LDO

Likestillings- og diskrimineringsombudet

PRAKSIS §

2009

Diskrimineringsjuss i PRAKSIS

English

CONTENTS

SPEAK OUT!

What do you do if other people try and tell you that you are inferior? If your future employer considers you less qualified for your dream job because you are pregnant? If the housing cooperative you live in sets up barriers in the yard even if it makes it difficult for you and your wheelchair to get through? If the doorman at the pub thinks that your skin colour makes you a troublemaker, or a prostitute. Do you make a fuss? Or do you put up with it?

In 2009, the Equality and Anti-Discrimination Ombud (LDO) received 303 complaints from people who decided NOT to put up with it. Instead they contacted LDO to get an evaluation of whether they were discriminated against or not. That requires courage because experiencing discrimination is hurtful. It is shameful to be weighed up and to be found lacking. We rarely share this shame with each other. This makes it difficult to establish how much discrimination there is.

If one looks at the complaints LDO receives it can look as if the most usual form of discrimination today is discrimination on the grounds of disability. Over half of all complaints from 2009 concerned possible breaches of the new Anti-Discrimination and Accessibility Act. Most are about inadequate universal design. The Ombud received many cases about discrimination against pregnant women and about racial discrimination. Very few complained about discrimination on the grounds of sexual orientation. Does this mean that lesbians and gay men are not discriminated against? And that discrimination on the grounds of disability or pregnancy is 10 times more usual than discrimination on the grounds of ethnicity? Or does this just mean that some forms of discrimination are easier to complain about than others? I am convinced that it is the latter. A wheelchair user who is locked out of the courthouse because it is impossible for her to come down the stairs can be fairly sure that discrimination can be proven if she decides to complain. A young man with cerebral palsy, who is refused entry to a place of entertainment because the doorman claims he is drunk, will have a much difficult burden of proof. Perhaps so difficult that he comes to the conclusion that there is no point in complaining about it.

Even if complaints are made, it takes time for things to change. In 2009, it was 30 years since the Gender Equality Act was passed. Since then thousands of women and men have complained about discrimination. Many women and some men still complain about differential treatment on the grounds of gender. Some are confronted with it when they apply for a new job. Others when they say they are going on parental leave. There are also large occupational areas where workers experience this every single month in the form of a payslip which tells them their work is worth less than that of others. This year both the politicians and the partners at the workplace have promised an equal pay settlement. It is high time. The Gender Equality Act stipulates that work of equal value shall be paid equally. In this report, we tell you about one person who dared to use the Equality Act to demand a fairer wage. She complained to LDO and her claim was upheld. I hope and believe that her fight will be of use to others.

But *Praksis 2009* is not just about those who feel discriminated against. Behind every single complaint LDO receives, there are at least two stories. One is the experience of the individual who feels that she was discriminated against and the other is the explanation of the business or the person who was blamed for the discrimination. This year we have chosen to allow some of those accused to speak for themselves in interviews. Their stories show clearly that discrimination is far removed from conscious differential treatment. Discrimination is often more due to ignorance and a lack of awareness than ill will. Perhaps that's why many companies show a great deal of willingness to rectify the damage and change the practice when their attention is drawn to the legislation? When it comes to universal design cases in particular, LDO can cite a large number of examples showing that as soon as they realise that a complaint to the Ombud has been lodged against them, businesses tackle the problem and create new, accessible solutions on their own initiative instead of waiting for the Ombud to process the case. In cases relating to the workplace, many businesses also choose to offer victims of discrimination financial compensation and damages. I am pleased about this and it shows that it is worth lodging a complaint.

Making a complaint also contributes in another important respect. It places the shame where it belongs – with the person who breaks the law. In the long-term, that is perhaps the most important aspect. Experiencing discrimination shouldn't be shameful. It should be much worse to be caught discriminating against others.

Sunniva Ørstavik

SUMMARY

Praksis is presented by the Norwegian Equality and Anti-Discrimination Ombud's legal section. We have selected some of the cases the Ombud has handled in the course of 2009. The selected cases highlight the questions and issues about which the Ombud receives many enquiries, as well as some relevant problematic issues in the area of anti-discrimination law, or raise questions of principle. We have conducted interviews related to the different cases and subjects we describe. In this edition of *Praksis*, we have interviewed two people who are defendants in specific complaints, as well as a representative of an interest organization. In this way, we would like to highlight different standpoints and views on the work we do.

The Ombud's role and legal tools

The Ombud has a wide mandate. The Ombud enforces several laws and also has a role as a driving force for the promotion of equality and equal treatment. **Chapter 3** highlights some principle aspects of the Ombud's mandate and role as a law enforcer.

Documentation of cases

Chapter 4 provides an overview of cases brought to the Ombud.

Anti-Discrimination and Accessibility Act

The Anti-Discrimination and Accessibility Act entered into force on 1 January, 2009. **Chapter 5** provides an overview of selected cases after the new law came in. In 2009, the Equality and Anti-Discrimination Ombud received 303 complaints and 1,624 requests for legal advice, a considerable increase compared to 2008. The increase is due to a large extent to cases that apply to discrimination against disabled people or cases regarding inadequate accessibility. There is a large diversity of cases and several of those cases raise problematic issues that were new for the Ombud.

30 years Gender Equality Act

The Gender Equality Act was 30 years old in 2009. **Chapter 6** sheds light upon some principle-based complaints which apply to gender equality. We see amongst other things that pregnant women are still experiencing discrimination in the workplace. In addition to a review of some of the Ombud's own cases, we also refer to some important developments that the Gender Equality Act and the protection against gender discrimination have gone through since the law was introduced 30 years ago.

Affirmative action

The legislation within certain frameworks permits placing emphasis on gender. This allowance of affirmative action is however underpinned by some conditions in accordance with the anti-discrimination legislation. **Chapter 7** refers to some complaints that illustrate this.

70 years age limit rule

Questions about discrimination in the workplace based on age are raised from time to time, both from the standpoint of the regulator and in court cases. In **Chapter 8,** we have included an excerpt from the Ombud's response to the public consultation, illustrating the Ombud's position regarding the rules for protection against dismissal up to the age of 70 in the Working Environment Act. We have also included a summary of a specific case regarding the 70-years age limit for public sector employees in accordance with age limit legislation.

Financial services

When taking out insurance and applying for banking services there is differential treatment based on risk assessments by the insurance companies and banks. Customers are placed in different categories in accordance with the risk the banks and insurance companies consider they represent, based on statistical data. In many cases, this places people at a disadvantage due, for instance, to gender and degree of disability. In **Chapter 9,** we refer to some cases that the Ombud has dealt with regarding insurance and the right to avail of banking services in 2009.

Non-negotiable equal treatment

The protection against discrimination is non-negotiable. This means, for instance, that an employer cannot make an agreement with an employee stipulating that the employee waives his right to be protected against discrimination. This was a significant point in one of the Ombud's cases, which is discussed in **Chapter 10**.

Positive duty to promote and account for equality

Employers have a duty to work actively, systematically and in a focused manner to achieve equality and to combat discrimination. Employers have a duty to account for what has been done to fulfil the positive duty to promote equality in the annual report or the annual budget. LDO monitors whether this accountability duty is observed. **Chapter 11** contains a review of the evaluations in 2009. The Ombud has reviewed the equality reports of 40 local authorities, two government ministries and five institutions within the university and higher education sector.

Towards general protection against discrimination?

The Anti-Discrimination Act committee proposed a new collective act against discrimination in 2009, NOU 2009: 14 "A holistic approach to protection against discrimination" ("Et helhetlig diskrimineringsvern"). In **Chapter 12** we highlight the Ombud's position on some of the proposals made by the Anti-Discrimination Act committee, which are included in the Ombud's response to the public consultation process.

The Ombud's role and legal tools

3.1. Alternative to the courts

The Ombud is an alternative to the courts and case processing is generally simpler and faster. The Ombud is a low threshold service. Processing of cases is free and there is no requirement to have a lawyer or legal advisor to represent you. Even if the Ombud's conclusions cannot be enforced, the decision provides a good basis for voluntary solutions. Many complaints end with financial compensation being paid to the complainant.

While the Ombud makes non-binding decisions, the Equality and Anti-Discrimination Tribunal has decision-making powers. The Tribunal can compel those responsible to discontinue or correct discriminatory conditions.

However, the tribunal's decision-making powers are limited as far as administrative decisions are concerned and also with regard to the decision to employ a person. In such cases, the tribunal can issue statements on whether a situation is in violation of the anti-discrimination legislation.

In cases where it is impossible to wait until the tribunal has come to a resolution, because it would be detrimental to the case, the Ombud has the possibility of resorting to a legally binding resolution. This can, for instance, apply to job advertisements that are in violation of discrimination prohibitions in the anti-discrimination legislation.

If one had to wait for the tribunal to process such cases, the position would most likely be filled before a decision was made. It would therefore be too late to intervene and ensure a hiring process based on equal treatment.

3.2. Legal basis

The Equality and Anti-Discrimination Ombud (also referred to as LDO) has its legal basis in the Equality and Anti-Discrimination Ombud Act:
Pursuant to the Equality and Anti-Discrimination Ombud Act, the Ombud shall monitor and contribute to the enforcement of the following laws:

The Gender Equality Act (Act of 9 June, 1978, no. 45 regarding gender equality)
The Anti-Discrimination Act (Act of 3 June, 2005 no. 33 regarding the prohibition of discrimination on the basis of ethnicity, religion etc.)
Anti-Discrimination and Accessibility Act (Act of 20 June, 2008 no. 42 relating to a prohibition against discrimination on the basis of disability)
Chapter 13 of the Working Environment Act (Act of 17 June 2005, no. 62 regarding working environment, working hours and job protection, with the exception of §13-1, paragraph 3 and §13-9)
The Property Unit Ownership Act §3a, second paragraph (Act of 23 May. 1997 no. 31 regarding ownership units)
The Tenancy Act §1-8 (Act 26March 1999 no. 17 regarding tenancy agreements)
The Residential Building Association Act (Act of 6 June, 2003 no.38 regarding residential building associations)
The Housing Cooperatives Act (Act of 6 June, 2003 regarding housing cooperatives).

3.3. Court assistant and “amicus curiae”

§15-7 and §15-8 of the Civil Procedure Act allow the Ombud to act as court assistant and "friend of the court" ("amicus curiae"). As court assistant the Ombud appears in court cases along with the counsel/lawyer of the party who has been discriminated against. In its capacity as "amicus curiae" the Ombud provides the court with the necessary legal basis to elucidate questions about discrimination.

The power for the Ombud to act as a court assistant and "amicus curiae" was introduced with the new Civil Procedure Act that entered into legal force on 1 January, 2008. The Ombud appeared as a court assistant in a case in 2008 that involved discrimination against a pregnant employee. The Ombud has not acted as court assistant or "amicus curiae" in 2009. However, the Ombud provided temporary assistance to one party in a court case in February 2010 concerning discrimination based on age and gender upon employment. In both cases the court found in favour of the employees and that they had been discriminated against, and they were awarded redress and compensation.

3.4. Lobbying body and driver in policy making

A central function of the Ombud's work is to comment on relevant legal processes and other political processes. This is an important part of the Ombud's work as a driving force to promoting equality and equal treatment.

It must be emphasised that the Ombud in 2009 has submitted a response to the proposal presented for public consultation by the Anti-Discrimination Act committee, NOU 2009: 14 "A holistic approach to protection against discrimination". The recommendations contain proposals for a new collective Anti-Discrimination Act, which will replace the current legislation if it is passed. The Ombud's response to the recommendations of the public consultation is dealt with in a separate chapter. Other particularly relevant responses are presented in the relevant chapters and are arranged according to topic.

DOCUMENTATION

of our own cases

4.1. The story in numbers

303 complaints were made to the Equality and Anti-Discrimination Ombud in 2009.
This is an increase of 75 per cent compared to 2008, when there were 173 complaints.
The increase is mainly due to the new Anti-Discrimination and Accessibility Act which entered into force on 1 January. 154 complaints are related to discrimination on the basis of disability. Most complaints are based on discrimination at work. The Ombud also receives a large number of complaints regarding inadequate universal design.

Number of complaints and legal guidance cases according to year of registration:

	2007	2008	2009	Total
Complaints	155	173	303	631
Guidance	1 151	1 225	1 624	4 000

Total	1 306	1 398	1 927	4 631

TABLE 4.1

In 2009, the Ombud received 303 complaints and had 1,624 requests for legal guidance. Table 4.1 shows that the increase in the number of complaints from 2008 to 2009 is significant as in 2008, the Ombud received 173 complaints. The cases the Ombud receives are probably not representative of the scope of discrimination in Norwegian society. Not everyone who experiences discrimination turns to LDO. There are several reasons for this. Firstly, the person concerned must know about LDO. Secondly, the party concerned must evaluate the costs of complaining, the opposite party's reactions to the fact that one has complained as well as the time it takes and other stresses related to participating in such a process.

4.2. Registration

Praksis presents the legal aspects of the Ombud's activity. LDO registers cases either as requests for legal advice or as complaints.

For all cases, LDO registers information regarding discrimination grounds, the sector it applies to, as well as the manner in which the case is brought before LDO. In complaints, information is registered regarding the complainant, the respondent and the case's outcome.

The following grounds of discrimination are registered: gender, ethnicity, national origin, background, skin colour, language, religion, age, disability, sexual orientation, political views, membership of a trade union etc.

4.3. Complaints

In complaints cases, a complaint is brought against a specific person or company. Before the Ombud takes a position on whether discrimination has taken place or not, both parties get an opportunity to provide an account of their view of the case. The Ombud usually makes a statement on whether discrimination has taken place or not. In some cases, the fact that the Ombud is processing a complaint means that the parties come to a voluntary solution before the statement is made. In such cases, the Ombud dismisses the case.

Figure 4.1 shows that a major proportion of the considerable increase in the number of complaints from 2008 to 2009 can be explained by the large number of complaints regarding compliance with the Anti-Discrimination and Accessibility Act. It also emerges from Figure 4.1 that a considerable proportion of complaints brought before the Ombud apply to discrimination on the grounds of gender or ethnicity.

Complaints cases according to discrimination grounds and year of case

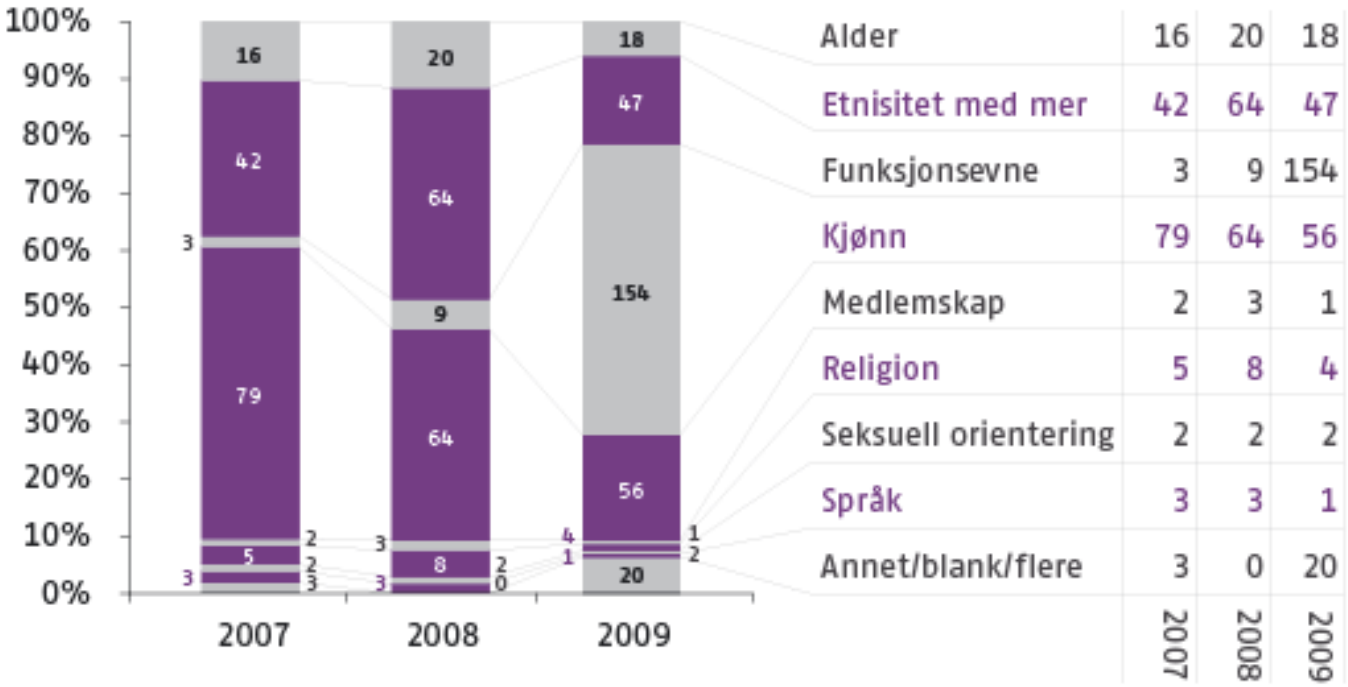

Figure 4.1
Age; Ethnicity, etc.; Disability; Gender; Membership; Religion, Sexual orientation, Language, Other/blank/more

Complaint according to sector and year of case

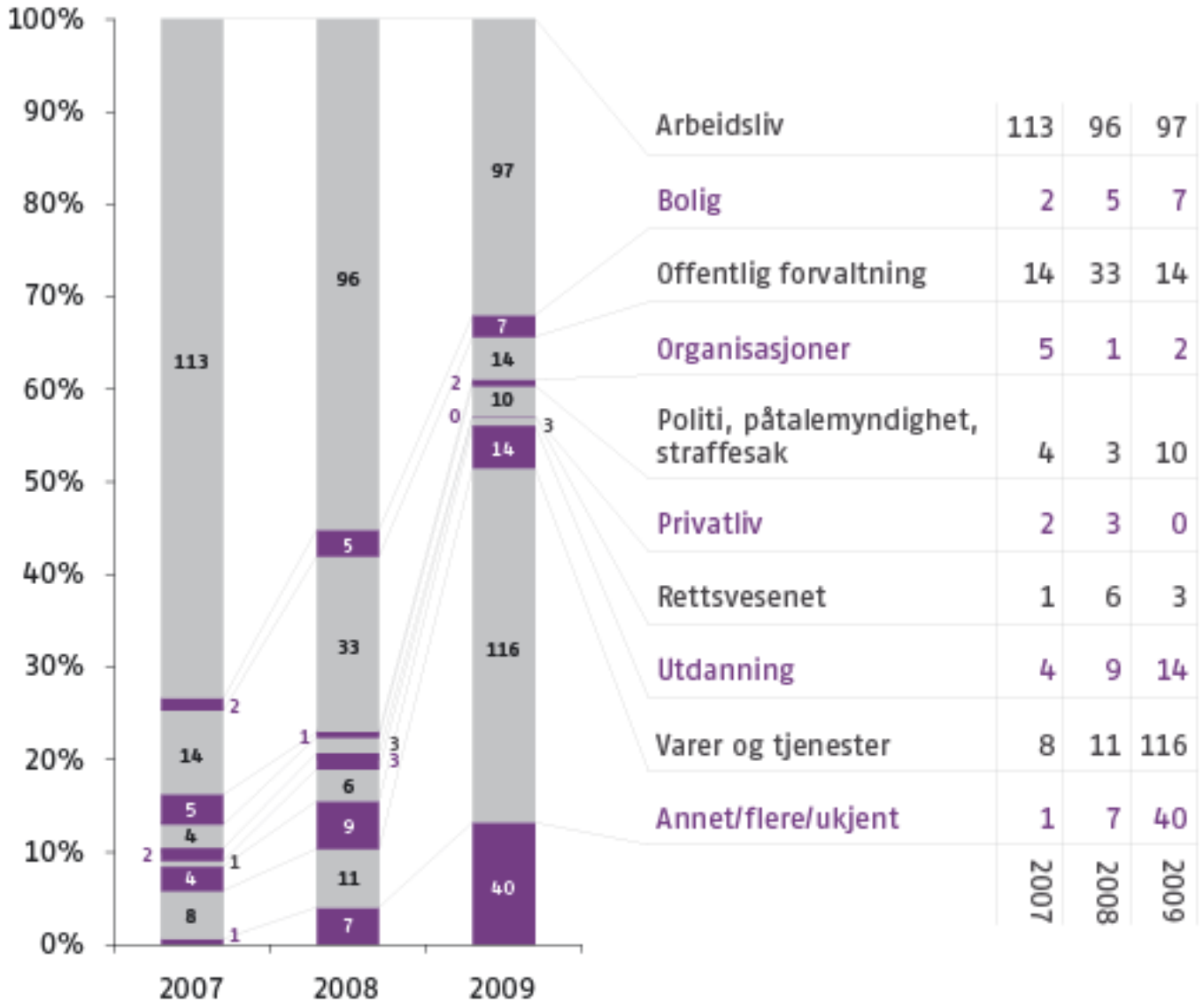

FIGURE 4.2
WORK; RESIDENTIAL; PUBLIC ADMINISTRATION; ORGANISATIONS; POLICE, PROSECUTION AUTHORITIES, CRIMINAL CASE; PRIVATE LIFE; ADMINISTRATION OF JUSTICE; EDUCATION; GOODS AND SERVICES; OTHER/MORE/UNKNOWN

4.4. Outcomes of complaints

A complaint has various possible outcomes: a statement of whether the anti-discrimination legislation has been breached or not, or if a case has been dismissed or rejected.

Registered outcome of complaints according to the year of the statement

	2007	2008	2009	total
Statement	88	80	98	319
Statement with warning of an urgent resolution	15	3	12	39
Urgent resolution	0	0	4	4
Statement after reversal	0	2	1	3

Dismissal	51	23	42	129
Rejection	3	8	9	24
	157	116	166	518

TABLE 4.2

The Ombud's statements, dismissals and rejections of cases may be brought before the Equality and Anti-discrimination Tribunal where they can be overruled.

Table 4.3: Cases brought before the Equality and anti-Discrimination Tribunal according to discrimination grounds and year the case was brought

Basis	2006	2007	2008	2009	Total
Gender	37	14	10	3	64
Ethnicity etc	8	11	6	2	27
Age	5	3	2	0	10
Disability	0	0	0	1	1
Sexual orientation	0	1	0	0	1
Religion	0	0	1	2	3
Language	3	1	0	0	4
Membership	1	0	2	0	3
Other/blank/several	1	1	0	0	2
Total	55	31	21	8	115

NOTE
The Equality and Anti-Discrimination Tribunal only deals with cases that have already been dealt with by the Equality and Anti-Discrimination Ombud.
The table shows cases dealt with by the tribunal according to the year the case was registered with the Ombud for the first time, and not how many cases are transferred each year.

TABLE 4.3

4.5. Case processing time

The legal case processing time varies, depending on the outcome of the case and the case's complexity. Cases outside the Ombud's mandate are usually rejected within a few weeks. Complicated cases take considerably longer. The large number of complaints in 2009 is reflected in a longer case processing time.

Case processing time for complaints – finished and unfinished cases

Time	Year of case registration			Total
	2007	2008	2009	
Under 3 months	27%	15%	17%	25%
From 3-6 months	14%	12%	10%	16%

From 6-9 months	33%	33%	9%	22%
Over 9 months	23%	22%	1%	11%
In process	3%	17%	64%	25%
	100%	100%	100%	100%

TABLE 4.4

4.6. Legal guidance cases

In a typical case of request for legal advice, or a so called "legal guidance case", a person contacts LDO to find out whether a practice is legal or if a regulation is in violation of anti-discrimination legislation. Trade unions and other interest or members organizations, for instance organizations for the disabled, can also contact us and put forward complaints on behalf of members.

LDO registered a total of 1,624 legal guidance cases in 2009.

Legal guidances cases according to discrimination grounds and year of case

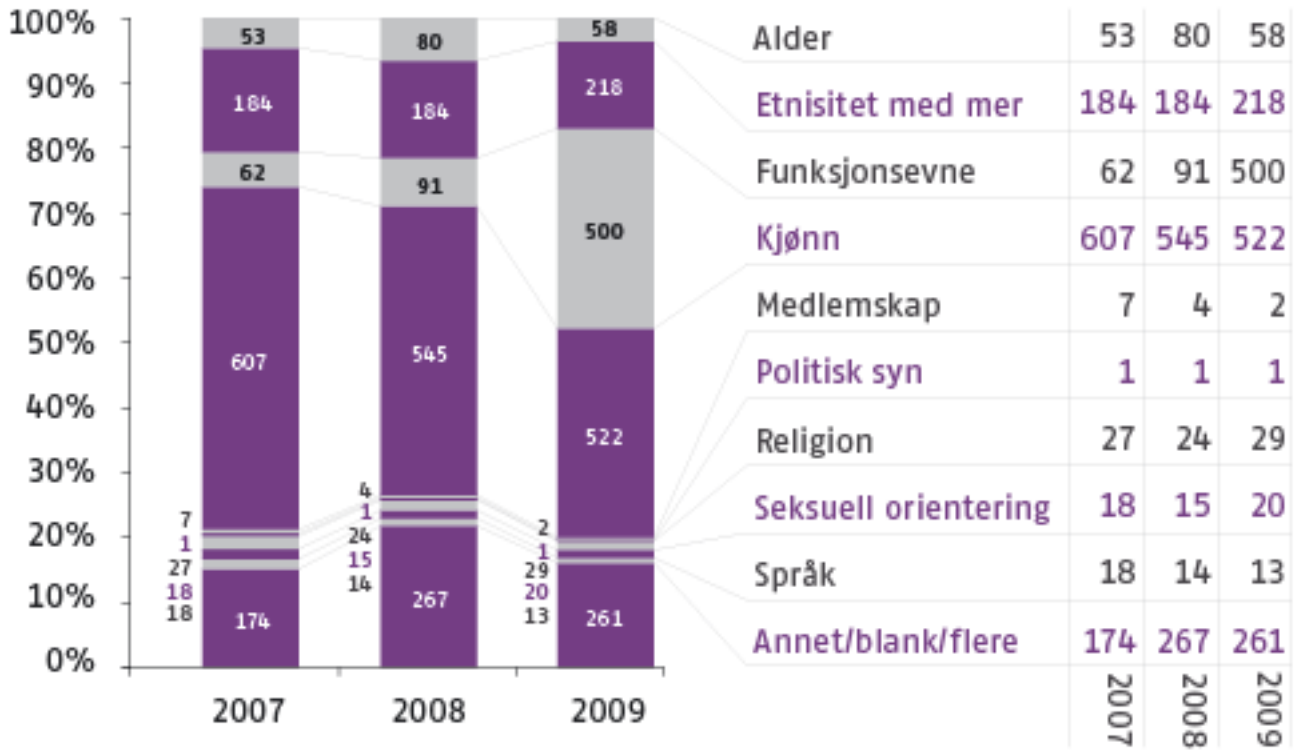

FIGURE 4.3
AGE; ETHNICITY, ETC.; DISABILITY; GENDER; MEMBERSHIP; POLITICAL VIEWS; RELIGION; SEXUAL ORIENTATION; LANGUAGE; OTHER/BLANK/MORE

4.7. Cases according to discrimination grounds, social sector and year

Earlier in this chapter, we referred to complaints and legal guidance cases, either according to discrimination grounds or sector. The tables below collate this material, so that in table 4.5, for instance, one can see how many complaints on the basis of gender discrimination the Ombud has received in various sectors.

Table 4.6 is structured in the same way, but shows legal guidance cases.

Complaints according to discrimination grounds, social sector and registration year

Complaint		2007	2008	2009	Total
Gender	Total	79	64	56	199
	Workplace	66	46	40	152
	Accommodation	0	2	0	2
	Public administration	5	6	4	15
	Organizations	4	0	0	4
	Police, prosecution, criminal case	1	2	0	3
	Private life	1	2	0	3
	Education	0	4	1	5
	Goods and services	2	1	5	8
	Other/several/unknown	0	1	6	7
Ethnicity etc	Total	42	64	47	153
	Workplace	17	11	25	53
	Accommodation	2	2	0	4
	Public administration	7	25	2	34
	Organizations	1	1	0	2
	Police, prosecution, criminal case	3	1	6	10
	Private life	1	1	0	2
	Administration of justice	1	5	1	7
	Education	4	4	5	13
	Goods and services	6	9	2	17
	Other/several/unknown	0	5	6	11
Age	total	16	20	18	54
	Workplace	16	18	18	52
	Public administration	0	2	0	2

continues •

complaint		2007	2008	2009	Total
Disability	Total	3	9	154	166
	Workplace	3	6	8	17
	Housing	0	1	5	6
	Public administration	0	0	7	7
	Organizations	0	0	1	1
	Police, prosecution, criminal case	0	0	4	4
	Administration of justice	0	1	0	1
	Education	0	0	7	7

	Goods and services	0	1	108	109
	Other/more/unkown	0	0	14	14
Sexual orientation	Total	2	2	2	6
	Workplace	2	1	0	3
	Goods and services	0	0	1	1
	Other/more/unknown	0	1	1	2
Religion	Total	5	8	4	17
	Workplace	4	8	1	13
	Housing	0	0	2	2
	Public administration	1	0	0	1
	Organizations	0	0	1	1
Language	Total	3	3	1	7
	Workplace	3	2	1	6
	Education	0	1	0	1
Membership	Total	1	4	1	6
	Workplace	1	4	1	6
Other/blank/more	Total	3		20	23
	Workplace	1		3	4
	Public administration	1		1	2
	Administration of justice	0		2	2
	Education	0		1	1
	Other/more/unknown	1		13	14
Total complaints		154	174	303	631

TABLE 4.5

Legal guidance cases arranged according to discrimination grounds, social sector and registration year

		2007	2008	2009	Total
Gender	Total	607	545	522	1 674
	Workplace	374	285	251	910
	Housing	3	8	8	19
	Public administration	75	33	27	135
	Organizations	11	10	4	25
	Police, prosecution, criminal case	1	3	3	7
	Private life	13	13	17	43
	Administration of justice	0	4	1	5
	Education	15	15	10	40
	Goods and services	49	37	43	129

	Other/more/unknown	66	137	158	361
Ethnicity etc	Total	184	184	218	586
	Workplace	55	58	65	178
	Housing	4	7	6	17
	Public administration	50	22	27	99
	Organizations	0	2	2	4
	Police, prosecution, criminal case	19	12	8	39
	Private life	2	3	6	11
	Judicial system	0	1	2	3
	Education	6	10	10	26
	Goods and services	26	13	18	57
	Other/more/unknown	22	56	74	152
Age	Total	53	80	58	191
	Public administration	34	51	33	118
	Organizations	1	0	3	4
	Police, prosecution, criminal case	0	3	3	6
	Private life	0	1	0	1
	Judicial system	1	0	0	1
	Education	2	1	2	5
	Goods and services	7	11	3	21
	Other/more/unknown	8	13	14	35
Ability level	Total	62	91	500	653
	Workplace	24	21	61	106
	Accommodation	1	4	8	13
	Public administration	11	15	66	92
	Organizations	2	1	3	6
	Police, prosecution, criminal case	2	0	3	5
	Private life	1	0	8	9
	Judicial system	0	0	4	4
	Education	2	8	44	54
	Goods and services	5	17	153	175
	Other/more/unknown	14	25	150	189

continues •

		2007	2008	2009	Total
Sexual orientation	Total	18	15	20	53
	Workplace	4	4	7	15
	Accommodation	1	2	0	3
	Public administration	5	2	2	9
	Organizations	1	1	0	2
	Police, prosecution, criminal case	1	0	0	1
	Private life	1	1	0	2
	Administration of justice	1	0	2	3
	Education	2	2	0	4
	Goods and services	2	3	9	14

Religion	Total	27	24	29	80
	Workplace	9	11	14	34
	Accommodation	1	0	2	3
	Public administration	4	4	1	9
	Organizations	3	1	2	6
	Police, prosecution, criminal case	2	0	0	2
	Private life	1	0	0	1
	Administration of justi ce	4	3	4	11
	Education	1	1	0	2
	Goods and services	2	4	6	12
Language	Total	18	14	13	45
	Workplace	5	4	6	15
	Public administration	5	0	2	7
	Organizations	1	0	0	1
	Police, prosecution, criminal case	1	0	0	1
	Private life	0	1	0	1
	Education	3	4	3	10
	Goods and services	0	1	0	1
	Other/several/unknown	3	4	2	9
Membership	Total	7	4	2	13
	Workplace	7	4	2	13
Political views	Total	1	1	1	3
	Workplace	1	0	1	2
	Other/several/unknown	0	1	0	1
	Total	174	267	261	702
	Workplace	42	92	58	192
	Housing	1	1	3	5
	Public administration	22	26	7	55
	Organizations	0	1	0	1
	Police, prosecution, criminal case	7	4	4	15
	Private life	1	2	5	8
	Administation of justice	1	1	1	3
	Education	1	3	9	13
	Goods and services	10	13	17	40
	Other/several/unknown	89	124	157	370
Total legal guidance cases		1 151	1 225	1 624	4 000

TABLE 4.6

ANTI-DISCRIMINATION AND

Accessibility Act

5.1. Increased legal protection against discrimination

The Anti-Discrimination and Accessibility Act (DTL) entered into force on 1 January, 2009. The Act provides protection against discrimination on the grounds of disability in all areas of society. Before this law was enacted, disabled people were protected against discrimination in work situations only.

The Ombud has received a large number of queries about DTL throughout 2009. The Ombud has provided written guidance about the Act and held lectures around the country. Discrimination on the basis of disability is the most common ground for complaint to the Ombud in 2009.

DTL is constructed in accordance with the same pattern as the Gender Equality Act and the Anti-Discrimination Act. Direct and indirect discrimination are forbidden. Harassment, issuing orders to discriminate or harass and retaliate are also forbidden. Differential treatment on the grounds of disability is legal where it is objectively justified. Affirmative action that enhances equality is legal.

DTL also contains a duty for companies dealing with the public to achieve universal design. By universal design we mean design or accommodation of the main solutions in the physical design so that the companies' general function can be utilised byas many people as possible. Schools, churches, doctor's offices, restaurants etc have a duty to ensure that the areas open to the public are universally designed. This applies as long as the modification does not represent a *disproportionate burden* for the businesses.

It is also pursuant to DTL that employers, educational institutions, kindergartens and municipalities have a duty to ensure a reasonable degree of accommodation for individuals. A complaint regarding inadequate individual accommodation must be dealt with by the usual authorities, such as the County Governor before they can be dealt with by the Ombud.

There have been a large number of complaints to the Ombud regarding inadequate general accommodation, so-called universal design. Both municipal/state and private enterprises have been reported to the Ombud for inadequate universal design. In some cases the Ombud has concluded that the companies have breached the duty to ensure universal design. The Ombud has done this too in cases where the companies have not responded to the Ombud's enquiries. In other cases, the Ombud has decided that it would be a disproportionate burden for the enterprises to make the necessary improvements. The Ombud has therefore concluded that the law has not been broken.

The Ombud has also dismissed a large number of complaints related to DTL. Some of the cases have been dismissed because it has emerged that the problems were due to misunderstandings between the parties. In other cases, the companies have rectified the problem during the complaint process. Further case processing has therefore not been necessary.

5.2. Large number of enquiries to the Ombud

A large number of the complaints brought before the Ombud in 2009 related to discrimination on the grounds of disability. This applied to 154 of a total of 303 complaints. Table 5.1 shows how the amount of cases based on discrimination on the grounds of disability has increased since the Anti-Discrimination and Accessibility Act entered into force. Many of these complaints apply to inadequate universal design.

Disability cases according to case type and case year

	2006	2007	2008	2009	Total
Complaint	2	3	9	154	168
Guidance	27	62	91	500	680
Total	29	65	100	654	848

TABLE 5.1

Organizations for the disabled have been active in submitting complaints pursuant the Anti-Discrimination and Accessibility Act. As seen from table 5.2, there have been noticeably more cases brought before the Ombud by the organizations on disability than on any other ground. These organizations have been active in campaigning to politicians and authorities to get the law passed, and the Ombud has noted that these organizations also use the law actively.

Complaints in 2009, number and proportion of complaints received from organizations (trade union, association, enterprise, organization, public body), on a selected basis

	Disability	Religion	Gender	Ethnicity etc	Age
Number of complaints from organizations	50	1	8	3	0
Percentage of cases reported by organizations	31.3%	25.0%	13.1%	6.3%	0.0%

Table 5.2

– We need a lot more low-entry buses, trams, trains and accessible taxi ranks/stations before wheelchair users can use public transport without having to plan their journeys very carefully, says Janne Skei of the social department of the Norwegian Association for the Disabled (NHF).

5.3. An inaccessible society

Norwegian society is very bad in terms of universal design. Deputy Leader Janne Skei of the social department of the Norwegian Association for the Disabled (NHF) says that between 70 and 80 per cent of all workplaces have physical barriers that limit freedom of choice for disabled people.

Most Norwegian Association for the Disabled (NHF) members have limited mobility.
"I would estimate that between 70 and 80 per cent of all workplaces in Norway have a physical barrier of some sort that limits freedom of choice. This means that even if the expertise is in place – if the workplace is inaccessible – one can either not work there, or improvements must be carried out," says NHF deputy leader Janne Skei. For the employer it is a choice between employing a person who doesn't need any accommodation or someone whose employment will cost time and money.

Schools

When schools are physically inaccessible, people with disabilities cannot get the education they wish to choose either. They must apply to colleges where it is *possible* to study.

New schools are to a larger extent accessible, even though they are not optimal.
"But many of our schools are unbelievably old. This applies most to primary schools. Universities and colleges are better, but there are physical barriers in most school buildings," Skei claims.

Travel, café

The Norwegian Association for the Disabled (NHF) carried out surveys a few years ago where they found that eight out of 10 cafes and restaurants in Norway were inaccessible to wheelchair users. In Oslo, this figure is nine out of 10.

A large part of the transport network is also inaccessible to people with reduced mobility.

"We now have several low-entry buses which have been adapted. But everything needs to be consistent before we are in a position to use the whole transport network. At the moment wheelchair users must plan very carefully. «I can get off there, but not there. I have to go on a few extra stops to get off when I'm going home." Until many of the stations are universally designed, it will be difficult to make any journeys on impulse," says Skei.

Complaints

Several of the Norwegian Association for the Disabled's approximately 18,000 members have complained to the Equality and Anti-Discrimination Ombud in 2009.

"I think more and more people will lodge complaints," says Skei, "because it's terribly frustrating to be part of a society where you are excluded all the time. It is the association itself that is behind several of the complaints concerning discrimination and inadequate access for disabled people."

"We have reported a city hall. Actually we have complained about two! One complaint came from the association's central office and one was reported by the regional office in Trøndelag. In our view, the municipalities have extra responsibility to ensure accessibility.

Over 70 per cent of public buildings exclude the disabled. That is quite a lot! Town halls and NAV offices are better than the average. They are least bad."

"The new Anti-Discrimination and Accessibility Act is a much wanted tool. Our members have not given up however. At last, it is not just that they *have* the right, they can *obtain* the right," says Janne Skei.

"When it comes to what companies and activities must do to comply with universal design requirements, disproportionality assessments are an important issue. We are very keen to see what the limits will be. First a number of cases must be dealt with before we can get a feel for it. We are concerned with financial guidelines. How much accomodation can be demanded relative to a company's finances? "

Ideal design

A universally designed society is a society without physical barriers where all follow the same flow and use the same services and surroundings. Technological development will help make many special problems disappear, so that one, according to Skei, is not stigmatised by for instance.being dependent on special lift fittings

There are no municipal role models in Norway as far as universal design is concerned.

Kristiansand has worked on it for a long time. But there are more than enough physical barriers in Kristiansand too. Rogaland County Authority has been working on universal design in the county for several years, particularly in the transport sector and has met the challenge in a systematic manner.

Skei says that the USA was the first place to focus on accessibility. A law was passed regarding physical accessibility in the transport sphere in 1990. The law contains obligatory action plans and deadlines for accommodation in different areas (ICT, building and outdoor areas as well as transportation).

"What is positive and provides hope is that when it comes to new buildings and outdoor space, it doesn't cost much to carry out the improvements for people with disabilities if such considerations are part of the plans from the beginning.

5.4. Complaints about universal design

5.4.1. Disproportionality limitations

Case 09/52
Ving Norge

The Norwegian Association for the Disabled (NHF) complained that the Ving Norge AS (Ving) shop in Karl Johans Sreet was not universally designed. The level difference between the street and the entrance was 14 cm. The Ombud concluded that the level difference meant that the shop was not universally designed. Just after the Ombud's statement, Ving confirmed that the entrance would be accommodated. Nine months after the Ombud's first statement, the parties have still not reached an agreement on which measures must be carried out to ensure universal design of the shop's general design.

The case was the first the Ombud dealt with pursuant to the Anti-Discrimination and Accessibility Act. NHF had concluded that the level difference of 14 cm between the street level and the entrance door means that wheelchair users do not come into the shop.

The Ombud pointed out that according to the technical regulations for planning and building legislation, the recommended threshold height for entrance doors should not be higher than 2.5 cm , so as to allow use by people with reduced mobility. The Ombud concluded therefore that the entrance door was not universally designed.

The Ombud assessed whether it would be a disproportionate burden for Ving to improve the entrance door. The Ombud judged that the requirement for universal design could not be circumvented by referring customers in wheelchairs to another shop 500 metres from the premises. The Ombud also considered that Ving had not shown adequately that the shop did not have the resources to make the improvements to the entrance door. The Ombud concluded therefore that Ving acted in breach of DTL §9.

After the Ombud's statement, Ving and NHF tried to come to an agreement about how the entrance could be improved to secure universal design. Ving was assisted by an architect. Ving considers the best overall solution to be a ramp with a gradient of 1/8. NHF requires a solution with a gradient of 1/12.

5.4.2. Universal design of protected buildings

Case 09/473
Røros Rådhus

Røros Town Hall is a protected building according to the cultural monument act. The building is an office for the mayor, city manager and head of childhood and youth services in the municipality. The Norwegian Association for the Disabled (NHF) complained that both the ground and first floors of the town hall were inaccessible to people with reduced mobility.

The main entrance to the town hall consisted of stairs without ramps. It was also difficult for wheelchair users to gain access to the meeting room on the ground floor. The public reception area was on the first floor. Offices of the mayor, city manager and head of childhood and youth services were placed on the first floor.

Røros municipality acknowledged that the town hall was not universally designed. The municipality put forward a proposal for making the ground floor accessible, but not the first floor. The municipality pointed out that the town hall is a protected building and that improving both floors would cost too much. The Ombud has not come to a final conclusion in this case.

Since the town hall is a protected building, the municipality had to bring the case before the county curator. The county curator thought it was possible to universally design the ground floor of the town hall. The county curator emphasized however that it is important that such a measure involve high-quality design and execution in keeping with the style of the building. They encouraged the municipality to seek advice on the detailed execution from an architect

The municipality put forward a proposed solution to the Ombud. The proposal was aimed at ensuring general accessibility to the ground floor of the town hall. The municipality wanted to install a ramp by the stairs of the main entrance. The municipality would also install a ramp indoors so that the meeting room on the ground floor would be accessible to wheelchair users. The reception was to be moved from the first floor to the ground floor.

The municipality considered that it would be too costly to ensure general accessibility to the offices on the second floor. The municipality alleged that it was only in special cases that the public needed to contact people in the second floor offices.

The Ombud has not come to a final conclusion in the case, but has provided an interim assessment of the different solutions to improve accessibility. According to the Anti-discrimination and Accessibility Act, only the parts of the enterprise directed at the public are covered by the requirement for universal design. The Ombud takes into account that the offices in the second floor are not directed at the public. Furthermore, the Ombud recognises that the town hall is subject to particular conservation considerations. The Ombud will issue the final statement in this case when Røros municipality has produced the documentation concerning the improvements that have been done.

City Manager Henrik Grønn of Røros municipality favours the solution making the ground floor of the protected building accessible with ramps.

5.4.3. Protected, but accessible

It is not easy to make a town hall from the 1700s, which is a protected building, accessible to all. The city manager of Røros municipality, Henrik Grønn, is pleased that the municipality has now found a solution that ensures accessibility without destroying the fine building.

In February 2009, the Norwegian Association for the Disabled reported Røros municipality to the Equality and Anti-Discrimination Ombud. The association for the disabled considered that the town hall was inaccessible for disabled people and was therefore in breach of the new Anti-Discrimination and

Accessibility Act. The complaint did not come as a surprise to the city manager Henrik Grønn.
"It wasn't unexpected, but I must say that we found the demands somewhat dogmatic and in the context of our statement we would have liked more understanding of the fact that we operate in a living cultural heritage and a protected building, says Grønn. However, he has no problem understanding that accessibility is important for the Association for the Disabled.

"We all understand that the best possible accessibility is required and we see that Røros town hall can be a good object for trying out the legislation," he says.

It is just the mayor, city manager and head of children's and youth services who currently have offices in the old town hall. The municipality's service office and other services aimed at the public are in another building, which is fully accessible. If someone needs to talk to the city manager or the mayor, but has problems with getting into the town hall, the solution up until now has been to hold the meeting in an office or meeting room in the other building. According to Grønn, this has not been a very pressing problem.
"After the case was brought to LDO, the municipality decided to make the town hall itself more accessible. They plan to build a ramp at the back of the building, so that the public counter and the meeting rooms on the ground floor are accessible to all the municipality's residents."
LDO has carried out a temporary assessment of the municipality's proposed solution, and has decided that if the municipality ensures that the ground floor is accessible in this way, the town hall will comply with the law. The association for the disabled originally wanted the offices on the first floor to be accessible as well, but the Ombud did not agree on this point. The city manager's view is that the planned solution is a good compromise between architectural preservation and accessibility considerations.
"We want the old mining town to be a living community, and conservation through use is an important feature. The real need for accessibility has to be balanced against the values inherent in preserving the protected building. If this balance cannot be found, what is best can become the enemy of what is good. In the today's situation for the municipality, a town hall is not the best place to spend most of the money right now," Grønn says.

5.4.4. Temporary circumstances

Case 09/934
Reitan Servicehandel

Disproportionate burden – poor finances and a short time left of the term of the tenancy agreement

A private person complained about the lack of universal design of the entrance to a 7-Eleven shop/kiosk. Even though the entrance was not built to universal design standards, LDO concluded that the business was not in breach of the Anti-Discrimination and Accessibility Act (DTL) §9.
The Ombud's view was that it would represent a disproportionate burden for the business to improve the entrance. The Ombud pointed out the fact that there was only a short period left of the term of the tenancy agreement.

The steps outside the premises of 7-Eleven at Røa made it difficult for disabled people to enter the shop. The business acknowledged that the entrance was not built to universal design, but contended that improving the entrance would be too costly as the business was losing money. The tenancy contract for the premises was also temporary. The term was due to expire in July 2010.

The Ombud stated that a shop has a duty to ensure that its entrance is universally designed, because It Is an element of its main solution.

The company acknowledged that the entrance area did not comply with universal design. A wheelchair ramp would have been too steep in this case.

The question of whether carrying out the improvements would be a disproportionate burden on the company was of central importance to the Ombud's assessment. The Ombud found that at the time it would be a disproportionate burden to Reitan Servicehandel to improve the entrance area. The fact that the company had presented figures showing that the shop was making a loss influenced the Ombud's decision. The Ombud also considered the fact that

the term of the tenancy agreement had almost expired. Reitan Servicehandel had confirmed to the Ombud that it would consider the duty to comply with universal design when entering into a new contract.

Case 09/1052
Frøya/Hitra Medical Centre

A disproportionate burden – thefacility moves to new premises

The Norwegian Association for the Disabled (NHF) complained about the lack of universal design of the car park, entrance and toilets at Frøya/Hitra Medical Centre. LDO concluded that the municipality had a duty pursuan to the Anti-Discrimination and Accessibility Act to ensure that disabled people could come in through the main entrance. However it would be very expensive to improve the toilet facilities. The medical centre was due to move to another building within a short time.

NHF submitted that neither the car park, nor the entrance, nor the toilets in the communal medical centre fulfilled the requirement of universal design in DTL. NHF considered that the medical centre had too few parking spaces for those with reduced mobility. The few places that were reserved were too far away from the entrance to the medical centre. Furthermore, NHF felt that the entrance to the medical centre could not be used by people with reduced mobility because the door was heavy and did not have an automatic door opener. NHF also submitted that the toilet facilities at the doctor's centre did not satisfy the requirements of DTL. NHF said that the placement of the toilet for the disabled impinged on the privacy of those taking blood tests at the centre.

The Ombud evaluated first whether the municipal centre was universally designed. The Ombud found that the area outside the medical centre and parking spaces were universally designed. When it came to the main entrance, the Ombud felt that the alternative use of another entrance door was not sufficient to fulfil the law's requirements that there be another entrance that could be used. The Ombud pointed out that it is the main solution that must be accessible. Therefore, the main entrance to the municipal centre did not fulfil the requirements for universal design. The toilets were also not considered to comply with the requirements of universal design in §9.

Pursuant to DTL §9, an enterprise directed towards the public has a obligation to secure universal design as long as it does not lead to a disproportionate burden. The Ombud therefore evaluated whether it would be a disproportionate burden for the municipality to improve the main entrance and toilets.

The Ombud considered that improvements to the toilet facilities would entail excessive costs. The medical centre was due to move to another building during the spring of 2010. The Ombud found therefore it could not be demanded that the municipality rebuild the toilet facilities. The Ombud emphasized that the municipality had a duty to do whatever was possible to make the toilets accessible for the disabled and those with reduced mobility.

The Ombud said that the main entrance could be improved by installing an automatic door opener. The Ombud established that purchasing and installing an automatic door opener could cost around NOK 22, 000. The Ombud considered that it was possible for the municipality to achieve this. The Ombud concluded that the municipality had a duty to ensure the accessibility of the main entrance for people with reduced mobility.

5.4.5. When the company does not respond

Case 09/49
Game Stop

The company Game Stop was reported to the Ombud. The Ombud concluded that Game Stop was breaching the Anti-Discrimination and Accessibility Act. The entrance was not adapted for disabled people. Game Stop did not respond to the Ombud's enquiresand therefore did not provide evidence that improvements to the entrance would be a disproportionate burden.

The Norwegian Association for the Disabled (NHF) complained about the difference between the ground level and the entrance door to one of the shops of the business. NHF considered that the level difference prevented wheelchair users from getting into the shop. The Ombud visited the premises and thought that it wasn't adapted for wheelchair users. There were several steps between the street level and the shop. The entrance area was not large enough so that wheelchair users could get in through the entrance (insufficient turning space). The Ombud wrote several letters to

Game Stop asking for a statement. Game Stop did not respond to the Ombud's enquiries and thereforedid not provide evidence that it would be a disproportionate burden to adapt the entrance. The Ombud concluded that Game Stop breached the universal design requirements in accordance with the Anti-Discrimination and Accessibility Act.

In light of the Ombud's statement, Game Stop contacted the Ombud and stated that it wouldimprove its premises so as to make them accessible. The case is still being processed.

5.5. Discrimination ban

Case 08/1738
Barriers in a housing cooperative

A housing cooperative set up seven barriers in the housing cooperative area. The barriers prevented a man with reduced mobility from using adapted transport for those with reduced mobility (TT). The Ombud concluded that the housing cooperative acted in breach of the Anti-Discrimination and Accessibility Act.

The man was dependent on an electronic wheelchair. He used a special scheme for adapted transport for those with reduced mobility. The housing cooperative set up the barriers to ensure the safety of children in the housing cooperation. There had previously been a great deal of traffic in the area. Access to a so-called Oslo key was required to open the barriers. Not all drivers in Oslo Taxi had access to the Oslo key. Oslo Taxi did not want to equip all its drivers with a key either. This meant that many TT taxis did not manage to come right up to the man's residence. The man had to go through the barriers in his electric wheelchair and down to the taxis. This was particularly difficult in the winter when there was a lot of snow outside.

The Ombud stated that setting up the barriers was a neutral act. The case however raised questions about indirect discrimination against people with reduced mobility. The Ombud thought that the barriers meant that people with reduced mobility had their freedom of movement reduced. The barriers made it particularly difficult for the man to use adapted transport. The Ombud found therefore that the barriers put those with reduced mobility at a disadvantage compared to the other residents of the housing cooperative.

The Ombud assessed whether the differential treatment was legal, that is, if it was reasonable, necessary and not disproportionately inconveniencing. The Ombud stated that the intention of safeguarding children's security was a reasonable objective. The Ombud still thought that the housing cooperative could put up barriers that were self-locking and for which there was no need for an Oslo key. The Ombud also considered that the housing cooperative had the resources to replace the barriers with self-locking barriers. Such a measure would not be disproportionately inconveniencing for the housing cooperative. The housing cooperative had therefore acted in breach of DTL §4.

Case 09/119
Barrier at a joint-ownership property

A woman complained to the Ombud that that her residential co-ownership had set up a barrier which was difficult to open. The Ombud concluded that the joint-ownership committee acted in breach of the Anti-Discrimination and Accessibility Act.

Barriers were set up in a jointly-owned property with 246 apartments to reduce traffic in the area. One barrier was heavy, making it difficult to open for people in a wheelchair.

According to the Anti-Discrimination and Accessibility Act, it is forbidden to have schemes that place people with reduced mobility at a disadvantage compared to others. The first question the Ombud took a position on was whether the barrier put people with reduced mobility at a disadvantage. The Ombud stated first that setting up a barrier was a neutral action. The Ombud considered however that the barrier could prevent freedom of movement for persons with reduced mobility. The decisive factor for the Ombud was that it wasn't possible for the woman to open the barrier without assistance. This prevented the complainant from getting to and from her home. The Ombud found therefore that the arrangement with the barrier placed disabled people at a disadvantage compared to the other residents.

A differential treatment that is necessary to achieve a reasonable objective, and which is not disproportionately invasive for those being treated differentially, is however legitimate. The Ombud considered that the joint ownership's

wish to limit the traffic in consideration of children in the jointly-owned property was a reasonable objective. The Ombud assessed whether the arrangement with the barrier was necessary to secure the goal. A new barrier that would be easier for most people to use would cost NOK 30,000 to acquire. There were 246 apartments in the jointly-owned property. The Ombud emphasized that a new barrier would be a low cost expenditure for each apartment. The Ombud found therefore that it wasn't necessary to keep the old, heavy barrier to ensure the children's security.

The joint ownership informed the Ombud afterwards that it would take corrective measures in accordance with the Ombud's statement. The joint ownership together the complainant will assess alternative solutions.

Case 09/342
Parking at a housing cooperative

A woman with heart problems who was waiting for a heart transplant was not able to park her car close to her residential unit. LDO concluded that the housing cooperative in which the woman lived had discriminated against her.

Owing to her reduced heart capacity, the woman had been advised by her doctor that her maximum walking distance was 50 metres on level ground. The woman therefore applied for permission from the housing cooperative to park her car outside the house. The housing cooperative rejected her application. The housing cooperative said that it did not wish more traffic in the area out of consideration for the children in the housing cooperative. On the other hand, it was allowed to drive to and from the residential units for loading and unloading of goods. Furthermore, some households in the housing cooperative already had permission to park outside the residential units.

The women suggested various alternative solutions. She suggested among other things that a car park could be set up at the back of her residence. None of her suggestions were accepted by the housing cooperative. The housing cooperative suggested setting up a common car park for people with reduced mobility. It would be at 80 meters' distance from the woman's building.

The Ombud assessed whether the housing cooperative's general prohibition to park outside the residential units was in breach of the Anti-Discrimination and Accessibility Act, §4. In the Ombud's view, the consequence of the housing cooperative's practice meant that the woman was placed at a disadvantage compared to the other residents. The Ombud pointed out that the parking places suggested by the housing cooperative were more than 50 metres away from her residence, which was further than her maximum walking distance. The woman would have difficulties getting there alone.

The Ombud assessed whether the differential treatment was nonetheless legal, that is whether the differential treatment was reasonable, necessary and not disproportionately invasive. The Ombud found the intention to safeguarde children's security and aesthetic considerations were reasonable objectives at the outset. The Ombud then assessed whether the housing cooperative's la ck of individual assessment of parking applications appeared to have a disproportionately negative effect on those with reduced mobility. The Ombud balanced the positive goal of enabling the woman to park near the residential unit against the negative effect that the parking could have on the other members of the housing cooperative. The Ombud found that to deny the woman the right to park at one of the parking alternatives would have a disproportionately negative effect. The Ombud concluded therefore that the housing cooperative had contravened DTL.

The case was brought before the Equality and Anti-Discrimination Tribunal.

Case 09/1352
Refusing entry to a blind restaurant guest with a guide dog

A man with impaired sight was denied access to a restaurant because he had a guide dog with him. LDO came to the conclusion that the restaurant owner had breached the ban on indirect discrimination in the Anti-Discrimination and Accessibility Act.

The restaurant acknowledged that the man had not been permitted to take his guide dog onto the premises. The restaurant pointed out that for health reasons dogs were not allowed in. Food was being prepared on the premises and the presence of dogs was therefore not acceptable.

The Ombud said that the practice of forbidding dogs was apparently neutral. This applied generally to all dog-owners. The case therefore raised questions about indirect discrimination. The Ombud emphasized that a blind person is dependent on his guide dog. The Ombud thought that the man was put in a worse position than other guests when he

was not allowed to take his guide dog into the restaurant.

Ombud took a position on whether the differential treatment was legal. That is whether it was reasonable, necessary and did not have a disproportionately negative effect on those being treated differently. The Ombud emphasized the fact that the provisions regarding food hygiene §27, paragraph 4 stipulates that guide dogs are not included in the ban on taking fur-bearing animals into premises where food is being prepared. The Ombud emphasized that the regulations are a part of Norwegian law which restaurants in Norway must follow. The Ombud considered that the refusal of the guest was not valid. The restaurant had acted in violation of the prohibition against indirect discrimination in DTL §4.

Case 09/1293
Refusing a wheelchair user access to a café

A man in a wheelchair was refused access to a café. The man considered that the reason was because he was in a wheelchair. LDO concluded that there was no reason to believe that the refusal was due to the fact that he was in a wheelchair.

The man alleged that he was refused entry to a café one afternoon. The man maintained that the owner of the café did not want wheelchairs in the area because he had just washed the floor. The man pointed out that the owner of the café locked the door from the inside.

The café owner denied that the man could not enter because he was in a wheelchair. The café owner showed that he had washed the floor and that the café was supposed to close at the time the man arrived. No further customers had access to the café that day.

The Ombud found no grounds to believe that the refusal of entry to the man was due to his disability. The Ombud pointed out that there were no direct witnesses to the incident. It was a question of claim against counter-claim. A mere allegation of discrimination is never sufficient to prove that the law has been broken.

5.6. Individual accommodation at work

Case 09/370
Firing of an epileptic kindergarten employee

A man suffering from epilepsy considered that he had been discriminated against on the grounds of disability when he was fired from his position as a kindergarten assistant. LDO concluded that the employer did not fulfil its duty to accommodate as provided in the Anti-Discrimination and Accessibility Act, §12.

The man was employed as a substitute until September 2009 with three month's probation. The man had a mild form of epilepsy. The man did not inform his employers about his epileptic condition when hired. Christmas 2008, the man showed epileptic symptoms four times at work. At the time, the man did not have access to medicines and his specialist doctor was on leave.

He was fired from his job in February 2009. The employer attributed the termination to a breach of contract and irresponsible behaviour. The kindergarten considered it irresponsible of the man not to have a supply of medicines when working at the kindergarten. The kindergarten feared that dangerous situations could arise if the man was alone on a shift with the children. The employers also showed that the man had not informed them about his epilepsy at the time he was hired. If he had done so, the kindergarten would have had the opportunity of accommodating the man's working situation. The employer pointed out that it had tried to accommodate the man. The man had been assigned shifts when several employees were present at the same time.

The Ombud pointed out that when an employee has a disability, the employer has a duty to accommodate it accordingly. The firing of an employee because he has epilepsy is in violation of DTL. The Ombud emphasized that a termination could be reasonable only if the employer has done all that is possible to ensure that the employee can continue in his job.

The kindergarten had not produced documentation that the man had received in-between shifts or that the shift arrangements had been changed. There was also no documentation showing that any other attempts at accommodation had been tried. The Ombud concluded therefore that the employer had not complied with the accommodation duty in

accordance with the Anti-Discrimination and Accessibility Act.

The case was brought before the Equality and Discrimination Tribunal. The tribunal came to the same conclusion as the Ombud, namely that the employer had not fulfilled the duty to accommodate in accordance with the Anti-Discrimination and Accessibility Act (tribunal's case no. 40/2009).

Case 08/1073
Accommodation at work – before the Anti-Discrimination and Accessibility Act entered into force

A man with depression considered that he had been discriminated against on the grounds of disability when he was fired from his job as a customs inspector. In the man's view, the employer should have adapted the working conditions instead of terminating his contract. The Ombud assessed the case in accordance with the Working Environment Act's earlier provisions §13-1, cf. §13-2 (1), since DTL was not in force in 2008. The Ombud found that the employer had done what was possible in order to accommodate the man to ensure that he could do his job.

The man was employed as a customs inspector but was fired in 2008. The employer attributed the termination of his contract to the fact that the man's unstable behaviour caused fear and insecurity in the working environment. The employer stated that it had attemped to accomate the man´s working tasks.The Ombud pointed out that a termination based on the employer's psychological state /illness would, in principle, violate the Working Environment Act, §13-1(1). The Ombud emphasized that according to the Act a termination is legal if the employer can document that the termination had a reasonable objective, was necessary and did not have a disproportionately negative effect on the employee. The Ombud assessed whether the employer could have accommodated the workplace or the man's working tasks, cf. the previous regulations in the Working Environment Act, §13-5.

The man had been on leave several times for the treatment of depression/illness. Several meetings were also arranged, in which the man, a doctor, NAV, company health services and the employer took part. The employer had produced documents that provided evidence of this to the Ombud.

The Ombud emphasized that a large number of measures so that the man could continue in his job had been carried out. The Ombud found therefore that the employer had done all that was possible in order to accommodate the man's working tasks. The Ombud emphasized that it would be difficult for the Ombud to overrule the discretionary assessment of the employer in this case. Since it was not possible to accommodate the man's tasks, the Ombud considered that the termination was legal.

5.7. Cases dismissed because the company made improvements in accordance with the law

A large number of complaints brought before the Ombud are dismissed because the companies rectify the situation in accordance with the legal requirements after receiving a letter from the Ombud regarding a complaint. This shows that we ensure that the legal requirements are complied with in many cases while avoiding a dispute between the parties. This also shows that it is useful to bring cases before the Ombud.

Case 09/1368

A man complained that a traffic station with a customer reception was not adapted for those with impaired hearing. The traffic station bought three wire loops that were placed in front of each public counter. The Ombud dismissed the complaint.

Case 09/1403

A man complained that a petrol station was not universally designed. The petrol station carried out changes and built a toilet for the disabled and an external wall. After the petrol station premises were expanded, the Ombud considered that the discrimination had ceased and therefore dismissed the complaint.

Case *09/218*

A woman complained that wheelchair users were not able to order cinema tickets over the internet. Wheelchair users were required to order tickets by telephone at a cost of NOK 6 per minute. Oslo Kino came up with a temporary solution whereby wheelchair users could order cinema tickets on the internet. The Ombud dismissed the complaint.

Case 09/950

An association for people with MS complained to the Ombud that a car parking space for the disabled was being used as a snow pit. The respondent pointed out that the snow had been moved and that nothing of the sort would happen again. The complainant never commented on the letter from the respondent. The Ombud considered that the discrimination had ceased. The Ombud dismissed the case.

5.8. Queries where the Ombud has provided legal guidance

Most people who make enquires to the Ombud seek general legal guidance either regarding protection against discrimination or in connection with a specific situation. These enquiries are not dealt with as complaints, where the Ombud issues a statement. In 2009, the Ombud provided legal guidance on a large number of cases.

Teaching accommodation

Case 09/2404
Leave of absence as a result of diabetes

A man with diabetes received a message from his college that there was a risk he would have to stop his studies because he had taken a large amount of sick leave. His absences were due to his diabetes and to changes to his medicine.

The Ombud advised the man that it is illegal pursuant to the Anti-Discrimination and Accessibility Act to discriminate against somebody on the grounds of disability. The Ombud also pointed out that pursuant to DTL §12, schools and educational institutions must carry out reasonable individual accommodation at the teaching facility to ensure that pupils and students with disabilities get equal training and educational possibilities. The Ombud emphasizes that a specific assessment must be carried out in each individual case. The Ombud advised the man to take up the question of teaching accommodation with the school's management again. He would have to show any doctor's certificates he may have to the school's management.

Case 09/1982
Right to study discontinued as a result of long-term sick leave

A woman lost her right to study because she had been on long-term sick leave resulting in her failure to submit her master's thesis.

The Ombud informed the woman that the term "reduced ability to function" includes physical, psychological and cognitive functions. Illnesses are not directly protected by law. However, the Ombud considered that there could be a doubt as to whether the university's regulations (which did not take sickness into account) contravened the prohibition against discrimination in DTL. The Ombud also pointed out that if the university's regulations wereshown to be necessary and not disproportionately negative in their effect, they would not breach the prohibition on indirect discrimination. The Ombud recommended that the woman should complain first to the university where she was studying.

Case 09/1960
Inadequate accommodation of a pupil at a lower secondary school

A mother maintained that the school her son attended had failed to accommodate the physical conditions and the teaching of her son. The son had Downs' syndrome, autism and behavioural difficulties.

The Ombud pointed out that the school had a duty to accommodate her son by ensuring that he received the same level of education as the other pupils. The Ombud stated that before the Ombud could assess a case concerning adaptation at a school, it had to be first dealt with by the appropriate authorities . The Ombud pointed out that all pupils in primary school have a general right to complain to the county office when they consider that their rights are not being complied with according to the law and regulations. The Ombud recommended that the woman complain to the County Governor. The Ombud informed her that the County Governor's decision could be complained against to the Ombud.

Discrimination and inadequate accomodationin the workplace

Case 09/856
Inadequate accommodation in the workplace for the hearing impaired

A woman thought that the school she worked at accommodated people with hearing impairments to a very limited degree. The woman wanted advice regarding which measures the school had a duty to put in place.

The Ombud provided examples of accommodation measures that the school had a duty to carry out. These could include different types of special equipment, special computer programmes, physical accommodation etc. The Ombud emphasized that this obligation only covers accommodation that does not place a disproportionate burden on the employer. What constitutes a disproportionate burden for the employer must be assessed in each individual case.

Case 09/1090
Discrimination on the grounds of association with a disabled person

A woman considered that she was discriminated against due to the fact that she had received a warning of termination of her contract from her employer. The woman considered that this was due to the fact that she had a home office. She depended on having a home office to be able to look after her disabled son. The Ombud considered that the case raised discrimination issues and advised the woman to lodge a complaint.

The Ombud emphasized again that a differential treatment is not considered to be discrimination if it is necessary to achieve a reasonable objective and does not have a disproportionately negative effect on the person or people who are treated differentially,. Differential treatment at the workplace may also be necessary for the execution of a specific work or profession. The Ombud has not yet received a response from the woman.

Case 09/107
Attendance bonus

A companyhad a so-called «attendance bonus». This meant that employees would receive an additional NOK 1000 every month if they had not been absent at all during the month.

The Ombud pointed out that sickness is not protected by law. Differential treatment due to absence owing to chronic illnesses is however covered by protection against discrimination pursuant the Anti-Discrimination and Accessibility Act. The Ombud said that this type of bonus raise indirect discrimination issues , as the bonus scheme is neutral in principle, but will place those who have chronic illnesses at disadvantage compared to others.

Case 09/1214
Job reduced by employer as a result of chronic illness

A woman was on sick leave because of chronic illness (cystic fibrosis) which amounted to 20% in one year. The doctor had provided a doctor's certificate (20%). The employer reduced the woman's work percentage to 80%. The woman had a decision that NAV covered the expense from the first day of illness.

The Ombud pointed out that there is no requirement that the negative consequences be of a certain magnitude. A less than full-time position will lead to loss of income and pension points. The Ombud considered therefore that the case raised questions about discrimination. The woman didn´t however lodge a complaint with the Ombud.

Individual accommodation of municipal services

Case 09/1206
The complaints avenues must be exhausted before the Ombud can process the case

A woman considered that the conditions in the municipal apartment she rented were not optimal with regard to the fact that her mobility was reduced.

The Ombud emphasized that services provided by municipal bodies should be adapted for the individual. The municipality has therefore a duty to accommodate municipal apartments for people with disabilities. This rule applies unless it entails a disproportionate burden for the municipality.

What the individual accommodation should involve will depend on a specific evaluation of the needs of the person to whom it applies.

The Ombud emphasized that the municipal offices must render a decision before the Ombud can assess cases on individual accommodation of municipal services. In the Act's preliminary work there are clear requirements that complaints regarding individual accomodation must be submitted to the County Governor before the Ombud can deal with them.

5.9. The Ombud’s opinions

The Ombud has received a large number of complaints and enquiries regarding discrimination on the grounds of disability. This shows that there is a major need for legal protection against discrimination on this basis.

The law demands that businesses or services directed towards the public be universally designed. It is common knowledge that the reality is different. In every Norwegian town, one can see for instance that there are steps up to shops, or that there are no members of staff to assist the blind and those with poor sight, unable to use a ticket machine. This is perhaps why it is not so surprising that the Ombud has received so many complaints about inadequate accessibility and inadequate universal design.

We believe however that we have a long way to go before we will get a satisfactory tool to promote the objectives of the Anti-Discrimination and Accessibility Act regarding accessibility and equal status. Among other things, there is a need for sector regulations for the universal design of buildings, transportation and ICT. Without an updated body of legislation for each sector that provides detailed requirements and that is enforced by the respective authorities in the field, we do not have a satisfactory legal tool or enforcement apparatus to achieve an accessible society.

There is also a need for standards, regulations or guidelines/directives that clarify universal design and explain the scope of this obligation. People with different disabilities have different needs. It can therefore be unclear which demands should be made and which needs should be taken care of, that will enable an enterprise's public function to

be utilised by as many people as possible. Our experience is that it is a challenge both for businesses under duty to comply with the law and for the Ombud that enforces the law, to establish how far the obligation extends.

One problem the Ombud has witnessed when processing complaints is that in some cases a conflict arises between the protection of cultural heritage and accessibility considerations. Another problem is establishing who takes responsibility and bears the costs of ensuring universal design when several businesses are in the same building as long as, according to the Anti-Discrimination and Accessibility Act, it is the enterprise and not the landlord that is responsible for this. We also emphasize that when setting a new business, it is important to include the requirements for universal design in the planning phase, so as to avoid subsequent demands for improvements by the Ombud or the tribunal er . An order to make improvements after the fact will often be a more expensive solution. Also, the solution may not be optimal, because the next best solution will often have to do. Either it will , for practical reasons, be impossible to achieve universal design or it will be disproportionately expensive.

The Gender Equality Act

IS 30 YEARS OLD

6.1. The Gender Equality Act from 1979 to 2009

The Gender Equality Act forbids differential treatment on gender grounds. The Gender Equality Act was enacted on 9 June, 1978, and entered into force on 15 March, 1979. At the same time, the Equality Ombud was set up. The purpose of the Act is to promote gender equality and is especially aimed at improving the position of women.

The Act has been amended a number of times. Some of the most important changes have been made in 2002 and 2005. Several of the changes involved codification of previous practice while other changes introduced new rules.

In §3 we find the Act´s so-called general clause, which forbids direct and indirect differential treatment of women and men. This clause did not originally distinguish between direct and indirect differential treatment. This change was made in 2002. Differential treatment with the effect of distorting gender equality was forbidden before that time, but with the amendment the terms were made more precise. The criteria for making exceptions were also clarified and partially made stricter. Discrimination on the grounds of pregnancy was before 2002 considered indirect discrimination, but this had to be changed as a result of Norway's association with the EEA agreement. EU directives and legal practice from European Court rulings relating to gender are binding for Norway and, according to EU law, discrimination on the grounds of pregnancy had to be considered direct discrimination.

In 2002, the duty to work actively in a targeted manner to achieve equality (activity plan), a duty which was incumbent on public authorities, was extended to include employers in the private sector as well as employees' and employers' organizations, cf. the Gender Equality Act §1 a.

Other changes that can be mentioned are: the ban on sexual harassment (2002) and harassment on the grounds of gender (2005), as well as the ban on retaliation against those who have taken action against differential treatment (2005). In the workplace, there has been a rule since 1995 regarding the shared burden of proof in cases, which is in accordance with the Gender Equality Act.In 2005 the rule was changed to also apply outside the workplace. The purpose of the burden of proof rules is to make discrimination protection more effective.

Two suggestions for changes to the equality legislation were put forward for political processing in 2009. One relates to an express ban on asking about pregnancy, adoption or family planning during job interviews. The other relates to following up the Anti-Dscrimination Act committee's partial assessment report NOU 2008: 1 «Women and gay people in faith communities», which includes proposals for changes to the Gender Equality Act's scope. It is proposed that the exception for circumstances internal to faith communities in §2 of the Act be removed. The committee considered that the faith communities' permission to treat differently on the grounds of religion can be accommodated by means of the rules on general objectivity, and that the exceptions for faith communities should not go any further than necessary. Ot.prp. no. 79 (2008–2009) and Prop. 16 L (2009–2010) proposes a new paragraph 5 in §3 and a new paragraph 3 in §4 in the Gender Equality Act, as well as that the Gender Equality Act apply to all areas.

The proposals were approved at a preparatory meeting of the Council of State of 9 April, 2010 and entered into force immediately.

6.2. Pregnancy and parental leave

In the 30 years of the Gender Equality Act´existence, the previous Equality Ombud and the current Anti-Discrimination and Equality Ombud have handled a very large number of complaints and have provided even more guidance concerning theon issues of protection against discrimination related to pregnancy and parental leave.

Workplace cases related to pregnancy per year

	Year of case registration			
	2007	2008	2009	Total
Complaint	30	26	14	109
Guidance	187	162	90	576
Total	217	188	104	685

TABLE 6.1

The general impression is that financial and practical considerations typically come before consideration for the pregnant employee. Many employers still seem unaware of the protection against discrimination while others do not believe that an absolute ban on discrimination should take precedence over their assessment of what is best for the company.

Breach of the law in employment cases dealing with pregnancy per year

	Year of case registration			
	2007	2008	2009	Total
No breach of the law	8	3	0	16
Breach of the law	15	14	5	40
Not completely processed or missing information	7	9	9	53
Total	30	26	14	109

TABLE 6.2

The Ombud observes that a number of men got in touch with questions about differential treatment for reasons of parental leave, either get legal guidance or lodge complaints. For the Ombud it is a positive development that as the father quota increases, more men take long periods of leave. But it is r worrying that both mothers and fathers experience discrimination for taking parental leave.

Complainant’s gender in cases related to parental leave

	Year of case registration			
	2007	2008	2009	Total
Not given	0	5	3	24
Women	12	13	4	40
Men	1	3	2	6
Total	13	21	9	70

TABLE 6.3

6.3. The UN women's convention

The Convention on the Elimination of all forms of Discrimination Against Women, CEDAW, was adopted in 1979 and had its 30th anniversary in 2009. In Norway, the position of the women's convention was strengthened in the Norwegian legislation on 6 May, 2009 by being incorporated into human rights legislation. Thus it has precedence over Norwegian law in case of conflict.

The women's convention has been signed by 186 states. Norway signed the convention when it was opened for signing in 1980. The women's convention was incorporated into gender equality legislation in 2005.

Several earlier conventions already secured a large number of the rights contained in CEDAW. It was seen however that these rights did not benefit women as they were intended. The women's convention was therefore created with the aim that the rights it ensured would *actually* be fulfilled, which is reflected in the convention's preamble. It challenged the lack of recognition by the other fundamental human rights that men and women encounter different challenges as far as rights and living conditions are concerned. The women's convention focuses on actual rights. When it was created the convention was very important, and so it still is today, because it is the sum of what all women from all corners of the world have defined as central challenges for their practice of human rights. The work for women's rights is a universal project across social, financial political and cultural lines of demarcation.

6.4. Selected complaints

The Ombud receives many complaints that apply to differential treatment due to gender. Typically these cases apply to allegations of being overlooked for appointments to jobs on the grounds of pregnancy and parental leave. The Ombud also deals with a number of complaints related to the legislation for equal wages for work of equal value.

6.4.1. Equal wages

Case 07/406
Supervisors in Fredrikstad municipality

A female employee in an after- school club in the Fredrikstad municipality complained to the Ombud that she her lower wages were lower than those of male managers employed in the municipal technical operations department. The Ombud concluded that the complainant carried out work of equal as that of the managers, and that the lower wages contravened the Gender Equality Act, §5, cf. §3.

The complainant was the manager of the after-school club in the municipality. Her annual wages were NOK 296, 595 kroner, and she had been employed by the local authority since 1983. The male technical operation employee had an annual wage of 321, 945 kroner, and had been employed by the local authority since the 1970s/1980s.

In this case, the Ombud discusses whether the complainant's wages are in violation of the principle in the Gender Equality Act, §5 which states that women and men shall have equal wages for equal work and work of equal value.

The complainant and the technical operation employees did not carry out the same type of work. The question was whether the complainant was carrying out work of *equal* value as the male employees. The Ombud established that the extent to which the work is of equal value is decided against the background of a general assessment, which emphasizes the expertise necessary to carry out work and other relevant factors such as effort, responsibility and working conditions. The Ombud came to the conclusion that the complainant's work had equal value to the work of the male technical operation employees and therefore considered that the wages were in violation of the Gender Equality Act, §5.

The Ombud assessed whether the wages were in violation of the ban on direct differential treatment on the grounds of gender, cf. the Gender Equality Act, §3, paragraph 1. The Ombud based it's assessment on the assumption that the unequal wages were not directly based on gender, because there were women in the technical operations department who had higher wages than the complainant. This was therefore not a case of direct differential treatment.

The Ombud considered that the case raised questions about indirect discrimination cf, the Gender Equality Act, §3, paragraphs 3 and 4, because it concerned typical female-dominated professions as opposed to male-dominated jobs. The Ombud stated that the apparently gender-neutral setting of wages that actually results in one gender being placed in a worse position than the other, contravenes the ban on indirect discrimination, cf. §3, paragraph 3. It was then considered whether female-dominated professions are lower paid than male-dominated professions that carry out work of equal value without there being reasonable grounds for this. The Ombud concluded that in this case the conditions regarding gender distortion were considered to have been fulfilled because a large majority of supervisors in the technical department were men and the complainant was a woman.

The local authority attributed the wage difference to market forces. They considered that it was difficult to recruit supervisors for the technical positions. However, the local authority did not document that they had had difficulties recruiting employees for these positions

The Ombud considered therefore that Fredrikstad municipality's reason for differential treatment regarding wages in this case where not enough to fulfil the conditions for legal differential treatment, cf. the Gender Equality Act §5, cf. §3, paragraph Accordingly the wages difference violates the Gender Equality Act's equal pay provisions.

The case was brought before the Equality and Anti-Discrimination Tribunal.

Case 08/1828
Can recruitment considerations be the basis of unequal wages?

A department in Sarpsborg local authority employed seven people, six women and a man. The women had lower salaries than the one man.One of the women complained to the Ombud and maintained that the wages difference contravened the equal pay principle in the Gender Equality Act. The Ombud came to the conclusion that the Gender Equality Act had not been contravened in this case because the municipality had provided evidence that the recruitment needs were the cause of the wage difference.

The parties in the case agreed that the female and male employees carried out work of equal value. The municipality s maintained however that the wages difference was not based on gender. The municipality submitted that the male employee had received higher wages than the female employees because there was a strong wish to recruit him for the position on the basis of his experience and qualifications.

The Ombud found that the male employees had stood in a strong negotiation position during the recruitment process. Use of wages as a means of employing qualified manpower is a gender-neutral consideration on which paying unequal wages can be legally based.

Accordingly Sarpsborg municipality had contravenened the Gender Equality Act by remunerating the female and male employees unequally. However,due to its duty to promote equality as provided in the Gender Equality Act §1 a, and as the work was of equal value, the municipality had to even out the wage differences in the long term.

6.4.2. Pregnancy and parental leave

Case 08/1088
Dismissal

A woman had worked as an apprentice for a sole proprietorship. Upon termination of the apprenticeship she was employed. When she informed the employer that she was pregnant, she was fired. The Ombud came to the conclusion that the termination contravened the Gender Equality Act §3.

The woman had not received a work contract, but it was undisputed that she was employed by the said employer. The latter confirmed that the parties had agreed to terminate the relationship on the same day that the woman had notified of her pregnancy. She was offered the opportunity of working to the end of the month and the following month The woman went on sick leave one month following the meeting, whereupon she was notified, first by text message and later by letter, that the relationship was deemed ended there and then.

The Ombud found that there were reasons to believe that the pregnancy was the reason for the termination, based on the employer's own explanation about the termination of employment on the same day as notification of pregnancy was issued. The employer maintained however that it was the woman's low earnings that was the reason for the termination. The employer produced a letter from the accountant advising against employing the woman because it was not economically justifiable.. The letter however was dated approximately three months before the woman got an offer of employment. The Ombud emphasized that the employer had chosen to employ the woman despite the accountant's advice. Even though it was documented that there had been some doubt as to t the profitability of employing the woman, it the relationship had been terminated only upon her informing of her pregnancy.This was decisive for the Ombud, who concluded that the termination contravened the Gender Equality Act's prohibition against discrimination on the grounds of pregnancy.

The case was brought the Equality and Anti-Discrimination Tribunal. The tribunal agreed with the Ombud's conclusion and concluded that the "employer had contravened the Gender Equality Act's §3 when terminating the employment " (tribunal case no. 32/2009).

Case 07/1979
Dismissal after the winding up of a company within a corporate group

A woman approached the Ombud and maintained that she had been discriminated against on the grounds of pregnancy and parental leave because she had not, as opposed to her colleagues, been offered a new job within the same corporate group upon the company´s dissolution. The Ombud came to the conclusion that the employer had not acted in contravention of the Gender Equality Act.

While the complainant was on sick leave due to her pregnancy, the company she worked for was wound down and the complainant was fired. The effective date for the termination of her employment was postponed until the expiration of her parental leave..

The woman maintained that her colleagues had rec eived a new offer in the same company without any prior application. She was the only one who hadnot gotten t such an offer. She had sent an application to another company in the same corporate group, but had not gotten any answer. Accordingly she belived that she had been placed at a disadvantage compared to her colleagues, and that the reason was her pregnancy and her subsequent absence on parental leave.

The Ombud had to form an opinion on whether the woman, because of the pregnancy and/ or parental leave had been putin a worse position than she otherwise would have been, cf. the Gender Equality Act, §3 paragraph 1, cf. second paragraph sec. 2 and paragraph 3.

The Ombud requested that the employer deliver an account of the hiring process that had taken place in connection with the company´s dissolution. Of the woman's four colleagues, one was a self-employed tradesman and could therefore not be compared wit the woman. Two colleagues had gotten jobs through the application process in the ordinary way. The Ombud concluded that the woman in this case had not been placed at a disadvantage compared to her colleagues, and had not as a result, been discriminated against. The solution found by the last of the three colleagues had been to work for another company in the same group on a provisional basis through his personal company. Thus he did not need to go through normal application procedures, but on the other hand he had not received an unsolicited job offer. The Ombud concluded also here, with some doubt however, that the woman had not been put at a disadvantage compared with her colleagues.

The Ombud came to the conclusion that the employer had not acted in contravention of the Gender Equality Act §3, paragraph 1, cf. paragraph 2, no. 2 and paragraph 3.

Case 09/184
Dismissal of subcontracted employees

The case related to questions about differential treatment on the grounds of pregnancy in accordance with the Gender Equality Act, §3, with regard to hired labour from a manpower agency. The case raises interesting issues relating to the meaning of being "placed at a disadvantage" as stated the Act, issues of liability for contributory negligence and the protection against discrimination for subcontracted employees.

In April 2007, A received a job offer through the manpower and recruitment bureau Proffice AS. She was subcontracted to TINE BA for the period 16 April, 2007 to 1June, 2008. The job was a 100% position as a customer consultant.

Subcontracted employees are employed by Proffice, which holds the employer responsibility. The employee receives wages directly from Proffice. The employee will still be employed by Proffice, shoud the company terminate its contract with Proffice before the end of the job assignment.

A became pregnant in September/October 2007. She informed TINE first, then Proffice, about the pregnancy. A short time after this A went to her doctor. The doctor recommended that she stay home for a week and therafter that she work 50% for a week's time to see how it went. Directly after the doctor's visit A rang and informed her boss at TINE of her going into sick leave, whereupon Proffice terminated its agreement with TINE concerning the hiring of A.

A went then on 100% sick leave. Proffice paid A sickness benefits throughout the period of her employment. Then A received sickness benefit payments from NAV in accordance with the National Insurance Act. She remained on 100% sick leave up until she went on parental leave.

The Ombud concluded that TINE BA had violated the prohibition on discrimination against pregnant women in the Gender Equality Act §3, paragraph 2, sec. 2. TINE had placed A in a worse position because of her pregnancy. The Ombud further emphasised that other parties apart from the employer may pursuant to the Gender Equality Act,.also be held liable for differential treatment.

The Ombud also concluded that Proffice AS had contributed to differential treatment in violation of the Gender Equality Act §3, paragraph 7. The Ombud pointed out that Proffice had accepted TINE's termination of the contract, which the company was not obliged to do, as the dismissal contravened the Gender Equality Act.

The case was brought before the Anti-Discrimination and Equality Tribunal, (Tribunal case reference 18/2009). The tribunal was divided into a majority (3) and a minority (2).

The majority of the tribunal did not find A to be in a worse position after the termination of the assignment with TINE BA. The majority pointed out that she remained with the same employer and had the same financial benefits. The majority also emphasised that A was getting her assignment beinh having been hired by a temporary staff contracting service. A characteristic feature of this type of work contract is a relatively frequent change of work and place of work. Accordingly A could not have an expectation of a stable place of work similar to that of people working at TINE.

So the majority came to the conclusion that neither TINE BA nor Proffice AS had contravened the Gender Equality Act §3 when terminating A's assignment with TINE.

The minority of the tribunal were of the opinion that the termination of the assignment with TINE was likely to place A in a worse position than she would have been if she had not been pregnant.

The minority pointed out that A would have to change place of work and work duties upon her return from sick leave. She had no guarantee of having to perform tasks requiring work experience of the same level. Improving her skills by acquiring relevant work experience had been an important factor for accepting this type of working contract. Contract work may entail having to change assignments, but anti-discrimination protection legislation is there to restrict what may trigger a change of assignments. The minority did not find that the exception to the rule applied in this case.

The minority found therefore that A had been subjected to differential treatment in violation of the Anti-Discrimination Act due to her pregnancy. The minority based their decision on the fact that the termination of the assignment had been effected by TINE BA, and they were therefore responsible for the discriminatory act. Proffice AS could still be held liable for aiding and abetting. As the majority concluded that a discriminatory act had not taken place, the minority had no opportunity to make a statement on whether the conditions for contributory liability were fulfilled In this case.

The united Tribunal found cause to emphasise that the legal protection against discrimination on the basis of pregnancy in the Gender Equality Act §3 applies to all types of actions, regardless of whether the action is carried out by the employer or others. This means that both Proffice AS as employer and TINE BA as commissioning client must honour their responsibility to ensure that contracted staff are not placed in a worse position as a result of pregnancy, childbirth or parental leave. The tribunal also emphasised that, pursuant to the Gender Equality Act, the legal framework for contract work between the contracting service and contracting employer does not absolve from liability, including liability for aiding and abetting. The tribunal stressed that the legal protection against discrimination also applies to the employer's treatment of contracted staff in cases of differential treatment based on sexual orientation and age. This is stipulated by the Working Environment Act §13-2, paragraph 2. The Gender Equality Act cannot be intended to provide less protection to pregnant women than the Working Environment Act.

Case 09/89
Appointment

Two women approached the Ombud and claimed they had been subject to discrimination as a result of pregnancy. Their employment in a shop was discontinued when the shop changed its name and continued trading with the same owner following bankruptcy. The Ombud concluded that the employer had violated the anti-discrimination laws on the basis of pregnancy.

The women were working in a shop that declared bankruptcy. The business continued trading under a different name, but with the same owners. The staff members were automatically offered a position in the new shop, except for the two women. The employer claimed that the reason was that they were not qualified and that they did not fit into the working environment. The employer presented statements from the shop manager in support of this claim.

The women claimed that they were qualified. They also showed that the employer had never discussed with them as to whether they were qualified or how they fitted in to the working environment.

A deciding factor for the Ombud was the fact that the statement from the shop manager was prepared after the case was brought before the Ombud. Such belated statements are awarded less weight when assessing whether the employer has established a probable case that grounds other than pregnancy were the reason for not offering a position. Thus, the Ombud concluded that the employer had violated the Gender Equality Act §4 and §3.

Following the Ombud's recommendation the plaintiffs and the employer agreed on a financial settlement.

Case 08/1324
Change of duties following parental leave

A woman approached the Ombud and claimed that she had been subjected to discrimination due to pregnancy and parental leave because she had been given different working tasks upon her return from parental leave. The Ombud concluded that the employer had not contravened the Gender Equality Act. The Ombud based its decision on the fact that the change in tasks was not related to her parental leave, but rather on an assessment of how to distribute assignments and on the fact that the woman had requested reduced working hours and working at home.

The woman was employed in the financial department of a hotel and conference centre. While she had been on parental leave, the business underwent structural changes, and she was offered a new contract involving different duties after her return. She was the only person affected by the restructuring. She perceived the change as a demotion, and believed to have been subjected to negative differential treatment due to her parental leave.

Employees who have been on parental leave are entitled to get back a position of same level and remuneration as they had had initially. The main duties in the new position must be be similar to the previous ones when it comes to tasks and responsibility.

However, the employee does not have an unconditional right to return to exactly the same position as he/she had prior to going on parental leave. The employer may by virtue of its managerial authority, implement som restructuring, but within the framework of the employment contract. The employer´s managerial authority is however

restricted by the anti-discrimination provisions of the Gender Equality Act. The changes must be based on reasons that are reasonable and linked to operational considerations. A change of working tasks is generally illegal if it results from use of of parental leave.

The question for the Ombud was whether the woman had been placed in a worse position as a result of the changes, and if this was related to her having been on parental leave.

When assessing whether the person is in a "worse position" one must take as a reference an objective standard, i.e. what would ordinarily be perceived as negative change. If there is any doubt whether the changes may be characterised as negative, then the employee's own perception of the changes will play a significant role. The Ombud´s opinion was that the woman had been placed in a worse position than prior to her parental leave because she had been relieved of certain duties.

After assessing the case the Ombud came to the conclusion that the restructuring had no connection with the woman having gone on parental leave. The new position that been offered to her was also based on her request for a reducedworking schedule and a home office.

The Equality and Anti-Discrimination Ombud concluded that the employer had not contravened the rule against indirect differential treatment due to gender, cf. the Gender Equality Act §3, paragraph 3.

Case 08/1869
A fireman did not get a permanent job due to his use of parental leave

A man approached the Ombud and claimed he had been discriminated with regard to a job appointment for having taken out parental leave.The man had a permanent employment as a reserve man in a fire service. Upon a vacancy for a position as a fire fighter on a permanent team he received a letter from the chief municipal fire officer saying that he would have been offered a permanent job in a stand-by fire fighting team, but that the position had been offered to someone else because he had chosen to go on parental leave. The man did not get any other permanent job in the fire service.

He learned of another permanent job that would become available six months later, but relinquished it to the other reserve man. Some time later a new position came up as permanent fire officer. In the meantime two new reserves had gotten employed and the permanent position was given to one of the new reserves. The following New Year the other reserve was offered a permanent stand-by position.

The man claimed that having gone on parental leave was the reason why he had not been offered any of the jobs. His absence on parental leave had lead to his missing at least 10 weeks of work experience. However, while he was on leave, he had followed the fire service's training programme, so as to avoid missing out on training and to stay up-to-date.

The fire service claimed that the decisions had been made based on agreement. The permanent jobs had been offered to the reserves with the most experience. Differential treatment due to use of parental øeave beyond what is allocated by law to a mother or father is considered to be indirect discrimination. This is also clear from the preparatory legislative work, which states clearly that men, when taking care of other people, do not suffer from differential treatment because they are in a typical male situation, but because their situation contradicts the traditional gender role pattern.The Gender Equality Act gives a protection against this kind of discrimination.

The Ombud's view was that the letter made it clear that the decision to give the first permanent job to the other reserve showed a negative emphasis on the fact that he had taken a parental leave.The Ombud did not put any emphasis on the fact that the man had relinquished the job because he was on parental leave, and that he had been lead to expect to get a new permanent job soon after. The Ombud stated that the responsibility for not violating the Gender Equality Act rests with the employer. The Ombud also criticised the employer, being the professional party, for saying that the decisions had been made as a result of an agreement when they clearly violated employee rights, cf the Gender Equality Act.

The fire fighter also claimed that he had been bypassed for other stand-by positions and extra hours. The Ombud found those claims to be supported only by allegations and counter allegations, and therefore found no basis for determining whether there had been differential treatment.

Case 09/1481
Woman on parental leave was not offered continued temporary contract

The case was brought to the Ombud through a joint statement of facts from the woman's trade union and Oslo police district A police lawyer, represented by her union, had been employed on a series of temporary contracts in Oslo police district. When going on parental leave she did not get a new temporary contract. So she felt discriminated because she was pregnant, a violation of the Gender Equality Act. The Ombud concluded that Oslo police district had contravened the Gender Equality Act.

The women had had several fixed-term replacement jobs with Oslo police district. The termas of her contract had been between two to seven months, and it was always clear from her contracts whose position she was standing in for. As her temporary job expired at the time she left on parental leave and the contract was not renewed. The person that the woman was replacing temporarily was still absent, but the position was filled by other substitutes. Until then, the woman had been offered renewed contracts successively. Following the end of the parental leave period, the woman was offered another fixed-term substitute position. She thereafter was offered continued substitute contracts until she was made a permanent member of staff.

The trade union was of the opinion that the woman had been discriminated against in breach of the Gender Equality Act because she had not been offered substitute contracts during the period while she was on parental leave. Oslo police district disagreed.

Oslo police district had offered the woman successive fixed-term substitute contracts for three and a half years, only interrupted by the woman's pregnancy and parental leave. Oslo police district did not provide any other reason than the woman's parental leave for not renewing her substitute position. The Ombud therefore found reason to believe that the reason for not renewing the woman's substitute contract was her parental leave.

Next, the Ombud considered whether the negative differential treatment was legal anyway, that is, if the differential treatment was impartial and objective, necessary and did not have a disproportionately negative effect on the party affected. The inconvenience for the employer resulting of having to employ substitutes to replace a substitute is not a good enough reason for differential treatment. This is in accordance with the practice of the EU court and the practice of the Gender Equality and Ant-Discrimination Tribunal. The Ombud's statement included:

> *"For the employer it can be inconvenient to hire staff for temporary substitute positions, in cases where the appointed person can only work for part of the term. The employer will then have to replace the substitute with another substitute, which can create a complex situation. However, the Ombud does not consider this inconvenience great enough to allow circumvention of the very narrow criteria for making exceptions to the Gender Equality Act's anti-discrimination provisions in these cases."*

One of the consequences for the woman of not getting an extension of the contract for the substitute position was that she did not get the difference between 6G which national insurance covers and full wages which follow from the tariff agreement. In addition, pension rights were lost for the period.

The Ombud concluded that Oslo police district had acted in contravention of the Gender Equality Act by not offering the woman a new substitute position when she was on parental leave. Oslo police district accepted the Ombud's statement and changed its practice in accordance with the provisions of the Gender Equality Act.

The woman and Oslo police district arrived at an amicable solution in accordance with the Ombud's statement. Oslo's police district were also going to investigate whether more people could have been discriminated against as a result of their previous practice with substitutes and offer these financial compensation.

6.4.3. Parental leave trouble in the police

When the Oslo police district were notified that they had breached the Gender Equality Act, they did not just change their recruitment practice. They also went through the archives to ensure that nobody had been discriminated against as a result of taking parental leave over the last 10 years.

Senior Consultant Vegard Aamodt of Oslo Police District is convinced that the police should have an open, honest and responsible attitude towards the employees as well as the public.

"For us this is about being aware of our responsibility. Oslo police district wants to be an open, honest and responsible police force. This must of course also apply to our colleagues. If our colleagues see that we as employers do not live up to the ideals of openness, honesty and responsibility in our work and our dealings with the public, it is questionable whether we can demand that our colleagues live up to the values of openness, honesty and responsibility in their work and dealings with the public," says Vegard Aamodt, senior consultant at the personnel and professional development division of the HR department of the Oslo police district. In the autumn of 2009, Oslo police was reported to the Equality and Anti-Discrimination Ombud (LDO) for breach of the Gender Equality Act. The woman who complained had had a number of interim positions with the Oslo Police District. Her last interim position expired while she was on parental leave, and she did not get it renewed. Instead it was given to another substitue. LDO concluded that this contravened the Gender Equality Act.

The Oslo police district decided to create something positive out of their experience. Vegard Aamodt has already made plans for how the police could share their knowledge of the problem.
"We have learned a great deal from this case, and the point it illustrates will be used in management training at the district," says Aamodt. On the basis of other cases he is aware of, he thinks many employers lack knowledge about how much protection the Gender Equality Act gives employees who are pregnant or on parental leave. This impression tallies with experiences from LDO and the former Equality and Anti-Discrimination Ombud. Over the last 30 years, we have handled several thousand complaints. Many of them have related to discrimination on the basis of pregnancy or parental leave. Few employers have however shown the same willingness as the Oslo police district to do something about the problem after the fact.

For instance, the police chose to cooperate with the complainant's union on a joint presentation of the facts of the case. Aamodt meant that there were several good reasons for this solution.

"The disagreements between us were not so great that they could not be put forward in a joint presentation. In that way the Oslo police district, the complainant's union as well as LDO saved meaningful resources. And last, but not least, LDO could reach a final deision much faster. This was very important for us because the woman who complained, still works here. Naturally enough, it can be stressful to have an ongoing case against one's employer," he says.

Today the case against the Oslo police district has been completed. The district has not just willingly come to an agreement with the woman, as LDO had required. Without being requested to do so, they also went through all of the division's cases since 2000 to find out if more people had been discriminated against through their previous practice with interin workers. The plan was to offer them financial compensation. They did not find any. Aamodt still believes that it was important and right to make the extra effort to check that there was no similar cases in the police archive.

"Pregnancy and parental leave should have no relevance in the fact that one gets hired as an interim at the Oslo Police District," he says.

6.4.4. Being overlooked for an appointment for gender reasons

Case 07/1018
Appointment of associate professor did not breach the Gender Equality Act

A male job applicant believed that he had been overlooked for a position as an associate professor at a university. The Ombud found that the university had provided evidence that gender had not been a factor in the appointment process.

The complainant was one of 12 applicants. Applications are evaluated by an expert committee. The appraisal process included a description and assessment of the applicant's education, work experience, research experience, other scientific activity, pedagogical competence and administrative experience.

At the end, the individual candidates were evaluated against each other. The committee concluded by ranking five applicants, with the complainant as number one.

The department then called in the five ranked applicants to an interview and test lecture, assessed by a special

interview committee. Three applications were recommended in light of the presentations that had been made at the interview and test lecture. This did not include the complainant. The three applicants chosen were all women.

As there was a great difference between the expert committee's ranking and the final recommendation, in which only women appeared, the Ombud meant that there was reason to believe that the complainant had been overlooked on gender grounds. Then the burden of proof was transferred to the university in accordance with the Gender Equality Act, §16.

The university managed however to show that gender had not beeen emphasized. The Ombud took specially into account the interview committee's written recommendation, which it found to be relevant and well-justified.

The Ombud concluded that the university had not violated the Gender Equality Act §3 in its appointment of the associate professor. The case was appealed to the Equality and Anti-Discrimination Tribunal, which reached the same conclusion as the Ombud (tribunal case no. 27/2009).

Case 08/1395
Hiring a chief inspector

A female applicant believed that, while he was in the process hiring a chief inspector, the police chief constable had emphasized the fact that she was a woman. Of all the candidates it was the woman who had the longest management experience. So she believed to be better qualified than the male applicants who had been called for an interview. The Ombud concluded that there were reasons to believe that the woman had been treated differently on the grounds of her gender. The reason was that, an assessment of her education and work experiencem showed that she was the one who emerged as the best-qualified of the actual candidates to the position of chief inspector.

Accordingly the police district had to prove that there were reasons other than gender for which she had not gotten the job. The Ombud found that the employer had adequately shown that other reasons explained why the woman was not been employed. In the interview the woman had proven to be the applicant with the least to say about the challenges in a job as chief inspector. Thus the Ombud therefore came to the conclusion that the police district had not acted violated the Gender Equality Act by not employing the woman.

6.4.5. Women’s housing cooperative

Case 08/909
The statutes of the Kvindernes Boligselskap AS in Oslo only allowed for women to buy and live in the housing cooperative apartments

The previous Gender Equality Ombud and Equality Tribunal has also gone through a legality assessement of the provision in this housing cooperative's regulations. The Gender Equality Ombud concluded in 2003 that the clause violated the Gender Equality Act. The tribunal however came to the conclusion that the clause did not violate the Gender Equality Act because of non-statutory exception rule.The tribunak based it decision on the housing cooperative's history and the fact that the case had a limited significance for gender equality.

In 2006, a man reported the housing cooperative to the Equality and Anti-Discrimination Ombud. The Ombud referred to the ealier 2003 case by the complainant to the tribunal, and pointed out that conditions had not changed since then. The Ombud did not believe the statutes to contravene the Gender Equality Act and dismissed the case.

The man complained again in 2008, reffering to the same conditions. The background for his new complaint was that several of the apartments had by now their own toilet and bathroom. Accordigly he believed that modesty considerations could no longer justify an exception to the provisions the Gender Equality Act's ban on differential treatment of women and men. The Ombud dismissed the complaint and referred to the decision in the previous case.

The man appealed the Ombud's dismissal of the case to the Equality and Anti-Discrimination Tribunal. The tribunal ordered the Ombud to tundertake a substantive assessment of the case. Afre doing so the Ombud concluded the housing cooperative's statutes put men in a worse position than women and therefore violate the Gender Equality Act.

When the company was founded in 1923, it was difficult for women to get their own residence and the objective of establishing the faciliies was to enable single, financially independent women to buy their own dwellings. As of today

the statutes still exclude men from buying and living in apartments in the housing cooperative.

§8 of the Gender Equality Act allows associations whose main purpose is to promote one gender's special interests, to only admit members of the one sex. Accordingly the Ombud first analysed whether the housing cooperative was an association where women's special interests were taken care of in such a way that it could be reserved for women. The Ombud concluded that today women have no special needs in the property market that can justify differential treatment ofthe sexes. Regardless of whether the Kvindernes Boligselskap was considered an association or not, the Ombud considered that the clause in the Gender Equality Act, §8 did not apply in this case.

The Ombud then established that men who did not have access to property in the housing cooperative were an unequal position compared to women. However men have access to many other apartments in Oslo. It is questionable therefore whether men *are really at a disadvantage* on the property market compared to women, because they can ´t have an apartment in the housing cooperative. These apartments in question are few in numbers and men truly have the same as women for acquiring their own residences, despite the fact that housing cooperative apartments in the actual are reserved for women.

Even so, the Ombud believes that the clause leads to an unfortunate result, that men are unwanted in the housing cooperative. One must exercize caution when excluding certain groups from living where they wish. So the Ombud found that the statutes do place men at a disadvantage compared to women, thus achieving fundamental and direvct differential treatment.

If direct differential treatment on gender grounds is to be allowed, it must be necessary to achieve a reasonable objective and it must not have a disproportionately negative effect on those concerned. The housing cooperative thought that modesty considerations – women wanted to avoid sharing the toilet and bathroom with men – and security considerations meant that the differential treatment was reasonable.

The Ombud however did not find that these considerations were objectives that could legitimise differential treatment and concluded therefore that the housing cooperative's statutes contravened the Gender Equality Act.

The case has been brought before the Equality and Anti-Discrimination Tribunal.

6.4.6. Cabin sharing breaches the Gender Equality Act

Case 08/1431

A woman contacted the Equality and Anti-Discrimination Ombud because she believed that cabin sharing arrangements in the vessel in which she worked breached the Gender Equality Act. The Ombud came to the conclusion that the arrangements meant an indirect differential treatment based on gender.

The woman worked as a catering assistant in a vessel. There were seven women and one man among the catering assistants, while the remaining crew consisted of men.

The catering assistants,as opposed to the rest of the crew, had to share a cabin. Since the rest of the crew mainly consisted of men, the complainant believed the arrangement to constitute differential treatment of her as a woman. The complainant considered that sharing cabins restricted the women's privacy.

The employer maintained that the shipping company's aim was to provide everybody on the vessel with single cabins. Due to space problems the employer had chosen to prioritise those in the crew that were part of safety-related crew or had positions directly involved in the operation of the ship. Supply assistants were not considered to be in this position.

The Ombud found that the sharing of the cabins seemed to place women at a disadvantage compared to men. There were seven women and one man employed as a supply assistant, while most of the remaining crew were men. In principle the cabin sharing was therefore in violation of the Gender Equality Act's prohibition against indirect differential treatment, cf. §3, paragraph 1, cf. paragraph 3. m Accordingly the employer had to provide evidence that the cabin sharing had a reasonable objective regardless of gende, and that cabin sharing was a special, necessary measure that did not have a disproportionate effect cf. the Gender Equality Act, §3, paragraph 4, cf. §16.

The Ombud found that the cabin sharing arrangements had a reasonable objective, ie. giving the crew the greatest possible degree of privacy, but that the sharing arrangements in place were was not necessary to achieve this objective. Other solutions than the current solution meant increased costs for the employer and an increased burden for

some employees in the form of increased discomfort at work. On the other hand, the Ombud believed that maintaining the current arrangement meant that the woman must bear alone the burden of the company's inability to meet the requirement of providing single cabins for everyone. So the Ombud found that the effect of sharing cabins differently and arranging the shifts alternatively so as to better ensure the crew's privacy requirements, would not have a disproportionately negative effect on the employer or employees. Accordingly the Ombud concluded that the arrangement constituted indirect differential treatment on gender grounds.

The case was brought before the Equality and Anti-discrimination Tribunal. The tribunal, with four votes against one, reached the same conclusion. (tribunal case no. 25/2009).

6.5. Public consultations

6.5.1. Proposal for future occupational insurance

Case 08/1956

The Ombud (and formerly the Gender Equality Ombud) have previously noted that current occupational injury insurance schemes implies differential treatment of men and women. In the autumn of 2008, the Ministry of Labour and Social Inclusion proposed to extend the list of occupational illnesses that qualify for occupational injury compensation. The Ombud concluded that the proposal for an extended list still entails differential treatment of women and men in contravention of the Gender Equality Act.

Injuries caused by accidents at work are considered occupational injuries. There are also a number of occupational illnesses that have the same status as occupational injury by specific regulations (the occupational injuries list). The Ombud's criticism of the current scheme predominantly relates to the fact that it does not include strain Injuries such as muscular and skeletal illnesses.
These ailments are particularly predominant in female-dominated professions, such as in the health sector and hygiene. The Ombud therefore believes that the current scheme allowss better care for men than women.

The committee proposes to include muscular and skeletal injuries in shoulders and arms, as well as foetal injuries in the occupational injuries list. Hopefully this will contribute to more women getting occupational injuries approved. However it is still questionable whether the proposed changes sufficiently remove the gender differences inherent in the current scheme. The Ombud emphasised that neck and back injuries had not been suggested as additions to the list.

The committee that made the proposal also recognises that:

> *[...] the list is still dominated by illnesses related to the physical and chemical working environment, and therefore traditional Norwegian industry where male dominated occupations are overrepresented.*

The Ombud believes that the proposal does not comply with the duty of public authorities to work proactively, in a targeted and methodical manner to promote gender equality in all areas of society (the duty to promote gender equality), cf. Gender Equality Act §1a. Regarding the content of the duty, Ot. prp. no. 77 (2000–2001) page 20 states that:

> *... the duty to promote gender quality [entails] not only a duty to carry out specific gender equality measures, but also to ensure that the gender equality issue is integrated in all public service activity. This entails, e.g. to take the initiative to change regulations that contravene the Gender Equality Act, and ensure that any proposal for new regulations are in accordance with it. (our emphasis)*

The Ombud also questions whether the committee's proposal to extend the list is compatible with international

obligations, including both the UN women's convention article 12, which commits countries to the abolition of discrimination against women in the area of health, and EU/EEA's gender equality directive on the equal treatment of women and men with regard to work and professional life.

6.5.2. Gender representation in public committees

Possibilities for exemption – exceptions to the rule

The assessment team was of the opinion that the access to exemption provided by the Gender Equality Act §21 does not function as intended. The Ombud believes that the access to exemption should be discontinued so that the regulations governing public committees become absolute and resemble the regulations for private companies as far as possible. The Ombud stated inits response to the public consultation that committee work is important to political decisions, and members can have real influence. The Ombud believes the regulations on gender representation are a good tool for ensuring participation by both genders and influence on political processes. If permission for exemptions is not discontinued, the Ombud believes that detailed guidelines for exemptions should be included in the memorandum, so they are made clear.

Enforcement of the rule

The Ombud agrees with the assessment team that enforcement of the Gender Equality Act §21 should remain with the Ministry of Children, Equality and Social Inclusion. However, in the Ombud's experience, many are not aware of this fact, and the Ombud recommended that the legal text should make it clear who is charged of enforcing the regulation.

Duty to report

It is not proposed in the Anti-Discrimination Act committee's assessment report that the duty to report be included in the proposed Act. The Ombud believes that public authorities currently have a duty to report associated with their implementation of public authority and that the ministries' practice of the Gender Equality Act §21 is an appropriate part of this reporting activity. The assessment team proposed that the duty to report is laid down in law in the Gender Equality Act §1a, which the Ombud supports. The Ombud also thinks that regulations should be implemented to regulate the content of the obligatory reporting. The Ombud shared the opinion of the assessment team that reporting on the execution of authority by public authorities should be enforced by the Anti-Discrimination and Equality Ombud / Anti-Discrimination and Equality Tribunal.

Sanctions

In the Ombud's opinion sanctions are important to make the Gender Equality Act §21 more effective. The Ombud believes it must be made clear that breaches of the Gender Equality Act §21 lead to sanctions and that the sanctions should be included in the legal text. Currently it is implicit in §21 that the ministry can stop proceedings. The Ombud wrote in their response to public consultation that this should be included in the legal text, because when it is set down in law it sends out a stronger signal. The Ombud is also of the opinion that as well as to the power to stop proceedings, the Ministry of Children, Equality and Social Inclusion should have the authority to demand rectification, which should also be clear from the Act. The assessment team pointed out in their report that invalidation would be appropriate sanctions. The Ombud agrees, and believes this should be further assessed.

6.5.3. Proposal for new, general statute against discrimination

The Anti-Discrimination Act committee submitted its assessment "Comprehensive discrimination protection" (NOU 2009: 14) June 19, 2009. The assessment has been submitted for public consultation, and the Gender Equality and Anti-Discrimination Ombud has critisized some of the proposed changes related to the Gender Equality Act. It had been proposed that the Gender Equality Act itself be abolished and replaced by a collective anti-discrimination statute.

In summary, the Ombud is concerned that protection against gender discrimination may become weaker than it currently is, because of the shaping of the proposed statute. In the proposal by the Anti-Discrimination Act committee, gender is listed as one of several grounds for discrimination. Based on the proposal for its goal the statute's actual

scope and the shaping duty to promote, there is, in the Ombud's view, cause for concern that the protection against gender discrimination may be weakened and that the UN women's convention may not be complied with.

The goal of the Gender Equality Act is that it *«aims in particular to improve women's position»*. This is not included in the proposal for the new statutory objective clause in the draft of the new Anti-Discrimination Act. Even if the Gender Equality Act applies to both women and men, legislators recognized that women are discriminated against in many areas of society to a greater degree than men. Experience shows, through statistics from the Ombud's cases, that women are still discriminated against to a greater degree than men. There may therefore be a need for the new statute to emphasize that women's position in particular must be improved. The Ombud has in its consultation response highlighted the fact that the Norwegian authorities are bound by the UN women's convention. If the particular reference to the position of women is not included in the law, it is doubtful whether our obligations with regard to the convention would be fulfilled.

In the legal draft *"family life and other purely personal relationships"* are exempt from the statute's scope (§2). The Ombud considers this unfortunate and does not support the proposal. The proposal would mean that the prohibition on gender discrimination would have has a more limited l scope than today. Even if the Ombud does not enforce the Gender Equality Act within the sphere of private life, the fact that the anti-discrimination legislation applies to family life and other purely personal circumstances still has an important symbolic value in the Ombud's view.

The committee proposes that the employer's duty to actively promote gender equality be implemented in the company's existing systems and HSE procedures and that the duty to actively promote equality for partners in industry be cancelled. According to the proposal, this is to be part of existing HSE work. The Ombud objects to this proposal, particularly when it comes to recruitment and equal wages. Norway has one of the most gender-divided labour markets in Europe. We also have a long way to go before the goal of equal wages is achieved.Making the duty to actively promote equality part of HSE work will bring the working environment committee, the safety delegate and those in charge of HSE managers into the process. This will also apply for instance to recruitment and wage-setting in an equal wages context. The Ombud is unsure oas to how this will work out in practice, but it fears that it will lead to a de-prioritising of gender equality in the recruitment process, not necessarily intentionally, but because the players move outside their usual roles and mandates. Recruitment and wage-setting are the employer's management prerogative within the limitations of the anti-discrimination legislation and tariff agreements.

The Ombud has difficulty seeing how the safety delegate/working environment committee will handle active measures for equal wages when all of this falls outside their mandate and responsibility. In the Ombud's view, it is natural to place the responsibility with those who *actually* negotiate wages locally, that is, employers and union representatives.

By and large, the Ombud supports the Anti-Discrimination Act committee's proposal for a new, general anti-discrimination statute, but has made critical comments to parts of the report. The Gender Equality Act celebrated its 30th anniversary last year and its continued relevancy is shown by the enquiries made to the Ombud. The work for improved protection against discrimination for more people must not lead to the erosion of rights that have been gained and the undermining of obligations that have been established.

6.6. The Ombud’s view

The Ombud believes that a low threshold for enforcing the ban on sexual harassment should be established and that the Ombud should be authorised to process these cases. LDO has currently limited authority to deal with complaints relating to sexual harassment allegations. The Ombud may only take a position on whether the employer has implemented adequate measures to prevent sexual harassment. The courts must take a position on whether sexual harassment has actually taken place.People who are subjected to sexual harassment fall between two stools as the risks associated with bringing cases to court are high.

The legislators' reason for assigning cases of sexual harassment only to the courts is that a sexual harassment allegation is serious for the person being accused and it is important to protect fundamental legal safeguards. The Ombud agrees with this, but considers that the same applies to cases regarding harassment on the grounds of ethnicity, because these can be easily experienced as an accusation of racism.
Cases of sexual harassment are enforced by most equality and anti-discrimination bodies in Europe, so the Ombud feels that there are good grounds for giving LDO the same authority.

Affirmative action

7.1. What is affirmative action?

The Ombud receives regular complaints from men who feel that employers have used affirmative action illegally to employ female applicants.

The main rule is that unreasonable differential treatment is prohibited. One cannot avoid employing the best-qualified applicant *due to the fact that he is a male.* There is one exception to this main rule. The prohibition on discrimination is not be breached if there are reasonable grounds for resorting to differential treatment.. When hiring a personal assistant for instance, there must be room for letting gender play a role on modesty grounds. In this case differential treatment is justified by the actual execution of the job.

The law also allows for differential treatment that promotes equality between the genders, the so-called affirmative action. In these cases, the reason for the differential treatment is not connected to the execution of the job, but to a desire for an even gender distribution, as for instance among the country's judges. See the discussion of the case below.

The conditions for taking affirmative action are partially drawn up through administrative and legal precedence, partially based on regulations. The measure must promote equality. Affirmative action must therefore be directed at the under-represented gender in the relevant area. In addition, the equality consideration must be weighed up against the inconvenience for those placed at a disadvantage as a result of the measure. Affirmative action may only be used up to the point in time when the equality target is reached.

From the practice of the European Court of Justice of directive 76/207/EEA (equal treatment directive) by which Norway is bound, access to affirmative action is being limited by the so-called *moderate quota system*, cf. Ot.prp. no. 77 (2000–2001) point 7.2 and 7.4. By moderate quota is meant that the applicants of the under-represented gender may be given preference for a position where the applicants are approximately equally well-qualified.. Since equality legislation has the particular objective of promoting the position of women, it has been understood that allowing affirmative action applies particularly to the special treatment of women. On the orther hand an applicant of the under-represented gender may not be given preference if she /he is not as well qualified, the so-called *radical quota system*. Affirmative action regulations only allow a quota system for men in jobs related to the education or care of children, as for example jobs in kindergarteens.

Employers and others may resort to affirmative action when the conditions are fulfilled, but are not obliged to do so.

7.2. Selected cases

Case 09/203
Appointment of a circuit judge –affirmative action permissible

A man believed that he had been overlooked in favour of a woman for a job as a circuit judge at a district court. The Ombud came to the conclusion that the Ministry of Justice and the Police had breached of the Gender Equality Act. The conditions for affirmative action were fulfilled. The complainant appealed the Ombud's decision at the Equality and Anti-Discrimination Tribunal (tribunal's case 23/2009). The tribunal came to the same result as the Ombud (dissenting opinions 3-2).

The King in a preparatory meeting of the Council of State decided to appoint a female applicant to the position. The man believed that he was best-qualified and that gender had been emphasized when making the appointment. The nominating board for civil service appointments had recommended the man as number one and the woman as number three.

The Ministry of Justice and Police alleged that the woman had the best qualifications. The ministry argued that the

woman had relevant experience in a management position and had documented good leadership skills from that. Furthermore, the feedback from her references was good. Additionally, the ministry noted that the woman and the man were approximately equally well-qualified and that the criteria for moderate gender quota practice were met. In this regard, the ministry noted that only 17 of 67 circuit judges were women.

In line with the assessment of the candidates by the nominating committee, the Ombud concluded that the male applicant appeared to be the best qualified person for the position.

With respect to the ministry's additional argument concerning affirmative action, the Ombud concluded that the department had substantiated the argument that the woman and the man were approximatively equally well qualified, and that women were under-represented amongst circuit judges. The Ombud noted that the objective of increasing the percentage of women among judges would contribute to achieving the objective of the Gender Equality Act; to improve the position of women. The criteria for use of affirmative action were therefore met.

The Equality and Anti-Discrimination Tribunal looked into the case (their case no. 23/2009). The ministry confirmed to the tribunal that gender had been taken into account during the appointment process. The ministry also dropped the statement that the woman was better-qualified than the man. The question for the committee was therefore whether the applicants were approximately equally well-qualified, and if the other criteria for affirmative action were met. The burden of proof that the criteria for positive discrimination were met, rested with the ministry, cf. the Gender Equality Act §16.

Due to the low share of female circuit judges and the fact that there neither the court of appeal nor the Supreme Court had female leaders, the tribunal stated that the appointment of a woman to this type of public position was of great importance to gender equality.

The majority (3) found that the nominating committee and the ministry had used different weighting of the candidate's qualifications. None of the assessments appeared to be inappropriate or unreasonable. The majority could not see that one assessment was more correct than the other.

The minority (2) found that the ministry had not substantiated the argument that the candidates were approximately equally well qualified for the position. The minority pointed out that the man's management experience from the police gave him an advantage. Further, the minority emphasised the fact that the nominating committee must have based its recommendations on the fact that the man was better qualified than the woman, since they had been listed as number one and number three, respectively. Since the ministry had not interviewed the applicants, the minority believed that the ministry did not have a good basis for overruling the nominating committee’s assessment of the qualifications.

Case 08/1982
Appointment of District Court Judge – affirmative action permissible

The plaintiff believed he had been passed over by a woman for a position as circuit court judge. The Ombud concluded that the Ministry for Justice and the Police had not contravened the Gender Equality Act. The criteria for affirmative action had been met.

The man was recommended as number one by the nominating committee for judges. The nominating committee also recommended a woman as number two. The leader of the court stated that she believed that the woman was better-qualified. The recommendation was not followed by the Ministry of Justice and Police, and the woman who was recommended as number two was appointed.

The question for the Ombud was whether the criteria for use of affirmative action were met, cf. Gender Equality Act §3a.

The authorities' specific goal is to increase the share of female judges in the lower courts. When assessing whether women were under-represented, the Ministry alleged that the share of women in the courts must be assessed generally and not just in the specific individual court. The Ombud concurred. In the national context only 33% of judges in the lower courts are women. Thereforethe Ombud concluded that the criterium of under-representation was met.

The Ombud also found that the woman appointed was approximately equally well-qualified as the male applicant. The Ombud referred to the Equality and Anti-Discrimination Tribunal case 23/2009 (see above). The Ombud believed the crucial question was whether the assessment by the court leader and the Ministry of the candidate's qualifications could be considered inappropriate or unreasonable.

The Ombud concluded that the nominating committee and court leader had weighted the qualifications differently.

The nominating committee assigned particular weight to the male applicant's thoroughness, his capacity for work and the results from his work as judge as these were documented, and his personal suitability for the job. The court leader assigned particular weight to the fact that the female applicant had better exam results and considered her accordingly better qualified professionally. Therefore, the Ombud found no reason to overrule the recommendation by the nominating committee. The Ombud concluded that the criteria for the use of affirmative action were met.

Case 08/1259
Management position in the armed forces – affirmative action disallowed

A man perceived himself to be passed over by a woman for a management position in the armed forces. The man believed he was clearly better-qualified than the woman who got the position. The Equality and Anti-Discrimination Ombud found that the Ministry of Defence had not substantiated itsargument that the woman was better-qualified than the man. The Ombud concluded that they were approximately equally well-qualified, and that the criteria for affirmative action were met, cf. the Gender Equality Act §3a. The complainant brought the Ombud's statement before the Equality and Anti-Discrimination Tribunal (tribunal case no. 33/2009). The tribunal came to the opposite conclusion(dissenting opinions 3-2).

The man was recommended as number one for the position. The woman was not among the three recommended for the position. The recommendation was not followed by the Ministry of Defence, and the woman was appointed.

Based on the formal qualifications and professional experience as submitted in the documentation, the Ombud found that the man appeared to be better-qualified. He had more experience than the woman, and he had 13 years operative experience compared to the woman who had two years. In his recommendations the ministry counsel wrote that he did not believe the woman to be the better qualified among the applicants, but he endorsed the recommendation in view of the political guidelines regarding female managers in the armed forces. Based on this endorsement the Ombud concluded that there was reason to believe that gender had been taken into account in the appointment process.

The Ombud concluded that the ministry had not substantiated the claim that the woman was better qualified than the man. However, the Ombud did conclude that they had substantiated the claim that she was approximately equally qualified as the man. As far as the Ombud could see, the ministry had placed less emphasis on the candidates' operative experience than the nominating committee. The advertisement for the position did not specify a requirement for operative experience, and the Ombud thought therefore that this type of experience could have been assigned too much weight by the appointing committee. The ministry also emphasised the woman's specialised expertise in the relevant field. The Ombud's understanding of the ministry was that her competence in this field made up for her shorter operative experience. This was an evaluation the Ombud did not have any basis for overruling. It was up to the ministry to decide what kind of experience should be given more weight.

The Ombud found, on this basis, that the criteria for affirmative action were met, cf. the Gender Equality Act §3a. The ministry had therefore not violated the Gender Equality Act.

The Equality and Anti-Discrimination Tribunal processed the case (tribunal case no. 33/2009).

The tribunal referred to the ministry's decision memorandum and particularly to the ministry counsel's endorsement, and found that the ministry had emphasized gender when making the appointment.

When the woman was appointed, she was the first woman, out of 23, to be at this grade level in the armed forces. The condition of affirmative action being directed at the under-represented gender was thereby fulfilled.

The tribunal split into a majority and minority when it came to the question of whether the woman was approximately as well qualified as the male applicant. The majority (3) pointed out that the man had a higher level of education than the woman. The man also had a good knowledge of the armed forces' education system. The man also had considerably broader and more comprehensive operational expertise from both the operational services and staff services than the female applicant. The operational service must be considered as relevant in the assessment because the teaching would include joint operations at the actual school. Even though there were no requirement for such experience in the job advertisement, the ministry seemed to also accept this experience as relevant.The man also had considerably longer management experience than the woman. The majority found therefore that the ministry had not provided evidence that the two applicants were approximately equally well-qualified.

A minority of the tribunal (2) did not find any grounds for reviewing the ministry's general evaluation and the different elements in the assessment. The tribunal's minority pointed out that the appointment of a woman at this grade would have a great deal of significance for equality. The minority accepted that the ministry's assessment differed from that of the nominating body for public sector appointments with regard to emphasis on operational service and referred to the duty to actively promote gender equality in the Gender Equality Act, §1a. There was also no requirement for such experience in the text of the advertisement. In this context, the minority found that the conditions in the Gender Equality Act §3a were fulfilled.

7.3. The Ombud's view

The question of whether applicants are approximately equally qualified is often central to the assessment of whether the conditions for affirmative action are fulfilled. It iss not possible to indicate precisely what this condition actually constitutes. There is not a great deal of administrative and legal practice in this area and this creates a great deal of insecurity amongst employers and law enforcers. An important guideline however is the tribunal's statement that the issue to be assessed is whether the employer's evaluation of qualifications is unreasonable or unjustifiable.

In the Anti-Discrimination Act committee's proposal for general protection against discrimination (NOU 2009: 14) it is suggested that affirmative action be permissible in the samen manner for all grounds of discrimination. The Ombud supports the proposal in its consultation response. The Ombud has also previously highlighted the fact the allowance for affirmative action for men should be changed in order to give an equal possibility to apply affirmative action to men as well as women. The Ombud has recommended that the regulation for affirmative action regarding men relating to the care and teaching of children be removed.

Use of affirmative action is a means of fulfilling the duty to promote equality in accordance with the Gender Equality Act §1a. The Ombud believes therefore that there is a need to specify the contents of the provision regarding affirmative action in the regulation**.** The regulation should state what affirmative action is and the conditions which must be fulfilled before it can be applied.

THE 70-YEARS AGE LIMIT RULE

8.1. Consultation on the "70-years age limit rule" in the Working Environment Act

Case 08/1664

The «70-years age limit rule» entails that the termination of employees who are 70 years old will always be considered to be reasonable, cf. the Working Environment Act's §15-7, paragraph 4. The rule means that the general protection against termination of employment in accordance with §15-7, paragraph 1 does not apply to employees who have turned 70.

In its consultation response, the Ombud took a position on two questions; 1) is such a rule in violation of the ban on age discrimination and 2) is such a rule desirable?

The Ombud based its assessment on the fact that the removal of the general protection from termination at 70 years implies that employees are bieng subjected to differential treatment on the grounds of age. In accordance with

the Working Environment Act, §13-3, paragraph 2 such differential treatment isnonetheless allowed if it is necessary to achieve a reasonable objective and does not have a disproportionately negative effect on those concerned. The Ombud came to the conclusion that the rule fulfilled a reasonable objective. The Ombud took into account an overall analysis in which the central elements were a dignified departure, employment policy considerations, relationship to the national legislationof other EU countries, and the importance of having a set of regulations which can withstand the stress of economic cycles.

There are three main considerations behind the 70-years age limit rule. First, the rule is meant to *safeguard the employer's interests.* This emerges clearly from the manner in which the rule is shape out– the employer may terminate unilaterally a working relationship without being required to provide a reason. Second, the rule *safeguards the employee* by ensuring a dignified departure from the workforce. Since the law allows the employer to terminate employees on the grounds of age, this will in many cases prevent the forced termination of older employees, whose long career otherwise would end by being told hat they must leave because they are no longer are good enough.. Third, the rule *promotes the objectives of employment policy*. The thinking is that the rule will help to increase employment among younger unemployed people when unemployment is high. Reference to employment policy objectives are also found in directive 2000/78/EF article, 6.

The question for the Ombud was whether these considerations weigh more heavily than the individual´s rights and the specific evaluation of whether a termination is reasonable.

The argument against maintaining the current rule is mainly that such a rule implies direct differential treatment on the grounds of age. The fact is that more and more people are getting older and continue to work longer. . Employment policy considerations have been put forward as an element in the analysis of whether it is legal/desirable to maintain the current 70-years age limit rule. The thinking has been that in a tight labour market older employees, who have worked up their pension rights, should cede to younger workers, allowing them entry into the labour market. This however is probably not a relevant consideration in today's labour market in Norway. Despite recent negative trends which also affected Norway, employment tis still high and there ia a great need for manpower. That would suggest that there is a need to remove the upper age limit trule rather than retain it. This would send out a signal to employers that they shoud enable older employees to work longer.

The argument in favour of maintaining the current upper age limit scheme rests on the wish that older employees depart from the workforce in a a dignified manner for instead of being terminated for no lomger being able to perform satisfactorily**.** The Ombud wants to emphasise also that in the Working Environment Act §15-7 (4) there is no age limit regulation which obliges the employee to resign from a job at 70. The regulation specifies only the content of the impartiality requirements when terminating an employee so that, when an employee has reached 70, the employer only has reasonable grounds to justify a termination on the grounds of age.. Thus it is the protection against termination that is weakened for employees who turn 70. Employees have therefore no obligation to resign when they reach 70. The employer must actively terminate the employment.. If the employment is not terminated, the working relationship continues. In practice, the current arrangements mean that the employer must take a deliberate position on whether he/she wants to terminate an employee who is 70 years old, or whether the employee will continue in his/ her job. The difference between today's scheme and the removal of the 70-years age limit rule is that the employer would otherwise hav et justify the termination on the grounds of inadequate performance of work, etc. This woud be a lot more stressful for the employee than if the employment is terminated upon reaching 70.. The Ombud also shared the view put forward in the aanalysis that some employees may risk receiving notice from their employers before they reach 70, instead of the employer keeping employees who perhaps do not deliver 100%, but only have a few years left before they turn70. This would add to the burden for employees who already experience problems in finding new work.

An overall assessment of the different aspects has lead the Ombud to tconclude that the rule should be upheld. The Ombud recommended however that the limit be changed to 75 years of age. The first reason is that the average lifespan has increased since the rule was first passed. Secondly, the demographic trend means that more people in the future will have to work for a longer time. Thirdly the consultation notes on age pension in the national insurance scheme show that that there is a suggestion to increase the upper age limit for earning pension points from currently 70 years to 75 years.

The 70-years age limit rule has been carried forward into the new provisions of the Working Environment Act §15-13 a, which entered into force on January 1, 2010. The limit has not been raised to 75 years of age suggested by the Ombud.

If the employer wishes the employee to retire on reaching the age limit, the employer must, with effect from the New Year send a written notification no later than six months before the time of retirement. The notification deadline

runs from the first day in the month after it has been sent. This means that if an employer does not send out a written notification accordingly and the employee passes the age of 70, the employee is not obliged to resign until six months after the notification has been sent. The reason for the rule is to give the employee time to make arrangements for retirement. There are no special requirements for the form of the notification apart from the fact that it must be in writing.

In addition to written notification, the employer must discuss with the employee if the working relationship is to be terminated on reaching 70. This discussion is voluntary and there are no legal consequences if it is not held.

8.2. A complaint against a university's use of the 70-years age limit rule

Case 08/1608

A professor was not able to continue in his job after he turned 70. The question was if this breached the ban on age discrimination in the Working Environment Act, Chapter 13. The Ombud came to the conclusion that the circumstances did not breach the ban on age discrimination. The Ombud's decision was brought before the Equality and Anti-Discrimination Tribunal (tribunal case 36/2009). The tribunal reached the same conclusion..

The complainant believed that the university's denial of his application to continue in the job amounted to age discrimination. He considered the Age Limit Act §3 clearly stipulated that each application must be dealt with individually and that both parties should be heard. He believed that it was up to the two parties in whether they wanted to continue the relationshio and pointed out that the Age Limit Act, §3, paragraph 2, stipulates that one must *" look to the circumstances in the relevant governmental office, the population growth and employment considerations"*. The complainant also believed that he should be allowed to continue in his job for having produced a voluminous amount of scientific papers.. He also pointed out that positions at the university represent a competence that highly needed and which takes a long time to achieve.

The university's justification for its decision was that it practiced a general age limit of 70 years. Applications to continue in a job beyond this were only granted in specific cases. In assessing the applications, one balances needs of the public servant against those of the the organisation. In this case, emphasis was given the faculty's wish for a change in the subject area. This meant that theprofile of the position had to be advertized differently. The faculty's overstretched wages budget was also emphasized.. Accordingly it was concluded that the faculty's finances did not allow the keeping on paying full wages as well as recruiting a new person in the same discipline. Employment of a new person on the basis of the retirement of previous employee emerged therefore as a natural compromise.

The Ombud based its assessment on the fact that the termination of the employment contract was based on the age of the professor. The Ombud therefore had to decide whether the University's rejection of the application to continue in the position after turning 70 contravened the Working Environment Act §13-1 (1).

§3 of the the Age Limit Act states that the general age limit is 70 years for public servants. The Working Environment Act §15-7, paragraph 4 states that termination of employees over 70 years of age will always be considered reasonable. Both rules are exceptions to the general prohibition in the Working Environment Act against age discrimination. The regulations allow the employer to enter into an agreement with the employee to continue the employment beyond 70 years. The regulations do not provide the employee with legal rights to continue in employment, or to be given a reason for why the employment is terminated, apart from the fact that the individual has reached the legal age limit. On this basis, the Ombud concluded that the university can reject applications for continuation of employment without providing a reason other than the fact that the employee has reached the age of 70.

The Ombud's decision was appealed to the Equality and Anti-Discrimination Tribunal (tribunal case no. 36/2009). The tribunal reached the same conclusion as the Ombud. The tribunal pointed out that the issue of whether a general age limit of 70 years is in violation of the prohibition on age discrimination has been assessed by legislators several times. The legislators' opinion is that to terminate an employee due to his/ her reaching 70 does not violate the protection against age discrimination . A specific assessment beyond the employee's age is not necessary. It is not up to the tribunal, but to parliament to change this situation. The appointing authority may use its discretion when deciding whether to approve applications to continue in a position after reaching 70, cf. the wording of §3, paragraph 1: *can make the decision*. The tribunal could not see that the denial of a dispensation from the age limit c amounted to age

discrimination. Nor did the tribunal find that the decision in itself constituted any form of discrimination based on age, apart from applying the age limit provided for in law.

FINANCIAL SERVICES

9.1. What does the law say?

The Gender Equality Act, the Anti-Discrimination Act and the Ant-Discrimination and Accessibility Act apply to all areas of society, and therefore also include financial services such as insurance and banking.

The main rule is that discrimination against people based on gender, ethnicbackground, disability, etc. is not permitted in connection with financial services.

Insurance represents an area where differential treatment is applied on several of the grounds prohibited by law. Differential treatment occurs both by the fact that persons are refused insurance, or are given insurance at a higher rate than other people. As regards banking services people can, for instance, be refused loans because they are not Norwegian citizens. This kind of differential treatment is only allowed if it is necessary to achieve a reasonable objective, and if it does not have a disproportionately negative effect.

As well as the anti-discrimination legislation, access to financial services is regulated by special statutes, e.g. the Insurance Contracts Act and the Insurance Act, as well as by EU law.

As shown in table 9.1 the Ombud has received several cases relating to insurance and banking services.

Cases relating to financial services (insurance and banking)
according to year, discrimination grounds and case type

			2006	2007	2008	2009	total
Insurance	Complaint	Total	7	1	1	3	12
		Gender	4	1	0	1	6
		Ethnicity, etc.	2	0	1	0	3
		Disability	0	0	0	2	2
		Other/blank/more	1	0	0	0	1
	Guidance	Total	13	15	8	16	52
		Gender	9	6	3	5	23
		Ethnicity, etc.	1	3	1	4	9
		Age	1	1	3	1	6
		Disability	1	1	1	4	7
		Sexual orientation	0	1	0	0	1
		Other/blank/more	1	3	0	2	6
Bank	Complaint	Total		2	4	2	8
		Gender		1	1	0	2
		Ethnicity, etc.		1	3	2	6
	Guidance	Total	6	12	12	16	46
		Gender	4	4	2	1	11

Ethnicity, etc.	0	5	3	4	12
Age	0	0	0	1	1
Disability	0	1	1	6	8
Other/blank/more	2	2	6	4	14

TABLE 9.1

9.2. Selected cases

Case 08/670
Conditions for citizenship, residential address and permanent Norwegian personal number on potential bank customers

A Swede applied to the Ombud because he believed that Skandiabanken's requirement for a Norwegian registered residential address and a permanent Norwegian personal identity number for customers contravened the Anti-Discrimination Act, §4. Skandiabanken is a self-service internet bank. The Ombud concluded that the bank had not breached the Anti-Discrimination Act, §4.

The man believed that foreign citizens with temporary personal identity numbers in Norway were at a disadvantage compared to Norwegian citizens and that this, in practice, was a form of ethnic discrimination. Skandiabanken places, in the complainant's view, unnecessarily strict demands for identification, stricter than the requirements of the Financial Security Advisory of Norway and the money-laundering legislation.

Skandiabanken maintained that its conditions were neutral,that they were not affected by the objectives of the Anti-Discrimination Act and therefore not affected by the prohibition. That the bank's conditions also excluded Swedish citizens shows that the bank was acting consistently and did not exclude anyone on the grounds of ethnicity/citizenship. Next, the bank maintained that the differential treatment had a reasonable objective. Skandiabanken's main reason for demanding that new customer have a residential address *registered at the Norwegian national registration office* was a need for safe identification of customers and general security. The requirement for a Norwegian personal identity number was due to compliance need with the Money-Laundering Act. It is pursuant to the Money-Laundering Act §5, paragraph 1 that the bank must ensure that new customers will be identified by valid identity documents. Since the bank operates as self--service and has no branches, it is impossible to identify people by personal appearance.

The Ombud stated that there is no legal protection against differential treatment on the grounds of citizenship or an address registered with the Norwegian Registration Office, cf. enumeration in the Anti-Discrimination Act §4. The Ombud still had to evaluate whether the emphasis on the combination of a permanent Norwegian personal identity number and an address registered by the Norwegian registration office implies indirect discrimination on the grounds of ethnicity, background or national origin.

The Ombud stated that the conditions would in practice affect persons who have so-called short-term residency in Norway, that is, who reside in Norway for less than six months. In that case one is not registered as a resident at the central Norwegian Registration Office. According to figures from Statistics Norway the majority of wage earners on

short term residencies are from other Nordic countries. The greatest growth is among persons from EU countries in Eastern Europe.

The Ombud based its decision on the fact that the banks' criteria were based on requirements for a certain amount of affiliation with Norway, but did not exclude the possibility that the criteria could be exclusively based on national origin/ethnicity. However, the Ombud did not find it necessary to consider this question since the Ombud in any case came to the conclusion that the bank's practice did not place the persons in a *particularly disadvantageous position*.

In order for a practice outside the workplace to be considered indirectly discriminatory on the basis of ethnicity, the requirement is that it places people at a particular disadvantage compared with others. What the Ombud had to decide was the degree of inconvenience experienced by the persons affected by the bank's practices. Furthermore, the Ombud had to take into account how difficult it would be for Skandiabanken to change its criteria, cf. Ot.prp. no. 33 (2004-2005) page 96.

The Ombud found that the groups who are excluded from becoming customers at the bank are less affiliated with Norway because they spend less than six months in Norway. The Ombud also took into account the fact that most of them already have an account in their home country or have can open an account in a Norwegian bank that operates on premises where customers can be attended physically. The Ombud concluded that any financial gain from using Skandiabanken is not sufficient to does not amount to the fact that, if not given this option, they are at a particular disadvantage compared to those who may become customers of the bank. The Ombud found that if the bank could not demand a permanent Norwegian national identity number and registered address, it would have to restructure its operations completely. Thiswould result into bringing disadvantages to the customer group as a whole.

The Ombud concluded on this basis that the bank did not contravene the Anti-Discrimination Act §4.

Case 08/1659
Norwegian citizenship as a requirement for obtaining a bank loan

A woman approached the Ombud because she believed that Bank Norwegian's requirement for Norwegian citizenship to obtain a loan for consumer goods breached the Anti-Discrimination Act §4. The Ombud concluded that the bank's requirements did not contravene the Anti-Discrimination Act §4.

The woman believed that the bank's requirement for Norwegian citizenship to get a loan for consumer goods was indirectly discriminatory on the grounds of ethnicity. First, she pointed out that one can move abroad even though one is a Norwegian citizen. Norwegian citizenship is therefore no guarantee of a greater affiliation with Norway. Second, the woman argued that the possibility of recovering money was just as good in the other Nordic countries as in Norway. The bank therefore does not have reasonable cause for refusing loans for consumer goods to citizens of other Nordic countries. Third, the woman refuted the argument that other banks require Norwegian citizenship. According to the woman other banks only require permanent jobs or Norwegian residency permits.

The bank rejected the claim that the requirement for Norwegian citizenship violated the prohibition on indirect discrimination. The requirement has an impartial objective; to ensure that defaulted loans can be recovered. The possibility of recovering claims from other than Norwegian citizens varies significantly depending on which country it relates to.

The Ombud stated that discrimination based on citizenship is not strictly covered by the Anti-Discrimination Act. But emphasis on citizenship could still entail indirect discrimination based on ethnicity. The Ombud took into account that the requirement could lead to exclusion based on ethnicity and referred to the Gender Equality and Anti-Discrimination Committee's case no. 18/2006 which revolved around rental of residence where there was a requirement for Norwegian citizenship.

The Ombud stated that persons who do not get a bank loan for consumer goods due to the requirement of Norwegian citizenship are not placed at a particular disadvantage. The Ombud found that consumer loans without security are not a benefit to which everyone is entitled as opposed to a mortgage or a bank account. Each individual applicant is subject to a credit assessment. In general, the result is that a large number of applicants, regardless of citizenship, fail to get a loan for consumer goods from Bank Norwegian. In this context, the Ombud decided that the requirement for Norwegian citizenship does not place those with ethnic backgrounds apart from Norwegian at a particular disadvantage. Accordingly the requirement did not breach the Anti-Discrimination Act §4.

Case 09/2369

Rejection of application for disability insurance due to ADHD diagnosis

Legal guidance case

The case was about a man whose application for disability insurance was refused due to his ADHD diagnosis. The man was advised that the Anti-Discrimination and Accessibility Act prohibits discrimination based on disability, but that differential treatment is in some cases appropriate and allowed by the law.

The Ombud referred to preparative legal work in which it is stipulated that a person who has a disability or high degree of risk of disability, can be refused insurance on the basis of this disability. The Ombud stated that the company could refuse the man insurance for disability based on the man's diagnosis, but it was not a given that the company could refuse the man insurance covering disability that might arise from other causes than the risk inherent in the diagnosis, such as an accident at work.

The Ombud also referred to the Insurance Contracts Act §3-10 from which it emerges that "circumstances that represent a particularly high risk, are considered reasonable cause, provided that there is a reasonable connection between the particular risk factor and the refusal. Other particular circumstances represent reasonable cause for refusal when they are such that the refusal cannot be considered unreasonable with respect to the individual."
The Ombud informed the man about a ongoing complaint concerning an similar issue, and gave him the opportunity to be kept informed of its result before he would decide whether to bring a complaints case.

Non-negotiable equal treatment

The protection against discrimination in Norwegian and international law exists based on the recognition that certain groups are more likely to experience unreasonable differential treatment than others. Preventing discrimination is important not only to those directly affected, but also for society as a whole.

Often the balance of power is unequal between the party acting in a discriminatory manner and the party being subjected to discrimination, such as in a work situation. An important question in this context is whether the stronger party may attempt to circumvent the protection against discrimination by way of agreement. One example would be if a work contract is discontinued in contravention of the anti-discrimination legislation in return for a modest compensation.

Case 08/1351

A woman approached the Ombud because she believed she had beensubjected to discrimination when she had been given the choice between stopping wearing a hijab at work and quitting her job (Ombud's case 08/1351). The Equality and Anti-Discrimination Ombud concluded that the employer had acted in contravention of the Anti-Discrimination Act and the Gender Equality Act. The employer brought the case to the Equality and Anti-Discrimination Tribunal (tribunal's case 26/2009). The tribunal reached the same conclusion as the Ombud.

The issue in the case was whether the woman's employer had acted in contravention of the Anti-Discrimination Act §4 and the Gender Equality Act §4, paragraph 2, cf. §3, paragraphs 1 and 4. The woman started wearing a hijab out of religious conviction in connection with the Muslim period of Ramadan. The day after the woman started wearing a hijab at work, she was called in to discuss her wearing of a headdress with her employer.. The woman claimed that she was given a choice between not wearing the hijab and leaving the job. The employer claimed that the woman quit her

job during the meeting. The woman denied this. She claimed that the employer encouraged her to take a few days off to think it over. After the meeting was over she signed out her access card and her keys. When, the following day, the woman submitted a doctor's certificate for sick leave, she was told that she was no longer an employee.

The woman contacted the Ombud and a lawyer. The parties reached a settlement by which the employer paid her a i salary compensation equivalent to four and a half months salary. As the Ombud may pursue cases on its own initiative, (cf. the Ant-Discrimination Ombud Act §3, paragraph 4), it decided to issue a statement of opinion even though the parties had come to a settlement. The employer was not informed that the case was being further processed by the Ombud.

The Ombud issued a statement that the protection against discrimination applied throughout the entire employment term. Therefore whether the woman was fired or pressurised into resigning from her position would not be decisive for the Ombud.

There was no dispute that the meeting between the parties was about the woman wearing a hijab. However the parties disagreed about what had been said at the meeting. The Ombud built on the fact that there was nothing to suggest that the woman had resigned from her position voluntarily. The fact that the woman submitted her notice of sick leave the following day indicated that she did not consider the employment relationship over. Thus there was reason to believe that discrimination had occurred, cf. the Anti-Discrimination Act §10 and the Gender Equality Act §16. The employer could not make a probable case that the termination of the employment was due to other reasons than the woman wearing a hijab. The Ombud therefore concluded that the employer had acted in contravention of the ban on direct discrimination on the basis of religion as given in the Anti-Discrimination Act §4 and indirect discrimination on the basis of gender in the Gender Equality Act §3.

The Equality and Anti-Discrimination Tribunal processed the case (case 26/2009). The tribunal stated that the Ombud should have informed the employer that the Ombud had continued processing the case after the settlement had been made. Errors in the Ombud's case processing were however rectified by the tribunal. The employer had been given the opportunity to make a statement in connection with the complaint to the tribunal. The tribunal's decision included the following statement:

> *«The tribunal's view is that it is not possible to agree on disregarding the protection given by the Anti-Discrimination Act and the Gender Equality Act, including the Ombud's or the tribunal's authority to try whether the law has been broken or not. Preventing discrimination is not only important to those directly affected, but also for society as a whole. The Ombud is therefore authorised to proceed with cases on its own initiative, cf. the Ant-Discrimination Ombud Act §3, paragraph 4. Normally consent should be given by the injured party.»*

The tribunal found that it was likely that the employer had acted in contravention of the Anti-Discrimination Act and the Gender Equality Act. Therefore it was not necessary to decide whether the woman was dismissed, fired or had resigned h on her own. The tribunal pointed out that the employer exerted pressure on her to stop wearing a hijab. According to the tribunal there were no circumstances that would lead to conflict between her wearing of a hijab and the enterprises legitimate needs or its goals.. Accordingly the criteria for making an exception were not applicable.

POSITIVE DUTY TO ACTIVELY

PROMOTE AND ACCOUNT FOR EQUALITY

The duty to actively promote equality is the employer´s obligation to work actively, in a targeted and systematic manner to promote equality and combat discrimination. The duty to actively promote equality is based on the contention that a prohibition on discrimination is not sufficient to promote equal treatment. Companies/employers must, in their annual reports or annual budgets, account for what has been done to fulfil the duty to actively promote equality. With regard to gender equality they also have to account for the status of the company/enterprise. From 2009 onwards, employers have a duty to be active and account for the gender, ethnicity, disability and other discrimination grounds. LDO monitors whether the reporting duty is fulfilled. In 2009 the Ombud reviewed several reports on gender equality. Assessment of gender equality reports has proved to be an effective measure for opening a dialogue with companies regarding challenges in gender equality and for following up the duty to work actively to promote equality.

11.1. The Ombud’s review of gender equality reports

In 2009, the Ombud reviewed the gender equality reports of 40 local authorities, two ministries and five universities and third level colleges. Out of the local authorities' gender equality reports reviewed, 23 were approved, while nine local authorities had their reports approved but reported as inadequate. Eight local authorities were not approved, of which six were sent to be reviewed by the tribunal. All local authorities that are not approved, or approved but deemed inadequate, will be reviewed again.

In addition to the Ombud's reviews, the tribunal has assessed gender equality reports from the Ringsaker, Porsgrunn, Flekkefjord, Austevoll, Lærdal and Surnadal local authorities. These were not approved by the Ombud in 2008, and they were handed over to the tribunal for review. The reason was that the Ombud had reviewed their reports for the second time and found that they did not meet the requirements of the Gender Equality Act.

The Gender Equality and Anti-Discrimination Tribunal concluded, as did the Ombud, that all of the six local authorities were in breach of the Gender Equality Act since the gender equality reports did not comply with the demands of the law. Flekkefjord, Austevoll and Lærdal local authorities were ordered to prepare reports that comply with the legal requirements. Porsgrunn, Ringsaker and Surnadal local authorities were not ordered so because they had already rectified their reports from 2008.

After improving theirreports, all six local authorities have had their gender equality reports for 2008 approved by the tribunal.

The Ministry of Fisheries and Coastal Affairs and the Ministry of Government Administration and Reform were reviewed for the first time. Their equality statements were not approved and will be assessed again next year.

Universities, university colleges and institutes were reviewed. These were IRIS, Sintef, University of Agder, Bodø University College and the University of Oslo. None of these were approved and they will be re-evaluated.

11.2. The Gender Equality Act’s requirements

Companies' duty to promote equality and produce an equality report as well as LDO's obligation to evaluate equality reports have their legal basis in the Gender Equality Act §1a. In accordance with this provision, the employer has a duty to work actively, in a focused, targeted and systematic manner to promote gender equality in their activities.

Companies obliged by law to prepare an annual report, must include a statement concerning actual status of equality in the company. They must also provide an account of the measures that have been implemented and the measures planned for implementation in order to promote equality and to prevent differential treatment.

Pursuant to the Gender Equality Act, the duty to prepare an equality report is conditional on a systematic description of the conditions relevant to evaluate the degree of equality between women and men in the company. Wages and other personal political conditions are particularly relevant. The account should describe the division of women and men in different job categories and levels. Working hours should be described by providing a gender-divided overview of full-time and part-time employees, incidence of over time, shift and rota work etc. The taking of leave should be described so that the division of time spent on carer's leave and other types of leave for women and men can be observed. The use of further education should be described with both time spent and costs evident and how the use of these resources is divided amongst the employees.

11.3. Criteria for assessment of local authorities' equality reports

The Act's reporting requirement is threefold. The annual report should include a systematic description of actual equality status, an overview of equality measures implemented and planned equality measures.

Reports on the actual equality situation should be documented with statistics, which should be prepared in such a way that it is easy to be able to see what the actual situation is. Over time Tthe overview should should also show changes.

In the Ombud's assessment of the contents of the report, the following must be included in order to provide an adequate description of the situation:

- Gender divisions in the company generally, as well as sector and job level
- Gender statistics of the wages conditions for the sector and position level as well as the average wage for women and men in the company overall
- A gender breakdown of the statistics regarding work time, including part-time and involuntary part-time
- A gender breakdown of the statistics for taking parental leave, sick leave and other leave
- A gender breakdown of the statistics for personal-political initiatives

This is not an exhaustive list, but should be considered a minimum requirement for the contents of a report. Temporary appointments and use of overtime divided into gender is also relevent information for providing a situation description of equality in the company.

Regarding the overview of implemented equality measures, the Ombud wants the business to describe:

- Measures
- Why measures are implemented
- The goals of the measures
- The results of the measures
- Anchoring of the measures, i.e. political principle, plan documentation or the like

If the local authority's overview uncovers gender inequality, the municipality has a duty to report what the planned measures to counteract this are.

11.4. Important clarifications of the tribunal's

decisions

Tribunal's cases no. 17, 12, 11, 10, 9 and 8/2009

The tribunal´s decisions provide for some clarifications of the content of the duty to report. The fact that the legal preparatory works use formulations as "should" and "for example" indicates that the legislator intends to provide a flexible rule, where the companies are given some freedom as long as the report gives a "systematic description" of circumstances relevant to assess the degree of gender equality. The main point is that the facts being reported must be relevant and appropriate for the assessment of the degree of gender equality being attained.

The tribunal highlights the fact that the Gender Equality Act is mainly focused on salary, part-time and leave of absence schemes. It is therefore natural to focus on such circumstances.

The tribunal also says that a general summary of the situation is not be enough. An account which lacks underlying facts can hardly be said to entail a systematic description of circumstances relevant to evaluate the degree of gender equality.

With regard to the local authority enterprises, the tribunal emphasizes the fact that these must generally be considered larger relatively compared to most private companies The tribunal has also emphasised through their reporting to KS local authorities can obtain relevant statistics. It has also emphasized that local authorities are complex entities where gender equality issues arise in many different ways at many different levels. In the legal preparatory work it appears that reporting is expected to be better from public than private enterprises/activities.

Towards comprehensive discrimination protection?

12.1. A combined statute

Today the protection against discrimination appears in several statutes; the Anti-Discrimination and Accessibility Act, the Gender Equality Act, the Anti-Discrimination Act and the Working Environment Act, Chapter 13.

The government decided in a preparatory meeting of the Council of State of 1 June 2007 to appoint a committee which had a mandate to work out a combined anti-discrimination statute. The mandate specified that the committee must assess whether any other grounds of discrimination, which are not a part of current anti-discrimination legislation, should be covered by a combined anti-discrimination statute. Furthermore, the committee should assess and recommend whether a combined anti-discrimination statute should contain an exhaustive listing of discrimination grounds, a non-exhaustive listing, or whether the discrimination bans should be designed differently. It was also specified that the committee's proposal should not undermine the present gender equality and anti-discrimination legislation.

In the committee's proposal (NOU 2009: 14) it is suggested that all the discrimination protection be brought together in one collective statute – the Anti-Discrimination Act. The Ombud supports the proposal, on the basis that a

collective anti-discrimination statute would be user-friendly and it would facilitate handling of cases of discrimination on several grounds to a greater degree than today.

Materially the proposal for a all-encompassing anti-discrimination statute is a continuation, harmonisation and a clarification of current legislation. In some areas the proposal diverges from current law. In the following we will present some of the committee's proposals and the Ombud's opinions on these. In addition we refer to the Ombud's response to the public consultation, which can be found on the Ombud's homepage (www.ldo.no).

12.2. Grounds of discrimination according to the law

The committee proposes a protection against discrimination on the basis of sexual orientation, which currently only applies in the workplace and to some extent in the property market. This is in contrast to discrimination on the basis of gender, ethnicity and disability, which is prohibited in all areas of society. The term sexual orientation includes lesbian, gay, bisexual and heterosexual people. The committee proposes that sexual orientation also be granted a general protection against discrimination across all areas of society. The Ombud supports the proposal.

Age discrimination is, like discrimination due to sexual orientation, prohibited only in the workplace. The committee proposes that the protection against age discrimination should in the future also be restricted to the working sector. The committee's reasoning for this is that differential treatment based on age is often more legitimate than differential treatment on other grounds. In the opinion of the committee a general ban on age discrimination across all areas of society would allow too much room for discretion on the part of the enforcing authorities.

However, the committee recognises that unreasonable differential treatment due to age occurs also outside the workplace. The committee does not exclude the possibility of also giving age a protection against unreasonable differential treatment outside the workplace, but then, as part of the proposed mixed bag category, see below. One example is the credit institution's evaluation of specific loan applications where the applicant's age is the only reason for not granting a loan.. The statute should not be a hindrance for setting restrictions majority age, voting rights, access to getting a driver's licence, alcohol purchase, schooling, division into school classes, senior citizen discounts, etc.

The Ombud refers to the proposal for a new EU directive (KOM (2008) 426 final). The proposed directive protects against age discrimination also outside the workplace, but specifies that countries may still to set specific age limits for access to e.g. social benefits, education, and aspecific goods and services. Allowing reasonable differential treatment is a basic principle in discrimination law. Accordingly the Ombud would like to see Norway fall in line with the proposed EU directive, alternatively that the issue be analyzed more thoroughly before concluding as to how age should be protected against discrimination.

The problem has not been sufficiently analyzed in the the Ombud´s view. Therefore it does not support the committee's assessments and its proposals.

The Ombud receives many enquiries the right to emphasize language for instance in job appointment. The committee's proposed list of discrimination grounds does not mention language. To emphasise that discrimination based on language is prohibited, the Ombud recommends that "language" be explicitly listed. The Ombud also advocates an explicit protection against discrimination for transsexuals because the mixed bag category provide them with insufficient legal protection.

12.3. Mixed bag category

The committee's majority proposes that the legal list of discrimination grounds be non-exhaustive, but be supplemented with the mixed bag category described as "other similarly significant circumstances associated with a person". A mixed bag category will mean the existence in specific cases of some other forms of discrimination on grounds not mentioned in the legal text.. The committee specifies that the mixed bag category should not apply in all

cases of unreasonable differential treatment. The purpose of a mixed category is to have a flexible norm for borderline cases, that is incidents that similar to the listed discrimination grounds or incidents where it would be shocking not to provide any protection. This is meant only with the discrimination grounds that are connected with or similar to the listed ones, either due to immutable or highly relevant personal circumstances or. Examples of discrimination grounds that could apply under this mixed bag category are: caring for loved ones (caring duties), health, addiction to drugs and alcohol, appearance, being overweight or a crime conviction.. The extent to which the differential treatment would contravene the Anti-Discrimination Act would depend on a specific objective assessment similar with other grounds of discrimination.

The Ombud supports the committee's proposal to introduce a mixed bag category. The main reason for this is that international human rights conventions, such as the European Convention on Human Rights (ECHR), the UN Convention onEconomic, Social and Cultural Rights and the UN Covenant on Civil and Political Rights contain non-exhaustive lists of discrimination grounds. Furthermore, a mixed bag category will ensure a flexible legislative framework that allows for societal development.

The committee proposes that the rules on shared burden of proof should not apply to the mixed bag category. This means that the responsibility for proving that a circumstance is discriminatory with respect to the mixed bag category rests entirely with the complainant. The reason given is the need for legal safeguards because the discrimination grounds that may be invoked are not defined in advance. The Ombud supports this proposal. The committee is of the opinion that the Anti-Discrimination Act's specific rules on damages and compensation should not apply to discrimination grounds claimed under the mixed bag category. In such cases assignment of liability, if any, should follow from rules on general compensation. The committee gives the following reason for this:

A mixed bag category provides less predictability and those responsible have less opportunity to plan their actions in a manner which does not violate the rules.
The circumstances can be complex, and prior definition of what the boundaries are for unreasonable differential treatment can be difficult. The Ombud disagrees with the committee's assessment. The Ombud believes that the rule of shared burden of proof satisfies the requirements for legal safeguards and as well as the rule of law in these cases .. In most cases where the Ombud concludes that anti-discrimination legislation has been breached, the discrimination has been unintentional. That also means that under the current legislation most perpetrators will be unprepared for having a discrimination complaint lodged against them, and therefore are also unprepared for compensation or damages liability. The Ombud believes therefore that the rules for compensation and damages should also apply when discrimination occurs on the basis of the mixed bag category.

The Equality and Anti-Discrimination Ombud

The Ombud combats discrimination and promotes equality regardless of gender, ethnicity, disability, language, religion, sexual orientation and age. The Ombud is professionally independent, but is under the administration the Ministry of Children and Equality.

The Ombud's work as a driving force will contribute to enhanced equal opportunity:
This includes identifying and publicizing conditions that obstruct equal opportunity and equal treatment and contributing to awareness and the influencing of attitudes and behaviour;
providing information, support and legal guidance for the promotion of equal opportunity and the combat of discrimination;
providing public and private sector employers with counselling and legal guidance on the matter of ethnic diversity in the employment sector;
providing expertise and developing documentation about equality and monitoring the type and scope of discrimination;
serving as a forum and an information centre in order to promote the co-operation between different agents.

The Ombud enforces:
The statute relating to gender equality (the Gender Equality Act);
The statute on prohibition against discrimination on the basis of ethnicity, religion, etc. (the Anti-Discrimination Act);

The Working Environment Act's chapter on equal treatment;
The discrimination prohibition in the legislation relating to housing;
The statute relating to prohibition against discrimination on the basis of disability (Anti-Discrimination and Accessibility Act).

The Ombud's role as enforcer involves making decisions on complaints regarding breach of laws and regulations that come under the Ombud's mandate. We also provide advice and legal guidance regarding these regulations.

Anyone who feels discriminated may bring a case before the Ombud. The Ombud will request information from both parties,it will carry out an objective assessment of the case and issue a statement on whether discrimination has taken place. The Ombud's decision may be appealed before the Equality and Anti-Discrimination Tribunal.

The Ombud provide s also legal guidance in discrimination cases that are covered by different regulations than those enforced by the Ombud. These include reports of racially motivated crime, cases relating to termination of employment that are subject to different regulations than those included in the equal treatment chapter of the Working Environment Act, or in the case of applications for free legal aid.

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