

Comprehensive protection against discrimination

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Comprehensive protection against discrimination

The Anti-Discrimination Act Commission's report on a comprehensive anti-discrimination Act, the protection to be afforded by the Constitution and the ratification of Additional Protocol no. 12 to the European Convention on Human Rights

Introduction

The Commission to propose comprehensive anti-discrimination legislation was appointed by the Norwegian Government on 1 June 2007.

The Commission has submitted a proposal for a compiled and more comprehensive anti-discrimination Act. According to the mandate, the Commission has considered the following issues:

- A compiled Act against discrimination, including the question of whether new groups should be protected by the anti-discrimination legislation.
- The abolition of the special exemptions of religious communities from the prohibition against discrimination on the basis of gender or homosexual cohabitation stipulated in the Gender Equality Act and Working Environment Act.
- The ratification and implementation of The European Convention on Human Rights' Protocol no. 12 on discrimination.
- Anti-discrimination provisions in the Constitution.

The nine members of the Commission were experts in anti-discrimination law, politics, human rights, labour law, etc. The chairman was Professor Hans Petter Graver LLD.

To make sure that affected interests and groups were included in the discussions, the Commission had a reference group consisting of representatives of different groups subject to discrimination, the social partners in the labour market and the Ministry of Government Administration and Reform (which is responsible for the state's central employer function).

The Commission submitted its recommendations on 19 June 2009. A partial recommendation regarding the exemptions for religious communities was submitted on 11 January 2008.

The Commission's recommendations consist of five parts. Part I explains the background for the appointment of the Commission and contains a presentation of the Commission's members, mandate, reference group and work, etc. An overview of the prevailing regulations, international regulations and foreign law is also given. In Part II, the Commission presents its proposal regarding a comprehensive Anti-Discrimination Act. In Part III, the Commission discusses the question of whether Norway should ratify Additional Protocol no. 12 to the European Convention on Human Rights. In Part IV, the Commission discusses the question of including an anti-discrimination provision in the Norwegian constitution and presents a draft constitutional provision. Finally, in Part V, the Commission presents a draft text of the Act and amendments to other Acts, with comments and an assessment of the financial and administrative consequences of the proposal.

A summary of the Commission's assessments and proposal is given here, as well as an English translation of the Commission's proposed Act relating to a prohibition against discrimination.

Official Norwegian Report (NOU) 2009: 14 "Et helhetlig diskrimineringsvern" and this English summary can be downloaded from <http://www.regjeringen.no/nb/dep/bld/>.

Summary

Part I Background

The concept of discrimination

Different phenomena and mechanisms lead to some persons or groups having a worse position in society than others. There may be a question of unjustified unequal treatment or harassment based on prejudices or stereotypes. There may also be a question of equal treatment which has an unequal effect, so that some persons end up worse off than others. Other examples are a lack of accessibility or systemic (structural) discrimination.

The legal concept of discrimination – which is the theme for the Commission’s recommendations - can be described as unjustified direct or indirect unequal treatment that can be linked to one or more grounds of discrimination.

International protection against discrimination

Non-discrimination is a general human rights law principle that is stipulated in a number of human rights conventions, such as in article 26 of the UN Convention on Social and Political Rights, the UN Convention on the Rights of the Child, the UN Convention on the Rights of Women, the UN Racial Discrimination Convention, the UN Convention on the Rights of Persons with Disabilities and ILO Convention no. 111 on discrimination in employment relationships. At a European level, the European Convention on Human Rights, article 14, and Additional Protocol no. 12 are the most important instruments. Norway has ratified all of these apart from the UN Convention on the Rights of Persons with Disabilities and Additional Protocol no. 12 to the European Convention on Human Rights, the ratification of which is being considered.

The EU has non-discrimination provisions in the Treaty and a number of directives. Norway is only bound by the EU’s directives ordering gender equality in working life through the EEA Agreement.

Protection against discrimination in Norwegian law

The protection against discrimination on the grounds of personal qualities or opinions is currently spread among various Acts in Norwegian law. The protection against discrimination varies depending on the ground for the

discrimination. The core of the anti-discrimination legislation is that it provides protection against unjustified unequal treatment. The requirement of justifiableness is also stated in other legislation.

Norway prohibits discrimination on the basis of gender, including pregnancy and a leave of absence for the birth or adoption of a child, in the Gender Equality Act of 1978. A prohibition against discrimination on the grounds of ethnicity, national origin, descent, skin colour, language, religion and belief is stipulated in the Anti-Discrimination Act of 2005. A prohibition against discrimination on the grounds of disability is regulated in the Anti-Discrimination and Accessibility Act of 2008. This Act also includes rules concerning universal design and individual accommodation. These Acts basically apply to all areas of society. Chapter 13 of the Working Environment Act prohibits discrimination in employment relationships on the basis of political views, membership of an employee organisation, sexual orientation, age, temporary employment or part-time employment. Norway also prohibits discrimination on the grounds of ethnicity, sexual orientation or disability in its housing legislation. The General Civil Penal Code also contains criminal-law protection against discrimination and hateful expressions.

The anti-discrimination legislation is enforced by separate enforcement bodies - the Equality and Anti-Discrimination Ombud and the Equality and Anti-Discrimination Tribunal (the Ombud and Tribunal). The appointment, method of organisation and authority of these bodies are regulated in the Anti-Discrimination Ombud Act.

Anti-discrimination legislation in other countries

The Commission has taken a closer look at the protection against discrimination in Sweden, Denmark, Finland, the Netherlands, Ireland and Canada. In total, these countries' legislation provide various examples of the implementation of EU-law requirements, of anti-discrimination legislation that applies to many grounds of discrimination, of countries that have a non-exhaustive list of grounds of discrimination (miscellaneous category) in their legislation, of countries that have ratified Additional Protocol no. 12 to the European Convention on Human Rights and of countries that have made the anti-discrimination principle a part of their constitution.

Part II A comprehensive Anti-Discrimination Act

According to its mandate, the Commission was to consider the question of, and make one or more proposals regarding, one combined Act relating to the prohibition of discrimination. This has been the Commission's main task. The Commission is submitting one proposal regarding an Act relating to the prohibition of discrimination, abbreviated to the "Anti-Discrimination Act". The Commission is unanimous in its support of the proposal as a whole, but has divided into a majority and a minority with regard to individual issues. An English translation of the majority's draft legislation has been included in this booklet.

General starting point for a combined Act

The Commission has adopted a general approach, characterised by the fact that the protection against discrimination applies in general to most areas of society and is common to several grounds of discrimination. The harmonisation of the prevailing anti-discrimination rules has been a key premise for the work of gathering the anti-discrimination rules. According to the mandate, the Commission's proposal was not to weaken the prevailing protection against discrimination. One of the objectives of a combined Anti-Discrimination Act is on the contrary to strengthen the protection against discrimination.

An anti-discrimination Act's foremost function is to stipulate rights and obligations. The Commission's goal has therefore been to propose rules that can in so far as possible be enforced both formally and in reality. However, the Commission has also taken account of the Act's symbolic function.

According to the Commission's mandate, the principles governing the organisation of the enforcement system (ie, the Ombud and Tribunal) will on the whole remain as they are at present.

The Commission has also, in accordance with the mandate, placed emphasis on international rules in this area, including rules by which Norway is not legally bound.

The prevailing anti-discrimination legislation will be revoked

The new Anti-Discrimination Act is to replace all the prevailing anti-discrimination legislation. The Gender Equality Act, Anti-Discrimination Act and Anti-Discrimination and Accessibility Act will be revoked as a result of

this. The same applies to the Anti-Discrimination Ombud Act. Chapter 13 of the Working Environment Act will remain in force with certain amendments as a consequence of some grounds of discrimination being transferred to the new Act. In addition, a reference to the Anti-Discrimination Act will be included in the Working Environment Act.

The Act's legislative purpose

The Commission has based its work on the fact that all people are equally valuable and have the same human worth, and that it should be a goal to promote equality irrespective of biological, social or cultural factors. The Commission proposes that the Act's legislative purpose shall be to promote equality irrespective of gender, pregnancy, a leave of absence due to the birth or adoption of a child, ethnicity, disability, sexual orientation, religion, belief, political views, age or other similar important factors relating to a person. By equality is meant equal worth and equal opportunities and rights as well as accessibility and accommodation. Refer to section 1 of the draft legislation.

The Act's scope of application

The Commission proposes that the Act is to apply to all areas of society in the same way as the Gender Equality Act, Anti-Discrimination Act and Anti-Discrimination and Accessibility Act. The Commission adopts as a principle for the wording of the Act that the Act's exemption rules are to be formulated as exemptions from the prohibition against discrimination and not from the Act's scope of application. However, the Commission does not believe that the Ombud and Tribunal should enforce a prohibition against discrimination in the sphere of private life. The Commission's majority therefore proposes that the Act is not to apply to family life and other purely personal circumstances, cf section 2, first subsection of the draft legislation. The minority proposes that the Act should apply in these areas too, with the opportunity for enforcement by the courts.

Protection for legal entities

The Commission proposes that it is only to be individual persons (individuals, natural persons) who are to be protected by the Anti-Discrimination Act. Enterprises, organisations and other legal entities should not have any rights pursuant to the Act, in the same way as pursuant to prevailing anti-discrimination legislation. The goal of promoting equality through the anti-

discrimination legislation is linked to individuals. It is human beings who are to be treated equally. It is not the anti-discrimination legislation's task to provide equal conditions for enterprises, firms, organisations and other legal entities.

Grounds of discrimination

The Commission has prepared a catalogue of prevailing and possible new grounds of discrimination. A ground of discrimination is a characteristic connected with a person that is used as a reason for treating someone differently from others in a corresponding situation. The function of a ground of discrimination in the legislation is to state a factor which basically cannot justify the less favourable treatment of human beings.

The Commission gives an account of the prevailing protection against discrimination, what the ground comprises (the concept) and the incidence of unequal treatment. The Commission has thereafter assessed the need for protection against discrimination based on the various grounds.

The Commission has examined the following grounds more closely (in random order): gender, ethnicity, religion and belief, disability, age, sexual orientation, political views, gender identity and gender expression (transsexuals), health (including those who are HIV positive), appearance, overweight, care tasks (caring for immediate family members), convicted persons, drug addicts and other socially vulnerable groups, citizenship, birth, social origin, marital status, place of residence, property and financial position, membership of an employee organisation, temporary employment and part-time employment.

The Act's grounds of discrimination – the Commission's assessments and proposals

The Commission has considered whether the new Anti-Discrimination Act should contain a list of grounds of discrimination, which grounds should in such case be included in the list and whether the protection against discrimination should be extended to cover new grounds and areas of society. The Commission has also assessed whether any grounds of discrimination should still be regulated by the Working Environment Act.

The Commission proposes that the protection against discrimination is to continue to be linked to a list of grounds of discrimination in the Act. The

Commission proposes that the grounds of discrimination in a comprehensive Anti-Discrimination Act be gender, pregnancy, a leave of absence due to the birth or adoption of a child, ethnicity, disability, sexual orientation, religion, belief, political views and age, cf section 4, first subsection of the draft legislation. The Commission thus does not propose any new grounds of discrimination.

The Commission's majority proposes that the Act's list of grounds of discrimination is not to be exhaustive and is to be supplemented by the miscellaneous category "other similar significant factors relating to a person" (cf section 4, first subsection, second sentence of the draft legislation). A miscellaneous category will mean that certain forms of discrimination on grounds that are not listed may also be invoked in special cases.

The objective of having a miscellaneous category is to have a flexible norm in order to cover borderline cases, cases which are similar to a listed ground or cases that it would be offensive to exclude from the protection afforded.

The Commission points out that it must not be possible to invoke the miscellaneous category in all cases of unjustified unequal treatment. Only grounds that are linked or similar to the listed grounds in the form of personal factors that cannot be changed or which are of great importance to the person concerned are intended. Examples of grounds which, according to the circumstances, may be invoked under this miscellaneous category will be gender identity and gender expression (transgender), care for immediate family members (care tasks), health, substance addiction, appearance, overweight or the fact that a person has been convicted of a crime. The miscellaneous category may also be invoked in special cases of unequal treatment on the grounds of age outside an employment relationship, cf the proposal below. Whether or not the unequal treatment will contravene the Anti-Discrimination Act will have to depend on a specific justification in the same way as for other grounds of discrimination, cf section 5 of the draft legislation.

The Commission's minority proposes that the Act's list of grounds of discrimination is to be exhaustive.

The Commission proposes to maintain the protection against discrimination on the grounds of gender, ethnicity or disability stipulated in the Gender Equality Act, Anti-Discrimination Act and Anti-Discrimination and Accessibility Act and to incorporate this into the new Anti-Discrimination Act.

The protection regarding sexual orientation and political views, which currently only applies in employment relationships, and also housing

relationships as regards sexual orientation, is to be extended to apply to all areas of society covered by the Act. As regards sexual orientation, the Commission has placed emphasis on the fact that homosexuals are discriminated against in areas other than those covered by the present protection against discrimination, such as in health, social and welfare services, sports, schools, churches and religion, socialising outside the home, etc. The extension of the protection against discrimination on the grounds of political views will be part of the protection of freedom of expression.

The protection against age discrimination currently only applies to employment relationships. The Commission proposes that the Act's general prohibition against age discrimination should still only apply in employment relationships. It will more often be justified to treat people differently due to age than for other reasons. In the Commission's view, having a general prohibition against unequal treatment on the grounds of age in all areas of society will therefore give the enforcement bodies too much room for discretion. However, the Commission does not believe that age discrimination is more acceptable than any other type of discrimination. The elderly, in particular, may be subject to unjustified unequal treatment which can be perceived as being unfair, unreasonable or offensive.

It should therefore be possible, outside employment relationships, to invoke the Act's prohibition against age discrimination in cases that are especially unreasonable or unjustified. In such cases, the prohibition against discrimination may, following a specific assessment, be invoked under the miscellaneous category. An example of this is credit institutions' assessments of specific loan applications following which a loan is not given to a person solely on the ground of this person's age. The Act must not prevent age limits when it comes to the age of majority, the right to vote, opportunity to obtain a driving licence or buy alcohol, age at which to start school, division into classes in primary/lower secondary school, discounts for pensioners, etc.

The Commission proposes that the prohibition against discrimination on the grounds of membership of an employee organisation, part-time employment or temporary employment is still to be regulated by the Working Environment Act and not by the Anti-Discrimination Act.

Discrimination on several grounds

The Commission's proposal regarding a comprehensive Anti-Discrimination Act will give the Ombud, Tribunal and courts an opportunity to try cases

where discrimination on more than one ground is alleged, provided at least one of the grounds pleaded is covered by the Act. Multiple discrimination describes a situation in which a person is subject to discrimination on more than one ground in the same act. Intersectionality is different from multiple discrimination in that the individual grounds of discrimination cannot be assessed separately. According to the Act's general rules, cases concerning discrimination on several grounds, both multiple discrimination and intersectionality, are covered by the Act. In the Commission's view, it is not necessary to have a separate provision regarding this.

The prohibition against discrimination

The Commission proposes a prohibition against discrimination that on the whole maintains the prevailing rules, cf section 4 of the draft legislation. The Commission proposes to establish by law one common prohibition against discrimination that is to apply to all the Act's grounds of discrimination and all areas of society covered by the Act. The Commission believes that the rules should be of a general, overarching nature. Some definitions which are currently provided by the Act's wording can instead be commented on in the preparatory works.

The Commission's majority proposes wording the Act as a prohibition against "discrimination", which is explained in the Act's wording as unjustified direct or indirect unequal treatment. A minority of the Commission's members believes in principle that it is unfortunate to use such a strongly negative expression as "discrimination" in an Act's wording, and therefore proposes wording the prohibition as a prohibition against "unjustified unequal treatment".

The prohibition against discrimination is to apply to unequal treatment on the grounds of existing, assumed, former and future circumstances relating to a person. It is to be made clear in the Act's wording that the Act applies to discrimination on the grounds of circumstances relating to another person (discrimination by association). This is to apply to all the Act's grounds, including miscellaneous category grounds that are pleaded.

Exceptions to the prohibition against discrimination

The current anti-discrimination legislation contains several rules which allow a general exception for justified unequal treatment. In addition, some specific

exceptions are established by law for religious and philosophical communities, which in the Gender Equality Act and Anti-Discrimination Act are worded as exceptions from the scope of the Act.

The Commission proposes that the prevailing exception rules be gathered in a general provision which states that justified unequal treatment is not to be regarded as discrimination, cf section 5, first subsection, first sentence of the draft legislation. According to the Commission's proposal, the conditions for justified unequal treatment are to be that the unequal treatment has a just cause, that it is necessary and that it does not disproportionately negatively affect the person or persons subject to the unequal treatment.

The concrete assessment of whether or not the unequal treatment is justified will vary, as it does today, according to the context, ie, the ground of discrimination that is invoked, whether the unequal treatment is direct or indirect, the interests or benefits at stake, etc. The conditions are to be the same for all the grounds of discrimination. However, since the opportunity for an exception will depend on a concrete assessment, the various considerations may have a different effect depending on the ground of discrimination. The proposal does not entail any changes to the actual opportunity for an exception. The definition of the justification requirement as a result of exception provisions in prevailing anti-discrimination legislation, preparatory works and case law will thus still be relevant, but must be interpreted in light of the fact that the new Act has a common standard for the opportunity for an exception. Reference is also made to the fact that the exception is to be interpreted in the light of the exception rules in the EU's anti-discrimination directives.

The Commission proposes that the prevailing special exception for religious communities be abolished. Nor are any special rules for insurance benefits or other specific areas proposed. Any unequal treatment in these areas must be assessed according to the general exception for treatment that is justified. This does not entail any change to the actual opportunity to obtain an exception according to the current rules. The Commission believes that questions linked to insurance and discrimination should be examined in further detail.

The Commission also proposes maintaining the current rules that a specific gender, sexual orientation, skin colour, etc, must be necessary for carrying out the work or profession in order to be given emphasis in an employment relationship, cf section 5, first subsection, second sentence of the draft legislation. This means that the prohibition against discrimination is stricter in employment relationships than in other areas. The rule is not to apply to

unequal treatment on the grounds of age. The proposal maintains the current rules.

The Commission believes there is a need for special definitions regarding the opportunity for an exception with regard to age. The Commission proposes that the general opportunity for an exception be supplemented by a rule stating the cases in which unequal treatment due to age is permitted. The Commission proposes that there is to be an opportunity to stipulate general age limits in an Act, regulation or nationwide collective bargaining agreement if this has a just cause, cf section 5, second subsection of the draft legislation. Employment and labour-market considerations and health and safety considerations are examples of just causes for determining a specific upper age limit. This means that the prohibition against discrimination is not to prevent rules concerning retirement ages in working life.

Active measures to promote equality

According to current rules, employers are obliged to make active efforts to promote equality in their enterprises irrespective of gender, ethnicity or disability. As regards ethnicity and disability, this obligation only applies to employers with 50 or more employees. They are also obliged to report on their work to promote equality in their annual reports, as well as the level of gender equality. The duty to report is enforced by the Ombud.

To replace these duties, the Commission proposes a duty for employers to be active in relation to all the Act's listed grounds of discrimination, but not grounds invoked under the miscellaneous category ("other similar significant circumstances relating to a person"). Refer to section 26 of the draft legislation. It is proposed to word the duty to be active such that it can be implemented in the enterprises' systematic health, environment and safety work. The duty is to apply to all enterprises, irrespective of their number of employees, but the content of the duty is different for small and large companies. The duty to be active is to be further defined in regulations applicable to enterprises with 50 or more employees, with rules formulated according to the pattern of the rules in the Working Environment Act concerning an employer's duty to carry out systematic health, environment and safety work. An English translation of the draft regulations is contained in this booklet. The regulations are to be enforced by the Norwegian Labour Inspection Authority as part of its ordinary supervision of enterprises, cf section 48 of the draft legislation.

The objective of the proposal is to introduce more systematic work to promote equality in enterprises. The Labour Inspection Authority's organisation, with its local offices and supervisory activities, may contribute to more efficient enforcement and thus greater compliance with the regulations than the current duty to be active which the Ombud has no authority to enforce. In addition, it may be simpler for the enterprises not to have two parallel regulations and enforcement bodies for overlapping areas.

The Commission also proposes that suppliers which submit tenders for the delivery of goods and services and for building and construction work are to submit a self-declaration confirming that the enterprise fulfils its duty as an employer to make active efforts to ensure equality pursuant to the Anti-Discrimination Act. The Commission proposes that the lack of such a declaration is to be a ground for rejecting the tender from the supplier.

According to the prevailing rules in the discrimination legislation, the organisations in working life are obliged to make active efforts to ensure equality. The Commission proposes abolishing this obligation in its current form. The work to promote equality carried out by the organisations in working life is to be continued through the members' systematic work in the enterprises. In the Commission's view, it is important that all parties in working life are active, since they are in different positions and can influence their respective areas.

According to the prevailing rules, public authorities are to make active, targeted and systematic efforts to promote equality irrespective of gender, ethnicity or disability in all areas of society. The Commission believes that public authorities should have a particular responsibility for promoting equal status and equality and for promoting the Anti-Discrimination Act's objectives. The Commission therefore proposes that the duty of public authorities to be active is to be expanded to apply to all the Act's grounds of discrimination, cf section 14 of the draft legislation.

Accessibility: Universal design and individual accommodation

The Commission proposes that the regulations governing accommodation for persons with disabilities in the Anti-Discrimination and Accessibility Act are to be continued in the new Anti-Discrimination Act. By accommodation is meant universal design and individual accommodation. The Commission proposes some clarifications and elucidations in the wording of the Act, cf sections 18 to 21 and section 27 of the draft legislation. The Commission has

not assessed whether the protection against discrimination can and ought to be expanded in this area. The Commission places emphasis on the fact that the Anti-Discrimination and Accessibility Act, which came into force on 1 January 2009, is completely new and has only been in effect for a short time. These questions have therefore been the subject of extensive reports and a political process very recently, and we have not managed to gain any experience of how the Act works in practice. The Commission has nonetheless pointed out some quite fundamental questions that have been raised since the Act was adopted. These are questions relating to the universal design of workplaces and of ICT in schools and educational institutions. The Commission proposes that the question of the universal design of ICT in workplaces be examined in further detail.

Special rules concerning employment relationships

The Commission proposes some special rules for employment relationships that are to be gathered in one chapter of the Act, cf chapter 4 of the draft legislation. Working life is an especially important arena for equality. This is an area where we have more, and more far-reaching, discrimination rules than in other areas.

The anti-discrimination legislation and Working Environment Act contain rules prohibiting an employer from obtaining information on a job-seeker's health, sexual orientation, political affiliation, membership of employee organisations or views on religious or cultural issues when hiring. In a proposal submitted to the Norwegian parliament (Stortinget) in the spring of 2009, the Ministry of Children and Equality suggested that it should also be against the law to obtain information concerning pregnancy, adoption or family planning. The Commission proposes that a prohibition against obtaining information on sexual orientation, pregnancy, adoption or family planning or on the job-seeker's attitude to political, religious or cultural issues be regulated in the new Anti-Discrimination Act, cf section 23 of the draft legislation. A prohibition against obtaining information on membership of employee organisations or health is, like today, to be regulated by the Working Environment Act.

The Commission proposes including in the Anti-Discrimination Act a separate provision regarding the right to equal pay for work of equal value irrespective of gender, cf section 24 of the draft legislation. This provision is a continuation of section 5 of the Gender Equality Act. The Commission has considered whether the provision should also be made applicable to other grounds of

discrimination in the Act but has decided that the provision should still only apply to gender discrimination. Protection against pay discrimination on other grounds will in any case be provided by the general prohibition against discrimination in section 22, first subsection, letter d of the draft legislation, cf section 4.

According to current rules, the employer has a duty to disclose information regarding the qualifications of the person who was hired. This gives a job-seeker an opportunity to assess whether or not there may be discrimination. The Commission proposes that the employer's duty of disclosure is also to apply to pay, including the pay determination criteria, in order to strengthen the right not to be discriminated against in this area. The right to know about pay is important in order for the employee to have access to information which says something about whether the pay determination may be in contravention of the law. Only employee representatives and safety representatives are to be allowed to demand access to pay information. The rules concerning the employer's duty of disclosure are stated in section 25 of the draft legislation.

The Commission proposes new rules concerning an employer's duty to be active, cf section 26 of the draft legislation. The Anti-Discrimination and Accessibility Act's rules concerning an employer's duty to individually accommodate employees with a disability are maintained in section 27 of the draft legislation.

Burden of proof

The anti-discrimination legislation establishes by law a so-called shared burden of proof, which means that if there are circumstances which give reasons to believe that there had been discrimination, it is the accused that must prove it probable that the discrimination has not occurred.

The Commission proposes that the prevailing rules concerning a shared burden of proof be maintained and apply to all the grounds of discrimination listed in the Act, cf section 28 of the draft legislation. A shared burden of proof is key to the protection against discrimination being effective and is necessary for ensuring real opportunities to succeed with an allegation of discrimination and thus enforce breaches of the rules. Based on due process considerations, the Commission proposes that a shared burden of proof is not to apply in those cases where the protection against discrimination is invoked on grounds that are covered by the miscellaneous category ("other similar significant factors relating to a person").

Damages for non-economic loss and compensatory damages

The key question for the Commission when it comes to liability for non-economic and compensatory damages if the Act is contravened has been whether the liability is to depend on fault and, if so, the fault requirements that are to apply. The current anti-discrimination legislation contains rules which stipulate fault requirements that are lower than those pursuant to the general rules regarding liability for damages. In some situations, the anti-discrimination legislation stipulates liability irrespective of fault. The rules are different for the various grounds of discrimination.

The Commission proposes new rules concerning damages for non-economic loss and compensatory damages that harmonise the prevailing rules, cf section 29 of the draft legislation. The Commission proposes that the employer's liability in the case of discrimination in working life is to apply irrespective of fault. The liability outside working life is to depend on the party that has discriminated being to blame (normal negligence/fault-based liability). The damages for non-economic loss and compensatory damages are to be determined as the amount that is found to be reasonable taking into consideration the economic loss, non-economic loss, the parties' circumstances and the other circumstances. The special rules concerning damages for non-economic loss and compensatory damages in the Anti-Discrimination Act are not to apply to grounds that are invoked in the miscellaneous category ("other similar significant factors relating to a person"). According to the Commission's majority, the rules are also not to apply to breaches of the universal design rules. In these cases, however, compensatory damages and possibly damages for non-economic loss may be claimed pursuant to general rules regarding liability for damages.

Enforcement. The Tribunal's authority

In accordance with its mandate, the Commission has not assessed changes to the way in which the enforcement system, ie, the Ombud and Tribunal, is organised. However, new tasks for the Ombud and Tribunal will be linked to the extension of the prohibition against discrimination to cover new grounds of discrimination and new areas of society. The Commission proposes that the Ombud be allowed to drop a case if the Ombud finds no reason to continue with it due to the seriousness of the case compared to the Ombud's available resources or if the complaint will obviously not succeed, cf section 35, second subsection of the draft legislation. The Commission also proposes that the rules concerning an employer's duty to be active are to be enforced by the

Norwegian Labour Inspection Authority, cf section 48 of the draft legislation. The Commission has considered whether the enforcement of the prohibition against discrimination should be strengthened by the Tribunal being authorised to determine damages for non-economic loss and compensatory damages. The Commission's majority believes that the Tribunal's authority should not be extended. The Commission's minority proposes that the Tribunal is to be authorised to determine damages for non-economic loss in working life in accordance with the Anti-Discrimination Act's rules.

Punishment for discrimination

The Commission believes that a breach of the Anti-Discrimination Act should not as a rule be a criminal offence. The Commission proposes, however, to maintain the penal provision in the Anti-Discrimination Act for gross contraventions of the prohibition against discrimination carried out by several persons jointly. The rules concerning punishment for a lack of compliance with the Tribunal's orders or a breach of the duty of disclosure to the Ombud and Tribunal pursuant to the Anti-Discrimination Ombud Act are also maintained.

Part III Additional Protocol no. 12 to the European Convention on Human Rights

Norway has signed Additional Protocol no. 12 to the European Convention on Human Rights of 2003, but has not yet ratified the protocol. Norway has no obligations under the protocol until ratification.

The Protocol provides general protection against discrimination. It was prepared because the protection against discrimination pursuant to article 14 of the Convention is limited to the rights protected by the Convention. Professor Janneke Gerards of the University of Leiden has, on behalf of the Commission, examined the state's obligations pursuant to the Protocol. This has been written in English and is included as an annex to the recommendations (can be downloaded from <http://www.regjeringen.no/nb/dep/bld/>).

The majority of the Commission's members recommend that Norway should not ratify the Additional Protocol. The majority places special emphasis on the considerable uncertainty regarding the obligations that the state undertakes upon ratification and regarding how the very broadly formulated wording in article 1 of the Additional Protocol will be interpreted by the European Court of Human Rights. The majority has also placed emphasis on the fact that

ratification of the Additional Protocol will entail greater protection against discrimination for legal entities and that this does not lie within the core area for the human rights law prohibition against discrimination. The minority recommends ratifying the Additional Protocol. The minority refers to the fact that the Protocol does not entail any new obligations for Norway, it only entails new procedural benefits for victims of discrimination. The minority also refers, i.a., to the fact that protection against discrimination for legal entities is already provided by article 14 of the European Convention on Human Rights. According to the minority, it is not very likely that the protection against discrimination will be developed by the European Court of Human Rights so that it introduces a general requirement of justification that is independent of the ground of discrimination.

The Commission is also divided in its view of how the Additional Protocol should be made part of Norwegian law if the authorities decide to ratify. The question has been whether the Protocol is to be included in the Human Rights Act or the Anti-Discrimination Act. If the Protocol is included in the Human Rights Act, it will in the case of any conflict take precedence over provisions in other legislation. The Commission's majority recommends including the Additional Protocol in the Anti-Discrimination Act. The reason for this is largely the same as the reason for the majority not recommending ratification, namely that there is a great deal of uncertainty regarding the obligations that the state undertakes. Incorporation into the Human Rights Act will, in the majority's view, lead to a considerable restriction on the Norwegian authorities' freedom of action as regards the requirement of reasonable conduct by authorities, and the limits of this freedom of action will be solely determined by the European Court of Human Rights' case law. The Commission's minority proposes incorporating the law in the Human Rights Act in the same way as, for example, the European Convention on Human Rights and other additional protocols to this.

Part IV Including the anti-discrimination principle in the Norwegian constitution

The Commission has considered the question of making the non-discrimination principle a part of the constitution in light of the fact that a constitutional provision, depending on how it is worded, can give the courts an opportunity to overturn the Norwegian parliament's assessment of what the content of the protection against discrimination should be and how it should be demarcated in relation to other fundamental rights. The Commission refers to the discussion

concerning making this law in which some people are critical about the fact that the Norwegian parliament in this way has less influence over fundamental questions of values while others claim that, on the contrary, this brings a new dimension and power to government in that the individual may, in an independent manner, exercise his or her own rights. The Commission also points out that it is difficult to predict how a constitutional provision that is agreed on today, and which it will be difficult to change, will be interpreted in the future. However, this uncertainty can be taken into account when wording the provision.

In any case, the constitution's symbolic value is so important that the Commission proposes making the anti-discrimination principle a part of the constitution. Such a constitutional provision will mark the fact that the anti-discrimination principle is anchored in the Norwegian legal system and Norwegian society. A constitutional provision will also be a key interpretation factor in the application of the law. It will give the principle greater weight in legal and political arguments.

The key question for the Commission as regards the wording of a constitutional anti-discrimination provision has been whether it is to stipulate a real barrier to the Norwegian parliament's legislative power. The Commission's majority proposes wording the anti-discrimination provision in the constitution such that the provision can be enforced by the courts and function as a barrier to legislation through the courts' right of judicial review. The majority proposes a provision stating that no one is to be subject to discrimination by the state's authorities on the basis of their gender, ethnicity, disability, sexual orientation, religion, belief, political views, age or other similar significant circumstances relating to a person. The Commission's minority proposes a provision stating as a principle that it is the responsibility of the state's authorities to ensure that no one is exposed to discrimination. According to the minority's proposal, more detailed provisions are to be stipulated in legislation.

The Commission's proposal regarding an Act relating to a prohibition against discrimination (the Anti-Discrimination Act)

Overview of the Act

- Chapter 1 Prohibition against discrimination
- Chapter 2 Universal design and individual accommodation
- Chapter 3 Active measures to promote equality
- Chapter 4 Special rules concerning employment relationships
- Chapter 5 Burden of proof, damages for non-economic loss and compensatory damages
- Chapter 6 The enforcement bodies. The Ombud, Tribunal, etc.
- Chapter 7 Penalties
- Chapter 8 Entry into force

Chapter 1 Prohibition against discrimination

Section 1 Legislative purpose

The Act's legislative purpose is to promote equality irrespective of gender, pregnancy, a leave of absence due to the birth or adoption of a child, ethnicity, disability, sexual orientation, religion, belief, political views, age and other similar significant circumstances relating to a person. By equality is meant equal status, equal opportunities and rights as well as accessibility and accommodation.

Section 2 The scope of the Act

The Act applies to all areas of society with the exception of family life and other purely personal matters.

The King may issue regulations stating that women's service in the Armed Forces is to be completely or partially exempted from the scope of the Act.

Section 3 The geographical scope of the Act

The Act applies in the Kingdom of Norway. The Act also applies on Svalbard and Jan Mayen, on installations and vessels operating on the Norwegian continental shelf, on Norwegian ships and Norwegian aircrafts.

As regards disability, sections 14, 18-21, 26 and 27 of the Act nonetheless do not apply on Svalbard and Jan Mayen, on installations and vessels operating on

the Norwegian continental shelf, on Norwegian ships engaged in foreign trade and Norwegian aircraft engaged in international traffic. However, section 27 applies to seamen.

The King may issue regulations concerning the application of provisions that are not applicable pursuant to the second subsection.

The King issues regulations concerning the application of the Act to posted employees, cf section 1-7 of the Working Environment Act.

Section 4 Prohibition against discrimination

Discrimination on the grounds of gender, pregnancy, a leave of absence due to the birth or adoption of a child, ethnicity, disability, sexual orientation, religion, belief, political views or age is prohibited. The same applies to discrimination on the grounds of other similar significant circumstances relating to a person. The prohibition against discrimination on the grounds of age stated in the first sentence only applies in employment relationships.

By discrimination is meant unjustified direct and indirect unequal treatment. By direct unequal treatment is meant an act or omission that has the intention or effect of making persons be treated less favourably, due to a circumstance stated in the first subsection, than other persons are, have been or would be treated. By indirect unequal treatment is meant any apparently neutral provision, condition, practice, act or omission which has the effect of placing persons in a worse position than others due to a circumstance stated in the first subsection.

The prohibition applies to discrimination on the grounds of existing, assumed, previous and future circumstances as stated in the first subsection.

The prohibition also applies to discrimination on the grounds of circumstances stated in the first subsection relating to another person with whom the person who is discriminated against is associated.

Section 5 Exception for justified unequal treatment

Unequal treatment that is necessary for achieving a just cause and does not disproportionately negatively affect the person or persons so treated does not contravene the prohibition against discrimination stated in section 4. In employment relationships, unequal treatment may only take place if this is necessary for the performance of the work or profession.

General age limits stipulated in an Act, regulation or nationwide collective bargaining agreement which are based on a just cause do not contravene the prohibition against discrimination stipulated in section 4. In the case of unequal treatment on the grounds of age, the second sentence of the first subsection does not apply.

Section 6 Breach of the duty to have universal design or individual accommodation

A breach of the duty to have universal design pursuant to section 18 or the duty to have individual accommodation stipulated in sections 20, 21 and 27 is to be regarded as discrimination.

Discrimination that is due to a lack of physical accommodation is exhaustively regulated in sections 18, 20, 21 and 27 for the legal persons and in the areas to which these provisions apply.

Section 7 Prohibition against harassment

Harassment on the grounds of circumstances covered by section 4, first subsection, of the third subsection, and sexual harassment are prohibited.

By harassment is meant acts, omissions or expressions which have an offensive, frightening, hostile, degrading or humiliating effect or which are intended to have such an effect.

By sexual harassment is meant unwanted sexual attention that is offensive to the object of the attention.

Section 8 Prohibition against instructions

It is prohibited to give instructions to discriminate in contravention of section 4, to harass in contravention of section 7 or to make use of reprisals in contravention of section 10.

Section 9 Prohibition against being an accessory

It is prohibited to contribute to discrimination, harassment, reprisals and instructions in contravention of this Act.

Section 10 Prohibition against reprisals

It is prohibited to carry out reprisals against someone who has complained about a breach of this Act or who has stated that he/she may make a complaint. This does not apply if the complainant has acted with gross negligence.

The first subsection applies correspondingly to witnesses in a complaints case.

It is prohibited to make use of reprisals against anyone who has failed to comply with instructions which contravene section 8.

Section 11 Mandatory nature

The provisions of this Act may not be waived by agreement.

Section 12 The prohibition against discrimination, etc. in human rights conventions

The United Nations' International Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965 shall apply as Norwegian law.

Provisions in human rights conventions that have been incorporated into the Norwegian Human Rights Act shall take precedence over the provisions of this Act in the case of any conflict, cf section 3 of the Human Rights Act.

Chapter 2 Active measures to promote equality

Section 13 Opportunity to take positive action

Specific measures which are likely to promote the Act's legislative purpose and do not disproportionately negatively affect the person or persons who are placed in a worse position as a result of the specific measures are not to be counted as discrimination pursuant to this Act.

The specific measures are to cease once their objective has been achieved.

The King may issue regulations concerning the forms of special treatment that are permitted pursuant to this Act, including provisions concerning the special treatment of men in connection with the teaching and care of children.

Section 14 Public authorities' duty to make efforts to ensure equality

Public authorities are to make active, targeted and systematic efforts to achieve the Act's objectives in their areas.

Section 15 Gender representation in public committees, etc

Both sexes are to be represented in the following manner:

1. If the committee has two or three members, both sexes shall be represented.
2. If the committee has four or five members, each sex shall be represented by at least two members.
3. If the committee has six to eight members, each sex shall be represented by at least three members.
4. If the committee has nine members, each sex shall be represented by at least four members, and if the committee has a greater number of members, each sex shall be represented by at least 40 per cent of the members.
5. The provisions of nos. 1-4 shall apply correspondingly to the election of deputy members.

Exceptions from the provisions of the first subsection may be made if there are special circumstances that make it obviously unreasonable to demand that the requirements be fulfilled.

The provisions of this section shall not apply to committees, etc which pursuant to statute shall consist only of members from directly elected assemblies.

The provisions of the Norwegian Local Government Act shall apply to committees, etc, elected by publicly elected bodies in municipalities and counties.

The King will issue regulations regarding enforcement and reporting. The King may issue regulations containing supplementary provisions pursuant to this section.

Section 16 Duty to guard against and prevent harassment

The management of organisations and educational institutions shall, within their areas of responsibility, guard against and try to prevent harassment from occurring in contravention of section 8.

Section 17 The content of teaching aid

In schools and other educational institutions, the teaching aids used shall be based on gender equality.

Chapter 3 Universal design and individual accommodation

Section 18 Obligation to ensure universal design

Public undertakings are to make active, targeted efforts to promote universal design within the undertaking. The same applies to private undertakings that offer goods and services to the general public.

By universal design is meant designing or arranging the main solution in the physical surroundings, including information and communication technology (ICT), so that the undertaking's normal functions can be used by as many persons as possible irrespective of disability.

Public and private undertakings that offer goods and services to the general public are obliged to ensure the universal design of the undertaking's normal function provided this does not entail an undue burden for the undertaking. When assessing whether the design or accommodation entails an undue burden, particular importance shall be attached to the effect of the accommodation on dismantling disabling barriers, whether the normal function of the undertaking is of a public nature, the necessary costs of the accommodation, the undertaking's resources, safety considerations and cultural heritage considerations.

There is no obligation to ensure universal design pursuant to this Act if the undertaking complies with further provisions in an Act or regulation concerning the content of the obligation to ensure universal design.

The King may issue regulations concerning the content of the obligation to ensure universal design in areas that are not covered by requirements in or pursuant to other legislation.

Section 19 The universal design of ICT

By information and communication technology (ICT) is meant technology and technology systems that are used to express, create, convert, exchange, store, duplicate or publish information, or which in some other way make information usable.

New ICT solutions which support the undertaking's normal functions and which are main solutions aimed at or made available to the general public are to be universally designed as from 1 July 2011, although nonetheless at the earliest 12 months after standards or guidelines relating to the content of this obligation have been established. For ICT solutions created prior to 1 January 2009, the obligation applies as from 1 January 2021. The body appointed

pursuant to section 49, second subsection, may grant exemption from these deadlines if there are particularly weighty grounds for this.

The King issues regulations containing more detailed provisions regarding the demarcation of the scope and content of the obligation to ensure the universal design of ICT solutions.

The obligation pursuant to section 18 applies if there is no obligation to ensure universal design pursuant to this provision.

Section 20 Right to the individual accommodation of municipal services

Children with a disability are entitled to suitable individual accommodation of municipal day care services to ensure equal opportunities for development and activity. Persons with a disability are entitled to suitable individual accommodation of municipal services pursuant to the Social Services Act and Municipal Health Services Act that is of a permanent nature for the individual in order to ensure that persons with a disability obtain equal service.

The right pursuant to the first subsection relates to accommodation which does not entail an undue burden. When considering whether or not the accommodation involves an undue 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.

Section 21 Right to individual accommodation in schools and educational institutions

Pupils and students with a disability who are attending schools and educational institutions are entitled to suitable individual accommodation of the place of learning, teaching, teaching aids and examinations in order to ensure equal training and educational opportunities.

The right pursuant to the first subsection relates to accommodation which does not entail an undue burden. When considering whether or not the accommodation involves an undue 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.

Chapter 4 Special rules concerning employment relationships

Section 22 Prohibition against discrimination in employment relationships

The prohibition against discrimination in section 4 applies to all aspects of an employment relationship, including:

- a) the job advertisement,
- b) hiring, redeployment and promotion,
- c) training and competence development,
- d) pay and working conditions, and
- e) the termination of the employment relationship.

The opportunity to take positive action pursuant to section 13 applies correspondingly.

Section 23 The employer's obtaining of information when hiring employees

The employer must not, when advertising for new employees or in any other manner, request applicants to provide information regarding:

- a) pregnancy, adoption or family planning,
- b) sexual orientation, or
- c) their views on political, religious or cultural issues.

The information stated in the first subsection, letters b) and c) may be obtained if obtaining information on the applicants' form of cohabitation or the applicants' views on political, religious or cultural issues is justified by the nature of the post or if the objective of the undertaking in question includes promoting particular political, religious or cultural views and the employee's job will be of importance to the fulfilment of the objective.

If the information stated in the first subsection, letters b) and c) will be asked for, this must be stated in the job advertisement.

The obtaining of health information and information on membership of employee organisations is regulated by sections 9-3 and 13-4 of the Working Environment Act.

Section 24 Equal pay for work of equal value irrespective of gender

Women and men in the same undertaking shall have equal pay for the same work or work of equal value. The pay shall be fixed in the same way for women and men regardless of gender.

The right to equal pay for the same work or work of equal value stated in this provision applies regardless of whether such work is connected with different trades or professions or whether the pay is regulated by different collective bargaining agreements.

Whether the work is of equal value is to be determined following an overall assessment in which importance is attached to the competence necessary to perform the work and other relevant factors, such as effort, responsibility and working conditions.

The term pay shall mean ordinary remuneration for work as well as all other supplements or advantages or other benefits provided by the employer.

Section 25 The employer's duty to disclose information to job applicants and employee representatives

A job applicant who believes himself or herself to have been passed over for a job in contravention of this Act may demand to be informed in writing by the employer of the education, work experience and other clearly ascertainable qualifications for the post that are held by the person who was hired.

Employee representatives and safety representatives may, on behalf of employees who believe themselves to be discriminated against in the case of a pay determination in contravention of section 22, letter d) or the principle of equal pay stated in section 24, demand that the employer state in writing the pay level and pay-determination criteria for the person or persons with whom the employee in question is comparing himself or herself.

Section 26 Employer's duty to make efforts to ensure equality

The employer is to make active, targeted and systematic efforts to promote the Act's objectives. The duty to be active applies, inter alia, to recruitment, pay and working conditions, promotions, development opportunities and protection against harassment.

The first subsection does not apply to circumstances relating to a person that are mentioned in section 4, first subsection, second sentence.

The King may issue regulations stating more detailed rules concerning the implementation of the requirements stated in this section.

Section 27 Right to individual accommodation

Employees and job applicants with a disability are entitled to suitable individual accommodation of a workplace and tasks in order to ensure that they can obtain or retain a job, have access to training and other competence development measures and carry out and have an opportunity to advance in their work in the same way as other persons.

The right pursuant to the first subsection relates to accommodation which does not entail an undue burden. When considering whether or not the accommodation involves an undue 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.

Chapter 5 Burden of proof, damages for non-economic loss and compensatory damages

Section 28 Burden of proof

Should there be circumstances which provide grounds for believing that there has been discrimination in contravention of this Act, it shall be assumed that discrimination has occurred unless the party responsible proves it probable that discrimination nonetheless has not taken place.

The first subsection does not apply if it is alleged that there has been discrimination on the grounds of circumstances relating to a person as stated in section 4, first subsection, second sentence.

Section 29 Damages for non-economic loss and compensatory damages

A person who has been treated in contravention of Chapter 1, Chapter 3 with the exception of sections 18 and 19, or Chapter 4 with the exception of section 26 is entitled to damages for non-economic loss and compensatory damages for economic loss if the party that has acted in contravention of the Act was at fault. The employer's liability applies irrespective of whether or not the employer was at fault.

The damages for non-economic loss and compensatory damages pursuant to the first subsection are to be fixed at the amount which is found to be reasonable in view of the economic loss, non-economic loss, the parties' circumstances and other facts in the case.

The first and second subsections do not apply if it is alleged that there has been discrimination on the grounds of circumstances relating to a person as stated in section 4, first subsection, second sentence.

The rules stated in this section do not place any restriction on the right to claim damages for non-economic loss and compensatory damages pursuant to general rules regarding liability for damages.

Chapter 6 The enforcement bodies. The Ombud, Tribunal, etc.

Section 30 The enforcement of the Act

The Equality and Anti-Discrimination Ombud and the Equality and Anti-Discrimination Tribunal (the Ombud and the Tribunal) shall monitor and contribute to the implementation of this Act, with the exception of the following:

- a) the prohibition against sexual harassment pursuant to section 7, third subsection,
- b) the requirements concerning representation in public committees pursuant to section 15,
- c) the obligation to ensure the universal design of ICT pursuant to section 19,
- d) the employer's duty to make active efforts pursuant to section 26,
- e) claims for damages for non-economic loss and compensatory damages pursuant to section 29, and
- f) penalties pursuant to Chapter 7 of the Act.

Section 31 The Ombud's role as a driving force

The Ombud shall work to promote genuine equality in accordance with the Act's legislative purpose.

Section 32 The Ombud's enforcement and guidance

The Ombud may take up cases on his or her own initiative or on the basis of an application from other parties. Anyone may bring a case before the Ombud. Cases brought before the Ombud by someone that is not a party to the case shall only be dealt with by the Ombud if the party whose rights were infringed consents to this. If special considerations warrant doing so, the Ombud may nonetheless deal with such a case, even if consent has not been given.

The Ombud shall provide guidance to the person who brings a case before the Ombud. The duty to provide guidance encompasses all relevant matters related

to the case and applies irrespective of whether the Ombud has the authority to give an opinion pursuant to this Act. The Ombud shall not represent the party in external proceedings.

Section 33 The Ombud's monitoring of international obligations

The Ombud shall monitor that Norwegian law and administrative practice are in accordance with Norway's obligations pursuant to the United Nations International Convention on the Elimination of All Forms of Discrimination against Women of 18 December 1979 and The United Nations International Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965.

Section 34 The Ombud's opinions and authority to make administrative decisions

The Ombud may give an opinion on whether a matter is in contravention of this Act. The Ombud shall seek to secure the parties' voluntary compliance with this opinion. If a voluntary arrangement cannot be reached, the Ombud may bring the case before the Tribunal to be dealt with pursuant to section 38.

Should the parties not voluntarily comply with the Ombud's opinion and awaiting the Tribunal's administrative decision is assumed to lead to a drawback or harmful effect, the Ombud may make an administrative decision as stated in section 39.

The Ombud is to state the grounds for the administrative decision at the time when the decision is made. The Tribunal is to be informed of the decision.

The Ombud's decision may be appealed against to the Tribunal.

Section 35 The Ombud's dismissal or dropping of cases

The Ombud shall dismiss a case if the case has been decided by a court of law or brought before a court of law for a decision. The Ombud shall also dismiss a case if the conditions for dealing with the case have not been met.

In special circumstances, the Ombud may drop a case if the Ombud finds no grounds for dealing with it any further based on the seriousness of the case compared to the Ombud's available resources or if it is obvious that the complaint cannot succeed.

The decision of the Ombud to dismiss or drop a case may be appealed against to the Tribunal.

Section 36 The organisation of the Ombud

The Ombud shall be appointed by the King in Council for a term of six years with no possibility of being reappointed.

The Ombud is an independent administrative body that is subordinate to the King and the Ministry for administrative purposes. Neither the King nor the Ministry may give instructions to the Ombud regarding the way in which individual cases are to be dealt with or regarding any other aspects of the Ombud's professional activities. Nor may the King or the Ministry reverse any administrative decisions made by the Ombud pursuant to section 34.

Section 37 The organisation of the Tribunal

The Tribunal shall consist of a chairperson, a deputy chairperson and six other members. There shall also be four deputy members. The Tribunal shall be divided into two divisions. The chairperson and the deputy chairperson shall participate in both divisions.

The members and deputy members shall be appointed by the King for a term of four years. Reappointment for one more such term is possible. The chairperson and deputy chairperson shall fulfil the requirements prescribed for judges.

The Tribunal is an independent administrative body subordinate to the King and the Ministry for administrative purposes. Neither the King nor the Ministry may give instructions regarding or reverse the Tribunal's exercise of authority in individual cases.

Cases shall be prepared by a dedicated secretariat.

Section 38 The functions of the Tribunal

The Tribunal shall deal with cases that are brought before it pursuant to section 34. Should the Ombud decide not to bring a case before the Tribunal pursuant to section 34, the case may be brought by a party to the case or by somebody that has brought the case before the Ombud without being a party. Cases

brought before the Tribunal pursuant to the second sentence shall only be dealt with by the Tribunal if the party whose rights were infringed consents to this.

The Tribunal may require the Ombud to bring specific cases that have been dealt with by the Ombud before the Tribunal.

Section 39 The Tribunal's authority to make administrative decisions

The Tribunal may make administrative decisions to the effect that there is a breach of the provisions of this Act unless otherwise stipulated. Should the Tribunal be unable to make an administrative decision pursuant to section 44, it shall state an opinion as to whether the matter brought before the Tribunal is in contravention of the provisions of this Act.

Subject to the exceptions that follow from sections 44 and 45, the Tribunal may order an act to be stopped or remedied or other measures that are necessary to ensure that discrimination, harassment, instructions or reprisals cease and to prevent their repetition. The Tribunal may set a time limit for compliance with the order.

The Tribunal shall state the grounds for an administrative decision at the time the decision is made.

Section 40 The Tribunal's dismissal or dropping of a case

The Tribunal shall dismiss a case if the case has been decided by a court of law or brought before a court of law for a decision. The Tribunal shall also dismiss a case if the conditions for dealing with the case have not been fulfilled. In special cases, the Tribunal may drop a case if it finds no grounds for dealing with it any further.

Section 41 Enforcement penalties

The Tribunal may make an administrative decision to impose an enforcement penalty to ensure the implementation of orders pursuant to section 39 if the time limit for complying with the order is exceeded. The enforcement penalty comes into force if a new time limit for complying with the order is exceeded, and shall normally remain in force until the order has been complied with. The Tribunal may reduce or waive a penalty that has been imposed when special reasons warrant doing so.

The enforcement penalty shall accrue to the State. An administrative decision to impose an enforcement penalty constitutes grounds for enforcement of execution.

The Tribunal shall state the grounds for an administrative decision to impose an enforcement penalty at the time the decision is made

The King may issue regulations stipulating the size and duration of the enforcement penalty and other provisions regarding the penalty's determination and implementation.

Section 42 Review of the Tribunal's administrative decisions

Administrative decisions made by the Tribunal may be brought before a court of law for a full review of the case. Administrative decisions made by the Ombud pursuant to section 34, second subsection, may not be brought before a court of law unless the right to appeal has been exercised and the appeal has been decided on by the Tribunal. Section 27b, second sentence of the Public Administration Act shall apply correspondingly.

Legal proceedings for the review of an administrative decision made by the Tribunal must be brought within three months of receipt of notification of the decision.

Legal proceedings regarding the validity of an administrative decision made by the Tribunal shall be brought against the State represented by the Tribunal.

Section 43 Duty to provide information to the Ombud and Tribunal. Judicial recording of evidence

Notwithstanding their duty of confidentiality, public authorities have a duty to give the Ombud and Tribunal such information as is necessary for the implementation of the Act. Such information may also be required of others who have a duty to testify pursuant to the Disputes Act. Section 24-8, third subsection of the Disputes Act applies correspondingly. Such decisions as are mentioned in section 22-6, first subsection, second sentence, section 22-7, section 22-8, second subsection, section 22-9, second to fourth subsections, section 22-10, second sentence and section 22-11, second subsection of the Disputes Act shall be made by the District Court.

The Ombud and Tribunal may undertake such investigations as they find necessary in order to perform their duties pursuant to this Act. If necessary, they may request the assistance of the police.

The Ombud and Tribunal may require that information shall be given to, or that investigations may be carried out by, other public bodies that have been directed to assist in the implementation of the provisions of this Act.

The Ombud and Tribunal may require the judicial recording of evidence in a court of law, cf. section 43, second subsection, of the Courts of Justice Act.

Section 44 The Tribunal's authority in relation to other administrative bodies

The Tribunal may not annul or alter administrative decisions made by other administrative bodies. Nor may the Tribunal issue orders as to how the authority to make administrative decisions must be exercised in order to avoid contravening the provisions of this Act.

Administrative decisions made by the Tribunal are not binding on the King or ministries.

Section 45 The Tribunal's relationship to the Labour Court

If a case pursuant to the provisions of this Act that indirectly raises a question about the existence, validity or interpretation of a collective bargaining agreement is brought before the Tribunal, each of the parties to the collective bargaining agreement may have this question decided by the Labour Court.

The Tribunal may give a reasoned opinion as to whether a collective bargaining agreement or a provision in such an agreement that is brought before the Tribunal is in contravention of the provisions of this Act. In such cases, the parties to the agreement may bring the question of the agreement's relationship to a provision of this Act before the Labour Court.

Cases before the Tribunal that are brought before the Labour Court pursuant to the first subsection or the second subsection, second sentence, shall be suspended until the Labour Court has finished dealing with the question.

In no circumstance may the Tribunal make decisions which lie within the competence of the Labour Court pursuant to the Labour Disputes Act and the Public Service Disputes Act.

Section 46 The relationship to the Public Administration Act

Unless otherwise provided, the Public Administration Act shall apply to the activities of the Ombud and the Tribunal.

Section 47 Regulations regarding the Ombud and Tribunal

The King may issue regulations regarding the organisation, tasks and administrative procedures of the Ombud and the Tribunal, including those of the secretariat.

Section 48 Enforcement of the employer's obligation to make active efforts pursuant to section 26

The Labour Inspection Authority (the Authority) monitors and enforces the employer's obligations pursuant to section 26. The Authority makes the orders necessary for implementing the obligations.

An order may stipulate an enforcement penalty applicable to each day or week or month that elapses between the expiry of the time limit set for carrying out the order and the date when the order has been complied with. An enforcement penalty may also be stipulated as a non-recurring penalty. The Authority may waive any enforcement penalty that has been incurred.

The Petroleum Safety Authority has corresponding powers within its sphere of authority.

Section 49 Enforcement of the obligation to ensure the universal design of ICT pursuant to section 19

The King shall appoint the body that is to monitor that the requirements stated in section 19 are complied with. This body may order an undertaking that does not fulfil the requirements stated in or pursuant to section 19, subsection three to rectify this and may impose an enforcement penalty so as to ensure that the order is carried out if the time allowed for compliance with the order has been exceeded. The regulations stipulated in section 41, first to third subsections of this Act apply correspondingly.

The body appointed pursuant to the first subsection may demand the information necessary for carrying out its tasks pursuant to the Act and demand access to ICT solutions as mentioned in section 19. The same applies to the appeals body if there is an appeal against a decision pursuant to the first subsection.

Any legal proceedings regarding the validity of a decision made by the body appointed pursuant to the first subsection or the appeals body must be brought within three months of information on the decision being received. A decision pursuant to the first subsection may not be brought before the courts unless the opportunity to appeal has been utilised and the appeal has been determined.

The King may issue regulations regarding an enforcement penalty pursuant to the first subsection, including regarding the size and duration of the enforcement penalty and other provisions regarding determination and execution.

Section 50 Right of organisations to act as agents

An organisation whose purpose is, wholly or partly, to combat discrimination may be used as an agent in administrative proceedings pursuant to this Act.

A person appointed by and with links to an organisation whose objective is wholly or partly that of combatting discrimination may be used as a legal representative in cases heard by the courts pursuant to this Act. This does not apply for the Supreme Court.

The court may refuse to accept a legal representative if the court believes there is a danger of the legal representative not having sufficient qualifications to safeguard the party's interests satisfactorily.

A legal representative shall, along with an authorisation as stated in section 3-4 of the Disputes Act, at the same time submit written information from the organisation regarding the legal representative's qualifications.

Chapter 7 Penalties

Section 51 Penalties for the contravention of an order and breach of the duty to provide information

Any party that wilfully or negligently fails to comply with an order given pursuant to section 34, second subsection or section 39 or who is an accessory thereto shall be liable to a fine. The same shall apply to wilful or negligent failure to comply with the duty to provide information pursuant to section 43.

Contravention by a person in a subordinate position shall not be punishable if the contravention is essentially due to the subordinate relationship.

The rule concerning the burden of proof in section 28 is not applicable when enforcing this provision.

Contravention shall only be prosecuted when so requested by the Tribunal, unless public prosecution is required in the public interest.

In connection with the criminal proceedings, the prosecuting authority may request a judgment approving measures to ensure that the unlawful act, omission or reprisal ceases and to prevent its repetition.

Section 52 Penalty for a gross contravention of the prohibition against discrimination on the ground of ethnicity that is carried out by several parties jointly

Any person who wilfully and jointly with at least two other persons commits a serious contravention or is accessory to a serious contravention of the prohibition against discrimination, harassment or instructions to discriminate on the ground of ethnicity, cf sections 4, 7 and 8, shall be liable to fines or imprisonment for a term not exceeding three years. Any person who has previously been sentenced to a penalty for contravention of this provision may be liable to a penalty even if the contravention is not serious.

When assessing whether or not a contravention is serious, particular importance shall be 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 a serious violation of a person's mental integrity, whether it is likely to create fear and whether it was committed against a person under the age of 18.

Before instituting a prosecution for such offences as are mentioned in the first subsection, an assessment shall be made of whether it will be sufficient to impose an administrative sanction.

If the contravention is part of the activity of an organised criminal group, sections 60a and 162c of the General Civil Penal Code shall apply.

The provisions of section 18 regarding the burden of proof is not applicable when enforcing this provision.

Chapter 8 Entry into force

Section 53 Entry into force

The Act enters into force on the date determined by the King. The King may decide that the individual provisions are to enter into force at different times.

The Commission's proposal regarding regulations concerning the employer's duty to make active efforts

To be authorised by section 26, third subsection of the Anti-Discrimination Act

Duty to make efforts to ensure equality

The employer shall make active, targeted and systematic efforts to promote equality irrespective of gender, pregnancy, a leave of absence due to the birth or adoption of a child, ethnicity, disability, sexual orientation, religion, belief, political views or age. The duty to make active efforts relates, inter alia, to recruitment, pay and working conditions, promotion, development opportunities and protection against harassment.

In undertakings with 50 employees or more, the duty to make active efforts pursuant to the first subsection means that the employer is to

- a) determine goals for the work to ensure equality,
- b) review the organisation's practices and culture in order to identify barriers to equality
- c) have an overview of how responsibilities, tasks and the authority relating to the work to ensure equality are distributed,
- d) quality assure the undertaking's activities, processes and routines in relation to the prohibition against direct and indirect discrimination, and prepare plans and implement measures to reduce the risk,
- e) ensure systematic work to prevent and follow up allegations of discrimination and harassment,
- f) ensure the systematic monitoring and review of the work to ensure equality in order to safeguard that this functions as presumed,
- g) prepare documentation of the actual level of gender equality in the undertaking, and
- h) prepare documentation of measures that have been implemented or are planned to be implemented to promote equality pursuant to letters a) to f).