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Country report

Non-discrimination

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

Norway

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2021 Directorate-General for Justice and Consumers

^{*} The author has gratefully built on the reports written until 2018 by the previous expert Else Leona McClimans.

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EXECUTIVE SUMMARY

1. Introduction

Norway is a relatively homogenous country with 5.39 million inhabitants.¹ There are 800 094 immigrants in Norway and 197 848 people who were born in Norway with immigrant parents. These two groups constitute approximately 18.5 % of the total population.² Of these, 376 656 people (or both their parents) are from EU or EEC countries, and 102 946 people are from other European countries. The remainder include: 334 028 people from Asia including Turkey; 140 414 from Africa; 27 983 people from Latin America; 12 608 people from the United States or Canada; and 2 595 people from Oceania.³

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

About 68 % of Norwegians are members of the Norwegian Protestant church,⁵ while other religious groups of a significant size are Islamic associations, the Roman Catholic church and the Pentecostal church.⁶ Official statistics suggest that there are 182 826 Muslims, 372 651 'other' Christians (that is Christians not belonging to the Norwegian church), 21 555 Buddhists, 12 153 Hindus, and 108 072 people belonging to other belief or life-stance (i.e. non-religious convictions as fundamental as religious ones) organisations.⁷

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

Of a population of almost 5.4 million, 849 657 people are aged 67 years or older.¹⁰

There are no reliable official figures on sexual orientation. In 2008, 2013 and 2017, the question, 'Are you attracted to people of the same sex?' was asked in three reports on attitudes towards lesbian, gay, and bisexual people. The responses have changed over time: the percentage of the population who answered that they were attracted to people of the same sex 'to some degree' or 'to a great degree' in 2008 was 1.8 %, while in 2017

¹ See front page of Statistics Norway on www.ssb.no.

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

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

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

⁵ See Statistics Norway: https://www.ssb.no/kultur-og-fritid/statistikker/kirke_kostraaar.

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

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

⁸ Norwegian Directorate for Children, Youth and Family Affairs: [Antall med nedsatt funksjonsevne \(bufdir.no\)](http://antall.med.nedsatt.funksjonsevne.bufdir.no).

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

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

it was around 10 %. Based on a scale from 1 (heterosexual) to 7 (homosexual), 25 % of the 2017 respondents placed themselves between numbers 2 to 7, (in other words, they do not consider themselves to be entirely heterosexual).¹¹

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

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

2. Main legislation

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

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

The Human Rights Act¹⁴ incorporates a number of treaties on human rights into the domestic legal system on a general basis in which the conventions prevail over any other conflicting statutory provision, including the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW). The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) was not incorporated into the Human Rights Act, but is included in the Equality and Anti-Discrimination Act (GEADA), the legal consequence being that ICERD does not prevail over other statutory provisions in the event of conflict, but has to be decided through interpretation. The UN Convention on the Rights of Persons with Disabilities (CRPD) was ratified on 3 July 2013.¹⁵ It is not incorporated into the GEADA. The Equality and Anti-discrimination Ombud (the Ombud) is responsible for the supervision of the national implementation of this convention, as well as the ICERD and the CEDAW.

¹¹ All three reports were commissioned by the Directorate for Children, Youth and Family Affairs (Bufdir) and these statistics are published on their website https://www.bufdir.no/Statistikk_og_analyse/lhbtig/Hvor_mange/.

¹² See https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/163/declarations?p_auth=7UxAGBtg&coeconventions_WAR_coeconventionsportlet_enVigueur=false&coeconventions_WAR_coeconventionsportlet_searchBy=state&coeconventions_WAR_coeconventionsportlet_codePays=NOR&coeconventions_WAR_coeconventionsportlet_codeNature=10.

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

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

¹⁵ See Prop. 106 S (2011-2012) Proposition to the Stortinget (proposal for Parliamentary resolution) on Consent to ratification of the UN Convention of 13.12.2006 on the rights of Persons with Disabilities and Prop 105 L 2011-2012 on Changes to the Anti-Discrimination Ombud's Act on the supervision of implementation of the UN Convention on the Rights of Persons with Disabilities.

Over the last decade, several attempts were made to harmonise the anti-discrimination legislation,¹⁶ culminating in the creation of a single anti-discrimination act, the General Equality and Anti-Discrimination Act (GEADA), which entered into force on 1 January 2018. The Working Environment Act (WEA) covers age, political views, membership in trade unions, and part-time and temporary work, but only in employment or similar situations. There is also specialised legislation, such as housing acts, which now refer to the new comprehensive Equality and Anti-Discrimination Act (GEADA) regarding discrimination issues.¹⁷

The protected grounds in the GEADA are: gender, pregnancy, leave in connection with childbirth or adoption, care responsibilities, ethnicity, religion, belief, disability, sexual orientation, gender identity, gender expression, age or combinations of these factors. 'Ethnicity' includes national origin, descent, skin colour and language. The new act thus also covers protection against age discrimination outside working life, whereas the protection against age discrimination within working life continues to be covered by the WEA.

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

It is presumed that Norwegian anti-discrimination legislation is in line with the EU *acquis*. The Government has committed to having as high - or higher - standards in its work against discrimination as the requirements of the EU.¹⁸ However, as the non-discrimination directives (2000/78 and 2000/43) are not incorporated in the EEA agreement, the specific exceptions allowed under the directives have not been clearly articulated. The protection of the directives has been reinforced by judgments of the Supreme Court.¹⁹

3. Main principles and definitions

Direct and indirect discrimination, harassment, and instructions to discriminate are defined in line with Directives 2000/43 and 2000/78.²⁰ Reasonable accommodation duties as well as protection against discrimination by association are provided for in the GEADA.²¹ Perceived or assumed discrimination is covered by national discrimination legislation if the perception or assumption has resulted in less favourable treatment of the person.

¹⁶ First, on 21 June 2013 upon the enactment of the Sexual Orientation Anti-Discrimination Act (SOA), covering sexual orientation, gender identity and gender expression, the other existing acts were revised and aligned. Four almost identical acts, the Gender Equality Act (GEA), the Anti-Discrimination Act (ADA) covering ethnicity, religion and belief, the Anti-discrimination and Accessibility Act (AAA) covering disability, and the Sexual Orientation Act (SOA) were in force until 31 December 2017, when they were replaced by the General Equality and Anti-Discrimination Act (GEADA).

¹⁷ Chapter 10 of the Ship Labour Act (SLA) has, almost word for word, the same sections as Chapter 13 of the WEA (and will therefore not be mentioned in this report unless there is a difference).

¹⁸ Norwegian Government (2003) *Skjerpet vern mot diskriminering i arbeidslivet* (White paper on strengthened protection against discrimination in working life), NOU 2003:2, p. 7.

¹⁹ For example in HR-217-219-A.

²⁰ Discrimination is defined in the GEADA (Section 6) and WEA (Section 13-1). The concepts of direct and indirect discrimination are not defined in Section 13-1 of the WEA, but are discussed in the preparatory works.²⁰ Harassment is prohibited by the GEADA (Section 13) and the WEA (Section 13-1(2)). Instructions to discriminate are prohibited in Section 15 of the GEADA and Section 13-1(2) of the WEA.

²¹ Various sections specify that the duty to provide reasonable accommodation exists not only at the workplace or during recruitment (Section 22), but also for pupils and students (Section 21), when using municipal services such as kindergartens (Section 20), and for all pregnant pupils, students, job applicants or employees (Section 23). Protection against discrimination by association is provided in Section 6(3), for all grounds except political views and trade union membership, and age in employment.

As of 1 January 2018, multiple discrimination is specifically included in the GEADA, and refers to any combination of the protected grounds covered by the GEADA. Protection against victimisation is found in the GEADA, and to some degree in the WEA.²²

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

4. Material scope

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

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

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

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

5. Enforcing the law

Cases alleging instances of discrimination may either be brought before an ordinary court or be brought to the national mechanism set up to assess cases of discrimination: the Norwegian Anti-Discrimination Tribunal (the Equality Tribunal). The Ombud provides advice, and in 2019 also provided assistance in two cases before the Equality Tribunal. The Ombud also monitors the human rights conventions CERD, CEDAW and CRPD and works proactively against discrimination.

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

²² GEADA Section 14 and the WEA Chapter 2A.

²³ Equality and Anti-Discrimination Tribunal, DIN-2018-410.

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

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

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

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

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

Associations may be used as agents in administrative proceedings and can act on behalf of or in support of victims, and often do so, mainly regarding complaints to the Equality Tribunal. The requirement is that the organisation must have a 'purpose, wholly or partly, to oppose discrimination' according to the grounds as prohibited by law.²⁴ Actions by associations are discretionary.

6. Equality bodies

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

The organisation, structure and mandate of these bodies were changed on 1 January 2018 by the adoption of the Equality and Anti-Discrimination Ombud Act (EAOA).²⁵ The key change to the system is that as of 1 January 2018, the Ombud no longer makes decisions regarding individual complaints, which are now left to the Equality Tribunal.

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

²⁴ The GEADA, Section 40 and the WEA, Section 13-10.

²⁵ Act relating to the Equality and Anti-Discrimination Ombud and the Anti-Discrimination Tribunal, 16 June 2017 No. 50, in force as of 1 January 2018. See <https://lovdata.no/dokument/NLE/lov/2017-06-16-50> for an English version of the act.

The Ombud provides advice and guidance with regard to the legislation within its mandate. It now takes some cases to the Equality Tribunal on its own initiative.²⁶ The Ombud also conducts independent surveys, publishes independent reports and makes recommendations on issues relating to discrimination. Every year the Ombud publishes annual reports and reports on the status of equality.

The Equality Ombud is funded by annual grants, which were financed until late 2018 by the Ministry for Children and Equality, and are now financed by the Ministry for Culture following the entry into Government of the Christian Democrats, who took over the Ministry for Children and Equality. Although the Ombud is nominated by the Ministry for Culture and her staff are public officials, her independence is not questioned in Norway, as her mandate is clarified by law and she must not be instructed by ministers. The funds allocated through the state budget for 2020 as income for the Ombud's office were approximately NOK 48 020 000 (approximately EUR 4 278 065), which was the same amount of funding as in 2019.²⁷

The Equality Tribunal is the only equality body that can investigate complaints. Its members are appointed by the Ministry for Culture for a term of four years, with the possibility for reappointment. The chairpersons must fulfil the requirements prescribed for judges. Everyone who handles discrimination cases, both in the secretariat preparing the cases and the members of the tribunal deciding them, are lawyers.²⁸ The staff of the Equality Tribunal's secretariat are public employees. The Equality Tribunal has a secretariat, whose staff are public employees. The 2020 budget for the secretariat and tribunal was NOK 22 260 000 (approximately EUR 1 983 127), which is the same as it was in 2019.²⁹

Although there are very few Roma in Norway, the Equality Ombud has repeatedly addressed some of the key issues seen in relation to Roma and Travellers. In her report to the UN CERD Committee, the Equality Ombud addressed the areas of critical concern and the fact that the Roma's access to basic rights is denied unless the traditional way of life is discontinued.³⁰ For example, in relation to schooling, the Ombud is concerned that Travellers are being made responsible for the consequences of the failure to adjust Norwegian school policy to the traditional manner of travelling. In December 2020, the Government launched its first action plan on national minorities including Roma and Travellers.

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

²⁶ Equality and Anti-Discrimination Ombud (2019) *Annual report 2018*, p. 8 (in Norwegian) <https://www.ido.no/nyheter-og-fag/brosjyrar-og-publikasjonar/Arsrapporter/arsmelding-2018/>.

²⁷ Numbers from the national budgets of 2018 category 11.10, at https://www.regjeringen.no/no/dokumenter/prop.-1-s-bld-20172018/id2574097/sec2?q=ombud#match_2, from 2019 at https://www.statsbudsjettet.no/upload/Statsbudsjett_2020/dokumenter/pdf/GULBOK.pdf.

²⁸ See the website of the Equality Tribunal, <http://diskrimineringsnemnda.no/nb/innhold/sider/3006> and <http://diskrimineringsnemnda.no/nb/innhold/sider/1215>.

²⁹ Numbers from the national budgets of 2018 category 11.10, at https://www.regjeringen.no/no/dokumenter/prop.-1-s-bld-20172018/id2574097/sec2?q=ombud#match_2, from 2019 at https://www.statsbudsjettet.no/upload/Statsbudsjett_2020/dokumenter/pdf/GULBOK.pdf.

³⁰ See Equality Ombud (2014) *CERD 2014- The Ombud's report to the UN Committee on the Elimination of Racial Discrimination- a supplement to Norway's twenty-first/twenty-second periodic report*, at http://www.ido.no/globalassets/03_nyheter-og-fag/publikasjoner/cerd-2014_web_engelsk_ny1.pdf.

7. Key issues

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

- Access to justice remains a key concern. First, there is the new legal competence of the Equality Tribunal to reject cases on the basis of their being clearly not in breach of the prohibitions against discrimination (EAOA, Section 10(2)). In 2018, 30 of 157 complaints were dismissed or rejected, and in 2019, 144 of 244 complaints were rejected or dismissed. In 2020, 125 of 313 complaints were rejected or dismissed.³¹ The Tribunal has been criticised by the Ombud for not explaining the reasoning behind these dismissals sufficiently.³²
- Secondly, the guidance provided by the Equality Ombud is not always sufficient to provide an effective opportunity to put forward a case, especially the more complex ones, or where the victim for other reasons does not have the resources to argue their own case, even though the simpler administrative procedures of the Equality Tribunal. The Ombud has tried to remedy this to some extent by initiating cases before the Equality Tribunal.³³ However, they did this with only two cases in 2019 and none in 2020. The Ombud has not expressed any reasons for this, or indicated any changes in their policy.
- The Equality Tribunal lacks effective remedies for many cases outside employment. Damages for injury of a non-pecuniary character can only be awarded in cases concerning employment (EAOA Section 12(1)), which means that lack of compliance with the GEADA rarely meets with any sanctions outside employment. Even when there is the opportunity to impose sanctions it is rarely done: the Equality Tribunal did not make use of this power at any point in 2018, and only once in 2019.³⁴ However, the power was used in nine cases in 2020, which is a significant improvement. The Tribunal has also used its power to issue orders four times in 2020, (only one of the cases concerned employment), and has also used its power to enforce the orders with a fine if not complied with within the deadline.
- In order to obtain effective remedies, some cases must be taken to the courts. This is costly, as there is no free legal aid in discrimination cases, and there is a significant risk of having to pay the costs of the defendant.³⁵ Two rounds of harmonisation of the anti-discrimination acts in 2013 and 2017 has led to a lack of clarity in parts of the legal coverage, as the previously very narrow exception to the definition of direct discrimination might be widened and not interpreted as narrowly as before.

³¹ [Søk i statistikk \(diskrimineringsnemnda.no\)](#).

³² Likestillings- og diskrimineringsombudet (2021) *Diskrimineringsretten 2020. Rettsutvikling på likestillings- og diskrimineringsfeltet, med gjennomgang av relevante lovendringer, forvaltnings- og rettspraksis*, p. 32. Available in Norwegian at [Diskrimineringsretten 2020 : rettsutvikling på likestillings- og diskrimineringsfeltet, med gjennomgang av relevante lovendringer, forvaltnings- og rettspraksis \(ldo.no\)](#).

³³ Equality and Anti-Discrimination Ombud (2019) *Årsmelding* (Annual Report for 2018), p. 8, available at <https://www.ldo.no/link/df00459339c5420ea293d70cd914a6d9.aspx>.

³⁴ Equality and Anti-Discrimination Tribunal, DIN-2018-410.

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

INTRODUCTION

The national legal system

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

Discrimination cases may be brought before the ordinary courts.

However, the key administrative procedure for discrimination cases is to bring them before the Equality and Anti-Discrimination Ombud (the Ombud) for advice³⁶ and the Equality and Anti-Discrimination Tribunal³⁷ (hereinafter referred to as the Equality Tribunal or the tribunal) for decisions regarding complaints.

Also of some relevance to anti-discrimination law is the Labour Court, which deals with disputes between trade unions and employers' organisations that include the interpretation, validity and existence of collective agreements and cases of breaches of collective agreements – to the extent that anti-discrimination provisions are included in the collective agreements.³⁸

List of main legislation transposing and implementing the directives

On 1 January 2018, the General Equality and Anti-Discrimination Act (GEADA)³⁹ replaced the four previous anti-discrimination acts.⁴⁰ It covers the following grounds of discrimination within all sectors: gender, ethnicity (including national origin, descent, skin colour, and language), religion or belief, sexual orientation⁴¹ and disability, as well as pregnancy, and leave in connection with childbirth or adoption, care responsibilities. The GEADA 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.⁴²

³⁶ See <http://www.ldo.no/en/>.

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

³⁸ See <http://www.arbeidsretten.no/engelsk.php>.

³⁹ Equality and Anti-Discrimination Act (GEADA) of 16 June 2017 No. 51, in force as of 1 January 2018. See <https://lovdata.no/dokument/NLE/lov/2017-06-16-51> for an English version of the act.

⁴⁰ Gender Equality Act (GEA) of 21 June 2013 No. 59, in force as of 1 January 2014, at <http://www.ub.uio.no/ujur/ulovdata/lov-20130621-059-eng.pdf>; Anti-Discrimination and Accessibility Act – (AAA) of 21 June 2013 No. 61, in force as of 1 January 2014 at <http://www.ub.uio.no/ujur/ulovdata/lov-20130621-061-eng.pdf>; Anti-Discrimination Act (ADA) of 21 June 2013 No. 60, in force as of 1 January 2014, at <http://www.ub.uio.no/ujur/ulovdata/lov-20130621-060-eng.pdf> and Sexual Orientation Anti-Discrimination Act (SOA) of 21 June 2013 No. 59, in force as of 1 January 2014. Translation at <http://www.ub.uio.no/ujur/ulovdata/lov-20130621-058-eng.pdf>.

⁴¹ To some degree, differential treatment on the basis of same-sex marriage or cohabitation, as well as religion or life stance, is allowed. The distinction between sexual orientation and same-sex living arrangements relates to the protection against discrimination on the basis of sexual orientation in religious organisations: no differential treatment is allowed on the basis of sexual orientation alone, but is permitted to some degree when it comes to actually living with another person of the same sex see, see GEADA Section 30(3).

⁴² In terms of specialised legislation, Chapter 10 of the Ship Labour Act (SLA) provides protection against discrimination in the employment relationship of seamen on the basis of political views, membership of a trade union, or age (Act of 21 June 2013 No. 102 relating to employment protection etc. for employees on board ships). See <https://www.sjofartsdir.no/en/legislation/laws/ship-labour-act/>. The SLA Chapter 10 gives almost exactly the same protection against discrimination as the WEA, but adds another labour sector to such protection.

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

Sections 185 and 186 of the Penal Code⁴³ contain criminal law protection against discrimination. Section 185 concerns hateful expressions, emphasising more clearly that racist expressions with insulting effects are punishable by law. Section 186 penalises the refusal to provide goods and services as well as admission to a public performance/exhibition/gathering. The provisions in the Penal Code are only applicable in relation to discrimination because of skin colour or national or ethnic origin, religion or life stance,⁴⁴ sexual orientation, gender identity and disability.⁴⁵

It is presumed that Norwegian anti-discrimination legislation is in line with the EU *acquis*, although the non-discrimination directives (2000/78 and 2000/43) are not incorporated in the EEA agreement. However, the Government has committed to having as high - or higher - standards in its work against discrimination as the requirements of the EU.⁴⁶ The protection of the directives has been reinforced by the judgments of the Supreme Court.⁴⁷

Directive 2000/78 is thus implemented through the Working Environment Act (WEA)⁴⁸ Chapter 13 (political views, membership of a trade union, and age), as well as through the Equality and Anti-Discrimination Act (GEADA). Protection against discrimination because of disability is found in the GEADA, although requirements to adapt the environment to meet the physical and psychological working environment of people with reduced functional ability is also found in Chapter 4 of the WEA, imposing general accommodation duties. It should be noted that, as the non-discrimination directives (2000/78 and 2000/43) are not incorporated in the EEA agreement, the specific exceptions allowed under the Employment Equality Directive Articles 4(1), 4(2) and 6(1) have not been clearly articulated.

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

⁴³ See the Penal Code of 20 May 2005 No. 28 in force as of 1 October 2015 at <https://lovdata.no/dokument/NLE/lov/2005-05-20-28>.

⁴⁴ Non-religious convictions as fundamental as religious ones.

⁴⁵ An assessment regarding the anti-discrimination protection in the Penal Code was carried out and published in November 2016, see: Larsen, K.M. (2016) *Utredning omdet strafferettslige diskrimineringsvernet* <https://www.regjeringen.no/no/dokumenter/utredning-om-det-strafferettslige-diskrimineringsvernet/id2520561/>. The suggested legal amendments will be to include protection against gender identity and gender expression as well as gender in both Sections 185 and 186. The amendments have not been made as of 13 February 2018.

⁴⁶ Norwegian Government (2003) *Skjerpet vern mot diskriminering i arbeidslivet* (White paper on strengthened protection against discrimination in working life), NOU 2003:2, p. 7.

⁴⁷ For example in Supreme Court judgment HR-217-219-A.

⁴⁸ Act relating to working environment, working hours and employment protection, etc. (Working Environment Act) (WEA) of 17 June 2005 No. 62. English version available at: <https://lovdata.no/dokument/NLE/lov/2005-06-17-62?q=work%20environment%20act>.

1 GENERAL LEGAL FRAMEWORK

Constitutional provisions on protection against discrimination and the promotion of equality

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

Article 98 of the Constitution reads: 'All people are equal under the law. No human being must be subject to unfair or disproportional differential treatment.'⁴⁹ The provision mentions no particular grounds of discrimination, groups or characteristics.

Article 92 of the Constitution states that:

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

A Supreme Court judgment clarified that Article 92 of the Constitution is not a clause that incorporates human rights conventions in Norwegian law, but obliges authorities to enforce human rights conventions at the level they are implemented in Norwegian law.⁵⁰ The Human Rights Act⁵¹ incorporates a number of important treaties on human rights - including the International Convention on Elimination of All Forms of Discrimination of Women (CEDAW) - into the domestic legal system on a general basis in which the conventions prevail over any other conflicting statutory provision.⁵² The International Convention on Elimination of All Forms of Racial Discrimination (ICERD) is not incorporated into the Human Rights Act, but into the Equality and Anti-Discrimination Act (GEADA), the legal consequence being that ICERD does not prevail over other statutory provisions in case of conflict, but has to be decided through interpretation. The UN CRPD (the Disability Convention) was ratified on 3 July 2013.⁵³ It is not incorporated into the Equality and Anti-Discrimination Act (GEADA) or any other Norwegian law. However, the Equality and Anti-Discrimination Ombudsman is responsible for the supervision of the national implementation of the convention, similar to the national supervisory system of the ICERD and CEDAW.⁵⁴

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

⁴⁹ See <https://www.stortinget.no/globalassets/pdf/english/constitutionenglish.pdf>. The preparatory works to the constitutional clause are found in Dok 16 (2011-2012) Report on Human Rights in the Constitution from the Constitutional Committee to the Storting (Parliament), Chapter 6, see <http://www.stortinget.no/Global/pdf/Dokumentserien/2011-2012/dok16-201112.pdf>.

⁵⁰ See Supreme Court, HR-2016-2554-P and HR-2016-2591-A of 20 December 2016, para 47. The latter case concerned the question whether a woman with a psychosocial disability (diagnosed paranoid schizophrenia) should be deprived of her legal capacity relating to her finances if the conditions for this were fulfilled in accordance with the Guardianship Act, Section 22. The Supreme Court found that the conditions to deprive the woman of a capacity to handle her own finances were fulfilled, even though this might be contrary to Article 12 of the CRPD. This is because of the Norwegian 'interpretative declaration' in relation to CRPD Article 12 (judgment, para. 58), and also because the CRPD is not incorporated into Norwegian law. An interesting observation is made in para. 63, in which it is stated that as long as the declaration made by Norway in relation to Article 12 is upheld by the legislature, the courts must abide by this even if it is in breach of international law.

⁵¹ Act relating to the status of human rights in Norwegian law of 21 May 1999 No. 30 (*Menneskerettsloven*).

⁵² The International Convention on Racial Discrimination is incorporated in the Anti-Discrimination Act (ADA), but the convention will in conflicting cases not automatically prevail. The failure to include the ICERD in the Human Rights Act has been repeatedly criticised by the NGOs working on anti-discrimination.

⁵³ See Prop. 106 S (2011-2012) Proposition to the *Stortinget* (proposal for Parliamentary resolution) on Consent to ratification of the UN Convention of 13 December 2006 on the Rights of Persons with Disabilities and Prop 105 L 2011-2012 on Changes to the Anti-Discrimination Ombud Act on the supervision of implementation of the UN Convention on the Rights of Persons with Disabilities.

⁵⁴ Equality Ombud (2016) 'Strategy of the Ombud (2017-2022)', at <https://www.ldo.no/nyheter-og-fag/brosjyrar-og-publikasjoner/Arsrapporter/arsmelding-2016/sammendrag-strategi/>.

The constitutional anti-discrimination provisions are directly applicable.⁵⁵

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

⁵⁵ Article 98 of the Constitution has only been assessed in one discrimination case, in a verdict by the National Insurance Court in Case No. TRR-2015-1542, of 29 January 2016 regarding gender discrimination. The case concerned a father who had been denied paid parental leave as the mother of the child did not fulfil the terms for paid parental leave according to the National Insurance Act, Section 14-13. The father claimed a right to paid leave based on the reasoning of the CJEU Judgment C-222/14 *Maistrellis*, and claimed that as such, Article 98 would be interpreted in accordance with the understanding of the European Court of Justice. The National Insurance Court did not agree with this, as it did not find that Article 98 provided the basis for setting aside a clause in the National Insurance Act. The verdict has not been appealed to the ordinary courts according to information given to the author, and is thus final. Several cases concerning the immigration legislation have been assessed in relation to Article 98, but none of these have been assessed from a discrimination perspective.

2 THE DEFINITION OF DISCRIMINATION

2.1 Grounds of unlawful discrimination explicitly covered

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

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

2.1.1 Definition of the grounds of unlawful discrimination within the directives

a) Racial or ethnic origin

The scope of the term 'ethnicity' is vague, and provision is made for some exercise of discretion by the enforcing agencies in defining its reach. The GEADA's preparatory works note that the term has both subjective and objective elements:⁵⁶

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

...

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

Thus, skin colour and language are closely linked to and subsumed under the concept of ethnicity, while the subjective part of the concept is quite similar to the definition of ethnicity in CJEU *CHEZ* C-83/14.⁵⁷ The preparatory works of the GEADA also make it clear that 'national origin' and 'descent', as grounds for discrimination, are closely associated with the term ethnicity: these grounds could include place of birth, non-Norwegian country background, the place where one was brought up or from which one has one's background, and relationships in the broad sense. Nationality is thus not seen as a ground in itself, but differential treatment based on nationality may be seen as indirect discrimination on the basis of 'ethnicity' (see section 4.4 below). Statelessness is also covered.⁵⁸ This does not imply a change in the understanding of the main concepts

⁵⁶ See the preparatory works to the GEADA; Prop 81 L (2016-2017) Chapter 11.2.3.2 Ethnicity, available (in Norwegian) at <https://www.regjeringen.no/no/dokumenter/prop.-81-l-20162017/id2547420/sec12>. These also refer to the preparatory works of the now replaced ADA: Proposition to Parliament, Prop. 88 L (2012-2013) *Diskrimineringslovgivningen*.

⁵⁷ CJEU, Judgment of 16 July 2015, *CHEZ*, C-83/14, paragraph 46, EU:C:2015:480.

⁵⁸ See decision of the Equality Ombud in Case No. 09/892 of 3 May 2012. In its Case 28/2015 of 29 September 2015, the Equality Tribunal found that demanding a Norwegian or Swedish criminal record check from 18 years of age to follow job applications to a security company constituted indirect discrimination because of nationality in breach of ADA Section 6. In reality, the demand from the security company signified that the company only accepted applicants that had been Norwegian or Swedish citizens since 18 years of age. The practice was seen as discriminatory vis-à-vis both EU citizens and third country nationals, that is everyone who is not a Norwegian or Swedish citizen. See also decision by the Equality Tribunal in LDN-2006-18 on advertisements for apartments to rent, 'only to Norwegian citizens', referred to in the preparatory works to the GEADA: Proposition to Parliament, Prop. 81 L (2016-2017) *Lov om likestilling og forbud mot diskriminering* Chapter 11.2.3.3.

and definitions.⁵⁹ These examples are now included in Section 6(1) of the GEADA.⁶⁰ These examples are binding, but not exhaustive, for the interpretation of the concept of ethnicity. National origin, descent, skin colour and language are not seen as individual grounds of discrimination and are only protected when there is a link to ethnicity, or the discrimination is on the grounds of ethnicity.⁶¹

Race or racial origin is not specified as a separate distinction in the GEADA, as the starting point for combating racism is to eliminate the idea that people can be divided into different races, in line with preamble no. 6 of Directive 2000/43. Discrimination based on perceptions of a person's race is regarded as discrimination based on ethnicity. Skin colour was taken into the GEADA's list of examples of ethnicity on the basis that the law should at least mention skin colour explicitly in order to better fulfil the requirements of CERD while not using the word 'race', as suggested by the Ombud and supported by several anti-racist NGOs.⁶²

b) Religion and belief

The GEADA covers discrimination because of religion or belief. The preparatory works of the GEADA do not refer to any EU sources regarding the interpretation of the concept of religion or life stance. 'Religion' is not defined in the preparatory works, although it is stated that the word 'belief' is specifically chosen to emphasise that all kinds of life-stance beliefs are covered, not only those linked to a specific line of religious thinking.⁶³ However, the preparatory works to the previous act (the ADA) specified that the wording follows the wording of Directive 2000/78, and that both having and not having a religion or belief is covered.⁶⁴ Political opinion is not protected as a 'belief', but is specifically protected in the Working Environment Act. In the preparatory works to the GEADA, the definition of religion in the ECtHR judgment *Eweida and others v. UK* is taken as a starting point.⁶⁵ In an Equality Tribunal case from 2018, the members of the tribunal all agreed that a refusal to shake hands with women should be seen as an expression of religious views, which is protected against discrimination.⁶⁶ This interpretation was upheld in a later decision,⁶⁷ but since the outbreak of COVID-19 the question has arisen again before the Equality Tribunal.

⁵⁹ See the legal preparatory works; Proposition to Parliament, Prop. 81 L (2016-2017) *Lov om likestilling og forbud mot diskriminering* Chapter 11.

⁶⁰ See the legal preparatory works; Proposition to Parliament, Prop 81 L (2016-2017) *Lov om likestilling og forbud mot diskriminering (likestillings- og diskrimineringsloven)*, Chapter 11.9.4.

⁶¹ Proposition to Parliament, Prop. 81 L (2016-2017) *Lov om likestilling og forbud mot diskriminering* Chapter 11.2.3.2, cfr the proposition of the first Anti-Discrimination Act regarding ethnicity etc., Ot.prp. No. 33 (2004-2005) Chapter 10.1.8.2.

⁶² See Proposition to Parliament, Prop. 81 L (2016-2017) *Lov om likestilling og forbud mot diskriminering chapter 11.2.3.1*.

⁶³ In its Case LDN-2016-16, the Equality Tribunal accepted veganism as a life stance. The preparatory works of the GEADA refer in particular to the ECtHR case of *Eweida v. United Kingdom*, premises 80-82, stating that not any action motivated by religious views is protected, it must be a closely connected to the religious belief, but not limited to issues generally acknowledged or seen as compulsory. Prop 81 L (2016-2017) *Lov om likestilling og forbud mot diskriminering (likestillings- og diskrimineringsloven)*, Chapter 11.2.3.7.

⁶⁴ See the preparatory works to the WEA; NOU 2003:2 *Skjerpert vern mot Diskriminering i arbeidslivet* p. 36.

⁶⁵ With the following quotes from paras 80-82: 'The right to freedom of thought, conscience and religion denotes views that attain a certain level of cogency, seriousness, cohesion and importance'; 'Even where the belief in question attains the required level of cogency and importance, it cannot be said that every act which is in some way inspired, motivated or influenced by it constitutes a 'manifestation' of the belief. Thus, for example, acts or omissions which do not directly express the belief concerned or which are only remotely connected to a precept of faith fall outside the protection of Article 9 § 1.' Prop 81 L (2016-2017) Chapter 11.2.3.7 <https://www.regjeringen.no/no/dokumenter/prop.-81-l-20162017/id2547420/sec12>.

⁶⁶ Equality Tribunal, case DIN-2018-48. A was temporarily employed as an assistant at a school. From the beginning he had made it clear that he did not shake hands with women on the basis of his religious convictions. His contract was not renewed due to this refusal. The majority of the members of the tribunal interpreted the school's actions as indirect differential treatment and concluded that it was necessary to demand that A shook hands with women. The minority of the tribunal saw the school's dismissal as direct differential treatment, and unjustifiable.

⁶⁷ Equality Tribunal, DIN-2018-325.

c) Disability

In the preparatory works to the GEADA, the Ministry for Children and Equality discussed whether the Norwegian concept of disability should be replaced. It proposed that the concept of disability as used in Norwegian, *nedsatt funksjonsevne*, (reduced functional ability) should be replaced with the Norwegian concept of *funksjonsnedsettelse* (functional reduction); this proposal was adopted.⁶⁸ The definition of disability in the GEADA in relation to professional life is understood as:

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

This is in line with the judgment of the European Court in the joined cases C-335/11 and C-337/11 *Skouboe Werge and Ring*, Paragraph 38. However, Norwegian law includes temporary illness in the concept of disability, unless it is 'a temporary and entirely insignificant condition which does not influence the functional ability to any significant degree'.⁶⁹ Furthermore, Norwegian law focuses on the discriminatory action in combination with the person's functional ability rather than the limitations that the condition alone creates.⁷⁰ The preparatory works explicitly state that it is undesirable to limit the protection to a specific group.⁷¹ Similarly, the focus must be on the discriminatory act, not on any diagnosis.⁷² The social element of the reduced functional ability and interaction with the environment in working life is also covered by the employer's duty of accommodation towards all employees in the WEA, Section 4-6. The Norwegian definition may be more in line with a social model than the CJEU case law on Directive 2000/78, since no diagnosis is needed. Regarding the temporariness of an illness, Norwegian law gives a very wide protection, since even temporarily reduced ability is protected against discrimination.⁷³

It should, however, be noted, that Norwegian law allows employers to dismiss employees on the basis of long-term sick leave (WEA Section 15-8 (1)) after 12 months of absence. Dismissal during this 12-month period shall be seen as based on the person's illness and therefore unjustified, unless clearly proven to have another and justifiable reason (WEA Section 15-8(2)). After the 12-month period, the dismissal of a sick or disabled employee must have legitimate aim.⁷⁴ While WEA Sections 15-7 and 15-8 specify what is a legitimate aim, they do not mention proportionality or necessity, and thereby do not provide as strict requirements as those in the anti-discrimination legislation. It is

⁶⁸ See the legal preparatory works; Proposition to Parliament, Prop 81 L (2016-2017) *Lov om likestilling og forbud mot diskriminering (likestillings- og diskrimineringsloven)* Chapter 11.2.

⁶⁹ Proposition to Parliament, Prop 81 L (2016-2017) *Lov om likestilling og forbud mot diskriminering (likestillings- og diskrimineringsloven)* Chapter 11.2.4, 5th paragraph. It also states that 'To the knowledge of the Ministry [of Children and Equality], there are no decisions from any of the institutions handling complaints [regarding discrimination] where the question of durability has been a key issue.'

⁷⁰ Proposition to Parliament, Ot.prp. No. 44 (2007-2008) *Om lov om forbud mot diskriminering på grunn av nedsatt funksjonsevne (diskriminerings- og tilgjengelighetsloven)* Chapters 9.4.6.2 and 9.4.8.

⁷¹ Proposition to Parliament, Ot.prp. No. 44 (2007-2008) *Om lov om forbud mot diskriminering på grunn av nedsatt funksjonsevne (diskriminerings- og tilgjengelighetsloven)* Chapter 9.4.8.1.

⁷² Ballangrud, A.J.B. and Søbstad, M. (2021), *Likestillings- og diskrimineringsloven. Lovkommentar*, Oslo, Universitetsforlaget, pp. 130-134. This means that there is no need of evidence concerning the complainant's health situation or abilities. However, a complaint concerning discrimination on the basis of allergy against electricity was dismissed on the basis of this not being a recognised diagnosis, see Equality Tribunal, DIN-2019-302.

⁷³ Passing and minor reduced ability is not protected, for example influenza or minor injuries. There is otherwise no clear limit, which should be seen in relation to the general duty of accommodation towards all employees. Ballangrud, A.J.B. and Søbstad, M. (2021), *Likestillings- og diskrimineringsloven. Lovkommentar*, Oslo, Universitetsforlaget, p. 132.

⁷⁴ If the reason is capacity reduction of the enterprise or trying to make the production more effective, the consequences for the employee must not be disproportionate compared to the needs of the enterprise, and a dismissal cannot be justified if other suitable work can be found for the employee within the enterprise (WEA Section 15-7).

therefore doubtful that these sections give sufficient protection against discrimination on the basis of disability after 12 months of absence.⁷⁵

d) Age

The definition of age does not have limits upwards or downwards. Discrimination based on age will thus encompass discrimination because of both high age and low age.⁷⁶

e) Sexual orientation

Sexual orientation includes both sexual orientation (attractions, emotions)⁷⁷ and sexual practices. The concept 'points to which gender appears in the law and/or sexuality is directed towards, if it is towards persons of the opposite sex/gender or towards the same sex/gender'.⁷⁸ The concept does not include particular sexual preferences or activities such as for example fetishism or sadomasochism.⁷⁹

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

2.1.2 Multiple discrimination

In Norway, multiple discrimination is explicitly prohibited by law. Section 6(1) of the GEADA, after the listing of the prohibited grounds of discrimination, states that 'combinations of these factors' are prohibited. Multiple discrimination is when a person is discriminated against because of two or more discrimination grounds separately but simultaneously. Intersectional discrimination occurs when a person is discriminated against because of several discrimination grounds simultaneously because of a unique combination of several discrimination grounds, which cannot be linked to one isolated ground. It follows from the Norwegian wording that both are included. Intersectional or multiple discrimination are not explicitly included in the WEA, but are in practice included through judicial interpretation.⁸⁰

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

The courts, the Ombud and the Equality Tribunal have made decisions in a number of cases relating to intersectional/multiple grounds discrimination, mainly in relation to gender and age,⁸¹ age and ethnicity,⁸² and gender and religion (wearing the hijab).⁸³

⁷⁵ See, for example, CJEU, Judgment of 18 January 2018, *Carlos Enrique Ruiz Conejero v Ferroservicios Auxiliares SA and Ministerio Fiscal*, C-270/16, EU:C:2018:17, paragraph 57.

⁷⁶ See the preparatory works to the WEA, Norwegian Government (2003) *Skjerpet vern mot Diskriminering i arbeidslivet* NOU 2003:2, p. 16.

⁷⁷ In the Norwegian language, the concept 'sexual orientation' can be translated into two different words 'orientering' and 'legning', which are both used here, and the author's insertion in brackets is intended to explain the slightly different meanings.

⁷⁸ The Norwegian language uses same word for sex and gender: 'kjønn'.

⁷⁹ See the legal preparatory works; Proposition to Parliament, Prop 81 L (2016-2017) *Lov om likestilling og forbud mot diskriminering (likestillings- og diskrimineringsloven)*, Chapter 11.9.5.

⁸⁰ The same is the case with the SLA.

⁸¹ See for example the Equality Tribunal's LDN-2015-18 in which the tribunal found that the claimant was discriminated against because of age, but not gender. In the Equality Tribunal's Case LDN-2015-34, the tribunal found that the claimant was neither discriminated against because of age nor gender by an age limit for retirement set by the employer at 67 years, at which she had to stop working. In the Equality Tribunal's Case LDN-2015-20, the tribunal found that the claimant was neither discriminated against because of age nor gender by her employer.

⁸² See for example the Equality Tribunal's Case LDN-2015-35 in which the tribunal found that the claimant was discriminated against both because of age and ethnicity as he was passed over for a position as a glass-maker. The decision does not state which ethnicity or nationality the glass-maker is, but only stated that he is of 'foreign origin', and that he was born in 1962, and thus was 52 years at the time of application.

⁸³ The Equality Tribunal's cases on hijab and gender are LDN-2009-26, LDN-2010-08, LDN-2014-2, LDN-2017-2 and DIN-2018-30. The 2014 case signalled a new line of reasoning within the tribunal, which in part ran

There are few cases involving three or more grounds of discrimination.⁸⁴ The Equality Tribunal case LDN-2008-1 was the first case to explicitly address multiple discrimination, and remains a landmark case due to its focus on intersectionality. Two women with an Asian background tried to book a hotel room in Oslo. The women were refused a room at the hotel, as the women's home address was in the Oslo area, based on written guidelines permitting staff to refuse access to people domiciled in Oslo and its environs. When assessing the case, the Equality Tribunal found circumstances that gave grounds to believe that the hotel had attached stereotypes related to sex work to the combination of the women's gender and ethnic background, and that the hotel was unable to substantiate that there were other reasons behind the refusal.

The national court system has made decisions in only a few cases where multiple discrimination has been claimed. In a 2020 case from Borgarting Court of Appeal, an elderly Russian woman who had migrated to Norway some years previously through family reunification, had her social security benefit revoked together with others who had migrated on the same basis, mainly women from Asia and Eastern Europe. The court found that the revocation of the social benefit aimed at ensuring this group a reasonable level of income, was justified, proportional and necessary.⁸⁵ The combination of ethnicity and gender was mentioned as a factor in the case but received only superficial treatment by the court. The Supreme Court rejected an appeal.⁸⁶

Few cases go through administrative proceedings before being taken to court. One example of such a case concerned recruitment to the fire brigade, where a female employee received compensation for discrimination on the basis of age and gender.⁸⁷ It should be noted that in Norway a breach of the law does not lead to a stricter penalty if it involves more than one ground of discrimination.

counter to the previous legal understanding of the Ombud and the Equality Tribunal regarding direct discrimination because of religion. The tribunal saw the prohibition of headscarves for security personnel at the airport as direct differential treatment on the basis of religion and indirect differential treatment on the basis of gender. The exception for direct discrimination was broadened regarding religion, as the tribunal accepted in this case that the secular and value-neutral orientation of the needs of the employer should be given priority over the right of Muslim women to be able to wear their religious symbols within employment. In LDN-2017-2 the tribunal thoroughly discussed international conventions as well as the decisions of the ECtHR. They concluded that general prohibitions of wearing religious symbols including hijab at the workplace should be considered indirect discrimination on the basis of religion, while the differential treatment of a woman on the basis of her wearing a hijab should be considered direct differential treatment. The ECJ Cases C-188/15 and C-157/15 are briefly referred to, with the conclusion that there is no contradiction between them and that the decision of the tribunal. The Equality Tribunal, Case DIN-2018-30, concerned a Muslim woman working as a steward on a passenger boat. In this case too, the prohibition of wearing of headscarf with the uniform was seen as indirect discrimination on the basis of religion alone. No ECJ cases were mentioned in the latter case. As yet, there has been no case tried before the ordinary courts on this issue.

⁸⁴ Although such cases are known to exist: Equality Tribunal, LDN-2015-31, concerned a woman who claimed to have been bypassed for a position as associate professor in physics: materials research with transmission electron microscopy (TEM). She claimed to have been bypassed because of her gender, age and ethnicity. The Equality Tribunal did not find that she had been discriminated against.

⁸⁵ LB-2019-53935. See section 12.2 for a more detailed description of the case.

⁸⁶ HR-2020-2160-U

⁸⁷ Øst-Finnmark court of first instance, judgment of 17 March 2010 in Case 09-136827TVI-OSFI. The case had already been assessed by the Equality Ombud and the Equality and Anti-Discrimination Tribunal, in its case no. LDN-2008-8. A county that was recruiting new staff was alleged to have discriminated against a female worker in the fire brigade because of her age and gender, in contravention of the GEA and the WEA. The case concerned a female worker aged 41, employed on a part-time basis in the fire brigade. She subsequently applied for a longer, full-time vacancy, and then a fixed-term, full-time position. A male worker aged 27 who was less qualified was employed in the position for which the woman had applied. The ads announcing the position had the following formulation: 'applicants should be between 27 and 35 years of age.' The Equality Tribunal and the court found that the woman was discriminated against on both the grounds of gender and age, and had also suffered from victimisation after her complaint. She was awarded compensation of EUR 37 500 (NOK 300 000) for economic losses as well as EUR 18 759 (NOK 150 000) for non-pecuniary damage.

2.1.3 Assumed and associated discrimination

a) Discrimination by assumption

In Norway, discrimination based on a perception or assumption of a person's characteristics, is prohibited in the GEADA, Section 6(2). The sub-paragraph reads: 'The prohibition includes discrimination on the bases of actual, assumed, former or future factors specified in the first paragraph'. From 1 January 2018, this covers gender, ethnicity (including national origin, descent, skin colour, and language), religion or life stance, sexual orientation and disability, pregnancy, leave in connection with childbirth or adoption, care responsibilities and age. Discrimination based on a perception or assumption is not explicitly included in the WEA, but is included in practice through judicial interpretation.⁸⁸

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

In the Ombud's case no. 16/628, the complainant had better qualifications than the person who was offered the position, and the Ombud found that there was a reason to believe that she was ranked lower for consideration because the employer thought she would be in need of accommodation or repeatedly be on sick leave, i.e. on the basis of assumed disability.

b) Discrimination by association

In Norway, discrimination based on association with persons with particular characteristics, is prohibited in the GEADA, Section 6(3). The sub-paragraph reads: 'The prohibition also applies if a person is discriminated against on the basis of his or her connection with another person, when such discrimination is based on factors specified in the first paragraph'. In the preparatory works to the former anti-discrimination laws, the ministry stated that the key issue is whether there is a causal relationship between the protected grounds of discrimination and the action in question.⁸⁹ Discrimination by association is not explicitly included in the WEA, but is included in practice through judicial interpretation.⁹⁰

There have been few cases regarding discrimination by association,⁹¹ but in only one case, the Equality Ombud's case No. 11/2514, has the issue really been assessed. Y wanted to sublet the apartment he rented to X, who was receiving social benefits due to an illness. The owner of the apartment refused, and Y complained to the Ombud on the basis of his association with X and his disability. The Ombud concluded that the link to X was too peripheral to be taken into account, using C-303/06 *Coleman v Attridge Law and Steve Law* as a comparator. Norwegian law has later been reviewed in line with C 83/14, *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia*,⁹² as mentioned above. This wider understanding of discrimination through association has not yet been used by the courts or the Equality Tribunal.

⁸⁸ The same is the case with the SLA.

⁸⁹ Preparatory works to the ADA, AAA and SOA of 2014, Prop. 88 L (2012-2013) *Diskrimineringslovgivningen* (The anti-discrimination legislation) p. 85, available in Norwegian at <https://www.regjeringen.no/no/dokumenter/prop-88-l-20122013/id718741/>.

⁹⁰ The same is the case with the SLA.

⁹¹ The Ombud's Cases 08/1121 and 14/1013. The Equality Tribunal refused the appeal of the latter on the basis of their limited competence in LDN-2015-73.

⁹² Norwegian Government (2012) Prop. 88 L (2012-2013) *Diskrimineringslovgivningen* (The Anti-discrimination legislation) p. 85, available in Norwegian at <https://www.regjeringen.no/no/dokumenter/prop-88-l-20122013/id718741/>.

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

a) Prohibition and definition of direct discrimination

In Norway, direct discrimination is prohibited in national law.

In WEA Section 13-1, the concepts of direct and indirect discrimination are not defined, but the concepts are discussed and defined in the preparatory works.⁹³

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

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

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

In several cases from the Equality Tribunal there seems to be some confusion regarding what constitutes direct differential treatment. A good example on the lack of clarity in the interpretation of what direct discrimination is and when it may be justified, is Equality Tribunal case number 48/2018, where the dismissal of a Muslim man, who refused to shake hands with women on the basis of religious convictions, was seen as justified indirect discrimination by the majority of the tribunal, and unjustified direct discrimination by the minority.⁹⁴ In case number 39/2018, the requirement of a good working knowledge of Norwegian was not seen as direct differential treatment, but indirect. In Equality Tribunal case DIN-2018-26, for example, it is unclear whether a language requirement is seen as direct or indirect differential treatment on the basis of ethnicity, while in several other cases from the Ombud and the Equality Tribunal, language requirements are seen as direct differential treatment.⁹⁵

b) Justification for direct discrimination

In Norway, as a starting point, neither the GEADA nor WEA permits justification of direct discrimination, neither generally, nor in relation to particular grounds, except with regard to genuine and determining occupational requirements (see section 4.1 below). However, the wording of the legal texts after the 2013 revision created uncertainty in relation to the extent of possible exceptions that were not an issue earlier, as described above.⁹⁶

⁹³ The definitions are not specified in the WEA Chapter 13 but are discussed in its preparatory works, Ot. Prp. No. 49 (2004-2005) Chapter 25.

⁹⁴ Due to the controversies around this case, and the legal complexities, the Equality Tribunal used the power to handle the case through a ‘strengthened Tribunal’: all three administrators and two tribunal members, instead of only one administrator and two members.

⁹⁵ For example, the Ombud’s Case Nos. 15/1208 and 14/153, Equality Tribunal DIN-2018-139.

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

This uncertainty is not addressed in the preparatory works to the GEADA.⁹⁷ Lawful differential treatment is defined in the GEADA, Section 9:

'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.

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

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

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

In Equality Tribunal case no. 82/2018, direct differential treatment on the basis of disability was seen as justified.⁹⁸

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

a) Prohibition and definition of indirect discrimination

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

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

The prohibition reads as follows:

'Discrimination on the basis of gender, pregnancy, leave in connection with childbirth or adoption, care responsibilities, ethnicity, religion, belief, disability, sexual orientation, gender identity, gender expression, age or combinations of these factors is prohibited. "Ethnicity" includes national origin, descent, skin colour and language. (...)

⁹⁷ See the legal preparatory works; Proposition to Parliament, Prop 81 L (2016-2017) *Lov om likestilling og forbud mot diskriminering (likestillings- og diskrimineringsloven)*. The justification of direct discrimination is not discussed in Chapter 14.2 or in Chapter 14.9.

⁹⁸ A received social benefit on the basis of being 100 % disabled in relation to employability due to aphasia. He worked, however, 18 hours a week on average in a grocery store. His wages were determined on an individual basis and were NOK 70 (approximately EUR 7) per hour, recently changed from NOK 40 (approximately EUR 4). Ordinary employees earn more than double that rate. On the basis of the evidence presented, the tribunal stated that it was unclear how the diagnosis influences A's ability to work, and whether it was the effect of his health situation or other things that led to the lower wages. They also noted that disability and reduced ability to work are not necessarily the same thing but concluded that this constituted direct differential treatment on the basis of disability or assumed disability. Due to A's clearly very reduced ability to work, and the risk and extra effort necessary on the side of the employer, the tribunal considered the aim to be legitimate, and that the reduced salary was necessary to achieve the aim. Regarding the proportionality, the tribunal saw the fact that he was considered 100 % disabled, and received social benefits accordingly, as decisive, and concluded that the reduced salary was proportionate on the condition that in the future the employer would continuously adjust the salary on the basis of A's situation at any given time.

“Discrimination” means direct or indirect differential treatment pursuant to Sections 7 and 8 that is not lawful pursuant to Sections 9, 10 or 11.’

Section 8 defines indirect discrimination as follows:

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

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

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

Indirect discrimination is not defined in the WEA itself, although the legal preparatory works state that the definitions follow Directive 2000/78, Article (2)(b).⁹⁹

b) Justification test for indirect discrimination

As of 1 January 2018, the justification for indirect discrimination is found in the GEADA, Section 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. The test used to justify indirect discrimination is derived from the *Bilka* case,¹⁰⁰ and thus is compatible with the origins of the directives. The legal preparatory works point directly to the understanding of the directives.

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

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

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

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

The preparatory works of the GEADA state that in respect of the definitions of direct and indirect discrimination there are no changes in the way in which the law should be

⁹⁹ See the legal preparatory works to the WEA; Proposition to the *Odelsting* No. 104 (2002-2003), Section 8.3.5.4, p. 36. See also, for example, the description of Equality Tribunal Case DIN-2018-48 in section 12.2 below.

¹⁰⁰ See CJEU, Judgment of 10 January 2006, *Bilka*, C-170/84, ECLI:EU:C:1986:204.

understood.¹⁰¹ That means that that the possibility for differential treatment in working life in particular should still be narrow and limited.¹⁰²

2.3.1 Statistical evidence

a) Legal framework

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

The GDPR was incorporated into Norwegian law in 2018, through a change in the Personal Data Act (PDA) of 14 April 2000, which includes a complete translation of the directive. According to Section 9 of the PDA, the collection of personal data revealing the racial ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, and the processing of genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation are prohibited. In addition to the exceptions mentioned in Section 9, the PDA also allows for the collection of such data when necessary for promoting equality at a workplace, or as part of purely personal or familial activities.¹⁰³

In Norway, statistical evidence may be admitted under national law in order to establish indirect discrimination, in accordance with the key principles of evidence in Norwegian courts. The key procedural principle in Norwegian civil courts is the free evaluation of evidence by the courts in the course of the case as presented in courts (see section 2.2.1 of this report and Chapter 21 of the Dispute Act (DA) for further details)¹⁰⁴ Chapter 25 of the DA also allows for expert witnesses, i.e. 'an expert assessment of factual issues in the case', for whom statistical evidence is particularly relevant.

National law permits the use of statistical evidence to establish indirect discrimination, however, it is not necessary to prove whether indirect discrimination has happened or not, as the assessment that has to be made according to national legislation is whether or not an action or non-action has had a negative result for the individual or the group.¹⁰⁵ The use of statistical evidence is however often a practical necessity, as the prohibition on indirect discrimination attempts to protect individuals against a systemic group identification that leads to unintended negative results for the individual or the group. In order to prove indirect discrimination at an individual level, the use of statistical data will often constitute a practical necessity in order to prove that discrimination has occurred. The law does not have a specific provision regarding statistical evidence – it is considered as all other forms of evidence.

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

b) Practice

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

There is no current debate on ethical or methodology issues on statistical data as evidence in court. This is probably because there are so few court cases concerning discrimination, and in the few cases where statistical data have been used, this has not

¹⁰¹ See Proposition to Parliament 81 L (2016/2017) Chapter 12.9.1.

¹⁰² See Proposition to Parliament; Prop. 88 L (2012-2013) p. 87.

¹⁰³ Personal Data Act of 14 April 2000 No. 31, Section 2(2).

¹⁰⁴ Official translation at <http://www.ub.uio.no/ujur/ulovdata/lov-20050617-090-eng.pdf>.

¹⁰⁵ See the preparatory works to the AAA; Proposition to the *Odelsting* No. 44 (2007-2008) p. 101.

caused problems or been debated. To the author's knowledge there has not been a discussion on European strategic litigation issues in public discussion forums.

The case law as yet in this area is sparse. There are examples where statistical data was used in a Supreme Court case on age and retirement,¹⁰⁶ as well as on gender and work-related pensions.¹⁰⁷ The significance attributed to this data by the Supreme Court in its judgment was low.

2.4 Harassment (Article 2(3))

a) Prohibition and definition of harassment

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

The two acts on anti-discrimination prohibit harassment within the grounds covered by the particular act, see the WEA (Section 13-1(2)) and the GEADA (Section 13).¹⁰⁸ The full material scope of the directives is covered in the various acts.

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

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

Section 185 of the Penal Code¹⁰⁹ contains criminal law protection against discrimination, and concerns hateful expressions, emphasising specifically that racist expressions with insulting effects are punishable by law. The provisions in the Penal Code are applicable in relation to discrimination because of skin colour or national or ethnic origin, religion or life stance, sexual orientation, disability and (from 1 January 2021) gender identity.

The legal preparatory works to the prohibition of harassment in the WEA emphasise that the concept of harassment must be construed in accordance with the general concept of

¹⁰⁶ Supreme Court, Judgment of 29 June 2011, Rt-2011-964 *Gjensidige*.

¹⁰⁷ Supreme Court, Judgment of 27 November 2003, Rt-2003-1657 *Braathens*.

¹⁰⁸ Sexual harassment is covered by the GEADA, but was not enforced by the Equality Tribunal until 1 January 2020, when the tribunal's mandate was expanded with this specific aim in mind. See Amendment to the Act on the Equality and Anti-Discrimination Ombud and the Equality and Anti-Discrimination Tribunal, 21 June 2019.

¹⁰⁹ See Penal Code of 20 May 2005 No. 28. The text of the Penal Code is not translated to English, but reads (author translation): 'Any person who wilfully or through gross negligence publicly utters a discriminatory or hateful expression shall be liable to fines or imprisonment for a term not exceeding three years. The use of symbols shall also be deemed to be an expression. Any person who aids and abets such an offence shall be liable to the same penalty. A discriminatory or hateful expression here means threatening or insulting anyone, or inciting hatred or persecution of or contempt for anyone because of his or her a) skin colour or national or ethnic origin, b) religion or life stance, c) homosexual orientation or d) disability'. Bisexuals are included through judicial interpretation of the preparatory works, see Proposition to the *Odelsting* No. 29 (1980-81), Section V.1 p. 12 and Prop. 66 L (2019-2020) Amendments to the Penal Code etc., Chapter 8.2.

harassment in the WEA (third paragraph of Section 4-3).¹¹⁰ 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.¹¹¹ Harassment according to the GEADA need occur only once if the action is sufficiently grave. It is furthermore not necessary that an imbalance exists between the victim and the perpetrator: harassment may also occur between colleagues at the same level.

b) Scope of liability for harassment

Where harassment is perpetrated by an employee, in Norway, the employer or the employee is liable. As a main rule, the person performing the harassment is liable. However, there are two exceptions: 1) when the person harassing is acting on behalf of the employer¹¹² 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.¹¹³ 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.¹¹⁴

There is, however, a duty of due diligence on the employer¹¹⁵ 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

¹¹⁰ 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.

¹¹¹ 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.

¹¹² It should be noted that this was changed as of 1 January 2020, see GEADA Section 38(2), second sentence.

¹¹³ Proposition to Parliament, Prop. 81 L (2016-2017) Chapter 28.5.2.4.

¹¹⁴ In the preparatory works to the recent changes in the GEADA giving the Equality Tribunal the authority to make decisions in cases concerning sexual harassment, it is stated that strict liability cannot follow from judicial interpretation, even when the employer performs the harassment. Prop. 63 L (2018-2019) p. 16. However, according to the main preparatory works to the GEADA, there is strict liability for the employer if someone acting on behalf of the employer has performed the harassment. Proposition to Parliament, Prop. 81 L (2016-2017) Chapter 28.5.8.4.

¹¹⁵ 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.

continuation of harassment when made aware of the existence of such.¹¹⁶ The liability for the employer thus does not include harassment between colleagues if no blame is attached to the employer.¹¹⁷ 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:¹¹⁸ 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).¹¹⁹

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

2.5 Instructions to discriminate (Article 2(4))

a) Prohibition of instructions to discriminate

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

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

To consider an action to be an instruction, a relationship of subordination, obedience or dependency must exist between the instructor and the person receiving it.¹²⁰ In a workplace, it will therefore be a case of instruction if a manager asks a subordinate to discriminate against another employee at the same level as the subordinate. However, if an employee asks another employee to discriminate, this demand will normally not be considered as an instruction in the legal sense, however inappropriate. The instructions must contain a specific order that one or more persons shall be discriminated against. For example, if a manager asks a middle manager to ensure that the unionised employees are assigned to the unpopular shifts this would constitute an illegal instruction. Another example is where a manager at a club instructs gatekeepers that

¹¹⁶ Proposition to Parliament, Prop 63 L (2018-2019) p. 16.

¹¹⁷ Proposition to the Odelsting, *Ot.prp.* No. 35 (2004-2005), p. 50 and Proposition to Parliament, [Prop.81 L \(2016-2017\) side 337](#).

¹¹⁸ Act relating to compensation in certain circumstances (*Skadeserstatningsloven*) of 13 June 1969 No. 26.

¹¹⁹ 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 she had made him aware of the harassment. This has been appealed to the Supreme Court.

¹²⁰ See the preparatory works to the previous WEA; Proposition to the *Odelsting* No. 104 (2002-2003) paragraph 8.3.5.6.

people with disabilities, wheelchair users or people with a particular skin colour should not be allowed in.

In 2018, the tribunal had the opportunity to assess a case of instruction to discriminate in a contractual relationship, which it erroneously rejected on the basis of the complainants having no legal standing. The owner of a restaurant required the bidding contractors for hiring a restaurant to employ Scandinavian personnel only, which the contractors saw as an unreasonable and discriminatory requirement. As the bidding contractors were of Scandinavian background, the case was dismissed on the basis of them having no legal standing.¹²¹

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

b) Scope of liability for instructions to discriminate

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

Legal persons/employers are liable for the actions and omissions of their employees according to the specific sanctions imposed in each of the acts as well as by general tort law. For the applicable rules, see section 2.3.b above on liability for harassment.

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

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

In Norway, the duty on employers to provide reasonable accommodation is included in the law and is defined.¹²²

The duty to provide reasonable accommodation for people with disabilities in employment relationships is specified in Section 22 of the GEADA, while Section 21 does the same for pupils and students in general. It refers to a right of 'individual accommodation' and does not mention the word 'reasonable'. The recruitment process is included in the right to individual accommodation.¹²³

The text of Section 22(1) reads:

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

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

Employers are expected to individually accommodate workplaces and tasks in order to ensure that employees or jobseekers with disabilities can obtain or retain a job, have

¹²¹ Equality Tribunal, Case 21/2018.

¹²² Proposition to Parliament, Prop 81 L (2016-2017) Chapter 23.

¹²³ This was already stated through case law, see Equality Tribunal Case LDN-2015-48 where a woman with hearing difficulties was not called for a second interview. The employer had not discussed her need for individual accommodation, which was seen as a breach of the duty of individual accommodation. See also Equality Tribunal Cases LDN-2014-56 and LDN-2014-69.

access to training and other measures to develop their competence and can carry out and have an opportunity to advance in their work in the same way as other people. The law states that the requirement is a 'suitable' accommodation. The specific accommodation measures must be assessed in relation to the individual person with the disability. The wording is intended to show that the assessment of the required accommodation measures needs to be assessed specifically against the situation, the need for the accommodation and the benefit for those who have needs to be accommodated.¹²⁴

There is no explicit rule regarding whether financial assistance from the state should be considered in assessing whether there is a disproportionate burden. However, there is a duty on the employer to investigate what support is available from the welfare authorities, as stated in a 2010 case from the Equality Ombud.¹²⁵

In addition to the specific protection afforded to disabled workers according to the GEADA, the WEA contains a general duty for employers to provide reasonable accommodation for workers who due to 'accident, sickness, fatigue or the like' need this (see WEA Section 4-6 concerning adaptation for employees with reduced capacity to work), and lays out procedural rules for the dialogue between employer and employee, including for mapping opportunities for reasonable accommodation. The duty comes under a part of the chapter in the law concerning general rules on working conditions, rather than on health and safety. In practice, it has overlapping application with its Chapter 13 on discrimination, and thus functions both as an anti-discrimination and health and safety clause. It may even be said to set out the procedural rules for how reasonable accommodation should be achieved. It should also be seen in relation to the broader Norwegian definition of disability, which includes temporary conditions.

In practice before the courts therefore, WEA Section 4-6 is often used in conjunction with Section 22 of the GEADA.¹²⁶

b) Case law

Reasonable accommodation in both the GEADA and the WEA is only framed as an obligation where the accommodation will not entail a 'disproportionate burden'. When considering whether the accommodation leads to a disproportionate burden, particular importance is to be attached to the effect of the accommodation on the dismantling of disabling barriers, the necessary costs of the accommodation and the undertaking's resources.¹²⁷ Beyond the assessment of those elements there is no one test of what constitutes a 'disproportionate burden'.¹²⁸

'Reasonable': The duty to provide reasonable individual accommodation must be considered in relation to each person with a disability. In this assessment, relevant factors are the planned duration of the relationship between the responsible party and the individual disabled person, as well as the kind of/degree of disability and the timeframe of the accommodation. Other factors that may be used in the legal

¹²⁴ See Ot.prp. No. 88L (2012-2013) p. 182 which refers to the previous preparatory works, in particular Ot.prp. No. 44 (2007-2008) Chapter 10.6.4 on p. 180ff, and Chapter 18 p. 263.

¹²⁵ [LDO - 10/175: Manglende tilrettelegging i arbeidslivet for person med nedsatt funksjonsevne.](#)

¹²⁶ The Ship Labour Act (SLA) does not provide the same general duty to provide reasonable accommodation, which constitutes the main difference between the SLA and the WEA regarding discrimination. Ship Labour Act, 21 June 2013. English version available at <https://www.sdir.no/en/shipping/legislation/laws/ship-labour-act/>.

¹²⁷ See the preparatory works to the AAA, Proposition to the *Odelsting* No. 44 (2007-2008) pp. 263-265 and to the GEADA, Chapter 23 <https://www.regjeringen.no/no/dokumenter/prop.-81-l-20162017/id2547420/sec24>.

¹²⁸ Relevant cases from the Equality Tribunal that give guidance on a possible norm for individual accommodation are DIN-2020-323, DIN-2020-202, DIN-2018-206, DIN-2018-413 and LDN-2014-25. The Ombud has developed a guide on reasonable accommodation on their website, available at [LDO - Individuell tilrettelegging](#).

assessment are to what extent the arena for adaptation is an essential part of that person's life, as well as the benefit for the person with disabilities.¹²⁹ In Equality Tribunal case DIN-2018-206, the position was found too difficult for the complainant since the complainant was unable to perform key tasks for the position, after thorough assessments and a lot of dialogue meetings between employer and employee. Other positions had been tried. The tribunal concluded that after such thorough procedures they could not overrule the conclusions of the employer.

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

What may be regarded as a disproportionate/undue burden must be seen in the context of what a reasonable accommodation entails. The cost should be viewed not in isolation from the resources of the enterprise, but also in relation to the individual beneficiaries of such accommodation arrangements. Another factor to be taken into consideration is whether others can benefit from the measure. A measure that only marginally improves the situation for one person is more easily perceived as an undue burden if that measure cannot be used for others. In Equality Tribunal case DIN-2018-14, the accommodation was mainly to work less. The lack of accommodation was not seen as discrimination due to its consequences for colleagues and those receiving care.¹³⁰

It should be noted that Section 4-3 of the WEA contains provisions on reasonable accommodation, see section 2.6.a above on the implementation of the duty to provide reasonable accommodation. In practice, the WEA provisions are used more often than the GEADA in cases that concern reasonable accommodation. The provision in WEA Section 4-6 concerns the procedural duties when employees have reduced capacity for working, for example due to illness, accidents etc. and thus covers the same persons as the GEADA. As there are direct financial consequences regarding reimbursement of wages to the employee in question during the first year of reduced ability, it is more effective in ensuring reasonable accommodation than the provisions in the GEADA, and much more widely known.

c) Definition of disability and non-discrimination protection

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

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

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

¹³¹ As per the legal preparatory works; Proposition to Parliament, Prop. 88 L (2012-2013) *Diskrimineringslovgivningen*, p. 62. In practice, the right to individual accommodation which follows from the education legislation is more important as its complaints procedures are more efficient. See the preparatory works to the GEADA, Prop 81 L (2016-2017) Chapter 23.2.2, <https://www.regjeringen.no/no/dokumenter/prop.-81-l-20162017/id2547420/sec24>. However, while WEA Section 4-6 appears to be in accordance with the definition of disability in the GEADA, the rules on burden of proof in Chapter 13 on discrimination in the WEA do not apply directly to other chapters in the WEA. This is a good reason why it might be useful for lawyers to use the GEADA in addition to WEA Sections 4-3 and 4-6 more often, instead of focusing only on the WEA.

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

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

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

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

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

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

In Norway, there is a legal duty to provide reasonable accommodation for people with disabilities outside the area of employment, but only in selected areas. Section 21 of the GEADA provides the right of individual accommodation in schools and educational institutions, including higher education. This right is given to 'pupils and students with disabilities who attend a school or educational institution' and states that they will 'have a right to suitable individual accommodation of the place of learning, teaching, teaching aids and examinations to ensure equal training and education opportunities'.¹³²

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

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

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

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

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

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

In Norway, there is a legal duty to provide reasonable accommodation in respect of other grounds in the public and the private sector, but only for pregnant jobseekers, workers, pupils and students (GEADA Section 23). There is also a general rule in WEA Section 4-2 (2) b), which states that 'the work shall be organised and arranged with regard for the individual employee's capacity for work, proficiency, age and other conditions'. WEA Section 4-6 imposes duties on employers to accommodate any employee with 'reduced capacity for work as a result of an accident, sickness, fatigue or the like.' This means that reduced ability to work due to age in practice is covered, albeit without the divided burden of proof applicable to WEA Chapter 13 and the GEADA.

There is no duty to provide reasonable accommodation regarding religion or life stance, ethnicity or sexual orientation except what follows from the general rules regarding direct and indirect discrimination. However, a person who is a member of a religious group other than the Church of Norway may have two days off for religious reasons every year, according to the Act relating to religious communities (ARC) Section 18.¹³³ According to WEA Section 10-10 (5) it is also possible for an employee to make a written agreement with their employer on having a different working week for religious reasons, i.e. to work on Sundays and/or Saturdays in exchange for having other days of the week off based on a religious calendar.

Age in employment is covered by the WEA, which does not contain a clause on reasonable accommodation like the one in the GEADA. However, reduced ability to work due to age is in practice covered by the parallel duty for the employer to provide reasonable accommodation in general: WEA Article 4-6 imposes duties on the employer in respect of adaptations. The wording reads:

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

Section 23 of the GEADA introduced a specific duty to promote individual accommodation for pregnant jobseekers, workers, pupils and students. While the wording of the Section is the same as for people with disabilities, the preparatory works state that what is seen as an unreasonable burden should be interpreted in a very narrow fashion, in line with case law regarding pregnant workers pupils and students. For example, there are no openings for employers to claim an unreasonable burden during hiring or firing processes.¹³⁴

¹³³ Act relating to religious communities of 24 April 2020 no. 31, available in Norwegian at: <https://lovdata.no/lov/2020-04-24-31/§18>.

¹³⁴ See the preparatory works to the GEADA, Prop. 81 L (2016–2017) Law on equality and prohibition against discrimination, Chapter 23.9.3.

3 PERSONAL AND MATERIAL SCOPE

3.1 Personal scope

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

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

This has been specifically raised as an issue in relation to the grounds of protection of the Equality and Anti-Discrimination Act (GEADA): citizenship is not explicitly mentioned as a basis for discrimination under the GEADA and therefore requiring Norwegian citizenship does not fall within the prohibition of direct discrimination in Section 7 of the GEADA. Discrimination based on citizenship is however discussed in the act's preparatory works, which state that discrimination based on citizenship may be subject to the prohibition against indirect discrimination based on ethnicity.¹³⁵ It is left to the enforcement agencies to determine the point at which discriminatory treatment based on citizenship comes under the prohibition of indirect discrimination based on ethnicity etc. The Equality Tribunal or the courts must assess each case on its own merits. A case involving the requirement of Norwegian citizenship was assessed by the Equality Tribunal in case LDN-2006-18 (as described in section 3.2.10 below).

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

a) Protection against discrimination

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

b) Liability for discrimination

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

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

a) Protection against discrimination

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

¹³⁵ See the preparatory works to the GEADA, Prop. 81 L (2016-2017) Chapter 11.2.3.

b) Liability for discrimination

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

3.2 Material scope

3.2.1 Employment, self-employment and occupation

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

Section 29 of the GEADA explicitly states that the prohibitions against discrimination in its Chapter 2 apply to all aspects of an employment relationship, and that this 'applies correspondingly to employer's selection and treatment of self-employed persons and hired workers'. However, this does not include reasonable accommodation and universal design. Self-employed persons and hired workers are thus protected against discrimination, harassment and retaliation on the same level as ordinary employees, but do not have a right to reasonable accommodation.

The provisions of the anti-discrimination chapter of the WEA also cover the employer's selection and treatment of self-employed and contract workers (see Section 13-2(1) of the WEA), as well as the rest of the WEA unless otherwise explicitly mentioned (WEA Section 1-2(1)).

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

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

The scope of discrimination in employment under all the different acts (WEA, Section 13-2 and GEADA, Section 29) covers all aspects of employment from the initial advertisement of posts until the termination of the work contract, such as pay and working conditions, training and other forms of skill development, appointment, relocation and promotion.¹³⁶

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

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

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

¹³⁶ The SLA is more indirect, stating that the rules set out in Chapter 10 of the SLA 'shall apply correspondingly to the company's selection and treatment of persons working on board' (Section 10-2(2)), which in practice also covers self-employed persons working on board ship.

A 2020 Court of Appeal case¹³⁷ on age limits for doctors working for the Norwegian Search and Rescue Service is the first case to discuss whether the prohibition of age discrimination in the GEADA is applicable in employment cases not covered by the WEA. The court reasoned that the WEA is constructed differently from the GEADA and that its prohibition against discrimination should be used together with its chapters on wages etc. On this basis, the court concluded that types of employment not covered by the WEA regarding age discrimination were not covered by the GEADA either – in this case, positions in the armed forces. See section 12.2 below for a summary of the case.

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

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

Given the full factual scope of the GEADA (Section 2) as described above, the act covers all types and all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience.¹³⁸ The GEADA, Section 29 and the WEA, Section 13-2(1)(b) regarding age in employment, specifically cover training and other forms of skill development.

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

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

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

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

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

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

The GEADA covers 'all sectors of society' according to its Section 2(1), including social protection, including social security and healthcare. This means that disability, religion or belief and sexual orientation are also covered, in addition to race/ethnicity, in all these areas. Protection against age discrimination outside employment is covered by the

¹³⁷ LB-2019-190061.

¹³⁸ For practical and historical reasons, Section 29 of the GEADA contains the same list as Section 13-2(1) of the WEA concerning the various aspects of employment covered. This does not, however, limit the general scope of the GEADA in any way.

GEADA (Section 6), with the specific exception in Section 2(2), stating that the GEADA 'shall not apply to discrimination on the basis of age and circumstances regulated by Chapter 13 of the Working Environment Act'. In addition, Section 9(3) of the GEADA states that age limits specified in laws or regulations, and favourable pricing based on age, do not breach the prohibition in Section 6.

Most legislation, including that on social security, is neutral in terms of the existing grounds for discrimination. This is a challenge in contexts where, for example, men and women's choices in reality are different because of stereotypical gender roles in society, or where choices made by the minority population of specific ethnic or religious groups makes it difficult for the individuals of this group to access the protection afforded to the majority population. Thus, in the absence of any proactive measures, the result of these kinds of neutral systems might lead to differences in results because of individual choices. A system of neutral legislation leaves little room for compensating results of stereotypical individual choices based on gender, ethnicity, religion, disability etc. A challenge in terms of addressing discrimination in social security thus becomes an issue of defining what is meant by 'discrimination' and 'equality' in the interaction between anti-discrimination legislation and social security.

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

The WEA – age – does not extend to social security, and as such is in line with the exception in Directive 2000/78, Article 3(3). As the non-discrimination directives (2000/78 and 2000/43) are not incorporated in the EEA agreement, the specific exceptions allowed under the directives have not been clearly articulated. It should, however, be noted that discrimination on the basis of age is covered by the GEADA in all sectors other than employment, but with the exception that age limits in laws or regulations shall not be considered to be in breach of the prohibition against discrimination (GEADA, Section 9(3)).

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

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

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

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

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

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

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

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

In Norway, national legislation prohibits discrimination in education as formulated in the Racial Equality Directive.¹³⁹

The anti-discrimination legislation on ethnicity, religion or belief, disability and sexual orientation (see Sections 2 and 6 of the GEADA), also covers all aspects of education including all types of schools, both public and private, given the full factual scope of the act as described above. Age is partly covered, as age limits following from laws or regulations are explicitly seen as permissible differential treatment in Section 9(3) of the GEADA.

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

The general approach to education for children with disabilities in Norway attempts to handle the needs of disabled children within the mainstream public education system, but also has a network of segregated 'special' education for those children unable to benefit from a more 'mainstream' approach. The downside to this solution is twofold: first, there is a lack of universal design in most schools,¹⁴⁰ and secondly, there is a lack of knowledge at the level of individual schools.

All children have a right to free education in Norway, as stated in the Education Act.¹⁴¹ Children have the right to go to school in the community where they live (Section 8-1). An exception is made for deaf students with sign language as their first language, as they are given the right to special instruction and education, under Section 2-6. The access to education for this group of children suffered during the COVID-19 lockdowns.¹⁴²

The school has a general duty to adapt all education and instruction for each student, depending on the individual's abilities and aptitudes. If this special adaptation is not enough and does not give each individual pupil sufficient educational training, the pupil will be entitled to special education (Section 5-1).

The challenge in Norway is practical aspects related to giving disabled children an equal education. Despite well-developed legislation in the field of education, the practical implementation is not always optimal for disabled children. This is partly because well-intended administrative decisions are not always complied with, and partly because of a lack of necessary resources and qualified personnel.¹⁴³ The actual practice in schools allowing full or part segregation of disabled children from the other students is being

¹³⁹ Migrant minors with residency rights in Norway have a right to enrol in the Norwegian educational system. Adult migrants with a residence permit, who do not have basic primary education, are entitled to enrol in the Norwegian primary school system free of charge and receive a monthly allowance/ subsidy from the welfare system during primary education.

¹⁴⁰ The anti-discrimination and equality unit of the Directorate for Children, Youth and Family Affairs commissioned a socioeconomic analysis of universal design of primary and secondary schools, which was published in 2018: BufDir and Oslo Economics (2018) *Samfunnsøkonomisk analyse av universelt utformet grunnskole*, available in Norwegian at https://www.bufdir.no/globalassets/global/Samfunnsokonomisk_analyse_av_universelt_utformet_grunnskole_i_2030.pdf.

¹⁴¹ Act on primary and secondary education of 17 July 1998 No. 61, see <http://www.ub.uio.no/ujur/ulovdata/lov-19980717-061-eng.pdf>.

¹⁴² According to their parents. See Caspersen, J. (2021) *Håndtering og konsekvenser av koronapandemien i grunnskolen* (The response to and consequences of the COVID-19 pandemic in primary education), Oslo, the Directorate for Education (Udir). Available at: [Håndtering og konsekvenser av koronapandemien i grunnskolen \(udir.no\)](https://www.udir.no/handtering-og-konsekvenser-av-koronapandemien-i-grunnskolen).

¹⁴³ See Wendelborg, C. og Tøssebro, J. (2010), 'Marginalisation processes in inclusive education in Norway – a longitudinal study of classroom participation', *Disability and Society*, 25 (6), 701-714. See also a number of reports in Norwegian: Norwegian Federation of Organisations of Disabled People (FFO) (2008), 'Rett til spesialundervisning i praksis? En rapport om spesialundervisning i grunnskolen og videregående skole', at http://ffo.no/globalassets/rapporter/rapport_spesialundervisning.pdf.

noted as an area of concern in the shadow report of civil society/disabled people's organisations to the UNCRPD committee.¹⁴⁴

a) Trends and patterns regarding Roma pupils

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

The Government action plan to improve the situation of the Roma in Oslo also includes elements related to schooling.¹⁴⁵ This includes both specific education in Norwegian as well as mother-language training according to Section 2-8 of the Education Act and Section 3-5 of the Private Education Act. However, data from the education information system shows that no Roma children use this right, as mentioned in the action plan. These figures might be misleading, as the count takes place annually on 1 October, when many Roma still are travelling. A project on the right to adult education for Roma in Oslo is referred to in the action plan as a positive initiative. The initiatives in schools include giving children computers for remote-distance education, home education and production of relevant educational material. There are 71 registered Roma pupils in 22 schools in Oslo, out of a total Roma population in Norway of about 700 persons. These services extend in principle to immigrant Roma children as well. However, a key issue in Norway in relation to Romanian Roma is that they visit Norway on a tourist visa and leave the country when their tourist visa expires.

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

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

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

The first court case in which a provider of goods and services was penalised in accordance with the Penal Code, Section 186 on discriminatory services because of religion, was assessed by the courts in 2016-2017, in which the service provider was issued a small fine for a case involving religious clothing (hijab).¹⁴⁶

¹⁴⁴ See Civil Society Coalition Norway (2019) *Alternative Report to the Committee for the Rights of People with Disabilities*. Available at https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCRPD%2fCSS%2fNOR%2f33866&Lang=en.

¹⁴⁵ See (in Norwegian) <https://www.regjeringen.no/no/dokumenter/Handlingsplan-for-a-bedre-levekarene-for-rom-i-Oslo/id594315/>. An evaluation of the action plan was carried out in 2014, but a new action plan has not been drafted yet (March 2019), see Tyldum, G. and Horgen Friberg J. (2014), 'Et skritt på veien', Fafo-rapport no. 50:2014 at <http://www.fafo.no/index.php/nb/zoo-publikasjoner/fafo-rapporter/item/et-skritt-pa-veien>.

¹⁴⁶ *Jæren tingrett* (Jæren district court), *Public prosecutor v. A*, Case TJARE-2016-96260, judgment of 9 September 2016. In this case, a hairdresser had refused a hijab-dressed woman her services. What was said in the situation is disputed, but the parties agree that two hijab-clad young women came to the hairdresser's salon. As they entered the hair salon, they asked the price of a hair colouring. The hairdresser said either: 'I do not take on people like you, go to another hairdresser' or 'Get out, I do not want to touch someone like you'. The women then walked away and reported the incident to the police, who fined the

a) Distinction between goods and services available publicly or privately

In Norway, national law distinguishes between goods and services available to the public (e.g. in shops, restaurants and banks) and those only available privately (e.g. those restricted to members of a private association). There have been a number of cases on this before the Ombud and Equality Tribunal.¹⁴⁷

There was a general exception until the GEADA entered into force on 1 January 2018, such that the legislation regarding grounds other than gender did not cover family life and purely personal relationships.¹⁴⁸ In the legal preparatory works to the previous legislation, it was specified that small local clubs and associations that were not directed towards the public, but only directed toward limited groups of people were assumed to fall under the exception of 'purely personal relationships'.¹⁴⁹ These included poker games, a reading circle or small closed friendship-clubs. If the goods and services were directed towards the public in general, the prohibition against discrimination still stood.

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

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

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

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

More specifically, the Tenancy Act states that the above-mentioned grounds cannot be considered just cause for refusing to accept a lease, sub-lease, or a member of a

hairdresser NOK 8 000 (approx. EUR 963). As the hairdresser refused to pay the fine, the case was taken to court by the public prosecutor. The hairdresser was sentenced to pay a fine of NOK 10 000 (approx. EUR 1 250) and NOK 5 000 (approx. EUR 500) in legal costs to the state for refusing a hijab-clad woman access to her store, as this was found to constitute discrimination on the ground of religion. The case was appealed to the Gulating appellate court, which, in judgment LG-2016-164427 sentenced the hairdresser to a fine of NOK 7 000 (approx. EUR 900). An appeal to the Supreme Court was rejected by Decision HR-2017-534-U of 10 March 2017.

¹⁴⁷ According to an email to the author from the Equality Ombud (5 April 2019), out of a total of 2 035 inquiries in 2018, 266 (13 %) were related to goods and services.

¹⁴⁸ The term 'family life' refers mainly to what happens within the family, i.e. between current or previous spouses or couples, between parents and children, such as for example the rearing of children, the distribution of responsibilities and tasks between spouses, private agreements regarding children after a divorce, etc. The term 'purely personal relationships' means, for example, the choice of lovers or friends, or private parties or activities which are not open to the public. Proposition to Parliament, Prop. 88 L (2012-2013) Chapter 9.1.2.4, available in Norwegian at <https://www.regjeringen.no/no/dokumenter/prop.-81-l-20162017/id2547420/sec10#kap9-1>.

¹⁴⁹ As per the preparatory works to the ADA, Proposition to the Odelsting No. 33 (2004-2005) p. 204, and the preparatory works to the AAA, Proposition to the Odelsting Ot. Prp. No. 44 (2007-2008) p. 78 and the preparatory works to the SOA, Proposition to Parliament, Prop. 88 L (2012-2013) p. 59.

household, and for transferring a lease to another person. Furthermore, these grounds cannot be invoked for terminating a lease. The act covers rentals for private, public and business purposes. The prohibition against discrimination did not apply to letting a room in one's own home, as the ADA did not cover personal relationships, but this changed with the GEADA on 1 January 2018. According to Section 2 of the GEADA, the act covers all areas of society.

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

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

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

Regulations have been approved under the Act on Planning and Building¹⁵⁰ regarding housing accessible to people with disabilities and older people.

a) Trends and patterns regarding housing segregation for Roma

In Norway, there are no known patterns of housing segregation and discrimination against the Norwegian Roma. In her 2018 report to the ICERD committee, the Ombud states that: 'There is insufficient documentation about the population's attitudes to the other four national minorities in Norway other than Jews: the Roma, Romani people, Kvens, and Forest Finns.'¹⁵¹ In a 2015 study on discrimination against various national minorities and immigrants in Norway, 'Roma continue to report discrimination, including in connection with housing.'¹⁵² In a white paper on national minorities from 2020, the Government commits to investigating discrimination issues for Roma concerning housing.¹⁵³

In an Equality Tribunal case, a housing cooperative refused to consent to an apartment in the cooperative being rented to A, a person of Roma background.¹⁵⁴ The person who wanted to let the apartment had said that they had wanted him as tenant, but that they could not after receiving a text message from the head of the board of the cooperative, which stated that the board would not consent to 'gypsies' as tenants. The board was made aware of the prohibition against discrimination by the Roma NGO, Romtiltaket, and apologised for their message. The apartment was then let to A's sister. The Equality Tribunal consider this constituted discrimination on the basis of ethnicity.

¹⁵⁰ Act relating to planning and the processing of building application/ building of 27 June 2008 No. 71, at (translation date as of January 2010) <https://www.regjeringen.no/en/dokumenter/planning-building-act/id570450/>.

¹⁵¹ Norwegian Equality and Anti-discrimination Ombud (2018) *ICERD 2018: the Ombud's Report to the UN Committee on the Elimination of Racial Discrimination – a supplement to Norway's 23rd/24th Periodic Report*, Chapter 2.1.4. Available at https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/NOR/INT_CERD_IFN_NOR_32892_E.pdf.

¹⁵² Midtbøen, A. and Lidén, H. (2015) *Diskriminering av samer, nasjonale minoriteter og innvandrere i Norge. En kunnskapsgjennomgang* (Discrimination against the Sámi, national minorities and immigrants in Norway: A knowledge review) Norwegian Institute for Social Research, Report 2015:01.

¹⁵³ Norwegian Government (2021), *Melding til Stortinget. Meld.St. 12 (2020-2021) Nasjonale Minoriteter i Norge. En helhetlig politikk.* (White paper to the Parliament, Meld.St. 12, National Minorities in Norway. A comprehensive policy) Chapter 4.1.4.

¹⁵⁴ Equality Tribunal, LDN-2014-94.

4 EXCEPTIONS

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

4.1 Genuine and determining occupational requirements (Article 4)

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

There is a general exception in Section 9(2) of the GEADA for genuine and determining occupational requirements for all protected grounds, including disability, which is in line with Section 4(1) of Directive 2000/78. Age within the employment sector is protected in the WEA Section 13-3 (for more on this, see section 4.7 below).

There have been several cases on genuine and determining occupational requirements, mostly regarding language or medical requirements. The majority of these cases were assessed by the Ombud only, such as case 09/1609 regarding medical requirements for drivers of locomotives (which were deemed genuine and necessary),¹⁵⁵ and case 14/153 where a municipality required a language test for a number of employees without any specific assessment, thus not having justified that the requirement was genuine and determining.¹⁵⁶ Compared to the 2014 legislation, the GEADA states more clearly that direct differential treatment is only allowed for genuine and determining operational requirements. This lack of clarity in the legislation preceding the GEADA has probably contributed to the differences in the results of cases assessed by the Equality Tribunal regarding the difference between direct and indirect discrimination (described in section 2.2.a above). As seen in these cases, which all concerned language requirements, there is also a lack of clarity on what are genuine and determining occupational requirements, as exemplified by the Equality Tribunal case regarding the refusal to shake hands with women on the basis of religious convictions.¹⁵⁷

There have been a number of cases concerning language requirements, which the Equality Tribunal has treated as both direct and indirect differential treatment. The Tribunal tends to defer to the employer's judgement on whether specific levels of knowledge of Norwegian are genuine and determining occupational requirements in any given situation. For example, in case DIN-2019-32, a nurse who had lived in Norway since 2001 and had received her education here was required to pass a test of her Norwegian skills when applying for a position. This was direct differential treatment since the only basis for this requirement was her ethnicity. The tribunal found that the requirement to pass the test was both legitimate and proportionate, on the basis that the employer is the one who should determine the language level that is required for any given position. The Equality and Anti-Discrimination Ombud has later criticised the tribunal for not looking into why there had been no individual assessment in this situation and why no reason had been given as to why no such assessment had been done.¹⁵⁸

¹⁵⁵ Available in Norwegian at <https://www.ldo.no/nyheter-og-fag/klagesaker/2010/Helsekrav-for-opptak-til-lokomotivforerutdanningen-ikke-diskriminerende/>.

¹⁵⁶ At <https://www.ldo.no/forebygg-i-arbeidslivet/Ansettelse-og-oppsigelse/Lover-og-regler1/Ansettelse/> the Ombud presents a number of examples of requirements that are allowed or prohibited, but without reference to individual cases.

¹⁵⁷ Equality Tribunal, DIN-2018-48. A was temporarily employed as an assistant at a school. From the beginning he had made it clear that he did not shake hands with women on the basis of his religious convictions. His contract was not renewed due to this refusal. The majority of the members of the tribunal interpreted the school's actions as indirect differential treatment and concluded that it was necessary to demand that he shook hands with women. The minority of the tribunal saw the school's dismissal as direct differential treatment, and unjustifiable. None of the tribunal saw the possibility of not shaking hands with anyone as a solution.

¹⁵⁸ See their report on developments in discrimination law in 2020: Likestillings- og diskrimineringsombudet (2021) *Diskrimineringsretten 2020. Rettsutvikling på likestillings- og diskrimineringsfeltet, med*

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

In Norway, national law provides for an exception for employers with an ethos based on religion or belief, which is not specific in the revised current legal text, but follows from the legal preparatory works.¹⁵⁹

Religious organisations have the right to set their own teachings, religious rituals, religious education and choice of religious leaders and this would still be accepted as a part of lawful differential treatment, see Section 9 of the GEADA.^{160 161}

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

The scope of this exception is specified in relation to the advertisements of such positions, as it is stated that employers may ask information regarding the applicant's stance on religious or cultural issues if the nature of the position so requires, or if it is part of the purpose of the enterprise concerned to promote specific religious or cultural views and the stance of the employee will be significant for the accomplishment of the said purpose (GEADA, Section 30(2)). It follows from the Church Act that, as an employer, the Church of Norway has the right to require that its employees are members of the church for confessional/ religious positions (see Section 29 of the Church Act).¹⁶²

A comprehensive white paper¹⁶³ was published in September 2016 regarding the consequences of a conscience-based refusal by employees to carry out tasks in their work that are contrary to their beliefs, and the question of reservations on the basis of religious convictions at the workplace was also addressed in the preparatory works to the Act on religious communities, which entered into force on 1 January 2021.¹⁶⁴ The main rule is that if you accept a position, you accept that you will perform all the tasks required in this position. Another main rule is that a refusal to accept a job for religious reasons means forfeiting the right to social benefits due to unemployment. However, some convictions are so deep that it would be unreasonable not to make exceptions. No general rule has been recommended regarding the right to reservation on the basis of deeply felt religious or non-religious convictions, although the paper recognised the need for legislation in particular areas. For example, under the current Abortion Act, Section 14 states that when organising the hospital service 'weight shall be given to health

gjennomgang av relevante lovendringer, forvaltnings- og rettspraksis, p. 32. Available in Norwegian at [Diskrimineringsretten 2020 : rettsutvikling på likestillings- og diskrimineringsfeltet, med gjennomgang av relevante lovendringer, forvaltnings- og rettspraksis \(ldo.no\)](https://www.regjeringen.no/no/aktuelt/diskrimineringsretten-2020-rechtsutvikling-paa-likestillings-og-diskrimineringsfeltet-med-gjennomgang-av-relevante-lovendringer-forvaltnings-og-rettspraksis/id2510546/).

¹⁵⁹ See the legal preparatory works; Proposition to Parliament, Prop 79 (2008-2009) Chapter 6.1.3.3.

¹⁶⁰ See the legal preparatory works; Proposition to Parliament, Prop. 88 L (2012-2013) Chapter 12.4.2.2, p. 88 and Proposition to Parliament, Prop 81 L (2016-2017) *Lov om likestilling og forbud mot diskriminering (likestillings- og diskrimineringsloven)* Chapter 14.2.5, pp. 120-121.

¹⁶¹ It should be noted that on 1 January 2021, a new Act relating to religious communities of 24 April 2020 no. 31 entered into force, which provided for the withdrawal of financial support from the Norwegian state to religious communities if they do not comply with the anti-discrimination legislation and the rights of children etc. The religious communities also have to report on differential treatment on the basis of all grounds, including sexual orientation and gender, in order to receive funding. Emphasis is put on dialogue and training, and funding will not be automatically removed if reporting etc. is lacking.

¹⁶² Church Act of 7 June 1996 No. 31.

¹⁶³ Norwegian Government (2016) *Samvittighetsfrihet i arbeidslivet* (Freedom of conscience in working life - white paper), NOU 2016:13. Available (in Norwegian) at <https://www.regjeringen.no/no/aktuelt/samvittighetsutvalget-overleverte-utredning-om-samvittighetsfrihet-i-arbeidslivet/id2510546/>.

¹⁶⁴ Proposition to Parliament, Prop 130 L (2018-2019) Chapter 9.3, available in Norwegian at [Prop. 130 L \(2018-2019\) \(regjeringen.no\)](https://www.regjeringen.no/no/aktuelt/prop-130-l-2018-2019/id2510546/).

personnel who want to be exempt from these services for conscientious rights'. A similar statement of principle is made in the Act on ritual circumcision of boys (Section 4). The preparatory works to the new Act on religious communities refer to the GEADA as the relevant legislation to guide the solution in individual cases,¹⁶⁵ and that three issues should receive particular attention in determining such cases: 1) the depth of the conviction; 2) whether a reservation can be made without any consequences for third parties,¹⁶⁶ and 3) whether it can be made without unreasonable consequences for colleagues and the employer.¹⁶⁷

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

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

In Norway, there is a specific provision relating to conflicts between the rights of organisations with an ethos based on religion or belief and other rights to non-discrimination in Section 30(3) of the GEADA in the context of employment. The first paragraph in Section 30 prohibits employers from asking about religion or life stance, or sexual orientation, gender identity or gender expression. According to Section 30(3),

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

There is case law from the Equality Ombud, some of which provided the basis for her handbook on religion at work, which has several pages devoted to the religious groups and to what extent they are allowed to differentiate on the basis of gender and sexual orientation.¹⁶⁸

For general employment in positions in religious organisations that have no bearing on the organisation itself, it is not allowed either to ask or emphasise religious affiliation, gender or sexual orientation. This is the case for positions such as caretakers or cleaners in churches/religious organisations. This approach has been confirmed in several cases brought before the Equality Ombud¹⁶⁹ and the Equality Tribunal, but the issue has not been brought before Norwegian courts. In Equality Tribunal case LDN-2013-29, a municipal church council was found to have breached the prohibition against harassment on the basis of sexual orientation. They had recently hired a woman who was married to another woman for a post in which she was responsible for faith education in the parish. This created a lot of debate in the parish, and during their annual meeting, where any member could attend, her choice of living arrangements was under formal debate. This

¹⁶⁵ Proposition to Parliament, Prop 130 L (2018-2019) Chapter 9.3.4, available in Norwegian at: Prop. 130 L (2018-2019) ([regjeringen.no](https://www.regjeringen.no))

¹⁶⁶ This includes discrimination issues concerning other grounds, for example gender and sexual orientation, as well as the dignity of the person concerned. See Norwegian Government (2016) *Samvittighetsfrihet i arbeidslivet* (Freedom of conscience in working life - white paper), NOU 2016:13, chapter 9.4.1. Available (in Norwegian) at <https://www.regjeringen.no/no/aktuelt/samvittighetsutvalget-overleverte-utredning-om-samvittighetsfrihet-i-arbeidslivet/id2510546/>.

¹⁶⁷ Proposition to Parliament, Prop 130 L (2018-2019) Chapter 9.3.4, available in Norwegian at [Prop. 130 L \(2018-2019\)](https://www.regjeringen.no) ([regjeringen.no](https://www.regjeringen.no)).

¹⁶⁸ See Equality Ombud (2016) *Religion and Beliefs in the Workplace*, Chapter 12. Available at <http://www.ido.no/nyheiter-og-fag/brosjyrer-og-publikasjoner/brosjyrer/Religion-og-arbeid/>.

¹⁶⁹ See the Equality and Anti-Discrimination Ombud, Case No. 08/1023 on a cleaner in an evangelical Lutheran church (not accepted), Case No. 10/779 on a gymnastics teacher in a religious (Christian/ Lutheran) boarding school (accepted), and Case No. 10/761 on teachers of Spanish/math/computer science in a private Christian (Lutheran) high school (accepted).

was not a general discussion of sexual orientation, but was a discussion of her particular life choices and sexual orientation. She had been told before the meeting that her living arrangements, and thereby also her sexual orientation would be discussed during the meeting to which her response had been that it was unacceptable to discuss such things in this type of meeting. The church council was partly responsible for her as an employer and the participants at the meetings were people who she would have to meet when performing the work of the council, so it had a duty to actively prevent such demeaning treatment of one of its employees.

4.3 Armed forces and other specific occupations (Article 3(4) and Recitals 18 and 19 Directive 2000/78)

In Norway, national legislation provides for an exception for the armed forces in relation to age discrimination (Section 3(4), Directive 2000/78). Norwegian nationality is also required.¹⁷⁰

National law provides an exception for the armed forces in relation to age discrimination as the Armed Forces Act, Section 44(2) states that 'Military personnel are exempt from the prohibition on age discrimination according to WEA, Section 13-1.'¹⁷¹ In the legal preparatory works to the WEA, it was stated that:

'The directive gives an opportunity for national legislation to provide for an exception for the armed forces in relation to age or disability discrimination. This gives an opportunity to, but not a duty to except the armed forces. The context of directive 3 no 3 and 4 is not explicitly included in the legislative proposal. The reason for this is that these provisions contain rules that are not a natural part of the provisions of the WEA.'¹⁷²

In Norway, the scope of the exception is limited to safeguarding the combat effectiveness of the armed forces. According to the Armed Forces Act, Section 44(2), military employees are excepted from the prohibition against discrimination on the basis of age in WEA Section 13-1. According to the preparatory works, this only means officers in the armed forces.¹⁷³

In Norway, the scope of the exception does not extend to other non-combat staff, such as civilians employed in administrative positions in the army. Court of Appeal case LB-2019-190061¹⁷⁴ concerned a doctor working for the Norwegian Search and Rescue Service (organised as squadron 330 of the armed forces), and whether the age limit of 60 years for such doctors was valid. His employment was not seen as part of the exemption for the armed forces by the Court of Appeal, contrary to the decision by the municipal court,¹⁷⁵ since this is a general emergency search and rescue service even though it is organised under the armed forces. The court also stated that when differential treatment on the basis of age in employment is not prohibited by the WEA, it is also not covered by the prohibition against age discrimination in the GEADA. The WEA Section 1-2 (2) states that military aviation, which is within the scope of the Aviation Act,¹⁷⁶ is exempted from the scope of the WEA altogether. The fact that employment

¹⁷⁰ Armed Forces Act of 12 August 2016, No. 7, Section 44(3). The Ministry of Defence may, according to Section 44(7), make regulations providing exceptions to this rule. This has not been done as of May 2021.

¹⁷¹ Armed Forces Act, 12 August 2016, Section 44(2).

¹⁷² See the preparatory works to the previous WEA on equality in employment, Proposition to the *Odelsting* No. 104 (2002-2003), Section 8.1.2 page 23.

¹⁷³ Proposition to Parliament, Prop. 102 L (2015-2016) *Lov om verneplikt og tjeneste i Forsvaret m.m. (forsvarsloven)*, Chapter 10.1.1, available in Norwegian at [Prop. 102 L \(2015-2016\) - regjeringen.no](https://lovdata.no/dokument/Prop/20152016/L0102).

¹⁷⁴ See section 12.2 below for more information about the case.

¹⁷⁵ TOSLO-2019-69527.

¹⁷⁶ The Act relating to aviation of 11 June 1993 no. 101, available in Norwegian at [Lov om luftfart \(luftfartsloven\) - Lovdata](https://lovdata.no/dokument/Lov/19930611-101), and in English at [Act no. 0101 of 11 June 1993 relating to Aviation \(Aviation Act\) - regjeringen.no](https://lovdata.no/dokument/Lov/19930611-101).

discrimination on most grounds is regulated by the GEADA, while the other parts of the WEA may be applicable, was not taken into consideration. The consequence of this ruling appears to be that there is a gap in the anti-discrimination legislation, where employment in military aviation is not covered by any of the acts prohibiting discrimination on the basis of age. This is only the case for personnel who perform military duties, and not, for example, doctors or administrative personnel.

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

The question of disability discrimination in the armed forces has never been tried before the courts, although an attempt to do so was made by an association for people with ADHD.¹⁷⁷ This was not successful, as current recruits with ADHD are not given an individual assessment for being able to enter military service, but are categorised as being unfit for war-time service by virtue of their diagnosis. The Equality and Anti-Discrimination Ombud took this issue to the Equality Tribunal in 2019, but no decision was made since the armed forces ceded the point that this requirement was discriminatory. However, during the internal proceedings to change this requirement, the armed forces concluded that the requirement was necessary.¹⁷⁸

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

4.4 Nationality discrimination (Article 3(2))

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

a) Discrimination on the ground of nationality

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

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

Nationality, in the sense of citizenship, is not included in the definitions of discrimination grounds of the GEADA,¹⁷⁹ as was the case with the ADA.¹⁸⁰

As explained above on the definition of ethnicity, the legal preparatory works make it clear that 'national origin', as grounds for discrimination, is closely associated with the

¹⁷⁷ The association ADHD Norway initiated a case against the state/the Equality Tribunal before the Oslo City court, claiming that the tribunal's decision in its Case LDN-2011-25 on the assessment of the introduction course for military recruits in the armed forces was invalid. As the introduction scheme was marginally changed after the decision of the tribunal, the appellate court in Case LB-2013-142603 rejected the case, as it found that the decision of the tribunal was not a live controversy. The dispute was by verdict rejected from court assessment based on a lack of a genuine need to have the case determined, as per the RDA Section 1-3. This verdict was appealed to the Supreme Court, which, in case Rt. 2014-480, found that the tribunal did not have a mandate to make a decision in the case, and that the tribunal – erroneously – had made a decision where it should have issued an opinion. It is not possible to refer an opinion to the courts.

¹⁷⁸ Equality Tribunal, DIN-2019-13.

¹⁷⁹ See the legal preparatory works; Proposition to Parliament, Prop 81 L (2016-2017) *Lov om likestilling og forbud mot diskriminering (likestillings- og diskrimineringsloven)* Chapter 11.2.3.3 p. 82.

¹⁸⁰ See Norwegian Government (2012) *Legal protection against ethnic discrimination* (white paper) NOU 2002:12, p. 34.

term ethnicity, and as such, nationality as a ground is protected under ethnicity. Statelessness is also covered.¹⁸¹

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

National law, under Section 6 of the GEADA protects 'national origin' as one of the interpretations of the concept 'ethnicity'. Nationality – other than Norwegian – is in reality thus a protected ground through judicial interpretation, within the context of 'ethnicity' as the protected ground. See for example Equality Tribunal case LDN-2006-18, which concerned a housing advert posted by a private landlord on the national website used for selling and letting houses (www.FINN.no), which stated; 'only Norwegian citizens need apply'. This was considered indirect discrimination on the basis of ethnicity.

Similarly, people who lack a nationality- the stateless - can also have their case heard. The Equality Ombud assessed the question of indirect discrimination against a stateless employee on the basis of ethnicity.¹⁸² As the employee was not entitled to a Norwegian personal id-number, he was refused a permanent access card for working in a business leasing employees to other employers, thus he was fired. The employer (the leasing company) claimed that the dismissal/ rejection was based on the fact that the employee as an asylum-seeker did not have a personal id-number, and thus could not be registered in the internal tax and salary systems of the firm. The Ombud considered that the requirement to have a personal id-number/ social security number was an apparently neutral rule. Nevertheless, the lack of a personal id-number led to the person being put in a worse position than others. There was a clear connection between his lack of personal identity number and his national origin. The company later changed its practice so that people who lack a personal id-number/ social security number, but hold a DUF number (a registration number issued by the immigration board) and work permit can take up employment in the company.

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

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

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

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

4.6.1 Direct discrimination

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

a) Exceptions to the prohibition of direct discrimination on grounds of age

¹⁸¹ See Decision of the Equality Ombud in Case No. 09/892 of 3 May 2012. In its Case 28/2015 of 29 September 2015, the Equality Tribunal found that demanding a Norwegian or Swedish criminal record check from 18 years of age to follow job-applications to a security company constituted indirect discrimination because of nationality in breach of Section 6 of the ADA. In reality, the demand from the security company signified that the company only accepted applicants that had been Norwegian or Swedish citizens since the age of 18. The practice was seen as discriminatory vis-à-vis both EU citizens and third country nationals, that is everyone who is not a Norwegian or Swedish citizen.

¹⁸² Equality Ombud, Case No. 09/892, statement of 3 May 2012.

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

According to the GEADA Section 9(3), age limits specified in laws or regulations, and favourable pricing based on age, do not breach the prohibition against differential treatment based on age outside employment in Section 6. This concerns age limits outside employment. However, there are several age limits within employment as well, which will be described below (see section c).

b) Justification of direct discrimination on the ground of age

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

The general exception in the WEA states that discrimination that has a just cause, does not involve disproportionate intervention in relation to the person or persons so treated and that is necessary for the performance of work or profession, will not be regarded as discrimination, as provided by Section 13-3(1) of the WEA. Outside employment, the GEADA Section 9 allows some differential treatment on the basis of age when it a) has an objective purpose, b) is necessary to achieve the purpose, and c) does not have a disproportionate negative impact on the person or persons subject to the differential treatment. The law does not list potential legitimate aims.

The test is in principle compliant with the test used by the Court of Justice in the *Mangold* case,¹⁸³ as the Norwegian Supreme Court referred explicitly to the *Mangold* test in its first judgment on age discrimination.¹⁸⁴

In case LB-2019-190061,¹⁸⁵ the complainant, A, had to stop working as a doctor for the Norwegian Search and Rescue Service (organised as squadron 330 under the Norwegian Ministry for Defence), due to the age limit of 60 years. This age limit was set forth in the cooperation agreement between squadron 330, the Norwegian Air Ambulance and the regional health administration in question. The Court of Appeal found that his employment was within the scope of the WEA Chapter 13 on discrimination, even though it was technically within the armed forces, referring to Directive 2000/78/EF¹⁸⁶ and emphasising that the scope of WEA Section 13-3 must not be interpreted more narrowly than the directive.¹⁸⁷

The court went on to consider whether the age limit had a legitimate aim and was necessary to achieve that aim. The aim of the age limit is to ensure the health and safety of the patients. The doctors working on helicopter ambulances often have to work under physically and mentally challenging conditions, sometimes of long duration. Although the doctors are part of a team, there is only one doctor per team, and they will have to, for example, be able to climb up and down mountainsides and give immediate medical aid under difficult conditions.

The court referred to C-229/08 (*Wolf*) on not using routine situations as the bar, but situations that are particularly challenging and that are bound to occur from time to time, and which the Norwegian Search and Rescue Service are the only ones able to perform. The age limit for military personnel is 60 years, and since the search and rescue service is organised under the Norwegian army, it was deemed logical to set the same age limit for medical doctors on the teams. The court saw individual testing as insufficient to

¹⁸³ CJEU, judgment of 22 November 2005, *Mangold v Helm*, C-144/04, EU:C:2005:709.

¹⁸⁴ See Supreme Court judgment of 18 February 2010, Rt-2010-202 (*Nye Kystlink*).

¹⁸⁵ Available in Norwegian at [Borgarting lagmannsrett - Dom: LB-2019-190061 - Lovdata](#). Login required.

¹⁸⁶ As interpreted in Supreme Court judgment Rt-2012-219, section 46.

¹⁸⁷ It should be noted that this directive is not directly binding on the Norwegian Government through the EEA agreement.

achieve the goal alone, due to the increased risk of sudden health issues that comes with age. The fact that two private companies providing the same service do not have such an age limit was seen as irrelevant on the basis of their contracts being a temporary solution due to limited capacity in squadron 330, and the age limit being otherwise consistently upheld over time and in all regional health units.

The court further distinguished the case from C-447/09 (*Prigge*) on the basis that in *Prigge*, the age limit of 60 years in question differed from national and international age limits, which were of 65 years. The court thereby concluded that the age limit was justified and necessary. Since A could continue working in other positions as a doctor, the age limit was not seen as disproportionate either, even though there are no extra pension rights because of the age limit. The final conclusion was thus that the age limit was not in breach of the WEA Chapter 13 on discrimination.

c) Permitted differences of treatment based on age

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

The WEA Section 1-2 exempts civil servants from its scope regarding retirement age and a number of other rules, covered instead by the Civil Servants Act. The Age Limits for Civil Servants Act¹⁸⁸ sets forth several age limits for civil servants, with a maximum age limit of 70,¹⁸⁹ and several lower limits for positions that are particularly demanding mentally or physically or require particular mental or physical capabilities.¹⁹⁰ In June 2020, it was suggested that the special age limits in these two acts should be removed¹⁹¹ and in a later hearing it was proposed that the general age limit be changed to 72 years.¹⁹²

There have been a number of court cases regarding the legality of age limits, including the Supreme Court judgment of 14 February 2012, Rt-2012-219, the 'helicopter' judgment. The question was whether the employer could require, based on a collective agreement, that its helicopter pilots retire at age 60. The court found that following the *Prigge* judgment, safety or health reasons cannot justify the 60-year age limit for helicopter pilots. The Supreme Court also stated that the other considerations, such as a dignified retirement, the rapid career advancement of younger pilots and protecting a good pension scheme were not sufficiently weighty to require that pilots stopped working at the age of 60. This is in contrast to a previous Supreme Court judgment of 5 May 2011 Rt-2011-609, HR-2011-910-A (*SAS-pilotene*) described below in section 4.7.5.a.

Protection against age-discrimination is provided in Norway within working life, in line with Directive 2000/78, in WEA Chapter 13. Protection against age-discrimination outside

¹⁸⁸ Act on Age Limits for Civil Servants and others of 21 December 1956 no. 1, available in Norwegian at [Lov om aldersgrenser for offentlige tjenestemenn m.fl - Lovdata](#). The responses to the hearing were still under consideration by the Government by the end of 2020.

¹⁸⁹ If the person is still qualified for the position, the main rule is that they may remain in this position for first two, then one more year at a time, up to a total of 5 years (Act on Age Limits for Civil Servants and others of 21 December 1956 no. 1 Section 3. The authority to make such a decision belongs to the employer.

¹⁹⁰ There are other age limits as well, such as for nurses and officers in the armed forces, as described earlier.

¹⁹¹ See Norwegian Government, Hearing – proposal of removing the duty to retire at the age limit for persons with lower age limits than the general age limit for civil servants, 23 June 2020. [Høring – Forslag om å fjerne plikten til å fratre ved aldersgrensen for personer med lavere aldersgrense enn den øvre aldersgrensen i staten - regjeringen.no](#).

¹⁹² See Norwegian Government, Hearing – proposal on changing the upper age limit for civil servants from 70 to 72 years, 3 December 2020, available in Norwegian at [Høring - forslag om å øke den øvre aldersgrensen i staten fra 70 til 72 år - regjeringen.no](#).

working life is included in Section 6 of the GEADA.¹⁹³ This protection has extensive exceptions, as age limits specified in law or regulations and favourable pricing based on age do not breach the prohibition in Section 6, according to Section 9(3) of the GEADA. 'Favourable pricing based on age' covers cheaper tickets for students and senior citizens.

d) Fixing of ages for to occupational pension schemes

In Norway, national law allows occupational pension schemes to fix ages for admission to the scheme, taking up the possibility provided for by the GEADA, Section 9(3).

The law allows for the use of age criteria in actuarial calculations, see for example the Insurance Agreement Act Section 10-2(e) and Section 13-8. There are no restrictions in this act regarding to what extent age can be considered a factor, which means that the rules of the GEADA apply without any specifications.

4.6.2 Special conditions for younger and older workers

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

4.6.3 Minimum and maximum age requirements

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

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

There is a prohibition against child labour in Section 11-1(1) of the WEA, which prohibits from working children under 15 years old or who have a duty to go to school,¹⁹⁴ with a few exceptions.¹⁹⁵ In general, for adults (above 18), there are no minimum age limits in Norway regarding access to employment, however a number of positions or access to training positions require that the employee be a major (i.e. above 18 years) in order to handle money. There is no minimum age of entry into public sector employment, as employment in this sector is governed to a large degree by qualification requirements. There are some select positions in public employment with minimum age requirements: Supreme Court judges must be at least 30 years old, judges of the appellate courts must be at least 25 and assistant/deputy judges at least 21 years, under the Act on Courts of 13 August 1915 no 5, Section 54. There is an age minimum of 20 years to work as a lawyer, as per Section 218b of the Act on Courts.

4.6.4 Retirement

a) State pension age

In Norway, there is a state pension age, at which individuals must begin to collect their state pensions.¹⁹⁶ If an individual wishes to work beyond the state pension age, the pension can be deferred. Also, an individual can collect part of a pension and still work.

¹⁹³ See the legal preparatory works; Proposition to Parliament, Prop 81 L (2016-2017) *Lov om likestilling og forbud mot diskriminering (likestillings- og diskrimineringsloven)* Chapter 15.

¹⁹⁴ Compulsory, primary education usually finishes in June the year the child turns 16.

¹⁹⁵ Such exceptions relate to cultural work or similar, easy work after turning 13, work as part of education or vocational training approved by the educational authorities and if the child is 14 or older.

¹⁹⁶ See National Insurance Act of 28 February 1997 No. 19, Section 19-4.

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

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

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

b) Occupational pension schemes

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

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

c) State-imposed mandatory retirement ages

In Norway, there is a state-imposed mandatory retirement age of 70 years for state workers according to the Act on age limits for public officials.¹⁹⁷ This is generally applicable, but there are also exceptions, such as for the armed forces and other sectors with a lower mandatory retirement age.¹⁹⁸

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

Two key judgments were given in 2015 concerning state-imposed mandatory retirement ages, both of which related to health workers in the public sector.¹⁹⁹ In both cases, the

¹⁹⁷ Act on age limits for public officials of 21 December 1956, No. 1, Section 2.

¹⁹⁸ Most age limits for state employees were approved by the Parliament in 1995, see St.prp No. 38 (1994-1995 *Om aldersgrenser for offentlige tjenestemenn m.fl.*, and Innst. S nr 77 (1995-1996).

¹⁹⁹ LB-2014-29065 and LG-2014-189475. LB-2014-29065 addressed whether or not the termination of employment as a result of a lower mandatory retirement age, set at 65 years for subordinate nurses in the Nurses Pension Act, Section 6, was in violation of the prohibition against age discrimination in the WEA Section 13-1, cf. Sections 13-3 and 15-13a and Directive 2000/78/EC, Articles 4 and 6. The age limit for supervisors or nurses in administrative positions is 70 years according to the act. The appellate court took as a starting point that the requirements of the WEA are the same as those of the directive. Although the aim of the act is not specified either in the act itself or in the preparatory works to the act, the court said that seen in context, the central purpose of the specific age limit is related to the physical and psychological strain of the job that the regular physical contact with patients and clients entails. The age limit also has an aspect related to the safety of patients, as the nurses need to keep abreast of professional developments and maintain sharp vigilance in each case. The latter aspect is not seen as being a legitimate aim in accordance with the directive, Article 6(1) but in line with Article 4(1). Also the strain of the profession is seen to fall under Article 4(1), as the possession of certain physical and mental capabilities, capabilities that deteriorate with age, is a regular professional requirement for subordinate nurses who have extensive contact with patients and clients. LG-2014-189475 addressed the termination of employment as a result of a lower mandatory retirement age, extended pursuant to a collective agreement until 67 years if the employee is not entitled to a full pension. The appellate court explicitly referred to the decision of February

appellate court found the lower mandatory retirement ages acceptable, relying heavily on the criteria set out in Directive 2000/78 Article 4(1) and the cases by the ECJ.

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

d) Retirement ages imposed by employers

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

Section 15-13a(1) of the WEA allows the employer to terminate an employment contract when the employee turns 72 years old.²⁰⁰ Dismissal before the age of 72 because of having reached the right to a pension according to the National Insurance Act cannot be objectively justified. It is thus implicitly accepted by Section 15-13a of the WEA that a person may be dismissed because of age when they reach 72 years.²⁰¹ In reality this means that it is acceptable to dismiss a person on the ground of age alone from 72 years and onwards. In reality, this is applicable only for employees in the private sector, as public officials have a retirement age of 70 years.²⁰²

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

The mandatory age limits set by employers cannot be lower than 70 years, according to WEA, Section 15-13(a)(3)).

2015 as cited above and pointed out that this age limit was established by law contrary to the case in February 2015 where the age limit was established by collective agreement. It is thus up to the legislature to change the law. The appeal to Supreme Court was not accepted, see HR-2015-2505-U of 15 December 2015.

²⁰⁰ This age limit was extended as per 1 July 2015 from 70 to 72 years. Preparatory works to the change is Prop. 48L (2014-2015) *Endringer i arbeidsmiljøloven og allmenngjøringsloven (arbeidstid, aldersgrenser, skatt, mv)*.

²⁰¹ A tripartite commission set up to assess the age limit of 72 years in the WEA handed in its report to the Government on 1 December 2016. The commission did not agree upon whether or not to expand or abolish the age limit of 72 years, see (in Norwegian) https://www.regjeringen.no/contentassets/44d25e06d416405e823ce79ef83e8238/a-0042_b_seniorer_og_arbeidslivet_uu.pdf.

²⁰² According to the Act on age limits for public officials of 21 December 1956 No. 1, Section 2.

e) Employment rights applicable to all workers irrespective of age

The law on protection against dismissal and other laws protecting employment rights do not apply to all workers irrespective of age, even if they remain in employment in the employment after attaining pensionable age or any other age, as described above. Legislation on protection against unjustified dismissal applies to workers under 70 years, see WEA, Section 15-13a(1). This general age limit was extended to 72 years on 1 July 2015 (see Prop 48 L (2014-2015)). Other employment rights remain in place.

f) Compliance of national law with CJEU case law

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

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

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

4.6.5 Redundancy

a) Age and seniority taken into account for redundancy selection

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

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

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

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

discrimination when chosen for redundancy.²⁰³ This judgment is probably not in accordance with Directive 2000/78. In similar cases in Sweden and Denmark concerning the same airline, the conclusion was the opposite: that the pilots were subject to discrimination, and entitled to compensation.²⁰⁴

b) Age taken into account for redundancy compensation

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

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

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

4.8 Any other exceptions

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

²⁰³ Supreme Court, Rt-2010-609 of 5 May 2011.

²⁰⁴ Swedish Labour Court, Judgment [AD-2011-37](#) and Østre Landsrett court of second instance in Denmark, Judgment B-1271-11.

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

a) Scope for positive action measures

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

Positive differential treatment is permitted both in Section 11 of the GEADA and Section 13-6 of the WEA on preferential treatment, which means that positive action is permitted for all discrimination grounds. In the WEA, the term used is 'preferential/ special treatment', but the content is intended to be the same.

Positive differential treatment is allowed if a) it promotes the purpose of the GEADA or WEA (i.e. has a legitimate, anti-discriminatory aim and is appropriate to achieve this aim), b) the negative impact is proportionate in view of the intended result, and c) the differential treatment will cease when its purpose has been achieved. The extent to which one may use positive differential treatment is still contested.²⁰⁵

The title of Section 11 of the GEADA is 'Permitted positive differential treatment', but apart from enlarging the scope of positive action to include all new discrimination grounds, including positive action for men, the scope for positive action measures remains the same as under the previous legislation.²⁰⁶

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

From January 2020, the public administration may give priority to applicants with an immigration background from outside the EU/EEA according to the Civil Servants Act, which gives persons with an immigrant background rights to positive action in employment. When recruiting to positions in the civil service, the employer must take into account the special rules in the Civil Servants Act in addition to the provisions of the Working Environment Act.²⁰⁷ If there are qualified applicants who inform the employer about their immigrant background, at least one of the applicants with an immigrant background must always be called for interview. However, in contrast to persons with disabilities (see below), there is no exception regarding their qualifications, so they will have to be as well qualified as the best applicant in order to be chosen for the position, i.e. it takes more to consider it proportionate differential treatment in order to hire people from an immigrant background compared to persons with disabilities.

b) Quotas in employment for people with disabilities

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

However, the state may give priority to applicants with disabilities according to the Civil Servants Act, which gives persons with disabilities rights to positive action in employment. When recruiting to positions in the civil service, the employer must take into account the special rules in the Civil Servants Act in addition to the provisions of the

²⁰⁵ Ballangrud, A.J.B. and Søbstad, M. (2021), *Likestillings- og diskrimineringsloven. Lovkommentar*, Oslo, Universitetsforlaget, Chapter 11.2.5.

²⁰⁶ See the legal preparatory works; Proposition to Parliament, Prop 81 L (2016-2017) *Lov om likestilling og forbud mot diskriminering (likestillings- og diskrimineringsloven)* Chapter 17.

²⁰⁷ See regulations to the Civil Servants Act (*statsansatteloven*), FOR-1983-11-11-1608, Section 9.

Working Environment Act.²⁰⁸ If there are qualified applicants with disabilities²⁰⁹ for a position, at least one of the applicants with a disability must always be called for interview. A specific provision in Section 4a expands this right to people who have been without employment while not being in training or studying, due to drug addiction, imprisonment or illness, and people who have been actively seeking employment during the period of unemployment. The applicants must themselves assess their disability and a disabled applicant seeking to rely on the right to be called for an interview must disclose his disability in the application. The employer may also choose to hire an applicant with disabilities, if they are almost as qualified as the best qualified applicant. This is often called 'radical positive action', and increases the likelihood of persons with disabilities being hired. In January 2017, a trainee programme was introduced for people with disabilities applying for positions in the civil service, in which it is possible to apply for trainee positions lasting up to one and a half years in order to get relevant work experience.²¹⁰

²⁰⁸ See regulations to the Civil Servants Act (*statsansatteloven*), FOR-1983-11-11-1608, Section 9.

²⁰⁹ A person registered as a disabled by the National Labour and Welfare Authorities (Nav), a person who has completed a vocational rehabilitation programme organised by Nav, or who holds a partial or full-time pension due to inability to work (the regulations to the Act on public officials Section 9, cfr. the Act on public officials, Section 5(1)).

²¹⁰ See the website for the trainee programme at <https://arbeidsgiver.difi.no/strategisk-hr-oq-ledelse/inkluderingsdugnaden/traineeprogrammet-i-staten>.

6 REMEDIES AND ENFORCEMENT

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

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

a) Available procedures for enforcing the principle of equal treatment

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

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

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

For the enforcement of the GEADA within the ordinary civil courts, discrimination cases follow the 'normal' procedural rules for civil cases as set out in the Dispute Act.²¹¹

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

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

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

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

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

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

²¹¹ See Act of 17 June 2005 No. 90 relating to mediation and procedure in civil disputes (the Dispute Act), see <http://app.uio.no/ub/ujur/oversatte-lover/data/lov-20050617-090-eng.pdf>.

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

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

Sections 185 and 186 of the Penal Code concern hateful expressions and refusal to provide goods and services. These are applicable in relation to discrimination because of skin colour or national or ethnic origin, religion or life stance, sexual orientation and disability, but are not applicable to claims in respect of age or gender.²¹²

b) Barriers and other deterrents faced by litigants seeking redress

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

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

There is furthermore a large economic risk linked to costs of proceedings. The general rules on costs of proceedings in discrimination cases before the ordinary courts are found in Chapter 20 of the Dispute Act, and are also applicable in discrimination cases. The general rule is that the successful party is entitled to full compensation for their legal costs from the opposite party (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)). There is also the possibility, in exceptional cases, that the cost of litigation can be shared between the parties, even if the main case is lost. This has happened in only a very few discrimination cases: in a case from March 2012, the Supreme Court found that the losing party did not have to pay due to the uneven level between the parties, irregularities in the handling of the case during the hiring process and the importance of the case for the claimant.²¹³ In an unpublished case from the Oslo municipal court (first instance) the judge found that the claimant who claimed to be discriminated against based on age – despite losing the case – had a due reason to have the case tried in court, as she considered herself the victim of discrimination. The court stated that 'there must be a possible option to have the case tried in court even though this belief was unfounded'.²¹⁴ Similar views were expressed in another case in the appellate court regarding discrimination on the basis of disability (blindness) in which the claimant lost the case but where the employer was partly to blame for the events that led to the dispute.²¹⁵ A claimant who was led to believe by trade union representatives that he might be subject to discrimination because of his non-Norwegian background lost his case. In the court of first instance he was ordered to

²¹² Gender expression was included from 1 January 2021. At the same time, 'sexual orientation' was protected instead of only 'homosexual orientation'.

²¹³ Supreme Court judgment of 5 March 2012 HR-2012-580-A.

²¹⁴ Oslo municipal court, Judgment of 29 June 2007 in Case 07-036427 TVI/OTIR/10.

²¹⁵ See the Eidsivating appellate court/ court of second instance, Judgment of 6 July 2007 (Case LE-2006-189239), the 'music teacher judgment'. This judgment was passed before the enactment of the AAA, thus the merits of the case was assessed according to the WEA, where disability was included as a ground of discrimination before the AAA was enacted in 2009.

pay the full costs of the opposite party. He appealed the case to the appellate court. He lost the case there as well, and the appellate court ordered him to pay the costs of the opposite party in relation to the case in the appellate court. He was however acquitted of paying the cost of litigation for the opposite party in the court of first instance, as the opposite party could be reproached for the action being brought, and was thus partly to blame for the action sought.²¹⁶

Another barrier was highlighted in the civil society' latest shadow report to the CERD committee:²¹⁷

'In a judgment issued in 2015 (LB-2015-158669-2), Borgarting Court of Appeal assessed the competence of a lay judge with documented, strong prejudices against immigrants in general and Muslims in particular. [...] Although her [often publicly expressed] views clearly contravene some of the most fundamental human rights of immigrants in general and Muslims in particular, this person has been a lay judge for a number of years. [...] Since the lay judge had not been convicted of making such unlawful statements, the court found that she could not be excluded from the pool [of lay judges].

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

The rules regarding the qualifications of judges and lay judges are vague in both civil and criminal cases. Section 55 of the Courts of Justice Act states that judges should fulfil high standards both personally and professionally and must perform their duties impartially and in a fashion that promotes common trust and respect. Section 70 of the Courts of Justice Act is particularly problematic, as it stipulates only that a lay judge must be 'personally suitable'. If this is not the case, the person may not be elected or must be excluded from the pool of lay judges.²¹⁸ This creates doubts about the impartiality of the courts in both civil and criminal cases.

c) Number of discrimination cases brought to justice

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

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

²¹⁶ Borgarting appellate court/ court of second instance, Judgment of 27 January 2003 (Case LB-2002-44) (*Sporveissaken*).

²¹⁷ Norwegian NGOs (2018) *NGO alternative report to CERD 2018*, paragraphs 308-311, https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCERD%2fNGO%2fNOR%2f32995&Lang=en.

²¹⁸ Act relating to the Courts of Justice (Courts of Justice Act) of 13 August 1915 No. 5, <https://lovdata.no/dokument/NL/lov/1915-08-13-5>.

discrimination cases. The selection of judgments published from the courts of first instance is carried out partly by the court itself, which forwards the judgments to Lovdata, and in part by staff at Lovdata.

A significant increase in discrimination cases before the lower instance courts has taken place since 2008, as key legislation in this area has come into force in the last decade (the ADA in 2006, the AAA in 2009, the SOA in 2014, and the GEADA in 2018).²¹⁹ From 2008 to 2017 only 11 discrimination cases were considered by the Supreme Court, i.e. about one per year on average: eight on age discrimination, one on disability,²²⁰ one on gender and one regarding the procedure for taking a decision of the tribunal to court when it did not state that discrimination had been proven.²²¹ In 2018 alone, however, there were three cases: one on religion,²²² one on ethnicity (Sami people),²²³ and one on gender. In 2019, two cases heard before the courts of second instance were published: one on sexual harassment²²⁴ and one regarding disability.²²⁵ Cases on hate speech are treated as criminal cases outside the scope of the non-discrimination directives and are therefore not part of this list.

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

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

d) Registration of national court decisions on discrimination

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

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

²¹⁹ A study carried out in 2008 for the publicly appointed committee that prepared the Government white paper on 'Comprehensive protection against discrimination' NOU 2009:14, gathered both published and previously non-published court material on discrimination cases. Between 1978 and 2008, approximately 51 legal disputes in the area of discrimination issues – mainly on gender – were assessed by the civil courts. See McClimans, E.L. (2008), *Rettspraksis om diskrimineringslovgivning*, (Court cases concerning discrimination legislation), Diskrimineringslovutvalget.

²²⁰ Supreme Court, HR-2014-955-U – Rt-2014-480 ADHD in the military service. See section 3.3 of this report on armed forces for details.

²²¹ Supreme Court, HR-2015-2400-U.

²²² Supreme Court, HR-2018-1958-A, see section 12.2 of this report.

²²³ Supreme Court, HR-2018-872-A, see section 12.2 of this report.

²²⁴ LH-2019-087696. LH-2019-135298. LH-2019-135300 (three different aspects of one issue treated in three court cases).

²²⁵ LE-2018-145654.

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

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

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

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

A key issue for bringing a case to court is that the claimant – including associations – must show a genuine need to have the claim determined against the defendant, which is a legal interest.²²⁶ The 'genuine need' shall be determined based on a total assessment of the relevance of the claim and the parties' connection to the claim (see Section 1-3(2) of the Dispute Act). In reality, this is a requirement for direct interest in a case in order to be a party to the case. An element of having 'direct interest' in a case is that the case is a live controversy and should not be based on a historical fact.²²⁷ The procedural rules before the court are not different in civil discrimination cases.

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

NGOs are, through their legal counsel, entitled to act on behalf of victims of discrimination with a specific power of attorney from the person or company or organisation in court (DA, Section 3-3(4) allows for a person with relevant qualifications to act on behalf of the victim). However, the actual victim (the party to the case) must

²²⁶ According to a legal dictionary (Craig, R. (2010) *Norsk Engelsk ordbok*, Universitetsforlaget third edition) the concept of legal interest according to Norwegian law has two aspects: 1) a requirement that the claimant and defendant have a sufficient connection to the subject matter in dispute and 2) a requirement that the dispute be a live controversy, is neither moot nor hypothetical.

²²⁷ The verdict of the Supreme Court in the ADHD Case (Rt. 2014-480) illustrates the procedural complications of taking a case to court. The association ADHD Norway initiated a case against the state/the Equality Tribunal for the Oslo city court, claiming that the tribunal's decision in LDN-2011-25 on the assessment of the introduction course for military recruits in the armed forces was invalid. The tribunal had found that the guidelines governing the introduction scheme for military recruits in the armed forces were not discriminatory for recruits with ADHD. The tribunal presumed in its decision that all recruits – including those with a disability – would be subject to an individual assessment of their merits. As recruits with a disability are excluded from further assessment because of their disability, the organisation challenged the presumption that the tribunal's decision was built on, and asked that the decision be found invalid. As the introduction scheme was marginally changed after the decision of the tribunal, the appellate court in Case No. LB-2013-142603 rejected the case, as it found that the decision of the tribunal was not a live controversy – it considered that the facts upon which the decision of the Equality Tribunal was based were historic, and not relevant for the situation today. The dispute was by verdict rejected from court assessment based on a lack of a genuine need to have the case determined, as per Section 1-3 of the DA. This verdict was appealed to the Supreme Court, which found that the Equality Tribunal did not have a mandate to make a decision in the case, and that the tribunal – erroneously – had made a decision where it should have issued an opinion. It is not possible to refer an opinion to the courts, and the case was rejected.

be present in court to give testimony during the main hearing, as provided by Section 9-15 of the Dispute Act. A key principle in Norwegian courtrooms is the oral hearing and the immediate presentation of evidence.

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

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

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

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

NGOs may engage in both civil and administrative proceedings according to the general rules of the Public Administration Act, Section 12,²²⁸ and the Dispute Act.

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

There are special provisions on victim consent in cases where obtaining formal authorisation is problematic, such as by minors (i.e. persons under 18 years) and persons under guardianship. The Guardianship Act²²⁹ gives the possibility to legally incapacitate a person, but never to a greater extent than absolutely necessary and always tailored to the person’s circumstances. In a 2018 Supreme Court decision, it was ruled that NGOs do not have legal standing in cases concerning legal guardianship, on the basis that NGOs are not listed as persons or institutions that may ask for someone to be put under guardianship in the Guardianship Act (Section 56).²³⁰

²²⁸ Act relating to procedure concerning the public administration (Public Administration Act) of 10 February 1967.

²²⁹ Act relating to guardianship of 26 March 2010 no. 9, available in Norwegian at [Lov om vergemål \(vergemålsloven\) - Lovdata](#).

²³⁰ Supreme Court, Case HR-2018-1786-U.

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

It should be noted that NGOs play a key role in access to justice for victims of discrimination in Norway. They often provide free legal information and advice, in addition to occasionally providing free legal aid in specific cases. In addition, they often work politically to make other legislation and regulations in line with the GEADA.

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

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

Although there are no impediments to NGO engagement in support of victims of discrimination or in strategic litigation, few organisations apart from the trade unions conduct strategic litigation on issues of non-discrimination. There are few specialised NGOs that work on non-discrimination that are competent to engage in litigation issues, apart from NOAS, the Norwegian Association for Asylum Seekers.²³¹ However, NOAS does not pursue strategic litigation from a non-discrimination perspective but from an immigration-law perspective. The Association for Gender and Sexual Diversity (FRI)²³² has initiated proceedings claiming compensation for those who have suffered from the previous practice of sterilising people as a requirement for changing the registered gender without an explicit requirement of such in the legislation.²³³

- c) *Actio popularis*

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

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

There is thus no need to have a specific victim to support or represent, although it is necessary to prove some kind of membership. The fact that a formalised membership structure exists will more easily demonstrate and classify the organisation as one with

²³¹ See <http://www.noas.no/en/>.

²³² See [FRI – Foreningen for kjønns- og seksualitetsmangfold \(foreningenfri.no\)](http://foreningenfri.no) in Norwegian only.

²³³ There have been two parallel complaints: In the first, the person had been sterilised in order to be able to change their registered gender. They lost in Borgarting Court of Appeal LB-2018-190131. The second case, Borgarting Court of Appeal LB-2018-154220, concerns a person who was unable to change their registered gender due to the sterilisation requirement. The court did not see this either as discrimination or a human rights violation. The Supreme Court rejected the appeal in both cases.

legal capacity to sue and be sued according to the law. Ad-hoc organisations, that is organisations established in order to forward a particular case of litigation, or other organisations that may be termed 'mayfly organisations' will not in themselves have the legal capacity to sue and be sued. Case law has widely accepted associations and cooperatives acting under a common name.²³⁴

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

d) Class action

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

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

A class action may be brought by any person who fulfils the conditions for class membership or by an organisation, association or public body charged with promoting a specific interest. In the preparatory works to the Dispute Act, discrimination cases are given as an example of the kind of cases where class action might be suitable.²³⁵ A class action may be brought by an organisation or an association or a public body charged with promoting specific interests, provided that the action falls within its purpose and normal scope pursuant to the Dispute Act, Sections 1-4 as provided by Section 35-3(1)b. Official documents and legal preparatory works have assumed that the Ombud is also able to bring a class action suit concerning discrimination to courts, however she has so far not made use of that ability.²³⁶

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

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

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

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

In cases concerning dismissals according to labour law procedural rules, it is a general principle that the employer must substantiate that the dismissal is based upon the correct facts. Other than this, in civil cases - as a general rule - the burden of proof is on the claimant. This is why the shifting burden of proof as implemented in the

²³⁴ See the preparatory works to the Dispute Act, Norwegian Official Report NOU 2001:32 Rett på sak point 2.2.2.1.

²³⁵ See Ot.prp No. 51 (2004-2005) s 322.

²³⁶ Norwegian Government (2008) *Kjønn og lønn* (Gender and Pay – white paper), NOU 2008:6, p. 114.

discrimination legislation is so important. In all discrimination cases, if there are circumstances that give 'reason to believe' that there has been direct or indirect differential treatment in contravention with the said legislation, such differential treatment will be assumed to have taken place unless the person responsible proves on a balance of probabilities that such differential treatment nonetheless did not take place. The revised Norwegian legal text as found in Section 37(1) of the GEADA now state that:

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

What is meant by 'reason to believe' for the burden of proof to be reversed is interpreted by the Equality Tribunal to mean that the allegation must be 'supported by the chain of events and the external circumstances of the case which necessitates an assessment of the specifics of the case'.²³⁷

An article by the previous head of the Equality Tribunal and the head of its secretariat, concludes that the rules on reversal on the burden of proof are useful and fulfil the EU requirements.²³⁸ That conclusion is shared by the author of this report. As the practice of the Ombud and the Equality Tribunal has not changed based on the new wording of the legislation, the revised text is also in line with the EU requirements.

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

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

Protection against retaliation/ acts of reprisals/ victimisation is implemented through Section 14 of the GEADA. The shift of the burden of proof also applies to situations of reprisals and victimisation. In all discrimination cases, if there are circumstances that give reason to believe that there has been direct or indirect differential treatment in contravention of the discrimination legislation, such differential treatment will be assumed to have taken place unless the person responsible proves on a balance of probabilities that such differential treatment nonetheless did not take place. It is not permitted to retaliate against any person who has submitted a complaint regarding a breach of provisions of the discrimination legislation, or who has stated that a complaint may be submitted. There is a limitation to this right, and that is in instances where the complainant has acted with gross negligence. The protection against victimisation applies correspondingly to witnesses or someone who helps the victim of discrimination to bring a complaint, for example a workers' representative.

Both the Ombud and the Equality Tribunal have dealt with a limited number of cases in which victimisation is alleged. Since 2018, the Equality Tribunal has made decisions in a total of 33 cases where victimisation was one of the issues raised;²³⁹ there were 8 victimisation cases in 2018, 7 in 2019 and 18 in 2020.²⁴⁰ The Equality Tribunal did not find that the prohibition against victimisation had been breached in any of these cases.

²³⁷ See the Equality Tribunal Case LDN-2006-26, in which the said quote was used by the dissenting member of the tribunal. Although the rest of the tribunal did not agree with the dissenting member in this particular case, the quote was later referred to by the Ombud and the Equality Tribunal in a number of subsequent cases.

²³⁸ See Syse, A. and Helgeland, G. (2009), 'Reglene om delt bevisbyrde i norsk diskrimineringsrett' (The rules on the shared burden of proof in Norwegian discrimination law), in Aune, Fauchald, Lilleholt and Michalsen (eds.), *Arbeid og Rett*, Festskrift til Henning Jakhellns 70-årsdag, Cappelen DAMM.

²³⁹ Sometimes different aspects of one complaint are separated into different decisions/case numbers.

²⁴⁰ See Equality Tribunal Cases 27/2008 (gender), 30/2009 (disability and ethnicity), 43/2010 (ethnicity), 20/2011 (ethnicity), 48/2011 (disability), 29/2012 (disability) and 50/2012 (disability), 21/2013 (gender) 34/2014 (gender).

In a 2010 court case on discrimination because of age and gender, the female complainant was found to have been subject to victimisation and discrimination on the basis of age and gender.²⁴¹

Age in employment is not covered by the GEADA, and thereby not by its prohibition against victimisation. There is a general prohibition against retaliation in WEA Section 2A-4, for example, after notifying the employer, a supervisory authority or other public authority about an unsatisfactory working environment, abuse of authority or a breach of data security (WEA Section 2A-1(2)).²⁴² Judicial interpretation is required whether this includes individual complaints concerning discrimination, and the wording does not appear to include all possible cases of discrimination and victimisation in the workplace. WEA Chapter 2A on notification constitutes, however, the only protection against victimisation in the WEA.

WEA Section 13-8 on burden of proof mentions victimisation explicitly, even though it is not mentioned anywhere else in WEA Chapter 13 on discrimination.

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

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

Sanctions according to the GEADA as well as the WEA that are enforced by the civil courts consist of liability for damages for injury of a non-pecuniary character or compensation for economic losses awarded to the claimant of discrimination. Sanctions according to criminal law consist of fines or imprisonment. In general, sanctions are equally applicable in private and public employment. Sanctions cover all discrimination grounds in all fields, except age, which is only covered in the field of employment. The regulations on sanctions are found in Section 38 of the GEADA and Section 13-9 of the WEA. It should be noted, however, that the EAOA limits the sanctions that may be awarded by the tribunal significantly, as will be described in more detail below.²⁴³

There are a number of general rules on compensation in Norwegian legislation that are applicable in discrimination cases. Compensation in Norwegian law is awarded either for fault-based liability (*culpa*) or for liability without fault. These ordinary rules are the rules on compensation set mainly by the Compensation Act,²⁴⁴ 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-

²⁴¹ Øst-Finnmark district court, judgment of 17 March 2010, Case No. TOSFI-2009-136827. The case had already been assessed by the Equality Ombud and the Equality and Anti-Discrimination Tribunal, in its case LDN-2008-8. The case concerned a female worker aged 41, employed on a part-time basis in the fire brigade. She subsequently applied for a longer, full-time vacancy, and then a fixed-term, full-time position. A male worker aged 27 who was less qualified was employed in the position. The ads announcing the position had the following formulation: 'applicants should be between 27 and 35 years of age.' The Equality Tribunal and the court found that the woman was discriminated against both on the grounds of gender and age and had also suffered from victimisation after her complaint. She was awarded compensation of EUR 37 500 (NOK 300 000) for economic losses as well as EUR 18 759 (NOK 150 000) for non-pecuniary damages. There have been no court cases since then where someone was found guilty of victimisation in cases concerning discrimination.

²⁴² After the cut-off date for this report, the Government decided to include in the mandate of the Equality Tribunal WEA Chapter 2A on notification of censurable conditions at the undertaking. See the updated version of the EAOA at [Lov om Likestillings- og diskrimineringsombudet og Diskrimineringsnemnda \(diskrimineringsombudsloven\) - Lovdata](https://lovdata.no/dokument/LST/lov/2016/2016-08-18/lov-om-likestillings-og-diskrimineringsombudet-og-diskrimineringsnemnda).

²⁴³ See the legal preparatory works; Proposition to Parliament, Prop 80 L (2016-2017) *Lov om likestillings- og diskrimineringsombudet og Diskrimineringsnemnda (diskrimineringsombudsloven)*, page 106. Available at <https://www.regjeringen.no/contentassets/14dd1daa159348c88de5dbe043feb0a4/horingsnotat.pdf>.

²⁴⁴ Norway, Compensation Act of 13 June 1969, No. 26.

employed people and hired workers, the employer's liability exists irrespective of whether the employer can be blamed, with the exception of harassment (for more on this, see section 2.4.b).

Regarding damages for injury of a non-pecuniary character, the GEADA contains the general rule that compensation will be set at an amount that is reasonable in view of the scope and nature of the harm, the relationship between the parties and 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,²⁴⁵ but refused by the Supreme Court,²⁴⁶ and by the appellate court in later cases.²⁴⁷

Section 39 of the GEADA provides penalties in the form of fines or imprisonment for up to three years for the perpetrators of a gross discrimination that has been committed jointly by several persons.²⁴⁸ This is in relation to discrimination on the following grounds: ethnicity, religion or belief.²⁴⁹ Any person who wilfully and jointly with at least two other persons commits a serious contravention or is an accessory to a serious contravention of parts of the GEADA is liable to fines or imprisonment for a term not exceeding three years. Furthermore, there is a specific clause on repeated behaviour, such that any person who has previously been sentenced to a penalty for contravention of the current provision may be liable to a penalty even if the contravention is not serious. When assessing whether a contravention is serious, particular importance is attached to the degree of manifest fault, whether the contravention was racially motivated, whether it is in the nature of harassment, whether it constitutes an offence against the person or serious violation of a person's mental integrity, whether it is liable to create fear and whether it was committed against a person under the age of 18. Before instituting a prosecution for such offences, an assessment must be made of whether it will be sufficient to impose an administrative sanction in the form of an order or fine. In the GEADA, the limit for imprisonment is three years. To the author's knowledge, this sanction has not yet been used. Given that Section 39 of the GEADA has never been used, this might be an indication that it does not comply with the criteria set by the ECJ of being a sufficiently dissuasive sanction.

The crime statistics do not tag information regarding whether 'hate motivation' is an aggravating circumstance, and therefore there is no way of knowing the usage, or extent of the usage, of this provision in the Norwegian courts. However, there have been several cases brought before the courts in recent years based on Sections 185²⁵⁰ and

²⁴⁵ For example, Oslo municipal court, verdict of 19 November 2009 in Case No. 09-143503TVI-OTIR/02.

²⁴⁶ 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.

²⁴⁷ Borgarting appellate court, verdict of 18 June 2014 in Case No. LB-2014-56188 (*Mediaas-saken*).

²⁴⁸ In an assessment of the penal protection against discrimination on behalf of the Ministry of Children and Equality, Professor Kjetil Mujezinovic Larsen assessed Section 26 of the former ADA and suggested that it be continued in the upcoming legislation, and that it should be extended to cover all grounds in a holistic new law. He furthermore proposed that gender, gender identity and gender expressions should be included in the penal protection; see: Larsen, K.M. (2016) *Utredning omdet strafferettslige diskrimineringsvernet* <https://www.regjeringen.no/no/dokumenter/utredning-om-det-strafferettslige-diskrimineringsvernet/id2520561/> (In Norwegian only). While Professor Larsen recommended several changes to the legislation, none of these had been made by the end of 2019.

²⁴⁹ See the legal preparatory works; Proposition to Parliament, Prop 81 L (2016-2017) *Lov om likestilling og forbud mot diskriminering (likestillings- og diskrimineringsloven)* Chapter 28.6.

²⁵⁰ See Case Nos. TBRON-2016-125647 (hate towards a Muslim politician) and TJARE-2016-72797 (hate towards Muslims as a group).

186²⁵¹ of the Penal Code, which at least shows that hate crime is being taken seriously. Case LB-2019-190061 was the first where a person was convicted for hate speech against a group, the Sami people, in line with recent judgments from the European Court of Human Rights.²⁵²

According to Section 12 of the EAOA, the Equality Tribunal has the power to make an administrative decision including damages for economic losses as well as damages for injury of a non-pecuniary character, but only in simple cases. In cases that do not concern employment only compensation may be awarded.²⁵³ 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).

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

The Equality Tribunal has a limited competence to make an administrative order - that is to order an act to be stopped or remedied or other measures that are necessary to ensure that discrimination, harassment, instructions or reprisals cease and to prevent their repetition (see Section 11 of the EAOA). Breaches of the duty of accommodation (individual accommodation/universal design) are regarded as discrimination and can be ordered to be stopped or remedied. The Equality Tribunal may set a time limit for compliance with the order. The tribunal will state the grounds for an administrative decision at the time the decision is made. Furthermore, the Equality Tribunal may make an administrative decision to impose a coercive fine to ensure the implementation of orders if the time limit for complying with the order is exceeded (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 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, as in case DIN-2018-32. 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. Between 2018 and 2020 it has issued a fine only once, as the decision and its deadline are usually respected.

b) Compensation – maximum and average amounts

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

²⁵¹ See Case TJARE-2016-96260 (refusal of a hairdresser's services to a woman wearing a hijab) and subsequent appeals: LG-2016-164427 and HR-2017-534-U.

²⁵² For example *Lilliendahl v. Iceland*, no. 29297/18, 12 May 2020.

²⁵³ There were 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.

Of the few court cases that exist, compensation has only been awarded in two Supreme Court cases, both of which concern discrimination because of membership of trade unions. In one case, damages for non-pecuniary losses were awarded.

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

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

Damages for injury of a non-pecuniary character was awarded in a recent case concerning sexual harassment, HR-2020-2476-A: two people had to pay NOK 15 000 and 20 000 (EUR 1 500 and 2 000) respectively.

In the other cases before the Supreme Court, compensation or damages either have not been claimed, or the case was lost, and compensation thus not awarded. Noteworthy is the lack of compensation awarded in Supreme Court judgment HR-2017-219-A. This case was a direct follow-up to the Supreme Court case Rt 2012-219, where the Supreme Court found that the pilots had been discriminated against (see section 12.2 below for a description of the case). The same court subsequently found that the discrimination did not merit compensation.

Apart from these judgments, compensation has been awarded in only four lower court cases: three concerning discrimination because of gender/pregnancy,²⁵⁴ and one concerning age and gender. All the cases concerned employment relations.²⁵⁵ Interestingly, the non-pecuniary compensation for the discrimination has been set above NOK 100 000 (approximately EUR 12 000) in the three recent cases. This is considered to be high when compared with, for example, the level of compensation in cases of unjustified dismissals within employment.²⁵⁶

There is no statistical information available concerning the average amount of compensation available to victims, but the amounts in each case are published on the website of the Equality Tribunal.²⁵⁷

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

²⁵⁴ These are: Court of second instance/ Hålogaland appellate court, Judgment of 21 January 2009 LH-2008-99829 (*Bang-saken*), Oslo municipal court, Judgment of 17 November 2006 Case TOSLO-2006-52718 and court of second instance/ Eidsivating appellate court 12 December 1994, Case LE 1994-892 (*Lufthansa*).

²⁵⁵ Judgment of Øst-Finnmark court of first instance - Judgment of 17 March 2010 in Case 09-136827TVI-OSFI (age and gender).

²⁵⁶ As of 31 December 2020.

²⁵⁷ See [Søk i klagesaker \(diskrimineringsnemnda.no\)](https://sok-i-klagesaker.diskrimineringsnemnda.no).

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).²⁵⁸ In all cases from 2018 to 2020, the damages for non-pecuniary losses were less than NOK 80 000 (EUR 8 000); the damages 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)).

c) Assessment of the sanctions

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

Statistics on discrimination cases in Norway show that although the courts do handle discrimination cases, and although the number of cases assessed by courts is increasing, by far the overwhelming number of discrimination cases in Norway are channelled through the administrative bodies: the Equality Ombud and the Equality Tribunal. For example, in 2020, the Equality Ombud provided advice in 1 966 cases.²⁵⁹ In contrast, a total of five decisions were made by the courts of appeal and the Supreme Court regarding the WEA Chapter 13 on discrimination or the GEADA. The Equality Tribunal made decisions in 313 cases in 2020.²⁶⁰

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 damages for non-pecuniary losses in cases concerning employment might partly overcome this barrier,²⁶¹ but a lot of cases will continue to lack efficient remedies, for example various types of harassment outside employment relationships. In such cases the Equality Tribunal can award only compensation for economic losses, not damages for injury of a non-pecuniary character (EAOA, Section 12). In 2018, the Equality Tribunal did not award any damages or compensation, but it has used the power increasingly since. Damages of a non-pecuniary character alone were awarded 10 times in 2019-2020, and in 2 of these cases, compensation was awarded as well. In one case, regarding disability, only compensation for economic losses was awarded, as this was outside employment.

As for remedies regarding the public sector outside for employment relationships, the Equality Tribunal has the power to evaluate the decisions of other parts of the public administration, even if it cannot overrule them (see EAOA, Section 14(2)). For the most

²⁵⁸ 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)).

²⁵⁹ Equality Ombud (2018) *Annual Report for 2020* (in Norwegian) at [LDO - Årsmelding 2020](#). Since 2017 the number of cases before the Equality Ombud has been close to 2 000 each year.

²⁶⁰ Email to the author from the Equality Tribunal of 10 August 2019.

²⁶¹ See the legal preparatory works; Proposition to Parliament, Prop 80 L (2016-2017) *Lov om likestillings- og diskrimineringsombudet og Diskrimineringsnemnda (diskrimineringsombudsloven)*, building upon the paper sent for public hearing in 2016 <https://www.regjeringen.no/contentassets/14dd1daa159348c88de5dbe043feb0a4/horingsnotat.pdf>. This proposal builds on an assessment of the structure and mandate of the equality bodies finalised in March 2016, see: <https://www.regjeringen.no/contentassets/04bd6c545ae74c4ebee246f44dcf4942/utredning-av-handhevings--og-virkemiddelapparatet-pa-likestillings--og-diskrimineringsfeltet.pdf>.

part, the Equality Tribunal appears to have been reluctant to use this opportunity in 2018 and 2019, as for example in cases 70/2018²⁶² and 19/124,²⁶³ and it has not yet been used.

In Norwegian courts, the procedure is oral, with direct presentation of proof and witnesses. Few claimants are represented by lawyers in discrimination cases, either through NGOs or by barristers. The Equality Tribunal is an administrative body, and from 1 January 2018 uses a written procedure instead of an oral one. Presenting your own case in writing is difficult when you do not know the law, have little experience of presenting such matters, and have little idea what type of proof is needed. Some people are also in an emotional crisis after what they have experienced. Lack of legal aid is thus an issue not only before the courts but also before the Equality Tribunal. An oral hearing in court may also give a different result, as the court will hear the case again in full, and not use the findings of the Ombud and the Equality Tribunal alone.²⁶⁴ Fortunately, in 2019, the Ombud has started helping in a few cases before the Equality Tribunal, which will remedy this problem to some degree. While the criteria the Ombud uses to select cases are transparent,²⁶⁵ few have been selected so far – in 2019 there were only two cases.

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

²⁶² The case was rejected on the basis that the tribunal could not overrule the administrative decision regarding care of a disabled person, while the opportunity to evaluate the decision with a view to Section 20 of the GEADA on the right to individually adapted municipal services, was not even mentioned.

²⁶³ This case concerned the refusal of people with hearing difficulties to be blood donors due to the cost of providing an interpreter.

²⁶⁴ The Judgment of Hålogaland appellate court in Case LH-2014-27941 of 27 June 2014 underscores this point. A man (A) claimed to have been subject to discrimination because of disability when he was not offered a position as a handling agent in the Norwegian National Collection Agency, and claimed compensation according to the (previous) AAA, Section 17. His complaint had previously been assessed both by the Ombud and by the Equality Tribunal, who both found that there was reason to believe that the employer had placed weight on his disability to his disadvantage when he was not considered for the position he had applied for (see Equality Tribunal, LDN-2012-8). The court found that he was not discriminated against because of his disability. The court found, based on the witnesses and other evidence provided in court, that A's personal abilities were decisive when he was not hired for the job. The court found that there was no evidence in the case that his disability was decisive. The court points in this context especially to two conditions. First, that it was not necessary to make adaptations to the work situation, as both an elevating table and chair are standard at all workstations. Secondly, that the collection agency at the time of the appointment also offered two people positions who were, at the time of the application, on sick leave. Furthermore, the employer had a relatively high number of employees with disabilities, some of whom had considerably greater disabilities than A.

²⁶⁵ Equality and Antidiscrimination Ombud, *The Ombud's strategic work 2017-2022*.

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

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

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

The Equality Tribunal is an administrative body providing a free and simplified procedure for most discrimination complaints (EAOA Section 1 and Chapter 3), while the Ombud provides information and advice to individuals, monitors equality efforts and works proactively on many levels to promote equality (EAOA Section 1 and Chapter 2).

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

There is evidence of recent positive political support for the designated bodies and of recent political hostility to the designated bodies. In 2020, the Liberal Party has held the post of Minister for Culture, which is the minister responsible for equality issues, replacing a minister from the Progress Party, which is known among other things for its scepticism towards immigration. Having a minister from the Liberal Party has for example led to a slightly increased focus on anti-discrimination issues by the Government. The current minister is Muslim, with a Pakistani family background, and is outspoken against homophobia.

There is evidence of popular debate that is supportive of equality and diversity and of the designated bodies. Popular debate is, in principle, positive and supportive of equality and diversity. A report commissioned by the Norwegian Directorate for Children, Youth and Family Affairs (Bufdir) found that while there has been a slight increase of negative comments on the Facebook pages of the editorial media in Norway, the main increase is in neutral comments, concluding that '[s]ome increased frustration and use of negative tone has been found, but what is more prominent is how the seriousness of the situation has given us more balanced, nuanced and factual comments'.²⁶⁶

While there here has been an increase in hate speech over several years, there has also been an increased level of response from the Government and the judiciary from 2016, especially from January 2020, since when the minister responsible for those issues is from the Liberal Party.²⁶⁷

- c) Institutional architecture

In Norway, the designated bodies do not form part of a body with multiple mandates, as equality and non-discrimination are the complete and only mandate of both the Ombud and the Equality Tribunal. As such, their only focus is on equality and non-discrimination.

²⁶⁶ Retriever (2021) *Tone og hatefulle ytringer in norske kommentarfelt. En analyse av fem norske mediers kommentarfelt på Facebook, før og under koronapandemien*. (Tone of speech and hate speech on the Facebook pages of the editorial media in Norway, before and during the COVID-19 pandemic.)

²⁶⁷ See, for example, the Government strategy against hate speech https://www.regjeringen.no/contentassets/72293ca5195642249029bf6905ff08be/hatefulleytringer_uu.pdf. and the report Lenz, C., Lid, S., Lorentzen, G., Nilsen, AB., Nustad, P. and Risea, E. (2018), *Tiltak mot hatefulle ytringer: kunnskaps- og tiltaksoversikt* (Report on existing knowledge and policies against hate speech). An action plan against racism and discrimination on the basis of ethnicity or religion was published in December 2019: https://www.regjeringen.no/contentassets/589aa9f4e14540b5a5a6144aaea7b518/handlingsplan-mot-rasisme_uu_des-2019.pdf; An action plan against discrimination and hate against Muslims was published in September 2020: [Handlingsplan mot diskriminering av og hat mot muslimer 2020-2023 - regjeringen.no](https://www.regjeringen.no/contentassets/589aa9f4e14540b5a5a6144aaea7b518/handlingsplan-mot-diskriminering-av-og-hat-mot-muslimer-2020-2023-regjeringen.no).

The Ombud's work has high public visibility, whereas the work of the Equality Tribunal has almost no visibility in the public domain.

The primary responsibilities of the Ombud are now:

- a. to provide advice and information;
- b. to monitor the implementation of the UN conventions CEDAW, CERD and CRPD; and
- c. to be a driving force regarding anti-discrimination and equality issues.²⁶⁸

From 1 January 2020, the Ombud also monitors the mandatory active equality efforts for employers (see GEADA Sections 26a and 26b, and EAOA Section 5(4)). The Ombud also runs courses and presentations on discrimination issues and participates in campaigns with both civil sector and public agencies.

The Anti-Discrimination and Equality Tribunal (the Equality Tribunal) is an administrative body with limited powers to make decisions in discrimination cases. The tribunal may only award damages for injury of a non-pecuniary character or compensation for economic losses in connection with employment and can only make decisions about compensation for concrete financial losses in simple cases.²⁶⁹ Damages for injury of a non-pecuniary character or compensation for economic losses claims must otherwise be filed before the ordinary courts. When the tribunal handles matters concerning regulations or administrative decisions made by a public administrative body, it can only issue a 'statement' on contravention of the GEADA, rather than a 'decision'.²⁷⁰ Bringing complaints to the Equality Tribunal is not mandatory before going to ordinary courts. However, very few discrimination cases are brought before the courts.²⁷¹ Legal aid is not granted in discrimination cases.

The Directorate for Children, Youth and Family Affairs also has a department responsible for obtaining and spreading knowledge both within the public sector and to the general public, through reports, advice and so on, about most of the protected grounds of discrimination, including: gender, sexual orientation, gender identity, persons with disabilities, ethnicity and life stance.²⁷² They are, however, not independent, and also serve as an advisory body for the ministries as well as implementing Government policies.²⁷³

d) Status of the designated bodies – general independence

i) Status of the bodies

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

²⁶⁸ See Equality Ombud (2016) *Strategy 2017-2022* available at <http://www.ldo.no/link/e7b12b5b0de341599adfc954c64bb562.aspx?id=12271>.

²⁶⁹ 'Simple cases' entails cases when the complainant is not asserting anything but the inability to pay or other obviously unsustainable objections.

²⁷⁰ Act in relation to the Equality and Anti-Discrimination Ombud and the Anti-Discrimination Tribunal of 16 June 2017 no. 50, Section 14 on the authority of the tribunal relative to other public administrative agencies: Available in English at: <https://lovdata.no/NLE/lov/2017-06-16-50/§14>.

²⁷¹ McClimans, E. (2008) *Rettspraksis om diskrimineringslovgivning* (Legal Practice on Anti-Discrimination Law (NB: Her own translation)). Submitted to the Anti-Discrimination Law Committee (we are not aware of newer reports on this topic).

²⁷² See Directorate for Children, Youth and Family Affairs (2016) *Strategy for 2017-2020* at https://bufdir.no/globalassets/global/bufdir_strategi_2017-2020.pdf and their website <https://www.bufdir.no/Inkludering/>.

²⁷³ Email to the author from BufDir (16 April 2019).

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

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

The Ombud has the powers to recruit and manage her staff. The members of the tribunal have other full-time positions and are supported in their work by a secretariat who are employed full-time, under the lead of a director of the secretariat who manages the staff. The Ministry for Culture recruits the director, who then recruits and manages the secretariat staff (EAOA Section 6(6)).

Both the Equality and Anti-Discrimination Ombud and the Equality Tribunal receive their funds in an annual letter of budget allocation from the Ministry for Culture,²⁷⁴ and they report on the use of these funds in their annual reports to the ministry, which are also published on their website.

The funds allocated through the state budget for 2020 as income for the Ombud were NOK 48 020 000 (approximately EUR 4 278 065), which was the same as it was in 2019.²⁷⁵ The Equality Tribunal has a secretariat, whose staff are civil servants. The 2020 budget for the secretariat and tribunal was NOK 22 260 000 (approximately EUR 1 983 127), which is the same as it was in 2019.²⁷⁶

ii) Independence of the bodies

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

e) Grounds covered by the designated bodies

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

Neither the Ombud nor the Equality Tribunal have compartmentalised their work according to the different grounds. The Ombud administration is divided into the following sections: the Ombud's staff, advice, monitoring and admin/HR.²⁷⁷ Staff are hired according to their specific expertise according to each discrimination ground, but the principal idea is that all staff within the Ombud's office should have knowledge about all grounds, particularly in order to uncover multiple discrimination.

²⁷⁴ Previously the budget came from the Ministry of Children and Equality.

²⁷⁵ Numbers from the national budgets of 2018 category 11.10, at https://www.regjeringen.no/no/dokumenter/prop.-1-s-bld-20172018/id2574097/sec2?q=ombud#match_2, from 2019 at https://www.statsbudsjettet.no/upload/Statsbudsjett_2020/dokumenter/pdf/GULBOK.pdf.

²⁷⁶ Numbers from the national budgets of 2018 category 11.10, at https://www.regjeringen.no/no/dokumenter/prop.-1-s-bld-20172018/id2574097/sec2?q=ombud#match_2, from 2019 at https://www.statsbudsjettet.no/upload/Statsbudsjett_2020/dokumenter/pdf/GULBOK.pdf.

²⁷⁷ See the Ombud's website: www.ldo.no/nyheiter-og-fag/om-ombudet/ansatte/.

Gender and disability are the areas in which there are most individual complaints, however the focus on shadow reports to the UN committees and the monitoring role of the Ombud in relation to the CERD, CEDAW and CRPD means that attention is also given to ethnicity and religion. In 2020, the Ombud paid particular attention to discrimination on the basis of ethnicity.²⁷⁸ There is also a working group on LGBTI issues. The discrimination ground with the least number of individual complaints is sexual orientation.²⁷⁹ Discrimination because of sexual orientation has been targeted through campaigns against hate crime and harassment, in particular in relation to schools and public life, participation in various reference groups, and participation in Pride or other public events. From an external perspective it does not appear that any discrimination ground is receiving less attention than the others.

f) Competences of the designated body/bodies – and their independent exercise

i) Independent assistance to victims

The Ombud provides independent assistance to victims by providing advice (EAOA, Section 5(2)). The victim submits a complaint to the Equality Tribunal, which also provides guidance on how to submit a formal complaint.²⁸⁰ From 1 January 2018, the mandate is to provide advice to anybody who contacts the Ombud (EAOA, Section 5(2)).

The Ombud has recently also started to assist victims in a few select cases before the Equality Tribunal. In the strategy, the Ombud states that it will give priority to cases that will have an effect on many people, which may prove a problem for small groups such as LGBT groups and minorities within minorities.²⁸¹ The Ombud has not yet used its power to support victims in taking claims to court. They have provided legal assistance in a few cases before the Equality Tribunal, and since 2018, they have also provided legal advice to lawyers in a few discrimination cases before the courts, so far only at the request of the lawyer of the claimant.²⁸²

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

NGOs working against discrimination play a key role in providing independent assistance to victims. They are often the first to identify a case since most of them provide some degree of legal advice for specific groups. Occasionally they also provide legal representation in cases before the tribunal.

Both the Ombud and the Equality Tribunal have resources available to them, although the move of the tribunal to Bergen as of 1 January 2018 has led to a depletion of skilled staff in the secretariat, as almost none of the previous staff moved, which implies a resource gap while new staff are being trained. Both the Ombud and the Equality Tribunal report that the changes in budget have been proportionate to the organisational changes.²⁸³ The tribunal was enlarged from three to four chambers from 1 January 2020.

²⁷⁸ The Equality and Anti-Discrimination Ombud (2021), *Annual report 2020, (Årsmelding)* available at [LDO - Årsmelding 2020](https://www.ldo.no/nyheter-og-arsmelding-2020).

²⁷⁹ There is no indication that this is due to fewer cases being reported on this ground; on the contrary, for several years, the LGBTIQ organisations have been doing a lot of work to discover and provide legal aid in discrimination cases.

²⁸⁰ Email to the author from the Equality Tribunal (16 April 2019).

²⁸¹ Anti-Discrimination Ombud (2016) *Strategy for 2017-2022*, paragraph 3; <http://www.ldo.no/nyheter-og-fag/brosjyrar-og-publikasjoner/Arssrapporter/arsmelding-2016/sammendrag-strategi/>.

²⁸² Emails to the author from the Ombud (5 April 2019 and 15 May 2019).

²⁸³ Emails to the author from the Ombud (5 April 2019) and from the Equality Tribunal (16 April 2019).

ii) Independent surveys and reports

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

The majority of good-quality reports and broad, independent surveys concerning discrimination are initiated and funded by an agency without independent status, the department for equality and universal design in the Directorate for Children, Youth and Family Affairs (BufDir). This agency focuses on the collection and dissemination of knowledge, both within the public sector and for anyone who requests it. Although the commission of certain reports may in itself be politicised by the sitting Government, the reports themselves are independent. Among other things, the agency coordinates and monitors the implementation of Government action plans.

The reports of the Ombud, in particular as part of her mandate to follow up on Norwegian obligations under the CERD, CEDAW and CRPD, show that this responsibility is effectively exercised in an independent manner. The Ombud also publishes reports on various legal matters, for example on age discrimination and reasonable accommodation.²⁸⁴

The reports that it produces on various legal subjects in the field of anti-discrimination play an important role in improving the knowledge on anti-discrimination and equality law both within and outside the Ombud, not least in the implementation of UN conventions and recommendations in national law. Although the commission of certain reports may in itself be politicised by the sitting Government, the reports themselves are independent.

From 2019, the Ombud started to publish annual reports on legal developments in the field of equality and anti-discrimination law. This includes monitoring the decisions of the Equality Tribunal.

iii) Recommendations

For several reasons, the effectiveness of the Equality Tribunal still has room for improvement. First, 40 % of all the decisions from 2018 to 2020 were rejected or dismissed,²⁸⁵ many of which 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 tribunal seem to have experience in the anti-discrimination field,²⁸⁶ there is an increased risk of overlooking widespread stereotypes using this justification, and several of the dismissals appear debatable, especially those using the ground 'clearly not in breach of' the anti-discrimination legislation (as provided in EAOA, Section 10(2)).²⁸⁷

²⁸⁴ Ombud (2014) 'Individual Accommodation for Employees and Jobseekers with Disability', <http://www.ldo.no/link/2d95e9dddad24563af903938afaeab95.aspx?id=1266> and Ombud (2015) 'Age Discrimination in Working Life' <http://www.ldo.no/link/6d30dab282ee4e5cbefceb5076beecb1.aspx?id=1132>.

²⁸⁵ Not including those that were filed without any decision due to lack of follow-up information from the complainant.

²⁸⁶ <https://diskrimineringsnemnda.no/nemndas-medlemmer>.

²⁸⁷ See, for example Equality Tribunal, DIN-2018-239, which is, at best, too brief to justify the dismissal. The Ombud also mentions these issues in their reports on recent legal developments in anti-discrimination law, Likestillings- og diskrimineringsombudet (2020) *Diskrimineringsretten 2019 - En gjennomgang av året som har gått*, available at https://www.ldo.no/globalassets/ldo_2019/03_ombudet-og-samfunnet/rapporter/diskrimineringsrett/diskrimineringsretten-2019.pdf, and Equality and Anti-Discrimination Ombud (2021), *Diskrimineringsretten 2020 – Rettsutvikling på likestillings- og diskrimineringsfeltet, med gjennomgang av relevante lovendringer, forvaltnings- og rettspraksis* (Discrimination Law 2020. Legal developments in equality and anti-discrimination law, including changes in the legislation, judgments and administrative decisions), available in Norwegian at: [Diskrimineringsretten 2020 : rettsutvikling på likestillings- og diskrimineringsfeltet, med gjennomgang av relevante lovendringer, forvaltnings- og rettspraksis \(ldo.no\)](https://www.ldo.no/globalassets/ldo_2021/03_ombudet-og-samfunnet/rapporter/diskrimineringsrett/diskrimineringsretten-2020-rettsutvikling-pa-likestillings-og-diskrimineringsfeltet-med-gjennomgang-av-relevante-lovendringer-forvaltnings-og-rettspraksis-ldo.no).

In their report on developments in 2020, the Ombud raised several concerns. First, the number of rejections or dismissals of cases where the reasoning is so briefly described that it is often impossible to understand why the case was dismissed. Secondly, according to the way in which the Ombud interprets the law, a case that has been dismissed or rejected may not be reopened.²⁸⁸ The Ombud therefore recommends that the Government clarifies the EAOA so that dismissed or rejected cases may be reopened, and recommends that the tribunal explain its dismissals and rejections more thoroughly.

Many of the cases brought before the Equality Tribunal concern discrimination by various parts of the public administration. The Equality Tribunal found a breach of the anti-discrimination legislation in only 2 % of the cases against the public administration, while it found a breach in 13 % of the sum total of cases in this period. Overall, 77 % of the cases against the public administration were dismissed or rejected, compared to 40 % of the cases in total. A few of the rejections are due to the Equality Tribunal's limited mandate, as it cannot assess whether legislation is in line with the GEADA. However, the lack of investigation into complaints against the public administration is a cause for concern, for example regarding care and housing issues for persons with disabilities. In their report on legal developments in 2020 mentioned above, the Ombud also recommends that the duty of the tribunal to investigate each case is clarified.

It is also a cause for concern that the tribunal never chooses to provide 'opinions' 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 powers to provide non-binding opinions (EAOA Section 14).

iv) Other competences

The Equality Tribunal only assesses individual cases of discrimination, including the active equality efforts stipulated in the law in relation to whether or not public authorities, employers and employees fulfil their duties to promote equality within their fields.

According to the EAOA, the mandate of the Equality and Anti-Discrimination Ombud is to promote real equality and work against discrimination on the basis of gender, pregnancy, ethnicity, religion, disability, sexual orientation, gender identity, gender expression and age. As of May 2021, no new regulations for their work have been issued. The Ombud's strategy from 2017 to 2022 gives priority to:

1. strengthening its monitoring role regarding the UN Conventions CEDAW, CERD and CRPD;
2. prevention instead of reaction;
3. issues that concern many people;
4. cooperation with NGOs;
5. writing reports and using them in the public debate.²⁸⁹

²⁸⁸ Equality and Anti-Discrimination Ombud (2020), *Diskrimineringsretten 2019 – En gjennomgang av året sin har gått* (Discrimination Law 2019. An overview of last year's legal developments), pp. 31-59. The report is available in Norwegian at https://www.ido.no/globalassets/ido_2019/03_ombudet-og-samfunnet/rapporter/diskrimineringsrett/diskrimineringsretten-2019.pdf. Equality and Anti-Discrimination Ombud (2021), *Diskrimineringsretten 2020 – Rettsutvikling på likestillings- og diskrimineringsfeltet, med gjennomgang av relevante lovendringer, forvaltnings- og rettspraksis* (Discrimination Law 2020. Legal developments in equality and anti-discrimination law, including changes in the legislation, judgments and administrative decisions), available in Norwegian at: [Diskrimineringsretten 2020 : rettsutvikling på likestillings- og diskrimineringsfeltet, med gjennomgang av relevante lovendringer, forvaltnings- og rettspraksis \(Ido.no\)](https://www.ido.no/globalassets/ido_2021/03_ombudet-og-samfunnet/rapporter/diskrimineringsrett/diskrimineringsretten-2020-rettsutvikling-pa-likestillings-og-diskrimineringsfeltet-med-gjennomgang-av-relevante-lovendringer-forvaltnings-og-rettspraksis.pdf).

²⁸⁹ Equality Ombud (2016) *Strategy for 2017 – 2022*.

The Ombud provides a number of courses on various discrimination issues and participates in campaigns together with NGOs and other parts of the public administration.²⁹⁰ The Ombud herself also participates in the public debate. From 1 January 2020, the Ombud is also responsible for monitoring the proactive duties of employers and the public administration reintroduced into the GEADA from the same date (see EAOA Section 5(4) and GEADA Sections 24, 25, 26 and 26a).

g) Legal standing of the designated body/bodies

In Norway, the Ombud in theory has legal standing to:

- bring discrimination complaints (on behalf of identified victims) to court;
- bring discrimination complaints (on behalf of non-identified victims) to court;
- bring discrimination complaints *ex officio* to court;
- intervene in legal cases concerning discrimination, such as *amicus curiae*.

In practice, the Ombud has only intervened in one court case (several years ago), and as such has not made use of that part of the mandate. In 2019, the Ombud brought a few selected discrimination complaints to the Equality Tribunal but did not provide legal representation in any new cases in 2020.²⁹¹ Occasionally legal experts from the Ombud act as *amicus curiae* if requested to do so by one of the lawyers.

The basis for how the Ombud selects cases is found in the Ombud strategy, and the most relevant criterion is no. 3, 'issues that concern many people'. The selection process is complex, as the Ombud has many different tools to promote an issue, but is reasonably transparent.

In Norway, the Equality Tribunal does not have legal standing to carry out any of the legal actions listed above.²⁹²

h) Quasi-judicial competences

In Norway, the Equality Tribunal is a quasi-judicial institution (EAOA Sections 1 and 7).

The Equality Tribunal is a permanent body that has been entrusted by law to exercise its functions and its composition is defined by law (see EAOA, Section 6). It must apply the law and is an independent body, as its members are external appointees, selected on personal merit.

A decision of the Equality Tribunal is a legally binding administrative decision if the case is against a private party, as provided by the EAOA in Section 11. The tribunal may not make an administrative decision establishing that an administrative decision of another public administrative agency breaches provisions in the anti-discrimination acts but may issue a statement as to how the tribunal evaluates the case seen in relation to the discrimination legislation (EAOA, Section 14). In accordance with a previous landmark case from the Parliamentary Ombudsman, a party to a case should either fulfil the decisions of the Equality Tribunal or forward the case to the ordinary courts.²⁹³

The Equality Tribunal has the right according to the law to award damages for injury of a non-pecuniary character and compensation for economic losses. Section 12 of the EAOA provides that the tribunal may make an administrative decision concerning damages for

²⁹⁰ Email to the author from the Ombud (5 April 2019).

²⁹¹ Equality Tribunal, Cases DIN-2019-3 and DIN-2019-114.

²⁹² EAOA Chapter 3.

²⁹³ The Ombud stated in a landmark decision of 1993 that public authorities that do not wish to comply with the statements of the Ombud have a duty to appeal the case to the tribunal for a final decision. A non-appeal to the tribunal by public authorities is seen as an implicit acceptance of the Ombud's conclusions.

injury of a non-pecuniary character in the context of an employment relationship under the GEADA (Section 38, second paragraph, first sentence) and the WEA (Section 13-9). This includes the treatment of self-employed people and hired workers. This means that in cases regarding, for example, harassment outside of employment, the only thing that a victim can obtain from the tribunal decision is a statement that they have been discriminated against.

However, the Equality Tribunal may order the cessation, correction and other necessary actions in order to ensure that the discrimination, harassment, instruction or victimisation ceases, or to prevent repetition (EAOA, Section 11). This does not include administrative decisions (EAOA, Section 14) and issues within the jurisdiction of the Labour Court (EAOA, Section 15). The tribunal follows up those cases where it had issued an order, for example in respect of several cases regarding universal design of the websites of the main political parties.²⁹⁴ The decisions of the Equality Tribunal are generally well respected.

The Equality Tribunal can unanimously award compensation for economic losses in all types of cases within its jurisdiction, but only when the compensation issue is fairly simple.²⁹⁵ The tribunal has used this opportunity to award damages or compensation increasingly since 2018, and in 2020 damages for non-pecuniary losses were awarded alone seven times, plus twice together with compensation for economic losses.²⁹⁶ The fact that the tribunal cannot award damages for injury of a non-pecuniary character in cases concerning issues outside employment relationships means that there are no effective sanctions against, for example, harassment outside employment.

There is no way of appealing a decision of the Equality Tribunal other than bringing it to the ordinary courts.

i) Registration by the body/bodies of complaints and decisions

In Norway, the Ombud registers the number of inquiries received, complaints of discrimination made and decisions by ground and field, but has only published statistics to 2015 on its website.²⁹⁷ More detailed statistics are available upon request to the Equality and Anti-Discrimination Ombud at www.ldo.no. In 2020, the Ombud provided advice in a total of 1 966 cases (compared to 1 988 in 2019). Of those cases, 399 concerned disability; 295 ethnicity (including language, where there were 37 cases); 95 age; 41 religion; 22 sexual orientation; 319 concerned other grounds (such as membership in trade union, political views or grounds not covered); and 178 concerned several grounds (the number of cases that actually concerned multiple discrimination is unknown).²⁹⁸ Of the fields covered, 1 000 cases concerned employment, 254 concerned goods and services, 251 concerned public administration, 114 related to education, 68

²⁹⁴ According to an email of 12.4.2019 from the Equality Tribunal to the author. Equality Tribunal, Cases Nos. 13/2018, 14/2018, 15/2018, 16/2018, 17/2018 and 18/2018. There were no cases in 2019 where the tribunal issued any orders.

²⁹⁵ EAOA, 2018, Sections 12 and 2.

²⁹⁶ [Søk i statistikk \(diskrimineringsnemnda.no\)](https://www.ldo.no/en/nyheiter-og-fag/ldos-statistikk/).

²⁹⁷ <https://www.ldo.no/en/nyheiter-og-fag/ldos-statistikk/>. Except for in the 2018 report, the Ombud has published an overview of the number cases according to grounds of discrimination and field in their annual report. See <https://www.ldo.no/en/nyheiter-og-fag/brosjyrar-og-publikasjonar/Arsrapporter/>.

²⁹⁸ Email from the Equality Ombud 23.03.2020. In 2018, 378 cases concerned disability; 243 ethnicity (including language, where there were 37 cases); 86 age; 62 religion; 18 sexual orientation; 332 concerned other grounds (such as membership in trade union, political views or grounds not covered); and 152 concerned several grounds (the number of cases that actually concerned multiple discrimination is unknown). Also, 339 cases concerned pregnancy and/or parental leave, 380 cases sex and/or gender, 21 care responsibilities, and 24 cases gender identity.

related to housing, 37 concerned the police and the judiciary, and 242 cases concerned other parts of society.²⁹⁹

The Equality Tribunal publishes its decisions in an online database and systematically registers some other statistical data.³⁰⁰ Decisions were made in 313 cases in 2020.³⁰¹ Of those cases, 98 concerned ethnicity, 25 disability, 60 age, 68 gender or pregnancy, 37 parental leave or care responsibilities, 22 religion or life stance, 11 gender identity or gender expression, 4 sexual orientation, 3 membership in a trade union and 5 other or non-protected grounds.

j) Roma and Travellers

Neither the Ombud nor the Equality Tribunal currently treat Roma and Travellers as a priority issue.

²⁹⁹ Email from the Equality Ombud 23.03.2020. In 2018, 1 101 cases concerned employment, 266 concerned goods and services, 217 concerned public administration, 148 related to education, 85 related to housing, 26 concerned the police and the judiciary, and 192 cases concerned other parts of society.

³⁰⁰ <https://diskrimineringsnemnda.no/klagesaker-og-statistikk/s%C3%B8kklagesaker>.

³⁰¹ Decisions were made in 296 cases in 2019, 157 cases in 2018, and in 58 cases in 2017. Equality Tribunal (2018) *Annual Report for 2017* and Equality Tribunal (2019) *Annual Report for 2018*, available at <http://diskrimineringsnemnda.no/nb/innhold/side/rapport>.

8 IMPLEMENTATION ISSUES

8.1 Dissemination of information, dialogue with NGOs and between social partners

- a) Dissemination of information about legal protection against discrimination (Article 10 Directive 2000/43 and Article 12 Directive 2000/78)

The Ombud had a specific duty to disseminate information about legal protection against discrimination,³⁰² but this is no longer specified anywhere. The current mandate of the Ombud is to:

- promote equality and prevent discrimination on the basis of sex and gender, pregnancy and, parental leave, care work, ethnicity, religion, life stance, disability, sexual orientation, gender identity, gender expression and age, in all areas of society;
- provide advice about discrimination law;
- monitor the implementation of the UN conventions CEDAW, CERD and CRPD; and
- monitor the duty for employers³⁰³ and the public sector to make active equality efforts and report on them.³⁰⁴

Additionally, public authorities have a general proactive duty according to chapter 4 of the GEADA, to make active, targeted and systematic efforts to promote non-discrimination policies and measures regarding ethnicity, sexual orientation and disability in all sectors of society. This includes dissemination of information. The Department for Equality and Universal Design in the Directorate for Children, Youth and Family Affairs (BufDir), plays a major role in fulfilling this duty. The department's recently developed strategy has five aims:

1. contribute to an equal and inclusive educational and working life;
2. increase knowledge and awareness about discrimination within the areas of responsibility of the various ministries and in the population at large;
3. provide available, up to date and applicable statistics, indicators and knowledge about equality and universal design;
4. promote cooperation and coordination for a holistic and targeted effort; and
5. develop their work with inclusion and equality as an employer.³⁰⁵

- b) Measures to encourage dialogue with NGOs with a view to promoting the principle of equal treatment (Article 12 Directive 2000/43 and Article 14 Directive 2000/78)

Although there are no formal rules in the anti-discrimination legislation on dissemination of information, social dialogue or dialogue with NGOs by the authorities, there is a broad tradition in Norway to regularly undertake public consultations with NGOs and social partners. NGOs and social partners are in general invited to participate in referee groups when new legal proposals are being drafted, and are also recipients of white papers and law proposals for consultative purposes before legislation is enacted. The various action plans (see chapter 9 below) are usually drafted and implemented in close collaboration with NGOs and social partners.

The Directorate for Children, Youth and Family Affairs (BufDir), and especially the Ombud, cooperate with NGOs systematically.³⁰⁶ Although recommendations from NGOs

³⁰² The previous Regulations on the organisation and activities of the Equality and Anti-Discrimination Ombud and the Equality and Anti-Discrimination Tribunal of 16 December 2005 no. 1524, Section 1.

³⁰³ Active equality efforts are required from the public sector, or for enterprises with more than 50 employees, and if a trade union or employer demands it for enterprises with 20-50 employees.

³⁰⁴ EAOA, Section 5.

³⁰⁵ Email to the author from BufDir (12 April 2019).

used to play an important part in the recruitment of members of the Equality Tribunal, this is no longer the case.

- c) Measures to promote dialogue between social partners to give effect to the principle of equal treatment within workplace practices, codes of practice, workforce monitoring (Article 11 Directive 2000/43 and Article 13 Directive 2000/78)

There are a number of initiatives in relation to promoting dialogue between social partners to give effect to the principle of equal treatment through workplace practices, codes of practice and workforce monitoring. This is done through projects by the Ministry for Children and Equality, the Directorate for Children, Youth and Family Affairs (BufDir) and the Equality Ombud, as well as by trade unions.³⁰⁷ The effect of such projects was questioned in a white paper on the structure of the Norwegian Government's policy implementation in relation to equality and discrimination.³⁰⁸ The same report proposed the creation of the directorate responsible for the coordination of this work, which led to the creation of the Department for Equality and Universal Design in the Directorate for Children, Youth and Family Affairs (BufDir). The department lists the following main tasks:

- to provide a good knowledge basis and promote equality in all areas of society;
- to have a holistic perspective and initiate work for equality on all grounds of discrimination;
- to have a targeted and established corporation with selected sectors;
- to coordinate efforts and implement government policies across all sectors; and
- to contribute to equivalent services from the public sector.³⁰⁹

From 1 January 2020, the duty for public administration bodies and medium-to-large businesses³¹⁰ to work proactively against discrimination based on all grounds was strengthened significantly (GEADA Chapter 4). The duties for the public administration are to

'issue a statement on what they are doing to integrate considerations relating to gender and non-discrimination into their work. Public authorities shall describe what they are doing to convert equality and non-discrimination principles, procedures and standards into action. Public authorities shall provide an assessment as to what has been achieved as a result of these efforts, and outline expectations with regards to future efforts in this area. The statement shall be provided in the annual report, another report issued annually or another document available to the general public.' (GEADA, Section 24)

The duties of the employers are, according to GEADA Section 26(2), to a) investigate whether there is a risk of discrimination or other barriers to equality, including by reviewing pay conditions by reference to gender and the use of involuntary part-time work every two years, b) analyse the causes of identified risks, c) implement measures suited to counteract discrimination and promote greater equality and diversity in the undertaking, and d) evaluate the results of efforts made pursuant to a) to c). Furthermore, these efforts must be documented in the annual report. They must also be

³⁰⁶ Emails to the author from BufDir (12 April 2019) and the Ombud (12 April 2019), translated by the author.

³⁰⁷ See for example, Directorate-General for Employment, Social Affairs and Inclusion (European Commission) (2010) 'Trade union practices on anti-discrimination and diversity', EC DG 4. Report available at: <https://publications.europa.eu/en/publication-detail/-/publication/d6856f18-7ba2-478a-b141-386d1f085482>.

³⁰⁸ For example in the official report NOU 2011:18 Structure for Equality, Chapter 7. See <http://www.regjeringen.no/nb/dep/bld/dok/nouer/2011/nou-2011-18.html?id=663064> (in Norwegian). For an English summary of the report, see https://www.regjeringen.no/globalassets/upload/bld/nou18_ts.pdf.

³⁰⁹ Email to the author from BufDir (12 April 2019), translated by the author.

³¹⁰ All businesses with 50 or more employees, or businesses with between 20 and 50 employees whenever the employer or trade union demands it.

made on an ongoing basis and in cooperation with employee representatives. The board of directors of limited liability companies and public limited liability companies 'shall ensure that the duty to engage actively in equality work and the duty to issue statements in this regard are met' (GEADA Section 26c). The reporting on active equality efforts is part of the annual report to the Norwegian Tax Administration and must also be made accessible to anyone who wishes to see it.³¹¹ If any compulsory part of the annual report is lacking, the Norwegian Tax Administration may issue a fine.³¹²

d) Addressing the situation of Roma and Travellers

Although there are very few Roma and Travellers in Norway, the Equality Ombud has repeatedly addressed some of the key issues seen in relation to Roma and Travellers, and has been praised for her role in fighting discrimination against the Roma. In her 2010 report to the UN CERD committee, the Equality Ombud addressed the areas of critical concern: that the Roma's access to basic rights is denied unless they discontinue their traditional way of life. In relation to schooling, the Ombud is concerned that the Travellers are being made responsible for the consequences of the failure to adjust Norwegian school policy to the traditional manner of travelling. The Roma people are furthermore systematically denied access to campsites and restaurants on the grounds that they belong to a national minority. In her 2018 report to the UN CERD committee, the Ombud reiterated her previous concerns related to schooling and housing, negative attitudes and harassment, focusing on the lack of knowledge about these groups.³¹³ At a policy level, the Ombud has thus been a public voice speaking out against the discrimination of the Roma in Norwegian society.

The Roma National Association in Norway (Taternes Landsforening)³¹⁴ is used as a dialogue point for organised interaction between the Roma community and the Equality Ombud as well as with different ministries. This includes, among others, the Ministry of Children and Equality, the Ministry of Labour and Social Affairs, the Ministry of Education and Research, the Ministry of Local Government and Modernisation, and the Ministry of Health and Care Services.

A key challenge in the Norwegian setting in relation to Roma is that there are very few of them,³¹⁵ and little knowledge exists about the discrimination that they face both at an individual and structural level. The previous Government action plan to improve the situation of the Roma is limited to Oslo, as this is where most Roma have a connection or reside for a larger share of their time.³¹⁶

The Government aimed to use the action plan to develop measures to allow real opportunities for the Roma to use already-established welfare systems within education, employment, health and housing. An evaluation of the action plan carried out by the Norwegian research institution FAFO in 2014 showed that the action points had not

³¹¹ Act relating to Annual Accounts (Lov om årsregnskap) of 17 July 1998 no. 56 Section 8-2. Available in Norwegian at [Lov om årsregnskap m.v. \(regnskapsloven\) - Lovdata](#).

³¹² Act relating to Annual Accounts (Lov om årsregnskap) of 17 July 1998 no. 56 Section 8-3. Available in Norwegian at [Lov om årsregnskap m.v. \(regnskapsloven\) - Lovdata](#).

³¹³ Norwegian Equality and Anti-discrimination Ombud (2018) *ICERD 2018: the Ombud's Report to the UN Committee on the Elimination of Racial Discrimination – a supplement to Norway's 23rd/24th Periodic Report*, https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/NOR/INT_CERD_IFN_NOR_32892_E.pdf.

³¹⁴ See <http://www.taterne.com/> (in Norwegian).

³¹⁵ Approximately 700 persons belong to a traditional group of Roma people living mainly in the Oslo area, while estimates put the number of Travellers at around a few thousand people. Statistics from Statistics Norway and the Government action plan to promote equality and prevent ethnic discrimination 2009-2012, https://www.regjeringen.no/globalassets/upload/bld/planer/2009/hpl_etnisk_diskriminering.pdf, and the Government action plan for improving the living conditions of Roma in Oslo https://www.regjeringen.no/globalassets/upload/fad/vedlegg/sami/handlingsplan_2009_rom_oslo.pdf.

³¹⁶ See http://www.regjeringen.no/nb/dep/fad/dok/rapporter_planer/planer/2009/Handlingsplan-for-a-bedre-levekarene-for-rom-i-Oslo.html?id=594315.

resulted in less discrimination against the individuals of the group. FAFO found that the action plan had led to little improvement in the living conditions of the group as a whole, although the work on the action points had led to a more precise understanding of relevant upcoming action points.³¹⁷

The Government presented a white paper on national minorities to the Parliament in December 2020, which describes the situation of national minorities, as well as on-going and planned activities. This includes Roma who speak Romanes;³¹⁸ and Romani people or Travellers, who have lived in Norway at least since the 16th century and speak Romani. The numbers are uncertain, as each person may determine whether they belong to one of these minorities regardless of whether they speak the language or not. However, they are small groups, somewhere between 200 and 2 000 people. The Norwegian Government takes the Council of Europe Framework Convention for the Protection of National Minorities as a starting point, focusing on three main goals: 1) the active participation of national minorities in society and their ability to use and develop their languages and culture; 2) the participation of national minorities in the decisions of the public administration; 3) national minorities shall receive public services of the same quality as other citizens.

To achieve the first goal, the Norwegian Government funds museums for each national minority, as well as several measures focused on the use and further development of their respective languages. For example, the Norwegian State Council for language (Språkrådet) has been given responsibility for strengthening and making more visible the languages Romani and Romanes in cooperation with the users of said languages. This includes the development of standards for written language. The national broadcasting corporation, NRK, has a responsibility to provide programmes in these languages.

To achieve the second goal, the Government focuses on funding CSOs representing the minorities, and creating forums for dialogue between these organisations and the public administration.

Regarding the third aim, that national minorities shall receive public services of the same quality as other citizens, the relevant public administration body is most often the municipality. The Government is aware that the relationship between the public administration and these groups is complicated, both due to historical discrimination and lack of knowledge about these groups among public servants. There is a 'bridge building' service for Oslo and surrounding municipalities for the Roma/Travelers, which employs people from this group together with other people, but national minorities elsewhere do not have such a service.

8.2 Measures to ensure compliance with the principle of equal treatment (Article 14 Directive 2000/43, Article 16 Directive 2000/78)

a) Compliance of national legislation (Articles 14(a) and 16(a))

Norway has taken the necessary measures to ensure that laws, regulations and administrative provisions are not contrary to the principle of equal treatment, even if there is still a need for interpretation and other measures. Before implementing international legislation in Norway, the national legislation was reviewed to ensure compliance.

A challenge is posed in relation to the 'normal' principles of interpretation in law, where the traditional principles of interpretation are used, such as *lex specialis* etc. This was

³¹⁷ Tyldum, G. and Friberg, J.H. (2014), *Et skritt på veien. Evaluering av Handlingsplan for å bedre levekårene blant rom i Oslo*, FAFO-rapport 2014:50 (in Norwegian) at <http://www.fafo.no/images/pub/2014/20397.pdf>.

³¹⁸ This group is descended mostly from five families who have lived in Norway from some time before World War II, and are mostly based around Oslo, but travel widely.

demonstrated in the Supreme Court judgment of 18 February 2010, where the Seaman's Act was referred to as *lex specialis* in relation to non-discrimination clauses, and a 62-year retirement age for seamen was thus accepted.³¹⁹

Of note is a Supreme Court Judgment from 2019 regarding the principle of equal treatment in public administration in general, not just discrimination law (see section 12.2, case HR-2019-273-A).³²⁰ The case concerned tax law, with a focus on the principle of equal treatment and when it applies in the public administration's decision-making. The tax authorities had interpreted the law in a way that the claimant saw as unjustified differential treatment. Before this judgment the common interpretation was that this principle was only applicable in situations where the public administration is allowed so-called free discretion. The public administration's 'free discretion' is seen as opposed to pure interpretation of a law, and concerns legal standards in narrow fields, often closely linked to the facts and science in a particular field, which the public administration has very good knowledge of and which the courts should be very reticent about overruling. This limited application of the principle of equal treatment was corrected by the Supreme Court, which concluded that the principle of equal treatment was applicable also to the interpretation of the law itself. The court could therefore address the question at hand, which concerned the public administration's discretion when interpreting the law (which is not considered part of its free discretion) and whether its interpretation of the law itself was in breach of the principle of equal treatment. However, when the public administration has interpreted the law correctly, extraordinary circumstances are required in order to overrule the decision on the basis of a breach of the principle of equal treatment.

This judgment has created some debate among lawyers, both regarding the extent to which the interpretation of the law may be subject to being overruled on the basis of this principle, and the need for such an extension of the use of this principle. Those not in favour of the extension argue, for example, that the courts have full authority to overrule the interpretation of the law by the public administration, and that the aim of the courts' adjudication is to ensure that the law has been interpreted correctly, not to ensure equal treatment. Those in support of the extension argue, among other things, that the public administration also uses its discretion when the law is interpreted, so there is no real reason for treating the different areas of discretion differently. If the question concerns any of the protected grounds of discrimination, the GEADA applies in any case, but the case also clarifies the scope of use of the GEADA.

There are no known laws or regulations or rules that are contrary to the principle of equality still in force, as in theory all legislative areas are assessed before the implementation of new directives and acts. However, while the Ombud works actively to comment on proposed new legislation, this is not the situation in practice. In part, some issues are overlooked when new legislation is made. In addition, old legislation and regulations have not always been updated with a view to the GEADA. The Equality Tribunal assessed three such cases in 2020. Case DIN-2020-188 concerned temporary restrictions on immigration due to COVID-19 in both legislation and regulations, which were claimed to constitute discrimination on the basis of ethnicity. The case was dismissed on the basis that the claimant did not have a personal interest in having the question determined by the tribunal. Case DIN-2019-161 concerned the Immigration Regulations³²¹ and whether the fact that a temporary pension for persons unable to work does not fulfil the requirement of future income when this is required for family immigration is discriminatory. The tribunal assessed the regulation but concluded that it did not constitute discrimination on the basis of disability, mainly since the situation is temporary. In DIN-2019-274 the Equality Tribunal assessed whether a person with

³¹⁹ Supreme Court, Judgment Rt 2010 s 202, (HR-2010-00303-A) (*Kystlink*).

³²⁰ Available at: <https://lovdata.no/pro/#document/HRSTIV/avgjorelse/hr-2019-273-a> (login required).

³²¹ Regulations relating to foreigners' access to the nation and their residence here (*Forskrift om utlendingers adgang til riket og deres opphold her*) of 15 October 2009 no. 1286.

multiple chemical sensitivity was discriminated against when she was refused a parking permit on the basis of her diagnosis. The Regulations relating to parking permits for persons with reduced mobility³²² only allow persons with diagnoses of a reduced physical mobility to have such permits. The tribunal found that since an individual assessment had been made, this was sufficient to be in accordance with the GEADA, and 'they could not evaluate the result of the assessment'.³²³ The latter conclusion is debatable with a view to EAOA Section 14 on the tribunal's authority concerning decisions made by the public administration. Since the published decision does not include any details concerning the assessment, its compliance with the CRPD or the GEADA remains unclear.

b) Compliance of other rules/clauses (Articles 14(b) and 16(b))

Norway has not taken the necessary measures to ensure compliance with Article 14(b) and Article 16(b) of Directive 2000/43 in order to ensure that contracts, collective agreements, internal rules of businesses and the rules governing independent occupations, professions, workers' associations or employers' associations that are contrary to the principle of equal treatment are or may be, declared null and void or are amended.

The WEA Section 13-9(2) contains a specific clause that provisions laid down in collective agreements, regulations, bylaws etc. will be declared null and void if they are in breach of the WEA Chapter 13 on discrimination. However, this provision only refers to Chapter 13 of the WEA. There is no such provision regarding the majority of the grounds of discrimination that are covered by the GEADA. The only grounds protected by the wording of this provision today are age in employment and membership of a trade union.

For collective agreements, if a provision is found to be against the law, it will be declared null and void by the Labour Court and any compensation that is paid will date back to the moment the invalid provision was put in force.³²⁴

Contracts and internal rules of businesses may be reviewed by the Equality Tribunal through the complaints procedure.³²⁵ However, in a case concerning the clauses of a proposed contract, the Equality Tribunal stated that it was a prejudicial question that had to be reviewed by the court as part of the contractual dispute, and dismissed the case.³²⁶

³²² Regulations relating to parking permits for persons with reduced mobility of 18 March 2016 no. 264.

³²³ Equality Tribunal, DIN-2019-274, page 5. Available in Norwegian at [19-274-anonymisert-uttalelse.pdf \(diskrimineringsnemnda.no\)](#).

³²⁴ See for instance the Labour Court Judgment ARD-1990-148 – Bio Engineers.

³²⁵ The preparatory works, Proposition to parliament, Prop. 88 L (2012-2013) Chapter 4.7.4 state that 'the tribunal cannot determine make decisions where a collective agreement is valid, how it should be interpreted, or regarding its existence. However, the tribunal can give a justified opinion on whether a collective agreement or part of the collective agreement is in breach of one of the prohibitions against discrimination.'

³²⁶ Equality Tribunal, DIN-2018-21.

9 COORDINATION AT NATIONAL LEVEL

The Ministry for Culture is responsible for dealing with anti-discrimination in relation to the grounds covered by the GEADA. The Ministry of Labour and Social Affairs is responsible for dealing with the anti-discrimination provisions of the WEA, which relate to age and membership in trade unions. Additionally, the Ministry of Labour and Social Affairs is responsible for the work on an inclusive working life, which is targeted at employees temporarily or permanently disabled and measures to promote their return to paid employment. The Ministry of Local Government and Modernisation is responsible for Samis and national minorities. The Ministry of Justice and Public Security is responsible for immigration, while the Ministry of Education and Research is responsible for integration issues.³²⁷

Coordination of equality and anti-discrimination efforts were lacking for a very long time, which led to the creation of the Department for Equality and Universal Design in the Directorate for Children, Youth and Family Affairs (BufDir). The department lists the following aims:

- to provide a good knowledge basis and promote equality in all areas of society;
- to have a holistic perspective and initiate work for equality on all grounds of discrimination;
- to have a targeted and established corporation with selected sectors;
- to coordinate efforts and implement Government policies across all sectors; and
- to contribute to equivalent services from the public sector.³²⁸

Among other things, this department plays a major role in developing and implementing Government action plans. Action plans are the main tool for coordinating the Government's efforts against discrimination.

The Government plan of action against discrimination because of sexual orientation, gender identity and gender expression covered the period 2017-2020. It has not yet been replaced. The title of the action plan was: 'Safety, openness and diversity: the Government plan of action against discrimination because of sexual orientation, gender identity and gender expressions'. The title aptly describes the key focus of the action plan, which is to ensure safe neighbourhoods and public spaces, equal public services and livelihoods for particularly vulnerable groups. The plan should, in addition to combating discrimination, help to ensure the rights of lesbians, gays, bisexuals, transgender and intersex persons.³²⁹ The measures linked to employment in the action plan were few, but increased attention to the GEADA and support for the implementation of the acts in working life are among the measures. Most of the measures have been fulfilled at least to some degree, often through the work of BufDir.

In a decision of December 2016, universal access of ICT was made a condition within education by 1 January 2021.³³⁰ A new holistic Government plan of action for improving the quality of life of people with disabilities was published in 2019, called 'A society for all – the Government's strategy for equality for people with disabilities 2020-2030'.³³¹ This strategy focuses on:

³²⁷ See [Ministries - regjeringen.no](https://www.regjeringen.no).

³²⁸ Email to the author from BufDir (12 April 2019), translated by the author.

³²⁹ Norwegian Government (2016) *Trygghet, mangfold, åpenhet. Regjeringens handlingsplan mot diskriminering på grunn av seksuell orientering, kjønnsidentitet og kjønnsuttrykk 2017-2020* at https://www.regjeringen.no/contentassets/6e1a2af163274201978270d48bf4dfbe/lhbt_handlingsplan_web.pdf.

³³⁰ See (in Norwegian) <https://www.regjeringen.no/no/aktuelt/innforer-krav-om-universell-utforming-av-ikt-i-utdanningen/id2521801/>.

³³¹ Norwegian Government (2019) *Et samfunn for alle – Likestilling, demokrati og menneskerettigheter Regjeringens handlingsplan for likestilling av personer med funksjonsnedsettelse 2020–2025*, p. 25, at

- developing both universal and specialised solutions;
- promoting self-determination, participation and inclusion;
- improved coordination in all areas; and
- four targeted areas of society: education, employment, health and care, and culture and leisure.

This action plan was not well received by the civil society organisations, which criticised it for not addressing a number of issues raised by the CRPD committee, and for otherwise lacking both funding and ambition.³³² A new action plan on universal design is promised from 2021.³³³

The Action plan against racism and discrimination based on ethnicity and religion 2020-2023³³⁴ includes research, a cross-ministry coordination group at the political level, a decision to try anonymous applications in public administration in ordinary hiring procedures, so that at least the first bar of stereotyping is removed. Other measures include information campaigns, for example on how to make complaints regarding discrimination on the basis of ethnicity and religion. A number of measures aim to improve equal public services, including education. Roma are mentioned as a group at risk regarding ethnic discrimination, but no measures target them specifically at a national level. The new action plan regarding discrimination against Muslims was one of the promised general measures.³³⁵ See section 8.1.d above on coordination concerning Roma and Travellers.

The Action plan against discrimination of and hate against Muslims was published in September 2020.³³⁶ The action plan contains 18 measures, including: a new funding programme for measures against racism, discrimination and hate speech to promote initiatives locally, regionally and nationally; promoting diversity in the culture sector, including arts and sports; developing a programme for communicating the diversity among Muslim identities, targeting adolescents; promoting religious dialogue; improving the dialogue between Muslim communities and the police; registering hate crime against Muslims separately (compared to today's registration of 'religion' or 'ethnicity' only); funding security measures for religious communities; and more research on discrimination against Muslims in the labour market, as well as the relationship between negative attitudes towards Muslims and the participation of Muslims in society and their perceived belonging to the larger society.

The Government strategy against hate speech 2016-2020³³⁷ has not yet been replaced. However, a status report on its progress was published in May 2020.³³⁸ At that point, 13 additional measures had been included in the Government's efforts, in addition to the 23

<https://www.regjeringen.no/contentassets/4538c7392f3d417a8d7cc48965a603c9/et-samfunn-for-alle---regjeringens-handlingsplan-for-likestilling-av-personer-med-funksjonsnedsettelse-des-2019.pdf>.

³³² <https://velferd.no/velferd/2019/knusende-kritikk-av-handlingsplan-for-funksjonshemmede>.

³³³ Norwegian Government (2019) *Et samfunn for alle – Likestilling, demokrati og menneskerettigheter* Regjeringens handlingsplan for likestilling av personer med funksjonsnedsettelse 2020–2025, p. 25.

³³⁴ Norwegian Government (2019) *Regjeringens handlingsplan mot rasisme og diskriminering på grunn av etnisitet og religion 2020–2023* at <https://www.regjeringen.no/contentassets/589aa9f4e14540b5a5a6144aaea7b518/handlingsplan-mot-rasisme-uu-des-2019.pdf>.

³³⁵ Norwegian Government (2019) *Regjeringens handlingsplan mot rasisme og diskriminering på grunn av etnisitet og religion 2020–2023*, p. 17.

³³⁶ Norwegian Government (2019), *Handlingsplan mot diskriminering av og hat mot muslimer 2020-2023* (Action plan against discrimination and hate against Muslims 2020-2023), available at [Handlingsplan mot diskriminering av og hat mot muslimer 2020-2023](https://www.regjeringen.no/handlingsplan-mot-diskriminering-av-og-hat-mot-muslimer-2020-2023) - [regjeringen.no](https://www.regjeringen.no).

³³⁷ Norwegian Government (2016), *Regjeringens strategi mot hatefulle ytringer 2016 – 2020* (Government action plan against hate speech 2016-2020). Available at [Regjeringens strategi mot hatefulle ytringer 2016 - 2020](https://www.regjeringen.no/Regjeringens-strategi-mot-hatefulle-ytringer-2016-2020) - [regjeringen.no](https://www.regjeringen.no).

³³⁸ Norwegian Government (2020) *Regjeringens strategi mot hatefulle ytringer 2016 – 2020. Statusrapport mai 2020* (Government action plan against hate speech 2016-2020. Status report May 2020). Available at: [Regjeringens strategi mot hatefulle ytringer 2016–2020. Statusrapport mai 2020](https://www.regjeringen.no/Regjeringens-strategi-mot-hatefulle-ytringer-2016-2020-statusrapport-mai-2020). - [regjeringen.no](https://www.regjeringen.no).

measures in the 2016 action plan. This includes a strengthening of the duty for employers to work proactively against discrimination, as described below in section 12.1.

10 CURRENT BEST PRACTICES

The scope of the anti-discrimination legislation: most discrimination grounds cover all areas of society, even if family and private matters are not enforced by the Equality Tribunal.

The active equality efforts of the GEADA give a duty for public authorities, employers and educational institutions to make active, targeted and systematic efforts to promote equality within the different grounds.³³⁹ The Equality and Anti-Discrimination Ombud monitors these efforts. From 2020, reporting on the active equality efforts are also part of the Accounting Act Section 3-3c, in addition to a duty to report on how they respect human rights, workers' rights, social conditions, the environment and act against corruption in their daily work.

Of particular interest is also the Department for Equality and Universal Design in the Directorate for Children, Youth and Family Affairs (BufDir), which works actively and systematically to gather knowledge and promote equality, especially within the ministries and other parts of the public sector.

According to the strategy from 2017, the Ombud will also provide advice to employers and others who are the subject of complaints of discrimination.

There are rules on employers' disclosure duty regarding pay, to try to minimise pay gaps because of ethnicity, disability or sexual orientation.

Jobseekers who consider that they might have been discriminated against in appointment processes have a right to request that the employer disclose written information about the education, experience and other clearly measurable qualifications of the appointed candidate.

There are no best practices to report in relation to the use of artificial intelligence (AI) to improve the effective implementation of the national legislation transposing the directives.

³³⁹ See GEADA, Chapter 4.

11 SENSITIVE OR CONTROVERSIAL ISSUES

11.1 Potential breaches of the directives at the national level

It is presumed that Norwegian anti-discrimination legislation is in line with the EU *acquis*, although the non-discrimination directives (2000/78 and 2000/43) are not incorporated in the EEA agreement. However, the Government has committed to having as high - or higher - standards in its work against discrimination as the requirements of the EU. This protection has been underlined by Supreme Court judgments. The legal consequence of the anti-discrimination directives not being incorporated into the EEA agreement is that the directives will not prevail in conflict, as the gender directives do. A practical consequence of this situation is that the practitioners use the directives and recent case law only to a very limited degree. However, the Ombud has started publishing an annual report on legal developments, which includes cases from the European Court of Justice (ECJ). The tribunal, however, still uses EU law very rarely.

The WEA Section 13-9(2) contains a specific clause that provisions laid down in collective agreements, regulations, bylaws etc. will be declared null and void if they are in breach of the WEA Chapter 13 on discrimination. However, this provision only refers to Chapter 13 of the WEA. There is no such provision regarding the majority of the grounds of discrimination, which are covered by the GEADA, which contains no such provision. The only grounds currently protected by the wording of the WEA provision are age in employment and membership of a trade union. However, the Equality Tribunal has the mandate to provide opinions on whether collective agreements are in breach of the GEADA or WEA.³⁴⁰

11.2 Other issues of concern

Access to justice remains a key concern, both regarding the Equality Tribunal and within the court system.

For several reasons, there is still room for improvement in the effectiveness of the Equality Tribunal. First, 40 % of all the decisions from 2018 to 2020 were rejected or dismissed,³⁴¹ many of which 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 tribunal seem to have experience in the anti-discrimination field,³⁴² there is an increased risk of overlooking widespread stereotypes using this justification, and several of the dismissals appear debatable, especially those using the ground 'clearly not in breach of' the anti-discrimination legislation (as provided in EAOA, Section 10(2)).³⁴³ Given that the EAOA, following statements made by the Government in a hearing on changes in the EAOA,³⁴⁴ should be interpreted as prohibiting the reopening of dismissed or rejected cases, this is an impediment with regard to access to justice in discrimination cases. In

³⁴⁰ Proposition to parliament, Prop. 88 L (2012-2013) Chapter 4.7.4 state that 'the tribunal cannot determine make decisions where a collective agreement is valid, how it should be interpreted, or regarding its existence. However, the tribunal can give a justified opinion on whether a collective agreement or part of the collective agreement is in breach of one of the prohibitions against discrimination.'

³⁴¹ Not including those which were filed without any decision due to lack of follow-up information from the complainant.

³⁴² <https://diskrimineringsnemnda.no/nemndas-medlemmer>.

³⁴³ See, for example Equality Tribunal, DIN-2018-239, which is, at best, too brief to justify the dismissal. The Ombud also mentions these issues in their report on recent legal developments in Anti-Discrimination law, available at https://www.ldo.no/globalassets/ldo_2019/03_ombudet-og-samfunnet/rapporter/diskrimineringsrett/diskrimineringsretten-2019.pdf.

³⁴⁴ 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 (etablering av et lavterskeltilbud for behandling av saker om seksuell trakassering og en styrking av aktivitets- og redegjørelsesplikten)*) available in Norwegian at [Prop. 63 L \(2018-2019\) - regjeringen.no](https://www.regjeringen.no).

their report on legal developments in 2020,³⁴⁵ the Ombud recommends that the Government clarifies the EAOA so that dismissed or rejected cases may be reopened. The Ombud also recommends that the tribunal explain its dismissals and rejections more thoroughly, and that the duty of the tribunal to investigate each case is clarified.

Secondly, many of the cases brought before the Equality Tribunal concern discrimination from various parts of the public administration. The Equality Tribunal found a breach of the anti-discrimination legislation in only 2 % of the cases against the public administration, while it found a breach in 13 % of the sum total of cases in this period. Of the cases against the public administration, 77 % were dismissed or rejected, compared to 40 % of the cases in total. A few of the rejections are due to the Equality Tribunal's limited mandate, as it cannot assess whether legislation is in line with the GEADA. However, the lack of investigation into complaints against the public administration is a cause for concern, for example regarding care and housing issues for people with disabilities.

It is also a cause for concern that the tribunal never chooses to provide 'opinions' in such cases, when it has the power 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 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).³⁴⁶ Therefore, harassment outside employment, for example, lacks effective remedies.

When it comes to the court system, there are two issues of concern. First, taking a case to court is costly, as there is no free legal aid in discrimination cases, and there is a significant risk of having to pay the costs of the defendant (see, for example, court case LE-2018-145654-2, described in section 12.2 below).

Secondly, there are no rules or guidelines to ensure that the judges or lay judges are trained in discrimination issues or, in the case of lay judges, nothing even to ensure that they are not openly and actively racist, as described in section 6.1.b.

An overhaul of the pensions system may lead to cases concerning the accrual of pension credits between 67 and 70 years, as currently, a number of systems stop the accrual of pension credits at 67, which is the general retirement age (as opposed to a maximum limit). The legality of some of these systems in relation to Directive 2000/78 is at present unclear.

Another issue of concern is the system for legal guardianship for persons with cognitive disabilities. In 2018, VG, a nationwide Norwegian newspaper, revealed that a Norwegian

³⁴⁵ Equality and Anti-Discrimination Ombud (2021), *Diskrimineringsretten 2020 – Rettsutvikling på likestillings- og diskrimineringsfeltet, med gjennomgang av relevante lovendringer, forvaltnings- og rettspraksis* (Discrimination Law 2020. Legal developments in equality and anti-discrimination law, including changes in the legislation, judgments and administrative decisions).

³⁴⁶ 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>.

municipality had had two brothers taken under legal guardianship without their knowledge or consent, probably because this would increase the amount of money transferred from the state to the municipality. This highlighted major flaws in the system for legal guardianship. The system has also been criticised by the Auditor General of Norway, who found that: in two out of three audited cases, the guardianship was general and not adapted to the individual in accordance with the law; and in only half of the cases had the guardianship authorities spoken to the person under guardianship. The auditor also found a lack of planned training for the guardians themselves.³⁴⁷ Some months later, the Supreme Court took the stance that the Norwegian organisation for people with mental disabilities (NFU) did not have legal standing in a case concerning legal guardianship. The reasoning was that NGOs are not listed as persons or institutions that may ask for someone to be put under guardianship in the Guardianship Act, Section 56.³⁴⁸ As a general rule, NGOs do have legal standing in cases concerning their field of work (see section 5.2 of this report).

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 specific rules and guidelines is evident, for example regarding insurance and the use of algorithms in the public administration.

³⁴⁷ <https://www.riksrevisjonen.no/globalassets/rapporter/no-2017-2018/vergemaal.pdf>.

³⁴⁸ Supreme Court, Case HR-2018-1786-U.

12 LATEST DEVELOPMENTS IN 2020

12.1 Legislative amendments

From 1 January 2020, the duty for public administration bodies and medium-to-large businesses³⁴⁹ to work proactively against discrimination based on all grounds was strengthened significantly (GEADA Chapter 4). The duties on the public administration are to

'issue a statement on what they are doing to integrate considerations relating to gender and non-discrimination into their work. Public authorities shall describe what they are doing to convert equality and non-discrimination principles, procedures and standards into action. Public authorities shall provide an assessment as to what has been achieved as a result of these efforts, and outline expectations with regards to future efforts in this area. The statement shall be provided in the annual report, another report issued annually or another document available to the general public.' (GEADA, Section 24)

The duties on the employers are, according to GEADA Section 26(2), to a) investigate whether there is a risk of discrimination or other barriers to equality, including by reviewing pay conditions by reference to gender and the use of involuntary part-time work every two years, b) analyse the causes of identified risks, c) implement measures suited to counteract discrimination and promote greater equality and diversity in the undertaking, and d) evaluate the results of efforts made pursuant to a) to c). Furthermore, these efforts must be documented in the annual report. They must also be made on an on-going basis and in cooperation with employee representatives. The board of directors of limited liability companies and public limited liability companies 'shall ensure that the duty to engage actively in equality work and the duty to issue statements in this regard are met' (GEADA, Section 26c).

On 1 July 2020, the Ombud for the Elderly Act entered into force. This Ombud is modelled on the Ombud for Children.³⁵⁰ They do not offer a complaints mechanism, but will instead work to promote the interests of the elderly with regard to both the public and private sectors. Their mandate is also to ensure that the interests of the elderly are sufficiently taken into consideration, and to propose measures that will improve the situation of the elderly. To some degree they are to provide advice and guidance concerning issues within their mandate.

On 19 October 2020, new regulations on passport and ID cards³⁵¹ entered into force. Until then, it was a requirement that the photographs for passports and ID cards included the ears of the person concerned. This caused difficulty for some people in relation to their religious convictions, for example Sikhs and some Muslims, while the requirement of including the ears for the sake of identification seemed rather redundant, and thus discriminatory on the basis of religion. The new regulation revoked this requirement, so that people who do not want to show their ears on photos for ID cards and passports for religious reasons are now allowed to be photographed with headscarves or other clothing, provided it is likely that they will wear similar clothing when passing checkpoints etc.

³⁴⁹ All businesses with 50 or more employees, or businesses with between 20 to 50 employees whenever the employer or trade union demands it.

³⁵⁰ Act on the Ombud for the Elderly of 19 June 2020 no. 80 (*Lov om Eldreombudet av 19. Juni 2020 nr. 80*) available in Norwegian at [Lov om Eldreombudet \(eldreombudsloven\) - Lovdata](#).

³⁵¹ FOR-2020-10-09-2012, available in Norwegian at [Forskrift om pass og nasjonalt ID-kort \(pass- og ID-kortforskriften\) - Lovdata](#).

12.2 Case law

AGE

Relevant discrimination ground: Age

Name of the court: Borgarting Court of Appeal

Date of decision: 3 November 2020

Name of the parties: *A v. the Norwegian Ministry for Defense and the Norwegian Medical Association*

Reference number: LB-2019-190061

Address of the webpage: [Borgarting lagmannsrett - Dom: LB-2019-190061 - Lovdata](#)

Brief summary: The complainant, A, had to stop working as a doctor for the Norwegian Search and Rescue Service (Redningshelikoptertjenesten), which is organised as squadron 330 under the Norwegian Ministry for Defence, due to the 60-years age limit. This age limit was set forth in the cooperation agreement between squadron 330, the Norwegian Air Ambulance (Luftambulansetjenesten) ANS and the regional health administration in question. The municipal court found that A was exempted from the WEA due to him being employed by a military squadron. However, since the service in practice is not military, the Court of Appeal found that his employment was within the scope of the WEA Chapter 13 on discrimination, referring to Directive 2000/78/EF³⁵² and emphasising that the scope of WEA Section 13-3 must not be interpreted more narrowly than the directive.³⁵³

The court went on to consider whether the age limit had a legitimate aim and was necessary to achieve that aim. The aim of the age limit is to ensure the health and safety of the patients. The doctors working on helicopter ambulances often have to work under physically and mentally challenging conditions, sometimes of long duration. Although the doctors are part of a team, there is only one doctor per team, and they will have to, for example, be able to climb up and down mountainsides and give immediate medical aid under difficult conditions.

The court referred to C-229/08 (*Wolf*) on not using routine situations as the bar, but situations that are particularly challenging and that are bound to occur from time to time, and which the Norwegian Search and Rescue Service are the only ones able to perform. The age limit for military personnel is 60 years, and since the search and rescue service is organised under the Norwegian army, it was deemed logical to set the same age limit for medical doctors on the teams. The court saw individual testing as insufficient to achieve the goal alone, due to the increased risk of sudden health issues that comes with age. The fact that two private companies providing the same service do not have such an age limit was seen as irrelevant on the basis of their contracts being a temporary solution due to limited capacity in squadron 330, and the age limit being otherwise consistently upheld over time and in all regional health units.

The court further distinguished the case from C-447/09 (*Prigge*) on the basis that in *Prigge* the age limit of 60 years in question differed from national and international age limits, which were set at 65 years old. The court thereby concluded that the age limit was justified and necessary. Since A could continue working in other positions as a doctor, the age limit was not seen as disproportionate, even though there are no extra pension rights because of the age limit. The conclusion was thus that the age limit was not in breach of the WEA Chapter 13 on discrimination.

This is also the first case to investigate whether the prohibition of age discrimination in the GEADA is applicable in employment cases not covered by the WEA. The court reasoned that the WEA is constructed differently from the GEADA and that its prohibition

³⁵² As interpreted in Supreme Court judgment Rt-2012-219, paragraph 46.

³⁵³ It should be noted that this directive is not directly binding on the Norwegian Government through the EEA agreement.

against discrimination should be used together with its chapters on wages etc. On this basis, the court concluded that there is a gap in the anti-discrimination legislation that is covered by neither the WEA Chapter 13 nor the GEADA. The fact that employment discrimination on most grounds is regulated by the GEADA, while the other parts of the WEA may be applicable, was not taken into consideration.

Relevant discrimination ground: Age

Name of the court: Borgarting Court of Appeal

Date of decision: 26 November 2020

Name of the parties: *A v. Norwegian Public Service Pension Fund*

Reference number: LB-2018-160188

Address of the webpage: [LB-2018-160188 - Lovdata Pro](#) (login required)

Brief summary: The case concerned the pension reform of 2011. State employees belong automatically to the Norwegian Public Service Pension Fund, which gives them some pension in addition to the general state pension scheme for everyone. The question in this case was whether the use of so-called asymmetrically proportionate numbers when coordinating the general and the state employee pensions constituted age discrimination for state employees. Since the negative consequences of the use of such numbers might be avoided if the two pensions were taken out simultaneously, the court concluded that the differential treatment did not constitute a real disadvantage, so that there could be no breach of the GEADA or WEA. The court chose not to go into whether the GEADA or the WEA were applicable, since the result would have been the same in either case.

ETHNICITY

Relevant discrimination ground: Ethnicity (language)

Name of the court: Equality Tribunal

Date of decision: 18 February 2020

Name of the parties: *A v. Helse Stavanger HF*

Reference number: DIN-2019-32

Address of the webpage: [19-32 Nemndas avgjørelse - uttalelse \(anonymisert\) \(diskrimineringsnemnda.no\)](#)

Brief summary: The case concerned whether a mandatory language test during the recruitment process to a position as a nurse constituted discrimination on the basis of ethnicity. A has lived in Norway since 2001, and her nursing diploma as well as a diploma in management were gained in Norway. When she applied for the position she was informed that it was a requirement that she had passed a standard language test, similar to TOEFL. The tribunal saw this as direct differential treatment. The regional health administration upheld that they had tried individual assessments, and that this had sometimes led to hiring people with inadequate language skills. On this basis the tribunal concluded that the differential treatment was justified and proportionate.

Relevant discrimination ground: Ethnicity

Name of the court: Oslo Municipal Court

Date of decision: 13 May 2020 (an appeal is pending at the Court of Appeal)

Name of the parties: *Brasovean v. Immigration Appeals Board (Utlendingsnemnda)*

Reference number: 20-000756TVI-OTIR/02³⁵⁴

Address of the webpage: Not available online

Brief summary: Mr Brasovean is a Romanian citizen of Roma origin. He first registered as a job seeker in Norway through the EEA agreement in 2015. He was caught stealing a cover for an iPhone in 2016 and resisting arrest by the police. The immigration authorities were notified, but did not expel him from Norway, while notifying him that

³⁵⁴ It should be noted that it is hardly ever mentioned in a case whether the person is of Roma or Traveller origin, unless there is a complaint about discrimination about this specific issue. This case was referred to the author by an NGO working with Roma who are not Norwegian citizens, there is no information about the person being Roma in the case itself.

any new offences might lead to such. In 2019, he was caught stealing sports equipment, which was stored outside waiting for return transport, worth about NOK 19 000 (EUR 1 900). This time he was expelled from Norway for a period of two years. The case concerned whether this was a disproportionate reaction. He had started working by the time of the second theft, and was in his trial period. Being expelled would make him and his family lose this source of income. He has a partner and a small daughter, and it is unclear what the consequences would be for them. With a view to the repeated character of the offences, and the increasing problems with theft by EEA citizens in Norway, the court did not see expelling him for two years as disproportionate, and upheld the decision of the Immigration Appeals Board to expel him.

Relevant discrimination ground: Ethnicity (and gender)

Name of the court: Borgarting Court of Appeal

Date of decision: 17 July 2020

Name of the parties: *A v. the Norwegian Labour and Welfare Administration*

Reference number: LB-2019-53935

Address of the webpage: [Borgarting lagmannsrett - Dom: LB-2019-53935 - Lovdata](#) (login him required)

Brief summary: The case concerns a type of social benefit for immigrants who are unable to obtain pension rights through work due to age, or refugees with a disability preventing them from working, called '*suppleringsstønad*' - supplementary financial support. The benefit is supposed to ensure an income at the same the same level as the lowest amount of pension from the state. From 2016, people who had migrated to Norway with the condition of receiving financial support from a relative living in Norway had their right to this benefit revoked, even if they had previously received it. The complainant, A, was born in Russia in 1934, and moved to Norway through family reunification with her daughter in 2008. She obtained the permanent residence permit in 2012, and received supplementary financial support from the same year until January 2016, due to a change in the legislation. This left her dependent on the minimum social security benefit, which is supposed to be a temporary solution only.

The court recognised that this change in the legislation mainly had consequences for women from low-income countries and found the logic behind it questionable. However, since the persons concerned would still receive the minimum social security benefit, the court still saw the change in legislation as having a legitimate aim, and was necessary and proportionate compared to the negative consequences for those concerned.

Relevant discrimination ground: Ethnicity

Name of the court: Equality Tribunal

Date of decision: 28 August 2020

Name of the parties: *A v. Oslo Police District*

Reference number: DIN-2019-126

Address of the webpage: [19-126-anonymisert-avgjoerelse.pdf \(diskrimineringsnemnda.no\)](#)

Brief summary: A is a Romanian citizen of Roma origin. He did not have a residence permit in Norway. After being suspected of stealing a chocolate worth NOK 12 (about EUR 1). He was held in police custody for 48 hours. While waiting for his flight to Romania, the police also wanted him held in immigration custody, but this was denied by the court. The Equality Tribunal saw this as differential treatment on the basis of ethnicity. A homeless Norwegian citizen would have been released after four hours. However, since the police have the authority to take foreign citizens without a residence permit into custody, the tribunal saw it as outside their authority to consider whether these rules were in accordance with the GEADA, referring to EAOA Section 1(4). On this basis the tribunal concluded that the differential treatment was justified.

Relevant discrimination ground: Ethnicity

Name of the court: Equality Tribunal

Date of decision: 3 November 2020

Name of the parties: *B on behalf of their child A v. Bergen municipality*

Reference number: DIN-2019-420

Address of the webpage: [offentlig-versjon-av-nemndas-vedtak.pdf
\(diskrimineringsnemnda.no\)](https://offentlig-versjon-av-nemndas-vedtak.pdf(diskrimineringsnemnda.no))

Brief summary: A was harassed and bullied in primary school, from first grade. The harassment included being called a monkey and other racist remarks, as well as physical abuse and threats. It escalated in sixth grade. The school tried to make a number of activity plans to improve the situation, which for example included increased adult presence and interference, cooperation training for the children, daily talks with an adult at the school, and regular meetings between the school and the parents about the situation. The parents sent a complaint to the regional supervisory authority, Fylkesmannen, which concluded that the school had neither investigated the bullying and harassment well enough, nor taken adequate measures to address it.

The tribunal concluded that the school had fulfilled its general duty to try to *prevent* harassment, since it had taken many measures including participation in a programme against harassment and bullying, with action plans tailored to this specific school, the training of a resource team at the school by the regional knowledge centre for children and youth, department for mental health.

However, the tribunal found that the school and the municipality it belonged to had not taken adequate measures to *stop* the on-going harassment and bullying. They criticized the school for not taking the harassment seriously enough, and found that there was a tendency to blame the victim by calling it 'cooperation difficulties' instead of racist harassment and bullying, which is clearly what this is. The measures seem to have focused mainly on improving A's social skills instead of making it clear that this kind of behaviour is unacceptable. While these measures may well be suited to improving A's general situation at school, they are not adequate when it comes to preventing harassment. No sanctions were imposed.³⁵⁵

Relevant discrimination ground: Ethnicity

Name of the court: Equality Tribunal

Date of decision: 21 September 2020

Name of the parties: *A v. Ministry for Justice and Public Security*

Reference number: DIN-2020-188

Address of the webpage: [20-188-anonymisert-avvisningsvedtak.pdf
\(diskrimineringsnemnda.no\)](https://20-188-anonymisert-avvisningsvedtak.pdf(diskrimineringsnemnda.no))

Brief summary: The case concerned temporary restrictions on entry to Norway for EU/EEA citizens, and whether these were discriminatory on the basis of ethnicity. A claimed that the temporary Act concerning restrictions on entry to Norway of 19 June 2020 no. 83 imposed more severe restrictions on EU/EEA citizens visiting a family of non-Norwegian citizens living in Norway than EU/EEA citizens visiting a Norwegian family living in Norway. The case was rejected on the basis that A did not suffer any direct consequences of these restrictions. The tribunal also noted that the complaint was outside the authority of the tribunal since it concerned legislation, see EAOA Section 1(5).

Relevant discrimination ground: Disability

Name of the court: Equality Tribunal

Date of decision: 28 April 2020

³⁵⁵ The Equality Tribunal cannot make binding decisions concerning decisions made by other parts of the public administration except when they act as employers, see EAOA Section 15. As for compensation or damages, the tribunal can only award compensation for economic losses in simple cases concerning employment. It had therefore no opportunity to award any compensation or damages in this case. The claimant could take the case to the court if they wanted any more sanctions imposed, but they have not done so, so the decision is final.

Name of the parties: *A v. Ministry for Justice and Public Security*

Reference number: DIN-2019-161

Address of the webpage: [19-161-anonymisert-uttalelse.pdf](#)
([diskrimineringsnemnda.no](#))

Brief summary: A has a post-traumatic stress disorder (PTSD) and receives a temporary social benefit called *arbeidsavklaringspenger* (AAP) while his health situation and ability to work is mapped. His family had applied for family reunification with him in Norway, but their application was rejected on the basis that his future income was uncertain and thus did not fulfil the requirements in the Immigration Regulations, Section 10-8 on financial guarantees for family reunification. A claimed that this requirement was discriminatory on the basis of disability, since temporary employment is accepted. The Ministry for Justice and Public Security claimed that the aim of the requirement is to ensure that the persons migrating to Norway will not depend on financial support from the public administration. They also argued that the requirement has been made stricter because no documentation of financial support is required when the residence permit is renewed.

The Equality Tribunal found that the rule was necessary, justifiable, and proportionate based on the arguments of the ministry, focusing on the temporariness of the situation – even though it had lasted as much as five years for A, since he had received this benefit repeatedly, having been able to work periodically. The tribunal also highlighted the need to create rules balancing different aims and needs, and that the aim of this benefit is to help the person into permanent employment after illness or injury.

Relevant discrimination ground: Disability

Name of the court: Equality Tribunal

Date of decision: 27 April 2020

Name of the parties: *A v. B municipality*

Reference number: DIN-2019-274

Address of the webpage: [19-274-anonymisert-uttalelse.pdf](#)
([diskrimineringsnemnda.no](#))

Brief summary: A has multiple chemical sensitivity and claimed that the refusal of a parking permit for persons with reduced mobility was discriminatory. The Regulations relating to parking permits for persons with reduced mobility³⁵⁶ only allow persons with diagnosed reduced physical mobility to have such permits. Her reduced mobility followed indirectly from the diagnosed condition. Since the case concerned decisions made by other parts of the public administration, the Equality Tribunal did not have the authority to make a binding decision, only a statement evaluating the accordance of the decision with the GEADA. The tribunal did not consider whether the condition constituted a disability, since this was not relevant for the result. The tribunal found that since an individual assessment had been made, this was sufficient to be in accordance with the GEADA, and 'they could not evaluate the result of the assessment'.

Relevant discrimination ground: Disability

Name of the court: Equality Tribunal

Date of decision: 25 August 2020

Name of the parties: *A, represented by their legal guardian v. B AS*

Reference number: DIN-2020-200

Address of the webpage: [sak-20-200-anonymisert-paalegg.pdf](#)
([diskrimineringsnemnda.no](#))

Brief summary: A has Asperger syndrome, and lives in a separate apartment in community living space Y, where X municipality hires the services from the enterprise B AS. A was not allowed any visitors from 12 March 2020 to 11 May 2020 due to the COVID-19 lockdown. After that, he was only allowed visits from his parents, not his siblings or any other persons, and only when B's employees were present. At the time of

³⁵⁶ Regulations relating to parking permits for persons with reduced mobility of 18 March 2016 no. 264.

the decision, A was only allowed visits outdoors and under supervision, due to a new lockdown. The recommendations from the national health authorities stated that living arrangements such should be counted as the person's own home, and only the person themselves could decide upon restrictions concerning visits. The service providers, family and legal guardian might be consulted.

The Equality Tribunal saw this as differential treatment on the basis of disability, which was clearly disproportionate. They then issued an order to cease the restrictions immediately, with a fine if not complied with within the deadline six days from the decision was made.

Relevant discrimination ground: Disability

Name of the court: Equality Tribunal

Date of decision: 6 November 2020

Name of the parties: *A, represented by C v. B*

Reference number: DIN-2020-344

Address of the webpage: [20-344-offentlig-versjon-av-vedtak.pdf \(diskrimineringsnemnda.no\)](https://20-344-offentlig-versjon-av-vedtak.pdf(diskrimineringsnemnda.no))

Brief summary: A works for the enterprise B. A has a cognitive disability and uses an electric wheelchair. She works for B which is an enterprise employing persons who need a lot of accommodation on a lasting basis. From 13 March to 16 October 2020 she was not allowed to show up physically at work. From 19 October she was allowed to be there 4.15 hours every Monday on certain conditions, in a trial period until 10 November. It was a requirement that she kept a wheelchair at the premises. This condition was renounced before A started working on the premises again. The reasoning behind was the restrictions to prevent COVID-19 contagion, since A needs help in the changing room, when using the bathroom, during lunch and needs instructions during work.

The Equality Tribunal was of the opinion that A had been directly differentially treated on the basis of her disability, since she had not been allowed to show up physically at work for seven months, and then only be able to be there 20 % of the hours in her contract. The tribunal saw such a long exclusion as unjustified, and that working in shifts and following the general guidelines concerning hygiene was sufficient. The tribunal ordered B to let her work at the premises as much as her colleagues within a deadline of 10 days from the day of the decisions, with a possible fine if not complied with within this deadline.

ANNEX 1: MAIN TRANSPOSITION AND ANTI-DISCRIMINATION LEGISLATION

Country: Norway
Date: 31 December 2020

Title of the Law: Act relating to equality and a prohibition against discrimination (Equality and Anti-Discrimination Act)

Abbreviation: GEADA

Date of adoption: 16. June 2017 No. 51

Entry into force: 1. January 2018

Latest amendments: LOV-2019-06-21-57 from 01.01.2020

Web link: [Act relating to equality and a prohibition against discrimination \(Equality and Anti-Discrimination Act\) - Lovdata](#)

Grounds protected: Gender, pregnancy, leave in connection with childbirth or adoption, care responsibilities, ethnicity, religion, belief, disability, sexual orientation, gender identity, gender expression, age or combinations of these factors

Civil law

Material scope: covers all areas

Principal content: prohibition of direct and indirect discrimination, harassment, instruction to discriminate within select grounds

Title of the Law: The Working Environment Act (WEA) on Working environment, working hours and employment protection, etc. (Arbeidsmiljøloven), Chapter 13

Abbreviation: WEA

Date of adoption: 17 June 2005

Latest amendments: LOV-2018-06-22-45, in force from 1 January 2019 for Chapter 13

Entry into force: 1 January 2006

Web link: <https://lovdata.no/dokument/NLE/lov/2005-06-17-62>

(English version of 1 February 2021)

Grounds protected: Age in employment (covers also part-time/ temporary work, political affiliation and membership in trade unions)

Civil law

Material scope: Public and private employment

Principal content: prohibition of direct and indirect discrimination, harassment, instruction to discriminate within select grounds

Title of the Law: Act relating to the equality and anti-discrimination Ombud and the anti-discrimination Tribunal (Equality and Anti-Discrimination Ombud Act)

Abbreviation: EAOA

Date of adoption: 16. June 2017 No. 50

Entry into force: 1. January 2018

Latest amendments: LOV-2019-06-21-57 from 01.01.2020

Grounds protected: -

Civil/administrative law

Material scope: Rules on the organisation and activities of the Equality and Anti-Discrimination Ombud and the Anti-Discrimination Tribunal

Principal content: Creation of a specialised body

Title of the law: Act relating to the strengthening of the status of human rights in Norwegian law (The Human Rights Act)

Abbreviation: HRA

Date of adoption: 21 May 1999 No. 30

Latest amendments: 9 May 2014 No. 9

Entry into force: 21 May 1999

Web link: <http://www.ub.uio.no/ujur/ulovdata/lov-19990521-030-eng.pdf>

Grounds covered: -

Civil law

Material scope: Incorporates select human rights instrument into Norwegian law Principal content: Strengthening the status of human rights

ANNEX 2: INTERNATIONAL INSTRUMENTS

Country: Norway
Date: 31 December 2020

Instrument	Date of signature	Date of ratification	Derogations/ reservations relevant to equality and non-discrimination	Right of individual petition accepted?	Can this instrument be directly relied upon in domestic courts by individuals?
European Convention on Human Rights (ECHR)	04.11.1950	15.01.1952	No	Yes	Yes, through Human Rights Act
Protocol 12, ECHR	Not signed	Not ratified	N/A	N/A	N/A
Revised European Social Charter	Yes	07.05.2001	Has accepted 80 of the revised charter's 98 paragraphs	Collective complaints protocol ratifies 20.03.1997	No
International Covenant on Civil and Political Rights	20.03.1968	13.09.1972	No	Yes	Yes, through Human Rights Act
Framework Convention for the Protection of National Minorities	Yes	17.09.1999	No	N/A	No
International Covenant on Economic, Social and Cultural Rights	20.03.1968	13.09.1972	No	No	Yes, through Human Rights Act
Convention on the Elimination of All Forms of Racial Discrimination	21.11.1969	06.08.1970	No	No	Yes, through the Anti-Discrimination Act
ILO Convention No. 111 on Discrimination	Yes	24.09.1959	No	N/a	No

Instrument	Date of signature	Date of ratification	Derogations/ reservations relevant to equality and non-discrimination	Right of individual petition accepted?	Can this instrument be directly relied upon in domestic courts by individuals?
n					
Convention on the Rights of the Child	26.01.1990	08.01.1991	No	Yes	Yes, through Human Rights Act
Convention on the Rights of Persons with Disabilities	30.03.2007	01.07.2013	No ³⁵⁷	No	No

³⁵⁷ No derogation or reservation is made, but 'interpretative declarations' to Sections 12 and 14 on fully supported decision-making arrangements and compulsory treatment are made by the Norwegian government (similar to those of Australia) which are especially relevant to people with psycho-social disabilities.

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