A, judgment of 20.12.2016.

<sup>18</sup> Chapter 10 of the Ship Labour Act (SLA) has, almost word for word, the same articles as Chapter 13 of the WEA (and will therefore not be mentioned in this report unless there is a difference).

<sup>19</sup> Norwegian Government (2003) *Skjerpet vern mot diskriminering i arbeidslivet* (White paper on strengthened protection against discrimination in working life), NOU 2003:2, p. 7.

'although there is no legal commitment to incorporate the Employment Equality Directive in national law, it is according to established practice from the Supreme Court that the regulations of the Working Environment Act is to be interpreted and implemented in accordance with the Employment Equality Directive' (author's translation).<sup>20</sup> In another Supreme Court case, Rt-2012-219, which was similar in content to the facts in the ECJ case C-447/09 (*Prigge*), the Supreme Court emphasised that the standards of the Working Environment Act must be interpreted to be compatible with the Employment Equality Directive.<sup>21</sup>

### 3. Main principles and definitions

Direct and indirect discrimination, harassment, and instructions to discriminate are defined in line with Directives 2000/43 and 2000/78. Discrimination is defined in the GEADA (Article 6) and WEA (Article 13-1). The concepts of direct and indirect discrimination are not defined in Article 13-1 of the WEA, but are discussed in the preparatory works.<sup>22</sup> Harassment is prohibited by the GEADA (Article 13) and the WEA (Article 13-1(2)). Instructions to discriminate are prohibited in Article 15 of the GEADA and Article 13-1(2) of the WEA.

Reasonable accommodation duties are provided for in the GEADA, with various articles specifying that this duty exists not only at the workplace or during recruitment (Article 22), but also for pupils and students (Article 21), when using municipal services such as kindergartens (Article 20), and for all pregnant pupils, students, job applicants or employees (Article 23).

Discrimination by association is covered through the GEADA (Article 6(3)) for all grounds except political views and trade union membership.

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

As of 1 January 2018, multiple discrimination is specifically included in the GEADA, and refers to any combination of the protected grounds covered by the GEADA.

Protection against victimisation is found in Article 2-5 of the WEA and Article 14 of the GEADA.

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

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<sup>20</sup> Supreme Court, Rt-2012-424, paragraph 30.

<sup>21</sup> Supreme Court, Rt 2012-219, paragraph 46. Similar statements were expressed in the other key Supreme Court decisions regarding age discrimination: Rt 2011-964, Rt 2011-609 and Rt 2010-202.

<sup>22</sup> Preparatory works to the most recent Work Environment Act, Ot.prp No. 49 (2004-2005) *Om lov om arbeidsmiljø, arbeidstid, stillingsvern mv*, Chapter 25 (in Norwegian): <http://www.regjeringen.no/nb/dep/aid/dok/regpubl/otprp/20042005/otprp-nr-49-2004-2005-/25.html?id=397026>.

#### **4. Material scope**

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

The scope of discrimination protection in the GEADA applies to all sectors, including employment, and covers each of the specific grounds covered by the directives.

The WEA only covers employment: it applies to businesses that engage employees, unless otherwise explicitly provided by the act. Since the main anti-discrimination act is the GEADA, the WEA primarily protects grounds that are not protected by the GEADA: political affiliation and membership in a trade union. Age in the employment sector is protected by the WEA, however, it is protected outside employment by the GEADA. The provisions also cover the employer's selection and treatment of self-employed and contract workers.

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

#### **5. Enforcing the law**

Cases alleging instances of discrimination may either be brought before an ordinary court or be brought to the national mechanism set up to assess cases of discrimination: the Equality and Anti-Discrimination Tribunal (the Equality Tribunal). Until December 2017, the Equality and Anti-Discrimination Ombud was the first instance and the Equality Tribunal received a much smaller number of complaints cases as a second instance. As of January 2018, the Ombud only provides advice, although from 2019 it will also provide assistance in a few cases before the Equality Tribunal, in addition to monitoring the human rights conventions CERD, CEDAW and CRPD and working proactively against discrimination.

More than 95 % of all cases on discrimination are dealt with by the Equality Tribunal, which is an administrative body, not a court. Since January 2018, the Equality Tribunal has had the ability to award compensation or damages for injury of a non-pecuniary character, the latter only in cases concerning employment. When the issue of damages or compensation is contested or complicated, it has to be taken to the courts. The Equality Tribunal has made use of this possibility only once so far.<sup>23</sup> Few cases are taken to the courts. The low rate of court litigation is partly due to the risks and costs involved in litigation, and the difficulties in obtaining free legal aid in discrimination cases.

As a general rule, the procedures for addressing discrimination issues are the same for employment in the private and public sectors. Sanctions under the GEADA and WEA that are enforced by the civil courts consist of liability for damages for injury of a non-pecuniary character or compensation for economic losses awarded to the claimant of discrimination. There are no upper limits for compensation and the national legal framework does not provide rules for the calculation of claims. Sanctions under criminal law consist of fines or imprisonment.

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. All kinds of evidence may be used, although evidence may only be presented on facts that may be of importance

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<sup>23</sup> Case No. 18/410.

for the ruling to be made. The scale and the scope of the presentation need to be proportionate in relation to the importance of the dispute. In civil cases before the courts, the procedural rules for evidence are the same in discrimination cases as in other cases.

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

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

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

Associations may be used as agents in administrative proceedings and can act on behalf of or in support of victims, and often do so, mainly regarding complaints to the Equality Tribunal. The requirement is that the organisation must have a 'purpose, wholly or partly, to oppose discrimination' according to the grounds as prohibited by law (see the GEADA, Article 40 and the WEA, Article 13-10). Actions by associations are discretionary. In 2018 there was a landmark case at the Supreme Court, where an NGO working for the rights of people with cognitive disabilities was not allowed to assist in a case concerning legal guardianship.

## **6. Equality bodies**

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

The organisation, structure and mandate of these bodies were changed on 1 January 2018 by the adoption of the Equality and Anti-discrimination Ombud Act (EAOA).<sup>24</sup> The key change to the system is that as of 1 January 2018, the Ombud no longer makes decisions regarding individual complaints, which are now left to the Equality Tribunal.

The Equality Tribunal cannot make statements concerning the activities of the Parliament, such as legislation. However, the Equality Tribunal may issue opinions regarding regulations and other administrative decisions. Such statements of opinions are not legally binding and may not be subject to enforcement, however it is assumed that public bodies should adhere to them.

The Ombud provides advice and guidance with regard to the legislation within its mandate. It now takes some cases to the Equality Tribunal on its own initiative.<sup>25</sup> The Ombud also conducts independent surveys, publishes independent reports and makes recommendations on issues relating to discrimination. Every year the Ombud publishes annual reports and reports on the status of equality.

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<sup>24</sup> Act relating to the Equality and Anti-Discrimination Ombud and the Anti-Discrimination Tribunal, 16 June 2017 No. 50, in force as of 1 January 2018. See <https://lovdata.no/dokument/NLE/lov/2017-06-16-50> for an English version of the act.

<sup>25</sup> Equality and Anti-Discrimination Ombud (2019) *Annual report 2018*, p. 8 (in Norwegian) <https://www.ldo.no/nyheiter-og-fag/brosjyrar-og-publikasjonar/Arsrapporter/arsmelding-2018/>.

The Equality Ombud is funded by annual grants, which were financed until late 2018 by the Ministry for Children and Equality, and are now financed by the Ministry for Culture following the entry into Government of the Christian Democrats, who took over the Ministry for Children and Equality. Although the Ombud is nominated by the Ministry for Culture and her staff are public officials, her independence is not questioned in Norway, as her mandate is clarified by law and she must not be instructed by ministers. The funds allocated through the state budget for 2019 as income for the Ombud were approximately NOK 48 020 000 (approximately EUR 4 278 065) while the budget in 2018 was NOK 42 929 000, (approximately EUR 4 300 000).<sup>26</sup>

Until 31 December 2017, the Equality Tribunal was the appeal body of the Equality Ombud. As of 1 January 2018, the Equality Tribunal is the only equality body that can investigate complaints. Its members are now appointed by the Ministry for Culture for a term of four years, with the possibility for reappointment. The chairpersons must fulfil the requirements prescribed for judges. Everyone who handles discrimination cases, both in the secretariat preparing the cases, and the members of the tribunal deciding them, are lawyers.<sup>27</sup> The staff of the Equality Tribunal's secretariat are public employees. The Equality Tribunal has a secretariat, whose staff are public employees. The 2019 budget for the secretariat and tribunal was NOK 22 260 000 (approximately EUR 1 983 127), and in 2018 it was NOK 18 611 000 (approximately EUR 1 860 000).<sup>28</sup>

Although there are very few Roma in Norway, the Equality Ombud has repeatedly addressed some of the key issues seen in relation to Roma and Travellers. In her report to the UN CERD Committee, the Equality Ombud addressed the areas of critical concern and the fact that the Roma's access to basic rights is denied unless the traditional way of life is discontinued.<sup>29</sup> For example, in relation to schooling, the Ombud is concerned that Travellers are being made responsible for the consequences of the failure to adjust Norwegian school policy to the traditional manner of travelling. The Roma are furthermore systematically denied access to campsites and restaurants on the grounds that they belong to a national minority.<sup>30</sup> At the policy level, the Ombud has thus been a public voice for the Roma in Norwegian society.

In addition, a section of the Directorate for Children and Equality organises and funds a number of research reports as well as providing advice to the public administration on anti-discrimination issues. The latter, however, is not an independent administrative institution, but is part of the public administration. It has a key role in coordinating the various ministries' work against discrimination.

## 7. Key issues

The key legal issues in Norway with regard to measures to combat discrimination based on race/ ethnic origin, religion/ belief, sexual orientation, disability and age are outlined below.

- Access to justice remains a key concern. First, there is the new legal competence of the Equality Tribunal to reject cases on the basis of their being clearly not in breach

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<sup>26</sup> Numbers from the national budgets of 2018 category 11.10, at [https://www.regjeringen.no/no/dokumenter/prop.-1-s-bld-20172018/id2574097/sec2?q=ombud#match\\_2](https://www.regjeringen.no/no/dokumenter/prop.-1-s-bld-20172018/id2574097/sec2?q=ombud#match_2), from 2019 at [https://www.statsbudsjettet.no/upload/Statsbudsjett\\_2020/dokumenter/pdf/GULBOK.pdf](https://www.statsbudsjettet.no/upload/Statsbudsjett_2020/dokumenter/pdf/GULBOK.pdf).

<sup>27</sup> See the website of the Equality Tribunal, <http://diskrimineringsnemnda.no/nb/innhold/sider/3006> and <http://diskrimineringsnemnda.no/nb/innhold/sider/1215>.

<sup>28</sup> Numbers from the national budgets of 2018 category 11.10, at [https://www.regjeringen.no/no/dokumenter/prop.-1-s-bld-20172018/id2574097/sec2?q=ombud#match\\_2](https://www.regjeringen.no/no/dokumenter/prop.-1-s-bld-20172018/id2574097/sec2?q=ombud#match_2), from 2019 at [https://www.statsbudsjettet.no/upload/Statsbudsjett\\_2020/dokumenter/pdf/GULBOK.pdf](https://www.statsbudsjettet.no/upload/Statsbudsjett_2020/dokumenter/pdf/GULBOK.pdf).

<sup>29</sup> See Equality Ombud (2014) *CERD 2014- The Ombud's report to the UN Committee on the Elimination of Racial Discrimination- a supplement to Norway's twenty-first/twenty-second periodic report*, at [http://www.ido.no/globalassets/03\\_nyheter-oq-faq/publikasjoner/cerd-2014\\_web\\_engelsk\\_ny1.pdf](http://www.ido.no/globalassets/03_nyheter-oq-faq/publikasjoner/cerd-2014_web_engelsk_ny1.pdf).

<sup>30</sup> See for example, Equality Ombud, Case No. 15/1512.

of the prohibitions against discrimination (EAOA, Article 10(2)). Many of the case dismissals made by the Equality Tribunal in 2018 and 2019 appear questionable. In 2018, 30 of 157 cases were dismissed or rejected, and in 2019 144 of 244 cases were rejected or dismissed. A significant proportion was dismissed on the basis of the exception 'clearly not a breach of the prohibition against discrimination' as provided by Article 10 of the EAOA, some by questionable reasoning.<sup>31</sup>

- Secondly, the guidance provided by the Equality Ombud is not always sufficient to provide an effective opportunity to put forward a case, especially the more complex ones, or where the victim for other reasons does not have the resources to argue their own case, even through the simpler administrative procedures of the Equality Tribunal. The Ombud has tried to remedy this to some extent since 2019 by initiating a few cases before the Equality Tribunal.<sup>32</sup> However, very few complainants are assisted throughout the entire complaint procedure by the Ombud: only two in 2019.
- The 2018 shadow reports on CERD and CRPD<sup>33</sup> show that most cases do not make it into the complaints system at all.
- The Equality Tribunal lacks effective remedies for many cases outside employment. Damages for injury of a non-pecuniary character can only be awarded in cases concerning employment (EAOA article 12(1)), which means that lack of compliance with the GEADA rarely meets with any sanctions outside employment. Even when there is the opportunity to impose sanctions it is rarely done: the Equality Tribunal did not make use of this power at any point in 2018, and only once in 2019.<sup>34</sup>
- In order to obtain effective remedies, some cases must be taken to the courts. This is costly, as there is no free legal aid in discrimination cases, and there is a significant risk of having to pay the costs of the defendant.<sup>35</sup> Two rounds of harmonisation of the anti-discrimination acts in 2013 and 2017 has led to a lack of clarity in parts of the legal coverage, as the previously very narrow exception to the definition of direct discrimination might be widened and not interpreted as narrowly as before.

<sup>31</sup> See for example Cases 19/41, 18/269, 18/287, 18/371 and 19/69.

<sup>32</sup> Equality and Anti-Discrimination Ombud (2019) *Årsmelding* (Annual Report for 2018), p. 8, available at <https://www.ldo.no/link/df00459339c5420ea293d70cd914a6d9.aspx>.

<sup>33</sup> Civil Society Coalition Norway (2019) *Alternative Report to the Committee for the Rights of People with Disabilities*, available at: [https://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCRPD%2fCSS%2fNOR%2f33866&Lang=en](https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCRPD%2fCSS%2fNOR%2f33866&Lang=en) and Norwegian NGOs (2018) *NGO alternative report to CERD 2018*, available at: [https://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCERD%2fNGO%2fNOR%2f32995&Lang=en](https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCERD%2fNGO%2fNOR%2f32995&Lang=en).

<sup>34</sup> Case No. 18/410.

<sup>35</sup> See for example court case LE-2018-145654-2, described in section 12.2.

## INTRODUCTION

### The national legal system

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

Discrimination cases may be brought before the ordinary courts.

However, the key administrative procedure for handling discrimination cases is to bring them before the Equality and Anti-Discrimination Ombud (the Ombud) for advice<sup>36</sup> and the Equality and Anti-Discrimination Tribunal<sup>37</sup> (hereinafter referred to as the Equality Tribunal) for decisions regarding complaints. 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).<sup>38</sup> The key change to the system is that, as of 2018, the Ombud no longer has the authority to make decisions regarding individual complaints, which is a matter only the Equality Tribunal. However, the Ombud continues to advise people regarding discrimination issues, including on an individual basis.

Also of some relevance to anti-discrimination law is the Labour Court, which deals with disputes between trade unions and employers' organisations that include the interpretation, validity and existence of collective agreements and cases of breaches of collective agreements – to the extent that anti-discrimination provisions are included in the collective agreements.<sup>39</sup>

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

On January 1 2018, the General Equality and Anti-Discrimination Act (GEADA)<sup>40</sup> replaced the four previous anti-discrimination acts.<sup>41</sup> It covers the following grounds of discrimination within all sectors: gender, ethnicity (including national origin, descent, skin colour, and language), religion or belief, sexual orientation<sup>42</sup> and disability, as well as pregnancy, and leave in connection with childbirth or adoption, care responsibilities. The new act also covers protection against age discrimination outside working life,

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<sup>36</sup> See <http://www.ldo.no/en/>.

<sup>37</sup> See <http://www.diskrimineringsnemnda.no/en/innhold/side/forside>.

<sup>38</sup> Act on the Equality and Anti-Discrimination-Ombud and the Anti-Discrimination Tribunal, 16 June 2017 No. 50, in force as of 1 January 2018. See <https://lovdata.no/dokument/NLE/lov/2017-06-16-50> for an English version of the act.

<sup>39</sup> See <http://www.arbeidsretten.no/engelsk.php>.

<sup>40</sup> Anti-Discrimination Act (GEADA) of 16 June 2017 No. 51, in force as of 1 January 2018. See <https://lovdata.no/dokument/NLE/lov/2017-06-16-51> for an English version of the act.

<sup>41</sup> Gender Equality Act (GEA) of 21 June 2013 No. 59, in force as of 1 January 2014, at <http://www.ub.uio.no/ujur/ulovdata/lov-20130621-059-eng.pdf>; Anti-Discrimination and Accessibility Act – (AAA) of 21 June 2013 No. 61, in force as of 1 January 2014 at <http://www.ub.uio.no/ujur/ulovdata/lov-20130621-061-eng.pdf>; Anti-Discrimination Act (ADA) of 21 June 2013 No. 60, in force as of 1 January 2014, at <http://www.ub.uio.no/ujur/ulovdata/lov-20130621-060-eng.pdf> and 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>.

<sup>42</sup> To some degree, differential treatment on the basis of same-sex marriage or cohabitation, as well as religion or life stance, is allowed. The distinction between sexual orientation and same-sex living arrangements relates to the protection against discrimination on the basis of sexual orientation in religious organisations: no differential treatment is allowed on the basis of sexual orientation alone, but is permitted to some degree when it comes to actually living with another person of the same sex see, see GEADA Article 30(3).



whereas the protection against age discrimination within working life continues to be covered by the WEA.<sup>43</sup>

Specialised legislation also includes prohibitions of discrimination on the grounds of ethnicity, sexual orientation or disability in four different acts on housing (see section 2.2.10 below), although from 2018 these now simply refer to the GEADA.

Articles 185 and 186 of the Penal Code<sup>44</sup> contain criminal law protection against discrimination. Article 185 concerns hateful expressions, emphasising more clearly that racist expressions with insulting effects are punishable by law. Article 186 penalises the refusal to provide goods and services as well as admission to public performance/exhibition/gathering. The provisions in the penal code are only applicable in relation to discrimination because of skin colour or national or ethnic origin, religion or life stance,<sup>45</sup> sexual orientation and disability.<sup>46</sup>

It is presumed that Norwegian anti-discrimination legislation is in line with the EU *acquis*, although the non-discrimination directives (2000/78 and 2000/43) are not incorporated in the EEA agreement. However, the Government has committed to having as high - or higher - standards in its work against discrimination as the requirements of the EU.<sup>47</sup> This protection has been reinforced by the Supreme Court in relevant judgments. In its judgment Rt 2012-424, the Supreme Court emphasised that 'although there is no legal commitment to incorporate the Employment Equality Directive in national law, it is according to practice from the Supreme Court established that the regulations of the Working Environment Act are to be interpreted and implemented in accordance with the Employment Equality Directive'.<sup>48</sup> In Supreme Court case Rt 2012-219,<sup>49</sup> which was similar in content to the facts in the ECJ case C-447/09 (*Prigge*), the Court emphasised that the standards of the Working Environment Act should be interpreted to be compatible with the Employment Equality Directive.<sup>50</sup>

Directive 2000/78 is thus implemented through the Working Environment Act (WEA)<sup>51</sup> Chapter 13 (political views, membership of a trade union, and age), as well as through the Equality and Anti-Discrimination Act (GEADA). Protection against discrimination because of disability is found in the GEADA, although requirements to adapt the environment to meet the physical and psychological working environment of people with reduced functional ability is also found in Chapter 4 of the WEA, imposing general

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<sup>43</sup> In terms of specialised legislation, Chapter 10 of the Ship Labour Act (SLA) provides protection against discrimination in the employment relationship of seamen on the basis of political views, membership of a trade union, or age (Act of 21 June 2013 No. 102 relating to employment protection etc. for employees on board ships). See <https://www.sjofartsdir.no/en/legislation/laws/ship-labour-act/>. The SLA Chapter 10 gives almost exactly the same protection against discrimination as the WEA, but adds another labour sector to such protection.

<sup>44</sup> See the Penal Code of 20 May 2005 No. 28 in force as of 1 October 2015 at <https://lovdata.no/dokument/NLE/lov/2005-05-20-28>.

<sup>45</sup> Non-religious convictions as fundamental as religious ones.

<sup>46</sup> An assessment regarding the anti-discrimination protection in the Penal Code was carried out and published in November 2016, see: Larsen, K.M. (2016) *Utredning omdet strafferettslige diskrimineringsvernet* <https://www.regjeringen.no/no/dokumenter/utredning-om-det-strafferettslige-diskrimineringsvernet/id2520561/>. The suggested legal amendments will be to include protection against gender identity and gender expression as well as gender in both Articles 185 and 186. The amendments have not been made as of 13 February 2018.

<sup>47</sup> Norwegian Government (2003) *Skjerpet vern mot diskriminering i arbeidslivet* (White paper on strengthened protection against discrimination in working life), NOU 2003:2, p. 7.

<sup>48</sup> Norwegian Supreme Court, Rt 2012-424, paragraph 30, (Else McClimans's translation).

<sup>49</sup> A follow-up case concerning the compensation awarded to these pilots for the discriminatory behaviour established by the Supreme Court in the helicopter-pilot case, Rt.2012-219, was finalised by the Supreme Court in its judgment of 30 January 2017, Case No. HR-2017-219-A, in which none of the pilots who had been discriminated against were awarded compensation (see section 4.7.1(b) below).

<sup>50</sup> See Supreme Court, Rt. 2012-424 paragraph 30, and Rt. 2012-219, paragraph 46.

<sup>51</sup> Act relating to working environment, working hours and employment protection, etc. (Working Environment Act) (WEA) of 17 June 2005 No. 62. English version available at: <https://lovdata.no/dokument/NLE/lov/2005-06-17-62?q=work%20environment%20act>.



accommodation duties. Directive 2000/43 was originally implemented by the first Act on the prohibition of discrimination based on ethnicity, religion and belief (the Anti-Discrimination Act - ADA) covering ethnicity, national origin, descent, skin colour, language, religion or belief.<sup>52</sup> The directives were described, but not assessed in the preparatory works to the GEADA.<sup>53</sup> However, as the non-discrimination directives (2000/78 and 2000/43) are not incorporated in the EEA agreement, the specific exceptions allowed under the Employment Equality Directive Articles 4(1), 4(2) and 6(1) have not been clearly articulated.

The anti-discrimination legislation has undergone a thorough revision twice in the last decade. The 2013 revision of the discrimination legislation aimed to harmonise and clarify the key definitions and ensure a similar protection for all discrimination grounds. The 2017 revision created one general act regarding all grounds of discrimination, adding a general protection against age discrimination outside employment, while trying to address some of the criticism of the 2013 revision. However, as key elements were taken out of the actual legal texts, while the preparatory works stated that no change was intended, there were concerns that it might indicate that new interpretation could develop over time, especially in relation to the exceptions allowed for direct discrimination. As the preparatory works to the acts in Norway are key to the definitions in the legal text, having many, and partly contradictory preparatory works to each act, may dilute the prohibitions of the legal texts. This continues to be an issue in the new GEADA in 2018, as the preparatory works to the GEADA lean heavily on previous preparatory works to earlier legal documents.

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<sup>52</sup> Anti-Discrimination Act (ADA) of 21 June 2013 No. 60, in force as of 1 January 2014. Upon the revision and harmonisation of the anti-discrimination legislation enacted in June 2013, the relationship with the directives was also assessed. See the legal preparatory works to the ADA; Proposition to Parliament, Prop. 88 L (2012-2013) *Diskrimineringslovgivningen*.

<sup>53</sup> See the legal preparatory works to the GEADA; Proposition to Parliament, Prop 81 L (2016-2017) *Lov om likestilling og forbud mot diskriminering (likestillings- og diskrimineringsloven)*, Chapter 6.

## 1 GENERAL LEGAL FRAMEWORK

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

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

Article 98 of the Constitution reads: 'All people are equal under the law. No human being must be subject to unfair or disproportional differential treatment.'<sup>54</sup> The provision mentions no particular grounds of discrimination, groups or characteristics.

Article 92 of the Constitution states that:

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

A Supreme Court judgment clarified that Article 92 of the Constitution is not a clause that incorporates human rights conventions in Norwegian law, but obliges authorities to enforce human rights conventions at the level they are implemented in Norwegian law.<sup>55</sup> The Human Rights Act<sup>56</sup> incorporates a number of important treaties on human rights - including the International Convention on Elimination of All Forms of Discrimination of Women (CEDAW) - into the domestic legal system on a general basis in which the conventions prevail over any other conflicting statutory provision.<sup>57</sup> The International Convention on Elimination of All Forms of Racial Discrimination (ICERD) is not incorporated into the Human Rights Act, but into the Equality and Anti-Discrimination Act (GEADA), the legal consequence being that ICERD does not prevail over other statutory provisions in case of conflict, but has to be decided through interpretation. The UN CRPD (the Disability Convention) was ratified on 3 July 2013.<sup>58</sup> It is not incorporated into the Equality and Anti-Discrimination Act (GEADA) or any other Norwegian law. However, the Equality and Anti-Discrimination Ombudsman is responsible for the supervision of the national implementation of the convention, similar to the national supervisory system of the ICERD and CEDAW.<sup>59</sup>

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

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<sup>54</sup> See <https://www.stortinget.no/globalassets/pdf/english/constitutionenglish.pdf>. The preparatory works to the constitutional clause are found in Dok 16 (2011-2012) Report on Human Rights in the Constitution from the Constitutional Committee to the Storting (Parliament), Chapter 6, see <http://www.stortinget.no/Global/pdf/Dokumentserien/2011-2012/dok16-201112.pdf>.

<sup>55</sup> See Supreme Court, HR-2016-2554-P and HR-2016-2591-A of 20 December 2016, para 47. The latter case concerned the question whether a woman with a psychosocial disability (diagnosed paranoid schizophrenia) should be deprived of her legal capacity relating to her finances if the conditions for this were fulfilled in accordance with the Guardianship Act, Article 22. The Supreme Court found that the conditions to deprive the woman of a capacity to handle her own finances were fulfilled, even though this might be contrary to Article 12 of the CRPD. This is because of the Norwegian 'interpretative declaration' in relation to CRPD Article 12 (judgment, para. 58), and also because the CRPD is not incorporated into Norwegian law. An interesting observation is made in para. 63, in which it is stated that as long as the declaration made by Norway in relation to Article 12 is upheld by the legislature, the courts must abide by this even if it is in breach of international law.

<sup>56</sup> Act relating to the status of human rights in Norwegian law of 21 May 1999 No. 30 (*Menneskerettsloven*).

<sup>57</sup> The International Convention on Racial Discrimination is incorporated in the Anti-Discrimination Act (ADA), but the convention will in conflicting cases not automatically prevail. The failure to include the ICERD in the Human Rights Act has been repeatedly criticised by the NGOs working on anti-discrimination.

<sup>58</sup> See Prop. 106 S (2011-2012) Proposition to the *Stortinget* (proposal for Parliamentary resolution) on Consent to ratification of the UN Convention of 13 December 2006 on the Rights of Persons with Disabilities and Prop 105 L 2011-2012 on Changes to the Anti-Discrimination Ombud Act on the supervision of implementation of the UN Convention on the Rights of Persons with Disabilities.

<sup>59</sup> Equality Ombud (2016) 'Strategy of the Ombud (2017-2022)', at <https://www.ido.no/nyheiter-oq-fag/brosjyrar-oq-publikasjoner/Arsrapporter/arsmelding-2016/sammendrag-strategi/>.

The constitutional anti-discrimination provisions are directly applicable.<sup>60</sup>

The constitutional equality clauses can be enforced both against state bodies and private individuals.

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<sup>60</sup> Article 98 of the Constitution has only been assessed in one discrimination case, in a verdict by the National Insurance Court in Case No. TRR-2015-1542, of 29 January 2016 regarding gender discrimination. The case concerned a father who had been denied paid parental leave as the mother of the child did not fulfil the terms for paid parental leave according to the National Insurance Act, Article 14-13. The father claimed a right to paid leave based on the reasoning of the CJEU Judgment C-222/14 *Maistrellis*, and claimed that as such, Article 98 would be interpreted in accordance with the understanding of the European Court of Justice. The National Insurance Court did not agree with this, as it did not find that Article 98 provided the basis for setting aside a clause in the National Insurance Act. The verdict has not been appealed to the ordinary courts according to information given to the author, and is thus final. Several cases concerning the immigration legislation have been assessed in relation to Article 98, but none of these have been assessed from a discrimination perspective.

## 2 THE DEFINITION OF DISCRIMINATION

### 2.1 Grounds of unlawful discrimination explicitly covered

Norwegian anti-discrimination legislation provides a basis to address the following grounds of discrimination within all sectors: gender, ethnicity (including national origin, descent, skin colour, and language), religion or belief, sexual orientation and disability under the GEADA. From 1 January 2018, pregnancy, leave in connection with childbirth or adoption, care responsibilities and age are also explicitly included as grounds of unlawful discrimination. 'Other significant characteristics of a person' is stated as one of the grounds within the aim of the GEADA, but is not specified as a protected ground in the list in Article 6 of the GEADA.

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

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

##### a) Racial or ethnic origin

The scope of the term 'ethnicity' is vague, and provision is made for some exercise of discretion by the enforcing agencies in defining its reach. Referring to the preparatory works of the ADA, the GEADA's preparatory works note that the term has both subjective and objective elements:<sup>61</sup>

'It is not possible to provide a comprehensive definition of what the term ethnicity includes. (...) When we try to define the term ethnicity, relations are a key issue. For example, a person's ethnicity is often expressed through the individual's or group's experience of being different than others.

...

The term ethnicity will also encompass objective elements. National origin, descent, skin colour and language are examples of such objective elements.'

Thus, skin colour and language are closely linked to and subsumed under the concept of ethnicity, while the subjective part of the concept is quite similar to the definition of ethnicity in CJEU *CHEZ* C-83/14.<sup>62</sup> The preparatory works of the GEADA also make it clear that 'national origin' and 'descent', as grounds for discrimination, are closely associated with the term ethnicity: these grounds could include place of birth, non-Norwegian country background, the place where one was brought up or from which one has one's background, and relationships in the broad sense. Nationality is thus not seen as a ground in itself, but differential treatment based on nationality may be seen as indirect discrimination on the basis of 'ethnicity' (see section 4.4 below). Statelessness is also covered.<sup>63</sup> This does not imply a change in the understanding of the main concepts

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<sup>61</sup> See the preparatory works to the GEADA; Prop 81 L (2016-2017) Chapter 11.2.3.2 Ethnicity, available (in Norwegian) at <https://www.regjeringen.no/no/dokumenter/prop.-81-l-20162017/id2547420/sec12> (in Norwegian).

<sup>62</sup> CJEU, Judgment of 16 July 2015, *CHEZ*, C-83/14, paragraph 46, EU:C:2015:480.

<sup>63</sup> See decision of the Equality Ombud in Case No. 09/892 of 3 May 2012. In its Case 28/2015 of 29 September 2015, the Equality Tribunal found that demanding a Norwegian or Swedish criminal record check from 18 years of age to follow job applications to a security company constituted indirect discrimination because of nationality in breach of ADA Article 6. In reality, the demand from the security company signified that the company only accepted applicants that had been Norwegian or Swedish citizens since 18 years of age. The practice was seen as discriminatory vis-à-vis both EU citizens and third country nationals, that is everyone who is not a Norwegian or Swedish citizen. See also decision by the Equality Tribunal in Case No. 18/2006 on advertisements for apartments to rent, 'only to Norwegian citizens', referred to in the preparatory works to the GEADA: Proposition to Parliament, Prop. 81 L (2016-2017) *Lov om likestilling og forbud mot diskriminering* Chapter 11.2.3.3.

and definitions.<sup>64</sup> These examples are now included in Article 6(1) of the GEADA.<sup>65</sup> These examples are binding, but not exhaustive, for the interpretation of the concept of ethnicity. National origin, descent, skin colour and language are not seen as individual grounds of discrimination and are only protected when there is a link to ethnicity, or the discrimination is on the grounds of ethnicity.<sup>66</sup>

Race or racial origin is not specified as a separate distinction in the GEADA, as the starting point for combating racism is to eliminate the idea that people can be divided into different races, in line with preamble no. 6 of Directive 2000/43. Discrimination based on perceptions of a person's race is regarded as discrimination based on ethnicity. Skin colour was taken into the GEADA's list of examples of ethnicity on the basis that the law should at least mention skin colour explicitly in order to better fulfil the requirements of CERD while not using the word 'race', as suggested by the Ombud and supported by several anti-racist NGOs.<sup>67</sup>

#### b) Religion and belief

The GEADA covers discrimination because of religion or belief. The preparatory works of the GEADA do not refer to any EU sources regarding the interpretation of the concept of religion or life stance. 'Religion' is not defined in the preparatory works, although it is stated that the word 'belief' is specifically chosen to emphasise that all kinds of life-stance beliefs are covered, not only those linked to a specific line of religious thinking.<sup>68</sup> However, the preparatory works to the previous act (the ADA) specified that the wording follows the wording of Directive 2000/78, and that both having and not having a religion or belief is covered.<sup>69</sup> Political opinion is not protected as a 'belief', but is specifically protected in the Working Environment Act. In the preparatory works to the GEADA, the definition of religion in the ECtHR judgment *Eweida and others v. UK* is taken as a starting point.<sup>70</sup> In a recent Equality Tribunal case, the members of the tribunal all agreed that a refusal to shake hands with women should be seen as an expression of religious views, which is protected against discrimination.<sup>71</sup> However, the majority of the members of the tribunal did not see it as discriminatory to refuse to renew a man's contract on the basis of these views.

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<sup>64</sup> See the legal preparatory works; Proposition to Parliament, Prop. 81 L (2016-2017) *Lov om likestilling og forbud mot diskriminering* Chapter 11.

<sup>65</sup> See the legal preparatory works; Proposition to Parliament, Prop 81 L (2016-2017) *Lov om likestilling og forbud mot diskriminering (likestillings- og diskrimineringsloven)*, Chapter 11.9.4.

<sup>66</sup> Proposition to Parliament, Prop. 81 L (2016-2017) *Lov om likestilling og forbud mot diskriminering* Chapter 11.2.3.2, cfr the proposition of the first Anti-Discrimination Act regarding ethnicity etc., Ot.prp. No. 33 (2004-2005) Chapter 10.1.8.2.

<sup>67</sup> See Proposition to Parliament, Prop. 81 L (2016-2017) *Lov om likestilling og forbud mot diskriminering chapter 11.2.3.1*.

<sup>68</sup> In its Case LDN-2016-16, the Equality Tribunal accepted veganism as a life stance. The preparatory works of the GEADA refer in particular to the ECtHR case of *Eweida v. United Kingdom*, premises 80-82, stating that not any action motivated by religious views is protected, it must be a closely connected to the religious belief, but not limited to issues generally acknowledged or seen as compulsory. Prop 81 L (2016-2017) *Lov om likestilling og forbud mot diskriminering (likestillings- og diskrimineringsloven)*, Chapter 11.2.3.7.

<sup>69</sup> See the preparatory works to the WEA; NOU 2003:2 *Skjerpet vern mot Diskriminering i arbeidslivet* p. 36.

<sup>70</sup> With the following quotes from paras 80-82: 'The right to freedom of thought, conscience and religion denotes views that attain a certain level of cogency, seriousness, cohesion and importance'; 'Even where the belief in question attains the required level of cogency and importance, it cannot be said that every act which is in some way inspired, motivated or influenced by it constitutes a 'manifestation' of the belief. Thus, for example, acts or omissions which do not directly express the belief concerned or which are only remotely connected to a precept of faith fall outside the protection of Article 9 § 1.' Prop 81 L (2016-2017) Chapter 11.2.3.7 <https://www.regjeringen.no/no/dokumenter/prop.-81-l-20162017/id2547420/sec12>.

<sup>71</sup> Equality Tribunal, Case Nos. 48/2018 and 18/325. A was temporarily employed as an assistant at a school. From the beginning he had made it clear that he did not shake hands with women on the basis of his religious convictions. His contract was not renewed due to this refusal. The majority of the members of the tribunal interpreted the school's actions as indirect differential treatment and concluded that it was necessary to demand that A shook hands with women. The minority of the tribunal saw the school's dismissal as direct differential treatment, and unjustifiable.

### c) Disability

In the preparatory works to the GEADA, the Ministry for Children and Equality discussed whether the Norwegian concept of disability should be replaced. It proposed that the concept of disability as used in Norwegian, *nedsatt funksjonsevne*, (reduced functional ability) should be replaced with the Norwegian concept of *funksjonsnedsettelse* (functional reduction); this proposal was adopted.<sup>72</sup> The definition of disability in the GEADA in relation to professional life is understood as:

'a limitation which results in particular from physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers.'

This is in line with the judgment of the European Court in the Joined Cases C-335/11 and C-337/11 *Skouboe Werge and Ring*, Paragraph 38. However, Norwegian law includes temporary illness in the concept of disability, unless it is 'a temporary and entirely insignificant condition which does not influence the functional ability to any significant degree'.<sup>73</sup> Furthermore, Norwegian law focuses on the discriminatory action in combination with the person's functional ability rather than the barriers or limitations that the condition alone creates.<sup>74</sup> The preparatory works explicitly state that it is undesirable to limit the protection to a specific group.<sup>75</sup> Similarly, there is no focus on diagnosis.<sup>76</sup> However, in C-337/11, *Skouboe Werge and Ring*, paragraph 47 sets as a criterion that the illness has to be '*medically diagnosed* as curable or incurable' (author's italics). The social element of the reduced functional ability and interaction with the environment in working life is also covered by the employer's general duty of accommodation in the WEA, Article 4-6. The Norwegian definition may be considered to be more in line with a social model than the CJEU case law on Directive 2000/78, since no diagnosis is needed. Regarding the temporariness of an illness, Norwegian law gives a very wide protection, since even short term reduced ability is protected against discrimination.

It should, however, be noted, that Norwegian law allows employers to dismiss employees on the basis of long-term sick leave (WEA article 15-8 (1)) after 12 months of absence. Dismissal during this 12-month period shall be seen as based on the person's illness and therefore unjustified, unless clearly proven to have another and justifiable reason (WEA Article 15-8(2)). After the 12-month period the dismissal of a sick or disabled employee must have reasonable aim. If the reason is capacity reduction of the enterprise or trying to make the production more effective, the consequences for the employee must not be disproportionate compared to the needs of the enterprise, and a dismissal cannot be justified if other suitable work can be found for the employee within the enterprise (WEA article 15-7). In Case C-270/16 *Ruiz Conejero*, the CJEU stated that:

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<sup>72</sup> See the legal preparatory works; Proposition to Parliament, Prop 81 L (2016-2017) *Lov om likestilling og forbud mot diskriminering (likestillings- og diskrimineringsloven)* Chapter 11.2.

<sup>73</sup> Proposition to Parliament, Prop 81 L (2016-2017) *Lov om likestilling og forbud mot diskriminering (likestillings- og diskrimineringsloven)* Chapter 11.2.4, 5th paragraph. It also states that 'To the knowledge of the Ministry [of Children and Equality], there are no decisions from any of the institutions handling complaints [regarding discrimination] where the question of durability has been a key issue.'

<sup>74</sup> Proposition to Parliament, Ot.prp. No. 44 (2007-2008) *Om lov om forbud mot diskriminering på grunn av nedsatt funksjonsevne (diskriminerings- og tilgjengelighetsloven)* Chapters 9.4.6.2 and 9.4.8.

<sup>75</sup> Proposition to Parliament, Ot.prp. No. 44 (2007-2008) *Om lov om forbud mot diskriminering på grunn av nedsatt funksjonsevne (diskriminerings- og tilgjengelighetsloven)* Chapter 9.4.8.1.

<sup>76</sup> Equality and Anti-Discrimination Ombud (2014), 'Forbudet mot diskriminering på grunn av nedsatt funksjonsevne. Rett til individuell tilrettelegging for arbeidstakere og arbeidssøkere med nedsatt funksjonsevne – en oppsummering' (Report on the right to reasonable accommodation – a summary), April 2014, p. 33. Available in Norwegian at: <http://www.ido.no/globalassets/brosjyrer-handboker-rapporter/diverse-pdf1/diverse-pdf/oppsummering-individuell-tilrettelegging-270314.pdf>.

'Article 2(2)(b)(i) of Directive 2000/78 must be interpreted as precluding national legislation under which an employer may dismiss a worker on the grounds of his intermittent absences from work, even if justified, in a situation where those absences are the consequence of sickness attributable to a disability suffered by that worker, unless that legislation, while pursuing the legitimate aim of combating absenteeism, does not go beyond what is necessary in order to achieve that aim, which is a matter for the referring court to assess.'<sup>77</sup>

Although the WEA gives a very strong protection against dismissal during the first 12 months of illness or disability, it is doubtful whether the WEA Article 15-7 provides adequate protection against dismissal on the basis of disability.

d) Age

The definition of age does not have limits upwards or downwards. Discrimination based on age will thus encompass discrimination because of both high age and low age.<sup>78</sup>

e) Sexual orientation

The Sexual Orientation Act of 2014 (SOA) prohibited discrimination on the basis of sexual orientation, gender identity and gender expression. The GEADA, which replaced the SOA and all other discrimination acts except the WEA from 2018, retains the legal definition of sexual orientation that was previously included in the SOA, an overarching concept that covers 'lesbian, gay, bisexual and heterosexual orientation. Sexual orientation includes both sexual orientation [attractions, emotions]<sup>79</sup> and sexual practices'. The concept 'points to which gender appears in the law and/or sexuality is directed towards, if it is towards persons of the opposite sex/gender or towards the same sex/gender'.<sup>80</sup> The concept does not include particular sexual preferences or activities such as for example fetishism or sadomasochism.<sup>81</sup>

The relationship between gender expression (also a protected ground in the GEADA) and assumed sexual orientation has not yet been addressed in any cases, as well as the relationship between race/ethnicity and assumed religious convictions.

### 2.1.2 Multiple discrimination

In Norway, multiple discrimination is now explicitly prohibited by law. As of 1 January 2018, multiple discrimination is specifically included in Article 6(1) of the GEADA, which, after the listing of the prohibited grounds of discrimination, states that 'combinations of these factors' are prohibited. Multiple discrimination is when a person is discriminated against because of two or more discrimination grounds separately but simultaneously. Intersectional discrimination occurs when a person is discriminated against because of several discrimination grounds simultaneously because of a unique combination of several discrimination grounds, which cannot be linked to one isolated ground. It follows from the Norwegian wording that both are included. Intersectional or multiple discrimination are not explicitly included in the WEA, but are in practice included through judicial interpretation.<sup>82</sup>

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<sup>77</sup> Judgment of 18 January 2018, *Carlos Enrique Ruiz Conejero v Ferroservicios Auxiliares SA and Ministerio Fiscal*, C-270/16, EU:C:2018:17, paragraph 57.

<sup>78</sup> See the preparatory works to the WEA, Norwegian Government (2003) *Skjerpet vern mot Diskriminering i arbeidslivet* NOU 2003:2, p. 16.

<sup>79</sup> In the Norwegian language, the concept 'sexual orientation' can be translated into two different words 'orientering' and 'legning', which are both used here, and the author's insertion in square brackets is intended to explain the slightly different meanings.

<sup>80</sup> The Norwegian language uses same word for sex and gender: 'kjønn'.

<sup>81</sup> See the legal preparatory works; Proposition to Parliament, Prop 81 L (2016-2017) *Lov om likestilling og forbud mot diskriminering (likestillings- og diskrimineringsloven)*, Chapter 11.9.5.

<sup>82</sup> The same is the case with the SLA.

In Norway, the following case law deals with multiple or intersectional discrimination.

The courts, the Ombud and the Equality Tribunal have made decisions in a number of cases relating to intersectional/multiple grounds discrimination, mainly in relation to gender and age,<sup>83</sup> age and ethnicity,<sup>84</sup> and gender and religion (wearing the hijab).<sup>85</sup> There are few cases involving three or more grounds of discrimination.<sup>86</sup>

The national court system has made decisions in only two cases where multiple discrimination has been claimed. Both cases concerned gender and age. Both had been through the complaints procedure at the Equality Ombud before being brought to court. In the most recent case, a 61-year-old male social worker claimed to be subject to discrimination because of gender and age, as he was not selected to participate in an interview for a position at the local welfare office on a small island called Smøla. The applicant was well known by the employers. The Equality Ombud agreed that he had been subject to discrimination because of age, as did the court of first instance. Neither found discrimination because of gender. Both the court of appeal and the Supreme Court found that he was not selected for interview because the employer sought to recruit someone with a different professional profile than social work. Thus, age was not the reason for his non-selection to participate in an interview.<sup>87</sup>

The other case was brought to the court of first instance because of the employer's non-compliance with the statement of the Equality Tribunal.<sup>88</sup> A county that was recruiting new staff was alleged to have discriminated against a female worker in the fire brigade because of her age and gender, in contravention of the GEA and the WEA. The case concerned a female worker aged 41, employed on a part-time basis in the fire brigade.

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<sup>83</sup> See for example the Equality Tribunal's Case 18/2015 in which the tribunal found that the claimant was discriminated against because of age, but not gender. In the Equality Tribunal's Case 34/2015, the tribunal found that the claimant was neither discriminated against because of age nor gender by an age limit for retirement set by the employer at 67 years, at which she had to stop working. In the Equality Tribunal's Case 20/2015, the tribunal found that the claimant was neither discriminated against because of age nor gender by her employer, the Norwegian Tax Authority.

<sup>84</sup> See for example the Equality Tribunal's Case 35/2015 in which the tribunal found that the claimant was discriminated against both because of age and ethnicity as he was passed over for a position as a glass-maker. The decision does not state which ethnicity or nationality the glass-maker is, but only stated that he is of 'foreign origin', and that he was born in 1962, and thus was 52 years at the time of application.

<sup>85</sup> The Equality Tribunal's cases on hijab and gender are Nos. 26/2009, 08/2010, 2/2014, 2/2017 and 30/2018. The 2014 case signalled a new line of reasoning within the tribunal, which in part ran counter to the previous legal understanding of the Ombud and the Equality Tribunal regarding direct discrimination because of religion. The tribunal saw the prohibition of headscarves for security personnel at the airport as direct differential treatment on the basis of religion and indirect differential treatment on the basis of gender. The exception for direct discrimination was broadened regarding religion, as the tribunal accepted in this case that the secular and value-neutral orientation of the needs of the employer should be given priority over the right of Muslim women to be able to wear their religious symbols within employment. As yet, there has been no case tried before the ordinary courts on this issue. In Case No. 2/2017 the tribunal thoroughly discussed international conventions as well as the decisions of the ECtHR. They concluded that general prohibitions of wearing religious symbols including hijab at the workplace should be considered indirect discrimination on the basis of religion, while the differential treatment of a woman on the basis of her wearing a hijab should be considered direct differential treatment. The ECJ Cases C-188/15 and C-157/15 are briefly referred to, with the conclusion that there is no contradiction between them and that the decision of the tribunal. Case No. 30/2018 concerned a Muslim woman working as a steward on a passenger boat. In this case too, the prohibition of wearing of headscarf with the uniform was seen as indirect discrimination on the basis of religion alone. No ECJ cases were mentioned in the latter case. The Equality Tribunal assessed a case on religious symbols in 2014, Case 46/2014, concerning a prohibition on wearing religious, political or ideological symbols during TV broadcasts by the Norwegian Broadcasting Service (NRK). This prohibition was accepted by the tribunal due to the need for the national broadcasting service to appear value-neutral.

<sup>86</sup> Although such cases are known to exist: Equality Tribunal Case No. 31/2015 concerned a woman who claimed to have been bypassed for a position as associate professor in physics: materials research with transmission electron microscopy (TEM). She claimed to have been bypassed because of her gender, age and ethnicity. The Equality Tribunal did not find that she had been discriminated against.

<sup>87</sup> Supreme Court, Rt-2012-424.

<sup>88</sup> Øst-Finnmark court of first instance, Judgment of 17 March 2010 in Case No. 09-136827TVI-OSFI. The case had already been assessed by the Equality Ombud and the Equality and Anti-Discrimination Tribunal, in its Case No. 8/2008.



She subsequently applied for a longer, full-time vacancy, and then a fixed-term, full-time position. A male worker aged 27 who was less qualified was employed in the position for which the woman had applied. The ads announcing the position had the following formulation: 'applicants should be between 27 and 35 years of age.' The Equality Tribunal and the court found that the woman was discriminated against both on the grounds of gender and age, and awarded her compensation of EUR 37 500 (NOK 300 000) for economic loss as well as EUR 18 759 (NOK 150 000) for non-pecuniary damage.<sup>89</sup> The employer (the county) did not take the case to the appellate court, and the judgment is final.

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

### **2.1.3 Assumed and associated discrimination**

#### **a) Discrimination by assumption**

In Norway, discrimination based on a perception or assumption of a person's characteristics, is prohibited in the GEADA, Article 6(2). The sub-paragraph reads: 'The prohibition includes discrimination on the bases of actual, assumed, former or future factors specified in the first paragraph'. From 1 January 2018, this covers gender, ethnicity (including national origin, descent, skin colour, and language), religion or life stance, sexual orientation and disability, pregnancy, leave in connection with childbirth or adoption, care responsibilities and age. Discrimination based on a perception or assumption is not explicitly included in the WEA, but is included in practice through judicial interpretation.<sup>90</sup>

There have been a number of cases concerning this type of discrimination, mainly on the basis of assumed current or future disability, most of which have been dealt with by the Ombud alone.

In the Ombud's case number 16/628, an employer was found to have discriminated against a woman on the basis of doubts about her medical limitations and possible sick leave/need for accommodation. She had better qualifications than the person who was offered the position, but had taken some sick leave due to inflammations and other minor issues related to hard physical work for many years. The Ombud found that there was a reason to believe that she was ranked lower for consideration because the employer thought she would be in need of accommodation or repeatedly be on sick leave, i.e. on the basis of assumed disability.

One example of what was not seen as discrimination by assumption is Equality Tribunal Case No. 46/2015. A kindergarten had alerted the child welfare authorities that they were worried about the situation at a child's home, in relation to the mother's physical and mental health. Both the Ombud and the tribunal came to the conclusion that this was

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<sup>89</sup> In Norway a breach of the law does not lead to a stricter penalty if it involves more than one ground of discrimination.

<sup>90</sup> The same is the case with the SLA.

not discrimination based on assumed disability, as the reasoning in the documents was based on specific issues, such as a lack of hygiene and appropriate clothing for the child.

#### b) Discrimination by association

In Norway, discrimination based on association with persons with particular characteristics, is prohibited in the GEADA, Article 6(3). The sub-paragraph reads: 'The prohibition 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'. In the preparatory works to the former anti-discrimination laws, the ministry stated that the key issue is whether there is a causal relationship between the protected grounds of discrimination and the action in question.<sup>91</sup> Discrimination by association is not explicitly included in the WEA, but is included in practice through judicial interpretation.<sup>92</sup>

There have been few cases regarding discrimination by association,<sup>93</sup> but in only one case, the Equality Ombud's Case No. 11/2514, has the issue really been assessed. Y wanted to sublet the apartment he rented to X, who was receiving social benefits due to an illness. The owner of the apartment refused, and Y complained to the Ombud on the basis of his association with X and his disability. The Ombud concluded that the link to X was too peripheral to be taken into account, using C-303/06 *Coleman v Attridge Law and Steve Law* as a comparator. Norwegian law has later been reviewed in line with C 83/14, *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia*,<sup>94</sup> as mentioned above. This wider understanding of discrimination through association has not yet been used by the courts or the Equality Tribunal.

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

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

In Norway, direct discrimination is prohibited in national law.

In WEA Article 13-1, the concepts of direct and indirect discrimination are not defined, but the concepts are discussed and defined in the preparatory works.<sup>95</sup>

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

This continues to be a matter of concern after the entry into force of the GEADA on 1 January 2018. The prohibition against direct discrimination is specified in Article 7 on direct differential treatment, which reads:

"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 Article 6, first paragraph.'

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<sup>91</sup> Preparatory works to the ADA, AAA and SOA of 2014, Prop. 88 L (2012-2013) *Diskrimineringslovgivningen* (The anti-discrimination legislation) p. 85, available in Norwegian at <https://www.regjeringen.no/no/dokumenter/prop-88-l-20122013/id718741/>.

<sup>92</sup> The same is the case with the SLA.

<sup>93</sup> The Ombud's Cases 08/1121 and 14/1013. The Equality Tribunal refused the appeal of the latter on the basis of their limited competence in Case No. 73/2015.

<sup>94</sup> Norwegian Government (2012) Prop. 88 L (2012-2013) *Diskrimineringslovgivningen* (The Anti-discrimination legislation) p. 85, available in Norwegian at <https://www.regjeringen.no/no/dokumenter/prop-88-l-20122013/id718741/>.

<sup>95</sup> The definitions are not specified in the WEA Chapter 13 but are discussed in its preparatory works, Ot. Prp. No. 49 (2004-2005) Chapter 25.

In several cases from the Equality Tribunal there seems to be some confusion regarding what constitutes direct differential treatment. A good example on the lack of clarity in the interpretation of what direct discrimination is and when it may be justified, is Equality Tribunal case number 48/2018, where the dismissal of a Muslim man, who refused to shake hands with women on the basis of religious convictions, was seen as justified indirect discrimination by the majority of the tribunal, and unjustified direct discrimination by the minority.<sup>96</sup> In case number 39/2018, the requirement of a good working knowledge of Norwegian was not seen as direct differential treatment, but indirect. In Equality Tribunal case no. 26/2018, for example, it is unclear whether a language requirement is seen as direct or indirect differential treatment on the basis of ethnicity, while in several other cases from the Ombud and the Equality Tribunal, language requirements are seen as direct differential treatment.<sup>97</sup>

b) Justification for direct discrimination

In Norway, as a starting point, neither the GEADA nor WEA permits justification of direct discrimination, neither generally, nor in relation to particular grounds, except with regard to genuine and determining occupational requirements (see section 4.1 below). However, the wording of the legal texts after the 2013 revision created uncertainty in relation to the extent of possible exceptions that were not an issue earlier, as described above.<sup>98</sup> This uncertainty is not addressed in the preparatory works to the GEADA.<sup>99</sup> Lawful differential treatment is defined in the GEADA, Article 9:

'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.

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.'

The first sub-paragraph follows the wording of the justification used for indirect discrimination, whereas the second sub-paragraph is specific to genuine and determining occupational requirements.

In relation to age outside employment, age limits specified in laws or regulations, and favourable pricing based on age, do not breach the prohibition against discrimination (see GEADA, Article 9(3)).

In Equality Tribunal case number 82/2018, direct differential treatment on the basis of disability was seen as justified (see section 12.2 below for a full description of the case).

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<sup>96</sup> Due to the controversies around this case, and the legal complexities, the Equality Tribunal used the power to handle the case through a 'strengthened Tribunal': all three administrators and two tribunal members, instead of only one administrator and two members.

<sup>97</sup> For example, the Ombud's Case Nos. 15/1208 and 14/153, Equality Tribunal Case No. 139/2018.

<sup>98</sup> Researchers are worried that the former very clear and narrow exceptions for direct discrimination will be undermined by not having clear definitions of direct discrimination in the legal acts themselves, see Strand, Vibeke Blaker (2014), *Likestillingsloven 2013 og forenklingssjuss – en trussel mot individvernet?* Kvinnerettslig skriftserie/ Studies in Women's Law at <http://www.jus.uio.no/ior/forskning/omrader/kvinnerett/publikasjoner/skriftserien/dokumenter/nr-96-vibeke-blaker-strand.pdf>.

<sup>99</sup> See the legal preparatory works; Proposition to Parliament, Prop 81 L (2016-2017) *Lov om likestilling og forbud mot diskriminering (likestillings- og diskrimineringsloven)*. The justification of direct discrimination is not discussed in Chapter 14.2 or in Chapter 14.9.

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

### a) Prohibition and definition of indirect discrimination

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

Article 6 of the GEADA prohibits both direct and indirect discrimination. The definition is similar to that of the directives.

The prohibition reads as follows:

'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. "Ethnicity" includes national origin, descent, skin colour and language. (...)

"Discrimination" means direct or indirect differential treatment pursuant to articles 7 and 8 that is not lawful pursuant to articles 9, 10 or 11.'

Article 8 defines indirect discrimination as follows:

"Indirect differential treatment" means any apparently neutral provision, condition, practice, act or omission that results in persons being put in a worse position than others on the basis of factors specified in article 6, first paragraph.'

Article 13-1(1) of the WEA reads:

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

Indirect discrimination is not defined in the WEA itself, although the legal preparatory works state that the definitions follow Directive 2000/78, Article (2)(b).<sup>100</sup>

### b) Justification test for indirect discrimination

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

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<sup>100</sup> See the legal preparatory works to the WEA; Proposition to the *Odelsting* No. 104 (2002-2003), Article 8.3.5.4, p. 36. See also, for example, the description of Equality Tribunal Case No. 48/2018 in section 12.2 below.

is not in contravention of the prohibition against indirect discrimination, discrimination on the basis of age or discrimination against an employee who works part-time or on a temporary basis.’

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

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

The legal preparatory works to the former laws ADA, AAA and SOA state that the possibility for differential treatment in working life in particular is narrow and limited.<sup>101</sup> Nothing in the GEADA or preparatory works changes this – on the contrary they state that in respect of the definitions of direct and indirect discrimination there are no changes in the way in which the law should be understood.<sup>102</sup>

The test used to justify indirect discrimination is derived from the *Bilka* case,<sup>103</sup> and thus is compatible with the origins of the directives. The legal preparatory works to the acts all point directly to the understanding of the directives.

### 2.3.1 Statistical evidence

#### a) Legal framework

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

The GDPR was incorporated into Norwegian law in 2018, through a change in the Personal Data Act (PDA) of 14 April 2000, which includes a complete translation of the directive. According to Article 9 of the PDA, the collection of personal data revealing the racial ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, and the processing of genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person’s sex life or sexual orientation are prohibited. In addition to the exceptions mentioned in Article 9, the PDA also allows for the collection of such data when necessary for promoting equality at a workplace, or as part of purely personal or familial activities.<sup>104</sup>

In Norway, statistical evidence may be admitted under national law in order to establish indirect discrimination, in accordance with the key principles of evidence in Norwegian courts. The key procedural principle in Norwegian civil courts is the free evaluation of evidence by the courts in the course of the case as presented in courts (see section 2.2.1 of this report and Chapter 21 of the Dispute Act (DA) for further details)<sup>105</sup> Chapter 25 of the DA also allows for expert witnesses, i.e. ‘an expert assessment of factual issues in the case’, for whom 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 indirect discrimination has happened or not, as the assessment that has to be made according to national legislation is whether or not an action or non-action has had a negative result for the individual or the group.<sup>106</sup>

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<sup>101</sup> See Proposition to Parliament; Prop. 88 L (2012-2013) p. 87.

<sup>102</sup> See Proposition to Parliament 81 L (2016/2017) Chapter 12.9.1.

<sup>103</sup> See CJEU, Judgment of 10 January 2006, *Bilka*, C-170/84, ECLI:EU:C:1986:204.

<sup>104</sup> Personal Data Act of 14 April 2000 No. 31, Article 2(2).

<sup>105</sup> Official translation at <http://www.ub.uio.no/ujur/ulovdata/lov-20050617-090-eng.pdf>.

<sup>106</sup> See the preparatory works to the AAA; Proposition to the *Odelsting* No. 44 (2007-2008) p. 101.

The use of statistical evidence is however often a practical necessity, as the prohibition on indirect discrimination attempts to protect individuals against a systemic group identification that leads to unintended negative results for the individual or the group. In order to prove indirect discrimination at an individual level, the use of statistical data will often constitute a practical necessity in order to prove that discrimination has occurred. The law does not have a specific provision regarding statistical evidence – it is considered as all other forms of evidence.

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

#### b) Practice

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

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

The case law as yet in this area is sparse. There are examples where statistical data was used in a Supreme Court case on age and retirement,<sup>107</sup> as well as on gender and work-related pensions.<sup>108</sup> The significance attributed to this data by the Supreme Court in its judgment was low.

## 2.4 Harassment (Article 2(3))

#### a) Prohibition and definition of harassment

In Norway, harassment is prohibited in national law, and explicitly constitutes a form of discrimination. It is defined. Both the perpetrator and victim may belong to any sex.

The two acts on anti-discrimination prohibit harassment within the grounds covered by the particular act, see the WEA (Article 13-1(2)) and the GEADA (Article 13).<sup>109</sup> The full material scope of the directives is covered in the various acts.

The general definitions are similar in the various bits of legislation: harassment means acts, omissions or statements that seem or aim to seem offensive, frightening, hostile, degrading or humiliating. The subjective view of the person is an element in determining whether the act is seen to constitute harassment, as well as a more 'objective' standard assessing whether a reasonable person would view the action as 'seeming' offensive.

The prohibition against harassment covers harassment on the basis of a present disability, assumed disability, past disability or possible future disability, as well as the harassment of a person on the basis of this person's relationship with a person with a disability. It is also prohibited to be an accessory to any breach of the prohibition against discrimination. The acts all provide a specific duty on employers and the managements of organisations and educational institutions to, within their areas of responsibility, prevent

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<sup>107</sup> Supreme Court, Judgment of 29 June 2011, Rt-2011-964 *Gjensidige*.

<sup>108</sup> Supreme Court, Judgment of 27 November 2003, Rt-2003-1657 *Braathens*.

<sup>109</sup> Sexual harassment is covered by the GEADA, but was not enforced by the Equality Tribunal until 1 January 2020, when the tribunal's mandate was expanded with this specific aim in mind. See Amendment to the Act on the Equality and Anti-Discrimination Ombud and the Equality and Anti-Discrimination Tribunal, 21 June 2019.

and seek to prevent harassment occurring. The definitions are equivalent to those of the directives.

Article 185 of the Penal Code<sup>110</sup> contains criminal law protection against discrimination, and concerns hateful expressions, emphasising specifically that racist expressions with insulting effects are punishable by law. The provisions in the Penal Code are applicable in relation to discrimination because of skin colour or national or ethnic origin, religion or life stance, sexual orientation, and disability.

The legal preparatory works to the prohibition of harassment in the WEA emphasise that the concept of harassment must be construed in accordance with the general concept of harassment in the WEA (third paragraph of Article 4-3).<sup>111</sup> This provision contains a general requirement that workers should not 'be subject to harassment or other improper conduct.' Harassment protection pursuant to Article 4-3 thus also includes harassment related to factors other than the grounds protected by discrimination rules. The provision is part of the requirements of the psychosocial work environment and is a continuation of the now obsolete Working Environment Act (1977), Article 12. Case law regarding the provision related to general harassment (previously WEA Article 12 and current WEA Article 4-3) is thus of relevance for the understanding of the concept of discriminatory harassment.<sup>112</sup> Harassment according to the GEADA need occur only once if the action is sufficiently grave. It is furthermore not necessary that an imbalance exists between the victim and the perpetrator: harassment may also occur between colleagues at the same level.

#### b) Scope of liability for harassment

Where harassment is perpetrated by an employee, in Norway, the employer or the employee is liable. As a main rule, the person performing the harassment is liable. However, there are two exceptions: 1) when the person harassing is acting on behalf of the employer<sup>113</sup> and 2) due diligence of the employer. Whether the liability is shared or only belongs to either the employer or the employee, depends on which rules of liability are applicable, especially regarding the degree of liability. The general rule on liability in discrimination cases is that in 'employment relationships and in connection with an employer's selection and treatment of self-employed persons and hired workers, employer's liability exists irrespective of whether the employer can be blamed' (GEADA Article 38(2)). In order to determine whether the employer is liable, a key issue is whether the employee was in a position of management of human resources or otherwise had the authority to instruct the person in question.

Until 2019, the judicial interpretation of the preparatory works was that there was strict liability for employers in cases where the employer or someone acting on behalf of the employer had harassed, which is the same rule as for other types of discrimination.<sup>114</sup> However, the following sentence was added to the GEADA Article 38(2) in 2019 (and came into effect from 1 January 2020):

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<sup>110</sup> See Penal Code of 20 May 2005 No. 28. The text of the Penal Code is not translated to English, but reads (author translation): 'Any person who wilfully or through gross negligence publicly utters a discriminatory or hateful expression shall be liable to fines or imprisonment for a term not exceeding three years. The use of symbols shall also be deemed to be an expression. Any person who aids and abets such an offence shall be liable to the same penalty. A discriminatory or hateful expression here means threatening or insulting anyone, or inciting hatred or persecution of or contempt for anyone because of his or her a) skin colour or national or ethnic origin, b) religion or life stance, c) homosexual orientation or d) disability'. Bisexuals are included through judicial interpretation of the preparatory works, see Proposition to the *Odelsting* No. 29 (1980-81), Section V.1 p. 12 and Prop. 66 L (2019-2020) Amendments to the Penal Code etc., Chapter 8.2.

<sup>111</sup> See Ot.prp. No. 88L (2012-2013) p. 162 which refers to the previous preparatory works, in particular Ot.prp. No. 35 (2004-2005) p. 38 on gender equality and Ot.prp. No. 104 (2002-2003 pp. 34-35) on the WEA.

<sup>112</sup> See the preparatory works' special notes to the actual provision (Article 13-1) in the Proposition to the *Odelsting*. No. 49 (2004-2005) on the WEA.

<sup>113</sup> It should be noted that this was changed as of 1 January 2020, see GEADA Article 38(2), second sentence.

<sup>114</sup> Proposition to Parliament, Prop. 81 L (2016-2017) Chapter 28.5.2.4.

'In cases concerning harassment and sexual harassment, and in sectors of society other than those specified in the first sentence, liability shall exist if the person responsible can be blamed.'

It is uncertain what degree of liability the employer now has when they themselves or their representatives harass someone.<sup>115</sup>

There is, however, a duty of due diligence on the employer<sup>116</sup> regarding harassment that is performed by other persons at the workplace, which is twofold (GEADA Article 13 (6)): 1) a duty to prevent harassment in general, and 2) a duty to prevent the continuation of harassment when made aware of the existence of such.<sup>117</sup> The liability for the employer thus does not include harassment between colleagues if no blame is attached to the employer.<sup>118</sup> While there are many cases regarding this issue from the tribunal, the employer's duty to prevent harassment is from 1 January 2020 exempted from the mandate of the tribunal in relation to Article 38(1)(a) of the GEADA on awarding compensation or redress for breaches of this duty. It remains to be seen how this change in the GEADA will be interpreted by the tribunal.

Outside the scope of Article 38 of the GEADA, the liability follows the rules of the Act relating to compensation in certain circumstances:<sup>119</sup> gross negligence or fault in order to claim damages for injury of a non-pecuniary character, and negligence or more for compensation for economic losses.

On this basis, service providers cannot be held directly liable for actions of third parties such as tenants, clients or customers, as long as the service provider has not been directly involved in the incident or instruction, or otherwise been aware of the situation and had the opportunity to act (with reference to the above-mentioned duty to prevent the continuation of harassment).<sup>120</sup>

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

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

### **a) Prohibition of instructions to discriminate**

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

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<sup>115</sup> In the preparatory works to the recent changes in the GEADA giving the Equality Tribunal the authority to make decisions in cases concerning sexual harassment, it is stated that strict liability cannot follow from judicial interpretation, even when the employer performs the harassment. Prop. 63 L (2018-2019) p. 16. However, according to the main preparatory works to the GEADA, there is strict liability for the employer if someone acting on behalf of the employer has performed the harassment. Proposition to Parliament, Prop. 81 L (2016-2017) Chapter 28.5.8.4.

<sup>116</sup> The employer's responsibilities to prevent harassment includes persons who are in relation to them similar to employees, such as persons temporarily hired directly or through an agency for performing tasks for the employer. Proposition to Parliament, Prop. 81 L (2016-2017) Chapter 28.5.8.

<sup>117</sup> Proposition to Parliament, Prop 63 L (2018-2019) p. 16.

<sup>118</sup> Proposition to the Odelsting, *Ot.prp.* No. 35 (2004-2005), p. 50 and Proposition to Parliament, [Prop.81 L \(2016-2017\) side 337](#).

<sup>119</sup> Act relating to compensation in certain circumstances (*Skadeserstatningsloven*) of 13 June 1969 No. 26.

<sup>120</sup> In Norway, Hålogaland Lagmannsrett (Court of Appeal) Case No. LH-2019-135298, a female industrial technician was awarded compensation after sexual harassment from one of the customers. The customer and the employer were jointly held liable for the economic loss, but not for damages for injury of a non-pecuniary character. The court held that the employer had acted without due diligence, since she had made him aware of the harassment. This has been appealed to the Supreme Court.



Instructions relating to discrimination or harassment are prohibited (see Article 15 of the GEADA and Article 13-1(2) of the WEA). It is also prohibited to instruct anyone to carry out an act of reprisal. It is furthermore prohibited to be an accessory to instructions to discriminate, that is to assist or support instructions to discriminate. The full material scope of the directives is covered in the various acts.

To consider an action to be an instruction, a relationship of subordination, obedience or dependency must exist between the instructor and the person receiving it.<sup>121</sup> In a workplace, it will therefore be a case of instruction if a manager asks a subordinate to discriminate against another employee at the same level as the subordinate. However, if an employee asks another employee to discriminate, this demand will normally not be considered as an instruction in the legal sense, however inappropriate. The instructions must contain a specific order that one or more persons shall be discriminated against. For example, if a manager asks a middle manager to ensure that the unionised employees are assigned to the unpopular shifts this would constitute an illegal instruction. Another example is where a manager at a club instructs gatekeepers that people with disabilities, wheelchair users or people with a particular skin colour should not be allowed in.

In 2018, the tribunal had the opportunity to assess a case of instruction to discriminate in a contractual relationship, which it erroneously rejected on the basis of the complainants having no legal standing. The owner of a restaurant required the bidding contractors for hiring a restaurant to employ Scandinavian personnel only, which the contractors saw as an unreasonable and discriminatory requirement. As the bidding contractors were of Scandinavian background, the case was dismissed on the basis of them having no legal standing.<sup>122</sup>

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

b) Scope of liability for instructions to discriminate

In Norway, the instructor or the discriminator is liable. Sometimes both are liable, depending on the degree to which they are to blame according to the GEADA or general tort law.

Legal persons/employers are liable for the actions and omissions of their employees according to the specific sanctions imposed in each of the acts as well as by general tort law. See section b).b above on liability for harassment for the applicable rules.

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

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

In Norway, the duty on employers to provide reasonable accommodation is included in the law and is defined.<sup>123</sup>

The duty to provide reasonable accommodation for people with disabilities in employment relationships is specified in Article 22 of the GEADA, while Article 21 does the same for pupils and students in general. As in the former law AAA, it refers to a right of 'individual accommodation' and does not mention the word 'reasonable'. The former rules in both

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<sup>121</sup> See the preparatory works to the previous WEA; Proposition to the *Odelsting* No. 104 (2002-2003) paragraph 8.3.5.6.

<sup>122</sup> Equality Tribunal, Case 21/2018.

<sup>123</sup> Proposition to Parliament, Prop 81 L (2016-2017) Chapter 23.

the AAA and the WEA are continued in Articles 20-23 of the GEADA, in force as of 1 January 2018,<sup>124</sup> adding only the recruitment process to the text.<sup>125</sup>

The text of Article 22(1) reads:

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

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

Employers are expected to individually accommodate workplaces and tasks in order to ensure that employees or jobseekers with disabilities can obtain or retain a job, have access to training and other measures to develop their competence and can carry out and have an opportunity to advance in their work in the same way as other people. The law states that the requirement is a 'suitable' accommodation. The specific accommodation measures must be assessed in relation to the individual person with the disability. The wording is intended to show that the assessment of the required accommodation measures needs to be assessed specifically against the situation, the need for the accommodation and the benefit for those who have needs to be accommodated.<sup>126</sup>

In addition to the specific protection afforded to disabled workers according to the GEADA, the WEA contains a general duty for employers to provide reasonable accommodation for workers who due to 'accident, sickness, fatigue or the like' need this (see WEA Article 4-6 concerning adaptation for employees with reduced capacity to work), and lays out procedural rules for the dialogue between employer and employee, including for mapping opportunities for reasonable accommodation. The duty comes under a part of the chapter in the law concerning general rules on working conditions, rather than on health and safety. In practice, it has overlapping application with the discrimination articles, and thus functions both as an anti-discrimination and health and safety clause. It may even be said to set out the procedural rules for how reasonable accommodation should be achieved. It should also be seen in relation to the broader Norwegian definition of disability, which includes temporary conditions.

In practice before the courts therefore, WEA Article 4-6 was often used in conjunction with Article 26 of the AAA, and now with its replacement, Article 22 of the GEADA.<sup>127</sup>

## b) Practice and case law

Reasonable accommodation in both the GEADA and the WEA is only framed as an obligation where the accommodation will not entail a 'disproportionate burden'. When

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<sup>124</sup> See the legal preparatory works; Proposition to Parliament, Prop 81 L (2016-2017) *Lov om likestilling og forbud mot diskriminering (likestillings- og diskrimineringsloven)*, Chapter 23 on individual accommodation, p. 220.

<sup>125</sup> This was already stated through case law, see Equality Tribunal Case No. 48/2015 where a hearing-impaired woman was not called for a second interview. The employer had not discussed her need for individual accommodation, which was seen as a breach of the duty of individual accommodation. See also Equality Tribunal Cases 56/2014 and 69/2014.

<sup>126</sup> See Ot.prp. No. 88L (2012-2013) p. 182 which refers to the previous preparatory works, in particular Ot.prp. No. 44 (2007-2008) Chapter 10.6.4 on p. 180ff, and Chapter 18 p. 263.

<sup>127</sup> The Ship Labour Act (SLA) does not provide the same general duty to provide reasonable accommodation, which constitutes the main difference between the SLA and the WEA regarding discrimination. Ship Labour Act, 21 June 2013. English version available at <https://www.sdir.no/en/shipping/legislation/laws/ship-labour-act/>.

considering whether the accommodation leads to a disproportionate burden, particular importance is to be attached to the effect of the accommodation on the dismantling of disabling barriers, the necessary costs of the accommodation and the undertaking's resources.<sup>128</sup> Beyond the assessment of those elements there is no one test of what constitutes a 'disproportionate burden'.

*'Reasonable'*: The duty to provide reasonable individual accommodation must be considered in relation to each person with a disability. In this assessment, relevant factors are the planned duration of the relationship between the responsible party and the individual disabled person, as well as the kind of/degree of disability and the timeframe of the accommodation. Other factors that may be used in the legal assessment are to what extent the arena for adaptation is an essential part of that person's life, as well as the benefit for the person with disabilities.<sup>129</sup>

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

What may be regarded as a disproportionate/undue burden must be seen in the context of what a reasonable accommodation entails. The cost should be viewed not in isolation from the resources of the enterprise, but also in relation to the individual beneficiaries of such accommodation arrangements. Another factor to be taken into consideration is whether others can benefit from the measure. A measure that only marginally improves the situation for one person is more easily perceived as an undue burden if that measure cannot be used for others. An example is Equality Tribunal case no 14/2018, where a care assistant with fibromyalgia was denied accommodation through only working evenings from January 2013 to May 2016, while she received this accommodation both before and after. During this period her accommodation was mainly to work less. The reason why she was denied this accommodation for several years was that other employees needed the same accommodation, and the denial was not seen as discrimination due to its consequences for colleagues and those receiving care.<sup>130</sup>

The assessment factors referred to above are not limited to cover only the person's working life, as the right to individual accommodation also covers municipal services under Article 20 of the GEADA and schools and educational institutions according to Article 21 of the GEADA (see section 2.6.e below).

It should be noted that Article 4-3 of the WEA contains provisions on reasonable accommodation, in addition to the provisions provided by the GEADA and Chapter 13 of the WEA, which is the chapter on anti-discrimination law in the WEA. These rules are described in more detail in section 2.6.a above on the implementation of the duty to

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<sup>128</sup> See the preparatory works to the AAA, Proposition to the *Odelsting* No. 44 (2007-2008) pp. 263-265 and to the GEADA, Chapter 23 <https://www.regjeringen.no/no/dokumenter/prop.-81-l-20162017/id2547420/sec24>. Relevant cases from the Equality Tribunal that give guidance on a possible norm for individual accommodation are Cases 21/2007, 40/2009, 22/2011 and 74/2014. The latter case did not find a breach of the AAA. The Ombud made a report about case law and other legal material on the subject of reasonable accommodation in 2014, see <https://www.ldo.no/globalassets/brosjyrer-handboker-rapporter/diverse-pdf1/diverse-pdf/oppsummering-individuell-tilrettelegging-270314.pdf>.

<sup>129</sup> See the preparatory works to the AAA, Proposition to the *Odelsting* No. 44 (2007-2008) pp. 263-265 and to the GEADA, Chapter 23 <https://www.regjeringen.no/no/dokumenter/prop.-81-l-20162017/id2547420/sec24>.

<sup>130</sup> <http://diskrimineringsnemnda.no/media/2180/sak-144-2018-anonymisert-uttalelse.pdf>.

provide reasonable accommodation. In practice, the WEA provisions are used more often than the GEADA in cases that concern reasonable accommodation. The provision in WEA Article 4-6 concerns employees with reduced capacity for working, for example due to illness, accidents etc. and thus broadly covers the same persons as the GEADA. As Article 4-6 sets out detailed procedures which the employer is required to follow strictly, with direct financial consequences regarding reimbursement of wages to the employee in question during the first year of reduced ability, it is more effective in ensuring reasonable accommodation than the provisions in the GEADA, and much more widely known.

c) Definition of disability and non-discrimination protection

Under Norwegian law, the definition of disability for the purposes of claiming reasonable accommodation is the same as the one for claiming protection from non-discrimination in general, as a breach of the duty to provide reasonable accommodation is defined as discrimination.<sup>131</sup>

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

In Norway, failure to meet the duty of reasonable accommodation in employment for people with disabilities counts as discrimination. Neither the GEADA nor case law specifies what kind of discrimination a failure to meet the duty of reasonable recommendation should be classified as.

The burden of proof is the same as for any other question of discrimination. The justification defence is related only to the standard of 'reasonable' as described above. The potential sanction in relation to individual accommodation is within working life economic compensation and compensation for non-monetary damage to the person discriminated against. The burden of proof is shifted to the employer/person responsible upon showing that there are reasons to believe that discrimination has occurred, as per Article 37 the GEADA on the burden of proof, which reads:

'Discrimination shall be assumed to have occurred if: circumstances apply that provide grounds for believing that discrimination has occurred, and the person responsible fails to substantiate that discrimination did not in fact occur. This shall apply in the case of alleged breaches of...c) the rules on individual accommodation in articles 20 to 23.'

As of 1 January 2018, the Equality and Anti-Discrimination Tribunal may, in simple cases, award compensation for economic losses, damages for injury of a non-pecuniary character in employment situations, or both after a breach of this duty (Article 38 of the GEADA and EAOA Article 12). The tribunal may also order the employer to provide reasonable accommodation, and impose fines if they employer does not comply within a set time limit (EAOA Article 11(2)).

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

In Norway, there is a legal duty to provide reasonable accommodation for people with disabilities outside the area of employment, but only in selected areas. Article 21 of the GEADA provides the right of individual accommodation in schools and educational institutions, including higher education. This right is given to 'pupils and students with

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<sup>131</sup> As per the legal preparatory works; Proposition to Parliament, Prop. 88 L (2012-2013) *Diskrimineringslovgivningen*, p. 62. In practice, the right to individual accommodation which follows from the education legislation is more important as its complaints procedures are more efficient. See the preparatory works to the GEADA, Prop 81 L (2016-2017) Chapter 23.2.2, <https://www.regjeringen.no/no/dokumenter/prop.-81-l-20162017/id2547420/sec24>.

disabilities who attend a school or educational institution' and states that they will 'have a right to suitable individual accommodation of the place of learning, teaching, teaching aids and examinations to ensure equal training and education opportunities'.<sup>132</sup>

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

The municipality must provide permanent individual accommodation with regard to a range of services pursuant to the Health and Care Services Act in order to ensure that people with disabilities obtain an equal service, as required in Article 20 of the GEADA, which provides the right to individual accommodation of municipal services, including kindergartens, healthcare and other care services of lasting character for the individual.

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

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

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

In Norway, there is a legal duty to provide reasonable accommodation in respect of other grounds in the public and the private sector, but only for pregnant jobseekers, workers, pupils and students. This was introduced in the GEADA Article 23, which came into force on 1 January 2018. There is no duty to provide reasonable accommodation regarding religion or life stance, ethnicity or sexual orientation except what follows from the general rules regarding direct and indirect discrimination. Age in employment is covered by the WEA, which does not contain a clause on reasonable accommodation like the one in the GEADA. However, reduced ability to work due to age is in practice covered by the parallel duty for the employer to provide reasonable accommodation in general: WEA Article 4-6 imposes duties on the employer in respect of adaptations. The wording reads:

'If an employee suffers reduced capacity for work as a result of an accident, sickness, fatigue or the like, the employer shall, as far as possible, implement the necessary measures to enable the employee to retain or be given suitable work. The employee shall preferably be given the opportunity to continue his normal work, possibly after special adaptation of the work or working hours, alternation of work equipment, work-oriented measures or the like.'

As of 1 January 2018, a specific duty was introduced in the GEADA (Article 23) to promote individual accommodation for pregnant jobseekers, workers, pupils and students. While the wording of the article is the same as for people with disabilities, the preparatory works states that what is seen as an unreasonable burden should be interpreted in a very narrow fashion, in line with case law regarding pregnant workers pupils and students. For example are there no openings for employers to claim an unreasonable burden as to hiring or firing processes.<sup>133</sup>

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<sup>132</sup> A duty for educational institutions to provide individual accommodation is also found in the Pre-school Act (*barnehageloven*) Article 19a, the Education Act (*opplæringsloven*) Articles 1-3 and 5-1, and the University Act (*universitets- og høyskoleloven*) Article 4-3(5).

<sup>133</sup> See the preparatory works to the GEADA, Prop. 81 L (2016–2017) Law on equality and prohibition against discrimination, Chapter 23.9.3.

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

#### **3.1 Personal scope**

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

In Norway, no residence or citizenship/nationality requirements are applied for protection under the relevant national laws transposing the directives. Citizenship/nationality requirements are not a ground for protection, but nationality will often be assessed as ethnicity, if negative value is placed on non-Norwegian citizenship. Those with an irregular status are protected against discrimination in the same way as other immigrants.

This has been specifically raised as an issue in relation to the grounds of protection of the Equality and Anti-Discrimination Act (GEADA): citizenship is not explicitly mentioned as a basis for discrimination under the GEADA and therefore requiring Norwegian citizenship does not fall within the prohibition of direct discrimination in Article 7 of the GEADA. Discrimination based on citizenship is however discussed in the act's preparatory works, which state that discrimination based on citizenship may be subject to the prohibition against indirect discrimination based on ethnicity.<sup>134</sup> It is left to the enforcement agencies to determine the point at which discriminatory treatment based on citizenship comes under the prohibition of indirect discrimination based on ethnicity etc. The Equality Tribunal or the courts must assess each case on its own merits. A case involving the requirement of Norwegian citizenship was assessed by the Equality Tribunal in Case No. 18/2006 (as described in section 3.2.10 below).

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

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

In Norway, the personal scope of anti-discrimination law covers natural persons, but not legal persons, for the purpose of protection against discrimination. As of 1 January 2018, the prohibition against discrimination (GEADA Article 6) in Norway is directed towards natural persons only, as 'treatment of a person' is specified in Articles 7 and 8 of the GEADA.

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

In Norway, the personal scope of anti-discrimination law covers (certain) natural and/or legal persons for the purpose of liability for discrimination. Legal persons are liable for discrimination under the GEADA (Article 6) and WEA (Article 13-2). The Ombud has accepted complaints from legal entities, in which it has been clear that the reason for possible discrimination is the discrimination ground related to the members of the entities.

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

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

In Norway, the personal scope of anti-discrimination law covers private and public sectors, including public bodies, for the purpose of protection against discrimination (see Article 13-2 of the WEA and Article 2 of the GEADA on factual scope and WEA Article 13-1 and GEADA Article 6 on the prohibition against discrimination).

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<sup>134</sup> See the preparatory works to the GEADA, Prop. 81 L (2016-2017) Chapter 11.2.3.

b) Liability for discrimination

In Norway, the personal scope of anti-discrimination law covers private and public sectors, including public bodies, for the purpose of liability for discrimination (see Article 13-2 of the WEA, and Article 2 of the GEADA on factual scope and WEA Article 13-1 and GEADA Article 6 on the prohibition against discrimination).

### **3.2 Material scope**

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

In Norway, national legislation applies to all sectors of private and public employment, self-employment and occupation, including contract work, self-employment, military service and holding statutory office, for the five grounds covered by Directives 2000/78 and 2000/43.

The scope of discrimination protection in Article 2 of the GEADA applies to all sectors, as well as all sectors of public and private employment and occupation, including contract work, self-employment, military service and holding statutory office, and covers each of the specific grounds covered by the directives.

The WEA applies to businesses that engage employees, unless otherwise explicitly provided by the act (see Article 13-2(1) of the WEA). The provisions of the anti-discrimination chapter of the WEA also cover the employer's selection and treatment of self-employed and contract workers (see Article 1-2(1) of the WEA). Regardless of the changes to other parts of anti-discrimination legislation as of 1 January 2018, the provisions of the WEA remain the same.

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

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

The scope of discrimination in employment under all the different acts (WEA, Article 13-2 and GEADA, Article 29) covers all aspects of employment from the initial advertisement of posts until the termination of the work contract, such as pay and working conditions, training and other forms of skill development, appointment, relocation and promotion.<sup>135</sup>

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

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

National law on discrimination covers working conditions including pay and dismissals (see WEA, Article 13-2(1) and GEADA, Article 29).

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<sup>135</sup> The SLA is more indirect, stating that the rules set out in Chapter 10 of the SLA 'shall apply correspondingly to the company's selection and treatment of persons working on board' (Article 10-2(2)), which in practice also covers self-employed persons working on board ship.

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

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

Given the full factual scope of the GEADA (Article 2) as described above, the act covers all types and all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience.<sup>136</sup> The GEADA, Article 29 and the WEA, Article 13-2(1)(b) regarding age in employment, specifically cover training and other forms of skill development.

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

In Norway, national legislation prohibits discrimination in relation to membership of, and involvement in workers or employers' organisations as formulated in the directives for all five grounds and for both private and public employment (see WEA, Article 13-1(1)).

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

Access to membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations, cannot be refused based on ethnicity or disability or the other grounds, however, there is a specific right in the WEA that the benefits offered by the organisation cannot be claimed by non-members (see Article 13-2(4) of the WEA).

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

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

Article 2 of the GEADA covers social protection, including social security and healthcare. This means that disability, religion or belief and sexual orientation are also covered, in addition to race/ethnicity. As of 1 January 2018, protection against age discrimination outside employment is covered by the GEADA (Article 6), with the specific exception in Article 2(2), stating that the GEADA 'shall not apply to discrimination on the basis of age and circumstances regulated by chapter 13 of the Working Environment Act'. In addition, Article 9(3) of the GEADA states that age limits specified in laws or regulations, and favourable pricing based on age, do not breach the prohibition in Article 6.

Most legislation, including that on social security, is neutral in terms of the existing grounds for discrimination. This is a challenge in contexts where, for example, men and women's choices in reality are different because of stereotypical gender roles in society, or where choices made by the minority population of specific ethnic or religious groups

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<sup>136</sup> For practical and historical reasons, Article 29 of the GEADA contains the same list as Article 13-2(1) of the WEA concerning the various aspects of employment covered. This does not, however, limit the general scope of the GEADA in any way.



makes it difficult for the individuals of this group to access the protection afforded to the majority population. Thus, in the absence of any proactive measures, the result of these kinds of neutral systems might lead to differences in results because of individual choices. A system of neutral legislation leaves little room for compensating results of stereotypical individual choices based on gender, ethnicity, religion, disability etc. A challenge in terms of addressing discrimination in social security thus becomes an issue of defining what is meant by 'discrimination' and 'equality' in the interaction between anti-discrimination legislation and social security.

a) Article 3(3) exception (Directive 2000/78)

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

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

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

Article 2 of the GEADA covers all sectors of society, thus also all forms of social advantages, meaning benefits that may be provided by either public or private actors to people because of their employment or residence status. Discrimination in this area will be unlawful. The WEA covers only the employment relationship (see Article 13-2(3)), and social benefits will therefore for the most part be protected by the GEADA.

Article 6(3) of the GEADA also states that '[a]ge limits specified in laws or regulations, and favourable pricing based on age, do not breach the prohibition in section 6'. This means that age limits, especially those that already exist, do not have to be evaluated with regard to the legitimate aim, necessity and proportionality (GEADA, Article 9(1)).

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

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

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

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

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

The anti-discrimination legislation on ethnicity, religion or belief, disability and sexual orientation (see Article 2 of the GEADA), also covers all aspects of education including all types of schools, both public and private, given the full factual scope of the act as described above. Age is partly covered, as age limits following from laws or regulations are explicitly seen as permissible differential treatment in Article 9(3) of the GEADA.

Migrant minors with residency rights in Norway have a right to enrol in the Norwegian educational system, which is free of charge. Adult migrants who do not have basic

primary education are entitled to enrol into the Norwegian primary school system free of charge and receive a monthly allowance/ subsidy from the welfare system during primary education.

Immigrants residing in Norway with no legal residency permit do not have a right to education, neither in accordance with the general Education Act, nor with the Act on an introduction programme for refugees and immigrants. To the author's knowledge, there are no cases in either the equality bodies or in the courts that specifically address discrimination against migrants in relation to education.

a) Pupils with disabilities

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

The general approach to education for children with disabilities in Norway attempts to handle the needs of disabled children within the mainstream public education system, but also has a network of segregated 'special' education for those children unable to benefit from a more 'mainstream' approach. The downside to this solution is twofold: first, there is a lack of universal design in most schools,<sup>137</sup> and secondly, there is a lack of knowledge at the level of individual schools.

All children have a right to free education in Norway, as stated in the Education Act.<sup>138</sup> Formal compulsory education normally starts the calendar year that the child turns six years, and lasts until the child has completed the tenth school year (Article 2-1 of the act). Children have the right to go to school in the community where they live (Article 8-1) and to belong to a group (Article 8-2). An exception is made for deaf students with sign language as their first language, as they are given the right to special instruction and education, under Article 2-6.

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

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

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<sup>137</sup> The anti-discrimination and equality unit of the Directorate for Children, Youth and Family Affairs commissioned a socioeconomic analysis of universal design of primary and secondary schools, which was published in 2018: BufDir and Oslo Economics (2018) *Samfunnsøkonomisk analyse av universelt utformet grunnskole*, available in Norwegian at [https://www.bufdir.no/globalassets/global/Samfunnsokonomisk\\_analyse\\_av\\_universelt\\_utformet\\_grunnskole\\_i\\_2030.pdf](https://www.bufdir.no/globalassets/global/Samfunnsokonomisk_analyse_av_universelt_utformet_grunnskole_i_2030.pdf).

<sup>138</sup> Act on primary and secondary education of 17 July 1998 No. 61, see <http://www.ub.uio.no/ujur/ulovdata/lov-19980717-061-eng.pdf>.

The state has also developed special expertise about educational provision for children, adolescents and adults with major special needs through the National Support Service for Special Needs Education (Statped).<sup>139</sup>

The challenge in Norway is practical aspects related to giving disabled children an equal education. Despite well-developed legislation in the field of education, the practical implementation is not always optimal for disabled children. This is partly because well-intended administrative decisions are not always complied with, and partly because of a lack of necessary resources and qualified personnel.<sup>140</sup> The actual practice in schools allowing full or part segregation of disabled children from the other students is being noted as an area of concern in the shadow report of civil society/disabled people's organisations to the UNCRPD committee.<sup>141</sup>

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

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

The Government action plan to improve the situation of the Roma in Oslo also includes elements related to schooling.<sup>142</sup> This includes both specific education in Norwegian as well as mother-language training according to Article 2-8 of the Education Act and Article 3-5 of the Private Education Act. However, data from the education information system shows that no Roma children use this right, as mentioned in the action plan. These figures might be misleading, as the count takes place annually on 1 October, when many Roma still are travelling. A project on the right to adult education for Roma in Oslo is referred to in the action plan as a positive initiative. The initiatives in schools include giving children computers for remote-distance education, home education and production of relevant educational material. There are 71 registered Roma pupils in 22 schools in Oslo, out of a total Roma population in Norway of about 700 persons. These services extend in principle to immigrant Roma children as well. However, a key issue in Norway in relation to Romanian Roma is that they visit Norway on a tourist visa and leave the country when their tourist visa expires.

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

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

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<sup>139</sup> See <http://www.statped.no/Spraksider/In-English/>.

<sup>140</sup> See Wendelborg, C. og Tøssebro, J. (2010), 'Marginalisation processes in inclusive education in Norway – a longitudinal study of classroom participation', *Disability and Society*, 25 (6), 701-714. See also a number of reports in Norwegian: Norwegian Federation of Organisations of Disabled People (FFO) (2008), 'Rett til spesialundervisning i praksis? En rapport om spesialundervisning i grunnskolen og videregående skole', at [http://ffo.no/globalassets/rapporter/rapport\\_spesialundervisning.pdf](http://ffo.no/globalassets/rapporter/rapport_spesialundervisning.pdf).

<sup>141</sup> See Civil Society Coalition Norway (2019) *Alternative Report to the Committee for the Rights of People with Disabilities*. Available at: [https://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCRPD%2fCSS%2fNOR%2f33866&Lang=en](https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCRPD%2fCSS%2fNOR%2f33866&Lang=en).

<sup>142</sup> See (in Norwegian) <https://www.regjeringen.no/no/dokumenter/Handlingsplan-for-a-bedre-levekarene-for-rom-i-Oslo/id594315/>. An evaluation of the action plan was carried out in 2014, but a new action plan has not been drafted yet (March 2019), see Tyldum, G. and Horgen Friberg J. (2014), 'Et skritt på veien', Fafo-rapport no. 50:2014 at <http://www.fafo.no/index.php/nb/zoo-publikasjoner/fafo-rapporter/item/et-skritt-pa-veien>.

The anti-discrimination legislation on ethnicity, religion or belief, disability and sexual orientation also covers access to and supply of goods and services, given the full factual scope of these acts as described above (see GEADA, Articles 2 and 6). As of 1 January 2018, age outside employment is also covered by the general prohibition in the GEADA, with the specific exception in Article 9(3) that age limits specified in laws or regulations, and favourable pricing based on age, are not discriminatory.

The first court case in which a provider of goods and services was penalised in accordance with the Penal Code, Article 186 on discriminatory services because of religion, was assessed by the courts in 2016-2017, in which the service provider was issued a small fine for a case involving religious clothing (hijab).<sup>143</sup>

a) Distinction between goods and services available publicly or privately

In Norway, national law distinguishes between goods and services available to the public (e.g. in shops, restaurants and banks) and those only available privately (e.g. those restricted to members of a private association). There have been a number of cases on this before the Ombud and Equality Tribunal.<sup>144</sup>

There was a general exception until the GEADA entered into force on 1 January 2018, such that the legislation regarding grounds other than gender did not cover family life and purely personal relationships.<sup>145</sup> In the legal preparatory works to the previous legislation, it was specified that small local clubs and associations that were not directed towards the public, but only directed toward limited groups of people were assumed to fall under the exception of 'purely personal relationships'.<sup>146</sup> These included poker games, a reading circle or small closed friendship-clubs. If the goods and services were directed towards the public in general, the prohibition against discrimination still stood.

Interestingly, as of 1 January 2018, the general exception for family life and personal relationships is not continued in Article 2 of the GEADA, so that the prohibition now covers both publicly and privately available goods and services. However, the Act on the Equality and Anti-Discrimination Ombud and the Anti-Discrimination Tribunal (EAOA) states that the anti-discrimination tribunal 'shall not enforce the prohibition against discrimination in family life and other purely personal circumstances pursuant to the Equality and Anti-Discrimination Act' (Article 7(2)).

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<sup>143</sup> *Jæren tingrett* (Jæren district court), *Public prosecutor v. A*, Case No. TJARE-2016-96260, judgment of 9 September 2016. In this case, a hairdresser had refused a hijab-dressed woman her services. What was said in the situation is disputed, but the parties agree that two hijab-clad young women came to the hairdresser's salon. As they entered the hair salon, they asked the price of a hair colouring. The hairdresser said either: 'I do not take on people like you, go to another hairdresser' or 'Get out, I do not want to touch someone like you'. The women then walked away and reported the incident to the police, who fined the hairdresser NOK 8 000 (approx. EUR 963). As the hairdresser refused to pay the fine, the case was taken to court by the public prosecutor. The hairdresser was sentenced to pay a fine of NOK 10 000 (approx. EUR 1 250) and NOK 5 000 (approx. EUR 500) in legal costs to the state for refusing a hijab-clad woman access to her store, as this was found to constitute discrimination on the ground of religion. The case was appealed to the Gulating appellate court, which, in judgment LG-2016-164427 sentenced the hairdresser to a fine of NOK 7 000 (approx. EUR 900). An appeal to the Supreme Court was rejected by Decision HR-2017-534-U of 10 March 2017.

<sup>144</sup> According to an email to the author from the Equality Ombud (5 April 2019), out of a total of 2 035 inquiries in 2018, 266 (13 %) were related to goods and services.

<sup>145</sup> The term 'family life' refers mainly to what happens within the family, i.e. between current or previous spouses or couples, between parents and children, such as for example the rearing of children, the distribution of responsibilities and tasks between spouses, private agreements regarding children after a divorce, etc. The term 'purely personal relationships' means, for example, the choice of lovers or friends, or private parties or activities which are not open to the public. Proposition to Parliament, Prop. 88 L (2012-2013) Chapter 9.1.2.4, available in Norwegian at <https://www.regjeringen.no/no/dokumenter/prop.-81-l-20162017/id2547420/sec10#kap9-1>.

<sup>146</sup> As per the preparatory works to the ADA, Proposition to the Odelsting No. 33 (2004-2005) p. 204, and the preparatory works to the AAA, Proposition to the Odelsting Ot. Prp. No. 44 (2007-2008) p. 78 and the preparatory works to the SOA, Proposition to Parliament, Prop. 88 L (2012-2013) p. 59.

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

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

In Norway, Article 3(1)h of Directive 2000/43 has been implemented by including specific provisions in four different acts on housing referring to the GEADA: the Tenancy Act (*husleieloven*) Article 1-8, the Housing Cooperative Act (*borettslagslova*) Article 1-5, the Property Ownership Act (*eierseksjonsloven*) Article 3a and the Act relating to housing cooperatives (*bustadbyggjelagslova*) Article 1-4. Through these acts, discrimination based on gender, ethnicity, religion or belief, sexual orientation or disability is prohibited. Age is also covered from 1 January 2018. Those provisions emphasise the point that the GEADA prohibits against discrimination in all these parts of the housing sector.

More specifically, the Tenancy Act states that the above-mentioned grounds cannot be considered just cause for refusing to accept a lease, sub-lease, or a member of a household, and for transferring a lease to another person. Furthermore, these grounds cannot be invoked for terminating a lease. The act covers rentals for private, public and business purposes. The prohibition against discrimination did not apply to letting a room in one's own home, as the ADA did not cover personal relationships, but this changed with the GEADA on 1 January 2018. According to Article 2 of the GEADA, the act covers all areas of society.

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

In its Case 5/2013, the Equality Tribunal found that a lesbian couple had been discriminated against after a landlord cancelled a viewing of a farmhouse that was for rental on his farm.

The prohibition against discrimination according to the housing acts does not include selling a dwelling, that is, the relationship between the vendor and the buyer. The selling of dwellings is covered by the GEADA directly (replacing the ADA in 2018) and is in practice the area in which a small number of cases have been assessed. No cases regarding housing discrimination have yet been taken to court, but the Equality Ombud and Equality Tribunal have had some cases.

The Equality Tribunal case no. 18/2006 concerned a housing advert posted by a private landlord on the national webpage used for selling and letting houses ([www.FINN.no](http://www.FINN.no)), which stated; 'only Norwegian citizens need apply'. The advert was for a two-bedroom flat in a four-family house. The flat had a private entrance. The landlord did not live in the flat himself. The landlord stated that he had not previously made Norwegian citizenship a requirement in his housing adverts, but wished to do so provided it was not unlawful. The landlord stated that his key concern is that his flats are properly looked after, that rent is paid punctually and that requisite guarantees are provided. He emphasised that his interests were purely financial, as where Norwegian citizens are concerned he can seek assistance from the enforcement officer to recover rental arrears, and that it is far simpler to obtain enforceable eviction and to collect money owed in the wake of a tenancy, for example by execution charge, attachment of earnings etc., and that he can claim compensation from Norwegian citizens for any damage they have caused. Furthermore, he argued that the requirement of Norwegian citizenship fell outside the scope of the Anti-Discrimination Act's prohibition of discrimination. The Equality Tribunal found that although citizenship is not explicitly mentioned as a basis for discrimination under the ADA, the preparatory works left the enforcement agencies to determine the point at which discriminatory treatment based on citizenship comes under the prohibition of indirect discrimination based on ethnicity etc. As the right to housing is

a key welfare good, and the Norwegian housing rental market features a substantial element of private letting, a possible exclusion of persons from the rental market is a heavy burden for those affected. Thus, the tribunal found that the requirement of Norwegian citizenship leads, or can lead, to persons of non-Norwegian descent, origin or ethnic background being put at a particular disadvantage compared with ethnic Norwegians. Hence the requirement entailed indirect discrimination in breach of the ADA on grounds of ethnicity, nationality and descent. The Equality Tribunal also ordered the landlord to halt his discriminatory advertising and letting practice. The landlord was ordered to confirm in writing, within 14 days of receiving notification of the decision of the tribunal, that the discriminatory letting practice would cease and that future housing adverts would be formulated in accordance with the rules of the Tenancy Act and the ADA.

The Equality Tribunal has furthermore made decisions in two cases of discrimination because of ethnicity, in which the vendor of the real estate sold the property to a (Norwegian) bidder even though a higher bid from a non-ethnic Norwegian was received. In one of the cases, No. 7/2007, the Equality Tribunal found it proved that the sale was not related to the bidders' ethnicity, whilst it found a breach of the ADA in case no 22/2007. No sanction was imposed.

Regulations have been approved under the Act on Planning and Building<sup>147</sup> regarding housing accessible to people with disabilities and older people.

Migrants have a right to rent publicly-owned subsidised housing in the municipality or county in which they live. However, such housing is scarce. The UN Committee on Economic, Social and Cultural Rights noted in its concluding observations on the fifth periodic report to Norway<sup>148</sup> that it was 'concerned that persons with an immigrant background face incidents of discrimination with regard to access to housing, employment, education and public health-care services'. To the author's knowledge, there are no cases in either the equality bodies or in the courts that address discrimination of migrants in housing, apart from the cases described above concerning non-Norwegians.

#### a) Trends and patterns regarding housing segregation for Roma

In Norway, there are no known patterns of housing segregation and discrimination against the Norwegian Roma. In her 2018 report to the ICERD committee, the Ombud states that: 'There is insufficient documentation about the population's attitudes to the other four national minorities in Norway other than Jews: the Roma, Romani people, Kvens, and Forest Finns.'<sup>149</sup> In the 2009 action plan for improvement of the living conditions of the Roma in Oslo, the authorities reported that the Roma experience discrimination in many areas of society, including the housing market.<sup>150</sup> In a 2015 study on discrimination against various national minorities and immigrants in Norway, 'Roma continue to report discrimination, including in connection with housing.'<sup>151</sup>

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<sup>147</sup> Act relating to planning and the processing of building application/ building of 27 June 2008 No. 71, at (translation date as of January 2010) <https://www.regjeringen.no/en/dokumenter/planning-building-act/id570450/>.

<sup>148</sup> Committee on Economic, Social and Cultural Rights (2013), *Concluding observations on the fifth periodic report of Norway*, E/C.12/NOR/Co/5, p. 3, point 7.

<sup>149</sup> Norwegian Equality and Anti-discrimination Ombud (2018) *ICERD 2018: the Ombud's Report to the UN Committee on the Elimination of Racial Discrimination – a supplement to Norway's 23rd/24th Periodic Report*, Chapter 2.1.4. Available at: [https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/NOR/INT\\_CERD\\_IFN\\_NOR\\_32892\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/NOR/INT_CERD_IFN_NOR_32892_E.pdf).

<sup>150</sup> Norwegian Government (2009) *Handlingsplan for å bedre levekårene for rom i Oslo* (Action plan for improvement of the living conditions of Roma in Oslo).

<sup>151</sup> Midtbøen, A. and Lidén, H. (2015) *Diskriminering av samer, nasjonale minoriteter og innvandrere i Norge. En kunnskapsgjennomgang* (Discrimination against the Sámi, national minorities and immigrants in Norway: A knowledge review) Norwegian Institute for Social Research, Report 2015:01.



## 4 EXCEPTIONS

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

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

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

As of 1 January 2018, there is a general exception in Article 9(2) of the GEADA for genuine and determining occupational requirements for all protected grounds, including disability, which is in line with Article 4(1) of Directive 2000/78. Age within the employment sector is protected in the WEA (for more on this, see section 4.7 below).

There have been several cases on genuine and determining occupational requirements, mostly regarding language or medical requirements. The majority of these cases were assessed by the Ombud only, such as case 09/1609 regarding medical requirements for drivers of locomotives (which were deemed genuine and necessary),<sup>152</sup> and case 14/153 where a municipality required a language test for a number of employees without any specific assessment, thus not having justified that the requirement was genuine and determining.<sup>153</sup> Compared to the 2014 legislation, the GEADA states more clearly that direct differential treatment is only allowed for genuine and determining operational requirements. This lack of clarity in the legislation preceding the GEADA has probably contributed to the differences in the results of cases assessed by the Equality Tribunal regarding the difference between direct and indirect discrimination (described in section 2.2.a above). As seen in these cases, which all concerned language requirements, there is also a lack of clarity on what are genuine and determining occupational requirements, as exemplified by the Equality Tribunal case regarding the refusal to shake hands with women on the basis of religious convictions.<sup>154</sup>

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

In Norway, national law provides for an exception for employers with an ethos based on religion or belief, which is not specific in the revised current legal text, but follows from the legal preparatory works.<sup>155</sup>

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

'Actions and activities carried out under the auspices of religious and belief communities and enterprises with a religious or belief-related purpose, if the

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<sup>152</sup> Available in Norwegian at <https://www.ldo.no/nyheter-og-fag/klagesaker/2010/Helsekrav-for-opptak-til-lokomotivforerutdanningen-ikke-diskriminerende/>.

<sup>153</sup> At <https://www.ldo.no/forebygg-i-arbeidslivet/Ansettelse-og-oppsigelse/Lover-og-regler1/Ansettelse/> the Ombud presents a number of examples of requirements that are allowed or prohibited, but without reference to individual cases.

<sup>154</sup> Equality Tribunal, Case No. 48/2018. A was temporarily employed as an assistant at a school. From the beginning he had made it clear that he did not shake hands with women on the basis of his religious convictions. His contract was not renewed due to this refusal. The majority of the members of the tribunal interpreted the school's actions as indirect differential treatment and concluded that it was necessary to demand that he shook hands with women. The minority of the tribunal saw the school's dismissal as direct differential treatment, and unjustifiable. None of the tribunal saw the possibility of not shaking hands with anyone as a solution.

<sup>155</sup> See the legal preparatory works; Proposition to Parliament, Prop 79 (2008-2009) Chapter 6.1.3.3.

actions or activities are significant for the accomplishment of the community's or the enterprise's religious or belief-related purpose.'

In the 2013 revision of the ADA, this specific exception was discontinued, so that the exception for employers with an ethos based on religion or belief would follow the general rule found in Article 7 of the ADA on lawful differential treatment. In the legal preparatory works before the revision, it was specified that that did not imply a change and that the right of religious organisations to set their own teachings, religious rituals, religious education and choice of religious leaders would still be accepted as a part of the lawful differential treatment under the ADA.<sup>156</sup> As of 1 January 2018, this approach is continued in Article 9 of the new GEADA.<sup>157</sup>

In working life, as a general rule, exceptions for employers with an ethos based on religion or belief are not accepted. However, employers with an ethos based on religion or belief may require that employees follow this religion or belief, provided that this is a genuine and determining occupational requirement in line with the general exception to the act. This would be the case for religious/confessional positions, under Article 30(2) of the GEADA.

The scope of this exception is specified in relation to the advertisements of such positions, as it is stated that employers may ask information regarding the applicant's stance on religious or cultural issues if the nature of the position so requires, or if it is part of the purpose of the enterprise concerned to promote specific religious or cultural views and the stance of the employee will be significant for the accomplishment of the said purpose (GEADA, Article 30(2)). It follows from the Church Act that, as an employer, the Norwegian church has the right to require that its employees are members of the church for confessional/ religious positions (see Article 29 of the Church Act).<sup>158</sup>

A comprehensive white paper was published in September 2016 regarding the consequences of a conscience-based refusal by employees to carry out tasks in their work that are contrary to their beliefs.<sup>159</sup> In the paper, no general rule was recommended, regarding the right to reservation on the basis of deeply felt religious or non-religious convictions, although the paper recognised the need for legislation in particular areas. For example, under the current Abortion Act, Article 14 states that when organising the hospital service 'weight shall be given to health personnel who want to be exempt from these services for conscientious rights'. A similar statement of principle is made in the Act on ritual circumcision of boys (Article 4). There have been no further developments regarding this white paper in 2018.

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

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

In Norway, there is a specific provision relating to conflicts between the rights of organisations with an ethos based on religion or belief and other rights to non-discrimination in Article 30(3) of the GEADA in the context of employment. The first

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<sup>156</sup> See the legal preparatory works; Proposition to Parliament, Prop. 88 L (2012-2013) Chapter 12.4.2.2, p. 88.

<sup>157</sup> See the legal preparatory works; Proposition to Parliament, Prop 81 L (2016-2017) *Lov om likestilling og forbud mot diskriminering (likestillings- og diskrimineringsloven)* Chapter 14.2.5, pp. 120-121.

<sup>158</sup> Church Act of 7 June 1996 No. 31.

<sup>159</sup> Norwegian Government (2016) *Samvittighetsfrihet i arbeidslivet* (Freedom of conscience in working life - white paper), NOU 2016:13. Available (in Norwegian) at: <https://www.regjeringen.no/no/aktuelt/samvittighetsutvalget-overleverte-utredning-om-samvittighetsfrihet-i-arbeidslivet/id2510546/>.



paragraph in Article 30 prohibits employers from asking about religion or life stance, or sexual orientation, gender identity or gender expression. According to Article 30(3),

'the collection of information on an applicant's living arrangements, religion or beliefs is permitted if the purpose of the undertaking is to promote particular beliefs or religious views and the worker's position will be important for the achievement of the purpose. If such information will be requested, this must be stated in the announcement of the position.'

There is case law from the Equality Ombud, some of which provided the basis for her handbook on religion at work, which has several pages devoted to the religious groups and to what extent they are allowed to differentiate on the basis of gender and sexual orientation.<sup>160</sup>

For general employment in positions in religious organisations that have no bearing on the organisation itself, it is not allowed either to ask or emphasise religious affiliation, gender or sexual orientation. This is the case for positions such as caretakers or cleaners in churches/religious organisations. There is no case law from courts on this, but that approach has been specified by the cases brought before the Equality Ombud<sup>161</sup> and the Equality Tribunal in several cases. In Equality Tribunal case number 29/2013, a municipal church council was found to have breached the prohibition against harassment on the basis of sexual orientation. They had recently hired a woman who was married to another woman for a post in which she was responsible for faith education in the parish. This created a lot of debate in the parish, and during their annual meeting, where any member could attend, her choice of living arrangements was under formal debate. This was not a general discussion of sexual orientation, but was a discussion of her particular life choices and sexual orientation. She had been told before the meeting that her living arrangements, and thereby also her sexual orientation would be discussed during the meeting to which her response had been that it was unacceptable to discuss such things in this type of meeting. The church council was partly responsible for her as an employer and the participants at the meetings were people who she would have to meet when performing the work of the council, so it had a duty to actively prevent such demeaning treatment of one of its employees.

– Religious institutions affecting employment in state-funded entities

In Norway, religious institutions are permitted to select people (on the basis of their religion) to hire for or to dismiss from a job, both when that job is in a state entity, or in an entity financed by the state. It is accepted that all churches, including the (previously state) Lutheran church<sup>162</sup> may require a particular religious belief when hiring priests and religious leaders, but cannot demand a particular religious affiliation related to positions that do not have a religious content. The assessment used is similar to that used for exceptions to the protections against discrimination in general.

The Equality Ombud has issued a statement concerning kitchen work in a religious boarding school.<sup>163</sup> The school is a private evangelical school, and requires that all staff at the school share the same view. The Equality Ombud found that this requirement was

<sup>160</sup> See Equality Ombud (2016) *Religion and Beliefs in the Workplace*, Chapter 12. Available at: <http://www.ldo.no/nyheiter-og-fag/brosjyrar-og-publikasjonar/brosjyrer/Religion-og-arbeid/>.

<sup>161</sup> See Ombud's Case No. 08/1023 on a cleaner in an evangelical Lutheran church (not accepted), Case No. 10/779 on a gymnastics teacher in a religious (Christian/ Lutheran) boarding school (accepted), Case No. 10/761 on teachers in Spanish/ maths/ computer science in a private Christian (Lutheran) high school (accepted).

<sup>162</sup> The Norwegian Lutheran church was the Norwegian State church until a constitutional change in 2012. The publicly (state) appointed Church Board ('*Statens særskilte kirkestyre*') was abolished on 21 May 2012, however the state sees it as its responsibility to support the Lutheran church as a religious organisation, and to support other religious organisations and belief-organisations equally.

<sup>163</sup> Equality Ombud, Case No. 10/761, statement of 4 January 2012.

a breach of the ADA, as people with a view other than Christianity were placed in a worse position as the advertisement for the position stated that only Christians would be considered for the position. The Equality Ombud assessed whether having a Christian belief was necessary to achieve a legitimate aim. The school argued that all staff at the school must have a Christian belief, as they might act as discussion partners or 'counsellors' for its pupils. The Equality Ombud found that although it was possible that such a function may be part of the position, this was not the key part of the job, and not relevant in terms of this particular job, thus the school could not demand a specific faith for positions working in the kitchen. The Ombud came to the opposite conclusion in relation to teachers. Assessing a different school, the Equality Ombud found that a religious boarding school was allowed to ask its teachers to have a Christian belief, as this was seen as a requirement for fulfilling the positions.<sup>164</sup>

There is no case law from national courts on this topic.

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

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

In Norway, national legislation provides for an exception for the armed forces in relation to age or disability discrimination (Article 3(4), Directive 2000/78). Norwegian nationality is also required.<sup>165</sup>

National law provides an exception for the armed forces in relation to age discrimination as the Armed Forces Act states that 'Military personnel are exempt from the prohibition on age discrimination according to WEA article 13-1.'<sup>166</sup> In the legal preparatory works to the WEA, it was stated that:

'The directive gives an opportunity for national legislation to provide for an exception for the armed forces in relation to age or disability discrimination. This gives an opportunity to, but not a duty to except the armed forces. The context of directive 3 no 3 and 4 is not explicitly included in the legislative proposal. The reason for this is that these provisions contain rules that are not a natural part of the provisions of the WEA.'<sup>167</sup>

The GEADA does not contain a specific exception for the armed forces regarding any grounds of discrimination, nor is this addressed in the legal preparatory works.

The question of disability discrimination in the armed forces has never been tried before the courts, although an attempt to do so was made by an association for people with ADHD. This was not successful, as current recruits with ADHD are not given an individual assessment for being able to enter military service, but are categorised as being unfit for war-time service by virtue of their diagnosis. The Equality and Anti-Discrimination Ombud took this issue to the Equality Tribunal in 2019, but no decision was made since the armed forces ceded the point that this requirement was discriminatory. However, during the internal proceedings to change this requirement within the armed forces, they

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<sup>164</sup> Equality Ombud, Case No. 10/779.

<sup>165</sup> Armed Forces Act of 12 August 2016, No. 7, Article 44(3). The Ministry of Defence may, according to Article 44(7), make regulations providing exceptions to this rule. This has not been done as of 3 April 2019.

<sup>166</sup> Armed Forces Act, 12 August 2016, Article 44(2).

<sup>167</sup> See the preparatory works to the previous WEA on equality in employment, Proposition to the *Odelsting* No. 104 (2002-2003), Article 8.1.2 s 23.

concluded that this requirement was necessary. A dialogue is still ongoing with the Equality and Anti-Discrimination Ombud. As recruits with a disability are excluded from further assessment because of their disability, the organisation challenged the presumption that the tribunal's decision was founded on, and asked that the decision be found invalid.<sup>168</sup>

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

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

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

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

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

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

Nationality, in the sense of citizenship, is not included in the definitions of discrimination grounds of the GEADA,<sup>169</sup> as was the case with the ADA.<sup>170</sup>

As explained above on the definition of ethnicity, the legal preparatory works make it clear that 'national origin', as grounds for discrimination, is closely associated with the term ethnicity, and as such, nationality as a ground is protected under ethnicity. Statelessness is also covered.<sup>171</sup>

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

National law, under Article 6 of the GEADA protects 'national origin' as one of the interpretations of the concept 'ethnicity'. Nationality – other than Norwegian – is in reality thus a protected ground through judicial interpretation, within the context of 'ethnicity' as the protected ground. See for example Equality Tribunal case no. 18/2006, which concerned a housing advert posted by a private landlord on the national website

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<sup>168</sup> The association ADHD Norway initiated a case against the state/the Equality and Anti-Discrimination Tribunal before the Oslo City court, claiming that the tribunal's decision in its Case No. 25/2011 on the assessment of the introduction course for military recruits in the armed forces was invalid. As the introduction scheme was marginally changed after the decision of the tribunal, the appellate court in Case No. LB-2013-142603 rejected the case, as it found that the decision of the tribunal was not a live controversy. The dispute was by verdict rejected from court assessment based on a lack of a genuine need to have the case determined, as per the RDA Article 1-3. This verdict was appealed to the Supreme Court, which, in case Rt. 2014-480, found that the tribunal did not have a mandate to make a decision in the case, and that the tribunal – erroneously – had made a decision where it should have issued an opinion. It is not possible to refer an opinion to the courts.

<sup>169</sup> See the legal preparatory works; Proposition to Parliament, Prop 81 L (2016-2017) *Lov om likestilling og forbud mot diskriminering (likestillings- og diskrimineringsloven)* Chapter 11.2.3.3 p. 82.

<sup>170</sup> See Norwegian Government (2012) *Legal protection against ethnic discrimination* (white paper) NOU 2002:12, p. 34.

<sup>171</sup> See Decision of the Equality Ombud in Case No. 09/892 of 3 May 2012. In its Case 28/2015 of 29 September 2015, the Equality Tribunal found that demanding a Norwegian or Swedish criminal record check from 18 years of age to follow job-applications to a security company constituted indirect discrimination because of nationality in breach of Article 6 of the ADA. In reality, the demand from the security company signified that the company only accepted applicants that had been Norwegian or Swedish citizens since the age of 18. The practice was seen as discriminatory vis-à-vis both EU citizens and third country nationals, that is everyone who is not a Norwegian or Swedish citizen.

used for selling and letting houses ([www.FINN.no](http://www.FINN.no)), which stated; 'only Norwegian citizens need apply'. This was considered indirect discrimination on the basis of ethnicity (as described above in section 3.2.10).

Similarly, people who lack a nationality- the stateless - can also have their case heard. The Equality Ombud assessed the question of indirect discrimination against a stateless employee on the basis of ethnicity.<sup>172</sup> As the employee was not entitled to a Norwegian personal id-number, he was refused a permanent access card for working in a business leasing employees to other employers, thus he was fired. The employer (the leasing company) claimed that the dismissal/ rejection was based on the fact that the employee as an asylum-seeker did not have a personal id-number, and thus could not be registered in the internal tax and salary systems of the firm. The Ombud considered that the requirement to have a personal id-number/ social security number was an apparently neutral rule. Nevertheless, the lack of a personal id-number led to the person being put in a worse position than others. There was a clear connection between his lack of personal identity number and his national origin. The company later changed its practice so that people who lack a personal id-number/ social security number, but hold a DUF number (a registration number issued by the immigration board) and work permit can take up employment in the company.

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

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

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

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

##### **4.6.1 Direct discrimination**

In Norway, national law provides for justifications for direct discrimination on the ground of age, under Article 13-3(1) of the WEA and Article 9(3) of the GEADA.

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

In Norway, national law provide for specific exceptions for direct discrimination on the ground of age.

The general exception in the WEA states that discrimination that has a just cause, does not involve disproportionate intervention in relation to the person or persons so treated and that is necessary for the performance of work or profession, will not be regarded as discrimination, as provided by Article 13-3(1) of the WEA. Outside employment, the GEADA Article 9 allows some differential treatment on the basis of age when 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.

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<sup>172</sup> Equality Ombud, Case No. 09/892, statement of 3 May 2012.

The test is in principle compliant with the test used by the Court of Justice in the *Mangold* case,<sup>173</sup> as the Norwegian Supreme Court referred explicitly to the *Mangold* test in its first judgment on age discrimination.<sup>174</sup>

b) Permitted differences of treatment based on age

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

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

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

Protection against age-discrimination is currently provided in Norway within working life, in line with Directive 2000/78. A legal study carried out during autumn 2014 assessed whether age as a discrimination ground should be expanded beyond the field of employment, as previously proposed by the European Commission in its document COM 2008(426) final proposing a new non-discrimination directive, and concluded that it should. The study makes an analysis of a variety of different age limits outside the field of employment. One of the findings was that there were many more minimum age requirements than maximum age requirements.<sup>175</sup> A subsequent report presented in January 2016 assessing the costs linked to such a proposal recommended that age as a discrimination ground should follow the limitations proposed in the proposed EU directive.<sup>176</sup>

As of 1 January 2018, protection against age-discrimination outside working life is included in Article 6 of the GEADA.<sup>177</sup> This protection has extensive exceptions, as age limits specified in law or regulations and favourable pricing based on age do not breach

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<sup>173</sup> CJEU, judgment of 22 November 2005, *Mangold v Helm*, Case C-144/04 EU:C:2005:709.

<sup>174</sup> See Supreme Court judgment of 18 February 2010, Rt-2010-202 (*Nye Kystlink*).

<sup>175</sup> See McClimans, E. L., Aune, H. and Ranheim, M. (2014), *Utredning av behovet for et utvidet vern mot diskriminering på grunn av alder*, available in Norwegian at <https://www.regjeringen.no/contentassets/7378a753b77d4b3b8a50151b5b3d35bb/aldersutredning.pdf>.

<sup>176</sup> See Oslo Economics (2016), *Utredning av kostnader og nytte av et vern mot aldersdiskriminering utenfor arbeidslivet*, (in Norwegian) <https://www.regjeringen.no/contentassets/aa98957f50dd4343a408396d34c7bf58/samfunnsokonomisk-analyse-aldersdiskriminering.pdf>.

<sup>177</sup> See the legal preparatory works; Proposition to Parliament, Prop 81 L (2016-2017) *Lov om likestilling og forbud mot diskriminering (likestillings- og diskrimineringsloven)* Chapter 15.

the prohibition in Article 6, according to Article 9(3) of the GEADA. 'Favourable pricing based on age' covers cheaper tickets for students and senior citizens.

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

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

#### **4.6.2 Special conditions for young people and older workers**

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

#### **4.6.3 Minimum and maximum age requirements**

In Norway, there are exceptions permitting minimum and/or maximum age requirements in relation to access to employment and training.

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

There is a prohibition against child labour in Article 11-1(1) of the WEA, which prohibits from working children under 15 years old or who have a duty to go to school,<sup>178</sup> with a few exceptions.<sup>179</sup> In general, for adults (above 18), there are no minimum age limits in Norway regarding access to employment, however a number of positions or access to training positions require that the employee be a major (i.e. above 18 years) in order to handle money. There is no minimum age of entry into public sector employment, as employment in this sector is governed to a large degree by qualification requirements. There are some select positions in public employment with minimum age requirements: Supreme Court judges must be at least 30 years old, judges of the appellate courts must be at least 25 and assistant/deputy judges at least 21 years, under the Act on Courts of 13 August 1915 no 5, Article 54. There is an age minimum of 20 years to work as a lawyer, as per Article 218b of the Act on Courts.

#### **4.6.4 Retirement**

- a) State pension age

In Norway, there is a state pension age, at which individuals must begin to collect their state pensions.<sup>180</sup> If an individual wishes to work beyond the state pension age, the pension can be deferred. Also, an individual can collect part of a pension and still work.

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

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<sup>178</sup> Compulsory, primary education usually finishes in June the year the child turns 16.

<sup>179</sup> Such exceptions relate to cultural work or similar, easy work after turning 13, work as part of education or vocational training approved by the educational authorities and if the child is 14 or older.

<sup>180</sup> See National Insurance Act of 28 February 1997 No. 19, Article 19-4.

For Government employees, if an individual wishes to work longer, the state pension can also be deferred, but only until the employee reaches 70 years of age. A pensioner can choose to work part-time and get a part-time pension.

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

#### b) Occupational pension schemes

In Norway, there is a standard age when people can begin to receive payments from occupational pension schemes and other employer-funded pension arrangements. However, there are several exceptions, and the system is now more flexible than it used to be.

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

#### c) State imposed mandatory retirement ages

In Norway, there is a state-imposed mandatory retirement age of 70 years for state workers according to the Act on age limits for public officials.<sup>181</sup> This is generally applicable, but there are also exceptions, such as for the armed forces and other sectors with a lower mandatory retirement age.<sup>182</sup>

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

Two key judgments were given in 2015 concerning state-imposed mandatory retirement ages, both of which related to health workers in the public sector.<sup>183</sup> In both cases, the appellate court found the lower mandatory retirement ages acceptable, relying heavily on the criteria set out in Directive 2000/78 Article 4(1) and the cases by the ECJ.

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<sup>181</sup> Act on age limits for public officials of 21 December 1956, No. 1, Article 2.

<sup>182</sup> Most age limits for state employees were approved by the Parliament in 1995, see St.prp No. 38 (1994-1995 *Om aldersgrenser for offentlige tjenestemenn m.fl.*, and Innst. S nr 77 (1995-1996).

<sup>183</sup> LB-2014-29065 and LG-2014-189475. LB-2014-29065 addressed whether or not the termination of employment as a result of a lower mandatory retirement age, set at 65 years for subordinate nurses in the Nurses Pension Act, Article 6, was in violation of the prohibition against age discrimination in the WEA Article 13-1, cf. Articles 13-3 and 15-13a and Directive 2000/78/EC, Articles 4 and 6. The age limit for supervisors or nurses in administrative positions is 70 years according to the act. The appellate court took as a starting point that the requirements of the WEA are the same as those of the directive. Although the aim of the act is not specified either in the act itself or in the preparatory works to the act, the court said that seen in context, the central purpose of the specific age limit is related to the physical and psychological strain of the job that the regular physical contact with patients and clients entails. The age limit also has an aspect related to the safety of patients, as the nurses need to keep abreast of professional developments and maintain sharp vigilance in each case. The latter aspect is not seen as being a legitimate aim in accordance with the directive, Article 6(1) but in line with Article 4(1). Also the strain of the profession is seen to fall under article 4(1), as the possession of certain physical and mental capabilities, capabilities that deteriorate with age, is a regular professional requirement for subordinate nurses who have extensive contact with patients and clients. LG-2014-189475 addressed the termination of employment as a result of a lower mandatory retirement age, extended pursuant to a collective agreement until 67 years if the employee is not entitled to a full pension. The appellate court explicitly referred to the decision of February 2015 as cited above and pointed out that this age limit was established by law contrary to the case in February 2015 where the age limit was established by collective agreement. It is thus up to the legislature to change the law. The appeal to Supreme Court was not accepted, see HR-2015-2505-U of 15 December 2015.

For employees who are not public officials, there is no state-imposed mandatory retirement age (see below for more information).

d) Retirement ages imposed by employers

In Norway, national law permits employers to set a retirement age of 70 or older by contract and/or collective bargaining and/or unilaterally through limits set by the firm itself, if the age limit is made known to the employees, it is consequently upheld, the employee has the right to satisfactory pension, and the age limit has been discussed with the elected representatives of the trade unions (WEA, Article 13-15a(3)). Lower age limits are allowed if it is necessary by reason of health or safety (WEA, Article 13-15a(2)). In both cases, lower age limits on the basis of law, contract or collective bargaining may be accepted if the aim is objectively justified and not disproportionate (WEA, Article 13-3(2)).

Article 15-13a(1) of the WEA allows the employer to terminate an employment contract when the employee turns 72 years old.<sup>184</sup> Dismissal before the age of 72 because of having reached the right to a pension according to the National Insurance Act cannot be objectively justified. It is thus implicitly accepted by Article 15-13a of the WEA that a person may be dismissed because of age when they reach 72 years.<sup>185</sup> In reality this means that it is acceptable to dismiss a person on the ground of age alone from 72 years and onwards. In reality, this is applicable only for employees in the private sector, as public officials have a retirement age of 70 years.<sup>186</sup>

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

e) Employment rights applicable to all workers irrespective of age

The law on protection against dismissal and other laws protecting employment rights do not apply to all workers irrespective of age, even if they remain in employment in the employment after attaining pensionable age or any other age, as described above. Legislation on protection against unjustified dismissal applies to workers under 70 years,

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<sup>184</sup> This age limit was extended as per 1 July 2015 from 70 to 72 years. Preparatory works to the change is Prop. 48L (2014-2015) *Endringer i arbeidsmiljøloven og allmenngjøringsloven (arbeidstid, aldersgrenser, skatt, mv)*.

<sup>185</sup> A tripartite commission set up to assess the age limit of 72 years in the WEA handed in its report to the Government on 1 December 2016. The commission did not agree upon whether or not to expand or abolish the age limit of 72 years, see (in Norwegian) [https://www.regjeringen.no/contentassets/44d25e06d416405e823ce79ef83e8238/a-0042\\_b\\_seniorer\\_og\\_arbeidslivet\\_uu.pdf](https://www.regjeringen.no/contentassets/44d25e06d416405e823ce79ef83e8238/a-0042_b_seniorer_og_arbeidslivet_uu.pdf). This report draws on the research done by FAFO in report 2016:22: Svalund J. and Veland, G. (2016) 'Aldersgrenser for oppsigelse og særordninger for eldre i arbeidslivet' (in Norwegian) at <http://www.fafo.no/index.php/nb/zoo-publikasjoner/fafo-rapporter/item/aldersgrenser-for-oppsigelse-og-saerordninger-for-eldre-i-arbeidslivet>. Although the latter report states that it assess the age limit for dismissals, the content of the report is an assessment of three special arrangements for seniors: the right to an extra paid week of holidays from 60 years, the rights to reduced working time from 62 years and the right to flexible working hours based on age.

<sup>186</sup> According to the Act on age limits for public officials of 21 December 1956 No. 1, Article 2.



see WEA Article 15-13a(1). This general age limit was extended to 72 years on 1 July 2015 (see Prop 48 L (2014-2015)). Other employment rights remain in place.

f) Compliance of national law with CJEU case law

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

National legislation is generally in line with the CJEU case law, as demonstrated by the Supreme Court judgment of 14 February 2012 *Bjørn Nybø and others v. CHC Helicopter Service AS*, Rt-2012-219, which fully built on the CJEU judgment in case C-447/09 *Prigge*. However, the claimants did not receive pecuniary compensation for this discrimination, which is not in compliance with the CJEU case law, nor with the principle of effective damages for injury of a non-pecuniary character, as per the Supreme Court judgment of 30 January 2017 in case number HR-2017-219-A (see chapter 12 below for a description of the Supreme Court reasoning).

The lower mandatory retirement ages for certain professions, as well as the acceptance of the right of employers to mandate and unilaterally impose retirement ages for company employees may not always be in line with the justification required by Directive 2000/78/EC and the practice of the CJEU, which is a possible cause for concern.

#### **4.6.5 Redundancy**

a) Age and seniority taken into account for redundancy selection

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

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

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

A Supreme Court judgment from 2011 accepted that 10 airline pilots were lawfully dismissed when turning 60 years, as part of a selection process for redundancy. The Supreme Court concluded that the selection of the dismissed pilots was based on considerations that were justifiable under Article 15-7 of the WEA, that is, an economic need for dismissals and the use of specified criteria – here – that the pilots were eligible for pension. The Supreme Court found that if, in a particular situation, an employer chooses to base the selection process for redundancies on criteria other than tenure, this cannot in itself lead to the decision being ill founded. In this specific setting, age was seen as a justifiable consideration, and thus, the pilots were not subject to age-based discrimination when chosen for redundancy.<sup>187</sup> This judgment is probably not in accordance with Directive 2000/78. In similar cases in Sweden and Denmark concerning

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<sup>187</sup> Supreme Court, Rt-2010-609 of 5 May 2011.

the same airline, the conclusion was the opposite: that the pilots were subject to discrimination, and entitled to compensation.<sup>188</sup>

b) Age taken into account for redundancy compensation

In Norway, national law does not provide for compensation for redundancy. However, some compensation for seniority is given that is only indirectly affected by age: national legislation concerning the paid periods of notice according to the law provides for longer periods of notice based on seniority, thus there is an element of compensation for age (see WEA, Article 15-3).

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

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

**4.8 Any other exceptions**

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

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<sup>188</sup> Swedish Labour Court, Judgment [AD-2011-37](#) and Østre Landsrett court of second instance in Denmark, Judgment B-1271-11.

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

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

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

Positive differential treatment is permitted both in Article 11 of the GEADA and Article 13-6 of the WEA on preferential treatment, which means that positive action is permitted for all discrimination grounds. The 2013 legal revision changed the wording of the legal text from positive action to 'positive differential treatment', but no change to the substantial content was intended. Although the wording in the different acts is somewhat different, it is assumed that it covers the area of the EU *acquis*. Positive differential treatment will not breach the prohibition against differential treatment if the differential treatment is designed to promote the purpose of the act, the negative impact of the differential treatment on the person whose position will worsen is reasonably proportionate in view of the intended result, and the differential treatment will cease when its purpose has been achieved. In the WEA, the term used is 'preferential/ special treatment', but the content is intended to be the same. The title of Article 11 of the GEADA is 'Permitted positive differential treatment', but apart from enlarging the scope of positive action to include all new discrimination grounds, including positive action for men, the scope for positive action measures remains the same as under the previous legislation.<sup>189</sup>

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

### **b) Quotas in employment for people with disabilities**

In Norway, national law does not provide for a quota for the employment of people with disabilities.

However, the state may give priority to applicants with disabilities according to the Civil Service Act, which gives persons with disabilities rights to positive action in employment. When recruiting to positions in the civil service, the employer must take into account the special rules in the Civil Service Act in addition to the provisions of the Working Environment Act.<sup>190</sup> If there are qualified applicants with disabilities<sup>191</sup> for a position, at least one of the applicants with a disability must always be called for interview. The applicants must themselves assess their disability and a disabled applicant seeking to rely on the right to be called for an interview must disclose his disability in the application. The employer may also choose to hire an applicant with disabilities, even if there are better-qualified applicants for the position. This is often called 'radical positive action', and increases the likelihood of persons with disabilities being hired. In January 2017, a trainee programme was introduced for people with disabilities applying for

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<sup>189</sup> See the legal preparatory works; Proposition to Parliament, Prop 81 L (2016-2017) *Lov om likestilling og forbud mot diskriminering (likestillings- og diskrimineringsloven)* Chapter 17.

<sup>190</sup> See regulations to the Civil Service Act (*statsansatteloven*), FOR-1983-11-11-1608, Article 9.

<sup>191</sup> A person registered as a disabled by the National Labour and Welfare Authorities (Nav), a person who has completed a vocational rehabilitation programme organised by Nav, or who holds a partial or full-time pension due to inability to work (the regulations to the Act on public officials Article 9, cfr. the Act on public officials, Article 5(1)).

positions in the civil service, in which it is possible to apply for trainee positions lasting up to one and a half years in order to get relevant work experience.<sup>192</sup>

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<sup>192</sup> See the website for the trainee programme at <https://arbeidsgiver.difi.no/strategisk-hr-og-ledelse/inkluderingsdugnaden/traineeprogrammet-i-staten>.

## 6 REMEDIES AND ENFORCEMENT

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

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

a) Available procedures for enforcing the principle of equal treatment

In Norway, there are no special procedures for enforcing the principle of equal treatment if the case is taken to the courts, as this follows general legal principles.

The procedures for enforcing the principle of equal treatment in Norway are listed below.

For matters within the scope of the WEA, the law itself has a special procedure to be followed in the ordinary court system (WEA, Chapter 17), which gives a number of clear timelines. Most individual conflicts regarding labour issues, for example regarding hiring or dismissals, go through these procedures.

For the enforcement of the GEADA within the ordinary civil courts, discrimination cases follow the 'normal' procedural rules for civil cases as set out in the Dispute Act.<sup>193</sup>

There are no specific procedural rules when forwarding a case to the administrative dispute mechanism, the Equality Tribunal, other than those laid out in the Act on the Equality and Anti-Discrimination Ombud and the Anti-Discrimination Tribunal (EAOA), described below in chapter 7. This is part of its role as a low-threshold and low-cost conflict resolution institution. There are no fees, and the procedures are based on the idea that individuals with no knowledge of the law should be able to complain directly to the tribunal with no legal aid.

As for criminal procedure, the GEADA and the Penal Code contain a few articles concerning discrimination. Such cases qualify for criminal procedure before the courts. Article 39 of the GEADA states as follows:

'A penalty of a fine or imprisonment for a term not exceeding three years shall be applied to any person who jointly with at least two other persons commits an aggravated breach of the prohibition against

- a) discrimination on the basis of ethnicity, religion or belief in article 6,
- b) harassment on the basis of ethnicity, religion or belief in article 13,
- c) retaliation on the basis of ethnicity, religion or belief in article 14, or
- d) instructing a person to discriminate on the basis of ethnicity, religion or belief in article 15.

Any person who has previously been penalized for breach of this provision may be penalized even if the breach is not aggravated.

When assessing whether a breach is aggravated, particular weight shall be given to the degree of culpability, whether the breach was racially motivated, whether it constitutes harassment, whether it involved physical assault or serious violation of another person's mental integrity, whether it is likely to cause fear and whether it was committed against a person under the age of 18.

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<sup>193</sup> See Act of 17 June 2005 No. 90 relating to mediation and procedure in civil disputes (the Dispute Act), see <http://app.uio.no/ub/ujur/oversatte-lover/data/lov-20050617-090-eng.pdf>.

Before an indictment is issued in respect of a matter specified in the first paragraph, consideration shall be given to whether a civil penalty would be sufficient.

The provisions on the burden of proof in article 37, first paragraph, do not apply in connection with enforcement of this provision.'

Articles 185 and 186 of the Penal Code concern hateful expressions and refusal to provide goods and services. These are applicable in relation to discrimination because of skin colour or national or ethnic origin, religion or life stance, sexual orientation or lifestyle<sup>194</sup> and disability, but are not applicable to claims in respect of age, gender or gender expression.

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

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

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

There is furthermore a large economic risk linked to costs of proceedings. The general rules on costs of proceedings in discrimination cases before the ordinary courts are found in Chapter 20 of the Dispute Act, and are also applicable in discrimination cases. The general rule is that the successful party is entitled to full compensation for their legal costs from the opposite party (Article 20-2(1) of the Dispute Act). The court can exempt the opposite party from liability for legal costs in whole or in part if the court finds that 'weighty grounds' justify exemptions (see Article 20-2(3)). There is also the possibility, in exceptional cases, that the cost of litigation can be shared between the parties, even if the main case is lost. This has happened in only a very few discrimination cases: in a case from March 2012, the Supreme Court found that the losing party did not have to pay due to the uneven level between the parties, irregularities in the handling of the case during the hiring process and the importance of the case for the claimant.<sup>195</sup> In an unpublished case from the Oslo municipal court (first instance) the judge found that the claimant who claimed to be discriminated against based on age – despite losing the case – had a due reason to have the case tried in court, as she considered herself the victim of discrimination. The court stated that 'there must be a possible option to have the case tried in court even though this belief was unfounded'.<sup>196</sup> Similar views were expressed in another case in the appellate court regarding discrimination on the basis of disability (blindness) in which the claimant lost the case but where the employer was partly to blame for the events that led to the dispute.<sup>197</sup> A claimant who was led to believe by

<sup>194</sup> In a legal context, this means being married to or living with, in a marriage-like relationship, a person of the same sex or gender, and only applicable in religiously based organisations or workplaces. See the definition in section 2.1.1 of this report.

<sup>195</sup> Supreme Court judgment of 5 March 2012 HR-2012-580-A.

<sup>196</sup> Oslo municipal court, Judgment of 29 June 2007 in Case 07-036427 TVI/OTIR/10.

<sup>197</sup> See the Eidsivating appellate court/ court of second instance, Judgment of 6 July 2007 (Case LE-2006-189239), the 'music teacher judgment'. This judgment was passed before the enactment of the AAA, thus the merits of the case was assessed according to the WEA, where disability was included as a ground of discrimination before the AAA was enacted in 2009.

trade union representatives that he might be subject to discrimination because of his non-Norwegian background lost his case. In the court of first instance he was ordered to pay the full costs of the opposite party. He appealed the case to the appellate court. He lost the case there as well, and the appellate court ordered him to pay the costs of the opposite party in relation to the case in the appellate court. He was however acquitted of paying the cost of litigation for the opposite party in the court of first instance, as the opposite party could be reproached for the action being brought, and was thus partly to blame for the action sought.<sup>198</sup>

Another barrier was highlighted in the civil society' latest shadow report to the CERD committee:<sup>199</sup>

'In a judgment issued in 2015 (LB-2015-158669-2), Borgarting Court of Appeal assessed the competence of a lay judge with documented, strong prejudices against immigrants in general and Muslims in particular. One hundred and fifty pages of comments taken from the lay judge's Facebook page were presented to the court. These included a large number of statements of a xenophobic and Muslim-hating nature, and contained comments written by the lay judge herself and links to articles of the same type published on radical right-wing and right-wing extremist websites. The lay judge has often posted a number of such comments every day. Here she says, among other things, that she believes Islam should be prohibited in Norway and that people who do not support the right-wing populist Progress Party (Fremskrittspartiet) should be punished for their lack of support. Although her views clearly contravene some of the most fundamental human rights of immigrants in general and Muslims in particular, this person has been a lay judge for a number of years.

The court found it proven that she was "strongly critical of immigration" and "biased in questions relating to immigrants in general and Muslims in particular". However, the court concluded that the judge could not be excluded from the court and the duty to be a lay judge based on the documentation that had been presented. Given the fundamental importance of freedom of speech, the court believed that, in order to be excluded from the pool of lay judges, it is a prerequisite that the hateful or discriminatory statements contravene article 185 of the Penal Code. Since the lay judge had not been convicted of making such unlawful statements, the court found that she could not be excluded from the pool.

This ruling creates a problematically high threshold for finding a person unsuitable to act as a lay judge, since the threshold for being convicted according to article 185 of the Penal Code is very high. Most convictions that we are aware of have some violent content (a desire to kill or in some other way harm a person/persons with a minority background). Other kinds of racist speech will to a (far) lesser extent lead to a contravention of article 185. This means that a judge with a proven racist attitude may be regarded as suitable according to this standard.

The Court of Appeal stated that her negative attitudes to immigrants could provide grounds for removing her from individual cases where immigrants/Muslims are involved. This transfers the responsibility for proving the lay judge's bias to the lawyer in each case, something that will produce a variable result. This also requires each lawyer to be aware of her bias, and this will very likely not be the case. Thus, as far as we know, she has continued to act as a lay judge, including in cases involving immigrants.'

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<sup>198</sup> Borgarting appellate court/ court of second instance, Judgment of 27 January 2003 (Case LB-2002-44) (*Sporveissaken*).

<sup>199</sup> Norwegian NGOs (2018) *NGO alternative report to CERD 2018*, paragraphs 308-311 [https://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCERD%2fNGO%2fNOR%2f32995&Lang=en](https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCERD%2fNGO%2fNOR%2f32995&Lang=en).

The rules regarding the qualifications of judges and lay judges are vague in both civil and criminal cases. Article 55 of the Courts of Justice Act states that judges should fulfil high standards both personally and professionally and must perform their duties impartially and in a fashion that promotes common trust and respect. Article 70 of the Courts of Justice Act is particularly problematic, as it stipulates only that a lay judge must be 'personally suitable'. If this is not the case, the person may not be elected or must be excluded from the pool of lay judges.<sup>200</sup> This creates doubts about the impartiality of the courts in both civil and criminal cases.

c) Number of discrimination cases brought to justice

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

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

A significant increase in discrimination cases before the lower instance courts has taken place since 2008, as key legislation in this area has come into force in the last decade (the ADA in 2006, the AAA in 2009, the SOA in 2014, and the GEADA in 2018).<sup>201</sup> From 2008 to 2017 only 11 discrimination cases were considered by the Supreme Court, i.e. about one per year on average: eight on age discrimination, one on disability,<sup>202</sup> one on gender and one regarding the procedure for taking a decision of the tribunal to court when it did not state that discrimination had been proven.<sup>203</sup> In 2018 alone, however, there were three cases: one on religion,<sup>204</sup> one on ethnicity (Sami people),<sup>205</sup> and one on gender. In 2019, two cases heard before the courts of second instance were published: one on sexual harassment<sup>206</sup> and one regarding disability.<sup>207</sup> Cases on hate speech are treated as criminal cases outside the scope of the non-discrimination directives and are therefore not part of this list.

The total number of court cases on discrimination remains sparse, especially compared with the volume of cases brought before the Equality Ombud. The Equality Ombud and

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<sup>200</sup> Act relating to the Courts of Justice (Courts of Justice Act) of 13 August 1915 No. 5. <https://lovdata.no/dokument/NL/lov/1915-08-13-5>.

<sup>201</sup> A study carried out in 2008 for the publicly appointed committee that prepared the Government white paper on 'Comprehensive protection against discrimination' NOU 2009:14, gathered both published and previously non-published court material on discrimination cases. Between 1978 and 2008, approximately 51 legal disputes in the area of discrimination issues – mainly on gender – were assessed by the civil courts. See McClimans, E.L. (2008), *Rettspraksis om diskrimineringslovgivning*, (Court cases concerning discrimination legislation), Diskrimineringslovutvalget.

<sup>202</sup> Supreme Court, HR-2014-955-U – Rt-2014-480 ADHD in the military service. See section 3.3 of this report on armed forces for details.

<sup>203</sup> Supreme Court, HR-2015-2400-U.

<sup>204</sup> Supreme Court, HR-2018-1958-A, see section 12.2 of this report.

<sup>205</sup> Supreme Court, HR-2018-872-A, see section 12.2 of this report.

<sup>206</sup> LH-2019-087696. LH-2019-135298. LH-2019-135300 (three different aspects of one issue treated in three court cases).

<sup>207</sup> LE-2018-145654.



the Equality Tribunal have detailed annual statistics for their work and they receive more than 95 % of all cases on discrimination (see section 7.g below).

Statistics thus show that although the courts do handle discrimination cases, and although the number of cases assessed by courts is slowly increasing, the overwhelming number of discrimination cases in Norway are channelled through the administrative bodies, the Ombud and the Equality Tribunal. This has consequences in relation to an assessment of compliance with EU law in terms of sanctions in particular, as the Equality Ombud and the Equality Tribunal do not have the power to enforce the clauses relating to sanctions in the form of liability for damages for injury of a non-pecuniary character/compensation (see section 6.5 below).

d) Registration of discrimination cases by national courts

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

Court cases are all published in Norwegian. There is no systematic translation of cases in Lovdata, although a fair number of criminal cases are translated into English (or another language) if the claimant does not understand Norwegian. This translation is in most cases arranged by the lawyers of either the defence or the victim, and paid for by the Court Administration.

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

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

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

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

A key issue for bringing a case to court is that the claimant – including associations – must show a genuine need to have the claim determined against the defendant, which is a legal interest.<sup>208</sup> The 'genuine need' shall be determined based on a total assessment of the relevance of the claim and the parties' connection to the claim (see Article 1-3(2) of the Dispute Act). In reality, this is a requirement for direct interest in a case in order to be a party to the case. An element of having 'direct interest' in a case is that the case is a live controversy and should not be based on a historical fact.<sup>209</sup> The procedural rules before the court are not different in civil discrimination cases.

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<sup>208</sup> According to a legal dictionary (Craig, R. (2010) *Norsk Engelsk ordbok*, Universitetsforlaget third edition) the concept of legal interest according to Norwegian law has two aspects: 1) a requirement that the claimant and defendant have a sufficient connection to the subject matter in dispute and 2) a requirement that the dispute be a live controversy, is neither moot nor hypothetical.

<sup>209</sup> The verdict of the Supreme Court in the ADHD Case (Rt. 2014-480) illustrates the procedural complications of taking a case to court. The association ADHD Norway initiated a case against the state/the Equality and Anti-Discrimination Tribunal for the Oslo city court, claiming that the tribunal's decision in its Case No.

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

NGOs are, through their legal counsel, entitled to act on behalf of victims of discrimination with a specific power of attorney from the person or company or organisation in court (DA, Article 3-3(4) allows for a person with relevant qualifications to act on behalf of the victim). However, the actual victim (the party to the case) must be present in court to give testimony during the main hearing, as provided by Article 9-15 of the Dispute Act. A key principle in Norwegian courtrooms is the oral hearing and the immediate presentation of evidence.

In discrimination cases, the right of associations to be used as agents in administrative proceedings and act on behalf of victims is expressly stated. The requirement is that the organisation must have a “purpose, wholly or partly, to oppose discrimination” according to the grounds as prohibited by law’ (see the GEADA, Article 40 and the WEA, Article 13-10). This rule supplements the rules concerning the individual rights of associations to act on their own (see section 6.2.c below on *actio popularis*) and the right of organisations to act on behalf of their members under the Dispute Act, Article 1-4. The Dispute Act governs the rights of bodies to stand on behalf of and in support of parties in courts. The right of organisations to act as legal representatives under the anti-discrimination acts is limited to representation before the Ombud and the Equality Tribunal.

A person appointed by and with links to an organisation the purpose of which is, wholly or partially, to work to prevent discrimination on the basis of disability or religion/ethnicity may be used as a legal representative in cases heard by the courts. However, this does not apply to proceedings before the Supreme Court. The court may refuse to accept the authorisation of a legal representative if the court believes there is a danger that the legal representative does not have sufficient qualifications to safeguard the party’s interests satisfactorily. A legal representative must, at the same time as providing an authorisation as stated in Article 3-4 of the Dispute Act, submit written information from the organisation regarding the legal representative’s qualifications (see Article 40(4) of the GEADA).

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

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25/2011 on the assessment of the introduction course for military recruits in the armed forces was invalid. The tribunal had found that the guidelines governing the introduction scheme for military recruits in the armed forces were not discriminatory for recruits with ADHD. The tribunal presumed in its decision that all recruits – including those with a disability – would be subject to an individual assessment of their merits. As recruits with a disability are excluded from further assessment because of their disability, the organisation challenged the presumption that the tribunal’s decision was built on, and asked that the decision be found invalid. As the introduction scheme was marginally changed after the decision of the tribunal, the appellate court in Case No. LB-2013-142603 rejected the case, as it found that the decision of the tribunal was not a live controversy – it considered that the facts upon which the decision of the Equality Tribunal was based were historic, and not relevant for the situation today. The dispute was by verdict rejected from court assessment based on a lack of a genuine need to have the case determined, as per Article 1-3 of the DA. This verdict was appealed to the Supreme Court, which found that the Equality Tribunal did not have a mandate to make a decision in the case, and that the tribunal – erroneously – had made a decision where it should have issued an opinion. It is not possible to refer an opinion to the courts, and the case was rejected.

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

NGOs may engage in both civil and administrative proceedings according to the general rules of the Public Administration Act, Article 12,<sup>210</sup> and the Dispute Act.

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

There are special provisions on victim consent in cases where obtaining formal authorisation is problematic, such as by minors (i.e. persons under 18 years) and persons under guardianship. The Guardianship Act of 26 March 2010 no 9 gives the possibility to legally incapacitate a person, but never to a greater extent than absolutely necessary and always tailored to the person's circumstances. In a 2018 Supreme Court decision, it was ruled that NGOs do not have legal standing in cases concerning legal guardianship, on the basis that NGOs are not listed as persons or institutions that may ask for someone to be put under guardianship in the Guardianship Act (Article 56).<sup>211</sup>

As a rule, associations have no legal standing within criminal law, although they have a limited right to raise a private criminal case against someone. This is seldom used in practice, and the author has never heard of a discrimination case in which this right has been exercised.

b) Engaging in proceedings in support of victims of discrimination (joining existing proceedings)

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

Although there are no impediments to NGO engagement in support of victims of discrimination or in strategic litigation, few organisations apart from the trade unions conduct strategic litigation on issues of non-discrimination. There are few specialised NGOs that work on non-discrimination that are competent to engage in litigation issues, apart from NOAS, the Norwegian Association for Asylum Seekers.<sup>212</sup> However, NOAS does not pursue strategic litigation from a non-discrimination perspective but from an immigration-law perspective. The Association for Gender and Sexual Diversity (FRI)<sup>213</sup> has initiated proceedings in the Oslo city court, court of first instance, claiming compensation for the previous practice of sterilising people undergoing gender confirmation treatment.

c) Actio popularis

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

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<sup>210</sup> Act relating to procedure concerning the public administration (Public Administration Act) of 10 February 1967.

<sup>211</sup> Supreme Court, Case HR-2018-1786-U.

<sup>212</sup> See <http://www.noas.no/en/>.

<sup>213</sup> See <https://foreningenfri.no/> (in Norwegian, unfortunately there is no information in English).

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

There is thus no need to have a specific victim to support or represent, although it is necessary to prove some kind of membership. The fact that a formalised membership structure exists will more easily demonstrate and classify the organisation as one with legal capacity to sue and be sued according to the law. Ad-hoc organisations, that is organisations established in order to forward a particular case of litigation, or other organisations that may be termed 'mayfly organisations' will not in themselves have the legal capacity to sue and be sued. Case law has widely accepted associations and cooperatives acting under a common name.<sup>214</sup>

The organisations that have a right of action in their own name may use all proceedings under the Dispute Act. The rules on the shifting burden of proof under the anti-discrimination legislation are also applicable to organisations and associations. However, since only individuals are protected against discrimination, not legal persons, organisations can only claim injunctive relief and the finding of discrimination on their own behalf.

#### d) Class action

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

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

A class action may be brought by any person who fulfils the conditions for class membership or by an organisation, association or public body charged with promoting a specific interest. In the preparatory works to the Dispute Act, discrimination cases are given as an example of the kind of cases where class action might be suitable.<sup>215</sup> A class action may be brought by an organisation or an association or a public body charged with promoting specific interests, provided that the action falls within its purpose and normal scope pursuant to the Dispute Act, Articles 1-4 as provided by Article 35-3(1)b. Official documents and legal preparatory works have assumed that the Ombud is also able to bring a class action suit concerning discrimination to courts, however she has so far not made use of that ability.<sup>216</sup>

As a general rule, in both general civil and criminal cases, victims must be identified. This is similar for class actions, where a specific victim of discrimination must be identified in most instances. The exception may be in the kind of class action where not all members of the class are required to be made known by name (see Articles 35-2 and 35-3).

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<sup>214</sup> See the preparatory works to the Dispute Act, Norwegian Official Report NOU 2001:32 Rett på sak point 2.2.2.1.

<sup>215</sup> See Ot.prp No. 51 (2004-2005) s 322.

<sup>216</sup> Norwegian Government (2008) *Kjønn og lønn* (Gender and Pay – white paper), NOU 2008:6, p. 114.

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

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

The rule of shared burden of proof applies for all grounds of discrimination, including reasonable accommodation, harassment, victimisation and instructions to discriminate, under Article 37 of the GEADA and Article 13-8 of the WEA.

In cases concerning dismissals according to labour law procedural rules, it is a general principle that the employer must substantiate that the dismissal is based upon the correct facts. Other than this, in civil cases - as a general rule - the burden of proof is on the claimant. This is why the shifting burden of proof as implemented in the discrimination legislation is so important. In all discrimination cases, if there are circumstances that give 'reason to believe' that there has been direct or indirect differential treatment in contravention with the said legislation, such differential treatment will be assumed to have taken place unless the person responsible proves on a balance of probabilities that such differential treatment nonetheless did not take place. The revised Norwegian legal text as found in Article 37(1) of the GEADA now state that:

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

What is meant by 'reason to believe' for the burden of proof to be reversed is interpreted by the Equality Tribunal to mean that the allegation must be 'supported by the chain of events and the external circumstances of the case which necessitates an assessment of the specifics of the case'.<sup>217</sup>

An article by the previous head of the Equality Tribunal and the head of its secretariat, concludes that the rules on reversal on the burden of proof are useful and fulfil the EU requirements.<sup>218</sup> That conclusion is shared by the author of this report. As the practice of the 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.

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

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

Protection against retaliation/ acts of reprisals/ victimisation is implemented through Article 14 of the GEADA. The shift of the burden of proof also applies to situations of reprisals and victimisation. In all discrimination cases, if there are circumstances that give reason to believe that there has been direct or indirect differential treatment in contravention of the discrimination legislation, such differential treatment will be assumed to have taken place unless the person responsible proves on a balance of probabilities that such differential treatment nonetheless did not take place. 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

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<sup>217</sup> See the Equality Tribunal Case 26/2006, in which the said quote was used by the dissenting member of the tribunal. Although the rest of the tribunal did not agree with the dissenting member in this particular case, the quote was later referred to by the Ombud and the Equality Tribunal in a number of subsequent cases.

<sup>218</sup> See Syse, A. and Helgeland, G. (2009), 'Reglene om delt bevisbyrde i norsk diskrimineringsrett' (The rules on the shared burden of proof in Norwegian discrimination law), in Aune, Fauchald, Lilleholt and Michalsen (eds.), *Arbeid og Rett*, Festskrift til Henning Jakhellns 70-årsdag, Cappelen DAMM.

correspondingly to witnesses or someone who helps the victim of discrimination to bring a complaint, for example a workers' representative.

Both the Ombud and Equality Tribunal have dealt with a limited number of cases in which victimisation is alleged. The Equality Tribunal has made decisions in a total of 27<sup>219</sup> cases where victimisation was one of the issues raised; there were 8 victimisation cases in 2018.<sup>220</sup> The Equality Tribunal case 27/2008 was subsequently taken to the Oslo municipal court by the municipality of Oslo, which was accused of reprisal. The decision of the tribunal was overruled by the court, which found that the refusal to employ a male nurse was due to his personal abilities, and that he was not subject to reprisals or victimisation from the former employer, as the decision to refuse to use his services as a nurse was taken before he brought the case to the Ombud and the Equality Tribunal.<sup>221</sup> In a case on discrimination because of age and gender, the female complainant was found to have been subject to victimisation in breach of the GEA and WEA, Articles 2-5 and 13-8.<sup>222</sup> In 2013, the Ombud received a complaint in which a witness to harassment claimed that he was subject to reprisals from his employer for having supported a victim of harassment. Immediately afterwards he was deprived of his position as shift supervisor. The Ombud found that there was a causal link between the deprivation and his support to the harassed victim.<sup>223</sup> An interesting case concerning reprisals regarding an instance of notification about sexual harassment has also been assessed by the Ombud.<sup>224</sup>

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

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

Sanctions according to the GEADA as well as the WEA that are enforced by the civil courts consist of liability for damages for injury of a non-pecuniary character or compensation awarded to the claimant of discrimination. Sanctions according to criminal law consist of fines or imprisonment. In general, sanctions are equally applicable in private and public employment. Sanctions cover all discrimination grounds in all fields, except age, which is only covered in the field of employment. The regulations on sanctions are found in Article 38 of the GEADA and Article 13-9 of the WEA. It should be noted, however, that the EAOA limits the sanctions that may be awarded by the tribunal significantly, as will be described in more detail below.<sup>225</sup>

There are a number of general rules on compensation in Norwegian legislation that are applicable in discrimination cases. Compensation in Norwegian law is awarded either for fault-based liability (*culpa*) or for liability without fault. These ordinary rules are the rules on compensation set mainly by the Compensation Act,<sup>226</sup> as well as by the non-statutory customary rules on compensatory damages. These also include a number of general rules to limit liability.

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<sup>219</sup> Sometimes different aspects of one complaint are separated into different decisions/case numbers.

<sup>220</sup> See Equality Tribunal Cases 27/2008 (gender), 30/2009 (disability and ethnicity), 43/2010 (ethnicity), 20/2011 (ethnicity), 48/2011 (disability), 29/2012 (disability) and 50/2012 (disability), 21/2013 (gender) 34/2014 (gender).

<sup>221</sup> Oslo municipal court, first instance judgment of 27 October 2009 (TOSLO-2009-72697).

<sup>222</sup> Øst-Finnmark district court, Judgment of 17 March 2010, Case No. TOSFI-2009-136827.

<sup>223</sup> Equality and Anti-discrimination Ombud, Case No. 12/314 of 6 May 2013 (in Norwegian) at <http://www.ldo.no/no/Klagesaker/Arkiv/2013/12314-Vitne-utsatt-for-gjengjeldelse-grunnet-bistand-i-en-trakasseringssak/>.

<sup>224</sup> Case No. 08/1177 of 6 January 2009.

<sup>225</sup> See the legal preparatory works; Proposition to Parliament, Prop 80 L (2016-2017) *Lov om likestillings- og diskrimineringsombudet og Diskrimineringsnemnda (diskrimineringsombudsloven)*, page 106. Available at <https://www.regjeringen.no/contentassets/14dd1daa159348c88de5dbe043feb0a4/horingsnotat.pdf>.

<sup>226</sup> Norway, Compensation Act of 13 June 1969, No. 26.

Article 38 of the GEADA regulates compensation and damages after 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, with the exception of harassment (for more on this, see section 2.4.b).

Regarding damages for injury of a non-pecuniary character, the GEADA contains 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 the circumstances otherwise (see Article 38(3) of the GEADA and Article 13-9 of the WEA).

A practical form of 'sanction' often claimed by victims of discrimination in employment is preliminary injunction on the right to remain in the position until the case has been finally decided in court. This has been granted on one occasion in relation to age discrimination in the context of interlocutory judgments,<sup>227</sup> but refused by the Supreme Court,<sup>228</sup> and by the appellate court in later cases.<sup>229</sup>

Article 39 of the GEADA provides penalties in the form of fines or imprisonment for up to three years for the perpetrators of a gross discrimination that has been committed jointly by several persons.<sup>230</sup> This is in relation to discrimination on the following grounds: ethnicity, religion or belief.<sup>231</sup> Any person who wilfully and jointly with at least two other persons commits a serious contravention or is an accessory to a serious contravention of parts of the GEADA is liable to fines or imprisonment for a term not exceeding three years. Furthermore, there is a specific clause on repeated behaviour, such that any person who has previously been sentenced to a penalty for contravention of the current provision may be liable to a penalty even if the contravention is not serious. When assessing whether a contravention is serious, particular importance is attached to the degree of manifest fault, whether the contravention was racially motivated, whether it is in the nature of harassment, whether it constitutes an offence against the person or serious violation of a person's mental integrity, whether it is liable to create fear and whether it was committed against a person under the age of 18. Before instituting a prosecution for such offences, an assessment must be made of whether it will be sufficient to impose an administrative sanction in the form of an order or fine. In the GEADA, the limit for imprisonment is three years. To the author's knowledge, this sanction has not been used. Given that it is never used, this might be an indication that it does not comply with the criteria set by the ECJ of being a sufficiently dissuasive sanction.

The crime statistics do not tag information regarding whether 'hate motivation' is an aggravating circumstance, and therefore there is no way of knowing the usage, or extent of the usage, of this provision in the Norwegian courts. However, there have been

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<sup>227</sup> For example, Oslo municipal court, verdict of 19 November 2009 in Case No. 09-143503TVI-OTIR/02.

<sup>228</sup> In its decision Rt 2011-974/ HR-2011-1294-A of 29 June 2011, the Supreme Court did not give the claimant the right to continue her position when addressing the possible discriminatory aspects of a retirement age of 67 set unilaterally by the company. The Supreme Court stated that allowing the claimant the preliminary right to remain in position in these kinds of litigation would reduce the content of these age limits.

<sup>229</sup> Borgarting appellate court, verdict of 18 June 2014 in Case No. LB-2014-56188 (*Mediaas-saken*).

<sup>230</sup> In an assessment of the penal protection against discrimination on behalf of the Ministry of Children and Equality, Professor Kjetil Mujezinovic Larsen assessed Article 26 of the former ADA and suggested that it be continued in the upcoming legislation, and that it should be extended to cover all grounds in a holistic new law. He furthermore proposed that gender, gender identity and gender expressions should be included in the penal protection; see: Larsen, K.M. (2016) *Utredning omdet strafferettslige diskrimineringsvernet* <https://www.regjeringen.no/no/dokumenter/utredning-om-det-strafferettslige-diskrimineringsvernet/id2520561/> (In Norwegian only). While Professor Larsen recommended several changes to the legislation, none of these had been made by the end of 2019.

<sup>231</sup> See the legal preparatory works; Proposition to Parliament, Prop 81 L (2016-2017) *Lov om likestilling og forbud mot diskriminering (likestillings- og diskrimineringsloven)* Chapter 28.6.



several cases brought before the courts in 2018 based on Articles 185<sup>232</sup> and 186<sup>233</sup> of the Penal Code, which at least shows that hate crime is being taken seriously.

Sanctions according to the GEADA and WEA that are enforced by the Equality Tribunal:

As of 1 January 2018, under Article 12 of the EAOA, the Equality Tribunal also has the power to make an administrative decision including damages for economic losses as well as damages for injury of a non-pecuniary character, but only in simple cases. In cases that do not concern employment only compensation may be awarded. The tribunal can award damages only up to about EUR 1 000 (NOK 10 000). Damages for injury of a non-pecuniary character does not have an upper limit, but is usually below EUR 8 000 (NOK 80 000), and can only be awarded in cases that concern employment (EAOA Article 12).<sup>234</sup>

Taking a case to court is costly, as there is no free legal aid in discrimination cases, and with a significant risk of having to pay the costs of the defendant (as we see for example in court case LE-2018-145654-2, described in section 12.2 below). This makes access to effective remedies in discrimination cases a concern.

The Equality Tribunal has a limited competence to make an administrative order - that is to order an act to be stopped or remedied or other measures that are necessary to ensure that discrimination, harassment, instructions or reprisals cease and to prevent their repetition (see Article 11 of the EAOA). Breaches of the duty of accommodation (individual accommodation/universal design) are regarded as discrimination, and can be ordered to be stopped or remedied. The Equality Tribunal may set a time limit for compliance with the order. The tribunal will state the grounds for an administrative decision at the time the decision is made. Furthermore, the Equality Tribunal may make an administrative decision to impose a coercive fine to ensure the implementation of orders under 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 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. The clearer legal basis through the GEADA seems to have led to a more effective system at least to some degree and functions as a strong motivation to comply when the tribunal gives a binding decision that requires action, as in case no. 32/2018. In cases no. 18/13, 18/14, 18/15, 18/16, 18/17 and 18/18 it was not required, but the threat of it may well have improved the speed regarding the fulfilment of the required actions.<sup>235</sup>

The Equality Tribunal's decision in Case 44/2009 of 12 March 2010, which was a follow-up to Case 10/2006, is an illustration of this. In the latter case, a position at a dry-

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<sup>232</sup> See Case Nos. TBRON-2016-125647 (hate towards a Muslim politician) and TJARE-2016-72797 (hate towards Muslims as a group).

<sup>233</sup> See Case No. TJARE-2016-96260 (refusal of a hairdresser's services to a woman wearing a hijab) and subsequent appeals: LG-2016-164427 and HR-2017-534-U.

<sup>234</sup> The Equality Tribunal's interpretation of this as an absolute limit was corrected in a white paper, Ministry for Culture (2020) *On changes in the GEADA and WEA*, published 2 July 2020, Chapter 7.4. Available in Norwegian at <https://www.regjeringen.no/contentassets/9a57245aabaf407d9b893ae303a2e727/endringer-i-diskrimineringsombudsloven-og-arbeidsmiljoloen.pdf>.

<sup>235</sup> Equality Tribunal Case 2014-40-2 of 15 June 2016 is a follow-up to the tribunal's case number 2014-40 of 15 January 2015, in which the tribunal ordered that city buses should be subject to 'universal design', that is, designed and built in a disability-accessible way, by equipping the buses with a system inside the bus that announces the upcoming stops, and that the stops be equipped with an outdoor system that announces where the bus is headed. In its decision of 15 June 2016, the Equality Tribunal gave the bus company a new deadline (28 February 2017) for implementing the 2015 order and ordered a daily fine of NOK 5 000 (approx. EUR 550) per business day, including Saturdays, that the order was not complied with.



cleaners in Oslo was advertised in the Norwegian national newspaper *Aftenposten* asking for 'Mature female aged 30-50 years is encouraged to apply for the vacancy in our Dry-Cleaners at Røa'. Both the Ombud and the Equality Tribunal found the announcement to be a breach on the grounds of age and gender. As the company had used a similar announcement previously, and the firm is a large, professional employer with 17 branch offices in the Oslo area, the tribunal ordered that similar advertisements should be stopped. The tribunal issued an order with a specific time limit for compliance to ensure that a similar advertisement would not be used again. Thereafter the tribunal received a notice from the firm confirming that the advertisement would not be used again. In its recent case, the dry-cleaners' advertisement in 2009 was for a 'mature woman'. The case was brought to the Equality Tribunal from the Ombud on her own initiative, asking whether or not the current advertisement was a breach of the tribunal's 2006 order. 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 Ombud in the wording of future advertisements, but did not issue a fine.

In practice thus, the mandate to make use of fines is more a coercive tool, as this sanction has been used so rarely.<sup>236</sup> The lack of use is a problem. The efficiency of this sanction may thus be questioned.

#### b) Compensation – maximum and average amounts

There are no upper limits for compensation for economic losses, and the national legal framework does not provide rules for calculation. Any compensation must as a rule give compensation for actual loss.

Of the few court cases that exist, compensation has only been awarded in two Supreme Court cases, both of which concern discrimination because of membership of trade unions.

In its judgment of 28 March 2014, the Eidsivating appellate court awarded in case number LE-2013-113570 *Gate Gourmet 2* compensation amounting to real economic loss because of discrimination due to membership of a trade union. The Supreme Court had in its case Rt-2011-1755 *Gate Gourmet*, found that these employees had been discriminated against in violation of the general rule in the Working Environment Act 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 damage for the discrimination incurred. In subsequent cases for the Øvre Romerike district court (12-073184TVI-OVRO of 23 April 2013) and the Eidsivating appellate court, the claimants were awarded compensation for incurred loss. The compensation to all claimants totalled more than NOK 8 million (approximately EUR 1 million).

In the other case where compensation was awarded, Rt 2001-248 *Olderdalen*, NOK 100 000, (approximately EUR 12 000) was awarded to the claimants as economic loss because of discrimination due to political affiliation. The WEA of the time did not contain a clause specifically on liability for economic loss, thus the comparable sanctions used for gender discrimination were referred to.

In the other cases before the Supreme Court, compensation has either not been claimed, or the case was lost, and compensation thus not awarded. Noteworthy is the lack of compensation awarded in Supreme Court judgment of 30 January, case HR-2017-219-A.

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<sup>236</sup> In its Case 7/2012, the Equality Tribunal warned a hotel that if it did not follow up the order given by the deadline of 1 January 2014, a coercive fine might be issued.

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 only four lower court cases: three concerning discrimination because of gender/pregnancy,<sup>237</sup> and one concerning age and gender. All the cases concerned employment relations.<sup>238</sup> Interestingly, the non-pecuniary compensation for the discrimination has been set above NOK 100 000 (approximately EUR 12 000) in the three recent cases. This is considered to be high compensation when compared with, for example, the level of compensation in cases of unjustified dismissals within employment.

There is no statistical information available concerning the average amount of compensation available to victims.

As of 1 January 2018, the Equality Tribunal has powers to award damages for injury of a non-pecuniary character for non-economic loss in cases concerning a breach of the prohibition against discrimination in employment relationships, under Article 12 of the EAOA. This power has been used once, in case no 18/410 regarding pregnancy, where damages of approximately EUR 6 000 (NOK 60 000) were awarded. According to the preparatory works to the GEADA, such damages for injury of a non-pecuniary character should usually be between NOK 20 000 and 80 000 (approximately EUR 2 000 to 8 000).<sup>239</sup> It should be noted that the power to award compensation is limited to cases where 'the only submissions made by the respondent relate to inability to pay or other manifestly untenable objections', and their decisions have to be unanimous (EAOA, Article 12(2)).

#### c) Assessment of the sanctions

The sanctions as formulated in the legislation and adopted in Norway are formally satisfactory in relation to EU directives per se to address problems of discrimination. A challenge in the Norwegian system as described above is not the sanctions alone, but the enforcement system.

Statistics on discrimination cases in Norway show that although the courts do handle discrimination cases, and although the number of cases assessed by courts is increasing, by far the overwhelming number of discrimination cases in Norway are channelled through the administrative bodies: the Equality Ombud and the Equality Tribunal. For example, in 2017, the Equality Ombud received a total of 2 009 inquiries.<sup>240</sup> Of these, 106 were registered as complaint-based case work. The Equality Tribunal assessed 58

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<sup>237</sup> These are: Court of second instance/ Hålogaland appellate court, Judgment of 21 January 2009 LH-2008-99829 (*Bang-saken*), Oslo municipal court, Judgment of 17 November 2006 Case No. TOSLO-2006-52718 and court of second instance/ Eidsivating appellate court 12 December 1994, Case No. LE 1994-892 (*Lufthansa*).

<sup>238</sup> Judgment of Øst-Finnmark court of first instance - Judgment of 17 March 2010 in Case No. 09-136827TVI-OSFI (age and gender).

<sup>239</sup> Prop.80 L (2016-2017) p. 94. The Tribunal's interpretation of this as an absolute limit was corrected in a white paper, Ministry for Culture (2020) *On changes in the GEADA and WEA*, published 2 July 2020, Chapter 7.4. Available in Norwegian at <https://www.regjeringen.no/contentassets/9a57245aabaf407d9b893ae303a2e727/endringer-i-diskrimineringsombudsloven-og-arbeidsmiljolooven.pdf>. It should also be noted that the tribunal's power to award compensation and damages for injury of a non-pecuniary character is limited to cases where the calculation of such is very complicated (EAOA article 12(2)).

<sup>240</sup> Equality Ombud (2018) *Annual Report for 2017* (in Norwegian) at <https://www.ldo.no/link/b7c4ac39ad00414bac517f28c6e31f2b.aspx?id=12770>.

cases.<sup>241</sup> In contrast, a total of eight decisions were made by the courts of appeal and the Supreme Court according to the current and previous anti-discrimination legislation.<sup>242</sup> In 2018, the Ombud provided advice in 2 035 cases,<sup>243</sup> and the Equality Tribunal made decisions in 157 cases.<sup>244</sup>

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,<sup>245</sup> but a lot of cases will continue to lack efficient remedies, for example various types of harassment outside employment relationships. In such cases the Equality Tribunal can award only compensation for economic losses, not damages for injury of a non-pecuniary character (EAOA, Article 12). In 2018, the Equality Tribunal did not award any damages or compensation. In 2019, damages were awarded in case 18/410 regarding pregnancy and employment.

As for remedies regarding the public sector outside for employment relationships, the Equality Tribunal has the power to evaluate the decisions of other parts of the public administration, even if it cannot overrule them (see EAOA, Article 14(2)). For the most part, the Equality Tribunal appears to have been reluctant to use this opportunity in 2018 and 2019, as for example in case 70/2018<sup>246</sup> and 19/124.<sup>247</sup>

In Norwegian courts, the procedure is oral, with direct presentation of proof and witnesses. Few claimants are represented by lawyers in discrimination cases, either through NGOs or by barristers. The Equality Tribunal is an administrative body, and from 1 January 2018 uses a written procedure instead of an oral one. Presenting your own case in writing is difficult when you do not know the law, have little experience of presenting such matters, and have little idea what type of proof is needed. Some people are also in an emotional crisis after what they have experienced. 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 Ombud and the Equality Tribunal alone.<sup>248</sup> Fortunately, in

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<sup>241</sup> GEADA, GEA, AAA, ADA, SOA, AOT and Chapter 13 of the WEA. Equality Tribunal (2018) *Annual Report for 2017* (in Norwegian) at <http://diskrimineringsnemnda.no/media/2173/aarsrapport-2017-oppdater-med-regnskap.pdf>.

<sup>242</sup> As cases brought before the court of first instance are not necessarily sent for publication, it is hard to know to what extent a search at [www.lovdata.no](http://www.lovdata.no) is fully correct regarding how many cases are actually assessed 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; Age: LA-2017-196536 and LG-2018-59094.

<sup>243</sup> Equality Tribunal (2019) *Annual Report for 2018*, available at <http://diskrimineringsnemnda.no/nb/innhold/side/rapport>.

<sup>244</sup> Email to the author from the Equality and Anti-Discrimination Tribunal of 10 August 2019.

<sup>245</sup> See the legal preparatory works; Proposition to Parliament, Prop 80 L (2016-2017) *Lov om likestillings- og diskrimineringsombudet og Diskrimineringsnemnda (diskrimineringsombudsloven)*, building upon the paper sent for public hearing in 2016 <https://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>.

<sup>246</sup> The case was rejected on the basis that the tribunal could not overrule the administrative decision regarding care of a disabled person, while the opportunity to evaluate the decision with a view to Article 20 of the GEADA on the right to individually adapted municipal services, was not even mentioned.

<sup>247</sup> This case concerned the refusal of persons with hearing difficulties to be blood donors due to the cost of providing an interpreter.

<sup>248</sup> The Judgment of Hålogaland appellate court in Case No. LH-2014-27941 of 27 June 2014 underscores this point. A man (A) claimed to have been subject to discrimination because of disability when he was not offered a position as a handling agent in the Norwegian National Collection Agency, and claimed compensation according to the (previous) AAA, Article 17. His complaint had previously been assessed both by the Ombud and by the Equality Tribunal, who both found that there was reason to believe that the employer had placed weight on his disability to his disadvantage when he was not considered for the position he had applied for (see Equality Tribunal Case No. 8/2012 of 25 October 2012). The court found that he was not discriminated against because of his disability. The court found, based on the witnesses and

2019, the Ombud has started helping in a few cases before the Equality Tribunal, which will remedy this problem to some degree. While the criteria the Ombud uses to select cases are transparent,<sup>249</sup> few have been selected so far – in 2019 there were only two cases.

Furthermore, current legislation contains sanctions - liability for damages/ compensation/ redress, penalties and administrative orders (that is an order for an act to be stopped or remedied or other measures that are necessary to ensure that discrimination, harassment, instructions or reprisals cease and to prevent their repetition) - that are seldom used. This makes sanctions in practice less effective than their legislative potential.

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other evidence provided in court, that A's personal abilities were decisive when he was not hired for the job. The court found that there was no evidence in the case that his disability was decisive. The court points in this context especially to two conditions. First, that it was not necessary to make adaptations to the work situation, as both an elevating table and chair are standard at all workstations. Secondly, that the collection agency at the time of the appointment also offered two people positions who were, at the time of the application, on sick leave. Furthermore, the employer had a relatively high number of employees with disabilities, some of whom had considerably greater disabilities than A.

<sup>249</sup> Equality and Antidiscrimination Ombud, *The Ombud's strategic work 2017-2022*.

## **7 BODIES FOR THE PROMOTION OF EQUAL TREATMENT (Article 13 Directive 2000/43)**

- a) Body/bodies designated for the promotion of equal treatment irrespective of racial/ethnic origin according to Article 13 of the Racial Equality Directive

The Equality and Anti-Discrimination Ombud and the Anti-Discrimination Tribunal (Equality Tribunal) are the specialised bodies for the promotion of equal treatment irrespective of racial or ethnic origin according to Article 13 of the Racial Equality Directive.

The organisation and mandate of the Norwegian equality bodies were changed under the new Act on the Equality and Anti-Discrimination Ombud and the Equality and Anti-Discrimination Tribunal of 16 June 2017 No. 50 (EAOA), in force as of 1 January 2018. The Ombud no longer functions as a first instance complaints mechanism, but provides advice to victims of discrimination and others. In 2019, the Ombud has decided to provide assistance in a few cases before the Equality Tribunal, as they have seen that this is necessary to ensure that the complainants' side of the story is adequately described and argued before the tribunal, and thus to achieve effective access to justice.<sup>250</sup> However, this approach is limited to a small number of cases, and to issues that affect many people.

- b) Political, economic and social context of the designated body

There is evidence both of recent positive political support for the designated bodies and of recent political hostility to the designated bodies. On the one hand, one of the political parties in the current multi-party Government has several times stated that it does not want equality bodies, and the Progress Party, the second largest party in the Government coalition, has had two ministers for justice who have repeatedly made racist comments, with apparently limited reactions from the Prime Minister.<sup>251</sup> On the other hand, the same Government has changed the Act on the Equality and Anti-Discrimination Ombud and the Anti-Discrimination Tribunal so as to give the tribunal the power to award damages for injury of a non-pecuniary character upon breach of the act (as of 1 January 2018), as well as several other improvements regarding anti-discrimination measures.<sup>252</sup> It is assumed that this will lead to a greater effectiveness of the legislation as well as increasing access to justice for victims of discrimination.

There is evidence of popular debate that is supportive of equality and diversity and of the designated bodies. In one area, popular debate is, in principle, positive and the political rhetorical debate is supportive of equality and diversity. However, the current Government has pushed forward a number of changes in relation to immigration and migrants that are a cause for concern, given that the plans are fragmented and have been sent on public hearings with short timeframes, making it difficult to understand their consequences. There has also been an increase in hate speech over several years, although from 2016 we have seen an increased awareness and increased responses from both the Government and from the judicial sector.<sup>253</sup>

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<sup>250</sup> Equality and Anti-Discrimination Ombud (2019) *Annual report 2018*, p. 8. Available at: <https://www.ldo.no/nyheiter-og-fag/brosjyrar-og-publikasjonar/Arsrapporter/arsmelding-2018/>.

<sup>251</sup> After the cut-off date for this report, in January 2020, the Progress Party left the Norwegian Government.

<sup>252</sup> For example, changes in the GEADA creating a stricter duty for employers to work proactively against discrimination, which entered into force after the cut-off date for this report, on 1 January 2020.

<sup>253</sup> See, for example, the Government strategy against hate speech [https://www.regjeringen.no/contentassets/72293ca5195642249029bf6905ff08be/hatefulleytringer\\_uu.pdf](https://www.regjeringen.no/contentassets/72293ca5195642249029bf6905ff08be/hatefulleytringer_uu.pdf) and the report Lenz, C., Lid, S., Lorentzen, G., Nilsen, AB., Nustad, P. and Risea, E. (2018), *Tiltak mot hatefulle ytringer: kunnskaps- og tiltaksversikt* (Report on existing knowledge and policies against hate speech). An action plan against hate speech has been announced, and should be published in 2020. In addition an action plan against racism and discrimination on the basis of ethnicity or religion was published in December 2019:

c) Institutional architecture

In Norway, the designated bodies do not form part of a body with multiple mandates, as equality and non-discrimination are the complete and only mandate of both the Ombud and the Equality Tribunal. As such, their only focus is on equality and non-discrimination. The Ombud's work has high public visibility, whereas the work of the Equality Tribunal has almost no visibility in the public domain.

The primary responsibilities of the Ombud are now:

- a. to provide advice and information;
- b. to monitor the implementation of the UN conventions CEDAW, CERD and CRPD; and
- c. to be a driving force regarding anti-discrimination and equality issues.<sup>254</sup>

The Ombud runs courses and presentations on discrimination issues and participates in campaigns with both civil sector and public agencies. It has recently started to provide legal assistance in a few cases before the Equality Tribunal, and since 2018, it has also acted as *amicus curiae* at the request of a lawyer in discrimination cases before the courts, so far only at the request of the lawyer of the claimant.<sup>255</sup>

The Anti-Discrimination and Equality Tribunal (the Equality Tribunal) is an administrative body with limited powers to impose restitution and compensation. The tribunal may only award damages for injury of a non-pecuniary character or compensation for economic losses in connection with employment and can only make decisions about compensation for concrete financial losses in simple cases.<sup>256</sup> Damages for injury of a non-pecuniary character or compensation for economic losses claims must otherwise be filed before the ordinary courts. When the tribunal handles matters concerning regulations or administrative decisions made by a public administrative body, it can only issue a 'statement' on contravention of the GEADA, rather than a 'decision'.<sup>257</sup> Bringing complaints to the Equality Tribunal is not mandatory before going to ordinary courts. However, very few discrimination cases are brought before the courts.<sup>258</sup> Legal aid is not granted in discrimination cases.

The Directorate for Children, Youth and Family Affairs also has a department responsible for obtaining and spreading knowledge both within the public sector and to the general public, through reports, advice and so on, about most of the protected grounds of discrimination, including: gender, sexual orientation, gender identity, persons with disabilities, ethnicity and life stance.<sup>259</sup> They are, however, not independent, and also serve as an advisory body for the ministries as well as implementing Government policies.<sup>260</sup>

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[https://www.regjeringen.no/contentassets/589aa9f4e14540b5a5a6144aaea7b518/handlingsplan-mot-rasisme\\_uu\\_des-2019.pdf](https://www.regjeringen.no/contentassets/589aa9f4e14540b5a5a6144aaea7b518/handlingsplan-mot-rasisme_uu_des-2019.pdf);

[https://www.bufdir.no/globalassets/global/Tiltak\\_mot\\_hatefulle\\_ytringer\\_Kunnskaps\\_og\\_tiltaksoversikt.pdf](https://www.bufdir.no/globalassets/global/Tiltak_mot_hatefulle_ytringer_Kunnskaps_og_tiltaksoversikt.pdf).

<sup>254</sup> See Equality Ombud (2016) *Strategy 2017-2022* available at:

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

<sup>255</sup> A case regarding pregnancy and discrimination, Borgarting court of appeal, Case No. 18-159246ASD-BORG/01. Emails to the author from the Ombud (5 April 2019 and 15 May 2019).

<sup>256</sup> 'Simple cases' entails cases when the complainant is not asserting anything but the inability to pay or other obviously unsustainable objections.

<sup>257</sup> Equality and Anti-Discrimination Ombud Act, LOV-2017-06-16-50, Article 14 on the authority of the 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>.

<sup>258</sup> McClimans, E. (2008) *Rettspraksis om diskrimineringslovgivning* (Legal Practice on Anti-Discrimination Law (NB: Her own translation)). Submitted to the Anti-Discrimination Law Committee (we are not aware of newer reports on this topic).

<sup>259</sup> See Directorate for Children, Youth and Family Affairs (2016) *Strategy for 2017-2020* at [https://bufdir.no/globalassets/global/bufdir\\_strategi\\_2017-2020.pdf](https://bufdir.no/globalassets/global/bufdir_strategi_2017-2020.pdf) and their website <https://www.bufdir.no/Inkludering/>.

<sup>260</sup> Email to the author from BufDir (16 April 2019).

d) Status of the designated bodies – general independence

i) Status of the bodies

The legal status of both the Ombud and the Equality Tribunal are found in the EAOA. They are independent public administrative agencies, administratively subordinate to the King and the ministry, although neither the King nor the ministry may issue instructions to the Ombud or the Equality Tribunal regarding their professional activities.

The Ombud is appointed by the King in Council for a fixed term of six years, in a full-time position. The members of the tribunal are appointed by the King in Council for four years. These members have other full-time positions. They are all lawyers, and the leaders of the three chambers must have the same qualifications as judges have experience as such, unless other particular qualifications make such experience unnecessary (EAOA, Article 6(3)).

Both the Ombud and the Equality Tribunal are financed by the state budget through the Ministry for Culture.

The Ombud has the powers to recruit and manage her staff. The tribunal members have other full-time positions, and are supported in their work by a secretariat who are employed full-time, under the lead of a director of the secretariat who manages the staff. The chairpersons of the tribunal recruit the director, who then recruits and manages the secretariat staff.

Both the Ombud and the tribunal receive their funds in an annual letter of budget allocation from the Ministry for Culture,<sup>261</sup> and they report on the use of these funds in their annual reports to the ministry, which are also published on their website. The Ombud also has bi-annual meetings with the ministry to discuss issues of mutual concern.

The funds allocated through the state budget for 2019 as income for the Ombud were approximately EUR 4 278 065 (NOK 48 020 000) while the budget in 2018 was approximately EUR 4 300 000 (NOK 42 929 000). The Equality Tribunal has a secretariat, whose staff are public employees. The 2019 budget for the secretariat and tribunal was approximately EUR 1 983 127 (NOK 22 260 000), and in 2018, it was approximately EUR 1 860 000 (NOK 18 611 000).<sup>262</sup>

ii) Independence of the bodies

In Norway, the independence of the bodies is stipulated in law. Article 4(2) of the Act on the Equality and Anti-Discrimination Ombud and the Anti-Discrimination Tribunal (EAOA) states that the Ombud is independent and not subject to instructions regarding the Ombud's professional activities. A similar provision in respect of the Equality Tribunal is found in Article 6(1). This independence exists in practice.

e) Grounds covered by the designated bodies

As of 1 January 2018, the grounds covered by the mandate of the equality bodies are gender, pregnancy, leave in connection with childbirth or adoption, care responsibilities, ethnicity, religion, belief, disability, sexual orientation, gender identity, gender expression, age, political views, membership of a trade union, or combinations of these.

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<sup>261</sup> Previously the budget came from the Ministry of Children and Equality.

<sup>262</sup> Numbers from the national budgets of 2018 category 11.10, at [https://www.regjeringen.no/no/dokumenter/prop.-1-s-bld-20172018/id2574097/sec2?q=ombud#match\\_2](https://www.regjeringen.no/no/dokumenter/prop.-1-s-bld-20172018/id2574097/sec2?q=ombud#match_2), from 2019 at [https://www.statsbudsjettet.no/upload/Statsbudsjett\\_2020/dokumenter/pdf/GULBOK.pdf](https://www.statsbudsjettet.no/upload/Statsbudsjett_2020/dokumenter/pdf/GULBOK.pdf).



Both the Ombud and the Equality Tribunal deal with discrimination against migrants through the ground 'ethnicity'. Migrants are not treated as a priority issue.

Neither the Ombud nor the Equality Tribunal have compartmentalised their work according to the different grounds, because the divisions of the Ombud used to be divided into outputs: there was one section dealing with advice, one dealing with individual complaints, one dealing with monitoring the UN conventions CEDAW, CERD and CRPD, one working with communications and one on administration/HR. Given the recent changes in the legislation and to the Ombud's mandate, its divisions have been reorganised such that the new departments are: the Ombud's staff, advice, monitoring and admin/HR.<sup>263</sup> Staff are hired according to their specific expertise according to each discrimination ground, but the principal idea is that all staff within the Ombud's office should have knowledge about all grounds, particularly in order to uncover multiple discrimination.

Gender and disability are the areas that receive most attention, as these are the areas in which there are most individual complaints, however the focus on shadow reports to the UN committees and the monitoring role of the Ombud in relation to the CERD, CEDAW and CRPD means that attention is also given to ethnicity and religion. There is also a working group on LGBTI issues. The discrimination ground with the least number of individual complaints is sexual orientation.<sup>264</sup> Discrimination because of sexual orientation has been worked on in terms of campaigns against hate crime and harassment, in particular in relation to schools and public life, participation in various reference groups, and participation in Pride or other public events. From an external perspective it does not appear that any particular discrimination ground is receiving less attention than the others.

- f) Competences of the designated body/bodies – and their independent exercise
  - i) Independent assistance to victims

The Ombud provides independent assistance to victims by providing advice (EAOA, Article 5(2)). The victim submits a complaint to the Equality Tribunal, which also provides guidance on how to submit a formal complaint.<sup>265</sup>

According to the strategy from 2017, the Ombud will also provide advice to employers and others who are the subject of complaints of discrimination. From 1 January 2018, the mandate is to provide advice to anybody who contacts the Ombud (EAOA, Article 5(2)).

The Ombud has recently also started to assist victims in a few select cases before the Equality Tribunal. In the strategy, the Ombud states that it will give priority to cases that will have an effect on many people, which may prove a problem for small groups such as LGBT groups and minorities within minorities.<sup>266</sup> The Ombud has not yet used its power to support victims in taking claims to court.

The assessment of individual cases of possible breaches of the law is effectively exercised in an independent manner. The assessment of whether or not a breach of the law is found is carried out independently. However, it remains an issue of concern that the tribunal rarely uses the opportunity to make recommendations to the public administration when it is the subject of discrimination complaints.

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<sup>263</sup> See the Ombud's website: [www.ldo.no/nyheiter-og-fag/om-ombudet/ansatte/](http://www.ldo.no/nyheiter-og-fag/om-ombudet/ansatte/).

<sup>264</sup> There is no indication that this is due to fewer cases being reported on this ground; on the contrary, for several years, the LGBTIQ organisations have been doing a lot of work to discover and provide legal aid in discrimination cases.

<sup>265</sup> Email to the author from the Equality Tribunal (16 April 2019).

<sup>266</sup> Anti-Discrimination Ombud (2016) *Strategy for 2017-2022*, paragraph 3; <http://www.ldo.no/nyheiter-og-fag/brosjyrar-og-publikasjonar/Arsrapporter/arsmelding-2016/sammendrag-strategi/>.



Under the legislation in force from 2018, the tribunal has been given the power to award damages for injury of a non-pecuniary character or compensation for economic losses. This may lead to more effective functioning of the tribunal. Damages have been awarded once in 2019, in case no. 18/410. Due to processing delays, the cases are not always dealt with promptly and effectively. An issue of concern, at least in part due to the large number of cases as well as the recent reorganisation and move of the tribunal from Oslo to Bergen, is the very high number of rejections and dismissals of cases: 144 of a total of 244 decisions in 2019 – 59 % of the decisions. Many of these appear debatable, but the facts described in the publicly available decisions are often too few to say for sure. Two of the tribunal's decisions were criticised by the Ombud in its report on legal developments in 2019: cases no. 19/41 concerning whether a parking space would be part of a reasonable accommodation and no. 19/103 on access to IVF for a transgender person. The facts are unclear as to the specifics of this case. Both were case dismissals that the Ombud found insufficiently justified.<sup>267</sup> In addition, the tribunal's decision to interpret the criterion in the Passport regulations for passport photos to include a person's ears as non-discriminatory, in cases no. 65/2018 and 18/94, has been criticised by human rights lawyer and researcher Njål Høstmælingen.<sup>268</sup> Other examples are mentioned elsewhere in this report.<sup>269</sup>

Both the Ombud and the Equality Tribunal have resources available to them, although the move of the tribunal to Bergen as of 1 January 2018 has led to a depletion of skilled staff in the secretariat, as almost none of the previous staff moved, which implies a resource gap while new staff are being trained. Both the Ombud and the Equality Tribunal report that the changes in budget have been proportionate to the organisational changes.<sup>270</sup> The tribunal was enlarged from three to four chambers from 1 January 2020.

## ii) Independent surveys and reports

In Norway, the Ombud does have the competence to conduct independent surveys and publish independent reports (EAOA, Articles 4(2) and 5).

The majority of good-quality reports and broad, independent surveys concerning discrimination are initiated and funded by an agency without independent status, the department for equality and universal design in the Directorate for Children, Youth and Family Affairs (BufDir). This agency focuses on the collection and dissemination of knowledge, both within the public sector and for anyone who requests it. Among other things, it coordinates and monitors the implementation of Government action plans. The reports of the Ombud, in particular as part of her mandate to follow up on Norwegian obligations under the CERD, CEDAW and CRPD, show that this responsibility is effectively exercised in an independent manner. The Ombud also publishes reports on various legal matters, for example on age discrimination and reasonable accommodation.<sup>271</sup>

<sup>267</sup> The Equality and Anti-Discrimination Ombud, 'Discrimination Law 2019. An overview of last year's legal developments' (*Diskrimineringsretten 2019 – En gjennomgang av året sin har gått*), pp. 31-59. The report is available in Norwegian at [https://www.ldo.no/globalassets/ldo\\_2019/03\\_ombudet-og-samfunnet/rapporter/diskrimineringsrett/diskrimineringsretten-2019.pdf](https://www.ldo.no/globalassets/ldo_2019/03_ombudet-og-samfunnet/rapporter/diskrimineringsrett/diskrimineringsretten-2019.pdf).

<sup>268</sup> Høstmælingen, N. (2019) 'Turban difficulties: Human rights challenges regarding the Norwegian requirements of visible ears on passport and ID photographs' (*Turban til besvær: Menneskerettslige utfordringer ved det særnorske kravet om synlige ører på pass- og ID-fotografier*), *Kritisk Juss* no. 3, pp. 98-128.

<sup>269</sup> See section 2.2 on direct discrimination of this report on the Case No. 48/2018 regarding refusal to shake hands with women on the basis of religious convictions in employment. See also section 2.5 on instructions to discriminate regarding Case No. 21/2018.

<sup>270</sup> Emails to the author from the Ombud (5 April 2019) and from the Equality Tribunal (16 April 2019).

<sup>271</sup> Ombud (2014) 'Individual Accommodation for Employees and Jobseekers with Disability', <http://www.ldo.no/link/2d95e9dddad24563af903938afaeab95.aspx?id=1266> and Ombud (2015) 'Age Discrimination in Working Life' <http://www.ldo.no/link/6d30dab282ee4e5cbefceb5076beecb1.aspx?id=1132>. For the first time ever, they have now published a summary of legal developments in 2019, including cases from the European Court of Justice. [https://www.ldo.no/globalassets/ldo\\_2019/03\\_ombudet-og-samfunnet/rapporter/diskrimineringsrett/diskrimineringsretten-2019.pdf](https://www.ldo.no/globalassets/ldo_2019/03_ombudet-og-samfunnet/rapporter/diskrimineringsrett/diskrimineringsretten-2019.pdf).

It is the responsibility of the Directorate for Children, Youth and Family Affairs (BufDir) to order and finance research studies and statistics on anti-discrimination and equality, which are then published on its website.<sup>272</sup> In addition to the website, in 2018 BufDir published two internal reports on universal design, as well as a number of research studies on anti-discrimination and equality, including some produced by the directorate and others commissioned from external research institutions.<sup>273</sup> Although the commission of certain reports may in itself, on rare occasions, be politicised by the sitting Government, the reports themselves are independent.

The Ombud has not prioritised resources to commission studies, nor worked with Statistics Norway to produce studies. The reports it produces on various legal subjects in the field of anti-discrimination play an important role in improving the knowledge on anti-discrimination and equality law both within and outside the Ombud, not least in the implementation of UN conventions and recommendations in national law. As BufDir has the funding and mandate to provide a variety of studies, both smaller and larger, the end result is quite positive regarding knowledge about discrimination issues in Norway.<sup>274</sup>

The level of resources could always be higher, but given that until now the Ombud has been a rather large public institution, it is her internal use of resources that could be reassessed in relation to the different parts of her mandate.

### iii) Recommendations

In Norway, the Equality Tribunal has the power to issue independent recommendations on discrimination issues in relation to private parties, but cannot issue binding recommendations in relation to other public agencies, according to Article 14 of the EAOA. The decision of the Equality Tribunal is a legally binding administrative decision if the case is against a private party as per the EAOA, Article 11. 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 it evaluates the case in relation to the anti-discrimination legislation (see Article 14 of the EAOA). This power is not effectively exercised in an independent manner in practice, as the Equality Tribunal rarely uses the opportunity to provide an opinion on administrative decisions from other parts of the public sector.<sup>275</sup>

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

The Ombud does not have the same limitations and its mandate covers working proactively for equality and against discrimination. This includes providing opinions during the preparatory work for new legislation, and notifying the Government when current legislation is in breach with the anti-discrimination legislation. The current Ombud appears to be rather restrained in her use of the latter opportunity so far.

<sup>272</sup> [https://bufdir.no/Statistikk\\_og\\_analyse/](https://bufdir.no/Statistikk_og_analyse/).

<sup>273</sup> For example, see reports: Directorate of Children, Youth and Family Affairs (2018) *Barrierer i høyere utdanning for personer med nedsatt funksjonsevne*. (Barriers for disabled people in higher education) <https://www.bufdir.no/Bibliotek/Dokumentside/?docId=BUF00004579>; Lenz, C., Lid, S., Lorentzen, G., Nilsen, AB., Nustad, P. and Risea, E. (2018), *Tiltak mot hatefulle ytringer: kunnskaps- og tiltaksoversikt* (Report on existing knowledge and policies against hate speech), <https://www.bufdir.no/Bibliotek/Dokumentside/?docId=BUF00004582> and the report Eggebø, H., Stubberud, E., and Karlstrøm, H. (2018) 'Levekår blant skeive med innvanderbakgrunn' (Living conditions among queer people with an immigrant background in Norway), [http://www.nordlandsforskning.no/getfile.php/1324905-1543846499/Dokumenter/Rapporter/1018/NF\\_9\\_2018.pdf](http://www.nordlandsforskning.no/getfile.php/1324905-1543846499/Dokumenter/Rapporter/1018/NF_9_2018.pdf).

<sup>274</sup> BufDir has, according to an email to the author of 12 April 2019, an annual budget of about EUR 2.6 million (NOK 25 million) for development projects, including research.

<sup>275</sup> See, for example, Equality Tribunal, Case No. 19/124 and 19/11. See also below on effectiveness.

For several reasons, the effectiveness of the Equality Tribunal's recommendations still leaves a lot to be desired. First, 30 of the 157 cases from 2018 and 144 of 244 decisions from 2019<sup>276</sup> were rejected or dismissed, many of which on the recently added justification of being 'clearly not in breach' of Article 1 of the GEADA. As few members of the tribunal seem to have experience in the anti-discrimination field,<sup>277</sup> 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 (as provided in EAOA, Article 10(2)).<sup>278</sup> Secondly, many of the cases brought before the Equality Tribunal concern discrimination from various parts of the public administration. It is a cause for concern that the tribunal rarely chooses to provide 'opinions' in such cases, when it has the mandate to do so. However, the tribunal does follow up cases where it issues an order, for example, in a number of cases in 2018 regarding universal design of the websites of the main political parties.<sup>279</sup>

When they are issued, recommendations regarding equality and non-discrimination are usually given careful consideration by employers, public administration offices and others, and the main barrier to implementation usually appears to be the cost of the measure in question.

Both the Ombud and the Equality Tribunal have resources available to them, although the move of the tribunal to Bergen as of 1 January 2018 has led to a depletion of skilled staff in the secretariat, given that almost none of the previous staff moved, which implies a resource gap while new staff are being trained. Both the Ombud and the tribunal report that the changes in budget have been proportionate to the organisational changes.<sup>280</sup>

#### iv) Other competences

The Equality Tribunal only assesses individual cases of discrimination, including the active equality efforts stipulated in the law in relation to whether or not public authorities, employers and employees fulfil their duties to promote equality within their fields.

According to the EAOA as of 1 January 2018, the mandate of the Equality and Anti-Discrimination Ombud is to promote real equality and work against discrimination on the basis of gender, pregnancy, ethnicity, religion, disability, sexual orientation, gender identity, gender expression and age. As of March 2019, the new regulations for her work have not yet been issued. The Ombud's strategy from 2017 to 2022 gives priority to:

1. strengthening its monitoring role regarding the UN Conventions CEDAW, CERD and CRPD;
2. prevention instead of reaction;
3. issues that concern many people;
4. cooperation with NGOs;
5. writing reports and using them in the public debate.<sup>281</sup>

<sup>276</sup> 57 cases were rejected, 87 were dropped, 41 concluded with a finding that there had been a breach of the GEADA, and 59 concluded that the GEADA had not been breached. In addition, 67 ended without any decision. <https://diskrimineringsnemnda.no/klagesaker-og-statistikk/søkkklagesaker>.

<sup>277</sup> <https://diskrimineringsnemnda.no/nemndas-medlemmer>.

<sup>278</sup> See, for example Case No. 239/2018, which is, at best, too brief to justify the dismissal. The Ombud also mentions these issues in their report on recent legal developments in Anti-Discrimination law, available at [https://www.ldo.no/globalassets/ldo\\_2019/03\\_ombudet-og-samfunnet/rapporter/diskrimineringsrett/diskrimineringsretten-2019.pdf](https://www.ldo.no/globalassets/ldo_2019/03_ombudet-og-samfunnet/rapporter/diskrimineringsrett/diskrimineringsretten-2019.pdf).

<sup>279</sup> The Equality Tribunal, Cases Nos. 13/2018, 14/2018, 15/2018, 16/2018, 17/2018 and 18/2018. There were none in 2019.

<sup>280</sup> Emails to the author from the Ombud (5 April 2019) and from the Equality Tribunal (26 April 2019).

<sup>281</sup> Equality Ombud (2016) *Strategy for 2017 – 2022*.

The Ombud provides a number of courses on various discrimination issues and participates in campaigns together with NGOs and other parts of the public administration.<sup>282</sup> The Ombud herself also participates in the public debate.<sup>283</sup>

g) Legal standing of the designated body/bodies

In Norway, the Ombud in theory has legal standing to:

- bring discrimination complaints (on behalf of identified victims) to court;
- bring discrimination complaints (on behalf of non-identified victims) to court;
- bring discrimination complaints *ex officio* to court;
- intervene in legal cases concerning discrimination, such as *amicus curiae*.

In practice, the Ombud has only intervened in one court case (several years ago), and as such has not made use of that part of the mandate. From 2019, the Ombud has brought selected discrimination complaints to the Equality Tribunal.<sup>284</sup> Occasionally legal experts from the Ombud act as *amicus curiae* if requested to do so by one of the lawyers.

The basis for how the Ombud selects cases is found in the Ombud strategy, and the most relevant criterion is no. 3, 'issues that concern many people'. The selection process is complex, as the Ombud has many different tools to promote an issue, but is reasonably transparent.

In Norway, the Equality Tribunal does not have legal standing to carry out any of the legal actions listed above.<sup>285</sup>

h) Quasi-judicial competences

In Norway, the Equality Tribunal is a quasi-judicial institution.

From 1 January 2018, the Ombud no longer provides opinions in individual cases, except by giving information and advice (EAOA, Article 5). The Equality Tribunal makes decisions regarding individual complaints on breaches of the law, supported by a secretariat that prepares the cases. A new regulation for the Equality Tribunal that came into force as of 1 January 2018 describes the organisation, areas of responsibility and the processing of cases by the tribunal.<sup>286</sup> All cases are now prepared in writing, but the chairpersons of the tribunal can decide to have an oral hearing if they deem it necessary.<sup>287</sup>

The Equality Tribunal is a permanent body that has been entrusted by law to exercise its functions and its composition is defined by law (see EAOA, Article 6). It must apply the law and is an independent body, as its members are external appointees, selected on personal merit.

A decision of the Equality Tribunal is a legally binding administrative decision if the case is against a private party, as provided by the EAOA in Article 11. 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 seen in relation to the discrimination legislation (EAOA, Article 14). In accordance with a previous landmark

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<sup>282</sup> Email to the author from the Ombud (5 April 2019).

<sup>283</sup> After the cut-off date for this report, from 1 January 2020, the Ombud monitors the proactive duties of employers and the public administration reintroduced into the GEADA from the same date, see EAOA Article 5(4) and GEADA Articles 24, 25, 26 and 26a.

<sup>284</sup> Equality Tribunal, Cases Nos. 19/3 and 19/114.

<sup>285</sup> EAOA, 2018, Chapter 3.

<sup>286</sup> See, the Regulations concerning the organisation, policies and procedures for the Equality and Anti-Discrimination Tribunal, Article 5, FOR-2017-12-20-2260.

<sup>287</sup> This has happened twice since 1 January 2018, in Cases Nos. 18/47 and 18/201.

case from the Parliamentary Ombudsman, a party to a case should either fulfil the decisions of the Equality Tribunal or forward the case to the ordinary courts.<sup>288</sup>

The Equality Tribunal has (from 1 January 2018) the right according to the law to award damages for injury of a non-pecuniary character and compensation for economic losses. Article 12 of the EAOA provides that the tribunal may make an administrative decision concerning damages for injury of a non-pecuniary character in the context of an employment relationship under the GEADA (Article 38, second paragraph, first sentence) and the WEA (Article 13-9). This includes the treatment of self-employed people and hired workers. This means that in cases regarding, for example, harassment outside of employment, the only thing that a victim can obtain from the tribunal decision is a statement that they have been discriminated against.

However, the Equality Tribunal may order the cessation, correction and other necessary actions in order to ensure that the discrimination, harassment, instruction or victimisation ceases, or to prevent repetition (EAOA, Article 11). This does not include administrative decisions (EAOA, Article 14) and issues within the jurisdiction of the Labour Court (EAOA, Article 15).

The Equality Tribunal can unanimously award compensation for economic losses in all types of cases within its jurisdiction, but only when the compensation issue is fairly simple.<sup>289</sup> The tribunal has used its increased opportunity to award damages or compensation once, in case no. 18/410 regarding pregnancy.

The fact that the tribunal cannot award damages for injury of a non-pecuniary character in cases concerning issues outside employment relationships is also problematic, as the result is that there are no effective sanctions against, for example, harassment outside employment.

Where a party does not pay compensation according to the decision of the Equality Tribunal, the parties to the case may bring an ordinary complaint before the courts, as described above.

There is no way of appealing a decision of the Equality Tribunal other than bringing it to the ordinary courts.

The tribunal follows up those cases where it had issued an order, for example in respect of several cases regarding universal design of the websites of the main political parties.<sup>290</sup> The tribunal checked whether the necessary changes had been done within the deadline. In its decisions, it made clear that it has the power to set a fine if the parties did not comply by the set deadline, as provided by Article 13 of the EAOA.<sup>291</sup>

The decisions of the Equality Tribunal are generally well respected.

#### i) Registration by the body/bodies of complaints and decisions

In Norway, the Ombud registers the number of inquiries received, complaints of discrimination made and decisions by ground and field, but has only published statistics

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<sup>288</sup> The Ombud stated in a landmark decision of 1993 that public authorities that do not wish to comply with the statements of the Ombud have a duty to appeal the case to the tribunal for a final decision. A non-appeal to the tribunal by public authorities is seen as an implicit acceptance of the Ombud's conclusions.

<sup>289</sup> EAOA, 2018, Articles 12 and 2.

<sup>290</sup> According to an email of 12.4.2019 from the Equality Tribunal to the author. Equality Tribunal, Cases Nos. 13/2018, 14/2018, 15/2018, 16/2018, 17/2018 and 18/2018. There were no cases in 2019 where the tribunal issued any orders.

<sup>291</sup> This was a strategic litigation case carried out by the NGO Stopp Diskrimineringen, targeting all the major political parties. The decisions were therefore very similar in all six cases.

to 2015 on its website.<sup>292</sup> More detailed statistics are available upon request to the Equality and Anti-Discrimination Ombud at [www.ldo.no](http://www.ldo.no). In 2019, the Ombud provided advice in a total of 1 988 cases (compared to 2 035 in 2018). Of those cases: 472 concerned disability; 196 ethnicity (including language, where there were 26 cases); 109 age; 37 religion; 20 sexual orientation; 365 concerned other grounds (such as membership in trade union, political views or grounds not covered); and 130 concerned several grounds (the number of cases that actually concerned multiple discrimination is unknown).<sup>293</sup> Of the fields covered, 1 004 cases concerned employment, 257 concerned goods and services, 205 concerned public administration, 127 related to education, 73 related to housing, 26 concerned the police and the judiciary, and 296 cases concerned other parts of society.<sup>294</sup>

The Equality Tribunal publishes its decisions in an online database and systematically registers some other statistical data.<sup>295</sup> Decisions were made in 244 cases in 2019.<sup>296</sup>

#### j) Stakeholder engagement

In Norway, the Ombud engages with stakeholders as part of implementing its mandate, but the Equality Tribunal does not.

For several years, the Ombud has had an advisory group consisting of representatives of various NGOs working on discrimination (*brukerutvalg*), hosting four to six meetings annually. For the period 2018-2020, the advisory group consists of representatives of 14 different civil society associations that represent various discrimination grounds.<sup>297</sup> In the Ombud's strategy for 2017 to 2022, cooperation with NGOs and other stakeholders is a priority issue.<sup>298</sup>

The Ombud has not initiated any organised networks with employer or service provider groups, but, through her participation in an annual political week called *Arendalsuka*, she is in regular contact with such organisations, especially with employer and employee organisations. There is also an on-going cooperation with the Labour inspection unit and with the armed forces regarding sexual harassment.

The Ombud ran a number of seminars and conferences in 2019, in which stakeholders were invited as speakers and guests.

#### k) Roma and Travellers

Neither the Ombud nor the Equality Tribunal currently treat Roma and Travellers as a priority issue.

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<sup>292</sup> <https://www.ldo.no/nyheiter-og-fag/ldos-statistikk/>. Except for in the 2018 report, the Ombud has published an overview of the number cases according to grounds of discrimination and field in their annual report. See <https://www.ldo.no/en/nyheiter-og-fag/brosjyrar-og-publikasjoner/Arsrapporter/>.

<sup>293</sup> Email from the Equality Ombud 23.03.2020. In 2018, 378 cases concerned disability; 243 ethnicity (including language, where there were 37 cases); 86 age; 62 religion; 18 sexual orientation; 332 concerned other grounds (such as membership in trade union, political views or grounds not covered); and 152 concerned several grounds (the number of cases that actually concerned multiple discrimination is unknown). Also, 339 cases concerned pregnancy and/or parental leave, 380 cases sex and/or gender, 21 care responsibilities, and 24 cases gender identity.

<sup>294</sup> Email from the Equality Ombud 23.03.2020. In 2018, 1 101 cases concerned employment, 266 concerned goods and services, 217 concerned public administration, 148 related to education, 85 related to housing, 26 concerned the police and the judiciary, and 192 cases concerned other parts of society.

<sup>295</sup> <https://diskrimineringsnemnda.no/klagesaker-og-statistikk/s%C3%B8kklagesaker>.

<sup>296</sup> Decisions were made in 157 cases in 2018, and in 58 cases in 2017. Equality Tribunal (2018) *Annual Report for 2017* and Equality Tribunal (2019) *Annual Report for 2018*, available at <http://diskrimineringsnemnda.no/nb/innhold/side/rapport>.

<sup>297</sup> See <https://www.ldo.no/ombudet-og-samfunnet/om-ombudet/ombudet/brukerutvalg/> for a list of the names of the 14 associations.

<sup>298</sup> Equality Ombud (2016) *Strategy for 2017 – 2022*, available at: <http://www.ldo.no/nyheiter-og-fag/brosjyrar-og-publikasjoner/Arsrapporter/arsmelding-2016/sammendrag-strategi/>.

## 8 IMPLEMENTATION ISSUES

### 8.1 Dissemination of information, dialogue with NGOs and between social partners

- a) Dissemination of information about legal protection against discrimination (Article 10 Directive 2000/43 and Article 12 Directive 2000/78)

The Ombud had a specific duty to disseminate information about legal protection against discrimination,<sup>299</sup> but this is no longer specified anywhere. The current mandate of the Ombud is:

- to promote equality and prevent discrimination on the basis of sex and gender, pregnancy and, parental leave, care work, ethnicity, religion, life stance, 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.<sup>300</sup>

Additionally, public authorities have a general proactive duty according to Articles 24-26 of the GEADA, to make active, targeted and systematic efforts to promote non-discrimination policies and measures regarding ethnicity, sexual orientation and disability in all sectors of society. This includes dissemination of information. The department for equality and universal design in the Directorate for Children, Youth and Family Affairs (BufDir), plays a major role in fulfilling this duty. The department's recently developed strategy has five aims:

1. contribute to an equal and inclusive educational and working life;
2. increase knowledge and awareness about discrimination within the areas of responsibility of the various ministries and in the population at large;
3. provide available, up to date and applicable statistics, indicators and knowledge about equality and universal design;
4. promote cooperation and coordination for a holistic and targeted effort; and
5. develop their work with inclusion and equality as an employer.<sup>301</sup>

A proactive duty is also required from employers with more than 50 employees. However, since there is no duty for employers to report on their efforts regarding grounds other than sex and gender, this proactive duty has limited effect.

- b) Measures to encourage dialogue with NGOs with a view to promoting the principle of equal treatment (Article 12 Directive 2000/43 and Article 14 Directive 2000/78)

Although there are no formal rules in the anti-discrimination legislation on dissemination of information, social dialogue or dialogue with NGOs by the authorities, there is a broad tradition in Norway to regularly undertake public consultations with NGOs and social partners. NGOs and social partners are in general invited to participate in referee groups when new legal proposals are being drafted, and are also recipients of white papers and law proposals for consultative purposes before legislation is enacted. The various action plans (see chapter 9 below) are usually drafted and implemented in close collaboration with NGOs and social partners.

The Directorate for Children, Youth and Family Affairs (BufDir), and especially the Ombud, cooperate with NGOs systematically.<sup>302</sup> Although recommendations from NGOs

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<sup>299</sup> AOT regulations, Article 1.

<sup>300</sup> EAOA, 2018, Article 5.

<sup>301</sup> Email to the author from BufDir (12 April 2019).

<sup>302</sup> Emails to the author from BufDir (12 April 2019) and the Ombud (12 April 2019), translated by the author.



used to play an important part in the recruitment of members of the Equality Tribunal, this is no longer the case.

- c) Measures to promote dialogue between social partners to give effect to the principle of equal treatment within workplace practices, codes of practice, workforce monitoring (Article 11 Directive 2000/43 and Article 13 Directive 2000/78)

There are a number of initiatives in relation to promoting dialogue between social partners to give effect to the principle of equal treatment through workplace practices, codes of practice and workforce monitoring. This is done through projects by the Ministry for Children and Equality, the Directorate for Children, Youth and Family Affairs (BufDir) and the Equality Ombud, as well as by trade unions.<sup>303</sup> The effect of such projects was questioned in a white paper on the structure of the Norwegian Government's policy implementation in relation to equality and discrimination.<sup>304</sup> The same report proposed the creation of the directorate responsible for the coordination of this work, which led to the creation of the department of equality and anti-discrimination in the Directorate for Children, Youth and Family Affairs. The department lists the following main tasks:

- to provide a good knowledge basis and promote equality in all areas of society;
- to have a holistic perspective and initiate work for equality on all grounds of discrimination;
- to have a targeted and established corporation with selected sectors;
- to coordinate efforts and implement government policies across all sectors; and
- to contribute to equivalent services from the public sector.<sup>305</sup>

The sitting Government has been sceptical toward proactive duties for employers. However, under pressure from the Parliament majority, it has now presented a proposal to strengthen this duty with regard to gender equality.<sup>306</sup>

- d) Addressing the situation of Roma and Travellers

Although there are very few Roma and Travellers in Norway, the Equality Ombud has repeatedly addressed some of the key issues seen in relation to Roma and Travellers, and has been praised for her role in fighting discrimination against the Roma. In her 2010 report to the UN CERD committee, the Equality Ombud addressed the areas of critical concern: that the Roma's access to basic rights is denied unless they discontinue their traditional way of life. In relation to schooling, the Ombud is concerned that the Travellers are being made responsible for the consequences of the failure to adjust Norwegian school policy to the traditional manner of travelling. The Roma people are furthermore systematically denied access to campsites and restaurants on the grounds that they belong to a national minority. In her 2018 report to the UN CERD committee, the Ombud reiterated her previous concerns related to schooling and housing, negative attitudes and harassment, focusing on the lack of knowledge about these groups.<sup>307</sup> At a policy level, the Ombud has thus been a public voice speaking out against the discrimination of the Roma in Norwegian society.

<sup>303</sup> See for example, Directorate-General for Employment, Social Affairs and Inclusion (European Commission) (2010) 'Trade union practices on anti-discrimination and diversity', EC DG 4. Report available at: <https://publications.europa.eu/en/publication-detail/-/publication/d6856f18-7ba2-478a-b141-386d1f085482>.

<sup>304</sup> For example in the official report NOU 2011:18 Structure for Equality, Chapter 7. See <http://www.regjeringen.no/nb/dep/bld/dok/nouer/2011/nou-2011-18.html?id=663064> (in Norwegian). For an English summary of the report, see [https://www.regjeringen.no/globalassets/upload/bld/nou18\\_ts.pdf](https://www.regjeringen.no/globalassets/upload/bld/nou18_ts.pdf).

<sup>305</sup> Email to the author from BufDir (12 April 2019), translated by the author.

<sup>306</sup> <https://www.regjeringen.no/no/aktuelt/styrking-av-aktivitets--og-redegjorelsesplikten-pa-likestillingsområdet/id2606813/>.

<sup>307</sup> Norwegian Equality and Anti-discrimination Ombud (2018) *ICERD 2018: the Ombud's Report to the UN Committee on the Elimination of Racial Discrimination – a supplement to Norway's 23rd/24th Periodic Report*, [https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/NOR/INT\\_CERD\\_IFN\\_NOR\\_32892\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/NOR/INT_CERD_IFN_NOR_32892_E.pdf).



The Roma National Association in Norway (Taternes Landsforening)<sup>308</sup> is used as a dialogue point for organised interaction between the Roma community and the Equality Ombud as well as with different ministries. This includes, among others, the Ministry of Children and Equality, the Ministry of Labour and Social Affairs, the Ministry of Education and Research, the Ministry of Local Government and Modernisation, and the Ministry of Health and Care Services.

A key challenge in the Norwegian setting in relation to Roma is that there are very few of them,<sup>309</sup> and little knowledge exists about the discrimination that they face both at an individual and structural level. The previous Government action plan to improve the situation of the Roma is limited to Oslo, as this is where most Roma have a connection or reside for a larger share of their time.<sup>310</sup>

The Government aimed to use the action plan to develop measures to allow real opportunities for the Roma to use already-established welfare systems within education, employment, health and housing. An evaluation of the action plan carried out by the Norwegian research institution FAFO in 2014 showed that the action points had not resulted in less discrimination against the individuals of the group. FAFO found that the action plan had led to little improvement in the living conditions of the group as a whole, although the work on the action points had led to a more precise understanding of relevant upcoming action points.<sup>311</sup> A new action plan has not been produced.

## **8.2 Measures to ensure compliance with the principle of equal treatment (Article 14 Directive 2000/43, Article 16 Directive 2000/78)**

### **a) Compliance of national legislation (Articles 14(a) and 16(a))**

Norway has taken the necessary measures to ensure that laws, regulations and administrative provisions are not contrary to the principle of equal treatment, even if there is still a need for interpretation and other measures. Before implementing international legislation in Norway, the national legislation was reviewed to ensure compliance.

A challenge is posed in relation to the 'normal' principles of interpretation in law, where the traditional principles of interpretation are used, such as *lex specialis* etc. This was demonstrated in the Supreme Court judgment of 18 February 2010, where the Seaman's Act was referred to as *lex specialis* in relation to non-discrimination clauses, and a 62-year retirement age for seamen was thus accepted.<sup>312</sup>

Of note is a recent Supreme Court Judgment regarding the principle of equal treatment in public administration in general, not just discrimination law (see chapter 12.2, Case HR-2019-273-A).<sup>313</sup> The case concerned tax law, with a focus on the principle of equal treatment and when it applies in the public administration's decision-making. The tax authorities had interpreted the law in a way that the claimant saw as unjustified differential treatment. Before this judgment the common interpretation was that this

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<sup>308</sup> See <http://www.taterne.com/> (in Norwegian).

<sup>309</sup> Approximately 700 persons belong to a traditional group of Roma people living mainly in the Oslo area, while estimates put the number of Travellers at around a few thousand people. Statistics from Statistics Norway and the Government action plan to promote equality and prevent ethnic discrimination 2009-2012, [https://www.regjeringen.no/globalassets/upload/bld/planer/2009/hpl\\_etnisk\\_diskriminering.pdf](https://www.regjeringen.no/globalassets/upload/bld/planer/2009/hpl_etnisk_diskriminering.pdf), and the Government action plan for improving the living conditions of Roma in Oslo [https://www.regjeringen.no/globalassets/upload/fad/vedlegg/sami/handlingsplan\\_2009\\_rom\\_oslo.pdf](https://www.regjeringen.no/globalassets/upload/fad/vedlegg/sami/handlingsplan_2009_rom_oslo.pdf).

<sup>310</sup> See [http://www.regjeringen.no/nb/dep/fad/dok/rapporter\\_planer/planer/2009/Handlingsplan-for-a-bedre-levekarene-for-rom-i-Oslo.html?id=594315](http://www.regjeringen.no/nb/dep/fad/dok/rapporter_planer/planer/2009/Handlingsplan-for-a-bedre-levekarene-for-rom-i-Oslo.html?id=594315).

<sup>311</sup> Tyldum, G. and Friberg, J.H. (2014), *Et skritt på veien. Evaluering av Handlingsplan for å bedre levekårene blant rom i Oslo*, FAFO-rapport 2014:50 (in Norwegian) at <http://www.faf.no/images/pub/2014/20397.pdf>.

<sup>312</sup> Supreme Court, Judgment Rt 2010 s 202, (HR-2010-00303-A) (*Kystlink*).

<sup>313</sup> Available at: <https://lovdata.no/pro/#document/HRsIV/avgjorelse/hr-2019-273-a> (login required).

principle was only applicable in situations where the public administration is allowed so-called free discretion. The public administration's 'free discretion' is seen as opposed to pure interpretation of a law, and concerns legal standards in narrow fields, often closely linked to the facts and science in a particular field, which the public administration has very good knowledge of and which the courts should be very reticent about overruling. This limited application of the principle of equal treatment was corrected by the Supreme Court, which concluded that the principle of equal treatment was applicable also to the interpretation of the law itself. The court could therefore address the question at hand, which concerned the public administration's discretion when interpreting the law (which is not considered part of its free discretion) and whether its interpretation of the law itself was in breach of the principle of equal treatment. However, when the public administration has interpreted the law correctly, extraordinary circumstances are required in order to overrule the decision on the basis of a breach of the principle of equal treatment.

This judgment has created some debate among lawyers, both regarding the extent to which the interpretation of the law may be subject to being overruled on the basis of this principle, and the need for such an extension of the use of this principle. Those not in favour of the extension argue, for example, that the courts have full authority to overrule the interpretation of the law by the public administration, and that the aim of the courts' adjudication is to ensure that the law has been interpreted correctly, not to ensure equal treatment. Those in support of the extension argue, among other things, that the public administration also uses its discretion when the law is interpreted, so there is no real reason for treating the different areas of discretion differently. If the question concerns any of the protected grounds of discrimination, the GEADA applies in any case, but the case also clarifies the scope of use of the GEADA.

There are no known laws or regulations or rules that are contrary to the principle of equality still in force, as in theory all legislative areas are assessed before the implementation of new directives and acts. However, the case work of the Equality Ombud shows a number of breaches to the acts, so full compliance cannot be claimed. Most such cases concern more recently added protected grounds, such as sexual orientation and gender identity. Two such cases were raised before the Equality Tribunal in 2018.

Case 1/2018 focused on whether the regulations regarding co-maternity are discriminatory because couples of opposite sexes can declare parenthood while same-sex couples must apply for parenthood. Case 284/2018 concerned the question whether the rules regarding family reunification and establishment in the Immigration Act<sup>314</sup> and its regulations are discriminatory towards same-sex couples. Both were dismissed on the basis that the Equality Tribunal does not have the authority to evaluate the actions of the Parliament with regard to the discrimination acts (EAOA, Article 1(3)).

#### b) Compliance of other rules/clauses (Articles 14(b) and 16(b))

Norway has not taken the necessary measures to ensure compliance with Article 14(b) and Article 16(b) of Directive 2000/43 in order to ensure that contracts, collective agreements, internal rules of businesses and the rules governing independent occupations, professions, workers' associations or employers' associations that are contrary to the principle of equal treatment are or may be, declared null and void or are amended.

The WEA Article 13-9(2) contains a specific clause that provisions laid down in collective agreements, regulations, bylaws etc. will be declared null and void if they are in breach

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<sup>314</sup> Act relating to the admission of foreign nationals into the realm and their stay here (Immigration Act) of 15 May 2008, No. 35.

of the WEA Chapter 13 on discrimination. In a case before the Equality Tribunal, the tribunal found that an agreement in breach of the ADA or the GEA should also be assumed to be void.<sup>315</sup> However, this provision only refers to Chapter 13 of the WEA. There is no such provision regarding the majority of the grounds of discrimination that are covered by the GEADA. The only grounds protected by the wording of this provision today are age in employment and membership of a trade union

For collective agreements, if a provision is found to be against the law, it will be declared null and void by the Labour Court and any compensation that is paid will date back to the moment the invalid provision was put in force.<sup>316</sup>

Contracts and internal rules of businesses may be reviewed by the Equality Tribunal through the complaints procedure.<sup>317</sup> However, in a case concerning the clauses of a proposed contract, the Equality Tribunal stated that it was a prejudicial question that had to be reviewed by the court as part of the contractual dispute, and dismissed the case.<sup>318</sup>

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<sup>315</sup> See Equality Tribunal, Case No. 26/2009.

<sup>316</sup> See for instance the Labour Court Judgment ARD-1990-148 – Bio Engineers.

<sup>317</sup> The preparatory works, Proposition to parliament, Prop. 88 L (2012-2013) Chapter 4.7.4 state that 'the tribunal cannot determine make decisions where a collective agreement is valid, how it should be interpreted, or regarding its existence. However, the tribunal can give a justified opinion on whether a collective agreement or part of the collective agreement is in breach of one of the prohibitions against discrimination.'

<sup>318</sup> Equality Tribunal, Case No. 21/2018.

## 9 COORDINATION AT NATIONAL LEVEL

The Ministry of Children and Equality is usually responsible for dealing with anti-discrimination in relation to the grounds covered by the GEADA, but late in 2018 the 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 taking the post of the Minister for Children, Youth and Family Affairs.

The Ministry for Labour and Social Affairs is responsible for dealing with the anti-discrimination provisions of the WEA, which relate to age. Additionally, the Ministry for Labour and Social Affairs is responsible for the work on an inclusive working life, which is targeted at employees temporarily or permanently disabled and measures to promote their return to paid employment. A job strategy for young people with disabilities was presented in January 2012.<sup>319</sup>

The Ministry for Local Government and Modernisation is responsible for Samis and national minorities.<sup>320</sup>

The Ministry for Justice and Public Security is responsible for immigration, while the Ministry for Knowledge and Education is responsible for integration issues.

In a white paper on the organisation of the Norwegian Government's policy implementation on equality and anti-discrimination, the lack of coordination and cooperation across different sectors was strongly criticised.<sup>321</sup> To remedy this, the same report proposed the creation of a directorate responsible for the coordination of such work, which led to the creation of the department of equality and anti-discrimination in the Directorate for Children, Youth and Family Affairs. The department lists the following aims:

- to provide a good knowledge basis and promote equality in all areas of society;
- to have a holistic perspective and initiate work for equality on all grounds of discrimination;
- to have a targeted and established corporation with selected sectors;
- to coordinate efforts and implement Government policies across all sectors; and
- to contribute to equivalent services from the public sector.<sup>322</sup>

Among other things, the department plays a major role in developing and implementing Government action plans.

There is a Government strategy against hate speech, which expires in 2020. Since several serving and previous ministers in this Government have used hate speech in public on several occasions,<sup>323</sup> this strategy cannot be called a success.

The Government plan of action against discrimination because of sexual orientation, gender identity and gender expression covers the period 2017-2020, and contains 43 specific measures to be implemented during that time. The title of the action plan is: 'Safety, openness and diversity: the Government plan of action against discrimination because of sexual orientation, gender identity and gender expressions'. The title aptly

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<sup>319</sup> See, <https://www.regjeringen.no/en/dokumenter/jobstrategy/id657116/> in English.

<sup>320</sup> <https://www.regjeringen.no/no/dep/kmd/id504/>.

<sup>321</sup> NOU 2011:18 Structure for Equality. See <http://www.regjeringen.no/nb/dep/bld/dok/nouer/2011/nou-2011-18.html?id=663064> (in Norwegian). For an English summary of the report, see [https://www.regjeringen.no/globalassets/upload/bld/nou18\\_ts.pdf](https://www.regjeringen.no/globalassets/upload/bld/nou18_ts.pdf).

<sup>322</sup> Email to the author from BufDir (12 April 2019), translated by the author.

<sup>323</sup> This concerns several of the former ministers from the Progress Party. This party has now left the Government coalition. For example, a former Minister for Justice, Per Willy Amundsen, has repeatedly, especially after leaving his post as a minister, made dehumanising and generalising statements about immigrants and Muslims.

describes the key focus of the action plan, which is to ensure safe neighbourhoods and public spaces, equal public services and livelihoods for particularly vulnerable groups. The plan should, in addition to combating discrimination, help to ensure the rights of lesbians, gays, bisexuals, transgender and intersex persons.<sup>324</sup> The action plan includes, for the first time in Norway, several initiatives that deal with the rights of intersex persons, such as developing research-based knowledge about the situation of intersex people in Norway. The measures linked to employment in the action plan are few, but increased attention to the SOA and GEADA and support for the implementation of the acts in working life are among the measures. Most of the measures have been fulfilled at least to some degree, often through the work of BufDir.

The action plan for improved accessibility and promoting universal design for people with disabilities, called 'Norway Universally Accessible 2025: on accessibility and universal design 2009-2013'<sup>325</sup> was followed up with a new action plan for universal design 2015-2019.<sup>326</sup> In a decision of December 2016, universal access of ICT is made a condition within education by 1 January 2021.<sup>327</sup> A new holistic Government plan of action for improving the quality of life of people with disabilities was published in 2019, called 'A society for all – the Government's strategy for equality for people with disabilities 2020-2030'.<sup>328</sup> This strategy focuses on:

- developing both universal and specialised solutions;
- promoting self-determination, participation and inclusion;
- improved coordination in all areas; and
- four targeted areas of society: education, employment, health and care, and culture and leisure.

This action plan was not well received by the civil society organisations, which criticised it for not addressing a number of issues raised by the CRPD committee, and for otherwise lacking both funding and ambition.<sup>329</sup> A new action plan on universal design is promised from 2021.<sup>330</sup>

The other action plan published in 2019 concerned racism and discrimination based on ethnicity and religion.<sup>331</sup> It includes measures such as research, a cross-ministry coordination group at the political level, a decision to try anonymous applications in public administration in ordinary hiring procedures, so that at least the first bar of stereotyping is removed. Other measures include information campaigns, for example on how to make complaints regarding discrimination on the basis of ethnicity and religion. A number of measures aim to improve equal public services, including education. Roma are mentioned as a group at risk regarding ethnic discrimination, but no measures target

<sup>324</sup> Norwegian Government (2016) *Trygghet, mangfold, åpenhet. Regjeringens handlingsplan mot diskriminering på grunn av seksuell orientering, kjønnsidentitet og kjønnsuttrykk 2017-2020* at [https://www.regjeringen.no/contentassets/6e1a2af163274201978270d48bf4dfbe/lhbt\\_handlingsplan\\_web.pdf](https://www.regjeringen.no/contentassets/6e1a2af163274201978270d48bf4dfbe/lhbt_handlingsplan_web.pdf).

<sup>325</sup> See [https://www.regjeringen.no/globalassets/upload/bld/homofile20og20lesbiske/universell\\_utforming.pdf](https://www.regjeringen.no/globalassets/upload/bld/homofile20og20lesbiske/universell_utforming.pdf).

<sup>326</sup> See the Government's 'Action Plan for Universal Design 2015-2019' at [https://www.regjeringen.no/contentassets/565cb331b0ee4bb4b997157a543a51d4/the-governments-action-plan-for-universal-design-20152019\\_q-1233-e.pdf](https://www.regjeringen.no/contentassets/565cb331b0ee4bb4b997157a543a51d4/the-governments-action-plan-for-universal-design-20152019_q-1233-e.pdf) (in English).

<sup>327</sup> See (in Norwegian) <https://www.regjeringen.no/no/aktuelt/innforer-krav-om-universell-utforming-av-ikt-i-utdanningen/id2521801/>.

<sup>328</sup> Norwegian Government (2019) *Et samfunn for alle – Likestilling, demokrati og menneskerettigheter* Regjeringens handlingsplan for likestilling av personer med funksjonsnedsettelse 2020–2025, p. 25, at <https://www.regjeringen.no/contentassets/4538c7392f3d417a8d7cc48965a603c9/et-samfunn-for-alle---regjeringens-handlingsplan-for-likestilling-av-personer-med-funksjonsnedsettelse-des-2019.pdf>.

<sup>329</sup> <https://velferd.no/velferd/2019/knusende-kritikk-av-handlingsplan-for-funksjonshemmede>.

<sup>330</sup> Norwegian Government (2019) *Et samfunn for alle – Likestilling, demokrati og menneskerettigheter* Regjeringens handlingsplan for likestilling av personer med funksjonsnedsettelse 2020–2025, p. 25.

<sup>331</sup> Norwegian Government (2019) *Regjeringens handlingsplan mot rasisme og diskriminering på grunn av etnisitet og religion 2020–2023* at [https://www.regjeringen.no/contentassets/589aa9f4e14540b5a5a6144aaea7b518/handlingsplan-mot-rasisme\\_uu\\_des-2019.pdf](https://www.regjeringen.no/contentassets/589aa9f4e14540b5a5a6144aaea7b518/handlingsplan-mot-rasisme_uu_des-2019.pdf).

them specifically at a national level. A new action plan regarding discrimination against Muslims is one of the promised general measures.<sup>332</sup>

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<sup>332</sup> Norwegian Government (2019) *Regjeringens handlingsplan mot rasisme og diskriminering på grunn av etnisitet og religion 2020–2023*, p. 17.

## 10 CURRENT BEST PRACTICES

The scope of the anti-discrimination legislation: most discrimination grounds cover all areas. Until 31 December 2017, age was only covered in employment, but as of 1 January 2018, age is also covered outside employment, under the GEADA.

The active equality efforts of the GEADA give a duty for public authorities, employers and educational institutions to make active, targeted and systematic efforts to promote equality within the different grounds.<sup>333</sup> Of particular interest is the department for equality and anti-discrimination at the Directorate for Children, Youth and Family Affairs, which works actively and systematically to gather knowledge and promote equality, especially within the ministries and other parts of the public sector.

There are rules on employers' disclosure duty regarding pay, to try to minimise pay gaps because of ethnicity, disability or sexual orientation.

During appointment processes, including during interviews, the employer may not collect information about an applicant's pregnancy and plans to have or adopt children, religion or beliefs, ethnicity, disability, sexual orientation, gender identity or gender expression. The collection of information on ethnicity, religion, belief, disability and living arrangements is nevertheless permitted if the information is of decisive significance for the performance of work or the pursuit of the occupation. The employer may ask about the need for reasonable accommodation during the recruitment process.<sup>334</sup> The collection of information on an applicant's living arrangements, religion or beliefs is permitted if the purpose of the undertaking is to promote particular beliefs or religious views and the worker's position will be important for the achievement of the purpose. If such information will be requested, this must be stated in the announcement of the position.

Jobseekers who consider that they might have been discriminated against in appointment processes have a right to request that the employer disclose written information about the education, experience and other clearly measurable qualifications of the appointed candidate.

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<sup>333</sup> After the cut-off date of this report, from 1 January 2020, the duties of employers and the public administration's duties proactively against discrimination were strengthened significantly. See GEADA, Article 24.

<sup>334</sup> The preparatory works to the GEADA, Prop 81 L (2016-2017) Chapter 27.3.2.6.

## 11 SENSITIVE OR CONTROVERSIAL ISSUES

### 11.1 Potential breaches of the directives at the national level

It is presumed that Norwegian anti-discrimination legislation is in line with the EU *acquis*, although the non-discrimination directives (2000/78 and 2000/43) are not incorporated in the EEA agreement. However, the Government has committed to having as high - or higher - standards in its work against discrimination as the requirements of the EU. This protection has been underlined by Supreme Court judgments. The legal consequence of the anti-discrimination directives not being incorporated into the EEA agreement is that the directives will not prevail in conflict, as the gender directives do. A practical consequence of this situation is that the practitioners use the directives and recent case law only to a very limited degree. However, the Ombud has started publishing an annual report on legal developments, which includes cases from the European Court of Justice (ECJ). The tribunal, however, still uses EU law very rarely.

The WEA Article 13-9(2) contains a specific clause that provisions laid down in collective agreements, regulations, bylaws etc. will be declared null and void if they are in breach of the WEA Chapter 13 on discrimination. However, this provision only refers to Chapter 13 of the WEA. There is no such provision regarding the majority of the grounds of discrimination, which are covered by the GEADA, which contains no such provision. The only grounds currently protected by the wording of the WEA provision are age in employment and membership of a trade union. However, the Equality Tribunal has the mandate to provide opinions on whether collective agreements are in breach of the GEADA or WEA.<sup>335</sup>

### 11.2 Other issues of concern

Access to justice remains a key concern, both regarding the Equality and Anti-Discrimination Tribunal and within the court system.

Regarding the tribunal, there are several issues of concern: first, 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 for the tribunal are new to the job. This creates concerns regarding both the quality and the efficiency of the work of the tribunal. For example, its decision to interpret the criterion in the passport regulations for passport photos to include the ears as non-discriminatory, in cases no. 65/2018 and 18/94, has been criticised by human rights lawyer and researcher Njål Høstmælingen in respect of the tribunal's interpretation of discrimination and human rights law regarding religion.<sup>336</sup> Other examples are mentioned elsewhere in this report.<sup>337</sup>

Secondly, there is the new opportunity for the Equality Tribunal to reject cases on the basis of their being clearly not in breach of the prohibitions against discrimination (EAOA, Article 10(2)). A number of the case dismissals made by the Equality Tribunal in 2018 and 2019 appear questionable. In 2018, 30 of 157 cases were dismissed or rejected, and in 2019, 144 of 244 cases were rejected or dismissed. A significant proportion were

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<sup>335</sup> Proposition to parliament, Prop. 88 L (2012-2013) Chapter 4.7.4 state that 'the tribunal cannot determine make decisions where a collective agreement is valid, how it should be interpreted, or regarding its existence. However, the tribunal can give a justified opinion on whether a collective agreement or part of the collective agreement is in breach of one of the prohibitions against discrimination.'

<sup>336</sup> Høstmælingen, N. (2019) 'Turban difficulties: Human rights challenges regarding the Norwegian requirements of visible ears on passport and ID photographs' (*Turban til besvær: Menneskerettslige utfordringer ved det særnorske kravet om synlige ører på pass- og ID-fotografier*), *Kritisk Juss* no. 3, pp. 98-128.

<sup>337</sup> See section 2.2 on direct discrimination on the Case No. 48/2018 regarding refusal to shake hands with women on the basis of religious convictions in employment. See also section 2.5 on instructions to discriminate regarding Case No. 21/2018.



dismissed on the basis of the exception 'clearly not a breach of the prohibition against discrimination' as provided by Article 10 of the EAOA, some by questionable reasoning.<sup>338</sup> Two were criticised by the Ombud in their report on legal developments in 2019: cases no. 19/41 concerning whether a parking space would be part of a reasonable accommodation and no. 19/103 on access to IVF for a transgender person. The facts are unclear as to the specifics of the latter case. Both were case dismissals that the Ombud found insufficiently justified.<sup>339</sup>

Thirdly, there is a lack of access to legal aid in discrimination cases, which in some cases constitutes a significant barrier for obtaining access to justice, not only when cases are taken to court, but also when the tribunal is the instance making the decision. The guidance provided by the Equality Ombud is not always sufficient to provide an effective opportunity to put forward a case, especially the more complex ones, or where the victim for other reasons does not have the resources to argue their own case, even through the simpler administrative procedures of the Equality Tribunal. Since 2019 the Ombud has tried to remedy this to some extent by initiating a few cases before the Equality Tribunal.<sup>340</sup> However, the Ombud focuses mainly on providing advice, and very few complainants are assisted throughout the entire complaints procedure by the Ombud – only two in 2019.

In addition, the Equality Tribunal does not have the power to award effective remedies in all types of cases. This means that some cases must be taken to court in order for victims to have access to effective remedies. The tribunal can only award damages or compensation in cases where these are fairly simple to calculate. In addition, the tribunal can, as a rule, award compensation only up to about EUR 1 000 (NOK 10 000). Damages for injury of a non-pecuniary character do not have an upper limit but can only be awarded in cases that concern employment (EAOA Article 12).<sup>341</sup> Therefore, harassment outside employment, for example, lacks effective remedies.

When it comes to the court system, there are two issues of concern. First, taking a case to court is costly, as there is no free legal aid in discrimination cases, and there is a significant risk of having to pay the costs of the defendant (see, for example, court case LE-2018-145654-2, described in chapter 12.2 below).

Secondly, there are no rules or guidelines to ensure that the judges or lay judges are trained in discrimination issues or, in the case of lay judges, nothing even to ensure that they are not openly and actively racist, as described in section 6.1.b.

An overhaul of the pensions system may lead to cases concerning the accrual of pension credits between 67 and 70 years, as currently, a number of systems stop the accrual of pension credits at 67, which is the general retirement age (as opposed to a maximum limit). The legality of some of these systems in relation to Directive 2000/78 is at present unclear.

Another issue of concern is the system for legal guardianship for persons with cognitive disabilities. In 2018, VG, a nationwide Norwegian newspaper, revealed that a Norwegian municipality had had two brothers taken under legal guardianship without their knowledge or consent, probably because this would increase the amount of money

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<sup>338</sup> See for example Cases 19/41, 18/269, 18/287, 18/371 and 19/69.

<sup>339</sup> Equality and Anti-Discrimination Ombud (2020) *Discrimination Law 2019. An overview of last year's legal developments* (*Diskrimineringsretten 2019 – En gjennomgang av året sin har gått*), pp. 31-59. The report is available in Norwegian at [https://www.ldo.no/globalassets/ldo\\_2019/03\\_ombudet-og-samfunnet/rapporter/diskrimineringsrett/diskrimineringsretten-2019.pdf](https://www.ldo.no/globalassets/ldo_2019/03_ombudet-og-samfunnet/rapporter/diskrimineringsrett/diskrimineringsretten-2019.pdf).

<sup>340</sup> Equality and Anti-Discrimination Ombud (2019) *Årsmelding* (Annual Report for 2018), p. 8, available at <https://www.ldo.no/link/df00459339c5420ea293d70cd914a6d9.aspx>.

<sup>341</sup> See the legal preparatory works; Proposition to Parliament, Prop 80 L (2016-2017) *Lov om likestillings- og diskrimineringsombudet og Diskrimineringsnemnda* (*diskrimineringsombudsloven*), p. 106. Available at <https://www.regjeringen.no/contentassets/14dd1daa159348c88de5dbe043feb0a4/horingsnotat.pdf>.

transferred from the state to the municipality. This highlighted major flaws in the system for legal guardianship. The system has also been criticised by the Auditor General of Norway, who found that: in two out of three audited cases, the guardianship was general and not adapted to the individual in accordance with the law; and in only half of the cases had the guardianship authorities spoken to the person under guardianship. The auditor also found a lack of planned training for the guardians themselves.<sup>342</sup> Some months later, the Supreme Court took the stance that the Norwegian organisation for people with mental disabilities (NFU) did not have legal standing in a case concerning legal guardianship. The reasoning was that NGOs are not listed as persons or institutions that may ask for someone to be put under guardianship in the Guardianship Act, Article 56.<sup>343</sup> As a general rule, NGOs do have legal standing in cases concerning their field of work (see section 5.2 of this report).

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<sup>342</sup> <https://www.riksrevisjonen.no/globalassets/rapporter/no-2017-2018/vergemaal.pdf>.

<sup>343</sup> Supreme Court, Case HR-2018-1786-U.

## 12 LATEST DEVELOPMENTS IN 2019

### 12.1 Legislative amendments

From 3 October 2019 a new Act on municipalities and regional administrations, the Municipality Act,<sup>344</sup> entered into force, and thereby introduced a duty for each municipality and regional administration to have an advisory council for the elderly and one for persons with disabilities, as well as a youth council or similar to ensure that young people have a say in the decisions of the municipality or regional administration (Municipality Act, Article 5-2(2)).

More detailed rules are provided in the Regulations on municipal and regional councils for the elderly, persons with disabilities and youth (Regulations on advisory bodies),<sup>345</sup> These councils are elected by the municipal or regional Parliament in question (Municipality Act, Article 5-12(1) and have the right to voice their opinion in cases concerning elderly people, persons with disabilities and youth respectively. A joint council for the elderly and persons with disabilities may be created if this is necessary due to local circumstances, such as the municipality being very small.

The municipal or regional Parliaments must present all such cases for the respective councils as early as possible (Regulations on advisory bodies, Article 2(3)) and the every year the council will prepare an annual report to be presented to the municipal or regional Parliament in question. The members of the councils may be given the right to participate and speak before the relevant Parliament.

Civil society organisations representing the elderly, persons with disabilities and youth have a right to propose members to the council representing their interests (Article 3). The regulations also have a number of rules to ensure that these councils will be able to function effectively, such as a duty to provide sufficient support from a secretariat.

### 12.2 Case law

#### SELECTED COURT CASES

**Name of the court:** Supreme Court

**Date of decision:** 12 February 2019

**Name of the parties:** *Trot horse driver Åsbjørn Tengsareid and the Norwegian Horsetrot Society v. the Norwegian Tax Authority (Skattedirektoratet)*

**Reference number:** HR-2019-273-A

**Address of the webpage:** <https://lovdata.no/pro/#document/HRSIV/avgjorelse/hr-2019-273-a> (login required)

**Brief summary:** The case concerns the principle of equal treatment in public administration in general, rather than discrimination law. The case concerned tax law, with a focus on the principle of equal treatment and when it applies in the public administration's decision-making. The tax authorities had interpreted the law in a way that the claimant saw as unjustified differential treatment. The VAT Appeals Board had reassessed outgoing VAT for a jockey's fixed pay for each race (*oppsittpengen*) and his shares of the cash prizes won (Section 3-1(1), cf. Section 1-3(1)(a) of the VAT Act). The Supreme Court concluded that the payments were taxable income from sale of services, and that the decision was valid. The fixed payments for each race were considered a form of start money (*startpengen*). The Court referred to the fact that a fixed and clear public administration practice assumed that start money in a competition constituted payment for a service and thus taxable income. The share of the cash prize was

<sup>344</sup> Municipality Act (*Lov om kommuner og fylkeskommuner (kommuneloven)*) of 22 June 2018 No. 83.

<sup>345</sup> Regulations on advisory bodies (*Forskrift om kommunale og fylkeskommunale råd for eldre, personer med funksjonsnedsettelse og ungdom (forskrift om medvirkningsordninger)*) of 17 June 2019 No. 727.

considered payment from the horse owner for the service the jockey delivered by driving the horse in harness races, which also constituted taxable income. The decision was also not invalid due to violation of the principle of equal treatment.

Before this judgment, the common interpretation was that this principle was only applicable in situations where the public administration is allowed so-called free discretion. The public administration's 'free discretion' is seen as opposed to pure interpretation of a law, and concerns legal standards in narrow fields, often closely linked to the facts and science in a particular field, which the public administration has very good knowledge of and which the courts should be very reticent about overruling. This limited application of the principle of equal treatment was corrected by the Supreme Court, which concluded that the principle of equal treatment was applicable also to the interpretation of the law itself. The Court could therefore address the question at hand, which concerned the public administration's discretion when interpreting the law (which is not considered part of its free discretion) and whether their interpretation of the law itself was in breach of the principle of equal treatment. However, when the public administration has interpreted the law correctly, extraordinary circumstances are required in order to overrule the decision on the basis of a breach of the principle of equal treatment.

This judgment has created some debate among lawyers, regarding both the extent to which the interpretation of the law may be subject to being overruled on the basis of this principle, and regarding the need for such an extension of the use of this principle. Those not in favour of the extension argue, for example, that the courts have full authority to overrule the interpretation of the law by the public administration, and that the aim of the courts' adjudication is to ensure that the law has been interpreted correctly, not to ensure equal treatment. Those in support of the extension argue, among other things, that the public administration also uses discretion when the law is interpreted, so there is no real reason for treating the different areas of discretion differently. If the question concerns any of the protected grounds of discrimination, the GEADA applies in any case.

**Name of the court:** Supreme Court

**Date of decision:** 27 August 2019

**Name of the parties:** A, B and C against Vågå municipality

**Reference number:** HR-2019-1637-U

**Address of the webpage:** <https://lovdata.no/dokument/HRSIV/avgjorelse/hr-2019-1637-u?q=HR-2019-1637-U>

**Brief summary:** The case concerns the termination of a rental contract by a municipality when reorganising the shared housing for three persons with disabilities. Their contract allowed the termination of the contract only under 'special circumstances', and when the municipality terminated their contract in order to reorganise the living facilities for a number of persons with disabilities, the three persons who had until then lived together for many years took the case to court. The Court of Appeal had considered the reorganisation of the housing of persons with disabilities in the municipality as reasonable, and was criticised by the Supreme Court for not considering whether 'reasonable' constituted the same thing as 'special circumstances' in the contract, especially since neither the GEADA nor the UN CRPD had been sufficiently discussed by the court. The Supreme Court sent the case back to the Court of Appeal for a reconsideration of the legal aspects of its decision, see below for the reconsidered decision of the Court of Appeal.

**Name of the court:** Eidsivating Court of Appeal (court of second instance)

**Date of decision:** 18 November 2019

**Name of the parties:** A, B and C against Vågå municipality

**Reference number:** LE-2018-145654-2

**Address of the webpage:** <https://lovdata.no/pro/#document/LESIV/avgjorelse/le-2018-145654-2> (login required)

**Brief summary:** In this case, the Court of Appeal reconsidered its previous decision as demanded by the Supreme Court in the case mentioned above, HR-2019-1637-U. The Court of Appeal found that the restructuring of its care services for persons with disabilities, and the need for renovation of the current housing for the three persons concerned constituted special circumstances as required by the rental contract. The court also stated that Norwegian law is assumed to be in line with the UN CRPD, as stated in the preparatory works to the ratification of the convention.<sup>346</sup> Furthermore, the main rule in the law is that the municipalities have a duty to provide the necessary services where the recipients wish to live, but that this duty is limited by the proportionality and reasonability of the resources required to do so. In this case, the people concerned were allowed to continue staying together and keep the same personnel, as well as the new housing facilities being of at least the same standard as the current one and their inconvenience was seen by the court as both minor and temporary. On this basis, the court did not see the termination of their contracts as a breach of the UN CRPD Article 19. The court did not consider whether the termination constituted discrimination, as it considered any differential treatment that might have happened as justified on the same basis.

Another noteworthy issue concerns the costs of the proceedings. According to the Dispute Act Article 20-2(3), the court can exempt the opposite party from liability for legal costs in whole or in part if the court finds compelling grounds to justify exemption. In particular, the court may take into account whether the case is important to the welfare of the party and the relative strength of the parties justifies an exception. According to Supreme Court judgment Rt-2012-209 paragraphs 17 and 18, this is not enough by itself, and that in order to be exempted from paying the cost, the decision must have concerned matters of principle or other significant reasons for having the case tried before the courts. Surprisingly, the Court of Appeal did not see the issue as a matter of principle, even though it concerned the extent of the right of disabled persons to decide where they want to live, but rather as concerning specific issues. The court also considered that there was little doubt regarding the legal interpretation. Therefore, the case did not fulfil the requirements for being exempted from paying the costs. Each of these persons thus had to pay around EUR 15 000 for the procedures before the courts of first and second instance.

**Name of the court:** Eidsivating Court of Appeal (court of second instance)

**Date of decision:** 21 October 2019

**Name of the parties:** A against Oslo Vedlikehold og Snekkerservice AS

**Reference number:** LE-2019-7118

**Address of the webpage:** <https://lovdata.no/pro/#document/LESIV/avgjorelse/le-2019-7118> (login required)

**Brief summary:** A was dismissed from her job on the basis of extensive, unfounded and undocumented absence, lack of results, refusal to obey orders, threats and disloyalty to the employer. She had been diagnosed with unstable personality disorder, and the employer received financial support from the Norwegian Labour and Welfare Administration to compensate for her reduced ability to work. A claimed that she had a right to work from home as a reasonable accommodation. Since she refused to be held accountable on how she spent her time, and repeatedly refused to obey orders, the court did not agree that she had a right to work from home. Her threatening behaviour when trying to make the employer pay her wages was seen as a sufficient reason alone for her dismissal, even if the employer's withholding of her wages was seen as at least in part unreasonable. The court concluded that she had not been discriminated against on the basis of her personality disorder.

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<sup>346</sup> Prop 196 S (2011-2012) Consent to the ratification of the UN Convention on the Rights of Persons with Disabilities.

## SELECTED CASES FROM THE EQUALITY AND ANTI-DISCRIMINATION TRIBUNAL

**Name of the court:** Equality Tribunal

**Date of decision:**

**Name of the parties:** *A and the Norwegian Seafarers' Union v shipowner B*

**Reference number:** 19/16<sup>347</sup>

**Address of the webpage:** <https://diskrimineringsnemnda.no/media/2229/anonymisert-version-av-vedtak-sak-19-16.pdf>

**Brief summary:** A is from Poland and worked as a fisherman from 2015 to 2019, on a boat owned by the company B and registered in the NOR registry, fishing for crabs in the Svalbard area. During an inspection, the Norwegian Seafarers' Union discovered that there were significant differences between the wages of the employees with Norwegian citizenship and two employees with Polish citizenship. The employer argued that the differential treatment was justified by the persons residing in a country with lower living costs. However, the shipowner could provide no evidence for such a practice, or for any other justifications of the practice. Such differential treatment was in any case likely to be considered indirect discrimination on the basis of ethnicity, (cfr. for example European Court of Justice, judgment of 6 January 2003, *Commission v. Italy*, C-388/01). The tribunal all thereby concluded that the two fishermen from Poland had been discriminated against on the basis of ethnicity. This case highlights the fact that the GEADA applies also on ships registered in Norway through the Ship Labour Act (SLA).

**Name of the court:** Equality Tribunal

**Date of decision:** 4 July 2019

**Name of the parties:** *A and the Norwegian Centre for Social Justice (OMOD) v. The Norwegian Postal Service*

**Reference number:** 18/325

**Address of the webpage:** <https://diskrimineringsnemnda.no/media/2111/anonymisert-avgjoerelse-18-325.pdf>

**Brief summary:** This is another case concerning a refusal to shake hands with women for religious reasons, as we saw in case no 18/2018 in last year's report, and it upholds the same views as that one, including the divided tribunal.

A applied for a position as a call substitute at a sorting centre in the Norwegian Postal Service. Just before the interview with the head of the section, A told her via text message that he did not shake hands with women on the basis of his religious convictions. She then cancelled the meeting, stating that this was something 'she could not have anything to do with.'

The members of the tribunal all agreed that his refusal to shake hands with women should be seen as an expression of religious views, which is protected against discrimination. There was also no doubt that this was the only reason for the employer cancelling the job interview. The members of the tribunal were, however, divided regarding the remaining legal considerations.

The majority of the members of the tribunal (two out of three) interpreted the employer's actions as indirect differential treatment. They furthermore concluded that it was necessary to demand that A shook hands with women. The ethical guidelines for the Norwegian Postal Service state that there shall be no discrimination on the basis of gender. The option of not shaking hands with anybody was not addressed by the majority this time. Instead, they referred to jurisprudence from the European Court of Human Rights, *Eweida and others v. the United Kingdom*, paragraph 106, which states 'The Court generally allows the national authorities a wide margin of appreciation when it

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<sup>347</sup> Case No. 19/43 concerns a colleague of the complainant in this case, another Polish citizen, and had the same facts and result, except that victimisation was not an issue. This case is available at <https://diskrimineringsnemnda.no/media/2230/anonymisert-version-av-vedtak-sak-19-43.pdf>.



comes to striking a balance between competing Convention rights', concluding that it takes a great deal to conclude a breach when two different rights are in conflict.

The tribunal also argues that the ground of discrimination concerned is one that it is possible to limit to his spare time, which is different from grounds such as ethnicity, sexual orientation or gender, which are impossible to 'lay aside' during work hours. Since this specific expression of religion has consequences for an employee's interaction with others at the workplace, the tribunal also argued that the employer should have more freedom to limit such expressions. Finally, the tribunal concluded that the aim of gender equality is at least as important as the freedom of religion, referring to the role of conservative Christianity and written history, and that the demand that A shook hands with women was not disproportionate. The official conclusion that the tribunal reached was therefore that this was indirect, but justifiable differential treatment, and that A had therefore not been discriminated against. There is no reference to the directives or any decisions by the ECJ.

The minority of the tribunal (one out of three), saw the cancelling of the interview as direct differential treatment, stating that there is a very narrow window for justifications of direct discrimination. They did not see the refusal to shake hands with the opposite sex as a clearly justifiable aim, arguing that he did not treat women worse than others by not shaking their hands. They further stated that the demand for A to shake hands with everybody was not necessary, as there were alternatives, for example greeting everybody the same way irrespective of gender.

The tribunal also stated that the conclusion might have been different if the case concerned the termination of employment.

**Name of the court:** Equality Tribunal

**Date of decision:** 4 October 2019

**Name of the parties:** *A v. B institution of higher education*

**Reference number:** 19/135

**Address of the webpage:** <https://diskrimineringsnemnda.no/media/2202/anonymisert-avgjoerelse-i-sak-19-135.pdf>

**Brief summary:** A is a student at B institution of higher education. A also has a chronic sleep disorder, and applied for a reasonable accommodation of his exams in the form of not starting the exam before noon or 13.00, as recommended by his doctor. The exam administration office rejected his application, and the rejection was upheld by the board of complaints at B institution. The administration argued that the accommodation constituted an unreasonable burden, since it would have to create a unique exam for the complainant. The complainant was instead offered extra time for the exam, and the opportunity to rest during the exam.

The tribunal disagreed that the accommodation was unreasonably burdensome, stating that the institution had not provided documentation, nor had it investigated alternative solutions to the expensive one that it had rejected. The tribunal also emphasised that the student was not put in a better position than others if he received reasonable accommodation during the exam. On this basis, the tribunal concluded that the educational institution had breached its duty to provide reasonable accommodation in accordance with the GEADA Article 21, and that the student had therefore been discriminated against. There was no remedy or sanction other than this conclusion.

This decision confirms previous decisions stating that educational institutions have extensive duties to provide reasonable accommodation for their students.

**Name of the court:** Equality Tribunal

**Date of decision:** 19 June 2019

**Name of the parties:** unavailable

**Reference number:** 18/413

**Address of the webpage:** <https://diskrimineringsnemnda.no/media/2119/sak-18-413-anonymisert-vedtak.pdf>

**Brief summary:** A works at B as an IT consultant in a 50 % temporary position due to his 50 % ability to work. The complainant applied for a full-time permanent position at the same workplace, but was informed that due to his reduced ability to work he was not qualified, and would therefore not get an interview for the position. The employer argued that it would constitute an unreasonable burden to hire him, due to the content of the position – the need to handle emergencies during all work hours – and the difficulty of getting another qualified person to fill the 50 % remainder.

Since there was no doubt that A's reduced ability to work was the reason for his not being seen as qualified for the position, the tribunal saw this as direct differential treatment. The tribunal then referred to its decision number 69/2014, where it had stated that 'a general provision that employees must be able to fill a 100 % position may make the provisions regarding reasonable accommodation (...) illusory if an otherwise qualified person with disability is in need of accommodation through reduced work hours'. B was considered a sufficiently resourceful institution to have the ability to make reasonable accommodations. On this basis, the tribunal concluded that the employer had not fulfilled its duty to provide reasonable accommodation when it did not invite A for an interview regarding the position in question.

**Name of the court:** Equality Tribunal

**Date of decision:** 2 December 2019

**Name of the parties:** A v. X municipality

**Reference number:** 19/41

**Address of the webpage:** <https://diskrimineringsnemnda.no/media/2233/19-41-anonymisert-versjon-av-henleggelsesbeslutning.pdf>

**Brief summary:** A works for B municipality in an administrative position. She also has a disability due to osteoarthritis in both knees and applied for accommodation in the form of a parking space close to the workplace. The tribunal chose to dismiss the case as 'clearly not in breach' of the GEADA (EAOA Article 10(2)) after interpreting the examples of accommodation listed in the preparatory works to the GEADA antithetically, without any further discussion.

This decision has been criticised by the Equality and Anti-Discrimination Ombud for not looking into the aim of the GEADA when interpreting its Article 22 on reasonable accommodation at the workplace.<sup>348</sup> The Ombud further argues that a refusal to accommodate a need for a particular parking space should have been evaluated in relation to the general prohibition against indirect discrimination.

### 12.3 Cases brought by Roma and Travellers

There were no cases concerning Roma or Travellers in 2019.

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<sup>348</sup> Equality and Anti-Discrimination Ombud (2020) *Diskrimineringsretten 2019* (Discrimination Law 2019).



## ANNEX 1: MAIN TRANSPOSITION AND ANTI-DISCRIMINATION LEGISLATION

**Country:** Norway  
**Date:** 31 December 2019

**Title of the Law: Act relating to equality and a prohibition against discrimination (Equality and Anti-Discrimination Act)**

Abbreviation: GEADA

Date of adoption: 16. June 2017 No. 51

Entry into force: 1. January 2018

Latest amendments: -

Web link: <https://lovdata.no/dokument/NLE/lov/2017-06-16-51?q=discrimination>

Grounds protected: 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

Civil law

Material scope: covers all areas

Principal content: prohibition of direct and indirect discrimination, harassment, instruction to discriminate within select grounds

**Title of the Law: The Working Environment Act (WEA) on Working environment, working hours and employment protection, etc. (Arbeidsmiljøloven), Chapter 13**

Abbreviation: WEA

Date of adoption: 17 June 2005

Latest amendments: in force 1 January 2014 for Chapter 13

Entry into force: 1 January 2006

Web link: <https://lovdata.no/dokument/NLE/lov/2005-06-17-62>

(English version as per 2017)

Grounds protected: Age (covers also part-time/ temporary work, political affiliation and membership in trade unions)

Civil law

Material scope: Public and private employment

Principal content: prohibition of direct and indirect discrimination, harassment, instruction to discriminate within select grounds

**Title of the Law: The Anti-Discrimination Act on Prohibition of discrimination based on ethnicity, religion etc. (Diskrimineringsloven)**

Abbreviation: ADA

Date of adoption: 21 June 2013 No. 60

Latest amendments: 1 October 2015

Entry into force: 1 January 2014, replaced by the GEADA 1 January 2019

Web link: <http://www.ub.uio.no/ujur/ulovdata/lov-20130621-060-eng.pdf>

Grounds covered: ethnicity, religion or belief.

Civil law

Material scope: Cover all areas except personal and family affairs

Principal content: prohibition of direct and indirect discrimination, harassment, instruction to discriminate within select grounds

**Title of the Law: The Anti-Discrimination and Accessibility Act on Prohibition against discrimination on the basis of disability (Tilgjengelighetsloven)**

Abbreviation: AAA

Date of adoption: 21 June 2013 No. 61

Latest amendments: -

Entry into force: 1 January 2014, replaced by the GEADA 1 January 2019

Web link: <http://www.ub.uio.no/ujur/ulovdata/lov-20130621-061-eng.pdf>

Grounds protected: Disability

Civil law

Material scope: Cover all areas except personal and family affairs  
Principal content: prohibition of direct and indirect discrimination, harassment, instruction to discriminate within select grounds

**Title of the Law: Sexual Orientation Anti-Discrimination Act**

Abbreviation: SOA

Date of adoption: 21 June 2013 No. 59

Latest amendments: -

Entry into force: 1 January 2014, replaced by the GEADA 1 January 2019

Web link: <https://app.uio.no/ub/ujur/oversatte-lover/data/lov-20130621-058-eng.pdf>

Grounds protected: Sexual orientation

Civil law

Material scope: Cover all areas except personal and family affairs

Principal content: prohibition of direct and indirect discrimination, harassment, instruction to discriminate within select grounds

**Title of the Law: Act relating to the equality and anti-discrimination Ombud and the anti-discrimination Tribunal (Equality and Anti-Discrimination Ombud Act)**

Abbreviation: EAOA

Date of adoption: 16. June 2017 No. 50

Entry into force: 1. January 2018

Latest amendments: -

Grounds protected: -

Civil/administrative law

Material scope: Rules on the organisation and activities of the Equality and Anti-Discrimination Ombud and the Anti-Discrimination Tribunal

Principal content: Creation of a specialised body

**Title of the law: Act on the Equality and Anti-Discrimination Ombud and the Equality and Anti-Discrimination Tribunal**

Abbreviation: AOT

Date of adoption: 10 June 2005 No. 40

Latest amendments: 19 June 2015

Entry into force: 1 January 2006, replaced by the AOT 1 January 2019

Web link: <https://www.regjeringen.no/en/dokumenter/The-Act-on-the-Equality-and-Anti-Discrim/id451952/> (English version as per 2007)

Grounds covered: -

Civil/administrative law

Material scope: Rules on the organisation and activities of the Equality and Anti-Discrimination Ombud and the Equality and Anti-Discrimination Tribunal

Principal content: Creation of a specialised body

**Title of the law: Act relating to the strengthening of the status of human rights in Norwegian law (The Human Rights Act)**

Abbreviation: HRA

Date of adoption: 21 May 1999 No. 30

Latest amendments: 9 May 2014 No. 9

Entry into force: 21 May 1999

Web link: <http://www.ub.uio.no/ujur/ulovdata/lov-19990521-030-eng.pdf>

Grounds covered: -

Civil law

Material scope: Incorporates select human rights instrument into Norwegian law

Principal content: Strengthening the status of human rights

## ANNEX 2: INTERNATIONAL INSTRUMENTS

**Country:** Norway

**Date:** 31 December 2019

Instrument	Date of signature	Date of ratification	Derogations/ reservations relevant to equality and non-discrimination	Right of individual petition accepted?	Can this instrument be directly relied upon in domestic courts by individuals?
European Convention on Human Rights (ECHR)	04.11.1950	15.01.1952	No	Yes	Yes, through Human Rights Act
Protocol 12, ECHR	Not signed	Not ratified	N/A	N/A	N/A
Revised European Social Charter	Yes	07.05.2001	Has accepted 80 of the revised charter's 98 paragraphs	Collective complaints protocol ratifies 20.03.1997	No
International Covenant on Civil and Political Rights	20.03.1968	13.09.1972	No	Yes	Yes, through Human Rights Act
Framework Convention for the Protection of National Minorities	Yes	17.09.1999	No	N/A	No
International Covenant on Economic, Social and Cultural Rights	20.03.1968	13.09.1972	No	No	Yes, through Human Rights Act
Convention on the Elimination of All Forms of Racial Discrimination	21.11.1969	06.08.1970	No	No	Yes, through the Anti-Discrimination Act
ILO Convention No. 111 on Discrimination	Yes	24.09.1959	No	N/a	No

Instrument	Date of signature	Date of ratification	Derogations/ reservations relevant to equality and non-discrimination	Right of individual petition accepted?	Can this instrument be directly relied upon in domestic courts by individuals?
Convention on the Rights of the Child	26.01.1990	08.01.1991	No	Yes	Yes, through Human Rights Act
Convention on the Rights of Persons with Disabilities	30.03.2007	01.07.2013	No <sup>349</sup>	No	No

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<sup>349</sup> No derogation or reservation is made, but 'interpretative declarations' to Articles 12 and 14 on fully supported decision-making arrangements and compulsory treatment are made by the Norwegian government (similar to those of Australia) which are especially relevant to people with psycho-social disabilities.

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