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Country report

Gender equality

How are EU rules transposed into
national law?

Norway

Marte Bauge

Reporting period 1 January 2020 – 01 January 2021

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1 Introduction¹

1.1 Basic structure of the national legal system

Norway is based on a civil law system, with the Constitution at the top and national laws and regulations defining the system in detail. The interpretation of laws is based on both preparatory works and interpretations by the courts. The court system is based on three levels: the municipal courts, the courts of appeal and the Supreme Court.

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

In addition, there is the Court of Labour Disputes (Labour Court) which interprets collective agreements. Judgments of the Labour Court may be appealed to the Supreme Court. The Labour Court deals with disputes between trade unions that include the interpretation, validity and existence of collective agreements and cases of breach of collective agreements – to the extent that anti-discrimination provisions are included in the collective agreements.⁴

The Ministry of Children and Equality has usually been responsible for dealing with anti-discrimination in relation to the grounds covered by the Equality and Anti-Discrimination Act (*Lov om likestilling og forbud mot diskriminering*) (GEADA),⁵ but late in 2018 equality and anti-discrimination issues were moved to the Ministry for Culture,⁶ with effect from 2019. The Ministry has delegated the Norwegian Directorate for Children, Youth and Family Affairs⁷ as also being responsible for equality and non-discrimination issues.

The Ministry for Labour and Social Affairs⁸ is responsible for dealing with the anti-discrimination provisions of the Working Environment Act (WEA)⁹ (*Lov om arbeidsmiljø, arbeidstid og stillingsvern*).

1.2 List of main legislation transposing and implementing the directives

The existing acts on discrimination were revised and aligned on 21 June 2013 upon the enactment of the Sexual Orientation Anti-Discrimination Act (SOA) (*Lov om forbud mot diskriminering på grunn av seksuell orientering, kjønnsidentitet og kjønnsuttrykk*) covering sexual orientation, gender identity and gender expression, which came into force on 1 January 2014.¹⁰ The other key pieces of anti-discrimination legislation were the Gender Equality Act (GEA),¹¹ the Anti-Discrimination Act (ADA) covering ethnicity, religion

¹ This report was written on the basis of the Gender Equality country report for 2017 written by Helga Aune and the reports covering 2018 and 2019 by Marte Bauge.

² See Equality Ombud's website: <http://www.ldo.no/en/>.

³ See Equality Tribunal's website: <http://www.diskrimineringsnemnda.no/en/innhold/side/forside>.

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

⁵ Act of 2017-06-16-51, available at: <https://lovdata.no/dokument/NLE/lov/2017-06-16-51>.

⁶ See Ministry's website: <https://www.regjeringen.no/en/dep/kud/id545/>.

⁷ See Bufdir website: http://www.bufdir.no/en/English_start_page/.

⁸ See Ministry's website: <https://www.regjeringen.no/en/dep/asd/id165/>.

⁹ Act of 2005-06-17-62, Working Environment Act (WEA) of 17 June 2005 No. 62, last amended by law of 21 June 2013 No. 61, in force as of 1 January 2014, available at: <https://lovdata.no/dokument/NLE/lov/2005-06-17-62>.

¹⁰ 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>.

¹¹ Gender Equality Act (GEA) of 21 June 2013 No. 59, in force as of 1 January 2014, available at: <http://www.ub.uio.no/ujur/ulovdata/lov-20130621-059-eng.pdf>. This act replaces the previous Gender Equality Act (GEA) of 9 June 1978 No. 45 (*Likestilling*). Key concepts remain similar in the previous and current versions.

and belief,¹² and the Anti-discrimination and Accessibility Act (AAA) covering disability.¹³ The four acts were almost identical and were in force until 31 December 2017. The WEA covered age, political views, membership of trade unions, part-time and temporary work, as well as specialised legislation (such as the Seamen's Act and housing acts).

In 2018 the GEA, AAA, ADA and SOA were replaced by the GEADA, in force as of 1 January 2018. The protected characteristics in the GEADA are: gender, pregnancy, leave in connection with childbirth or adoption, care responsibilities, ethnicity, religion, belief, disability, sexual orientation, gender identity, gender expression, age or combinations of these factors. The new act thus also covers protection against age discrimination outside working life, whereas the protection against age discrimination within working life continues to be covered by the WEA.

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

In addition, the WEA specifically refers to the GEADA in its Chapter 13. All major collective agreements contain gender equality and non-discrimination clauses.

The relevant EU directives have been transposed in national legislation, but the actual text of the directives is not included in the text of the law as such. All the directives in the area of gender equality are implemented and are assumed to be covered by the GEADA.

Pregnancy, maternity and leave related to work-life balance for workers (Directive 92/85/EEC, relevant provisions of the Directives 2006/54/EC and 2010/18/EU) are covered by the provisions in the GEADA, WEA and the National Insurance Act (*Lov om folketrygd*) (NIA).¹⁴

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

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

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

1.3 Sources of law

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

Case law on discrimination from national courts is quite sparse, but cases from the Equality Tribunal are an important source when it comes to gender equality law in Norway. There is now only one Equality Tribunal that treats cases regarding discrimination on all grounds

¹² Anti-Discrimination Act (ADA) of 21 June 2013 No. 60, in force as of 1 January 2014, available at: <http://www.ub.uio.no/ujur/ulovdata/lov-20130621-060-eng.pdf>. This act replaces the Anti-Discrimination Act of 3 June 2005 No. 33 on Prohibition of discrimination based on ethnicity, religion etc. (*Diskrimineringsloven*). Key concepts remain similar in the previous and current versions.

¹³ Anti-Discrimination and Accessibility Act (AAA) of 21 June 2013 No. 61, in force as of 1 January 2014, available at: <http://www.ub.uio.no/ujur/ulovdata/lov-20130621-061-eng.pdf>. This act replaces the previous Act of 20 June 2008 No. 42 relating to a prohibition against discrimination on the basis of disability (*tilgjengelighetsloven*). Key concepts remain similar in the previous and current version.

¹⁴ Act of 1997-02-28-19, available at: <https://lovdata.no/dokument/NL/lov/1997-02-28-19?q=folketrygdloven>.

covered by the GEADA and, since few cases are brought before the courts, opinions issued by the Equality Tribunal of course play an important role, not least because they are binding.

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

2 General legal framework

2.1 Constitution

2.1.1 Constitutional ban on sex discrimination

Section¹⁵ 98 of Norway's Constitution (*Noregs grunnlov*)¹⁶ prohibits discrimination. The section is general in its wording and is assumed to cover sex discrimination according to the preparatory documents to the amendments of the GEADA.¹⁷ Section 98 was new to the Constitution of 27 May 2014 and has the following wording:

'All persons are equal under the law. No person must be subject to unjust or unreasonable differential treatment.'¹⁸

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

Since June 2014, Section 98 of the Constitution reads: 'All people are equal under the law. No human being must be subject to unfair or disproportional differential treatment'.¹⁹

The Human Rights Act (*Menneskerettsloven*)²⁰ incorporates a number of treaties on human rights into the domestic legal system on a general basis in which the conventions prevail over any other conflicting statutory provision. The Equality Ombud is responsible for the supervision of the national implementation of the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW).

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

2.1.2 Other constitutional protection of equality between men and women

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

2.2 Equal treatment legislation

Norway has one specific piece of equal treatment legislation that prohibits sex discrimination – the GEADA.

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

¹⁵ In the previous reports covering 2018 and 2019 the author has used the term 'Article' instead of 'Section'; in this report this is changed as the translated versions of the Norwegian Acts uses 'Section' and not 'Article'.

¹⁶ Act of 1814-05-17, available at: <https://lovdata.no/dokument/NLE/lov/1814-05-17>.

¹⁷ See Prop 81 L(2016-2017) p. 4.3, available at: <https://www.regjeringen.no/no/dokumenter/prop.-81-l-20162017/id2547420/?ch=5>.

¹⁸ Constitution, available (in Norwegian) at: <https://lovdata.no/dokument/NL/lov/1814-05-17?q=Grunnloven>.

¹⁹ See <https://www.stortinget.no/globalassets/pdf/english/constitutionenglish.pdf>. The preparatory works to the constitutional clause: Human Rights Committee (2011) *Dokument 16 (2011-2012) Rapport til Stortingets presidentskap fra Menneskerettighetsutvalget om menneskerettigheter i Grunnloven* (Report on human rights in the Constitution from the Human Rights Committee to the Storting (Parliament)), Chapter 6, see: <http://www.stortinget.no/Global/pdf/Dokumentserien/2011-2012/dok16-201112.pdf>.

²⁰ Act Relating to the Status of Human Rights in Norwegian Law of 21 May 1999 No. 30, available at: <https://lovdata.no/dokument/NLE/lov/1999-05-21-30>.

- pregnancy, leave in connection with childbirth or adoption;
- care responsibilities;
- ethnicity;
- religion, belief;
- disability;
- sexual orientation;
- gender identity and gender expression;
- age;
- or a combination of these factors.

In addition to the GEADA, the WEA Chapter 13 covers age, political views and union membership.

3 Implementation of central concepts

3.1 General (legal) context

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

Several reports have been published over the last five years that provide insights into legal definitions, implementation and limits in Norway when it comes to gender equality law. A few examples will be mentioned.

A recent report from the Department for Social Research in Norway²¹ presents results from a survey of experiences of hate speech by LGBT people, and the rest of the population. The results show that LGBT people, transgender people and other minority groups have been exposed to hate speech to a greater extent than the rest of the population. The Government's action plan on discrimination on the grounds of sexual orientation, gender identity and gender expression covers the period 2017-2020 and contains 43 specific measures to be implemented over the next three years. The title of the action plan is: 'Safety, openness and diversity: The Government plan of action against discrimination on the grounds of sexual orientation, gender identity and gender expression'.²²

Surveys and reports from 2020 have also highlighted that harassment and sexual harassment remain a problem in the armed forces in Norway, as well as in the Police.

In a survey from 2020²³ on bullying, harassment and sexual harassment among conscripts/soldiers and staff in the Norwegian Armed Forces, 22 % of the respondents answered that they have experienced some form of sexual harassment at least once or twice during the past year. In all groups, women have experienced more sexual harassment than men. In addition, age seems to be an important factor when it comes to sexual harassment as it declines with age. 63 % of women under 30 years of age have experienced sexual harassment.

Also, a recent study from 2020²⁴ has revealed a negative 'sex culture' in the Norwegian Police districts. The study identified a number of problematic issues, a culture with forced kissing and pinching on the body. Stories also emerged about the abuse of position, where some members of the Police requested sexual acts in exchange for favourable duties, shifts, or good references. Among other things, information emerged about so called fuck-Thursdays, where instructors at the Police Academy were said to have sex with female students.²⁵

²¹ See Fladmoe, Nadim and Birkvad; Report 2019:4 'Erfaringer med hatytringer og hets blant LHBT personer, andre minoritetsgrupper og den øvrige befolkningen' (Experiences with hate speech amongst LGBT persons and other minority groups and the rest of the people in society) website of 'Samfunnsforskning' (Institute for Social Research): <https://samfunnsforskning.brage.unit.no/samfunnsforskning-xmlui/bitstream/handle/11250/2584665/Erfaringer%2bmed%2bhatytringer.pdf?sequence=2&isAllowed=y>.

²² See the action plan entitled (in Norwegian) *Trygghet, mangfold, åpenhet. Regjeringens handlingsplan mot diskriminering på grunn av seksuell orientering, kjønnsidentitet og kjønnsuttrykk 2017-2020*, available at: https://www.regjeringen.no/contentassets/6e1a2af163274201978270d48bf4dfbe/lhbt_handlingsplan_web.pdf.

²³ Fasting, Køber and Strand, *Forsvarets Forsknings Institutt* (The Armed Forces Research Institute) report 21/00414 *Mobbing og seksuell trakassering i forsvaret. Resultater fra MOST-undersøkelsen 2020*. (Bullying and sexual harassment in the armed forces. Results from the MOST survey 2020).

²⁴ Professor Dag Ellingsen at the Police Academy and Professor Ulla-Britt Lilleaas at the Centre for Interdisciplinary Gender Research were behind the initial research project presented in October 2020. See Ellingsen, D. and Lilleaas, U., 'Ekskluderende maskulinitetskulturer i en mannsbastion – belyst gjennom et norsk politidistrikt' ('Excluding masculinity in a male-dominated environment – a study of a Norwegian Police district') https://www.idunn.no/spa/2020/04/ekskluderende_maskulinitetskulturer_i_en_mannsbastion_bel (Norwegian).

²⁵ After the initial study the Police Director issued a work environment survey that confirmed the problems. In the work environment survey 6 % of students answered 'yes' to whether they received unwanted sexual

3.1.2 Other issues

The most relevant surveys and reports have been mentioned already.

3.1.3 General overview of national acts

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

3.1.4 Political and societal debate and pending legislative proposals

In 2020, gender identity and gender expression were made protected grounds in Section 186 of the Penal Code, and hate speech based on these grounds is now punishable according to Section 185 of the Penal Code.²⁶

At the same time it was discussed whether sex/gender should be added as protected grounds in the Penal Code, but the suggestion did not go through. In 2017, the CEDAW Committee submitted its conclusions to Norway's ninth periodic report.²⁷ The Committee expressed concern that Section 185 of the Penal Code does not include gender-based hate speech provision, and recommended Norway add gender as protected grounds. It is unfortunate that gender/sex is not a protected ground in Section 185 of the Penal Code. If the Ministry believes that women are in a different position, so that criminal protection is a less effective instrument for this group than for the other protected grounds, this must be justified. So far it has not been justified.

3.2 Sex/gender/transgender

3.2.1 Definition of 'gender' and 'sex'

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

3.2.2 Protection of transgender, intersex and non-binary persons

Transgender, sex and gender identity are explicitly listed as discrimination grounds in Section 6 of the GEADA. Sex characteristics are not explicitly covered as grounds of discrimination in the GEADA. However, according to the GEADA preparatory work,²⁸ sex/intersex characteristics are said to be covered by the law through the grounds of gender identity and gender expression or sex (depending on the specific case) in Section 6 and Section 2.

attention. The proportion increased to 11 % (103 people) when one includes those who experienced specific behaviours defined as unwanted sexual attention. The survey also showed that it is difficult for victims of sexual harassment to report this in the Police. After the surveys the Police Director Benedicte Bjørnland urged the victims to report the abuse, and the survey has led to increased focus on this within the Police districts.

²⁹ Holst, Skjeie and Teigen 2019, *Europeisering av norsk likestillingspolitikk* (Europeanisation of Norwegian gender equality policies).

²⁶ The Parliament addressed the proposition in November 2020; see the Parliament's website: <https://www.stortinget.no/no/Saker-og-publikasjoner/Saker/Sak/?p=79326>.

²⁷ See link: <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhsqMFgv33OTgoZv7ZAgl6thA2b1CIHCgLqoCAwUYIwGcvCWzf3zvJ0s1jT%2FQFJCN3WCvjKTCWrKoDQbS%2B20rXjvpZZntsUNjNOZhCjwLMqEGv>.

²⁸ Preparatory works Prop. 81-L (2016-2017) for the Gender Equality and Anti-Discrimination Act (GEADA), available at: <https://www.regjeringen.no/no/dokumenter/prop.-81-l-20162017/id2547420/>.

Non-binary people are not explicitly protected in the GEADA but are still covered by the act because discrimination on the grounds of gender identity or gender expression is covered directly in Section 6 of the GEADA.

In 2020 the Equality Tribunal issued one statement on gender identity.²⁹ The question was whether a leader of a municipal department had harassed a colleague who in 2015 had gone through gender-confirming treatment from woman to man, due to gender identity. The colleague had commented on the complainant's beard and asked if he had started on hormone treatment, and said that it was painful to have a breast reduction. The Equality Tribunal did not find the statements serious enough and after an overall assessment, concluded that the statements were not sexual harassment after Section 13 of the GEADA.

The other complaints on gender identity and gender expression that were brought to the Equality Tribunal in 2020 were either closed or dismissed. Most cases were closed as the Equality Tribunal found that the issues were 'clearly not in breach' after Section 10 of the GEADA.

In 2020, Borgarting Court of Appeal³⁰ heard a case on claims for compensation due to the former conditions on treatment and sterilisation surgery to be able to change legal gender. The plaintiff was registered as a man in the National Register by birth, but wanted to change their legal gender from male to female in January 2014 due to her gender identity as a female. Up to 1 July 2016, there was a condition in Norway that to change legal gender, the person had to have undergone hormonal treatment and had irreversible sterilisation performed. In this case the complainant had not wanted to go through gender-confirming treatment, and argued that this had made her life very difficult and asked the state for compensation. The Court did not award compensation, and did not see this as direct discrimination towards the plaintiff, but the Court concluded that the state practice on legal gender change was indirect differential treatment according to the former SOA. The Court argued that the comparison had to be done with women who do not want or need to change their legal gender. The plaintiff and others with her wanted to do this, but not go through sterilisation. Being assigned a correct social security number was important to the plaintiff and also to other trans people. The Court highlighted that while some people want or can be assigned such a number simply because they are born female, the state practice had made this impossible for biologically male transgender people, unless they went through sterilisation. The Court found that the practice was indirect differential treatment.

However, the Court concluded that the criterion for changing legal gender at the time had a legitimate aim – the production of male and female gametes was to cease – and this was the central criterion for the medical, biological definition of gender. The practice at the time was not regarded as disproportional. The judgment was appealed at the Norwegian Supreme Court, but the appeal was later denied by the Supreme Court.³¹

3.2.3 Specific requirements

There are no specific requirements listed in the GEADA that have to be fulfilled in order for a transgender person to be protected by the act. Protection against discrimination based on gender identity and/or gender expression applies irrespective of diagnosis and surgical treatment, or whether a person has changed legal gender. Moreover, it is not a requirement that the person identifies themselves as being transgender. However, the protection does not include a person's experience of not being male/female where it is not visible to others or is not known or otherwise manifested.³² The grounds of gender identity

²⁹ Statement from the Equality Tribunal of 28 April 2020 in Case 19/273.

³⁰ Judgment from Borgarting Court of Appeal of 15 April 2020 in LB-2018-154220.

³¹ See decision from the Norwegian Supreme Court of 17 June 2020 in HR-2020-1486-U.

³² See the former Discrimination Acts preparatory work in Prop. 88 L (2012-2013) s. 119. <https://www.regjeringen.no/no/dokumenter/prop-88-l-20122013/id718741/?ch=1>.

and gender expression differ from the other grounds of discrimination, because they are largely based on the individual's subjective experiences of themselves.³³

3.3 Direct sex discrimination

3.3.1 Explicit prohibition

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

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

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

3.3.2 Prohibition of pregnancy and maternity discrimination

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

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

Discrimination because of pregnancy and leave is listed as an explicit ground in Section 6 of the GEADA. The prohibition also covers discrimination because of someone's actual, presumed, previous or possible future pregnancy or leave. The prohibition also covers discrimination because of 'association with a person in the aforementioned conditions'.

The provision complies with Article 2(2)(c) of Directive 2006/54/EC. However, Norway has still not implemented the Pregnant Workers Directive 92/85/EEC correctly. Women are not guaranteed 14 weeks' maternity leave reserved for themselves. Instead, this leave is blurred within the 'big bag' of parental leave.³⁴

Case law on pregnancy and maternity discrimination concerns, for instance, the refusal by employers to hire pregnant workers and issues regarding changes in pregnant workers' working conditions and employment contracts (see more about this in part 5.2) These cases relating to pregnancy and maternity discrimination are regarded as direct discrimination.³⁵

3.3.3 Specific difficulties

There are no other specific difficulties in Norway in applying the concept of direct sex discrimination, other than what has already been discussed.

3.4 Indirect sex discrimination

3.4.1 Explicit prohibition

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

³³ See the GEADAS preparatory work in Prop. 81 L (2016-2017).
<https://www.regjeringen.no/no/dokumenter/prop.-81-l-20162017/id2547420/>.

³⁴ See Aune Helga, Norway – Country report gender equality 2018. 'How are EU rules transposed into national law? State of affairs 1 January 2018'.

³⁵ See for example Equality Tribunal Cases 118/2019 and 20/27 discussed in Section 5.2.

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

The Norwegian text of the article is not identical to the text of the Directive, but the content of the exemption is the same as in the EU Directive. The Norwegian Supreme Court has in several cases stated that it will interpret the law in line with the EU directives as interpreted by the ECJ.³⁶

3.4.2 Statistical evidence

In Norway, there is legislation regulating the collection of personal data.³⁷ Statistical evidence is permitted in courts by national law in order to establish indirect discrimination. The key procedural principle in Norwegian civil courts is the free evaluation of evidence by the courts in the course of the case as presented in court, see the Dispute Act (DA),³⁸ Chapter 21, for further details. Chapter 25 of the DA also allows for expert witnesses, i.e. 'an expert assessment of factual issues in the case', for which statistical evidence is particularly relevant.

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

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

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

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

The case law in this area is sparse. In an older case – Ombud's Case 13/1307³⁹ on age and pension rights for women – the Ombud took statistics into account and concluded that the age limit of 67 years in general can disadvantage women financially compared to men, since women have fewer working years due to childcare. Based on the figures, the Ombud

³⁶ See for instance Decision from the Norwegian Supreme Court of 14 February 2012 in Rt 2012-219 *Helikopterpilotes*. This is a case with similarities to that of C-447/09 *Prigge* with regard to age discrimination.

³⁷ See *Lov om behandling av personopplysninger* (Act on personal information) of 2018-06-15-38, <https://lovdata.no/dokument/NL/lov/2018-06-15-38>.

³⁸ Act of 2005-06-17-90: <https://lovdata.no/sok?q=tvisteloven> (Norwegian).

³⁹ Statement of 29 April 2014 from the Equality Ombud.

concluded that an age limit of 67 years in general put women in a worse situation than men, and therefore indirectly discriminates against women compared to men.

There are examples where statistical data were used in a Supreme Court case on age and retirement,⁴⁰ as well as on gender and work-related pensions.⁴¹ The significance attributed to this data by the Supreme Court in its judgment was minimal.

3.4.3 Application of the objective justification test

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

'Differential treatment does not breach the prohibition in Section 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 Section 13-3(2):

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

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

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

The legal preparatory works to the former laws ADA, AAA and SOA state that the possibility for differential treatment in working life is in particular narrow and limited.⁴² Nothing in the GEADA or preparatory works changes this, on the contrary they state that regarding the definitions of direct and indirect discrimination there are no changes in the way the law should be understood.⁴³

The test used to justify indirect discrimination is derived from the *Bilka* case,⁴⁴ and thus is compatible with the origins of the directives. The legal preparatory works to the acts all point directly to the understanding of the directives.

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

⁴⁰ Supreme Court judgment of 29 June 2011 in Rt-2011-964 *Gjensidige*.

⁴¹ Supreme Court judgment of 27 November 2003 in Rt-2003-1657 *Braathens*.

⁴² See Proposal to Parliament: Prop. 88 L (2012-2013), p. 87.

⁴³ See Proposal to Parliament 81 L (2016/2017), Chapter 12.9.1.

⁴⁴ See CJEU case number C-170/84.

There is little case law from the Norwegian courts in general and especially on indirect⁴⁵ discrimination regarding the former GEA and the GEADA. One example is a case from the Labour Court⁴⁶ where the parties disagreed on whether part-time employees should be promoted at the same time as employees working full-time. The wording of the provisions did not give clear indications but was interpreted in the context of the development process of the collective agreements and other provisions. On this basis, the right to promotion was given at the same time for part-time employees as employees working full-time. One judge had a different view on the question of interpretation. According to the majority decision of the Court, it was not necessary to decide whether the unequal treatment of part-time and full-time employees was necessary, and not disproportionate, in order to achieve a legitimate aim. The Court ruled that it was also unnecessary to decide whether it was indirect discrimination in violation of Section 3, second paragraph, second sentence, of the Equality Act and the nature of the European Economic Area (EEA) Agreement.

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

In a case from the Court of Appeal⁴⁷ from 2020, one of the questions for the Court was whether enforcement of Section 3 of the Benefit Act⁴⁸ is to be regarded as indirect discrimination. After a change of Section in 2016, an applicant of supplementary benefit was no longer entitled to this if the Directorate of immigration had required that the reference person (garrantor) had a certain income. The consequence of the change was that many older women who come to Norway from eastern countries through family reunification schemes are no longer entitled to supplementary benefit, but to a social benefit, which is less money.

The Court stated that those who receive supplementary benefits are often female immigrants from countries in the Third World with underdeveloped security systems, and two thirds of those who receive benefits are women. The Court of Appeal admitted that the practice after the change of the Benefit Act raised the question of discrimination, and was not logical.

When it comes to whether the practice was reasonable and had a legitimate aim, the Court answered this in the affirmative. The Court stated that the decision on who is to receive supplementary benefits is made on the basis of the relationship between earned pension benefits and immigration policy priorities. The Court stated that the new rules from 2016 primarily affect those who had already been granted permanent residence and who had been entitled to supplementary benefits, and then lost this due to a narrowing of who is entitled under the scheme. The Court of Appeal did not regard this as unjustified. Furthermore, the purpose of the new legislation is to limit the number of persons who are entitled to receive supplementary benefits, and this was not unjustified according to the Court.

On the question as to whether the possible differential treatment was disproportionate, the Court answered this in the negative, and also took into account that the applicants were still entitled to social benefit.

⁴⁵ See Case HR-2020-2160-U.

⁴⁶ See case from the Norwegian Labour Court of 15 December 1997 in ARD-1997-253 (public link not available).

⁴⁷ Judgment of 17 July 2020 from Borgarting Court of Appeal in LB-2020-53935. The Case was appealed to the Supreme Court, but the appeal was rejected in case HR-2020-2160-U.

⁴⁸ See 'Lov om supplerende stønad til personer med kort botid i Norge' (The Benefit Act) LOV-2005-04-29-21; https://lovdata.no/pro/#document/NL/lov/2005-04-29-21/KAPITTEL_2.

3.4.4 Specific difficulties

The relatively low number of cases on gender equality and indirect discrimination may be explained by a variety of reasons, but one explanation may be that not many lawyers are familiar with the discrimination legislation, especially when it comes to indirect discrimination. This also goes for the judges in Norwegian courts. Discrimination law is not part of the compulsory curriculum in law schools. The members of the Equality Tribunal are lawyers and judges from the District Courts, Courts of Appeal and even former Supreme Court judges, but very few have special competence in Discrimination Law.

Protection from discrimination against part-time workers (the Part-Time Work Directive) seems to be effective. However, protection against indirect sex discrimination in relation to part-time work is still 'strong on paper but weak in practice'. This is a serious point, as gender equality legislation is the only legislation addressing the structural level that recreates and strengthens the gender-stereotypical patterns in society. In the report from 2017,⁴⁹ former national expert on gender equality for Norway, Helga Aune, considered the following to be possible solutions to this problem, which the author of this report agrees on: 1) establishing a connection between the WEA and the GEADA to ensure a gender perspective in employment law, which is segregated from gender equality concerns, and 2) strengthening the legislation on the activity and reporting duty regarding gender equality at the company level.

With regard to the second solution on strengthening the legislation on the 'activity and reporting duty', on 11 June 2019 the Norwegian Parliament approved amendments to the GEADA on 'activity and reporting duties', including for companies.⁵⁰ The amendment entered into force on 1 January 2020.

This means that the employer's duty to report on their efforts to promote equality has been strengthened; see Sections 26, 26a, 26b and 26c of the GEADA. See more details about the duty in part 4.2.12.

This revision also includes changes to the Act concerning Annual Accountancy (Section 3-3c of the Accountancy Act),⁵¹ stating that large enterprises must report on their efforts regarding anti-discrimination and human rights.

3.5 Multiple discrimination and intersectional discrimination⁵²

3.5.1 Definition and explicit prohibition

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

'Discrimination on the basis of gender, pregnancy, leave in connection with childbirth or adoption, care responsibilities, ethnicity, religion, belief, disability, sexual

⁴⁹ Aune, H. (2017) *Country report. Gender equality 2017. How are EU laws transposed into national law? Norway*, available at: <https://www.equalitylaw.eu/downloads/4470-norway-country-report-gender-equality-2017-pdf-1-46-mb>.

⁵⁰ Link to the legal decision from the parliament with the amendment: <https://www.stortinget.no/no/Saker-og-publikasjoner/Vedtak/Beslutninger/Lovvedtak/2018-2019/vedtak-201819-085/>. The text has not been translated into English and there is no English summary. See also Flash report of 30 July 2019 available at: <https://www.equalitylaw.eu/downloads/4947-norway-amendments-to-the-act-on-the-equality-and-anti-discrimination-ombud-and-the-equality-and-anti-discrimination-tribunal-and-gender-equality-and-anti-discrimination-act-pdf-77-kb>.

⁵¹ Act concerning Annual Accountancy of 17 July 1998 No. 56 (*regnskapsloven*), available at: <https://lovdata.no/dokument/NL/lov/1998-07-17-56>.

⁵² For more information, see Fredman, S. (2016) *Intersectional discrimination in EU gender equality and non-discrimination law*, European network of legal experts in gender equality and non-discrimination, available at: <https://www.equalitylaw.eu/downloads/3850-intersectional-discrimination-in-eu-gender-equality-and-non-discrimination-law-pdf-731-kb>.

orientation, gender identity, gender expression, age or combinations of these factors is prohibited.’

3.5.2 Case law and judicial recognition

There have been several cases in Norway regarding the banning of headscarves. Traditionally these cases have been considered direct discrimination on the grounds of religion and indirect discrimination on the grounds of sex/gender in Norway.⁵³ In recent years there seems to have been a certain change in how the Equality Tribunal approaches headscarf-related cases. At the same time there have been debates on whether it is necessary to include the gender aspect in these cases as the hijab is regarded by some as discriminating in itself.⁵⁴

3.6 Positive action

3.6.1 Definition and explicit prohibition

Positive action is allowed in Norwegian national law. Section 11 of the GEADA states that positive action measures in favour of one gender is not in violation of Section 6 if a) the differential treatment is suitable to enhance the aim of the GEADA (to improve equality), b) it is a fair balance between the aim pursued viewed in proportion to how negatively the measures affect the individual or the group affected by the measure, and c) the differential treatment comes to an end when the objective is achieved. Section 11 introduces the possibility for the Ministry (now Ministry of Culture), by means of delegation from the King (i.e. the Government), to issue regulations providing further details of possible positive actions.⁵⁵

The Norwegian definition also complies with the EU definition.

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

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

In Case 18/341⁵⁶ a male archaeology student complained to the Equality Tribunal that he was not allowed to participate in an exchange programme issued by the Directorate for Internationalisation and Quality Development in Higher Education. The available places went to two female applicants. The Equality Tribunal discussed whether the requirement to strive for 50 percent women in the programme was to be regarded as a positive action measure as in Section 11 of GEADA. The Equality Tribunal argued that the measure in fact did promote equality for women. The Equality Tribunal also argued that the measure contributed to the educational institutions working actively internationally to increase the

⁵³ Statement of 20 August 2010 from the Equality Tribunal, Case 8/2010 Headgear/hijab in the Norwegian Police (searched in ‘old cases’).

⁵⁴ See Gullikstad, B. (2007), available at: <https://forskning.no/innvandring-kjonn-og-samfunn-likestilling/likestilling-med-hijab/996868>. Based on its most recent decisions on headscarves it seems that the Equality Tribunal regards such cases only as discrimination based on religion, and not indirect discrimination on the grounds of sex (gender).

⁵⁵ The former regulation 1998-07-17-622 (*Forskrift om særbehandling av menn – Regulation on positive action in favour of men*), which explicitly allowed differential treatment in favour of men concerning recruitment for positions within education, was repealed in 2017. Positive action measures to employ men in certain positions still have to be suitable for eliminating the disadvantages and barriers to applying for positions that are strongly dominated by women. An employer’s wish to improve the gender balance in a workplace will not be enough to justify differential treatment of women and men.

⁵⁶ Statement from the Equality Tribunal of 6 January 2020.

proportion of women in higher education. The Equality Tribunal also pointed out that the purpose of the measure is to get a higher proportion of women among the students who participate in exchanges, because women are under-represented in higher education in the partner countries.

3.6.3 Specific difficulties

As boys on average achieve lower grades than girls at school, female students are increasingly enrolling in previously male-dominated higher education courses at the universities and thus the request is more and more frequently made for 'gender points' to be used in order to assist the under-represented gender's access to these courses.⁵⁷ Practically speaking, this means that the under-represented gender is awarded a specific number of points if its members apply to study courses where it is under-represented. For example, a male applicant is awarded two gender points if he applies to nursing school.⁵⁸ This might lead to possible conflicts with the GEADA.⁵⁹ Some researchers have stated that schools and universities, just like employment, should be obliged to report on how they work with equality, and be obliged to achieve equality – the same activity and reporting duty as for employment today.⁶⁰ In 2020 the Government asked the Norwegian Institute for Studies in Innovation, Research and Education (NIFU) to review the Norwegian recording system of higher education, and especially how the characters and additional points affect the recording. Four areas in education were in focus: professional education in medicine, psychology, law (jurisprudence) and elementary school teaching (GLU) 1-7.⁶¹ The Equality Ombud has encouraged the Government to look for other possible ways to achieve equality in education than by using gender points.⁶²

The Equality Ombud released a report in May 2015 on the use of positive action and explaining the legal boundaries of positive action measures.⁶³

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

3.6.4 Measures to improve the gender balance on company boards

The legislative technique of quotas, in the sense of demanding the representation of members of both sexes, has been successfully in use since 1981 when the rule was introduced in the GEA of 9 June 1978, regarding public boards and committees. Examples are public-appointed boards of any kind, such as the Board of the National Museum, official delegations representing Norway at the UN, and committees preparing legal reforms.

⁵⁷ See the university newspaper of Oslo University: <http://universitas.no/nyheter/60404/krever-kjonnspoeng-pa-uo0>.

⁵⁸ <https://www.samordnaopptak.no/info/opptak/poengberegning/legge-til-poeng/kjonnspoeng/>.

⁵⁹ See Aune, H. (2018) *Country report. Gender equality. How are EU laws transposed into national law? Norway 2018*.

⁶⁰ See Aune, H., Article in newspaper *Dagens næringsliv* of 23 March 2021 'Ja, nå er det guttas tur, og likestillingen må starte i skolen' (It's the boys' turn, and equality should start in schools)'.

⁶¹ Hovdhaugen; Sandsør; Rønsen; Carlsten. NIFU report 2020: 4. Admission to higher education. A study of the impact of quota and scoring with focus on psychology, medicine, law and education.

⁶² See letter of 11 December 2020 from the Equality Ombud to the NIFU report; <https://www.ido.no/arkiv/hoyringsarkiv/hoyringar-2017-2020/horingssvar-fra-likestillings--og-diskrimineringsombudet---nifu-rapport-om-opptak-til-hoyere-utdanning/>.

⁶³ For more information, see the Equality Ombud's report, *Positive action*, May 2015. The report is not available online.

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

Rules applying to public limited liability companies were put into force by Norway on 1 January 2006 in Sections 6-11a of the Public Limited Liability Companies Act. Similar rules are implemented in all the other company acts where there is partial public ownership.⁶⁴ Private companies have no quota requirements as there are many small companies which are owned by between just one and three people and the boards are made up of only three people.

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

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

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

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

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

3.7 Harassment and sexual harassment

3.7.1 Definition and explicit prohibition of harassment

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

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

⁶⁴ Teigen, M. (2015), 'Virkningen av kjønnskvotering i norsk næringsliv' (The effects of the quota rule / affirmative action in the Norwegian employment market), *Gyldendal Akademisk*.

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

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

The legal preparatory works to the prohibition of harassment in the GEADA emphasise that the concept of harassment must be construed in accordance with the general concept of harassment in the WEA (third paragraph of Section 4-3).⁶⁵ This provision contains a general requirement that workers should not 'be subject to harassment or other improper conduct.' Harassment protection pursuant to Section 4-3 thus also includes harassment related to factors other than the grounds protected by discrimination rules. The provision is part of the requirements of the psychosocial work environment and is a continuation of the now obsolete Working Environment Act (1977), Section 12. Case law regarding the provision related to general harassment (previously WEA Section 12 and current WEA Section 4-3) is thus of relevance for the understanding of the concept of discriminatory harassment.⁶⁶ 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.

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 employer⁶⁷ 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 Section 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.⁶⁸ However, the following sentence was added to the GEADA Section 38(2) in 2019 (and came into effect from 1 January 2020):

'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.⁶⁹

⁶⁵ 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.

⁶⁶ See the preparatory works' special notes to the actual provision (Section 13-1) in the Proposition to the *Odelsting*. No. 49 (2004-2005) on the WEA.

⁶⁷ It should be noted that this was changed as of 1 January 2020, see GEADA Section 38(2), second sentence.

⁶⁸ Proposition to Parliament, Prop. 81 L (2016-2017) Chapter 28.5.2.4.

⁶⁹ 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

There is, however, a duty of due diligence on the employer⁷⁰ regarding harassment that is performed by other persons at the workplace, which is twofold (GEADA Section 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.⁷¹ The liability for the employer thus does not include harassment between colleagues if no blame is attached to the employer.⁷² 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 Section 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 Section 38 of the GEADA, the liability follows the rules of the Act relating to compensation in certain circumstances:⁷³ 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).⁷⁴

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.

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

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

3.7.2 Scope of the prohibition of harassment

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

3.7.3 Definition and explicit prohibition of sexual harassment

Sexual harassment is explicitly prohibited in Norwegian legislation, and is defined in Section 13, third paragraph of the GEADA:

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

someone acting on behalf of the employer has performed the harassment. Proposition to Parliament, Prop. 81 L (2016-2017) Chapter 28.5.8.4.

⁷⁰ 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.

⁷¹ Proposition to Parliament, Prop. 63 L (2018-2019) p. 16.

⁷² Proposition to the Odelsting, *Ot.prp.* No. 35 (2004-2005), p. 50 and Proposition to Parliament, [Prop. 81 L \(2016-2017\) side 337](#).

⁷³ Act relating to compensation in certain circumstances (*Skadeserstatningsloven*) of 13 June 1969 No. 26.

⁷⁴ In Norway, Hålogaland *Lagmannsrett* (Court of Appeal) Case 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 the technician had made him aware of the harassment. This has been appealed to the Supreme Court.

The sexual attention can be verbal, non-verbal or physical, and how the victim themselves has experienced the situation is important. This includes everything from looks, touching and sexual comments to rape and attempted rape.⁷⁵ Sexual harassment can also occur if someone is sent pictures or videos with sexual content via, for example, letters, telephone or the internet. The former Section 8 of GEA has similar wording. The definition of sexual harassment in Norwegian law has several similarities with the definition of 'sexual harassment' in Article 2(1)(d) of Directive 2006/54/EC. However, contrary to the definition in the Directive, the definition in Section 13 of the GEADA does not require that a person's 'dignity has to be violated' for it to be sexual harassment. There may be cases of unwanted sexual attention even if the person's dignity is not violated. For example, in cases where the sexual attention is just annoying, but does not violate dignity. In other words, in Norway 'just' bothering behaviour can also be regarded as sexual harassment as long as it is linked to sexual attention of some sort, either verbal, non-verbal or physical. If there is an unequal relationship between the parties, for example, if the person being harassed is in a subordinate position to the person responsible for the sexual attention, the behaviour will probably be considered more troublesome.

In Section 13 of the GEADA it is also a criterion that the sexual attention is unwanted from the victim's perspective. Basically, the harasser must, by word or action, be made aware that their action is unwanted (though this seems not to be an absolute requirement). Individual cases of sexual attention may be of such a serious nature that it is not a requirement that the person responsible for the attention is made specifically aware that it is not wanted. The requirement that the harasser must be made aware that the harassment is unwanted does not apply in situations where the person being harassed did not speak and say stop, because it must have been obvious to the perpetrator that such behaviour was unwanted. Using body language must also be regarded as saying stop.⁷⁶

However, contrary to the GEADA, the argument under EU law, EU Directive 2006/54/EC Article 2(1)d, is that there is no clear requirement for the person subject to the harassment to say stop or make the harasser aware of the fact that the conduct is perceived as harassment. In last year's report, the author asked if the Norwegian law fulfilled the EU law on this matter. In the first Supreme Court judgment⁷⁷ (see below for the case from the Court of Appeal and the Supreme Court) on sexual harassment after Section 13 of GEADA, the Court modifies this and states that it is not an absolute requirement that the person who is exposed to the sexual attention makes the perpetrator aware that the attention is unwanted. In serious cases an objective assessment will show that perpetrator should have understood that the actions were unwanted from the victim's perspective. However, in EU law there is also no clear requirement when it comes to a one-off incident. In the author's view, Norwegian law may not fulfil EU law on this matter.

A case from Hålogaland Court of Appeal from December 2019⁷⁸ was appealed to the Supreme Court by the victim, and the Supreme Court reached its judgment in December 2020 as the first Supreme Court judgment on sexual harassment. A female apprentice training to become a welder filed a lawsuit complaining of sexual harassment in the workplace, demanding damages and compensation from the employer and two customers. The woman was 19 years old at the time. She was also the only female working there. The workshop was situated in a small community on an island in Norway. The woman had experienced several insulting episodes with the two customers, and complained to her employer about this. One of the customers, a 50-year-old man (A) who worked for the largest salmon company in the area, had come up behind her, and placed both hands on her back, under her sweater on bare skin while she was on the floor working. When this happened, the woman stopped what she was doing, got up and left the room without

⁷⁵ See the Preparatory works for the GEADA, Prop. 81 L (2016-2017), available at: <https://www.regjeringen.no/no/dokumenter/prop.-81-l-20162017/id2547420/>.

⁷⁷ Judgment from The Norwegian Supreme Court of 22 December 2020 in Case No. HR-2020- 2476-A.

⁷⁸ Judgment of 12 December 2019 from Hålogaland Court of Appeal in Case LH-2019-87696 – LH-2019-135298 – LH-2019-135300 (only closed link available).

saying anything. On another occasion the same customer had stood in the doorway and reached out a hand and pretended to grab her by the crotch. The woman clearly stated to him that this was undesirable behaviour. Another customer, (B), had repeatedly tickled her waist and on one occasion had patted her on the bottom.

In the Court of Appeal the employer was held responsible for their failure to prevent and seek to prevent sexual harassment pursuant to the former GEA and GEADA, and sentenced to pay damages to the complainant. The woman also argued that she had been sexually harassed by the two customers, where A was acquitted in the Court of Appeal, and B was sentenced to pay her compensation.

The Supreme Court concluded that both customers had sexually harassed the woman as their behaviour was regarded as sexual attention and was unwanted and troublesome for her. The customers were sentenced to pay compensation to the woman of NOK 20 000 (approximately EUR 2 000) and NOK 15 000 (approximately EUR 1 500). The court was made up of five Supreme Court judges. The judgment was a unified decision. All in all, the judgment clarifies to some extent the threshold for what is sexual harassment. However, the Supreme Court's arguments are a bit incomplete about what is regarded as 'sexual attention' except for what is already stated in the preparatory works. As this is the first judgment on sexual harassment it would be preferable if the Court had clarified this a bit more than it actually does.⁷⁹

The Supreme Court stated that what is regarded as sexual harassment is based on a concrete assessment, and the Court mentions various factors as to whether a behaviour is 'unwanted and troublesome'. When it comes to whether A's actions were 'troublesome', the Supreme Court importantly states that a key element in the interpretation is what the Court refers to as a 'women's norm', since far more women experience sexual harassment than men. The Supreme Court reference to this norm is important and can make it easier for victims to argue sexual harassment in other cases. The Supreme Court stated that the fact that the sexual attention must be unwanted implies that individual events – where the victim has not had the opportunity to speak out in advance – will only be regarded as sexual harassment if it is serious enough. As both customers had shown repeated behaviour in this, this was obvious for the Court in this case.

However, about the incident where one of the customers had touched the woman's back, the Supreme Court stated a bit surprisingly, that this probably would not be considered serious enough to be regarded as sexual harassment, as an isolated incident. This is surprising given that the customer who had touched her back on bare skin from behind was in fact a superior, and given the age difference. It seems like the Supreme Court is too strict on what is considered to be sexual harassment during a one-off incident.

3.7.4 Scope of the prohibition of sexual harassment

Section 13 of the GEADA applies to all areas of society.

3.7.5 Understanding of (sexual) harassment as discrimination

Norwegian law covers Article 2(2)(a) of Directive 2006/54/EC in Section 13 of the GEADA and Section 13-1(7) of the WEA, as well as Sections 298 and 305 of the Penal Code.⁸⁰ In national law, harassment is also understood as discrimination.

Specific difficulties

⁷⁹ This is also highlighted in an article of 16 March 2021 from magazine Juridika written by lawyer Lill Egeland from the Law firm Simonsen Vogt Wiig. See 'Kommentar til Høyesteretts dom i Metoo-saken HR-2020-2476-A. (Comments on the Me too judgment).

⁸⁰ The Penal Code, Act of 2005-05-20-28, available at: <https://lovdata.no/dokument/NLE/lov/2005-05-20-28>.

As mentioned in part 3.7.1, a specific difficulty is that it is uncertain what degree of liability employers now have when they themselves or their representatives harass someone.

Another specific difficulty is that there are very few cases of sexual harassment brought before Norwegian courts. Sexual harassment cases are time-consuming and expensive. Therefore, few victims of sexual harassment bring their cases to court. The case from December 2020 was the first Supreme Court judgment on sexual harassment, but the compensation amount awarded was low which may lead to few cases before the courts on sexual harassment. In any case, the judgment is an important source for similar cases in the future.

Statistics from the Equality Tribunal⁸¹ also show that there were few cases brought before the Tribunal in 2020 concerning harassment on the basis of sex/gender.

Since 1 January 2020 the Equality Tribunal has had the authority to enforce Section 13 of the GEADA regarding the prohibition of sexual harassment.⁸² The Equality Tribunal has concluded that it has a mandate to deal with cases of sexual harassment where the harassment happened and ended before 1 January 2020.⁸³

During 2020 the Equality Tribunal received 17 complaints of sexual harassment, which is not a low number given that it is its first year to deal with these cases. The Equality Tribunal dealt with nine cases in 2020, but only gave one statement. The other cases on sexual harassment were closed due to lack of evidence or because the complainant did not follow up the complaints. The seven other complaints on sexual harassment from 2020 were still under investigation as at 1 January 2021.

The Equality Tribunal's only statement in Case 20/118⁸⁴ on sexual harassment in 2020 is questionable, especially in light of the Supreme Court judgment from December 2020. However, the Equality Tribunal concluded this case before the 'Me too' judgment from the Supreme Court. The case concerned an incident at a workplace where a male superior had come up behind a male employee and pulled down his boxer shorts in front of another colleague when they were changing into work clothes. The Equality Tribunal concluded that no sexual harassment had taken place. The Equality Tribunal argued that circumstances surrounding the incident – the fact that the action took place in daytime, in a locker room with closets where it is normal to undress and change into work clothes together with others, and that the parties also knew each other well after working together for many years – can occur in such situations and the Tribunal did not find the event extraordinary. Also, the fact that it had happened only once, and that the superior had apologised for what had happened made the event excusable according to the Tribunal. The Tribunal's conclusion in this case is questionable, however, since 'sexual intention' has never been a requirement for sexual harassment in the GEADA. Also, the male complainant in the case was clearly affected by the incident and took sick leave. There is no doubt that the incident was serious enough for it to be regarded as sexual harassment. In the author's opinion it is relevant to ask if the conclusion would have been the same if the complainant in this case had been a woman.

⁸¹ See the Equality Tribunal website: <https://www.diskrimineringsnemnda.no/klagesaker-og-statistikk/sokstatistikk>.

⁸² The amendment entered into force on 1 January 2020.

⁸³ See Equality Tribunal's Case 20/54 where the Equality Tribunal consisting of five members in accordance with Article 6 of the regulations on the organisation, tasks and case processing of the Equality Tribunal (FOR-2017-12-20-2260) (see more about this in Section 11) concludes that it has competence to treat cases where the matter had happened before 1 January 2020. The concrete case was later dismissed because the accused party reported the victim to the Police for making a false statement and the Police were investigating the case at the time of the complaint. According to Article 10(c) of the EAOA, the Equality Tribunal cannot treat complaints where the Police are investigating a matter.

⁸⁴ Statement from the Equality Tribunal of 21 December 2020.

In Case 20/154⁸⁵ the Equality Tribunal also considered whether the victim's employer in the case mentioned above had fulfilled its 'duty to prevent and seek to prevent' sexual harassment in light of the incident described in the case. The question was whether the employer had taken the case seriously and followed up on the message that one of his employees had been sexually harassed. The Equality Tribunal answered this in the affirmative. Meetings were held about the case and the actual colleague received a warning – according to the Equality Tribunal, the duty to seek to prevent new cases was therefore met. The employer's follow-up on the case had been adequate. The incident appeared to be an isolated event and was according to the Equality Tribunal not part of a pattern of repeated incidents.

The Equality Tribunal has also acquired the authority to award damages for economic loss in cases regarding breaches of the GEADA and WEA and the other acts mentioned in Section 1 of the Equality and Anti-Discrimination Ombud Act.(EAOA) where the only submissions made by the respondent relate to inability to pay or other manifestly untenable objections. However, there are still some restrictions as to what discrimination cases the Equality Tribunal may take up for decision. There is no limit on the Equality Tribunal's power to award redress/compensation. In the preparatory works a limit of NOK 10 000 (approximately EUR 100) in damages is mentioned, but this is not absolute.⁸⁶ However, it has to be in the context of an employment relationship and in connection with an employer's selection and treatment of self-employed persons and hired workers according to Section 12 of the EAOA. The Equality Ombud's mandate to give guidance and legal help in cases of sexual harassment has been strengthened, and the Equality Ombud gave guidance in a high number of cases regarding sexual harassment. See more about this in part 11 on the Equality Ombud.

In some cases decided by the Tribunal's chair, the parties are entitled to oral negotiations according to Section 5 of the regulation on the organisation, tasks and case processing for the Equality Tribunal.⁸⁷ In cases on sexual harassment, oral negotiations may be more necessary than in other cases, since these cases are completely new to the Equality Tribunal and due to the fact that these cases are very often based on statements from the victim, the accused and witnesses.

The Equality Tribunal reported that it prepared for oral hearing in one case on sexual harassment in 2020, but the case was closed due to lack of follow-up from the complainant.⁸⁸ The Equality Tribunal's decisions are directly enforceable in cases where redress/compensation has been awarded. Victims of sexual harassment can also still bring their cases to the courts.

3.8 Instruction to discriminate

3.8.1 Explicit prohibition

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

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

Section 13-1(2) of the WEA also has the following wording:

⁸⁵ Statement from the Equality Tribunal of 21 December 2020.

⁸⁶ See the Preparatory works Prop. 80 L (2016-2017) p. 106, available at: <https://www.regjeringen.no/contentassets/7004bcfcff27491da0ff4cafe6c8eec5/no/pdfs/prp201620170080000dddpdfs.pdf>.

⁸⁷ Regulation FOR-2017-12-20-2260, entry into force 1 January 2018.

⁸⁸ Information given by the Equality Tribunal's Director by phone in December 2020.

'Harassment and an instruction to discriminate against persons on the basis of the various protected grounds listed in the act are defined as discrimination.'

3.8.2 Specific difficulties

The author is not familiar with any specific difficulties in relation to the concept of an instruction to discriminate and very few cases on this topic have come before the Equality Tribunal.

3.9 Other forms of discrimination

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

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

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

Algorithmic discrimination (AI) is covered by the general legislation on discrimination in the GEADA. The Government has also developed a Strategy⁸⁹ for using AI in public administration. The Government is also considering targeted legislation for various types of AI in different sectors of society.⁹⁰ When it comes to AI there is very limited case law to report on, only a couple of examples from the media.⁹¹ There is still a lack of awareness and knowledge about the potential discriminatory effects of algorithms and how to prevent this, both in the public and private sector. A lack of more concrete rules and guidelines is visible, for example, regarding insurance and the use of algorithms in the public administration.

3.10 Evaluation of implementation

The national law that implements the EU law concepts discussed in this chapter is in general satisfactory.

However, it remains a concern that few cases of discrimination reach the Norwegian courts. After the latest Supreme Court judgment on sexual harassment, mentioned in part 3.7.3, this might change, but on the other hand, the amount of compensation awarded in that case was very low which may lead to few cases on sexual harassment being brought to court. The Equality Tribunal has a mandate to treat cases on sexual harassment, but so far the Equality Tribunal has also only given one statement in one case as mentioned in 3.7.5, where the result also was questionable.

⁸⁹ See National Strategy for Artificial Intelligence; <https://www.regjeringen.no/no/dokumenter/nasjonal-strategi-for-kunstig-intelligens/id2685594/?ch=7>.

⁹⁰ Norwegian Government (2020) Government strategy on artificial intelligence, <https://www.regjeringen.no/contentassets/1febbb2c4fd4b7d92c67ddd353b6ae8/no/pdfs/ki-strategi.pdf>, see, for example, p. 8, where the health sector is mentioned in particular.

⁹¹ In a case from May 2017, in a commercial for the pizza company 'Peppes Pizza' in Oslo central station, a male IT expert discovered that there was an error with the software in the digital advertising screen at the pizza restaurant. The screen did not show him pictures of tempting pizza or drinks, but instead a detailed description of what kind of people had looked at the screen, showing their gender, age, appearance and even their mood. When he approached to take a picture, the advertising screen described him as 'male', 'young adult', 'glasses' and finally 'smile'. The purpose of the advertising sign was to adapt the restaurant's content to the viewer and sell more food and beverages. The result was that at the pizza place, men were shown pictures of pizza with steak/meat, while women were shown healthy salads.

Furthermore, a large number of complaints relating to gender identity/gender expression are dismissed by the Equality Tribunal, even cases that in the author's opinion clearly raise questions of discrimination; see more about this in part 3.2.2.

3.11 Remaining issues

The most important issues have already been discussed in the previous parts of the report.

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

4.1 General (legal) context

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

The COVID-19 pandemic has influenced work life in Norway in 2020, also when it comes to equal pay. Numbers from Statistics Norway from 2020⁹² show that the pay gap between men and women most definitely still exists in Norway, and that the pay gap between men and women increased also from 2019 to 2020, but at the same time went down in all sectors. The survey shows that from 2016 to 2019, the gender pay gap was reduced by 1.3 percentage points, with a lower reduction from year to year. However, from 2019 to 2020, there was an increase in the differences in salary between women and men with 0.2 percentage points. This is due to the major changes in working life after the measures effectuated by the Norwegian Government on 12 March 2020⁹³ because of the COVID-19 pandemic.⁹⁴ Within the individual sectors, however, the women's share of wages has increased in all sectors.

4.1.2 Surveys on the difficulties of realising equal treatment at work

Reports from Kilden Research Centre on behalf of The Directorate for Children, Youth and Family affairs (BufDir) and Kilden Research Centre⁹⁵ also show that the COVID-19 pandemic has caused unemployment in both the private sector and the public sector due to the Government's strict measures to prevent spread of the COVID-19 virus.⁹⁶ This has led to an increased workload, especially in female-dominated sectors such as healthcare and service-oriented professions. Studies from the early phase of the pandemic also showed that women were more affected by the measures than men. This may be due to an over-representation of women in the industries affected by the Government measures, such as personal service and accommodation and catering services, but also because women have jobs where it is difficult to actually avoid contact with others, such as in healthcare, kindergarten and schools. Minority women who work in sectors that have been hit hard by the crisis are extra vulnerable. According to the report from Kilden Gender Research, women in innovation, academia and the arts and culture sector were also

⁹² See article of 4 March 2021 with survey 'Lønnsforskjeller mellom men og kvinner påvirkes av korona' (The gender pay gap is influenced by corona) from *Statistisk sentralbyrå* (Statistics Norway) website on numbers from 2020 published 4 March 2021 <https://www.ssb.no/arbeid-og-lonn/artikler-og-publikasjoner/lonnsforskjeller-mellom-kvinner-og-menn-pavirkes-av-korona>.

⁹³ For information about the measures, see the Government's website: <https://www.regjeringen.no/en/aktuelt/economic-measures-in-norway-in-response-to-covid-19/id2694274/>.

⁹⁴ Because of the COVID-19 pandemic the Norwegian Government shut down large parts of the country from 16 March 2020. All kindergartens and schools were shut down entirely from 16 March 2020 to 20 April 2020. Kindergartens then reopened partially, and schools reopened for all pupils from 11 May, entirely or partially, depending on the school's administration. Since then, various parts of the country have been shut down and opened in different periods depending on the situation in the district. Timeline for COVID-19 measures: <https://www.regjeringen.no/no/tema/Koronasituasjonen/tidslinjekoronaviruset/id2692402/>.

⁹⁵ The Directorate's Department for Equality and Universal Design, has been assigned responsibility for looking into discriminatory effects of COVID-19 in Norway 'based on gender and other grounds of discrimination in relevant areas, for example violence, employment and economics'. On behalf of *Bufdir*, Kilden Research Centre has published three reports about the effects of COVID-19 related to gender equality. *Bufdir* has also issued its own reports on the effect of the COVID-19 pandemic when it comes to economy and working life for gender equality, ethnicity and LGBTIQ.

⁹⁶ See Kilden Gender Research's website: <https://kjonnsforskning.no/nb/koronapandemiens-konsekvenser-for-likestillingen>. The reports are about: 1. Violence against women, 2. working life and economy and 3. one report on how to move on after the pandemic. See report from Kilden Gender Research 'Likestillingskonsekvenser av koronapandemien Arbeidsliv og økonomi' (Consequences for Gender Equality because of the COVID-19 pandemic. Working life and economy) https://kjonnsforskning.no/sites/default/files/notat_bufdir_likestillingskonsekvenser_av_koronapandemien_arbeidsliv_og_ekonomi.pdf.

affected by the pandemic in 2020. Women with 'start up' businesses were hit particularly hard.

4.1.3 Other issues

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

4.1.4 Political and societal debate and pending legislative proposals

In 2019 the Parliament discussed the proposal on a statutory certification process for companies and institutions with over 25 employees like they have in Iceland. All parties supported the intention of the representative's proposal to equalise gender-based wage differences in Norwegian working life and the importance of equal pay for equal work. However, the Conservative Government parties did not support the proposal, and it did not receive a majority in Parliament.⁹⁷

4.2 Equal pay

4.2.1 Implementation in national law

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

4.2.2 Definition in national law

The concept of pay itself is defined in Section 34, paragraph 4 of the GEADA:

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

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

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

There has not been any recent national case law on the definition of pay. However, there are some relevant older cases from the Equality Ombud. In Case 07/406⁹⁸ a woman who was employed by the school leisure scheme in a municipality complained that she received less salary than male supervisors at another department in the municipality. The Equality Ombud concluded that the complainant performed work of equal value to the supervisors and that the lower remuneration was in violation of Section 5 of the GEA, cf. Section 3. The Equality Ombud stated that:

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

This statement from the Equality Ombud is also relevant when it comes to Section 34 of the GEADA. The case was appealed to the Equality Tribunal in Case 42/2009 *Fredrikstad*

⁹⁷ See the decision from the Committee for Family and Culture in the Norwegian Parliament: available at: <https://www.stortinget.no/no/Saker-og-publikasjoner/Publikasjoner/Innstillinger/Stortinget/2018-2019/inns-201819-192s/?m=3>.

⁹⁸ Statement of 8 April 2009 from the Equality Ombud.

*kommune*⁹⁹ where the Tribunal, by a majority, reached the same conclusion as the Equality Ombud.

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

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

4.2.4 Related case law

An older landmark case came from the Labour Court, ARD-1990-148,¹⁰⁰ regarding an equal pay claim by female bioengineers as compared to other types of engineers who were all male. The bioengineers were paid less per hour than the other engineers. The court found, after a thorough and specific evaluation of the various elements of the job tasks, that it was indeed work of equal value and that the equal pay rule had been violated. The Court found that the clause collectively negotiated was invalid, while the remaining part of the collective agreement remained valid.

Another landmark case is Tribunal Case 42/2009 *Fredrikstad kommune* mentioned in Section 4.2.2 where a municipality was ordered to remedy the error of not paying equal pay to women working in afterschool care compared to men in equivalent positions as 'work leaders'. The Equality Tribunal undertook a specific evaluation of the job tasks at the two workplaces.

In Case 19/330¹⁰¹ a university had offered a male applicant to a position as associate professor a higher salary than the female complainant was offered when she had started in the same position a year before. The University argued that the pay gap was necessary due to recruitment difficulties, and the need for a person who could start the job as soon as possible. The Equality Tribunal concluded that the University had acted in contradiction to Section 34 of the GEADA by doing so. The first question for the Equality Tribunal was whether the complainant and her male colleague performed 'the same work or work of equal value', and the Tribunal answered this in the affirmative. The Tribunal pointed out that they were the same age, had the same education and that both were considered qualified by a nomination committee. Regarding the employer's argument about recruitment difficulties, the Equality Tribunal pointed out that it may be necessary to take recruitment considerations into account when it comes to wage determination in some cases, but the requirements for counter-evidence or justification are strict. The Tribunal concluded that it had not been provided with sufficient evidence that the recruitment situation made such a difference in salary necessary.

Also, in Case 19/445¹⁰² the Equality Tribunal considered whether the employer had acted contrary to Section 34 of the GEADA because there was a considerable pay gap between the complainant and a colleague who received a higher salary than her when he got a job in the municipality. However, in this case the Equality Tribunal concluded that the employer had not acted contrary to the equal pay provision in Section 34 of the GEADA. The Equality Tribunal found that the two employees did not perform the same work or work of equal value. According to the Equality Tribunal, the man had a higher and different position with more responsibility than the complainant.

⁹⁹ Statement of 27 May 2010 from the Equality Tribunal.

¹⁰⁰ Judgment from the Labour Court of 28 September 1990 in case ARD-1990-148 (no public link available).

¹⁰¹ Statement of 19 May 2020 from the Equality Tribunal.

¹⁰² Statement of 17 August 2020 from the Equality Tribunal.

Case 19/453¹⁰³ was about determination of pay and a complainant who did not receive a 'qualification supplement' from the employer in 2016, 2017 and 2018. At the time she had been on parental and sick leave. The Equality Tribunal concluded that no discrimination due to sex/gender and use of parental leave had occurred. The qualification supplement raises questions on indirect discrimination due to gender and parental leave because according to the employer's practice, it seems this would never be given to an employee who was not present at the work place for a whole year. However, the Equality Tribunal never discussed indirect discrimination.¹⁰⁴

4.2.5 Permissibility of pay differences

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

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

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

4.2.6 Requirement for comparators

A concrete comparator is not required according to the law (Section 34 of the GEADA). However, a comparator of the other sex is very often referred to, but this may be a hypothetical comparator, which is accepted. This is not perceived as problematic in practice and may be regarded as a necessity, as the Norwegian employment market is highly gender-segregated. If there was a requirement that there should be a concrete comparator of the opposite sex in every case, it would be almost impossible to bring an equal pay claim.¹⁰⁵

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

The GEADA (Section 34, third paragraph) establishes that the decision as to whether or not the work/positions are of equal value is made after an overall evaluation where relevant factors such as effort, responsibility and working conditions in the workplace are assessed. For example, the need for the necessary competence/qualifications to perform the job is relevant as well as other factors such as effort, responsibility and other working conditions. The parties can in principle raise all aspects/parameters that they consider relevant.

In Case 19/330, mentioned in part 4.2.4, the Equality Tribunal stated that in order for there to be a violation of Section 34 of the GEADA, the people being compared must receive different pay, there must be people of different sexes, and the people being compared must work in the same industry. Furthermore, the Equality Tribunal stated that the people compared must have the same work or work of equal value. In the case, the

¹⁰³ Statement of 15 September 2020 from the Equality Tribunal.

¹⁰⁴ In the report from April 2021 'Diskrimineringsretten 2020 Rettsutvikling på likestillings- og diskrimineringsfeltet, med gjennomgang av relevante lovendringer, forvaltnings- og rettspraksis' (Discrimination Law 2020) the Equality Ombud has asked why the case was not regarded as indirect discrimination, and the author agrees with the Equality Ombud.

¹⁰⁵ For more on proving unequal pay and the use of a comparator or a hypothetical comparator see the Equal Pay Commission's discussion in NOU 2008: 6 *Kjønn og lønn*, Chapter 7.1.2.

Equality Tribunal emphasised as parameters that the two were of the same age, had the same education and were both found qualified by a nomination committee.

4.2.8 Other relevant rules or policies

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

4.2.9 Job evaluation and classification systems

Norway has not introduced the 'Icelandic model', an explicit mandatory certification process for companies and institutions with more than 25 employees,¹⁰⁶ to provide evidence that they pay men and women equally for the same job. As mentioned in part 4.1.6, this was proposed in Parliament in Norway in 2018 by the Socialist Party, but did not have enough support in Parliament. See also parts 4.2.11 and 4.2.12 about the strengthened 'activity and reporting duty' for employers also when it comes to equal pay.¹⁰⁷

4.2.10 Wage transparency

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

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

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

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

National law addresses wage transparency, and Norway has implemented some of the European Commission's Recommendations of 7 March 2014 on strengthening the principle of equal pay between men and women. Most of them were implemented in national legislation before the recommendations entered into force. However, there is no information about any actions in response to the Recommendations on the Government's website.

Right to information on pay: Section 32 of the GEADA lays down the employer's duty to provide information regarding pay as mentioned in part 4.2.10. In a complaint to the Equality Tribunal on discrimination, the complainant may ask the employer to provide such information.

¹⁰⁶ See report 2018:10, 'Sertifisert likestilling, lønnsstandarden på Island' (Certified equity. Equal pay in Iceland) from the *Institutt for samfunnsforskning* (Institute for Social Research), available at: https://samfunnsforskning.brage.unit.no/samfunnsforskning-xmlui/bitstream/handle/11250/2503028/Rapport_2018_10_Sertifisering_web.pdf?sequence=1&isAllowed=y.

¹⁰⁷ See Flash Report of 30 July 2019 available at: <https://www.equalitylaw.eu/downloads/4947-norway-amendments-to-the-act-on-the-equality-and-anti-discrimination-ombud-and-the-equality-and-anti-discrimination-tribunal-and-gender-equality-and-anti-discrimination-act-pdf-77-kb>.

Concept of work of equal value: According to Section 34 of the GEADA, women and men in the same enterprise shall receive equal pay for the same work of equal value. Pay shall be set in the same way, without regard to gender. The measures are enforced. As mentioned, the Equality Tribunal may issue statements in cases on claims of unequal pay. There is a broad understanding of what constitutes 'the same enterprise'. The state is considered one employer, as is each individual municipality (local government) in the public sector. In the private sector it is more restrictive, as there are many employers that are considered completely separate. However, especially in the public sector, this broad understanding of 'the same enterprise' has allowed the Equality Ombud¹⁰⁸ and Tribunal to evaluate the relative value of widely different jobs.

When it comes to statistics and administrative data, Statistics Norway publishes statistics on the pay for women and men.¹⁰⁹ The Norwegian Directorate for Children, Youth and Family Affairs (*Bufdir*) also publishes statistics each year on the gender pay gap.¹¹⁰

Duty to report on pay: As mentioned in part 3.4.4, the 'activity and reporting duty' in Chapter 4 of the GEADA was significantly strengthened as of 1 January 2020, when it comes to the duty to report on work for equal pay.

According to the GEADA Section 26, first paragraph, public authorities have a duty to engage actively in efforts to promote equality in all sectors of society, also when it comes to equal pay. In addition, public authorities now have a duty to provide reasons in connection with the exercise of official powers and their role as a service provider.

According to Section 26, second paragraph, both public and private employers have a duty to make active, targeted efforts to promote equality in their operations. Public undertakings and private-sector undertakings with more than 50 employees are also required to adopt a concrete methodology ('activity duty'). The same applies to private undertakings with between 20 and 50 employees, if demanded by a social partner such as a union representative.

The reporting duty in Section 26a of the GEADA requires that employers specified for activity duty as mentioned in Section 6, must report on both the current state of gender equality in the business and on the work they have done to fulfil the activity obligation. As of 1 January 2020, it is also an obligation for the employers to develop wage surveys. The wage surveys are to be reported on for the first time in 2021.¹¹¹

When it comes to the obligatory survey on wage, this must be based on quantitative data and all employees must be included (monthly salary or annual salary in full-time equivalents). The employer is to divide the salary survey into job groups or other appropriate division.

The wage survey must also be based on a comparison of the wage information (average) between women and men in the respective job groups. The proportion of men and women in each category must be stated. A survey of equal work and work of equal value must also be made. All remuneration must be included (fixed salary, bonus, benefits, etc.). This can be stated together or separately. The results of the survey will be published in anonymous form.¹¹²

¹⁰⁸ The Equality Ombud treated complaints after the former GEA until 2018 when its mandate was changed.

¹⁰⁹ See Statistics Norway's website: <https://www.ssb.no/sok?hovedemner=Befolkning&sok=likel%C3%B8nn>.

¹¹⁰ See *Bufdir*'s website: https://bufdir.no/Statistikk_og_analyse/kjonnsligestilling/Okonomi_og_kjonn/.

¹¹¹ If the company already had the numbers ready in 2020, the numbers could also be reported on in 2020. See the Equality Ombud's website: <https://ldo.no/en/jobbe-for-likestilling/i-arbeidslivet/Aktivitets-og-redegjorelsesplikten/> (only in Norwegian).

¹¹² See the Equality Ombud's website for information about the duty: <https://ldo.no/jobbe-for-likestilling/i-arbeidslivet/Aktivitets-og-redegjorelsesplikten/>.

The employers must complete the survey every two years. Employers also have a duty every two years to make a survey of involuntary part-time work in the business.

The reporting duty requires that employers report on gender pay gap and present statistics beyond average differences in the company, also showing differences for men and women at different levels in the company.

The companies must also give an overview of gender equality at different levels of the company and an overview of who takes parental leave and for how long and an overview of part-time work and involuntary part-time workers.

The employers must also report on the current state of gender equality in the business and the work that has been done to fulfil the obligation. The statement is to be given in the annual report or other public document. If the statement is given in another public document, it must be referred to in the annual report. There are no sanctions towards companies that report on large discrepancies, but high inequality will not look good for the companies reporting them. It may be a weakness that the reporting duty is only mandatory for companies with 50 employees or more, or for 20 or more employees if union representatives require them too. Many Norwegians work in small companies with fewer than 20 employees. On the other hand, it would be a lot to demand for a very small company to issue reports every second year if it only has a few or five or six employees.

Collective bargaining: Under the GEADA, trade unions and employer organisations are under an obligation to actively target and systematically work towards gender equality and equal pay. Equal pay forms a formal part of collective bargaining agendas today. Several of the organisations have incorporated framework agreements on gender equality within their basic collective agreements. For example, the basic collective agreement between national employer organisation Norwegian Trade Organisation (NHO) and the national trade union Landsorganisasjonen (LO) Norway, contains a supplementary agreement with provisions on equality between men and women in employment.¹⁴⁹ The Confederation of Vocational Unions (YS) and employer organisation Virke have the same provisions incorporated into their basic collective agreement.

Equality bodies: As mentioned, the Equality Tribunal deals with complaints of unequal pay, and issues statements. The Equality Ombud's role in connection with the increased duty of activity and accountability is stated in Section 5, fourth paragraph, of the amended EAOA. The Equality Ombud can, among other things, review the gender equality reports and conduct follow-up visits to companies.

In addition, an extension has been made in connection with the grounds for discrimination / areas that employers must work with. Gender-based violence and combined discrimination have been added (i.e. discrimination on several grounds at the same time). See more about the activity and reporting duty and the Equality Ombud and Equality Tribunal's work on this in part 11 of this report.

In 2020 the Equality Ombud together with the Directorate for Children, Youth and Family Affairs¹¹³ (*Bufdir*) developed guidelines and electronic forms to simplify the reporting for Norwegian companies. The Equality Ombud also reports that it has given significantly increased guidance to companies on the strengthened duties in 2020. See more about this in part 11 on the equality bodies.¹¹⁴

¹¹³ See website: <https://www.bufdir.no/en>.

¹¹⁴ Email of 16 March 2021 from representatives from the Equality Ombud.

4.2.12 Other measures, tools or procedures

The Government also plans to initiate measures that contribute to a more even gender balance in education programmes and will prioritise recruiting men to primary and lower secondary education and to education in the health and social care sector.¹¹⁵ This may be a measure that can affect the gender pay gap between women and men in the long term.

The Norwegian Government is developing a strategy to achieve less gender-segregated education and work life, and the former Minister of Culture has stated that they will make suggestions on how to achieve a more equal-based work life.¹¹⁶ After the COVID-19 pandemic, focus on equal-based working life is even more important.

4.3 Access to work, working conditions and dismissal

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

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

A worker is not defined as such in the WEA but is defined by analysing the characteristics of the relationship between an employer and an employee as laid down in Articles 1-8 and 1-9 of the WEA. However, it follows from the EEA and the Norwegian Supreme Court's decisions in other areas of employment law that Norwegian law seeks to be compliant with the rulings of the CJEU.¹¹⁷ This includes the fact that the term 'employee' includes everyone active in the labour market.

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

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

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

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

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

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

¹¹⁵ See the Government's page (in Norwegian): <https://www.regjeringen.no/no/aktuelt/nummer-to-i-verden-pa-likestilling/id2623472/>.

¹¹⁶ See article from Interreg Europe of 6 January 2020: <https://www.interregeurope.eu/femina/news/news-article/7379/norway-new-reporting-requirements-on-equality/>.

¹¹⁷ See for instance the following cases relating to age discrimination: Supreme Court Judgment of 5 May 2011 in Rt-2011-609 and Supreme Court Judgment of 14 February 2012 in Rt-2012-219.

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

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

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

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

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

4.3.6 Particular difficulties

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

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

Norway made use of the ability to maintain or adopt positive action measures within the meaning of Article 157(4) of the Treaty, but according to Section 28 of the GEADA on positive action, both the Equality Ombud and the Equality Tribunal in Case 8/2014 from 10th June 201 regarding ethnicity have assumed that the legal situation has not changed and that the principles derived from the former EU judgments on positive action are still relevant. This means that earmarking of positions is not permitted by law, including temporary positions. Rigid quotas for under-represented groups are therefore still prohibited in Norway.

4.4 Evaluation of implementation

All in all, the national law fulfils the requirements of EU law discussed in this chapter.

4.5 Remaining issues

As mentioned in part 4.1.2, the reports on working life and economy show that the COVID-19 pandemic has caused unemployment in both the private business sector and the public sector due to the Government's strict measures to prevent spread of the coronavirus, especially at the beginning of the pandemic.

A recent study¹¹⁸ shows that the unemployment has increased most during the pandemic in low-income groups and among those with low education. The research shows no major gender differences, but the researchers summarise that the workers in the industries where there is most unemployment are often women, without an upper secondary degree, with lower previous income and who are immigrants. Women also have a lower probability than men to be back at work four months after the start of the pandemic. As mentioned in Section 4.2.1, the challenges when it comes to part-time work have also increased because the hospitals have needed skilled professional health personnel around the clock during the pandemic. In the State Budget for 2021,¹¹⁹ the Government wants to strengthen the health sector and allocate about NOK 11 billion related to the pandemic, such as better infection control and increased capacity to handle a large number of admissions, in addition to dealing with health queues that have arisen.

¹¹⁸ Article from 'Samfunnsøkonomen' no. 2 in 2020; Frisch centre Bratsberg, Eielsen, Markussen, Raaum, Røed, Vigtel, 'Koronakrisens første uker hvem tok støyten i arbeidslivet' (The first weeks of the Corona crisis, who got hit hardest in work life).

¹¹⁹ Government 2020: <https://www.regjeringen.no/no/aktuelt/regjeringen-ruster-helsetjenesten-for-videre-koronainnsats/id2768686/>.

5 Pregnancy, maternity, and leave related to work-life balance for workers (Directive 92/85, relevant provisions of Directives 2006/54, 2010/18 and 2019/1158)¹²⁰

5.1 General (legal) context

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

The author has not found statistics that show how many pregnant women and fathers-to-be have been laid off or lost their jobs due to the COVID-19 crisis.¹²¹ However, the reports mentioned in part 4.1.2 state that younger women are over-represented among those who received unemployment benefits as a result of the strict measures implemented by the Government in March 2020 to prevent spread of the virus. The number of unemployed is also highest in the age group 30-39 years for both genders. Figures from Statistics Norway show that the average age of first-time mothers in Norway in 2019 was 29.8 years for mothers and 32 years for first-time fathers. In other words, the redundancies and unemployment hit hardest in the age group where most people have children. The reports also highlight the risk for the current parental benefits system to contribute to a more difficult situation for expecting parents who have lost their job or have been laid off.¹²²

5.1.2 Other issues

The link between female employees and part-time work is an important issue in Norway in relation to work-life balance, especially after having children. Part-time work is highest in female-dominated professions such as shop assistants, auxiliary nurses, care workers, waiting staff and canteen workers. The proportion of full-time employees is around 30 % in occupations such as care work, shop work, etc., while the proportion of full-time employees is significantly higher among nurses and among pedagogical staff within kindergartens and primary schools. In 2020, part-time work was a challenge due to the COVID-19 pandemic.

5.1.3 Overview of national acts on work-life balance issues

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

The WEA, Chapter 4 and Chapter 13, especially Section 13-1, 4-3, and Chapter 12.
The National Insurance Act, Chapters 14 and 15.
The GEADA, Sections 6, 9 and 10 and Chapter 5.

¹²⁰ See Masselot, A. (2018) *Family leave: enforcement of the protection against dismissal and unfavourable treatment*, European network of legal experts in gender equality and non-discrimination, available at: <https://www.equalitylaw.eu/downloads/4808-family-leave-enforcement-of-the-protection-against-dismissal-and-unfavourable-treatment-pdf-962-kb> and McColgan, A. (2015) *Measures to address the challenges of work-life balance in the EU Member States, Iceland, Liechtenstein and Norway*, European network of legal experts in gender equality and non-discrimination, available at: <https://www.equalitylaw.eu/downloads/3631-reconciliation>.

¹²¹ See the reports from Kilden Gender Research and *Bufdir* on consequences of the COVID-19 pandemic for gender equality, mentioned in Section 4.1.2.

¹²² Today, the parental benefit is calculated from the last 3 or 12 months before the leave starts. This also applies to freelancers and those laid off who only receive 64.2 % of the income. For pregnant women who have been laid off or left without work throughout or in part of 2020, this may result in a significantly lower income during the entire leave period. This will apply even if other lay-offs in the business they work in are brought back to work. For freelancers the scheme may mean that some women will be forced to work extra hard in the last three months before the leave to make up for the lost income in the last year, which may result in health consequences for the pregnant worker. Another consequence of the COVID-19 pandemic is that the father/co-mother will have to postpone the use of the parental quota reserved for them due to economic difficulties in the families. In light of the COVID-19 pandemic, *Bufdir* proposes a new or temporary calculation model for parental benefits that takes better care of expectant parents who are or have been laid off or are without work due to the pandemic.

5.1.4 Political and societal debate and pending legislative proposals

The GEADA entered into force on 1 January 2018 and covers discrimination-related work-life balance issues together with the WEA. The author is not familiar with pending legislative proposals on work-life balance at the moment.

5.2 Pregnancy and maternity protection

5.2.1 Definition in national law

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

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

5.2.2 Obligation to inform employer

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

However, Section 12-7 of the WEA states that leave related to pregnancy is to be notified to the employer as soon as possible and no later than 1 week in advance in the case of absence of more than 2 weeks; no later than 4 weeks in advance in the case of absence of over 12 weeks and no later than 12 weeks in advance in the case of absence of over 1 year.

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

Another case concerning discrimination because of pregnancy is from the Equality Tribunal in 2018 (Case 126/2018).¹²³ Since the case was from before the GEADA entered into force, the Equality Tribunal considered the case in light of the former GEA. In the case, a real estate agent was awarded fewer internal assignments after the employer found out that she was pregnant. The Equality Tribunal discussed whether the woman had been treated less favourably when she did not receive the same amount of internal assignment as before. The answer to this was that she had been treated less favourably and the Equality Tribunal also found that there was no doubt that this happened due to her pregnancy. The Equality Tribunal also stated that protection against discrimination due to pregnancy and maternity leave is absolute and is not covered by the exemption clause in Article 6 of the GEA.

Cases on breastfeeding: In Case 07/1706,¹²⁴ the Equality Ombud stated that a woman was discriminated against as a result of lack of facilitation during breastfeeding. In the opinion of the defendant, the Directorate of Health, there was no discrimination, as the process was governed by gender-neutral rules. However, the Directorate admitted that the rules did not sufficiently take into account the needs of young children and nursing mothers. The Equality Ombud assumed that discrimination based on breastfeeding is covered by the prohibition of direct discrimination on the basis of gender in the former

¹²³ Statement of 18 December 2018 from the Equality Tribunal.

¹²⁴ Statement of 2 February 2010 from the Equality Ombud.

GEA. Failures are equated with actions in the GEA. Failure to facilitate, so that someone is disadvantaged by breastfeeding, was a violation of the GEA's prohibition of direct discrimination on the grounds of gender. In this case the Directorate of Health did not sufficiently prove that it could justify exemptions from the prohibition of discrimination. The Equality Ombud therefore concluded that the lack of facilitation during the nursing period was discriminatory.

In Case 19/195¹²⁵ a woman argued that the employer had not adapted her work task for her to breastfeed her baby. The Equality Tribunal concluded that the employer had in fact tried to facilitate for her breastfeeding. The Equality Tribunal also highlighted that the employer must also be able to distribute the tasks so that the work is actually done. The statement has not been published due to privacy so the author is not familiar with the reasoning behind the Tribunal's conclusion.

In Case 19/197¹²⁶ the Equality Tribunal concluded that there was reason to believe that the complainant had been discriminated against because of pregnancy and parental leave when she did not get more pay and a higher position in the wage settlements at the place where she worked after she returned from parental leave. She was a skilled worker and had long experience in the field. She had also had time off from work for breastfeeding in compliance with Section 12-8(1) of the WEA after she returned from leave. The Tribunal found that the employer had proved that there were other reasons as to why she did not get higher pay. The employer argued that the complainant had limited tasks within management support, project work, development and assessment tasks compared to other workers who she compared herself to, and it was not planned for her to have these tasks either. The Equality Tribunal found no reason to review the employer's reasons, and found that the complainant had not been discriminated against because of parental leave and pregnancy or the fact that she was breastfeeding.

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

The protective measures mentioned in Articles 4-7 of Directive 92/85/EEC are not explicitly implemented in national law, but the legislation provides broad protection against health hazards for all employees in relation to the rules on the general working environment, working hours, the information and consultation obligation and the entitlement to leave. Pregnant workers are protected under the general provisions of the WEA (Sections 8-1, 4-6(1), 10-2(1) and 12-8).

Section 8-1 of the WEA has the following wording: 'In undertakings that regularly employ at least 50 employees, the employer shall provide information concerning issues which are of importance to the employees' working conditions and discuss such issues with the employees' elected representatives.' Also, according to Section 26 of the GEADA, all employers in their work are to make active, targeted and systematic efforts to promote equality and prevent discrimination on the basis of, amongst other things, gender, pregnancy, leave in connection with childbirth or adoption, and care responsibilities. See more about the 'activity duty' for employers in part 4.2.12 of this report.

Section 4-6(1) of the WEA applies to employees with reduced capacity for work because of an accident, sickness, fatigue or the like. This is a general provision, which can also apply to some pregnant workers. It obliges the employer to make adjustments in the working environment in these situations. The wording is as follows:

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

¹²⁵ Statement of 28 April 2020 from the Equality Tribunal (not published).

¹²⁶ Statement of 27 April 2020 from the Equality Tribunal.

suitable work. The employee shall preferably be given the opportunity to continue his or her normal work...'

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

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

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

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

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

5.2.6 Prohibition of night work

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

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

5.2.7 Case law on the prohibition of night work

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

5.2.8 Prohibition of dismissal

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

Section 15-9(1) of the WEA states: 'An employee who is pregnant may not be dismissed on grounds of pregnancy. Pregnancy shall be deemed to be the reason for the dismissal of a pregnant employee unless other grounds are shown to be highly probable.' Also, discrimination because of pregnancy and leave in connection with childbirth is prohibited according to Section 6 of the GEADA.

A dismissal is thus permitted in exceptional cases as defined in the Directive's Article 10(1) and according to Section 9 of the GEADA. This is if the employer can show that it is highly

probable that the dismissal during pregnancy is grounded on general terms, which justify a dismissal according to the Norwegian WEA. This will typically be instances where an enterprise is forced to downsize due to economic conditions and insufficient level of activity to maintain the business.

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

5.2.9 Redundancy and payment during maternity leave

If an employee is made redundant during her maternity leave this does not mean that maternity leave payments cease.

According to Section 14-4 of the NIA the right to parental benefit (the payment for maternity leave) is earned through work activity. Both the mother and the father can earn the right to parental benefit by being active in employment with pensionable income (Section 3-15) for at least 6 of the last 10 months before they begin to draw parental benefit, see Section 14-10 first and second paragraph and Section 14-14(2).

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

5.2.10 Employer's obligation to substantiate a dismissal

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

In the case of an illegal dismissal / notice of termination because of pregnancy / parental leave, the employee / job seeker may receive full compensation for his or her economic loss in addition to punitive damages.¹²⁷

5.2.11 Case law on the protection against dismissal

In part 5.2.3 it was shown through case law that discrimination because of pregnancy and breastfeeding is still regarded as a problem in Norway.

Some cases have appeared before the courts with questions about the dismissal of pregnant workers, based on Section 15-9 of the WEA. One case from 2018 at the Supreme Court relating to discrimination on the basis of Section 15-9 of the WEA¹²⁸ concerned a pregnant worker who was partially on sick leave and was dismissed with reference to the company's staffing needs a few weeks into the leave. The Supreme Court treated the case as a discrimination issue based on Section 15-9 of the WEA. The Supreme Court unanimously concluded that, according to Section 15-9 of the WEA, the termination of a pregnant employee's contract requires a clear likelihood that the dismissal is not due to

¹²⁷ See judgment from Oslo District Court from 17 November 2017 in TOSLO-2006-52718 and verdict from Alta District Court from 7 April 2008 in TALTA-2007-74733. In the database 'Lovdata Pro'. Public link not available.

¹²⁸ Supreme Court judgment of 19 June 2018 in HR-2018-1189-A (No public link available in Lovdata Pro').

the pregnancy. The Supreme Court concluded that clear likelihood ('predominantly probable') means that the employer must provide clear proof that the termination is not due to the pregnancy. Based on the evidence presented in the case, the Court found that the company had not fulfilled its duties and had discriminated against the woman.

This judgment clarifies the requirement of proof for dismissal in accordance with the special employment protection rules in the working environment legislation. It revoked the earlier decision by the Court of Appeal (*Borgarting lagmannsrett*), which was divided on whether the dismissal of A was objectively justified and in which the majority, consisting of three judges, concluded that the dismissal was justified in the circumstances of this company and did not have any connection with A's pregnancy. The Court of Appeal had thus acquitted the employer.¹²⁹

In another Court of Appeal case (Case LB-2018-159246)¹³⁰ a woman who was employed as a labour inspector had her employment contract terminated while she was on parental leave. The Court of Appeal found that her dismissal was not justified, if it was due to her pregnancy or parental leave. The court was divided but the majority found that the dismissal did not have a substantive basis in her work performance, based on the WEA. Two judges found the dismissal to be justified. The woman was awarded EUR 78 000 (NOK 700 000) in redress and the company also had to pay her court expenses of EUR 53 163 (NOK 478 467).

A recent judgment from Oslo District Court from 2020¹³¹ is not directly about dismissal, as the complainant did not quit the job, but the Court discusses discrimination because of pregnancy, parental leave, harassment and sexual harassment. A security guard in the Government's department filed a claim for damages and compensation against her employer for violation of the Sections 6, 7 and 13 of the GEADA. She argued that she had been directly discriminated against due to gender, pregnancy and maternity leave and sexually harassed. For the discussion on sexual harassment in this case, see part 3.7.3. The District Court concluded that no such discrimination had taken place. The Court did not find that the complainant had proved that she had been discriminated against when she had been asked to take a course for leaders in autumn 2019. She had not been treated less favourably than other employees.

The Court concluded that she had not been discriminated against because of pregnancy when she was removed from a course at the Police Academy. Other colleagues were also rescheduled to other courses. She also argued lack of accommodation when she was pregnant, but this argument was not heard.

Nor did the Court find that she had provided evidence for her claims of harassment because of gender, pregnancy and parental leave. She had not been degraded and made invisible by the employer as she claimed.

The Court also concluded that she had not been discriminated against or harassed when she lost a specific job task at the workplace. The Court stated that several of her colleagues were also deprived of the recruitment task they had originally been assigned to together with the complainant. The Court found that the employer had proved practical reasons as to why the task was redistributed.

Furthermore, she had not been discriminated against or harassed when the employer rejected her application for more leave after she returned to work after parental leave. According to the Court, it was not her gender nor her absence from work when she was

¹²⁹ See judgment from Borgarting Court of Appeal of 11 September 2017 in LB-2016-147369.

¹³⁰ See [judgment from Borgarting Court of Appeal of 13 March 2019 in LB-2018-159246](#).

¹³¹ Judgment from Oslo District Court of 9 July 2020. It is not clear whether the judgment has been appealed yet. See part 3.7.3, chapter on sexual harassment.

on parental leave that was the reason for the refusal, but the employer's need for a reliable workforce. The Court argued that another woman at the workplace was also denied leave.

The employee also argued that she was discriminated against when she was not heard with her claim for more pay, but the Court did not agree with her on this either. The Court stated that her salary was not determined in any other way, or according to other criteria, than for her male shift supervisor colleagues.

The author finds the judgment questionable, as the District Court discusses the case solemnly based on national law, and makes no reference to the EU directives. This is remarkable, as in cases on discrimination based on pregnancy and parental leave, the Court normally makes a reference to the directives and practice from the Court of Justice of the European Union.

A number of cases with questions about the dismissal of pregnant workers have come before the Equality Tribunal.

The Equality Tribunal Case 2018/410¹³² is interesting because the Tribunal concludes that the GEADA requires that the employer must have been aware of the employee's pregnancy, and that the employer must have acted intentionally, possibly negligently, for it to be considered to be discrimination in law. There is no requirement for discriminatory intent in discrimination cases, according to the GEADA. There is also no requirement for an employer to be jointly liable for a breach of the law, according to Section 38, second paragraph of the GEADA. Whether or not a pregnant employee is responsible for helping to avoid discrimination in situations as described in the case is not discussed in the preparatory works of the GEADA.¹³³ The case concerned whether a woman was discriminated against on the basis of pregnancy when she was not offered a new agreement working shifts at a nursing home in the municipality of Oslo. The Equality Tribunal concluded that the woman was discriminated against because of pregnancy and granted her compensation of NOK 60 000 (approximately EUR 6 000).

The complainant and the municipality had agreed on a 'framework agreement' with the nursing home that lasted from September 2017 to March 2018. An agreement like this means that the employee receives an overview of available shifts and the workers are assigned shifts according to the department's specific need. The Tribunal argued that there were no other obvious reasons than her pregnancy to explain why a new framework agreement should not be offered to the complainant. The employer had also not provided sufficient evidence that there were other reasons why she was not offered a new agreement.

The Equality Tribunal's Case 20/167,¹³⁴ also mentioned in part 11.6.2, concerned discrimination due to pregnancy, when a municipality did not extend a temporary position of a pregnant employee. There was also an allegation of expulsion due to the pregnancy. The Equality Tribunal concluded that the allegation of expulsion was not documented with sufficiently concrete evidence, and did not find a breach of the law here. However, the Equality Tribunal concluded that the municipality had discriminated against the employee by not extending the temporary position. This was also the case in Case 19/53,¹³⁵ and the Equality Tribunal also concluded that the municipality had acted contrary to Section 6 in the GEADA on discrimination on pregnancy and parental leave by not extending the complainant's contract. She was pregnant and using parental leave at the time.

¹³² Statement of 4 October 2019 from the Equality Tribunal.

¹³³ *Proposisjon til Stortinget om Lov om likestilling og forbud mot diskriminering* (Proposition for the Parliament) Equality and Anti-Discrimination Act Prop 81 L (2016-2017), available at: <https://www.regjeringen.no/no/dokumenter/prop.-81-l-20162017/id2547420/?ch=2#kap1-1>.

¹³⁴ Statement from the Equality Tribunal of 3 November 2020.

¹³⁵ Statement from the Equality Tribunal of 16 January 2020.

In Case 20/57¹³⁶ a female cosmetic nurse got a position at a private healthcare facility. She was offered NOK 25 000 (approximately EUR 2 500) in minimum wages, plus a certain percentage of the profits of the sales. Shortly after starting her new position, she informed her employer of her pregnancy. She was informed by the employer by email that it would be problematic to let her start in the position due to her pregnancy and the upcoming parental leave. The Equality Tribunal unanimously found that the nurse was a victim of direct discrimination, violating Section 6 of the GEADA, because of both her pregnancy and parental leave. The employer argued that the complainant had been offered a position as an 'independent therapist' in a temporary position, and not a permanent position as a nurse. The Equality Tribunal concluded that the emails from the employer to the complainant suggested that the position she applied for was a permanent one. There were no reasons, other than the pregnancy and parental leave, for terminating the position she had been offered at the healthcare facility. This case is the first case where the Equality Tribunal awards damages; see discussion about this in part 11.6.2.

In Case 19/115 and Case 19/196,¹³⁷ the contract of a woman, employed as a substitute in an industry company (through a recruitment agency), was not extended when she got pregnant and wanted to take parental leave. The cases against both the company where she was placed to work (19/196), and against the recruitment company (19/115), were brought before the Equality Tribunal. The Equality Tribunal unanimously found that the woman was a victim of direct discrimination, violating Section 6 of the GEADA, because of her pregnancy and parental leave. The Tribunal found there were no reasons other than the pregnancy and planned parental leave for not extending the contract. She had a part-time contract with the recruitment company, working 50 %, but after the contract with the industry company was not extended, she did not get other contracts or jobs through the recruitment company. In the Tribunal's opinion, there was therefore no doubt that the woman had been put in a less favourable position because she was pregnant and planned parental leave. A central question was whether the recruitment agency had contributed to the discrimination, which is prohibited by Section 16 of the GEADA. The Tribunal answered this with a clear yes. Also here the Equality Tribunal awarded compensation and this is discussed in part 11.6.2.

In Case 19/193¹³⁸ the Equality Tribunal awarded NOK 50 000 (approximately EUR 5 000) to a woman who had been discriminated against because of pregnancy and parental leave when she did not get a permanent position and her contract was not extended.

In Case 19/118¹³⁹ a woman wanted to apply for a position as head teacher at a kindergarten as the workplace went through organisational changes. When she got pregnant and wanted to take up parental leave, she was not considered for the position, and not given the opportunity to apply for other positions or functions in the kindergarten. She did not return to work in the kindergarten after her leave. It was also questioned whether she was discriminated against due to parental leave, as she was removed from the employer's email list during the leave period. The Equality Tribunal unanimously found that the woman was a victim of direct discrimination, violating Section 6 of the GEADA, because of her pregnancy and use of parental leave. The Tribunal found there were no reasons, other than the pregnancy and the parental leave, as to why the employer had not given her the option to apply for other positions with more responsibilities in the kindergarten. The woman had been put in a less favourable position than if she had not been pregnant nor taken up parental leave. The woman was awarded compensation; see about this also in part 11.6.2.

¹³⁶ Statement of 24 September 2020 from the Equality Tribunal.

¹³⁷ Statement of 29 January 2020 from the Equality Tribunal.

¹³⁸ Statement of 5 March 2020 from Equality Tribunal.

¹³⁹ Statement of 14 January 2020 from the Equality Tribunal.

5.3 Maternity leave

5.3.1 Length

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

5.3.2 Obligatory maternity leave

The obligatory period of maternity leave before and/or after birth consists of three weeks before the birth and six weeks after the birth, as per Section 14-9 of the NIA.¹⁴⁰ Section 12-4 of the WEA states: 'After giving birth, the mother shall have a leave of absence for the first six weeks unless she produces a medical certificate stating that it is better for her to resume work'. In total, the maternity leave is therefore for nine weeks.

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

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

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

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

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

5.3.4 Legal protection of rights ensuing from the employment contract

Sections 14-4 and 14-5 of the NIA establish the rights to maternity benefits and parental benefits paid by National Insurance.

5.3.5 Level of pay or allowance

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

¹⁴⁰ See NIA, Article 14-9, fifth paragraph: https://lovdata.no/dokument/NL/lov/1997-02-28-19/KAPITTEL_6-1#KAPITTEL_6-1. As of 1 July 2018, the parental quotas have been extended from 10 to 15 weeks reserved for each of the parents and the remaining period of the parental leave may be shared between both parents as they wish. The length of the parental leave as such remains unchanged. Just as before, the maternity leave period is included in the quota reserved for the mother.

5.3.6 Additional statutory maternity benefits

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

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

The conditions for being eligible for the applicable benefits follow from Section 14-6 of the NIA which meet the requirements of Article 11(4) of Directive 92/85/EEC. Section 14-6 states that parental benefits are paid on the basis of the individual being engaged in work-related activity and having had paid work for 6 of the last 10 months before the birth. However, if the parents are receiving other benefits from the National Insurance fund instead of a salary at the time of the birth, they are still entitled to parental benefits from the National Insurance fund. The amount of parental benefits received depends on the income of the person in question.

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

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

5.3.9 Legal right to share maternity leave

As mentioned in part 5.3.2 the maternity leave is nine weeks in total that is reserved for the mother. Maternity leave is specifically defined as being included in and a part of the parental leave. The Norwegian solution thus blurs the two different types of leave. As of 1 July 2018, the parental quotas have been extended from 10 to 15 weeks reserved for each of the parents and the remaining period of the parental leave may be shared between both parents as they wish.

5.3.10 Case law

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

5.4 Adoption leave

5.4.1 Existence of adoption leave in national law

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

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

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

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

5.4.3 Case law

The author is not familiar with cases relating to adoption leave from 2019 or before.

5.5 Parental leave

5.5.1 Implementation of Directive 2010/18

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

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

The legislation applies equally to the public and the private sectors, but not for matters concerning the Parliament. According to Section 1 third paragraph of the EAOA, the Equality Tribunal does not have a mandate to enforce activities of the Parliament, including legislative decisions. Equality Tribunal Cases 19/74 to 19/97¹⁴¹ concerned questions of discrimination on the grounds of sex and the amendment of Section 14-9 of the NIA on the distribution of parental leave between the parents. The Equality Tribunal had no choice but to dismiss the 24 complaints because the cases concerned a legislative decision on how the parental leave should be shared between the parents.

5.5.3 Scope of the transposing legislation

National legislation applies equally to all types of employment contracts.

5.5.4 Length of parental leave

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

The framework for parental leave is laid down in Section 12-5 of the WEA. Parents are entitled to 12 months of leave, see Section 12-5, 1 of the WEA. Pay is regulated by the NIA. An employee who has been gainfully employed for at least 6 of the last 10 months prior to the birth of a child is entitled to paid leave for 46 weeks (at the full daily rate) or 56 weeks (at a reduced daily rate) in connection with the birth of a child.

¹⁴¹ Statement of 23 April 2019 from the Equality Tribunal that was dismissed. Case 19/74.

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

5.5.5 Age limits

Workers are entitled to paid parental leave until the child is three years old or until the workers have another child (see Section 14-10(3) of the NIA).

5.5.6 Individual nature of the right to parental leave

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

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

With regard to this paid leave, both parents have a right to their 'quota': 15 weeks of the leave is reserved for each of the parents if they choose the full rate. If they choose the reduced rate with 80 % payment, 19 weeks are reserved for each of the parents. The remaining part of the leave may be shared between the parents as they deem fit.

5.5.7 Transferability of the right to parental leave

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

5.5.8 Form of parental leave

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

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

According to Section 14-6(1), the required period of service is at least 6 of the last 10 months before starting the parental leave. In the case of successive fixed-term contracts with the same employer (as defined in Council Directive 1999/70/EC on fixed-term work), the sum of these contracts is taken into account for the purpose of calculating the qualifying period.

5.5.10 Notice period

According to Section 12-7 of the WEA, the employee is under an obligation to notify the employer about the leave as soon as possible and no later than 1 week in advance in the case of leave lasting for more than 2 weeks; at least 4 weeks in advance in the case of leave lasting for more than 12 weeks and no later than 12 weeks in advance for leave lasting for more than 1 year. If an employee does not meet these periods of notice, the consequence may be that the leave may be postponed so that the notice period is met.

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

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

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

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

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

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

Section 12-9(3) of the WEA states:

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

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

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

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

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

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

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

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

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

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

5.5.18 Status of the employment contract or relationship during parental leave

The employment relationship is maintained during parental leave.

5.5.19 Continuity of entitlement to social security benefits

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

5.5.20 Remuneration

Parental leave is not remunerated by the employer. Parental leave benefits are paid by the Norwegian Labour and Welfare Service (NAV). If the employment contract entitles the employee to their full salary during the leave, and this exceeds the maximum amount of six times the social security base,¹⁴² the employer is obliged to cover the difference if this is stated in the individual employment contract or as part of a company's Employee Handbook.

5.5.21 Social security allowance

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

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

When it comes to Clause 8 of Directive 2010/18/EU the paid father's quota has had positive consequences regarding the rate of fathers taking parental leave. Statistics show that most fathers take up exactly the number of days of parental allowance in the quota.¹⁴³ As the length of the paternity quota changes, the length of paternity leave taken by fathers also changes almost immediately.

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

5.5.23 Case law

There are cases from the Equality Tribunal concerning unfavourable treatment related to parental leave. An important case from 2019 is Case 95/2018.¹⁴⁴ The question was whether a nurse had been discriminated against because of parental leave when she was assigned different job tasks when she returned from the leave.

The Equality Tribunal treated the question in accordance with the rule on the burden of proof in Section 37 of the GEADA. The Tribunal found that there was reason to believe that the changes in the nurse's position were related to her leave. This is because both she and her colleagues were informed of the changes and because they also coincided

¹⁴² See NAV's website for the social security base amount for 2019: <https://www.nav.no/no/nav-og-samfunn/kontakt-nav/utbetalinger/grunnbelopet-i-folketrygden>.

¹⁴³ <https://www.infotjenester.no/artikler/fedre-tar-noytaktig-ut-fedrekvoten/> (Norwegian text).

¹⁴⁴ Statement of 29 March 2019 from the Equality Tribunal.

with her return from leave. However, the Tribunal found that the employer had proved that the possible changes were not related to the leave, but that these changes would have happened anyway as part of the municipality's restructuring of existing positions.

In previous statements, the time for assessing whether the job tasks have been changed when returning from parental leave has been at the actual return. In this case the Equality Tribunal's view is that the complainant's right to return to the same position was not violated because the changes were reversed six months later. The Equality Ombud has commented on the decision,¹⁴⁵ and in its opinion it would have been better to include arguments that the changes in job tasks were in fact reversed when discussing whether the changes of job tasks were proportional under the exemption in Section 9 of the GEADA. The author agrees with the Equality Ombud on this matter.

For more case law, see part 5.2.11, as the cases mentioned there from the Equality Tribunal are about discrimination due to pregnancy and parental leave.

5.6 Paternity leave

5.6.1 Existence of paternity leave in national law

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

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

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

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

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

5.6.3 Case law

¹⁴⁵ In the report from the Equality Ombud (2019) *Diskrimineringsretten 2019, gjennomgang av året som er gått* ('Discrimination Law 2019 – a summary') p. 33: available at: https://www.ldo.no/globalassets/ldo_2019/03_ombudet-og-samfunnet/rapporter/diskrimineringsrett/diskrimineringsretten-2019.pdf.

The author is not familiar with cases from 2020 dealing directly with on paternity leave , but there are some older cases from the Equality Tribunal concerning unfavourable treatment related to parental leave, with the quota that is reserved for the father, now a minimum of 15 weeks.

In Case 41/2009¹⁴⁶ a municipality in Norway wanted to employ a lawyer to lead the municipality's property tax office. Five applicants were called for the first interview. Three of the candidates went on to a second interview. One of the candidates who did not go further in the interview process expressed a wish during the first interview to take parental leave (the father's quota) in May/June 2009.

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

In 2019¹⁴⁷ a case regarding Norway's parental benefits for fathers was brought before the EFTA Court by the EFTA Surveillance Authority (ESA).

According to Sections 12-2, 12-4 and 12-5 of the WEA, parents are entitled to parental leave. According to Section 14-13 first paragraph of the NIA, a father's right to parental benefits during the shared period of parental leave depends on whether, after the birth or after taking over care responsibilities for a child, the mother is involved 'in activity', such as working or studying.

In contrast, the mother's rights to parental benefits in the NIA are independent of the father's activities. ESA argued that this unlawfully discriminates against fathers on the grounds of sex, in breach of Article 14(1)(c) of the Recast Directive.

The Court concluded that the parental benefit scheme established in the NIA does not fall under 'employment and working conditions', within the meaning of Article 14(1)(c) of the Recast Directive. Although the right to parental benefits clearly affects an employee's ability to use parental leave, the purpose of the scheme is to provide income support that is not in itself related to any employment relationship.

The Court also rejected ESA's claim that parental benefits are directly linked to the right to parental leave, so that parental benefit must be considered as 'employment and working conditions' as in the Recast Directive. The Court recalled that, although the EEA States, with the exception of a defined period of protection for the mother, must give both parents the right to leave on equal terms, it is up to the EEA States to provide additional support schemes. Finally, the Court pointed out that the concept of 'pay' in the Recast Directive does not include social security schemes as in this case.

Consequently, the Court dismissed ESA's application seeking a declaration that Norway had failed to fulfil its obligations under Article 14(1)(c) of the Recast Directive by maintaining in force provisions such as Sections 14-13 and 14-14 of the NIA.

¹⁴⁶ Statement of 12 March 2010 from the Equality Tribunal.

¹⁴⁷ Judgment of 13 December 2019 from the EFTA Court. Link to the judgment, available at: <https://eftacourt.int/download/1-18-judgment/?wpdmdl=6387>.

5.7 Time off for *force majeure*

5.7.1 Time off for *force majeure*

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

5.7.2 Case law

The author is not familiar with cases on *force majeure* for urgent family reasons in the event of sickness or an accident.

5.8 Care leave

5.8.1 Existence of care ('or carers') leave in national law

According to Section 12-10 of the WEA, employees who nurse close relatives and/or other close persons in the home during the terminal stage shall be entitled to 60 days' leave of absence to take care of the individual close person. Employees shall be entitled to a maximum of 10 days' leave of absence per calendar year to care for parents, spouse, cohabitant or registered partner. The same is to apply in connection with necessary care of a disabled or chronically sick child, from and including the calendar year after the child reaches the age of 18 when the employee is responsible for care of the child as referred to in Section 12-10, third paragraph.

As mentioned in part 5.5.8, employees on parental leave may also use the right to a period of extended care leave. These provisions in the WEA entitle the employee to a leave of absence from work, but not to paid leave. According to Section 12-5 of the WEA, in addition to leave of absence pursuant to the first paragraph, each of the parents is entitled to leave of absence for up to 12 months for each birth. This leave must be taken immediately after the parents' leave of absence pursuant to the first paragraph. An employee who has partial leave of absence after Section 12-6 is not entitled to leave of absence pursuant to Section 12-5..

Also, according to Section 6 of the GEADA, discrimination on the basis of care responsibilities is prohibited.

No further rules for care leave have been specified in Norwegian law.

5.8.2 Case law

In part 5.6.3 above, there are examples of national case law concerning unfavourable treatment related to the taking up of the 'father's quota' of parental leave. See especially the judgment of 13 December 2019 from the EFTA Court mentioned in part 5.6.3 under case law.

5.9 Leave in relation to surrogacy

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

5.10 Flexible working time arrangements

5.10.1 Right to reduce or extend working time

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

In Section 10-2(3) it is stated that an employee shall be entitled to flexible working hours if this can be arranged without major inconvenience to the employer. Pursuant to Section 10-2(4) of the WEA,¹⁴⁸ an employee who has reached the age of 62, *or who for health, social or other weighty welfare reasons* so requires, has the right to a reduction of their normal working hours, if the reduction of working hours can be arranged without major inconvenience to the employer. The size of the employer does not matter, but the reduction of working hours must be arranged without major inconvenience to the employer.

'Health' refers to the employee themselves. Health reasons must be documented with a medical certificate. If an application for reduced working hours in such cases is related to the fact that the employee has reduced opportunities to practise their profession, the situation must be assessed on the basis of the legal obligation of the employer to organise the work for disabled workers.

'Social reasons' relate to the employee's family or immediate surroundings. Examples are care obligations, sole responsibility for children, responsibility for children with chronic illnesses, care for spouse or parents with permanent illness and care needs. If necessary, the employer may require the situation to be documented with a medical certificate.

'Other important welfare reasons' are primarily related to the needs of parents of toddlers to spend more time with their young children, or parents who have trouble obtaining childcare during working hours. There is no explicit age limit for children, but 'young children' means children of preschool age and children who are not old enough to be left unattended.

An employee is not entitled to pay during their non-employed periods. If an employee works extra during the 'off-duty period', they will not be entitled to overtime payment for work that falls within ordinary working hours. Only when the working day exceeds nine hours within 24 hours or 40 hours within seven days is the right to overtime triggered by the rules of the WEA.

According to Section 10-2(4) second paragraph, the employee, when the agreed period of reduced working hours has expired, has the right to resume their previous working hours, stated in the employment relationship / employment agreement, unless otherwise agreed.

The right to reduction in working hours must not cause significant disadvantage for the company. The employer must evaluate the situation and weigh the needs of the employee against the disadvantages of the business. The disadvantages, for example, may be that it is difficult to cover the remaining time available, that the position itself may be difficult to divide, or that it is not possible to adapt the reduction to the rota schedule. If the employee needs reduced working hours, the employer must have a stronger justification in order to reject the application.

It is an absolute requirement that there must be a need for reduced working hours. For example, long work trips, participation in political activities, sports or other activities are not considered to be important welfare reasons.

¹⁴⁸ See the Preparatory works for the WEA Ot. Prop. 49 (2004-2005), available at: <https://www.regjeringen.no/no/dokumenter/otprp-nr-49-2004-2005-/id396602/>.

There are no measures specifically to encourage men to make use of reduced working time. The same rules apply for men and women.

5.10.2 Right to adjust working time patterns

National law also provides workers with a legal right to adjust working time patterns on request under certain conditions. Section 10-2(3) of the WEA states that the worker is entitled to flexible working hours if this can be done without major disadvantages for the employer.

There is no detailed regulation on flexible working hours. Employees are equally entitled to demand such a scheme. The employer must in any case justify a possible refusal in specific circumstances (that there is a 'significant disadvantage'). If the employer and employee do not agree on flexible working hours, the dispute may be brought before the Dispute Settlement Board.¹⁴⁹

However, there are collective agreements between unions on working life that may have detailed regulations on, for example, flexible time. The 'flexi-time' agreement in the public sector in Norway is probably the best-known exception from working time.¹⁵⁰ A special agreement on flexible working hours in the public sector is entered into on the basis of Section 10-12 of the WEA. The agreement on flexible working hours in the public sector does not prevent the employer and employee from entering into an individual agreement in accordance with Section 10-2, third paragraph and Section 10-5, first paragraph of the WEA.

During the COVID-19 pandemic many employees have worked from home and with strict measures where schools and kindergartens have been closed, it has been necessary for many to adjust their working hours.

Normally, all Government employees must have a working time from 09.00 to 14.30 every day. When the country shut down in March 2020 as a result of the pandemic, the four biggest associations in employment and the state agreed that this set working time should be suspended for a period. This suspension period has been extended until 31 August 2021.¹⁵¹

5.10.3 Right to work from home or remotely

National law does not give employees a legal right to work from home or remotely on request. This has to be arranged in the employment contract or by making an arrangement with the employer. However, during the COVID-19 pandemic in 2020, working from the 'home office' has become the norm, and in some periods there have also been governmental orders to work from the home office. It gives reason to believe that more employers will accept home office work on a bigger scale also after the pandemic.

Section 10-2(3) and (4) of the WEA apply to 'the employee'. As mentioned in part 5.10.1 and 5.10.2 and according to Section 10-2(3), the employee shall be entitled to flexible working hours if this can be arranged without any major inconvenience for the company.

5.10.4 Other legal rights to flexible working arrangements

Section 10-6(12) of the WEA provides for some legal rights to flexible working arrangements whereby workers can 'bank' hours to take time off in the future. These

¹⁴⁹ See the Dispute Settlement Board website: <https://www.nemndene.no/tvistelosningsnemnda/>.

¹⁵⁰ See the Special Agreement on Flexible Working Hours in the state: https://lovdata.no/dokument/SPH/sph-2020/KAPITTEL_9-15#KAPITTEL_9-15.

¹⁵¹ See the Government's website: <https://www.regjeringen.no/no/aktuelt/fortsatt-mulighet-for-storre-fleksibilitet-i-arbeidstiden/id2787904/>.

rights are in connection with the overtime rules. Section 10-6(12) states that the employer and the employee may agree in writing that overtime hours shall be wholly or partly taken as off-duty time on agreed dates. Some basic collective agreements provide for time banking accounts where overtime may be taken as time off instead.

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

5.10.5 Case law

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

5.11 Evaluation of implementation

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

However, the previous national expert on gender equality for Norway, Helga Aune,¹⁵² has argued that one area is still not satisfactory. This is in relation to the Pregnant Workers Directive 92/85/EEC, which is, in her opinion, not correctly implemented in Norway, as mothers are still not guaranteed a specific 14 weeks of independent maternity leave.¹⁵³ In Norway, women are entitled to three weeks' leave before the birth and six weeks afterwards as leave which is specifically for women who are pregnant or have recently given birth. However, these weeks are deemed to be part of the parental leave under what is called a 'mother's quota'.

With reference to the two very different purposes of the two types of leave, one may argue that the Norwegian solution is problematic. The Ministry of Children, Equality and Inclusion (the former 'BLD')¹⁵⁴ has interpreted EU law (the EU Directive) on the right to maternity leave so that it can be fulfilled with leave both before and after the birth. This understanding provides for a total of 18 weeks of maternity leave in the Norwegian model. However, as the author sees it, as stated by Aune, leave before the birth should not be a part of the fulfilment of the maternity directive requirement. The right to maternity leave of 14 weeks in accordance with the maternity directive should, in the author's opinion, be compared with the right to the six compulsory weeks of leave after the birth set out in Section 12-4 of the WEA.

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

In an EFTA judgment of 13 December 2019 (as mentioned in part 5.6.3), the Court did not consider whether the mentioned provisions of the NIA discriminate against fathers on the grounds of sex according to the Recast Directive. As this was not discussed, it is not a judgment of much relevance when it comes to EU or Norwegian Discrimination Law. However, the fact that the Court considered this case to fall outside the scope of the Recast Directive does not mean that the regulations are not discriminatory according to the GEADA.

¹⁵² See Aune, H. (2018), *Country report. Gender Equality. How are EU rules transposed into national law? Norway*, State of affairs 1 January 2018, available at: <https://www.equalitylaw.eu/country/norway?page=1>.

¹⁵³ See the article where this situation is described: Aune, H., Nylander, G. (2015), 'Barseltid et faktum. Barseltid en rettslig sannhet', *Nordisk tidsskrift for Sosialrett*, 20 September. See also CJEU cases C-519/03 para. 32 and C-342/01 para. 41 and the Maternity Leave Directive 92/85/EEC.

¹⁵⁴ Currently, Ministry of Culture.

In Case 12/340¹⁵⁵ the Equality Ombud concluded that the requirement in Section 14-13 of the NIA on 'activity' for mothers was not in compliance with the former Gender Equality Act (GEA) (the GEADA has similar wording) because no corresponding requirements were set out for the father's activity for mothers to be entitled to parental benefit.

The author agrees with the Equality Ombud's arguments that the practice amounts to discrimination against fathers since mothers and fathers do not have equal rights in this matter. It seems that the Ministry does not agree with the Ombud, since in the EFTA Court case it argues that the regulation in the NIA is a type of 'positive action measure' that is an advantage to women because fathers are more likely to assume a larger share of family obligations if the mother returns to work in the period where the father receives benefits.

5.12 Remaining issues

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

¹⁵⁵ From the Ombud's website: <https://www.ldo.no/arkiv/nyheitsarkiv/Nyheter-i-2013/--Gi-far-eigen-rett-til-permisjon/>.

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

6.1 General (legal) context

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

Surveys from Statistics Norway show that gender equality has increased in several areas of working life over the years.¹⁵⁶ Nevertheless, Statistics Norway's gender equality indicators show that the labour market in Norway is still gender-divided, and this affects the occupational social security schemes. The proportion of women who work part-time is still large, compared to men. In addition, women and men work to a large extent within different sectors and industries, which contributes to different salaries among women and men, and different social security schemes. Reports¹⁵⁷ also show that there are far more women than men who receive benefits. Among those over 45 years old, the proportion is about 1.5 times as high.

6.1.2 Other issues related to gender equality and social security

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

6.1.3 Political and societal debate and pending legislative proposals

There has not been any particular political/societal debate or pending legislative proposals on this topic in 2020.

6.2 Direct and indirect discrimination

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

6.3 Personal scope

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

6.4 Material scope

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

6.5 Exclusions

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

¹⁵⁶ See *Statistisk sentralbyrås* (Statistics Norway's) website: <https://www.ssb.no/en>.

¹⁵⁷ See article from NAV: <https://memu.no/artikler/store-kjonnforskjeller-innen-uforetrygd/>.

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

There are no laws or new case law from 2020 which would fall under the examples of sex discrimination as mentioned in Article 9 of Directive 2006/54/EC.

6.7 Actuarial factors

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

6.8 Difficulties

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

6.9 Evaluation of implementation

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

6.10 Remaining issues

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

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

7.1 General (legal) context

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

Statistics show that there is a higher sickness absence among women than among men.¹⁵⁸ Absence from work due to sickness has also been higher among women than men since the 1970s (Statistics Norway 2016). The situation and developments in Norway are similar to those in other countries with high labour force participation by women.¹⁵⁹ The reports mentioned in part 4.1.2 and part 5.1.1 also show that more women than men have been on sick leave during the COVID-19 pandemic, but that the numbers are quite even when it comes to gender. This may be a result of more women than men working in the healthcare profession where the workload has been very high during all of 2020. The absence due to sickness for both women and men increased in the first part of 2020 for both genders, but then decreased again for both genders in the second part of 2020.¹⁶⁰

Research also shows that absence due to sickness clearly affects the pay gap.¹⁶¹

7.1.2 Other relevant issues

The relevant topics have already been discussed.

7.1.3 Overview of national acts

Folketrygdloven LOV-1997-02-28-19 TNIA, The National Insurance Act of 1 May 1997),¹⁶² *Sosialtjenesteloven LOV-2009-12-18-131* (The Act on Social Services in the Work and Welfare Administration of 1 January 2010),¹⁶³ *Lov om Statens Pensjonskasse LOV-1949-07-28-26* (The Act on the State Pension Fund) of 1 August 1949¹⁶⁴ and the WEA contain provisions on statutory security schemes.

7.1.4 Political and societal debate and pending legislative proposals

There is no societal debate or pending legislative proposals to report on here regarding gender equality issues.

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

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

¹⁵⁸ See report from *Statistisk sentralbyrå* (Statistics Norway): <https://www.ssb.no/sykefratot/>.

¹⁵⁹ See *Bufdir* website: https://bufdir.no/Statistikk_og_analyse/Kjonnslukestilling/Helse_og_kjonn/Sykefravar_og_uforhet/.

¹⁶⁰ See article from Statistics Norway 'Nedgang i sykefraværet' (Decrease in absence due to sickness) of 2 September 2020, <https://www.ssb.no/arbeid-og-lonn/artikler-og-publikasjoner/nedgang-i-sykefravaeret>.

¹⁶¹ Sick leave results in lower income in the short term, and this can probably be strengthened over time. See article from Statistics Norway 'Sykefravær gir dårligere lønnsutvikling' (Absence due to sickness affects the pay) of 22 October 2019, <https://www.ssb.no/arbeid-og-lonn/artikler-og-publikasjoner/sykefravaer-gir-darligere-lonnsutvikling>.

¹⁶² See Lovdata: <https://lovdata.no/dokument/NL/lov/1997-02-28-19?q=folketrygdloven>.

¹⁶³ See Lovdata: <https://lovdata.no/dokument/NL/lov/2009-12-18-131?q=sosialtjenesteloven>.

¹⁶⁴ See Lovdata: <https://lovdata.no/dokument/NL/lov/1949-07-28-26>.

Some trade unions have argued that the acts covering the occupational pension scheme in the private sector¹⁶⁵ indirectly discriminates against women contrary to the former GEA (current Section 6 of the GEADA) and Section 13-1 of the WEA because workers with a 20 % position do not receive a pension for their work and do not earn a pension for the first NOK 90 000 (approximately EUR 9 000). Nor do they from an employment relationship that lasts less than one year. The unions argue that that these rules affect women more than men, because it is mainly women who work part-time and in short-term temporary positions and engagements. In 2016 the Norwegian Union of Commerce and Office employees complained about these rules to the Equality Ombud,¹⁶⁶ but the Ombud closed the case, as cases regarding conflict between the discrimination legislation and other laws is outside the Ombud's mandate, and the Union was asked to take the case to the Norwegian courts. This question has not been settled by the Norwegian courts yet, and there is still conflict between the acts on pension rights in the private labour market and the GEADA and the WEA.

In Norway there is no earlier retirement for women only. The retirement age goes for both women and men.

7.3 Personal scope

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

7.4 Material scope

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

7.5 Exclusions

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

7.6 Actuarial factors

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

7.7 Difficulties

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

7.8 Evaluation of implementation

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

7.9 Remaining issues

The author has no remaining issues to discuss in this chapter.

¹⁶⁵ See *lov om inntekstpensjon* (Act on Income Pension) Article 4-2; *lov om foretakspensjon* (Act on Company Pension) Article 3-5; *lov om tjenestepensjon* (Act on Occupational Pension) Article 3-4; and *lov om obligatorisk tjenestepensjon* (Act on Mandatory Occupational Pension) Article 3-4.

¹⁶⁶ See Equality Ombud's Case 16/449: https://www.ldo.no/arkiv/klagesaker/klagesaker_annet/avviste-saker/16449-avvist---sporsmal-om-motstrid-mellom-lov/.

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

8.1 General (legal) context

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

There are few reports and surveys from the last five years that provide insights into the specific difficulties that self-employed workers face. However, research shows that the under-representation of women in entrepreneurship is consistent over cultures and countries, and is even higher in Norway than in most other industrialised societies.¹⁶⁷

The reports from Kilden Gender Research and *Bufdir* on consequences of the COVID-19 pandemic for gender equality mentioned in part 4.1.2 and part 5.1.1, show that female entrepreneurs in sectors such as the health and social sector, tourism, culture and personal services such as hairdressers and other salons for wellness were hit especially hard by the COVID-19 pandemic compared to men. Numbers from Innovation Norway¹⁶⁸ also show that the proportion of women who apply for funding from the Government to start new businesses and projects has decreased from 27 % in 2019 to 24 % until September 2020. In contrast, Innovation Norway's offer of crisis mentoring is now used by 32 % of women. Innovation Norway considers this to be a high number compared to before and believes this shows that a large number of female entrepreneurs need help due to the pandemic.

The reports also show that taking care of the family and managing the business have been an increased challenge for female entrepreneurs during the COVID-19 pandemic. The reports also state that more men apply for funding from the Government due to the crisis, and that this clearly affects female entrepreneurs.

8.1.2 Other issues

The high and persisting sex segregation in education and in the labour market may explain the low number of female entrepreneurs. Girls tend to choose an education that qualifies them for jobs in the public and private service sectors, whereas boys choose fields that more often qualify them for jobs in private industry and commerce.

8.1.3 Overview of national acts

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

8.1.4 Political and societal debate and pending legislative proposals

There has been no particular political/societal debate or pending legislative proposals on this topic, except in relation to the COVID-19 pandemic in 2020.

8.2 Implementation of Directive 2010/41/EU

The NIA and the GEADA contain the rights established in Directive 2010/41/EU.

¹⁶⁷ See *Statistisk sentralbyrå* (Statistics Norway) website: <https://www.ssb.no/a/publikasjoner/pdf/DP/dp727.pdf>.

¹⁶⁸ Innovation Norway is a state-owned Norwegian special law company founded in 2003 with the aim of increasing innovation in the business community throughout the country, helping to develop the districts, and profiling Norwegian business and Norway as destinations. Innovation Norway was formed by merging several existing institutions. See website: <https://www.innovasjon Norge.no/en/start-page/>.

8.3 Personal scope

8.3.1 Scope

Self-employment is defined in Section 1-10 of the NIA. Whether or not a person is self-employed will depend on an overall evaluation of various factors such as: does the person run an activity at their own cost and risk and is this activity likely to create an income; does the activity have a certain turnover; does the person employ freelancers or employees; does the business have its own office/workshop, and does the person own their own tools and are they economically responsible for the entity?

8.3.2 Definitions

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

8.3.3 Categorisation and coverage

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

8.3.4 Recognition of life partners

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

8.4 Material scope

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

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

8.4.2 Material scope

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

8.5 Positive action

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

8.6 Social protection

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

The NIA covers self-employed workers. According to Sections 23-6 and 8-35, self-employed people may receive sickness benefit of up to 65 % of the sickness allowance scheme. The Norwegian system relies on the NIA as a base platform for all residents. In addition, people are free to purchase additional insurance in the NIA system as a supplement. The requirement to ensure that spouses and life partners can benefit from

social protection in accordance with national law has been implemented in a voluntary system where it is possible to buy social protection measures such as health benefits and voluntary occupational injury insurance and pensions), on the basis of Sections 3-13 and 23-6 of the NIA and under a specific regulation.¹⁶⁹ Working spouses of self-employed workers however need to purchase specific insurance.

8.7 Maternity benefits

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

The maternity allowance is the same for employees and the self-employed: the payment is either 80 % or 100 % of the salary level, depending on the length of the leave to be taken. The maximum pay is 6 G, one G corresponding to the base amount for calculations for the NIA, subject to annual regulations.¹⁷⁰

Female self-employed workers and female spouses and life partners are entitled to maternity benefits if they have fulfilled the base requirement of having been at work during 6 of the last 10 months before the birth of the child, see Section 14-6 and 14-7 of the NIA. The amount of the benefit is calculated according to the average income during the last three years.¹⁷¹ Spouses or any person who does not work will receive a cash benefit in relation to the birth; see Section 14-17 of the NIA. As mentioned in part 5.1.1 of this report, the COVID-19 pandemic has made the situation difficult for mothers and fathers. For pregnant women who have been laid off or left without work throughout or in part of 2020, this may result in a significantly lower income during the entire leave period.

8.8 Occupational social security

8.8.1 Implementation of provisions regarding occupational social security

Article 10 of Directive 2006/54/EC regarding occupational social security for self-employed people is implemented in the NIA. It is a voluntary system where it is possible to buy social protection (health/sickness or a pension) according to Sections 3-13 and 23-6 of the NIA and under a specific regulation.¹⁷²

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

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

8.9 Prohibition of discrimination

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

¹⁶⁹ See Regulation F11.03.1997 No. 210 *Forskrift om frivillig yrkesskadetrygd for selvstendig næringsdrivende og frilansere*.

¹⁷⁰ In 2019 the G (*grunnbeløp*) was NOK 99 858 (about EUR 11 095). The G is a calculation figure for the NAV, calculating every person's right to benefits from the National Insurance system (*Folketrygden*).

¹⁷¹ See the information about maternity/parental leave benefits on the NAV website: <https://familie.nav.no/>.

¹⁷² See Regulation F11.03.1997 No. 210 *Forskrift om frivillig yrkesskadetrygd for selvstendig næringsdrivende og frilansere*.

8.10 Evaluation of implementation

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

8.11 Remaining issues

For consequences of the COVID-19 pandemic, see part 8.1.1 on female entrepreneurs. As mentioned in part 5.1.1, the COVID-19 pandemic has also made the situation difficult for mothers and fathers, and for entrepreneurs and freelancers. For pregnant women who have been laid off or left without work throughout or in part of 2020, this may result in a significantly lower income during the entire leave period.

9 Goods and services (Directive 2004/113)¹⁷³

9.1 General (legal) context

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

The report 'Investing in gender equality' from Price Waterhouse Cooper (PwC) Norway commissioned by Storebrand and Care Norway¹⁷⁴ from 2019 shows that gender equality is profitable for businesses. Increasing female labour market participation has led to many positive effects, such as increased economic growth, increased productivity and an increased economic resilience. The report points out that a more diverse corporate culture can lead to more innovation, creativity and critical thinking, as well as higher productivity. In addition, the literature finds that more diverse leadership can lead to increases in profitability. Gender equality in management and on company boards is even more crucial as the workforce and markets become more diverse.

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

There have been some examples of sex discrimination in advertisements where the body of a person of one sex is taken advantage of and represented in an offensive and degrading manner. This especially applies to women. The Consumer Authority (CA)¹⁷⁵ has also dealt with cases on dating sites, such as Richmeetbeautiful.no and Digisec Media AS,¹⁷⁶ and concluded that the sites contravened Section 2 of the Marketing Act, as they used stereotypes and outdated views of men and women in their advertisements. When it comes to the media and advertising, Norwegian law appears to be broader than the Directive Article 3(3) as well.

9.1.3 Political and societal debate

There has been no particular/specific political or societal debate on this topic in Norway in 2020 except what has already been discussed in the report.

9.2 Prohibition of direct and indirect discrimination

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

In Case 19/114¹⁷⁷ the Equality Tribunal concluded that the Norwegian Correctional Service discriminates against female inmates, contrary to Section 6 of the GEADA, by not giving them equal services/opportunities as male inmates in a prison in Tromsø, a city in the north of Norway. The case was brought to the Tribunal by the Equality Ombud. The Equality Tribunal concluded unanimously that female inmates in Tromsø prison are 'treated worse' than male prisoners in the prison contrary to Section 6 of the GEADA, because female prisoners are placed in the custody department due to the absence of their own

¹⁷³ See e.g. Caracciolo di Torella, E. and McLellan, B. (2018) *Gender equality and the collaborative economy*, European network of legal experts in gender equality and non-discrimination, available at: <https://www.equalitylaw.eu/downloads/4573-gender-equality-and-the-collaborative-economy-pdf-721-kb>.

¹⁷⁴ 'Investing in Gender Equality', Report of 5 June 2019 prepared by PwC Norway and commissioned by Storebrand and Care, available at: <https://www.pwc.no/no/pwc-aktuelt/likestilling-er-lonnsomt-for-virksomheter.html>.

¹⁷⁵ See the Consumer Authority website: <https://www.forbrukertilsynet.no/english>.

¹⁷⁶ Case from the Consumer Authority in Case 17/2040. See CA website: <https://www.forbrukertilsynet.no/lov-og-rett/veiledninger-og-retningslinjer/veiledning-kjonnsdiskriminerende-reklame>.

¹⁷⁷ Statement of 9 June 2020 from the Equality Tribunal: <https://www.diskrimineringsnemnda.no/media/2413/sak-19-114.pdf>.

prison department for female inmates serving time in high security. The Equality Tribunal also found that the custody department is much more restrictive than the prison department, and the Equality Tribunal therefore concluded that there was reason to believe that female inmates in general are treated worse than male inmates. The Correctional Service did not deny that the offerings in the prison were not identical for women as for men, and claimed that it had implemented measures to compensate the women who served time in the custody department. The Equality Tribunal found that these compensatory measures implemented by the Correctional Service were not sufficient following Section 9 of the GEADA. The Equality Tribunal concluded that this was discrimination against female inmates, but it is a bit unclear whether the Tribunal refers to indirect or direct discrimination.

Cases 19/398 and 19/399¹⁷⁸ from the Equality Tribunal concerned Oslo Taxi's initiative with 'girl taxi' in the period from November to December 2019 where some taxis at night were reserved for women only. A man complained to the Tribunal, as he believed this was discrimination and harassment of men. The Equality Tribunal closed both cases as the measure was not disproportionate, and in line with the purpose of the GEADA, including improving the position of women. It is a bit surprising that the Equality Tribunal does not write a statement on non-discrimination here instead of closing the case. The Equality Ombud also had several enquiries about the 'girl taxi' practice in 2020.¹⁷⁹

9.3 Material scope

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

9.4 Exceptions

As mentioned in part 9.1 and 9.3, when it comes to media and advertising and teaching materials in schools,, Norwegian law appears to be broader than the Directive as well. There is protection against discrimination on the grounds of gender in the Marketing Act (*Lov om markedsføring og avtalevilkår mv.*) (Section 2)¹⁸⁰ as follows:

'Advertisements and the person producing a commercial/advertisement shall ensure that the advertisement is not in violation of the principle of equality between men and women, and ensure that the advertisement does not take advantage of either gender's body or image or provide a representation of one of the sexes in an offensive or degrading manner.'¹⁸¹

9.5 Justification of differences in treatment

There have been some cases in 2020 where the Equality Tribunal has argued justification of differences in treatment.

In Case 19/355¹⁸² the question was whether an association of 'colony gardens' had discriminated against a female applicant for a cabin in the association based on gender,

¹⁷⁸ Decisions from the Equality Tribunal of 25 February 2020 and 12 March 2020.

¹⁷⁹ See the report 'Diskrimineringsretten 2020' (Discrimination Law 2020) from the Equality Ombud p. 26. https://www.ido.no/globalassets/ldo_2019/03_ombudet-og-samfunnet/rapporter/diskrimineringsrett/ldo_diskrimineringsrettsrapporten_2020-web.pdf.

¹⁸⁰ Act-2009-01-09-2.

¹⁸¹ Unofficial translation.

¹⁸² Statement from the Equality Tribunal of 8 December 2020.

by earmarking some of the cabins /parcels of land for men only. The association argued that it was in need of 'handy men' to work at the cabins. The Equality Tribunal concluded that the exception in Section 9 of the GEADA did not apply in this case, and stated that the assumption that men can take care of maintenance better than women is a generalising practice. There is no evidence or proof that every man wants to be more 'handy' than a woman.

9.6 Actuarial factors

The GEADA, with the general prohibition on discrimination, ensures that the use of sex/gender as a factor in the calculation of premiums and benefits for the purposes of insurance and related financial services does not result in differences in individual premiums and benefits; see Article 5(1) of Directive 2004/113.

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

Norway has not made any exceptions according to Article 5(2) of Directive 2004/113/EC. Even though it is clear, according to the Equality Tribunal's early practice and the text of the law, that sex discrimination is not legal in collective pensions, the judgment of the Court of Labour Disputes (2013-01-014 ARD-2013-1)¹⁸³ implies that sex may still be used as an actuarial factor in some cases. The *Test-Achats* ruling has therefore not resulted in any changes to national legislation, as Norway presumes that national law is in compliance.

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

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

9.9 Specific problems related to pregnancy, maternity or parenthood

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

For several years the Norwegian Act of Biotechnology¹⁸⁴ has raised questions on inequality because donation of sperm has been allowed, but egg donation has not. Before the change of the Act in 2020, the Equality Ombud, among others, criticised this practice.

In July 2020 the Parliament decided to permit egg donation by changing Section 2-11 of the Biotechnology Act.¹⁸⁵ According to the amendment, egg donation entails a woman donating one or more eggs, which can be used for artificial fertilisation of another woman, or for research purposes. The female donor must be over the age of 25, and not older than 35 (while the semen donor must be over the age of 18). It is the physician who chooses the semen or egg donor.

¹⁸³ Judgment from the Norwegian Court of Labour Disputes 'Arbeidsretten', of 14 January 2013.

¹⁸⁴ Act-2003-12-05-100 <https://lovdata.no/dokument/NL/lov/2003-12-05-100?q=bioteknologiloven> (only in Norwegian).

¹⁸⁵ See the Government's website: <https://www.regjeringen.no/no/aktuelt/endringer-i-bioteknologiloven-fra-1.-juli/id2721705/> (Only in Norwegian). All pregnant women in their first trimester of pregnancy will now also be offered an ultrasound with additional examinations, which can reveal serious illness or fatal injury of the fetus. The amendment also allows a so-called Non-Invasive Prenatal Test (NIPT) to be carried out on all pregnant women in Norway. The pregnant woman is not obliged to go through with the test. With the new changes, insemination can also take place on a single woman, without the requirement of her having a male or female partner. To be considered as a single person, the woman must live alone. For more details on the changes, see Flash Report to the European Commission by Marte Bauge of 23 July 2020: 'Amendments to the Norwegian Biotechnology Act. Egg donation and assisted fertilisation of single women permitted. Free ultrasound early in the pregnancy'. <https://www.equalitylaw.eu/downloads/5200-norway-amendments-to-the-norwegian-biotechnology-act-egg-donation-and-assisted-fertilization-of-single-women-permitted-free-ultrasound-early-in-the-pregnancy-87-kb>.

9.10 Evaluation of implementation

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

9.11 Remaining issues

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

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

10.1 General (legal) context

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

At the beginning of the COVID-19 pandemic the Norwegian authorities gave instructions to the population to avoid contact with the health services unless strictly necessary, in order not to overstrain the healthcare system. Reports and surveys from 2020¹⁸⁶ reveal that the COVID-19 pandemic has caused more and serious violence towards women during the lockdown and with the COVID-19 measures. The Police in Norway have also experienced an increase in cases regarding harassment, sexual harassment, and the spread of nude photos on social media.

According to the survey mentioned in part 4.1.1¹⁸⁷ fewer victims contacted the Police, women's shelters and other helplines when society was shut down. At the same time in the last week of May and the first week of June in 2020, Police districts across the country reported increased levels of conflict and violence between family members. Some of the incidents are directly related to the lockdown and the control measures set by the Government.

The Norwegian Government is now working on the sixth national action plan against domestic violence, which will apply for the period 2020 to 2024.¹⁸⁸ This action plan follows up on and further develops the Action Plan against Domestic Violence, A Life without Violence (2014–2017), and outlines and addresses the remaining challenges.

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

Norwegian law contains a limited number of rules with wording that is solely aimed at violence against women.

In Norwegian, the term consistently used is '*vold i nære relasjoner*', which can be literally translated as 'violence in close relationships'. The term is translated variously as 'domestic

¹⁸⁶ See the report of 12 May 2020 from the Norwegian Centre for Violence and Traumatic Stress Studies (NKVTS) <https://rvtsnord.no/wp-content/uploads/2020/05/krisesentre-og-covid-19.pdf>. The report shows the importance of the women's shelters during the pandemic, and that the measures to stop and control the virus have clearly had an impact when it comes to what kind of help women and child victims of domestic violence got during the pandemic. Much of the follow-up on victims was done by phone at the beginning of the pandemic. The report also shows that the shelters are worried because there has been a decrease in the number of people who have sought help from the women's shelters during the pandemic. Some are also concerned that the situation may have created new opportunities for exerting control and psychological violence in the family. Cases also show that some perpetrators use the victims' fear of the pandemic to prevent the cohabitants and/or children from leaving home, that the pandemic is part of the control and violence regime. This has also been confirmed in the survey done by NKVTS where one third of the women's shelters answered that they had seen this form of violence. A large proportion of users of the shelters are also women from a minority background, many of whom were also exposed to social control.

¹⁸⁷ See report from Gender Research Norway 'Likestillingskonsekvenser av pandemien. Vold mot kvinner'. (Consequences for gender equality because of the pandemic. Violence against women). https://kjonnsforskning.no/sites/default/files/likestillingskonsekvenser_av_koronapandemien_vold_mot_kvinner.pdf.

The survey detects that communication from the authorities has been insufficient when it comes to the pandemic and violence against women, and the information that was given has probably not reached enough of those who it was intended to reach, especially when it comes to minority women. Furthermore, all binding national contingency plans should address domestic violence. The survey also discovered that the municipalities have to become more aware of their responsibility for the women's shelters. There is also a need to strengthen the people's knowledge on what kind of help is out there for victims of domestic violence.

¹⁸⁸ Work on the action plan is coordinated by the Ministry of Justice and Public Security and anchored in the Interministerial Working Group against Domestic Violence.

violence', 'family violence', 'partner abuse', 'battering', etc., mainly to distinguish this violence from more random violence perpetrated by attackers with whom the abused has no established or lasting relationship.

Norwegian criminal law is general and gender neutral by design. At the same time, it covers many crime categories that most often affect women.

The Norwegian Penal Code:

In 2005, the Parliament adopted a penal provision regarding '*vold i nære relasjoner*' (Section 219 of the former Penal Code from 1902; current Section 282). According to Section 282, it is the perpetrator's long-term terrorisation and abuse of the next-of-kin (current or ex-spouse or partner, their own or their partner's relatives, household members or others for whom the perpetrator plays a caring role) that constitutes the criminal aspect of the act. The expression 'domestic violence' (also referred to as 'family violence', 'partner abuse', 'battering', etc.) covers all forms of physical and emotional abuse of current or former family members, and its victims include child witnesses.

Sexual assault/rape is covered by Sections 291-293 of the Penal Code. The duty to criminalise female genital mutilation, as mentioned in Article 38(a) of the Istanbul Convention, is fulfilled in Norwegian law through Section 284, first paragraph of the Penal Code. Section 253 of the Penal Code criminalises forced marriage.¹⁸⁹ Forced abortion and forced sterilisation, as mentioned in Article 39 of the Istanbul Convention, are encompassed by the general provisions of the Penal Code on violent crime, under Section 274, second paragraph of the Penal Code.

The Criminal Procedure Act:

The prosecution authority is authorised to impose interim/emergency restraining orders, according to Section 222a of the Criminal Procedure Act. Emergency barring orders are understood in the Norwegian context as an interim restraining order. In addition, there are restraining orders against contact, which serve the same purpose and are imposed on the same conditions, but are also a penal sanction that is imposed by the courts rendering a judgment.

Victims of certain forms of violence and abuse are entitled to a legal representative for victims pursuant to Section 107a of the Criminal Procedure Act. The assistance is free and provided without means testing, that is, regardless of the victim's income or net worth.

Victims also have an opportunity to apply for free legal aid pursuant to Section 11, first paragraph (4), (6) and (7) of the Free Legal Aid Act.¹⁹⁰ In 2020 the Legal Aid Committee proposed a reform of the legal aid scheme, and a new law on support for legal aid (the Legal Aid Act), which is intended to replace the current law on free legal aid. The Committee proposes that everyone should pay one amount, and that this amount shall be calculated on the basis of the total legal aid costs in the case. The Committee also suggests that the size of the amount should be calculated based on the legal aid recipient's ability to pay.¹⁹¹ The proposal may lead to an expansion of the assistance outside the courts, and a narrowing of the assistance before the courts.

¹⁸⁹ The sentencing framework is imprisonment for a maximum of 6 years. Because extrajudicial marriage is often perceived to be as binding as a marriage entered into formally, the Ministry has proposed that Section 253 of the Penal Code of 2005 be expanded to also include extrajudicial forced marriage, cf. Proposition 66 (2019–2020). Entering into marriage with a person under the age of 16 is punishable irrespective of whether coercion is used, cf. Section 262, second paragraph of the Penal Code.

¹⁹⁰ *Lov om Fri rettshjelp* (The Act on Free Legal Aid) Act of 1980-05-13-35 <https://lovdata.no/dokument/NL/lov/1980-06-13-35?q=rettshjelploven> (Only in Norwegian).

¹⁹¹ See report from the Legal Aid Committee in NOU 2020:5; *Likhet for loven – Lov om støtte til rettshjelp* (Equality before the law – Act on support for legal aid).

The Damages Act¹⁹² also contains several rules that entitle victims of violence to compensation from the perpetrator. If the victim of violence has sustained a personal injury, they are entitled to compensation for any injury sustained, loss of future earnings and expenses that the personal injury is assumed to inflict on the person in question in the future, see Section 3-1.

The Compensation for Victims of Violent Crime Act:¹⁹³

Anyone who has suffered personal injury as a result of a criminal act that violates the victim's life, health or freedom, or the victim's surviving relatives, is entitled to compensation for victims of violent crime from the state in accordance with the rules of this Act. In 2020 the Ministry of Justice sent a proposal for a new act on compensation from the state to victims of violence. The proposal means that all victims who are awarded compensation from the perpetrator for specified violence or sexual offences, shall receive the compensation from the state almost immediately, without submitting any application. Several bodies, such as the Equality Ombud are critical of the proposal since many criminal cases are closed due to lack of evidence. The proposal means that many victims who today can apply for compensation from the state will not be entitled to compensation. It may be particularly difficult for victims of domestic violence or honour-related violence to file a claim for damages, due to the connection with the perpetrator.¹⁹⁴

The Act relating to Municipal Crisis Centre Services¹⁹⁵ entered into force on 1 January 2010. The purpose of the Act is to ensure the provision of a good, comprehensive crisis centre service for women, men and children who are subjected to domestic violence or threats of such violence.

10.1.3 National provisions on online violence and online harassment

There is no specific regulation regarding online violence and harassment of women and girls in the national legislation. Threats and serious threats are prohibited in Section 263 of the Penal Code. Section 264 also covers serious threats and online threats. Section 266 of the Penal Code covers harassing conduct. Section 267 covers violation of privacy. This also includes matters happening online.

Since the introduction of Section 266a of the Penal Code, serious stalking has become a crime in Norway.¹⁹⁶ However, the provision on stalking has been debated after the Supreme Court concluded in a recent case¹⁹⁷ that serious stalking is not illegal as long as the victim does not know about the perpetrator's intent to stalk.¹⁹⁸

Section 108 of the Copyright Act covers the right to images.¹⁹⁹ The provision of the Copyright Act is limited to apply to personal photographs, including live films.²⁰⁰ The provision is therefore also relevant for image sharing between people.

¹⁹² *Lov om Skadeerstatning* (The Damages Act) Act-1969-06-13-26;

<https://lovdata.no/dokument/NL/lov/1969-06-13-26?q=erstatningsloven>.

¹⁹³ *Lov om voldsoffererstatning* (Compensation for Victims of Violent Crime Act) Act of 2001-04-20-13.

<https://lovdata.no/dokument/NL/lov/2001-04-20-13?q=lov%20om%20voldsoffer>.

¹⁹⁴ See report from the Equality Ombud from April 2021: 'Diskrimineringsretten 2020, Rettsutvikling på likestillings- og diskrimineringsfeltet, med gjennomgang av relevante lovendringer, forvaltningsog rettspraksis (Discrimination Law 2020 – summary of cases and relevant changes).

¹⁹⁵ *Lov om kommunale krisesenterstilbud* (The Crisis Centre Act) of 2009-06-19-44:

<https://lovdata.no/dokument/NL/lov/2009-06-19-44?q=krisesenterlova>.

¹⁹⁶ See Article 266 at: https://lovdata.no/dokument/NLE/lov/2005-05-20-28/KAPITTEL_2#KAPITTEL_2.

¹⁹⁷ Supreme Court judgment of 21 March 2019 in HR-2019-563-A.

¹⁹⁸ After this ruling from the Supreme Court several political parties initiated a campaign to change the article in the Penal Code so that stalking that is hidden, where the victim does not know they are being stalked, will be a crime according to Norwegian legislation. In 2019 the former Director of Public Prosecutions Tor Aksel Busch advised against an urgent treatment of the proposition. As of 1 January 2020, the law has not yet been changed on this matter.

¹⁹⁹ Act of 2018-06-15-40; <https://lovdata.no/dokument/NL/lov/2018-06-15-40?q=%C3%A5ndsverkloven> (Only in Norwegian).

²⁰⁰ Judgment from the Supreme Court in Rt-1995-1948.

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

10.1.4 Political and societal debate

The survey on the COVID-19 pandemic and domestic violence mentioned in part 10.1.1 concludes that the communication from the authorities has been insufficient during the pandemic, and the information that has been given has probably not reached enough victims of violence. The Equality Ombud has also highlighted the challenges of violence towards women during the COVID-19 pandemic mentioned in part 10.1.1 in a letter²⁰¹ to the 'Corona commission',²⁰² and asked for a thorough evaluation of the situation of vulnerable groups during the pandemic, as this has not been sufficient.

Another debate has been whether gender/sex should be a protected ground for hate speech in the Penal Code.²⁰³ Last year the Parliament decided not to add this as a protected ground. At the same time, gender identity and gender expression were made protected grounds. The arguments for not including gender/sex remains questionable. In the author's opinion it would be a 'suitable and accurate tool to combat incitement against women'. Also, not all hate speech towards women in particular will be covered by other provisions in the Penal Code.

10.2 Ratification of the Istanbul Convention

The Istanbul Convention was ratified by the Norwegian Parliament in July 2017 and entered into force on 1 November the same year. The state report from Norway was received by GREVIO on 16 September 2020.²⁰⁴ Norway has not issued any reservations to the Convention.

²⁰¹ See 'Innspill til Koronakommisjonen' of 21 October 2020: <https://www.ldo.no/ombudet-og-samfunnet/siste-nytt2/her-er-ombudets-innspill-til-koronakommisjonen/>.

²⁰² On 24 April 2020 the Norwegian Government created a commission who are to evaluate the authorities' actions regarding COVID-19. Discrimination issues are not mentioned in particular, but the economic and social consequences of the pandemic and the measures taken against it are on the list of things they are to look into. <https://www.koronakommisjonen.no/mandate-in-english/>.

²⁰³ See the preparatory works, Prop. 66 L (2019-2020).

²⁰⁴ See Norway's report to GREVIO: Report submitted by Norway pursuant to Article 68, paragraph 1 of the Council of Europe Convention on preventing and combating violence against women and domestic violence (Baseline Report) sent 16 September 2020. Published 17 September 2020. <https://www.coe.int/en/web/istanbul-convention/-/grevio-receives-state-report-for-norway>.

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

11.1 General (legal) context

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

The author is not familiar with specific surveys or reports about difficulties for victims of gender discrimination related to obtaining legal redress.

11.1.2 Other issues related to the pursuit of a discrimination claim

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

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

For the enforcement of the GEADA within the ordinary civil courts, discrimination cases follow the 'normal' procedural rules for civil cases as set out in the Dispute Act.²⁰⁵

There are no specific procedural rules when referring 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 under 'Equality bodies'.

11.1.3 Political and societal debate and pending legislative proposals

The courts can award redress/compensation and damages in all discrimination cases.

Only the Equality Tribunal has a mandate to give administrative decisions, including redress and compensation/damages, under Section 12 of the EAOA. The Equality Tribunal may make an administrative decision concerning redress in the context of an employment relationship and in connection with an employer's selection and treatment of self-employed persons and hired workers. The Equality Tribunal may make a unanimous administrative decision concerning damages in connection with a breach of the discrimination provisions, if the only submissions made by the respondent relate to inability or pay or other manifestly untenable objections. Following this change, there has not been any particular public debate on this matter and there are no relevant pending legislative proposals at the moment.

As of 1 January 2020, the Equality Tribunal has had a mandate to deal with individual complaints of sexual harassment and also to award redress/compensation and damages in these cases, as stated in Section 12 of the EAOA. Claims for redress and damages in other cases of sexual harassment, which the Tribunal does not have a mandate to consider (outside employment), will have to be brought before the courts (for more on this see part 3.1.1 above, under *sexual harassment*). However, the Equality Tribunal does not have a mandate to award compensation/damages in cases based on Section 13(6) of the GEADA on the employer's duty to prevent harassment and sexual harassment. It is the Equality Tribunal that enforces this provision, but the Tribunal does not have the authority to

²⁰⁵ See Act of 17 June 2005 no. 90 relating to mediation and procedure in civil disputes (the Dispute Act), available at: <http://app.uio.no/ub/ujur/oversatte-lover/data/lov-20050617-090-eng.pdf>.

impose redress and compensation. Any claim for redress and compensation in these types of cases must therefore be submitted to the ordinary courts.

11.1.4 Gender mainstreaming

Norway has included gender mainstreaming in its overall strategy for gender equality, but keeps gender-specific action as an equally important approach. The gender mainstreaming approach calls for the integration of gender perspectives into all stages of policy processes – design, implementation, monitoring and evaluation – to promote equality between women and men. The strategy recognises gender as a cross-cutting issue which has relevance in most areas of society.

11.2 Victimisation

In national law the directives' provisions on victimisation are implemented through Section 14 of the GEADA and Section 2 A-2 and 2 A-4 of the WEA. If there are circumstances that give reason to believe that there has been direct or indirect differential treatment in contravention of the discrimination legislation, such differential treatment shall be assumed to have taken place unless the person responsible proves, on the balance of probabilities, that such differential treatment did not take place. This goes for all discrimination cases and applies equally to situations of reprisals and victimisation. In addition, it is not permitted to retaliate against any person who has submitted a complaint regarding a breach of provisions of the discrimination legislation, or who has stated that a complaint may be submitted. There is a limitation to this right, and that is in instances where the complainant has acted with gross negligence. The protection against victimisation applies correspondingly to witnesses or someone who helps the victim of discrimination to bring a complaint, for example a workers' representative.

Both the Ombud and Equality Tribunal have dealt with a limited number of cases in which victimisation was alleged. The Equality Tribunal Case 27/2008 was subsequently taken to the Oslo municipal court by the municipality of Oslo, which was accused of reprisals. 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 by 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.²⁰⁶

In a court case on discrimination on the grounds of age and gender, the female complainant was found to have been subject to victimisation in breach of the GEA and Section 2-5 and 13-8 of the WEA.²⁰⁷

On 2 July 2020, the Ministry of Labour and Social Affairs and the Ministry of Culture submitted proposals for amendments to the EAOA. One of the proposals was to give the Equality Tribunal a mandate to handle cases on victimisation after the WEA, and a mandate to award damages and compensation in some of the cases on victimisation. The proposal does not include the authority to deal with cases of victimisation after termination, change of termination or dismissal. These disputes must still be brought before the courts.²⁰⁸ Cases on victimisation after the WEA have a different character and complexity, and demand much time and resources. If this proposal goes through without the Equality Tribunal being given extra resources and capacity, this might lead to longer case processing in discrimination cases.

²⁰⁶ Oslo District Court, first instance judgment of 27 October 2009, case number TOSLO-2009-72697.

²⁰⁷ Øst-Finnmark District Court, judgment of 17 March 2010, case number TOSFI-2009-136827.

²⁰⁸ As of 1 January 2021, the Government's proposal has been forwarded to the Parliament.

11.3 Access to courts

11.3.1 Difficulties and barriers related to access to courts

Access to the courts is in theory legally guaranteed for alleged victims of sex discrimination. However, an important and significant challenge is that, in practice, few cases make it to the courts. 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 complainant 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 significant economic risk linked to the 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 (Section 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 Section 20-2(3)). These costs are practical barriers for most discrimination complaints if not represented by a trade union which may reduce the costs a bit. In the case from the Supreme Court on sexual harassment mentioned in part 3.7.3, the victim was represented by lawyers from *Landsorganisasjonen i Norge* (LO Norway), Norway's biggest trade union.

Also, there are no rules or guidelines to ensure that the judges or lay judges are trained in discrimination issues.

Although the courts do handle discrimination cases, and the number of cases before the courts is increasing, the overwhelming number of discrimination cases in Norway are still channelled through the Equality Tribunal.

The total number of discrimination cases brought to court remains small, especially compared with the volume of cases on guidance brought before the Equality Ombud and complaints brought before the Equality Tribunal. The Equality Ombud and the Equality Tribunal have detailed annual statistics for their work and they receive more than 95 % of all discrimination cases.

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

11.3.2 Availability of legal aid

Legal aid is offered to individuals whose income is below a certain level.²⁰⁹ In 2019 the eligibility thresholds for free legal aid were NOK 246 000 for single households (EUR 28 000) and NOK 369 000 (EUR 41 000) for spouses/co-habiting partners. Discrimination as a ground for eligibility for free legal aid does not exist.

²⁰⁹ See Regulation concerning free legal aid FOR-2005-12-12-1443 (*Forskrift til lov om fri rettshjelp*), available at: https://lovdata.no/dokument/SF/forskrift/2005-12-12-1443?q=fri_rettshjelp.

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

The Equality Ombud also offers free guidance on Discrimination Law within its mandate, see more about this under the chapter on Equality bodies.

11.4 Horizontal effect of the applicable law

11.4.1 Horizontal effect of relevant gender equality law

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

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

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

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

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

11.5 Burden of proof

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

In cases concerning dismissals according to the labour law procedural rules, it is a general principle that the employer must substantiate that the dismissal is based upon the correct facts. Other than this, in civil cases – as a general rule – the burden of proof rests with the claimant. This is why the shifting of the burden of proof, as implemented in the discrimination legislation, is important. In all discrimination cases, if there are circumstances that give '*reason to believe*' that there has been direct or indirect differential treatment in contravention of the said legislation, such differential treatment shall be assumed to have taken place, unless the person responsible proves, on the balance of probabilities, that such differential treatment nevertheless did not take place. Section 37 of the GEADA states:

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

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

In a judgment from the Norwegian Supreme Court ('*Kontreadmiral*')²¹⁰ the Court stated that the 'burden of proof' will be reversed/transferred to the employer if sex/gender is mentioned during the case preparation.

The Equality Tribunal has also stated that for the burden of proof to be reversed/transferred the allegation must be 'supported by the chain of events and the external circumstances of the case which necessitate an assessment of the specifics of that case'.²¹¹

Equality Tribunal Case 97/2018²¹² is interesting when it comes to 'burden of proof' because in this case the Equality Tribunal made an overall assessment of the evidence instead of starting by transferring the burden of proof to the employer. Normally, the Tribunal starts by discussing the burden of proof. The question was whether a woman was discriminated against on the grounds of sex when she was not hired for a position as head teacher at a school. A male applicant got the job. The Equality Tribunal concluded that gender was not the main reason the male applicant was chosen, but that gender had been part of the decision. To achieve gender balance among school head teachers was explicitly listed as something the municipality wanted to achieve. However, the argument on gender balance came last, and after the consideration of the male applicant's experience. The Tribunal concluded that there was no 'reason to believe' that the female applicant was discriminated against on the grounds of sex when she did not get the job.

The Tribunal might have reached the same conclusion if it had transferred the burden of proof to the employer. However, 'reason to believe' requires less with regard to evidence than the usual balance of probabilities in discrimination cases.²¹³

In an article by a previous head of the Equality Tribunal and the head of its secretariat, the conclusion was drawn that the current rules on the reversal of the burden of proof are useful and fulfil the EU requirements.²¹⁴ As the practice of the Equality Ombud and the Equality Tribunal has not changed based on the new wording of the legislation from 2018, the revised text is also in line with the EU requirements, including the CJEU judgment of 21 July 2011 (C-104/10 *Patrick Kelly v National University of Ireland*) and CJEU judgment of 19 April 2012 (Case C-45/10 *Galina Meister v Speech Design Carrier Systems*).

11.6 Remedies and sanctions

11.6.1 Types of remedies and sanctions

Applicable sanctions in EU gender equality law.

Sanctions according to the GEADA and the WEA that are enforced by the civil courts consist of liability for damages and compensation/redress awarded to the discrimination claimant. Sanctions according to criminal law consist of penalties such as fines or imprisonment.

²¹⁰ Supreme Court judgment of 29 April 2014 in Rt 2014 s.402 (only available via non-public link in 'Lovdata Pro').

²¹¹ See Statement of 21 December 2006 from the Equality Tribunal in Case 26/2006 in which this quote was used by the dissenting member of the Equality Tribunal. Although the remainder of the Equality Tribunal in this particular case did not agree with the dissenting member, the quote was later referred to by the Equality Ombud and the Equality Tribunal in a number of subsequent cases.

²¹² Statement of 26 March 2019 from the Equality Tribunal.

²¹³ See the Preparatory works in Prop. 81 L (2016-2017) Chapter 28.4.2.2 p. 293.

²¹⁴ See Syse, A., Helgeland, G. (2009), 'Reglene om delt bevisbyrde i norsk diskrimineringsrett' ('The rules on the shared burden of proof in Norwegian discrimination law'), in Aune, H., Fauchald, O.K., Lilleholt, K. and Michalsen, D. (eds), *Arbeid og Rett, Festschrift til Henning Jakhellns 70-årsdag*, Cappelen DAMM.

Sanctions are largely equally applicable in private and public employment. In general, they cover all discrimination grounds in all fields. The provisions on sanctions are found in Section 38 of the GEADA and Section 13-9 of the WEA.

There are several general rules on compensation in Norwegian legislation that are applicable when it comes to gender equality law. Compensation in Norwegian law is awarded either for fault-based liability (*culpa*) or for liability without fault. These ordinary rules are the rules on compensation set mainly by the Act relating to Compensation,²¹⁵ as well as by the non-statutory customary rules on compensatory damages. These also include a number of general rules to limit liability.

Section 38 of the GEADA regulates compensation and damages. 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 part 3.7 in this report).

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 other circumstances (see Section 38(3) of the GEADA and Section 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,²¹⁶ but refused by the Supreme Court,²¹⁷ and by the appellate court in later cases.²¹⁸

Regarding redress/compensation for non-economic loss, all acts contain the general rule that compensation will be set at an amount that is reasonable in view of the scope and nature of the harm, the relationship between the parties and other circumstances (see Section 38(3) of the GEADA and Section 13-9 of the WEA).

Preliminary injunction on the right to remain in position: a practical form of 'sanction' often claimed by victims of discrimination in employment is the right to remain in their position until the case has been finally decided in court. This has been granted on one occasion related to age discrimination in the context of interlocutory judgments,²¹⁹ but refused by the Supreme Court²²⁰ and in later cases by the appellate court.²²¹

Section 39 of the GEADA provides penalties in the form of fines or imprisonment for up to three years for the perpetrators of a serious case of discrimination that has been

²¹⁵ *Lov om Skadeerstatning* LOV-1969-06-13-26 of 1 July 1967 (Act relating to Compensation of 13 June 1969, No. 26).

²¹⁶ For example, Oslo municipal court, judgment of 19 November 2009 in Case No. 09-143503TVI-OTIR/02.

²¹⁷ 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.

²¹⁸ Borgarting Court of Appeal, verdict of 18 June 2014 in Case No. LB-2014-56188 (*Mediaas-saken*).

²¹⁹ For example, judgment of 19 November 2009 by the Oslo municipal first instance court in Case No. 09-143503TVI-OTIR/02.

²²⁰ In its judgment Rt 2011-974/ HR-2011-1294-A of 29 June 2011, the Supreme Court did not give the claimant the right to continue in her position when addressing the possible discriminatory aspects of a retirement age of 67 set unilaterally by the company.

²²¹ Judgment of Borgarting Court of Appeal of 18 June 2014 in Case No. LB-2014-56188 (*Mediaas-saken*).

committed jointly by several persons.²²² However, this is only in relation to discrimination based on ethnicity, religion or belief.²²³

The Equality Tribunal also has a mandate to give an administrative decision including redress/compensation and damages under Section 12 of the EAOA. However, the Equality Tribunal can only award redress/compensation in employment relationships and in connection with an employer's selection and treatment of self-employed persons and hired workers, and award damages if the only submissions made by the respondent relate to inability to pay or other manifestly untenable objections. In cases that do not concern employment only compensation may be awarded.²²⁴ Damages for injury of a non-pecuniary character is usually below EUR 8 000 (NOK 80 000), and can only be awarded in cases that concern employment (EAOA, Section 12).

The Equality Tribunal also has limited authority to make an administrative order – that is to order an act to be stopped or remedied or other measures that are necessary to ensure that discrimination, harassment, instructions or reprisals cease and to prevent their repetition.

The Equality Tribunal may set a time limit for compliance with the order. The Equality Tribunal will state the grounds for an administrative decision at the time the decision is made. Furthermore, the Equality Tribunal may make an administrative decision to impose a coercive fine to ensure implementation of orders pursuant to Section 7, if the time limit for complying with the order is exceeded (see EAOA, Section 13). The coercive fine begins to run if a new time limit for complying with the order is exceeded and will normally run until the order has been complied with. The Equality Tribunal may reduce or waive a fine that has been imposed when special reasons warrant doing so. The coercive fine accrues to the state. An administrative decision to impose a coercive fine constitutes grounds for enforcement. The Equality Tribunal must state the grounds for an administrative decision to impose a coercive fine at the time the decision is made.

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 Equality Tribunal gives a binding decision that requires action. Since the revision of the anti-discrimination legislation and reorganisation of the equality bodies in 2018, the Equality Tribunal has made use of administrative orders in 11 cases, all except one concerning disability or universal design. Only once from 2018 to 2020 has it issued a fine, since the decision and its deadline is usually respected.

²²² In an assessment of the penal protection against discrimination on behalf of the former Ministry of Children and Equality (now Ministry of Culture), Professor Kjetil Mujezinovic Larsen assessed the former ADA Article 26 and suggested that it be continued in the upcoming legislation, and that it should be extended to cover all grounds in a holistic new law. He furthermore proposed that gender, gender identity and gender expression should be included in the penal protection: see <https://www.regjeringen.no/no/dokumenter/utredning-om-det-straafferettslige-diskrimineringsvernet/id2520561/> (in Norwegian only). It was upheld, but not extended to other grounds.

²²³ See the legal preparatory works: Proposition to Parliament, Prop. 81 L (2016-2017) *Lov om likestilling og forbud mot diskriminering (likestillings- og diskrimineringsloven)* (GEADA), Chapter 28.6.

²²⁴ There was some confusion just after the reorganisation of the equality bodies in 2018 as to whether there was an upper limit to the damages the Equality Tribunal could award. 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-arbeidsmiljolooven.pdf>. In 2020, damages of over NOK 100 000 (EUR 10 000) have been awarded in several cases, all concerning gender, for example, Equality Tribunal Cases DIN-2020-207 and DIN-2020-171.

Level of remedies and sanctions

There are no upper limits for compensation or damages, nor are there rules for calculation provided in the national legal framework. The compensation must as a rule compensate for actual loss.

Redress/compensation was awarded in two Supreme Court cases,²²⁵ both of which concern discrimination on the grounds of membership of trade unions. In the *Gate Gourmet 2* case, the Eidsivating²²⁶ Court of Appeal awarded compensation for real economic loss because of discrimination due to membership of a trade union. In Case Rt-2011-1755 *Gate Gourmet* the Supreme Court found that the employees had been discriminated against in violation of the general rule in the Working Environment Act (Section 13-1, first paragraph) because jobseekers who were members of another union got preferential hiring. The 50 complainants were awarded NOK 5 000 (EUR 625) in non-monetary damages for discrimination incurred.

In the Supreme Court case on sexual harassment mentioned in part 3.7.6, the victim was awarded NOK 20 000 (approximately EUR 2 000) in compensation from both of the customers that had sexually harassed her. The damages were set at NOK 36 387 (approximately EUR 4 000) The redress/compensation awarded in this case seems very low, and with these amounts it may not be tempting for victims to bring sexual harassment cases to court. However, not many cases of sexual harassment have yet come before the Norwegian courts. This is the Supreme Court's first case on sexual harassment after the GEADA.

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 a Supreme Court judgment of 30 January 2017.²²⁷ This case was a direct follow-up to the Supreme Court Case in Rt 2012-219,²²⁸ where the Supreme Court found that the pilots had been discriminated against (see part 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 lower court cases: discrimination on grounds of gender/pregnancy²²⁹ and concerning age and gender. The cases all concern employment relations.²³⁰ The non-pecuniary compensation for the discrimination was set above NOK 100 000 (approximately EUR 12 000) in the three recent cases. This is considered to be a high level of compensation when compared with, for example, the level of compensation in cases of unjustified dismissals within employment. In cases concerning Section 15-2 of the WEA and dismissals the courts have also rewarded compensation. In the judgment in Case LB-2018-159246²³¹ the compensation was set at NOK 705 000, about EUR 78 000 (see part 5.2.11).

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

²²⁵ Supreme Court judgment of 22 December 2011 in Rt-2011-1755 (public link not available in 'Lovdata Pro').

²²⁶ Judgment of 28 March 2014 from Eidsivating Court of Appeal, Case No. LE-2013-113570.

²²⁷ Supreme Court Judgment of 30 January 2017 in HR-2017-219-A (public link not available in 'Lovdata Pro').

²²⁸ Supreme Court Judgment of 14 February 2012 in Rt-2012-219 (public link not available in 'Lovdata Pro').

²²⁹ These are: Court of second instance / Judgment from Hålogaland Court of Appeal, 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 Court of Appeal, 12 December 1994, Case No. LE 1994-892 (*Lufthansa*).

²³⁰ Judgment of 17 March 2010 from Øst-Finnmark court of first instance, Case No. 09-136827TVI-OSFI (age and gender).

²³¹ Judgment from Borgarting Court of appeal of 13 March 2019 in LB-2018-159246 (no public link available in 'Lovdata Pro').

From 2018 the Equality Tribunal has had powers to award damages for injury of a non-pecuniary character for non-economic losses in cases concerning a breach of the prohibition against discrimination in employment relationships, under Section 12 of the EAOA. This power has been used several times since. 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).²³² All cases from 2018 to 2020 were less than NOK 80 000 (EUR 8 000). The damages for non-pecuniary losses have been within the same range, except one which was only NOK 15 000 (EUR 1 500). It should be noted that the power of the Equality Tribunal 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, Section 12(2)).

There is no statistical information available concerning the average amount of compensation available to victims from the Equality Tribunal, but the amounts are published in each case on the website of the Equality Tribunal.²³³

11.6.2 Effectiveness, proportionality and dissuasiveness

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

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, has partly overcome this barrier,²³⁴ 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 damages for economic loss in some specific cases, not redress/compensation (EAOA, Section 12).

However, it seems like there has been an improvement since last year. In 2020 the Equality Tribunal awarded damages and compensation in several cases, most of them cases on pregnancy and parental leave discrimination. However, the amount awarded in damages and compensation seems quite low compared to court cases. For example, in Case 20/167²³⁵ on discrimination due to pregnancy and parental leave, mentioned in Section 5.2.11, the Equality Tribunal awarded the complainant NOK 19 207 in damages for loss of parental benefit and NOK 20 000 (approximately EUR 2 000) in compensation.

²³² 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 not very complicated (EAOA Section 12(2)).

²³³ See *Søk i klagesaker* ([diskrimineringsnemnda.no](https://www.diskrimineringsnemnda.no)).

²³⁴ See the legal preparatory works: Proposition to Parliament, Prop. 80 L (2016-2017) *Lov om likestillings- og diskrimineringsombudet og Diskrimineringsnemnda (diskrimineringsombudsloven)*, building on 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/04bd6c545ae74c4ebee246f44dcf4942/utredning-av-handhevings-og-virkemiddelapparatet-pa-likestillings-og-diskrimineringsfeltet.pdf>.

²³⁵ Statement of 3 November 2020 from the Equality Tribunal: <https://www.diskrimineringsnemnda.no/media/2646/sak-20-167-offentlig-versjon-av-nemndas-vedtak-og-uttalelse.pdf>.

Case 20/57²³⁶ that was also discussed in part 5.2.11 of this report is important as it is the first case where the Equality Tribunal awarded damages and compensation in one case. The Equality Tribunal found that the defendant's (employer's) objections were obviously untenable and could be set aside. The Equality Tribunal could therefore award damages. Based on previous statements in the preparatory works for the EAOA, the Equality Tribunal discussed whether its competence to award damages is limited to NOK 10 000, (approximately EUR 1 000). The Equality Tribunal concluded that it has never been the Government's intention to limit the Tribunal's mandate to award damages to a maximum of NOK 10 000. Its competence goes further than this, and the Tribunal therefore awarded the nurse NOK 75 000 (approximately EUR 7 500) in damages for 'economic loss' for three months' lost income, which matched her claim. In accordance with Section 12(1), the Equality Tribunal also awarded the complainant NOK 50 000 in compensation (approximately EUR 5 000).

In Case 19/115 and Case 19/196,²³⁷ also mentioned in part 5.2.11, the Equality Tribunal awarded the complainant NOK 15 000 in compensation (approximately EUR 1 500) from the employer and NOK 25 000 (approximately EUR 2 500) from the recruitment agency. The Equality Tribunal does not explain why the compensation was not set any higher, but pointed out that the prohibition against discrimination on the grounds of pregnancy in employment requires particularly strong protection, and that both the company where she was placed to work and the agency should be held responsible.

In Case 19/118²³⁸ the Equality Tribunal also awarded the complainant compensation. When determining the amount, the Tribunal again stated that the prohibition against discrimination on the grounds of pregnancy in employment requires particularly strong protection. Moreover, the Tribunal stated that the woman had been deprived from opportunities for various position, and that this could possibly impact her career. However, the Tribunal also pointed out that in this case there was not sufficient evidence to state that the complainant would have actually obtained the relevant positions and function had she not been pregnant and then taken parental leave. Therefore the compensation was not set any higher than NOK 30 000 (approximately EUR 3 000).

As for remedies regarding the public sector apart from employment relationships, the Equality Tribunal can evaluate the decisions of other parts of the public administration, even if they cannot overrule them; see Section 14(2) of the EAOA. For the most part, the Equality Tribunal appears to have been reluctant to use this possibility so far.

When it comes to the Equality Tribunal's power to issue fines, the mandate to make use of fines is more a coercive tool, as this sanction has been used so rarely.²³⁹ The lack of use is a problem. The effectiveness of this sanction may also be questioned.

In addition, the Equality Tribunal has written procedures instead of oral. Presenting a case in writing is difficult for complainants when they do not know the law, have little experience with presenting such matters, and have little idea what type of proof is needed. However, according to Section 9 of the EAOA, the Equality Tribunal shall consider whether an oral hearing should be held for the purpose of elucidating the case. A decision to hold an oral hearing may be made by a Tribunal chairperson. In cases concerning sexual harassment, and in cases where a claim for compensation has been made, the parties are entitled to an oral hearing. In 2020 the Equality Tribunal prepared one case on sexual harassment for oral procedures, but the case was eventually closed due to lack of following up of the case by the victim.

²³⁶ Statement of 24 September 2020 from the Equality Tribunal.

²³⁷ Statement of 29 January 2020 from the Equality Tribunal.

²³⁸ Statement of 14 January 2020 from the Equality Tribunal.

²³⁹ In Case 7/2012, the Equality Tribunal warned the hotel that if it did not follow the order given by the deadline of 1 January 2014, a coercive fine might be issued.

Lack of legal aid is thus an issue not only before the courts but also before the Equality Tribunal. An oral hearing in court may also give a different result, as the court will hear the case again in full, and not use the findings of the Equality Ombud and Tribunal alone. As the Equality Tribunal now also has a mandate to deal with cases on sexual harassment, more cases will probably have oral hearings.

11.7 Equality body

The organisation and mandate of the Norwegian equality bodies were changed under the EAOA, in force from 1 January 2018.

The Equality Ombud²⁴⁰ provides advice to victims of discrimination and others and is funded by annual grants financed until late 2018 by the Ministry for Children and Equality, then by the Ministry for Culture after the Christian Democrats entered the Government and took over the former ministry.

The funds allocated through the state budget for 2020²⁴¹ as income for the Ombud were NOK 48 020 000 (approximately EUR 4 278 065), the same amount as for 2019. The Equality Ombud has reported that in 2020 it received a total of 1966 enquiries on all discrimination grounds regarding guidance in discrimination cases and political work within the Equality Ombud remit. Of these, there were 78 enquiries regarding sex discrimination and sexual harassment, where most of the enquires were about sexual harassment. The numbers are basically the same as in 2019 (72 enquiries) and a little lower than in 2018 (90 enquiries).²⁴² The increase of enquiries on sexual harassment should be explained by the Equality Tribunal's mandate to deal with cases on sexual harassment from 1 January 2020.

The Equality Tribunal²⁴³ is the only equality body in Norway that investigates complaints. Its members are appointed by the Ministry of Culture for a term of four years, with the possibility of reappointment. The chair must fulfil the requirements prescribed for judges. The Equality Tribunal has a secretariat, whose staff are public employees. The 2020 budget for the Equality Tribunal and its secretariat in 2020²⁴⁴ was NOK 22 260 000 (approximately EUR 1 860 000), the same as for 2019.

In 2020, the Equality Tribunal received a total of 289 complaints on all discrimination grounds, and dealt with 312 complaints because the Equality Tribunal also dealt with complaints in 2020 that it had received during the previous years. The Equality Tribunal dealt with 52 cases regarding sex; 16 cases regarding pregnancy; 25 cases regarding pregnancy leave or adoption leave; 12 cases regarding care responsibilities and 6 cases on gender identity and 5 cases on gender expression.²⁴⁵

Purpose and competence of the bodies:

The Equality Ombud²⁴⁶ runs courses and presentations on discrimination issues and participates in campaigns with both civil sector and public agencies. In 2020 the Equality

²⁴⁰ See the Equality Ombud website in English: <http://www.ldo.no/en/>.

²⁴¹ Numbers from the National budget of 2020: https://www.ldo.no/globalassets/ldo_2019/03_ombudet-og-samfunnet/om-ombudet/tildelingsbrev/tildelingsbrev-likestillings-og-diskrimineringsombudet-2020.pdf.

²⁴² Email from a representative of the Equality Ombud of 18 March 2021.

²⁴³ See the Equality Tribunal's website: <https://www.diskrimineringsnemnda.no/spr%C3%A5k/1230>.

²⁴⁴ Figures from 'Tildelingsbrev Sekretariatet for diskrimineringsnemnda' (Budget for the Equality Tribunal) of 2020 at: <https://www.diskrimineringsnemnda.no/media/2242/tildelingsbrev-sekretariatet-for-diskrimineringsnemnda-2020.pdf>.

²⁴⁵ See statistics from 2020 on the Equality Tribunal's website: <https://www.diskrimineringsnemnda.no/klagesaker-og-statistikk/s%C3%B8kstatistikk>.

²⁴⁶ The Equality Ombud's primary responsibilities are to promote equality and prevent discrimination on the basis of sex and gender, pregnancy and parental leave, care work, ethnicity, religion, belief, disability, sexual orientation, gender identity, gender expression and age, in all areas of society, provide advice about discrimination law; and monitor the implementation of the UN conventions CEDAW, CERD and CRPD.

Ombud cooperated with JURK²⁴⁷ and the Equality Tribunal in a campaign to give information on the rules on sexual harassment.²⁴⁸ During 2020 the Equality Ombud also cooperated with the Armed Forces on courses and guidance on how to prevent harassment/sexual harassment,²⁴⁹ and this cooperation is still ongoing. In 2020 the Equality Ombud together with the Norwegian Centre for Equality (KUN) made a cooperation with the Police Academy to arrange courses for the Police Academy's management, employees, union representatives and students on how to prevent sexual harassment. The courses are to take place during 2021.²⁵⁰

As permitted by Section 15-7 in the Dispute Act,²⁵¹ in 2020 the Equality Ombud also intervened in the 'Me too' Supreme Court case on sexual harassment, mentioned in part 3.7.3. The intervention consisted of sending a letter to the Supreme Court with information about Section 13 of the GEADA and the practice on sexual harassment.²⁵² It also contributed in a case on parental leave before the Court by giving the plaintiff oral and written guidance about the GEADA and the rule of law. The case has now been appealed to the Court of Appeal.²⁵³ The Equality Ombud has also 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.²⁵⁴ The Equality Ombud also issues reports about Discrimination Law in Norway, on relevant changes in law and practice from the Norwegian courts and the Equality Tribunal, and international practice from the European Court of Justice and the European Court of Human Rights every year.²⁵⁵

From 1 January 2018, the Ombud's mandate has been to provide advice to anybody who contacts it (Section 5(2) of EAOA), victims and defendants.

It is now explicitly stated in Section 5, second paragraph of the EAOA that anyone can turn to the Ombud for guidance, even in individual cases. The Equality Ombud's role in connection with the increased duty of activity and accountability is stated in Section 5, fourth paragraph of the amended EAOA. The Equality Ombud can, among other things, review the gender equality reports and conduct follow-up visits to companies.

During 2020 the Equality Ombud gave guidance on the activity and reporting duty²⁵⁶ in 57 cases. The Equality Ombud reports²⁵⁷ that this is an increase from previous years (16 cases in 2019 and 10 cases in 2018). Of the 83 lectures the Equality Ombud conducted in 2020, 26 of them applied the activity and reporting duties and was for approximately 2 670 people.

²⁴⁷ Legal counselling for women (JURK) is an organisation run by law students at the University of Oslo that provides customised help free of charge to anyone who defines themselves as a woman.
<https://foreninger.uio.no/jurk/english/>.

²⁴⁸ See the campaign's website: <https://www.ldo.no/ombudet-og-samfunnet/siste-nytt2/ny-kampanje-mot-seksuell-trakassering/>.

²⁴⁹ See Section 3.1.1 for information on the surveys from the Armed Forces and the Police on sexual harassment.

²⁵⁰ See article from the Equality Ombud's website: 'LDO inngår samarbeid med Politihøgskolen' (The Equality Ombud cooperates with the Police Academy), <https://www.ldo.no/ombudet-og-samfunnet/siste-nytt2/ldo-innqar-samarbeid-med-politihogskolen/>.

²⁵¹ Act relating to mediation and dispute in civil disputes of 2005-06-17-90. Entry into force 1 January 2008: <https://lovdata.no/dokument/NLE/lov/2005-06-17-90>.

²⁵² Information from representative from the Equality Ombud in letter of 16 April 2021.

²⁵³ Gulating Court of Appeal. Information from representative from the Equality Ombud in letter of 16 April 2021.

²⁵⁴ 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).

²⁵⁵ See the report from April 2021 'Discrimination Law 2020' from the Equality Ombud mentioned several times in this report.

²⁵⁶ See more about the duty in Section 4.1.12.

²⁵⁷ Email from a representative from the Equality Ombud of 18 March 2021.

The Equality Ombud also reports that in 2020 it has given information about the reinforcement of the activity and reporting duty and has written a number of articles on this. The Equality Ombud has also given information about the duty on its websites and in social media such as LinkedIn and Facebook. Furthermore, the Equality Ombud is now represented in the Directorate for Children, Youth and Family Affairs (*Bufdir's*) three working groups that are working with authorities' guidance material and templates for the work with the activity and reporting duty.

The Equality Ombud also reports that it is cooperating with two large Norwegian companies to inform them about the activity and reporting duty, as well as a relatively comprehensive follow-up over a period of approximately a year.

The Equality Ombud has also started to assist victims in cases before the Tribunal as well as before the Norwegian Courts, but only a selected few. In its strategy, it states that it gives priority to cases that will have an effect for many people,²⁵⁸ which may prove a problem for small groups such as LGBT groups and minorities within minorities.

The Equality Ombud may also send complaints to the Equality Tribunal. Case 19/114 that was discussed in part 9.2, where the Equality Tribunal concluded there had been discrimination of female inmates in a Norwegian prison, was brought to the Equality Tribunal on the Equality Ombud's initiative in 2019.²⁵⁹ The Equality Ombud also reports that in 2020 no cases on discrimination were brought to the Equality Tribunal by the Equality Ombud.²⁶⁰

The Equality Tribunal is the only administrative body with the competence to issue independent recommendations on discrimination issues in relation to private parties but does not have a mandate to issue binding recommendations in relation to other public agencies, according to Section 14 of the EAOA. In other words, it may be described as a 'Court-like administrative body' in discrimination cases. The decision of the Equality Tribunal is a legally binding administrative decision if the case is against a private party as per Section 11 of the EAOA. However, the Equality 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 Equality Tribunal evaluates the case in relation to the anti-discrimination legislation (see Section 14 of the EAOA). The Equality Tribunal does not have the competence to evaluate the actions of the Parliament or courts and their administrative branches, according to Section 1(3) of the EAOA. This also means that it cannot evaluate laws or judgments. However, regulations made by the ministries do fall under its jurisdiction.

According to the Section 10 of the EAOA, the Equality Tribunal has the power to dismiss a case if the case has been decided by a court or been brought before a court for adjudication. The Equality Tribunal also dismisses a case if the conditions for processing it are not met. Furthermore, the Tribunal may dismiss a case if the matter is more than three years old. Furthermore, the Tribunal's duty to dismiss cases is extended in Section 10 of the EAOA. The Tribunal shall dismiss cases that are under investigation by the prosecuting authorities and cases where charges have been pressed against the victim in sexual harassment cases for false statements.

²⁵⁸ See the Equality Ombud website: <https://www.ldo.no/ombudet-oq-samfunnet/om-ombudet/arsmeldinger/arsmelding-2016/>.

²⁵⁹ The Equality Ombud reports that it will continue to follow up on the Correctional Service regarding the conditions for female inmates. Stated by representative Margrethe Søbstad at the Equality Ombud's office in webinar on 27 April 2021 on the presentation of the Equality Ombud's report on Discrimination Law for 2020.

²⁶⁰ Email of 12 April 2021 from representative May Schwartz on behalf of the Equality Ombud.

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

In connection with the change in the EAOA, the provision on the organisation of the Equality Tribunal in Section 6 of the Act was also amended, so that the number of departments in the Tribunal can be expanded if necessary.

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

As mentioned in part 3.1.1 and 3.7.6, the Equality Tribunal from 1 January 2020 has had a mandate to treat individual complaints concerning sexual harassment. As mentioned in part 11.2, the Ministry of Labour and Social Affairs and the Ministry of Culture has also proposed to give the Equality Tribunal a mandate to handle cases on victimisation after the WEA, and a mandate to award damages and compensation in some of the cases on victimisation. The proposal has been forwarded to the Parliament.

Grounds covered by the designated bodies

The mandates of the Equality Ombud and the Equality Tribunal cover all legislative discrimination grounds covered by Article 6 of the GEADA, including sexual harassment. The mandate of the Equality Ombud also involves ensuring that Norwegian legislation and administrative practice are in accordance with Norway's obligations according to CEDAW and the other UN conventions.²⁶¹

Impact on addressing gender inequality problems

Both the Equality Ombud and the Equality Tribunal clearly have an impact when it comes to addressing gender inequality problems in Norway, but in different ways:

The Equality Ombud conducts independent surveys, publishes independent reports and makes recommendations on issues relating to discrimination. Every year the Equality Ombud publishes annual reports and relevant reports on the status of equality. In 2020 as it did in 2019, the Equality Ombud published a summary report on Discrimination Law and cases from the courts in Norway, the Equality Tribunal and from the European Court of Human Rights and the European Court of Justice,²⁶² and has also published a report for 2020.²⁶³ It seems like the Equality Ombud is reluctant to criticise the Equality Tribunal.

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

²⁶¹ Convention on the Rights of People with Disabilities (CRPD) and the Convention on the Elimination of All Forms of Racial Discrimination (CERD).

²⁶² See report from the Equality Ombud 'Diskrimineringsretten 2019, en gjennomgang av året som har gått' (Discrimination Law, summary of 2019): https://www.ldo.no/globalassets/ldo_2019/03_ombudet-og-samfunnet/rapporter/diskrimineringsrett/diskrimineringsretten-2019.pdf.

²⁶³ See report from the Equality Ombud 'Diskrimineringsretten 2020, Rettsutvikling på likestillings- og diskrimineringsfeltet, med gjennomgang av relevante lovendringer, forvaltnings- og rettspraksis (Discrimination Law, summary of changes and cases 2020): Diskrimineringsretten 2020 : rettsutvikling på likestillings- og diskrimineringsfeltet, med gjennomgang av relevante lovendringer, forvaltnings- og rettspraksis ([ldo.no](https://www.ldo.no))

gender equality in 2020. If the defendant does not comply with the instruction within the given deadline, the Equality Tribunal may decide to impose a coercive fine.

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 damages in cases concerning employment, has partly overcome this barrier.²⁶⁴ As mentioned in part 11.6.2, the Equality Tribunal has awarded damages and compensation in several cases on pregnancy and parental leave in 2020.

However, the Equality Tribunal may still only provide damages and compensation for non-monetary loss in connection with employment and can only make decisions about damages for concrete financial losses in 'simple cases'.²⁶⁵ Damages and compensation claims must otherwise be filed before the ordinary courts. When the Equality Tribunal handles matters concerning regulations or administrative decisions made by a public administrative body, the Equality Tribunal can only issue a 'statement' on contravention of the GEADA, not a 'decision'.²⁶⁶ It is not mandatory to lodge complaints with the Equality Tribunal before going to the ordinary courts. However, very few discrimination cases are brought before the courts.²⁶⁷ The Equality Tribunal's statements are important sources of law in the gender equality field in Norway, and are generally well respected. If a party disagrees with the Equality Tribunal's decision, the case may be brought to the Court system for a full trial of the case.²⁶⁸

For several reasons, the effectiveness of the Equality Tribunal still has room for improvement. Firstly, 40 % of all the decisions from 2018 to 2020 were rejected or dismissed,²⁶⁹ many on the justification of being 'clearly not in breach' of Section 1 of the GEADA, which was added in the 2018 revision of the anti-discrimination legislation, and often with little explanation of the decision. As few members of the Equality Tribunal seem to have experience in the anti-discrimination field,²⁷⁰ there is an increased risk of overlooking widespread stereotypes using this justification, and several of the dismissals appear debatable. An example is the case on 'girl taxis' mentioned in part 9 of the report, where the Equality Tribunal closed the case rather than making a statement, but at the same time stated that the matter was justified according to Section 9 of the GEADA. Some of the decisions on closing the cases are also very short, some seem to be closed because of lack of evidence, while others are deemed 'clearly not in breach', but the decision often has the same arguments regardless. This makes it difficult for complainants and others to understand the Equality Tribunal's arguments. Since the EAOA, with a view to statements made by the Government in a hearing on changes in the EAOA,²⁷¹ should be interpreted

²⁶⁴ See the legal preparatory works: Proposition to Parliament, Prop. 80 L (2016-2017) *Lov om likestillings- og diskrimineringsombudet og Diskrimineringsnemnda (diskrimineringsombudsloven)*, (Equality and Anti-Discrimination Ombud Act) developing the paper sent for public hearing in 2016:

www.regjeringen.no/contentassets/14dd1daa159348c88de5dbe043feb0a4/horingsnotat.pdf. This proposal builds on an assessment of the structure and mandate of the equality bodies finalised in March 2016, see: <https://www.regjeringen.no/contentassets/04bd6c545ae74c4e246f44dcf4942/utredning-av-handhevingss--og-virkemiddelapparatet-pa-likestillings--og-diskrimineringsfeltet.pdf>.

²⁶⁵ 'Simple cases' means cases when the complainant is not asserting anything but the inability to pay or other obvious unsustainable objections.

²⁶⁶ Norway, Equality and Anti-Discrimination Ombud Act, LOV-2017-06-16-50, Article 14, The authority of the Equality Tribunal relative to other public administrative agencies. Norwegian version: <https://lovdata.no/lov/2017-06-16-50/§14>; English version: <https://lovdata.no/NLE/lov/2017-06-16-50/§article14>.

²⁶⁷ McClimans, E. (2008) *Rettspraksis om diskrimineringslovgivning* (Legal practice on anti-discrimination law (NB: the author's own translation)). Submitted to the Anti-Discrimination Law Committee.

²⁶⁸ See the website of Norwegian Court administration: <https://www.domstol.no/om-domstolene/de-alminnelige-domstolene/> (Norwegian text only).

²⁶⁹ Not including those which were filed without any decision due to lack of follow-up information from the complainant.

²⁷⁰ The members of the Equality Tribunal are presented on the website: <https://www.diskrimineringsnemnda.no/nemndas-medlemmer>.

²⁷¹ See Proposition to Parliament, Prop. 63 L (2018-2019) Changes in the EAOA and the GEADA (establishing a low threshold complaints mechanism for cases concerning sexual harassment and a strengthening of the active equality efforts) (*Endringer i diskrimineringsombudsloven og likestillings- og diskrimineringsloven*

as prohibiting the reopening of dismissed or rejected cases, this is an impediment with regard to access to justice in discrimination cases. In its report on legal developments in 2020,²⁷² the Equality Ombud recommends that the Government clarifies the EAOA so that dismissed or rejected cases may be reopened. It also recommends that the Tribunal explains their dismissals and rejections more thoroughly, and that the duty of the Tribunal to investigate each case is clarified.

Also, according to Section 3 of the Regulations on organisation, tasks and case processing for the Discrimination Tribunal,²⁷³ the secretary staff of the Equality Tribunal have a duty to provide necessary information to clarify the matter. This remains a concern since so many cases are still closed. It remains unclear how much information is provided to the Equality Tribunal before a case is decided closed. Still no research has been carried out to analyse the case work of the Equality Tribunal over the last few years.

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 Equality Tribunal never chooses to provide 'statements' in such cases, when it has the mandate to do so. The Equality Tribunal does not have the power to evaluate the actions of the Parliament or courts and their administrative branches (EAOA, Section 1(3)). This also means that it cannot evaluate laws or judgments. However, regulations made by the ministries fall under its jurisdiction. 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 the public sector, according to Section 14 of the EAOA.

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 Equality Tribunal can only award damages or compensation in cases where these are fairly simple to calculate. Damages for injury of a non-pecuniary character can only be awarded in cases that concern employment (EAOA, Article 12).²⁷⁴ Therefore, harassment and sexual harassment outside employment, for example, still lack effective remedies.

Besides the Equality Ombud and the Equality Tribunal, the Directorate for Children, Youth and Family Affairs (*Bufdir*) also has a department responsible for obtaining and disseminating knowledge about most of the protected grounds of discrimination both within the public sector and to the general public (gender, sexual orientation, gender identity, people with disabilities and ethnicity).²⁷⁵ However, the department is not independent and also serves as an advisory body for the ministries and implements Government policies.²⁷⁶

Also, the Norwegian Centre for Equality and Diversity (KUN)²⁷⁷ is a foundation that works to combat discrimination and promote equality. Its commitment to equality issues includes

(*etablering av et lavterskeltilbud for behandling av saker om seksuell trakassering gen styrking av aktivitets- og redegjørelsesplikten*)) available in Norwegian at Prop. 63 L (2018–2019) – regjeringen.no.

²⁷² The Equality and Anti-Discrimination Ombud, 'Discrimination Law 2020. Legal developments in equality and anti-discrimination law, including changes in the legislation, judgments and administrative decisions (*Diskrimineringsretten 2020 – Rettsutvikling på likestillings- og diskrimineringsfeltet, med gjennomgang av relevante lovendringer, forvaltnings- og rettspraksis*).

²⁷³ See Regulation FOR-2017-12-20-2260.

²⁷⁴ 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>.

²⁷⁵ See the *Bufdir* strategy for 2017-2020 at: https://bufdir.no/globalassets/global/bufdir_strategi_2017-2020_digital.pdf and its website: <https://www.bufdir.no/Inkludering/>.

²⁷⁶ Email from *Bufdir*, 16 April 2019.

²⁷⁷ See *Likestillingscenteret* (Centre for Equality and Diversity) KUN's website: <https://www.kun.no/english.html>.

perspectives on sex, age, gender identity, sexual orientation, ethnic origin, and (dis)ability.

11.8 Social partners

A number of initiatives have been taken in relation to promoting dialogue between the social partners to give effect to the principle of equal treatment through workplace practices, codes of practice and workforce monitoring. This is done through initiatives by the Ministry, the Equality Ombud and trade unions.

Good practice by social partners in addressing the gender inequality problem

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

11.9 Other relevant bodies

Several NGOs in Norway are engaged in enforcement of gender equality law. 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 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 Equality Ombud, cooperate with NGOs systematically.²⁷⁸ Although recommendations from NGOs used to play an important part in the recruitment of members of the Equality Tribunal, this is no longer the case.

When it comes to strategic litigation, in particular, it is relevant to mention NGOs and gender equality groups related to gender identity and gender expression and trans issues. Examples of organisations that are engaged in the enforcement of gender equality law are: *Landsforeningen for lesbiske, homofile, bifile og transpersoner* (Association of Lesbian, Gay, Bisexual and Transgender People)²⁷⁹ and *Foreningen for kjønns-og seksualitetsmangfold (FRI)* (Gender and Sexual Diversity Association).²⁸⁰

11.10 Evaluation of implementation

As mentioned earlier in the report, it may be a grave sign that the GEADA itself is relied upon in few cases before the courts. There have been a few more cases before the courts in 2020 than in the years before, but all in all, not many. Only one Supreme Court judgment on sexual harassment from the GEADA in many years is not much. This may be a result of a combination of reasons:

²⁷⁸ Emails to the author from *Bufdir* (12 April 2019) and the Ombud (12 April 2019), translated by the author.

²⁷⁹ See the organisation's website: <https://skeivtarkiv.no/skeivopedia/landsforeningen-lesbiske-homofile-bifile-og-transpersoner-llh>.

²⁸⁰ See the organisation's website: <https://www.foreningenfri.no/>.

- 1) Most discrimination cases are brought to the Equality Tribunal system and not the courts, as it has a low threshold and is free of charge. As of 1 January 2020, the Equality Tribunal can also deal with cases on sexual harassment, and cases on sexual harassment in employment need not be taken to court. However, too many cases before the Equality Tribunal are closed.
- 2) Lawyers and judges in the country are not particularly trained in Discrimination Law.
- 3) There is no extraordinary support such as free legal aid in discrimination cases.

11.11 Remaining issues

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

12 Overall assessment

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

The following enforcement issues are of particular concern:

1. Too few discrimination cases are still taken to the national courts. Taking a case to court is costly, and there are no rules or guidelines to ensure that judges and lay judges are trained in Discrimination Law.
2. The Equality Tribunal does not have the power to award effective remedies, such as compensation and damages in all types of discrimination cases. This means that some cases must still be taken to court in order for victims to have access to effective remedies.
3. It is also a cause for concern that the Equality Tribunal almost never chooses to provide 'opinions' in cases against public administration, when it has the mandate to do so.
4. In cases concerning (sexual) harassment outside employment, the Equality Tribunal lacks the opportunity to award compensation, and the criminal procedure, which must be investigated by the Police, is the only real means of enforcement besides taking a civil case to court.
5. In cases concerning the employer's duty to prevent harassment and sexual harassment, the Equality Tribunal lacks the opportunity to award redress.
6. Too many cases brought before the Equality Tribunal are still being closed and dismissed.

The following transposition problems were also mentioned in this report:

1. The Pregnant Workers Directive 92/85/EEC may not be correctly implemented, as mothers are still not guaranteed a specific 14 weeks of independent maternity leave.²⁸¹

2. In Section 13 of the GEADA on sexual harassment it is a criterion that the sexual attention is unwanted from the victim's perspective. Even though it is not an absolute requirement according to the GEADA, it requires that the harasser, by a word or action, must be made aware that their action is unwanted for actions that are regarded as less serious or for single incidents. This is not a requirement under EU law. The GEADA and the courts' interpretation of it may not be in accordance with EU law on this matter.

²⁸¹ See the article where this situation is described: Aune, H., Nylander, G. (2015), 'Barseltid et faktum. Barseltid en rettslig sannhet', *Nordisk tidsskrift for Sosialrett*, 20 September. See CJEU Cases C-519/03 para. 32 and C-342/01 para. 41 and the Pregnant Workers Directive 92/85/EEC.

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